3-1-2008

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Recommended Citation
Available at: https://digitalcommons.lmu.edu/llr/vol41/iss3/4
TORT REFORM, ONE STATE AT A TIME: RECENT DEVELOPMENTS IN CLASS ACTIONS AND COMPLEX LITIGATION IN NEW YORK, ILLINOIS, TEXAS, AND FLORIDA

Adam Feit*

I. INTRODUCTION

The tort reform movement is part of a continuing debate between corporate and insurance interests on one side and consumer groups and plaintiffs’ lawyers on the other.¹ In the 1970s and early 1980s, various corporate interests began to attack the tort system at the state level and advocate for what they termed “tort reform”: legislative measures aimed at limiting the availability and amount of relief in personal injury actions.² Arguing that these measures were needed to reduce frivolous lawsuits and decrease insurance premiums, proponents of the movement lobbied state legislatures to limit non-economic and punitive damages, abolish joint and several liability, and raise pleading requirements.³ Consumer interests and plaintiffs’ lawyers responded, with mixed success, by challenging the constitutionality of these reforms in state courts. The opposition utilized various state constitutional provisions such as due process, equal protection, separation of powers, right to a jury trial, and access to open courts.⁴

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². See id. at 944.

³. See id.

⁴. See id. at 944–95.
During this early part of the “tort reform” era, federal courts were not seen as a focal point for tort cases; instead, state courts saw most of the action. But as mass tort litigation like asbestos began to rise, the federal courts became a player in the tort arena. The Federal Multidistrict Litigation Panel transferred mass torts for pretrial purposes, and many perceived state courts to lack the resources and procedures for resolving complex, multiparty, multijurisdictional litigation. By the mid-1980s, federal courts were considered a more appropriate place to resolve mass tort claims, and plaintiffs’ lawyers preferred federal suits because of the potential class recovery with huge attorney’s fees.

However, after the Supreme Court decided Amchem Products, Inc. v. Windsor, along with Daubert v. Merrell Dow Pharmaceuticals, Inc. and the summary judgment “trilogy,” it became harder to obtain class certification in federal courts. Thus, plaintiffs’ lawyers returned to the states, seeking out specific state courts that appeared more receptive to class certification and jury trials. Counties in certain states—particularly Illinois, Florida, and Texas—became magnets for plaintiffs in certain forms of litigation.

6. See id.
7. See id.
9. 521 U.S. 591 (1997). Amchem establishes guidelines for when a class action can be certified for settlement purposes only, and also questions the propriety of federal court class resolution of mass tort litigation. Id. at 620, 629.
10. 509 U.S. 579 (1993). Daubert increases the power of federal judges to exclude relevant expert testimony by investing them with a “gatekeeping” function to determine whether scientific proof is reliable enough to be considered by the jury. Id. at 597.
This led to brutal forum selection battles between plaintiffs seeking to keep cases in state court and defendants trying to remove them to federal court.¹⁵ Plaintiffs learned to defeat the right to removal by naming non-diverse parties as defendants to destroy complete diversity, and defendants learned to shed light on lawsuit abuse by crowning certain counties as "judicial hellholes."¹⁶

In response to this dynamic, Congress enacted the Class Action Fairness Act ("CAFA").¹⁷ States got the message and realized they needed to clean up their acts, i.e., enact tort reform in response to real or imagined lawsuit abuse. Thus, the tort reform movement that began in the late 1970s and early 1980s is still alive and kicking. With the Democrats in control of Congress as of this writing, further national reforms with such broad impact as CAFA appear unlikely. Accordingly, ardent advocates of tort reform from the business community are returning to the states, where the tort reform movement first took root. For example, groups like the American Tort Reform Association,¹⁸ a leading advocate for reining in class action lawsuits, have turned their lobbying efforts away from Congress and are now focused on lobbying state legislatures and educating voters through sensationalist billboards.¹⁹

The stakes are high for states that fail to enact legislation to limit the promulgation of lawsuits. They risk an exodus of national companies and businesses that could move their headquarters to greener pastures across state lines. Savvy businesses are reluctant to base their operations in states where local laws do not protect them

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¹⁵. *Id.* at 979.
¹⁶. *See id.* at 981–82.
¹⁷. Pub. L. No. 109-2, 119 Stat. 4 (2007) (codified in scattered sections of 28 U.S.C.). CAFA broadens federal diversity jurisdiction and makes it easier for out-of-state defendants to remove their cases to the federal courts, which many in the business community perceive to be more sympathetic to their defenses. However, CAFA may not be helpful, depending on class composition and other factors, when class actions are brought against businesses that are incorporated or have their principal place of business in the state. Moreover, cases are only assured of being removed when more than two-thirds of the plaintiffs are from out-of-state. For a more detailed perspective on CAFA and pleading strategies, see Nicole Ochi, *Developments, Are Consumer Class and Mass Actions Dead? Complex Litigation Strategies After CAFA and MMTJA*, 41 Loy. L.A. L. Rev. 965 (2008).
¹⁸. The American Tort Reform Association is a national organization dedicated to reforming the civil justice system through public education and the enactment of legislation. *See Am. Tort Reform Ass'n, About ATRA*, http://www.atra.org/about.
from what they perceive to be frivolous lawsuits and unduly high punitive damage awards. Corporate CEOs do not want their companies to be located in so-called “judicial hellholes,” where judges supposedly favor plaintiffs and will certify any class that walks in their courtroom. Accordingly, businesses may prefer to relocate to so-called “business friendly” states that have special forums for complex litigation such as business courts, which are perceived to expediently handle business versus business litigation.

In light of these considerations and the issues they raise, this Article looks beyond California to present a brief snapshot of the “climate” of class and complex litigation in four distinct states: New York, Illinois, Texas, and Florida. These states were chosen for analysis because they follow California as the next four most populous states in the nation. In addition, the approach to tort litigation and reform taken in these states plays an important role in setting national standards and trends that are later mimicked by other states. Before discussing the pertinent developments in each of the chosen states, this Article briefly lays out some of the standards and procedures for class actions and complex litigation in each specific jurisdiction. This Article then discusses some of the latest developments in the local legal landscape of each of these states and the impact and implications of these developments on state court litigation.

Part II introduces New York’s approach to class and complex litigation and explores how New York’s business courts are used for complex commercial litigation, considering whether they are a viable alternative for complex commercial matters or just a hidden form of tort reform. Part III discusses Illinois’s standards for class and complex litigation and focuses on the merits of the tort reform battle against Illinois’s perceived “judicial hellholes.” Part IV summarizes Texas’s rigorous standards for class and complex litigation and discusses how recent legislative reforms and runaway juries shape class and complex litigation in the Lone Star State. Finally, Part V explores Florida’s efforts to undo its reputation as a “judicial

20. Id.
21. See infra Part III.C.
22. See infra Part II.C.1.
hellhole" and to create a litigation environment friendlier to the domestic and international business communities.

II. NEW YORK

A. New York's Class Action Standards: Providing "Therapeutic Benefits" to Consumers

New York's modern class action rules, adopted in 1975, are derived from and are substantially similar to the federal standards. Emulating the federal policies of the 1970s that favored class actions and liberal interpretations of their rules, New York intended their modern class action standards to be more liberal and flexible than the narrow class action legislation that preceded them. New York followed the expansive federal attitude of that time because class actions could play a desirable role in society by providing "therapeutic benefits" and "due process." The "therapeutic benefit" theory holds that collateral public benefits flow from allowing class actions. A class action is perceived as a way to induce businesses and corporations to act in both a socially and ethically responsible manner and to deter them from implementing potentially harmful courses of action affecting large numbers of individuals. Without the availability of class actions, so the theory holds, these institutions operate virtually unchecked, engaging in a form of "legalized theft" that occurs when consumers are harmed but each consumer's damage is worth less than $100. Since attorneys' fees effectively inhibit the filing of individual suits based upon such small claims, class actions are seen as the preferred deterrence for this "legalized theft."

25. Friar v. Vanguard Holding Co., 434 N.Y.S.2d 698, 703 (N.Y. App. Div. 1980) ("Under earlier laws ... class actions were viewed as requiring a sort of unity among class members bordering on the nebulous concepts of 'privity' or 'joint tenancy.'" (citations omitted)).
26. Id. at 705.
27. Id.
28. See id.
29. Id.
The other theory persuasive in developing New York’s class action standards was the notion that class actions provide “due process” by allowing many individuals a quasi-constitutional right to litigate and participate meaningfully in the legal process. Individuals might not exercise this right otherwise. If judges construe these rules too narrowly, they basically deny access to the courts for thousands of individuals whose minimal damages would be greatly outweighed by the prohibitive costs needed to sue a wealthy and powerful opponent. The New York legislature believed judges were too restrictive and so adopted the modern rules in 1975.

The New York legislature had both theories in mind while drafting their modern class action rules in the 1970s. The legislature understood that the future of the class action and its role in society would depend on the judges who construed the rules governing them. Class action certification requirements are so flexible that reasonable minds can flex them to embrace or reject certification. The New York legislature hoped its judges would flex these requirements and embrace the once-broad federal approach of allowing class actions. It is unclear if this hope was realized.

1. Requirements for Class Certification in New York Courts

In order to have a class action certified in a New York state court, the plaintiff bears the burden of proving five requirements, known as numerosity, commonality, typicality, adequacy, and efficiency. Numerosity means that the proposed plaintiffs are so numerous that it would be impracticable to use traditional joinder


31. Friar, 434 N.Y.S.2d at 705.
32. See id. at 706.
33. See id. at 705.
34. See id. at 706.
35. Id.
36. See id.
37. N.Y. C.P.L.R. 901(a) (McKinney 2007).
rules to join them each individually.\textsuperscript{38} Commonality, considered the “most troublesome” of the requirements in New York,\textsuperscript{39} refers to whether the case involves common questions of law or fact that predominate over questions affecting only individual plaintiffs.\textsuperscript{40} If these common questions of law or fact predominate over those affecting only individuals, then it makes sense to combine all plaintiffs into one class to hear their cases together. This does not require that all proposed plaintiffs be identical, share a substantive unity in a common interest, or that individual issues be nonexistent.\textsuperscript{41} Nor do New York courts have a mechanical test for determining commonality but instead consider the nebulous concept of “whether the use of a class action would achieve economies of time, effort, and expense and promote uniformity of decision as to persons similarly situated.”\textsuperscript{42} Commonality can be a hard requirement to meet, especially in product liability cases where damages or the proximate causation of each individual’s injuries may have to be determined on a case-by-case basis.\textsuperscript{43}

Typicality and adequacy, the next two requirements, contemplate the relationship between the named class representative and the individual class members. Typicality is satisfied if the claims of the class representative are typical of the claims of all the class members.\textsuperscript{44} To that end, it is easily satisfied when all the plaintiffs’ claims are due to the same legal theory, but not when the extent of damages for each individual has to be separately

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\textsuperscript{38} Id. There is no set rule for the number of prospective class members which must exist to certify a class. Friar, 434 N.Y.S.2d at 706.

\textsuperscript{39} 434 N.Y.S.2d at 706.


\textsuperscript{42} Friar, 434 N.Y.S.2d at 707 (citation omitted).


\textsuperscript{44} N.Y. C.P.L.R. 901(a)(3) (McKinney 2007).
established and investigated. Since the rules are designed to be flexible, it is not necessary that the claims of the class representative be identical to those of the class. Typicality can even be satisfied in New York when the class representative cannot personally assert all the claims made on behalf of the class.

Next, the adequacy requirement inquires whether the named class representative will fairly and adequately protect the interests of the class members. New York courts consider three factors in determining whether the proposed class representative meets this standard: (1) whether conflicts of interest exist between the representative and the class members; (2) the representative’s familiarity with the lawsuit and her financial resources; and (3) the competence and experience of the class counsel. For example, a class cannot be certified in New York if the representative is not willing to bear the expenses of the class action, or if the representative’s interests are antagonistic or in conflict with those of other class members.

Finally, the requirement of efficiency considers whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. This requirement considers the public benefits society derives from class actions. These include inducing wealthy institutions to engage in socially and ethically responsible behavior, and deterring institutions from acting with impunity since the realities of our legal system make it cost prohibitive for plaintiffs who suffer relatively insignificant amounts of damages to have their claims addressed. New York courts realize that a class action is not only superior but is indeed the only economically viable means of redressing circumstances in which

45. Hurtado, No. 12648/03, slip op. at 7.
47. Id.
50. See Pruitt, 574 N.Y.S.2d at 678.
54. Id.
numerous plaintiffs suffered relatively small economic injuries.\textsuperscript{55} However, a class action is not considered the superior method of adjudication in New York for cases involving individual proof of addiction,\textsuperscript{56} individual inquiries into reliance,\textsuperscript{57} or adjudication of a controversy against a governmental body.\textsuperscript{58}

2. Appellate Review of Class Certification

New York courts “liberally construe” the five requirements for class certification.\textsuperscript{59} The trial courts have sound discretion to grant or deny class certification, and any errors are generally resolved in favor of allowing the class action to proceed.\textsuperscript{60} However, an order granting certification should not be considered immutable.\textsuperscript{61} The trial judge has discretion to sever certain issues from class status, to divide the class into subclasses, or even to decertify the entire class.\textsuperscript{62}

Many businesses and corporations are located within the state, and New York courts often hear nationwide class actions against locally based defendants on behalf of plaintiffs from across the country. Despite the liberal approach towards certification requirements, there are a number of inhibitors to the hearing of nationwide class actions in New York courts. For example, defendants may successfully avoid certification by making a motion to dismiss the action on the grounds of forum non conveniens,\textsuperscript{63} a forum selection clause,\textsuperscript{64} or a choice of law issue.\textsuperscript{65} Additionally, if

\textsuperscript{57} See id.
\textsuperscript{58} LaCarruba v. Legis. of Suffolk, 640 N.Y.S.2d 130, 131 (N.Y. App. Div. 1996). A class action against a governmental body fails to meet the “efficiency” requirement because consolidation is simply not necessary. A successful individual challenge to a governmental body changes the government practice at issue. All similarly situated individuals should then be protected from the government practice at issue under the doctrine of stare decisis and because government policies should apply equally to all citizens. See Jack E. Pace III, Note, Automatic Stays and Governmental Operations: How New York State Protects the Government from the Poor, 24 FORDHAM URB. L.J. 137, 146–48 (1996).
\textsuperscript{60} Id.
\textsuperscript{62} Id.
\textsuperscript{63} N.Y. C.P.L.R. 327 (McKinney 2008).
\textsuperscript{64} See, e.g., Brower v. Gateway 2000, 676 N.Y.S.2d 569, 575 (N.Y. App. Div. 1998) (enforcing arbitration and choice of law clause, although arbitration before International Chamber of Commerce is substantively unconscionable); Gates v. AOL Time Warner, Inc., No. 604141/02,
the size of a proposed multistate class is too large, New York courts may consider limiting the class to New York residents in order to conserve judicial resources.\textsuperscript{66}

Once the trial court has issued its order granting or denying class certification, the order is immediately appealable by an interlocutory appeal.\textsuperscript{67} Unlike the federal system and most other states, New York gives parties the right to appeal almost any civil interlocutory order.\textsuperscript{68} By contrast, a federal court of appeals has discretion under Federal Rule 23(f) to hear the interlocutory appeal of orders granting or denying class certification.\textsuperscript{69}

Also unique to New York is the almost nonexistent role that New York's highest court plays in shaping the rules and standards of class action litigation.\textsuperscript{70} The New York Court of Appeals, the state’s highest court, only reviews questions of law, except when the Appellate Division of the State Supreme Court has reversed or modified a judgment and made new findings of fact.\textsuperscript{71} Therefore, if the appellate division affirms the trial court’s ruling on class certification and does not adopt new facts, the court of appeals has no jurisdiction to review the class certification decision.\textsuperscript{72} Accordingly, the appellate division plays a far more significant role

**B. An Overview of New York's Procedures for Handling Complex Litigation**

Though there is no exact definition for complex litigation, the term broadly encompasses difficult or protracted actions that may involve complex issues, related actions pending in different districts or court systems, multiple parties, difficult legal questions, or unusual proof problems.\footnote{See Manual for Complex Litigation (Fourth) §§ 10.1, 10.11 (2004); see also Scott Paetty, Developments, Classless Not Clueless: A Comparison of Case Management Mechanisms for Non-Class-Based Complex Litigation in California and Federal Courts, 41 Loy. L.A. L. Rev. 845 (2008).} As a result of their difficult and demanding nature, complex cases need increased judicial supervision and special mechanisms to handle the consolidation of related cases.\footnote{See id. §§ 10.1, 10.123.} New York has promulgated various programs and procedures in response to these unique demands. These efforts include a mechanism for coordinating related actions pending in more than one judicial district, the implementation of an inactive docket to administer the congestion of asbestos claims, and the establishment of a specialized commercial court.

A common situation in complex litigation is one where related cases are pending in more than one jurisdiction.\footnote{See id. § 10.123.} The transfer and consolidation of such cases into one action for pretrial proceedings gives a single judge the potential to expeditiously review similar claims in an efficient manner.\footnote{See Mark C. Weber, Managing Complex Litigation in the Illinois Courts, 27 Loy. U. Chi. L.J. 959, 967 (1996).} New York handles such situations with a coordination mechanism analogous to the Federal Multidistrict Litigation Statute ("MDL Statute").\footnote{The Federal Multidistrict Litigation Statute, 28 U.S.C. § 1407, permits the transfer and consolidation of related cases pending in federal districts throughout the United States.} When related cases require judicial management in New York, the Chief Administrator of the Courts creates a Litigation Coordinating Panel composed of one justice of the Supreme Court from each judicial department.\footnote{N.Y. Comp. Codes R. & Regs. Tit. 22, § 202.69(b)(1) (2007).}

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75. See id. §§ 10.1, 10.123.
76. See id. § 10.123.
78. The Federal Multidistrict Litigation Statute, 28 U.S.C. § 1407, permits the transfer and consolidation of related cases pending in federal districts throughout the United States.
before one or more individual coordinating justices to handle all
pretrial proceedings, including dispositive motions. This panel has
been praised for smoothly and successfully managing mass tort cases
in New York.

Uniquely, New York’s coordination mechanism also attempts to
address the common situation of related cases pending in state and
federal courts. If there are such cases pending in federal courts or
even in the courts of other states, the panel instructs the coordinating
justice to consult with the respective judge(s) from these external
jurisdictions, in an effort to further the shared goals of coordination.
The coordinating justice can even order discovery in New York cases
to proceed jointly or in coordination with the discovery in federal or
other states’ actions.

Another innovation effectively utilized by New York courts to
handle complex asbestos litigation is a “first in, first out” system of
docket management. This system defers the claims of unimpaired
plaintiffs to a separate deferred docket in order to allow the claims of
truly sick plaintiffs to be heard more promptly. In New York’s
“first in, first out” system, plaintiffs affected by asbestos who do not
yet show signs of actual physical impairment do not lose the right to
have their cases heard, as the statute of limitations on their claims is
tolled while their case waits in the inactive docket. Once the
plaintiffs show sufficient physical impairment, their cases are
removed to the active docket and set for trial. Such a system
enables the efficient and equitable handling of dockets congested
with asbestos claims.

80. Id.
82. See Yvette Ostolaza & Michelle Hartmann, Overview of Multidistrict Litigation Rules at the State and Federal Level, 26 REV. LITIG. 47, 75 (2007).
84. Id. § 202.69.
87. Id.
88. Id. at 9.
1. The Supreme Court of New York’s Commercial Division

Last but not least, New York has created “business courts” in many counties known as the commercial division, to handle complex commercial disputes and commercial class actions. The commercial division was founded because of the perception that business litigants in New York avoided the state courts and preferred to have their claims heard in the federal courts, the courts of Delaware, or through private alternative dispute resolution. Since its founding as a pilot program in 1993, the commercial division has been widely praised as a success by both the bar and the business community, expanding into several counties throughout the state. Currently, the commercial division handles cases that will involve significant discovery and many motions because of the complexity of the issues and the sums at stake.

The jurisdiction of commercial division courts broadly includes tort claims for fraud and misrepresentation; business torts (e.g., unfair competition); breach of contract or fiduciary duty; statutory and/or common law violations arising out of business dealings (e.g., violations of business agreements, trade secrets, restrictive covenants, and employment agreements); UCC transactions; shareholder derivative actions; commercial class actions; accountant malpractice; legal malpractice in commercial matters; environmental and commercial insurance coverage claims; corporate dissolution matters; and arbitration applications. A monetary threshold, which varies from $25,000 to $100,000 depending on the county in which the court sits, must also be met, except in shareholder derivative actions, commercial class actions, and dissolution claims.

New York’s is considered a model of success. It has demonstrated that it can provide efficient, cost-effective, and timely processing of commercial cases and has improved the quality and

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90. See id. at 152–59.
91. Id. at 156.
93. Id.
predictability of judicial decisions.\textsuperscript{94} Overall, the commercial division is perceived as a preferable forum for resolving complex business disputes and arguably has reversed the trend of business litigants avoiding New York courts.\textsuperscript{95} Indeed, other states look to New York’s commercial division when contemplating their own experiments in creating a specialized business court.\textsuperscript{96}

There are commendable considerations that favor the establishment of business courts like New York’s commercial division.\textsuperscript{97} “Complex business cases are known to move at a glacial pace, making it difficult for the businesses involved, and tying up the court system for other litigants.”\textsuperscript{98} In theory, such cases can be resolved more efficiently in a separate specialized docket. Having complex cases heard by judges with a higher level of expertise in and sensitivity to commercial matters may lead to more predictable and consistent results.\textsuperscript{99}

Nonetheless, hearing commercial claims in a separate docket raises at least one important concern. As Mary Alexander, President of the Consumer Attorneys of California, has said, “[c]ommercial courts establish a two-tiered system of justice—one for the rich and one for the average citizen.”\textsuperscript{100}

2. Business Courts: Panacea for Complex Litigation or Tort Reform in Disguise?

Despite some scholars’ praise for New York’s commercial division, there is an equal body of criticism against the establishment of state business courts. The chief complaint is that these specialized courts provide an “elite form of justice” by creating a two-tiered system that divides corporate litigants and average citizens.\textsuperscript{101} A

\begin{itemize}
  \item \textsuperscript{94} Bach & Applebaum, \textit{supra} note 89, at 158.
  \item \textsuperscript{95} \textit{Id}.
  \item \textsuperscript{96} See generally Kimberly A. Ward, \textit{Getting Down to Business—Pennsylvania Must Create a Business Court, or Face the Consequences}, 18 \textit{J.L. & COM.} 415, 432 (1999) (advocating for the New York model to be considered if a business court is created in Pennsylvania).
  \item \textsuperscript{98} \textit{Id}. at 316–17.
  \item \textsuperscript{99} \textit{Id}. at 317.
  \item \textsuperscript{101} Junge, \textit{supra} note 97, at 318.
\end{itemize}
court whose very function is to facilitate the state's commercial enterprise could easily develop a bias in favor of commercial parties or a bias against non-business litigants involved in commercial litigation.\(^\text{102}\)

The justice rendered by business courts has the potential to become questionable when these business courts decide claims brought against businesses by individuals, as they are increasingly doing in some states.\(^\text{103}\) Arguably, this scenario can readily happen in a claim from an aggrieved employee, a claim of fraud or misrepresentation, a consumer class action, or an insurance coverage claim. The action itself may be "complex" and would benefit from the managerial resources of a business court. Nonetheless, non-business litigants may suffer prejudice in the hands of an elected judge whose focus is to facilitate robust commercial activity in his own community.

From the perspective of plaintiffs' attorneys, states like New York created business courts to benefit or attract businesses, not to benefit consumers or communities.\(^\text{104}\) States do in fact scheme for new ways to attract businesses to locate, incorporate within, and remain within their state.\(^\text{105}\) Lately, these schemes often involve legislative tort reform. Business courts could be viewed as one such scheme. As proponents of New York's business courts argued, establishing the commercial division fostered a more favorable environment for attracting and maintaining business in New York, which in turn enhances the economic wellbeing of the state.\(^\text{106}\) Such an outcome is clearly attractive to both the State and the business community, but perhaps at the expense of individual litigants' rights.

It is interesting to note the approach to business courts taken by California. After years of study and analysis, California decided against the creation of business courts.\(^\text{107}\) California Court of Appeal

102. Id.
104. See id.
Justice Richard Aldrich, who chaired a task force looking into such courts, noted "the only place we found support [for business courts] was within the business community." California also found that business courts are "elitist," taking the best judges and other resources away from other courts and potentially favoring business interests. As an alternative, California established a complex court system, which is probably the best alternative to a business court. As California's approach demonstrates, the ideal approach to complex litigation should fairly balance the interests of both consumer and corporate litigants, without a bias in favor of either group.

If the stated goal of a business court is to allow businesses to operate successfully in a state in order to attract other businesses, then suits by consumers, employees, and other individually aggrieved plaintiffs challenging the conduct of a business should not be assigned to a business court. But this potential conflict can occur in New York because the jurisdiction of the commercial division is so broad. Business courts should adjudicate disputes arising between businesses, but claims brought by an individual against a business inevitably create a potential for bias since the court itself is specially designed to favor business activity. Further, business court judges are selected for their backgrounds and expertise in the field. In light of such circumstances, a non-business litigant cannot fairly challenge the actions of a business in a court specially designed to favor businesses.

III. ILLINOIS

A. An Overview of Illinois's Class Action Standards: "The Last Barricade of Consumer Protection"

Like New York, Illinois acknowledges the utility of the class action as a method of litigating complex common questions brought by numerous claimants. Illinois courts perceive the class action as

108. Jackson, supra note 103, at 50.
110. See generally Paety, supra note 74.
111. See Jackson, supra note 103, at 54.
a potent procedural vehicle that adjudicates claims by multiple persons without requiring individual court appearances. Even before Illinois adopted class action procedural statutes in 1977, its courts allowed class actions and relied on common law to determine the correct standards.

Illinois courts appear to welcome class actions even when the size of the claim(s) or class is small. For example, no defined rules exist requiring a set number of putative plaintiffs. Instead, courts demand only that the potential number of class members be great enough to render separate litigation impractical. Illinois case law also makes the class action available in cases involving small claims because it benefits people whose claims are so small as to discourage the filing of individual actions. However, there are limits, and courts deny class treatment where the recovery sought is "too trivial to justify an imposition upon the administration of civil justice."

Illinois also permits partial class actions. A partial class action is useful in mass tort claims when common issues like individual damages do not predominate over individual issues. Thus, Illinois achieves a modicum of judicial economy by certifying a class as to only a few issues, preserving other aspects of the plaintiffs’ autonomy. In essence, this rule works as a partial consolidation mechanism. It is helpful when individual plaintiffs fear losing

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113. Steinberg, 371 N.E.2d at 641.
114. Id. at 642. Under Illinois common law, a class action was only proper when there existed a community of interest in the subject matter and a community of interest in the remedy among all who made up the purported class. Moseid v. McDonough, 243 N.E.2d 394, 396 (Ill. App. Ct. 1968).
118. ROSSMAN, supra note 116, at 122; see also Smyth v. Kaspar Am. State Bank, 136 N.E.2d 796, 805 (Ill. 1956) (allowing class action instituted by owners of certificates of beneficial interest against a bank).
120. 735 ILL. COMP. STAT. ANN. 5/2-802(b) (West 2003) (allowing the maintenance of class actions with respect to particular issues, or divided into sub-classes where each sub-class is treated as a class).
121. Weber, supra note 77, at 984.
122. Id.
complete control over the litigation by joining a class and placing
their case exclusively in the hands of the lead class counsel.\textsuperscript{123}

Nonetheless, tort reformers have raised concerns about the
possibility of abuse of the class action vehicle, particularly in
Illinois.\textsuperscript{124} The Illinois Supreme Court recognizes that some of these
allegations are leveled at its own courts,\textsuperscript{125} and that these reformers
call parts of Illinois “judicial hellholes.”\textsuperscript{126} Though the class action
held an important position for Illinois’s judiciary for over 100 years,
recent decisions by the Illinois Supreme Court appear to show a new
hostility toward the virtues of class-based litigation. For example,
the court has made certification requirements more difficult for
nationwide class actions.\textsuperscript{127} However, one Illinois appellate court
recently reaffirmed its view that class actions are often the last
barricade of consumer protection.\textsuperscript{128} In particular, this court noted
that consumer class actions provide restitution to the injured and
deterrence to the wrongdoer, thus attaining goals of equity and
justice.\textsuperscript{129} Nonetheless, the role that class actions will have in
Illinois, even as vehicles for consumer protection, will ultimately be
decided by the Illinois Supreme Court with some implicit direction
from Congress. It is an open question whether Congress’s passing of
the Class Action Fairness Act of 2005\textsuperscript{130} and the Illinois Supreme
Court’s three decisions (that same year) limiting the availability of
Illinois courts to nationwide class actions are a mere coincidence.\textsuperscript{131}

\textsuperscript{123} See id.

\textsuperscript{124} See infra Part III.C.3 (discussing Illinois’s so-called “judicial hellholes,” which are
widely considered friendly to certifying and hearing nationwide consumer class actions).

\textsuperscript{125} Avery v. State Farm Mut. Auto. Ins. Co., 835 N.E.2d 801, 881 (Ill. 2005) (Freeman, J.,
dissenting).

\textsuperscript{126} See supra note 124.

\textsuperscript{127} See, e.g., Avery, 835 N.E.2d at 863–64 (reversing certification of a nationwide contract
class action on numerous grounds, and limiting class actions brought under the Illinois Consumer
Fraud Act to fraudulent transactions that take place within Illinois); Gridley v. State Farm Mut.
Auto. Ins. Co., 840 N.E.2d 269, 272 (Ill. 2005) (dismissing class action on forum non conveniens
grounds since named plaintiff was a citizen of Louisiana, events giving rise to the claim occurred
in Louisiana, and claim involved a violation of Louisiana law); Price v. Philip Morris, Inc., 848
N.E.2d 1, 32 (Ill. 2005) (dismissing class action and reversing a $10 billion verdict against a
tobacco maker because the deceptive conduct at issue was authorized by a federal regulatory
body).


\textsuperscript{129} Id.


\textsuperscript{131} See supra note 127 and accompanying text.
Perhaps the Illinois Supreme Court understood the message from Congress: rein in your courts, or we will do it for you.

1. Requirements for Class Certification in Illinois Courts

Illinois’s class action statute essentially codified prior Illinois case law. A class may be certified if the plaintiff establishes the four requirements of numerosity, commonality, adequacy of representation, and appropriateness. The numerosity requirement—whether the putative plaintiffs are so numerous that joinder would be impracticable—depends on the particular facts of each case. Illinois courts have construed the state numerosity requirement to follow federal practice in interpreting the rule because of its similar language.

The commonality requirement is determined in Illinois by the “successful adjudication” test. This test inquires whether the successful adjudication of the named plaintiff’s claim establishes a right to recovery for the class members. The mere existence of some ancillary individual issues—such as separate determinations of damages, multiple theories of recovery, or even the inability of some class members to obtain relief because of a particular individual factor—will generally not prevent the establishment of commonality so long as these individual issues do not predominate over the shared questions.

The adequacy of representation requirement ensures that all class members receive proper, efficient, and appropriate protection of their interests in the litigation. This requirement is met if the

133. 735 ILL. COMP. STAT. ANN. 5/2-801 (West 2003).
135. Id.; FED. R. CIV. P. 23(a)(1).
136. 735 ILL. COMP. STAT. ANN. 5/2-801(2) (West 2003) (“There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.”).
138. Id.
140. 735 ILL. COMP. STAT. ANN. 5/2-801(3) (West 2003) (“The representative parties will fairly and adequately protect the interest of the class.”).
named plaintiff's attorney is qualified, experienced, and able to conduct the case. Further, the named plaintiff's interests cannot be antagonistic to the interests of the class, and the case cannot be collusive. 142

The final appropriateness requirement143 considers whether a class action best promotes uniformity and secures economies of time, effort, and expense, or otherwise accomplishes ends of equity and justice.144 Class actions are particularly appropriate when separate suits could result in inconsistent standards of conduct for the defendants or when a separate suit could affect the rights of the other class members.145 A controlling factor in many evaluations of appropriateness is whether a class action is the only practical means for class members to have their claims redressed, especially if their individual claims are small.146

Taken together, Illinois's class certification requirements do not appear stringent. To survive a motion to dismiss, plaintiffs do not have to conclusively establish all of the statutory requirements. A complaint's factual allegations must only be sufficiently broad to plead the possible existence of a class action claim.147 When there is doubt, Illinois courts are directed to err in favor of certifying a class action.148 These lenient standards likely contribute to the perceived abuse of class actions in Illinois.149

2. Appellate Review of Class Certification

Illinois trial courts have discretion to certify a class action, and the state's appellate courts only reverse upon a showing that the trial court clearly abused its discretion or applied impermissible legal criteria.150 Similar to the federal system, Illinois allows the interlocutory appeal of a trial court order granting or denying class

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143. 735 ILL. COMP. STAT. ANN. 5/2-801(4) (West 2003) (“The class action is an appropriate method for the fair and efficient adjudication of the controversy.”).
144. Gordon, 586 N.E.2d at 467.
146. Gordon, 586 N.E.2d at 467.
149. See infra Part III.C (discussing the proliferation of class action filings in Illinois's "judicial hellholes").
150. Walczak, 850 N.E.2d at 366.
certification. However, this certification decision is not reviewed de novo; rather, it is reviewed for abuse of discretion by the trial court.

B. A Brief Overview of Illinois’s Handling of Complex Litigation

“Illinois has been the forum for a great deal of complex litigation, and it is likely to continue to have this role in the future.” A variety of factors explain why Illinois courts hear a large amount of complex litigation and class actions. First, there is the presence of sophisticated plaintiffs’ firms in the state, especially in Chicago where these firms tend to be headquartered. Second, certain counties, so called “judicial hellholes,” award some of the highest jury verdicts in the country. Finally, Illinois has a liberal long-arm statute. Even if the events that led to suit did not occur within Illinois, the presence of many national corporate and industrial entities in the state minimizes personal jurisdiction problems.

Illinois courts take a proactive approach to complex litigation known as “affirmative case management.” Under this approach, judges become active managers in order to keep costs and delays to a minimum and shape the litigation into a form capable of resolution. When confronted with the difficult demands of complex litigation, judges are instructed not to respond by modifying case law doctrine or to press for the adoption of revolutionary statutes or court rules. Instead, Illinois judges are urged to recognize the concept of affirmative case management as a matter of

152. Weiss, 804 N.E.2d at 544.
153. Weber, supra note 77, at 962 (“Illinois was one of the first states to adjudicate a class action in which many members of the plaintiff class did not reside in the state.”). Miner v. Gillette Co., 428 N.E.2d 478 (Ill. 1981), cert. dismissed, 459 U.S. 86 (1982).
155. See infra Part III.C.
156. 735 ILL. COMP. STAT. ANN. 5/2-209(c) (West 2003) (“A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States.”).
158. Id. at 966.
159. Id.
160. Id.
attitude and sound practice, "a science more practical than doctrinal."\textsuperscript{161}

1. Case Consolidation

Illinois provides a consolidation mechanism that allows the court or litigants to take initiative and secure the advantages of simplified, consolidated proceedings before a single Illinois court.\textsuperscript{162} Under this mechanism, transfer and consolidation of cases is appropriate when cases involving one or more common questions of fact or law are pending in different judicial circuits within Illinois, where transfer and consolidation would serve the convenience of the parties and witnesses, and where such action would promote justice and efficiency.\textsuperscript{163} The Illinois Supreme Court, which plays a supervisory role in reviewing and approving consolidations, may act on its own motion or that of any party.\textsuperscript{164} An order of transfer and consolidation may include pretrial, trial, or post-trial proceedings.\textsuperscript{165}

Like New York, Illinois allows for limited coordinated discovery when there are similar cases pending in state and federal court.\textsuperscript{166} Illinois judges are free to contact judges in the federal or other state systems, so long as they do not delegate any authority over the case to a non-Illinois judge.\textsuperscript{167}

2. The Circuit Court of Cook County’s Commercial Calendar

Cook County, the home of Chicago, has its own business court to handle complex business disputes.\textsuperscript{168} Known officially as the Circuit Court of Cook County Commercial Calendar, the court was designed to enhance the commercial climate of Cook County by providing special expertise in the area of commercial litigation and priority scheduling for the disposition of commercial disputes.\textsuperscript{169} The commercial calendar hears cases—whether based upon theories of

\begin{itemize}
  \item \textsuperscript{161} Id.
  \item \textsuperscript{162} ILL. SUP. CT. R. 384 (2007).
  \item \textsuperscript{163} Id.
  \item \textsuperscript{164} Weber, supra note 77, at 965.
  \item \textsuperscript{165} Id.
  \item \textsuperscript{166} See id. at 975–76.
  \item \textsuperscript{167} Id. at 976.
  \item \textsuperscript{168} Bach & Applebaum, supra note 89, at 160.
  \item \textsuperscript{169} Id.
\end{itemize}
tort, contract, or otherwise—that involve a commercial relationship between the parties.\textsuperscript{170} The amount of monetary damages sought must be in excess of $30,000.\textsuperscript{171} The commercial calendar’s approach to cases differs from that of other Cook County courts. The other courts use a master calendar system in which certain judges address various pretrial matters and different judges handle the trials.\textsuperscript{172} In contrast, an individual judge presides over every phase of cases in the commercial calendar, from start to finish.\textsuperscript{173}

According to former Presiding Judge Judith N. Cohen, the commercial calendar has been tremendously well received by commercial litigators.\textsuperscript{174} The court’s eight-judge contingent hears roughly 4,500 new cases a year.\textsuperscript{175} By regularly handling commercial disputes, the judges “have learned and developed an expertise in commercial law.”\textsuperscript{176} Presumably, this creates more expeditious and fair results.

\section*{C. New Developments in Illinois Class Action Law: Judicial Hellholes and the Campaign for Tort Reform}

Illinois presents a prime example of an interesting development in the movement for tort reform. Advocates for reform, like the U.S. Chamber of Commerce and the American Tort Reform Association (“ATRA”), want to limit class action lawsuits, rein in exorbitant punitive damage awards, and educate voters about electing state legislators, attorneys general, and judges “who endorse a free-enterprise system that lets companies operate without fear of large punitive awards or excessive government restraint.”\textsuperscript{177} With Democrats in control of Congress, chances are slim for passing more national tort reforms like CAFA. Thus, corporations and businesses...
are compelled to focus their lobbying on state capitals and the courts of public opinion.\textsuperscript{178}

These attempts to court public opinion and educate voters about the goals of tort reform are tangible in Illinois. For example, ATRA declared war on the use of class actions in Illinois.\textsuperscript{179} ATRA deemed Illinois’s Cook, Madison, and St. Clair counties as some of the worst jurisdictions in the country for lawsuit abuse.\textsuperscript{180} To emphasize its point, ATRA designated these counties “judicial hellholes.”\textsuperscript{181}

What is a “judicial hellhole”? According to ATRA, it is a place “where judges systematically apply laws and court procedures in an unfair and unbalanced manner, generally against defendants in civil lawsuits.”\textsuperscript{182} It is a court system in which weaknesses in evidence are overcome by pretrial and procedural rulings;\textsuperscript{183} where judges proceed even though the plaintiffs, defendants, witnesses, and events in question have no connection to the jurisdiction;\textsuperscript{184} where product identification and causation are irrelevant because the jury will undoubtedly return a verdict in favor of the plaintiffs;\textsuperscript{185} where plaintiffs need not be injured to receive damages;\textsuperscript{186} and where class actions are certified without meeting the rigors of commonality.\textsuperscript{187} In other words, a “judicial hellhole” is a jurisdiction perceived as unfair

\textsuperscript{178} Id.
\textsuperscript{181} At the time this Article was written, ATRA’s most recent release of its Judicial Hellholes series was from 2006. Recently, ATRA released its 2007 edition, which lowers Madison and St. Clair Counties from “judicial hellhole” to “watch list” status due to a substantial drop in filings of class actions. AM. TORT REFORM ASS’N, JUDICIAL HELLHOLES 2007 (2007), http://www.atra.org/reports/hellholes/report.pdf [hereinafter JUDICIAL HELLHOLES 2007].
\textsuperscript{182} JUDICIAL HELLHOLES 2007, supra note 180, at ii.
\textsuperscript{183} JUDICIAL HELLHOLES 2006, supra note 179, at 1.
\textsuperscript{184} Id.
\textsuperscript{185} See generally, Price v. Philip Morris, Inc., 848 N.E.2d 1, 52 (Ill. 2005), cert. denied, 127 S. Ct. 685 (2006). The Illinois Supreme Court questioned the trial court’s treatment of the causation issue after vacating a $10.1 billion judgment against big tobacco, the largest judgment in state history. Id.
\textsuperscript{186} JUDICIAL HELLHOLES 2006, supra note 179, at 1.
toward business and corporate defendants. When these defendants fall into a "judicial hellhole," they lose not because they are legally culpable but because they have deep pockets and because the threat of being subject to the jurisdiction of the "judicial hellhole" will force them to settle.

On the other hand, some plaintiffs' lawyers consider these courts to be "magic jurisdictions" because of their tendency to award large jury verdicts. ATRA believes that "[p]ersonal injury lawyers are drawn to these jurisdictions like magnets and look for any excuse to file lawsuits there." As one former Madison County judge said, "[w]hen people come from hither and thither to file these cases, there's gotta be an inducement, doesn't there? They're not coming to see beautiful Madison County." Indeed, Illinois courts do see a fair share of class actions without merit and lawsuits that the local media portray as wacky.

Illinois has three "magic jurisdictions" or "judicial hellholes," depending on one's perspective. The rulings of these courts are important because they have national implications beyond the county in which the judge sits. When an Illinois judge sitting in St. Clair County decides a suit involving parties from across the country, the judge may be regulating an entire national industry. This scenario

188. JUDICIAL HELLHOLES 2006, supra note 179, at 1.
189. Id.
193. These are Cook, Madison and St. Clair Counties. See supra text accompanying notes 179–81.
194. See, e.g., Ann Knef, Lakin Files Class Action Against State Farm in St. Clair County, RECORD, June 7, 2006, available at http://www.madisonrecord.com/news/180199-lakin-files-class-action-against-state-farm-in-st.-clair-county. This case involves a class action against State Farm Insurance for wrongfully subrogating medical payment claims instead of allowing individuals to recover from third parties in auto accident claims. The lead plaintiff is an Illinois resident who died in an auto accident in Missouri. Missouri does not allow the medical payments to be subrogated, and State Farm allegedly violated this law when it made a subrogation claim for the plaintiff's medical payments. The putative class includes all residents of Illinois.
is a serious concern when class actions are filed in Illinois for tactical reasons on behalf of people who do not even live in Illinois. 195

Nonetheless, in a series of decisions from the pre-CAFA era, the U.S. Supreme Court affirmed that state courts, like Illinois’s “judicial hellholes,” are competent to hear nationwide class actions. Beginning in the late 1960s, the Court first made it harder for federal courts to hear class actions based on diversity jurisdiction, unless a question of federal law was involved. 196 Then, the Court decided in 1985 that state courts can handle class actions involving the nationwide marketing of goods and services and that state courts have jurisdiction over non-resident class members in class actions seeking money damages when an opt-out form of notice is used. 197 More recently, the Court held in 1996 that a state court has the power to approve the settlement of a nationwide class action releasing claims that were never filed and that were solely within the jurisdiction of a federal court. 198 As such, in the pre-CAFA era, the Court approved the filings of class actions with nationwide impact in the small counties of Illinois, though they were probably filed in Illinois for tactical reasons. Congress, on the other hand, does not appear to approve of these filings and hopes that CAFA will end the adjudication of nationwide class actions in small Illinois counties. 199

1. Connecting Class Actions to Illinois’s Economic Woes

Regardless of whether one considers the proliferation of class actions in Illinois to be a form of civil justice or judicial abuse, ATRA hopes to convince the local citizens of the need to rein in plaintiffs’ lawyers. To achieve this effort, ATRA initiated a

195. See e.g., Ann Knef, Out-of-State Plaintiffs Take on Bextra in St. Clair County, RECORD, Jan. 24, 2006, available at http://www.madisonrecord.com/news/173752-out-of-state-plaintiffs-take-on-bextra-in-st.-clair-county. The Bextra case is a class action against major pharmaceutical manufacturers filed on behalf of Kentucky, Tennessee and Alabama residents. The class contains no Illinois residents. However, venue is proper in St. Clair County, Illinois, because Monsanto, one of the defendants, operates a plant there. Id.

196. In Zahn v. International Paper Co., 414 U.S. 291 (1973), the Court held that each class member must individually meet the jurisdictional amount, and in Snyder v. Harris, 394 U.S. 332 (1969), the Court disallowed the aggregation of claims for purposes of meeting the requisite dollar amount for federal diversity jurisdiction. Taken together, these decisions effectively relegated class actions involving state law to the state courts.


199. See infra Part III.C.2.
campaign of sensationalist propaganda aimed directly at the hearts and minds of voters. With this campaign, ATRA hopes to instill in Illinois voters’ minds the idea that class actions are to blame for the state’s economic woes. For example, there is a billboard outside the minor league ballpark of the Schaumburg Flyers that depicts an injured ballplayer and the words “Lawsuits Outta Leftfield Help Put Illinois’ Economy on the Disabled List.”

An interesting aspect of this new campaign for tort reform in Illinois is that ATRA is reaching out to voters and trying to sway public opinion, rather than lobbying the members of the state legislature. To press their claim on the local public, ATRA uses “rolling billboards,” trucks with slogans and signs slamming personal-injury lawyers. One such billboard depicts a vampire’s teeth dripping dollar signs along with the words “lawsuit abuse.” In another, a license plate labels Cook County as the “Land of Lawsuits.” Above all, ATRA hopes these billboards will remind Illinois citizens that “as workers, consumers and taxpayers, they continue to foot the bill for the economy-sapping shenanigans of shameless personal injury lawyers.”

According to the presiding judge of the Cook County Law Division, a so-called “judicial hellhole,” the billboard campaign is “juvenile.” “Sensationalism is all they’re looking for . . . I’d like to see something rational,” says Judge William D. Maddux. Most troubling to Judge Maddux is the media’s and tort reformers’ abuse of the significance of large runaway verdicts. In fact, most runaway verdicts get cut down: “down the road when rationality

202. Id.
203. Id.
204. Press Release, Am. Tort Reform Ass’n, supra note 200. For the opinion of a Chicago based litigator who represents pharmaceutical companies and other businesses, see Michael J. Wagner, Impact of Product Liability Issues on Innovation, Address Before the Canada-United States Law Institute (Apr. 7–8, 2006), in CAN.-U.S. L.J., 2006, at 263, 279 (discussing how corporate liability has a negative impact on product innovation). The local companies Michael Wagner represents are reluctant to develop new products or services because of potential liability lawsuits. Id.
205. Milhizer, supra note 201, at 1.
206. Id.
207. Id.
prevails . . . something is done to those verdicts to put them back in line."

Unfortunately, the media does not accurately convey this.

After Cook County was designated a "judicial hellhole," Judge Maddux asked the court clerk for some empirical data to determine what was happening in his court system. The data showed that in 2004, 51 percent of jury verdicts favored plaintiffs, and 49 percent were for defendants. In 2005, two out of three motions to transfer a case out of Cook County were granted. These figures seem fair and reasonable, though in 2000 plaintiffs did win 66 percent of verdicts, compared to 34 percent for defendants. Nonetheless, Judge Maddux is satisfied with the fairness reflected in these figures and thinks groups like ATRA "are just not interested in the truth."

2. CAFA and Judicial Hellholes

If the truth is out there, it will not be found in ATRA's annual reports on "judicial hellholes." However, ATRA's efforts to showcase the negative implications of hearing national class actions in state courts led to the tort reform movement's greatest recent success, the passing of CAFA. CAFA's purpose is to shift a portion of class action litigation from state to federal courts, where there is more opportunity for corporate defendants to resist class

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208. Id.
209. Id.
210. Id.
211. Id.
212. Id.
213. Id.
214. ATRA's Judicial Hellholes Reports are available at http://www.atra.org/reports/hellholes/. Although extremely entertaining to read, these annual reports are pure propaganda filled with half-truths and manipulated misconceptions about our justice system. For example, the reports often portray state courts hearing claims by out-of-state plaintiffs to be an absurdity, without explaining that principles of personal jurisdiction require suits to be heard in states where the court has personal jurisdiction over the defendants, not the plaintiffs. Also, the reports often discuss the filings of newsworthy "frivolous" lawsuits, with citations to local newspaper articles as their sources. A minimal amount of further research, such as reading the newspaper articles (not all of them actually exist), often shows that these cases were eventually dismissed, withdrawn, removed to federal court, or reversed. The reports rarely discuss the subsequent history of these newsworthy cases.
certification.\textsuperscript{216} The certification question is paramount to defeating a class action. As one longtime class action defense attorney put it: "if you win on certification, you win."\textsuperscript{217} Because it is easier for plaintiffs to certify a class action in state court, defendants often spend a lot of money to remove the case to federal court if they think they can win on certification.\textsuperscript{218} The majority of class actions filed in federal courts are either dismissed or withdrawn.\textsuperscript{219} Furthermore, only 20 to 40 percent of cases filed as class actions are actually certified.\textsuperscript{220} Once certified, class actions are settled before trial 90 percent of the time.\textsuperscript{221}

Empirical evidence shows CAFA has successfully brought more state-law diversity class actions into the federal courts.\textsuperscript{222} Federal diversity class action filings have increased by more than 300 per year, compared to pre-CAFA levels.\textsuperscript{223} The majority of this increase are state-law contract and fraud claims, types that were heard in state courts in the pre-CAFA era.\textsuperscript{224} Still, it will take a few years until we have enough state and federal appellate decisions to see how CAFA reforms the state class action landscape. It is also unclear whether CAFA deters some cases from being filed at all or are instead filed as single-state cases.

CAFA proponents believed that resource-deficient state judges were handling too many class actions and that it made better sense to hear national cases in the federal system.\textsuperscript{225} Although these are valid arguments, plaintiffs’ attorneys speculate that there are hidden agendas behind CAFA. One possible motive is to eliminate class
actions entirely.226 If that cannot be accomplished, plaintiffs’ attorneys predict that Congress will at least “force them all into one forum which can be managed [more easily] than cases brought in different state courts.”227 Some believe the goal of CAFA is “to blow up the caseload in the federal court system, so that cases [will] move more slowly, if at all.”228 Similarly, civil rights groups are concerned that federal courts will be overwhelmed with class actions that were once handled by state courts and will become too busy to hear federal antidiscrimination lawsuits.229

Plaintiffs’ attorneys, consumer advocacy groups, and skeptics also believe that a movement to grant the business community broad immunity from consumer liability lies behind CAFA and the campaign against “judicial hellholes.” Joanne Doroshow, a prominent consumer advocate, has called ATRA’s campaign one example of the “tremendous increase in efforts to eviscerate the civil justice system and make sure that corporations do not get sued for anything they do wrong.”230

Nonetheless, one positive result of ATRA’s campaign is that it offers the opportunity to learn about important issues that all informed citizens should consider. Citizens should understand the proper role of state courts in their communities. These courts exist to protect individual rights, limit government power, and redress economic and physical injuries. Moreover, citizens should understand that the filing of a class action is much more than an ATM for plaintiffs’ lawyers. Rather, class actions can be a vehicle to protect consumer rights, regulate unscrupulous conduct by businesses, and compensate victims for the injuries of a mass tort.

Even CAFA begins with the finding that “[c]lass action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties.”231 Class actions eliminate or reduce the threat of repetitive litigation, prevent the inconsistent resolution of similar cases, and provide an effective means of redress for individuals

226. Id.
227. Id. at 69 (quoting Clinton Krislov, a plaintiff’s class action attorney).
228. Id. at 55 (quoting James Sturdevant, a plaintiff’s class action attorney in San Francisco).
230. Id. at 20.
whose claims are too small to make it economically viable to pursue them as independent actions. At their best, class actions help control conduct that threatens to harm society or the marketplace. For example, securities and consumer class actions enforce regulatory standards designed to control or deter fraudulent marketplace conduct that might otherwise escape regulation. At their worst, however, class actions are a vehicle for plaintiffs' attorneys to obtain hefty paychecks out of corporations that would rather settle than go through the expense and risk of a trial. Such class actions inspire sensationalist tort reform campaigns with the danger to mislead and misinform the public.

Although there have been problems with lawsuit abuse in Illinois, the disproportionate filing of nationwide class actions in Illinois's "judicial hellholes" is not a complete explanation for the loss of manufacturing jobs in Illinois. Many other factors should be considered, such as the importation of cheaper goods from abroad, rising energy costs, the devaluation of the dollar, and the international credit crunch crisis. In light of the many domestic problems the United States now faces, blaming plaintiffs' lawyers for the economic slump of Illinois is misguided. The Achilles heel of tort reformers like ATRA is the self-interest behind their message. Reform groups try to conceal the identities of their financial sponsors, usually tobacco and insurance companies, because they know how much the public distrusts those companies. As their self-interest is uncovered, proponents of tort reform lose the credibility they need to persuade voters and legislators to enact their proposals.

233. ROTHSTEIN & WILLGING, supra note 219, at 1.
234. Id.
235. Id.
236. Doroshow, supra note 229, at 22.
IV. Texas

A. An Overview of Texas's Class Action Standards: A "Rigorous Approach"

Compared to other states like New York and Illinois, Texas courts take an admittedly more "rigorous approach" to the issue of class certification. This rigor is apparent in both attitude and procedural process. Though Texas may consider the class action an "efficient device," its courts do not recognize a right to litigate a claim as a class action.

A Texas court may certify a class action only if the plaintiffs satisfy all the statutory requirements, but Texas judges will not certify a class action simply on the basis of a well-pleaded petition. Instead, a hearing on the issue of certification is always held. In this hearing, the proponents of a class action have the burden of proving to the court all of the statutory elements of certification. Furthermore, the court must perform a "rigorous analysis" when considering whether to certify the class. Thus, a Texas court is required to look beyond the pleadings and understand the parties' claims, defenses, relevant facts, and even the applicable substantive law in order to make a meaningful determination of certification issues. This analysis means that in deciding whether to certify a class, a Texas court will consider more than just the petition and answer, instead evaluating the ultimate merit of the claims and defenses. Moreover, a court is not bound by the class definitions submitted by the parties. Overall, Texas's trial courts have broad discretion to independently define the class based on the available evidence, and the state's appellate courts can redefine the class to correct any infirmities.

239. Id.
240. ROSSMAN, supra note 116, at 279.
241. Id.
245. ROSSMAN, supra note 116, at 280.
246. Bailey, 83 S.W.3d at 848.
Texas imposes even higher certification burdens on proposed nationwide class actions filed in the state. When the laws of other states are implicated, the Texas Supreme Court doubts a trial court’s ability to accurately determine the merits of certification. This view undermines the viability of nationwide classes filed in the state because a determination of the applicable substantive law is of paramount importance in such actions. Class representatives are required to present Texas trial courts with an extensive analysis evaluating differences in the various states’ laws. Texas courts are then independently responsible to determine whether Texas law conflicts with the laws of another state. They must analyze and decide all conflict-of-law issues before granting certification. Unless the courts conduct a detailed state-by-state analysis of any conflict-of-laws, their certification order will be reversed.

Also indicative of their general attitude toward class actions, the Texas Supreme Court expressly rejects a “certify now and worry later approach,” instead requiring lower courts to perform a rigorous analysis before allowing a case to proceed as a class action. As such, Texas trial courts must resolve all dispositive issues that impact the viability of the case before even considering certification. This plan allows reviewing courts another opportunity to assure that all statutory requirements were satisfied and that the trial court fulfilled its obligation to rigorously analyze and understand all of the claims, defenses, relevant facts, and applicable substantive law.

With all of this skepticism and rigor, Texas does not appear to be as friendly to the class action device as New York and Illinois. In fact, the Texas Supreme Court appears to be far less sympathetic to

248. Id. at 672.
249. Id.
250. Id. at 673.
251. Id. at 680.
252. See id. at 672–73.
254. Id.
255. Id. The trial plan requirement is codified in TEX. R. CIV. P. 42(c)(1)(D).
the general argument that denial of class treatment effectively denies legal redress to numerous plaintiffs because their claims are simply too small to justify the cost of individual litigation. The court’s response has simply been that “there is no right to litigate a claim as a class action.” The Texas Supreme Court’s notions of fairness and justice are only predicated on strict compliance with the standards of certification. Noticeably absent from Texas Supreme Court opinions is any language demonstrating that the class action device deters wrongful corporate behavior.

1. Requirements for Class Certification in Texas Courts

Texas’s class action standards are almost identical to the federal standards, and indeed, federal decisions determining class certification serve as “persuasive authority” within Texas courts. In order to certify a class in Texas, the plaintiff must establish the requirements of numerosity, commonality, typicality, and adequacy of representation.

The requirement of numerosity is not difficult to meet, and Texas law does not require precise proof of the number of putative class members. The standard for commonality is also not high in Texas. Common questions are questions that when answered as to the named plaintiff, are answered for all the class members. The presence of a single common question of either law or fact can warrant class certification.

257. Sw. Ref. Co. v. Bernal, 22 S.W.3d 425, 439 (Tex. 2000) (reversing certification of the class in an action arising from an oil refinery fire that injured nearby residents and exposed them to toxic gases, in an opinion by resigned U.S. Attorney General Alberto Gonzales, formerly of the Texas Supreme Court (quoting Sun Coast Res., Inc. v. Cooper, 967 S.W.2d 525, 529 (Tex. App. 1998))).

258. Id.

259. The requirements for class certification are found in TEX. R. CIV. P. 42.


261. TEX. R. CIV. P. 42(a).

262. Id. at 42(a)(1) (“[T]he class is so numerous that joinder of all members is impracticable.”).


264. TEX. R. CIV. P. 42(a)(2) (“[T]here are questions of law, or fact common to the class.”).


266. Health & Tennis Corp. of Am. v. Jackson, 928 S.W.2d 583, 590 (Tex. App. 1996).

267. Id.
The requirement of typicality in Texas\(^{268}\) is met if the named plaintiff's claims have the same essential characteristics as those of the class.\(^{269}\) Moreover, these claims "need not be identical, only substantially similar."\(^{270}\) It is enough if the claims arise from the same pattern of conduct and are based on the same legal theory.\(^{271}\)

The requirement of adequacy of representation\(^{272}\) is established if there are no conflicts of interest between the named plaintiff and the class members and if the class counsel is sufficiently qualified and experienced to prosecute the action vigorously.\(^{273}\) If there is any doubt regarding the adequacy of a class representative, the Texas trial court can easily rectify it by requiring additional class representatives.\(^{274}\)

In addition to these familiar requirements, plaintiffs must also establish one of the following: (1) that making the plaintiffs bring individual actions would create a risk of inconsistent judgments that would interfere with the interests of other putative plaintiffs or establish incompatible standards of conduct for the defendants; (2) that declaratory or injunctive relief is appropriate because the defendants have acted or refused to act on grounds that generally apply to the class; or (3) that common questions of law or fact predominate over questions affecting individual plaintiffs and a class action is the superior method for the fair and efficient resolution of the controversy.\(^{275}\) If the plaintiff can satisfy at least one of these standards, the court will apply their "rigorous approach" and determine, in their discretion, whether to grant certification of the class.\(^{276}\)

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\(^{268}\) **TEX. R. CIV. P. 42(a)(3)** ("The claims or defenses of the representative parties are typical of the claims or defenses of the class.").

\(^{269}\) **Microsoft Corp. v. Manning**, 914 S.W.2d 602, 613 (Tex. App. 1995).


\(^{271}\) **Manning**, 914 S.W.2d at 613.

\(^{272}\) **TEX. R. CIV. P. 42(a)(4)** ("[T]he representative parties will fairly and adequately protect the interests of the class.").

\(^{273}\) **Health & Tennis Corp. of Am. v. Jackson**, 928 S.W.2d 583, 589 (Tex. App. 1996).

\(^{274}\) **TEX. R. CIV. P. 42(c)(1)(c)** ("The court may order the naming of additional parties in order to insure the adequacy of representation.").

\(^{275}\) **Id.** 42(b).

2. Appellate Review of Class Certification

A Texas trial court decision that certifies or refuses to certify a class is immediately subject to interlocutory appeal. While pending, this appeal stays all other class action proceedings in the trial court, including notice to the class or trial of the claims. Also, this interlocutory appeal is strictly limited to the trial court’s decision regarding certification, and Texas appellate courts do not have jurisdiction to review anything else, such as orders granting partial summary judgment or the trial plan.

Interestingly, class certification orders are subject to two levels of appellate review in Texas. In 2003, the Texas legislature decided to grant the state supreme court jurisdiction to conduct interlocutory review of class certification orders. Before 2003, a trial court’s order certifying a class could not be reviewed by the supreme court until after a final judgment, unless there was a conflict of decisions among the appellate courts or a dissenting opinion filed in the court of appeals. This limitation made the Texas Courts of Appeals develop class action jurisprudence with little guidance from the state supreme court. Now, however, a disappointed litigant has an unqualified right to an interlocutory appeal of a decision on class certification all the way to the state supreme court. This change benefits defendants because it gives them an additional tactic to defeat class certification. An order granting class certification can have staggering economic consequences and often impels a defendant to settle, while a denial of certification usually means that the defendant will only face individual claims.

When reviewing a trial court’s order granting certification, the Texas Courts of Appeals and the Texas Supreme Court employ a heightened standard beyond abuse of discretion. The appellate

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277. TEX. CIV. PRAC. & REM. CODE ANN § 51.014(3) (Vernon 1997).
278. Id. § 51.014(b); ROSSMAN, supra note 116, at 286.
280. TEX. GOV’T CODE ANN. § 22.225(d) (Vernon 2004).
281. Hankins, 111 S.W.3d at 72.
282. TEX. GOV’T CODE ANN. § 22.225(d) (Vernon 2004).
283. Compaq Computer Co. v. Lapray, 135 S.W.3d 657, 671 (Tex. 2004) (“Although we review the trial court’s order for abuse of discretion, we do not indulge every presumption in its favor, as compliance with class action requirements must be demonstrated rather than presumed.”).
courts expressly refuse to indulge every presumption in favor of the trial court’s ruling.\textsuperscript{284}

A trial court has discretion to rule on class certification issues, and some of its determinations—like those based on its assessment of the credibility of witnesses, for example—must be given the benefit of the doubt. But the trial court’s exercise of discretion cannot be supported by every presumption that can be made in its favor.\textsuperscript{285}

Instead, compliance with class action requirements must be demonstrated rather than presumed.\textsuperscript{286} Accordingly, the standards for class certification in Texas are as “rigorous” as the state’s own courts proclaim them to be.\textsuperscript{287} The double layer of appellate review and the heightened standard of review make class certification a higher hurdle for Texas plaintiffs to overcome.

\textbf{B. An Overview of the Texas Approach to Complex Litigation}

Unlike New York, Illinois, and Florida, Texas does not have a business court for the adjudication of major and complex commercial disputes. In addition, until fairly recently, Texas lacked a mechanism to coordinate or consolidate cases pending in different districts throughout the state. For years, Texas courts disfavored multiple suits in order to encourage judicial economy and avoid inconsistent judgments.\textsuperscript{288} Nonetheless, courts realized that when facing mass tort actions filed throughout the state—such as the breast implant, diet drug, and Firestone tire litigations—the courts detrimentally lacked a mechanism to bring coordinated discovery or other proceedings before a single judge.\textsuperscript{289} Without such a mechanism, individual courts risked creating duplicative or inconsistent rulings.

\textsuperscript{284} Id.
\textsuperscript{285} Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 691 (Tex. 2002).
\textsuperscript{286} Compaq Computer, 135 S.W.3d at 671.
\textsuperscript{288} See Mark Herrmann et al., Get Ready for the New Texas MDL Statute, TEX. LAW., Sept. 1, 2003.
\textsuperscript{289} See id.
In response, the Texas legislature established a Multidistrict Litigation Panel ("MDL") in 2003. Its coordination process closely tracks the federal multidistrict litigation scheme that has existed since 1968. The Texas MDL panel can transfer related cases pending in trial courts in different counties across the state to a single pretrial court for coordinated pretrial supervision. Cases are considered related if they involve one or more common questions of fact. The MDL panel may order transfer of such cases if it: (1) will serve the convenience of the parties and witnesses; and (2) promote the just and efficient conduct of the litigation. Once the pretrial court concludes that the cases are ready for trial, it remands them back to the original courts for trial in the parties’ venue of choice.

Texas courts now recognize the virtues of transferring related cases to a single pretrial judge. One recent situation ripe for coordination involved 453 plaintiffs that had filed 71 lawsuits in 55 different districts against 158 defendants. In the pre-MDL days, trial judges were too busy to give complex litigation such as this the deliberate, thoughtful, and consistent pretrial attention that they deserved. Also, Texas trial judges traditionally set complex cases for trial on dates before they were truly ready, in hopes that the case would settle under the pressure of an impending trial. Now, after implementing the Texas MDL, the pretrial judge will not return complex cases to the trial judges until they are fully ready for trial. Thus, the pretrial judge can invest the necessary time and study required by a complex case.

In order to have cases consolidated by the MDL panel, the moving party must "simply" convince the panel "that transfer to a
pretrial judge would promote . . . convenience and efficiency.\textsuperscript{300} According to Justice Mack Kidd, the Texas legislature and Texas Supreme Court originally intended to establish an "extremely onerous burden of proof" to warrant MDL consolidation, since MDL consolidation was viewed as a drastic change from the conventional Texas civil justice system, in which a diverse group of judges across the state brought their collective knowledge and experience to bear on legal issues rather than assigning decisions to a single judge.\textsuperscript{301} Justice Kidd also believes that MDL consolidation should be "an extraordinary remedy," used only when Texas trial courts fail to handle the caseload efficiently.\textsuperscript{302}

In 2003, the MDL panel consolidated all asbestos cases to a single, statewide asbestos judge. In his dissent to this order, Justice Kidd reasoned that this was simply wrong.\textsuperscript{303} Texas courts had already efficiently disposed of almost 30,000 asbestos cases through the use of a series of agreed-upon standing pretrial orders and the cooperation of counsel on both sides.\textsuperscript{304} By sharp contrast, Justice Kidd believed that the federal experience with asbestos consolidation had not been as smooth or successful.\textsuperscript{305} Justice Kidd concluded that after all pretrial matters in federal asbestos cases were assigned to a single federal district court, the docket suffered from "pretrial paralysis" as dying victims had their cases "pretried" to death.\textsuperscript{306} Based on the Texas courts' prior success with disposing of asbestos litigation, Justice Kidd found no need for Texas to assign all pretrial matters to a single Texas judge.\textsuperscript{307} Justice Kidd concluded that consolidation of the asbestos cases simply did not promote the just and efficient result that the MDL panel strives for.\textsuperscript{308}

\textsuperscript{300} In re Hurricane Rita Evacuation Bus Fire, 216 S.W.3d 70, 72 (Tex. J.P.M.L. 2006).
\textsuperscript{301} In re Silica, 166 S.W.3d at 8, (Kidd, J., dissenting).
\textsuperscript{302} Id. at 11.
\textsuperscript{303} See Union Carbide v. Adams, 166 S.W.3d 1, 2 (Tex. J.P.M.L. 2003) (Kidd, J., dissenting).
\textsuperscript{304} Id. at 1.
\textsuperscript{305} See, e.g., In re Patenaude, 210 F.3d 135, 138 (3d Cir. 2000), cert. denied, 531 U.S. 1011 (2000) (describing negotiations of a global settlement of all asbestos claims that "fell apart" and a seven year lapse in the global resolution of common questions of law or fact by the transferee court).
\textsuperscript{306} Union Carbide, 166 S.W.3d at 2 (Kidd, J., dissenting).
\textsuperscript{307} Id.
\textsuperscript{308} Id.
Indeed, a better use of the MDL panel is in litigation arising from one common, tragic event, such as the bus carrying elderly Hurricane Rita evacuees that caught fire in 2005.\textsuperscript{309} Consolidating cases that arise from one common event and involve the same witnesses and investigators better promotes Texas’s goals of convenience and efficiency.

C. New Developments in Class and Complex Litigation in Texas: Civil Justice or Tort Reform?

In 2003, the Texas legislature believed that Texas fostered an environment of excessive litigation.\textsuperscript{310} This environment purportedly harmed consumers, caused companies to locate outside of Texas, burdened Texas courts, and even forced some companies into bankruptcy.\textsuperscript{311} In order to change Texas’s reputation as a “plaintiff-friendly state” and alleviate this perceived crisis, the legislature passed a monumental and comprehensive bill full of “civil justice” and “tort reform.”\textsuperscript{312} According to the bill’s authors, their intent was to bring more balance to the Texas civil justice system, reduce litigation costs, and address the role of litigation in society.\textsuperscript{313} In addition to creating the MDL panel and expanding the Texas Supreme Court’s jurisdiction to review interlocutory appeals of class certification orders, the bill addressed a large number of issues implicated in class and complex litigation.\textsuperscript{314} Many of the bill’s reforms are tremendously advantageous to a corporate litigant defending a class or complex lawsuit in Texas.

1. Eroding the “American Rule”

Among the many noteworthy changes in the law are new rules that allow for the shifting of litigation costs, including attorney’s

\textsuperscript{309} See \textit{In re} Hurricane Rita Evacuation Bus Fire, 216 S.W.3d 70 (Tex. J.P.M.L. 2006).
\textsuperscript{311} See id.
\textsuperscript{312} Id. See Ralph Blumenthal, \textit{After Texas Caps Malpractice Awards, Doctors Rush to Practice There}, N.Y. TIMES, Oct. 5, 2007, at A21.
\textsuperscript{313} S.R. 4, 78th Reg. Sess. at 1 (Tex. 2003).
\textsuperscript{314} The bill addressed class action lawsuits, offers of settlement, venue and forum non conveniens, proportionate responsibility, products liability, prejudgment and post-judgment interest, appeal bonds, seat belts and child safety seats, medical malpractice, charitable volunteer immunity and liability, admissibility of evidence regarding nursing homes, and liability relating to asbestos claims. Id.
fees, when an offeree refuses his opponent’s offer to settle and does no better at trial. Under this new procedure, if a settlement offer is made and rejected, and the ultimate judgment rendered by a court or jury is significantly less favorable to the rejecting party than the offer was, the rejecting party must pay the offeror’s litigation costs, including attorney and expert witness fees. This change can make the rejection of a settlement offer a costly decision and increases the risks inherent in trying complex litigation.

This new procedure is clearly an erosion of the “American Rule”—that parties bear the costs of their own attorney’s fees in litigation, regardless of whether they win or lose. The United States has long rejected the “English Rule,” followed in England and most European nations, which makes the losing party pay the winning party’s attorney’s fees. A preference for the “American Rule” is premised on the traditional U.S. belief in liberal access to the courts to redress wrongs. The threat of paying the other side’s legal fees if the suit is unsuccessful is considered an unwanted deterrent because of concerns that wrongs may go without redress.

The Texas legislature felt it needed this drastic change in the law to encourage settlements and avoid protracted litigation. Indeed, this new rule encourages a more serious evaluation of a proposed settlement at an earlier stage than otherwise might occur and can lead to the disposition of cases before the heaviest expenses have been incurred. Fee shifting of some kind is already common in a majority of states and has been allowed in federal practice since 1938.

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315. TEX. CIV. PRAC. & REM. CODE ANN. § 42.004(a) (Vernon Supp. 2007). Plaintiff pays defendant’s costs if judgment is less than 80 percent of defendant’s settlement offer. Defendant pays plaintiff’s costs if judgment is more than 120 percent of plaintiff’s settlement offer. Id. § 42.004(b).

316. “Litigation costs” is defined as money actually spent and obligations actually incurred that are directly related to the case in which a settlement offer was made. It includes court costs, reasonable fees for up to two testifying experts, and reasonable attorney’s fees. Id. § 42.001(5).


318. Id.

319. Id.

320. Id.

321. See id.

322. Id. at 36. State laws vary with regards to what kinds of costs are recoverable and whether cost-shifting is available to both plaintiffs and defendants. Id. Federal Rule of Civil Procedure 68 only allows the recovery of court costs, not attorney’s fees, so there is little incentive to use it.
Nonetheless, the need for such a rule is highly questionable. There is no legal duty to settle a case before trial nor an obligation to accurately predict the outcome of a suit. In many cases, especially in class and complex litigation, it can be very difficult to predict a jury verdict. Both sides can have reasonably different valuations of the case and damage models. Thus, it seems illogical to have a procedural rule that punishes parties who reasonably believed that they would fare better at trial than by accepting a pretrial offer.

Since 95 percent of cases already settle before trial,\(^{323}\) the new rule seems superfluous if its function is to encourage or promote settlement offers. Alternative dispute resolution, mediation, and sanction rules already exclude the majority of cases from their "day in court." Accordingly, the new rule's actual purpose is probably to give defendants an additional hammer to hold over plaintiffs, and it will likely result in lower settlements. Though the cost-shifting rule does not apply to class actions, it undoubtedly increases the risks inherent in trying complex cases in Texas courts. Although the rule will likely be an effective tool to encourage parties to settle their lawsuits without bothering the courts, this efficiency comes at a high cost to plaintiffs and will disproportionately affect plaintiffs of limited means. It is easy to look back in hindsight and realize that a settlement offer should have been taken, but such clarity is not always apparent in the moment of decision. In a complex case in which both parties reasonably differ as to the value of the case, it is inherently unfair to make the winner pay the legal fees of the loser.

2. Reforming Appeal Bonds

Also of note and extremely advantageous to defendants, especially in class actions where the liability can be astronomical, is a reform in the amount of security needed to stay collection proceedings while a defendant appeals a money judgment. Suppose a jury finds a company liable for $50 million in compensatory damages and $100 million in punitive damages. Naturally, the company will want to appeal, especially the punitive damage award. The mere filing of an appeal, however, does not prevent the winning party from collecting the $150 million judgment. To stay the

\(^{323}\) Carlson, Fee Shifting, supra note 317, at 38.
collection and protect the company’s assets from being seized while the appeal is pending, the company must deposit with the court a security interest called a supersedeas bond (appeal bond) that covers the judgment, plus the interest that will accrue during the appeal.\textsuperscript{324} In cases with giant verdicts, purchasing such an appeal bond may put a severe strain on the company’s resources, maybe even forcing it into bankruptcy. If the company does not obtain a stay, however, the plaintiff can pursue execution proceedings to collect the judgment even while the appeal is underway.\textsuperscript{325}

The history of Texas juries granting large damage awards made the traditional requirement that an appeal bond cover the total amount of damages unrealistic.\textsuperscript{326} For example, in the famous \textit{Pennzoil v. Texaco}\textsuperscript{327} case, a jury awarded a Texas-based oil company over $10 billion in damages against a New York oil company for tortiously interfering with a contract.\textsuperscript{328} The New York company could not afford to buy a $10 billion appeal bond, and thus, a serious cloud was cast on the company’s future.\textsuperscript{329}

Under the new rules adopted as part of the 2003 tort reforms, an appeal bond must simply cover the compensatory damage award, plus interest and costs.\textsuperscript{330} Punitive damage awards, no matter how large, need no longer be bonded.\textsuperscript{331} In addition, the maximum amount required for an appeal bond is now capped at the lesser of either $25 million or 50 percent of the defendant’s net worth.\textsuperscript{332} The new rules are also flexible: if the defendant can prove that

\textsuperscript{324} Timothy S. Bishop & Jeffrey W. Sarles, \textit{Supersedeas Bonds: A Crushing Burden}, NAT’L L.J., Nov. 1, 1995, http://www.appellate.net/articles/supersedeas.asp. A supersedeas bond traditionally serves two functions. First, it preserves the prejudgment status quo pending the outcome of the appeal. Second, it provides security to the non-appealing party by insuring that if the appellate court affirms the judgment, which could occur many years later, the winning party will still have a source of recovery and will not be prevented from successfully collecting the judgment. Kevin W. Liles, Comment, \textit{Supersedeas Bonds: The Ostensible Authority Struggle over Who Gets a Reduction}, 48 BAYLOR L. REV. 469, 470 (1996).


\textsuperscript{326} Bishop & Sarles, supra note 324.

\textsuperscript{327} 481 U.S. 1 (1987) (aff’d on abstention grounds).

\textsuperscript{328} \textit{Id.} at 4–6.

\textsuperscript{329} \textit{See id.}

\textsuperscript{330} TEX. CIV. PRAC. & REM. CODE ANN. § 52.006 (Vernon 2007).


\textsuperscript{332} TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(b) (Vernon 2007).
purchasing the bond will cause him or her "substantial economic harm," the court must lower the security to a more agreeable amount. This change should prevent astronomical Pennzoil-like judgments from ever again precluding a defendant from staying a judgment during appeal.

Setting a cap and integrating flexibility into the appeal bond rules was a wise decision by Texas. There are several sound arguments against requiring a defendant to post a bond in the full amount of a judgment to secure an appeal, especially when the judgment is extremely large. Judges and scholars have found that an inflexible rule "denies an appellant's due process right to an effective appeal" and can amount to confiscation of the defendant's property without due process. It also generates inequitable situations in cases where the sheer size of the judgment effectively prohibits a defendant from appealing because the defendant either cannot afford the bond or a sufficient bond is simply not available.

Limiting the amount of the bond to compensatory damages, however, creates a greater incentive for defendants to appeal damage awards, especially punitive damage awards. Having more appeals climb up the ladder increases the likelihood that large awards will be reduced or overturned by a court of appeals.

3. Concerns over the Role of the Jury in Class and Complex Litigation

Some of the 2003 tort reforms are probably attributable to an outright fear of letting Texas juries decide cases. The fear that these juries will misunderstand the facts and render an exorbitant verdict against a corporate defendant explains why some of the reforms noticeably chip away at a jury's power to have their say in class or complex litigation. For example, the jury must now be unanimous in

333. Id. § 52.006(c).
337. See, e.g., id.
both the finding of liability and in the amount to be given in order to
award exemplary damages, which include punitive damages.\(^{338}\)
Requiring unanimity makes this accord harder to reach. Also, Texas
now limits the awarding of non-economic damages in medical
malpractice cases to $250,000.\(^{339}\) Further, Texas passed a state
constitutional amendment that grants the legislature clear authority to
place further limits on non-economic damages in other kinds of
cases, if they choose to do so.\(^{340}\) The amendment was needed to
preclude expected constitutional challenges because arbitrary
damage caps implicate a number of constitutional issues.\(^{341}\)

Though the legislature has not done so yet, plaintiffs’ lawyers
fear that one day the Texas legislature will use its new authority to
extend damage caps to tort and contract claims.\(^{342}\) Establishing
damage caps raises important social questions: What does it mean
when a jury can sentence a criminal to death and take away his or her
individual life, but cannot decide the amount of damages an injured
victim should be awarded?\(^{343}\) Is the role of the jury in non-criminal

\(^{338}\) TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(d) (Vernon 2007). Also, the jury must be
specifically instructed that an award of damages be unanimous. Id. § 41.003(e). See generally
Patricia F. Miller, Comment, 2003 Texas House Bill 4: Unanimous Exemplary Damage Awards
and Texas Civil Jury Instructions, 37 ST. MARY’S L.J. 515 (2006) (discussing the requirement of
jury unanimity).

\(^{339}\) TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (Vernon 2007). For an interesting look at
the local impact of this legislation see Blumenthal, supra note 312. California also caps the
amount of non-economic damages at $250,000. CAL. CIV. CODE § 3333.2(b) (West 2008).

\(^{340}\) TEX. CONST. art. III, § 66. The purpose of the amendment is to preclude any
constitutional challenges to the legislature’s power to establish limits on non-economic damages.

\(^{341}\) Michael D. Johnston, Note, The Litigation Explosion, Proposed Reforms, and Their
Consequences, 21 BYU J. PUB. L. 179, 192 (2007). Courts in other states have reached
inconsistent conclusions as to whether damage caps comport with their respective constitutional
doctrines. The Virginia Supreme Court upheld the constitutionality of damage caps. Etheridge v.
Med. Ctr. Hosp., 376 S.E.2d 525, 534 (Va. 1989). However, damage caps were found to violate
the Florida Constitution because they deprive a plaintiff of the right to a jury trial. Smith v. Dep’t
of Ins., 507 So. 2d 1080, 1088–89 (Fla. 1987). In Illinois, damage caps were held to be an
unconstitutional violation of the separation of powers doctrine because they functioned as a
“legislative remitituir” and unduly encroached upon the traditional remitituir power of the
called an unsuccessful effort by Senate Republicans to pass a federal damage cap “The Drunk
Drivers Protection Act of 1995” and asserted that it would also “protect rapists, child abusers . . .
despoilers of the environment and even ‘perpetrators of terrorist acts and hate crimes.’” Neil A.
Lewis, Senate Republicans Halt Effort to Redo Civil Legal System, N.Y. TIMES, May 5, 1995, at
A1.

\(^{342}\) See Michael S. Hull et al., supra note 331, at 166–67.

\(^{343}\) Round Table Discussion: Jury Service and the Jury System, HOUSTON LAW., available at
http://www.thehoustonlawyer.com/aa_sep05/page24.htm [hereinafter Round Table
Discussion].
cases being usurped? Can juries still play a meaningful role in class and complex litigation?

With the threat of the legislature extending damage caps to other causes of action looming in the distance, there is an ongoing debate in Texas about whether damage caps are proper. From a legislative perspective, damage caps and the new unanimity requirement for punitive damages suggest an overall legislative disapproval of jury verdicts. Indeed, the Texas legislature had already limited punitive damage awards.44 Taken together, these damage caps send the message that the Texas legislature believes juries overly punish defendants with presumed deep pockets and that juries are not playing their proper role in the system. Apparently, a jury may determine a defendant’s fault but cannot be trusted to determine the entire remedy of this fault. Tort reformers agree with this position and defensibly argue that damage caps serve a greater purpose by lowering insurance costs and reducing litigation.45 Indeed, of the various tort reforms mentioned in this Article, damage caps are probably the single greatest disincentive to filing a lawsuit.46

Even though damage caps are not fair to plaintiffs, some argue they are necessary47 due to the disruption that large verdicts cause within the business community. This line of reasoning is analogous to that underlying workers’ compensation law, where damages are similarly cut off completely, except on a schedule, based on the assumption that litigation over work-related injuries disrupts industries and the workplace and is not economically efficient.48 Naturally, consumer advocates strongly oppose the establishment of further damage caps and fear that Texas’s adoption of damage caps sets a dangerous precedent for further limiting jury participation in the process.49 Some argue that damage caps are really caps on professional accountability, favoring wrongdoers over their

344. TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (Vernon 2007). Exemplary damage awards may not exceed an amount equal to the greater of: “(1)(A) two times the amount of economic damages; plus (B) an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or (2) $200,000.” Id.


346. Id.

347. See Round Table Discussion, supra note 343, at 33.

348. Id.

349. Chamberlain, supra note 345, at 67.
victims. One Texas judge fears that establishing damage caps is a slippery slope leading to a system where juries will not be needed at all and all damages will be statutorily established and regulated.

In complex litigation, there may be legitimate concerns that support the need to avoid or circumvent the traditional role of the jury. There is a widely held belief that jurors are not the best people to decide complex technical aspects of cases involving intellectual property issues, patents, or sophisticated business disputes. In some cases, the stakes can be so high financially that some companies consciously avoid using juries. They may fear that jurors will decide against their company simply because jurors tend to mistrust insurance or tobacco companies. Also, it may be too financially risky in complex litigation to let twelve random people decide the fate and fortune of a company since a jury decision is a variable whose outcome cannot be predetermined.

The fear of letting juries decide the outcome of complex litigation is exacerbated by the low turnout percentage of those who are called to serve on juries in Texas. According to one complex litigator, "we don't pick juries." Instead, Texas juries are composed of the first twelve leftovers, after both sides use their strike privileges to dismiss potential jurors from the pool. In evaluating these leftovers, commercial litigators fear that too few are businesspeople who will understand the impact of their decision or are citizens with a sufficient stake in the community. At the same time, the higher someone is in the socioeconomic scale, the less likely they are to serve on a jury.

There are various reasons why people elect not to participate on a jury. Some people avoid jury service because of economic reasons,
i.e., they cannot afford to miss work. Others never show up because they simply do not care. Some litigators even find this apathy acceptable from a "natural selection" perspective: "If they don’t show up, if they don’t care . . . we don’t want them anyway."

There is a sense that people who do not want to participate in the process should not be compelled against their will since resentment for being required to participate may cloud their reasoning.

Unfortunately, many people misunderstand the importance of jury duty and how critical it is to citizenship. "Democracy is not a spectator sport. It’s participatory." Jury duty is one important way people can participate in the process and voice their opinion on issues such as corporate misconduct and the proper role of class and complex litigation in society. The general apathy toward jury service, and even toward voting, is evidence of the fact that most people do not appreciate their individual roles in their own community or the importance of their state and federal citizenship. The Texas legislature’s conscious decision to place caps on non-economic damages, though limited at this time to cases of medical liability, expresses a lack of confidence in the ability of a jury to adequately compensate an injured victim for the harm they may have suffered.

The collapse of confidence in juror discretion demonstrates serious issues that need to be rectified in the future. Like Illinois, Texas needs to take affirmative steps to educate its citizens about the proper role of litigation in their society, in order to counter the threat of miseducation perpetuated by tort reformers. When the Texas jury in a recent Vioxx case awarded a widow $253.5 million, the jury sent a message to the pharmaceutical company it believed was responsible for her husband’s wrongful death. When Texas’s requirement of proportionate punitive damages immediately reduced the amount to $26.1 million, the legislature was in effect depriving

359. Round Table Discussion, supra note 343.
360. Id.
361. Id.
362. Id.
the jurors of their ability to voice their discontent with the corporation's actions. Even though class and complex litigation can involve large sums of money and create a risk that twelve random individuals could bring great losses upon a national corporation, excluding or limiting jury participation in the process is inherently undemocratic. Denying jurors a real say in the process will only lead to further juror disenchantment.

As a first step toward addressing this quagmire, Texas recently increased the daily pay for jurors for the first time in 50 years. Now, jurors are entitled to not less than $6 on the first day and $40 on each additional day, plus reasonable travel expenses. In theory, this pay increase will inspire more Texans to participate in the jury process. Unfortunately, this change is probably too late. Texas already appears to believe that an arbitrary statute limiting damage awards in medical cases to $250,000 can determine the correct amount a victim deserves better than twelve human beings capable of empathy and reason.

V. FLORIDA

A. An Overview of Florida's Class Action Standards: Undoing "Judicial Hellhole" Status with Tougher Standards

Like Texas, Florida also now requires its trial courts to perform a "rigorous analysis" before certifying a class action. This requirement is perhaps a response to the reputation Florida has earned as a "judicial hellhole." Through cases like Liggett v. Engle, Florida became known nationally for large damage awards and plaintiff-friendly rulings that have attracted numerous class action filings. Aggregating claims into a class action makes it

364. See id.
365. See TEX. GOV'T. CODE ANN. §61.001(a) (Vernon 2007).
366. Id.
369. See JUDICIAL HELLHOLES 2007, supra note 181, at 5.
370. 853 So. 2d 434 (Fla. Dist. Ct. App. 2003) (reversing a final judgment that awarded $12.7 million in compensatory damages to three individual plaintiffs and $145 billion in punitive damages to the entire class).
371. See JUDICIAL HELLHOLES 2007, supra note 181, at 5.
more likely that a defendant will be found liable and have to pay a significant damage award. Some class actions even become a form of “legalized blackmail.” This scenario occurs when the defendant’s potential liability and litigation costs increase to the point where it may be more economically prudent to abandon a meritorious defense and settle.

To prevent this from happening, Florida courts apply a “rigorous analysis” to class action standards, whereby trial courts look beyond the parties’ pleadings and evaluate how the disputed issues might be addressed on a class-wide basis. Even if a class becomes certified, the order granting certification is certainly not definite, and Florida courts are required to reassess their class rulings as the case develops. In fact, state judges may alter or amend class certification at any time before entry of a judgment on the merits. This flexibility is understandable because a class is certified early in litigation and often precedes substantial development of the issues and facts.

In general, Florida’s approach to class actions is more concerned with pragmatism than consumer protection. The stated purpose of allowing class actions in Florida is to provide litigants who share common questions of law and fact an economically viable means of addressing their needs in court. Unlike New York or Illinois, where class actions are perceived as an effective vehicle of consumer protection, in Florida there is a stronger concern for preventing “legalized blackmail” than for discouraging “legalized theft” in the marketplace.

1. Requirements for Class Certification in Florida Courts

Class certification in Florida requires plaintiffs to plead and prove the four threshold requirements of numerosity, commonality,
typicality, and adequacy of representation.\textsuperscript{378} First, the plaintiff must meet the numerosity requirement by demonstrating that “the members of the class are so numerous that separate joinder of each member is impracticable.”\textsuperscript{379} Florida courts tend to believe that a lawsuit involving more than fifty plaintiffs makes joinder impracticable, but the general test of impracticability is actually whether the names and number of class members will be unstable.\textsuperscript{380} If the lawsuit involves less than fifty potential plaintiffs, courts must consider additional factors, including the judicial economy achieved by avoiding multiple lawsuits, the geographic dispersion of the plaintiffs, the financial resources of the plaintiffs, plaintiffs’ ability to file individual suits, and how requests for prospective relief may affect the rights of other plaintiffs.\textsuperscript{381}

Florida’s primary concern regarding the commonality requirement\textsuperscript{382} is whether the named plaintiff’s claims arise from the same course of conduct that gives rise to the class members’ claims and whether the claims are all based on the same legal theory.\textsuperscript{383} If liability and damages depend on individual factual determinations, then commonality will not be met.\textsuperscript{384}

Florida’s typicality requirement mandates that the named plaintiff’s claims be typical of the class members’ claims.\textsuperscript{385} Merely pointing to common issues of law is not sufficient if the facts necessary to prove the claims are markedly different.\textsuperscript{386}

The adequacy of representation requirement\textsuperscript{387} serves to uncover conflicts of interest between the named plaintiff and class

\textsuperscript{378} Seminole County v. Tivoli Orlando Ass’n, 920 So. 2d 818, 822 (Fla. Dist. Ct. App. 2006). FLA. R. CIV. P. 1.220 governs class actions in Florida courts.

\textsuperscript{379} Braun v. Campbell, 827 So. 2d 261, 266 (Fla. Dist. Ct. App. 2002).

\textsuperscript{380} See id.

\textsuperscript{381} Id.

\textsuperscript{382} FLA. R. CIV. P. 1.220(a)(2) (“[T]he claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class.”).

\textsuperscript{383} Braun, 827 So. 2d at 267.

\textsuperscript{384} Id.

\textsuperscript{385} FLA. R. CIV. P. 1.220(a)(3) (“[T]he claim or defense of the representative party is typical of the claim or defense of each member of the class.”); Braun, 827 So. 2d at 267.

\textsuperscript{386} Braun, 827 So. 2d at 267.

\textsuperscript{387} FLA. R. CIV. P. 1.220(a)(4) (“[T]he representative party can fairly and adequately protect and represent the interests of each member of the class.”).
The requirement is met when the named plaintiff is a part of the class, possesses the same interest, and suffers the same injury as the other class members. Also, the named plaintiff must possess undivided loyalties to the absent class members. This requirement ensures that the interests of each class member are fairly and adequately protected.

In addition to these four threshold requirements, Florida class action plaintiffs must also establish that their lawsuit is at least one of three potential types of class actions. The first type of class action requires a showing that individual claims would create incompatible standards of conduct or be dispositive toward the interests of other putative plaintiffs not part of the class. The second type of class action, known as “ground certification,” requires a showing that the defendants acted, or refused to act, on grounds generally applicable to all class members, thereby making injunctive or declaratory relief appropriate. This type of class action truly depends on homogeneity of claims and interests. The third type of class action requires a predominance inquiry, showing that questions of law or fact common to the class predominate over questions that only affect individuals. This predominance inquiry is basically a balancing test. The court balances the value of allowing individual actions that protect each person’s own interests against the judicial economy achieved by resolving the issues as a class action.

This predominance requirement is far more demanding than the commonality requirement. For example, in a case against tobacco companies, Florida found that personal smoking behavior is too individualized for common questions to predominate. However,

388. *Braun*, 827 So. 2d at 268.
390. *Id.*
391. *Id.*
392. *Braun*, 827 So. 2d at 268.
394. FLA. R. CIV. P. 1.220(b)(2); *Freedom Life*, 891 So. 2d at 1117.
395. 891 So. 2d at 1117.
397. *See* 859 So. 2d at 1258.
398. *Freedom Life*, 891 So. 2d at 1119.
individualized damage issues are considered acceptable and do not prevent a finding of predominance.\textsuperscript{400}

Florida’s class action standards also require that class representation be superior to other available methods to fairly and efficiently adjudicate the claims presented.\textsuperscript{401} If significant individual issues exist, then “little value is gained by proceeding as a class action.”\textsuperscript{402} Moreover, it would be considered unjust to continue as a class action because a negative outcome would unfairly bind absent class members with individualized issues.\textsuperscript{403} In such circumstances, a class action will not meet Florida’s standards for superiority.\textsuperscript{404}

2. Appellate Review of Class Certification

Florida trial courts may certify a class action only after determining through rigorous analysis that the above elements of a class action have been met.\textsuperscript{405} To achieve certification, a plaintiff must do more than merely plead the language of the statute.\textsuperscript{406} The plaintiff has a heavy burden to prove all the elements of a class action through the presentation of affidavits, testimony, and other evidence in a formal hearing.\textsuperscript{407}

Like the other states examined in this Article, Florida also allows immediate interlocutory appeal of an order granting or denying class certification.\textsuperscript{408} The determination of certification is within the trial court’s discretion and will only be reversed on appeal if an abuse of discretion is shown.\textsuperscript{409} The Florida Courts of Appeal do not have jurisdiction to review other rulings or orders not listed within their rules, such as a motion to amend the complaint to add

\begin{itemize}
\item \textsuperscript{400} Freedom Life, 891 So. 2d at 1119.
\item \textsuperscript{402} Id.
\item \textsuperscript{403} Id.
\item \textsuperscript{404} Id.
\item \textsuperscript{405} Seminole County v. Tivoli Orlando Assoc., 920 So. 2d 818, 823–24 (Fla. Dist. Ct. App. 2006).
\item \textsuperscript{406} Id. at 822.
\item \textsuperscript{407} See id. at 824.
\item \textsuperscript{408} FLA. R. APP. P. 9.130(a) governs the interlocutory appeals of class certification orders.
\item \textsuperscript{409} Pinellas County Sch. Bd. v. Crowley, 911 So. 2d 881, 882 (Fla. Dist. Ct. App. 2005).
\end{itemize}
punitive damages or findings involving the enforcement of a previously approved settlement agreement.\textsuperscript{410}

B. Florida’s Complex Business Litigation Courts

After ten years of lobbying, the Business Law Section of the Florida Bar finally convinced Florida to establish complex business litigation courts.\textsuperscript{411} These courts specialize in handling complex business cases, such as antitrust suits, intellectual property cases, franchise cases, and unfair competition cases.\textsuperscript{412} They generally hear disputes where the amount in controversy exceeds $75,000 and the case presents contract or tort issues of a business nature.\textsuperscript{413}

Florida’s complex business litigation courts are widely praised by both the local bar and the business community for their expedient dockets and the specialized attention they provide to high-stakes cases.\textsuperscript{414} Cases filed in these courts are generally scheduled for trial within two years.\textsuperscript{415} Cases that previously took three to five years to resolve in regular trial courts are now concluded in fourteen to twenty-two months.\textsuperscript{416} This efficiency is possible because of the unique features of the complex business litigation courts. For every case filed, the courts enter a scheduling and trial order early in the proceedings, similar to those entered by federal courts.\textsuperscript{417} Additionally, each court has a law clerk and case managers to make sure matters are heard and tried effectively in a short time frame.\textsuperscript{418}

There are now three complex business litigation courts in Florida. The first was established in 2003 in the Ninth Judicial


\textsuperscript{414} See id.

\textsuperscript{415} Id.


\textsuperscript{417} BUS. LAW SECTION OF THE FLA. BAR, supra note 413.

\textsuperscript{418} Id.
Circuit in Orange County, which includes Orlando.  Two more complex business litigation courts took effect in January of 2007, in Miami and Tampa. Additional business courts are expected in Jacksonville and Fort Lauderdale in the near future.

Florida hopes these specialized business courts will draw large companies to the state. In theory, these courts could make Florida a more attractive place to do business by removing some of the legal uncertainties of complex litigation. A court that hears issues that repeatedly arise in business litigation can develop a predictable body of business law. Litigants and their attorneys can apply these principles of law to their cases and have a better sense of future results. With a single judge hearing business cases, local attorneys will learn how the judge is likely to rule on certain issues—which may prevent lawsuits from even being filed. Adding certainty and predictability to how the court will rule also helps promote early settlement and reduces the time and costs of complex litigation. Businesses will also likely be attracted to the emphasis Florida’s business courts place on alternative dispute resolution, pre-trial settlement, and the proactive role the judges take in managing cases.

As an additional incentive, litigants in the complex business litigation court in Orange County have at their disposal a state-of-the-art high-tech courtroom. This courtroom offers numerous flat-screen monitors strategically placed throughout the courtroom. Courtroom participants may view the presentation of evidence,

419. Ninth Judicial Circuit Court of Florida, supra note 412.
420. BUS. LAW SECTION OF THE FLA. BAR, supra note 413.
421. Id.; see also Krueger, supra note 416 (discussing the introduction of legislation to further increase the number of business courts in Florida).
422. See Ninth Judicial Circuit Court of Florida, supra note 412.
424. See id.
426. See BUSINESS COURT BROCHURE, supra note 423, at 4.
427. See id. at 3–4.
videoconference testimony of remote witnesses, and real-time court reporting on these monitors.429 The jury box alone has ten monitors, to allow for easy viewing.430

Concerns voiced in other states that business courts provide a two-tiered system of justice, one for the rich and one for the average citizen,431 have not been adequately addressed in Florida. This situation is unsurprising, since Florida’s business courts were created to cater to large corporations, not local small businesses. In fact, after local bar members complained that small businesses were clogging the docket of Orange County’s complex business litigation court, the minimum amount in controversy was raised from $15,000 to $150,000.432 However, it has since been lowered to its current level of $75,000.433

The desire to exclude small-level business disputes from the docket is understandable since Florida’s stated purpose in establishing business courts is to provide economic stimulus to the community by drawing big businesses to relocate to Florida.434 Florida wants to present itself as sophisticated enough for the supposedly high-level litigation that large companies need and promote the notion that business cases in Florida will be treated with the same level of sophistication that would be found in New York.435 Nonetheless, Florida has a long way to go if it wants to remake itself as the new Delaware, where businesses are drawn to incorporate in part because of the wealth of corporate case law and opinions from Delaware’s Court of Chancery.436

429. Id.
430. Id.
434. See Ninth Judicial Circuit Court of Florida, supra note 412.
436. See id.
C. New Developments in Class and Complex Litigation in Florida

1. International Arbitration

One of the alternative methods for resolving complex litigation is through arbitration. Some companies may prefer to resolve complex lawsuits through arbitration because of the perception that arbitration is more efficient and less costly than formal litigation.\textsuperscript{437} Arbitration is often praised because of its flexible procedures and private proceedings.\textsuperscript{438} These circumstances are distinct from traditional litigation, where the proceedings become a matter of public record. In addition, an arbitration award in international business cases may in fact be more binding than a state court’s judicial ruling since international arbitration relies on widely recognized treaties like the Inter-American Convention on International Commercial Arbitration and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.\textsuperscript{439} On the other hand, because arbitration is a contractual method of dispute resolution, international arbitration by definition also has inherent consolidation and joinder issues.\textsuperscript{440} In complex cases involving many parties, not every defendant may be willing to consent to arbitration, which could be troubling.\textsuperscript{441}

In light of the above considerations, Florida recently revised its laws on multijurisdictional practice to facilitate the state’s rising position as a destination for international arbitrations. According to some legal experts, Miami is now second to New York City as the


\textsuperscript{441} \textit{See id.}
most popular destination for international arbitration.\textsuperscript{442} For many years, Miami has increasingly become a preferred location for arbitration hearings, especially among corporations doing business in Central and South American countries.\textsuperscript{443} As the political climate in Latin America continues to destabilize, global companies view corrupt courts and leftist regimes as threats to their business interests. Miami is often seen as a neutral and logical place to arbitrate complex disputes.\textsuperscript{444}

To facilitate the use of Miami as a destination for international arbitration, the Florida Bar adopted new rules in 2006 that allow out-of-state attorneys to appear in an unlimited number of international arbitrations in Florida.\textsuperscript{445} Before, out-of-state attorneys could only make three pro hac vice appearances in Florida.\textsuperscript{446} Now, out-of-state attorneys can participate in an unlimited number of international arbitrations in Florida. Under the new Florida law, international arbitrations encompass proceedings where the underlying subject matter of the dispute involves property located outside the U.S., relates to a contract that envisages performance outside the U.S., involves international investment, relates to one or more foreign countries, or involves a foreign state.\textsuperscript{447} However, out-of-state attorneys cannot appear in Florida courts to confirm or vacate the awards received in these international arbitrations without following the state’s procedures for pro hac vice admission.\textsuperscript{448}

These new rules are designed to encourage parties to choose Florida as a location for international arbitrations.\textsuperscript{449} Multijurisdictional practice is now becoming more in demand as businesses expand their operations into other states and require legal advice and services in jurisdictions where their regular attorneys are not admitted to practice law.\textsuperscript{450} Florida hopes its new rules will make

\begin{itemize}
  \item \textsuperscript{442} Neyman, \textit{Alternative}, supra note 437.
  \item \textsuperscript{443} Neyman, \textit{Boundaries}, supra note 438.
  \item \textsuperscript{444} Neyman, \textit{Alternative}, supra note 437.
  \item \textsuperscript{447} See Fla. Bar Reg. R. 1-3.11 (2007) (the definition of international arbitration appears in the comment following the Rule).
  \item \textsuperscript{448} Bopst & Beiley, supra note 446, at 38.
  \item \textsuperscript{449} See id.
  \item \textsuperscript{450} Id. at 36.
\end{itemize}
its multijurisdictional standards more consistent with modern business practices.\textsuperscript{451} Illinois and New York already allow out-of-state attorneys to appear in arbitration proceedings without violating their respective rules against the unauthorized practice of law.\textsuperscript{452} Florida has not completely joined these states because appearances by non-Florida attorneys for domestic arbitrations are still limited to three pro hac vice appearances per year.\textsuperscript{453} Nonetheless, the new openness to appearances by out-of-state attorneys in international arbitrations is an interesting development in Florida law, likely to have an important impact on the local legal community.

2. Class Action Reform

Florida’s courts were once open to out-of-state residents in the same way Florida’s beaches and theme parks were. However, some recent legislation imposes more stringent restrictions on when out-of-state residents can be members of a class action filed in a Florida court. According to a new law passed in 2006, class membership in any Florida class action is now exclusively limited to Florida residents only, with a few narrow exceptions.\textsuperscript{454} The first exception allows nonresidents to participate in a class action filed in Florida if their claim would be recognized within their own state, the claim is not time-barred, and they would be unable to bring the claim in their own state because their state of residence lacks personal jurisdiction over the defendants.\textsuperscript{455} The second exception allows a class action to include nonresidents if the conduct giving rise to the claim occurred in or emanated from Florida.\textsuperscript{456} The new law also does not affect class action lawsuits involving federal or state civil rights laws.\textsuperscript{457}

Nonetheless, the new law will likely achieve its intended effect of precluding Florida courts from hearing nationwide class actions.

\textsuperscript{451} Id.
\textsuperscript{453} Bopst & Beiley, supra note 446, at 36.
\textsuperscript{454} FLA. STAT. § 768.734 (2008).
\textsuperscript{455} See id. § 768.734(1)(b)(1).
\textsuperscript{456} See id. § 768.734(1)(b)(2).
\textsuperscript{457} See id. § 768.734(3).
This new law certainly complements CAFA and the national trend toward removing cases of national importance to federal courts. Florida lawmakers considered several of CAFA's congressional findings on state courts mishandling class actions as justification for this change in Florida law. These findings included the perceived bias in national class actions toward out-of-state defendants and the federalism issues implicated when the courts of one state impose their view on the law of another state, binding the rights of another state's residents.

Restricting membership to Florida residents is certainly not unprecedented. In *R.J. Reynolds Tobacco Co. v. Engle*, a class of more than a million members was restricted to Florida residents because of the unwarranted burden that the case threatened to place on state judicial resources and Florida taxpayers. Although it is too soon to demonstrate its effects empirically, Florida's new restrictions on nonresident membership in class actions may still negatively impact the Florida court system. While the new law will certainly reduce the number of complex class actions involving large numbers of nonresidents, it may also increase the number of suits brought by nonresidents as individual actions.

Other states contemplating reform of their own laws to exclude nonresidents from class actions should note that Florida's new law may be susceptible to a number of constitutional challenges. First, limiting state courts to resident plaintiffs in a class action implicates the Privileges and Immunities Clause of Article IV of the U.S. Constitution. The Privileges and Immunities Clause prohibits discrimination by states against nonresidents when there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other states, unless there are valid reasons for the disparity of treatment. If Florida's restrictions on nonresidents participating in class actions are challenged on this ground, Florida

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458. See HOUSE OF REPRESENTATIVES STAFF ANALYSIS, JUSTICE COUNCIL COMMITTEE, H.R. 7259, at 4 (Fla. 2006) [hereinafter STAFF ANALYSIS].
459. *Id.*
461. *Id.* at 41.
462. See STAFF ANALYSIS, supra note 458, at 6.
463. U.S. CONST. art. IV, § 2, cl. 1.
will have to present "substantial reasons" for the difference in treatment and show that the discrimination against nonresidents bears a substantial relationship to the state's objective. Florida may be able to point to the policy reasons for adopting CAFA as similar substantial reasons for the difference in treatment, but it is questionable how the Florida Supreme Court will rule on the issue.

The new law also implicates plaintiffs' fundamental right to access the courts. This right is protected in both the Florida and Federal Constitutions and limits the ability of legislatures to unduly or unreasonably burden or restrict access to state courts. However, the new law still allows nonresidents the ability to file individual actions in Florida and does not limit the ability of nonresidents to file separate class actions in their own states. Moreover, federal courts are now more available to hear class actions involving nonresident members, at least in theory, since CAFA has broadened their jurisdiction. Accordingly, Florida's new law will likely survive a challenge on this ground.

Lastly, Florida's new law could implicate the separation of powers doctrine in the Florida Constitution. The Florida legislature is vested with "legislative power" and the ability to define substantive rights, while the Florida Supreme Court is vested with the power to adopt procedural rules for the courts. Procedural rules, which may be implicated in the new law, include all rules that govern the parties. If the new limits on class membership are determined to be procedural rather than substantive, the legislature's

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465. See id.
466. See STAFF ANALYSIS, supra note 458, at 7.
467. Id.
468. According to Article I, Section 21 of the Florida Constitution: "The courts shall be open to every persons for redress of any injury, and justice shall be administered without sale, denial or delay." FLA. CONST. art. I, § 21. The U.S. Constitution does not contain a specific clause providing for the right of access to courts, but the Supreme Court has held that there is such a qualified right arising from the Due Process Clause. See Boddie v. Connecticut, 401 U.S. 371, 377 (1971) ("[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.").
469. STAFF ANALYSIS, supra note 458, at 7.
470. Id. at 8. Article II, Section 3 of the Florida Constitution provides: "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." FLA. CONST. art. II, §3.
471. See FLA. CONST. art. III, §1 (stating that legislative power is vested in the legislature).
472. STAFF ANALYSIS, supra note 458, at 8.
actions could be viewed as an encroachment on the courts’ responsibilities. On the other hand, the law’s title, “Capacity to Sue,” could contemplate the absence of a legal disability. Namely, the law could deprive a party of the right to come into court, which would be considered a substantive right. It appears arguable whether the new law should be considered procedural or substantive in nature, and it is unclear if the law will survive a separation of powers challenge.

Supporters of the new law claimed it would save taxpayers money by reducing the size and number of class actions filed in Florida. This claim may be true, but the real impetus for the law is more likely the growing national trend toward narrowing the scope of permissible class action claims. Like Illinois, Florida is likely troubled by its designation as a “judicial hellhole” and would like to rectify its image as an overly plaintiff-friendly state. The new limits on class action membership are a major step in this direction.

3. Abolishing Joint and Several Liability

Being perceived as a plaintiff-friendly state is apparently bad for business. A state’s legal environment and friendliness to plaintiffs is one of several important criteria in the relocation of large companies. To make Florida more attractive to the business community, Florida recently abolished the last vestiges of joint and several liability in apportioning negligence damages in favor of a comparative fault approach. By doing so, Florida now joins its neighbors—Georgia, Mississippi, and Louisiana—which have already abolished joint and several liability as an incentive to attract new businesses to relocate to the region.

474. STAFF ANALYSIS, supra note 458, at 8.
475. Rapprich & Harne, supra note 473, at 12.
476. See id.
479. See FLA. STAT. ANN. § 768.81 (West 2008).
480. Dorsch, supra note 478.
In its purest form, joint and several liability makes each defendant at fault individually liable for the entire judgment awarded to the plaintiff in a negligence action, regardless of each individual defendant’s percentage of fault. It effectively makes each defendant a guarantor of all tortfeasors’ obligations, allowing the plaintiff to recover from one or any combination of defendants at fault. Supporters of the rule argue that it is necessary because it upholds the compensatory goal of our tort system by ensuring that plaintiffs are “fully and adequately” compensated. According to the theory, the rule is also fair because defendants are considered to be in a better position to spread the costs and risks of an insolvent defendant’s liability.

Naturally, the insurance industry strongly opposes these policy arguments. The Florida Association of Insurance Agents maintained that joint and several liability converted lawsuits into quests for financially viable “deep-pocket” defendants. Even if these defendants were minimally at fault for the underlying injury, they would effectively be forced to settle the lawsuit out of court to avoid being responsible for the entire damage award. The defense bar believed that there was a longstanding litigation “lottery” mentality prevailing in the Florida courts because plaintiffs’ attorneys sought to target defendants with deep pockets. Resentment over the rule has been brewing in Florida for many years, especially after the oft-cited case of Walt Disney World Co. v. Wood. There, Disney World was found to be 1 percent at fault, the plaintiff 14 percent at fault, and another person 85 percent at fault, yet the plaintiff was entitled to collect the entire award from Disney.

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481. STAFF ANALYSIS, supra note 458, at 1.
482. Id.
484. See id.
486. Id.
487. Id.
488. 515 So. 2d 198 (Fla. 1987).
489. Id. at 199.
However, proponents of joint and several liability argue that the ban still hurts taxpayers and the state because unpaid accident costs fall upon the victim and ultimately the state in higher Medicaid costs.\(^{490}\) Also, the rule of joint and several liability did not appear to stop companies from relocating to and doing business in Florida prior to the ban.\(^{491}\) So, there may be some faulty analysis and reasoning supporting Florida’s decision in this matter.

Nonetheless, by abolishing joint and several liability, the Florida legislature hoped to send a statement to companies throughout the country that Florida is open for business.\(^{492}\) The state legislature is convinced that a state’s economic development is closely tied to its litigation environment.\(^{493}\) In hopes of undoing their reputation as a "judicial hellhole," Florida is following the national trend of enacting tort reform. Like Texas, Florida has placed caps on non-economic damages in medical malpractice suits\(^{494}\) and the amount necessary to secure an appeal bond.\(^{495}\) Every tort reform enacted, from limiting class actions to abolishing joint and several liability, provides an additional arrow in the quiver of economic recruiters.\(^{496}\)

VI. CONCLUSION

Like many other states, New York, Illinois, Texas, and Florida all find themselves in a difficult predicament. On one hand, states have a duty to protect consumers and discourage businesses from engaging in actions that threaten or harm large groups of people. On the other hand, states are under tremendous pressure from the business community to enact tort reforms that limit business liability and preserve the economic activity that benefits all of society. Each state handles this difficult task of balancing competing interests in its own way.

It is fortunate for the nation that each state has the freedom to adopt its own standards and procedures for handling class and

\(^{490}\) Dorsch, supra note 478.

\(^{491}\) Id.


\(^{493}\) See Kaiser, supra note 485.

\(^{494}\) See FLA. STAT. ANN. § 766.118 (West Supp. 2007).

\(^{495}\) See id. § 45.045.

\(^{496}\) See id.
complex litigation. Each state can act as a mini-laboratory,\textsuperscript{497} experimenting with different amounts of tort reform, consumer protection, and due process considerations. Each state can examine the results of other states’ efforts and consider what standards are most effective for achieving the balancing of interests that state courts struggle with every day when deciding class and complex litigation.

Perhaps the best way to understand the difficult predicament in which states find themselves in is to consider a swinging pendulum. The pendulum can swing either way, toward protecting the due process rights of consumers and discouraging “legalized theft” or in the opposite direction, toward protecting the due process rights of defendant corporations and inhibiting “legalized blackmail.” The underlying message implied in CAFA—that state courts are abusing the class action vehicle—has not gone unnoticed and is encouraging state courts and legislatures to swing the pendulum toward enacting further tort reforms. It remains to be seen how far the pendulum will swing.

\textsuperscript{497} The metaphor of states as democratic laboratories is not novel. See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).