Louisiana Law Review

Volume 58 | Number 3
Spring 1998

The Louisiana Class Action

Charles S. McCowan Jr.

Calvin C. Fayard Jr.

The Louisiana Class Action

Charles S. McCowan, Jr.[*]
Calvin C. Fayard, Jr.[**]

Prior to the adoption of the Louisiana Code of Civil Procedure in 1960, Louisiana did not have statutory provisions providing for class actions. The earliest use of the class action concept in Louisiana is *Executive Committee of French Opera Trades Ball v. Tarrant*,[1] which involved a suit by seven of the "leading ladies" of New Orleans to recoup the proceeds of a charity ball which had not been properly remitted by a defendant "in very bad grace." The court found that the suit could proceed on the basis that the plaintiffs were an "unincorporated association" who had a "common or general interest in the subject-matter of the suit, or where the members are so numerous and it is impracticable to bring them all before the court . . . ."[2] Subsequently, but again before any statutory authority, Louisiana courts were urged to use the "found doctrine" to justify the services of counsel, representing a comparatively small group of depositors, where the services were rendered for preserving common rights to funds which had been recovered on behalf of all of the depositors of a failed bank.[3]

The 1960 Louisiana Code of Civil Procedure had the stated purpose of "consolidating" the procedural rules applicable to civil actions formerly covered by the Code of Practice, the Louisiana Revised Statutes, and the Louisiana Civil

---

* Charles S. McCowan, Jr. is a 1967 graduate of the LSU Law Center and was a member of the Order of the Coif and the Louisiana Law Review. He is a partner in the Baton Rouge, Louisiana law firm of Kean, Miller, Hawthorne, D'Armond, McCowan and Jarman. He is a member of the Louisiana Association of Defense Counsel.

** Calvin C. Fayard, Jr. received his J.D. from the LSU Law Center in 1969 and is a partner in the Denham Springs, Louisiana law firm of Fayard & Honeycutt. He was an elected delegate to the Louisiana Constitutional Convention of 1973 and is Past-President of the Louisiana Trial Lawyers Association.

1. 164 La. 83, 113 So. 774 (La. 1927).

2. Id. at 88, 113 So. at 776.

3. See Interstate Trust & Banking Co., 235 La. 825, 106 So. 2d 276 (La. 1958). The rationale of the "found" doctrine is closely akin to the class action concept:

> A court of equity or a court in the exercise of equitable jurisdiction will, as a general rule, in its discretion, order an allowance of counsel fees or, as it is sometimes said, allow costs as between solicitor and client *to a complainant* (and sometimes directly to the attorney) who at his own expense has maintained a second successful suit for the preservation, protection, or increase of a common fund or of common property or who has created at his own expense, or brought into court, a fund in which others may share with him. The rule rests upon the ground that where one *litigant* has borne the burden and expense of the litigation that has inured to the benefit of others as well as to himself, those who have shared in the benefits should contribute to the expense.

Id. at 832, 106 So. 2d at 278.

Code.[4] It included provisions for the "class action" patterned on Rule 23 of the Federal Rules of Civil Procedure.[5] That provision, in existence in one form or another since 1937,[6] was originally of limited applicability to shareholder actions.[7]

Since the adoption of the Louisiana Code of Civil Procedure, the class action has been used in both tort and non-tort cases. This article will trace the jurisprudential history of the use of the class action in mass toxic tort cases and in other contexts, such as employment, insurance and business-related cases. The Louisiana Code of Civil Procedure articles on class certification are relatively brief.[8] Consequently, the substantive and procedural requisites for certification have been developed on a case-by-case basis. This article will discuss those developments and will describe the 1997 legislative "reforms" to the Louisiana class action provisions.

I. CLASS ACTIONS AND MASS TOXIC TORT CASES

The class action was an equitable remedy until 1938, when Federal Rule of Civil Procedure 23 was adopted.[9] The enactment was intended to provide for the "true" class action in which "the right to enforcement for . . . the class was . . . joint, or common, or secondary in the sense that the owner of the primary right refuses to enforce it and a class member thus becomes entitled to enforce it."[10] Examples of the "true" class action were suits to obtain workers' protection under union contract seniority rights,[11] rights of insurance policyholders against the corporate issuer of a policy,[12] suits by stockholders to enforce a corporate right,[13] and challenges of statutes on constitutional grounds.[14] The "true" class action is distinguished from the "hybrid" class action, in which the members of the class make individual claims against a common fund or property right and the "spurious" class action in which the members of the class assert their own claims which involve a common question of law or fact.[15]

A stated limitation on the use of class actions is found in the Advisory Committee's Notes to Federal Rule of Civil Procedure 23, which provides that

---

4. La. Code Civ. P., Preface, at III.
5. *See* La. Code Civ. P. art. 591, "Official Revision Comments."
6. Fed. R. Civ. P. 23 (1937). *See also* 7 C. Wright & A. Miller, Federal Practice and Procedure: Civil Section 1752 (1972); Williams v. State, 350 So. 2d 131, 140 (La. 1977).
7. Fed. R. Civ. P. 23, Advisory Committee Notes.
8. La. Code Civ. P. arts. 591-597.
9. *See* Ford v. Murphy Oil U.S.A., Inc., et. al., 703 So. 2d 542, 544 (La. 1997).
10. *Id.*
11. System Federation No. 91 v. Reed, 180 F.2d 991 (6th Cir. 1950).
12. Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 41 S. Ct. 338 (1921).
13. Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 56 S. Ct. 466 (1936).
14. *See* Shelton v. McKinley, 174 F. Supp. 351 (E.D. Ark. 1959), *rev'd on other grounds*, 364 U.S. 479, 81 S. Ct. 247 (1960).
15. *Ford*, 703 So. 2d at 545.

the class action device "is ordinarily *not* appropriate" in situations involving mass torts "because of the likelihood that significant questions, not only of damages, but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried."[16] Louisiana jurisprudence has not followed this admonition.

In 1977, the Louisiana Supreme Court first addressed the applicability of the Louisiana Code of Civil Procedure class action provisions to "mass torts" in *Williams v. State*.[17] The Louisiana Supreme Court certified an action by 600 inmates who suffered food poisoning following a noon meal which allegedly contained contaminated substances. In this case involving a "single incident," Justice Tate provided a thorough review of the history of the adoption of the class action provisions and concluded that the lower court erred in finding the device was "not available because of the variances in the damages resulting to each individual from the mass tort alleged."[18] The court reasoned that the Louisiana provisions were more expansive than the federal source provisions in situations where numerosity and adequate representation were present and allowed judges discretion in determining whether the "intertwined values" of affecting substantive law, judicial efficiency, and individual fairness justified the use of the class action in a situation involving small claims that could have inconsistent judgments when they arose from a single operative event.[19]

The first circuit again rejected the "true" class action as being the exclusive test for certification in *Livingston Parish Police Jury v. Illinois Central Gulf Railroad Co.*[20] There, the Livingston Parish Police Jury and twenty-one individuals filed suit as a result of a railroad derailment and fire. The defendants urged that the use of a class action was inappropriate because of the multitude of individual issues which could not be adjudicated on a class-wide basis, such as causation and damages, which could vary from claim to claim. The court of appeal did not address the difference in causation urged by the defendants. Rather, it found that the Louisiana class action provisions were not as "explicit or inflexible as the federal rules."[21] The criteria for certification, the court reasoned, included a determination of whether the institution and prosecution of different suits posed a risk of inconsistent adjudications that would prejudice subsequent litigation or would impede the ability of the class members to protect their interest. A determination of whether there were specific defenses to some of the class members' claims and the predominance of common issues of law and fact were also deemed to be important factors for the availability of class certification. The court added the following additional criteria for certification:

16. Fed. R. Civ. P. 23, Advisory Committee Notes.
17. 350 So. 2d 131 (La. 1977).
18. *Id.* at 132.
19. *Id.* at 133.
20. 432 So. 2d 1027 (La. App. 1st Cir.), *writ denied*, 437 So. 2d 1137 (1983).
21. *Id.* at 1029.

> The class action [is] the superior procedural vehicle for the fair and efficient adjudication of the controversy because:
>
> a. The vast majority of the class members have no interest in controlling the litigation;
>
> b. The lack of individual lawsuits already filed would allow the court to process all of the claims in one proceeding;
>
> c. It is desirable to concentrate all the litigation in one forum; and,
>
> d. Class litigation is manageable considering the opportunity to afford reasonable notice of significant phases of the litigation to class members and permit distribution of the recovery, if any.[22]

The first circuit also took the opportunity to announce a firm position contrary to the Federal Rule 23 Advisory Committee's admonition that the class action was not "ordinarily" appropriate for certification in mass tort cases, finding that the single-catastrophic-event case presented the "perfect" situation for the use of the class action.[23] The reasoning was based upon a finding that the procedural device provided for "simple" means for individuals to redress wrongs, which may otherwise have not been feasible to pursue in a judicially economical manner. This finding did not address the differences in proof of causation and individual damage issues that were necessarily required for the adjudication of each class members' claims. The result, however, was clear that the "true" class action requirement contemplated by the redactors of the Louisiana Code of Civil Procedure[24] had been abandoned for single incident, single source mass tort situations.

In the seminal case of *McCastle v. Rollins Environmental Services of Louisiana, Inc.*,[25] the Louisiana Supreme Court reiterated the foregoing class action "basic rules" for a single source of alleged damage, but expanded the "single incident" limitation in toxic tort class actions to situations involving multiple or long-term exposures to alleged harmful materials emanating from a single source. This case presented a certification issue involving 4,000 plaintiffs who complained of noxious fumes and odors coming from a single source over an extended period of time resulting in claims of "unreasonable inconvenience and minor, temporary illness. . . ."[26] "Causation" and individual differences in

---

22. *Id.* at 1033. These factors are consistent with the Louisiana Supreme Court's findings in Stevens v. Board of Trustees of Police Pension Fund, 309 So. 2d 144 (La. 1975), that there should be an intertwining of values in order to effectuate substantive law, judicial economy and individual fairness. The result is clearly sanctioning much more than merely a "true" class action, as it allows the individual's claim to be adjudicated at the same time as the "common" right.

23. *Livingston Parish Police Jury*, 432 So. 2d at 1033-34.

24. Ford v. Murphy Oil U.S.A., Inc., et. al., 703 So. 2d 542, 544 (La. 1997).

25. 456 So. 2d 612 (La. 1984).

26. *Id.* at 619.

damages were at issue in the case, but the supreme court went to great length to stress that the "commonality" of the claims predominated. The court focused on the defendant's conduct rather than the plaintiffs' injuries or damages. In doing so, the court stressed that the same facts would necessarily have to be offered by each class member in order to prove that the defendant's conduct in causing hazardous materials to injure the plaintiffs by emitting gases, fumes and odors would be identical. The elements of the cause of action for each plaintiff required an individual showing that the wastes were capable of causing the type of unreasonable inconvenience and damage. There were also individual issues of whether each plaintiff had been exposed on the various dates alleged and whether the weather conditions on those dates were capable of dispersing the odors to the areas in which the plaintiffs were located. However, due to the nature of the alleged cause of damage, individual defenses such as contributory negligence and assumption of the risk were inapplicable, resulting in the court finding "the nucleus of liability issues . . . [was] . . . identical for each claim."[27]

The supreme court found a "safety valve" was present because the case management procedure could be modified from time to time to allow for separate trials of liability issues, determinations of common damages, and determinations and assessments of individual damages as well as class constituency modification.[28] There was, however, no discussion of how this procedure would be consistent with the provisions of the Louisiana Code of Civil Procedure articles 593.1 and 1562 requiring that the *same* jury must try liability and damages.[29]

Following *McCastle*, the courts of appeal routinely approved class certifications in mass toxic tort cases.[30] However, in the vast majority of the

---

27. *Id.* at 620-21.

28. A related issue, concerning the manner of assessment of punitive damages in a toxic tort class action case, was decided in In re New Orleans Train Car Leakage Fire Litig., 697 So. 2d 239 (La. 1997), where the supreme court rejected the use of a "multiplier based on compensatory damages" and found that:

> [I]n the event the jury in this matter determines that the defendants are liable for punitive damages, the trial court is prohibited from instructing the jury that it may use a multiplier when determining the amount of punitive damages that can be awarded, but should instruct the jury to determine that [the] amount of punitive damages by consideration of all relevant factors.

Additionally, on subsequent review, the court made it clear that in no event could a trial court render a class action damage judgment until a judgment was rendered and signed adjudicating all liability issues. In re New Orleans Tank Car Litigation, 702 So. 2d 677 (La. 1997).

29. *See infra* discussion and notes 55 and 119.

30. *See, e.g.*, Richardson v. American Cyanamid Co., 672 So. 2d 1161 (La. App. 5th Cir.), *writ denied*, 679 So. 2d 1344 (1996); McGee v. Shell Oil Co., 659 So. 2d 812 (La. App. 5th Cir.), *writ denied*, 664 So. 2d 457 (1995); Lailhengue v. Mobil Oil Co., 657 So. 2d 542 (La. App. 4th Cir. 1995); Atkins v. Harcross Chems., Inc., 638 So. 2d 302 (La. App. 4th Cir.), *writ denied*, 644 So. 2d 396 (1994); Dumas v. Angus Chem. Co., 635 So. 2d 446 (La. App. 2d Cir.), *writ denied*, 640 So. 2d 1349 (1994); Rivera v. United Gas Pipeline Co., 613 So. 2d 1152 (La. App. 5th Cir. 1993); Livingston Parish Police Jury v. Acadian Shipyards, Inc, 598 So. 2d 1177 (La. App. 1st Cir.), *writ denied*, 605 So. 2d 1122 (1992); Ellis v. Georgia-Pacific Corp., 550 So. 2d 1310 (La. App. 1st Cir. 1989), *writ denied*, 559 So. 2d 121 (1990); Adams v. CSX R.R., 615 So. 2d 476 (La. App. 4th Cir.

cases presented, there was a single source for a toxic release and there was a single event that caused the harm, such as a railroad car leak and fire,[31] a discharge into the Mississippi River which entered a drinking water supply,[32] a pipeline rupture,[33] a chemical plant explosion,[34] or a refinery fire.[35] In each of these cases, the courts of appeal adopted the *McCastle*[36] reasoning to the effect that the Louisiana class action procedure is "more flexible than Federal Rule 23 . . . [and] also encompasses most situations involving multiple claims arising from a single incident, assuming the class criteria are met."[37] The courts of appeal did not discuss the Code of Civil Procedure's requirement that the issue of "liability for all damages" be tried to the same jury in the absence of consent of the parties to bifurcate the issues in any of the cases;[38] certification was denied only when the plaintiffs failed to prove that the class action was superior to other available adjudicatory methods.[39]

In the context of single incident limitation, there were several notable exceptions involving class certification, although all involved a single source of the alleged damage. The "discretionary grant"[40] announced in *Stevens*[41] was followed in *Millet v. Rollins Environmental Services of Louisiana, Inc.*,[42] when a class of 1400 persons allegedly affected by odors and fumes from a deep-well disposal facility was certified. Although this case involved long-term exposure rather than a single event, it did arise from a "single source." The court found that in implementing the legislative intent of providing for class actions, the basic goals should be fairness to the parties and judicial economy. In arriving at these goals, the supreme court observed that the observations of the federal advisory committee regarding the class action not ordinarily being appropriate to mass tort cases had been found to be "functionally unsound"[43] and followed Justice Tate's reasoning that in order to implement the legislative intent in enacting the Louisiana class action provisions, the supreme court should be mindful of whether separate adjudications would have a precedential effect and whether the size of the individual claims would preclude the holder from pursuing it in a

---

1993). *But see* Carr v. GAF, Inc., 702 So. 2d 1384 (La. 1997), where the court decertified a nationwide class on a suspensive appeal.

31. *Adams*, 615 So. 2d 476.

32. *Ellis*, 550 So. 2d 1310.

33. *Rivera*, 613 So. 2d 1152.

34. *Dumas*, 635 So. 2d 446.

35. Lailhengue v. Mobil Oil Co., 657 So. 2d 542 (La. App. 4th Cir. 1995)

36. McCastle v. Rollins Envtl. Servs. of La., Inc., 456 So. 2d 612 (La. 1984).

37. Adams v. CSX R.R., 615 So. 2d 476 (La. App. 4th Cir. 1993).

38. *See supra* text accompanying note 19.

39. *See* Becnel v. United Gas Pipeline Co., 613 So. 2d 1155 (La. App. 5th Cir.1993); Brumfield v. Rollins Envtl. Servs. Inc., 589 So. 2d 35 (La. App. 1st Cir. 1991); Hunter v. Union Carbide Corp., 468 So. 2d 28 (La. App. 5th Cir. 1985).

40. Ford v. Murphy Oil U.S.A., Inc., et. al., 703 So. 2d 542, 546 (La. 1997).

41. Stevens v. Board of Trustees of Police Pension Fund, 309 So. 2d 144, 150 (La. 1975).

42. 428 So. 2d 1075 (La. App. 1st Cir.), *writ denied*, 438 So. 2d 153 (1983).

43. Williams v. State, 350 So. 2d 131, 136 (La. 1977).

separate adjudication.[44] This reasoning illustrates a continuing shift in the focus in certification issues from merely a determination of whether the action was a "true" class action to a discretionary focus by the court of whether the rights sought to be enforced were of a "common character" and whether judicial economy would be served by certification. This change was consistent with the 1966 amendment to Federal Rule of Civil Procedure 23, which eliminated the distinction between the three types of class actions.[45]

In *Livingston Parish Police Jury v. Acadiana Shipyards, Inc.*,[46] the first circuit affirmed the certification of a class of 1200 plaintiffs against 84 defendants for various injuries and damages arising from the alleged long-term exposure to toxic wastes from a dump site. This case did, however, again involve a single source of the alleged injury. The defendants resisted certification on the grounds that there were individual factual and legal issues that predominated. The court of appeal rejected these arguments and chose to focus on the defendants' conduct. It found that the common issues of whether the site contained toxic and harmful substances in sufficient concentrations to endanger the public, the defendants' duty to prevent injury and provide precautions and whether punitive damages should be awarded predominated over the individual plaintiff-related issues.[47]

In *Atkins v. Harcross Chemical Inc.*,[48] also involving alleged long-term exposure to a single toxic waste site, there were similar objections to certification by the defendants contending that the commonality requirement was not met. The defendants urged a lack of commonality because of the wide divergence of injuries alleged by the class members from exposure to different chemicals stored at the site. Under such circumstances, the defendants argued, individual issues of proof should preclude the court from certifying the action.[49] Applying the *McCastle*[50] "balancing test," certification was approved because judicial economies of time, effort, expense, and uniformity of decisions weighed in favor of the class action because the class members did not have a material variation in the elements of their claims or the individual amount of damages involved.

Again, neither *Acadiana*[51] nor *Atkins*[52] addressed the potential prohibition of trying liability and damages to different juries.[53] In this regard, Article 593.1(C) of the Code of Civil Procedure[54] provides an exception to the general

---

44. *Millet*, 428 So. 2d at 1077.

45. Ford v. Murphy Oil U.S.A., Inc., et. al., 703 So. 2d 542, 546 (La. 1997).

46. 598 So. 2d 1177 (La. App. 1st Cir.), *writ denied*, 605 So. 2d 1122 (1992).

47. *Id.* at 1182.

48. 638 So. 2d 302 (La. App. 4th Cir.), *writ denied*, 644 So. 2d 396 (1994).

49. *Id.* at 304.

50. McCastle v. Rollins Envtl. Servs. of La., Inc., 456 So. 2d 612 (La. 1984).

51. Livingston Parish Police Jury v. Acadiana Shipyards, Inc., 598 So. 2d 1177 (La. App. 1st Cir. 1992).

52. Atkins v. Harcross Chem., Inc., 638 So. 2d 302 (La. App. 4th Cir. 1994).

53. *See* La. Code Civ. P. arts. 1562 and 593.1(C).

54. Prior to Act 839 of 1997, Louisiana Code of Civil Procedure article 593.1(C) provided:

rule[55] that the same jury must, in the absence of consent, try both liability and damages. While Article 593.1(C) would allow a court to adopt a management plan which allows the trial of issues before the same or another jury as the interests of justice dictate, there is no provision which allows issues of *all* liability to be divided into *common issues of liability* and *individual issues of liability*. This situation was addressed in *Brown v. New Orleans Public Service, Inc.*,[56] where the fourth circuit recognized that it was permissible under Article 593.1 to promulgate a case management plan which includes separate trials of distinct issues. However, even such a plan could not eliminate the problems of management which are presented by the individual questions of causation. While Article 593.1 expressly authorizes trial of the issues of determination and assessment of damages after the issue of liability has been established in a separate trial, it does not allow trial on fault alone, separate from the question of causation. Hence, the court found that the issues which could be tried separately under Article 593.1 should not be broken down in order to accommodate management issues, as fault and liability were too closely related to be tried separately. Additionally, the court found that "sound policy reasons dictate that a defendant should not be subjected to a determination of his fault before the court even considers whether the fault caused the plaintiffs' damages."[57]

C. After determining that the pending action is appropriate for litigation as a class action, the court may, on its own motion or on the motion or recommendation of any party, adopt a plan for the management of the class action litigation, which may include provisions for subdivision of the action or separation of the issues therein raised, to which these rules of procedure shall be applicable as though each were a separate action. The management plan may provide for separate trials of separate issues and, if jury trial has been requested and is otherwise permissible, each separate trial may be heard before the same or another jury as the court may direct in the interest of justice. The management plan may provide for separate trials of the following issues in the order herein set forth:

(1) Liability for all damages.

(2) Determination of any item of damage common to the class and the basis for assessment thereof.

(3) Assessment of common damages on the basis determined in (2) above or on such basis as may be appropriate in the absence of any prior determination of the basis thereof.

(4) Determination and assessment of individual damages not common to the class, either in one trial or in a series of trials involving one or more members of the class.

For the effect of Act 839 of 1997, see *infra* text accompanying note 114.

55. Article 1562 of the Louisiana Code of Civil Procedure provides in part:

A. If it would simplify the proceedings or permit a more orderly disposition of the case or otherwise would be in the interest of justice, at any time prior to trial the court may order, with the consent of all parties, separate trials on the issues of liability and damages, whether or not there is to be a jury trial on either issue.

B. If a defendant has been found liable by a jury, the court shall proceed with the trial of the remaining issues before the same jury unless all parties consent to a trial before a different jury. . . .

56. 506 So. 2d 621 (La. App. 4th Cir.), *writ denied*, 508 So. 2d 67 (1987).

57. *Id.* at 624. In a related matter, on writs, the Louisiana Supreme Court ruled that under Article 593.1(D), as it existed prior to Act 839 of 1997, a separate judgment on the amount of

This position is also consistent with the view that Louisiana law defines tort "liability" as being comprised of fault and causation of damages.[58] It is only when one's fault "causes damage to another" that "liability" is triggered.[59]

The trial court's action on certification is given great deference on appeal. The importance of factual findings at the certification hearing by the trial court is apparent, as the standard of review of a trial court's decision on certification is governed by the manifest error/clearly wrong standard.[60] There is a two-part test utilized to review the trial court's action on the issue of certification. First, the reviewing court must determine whether there is a reasonable factual basis in the record. Second, the reviewing court must determine whether the record establishes that the finding is not manifestly erroneous.[61] When this standard is coupled with the discretion given trial courts in matters involving class certification, it is very difficult to have a decision involving certification reversed by an appellate court.[62]

In September 1997, the Louisiana Supreme Court conducted its first comprehensive review of the Code of Civil Procedure class action provisions, since *McCastle*, in *Ford v. Murphy Oil Co.*[63] Unlike *McCastle* and the other cases that had expanded class consideration from single incident-single source cases to multiple incidents-single source, this case was brought against four petrochemical plants located along the Mississippi River in St. Bernard Parish, which manufactured various products, using different ingredients and using different processes. The four companies operated completely independently of each other. Twenty-six class representatives, living in different areas of the parish, alleged that the plants' combined operations impacted the quality of life

---

punitive damages could not be rendered until there was a judgment adjudicating all liability issues. In re New Orleans Tank Car Litigation, 702 So. 2d 677 (La. 1997). Article 593.1(D) was not included in Act 839 of 1997. It is submitted, however, that the same result would be mandated under Article 1915 of the Code of Civil Procedure, which allows a partial judgment to be rendered only in numerated circumstances. *See also* Jordan v. Intercontinental Bulktank Corp., 621 So. 2d 1141 (La. App 1st Cir.), *writ denied*, 623 So. 2d 1335 (1993), *cert. denied*, 510 U.S. 1094, 114 S. Ct. 926 (1994), in which a similar result was justified on the basis that an incomplete judgment on compensatory damages prior to a judgment on punitive damages would deprive the reviewing court one of the factors necessary to make a determination of the reasonableness of the punitive award.

58. *See* La. Civ. Code art. 2315; Saden v. Kirby, 660 So. 2d 423 (La. 1995); Brown v. New Orleans Pub. Serv., Inc., 506 So. 2d 621 (La. App. 4th Cir.), *writ denied*, 508 So. 2d 67 (1987). Louisiana Code of Civil Procedure article 593.1(C) only allows for the bifurcation of the entire issue of liability for all damages and not "common" issues of liability and "individual" issues of liability.

59. *Brown*, 506 So. 2d at 623.

60. Boudreaux v. State D.O.T.D., 690 So. 2d 114 (La. App. 1st Cir. 1997).

61. *Id.* at 119.

62. *See, e.g.*, Ellis v. Georgia Pac. Corp., 550 So. 2d 1310 (La. App. 1st Cir. 1989), *writs denied*, 559 So. 2d 121 (1990); Bergeron v. AVCO Fin. Servs., 468 So. 2d 1250 (La. App. 4th Cir.), *writ denied*, 474 So. 2d 1308 (1985); Ducote v. City of Alexandria, 670 So. 2d 1378 (La. App. 3d Cir. 1996). *But see* Boudreaux v. State Dep't of Transp. and Dev., 690 So. 2d 114 (La. App. 1st Cir. 1997).

63. *See* Ford v. Murphy Oil U.S.A., Inc., et. al., 703 So. 2d 542 (La. 1997).

in neighboring areas as the result of *both* permitted emissions *and* upsets which had taken place over a multi-year period. Thus, this case presented an opportunity for the supreme court to review another attempted expansion of certification to situations involving multiple source-multiple incidents. The plaintiffs did not complain about a particular emission at any specific point in time. Rather, they alleged a "synergistic" theory, contending that each plant "caused or contributed . . . to a condition or situation which significantly and materially affected and/or affects petitioners' legally protected rights by virtue of a synergistic accumulation or combination of releases, emissions, disbursements . . . or otherwise non-consensual placing of pollutants;"[64] resulting in physical and property damages as a result of the continuous emissions, combined and individual, of the defendants. With respect to the permitted emissions, it was alleged that a "synergistic" effect caused noise, odor, heat, dust and flare releases from the four industrial sites. Although there were isolated incidents that resulted in releases that exceeded permit limits through the years by virtue of upsets, the overall operating emissions of the defendant companies met the standards of the Louisiana Department of Environmental Quality and the Federal Clean Air Act.

In *decertifying* the class, the Louisiana Supreme Court reviewed the history of the class action in Louisiana in view of its federal origin and recent federal decisions in mass tort cases.[65] It was recognized that the Louisiana provisions were modeled after the original Federal Rule of Civil Procedure 23 before "the explosion of 'mass tort' class actions, and with the express legislative intent to recognize only 'true' class actions under the original federal rule because of the availability of Louisiana's liberal joinder and intervention rules."[66] The majority affirmed the supreme court's prior position that the Louisiana class action provisions were not governed by the "true" class action restraints, and that the redactors of the Louisiana provisions had intended to implement the substantive law in such a manner as to provide the maximum degree of fairness to the parties to the litigation with the minimum amount of expenditure of judicial effort. In achieving these factors, the court reasoned, there had to be an inquiry into the precedential value of the first decision in separate adjudications, and into whether the nature and value of the claims would discourage individual prosecutions of them in separate suits.[67] The court did, however, find that claims arising from multiple sources asserted by the *Ford* plaintiffs distinguished the case from the facts of *McCastle*,[68] which involved only a single source of

64. *Id.* at *1.

65. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997).

66. *Ford*, 703 So. 2d at 545.

67. This position is consistent with the factors set forth in the discussion of Livingston Parish Police Jury v. Illinois Central Gulf R.R. Co., 432 So. 2d 1027 (La. App. 1st Cir.), *writ denied*, 437 So. 2d 1137 (1983).

68. McCastle v. Rollins Envtl. Servs. of La., Inc., 456 So. 2d 612 (La. 1984). In a concurring opinion in *Ford*, Chief Justice Calogero noted that, "I write separately to emphasize that this Court's

the alleged injuries. In refusing to extend certification to multiple incident-multiple source situations, the class action was "dismissed"[69] upon a finding that:

> The court of appeal made the following erroneous crucial finding based on *McCastle* that "[o]ffering the same facts, all class members will attempt to establish that the activities of Mobil and Murphy emitted hazardous, toxic, corrosive, or noxious odors, fumes, gases or particulate matter that caused them damage. . . . The causation issue is even more complicated considering the widely divergent types of personal, property and business damages claimed and considering each plaintiff's unique habits, exposures, length of exposures, medications, medical conditions, employment, and location of residence or business. . . . As aptly stated by Judge Schott in his dissent, "[o]ne plaintiff cannot prove individual causation and individual damage based on the exposure of another plaintiff to a particular emission."[70]

Additionally, the majority,[71] citing *Castano v. American Tobacco Co.*,[72] also found that the action was inappropriate for certification "because the

---

decision in McCastle v. Rollins Environmental Services of Louisiana, Inc., 456 So. 2d 612 (La. 1984), is still good law. As recognized by the majority, a mass tort case may well be appropriate for certification as a class action if it arises from a common cause or disaster, as was the case in *McCastle*, which involved plaintiffs' complaints about discrete environmental emissions from a single defendant in a single geographic area under traditional tort theories." *Ford*, 703 So. 2d at 551.

69. On rehearing, the supreme court made it clear that the entire suit had not been dismissed and that the named plaintiffs could proceed individually by amendment to the petition. *Ford*, 703 So. 2d at 542.

70. *Id.* The supreme court also found another factor justifying the denial of certification was that each plaintiff would be required to prove that the specific harm that he suffered surpassed the level of inconvenience that is to be tolerated under revised Louisiana Civil Code article 668. This finding appears to be consistent with White v. Monsanto Co., 585 So. 2d 1205 (La. 1991); Clomon v. Monroe City Sch. Bd., 572 So. 2d 571 (La. 1990) and LeJeune v. Rayne Branch Hosp., 567 So. 2d 559 (La. 1990), to the effect that, except in limited circumstances, a plaintiff is not entitled to recover for emotional distress in the absence of physical injuries. *But see* Moresi v. Dept. of Wildlife and Fisheries, 567 So. 2d 1081 (La. 1990).

71. In a concurring opinion, Justice Kimball found that it was not necessary to reach the issue of whether the existence of a novel and untested theory necessarily renders a class action inappropriate. *Ford*, 703 So. 2d at 551.

72. 84 F.3d 734 (5th Cir. 1996). *Castano* involved a motion for class certification in an action brought on behalf of all smokers and nicotine-dependent persons and their families in the United States. The Fifth Circuit Court of Appeals reversed an order certifying the matter as a class action on the basis that the lower court had failed to consider how state law variations would affect necessary Federal Rule of Civil Procedure 23 findings of predominance and superiority and had also failed to determine in the predominance inquiry as how a trial on the merits would be conducted. In this regard, the Fifth Circuit noted:

> FN15. We find it difficult to fathom how common issues could predominate in this case when variations in state law are thoroughly considered. The *Georgine* court found that common issues in an asbestos class action did not predominate:

'synergy' theory is a novel and untested theory of law, making it impossible for plaintiffs to prove that the class action procedure is appropriate." Focusing on the "gravamen" of the complaint alleging "synergistic accumulation or combination of releases" causing the plaintiffs' damages, the majority found that the "tort is immature," as the "plaintiffs' 'synergy theory' is novel and untested" and "whether a cause of action against more than one defendant can be sustained under C.C. arts 667-669 has never been decided." The court did grant a limited rehearing on the plaintiffs' request for "clarification" as to the order "dismissing" the class action. The rehearing addressed Chief Justice Calogero's concerns expressed in a concurring opinion regarding prescription and the survival of the named plaintiffs' claims following the failure to certify, or decertification, of a class. In order to protect the individual named plaintiffs' claims, the court remanded the case to the trial court for consideration under Louisiana Code of Civil Procedure article 593.1[73] for the purpose of determining whether to allow amendment to the pleadings so that the named parties could pursue their individual claims. These concerns have since been the subject of legislative amendment to the class action provisions.[74] The limited rehearing did not address the issue of whether, upon remand, an exception of improper cumulation of actions or the other dilatory or declinatory exceptions would be timely,[75] or

---

> However, beyond these broad issues, the class members' claims vary widely in character. Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma—a disease which, despite a latency period of approximately fifteen to forty years, generally kills its victims within two years after they become symptomatic. Each has a different history of cigarette smoking, a factor that complicates the causation injury.

Id. at 742 n.15 (citations omitted).

The Fifth Circuit then went on to rule that:

> Our specific concern is that a mass tort cannot be properly certified without a prior track record of trials from which the district court can draw the information necessary to make the predominance and superiority analysis required by rule 23. This is because certification of an immature tort results in a higher than normal risk that the class action may not be superior to individual adjudication.

Id. at 747.

73. La. Code Civ. P. art. 593.1 provided in part:

> If the court finds that the action should be maintained as a class action, it shall certify the action accordingly; otherwise the action shall be dismissed. The court may permit amendment of the pleadings in the action to permit maintenance thereof as an ordinary proceeding on behalf of the parties expressly named therein.

A similar provision was carried incorporated in Act 839 of 1997. *See infra* text accompanying note 114.

74. 1997 La. Acts No. 839. *See infra* text accompanying note 126.

75. Louisiana Code of Civil Procedure article 928 requires that the dilatory and declinatory

whether consolidation of the individual claims would be appropriate under Article 1561 of the Louisiana Code of Civil Procedure,[76] as that article contemplates consolidation only when there are "common issues of law or fact," and the determination of the certification issues was based upon a finding that common issues did not predominate.

It is apparent that in the context of mass tort litigation, certification "dramatically affects the stakes"[77] for both the plaintiff and the defendant. The Louisiana cases clearly reflect a departure from the Federal Advisory Committee's admonition that certification is ordinarily not appropriate for mass tort cases in favor of an approach that emphasizes judicial economy. The jurisprudence reveals a trend in tort cases towards testing the "commonality" requirement from the standpoint of the defendant's conduct rather than the plaintiffs' injuries or damages. There are, however, limitations when multiple potential causes of the alleged injuries are involved.

II. CLASS ACTIONS IN OTHER TYPES OF CASES

Unlike the trend in tort cases of gauging "commonality" from the defendants' conduct, the non-tort cases seem to maintain the traditional test of examining the commonality aspects from an examination of the plaintiffs' causation, injuries, and damages.[78] The result has been that certification in non-toxic tort cases appears to have been much more difficult to achieve than in the "mass tort" context. Certification has been denied because of a lack of commonality in actions against landlords for the failure to make repairs following flooding,[79] insurers for benefits under hospitalization policies,[80]

---

exceptions be pled prior to answer or judgment by default. In many cases, an answer has been filed by the time certification is tried or the decision is reviewed by an appellate court. If the certification issue is decided by an appellate court at a later stage, as was the case in *Ford*, 703 So. 2d at 542, the issue remains whether such an exception would be timely upon remand.

76. Article 1561 of the Louisiana Code of Civil Procedure provides:

> When two or more separate suits involving a common issue of law or fact are pending in the same court, the court, at any time prior to trial, may order the consolidation of the suits for trial or may order a joint trial of the common issues.

77. Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996).

78. *See infra* notes 79-82 for examples of situations in which certification has been determined by utilizing the traditional view of "plaintiffs' claim."

79. Pulver v. 1st Lake Props., 681 So. 2d 965 (La. App. 5th Cir. 1996). In denying certification, the court noted that although there were 700-1000 potential class members, many had different lease contracts containing varying terms, provisions, conditions and remedies. Additionally, there were differing legal remedies available to redress the alleged wrongs. Under such circumstances, the court found that, "[A]llowing a class action to proceed for this type action would bind all class members to the relief selected by the class representatives, whether that is the type of relief the individual class members in fact wanted." *Id.* at 969.

80. Pellerin v. Louisiana Health Serv. and Indem. Co., 460 So. 2d 93 (La. App. 3d. Cir. 1984). In this regard, in Louette v. Security Indus. Ins. Co., 361 So. 2d 1348, 1351 (La. App. 3d Cir.), *writ denied*, 364 So. 2d 564 (1978), the court found that commonality was lacking because the insurer

employers for back pay,[81] utilities for damages resulting from power outages,[82] and oil producers for the failure to pay royalties.[83]

Regarding the "numerosity" requirement for certification, although there is not a "set number" of member participants needed to satisfy the numerosity requirement for certification of a class,[84] a failure to meet numerosity requirements has been cited as justification for the refusal to certify class actions in cases involving subdivision redhibition claims,[85] claims by heirs in succession-related proceedings,[86] teacher pay cases,[87] attacks on city rent adjustment policies,[88] insurance company agent's commission claims,[89] suits by tenants against their landlords,[90] and allegations of usurious interest.[91] Confidentiality and privacy considerations have also been cited as reasons to deny class certification in non-toxic tort cases,[92] as well as the failure of proof by the proponent of class action procedure.[93]

---

would have "different reasons for refusing to pay benefits in each case." This reasoning would appear to also be applicable to the proof of individual causation in the toxic tort context.

81. Phillips v. Orleans Parish Sch. Bd., 541 So. 2d 226 (La. App. 4th Cir. 1989). *But see* Stevens v. Board of Trustees of Police Pension Fund, 309 So. 2d 144 (La. 1975) and Spillman v. City of Baton Rouge, 417 So. 2d 1212 (La. App. 1st Cir. 1982), *writ denied*, 446 So. 2d 1213 (1983), where the courts found that the fact that the amount due to each member of the class would be different was not a basis for the rejection of the class action.

82. Brown v. New Orleans Pub. Serv., Inc., 506 So. 2d 621 (La. App. 4th Cir.), *writ denied*, 508 So. 2d 67 (1987), where the court recognized that in many of the mass tort cases discussed *supra*, certification was granted even though each class member would have to prove individual causation and damage. However, the court found that some claims may have been affected by the weather, a cause independent of action by the defendant, and that the "causative link" between the alleged wrongful act and the damages varied between plaintiffs. *Id.* at 623. These differences, the court reasoned, justified denying certification.

83. Stoute v. Wagner & Brown, 637 So. 2d 1199 (La. App. 1st Cir.), *writ denied*, 644 So. 2d 638 (1994). The court, in reasoning similar to *Pulver*, 681 So. 2d 965, found that there were different types of mineral royalty contracts involved and there were "many different rights, remedies and defenses which are likewise involved." *Id.* at 1200. These differences justified the refusal to certify the action based upon the lack of commonality.

84. Thomas v. Charles Schwab, 683 So. 2d 734 (La. App. 3d Cir.), *writ denied*, 685 So. 2d 859 (1997), *writ denied*, 686 So. 2d 858 (1997).

85. Debs v. Sunrise Homes, Inc., 430 So. 2d 110 (La. App. 5th Cir.), *writ denied*, 437 So. 2d 1153 (1983).

86. Terral v. Terral, 301 So. 2d 754 (La. App. 2d Cir. 1974).

87. Phillips v. Orleans Parish Sch. Bd., 541 So. 2d 226 (La. App. 4th Cir. 1989) and Lewis v. Roemer, 643 So. 2d 819 (La. App. 4th Cir. 1994).

88. Farlough v. Smallwood, 524 So. 2d 201 (La. App. 4th Cir.), *writ denied*, 526 So. 2d 810 (1988).

89. Compass v. Pan Am. Life Ins. Co., 443 So. 2d 720 (La. App. 4th Cir. 1983), *writ denied*, 446 So. 2d 1231 (1984).

90. Pulver v. 1st Lake Properties, Inc., 681 So. 2d 965 (La. App. 5th Cir. 1996).

91. O'Halleron v. L.E.C., Inc., 471 So. 2d 752 (La. App. 1st Cir. 1985).

92. Bergeron v. AVCO Fin. Servs. of New Orleans, 468 So. 2d 1250 (La. App. 4th Cir.), *writ denied*, 474 So. 2d 1308 (1985)

93. McClure v. A. Wilbert's Sons Lumber Co., 223 So. 2d 879 (La. App. 1st Cir. 1970); Metropolitan New Orleans Chapter of the La. Consumer's League v. City of New Orleans, 391 So.

The two leading non-toxic tort cases in which certification was granted are *State v. General Motors Corp.*[94] and *Stevens v. Board of Trustees of the Police Pension Fund.*[95] *Stevens* involved an action instituted by a former policeman for reimbursements to a pension fund. The case presented the supreme court with an opportunity to resolve a conflict between the circuits regarding whether the requirement of commonality was dependent on the concept of joinder of necessary and indispensable parties. The second and fourth circuits had held that a right was not "common" if the presence of all of the members of the proposed class was not required. The first circuit had taken the position that the test was whether there was a "community of interest" or a "common interest," despite monetary or incidental differences in the claims of the class members. The Louisiana Supreme Court adopted the first circuit's reasoning on the basis of a "policy-value" in the Louisiana provision to avoid a multiplicity of actions in the interest of judicial economy and efficiency [96] The supreme court recognized the applicability of the guidelines that were contained in Federal Rule of Civil Procedure 23, but noted that under Louisiana law the inquiry did not stop with those rules:

> Fairness to the parties demands at the least that the relations between the claims of members of the class should be examined to determine whether it would be unfair to require separate adjudications, for instance, the courts should consider the precedential value of the first decision, as well as the extent of justice that will be produced by inconsistent judgments in separate actions. Another factor to be considered, for example, is the size of the claims of the absent members of the class, for the greater the claim, the greater the interest of its owner in prosecuting it in a separate action.[97]

State v. General Motors Corp.[98] involved an action brought by the State under the unfair trade practices law.[99] The State sought injunctive relief on behalf of all Louisiana citizens who purchased a General Motors vehicle with a substitute model engine. General Motors claimed that the action could not be certified because the element of commonality was lacking. The Louisiana Supreme Court disagreed, certifying the action based on the *Stevens*[100] reasoning that the risk of inconsistent adjudications in separate actions, the smallness of the claims and the lack of filed suits, the similarity of defenses to

---

2d 878 (La. App. 4th Cir.), *writ denied*, 396 So. 2d 898 (1981); Honeywell, Inc. v. Bernstein, 479 So. 2d 32 (La. App. 4th Cir. 1985).

94. 370 So. 2d 477 (La. 1978).

95. 309 So. 2d 144 (La. 1975).

96. *Id.* at 147.

97. *Id.* at 151.

98. *General Motors Corp.*, 370 So. 2d 477.

99. La. R.S. 51:1401-1418 (1981).

100. *Stevens*, 309 So. 2d at 144.

each claim, and common questions of law all justified the certification of the case.

The certification criteria utilized in *Stevens*[101] and *General Motors*[102] is consistent with both prior and later cases involving collective bargaining disputes,[103] compensation for damages to property appropriated for levee purposes,[104] suits against security brokers for failure to disclose certain facts about customers' accounts,[105] and heirs to quiet title to property.[106]

III. LEGISLATIVE DEVELOPMENTS

Louisiana class action cases stress the importance of judicial economy in multiple party claims that are small in nature and that could result in inconsistent adjudications over the traditional Federal Rule 23 requirements. The resulting expanded use of the class action device, from the "true" class action to mass tort and business-oriented factual situations, revealed voids in the statutory provisions, which often failed to address all of the areas required for the efficient management of the complex case. Such an example is *Cotton v. Gaylord Container Corp.*,[107] which presented a review of a trial court certification, without hearing, in multiple personal injury and property damage actions arising from a nitrogen tetroxide leak and fire. The first circuit recognized that the Louisiana class action articles were silent on the issue of notice. Thus, the court relied upon general federal and state due process considerations to fashion a rule that notice to class members be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an

---

101. *Id.*

102. *General Motors*, 370 So. 2d 477.

103. Ducote v. City of Alexandria, 670 So. 2d 1378, 1387-88 (La. App. 3d Cir. 1996). In this case there was agreement that the "commonality" requirement was present. However, since there were only 184 identified plaintiffs, the defendants argued that "numerosity" was not met. The third circuit concluded that the trial judge had not abused his discretion because, "[T]he joinder of one hundred and eighty-four (184) parties to a lawsuit could be inefficient and unduly burdensome upon the trial court." *Id.*

104. Vela v. Plaquemines Parish Gov't, 658 So. 2d 46, 48 (La. App. 4th Cir. 1995). Without citing authority, the court found that "[a] presumption arises that joinder is impractical if more than 40 class members exist." *Id.* This statement is contrary to the generally accepted rule that "[t]here is no set number above which a class is automatically considered so numerous as to make joinder impractical as a matter of law." Dumas v. Angus Chem. Co., 635 So. 2d 446 (La. App. 2d Cir.), *writ denied*, 640 So. 2d 1349 (1994). Whether a class is so numerous as to make joinder impracticable is based upon the facts and circumstances of each case.

105. Dumont v. Charles Schwab & Co., 670 So. 2d 548, 550-51 (La. App. 4th Cir. 1996). Here certification was opposed on the basis that there were individual issues as to *each* securities customer's consent, knowledge, sophistication, diligence, acquiescence, waiver, estoppel, reliance, causation, state of mind and damages. The fourth circuit nevertheless certified the action because "the defendant's legal duty was common to every case." It does not appear that a similar result would occur today because of 1997 La. Acts No. 839. *See infra* text accompanying note 119.

106. Verdin v. Thomas, 191 So. 2d 646 (La. App. 1st Cir. 1966).

107. 691 So. 2d 760 (La. App. 1st Cir.), *writ denied*, 693 So. 2d 147 (1997).

opportunity to present their objections."[108] With regard to the nature of proof required for certification, the court found that a judge could consider pleadings, affidavits, depositions, briefs and testimony to determine whether the statutory requisites of a class were present.[109] However, the court noted that the Code of Civil Procedure was silent with respect to a requirement of a pre-certification hearing, and that a class could be certified without a hearing unless the court deemed that "additional information is necessary."[110] While the majority found no basis for allowing pre-certification discovery under existing law, Chief Justice Calogero, in a concurring opinion,[111] disagreed:

> In my view, it is imperative that parties be permitted to engage in the early assembly of proof of claim forms for the ultimate use and benefit of the district court, the defendants, the plaintiffs lawyer committee, the other attorneys representing plaintiffs, and the plaintiffs themselves, as some of the most fundamental purposes of the class action device are to achieve economies of time, effort and expense. . . . Such purposes cannot be advanced by requiring that a determination of liability precede discovery or the gathering of information needed to further the parties' preparation for trial or settlement negotiations.[112]

Statutory voids such as those illustrated by *Cotton*[113] were the focal point of the Louisiana Legislature's review of the class action provisions during the 1997 Regular Session.[114] Act 839 of the 1997 Regular Session addresses many of the jurisprudential developments and issues discussed above.

The new provisions retain the prior Louisiana Code of Civil Procedure requirements of numerosity, commonality, and adequate representation.[115] The legislation adds a fifth requirement to Article 591 that "[t]he class is or may be defined objectively in terms of ascertainable criteria, such that the court may

---

108. *Id.* at 767 (quoting Williams v. State, 350 So. 2d 131, 138 (La. 1997)).

109. *Id.* at 768.

110. *Id.* at 772.

111. *Cotton*, 693 So. 2d 148.

112. Cotton v. Gaylord Container Corp., 691 So. 2d 760 (La. App. 1st Cir.), *writ denied*, 693 So. 2d 147 (1997). The *Cotton* court did find that remand was required in order to redefine the geographic boundaries of the class so as to support a "concise geographic definition of the class of individuals impacted by this incident." *Id.* at 769.

113. *Id.*

114. *See* 1997 La. Acts No. 839.

115. La. Code Civ. P. art. 591, as amended by 1997 La. Acts No. 839:

> A. One or more members of a class may sue or be sued as representative parties on behalf of all, only if:
>
> (1) The class is so numerous that joinder of all members is impracticable.
>
> (2) There are questions of law or fact common to the class.
>
> (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class.
>
> (4) The representative parties will fairly and adequately protect the interests of the class . . . .

determine the constituency of the class for purposes of the conclusiveness of any judgment that may be rendered in the case." This provision addresses those instances in which classes have been certified so as to define the class as "[a]ll those injured or who suffered damages. . . ." It was felt that such definitions did not provide an objective basis to determine the geographic extent or numerical limits of the proposed class. Newly reformulated Article 591(B) includes a codification of Federal Rule 23(B), and requires that in addition to the numerosity, commonality, and adequate representation requirements, a class can be certified only if the court also finds that:

> B. (1) The prosecution of separate actions by or against individual members of the class would create a risk of:
>
> (a) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (b) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. . . .[116]

With respect to the last factor, the new provisions stress the pertinence of findings that include a determination of the interests of the members of the class in individually controlling the prosecution or the defense of the action; the extent and nature of any existing litigation; the desirability or undesirability of concentrating the litigation in a particular forum; the difficulties in the management of a class action; the practical ability of the individual class members to pursue their claims without class certification; the extent to which the relief plausibly demanded justifies the burdens of class litigation; or, that the parties have requested a settlement class.[117]

---

116. La. Code Civ. P. art. 591(B), as amended by 1997 La. Acts No. 839.

117. La. Code Civ. P. art. 591(B)(3), as amended by 1997 La. Acts No. 839:

> (3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to these findings include:

Of particular importance is Article 591(C),[118] which provides:

> C. Certification shall not be for the purpose of adjudicating claims or defenses dependent for their resolution on proof individual to a member of the class. However, following certification, the court shall retain jurisdiction over claims or defenses dependent for their resolution on proof individual to a member of the class.[119]

The law also codifies many of the procedural practices that courts are presently utilizing in class action cases. In this regard, the new provisions require that within ninety days of service on all adverse parties, a motion to certify must be filed, unless the time is extended for good cause or agreement of the parties; and, in the absence of such, a procedure is included that allows the opponent of certification to ask that the class allegations be stricken.[120] There is also a requirement for a hearing prior to certification; but, in no event can the hearing be scheduled before all named adverse parties have been served, made an appearance, or a due diligence return is made and the parties have had an

---

(a) The interest of the members of the class in individually controlling the prosecution or defense of separate actions;
(b) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
(c) The desirability or undesirability of concentrating the litigation in the particular forum;
(d) The difficulties likely to be encountered in the management of a class action;
(e) The practical ability of individual class members to pursue their claims without class certification;
(f) The extent to which the relief plausibly demanded on behalf of or against the class, including the vindication of such public policies or legal rights as may be implicated, justifies the costs and burdens of class litigation; or
(4) The parties to a settlement request certification under Subparagraph B(3) for purposes of settlement, even though the requirements of Subparagraph B(3) might not otherwise be met.

118. 1997 La. Acts No. 839.

119. La. Code Civ. P. art. 591(C), as amended by 1997 La. Acts No. 839. *See also* In re Chevron, 109 F.3d 1016 (5th Cir. 1997), concerning the utilization of results from a bell-weather trial in federal proceedings.

120. La. Code Civ. P. art. 592(A), as amended by 1997 La. Acts No. 839:

> A. (1) Within ninety days after service on all adverse parties of the initial pleading demanding relief on behalf of or against a class, the proponent of the class shall file a motion to certify the action as a class action. The delay for filing the motion may be extended by stipulation of the parties or on motion for good cause shown.
> (2) If the proponent fails to file a motion for certification within the delay allowed by Subparagraph A(1), any adverse party may file a notice of the failure to move for certification. On the filing of such a notice and after hearing thereon, the demand for class relief may be stricken. If the demand for class relief is stricken, the action may continue between the named parties alone. A demand for class relief stricken under this Subparagraph may be reinstated upon a showing of good cause by the proponent. . . .

opportunity for discovery on class certification issues.[121] The provision allowing discovery prior to the hearing is limited to certification issues and on such terms and provisions as the court deems proper.

The 1997 revisions require continuing oversight by the court on whether the certification should be altered, amended, recalled or the class definition modified.[122] Notice and notice-content provisions and expense requirements that address state and federal due process requirements are set forth in detail.[123] In this regard, the new provisions require "the best notice practicable under the circumstances," including individual notice if the class members can be identified through "reasonable effort." The notice must also contain information concerning opt-out rights.[124] Provisions making it clear that the selection of class counsel, dismissal, compromise, and attorneys' fees are subject to continuing court review are contained in the revisions.[125] Further, the 1997 statute makes it clear that prescription is suspended pending certification and the statute contains various periods in which prescription commences as to excluded members or opt-outs.[126]

The practice of many courts in adopting extensive case management orders addressing consolidation, duties of counsel, scheduling for pre-certification and post-certification discovery has been codified.[127] Of particular importance is a provision in the statute which provides that "the court may not order the class-wide trial of issues dependent for their resolution on proof individual to a member of the class, including but not limited to the causation of the member's injuries, the amount of the member's special or general damages, the individual

---

121. La. Code Civ. P. art. 592(A)(3)(a), as amended by 1997 La. Acts No. 839.

122. La. Code Civ. P. art. 592(A)(3)(c), as amended by 1997 La. Acts No. 839:

> (c) In the process of class certification, or at any time thereafter before a decision on the merits of the common issues, the court may alter, amend, or recall its initial ruling on certification and may enlarge, restrict, or otherwise redefine the constituency of the class or the issues to be maintained in the class action.

123. La. Code Civ. P. art. 592(B)(1), (3), as amended by 1997 La. Acts No. 839.

124. La. Code Civ. P. art. 592(B)(1), (3), as amended by 1997 La. Acts No. 839.

125. La. Code Civ. P. art. 592(E), as amended by 1997 La. Acts No. 839.

126. La. Code Civ. P. art. 596, as amended by 1997 La. Acts No. 839:

> Liberative prescription on the claims arising out of the transactions or occurrences described in a petition brought on behalf of a class is suspended on the filing of the petition as to all members of the class as defined or described therein. Prescription which has been suspended as provided herein, begins to run again:
>
> (1) As to any person electing to be excluded from the class, from the submission of that person's election form;
>
> (2) As to any person excluded from the class pursuant to Article 592, thirty days after mailing or other delivery or publication of a notice to such person that the class has been restricted or otherwise redefined so as to exclude him; or
>
> (3) As to all members, thirty days after mailing or other delivery or publication of a notice to the class that the action has been dismissed, that the demand for class relief has been stricken pursuant to Article 592, or that the court has denied a motion to certify the class or has vacated a previous order certifying the class.

127. La. Code Civ. P. art. 592(E), as amended by 1997 La. Acts No. 839.

knowledge or reliance of the member, or the applicability to the member of individual claims or defenses."[128]

Not all of the potential issues involved in a class action case were addressed by Louisiana Acts No. 839 of 1997. For instance, it is uncertain how these new provisions will impact the qualifications and selection of class representatives for the actual trial of the case.[129] Louisiana courts have required that the class representatives must reflect a "cross section of all injuries alleged on behalf of the class" and "willingly represent the absent members."[130] This rule appears consistent with the federal requirement of "statistical stratification" in order for "bell-weather" plaintiffs to act as representatives of the damages of the class as a whole.[131] The supreme court has rejected "random selection" of trial representatives and has required the use of a method for the trial judge selection of trial plaintiffs that will "ensure adequate class representation."[132] The new provisions are silent regarding the selection of representative plaintiffs for trial.

The Louisiana class action has historically developed from an equitable remedy to being patterned on Federal Rule 23, which recognized only the "true" class action, and more recently to use in situations involving single-source long-term exposure incidents in mass tort cases and varied non-tort situations. At the time Rule 23 was adopted, "mass tort litigation" did not exist.[133] Since that type of litigation evolved, the statutory provisions often lagged behind the developing procedural complexities involved in such litigation. The courts have demonstrated their willingness to be innovative in utilizing class actions. However, at the same time there have been recognized limitations placed on its use, especially in cases where varied legal theories and defenses or different issues of proof were involved. The popularity of the class action can be attributed to the "judicial economy" involved in resolving claims that are not economically feasible to pursue as separate suits. The award of reasonable expenses of litigation, including attorney's fees, when as the result of a class action a fund is made available, or a compromise or recovery that is beneficial to the class,[134] is also an important factor in the increasing use of the procedural device. Act 839 of 1997 provides a needed codification of many of the substantive rules governing certification and the procedural practices that were put into place through case management orders in recent class action litigation.

---

128. La. Code Civ. P. art. 592(E)(5), as amended by 1997 La. Acts No. 839.
129. Dumas v. Angus Chem. Co., 702 So. 2d 1386 (La. 1997).
130. Lailhengue v. Mobil Oil Co., 657 So. 2d 542, 546 (La. App. 4th Cir. 1995).
131. In re Chevron U.S.A., Inc., 109 F.3d 1016 (5th Cir. 1997).
132. *See Dumas*, 702 So. 2d 1386.
133. Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996).
134. La. Code Civ. P. art. 595 (1960).