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Certification of Class Actions in Louisiana

Kent A. Lambert

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In the familiar mantra of the American adversarial system, the trial court serves as "a neutral umpire, charged with little or no responsibility for the factual aspects of the case or for shaping and organizing the litigation for trial."[1] Within this system, the enforcement of rights and obligations is the responsibility of individuals who, guided by personalized considerations of cost versus benefit, are the sole arbiters of what does and does not come before the courts.

Thus, the American civil justice system by definition rejects any doctrine that:

> [W]ould substitute for the traditional restraints familiar to the profession a social welfare theory placing less emphasis than has been customary upon the frugal use of the legal process and more emphasis . . . upon the use of courts as social agencies to set aright whatever is out of joint.[2]

While this approach has not always been the rule in Louisiana, whose civilian ancestry once provided for a much more proactive judiciary, since the adoption of the civil jury trial in Livingston's 1805 Practice Act, Louisiana has been firmly committed to it.

The one (evolving) exception to the passivity of the American judiciary and, therein, the professed absence of social engineering within American courts, has been the class action. Not only has this relatively new procedural mechanism overrun, Kudzu-like, much of the landscape of civil litigation within this country in only a few decades, it has with equal rapidity come to represent a powerful force guiding the evolution of numerous facets of the nation's substantive law, including securities law,[3] antitrust law[4] and, of course, tort law.

Indeed, as is painfully apparent in the context of mass-tort litigation, the class action has spawned radical leaps in the substantive law that often have more to do with the stakes of the litigation than any jurisprudential doctrine or legislative pronouncement. As the Fifth Circuit recently opined:

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* An attorney with the Commercial Litigation Group at the New Orleans office of Phelps Dunbar, L.L.P., the author has helped represent defendants in numerous class actions, including various insurers and lenders involved in so-called CPI class action suits filed in Louisiana and Mississippi. Special thanks to Mary Beth, without whose patience and indefatigable assistance this article could never have become a reality.

1. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1286 (1976); *see also* Roscoe Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice*, 35 F.R.D. 273, 281 (1964) ("[I]n America, we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference.").
2. Cherner v. Transitron Elec. Corp., 201 F. Supp. 934, 937 (D. Mass. 1962).
3. Consider the Private Securities Litigation Reform Act of 1995.
4. As evidenced by the recent authorization for state and FCC *panens patriae* antitrust suits.

> In the context of mass tort class actions, certification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damages awards.
>
> In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail.[5]

It is, perhaps, somewhat ironic that Louisiana, whose judiciary started out far more proactive than those of her sister states, would today represent one of the most conservative forums with respect to the use (or abuse) of class actions as a mechanism for playing Robin Hood, both within particular cases and with respect to entire fields of substantive law. Whether this will continue to be the case in Louisiana is now very much an open question, as the state finds itself at a unique crossroads.

The evolution of class action procedure in Louisiana has in fact been somewhat stilted, an occurrence which is somewhat unremarkable as the class action has no civilian forebear and, therefore, has always been more a creature of the jurisprudence than of legislation.[6] Indeed, the introduction of the class action to Louisiana law was entirely a matter of jurisprudential fiat.[7]

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5. Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (citations omitted). With respect to allowing class counsel to "notify" potential class members of the existence of the class suit, Justice Scalia observed the following:

> There is more than a little historical irony in the Court's decision today. "Stirring up litigation" was once exclusively the occupation of disreputable lawyers, roundly condemned by this and all American courts. . . . But in the age of the "case managing" judicial bureaucracy, our perceptions have changed. Seeking out and notifying sleeping potential plaintiffs yields such economies of scale that what was once demeaned as a drain on judicial resources is now praised as a cutting edge tool of efficient judicial administration. Perhaps it is. But that does not justify our taking it in hand when Congress has not authorized it. Even less does it justify our rush to abandon (not only without compulsion but without invitation) what the Court depreciatingly calls the courts' "passive role" in determining which claims come before them, but which I regard as one of the natural components of a system in which courts are not inquisitors of justice but arbiters of adversarial claims.

Hoffman-La Roche, Inc. v. Sperling, 493 U.S. 165, 181, 110 S. Ct. 482, 492 (1989) (Scalia, J., dissenting).

6. *See, e.g.*, Eric Stephen Valley, Comment, *Louisiana's Class Action: Judge-Made Law in a Mixed Civil-and-Common-Law Jurisdiction*, 61 Tul. L. Rev. 1205, 1213 (1987); *see also* Robert S. Rooth, Note, *Civil Procedure—Class Actions in Louisiana—The "Common Character" of the Right Sought to be Enforced*, 50 Tul. L. Rev. 692, 692 (1976).

7. *See* Executive Comm. of French Opera Trades Ball v. Tarrant, 113 So. 774 (La. 1927) (allowing members of unincorporated association to sue "collectively"), *cited by* La. Code Civ. P.

The evolution of the class action in Louisiana culminated with the enactment of the Louisiana Class Action Statute of 1960, a fascinating piece of reactive legislation based upon the 1937 formulation of Federal Rule of Civil Procedure 23, governing class action procedure in the federal courts. Unfortunately, although Rule 23 would be amended just six years later,[8] it would be nearly four decades before Louisiana's legislature would revisit its own version of that rule. Finally, however, on July 10, 1997, Louisiana took a significant—if perhaps too ambitious—step towards "modernizing" the Louisiana class action, introducing several significant refinements based upon the post-1966 version of Rule 23.

The instant article attempts to address only one aspect of this new regime (although admittedly an important one): class certification. In an attempt to provide context and depth to the discussion, considerable attention has been given to both the state of Louisiana law concerning certification prior to July 10, 1997,[9] and modern practice under Federal Rule of Civil Procedure 23.

As courts begin to construe the recent amendments to Louisiana's class action rules, it is hoped that they will pay careful attention to the hard won experience of the federal judiciary before turning our courts into laboratories for lawyer-driven social policies. It is the principal ambition of this article to provide a few educated insights into those experiences within the context of the state's existing case law.

I. INTRODUCTION TO CLASS ACTION PROCEDURE IN LOUISIANA

A. Background

Class actions in the Louisiana courts are governed by Louisiana Code of Civil Procedure articles 591-97,[10] which until July of 1997 loosely tracked

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art. 591 cmt. (a). *Cf.* Adolf Homburger, *State Class Actions and the Federal Rule*, 71 Colum. L. Rev. 609, 611 (1971) (discussing the common law origins of the class action procedure).

8. *See* Fed. R. Civ. P. 23 (1966).

9. 1997 Louisiana Act No. 839, section 3 provides that the amended articles shall apply only to actions filed on or after July 10, 1997, making both the old and new versions of the relevant Code articles pertinent for present-day litigators.

10. These articles were amended as of July 10, 1997. Prior to their amendment, the pertinent articles provided as follows:

> *Art. 591. Prerequisites*
>
> A class action may be instituted when the persons constituting the class are so numerous as to make it impracticable for all of them to join or be joined as parties, and the character of the right sought to be enforced for or against the members of the class is:
>
> (1) Common to all members of the class; or
>
> (2) Secondary, in the sense that the owner of a primary right refuses to enforce it, and a member of the class thereby becomes entitled to enforce the right.
>
> *Art. 592. Representation*
>
> One or more members of a class, who will fairly insure the adequate representation of all members, may sue or be sued in a class action on behalf of all members.

La. Code Civ. P. arts. 591-92 (1960).

Federal Rule of Civil Procedure 23 as it read *prior* to its amendment in 1966. By Act No. 839 (1997), Louisiana has now amended its class action rules to track almost verbatim the post-1966 version of Federal Rule of Civil Procedure 23. Not surprisingly, then, to understand both the new and old versions of Louisiana's class action statutes, one must first appreciate the evolution of Federal Rule of Civil Procedure 23.

B. True, Spurious, and Hybrid Class Actions

To set the stage for the Louisiana Class Action Statute as enacted in 1960, careful attention must be given to the prior version of Rule 23.[11] Under that rule, envisioned at the time of its enactment as a refinement of Federal Equity Rule 38,[12] class actions were divided into three categories based upon the substantive character of the right sought to be enforced by or against the class. These classes, each of which presupposed a class of persons too numerous for

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11. Prior to its amendment in 1966, Rule 23 read as follows:

(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it; (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

(b) Secondary Action by Shareholders. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath, and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.

(c) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

Fed. R. Civ. P. 23 (amended 1966).

12. Federal Equity Rule 38, 226 U.S. 659 (1912), reads as follows:

When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

See also 1849 N.Y. Laws, Ch. 438, § 119.

their joinder to the action and adequate representation of that class within the action, were defined as follows:

> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.[13]

These three categories have since become known as, respectively, the "true," "hybrid," and "spurious" class actions.[14]

The following passage from Wright, Miller & Kane's Federal Practice & Procedure provides an instructive summary of how the courts treated these categories of class actions:

> A "true" class action was said to be one in which the right to be enforced was "joint," or when it was "common," or when it was "secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it." The meaning of these terms was never altogether clear. "Joint," perhaps, is a familiar enough term. Its use in former Rule 23(a) paralleled the pre-1966 text of Rule 19(a), which required joinder of parties with a "joint" interest. Thus, when parties had a "joint" interest they all had to be joined unless they were merely "necessary," under former Rule 19(b), or unless they were so numerous that it was impracticable to join all of them, in which case a class action might have been brought under Rule 23(a)(1). This did not make a "joint" interest any easier to define, but at least it made applicable the rather considerable body of law dealing with that term in connection with compulsory joinder.
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> The mention of a "secondary" right had reference to derivative actions. The most familiar example of this category is the stockholders' suit to redress a wrong done to the corporation. Another is a beneficiary's suit to enforce the rights of the estate when the executor or administrator refuses to do so.
>
> The principal difficulty was caused by the inclusion of "common" rights. The term "common" had not been used previously in connection with the joinder of parties. It therefore is not surprising that the courts and the learned writers had difficulty in defining when a right was "common," so that the class suit was "true," and when it was merely

13. Fed. R. Civ. P. 23(a) (amended 1966).

14. *See generally* 5 James Wm. Moore's Federal Practice, Appendix ¶¶ 23.08-23.13 (3d ed. 1998).

"several," and the suit was therefore "hybrid" or "spurious." Accordingly, the following situations show no more than that certain courts in particular cases apparently considered the suit before them to be a "true" class action under former Rule 23(a)(1).

"True" class actions in which a plaintiff was allowed to represent a class included: an action by members of an unincorporated association to enjoin the enforcement of a state statute; suits by members of a labor union to enjoin race discrimination in collective bargaining agreements or to enjoin the enforcement of a statute that would deprive them of the right to bargain collectively; a suit by owners of undivided fractional interest in minerals and royalties; a suit by numerous manufacturers to restrain defendants from fraudulently using a trade name in which they had a joint interest; a suit by the beneficiary of a trust on behalf of all beneficiaries to have diverted trust funds restored to the trust estate; an action by holders of collateral trust notes for restoration of the trust fund; and a suit by members of a craft for protection of seniority rights.

In the popular terminology, all class suits that were not "true" were either hybrid" or "spurious." These types of action were alike in that the claims urged were "several" rather than "joint" or "common" as was the case with the "true" class suit. The distinction was that in the "hybrid" action, as contrasted with the "spurious" action, the object of the proceeding was the adjudication of claims that did or might affect the specific property involved in the action. One court put it this way:

> If the rights of the individual plaintiffs are separate causes of action and they have no right to a common fund or to common property, the class action at bar is a "spurious" one. If, upon the other hand, the individual plaintiffs having individual causes of action have also a right to a common fund or in common property, the class action may be "hybrid."

This seemingly easy distinction was complicated by the further observation of the court in the case quoted from that a "spurious" class action might be turned by circumstances into a "hybrid" class action. The court gave the example of a suit by a number of individuals against a corporation that fraudulently induced them to buy its stock. This, the court said, would be a "spurious" class action. But if the corporation subsequently became insolvent, and plaintiffs were compelled to look for redress to a common fund in the hands of a receiver, then the action would become "hybrid."[15]

15. 7A Charles Alan Wright et al., Federal Practice and Procedure § 1752 (2d ed. 1986); *see also* Fed. R. Civ. P. 23 Advisory Comments.

At a much more basic level, the confusion that surrounded the construction and application of prior Rule 23 can be traced to its reliance upon what has variously been described as "jural relations" or "substantive privity" as the mechanism for determining the propriety of a class suit.[16] Thus, under the original text of the Rule, cohesiveness and homogeneity of proposed classes were defined in terms of the existence of a "general" or "common or joint" right, *vis-a-vis* a "several" right. It would take decades before another approach, already popular in other procedural contexts, would begin to pave the way for a much clearer and more functional gate-keeping mechanism for class actions.

C. *The Transactional Approach and the 1966 Amendments to Federal Rules of Civil Procedure 23*

In an effort to solve the problems with Rule 23 as originally enacted, the Rule was given a complete overhaul in the 1966 amendments to the Federal Rules of Civil Procedure. As thus amended, the original Rule's rather abstract criteria were replaced by more functional provisions, at least in a relative sense. Paragraph (a) of the amended Rule now restates the traditional common law prerequisites to any class action, to-wit: numerosity, commonality, typicality, and adequacy of representation. If the prerequisites of Rule 23(a) are met, paragraph (b) of the Rule requires a second step in the analysis, pursuant to which at least one of the three following grounds for a class action must be shown to exist: (1) that separate lawsuits by each class member risks either (a) imposing incompatible standards of conduct on the party opposing the class, through inconsistent adjudications, or (b) impairing the interests of other members of the class; (2) that the party against whom relief is being sought has acted in a manner generally attributable to a class of persons, such that declaratory or injunctive relief as to the entire class is appropriate; or (3) questions of law or fact common to a class of persons "predominate" over questions unique to individual class members and "on balance" a class action represents the "superior" procedure for adjudicating the controversy.[17]

These latter categories, intended to replace the amorphous classifications under the Rule's earlier version, represent the most substantial change made to Rule 23 in the 1966 amendment.[18] Specifically, these categories, particularly those found in 23(b)(3), abandoned the original Rule's focus upon the substantive (or jural) relationships between class members in favor of a transactional

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16. *See* James Moore & Marcus Cohn, *Federal Class Actions*, 32 Ill. L. Rev. 307, 314 (1937).

17. Fed. R. Civ. P. 23(b).

18. Significantly, in the ABA Section on Litigation, Report and Recommendations of the Special Committee on Class Action Improvements, 110 F.R.D. 195 (1986), it was observed that even these categories have engendered confusion, with the result that additional modifications have been suggested, including, *inter alia*, a unified standard for all class actions merging FRCP 23(b)(1)-(3). These recommendations have been viewed very favorably by the Advisory Committee and may strongly influence proposed amendments to Rule 23 in the next few years.

approach concerned with the presence of common issues of law or fact predicated upon particular acts or omissions.

1. Federal Rule of Civil Procedure 23(a)

The requirements articulated under Rule 23(a) can be roughly summarized as inquiring into whether there is a class in the first instance and, if there is one, whether that class is properly represented in the litigation. Specifically, Rule 23(a) imposes four prerequisites, commonly referred to as the requirements of impracticality, commonality, typicality, and adequacy.

a. Impracticality

A class must be large enough to make joinder impractical.[19] This requisite is directly addressed to concerns of economy, ensuring that class action procedure is used only when it will resolve numerous claims.[20] Although often deemed equivalent to an inquiry into the size of the proposed class, the impracticality of joinder element in Rule 23(a) is intended to be broader than a mere numerosity test.[21] Thus, while it is probably correct that when the class is large, the class' numbers alone should be dispositive,[22] other factors may also be relevant, such that a relatively small class action may properly be maintained under Rule 23(a)(1) in certain circumstances.[23] Other relevant factors include judicial economy arising from the avoidance of multiple actions, the geographic dispersion of class members, the size of individual claims within the class, the financial resources of class members, and the ability of class members to sue individually.[24] In addition, where prospective injunctive or declaratory relief is sought which might affect the rights or interests of as-yet unknown future class

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19. Fed. R. Civ. P. 23(a)(1). In general, where subclasses are employed, the impracticality requirement must be satisfied as to each sub-class. *E.g.*, Roby v. St. Louis S.W. Ry. Co., 775 F.2d 959 (8th Cir. 1985).

20. Herbert B. Newberg & Alba Conte, 1 Newberg on Class Actions § 3.03, at 3-10-11 (3d ed. 1992).

21. *Id.*; *see* Harriss v. Pan Am World Airways, Inc., 74 F.R.D. 24, 45 (N.D. Cal. 1977); *see also* Republic Nat. Bank v. Denton & Anderson Co., 68 F.R.D. 208 (N.D. Tex. 1975).

22. *E.g.*, Mathis v. Bess, 138 F.R.D. 390, 393 (S.D.N.Y. 1991); Finnan v. L.F. Rothschild & Co., 726 F. Supp. 460, 465 (S.D.N.Y. 1989); Thillens, Inc. v. Community Currency Exch. Ass'n, 97 F.R.D. 668, 676-77 (N.D. Ill. 1983); *cf.* Ashe v. Board of Elections, 124 F.R.D. 45, 52 (E.D.N.Y. 1989).

23. *See, e.g.*, Robidoux v. Celani, 987 F.2d 931 (2d Cir. 1993); Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113, 101 S. Ct. 923 (1981); *see also* Jordan v. County of Los Angeles, 669 F.2d 1311 (9th Cir.), *vac'd on other grounds*, 459 U.S. 810, 103 S. Ct. 35 (1982); Larry James Oldsmobile-Pontiac-GMC Truck Co. v. General Motors Corp., 164 F.R.D. 428 (N.D. Miss. 1996); *cf. Robidoux*, 987 F.2d at 935 ("impractical" should not be equated with "impossibility"); Bradley v. Harrelson, 151 F.R.D. 422 (M.D. Ala. 1993).

24. *E.g.*, *Robidoux*, 987 F.2d 931.

members, the mere existence of such potential future claimants may be enough to satisfy the numerosity requirement.[25]

b. Commonality

Perhaps the most fundamental inquiry under Rule 23(a)(2), the commonality requirement simply asks whether a single wrong or series of related wrongs are common to the members of the proposed class. It is generally recognized that Rule 23(a)'s commonality requirement does not require an absolute identity of factual or legal issues among prospective class members; rather, there need only be a predominance of such common issues.[26] Nonetheless, the jurisprudence is by no means consistent.[27] Indeed, a dispute exists as to whether more than one common question—no matter how critical or fundamental that issue may be—is necessary.[28]

As will be seen later, the commonality analysis required under Rule 23(a)(2) is intimately linked with the predominance inquiry under Rule 23(b)(3).[29] Indeed, even the Supreme Court has noted that the commonality and typicality requirements "tend to merge."[30] Nonetheless, the 23(a)(2) requirement does retain significance as a threshold inquiry before courts address the predominance prong under Rule 23(b)(3).[31] On the other hand, under 23(b)(2), which allows for certification of certain classes without any predominance inquiry, the class need only satisfy the commonality inquiry under 23(a)(2).[32]

Perhaps the most obvious example of a case where commonality is present is a suit where the party opposing the class has engaged in a course of conduct that has given rise to a legally cognizable injury to a group of persons, such as

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25. Williams v. New Orleans S.S. Ass'n, 673 F.2d 742 (5th Cir. 1982), *cert. denied*, 460 U.S. 1038, 103 S. Ct. 1428 (1983); Murillo v. Musegades, 809 F. Supp. 487 (W.D. Tex. 1992).

26. *E.g.*, Johnson v. American Credit Co., 581 F.2d 526 (5th Cir. 1978); D'Alauro v. GC Servs. Ltd. Partnership, 168 F.R.D. 451 (E.D.N.Y. 1996); *see also* Applewhite v. Reichhold Chems., Inc., 67 F.3d 571, 573 (5th Cir. 1995) ("Although the threshold for commonality is not high, class certification requires at least two issues in common. . . . If the plaintiffs cannot identify more than one common issue, they cannot argue that the common issues predominate this litigation.").

27. *Compare* In re Asbestos Litig., 90 F.3d 963, 974 (5th Cir. 1996) (interest in minimizing attorneys' fees supported finding of commonality) *with* Georgine v. Amchem Prods., Inc., 83 F.3d 610, 626-27 (3d Cir. 1996) (existence of different types of injuries allegedly caused by asbestos exposure weighs against finding of commonality), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997).

28. *Compare* Stewart v. Winter, 669 F.2d 328, 335 n.16 (5th Cir. 1982) *with* Trief v. Dun & Bradstreet Corp., 144 F.R.D. 193, 198-99 (S.D.N.Y. 1992).

29. *See infra* text accompanying notes 98-108.

30. General Tel. Co. v. Falcon, 457 U.S. 147, 157 n.13, 102 S. Ct. 2364, 2371 n.13 (1982). *Cf.* In re The Appliance Store, Inc., 158 B.R. 384 (Bankr. W.D. Pa. 1993) (suggesting that "commonality inquiry" is intertwined with typicality, adequacy, and standing requirements).

31. *See, e.g.*, Brown v. Pro Football, Inc., 146 F.R.D. 1, 3 (D.D.C. 1992); Heastie v. Community Bank, 125 F.R.D. 669, 674 (N.D. Ill. 1989).

32. Adamson v. Bowen, 855 F.2d 668, 675-76 (10th Cir. 1988).

a consumer anti-trust suit or a RICO action.[33] Similarly, commonality will often be present where a group of individuals seek to challenge a property right, such as a challenge by licensees to a common underlying patent or copyright.[34]

c. Typicality

Typicality, the third prerequisite for certification of a class action identified under Rule 23(a), requires commonality between the legal claims of the named class representatives and the unnamed class members.[35] As explained by one commentator:

> Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. In other words, when such a relationship is shown, a plaintiff's injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff. Thus, a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.[36]

In other words, the purported representative "must be part of the class and possess the same interest and suffer the same injury as the class members."[37]

Generally speaking, a plaintiff's claim is "typical" if it arises from the same event or conduct that gave rise to the claims of the other class members *and* is based on the same legal theory.[38] Additionally, the class representative must

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33. *E.g.*, Buford v. H & R Block, Inc., 168 F.R.D. 340 (S.D. Ga. 1996); In re Catfish Antitrust Litig., 826 F. Supp. 1019 (N.D. Miss. 1993); *cf.* Hoban v. USLIFE Credit Life Ins. Co., 163 F.R.D. 509 (N.D. Ill. 1995) (commonality predicated upon use of form contract).

34. *E.g.*, Dale Elecs., Inc. v. R.C.L. Elecs., Inc., 53 F.R.D. 531 (D.N.H. 1971).

35. Federal courts have long struggled with both the meaning and the purpose of this requirement, with some courts strongly questioning its usefulness. *See, e.g.*, Sanders v. Robinson Humphrey/American Express, Inc., 634 F. Supp. 1048, 1056 n.10 (N.D. Ga. 1986), *aff'd in part sub nom* Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718 (11th Cir. 1987). Not surprisingly, many courts have concluded that typicality is subsumed within the commonality and adequacy of representation prongs of Rule 23(a). *E.g.*, Alfus v. Pyramid Tech. Corp., 764 F. Supp. 598, 606 (N.D. Cal. 1991); *see also*, Duggan v. Bowen, 691 F. Supp. 1487, 1500-04 (D.D.C. 1988).

36. 1 Newberg, *supra* note 20, § 3.13, at 3-76-77.

37. General Tel. Co. v. Falcon, 457 U.S. 147, 156, 102 S. Ct. 2364, 2370 (1982).

38. *See* Rosario v. Livaditis, 963 F.2d 1013, 1018 (7th Cir. 1992), *cert. denied*, 506 U.S. 1051, 113 S. Ct. 972 (1993).

demonstrate an actual injury[39] of the same type as other class members' (though not necessarily of the same severity, nor necessarily having been suffered at the same time)[40] that both is of sufficient severity properly to motivate the representative vigorously to pursue the entire suit[41] (as in a conspiracy case)[42] and is not subject to any unique defenses.[43] If the representative brings a different claim,[44] or is subject to unique defenses (as where a putative class representative in a consumer fraud case defaulted on a loan), this inconsistency may disqualify her.[45] The facts and claims applicable to the representative to the class do not, however, have to be identical.[46]

In consumer fraud cases, where the plaintiff often must prove some degree of actual reliance on the defendant's unlawful conduct absent a presumption of reliance (as applies under the fraud-on-the-market doctrine developed under Rule 10b-5), this patently individual question may of itself frustrate a finding of typicality.[47] Similar complications often obtain in mass-tort cases.[48]

d. Adequacy

Class representatives, as well as their counsel, must adequately represent the class.[49] What constitutes adequate representation is a question of fact that depends on the circumstances of each case.[50] It is the plaintiff's

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39. *See, e.g.*, O'Shea v. Littleton, 414 U.S. 488, 94 S. Ct. 669 (1974).

40. *See* Sanna v. Delta Airlines, 132 F.R.D. 47 (N.D. Ohio 1990); Wucsina v. Reliance Elec. Co., 129 F.R.D. 164 (N.D. Ind. 1986).

41. Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975).

42. La Mar v. H&B Novelty & Loan Co., 489 F.2d 461, 463 (9th Cir. 1973).

43. Ross v. Bank South, N.A., 837 F.2d 980, 990 (11th Cir. 1988).

44. The mere fact that a putative class representative has claims those of the class of itself would normally defeat typicality. *See, e.g.*, McCarthy v. Kleindienst, 741 F.2d 1406 (D.C. Cir. 1984).

45. *See, e.g.*, Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 176 (2d Cir. 1990), *cert. denied*, 498 U.S. 1025, 111 S. Ct. 675 (1991); Hoexter v. Simmons, 140 F.R.D. 416 (D. Ariz. 1991); *see also*, Graham v. Security Sav. & Loan, 125 F.R.D. 687, 691 n.4 (N.D. Ind. 1989), *aff'd sub nom.* Veal v. First Am. Savs. Bank, 914 F.2d 909 (7th Cir. 1990).

46. *See, e.g.*, Appleyard v. Wallace, 754 F.2d 955, 958 (11th Cir. 1985); Milonas v. Williams, 691 F.2d 931, 938 (10th Cir. 1982), *cert. denied*, 460 U.S. 1069, 103 S. Ct. 1524 (1983); Leyva v. Buley, 125 F.R.D. 512, 515 (E.D. Wash. 1989).

47. *Cf.* Maguire v. Sandy Mac, Inc., 138 F.R.D. 444, 451 (D.N.J. 1991), *vac'd on other grounds*, 145 F.R.D. 50 (D.N.J. 1992); *but see* Rosario v. Livaditis, 963 F.2d 1013, 1018 (7th Cir. 1992), *cert. denied*, 506 U.S. 1051, 113 S. Ct. 972 (1993).

48. *See, e.g.*, Ikonen v. Hartz Mountain Corp., 122 F.R.D. 258, 262-63 (S.D. Cal. 1988); *but see* In re A.H. Robins Co., 880 F.2d 709, 747 (4th Cir.), *cert. denied sub nom.* Anderson v. Aetna Cas. & Surety Co., 493 U.S. 959, 110 S. Ct. 377 (1989).

49. *See* Newberg, *supra* note 20, § 3.21, at 3-125.

50. *See* Ballan v. Upjohn Co., 159 F.R.D. 473, 482 (W.D. Mich. 1994); Diduck v. Kaszycki & Sons Contractors, Inc., 149 F.R.D. 55, 59 (S.D.N.Y. 1993). It should be noted that there is a significant body of case law merging analysis under the adequacy and typicality prongs of Rule 23(a). *See* 1 Newberg, *supra* note 20, at § 3.22; *see also* Wynn v. Dixieland Food Stores, Inc., 125 F.R.D. 696, 700 (M.D. Ala. 1989); Bartleson v. Dean Witter & Co., 86 F.R.D. 657 (E.D. Pa. 1980).

burden to establish the adequacy of her prospective representation of the class.[51]

Adequate representation is the foundation which renders class actions consistent with Due Process, and the trial court has a continuing duty to scrutinize the adequacy of the representation by the alleged representative and her counsel.[52] Few conflicts are tolerated, because if absent class members are not adequately represented, any final judgment will have no *res judicata* effect as to them.[53]

Certainly, class representatives must understand and accept responsibility for prosecuting the claims of the class.[54] Contrary to a common misconception, to be an adequate representative, a named plaintiff does not necessarily have to be able to finance notice (indeed, class counsel often funds this and related "litigation costs").[55] Nor does the proposed representative need to understand the technical aspects of the case; class representatives need only have a general understanding of the nature of the claims alleged on behalf of the class.[56]

Antagonism or conflict between class members may frustrate the adequacy of representation.[57] Thus, for example, class representatives must seek the same relief sought for the class as a whole (a line of inquiry which, of course, returns analysis to the typicality prong discussed above).[58]

Some courts have also examined the "credibility" of the class representative, an analysis that in practice focuses upon the character of the proposed representative, as well as concerns akin to those implicated under Rule 23(a)(3).[59] For lack of credibility alone to defeat certification, however, the deficiency must be

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51. *E.g.*, Fairley v. Patterson, 493 F.2d 598, 604 n.8 (5th Cir. 1974).

52. In re General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1124 (7th Cir.), *cert. denied sub nom.* Oswald v. General Motors Corp., 444 U.S. 870, 100 S. Ct. 146 (1979); *see also* Hansberry v. Lee, 311 U.S. 32, 42, 61 S. Ct. 115, 118 (1940); Walker v. Luther, 644 F. Supp. 76, 79 (D. Conn. 1986), *aff'd*, 830 F. 2d 1208 (2d Cir. 1987).

53. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 808-09, 105 S. Ct. 2965, 2972-73 (1985) (citing *Hansberry*, 311 U.S. 32); Crawford v. Honig, 37 F.3d 485, 487 (9th Cir. 1994).

54. Newberg, *supra* note 20, § 3.26; Rivera v. Fair Chevrolet Geo Partnership, 165 F.R.D. 361 (D. Conn. 1996).

55. *See* Seidman v. American Mobile Sys., Inc., 157 F.R.D. 354 (E.D. Pa. 1994); Harris v. General Dev. Corp., 127 F.R.D. 655 (N.D. Ill. 1989); *but see* Jackson v. Rapps, 132 F.R.D. 226 (W.D. Mo. 1990); In re Agent Orange Prod. Liab. Litig., 818 F.2d 216 (2d Cir. 1987); *cf.* Roper v. Consurve, Inc., 578 F.2d 1106 (5th Cir. 1978) (resources of putative class representative may be relevant), *aff'd on other grounds sub nom.* Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 100 S. Ct. 1166 (1980); Model Rules of Professional Conduct Rule 1.8(e) (1983).

56. *E.g.*, Welling v. Alexy, 155 F.R.D. 654 (N.D. Cal. 1994).

57. *See* Newberg, *supra* note 20, § 3.23, at 3-130 to 3-131; *see also* Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 485-86 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207, 103 S. Ct. 3536 (1983); Gill v. Monroe County Dep't of Soc. Servs., 95 F.R.D. 518, 520 (W.D.N.Y. 1982).

58. TBK Partners v. Chomeau, 104 F.R.D. 127 (E.D. Mo. 1985).

59. Newberg, *supra* note 20, § 3.36; *see, e.g.*, Hall v. Burger King Corp., No. 89-0260-CIV-KEHOE, 1992 WL 372354, at *9 (S.D. Fla. Oct. 26, 1992); Kaplan v. Pomerantz, 132 F.R.D. 504, 510 (N.D. Ill. 1990).

almost blatantly obvious.[60] Related concerns arise in situations where there is reason to believe that the representative will pursue personal interests at the expense of the class.[61] Similarly, certification may be inappropriate where there is conflict or antagonism between class members and class representatives.[62] In that regard, the Fifth Circuit has held that the mere existence of such a conflict at the outset of the suit warrants denial of certification absent a ready cure, such as the exclusion of antagonistic class members or the creation of subclasses.[63]

In the federal jurisprudence, adequacy of representation also requires the court to consider the *adequacy of the class attorneys* who, as the guardian of the class, have a *fiduciary duty* toward *each* class member.[64] Thus, attorneys for the class must be committed to serving the class as fiduciaries, avoiding any conflicts with class members (including absent members) and vigorously litigating all aspects of the case.[65] Because class counsel is considered a guardian of the class and has a fiduciary duty to each member of the class, class counsel is held to a very high standard of care.[66] Class counsel may be scrutinized as to their professional credentials, experience, resources, actual performance, ethical records, potential or actual conflicts, and the like. In the present litigation environment, one interesting application of this element of the adequacy of representation inquiry is the potential for challenges to class counsel who represent another class in a separate suit (or suits) against the same defendant, since both classes are potentially competing for the same funds or assets.[67]

Courts have the power to "cure" deficient representation, but where there is an actual, serious conflict among class members or there is a significant diversity of class interests, or in other situations of significant conflicts or divergences—particularly in cases concerning defendant classes—de-certification may be the only available alternative.[68]

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60. *See, e.g.*, Bieneman v. City of Chicago, 864 F.2d 463, 465-66 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080, 109 S. Ct. 2099 (1989).

61. *See, e.g.*, *TBK Partners*, 104 F.R.D. at 131.

62. *See, e.g.*, Sosna v. Iowa, 419 U.S. 393, 403, 95 S. Ct. 553, 559 (1975); Payne v. Travenol Labs., Inc., 673 F.2d 798, 810 (5th Cir.), *cert. denied*, 459 U.S. 1038, 103 S. Ct. 451 (1982).

63. *Payne*, 673 F.2d at 812.

64. In re "Agent Orange" Prod. Liab. Litig., 800 F.2d 14, 18 (2d Cir. 1986).

65. 1 Newberg, *supra* note 20, § 3.24.

66. *See* Piambino v. Bailey, 757 F.2d 1112, 1144 (11th Cir. 1985) *cert. denied*, 476 U.S. 1169, 106 S. Ct. 2889 (1986); Kurczi v. Eli Lilly & Co., 160 F.R.D. 667, 679 (N.D. Ohio 1995); *see also* In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 179 (2d Cir. 1987).

67. Sullivan v. Chase Inv. Servs., Inc., 79 F.R.D. 246, 258 (N.D. Cal. 1978); *but cf.* Harris v. General Dev. Corp., 127 F.R.D. 655, 663 (N.D. Ill. 1989).

68. Payne v. Travenol Labs, Inc., 673 F.2d 798, 812 (5th Cir.), *cert. denied*, 459 U.S. 1038, 103 S. Ct. 451 (1982).

2. Federal Rule of Civil Procedure 23(b)

Rule 23(b) provides three alternate "grounds" for certification, assuming the existence of a proper class and class representative consistent with the requirements of 23(a). Subsection (b)(1) addresses situations where the defendant or absent class members would be prejudiced without a single, unitary decision; Subsection (b)(2) addresses cases where an injunction is sought to restrain or enforce conduct by a defendant on grounds uniformly applicable to all class members; and Subsection 23(b)(3) broadly allows for class actions in any other situations where the procedure is shown to be superior to alternative procedural options and it is demonstrated that common issues predominate over individual ones. Given the direct incorporation of Section (a) of Rule 23 into each subsection of 23(b), it is not surprising that there is considerable overlap between these categories. Clearly, Subsection (b)(3) is the broadest, almost acting as a catch-all; indeed, it has been suggested (with some persuasiveness) that 23(b)(3) states the general rule, while Sections (b)(1) and (b)(2) simply represent specific examples of particularly appropriate types of class action.[69]

a. Rule 23(b)(1)

Rule 23(b)(1) actions (commonly referred to as "prejudice actions")[70] are proper in cases where the rights of individual class members would be prejudiced if the suit were brought individually or in cases in which inconsistent adjudication among the parties might result if the suit were pursued individually, rather than by the appropriate class.[71]

The rule is divided into two sections, concerned with the interests of potential defendants and potential absent class members respectively. A Rule 23(b)(1)(A) class action exists for the benefit of potential defendants where there is a serious risk of irreconcilable results if separate actions were to be pursued.[72] There must, however, be a real risk that separate actions will occur; there is no danger of courts fashioning different, incompatible standards without the risk of separate actions.[73] Consistent with Rule 23's heritage, this type of class action can fairly be viewed as analogous to interpleader, bringing claimants together to litigate in one action their conflicting claims against a common defendant.[74]

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69. *See* Adolf Hamburg, *State Class Actions and the Federal Rule*, 71 Colum. L. Rev. 609, 653-54 (1971).

70. *See* Zimmerman v. Bell, 800 F.2d 386, 389 (4th Cir. 1986).

71. *Id.*

72. *See, e.g.*, Winder Licensing, Inc. v. King Instrument Corp., 130 F.R.D. 392 (N.D. Ill. 1990); CBS, Inc. v. Smith, 681 F. Supp. 794, 802 (S.D. Fla. 1988).

73. First Fed. Bank v. Barrow, 878 F.2d 912, 919 (6th Cir. 1989); *see* Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976).

74. *See, e.g.*, In re Agent Orange Prod. Liab. Litig., 506 F. Supp. 762, 789 (E.D.N.Y. 1980),

Generally, if the threatened inconsistency is the possibility of inconsistent liability judgments, as where the defendant is required to pay money damages to one plaintiff but not to another, or where there is some lingering risk of subsequent adverse judgments, the purpose underlying Rule 23(b)(1)(A) is not met.[75] For example, Rule 23(b)(1)(A) certification is not appropriate when the threatened inconsistency is that the defendant might be ordered to pay damages in one lawsuit but not another. Thus, federal courts commonly state that Rule 23(b)(1)(A) classes are only appropriate where the defendant will truly be in a "conflicted position," wherein different results that would directly impair the defendant's ability to pursue a uniform course of conduct are likely.[76] The classic example of a Rule 23(b)(1)(A) class action is a suit by a group of patent licensees challenging the underlying patent. Other examples might include a suit by shareholders to compel a dividend or recognize preemptive rights, or an action by an indenture trustee to protect the holders of securities.[77]

Rule 23(b)(1)(B) protects the absent potential class members from a situation where the one action that could effectively dispose of their rights or interests proceeds without them.[78] The best example of a 23(b)(1)(B) class action is a suit over disposition of a common, limited fund; for instance, the dissolution of a corporation or partnership.[79] When such a proceeding is allowed to go forward, "[a]ll those who come within the description in the certification become, and must remain, members of the class because no opt-out provision exists."[80] Movants must, accordingly, demonstrate that there is a finite source of funds for satisfying the alleged liability that exceeds the value of the fund, which in turn requires proof with respect to the total available assets and the likely aggregate value of all potential claims.[81]

As noted, courts usually hold that suits for damages do not qualify for Rule 23(b)(1) certification, since such actions generally do not give rise to a risk of inconsistent results that establish incompatible standards of future conduct or raise the concern of impairing class members' rights to protect their interests.[82]

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mod'd, 100 F.R.D. 718 (E.D.N.Y. 1983), *mandamus denied*, 725 F.2d 858 (2d Cir.), *cert. denied sub nom.* Diamond Shamrock Chems. Co. v. Ryan, 465 U.S. 1067, 104 S. Ct. 1417 (1984); *cf. CBS, Inc.*, 681 F. Supp. at 802.

75. La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 465-67 (9th Cir. 1973).

76. *E.g.*, United States v. Truckee-Carson Irrigation Dist., 71 F.R.D. 10, 17 (D. Nev. 1975).

77. *See* Advisory Committee's Note, 39 F.R.D. 98, 100.

78. D'Arrigo Bros. Co. v. Freshville Produce Distribs., Inc., No. 87 Civ. 1091, 1990 WL 310632 (S.D.N.Y. April 13, 1990).

79. *See* Advisory Committee's Note, 39 F.R.D. 69, 101 (1966); *see also* Specialty Cabinets & Fixtures, Inc. v. American Equitable Life Ins. Co., 140 F.R.D. 474, 477 (S.D. Ga. 1991).

80. In re School Asbestos Litig., 789 F.2d 996, 1002 (3d Cir.), *cert. denied*, 479 U.S. 852, 915, 107 S. Ct. 182, 318 (1986).

81. *Id.*; *see also* In re Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 825 (E. & S.D.N.Y. 1991), *vac'd*, 982 F.2d 721 (2d Cir. 1992), *mod'd*, 993 F.2d 7 (2d Cir. 1993).

82. *See, e.g.*, In re Dennis Greeman Secs. Litig., 829 F.2d 1539, 1545 (11th Cir. 1987); In re Bendictin Prods. Liability Litigatgion, 749 F.2d 300, 305 (6th Cir. 1984); Bear v. Oglebay, 142 F.R.D. 129, 132 (N.D. W.Va. 1992).

Thus, certification of a Rule 23(b)(1) class action generally occurs in cases seeking only injunctive and declaratory relief, although certification is *not* expressly limited to such cases, and 23(b)(1) theoretically may also be relied upon in certain types of damage actions, such as cases where class demands exceed the resources of the defendant.[83] The risk of prejudice must be inevitable and not just possible in such cases, however. Thus, for example, certification is not warranted under 23(b)(1)(B) where victims of a mass tort complain that a defendant has limited funds, rendering it *improbable* that all victims may recover or recover the full amount, since there is no *certainty* that the defendant's assets will be exhausted in the course of defending against and satisfying potential individual claims.[84]

b. Rule 23(b)(2)

A Rule 23(b)(2) class action is available when "[t]he 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." Thus, a Rule 23(b)(2) class action ordinarily is appropriate for claimants seeking injunctive or declaratory judgment relief. In addition, however, the class proponent must show that the other party acted or refused to act on grounds generally applicable to the class. This type of class was designed primarily to handle constitutional and civil rights cases and is often referred to as the "civil rights" class action rule.[85] It also has been used to prosecute environmental claims and for the resolution of far-reaching patent claims.[86]

The text of Rule 23(b)(2) imposes two prerequisites to certification. First, the challenged conduct must be "generally applicable to the class," which means that the defendant's actions must affect all persons fitting within the defined putative class.[87] This does not, however, mean that the defendant must have acted directly against each member of the class.[88] Second, the suit must seek injunctive or declaratory relief.[89] Rule 23(b)(2) "does not extend to cases in

83. *See, e.g.*, Church v. Consolidated Freightways, Inc., [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96, 162 at 90, 898-99 (N.D. Cal., June 14, 1991).

84. *E.g.*, McDonnell Douglas Corp. v. United States Dist. Ct., 523 F.2d 1083 (9th Cir. 1975), *cert. denied*, 425 U.S. 911, 96 S. Ct. 1506 (1976).

85. General Tel. Co. v. Falcon, 457 U.S. 147, 159 n.15, 102 S. Ct. 2364, 2371 n.15 (1982); *see* Advisory Committee's Note, 39 F.R.D. 69, 102 (1966); Holmes v. Continental Can Co., 706 F.2d 1144, 1152 (11th Cir. 1983).

86. Newberg, *supra* note 20, § 4.11 nn. 123-27.

87. *E.g.*, Smiths v. Reader's Digest Ass'n, Inc., 19 Fed. R. Serv. 2d (Callaghan) 501 (S.D.N.Y. Nov. 6, 1974).

88. Wilcox v. Petit, 117 F.R.D. 314, 318 (D. Me. 1987).

89. *See* Angelo N. Ancheta, *Defendant Class Actions and Federal Civil Rights Litigation*, 33 UCLA L. Rev. 283, 314-15 (1985).

which the appropriate final relief relates exclusively or predominantly to money damages."[90]

Because of the notice costs and additional certification requirements imposed upon the class representative under Rule 23(b)(3) classes, class representatives and their counsel sometimes attempt to invoke Rule 23(b)(2) improperly by including in their requested relief a demand for an injunction or declaratory judgment. Federal cases have held that a suit that predominantly seeks monetary damages does not qualify under Rule 23(b)(2).[91] In *Indiana State Employees Association, Inc. v. Indiana State Highway Commission*,[92] state employees sought reimbursement of forced political contributions and declaratory and injunctive relief. The court rejected the plaintiffs' argument that their class qualified under Rule 23(b)(2), stating that the individualized nature of the damage claims was such that the damage issues in the case would predominate or overwhelm issues of generalized, equitable relief.[93]

c. Rule 23(b)(3)

Ever since *Eisen v. Carlisle & Jacquelin*,[94] which required class representatives to bear the cost of notice in 23(b)(3) actions, litigants have made a determined effort to fit their suits within 23(b)(1) and 23(b)(2), which do not have opt-out provisions and, hence, do not require the same notice necessary under Rule 23(b)(3), which requires members be allowed to opt out. Nonetheless, because it is in effect a catch-all category, 23(b)(3) remains the most common ground for pursuing class actions.

A Rule 23(b)(3) class action may be certified when "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."[95] The essential issue under Rule 23(b)(3) is balancing judicial economy against procedural fairness to individual persons whose interests are implicated in the putative class action: the class representative must "assure the [c]ourt that use of the class action device will achieve the economies of time, effort and expense contemplated by the Rule, without sacrificing procedural fairness or bringing about other undesirable results."[96]

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90. Advisory Committee's Note, 39 F.R.D. 69, 102 (1966).

91. Angelastro v. Prudential-Bache Secs., 113 F.R.D. 579 (D.N.J. 1986). *But cf.* Newberg, *supra* note 20, § 4.14.

92. 78 F.R.D. 724, 726 (S.D. Ind. 1978).

93. *Id.* at 725-26; *see also* Nelsen v. King County, 895 F.2d 1248, 1254 (9th Cir. 1990); *cf.* Probe v. State Teachers' Retirement Sys., 780 F.2d 776, 780 (9th Cir.), *cert. denied*, 476 U.S. 1170, 106 S. Ct. 2891 (1986); Arkansas Educ. Ass'n v. Board of Educ., 446 F.2d 763 (8th Cir. 1971).

94. 417 U.S. 156, 94 S. Ct. 2140 (1974).

95. *See* Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 Cornell L. Rev. 779, 789 (1985).

96. Brown v. Cameron-Brown Co., 92 F.R.D. 32, 41 (E.D. Va. 1981). This phrasing is almost

As written, Rule 23(b)(3) requires that two subcomponents be met in order to properly certify a class thereunder. The court must find that: (1) common questions among the class predominate over any questions affecting only individual members; and (2) that a class action is the superior method of adjudicating the matter.[97]

D. Common Questions Predominate

The concept of judicial efficiency is at the heart of the predominance inquiry.[98] As Professor Newberg explains, this test is not meant to require that "common issues . . . be dispositive of the controversy, or even be determinative of the liability issues involved"; or to require a comparison of the court time of disposing of the common questions versus the court time involved in disposing of individual issues; or to give rise to a "numerical test" between the number of individual issues and the number of common questions.[99] He states:

> A single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions. . . . In finding that common questions do predominate over individual ones in particular cases, courts have pointed to such issues that possess the common nucleus of fact for all related questions, have spoken of a common issue as the central, or overriding question, or have used similar articulations.[100]

In determining whether common issues predominate, courts generally engage in a three-stage analysis: (1) first, the court must identify the substantive elements of the cause of action; (2) the proof necessary to meet the plaintiff's burden of proof as to those elements must be considered; and (3) the alternative procedural mechanisms for adjudicating the case must be evaluated in terms of promoting judicial economy.[101] The mere fact that each class member seeks separate damages, or even that each claim arose out of a separate transaction with the defendant, are not necessarily dispositive—the question is whether common issues of law and fact present in each class member's claim "predominate."[102]

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indistinguishable from the "common character" inquiry developed in Louisiana case law construing the state's prior class action rules.

97. *See* Trangsrud, *supra* note 95, at 789.

98. *See* Elkins v. Equitable Life Ins. of Iowa, No. 96-296, 1998 WL 133741 (M.D. Fla., Jan. 27, 1998).

99. 1 Newberg, *supra* note 20, § 4.25, at 4-82 to 4-84.

100. *Id.* at 4-84 to 4-86.

101. *See* Expanding Energy, Inc. v. Koch Indus., Inc., 132 F.R.D. 180 (S.D. Tex. 1990); *see also*, Anderson v. Bank of the South, N.A., 118 F.R.D. 136, 150 (M.D. Fla. 1987); Goldwater v. Alston & Bird, 116 F.R.D. 342, 354 (S.D. Ill. 1987).

102. Blackie v. Barrack, 524 F.2d 891, 905 (9th Cir. 1975), *cert. denied*, 429 U.S. 816, 97 S. Ct. 57 (1976); *see also* Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988); Bresson v. Thomson McKinnon Secs., Inc., 118 F.R.D. 339, 343 (S.D.N.Y. 1988).

By way of example, although it is possible to certify fraudulent misrepresentation cases, certification ordinarily is not appropriate. To begin with, the same or a substantively indistinguishable misrepresentation must have been made to all class members, as where the misrepresentation appears in a standardized document or public filing or similarly common disclosure.[103] Second, in such cases reliance ordinarily must be established, which usually requires proof as to the state of mind of each claimant, a practicality of proof that normally will frustrate certification because of its inherent individuality.[104] Proof of causation may also engender significant individual issues.[105] Also, questions of individual injury may preclude certification, particularly where the court fears those questions may "overwhelm" the litigation as a whole.[106]

In many cases, the question of individual damages takes center stage. As Professor Newberg has observed: "In most cases, the amount of damages suffered is an individual matter, but the Advisory Committee Notes expressly state that . . . individual proof of damages will not preclude a finding of predominance."[107] Thus, the mere presence of individual damage issues should not automatically preclude certification under the prong of Rule 23.[108]

E. Class Action is Superior Method of Adjudicating the Matter

In addition to finding that common questions predominate over individual ones, Rule 23(b)(3) also requires that a class action be the "superior" method for litigating the case. The court in *Plekowski v. Ralston Purina Co.*[109] explained this requirement as follows:

> Even if the other prerequisites could be shown, the plaintiff must demonstrate that a class action is the best means of resolving the controversy. The Rule does not say that the class vehicle must be "as

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103. *See* Crasto v. Estate of Kaskel, 63 F.R.D. 18 (S.D.N.Y. 1974).

104. *E.g.*, Simer v. Rios, 661 F.2d 655, 673-74 (7th Cir. 1981), *cert. denied*, 456 U.S. 917, 102 S. Ct. 1774 (1982); Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 482 F.2d 880 (5th Cir. 1973); Freedman v. Arista Records, Inc., 137 F.R.D. 225 (E.D. Pa. 1991); *cf.* Basic, Inc. v. Levinson, 485 U.S. 224, 247, 108 S. Ct. 978, 991 (1988) (presuming reliance in Rule 10b-5 cases under the "fraud on the market" theory); *see also* Grainger v. State Sec. Life Ins. Co., 547 F.2d 303, 307-08 (5th Cir. 1977), *cert. denied sub nom.* Nimmo v. Grainger, 436 U.S. 932, 98 S. Ct. 2832 (1978).

105. *See* Strain v. Nutri/System, Inc., No. Civ.A. 90-2772, 1990 WL 209325, at *6 (E.D. Pa. Dec. 12, 1990); *see also* Torres v. CareerCom. Corp., No. 91-3587, 1992 WL 245923, at *3 (E.D. Pa. Sept. 18, 1992).

106. *Elliot*, 1992 U.S. Dist. LEXIS 17340 at *49-50; *see also*, Parnes v. Mast Prop. Investors, Inc., 776 F. Supp. 792, 799 (S.D.N.Y. 1991).

107. 1 Newberg, *supra* note 20, § 4.26, at 4-90 to 4-91.

108. *But see Elliot*, 1992 U.S. Dist. LEXIS 17340, at *49-50; Parnes v. Mast Prop. Invs., Inc., 776 F. Supp. 792, 799 (S.D.N.Y. 1991).

109. 68 F.R.D. 443, 454 (M.D. Ga. 1975); *see also Elkins*, 1998 WL 133741 at *14-16.

> good as" or "almost as good as" some other available method. The word chosen was "superior." Thus, if, as here, the maintenance of a case as a class action presents problems not present in some other procedural alternative, it clearly is not superior to all other methods. (footnotes omitted).

Rule 23(b)(3) specifies four non-exclusive factors which may be considered under the superiority inquiry: (1) the interest of individual control by class members; (2) the existence of other litigation; (3) the effect of concentrating the litigation in the particular forum; and (4) the likely difficulties in managing the action.

First, then, the court must consider the interest of the class members in maintaining an individual action, which could be a serious concern in cases where class members have suffered catastrophic injuries.[110] Next, the court should look at pending litigation addressing the same or related issues by or against some or all of the putative class' members, considering the feasibility of staying or consolidating those competing suits.

Third, the court should look at the desirability or undesirability of concentrating the litigation of the claims in that particular forum considering party and witness convenience, accessibility of tangible evidence, the interests of the forum state, and the like.

Finally, the court must consider the manageability of the proposed class action, keeping in mind such factors as the size of the proposed class, the number (and complexity) of individual versus class issues, the likelihood of personal interventions by other class members, the potential for counter-claims, cross-claims, and the like, the receptiveness of class members to certification, and whether the costs of obtaining and distributing any likely recovery can be expected to render de minimis the benefit to individual class members.[111]

Inquiry under all of these factors is driven by concern with the relative desirability of alternative procedural devices, including requiring the prosecution of individual suits that are to be consolidated for trial of common issues.[112]

F. The Immature Tort: Castano

Construing Rule 23(b)(3), the Fifth Circuit recently overturned certification of a nationwide tobacco exposure class action described by the court as "the largest class action ever attempted in federal court. . . ."[113] In *Castano*, the class complaint alleged that several tobacco companies failed to inform consumers that nicotine is addictive and manipulated the level of nicotine in

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110. Abed v. A. H. Robins Co., 693 F.2d 847 (9th Cir. 1982).

111. *E.g.*, In re Hotel Tel. Charges, 500 F.2d 86 (9th Cir. 1974).

112. *See, e.g.*, Curley v. Cumberland Farms Dairy, Inc., 728 F. Supp. 1123, 1133 (D.N.J. 1989); Moskowitz v. Lopp, 128 F.R.D. 624, 636 (E.D. Pa. 1989).

113. Castano v. American Tobacco Co., 84 F.3d 734, 737 (5th Cir. 1996).

cigarettes to enhance their addictive properties.[114] The putative class included "nicotine-dependent" persons throughout the United States, together with their heirs, relatives, and "significant others." After finding that the putative class and class representatives met the Rule 23(a) prerequisites, as well as the predominance and superiority requirements of Section (b)(3), the district court conditionally certified the class with respect to several "core liability" issues.

On appeal, the Fifth Circuit reversed and remanded. The Fifth Circuit anchored its opinion with the observation that class actions are not generally appropriate for mass torts.[115] According to the court, certification of a class in such cases "dramatically affects the stakes for defendants, . . . magnifies and strengthens the number of unmeritorious claims, . . . makes it more likely [that defendants will be found liable, and] creates insurmountable pressure on defendants to settle."[116] The Fifth Circuit even went so far as to characterize the seemingly inevitable progression of such cases towards settlement as a type of "judicial blackmail."[117]

The Fifth Circuit did not, however, ultimately base its decision on the appropriateness of mass tort class actions. Instead, the court focused upon the propriety of using the class action to test so-called "novel" torts,[118] concluding that, because "no court in the country had ever tried an addiction-as-injury claim," the predominance and superiority requirements of Rule 23(b)(3) could not be met.[119] Embedded within the court's novelty discussion was concern with the "maturity" of the underlying cause of action: the Fifth Circuit plainly felt that without an "established track record of trials" adjudicating a novel theory for recovery, a proper predominance and superiority analysis under Rule 23(b)(3) was impossible.[120] Moreover, even with such a "track record," the Fifth Circuit suggested that the superiority requirement also required proof of enough individual lawsuits advancing the theory that a "judicial management crisis" appeared imminent.[121]

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114. *Id.*

115. *Id.* at 746.

116. *Id.* (citations omitted).

117. *Id.*

118. *See id.* at 748.

119. *Id.* at 744-45.

120. *Id.* at 747. For example, without established jurisprudence, it would be difficult for a court even to identify the issues of the novel cause of action, let alone determine if common issues predominate. *Id.* at 749. Similarly, given the inherent pressures and prejudices endemic to class actions, particularly those alleging mass torts, it is very difficult to argue that the class action is the superior mechanism by which to test and "mature" novel theories of recovery. "The collective wisdom of individual juries is necessary before this court commits the fate of an entire industry or, indeed, the fate of a class of millions, to a single jury." Significantly, the proposed amendments to Rule 23 would include a maturity inquiry under 23(B)(3). 167 F.R.D. 559, 559 (1996).

121. *Id.* at 747-48; *see also* In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.) (Posner, J.), *cert. denied*, 516 U.S. 867, 116 S. Ct. 184 (1995).

II. THE LOUISIANA ARTICLES

A. Introduction

The relevant Articles of the Code of Civil Procedure were dramatically altered by Louisiana Act 1997 No. 839, section 1, which adopted wholesale the provisions of Federal Rule of Civil Procedure 23 with a few additions. Pursuant to Section 3 of Act 839, however, this new regime is applicable "only to actions filed on and after its effective date," which was July 10, 1997. Thus, class actions filed before July 10, 1997 will be governed by the prior rules. It remains to be seen how the courts will treat federal cases filed before July 10, 1997 that are later remanded to state court, an inquiry which *may* vary depending upon whether the case was originally filed in federal court or, instead, was removed from state court.[122]

B. The Amended Articles

As now amended, the relevant Code article governing the certification of class actions, Louisiana Code Civil Procedure article 591, provides as follows:

> 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.
>
> (5) The class is or may be defined objectively in terms of ascertainable criteria, such that the court may determine the constituency of the class for purposes of the conclusiveness of any judgment that may be rendered in the case.
>
> B. An action may be maintained as a class action only if all of the prerequisites of Paragraph A of this Article are satisfied, and in addition:
>
> (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

122. *See* Armentor v. General Motors Corp., 399 So. 2d 811 (La. App. 3d Cir. 1981); *cf.* deReyes v. Marine Mgt. & Consulting, Ltd., 544 So. 2d 1259 (La. App. 4th Cir.), *writ denied*, 548 So. 2d 1249 (1989).

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. The matters pertinent to these findings include: (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.

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.

Act No. 839, section 1 (1997).

Also of note is new-Article 592, which provides a new *procedure* for obtaining certification of class actions:

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.

(3)(a) No motion to certify an action as a class action shall be granted prior to a hearing on the motion. Such hearing shall be held as soon as practicable, but in no event before (i) all named adverse parties have been served with the pleading containing the demand for class relief or have made an appearance or, with respect to unserved defendants who have not appeared, the proponent of the class has made due and diligent effort to perfect service of such pleading; and (ii) the parties have had a reasonable opportunity to obtain discovery on class certification issues, on such terms and conditions as the court deems necessary. (b) If the court finds that the action should be maintained as a class action, it shall certify the action accordingly. If the court finds that the action should not be maintained as a class action, the action may continue between the named parties. (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. (d) No order contemplated in this Subparagraph shall be rendered after a judgment or partial judgment on the merits of common issues has been rendered against the party opposing the class and over such party's objection.

B. (1) In any class action maintained under Article 591(B)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. This notice, however given, shall be given as soon as practicable after certification, but in any event early enough that a delay provided for the class members to exercise an option to be excluded from the class will have expired before commencement of the trial on the merits of the common issues. (2) The notice required by Subparagraph B(1) shall include (a) a general description of the action, including the relief sought, and the names and addresses of the representative parties or, where appropriate, the identity and

location of the source from which the names and addresses of the representative parties can be obtained; (b) a statement of the right of the person to be excluded from the action by submitting an election form, including the manner and time for exercising the election; (c) a statement that the judgment, whether favorable or not, will include all members who do not request exclusion; (d) a statement that any member who does not request exclusion may, if the member desires, enter an appearance through counsel at that member's expense; (e) a statement advising the class member that the member may be required to take further action as the court deems necessary, such as submitting a proof of claim in order to participate in any recovery had by the class; (f) a general description of any counterclaim brought against the class; (g) the address of counsel to whom inquiries may be directed; and (h) any other information that the court deems appropriate. (3) Unless the parties agree otherwise, the proponents of the class shall bear the expense of the notification required by this Paragraph. The court may require the party opposing the class to cooperate in securing the names and addresses of the persons within the class defined by the court for the purpose of providing individual notice, but any additional costs reasonably incurred by the party opposing the class in complying with this order shall be paid by the proponent of the class. The court may tax all or part of the expenses incurred for notification as costs.

C. The judgment in an action maintained as a class action under Article 591(B)(1) or (B)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under Article 591(B)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in Paragraph B was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

D. When appropriate (1) an action may be brought or maintained as a class action with respect to particular issues, or (2) a class may be divided into subclasses and each subclass treated as a class, and the provisions of Article 591 and this Article shall then be construed and applied accordingly.

E. In the conduct of actions to which Article 591 and this Article apply, the court may make any of the following appropriate orders:

(1) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument.

(2) Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to members of

> the class of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action.
> (3) Imposing conditions on the representative parties or on intervenors.
> (4) Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly.
> (5) Dealing with similar procedural matters, including but not limited to case management orders providing for consolidation, duties of counsel, the extent and the scheduling of and the delays for pre-certification and post- certification discovery, and other matters which affect the general order of proceedings; however, 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 knowledge or reliance of the member, or the applicability to the member of individual claims or defenses.
> (6) Any of the orders provided in this Paragraph may be combined with an order pursuant to Article 1551, and may be altered or amended as may be desirable from time to time.

At the time this article was written, the author could locate no reported case law addressing certification under revised Articles 591 or 592. Obviously, given the legislature's reliance upon Federal Rule of Civil Procedure 23, Louisiana courts can be expected to look to federal case law for guidance in construing these articles. A few obvious distinctions between Article 591 and Rule 23(a) and (b) should be noted, however.

1. Identifiability: Article 591(A)(5)

The first difference of note as between Rule 23 and Article 591 is found at Article 591(A)(5), which has no counterpart in Rule 23. The text of this subsection, however (which requires that the members of a proposed class must be objectively identifiable), tracks well-settled federal case law implying such a provision into Rule 23. In addressing this identifiability requirement, federal courts have generally concluded that a class is identifiable if, from the description of the class in the complaint, the court can determine whether a

particular individual is a member.[123] This implied requirement is said to serve two purposes: (1) it assists both the court and the litigants in ascertaining the manageability of the proposed class action; and (2) it ensures that the parties whose rights or interests are at stake will be the recipients of any relief.[124] Furthermore, because the outcome of the putative class action will be *res judicata* as to all unnamed members, the definition of the class must not be vague or difficult to apply; courts therefore commonly require that membership be "capable of ascertainment under some objective standard."[125] Thus, for example, the class definition cannot depend upon the individual members' state of mind.[126]

2. Practicability and Relief: Article 591(B)(3)(e) & (f)

Next, it should be noted that the factors appearing at Subsections (e) and (f) under Article 591(B)(3) (which is taken from Rule 23(b)(3)) do not appear in the corresponding text of Federal Rules of Civil Procedure 23. Again, however, these criteria track considerations commonly "read into" Rule 23 by the case law.[127] Relevant to the inquiry would be questions as to the plausibility of consolidation, intervention, and joinder.

3. The Settlement Class: Article 591(B)(4)

Similarly, Article 591(B)(4), providing for settlement classes, has no equivalent provision under Rule 23. Nonetheless, the use of settlement classes

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123. Luedke v. Delta Air Lines, Inc., No. 92 Civ. 1778, 1993 WL 313577, at *3 (S.D.N.Y. Aug. 10, 1993); Wright et al., *supra* note 15, § 1760.

124. Simer v. Rios, 661 F.2d 655, 670 (7th Cir. 1981), *cert. denied*, 456 U.S. 917, 102 S. Ct. 1773 (1982).

125. Crosby v. Social Sec. Admin., 796 F.2d 576, 580 (1st Cir. 1986) (quoting 3B Moore's Federal Practice § 23.04[1], at 23-199).

126. *Simer*, 661 F.2d at 669; DeBremaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970). *Compare* Harris v. General Dev. Corp., 127 F.R.D. 655, 659 (N.D. Ill. 1989) (declining to certify class of persons deterred from seeking employment at defendant corporation because of inevitable questions as to each member's state of mind) *with* Rosario v. Cook County, 101 F.R.D. 659, 664 (N.D. Ill. 1983) (certifying class of current employees allegedly deterred from seeking promotion).

127. With respect to Article 591(B)(3)(f), *see, e.g.*, In re Ramtek Sec. Litig., [1990-91 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95, 814, at 98, 908 (N.D. Cal., Feb. 4, 1991); In re Crazy Eddie Secs. Litig., 135 F.R.D. 39 (E.D.N.Y. 1991); *see also* Kline v. Coldwell, Banker & Co., 508 F.2d 226, 234 (9th Cir. 1974), *cert. denied*, 421 U.S. 963, 95 S. Ct. 1949 (1975) (denying certification where the size of the potential verdict shocked the court's conscience). With respect to Article 591(B)(3)(e), which to some extent simply re-states the "superiority" inquiry, *see, e.g.*, Dickson v. Chicago Allied Warehouses, Inc., No. 90 C 6161, 1993 WL 362450, at *2 (S.D. Ill. Sept. 15, 1993); Johns v. DeLeonardis, 145 F.R.D. 480, 482 (N.D. Ill. 1992); Bressen v. Thomson McKinnon Sec. Inc., 118 F.R.D. 339, 345 (S.D.N.Y. 1988); Goldwater v. Alston & Bird, 116 F.R.D. 342, 356 (S.D. Ill. 1987).

is commonplace in federal practice.[128] This practice is not without its critics, as earlier versions of the manual for complex litigation confirms: "[T]entative classes for the purpose of settlement . . . should never be formed."[129]

In federal practice, the only clear prerequisite for certification of a settlement class, once requested by the parties, is the existence of an identifiable class.[130] Interestingly, as written, 591(B)(4) appears to incorporate all of the requirements under paragraph (A), to-wit: numerosity, commonality, typicality, and adequacy.

4. Article 591(C): The Function of Certification

Finally, Paragraph (C) of Article 591 is without precedence under Rule 23 as best as this author can tell. Perhaps it is intended to resolve aspects of the tolling question addressed in *American Pipe & Construction Co. v. Utah*,[131] and its progeny. In any event, the exact function—and, frankly, meaning—of this paragraph is unclear, in part because certification is a purely procedural exercise entirely divorced (at least theoretically) from the substantive merits of a case,[132] and in part because, under paragraphs (A)(1) and (B) of Article 591, certification is by definition concerned with common issues of law and fact.

C. The Prior Regime in Louisiana

Article 591 (1997) *et seq.*, enacted with the rest of the Louisiana Code of Civil Procedure in 1960, represented a middle ground, of sorts, between the original version of Federal Rules of Civil Procedure 23(a) and the amended version adopted in 1966. In piecing Article 591 (1997) *et seq.* together, the Code's redactors properly recognized that the "hybrid" and "spurious" class actions functioned as a sort of joinder mechanism, unnecessary given the Code's separate joinder provisions and the general jurisdiction of the state's courts:

> Under federal practice, Fed. Rule 23 covers three separate and distinct types of class actions: the true class action, the hybrid class action, and the spurious class action.
>
> In the true class action, if the representation of the members of the class is adequate, the judgment concludes not only the representative parties, but all other members of the class who are not joined as parties. In strict theory the judgment in the hybrid class action concludes only

128. *See, e.g.*, Gould v. Alleco, Inc., 883 F.2d 281 (4th Cir. 1989), *cert. denied*, 493 U.S. 1058, 110 S. Ct. 870 (1990); In re Beef Indus. Antitrust Litig., 607 F.2d 167, 175 n.5 (5th Cir. 1979) (citing cases), *cert. denied*, 452 U.S. 905, 101 S. Ct. 3029 (1981).

129. Manual for Complex Litigation § 1.46, at 24 (1973).

130. In re Beef Indus. Antitrust Litig., 607 F.2d 167, 177-78 (5th Cir. 1979). *But see* In re Dennis Greenman Secs. Litig., 622 F. Supp. 1430 (S.D. Fla. 1985), *rev'd*, 829 F.2d 1539 (11th Cir. 1987).

131. 414 U.S. 538, 94 S. Ct. 756 (1974).

132. *E.g.*, Hardin v. Harshbarger, 814 F. Supp. 703, 706 (N.D. Ill. 1993).

> the representative parties and persons who subsequently join in the action, but, as a practical matter, since there is a disposition of the property involved under the judgment, the latter may be prejudicial to those members of the class who do not join in the action. In the spurious class action, only the parties who actually join in the action are concluded by the judgment, and their rights would not be affected by their failure to join. "It is an invitation and not a command performance." 3 Moore's Federal Practice (2d ed.) 3443 (1948).
>
> Both the hybrid and the spurious class actions are permissive joinder devices which are badly needed in federal practice where the jurisdiction of the court often depends upon diversity of citizenship. Joinder of all members of the class in the original complaint, or by intervention, would otherwise deprive a federal court of jurisdiction in all cases where a plaintiff and a defendant are citizens of the same state. But through the use of this permissive joinder device, the representative plaintiffs or defendants can be so selected as to afford the necessary diversity of citizenship; and once the court has acquired jurisdiction over the class action, it has ancillary jurisdiction to permit the subsequent joinder, or to adjudicate the rights of, all other members of the class. Hence, under its ancillary jurisdiction, the federal court may render judgment on the claims of those members of the class who subsequently join in the action.
>
> There is no need for either the hybrid or the spurious class action in Louisiana, and therefore this Code provides for only the true class action.[133]

Louisiana Code of Civil Procedure articles 591-592 (1997) were thus taken almost verbatim from the original Rule 23(a), save for the deletion of paragraphs 23(a)(2) and (3) (addressing hybrid and spurious class actions), and the addition of a reference to secondary actions (addressed in old Rule 23(b)), which paragraph was incorporated by the Code's redactors into Article 611 (1997). Construing this text, Louisiana courts articulated three requirements for certification of class actions that, at least as subsequently construed in the jurisprudence, address the same concerns as do sections (a) and (b) from the amended text of Rule 23, commonly referred to as the impracticality (or "numerosity"), adequacy, and "common character" requirements.

1. Impracticality

Under the so-called "impracticality" prong, the jurisprudence requires that the persons constituting the putative class be "so numerous as to make it

133. *See also* Ford v. Murphy Oil U.S.A., Inc., 703 So. 2d 542, 543-44 (La. 1997).

impracticable for all of them to join or be joined as parties."[134] This requirement reflects the basic function of the class action as a device for allowing a small number of persons to protect or enforce rights or claims for the benefit of many where it would be inequitable and impracticable to join every person sharing an interest in the rights or claims at issue in the suit.[135] The burden is on the plaintiff to make a *prima facie* showing that a definable group of aggrieved persons exists, and that joinder of all of the class' members would be impracticable.[136] By requiring numerosity, the Code, like Federal Rule of Civil Procedure 23(a)(1), protects members of very small classes from being denied their day in court.

Impracticability is not intended as a synonym for "impossibility."[137] The court must instead examine the facts of each case and reach a fact-specific conclusion.[138] In undertaking this analysis, the most obvious factor for examination is the actual size of the class. In this sense, although no specific cut-off number exists, the proponent of class action status must do more than merely allege that a large number of people may be involved.[139]

In addition to the actual size of the class, other factors, such as the difficulty of identifying claimants (for example, situations where prospective relief, that might directly impact future unknown absent class members, is being sought) and their geographic dispersion, also are relevant under this prong of Article 591.[140]

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134. *See* Fed. R. Civ. P. 23(a)(1).

135. *See, e.g.*, Lailhengue v. Mobile Oil Co., 657 So. 2d 542 (La. App. 4th Cir. 1995); Verdin v. Thomas, 191 So. 2d 646 (La. App. 1st Cir. 1966).

136. Cotton v. Gaylord Container, 691 So. 2d 760, 768 (La. App. 1st Cir.), *writ denied*, 693 So. 2d 147 (La. 1997); Pulver v. 1st Lake Properties, 681 So. 2d 965, 968 (La. App. 5th Cir. 1996); Brumfield v. Rollins Envtl. Servs., Inc., 589 So. 2d 35, 37-38 (La. App. 1st Cir. 1991).

137. *See generally* Robidoux v. Lelani, 987 F.2d 931, 935 (2d Cir. 1993); Cypress v. Newport News, 375 F.2d 648 (4th Cir. 1967).

138. Dumas v. Angus Chem. Co., 635 So. 2d 446 (La. App. 2d Cir.), *writ denied*, 640 So. 2d 1349 (La. 1994); Adams v. CSX R.R., 615 So. 2d 476 (La. App. 4th Cir. 1993).

139. *See Pulver*, 681 So. 2d at 968; Becnel v. United Gas Pipeline Co., 613 So. 2d 1155, 1157 (La. App. 5th Cir. 1993); *Dumas*, 635 So. 2d at 449 (citing Rivera v. United Gas Pipeline Co., 613 So. 2d 1152, 1154 (La. App. 5th Cir. 1993)); O'Halleron v. L.E.C., Inc. 471 So. 2d 752, 755 (La. App. 1st Cir. 1985)); *cf.* Rivera v. United Gas Pipeline Co., 613 So. 2d 1152, 1154 (La. App. 5th Cir. 1993) (citing Farlough v. Smallwood, 526 So. 2d 810 (La. 1988)).

140. McCastle v. Rollins Envtl. Servs., 456 So. 2d 612, 620 (La. 1984) ("Difficulty in identifying the claimants is one of the factors which makes joinder impracticable and a class action appropriate."); *cf.* Williams v. State, 350 So. 2d 131, 133 (La. 1977).

Among those cases where certification was denied under the impracticability standard are the following: Carr v. Houma Redi-Mix Concrete, Inc., 705 So. 2d 213 (La. App. 1st Cir. 1997); Phillips v. Orleans Parish Sch. Bd., 541 So. 2d 226 (La. App. 4th Cir. 1989); Farlough v. Smallwood, 524 So. 2d 201 (La. App. 4th Cir.), *writ denied*, 526 So. 2d 810 (La. 1988); O'Halleron v. L.E.C., Inc., 471 So. 2d 752 (La. App. 1st Cir. 1985); Debs v. Sunrise Homes, Inc., 430 So. 2d 110 (La. App. 5th Cir.), *writ denied*, 437 So. 2d 1153 (1983).

2. Adequate Representation

Article 592 (1997) also required, in addition to numerosity, that there be as representatives of the class "[o]ne or more members of [the] class, who will fairly insure the adequate representation of all members. . . ." Although the jurisprudence is somewhat confused—a state of affairs that is not surprising given the meandering language of Article 591 (1997) *et seq.*—the case law appears to construe this requirement as a sort of amalgamation of the commonality, typicality, and representation requirements imposed under Federal Rule of Civil Procedure 23(a)(2)-(4).[141]

Again, there are important due process connotations attendant to the need for adequate representation. Indeed, even aside from concerns about notice to absent class members, inadequacy in the representation afforded to class members not party to a class action suit alone is a sufficient basis to upset any judgment obtained in the class action suit.[142]

A determination of adequacy is inevitably fact intensive, focusing upon the appropriateness of one or another (often competing) group or faction as the representative of a class. Most immediately, such an inquiry demands both (1) that there be an identifiable class, that is, a group of people sharing a claim or claims that arose from the same event, practice, or course of conduct, based upon the same legal theory or theories; and (2) that the putative class representative be a member of that class.[143] Simply stated, without membership in the class and an attendant interest in the outcome of litigation concerning that class, it is assumed that one lacks the motivation vigorously to pursue the rights or claims shared by the class' members.[144] Thus, as was noted above, the concept of

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141. *Cf.* General Tel. Co. v. Falcon, 457 U.S. 147, 157 & n.13, 102 S. Ct. 2364, 2370 & n.13 (1982) ("[T]he commonality and typicality requirements of Rule 23(a) tend to merge . . . as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest."); Fertig v. Blue Cross of Iowa, 68 F.R.D. 53, 57 (N.D. Iowa 1974) (the typicality requirement "apparently overlaps and was intended to buttress the fair representation requirement . . . on the theory that if the claims and defenses are typical the representatives in supporting their own claims will likewise advance the claims of others in like position").

142. *See* Hansberry v. Lee, 311 U.S. 32, 44-46, 61 S. Ct. 115, 119-20 (1940); Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975); *see also* Allen R. Kamp, *The History Behind* Hansberry v. Lee, 20 U.C. Davis L. Rev. 481 (1987).

143. *See McCastle*, 456 So. 2d at 616; *cf.* Redditt v. Mississippi Extended Care Ctrs., Inc., 718 F.2d 1381, 1387 (5th Cir. 1983); Simer v. Rios, 661 F.2d 655, 669 (7th Cir. 1981); Jones v. Diamond, 519 F.2d 1090 (5th Cir. 1975).

144. *See* Lewis v. Texaco Exploration and Prod. Co., 698 So. 2d 1001, 1012 (La. App. 1st Cir. 1997).

"typicality" provided for in Federal Rule of Civil Procedure 23(a)(3) is necessarily present under Article 592 (1997) as well.[145]

It is the class proponent's burden to demonstrate by affirmative evidence that the putative class representative will be able to discharge the role of class representative adequately.[146] However, no specific ruling concerning the class representative is required, as certification presumes adequacy.[147]

Louisiana courts considering the question of adequacy have stressed the need for class membership, often at the expense of any meaningful analysis. In one often repeated passage, the adequacy requirement is described as a rule that "the claims of the class representatives must merely be a cross-section of, or typical of, the claims of all class members."[148] Thus, as explained by one court finding adequate representation, "[w]hile each member has not suffered every type of alleged injury, the representatives' claims are typical of the majority of the class and their damages represent a cross-section of the typical property, emotional, and economic injuries suffered by members of the class."[149]

In one recent case where certification was denied for inadequacy of representation, the court focused upon the presence of unique factual issues distinguishing the proposed representatives' claims from those of the class members as defined in the petition, commenting that even where a common legal theory has been advanced, if the circumstances giving rise to the representatives' claim are unique, their representation cannot be adequate: "It is the circumstances under which class representatives and absent class members came to [be injured] . . . that is the determining factor."[150]

Among other factors which *may* be relevant to such a "typicality" inquiry are the following:

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145. *See supra* note 141 and accompanying text.

146. *E.g.*, Cotton v. Gaylord Container, 691 So. 2d 760, 769 (La. App. 1st Cir. 1997); *cf.* Ellis v. Georgia-Pacific Corp., 550 So. 2d 1310, 1315 (La. App. 1st Cir. 1989); *Dumas*, 635 So. 2d at 451; Adams v. CSX R.R., 615 So. 2d 476, 481 (La. App. 4th Cir. 1993); Livingston Parish Police Jury v. Acadiana Shipyards, Inc., 598 So. 2d 1177, 1181 (La. App. 1st Cir. 1992).

147. *E.g.*, Atkins v. Harcross Chems., Inc., 638 So. 2d 302, 306 (La. App. 4th Cir.), *writ denied*, 644 So. 2d 396 (1994).

148. *Atkins*, 638 So. 2d at 305 (citing Adams v. CSX RR., 615 So. 2d 476, 481 (La. App. 4th Cir. 1993)); *see also* Lewis v. Texaco Exploration & Prod. Co., 698 So. 2d 1001, 1012 (La. App. 1st Cir. 1997) ("If the claims of multiple class representatives are demonstrated to be a cross-section of the types of claims asserted by the class members, and not antagonistic to the class, the representatives are adequate."); *Dumas*, 635 So. 2d at 450.

149. Boudreaux v. State, 690 So. 2d 114, 124 (La. App. 1st Cir. 1997). *Cf.* Verdin v. Thomas, 191 So. 2d 646, 650-51 (La. App. 1st Cir. 1966) ("It is the unity of interest among members of the class which is controlling. In determining the question (of adequate representation) the court must consider (1) whether the interest of the named party is co-extensive with the interests of the other members of the class; (2) whether his interests are antagonistic in any way to the interest of those whom he represents; (3) the proportion of those made parties as compared with the total membership of the class; (4) any other factors bearing on the ability of the named party to speak for the rest of the class.") (citing Moore's Federal Practice).

150. Strong v. Bell South Communications, Inc., 643 So. 2d 319, 322 (La. App. 2d Cir. 1994).

(1) The representative must be able to demonstrate that he or she suffered an actual—*vis-a-vis* hypothetical—injury;[151]

(2) The representative should possess first hand knowledge or experience of the conduct at issue in the litigation;[152]

(3) The representative's stake in the litigation, that is, the substantiality of his or her interest in winning the lawsuit, should be significant enough, relative to that of other class members, to ensure that representative's conscientious participation in the litigation;[153] and

(4) The representative should not have interests seriously antagonistic to or in direct conflict with those of other class members, whether because the representative is subject to unique defenses or additional claims against him or her, or where the representative is seeking special or additional relief.[154]

In addition to addressing the class representative, the adequacy of class counsel has also been considered by at least one court under this prong of the certification inquiry:

> Additionally, we find that there was no evidence in the record to support a finding of adequacy of class counsel. To date, our state courts have not specifically addressed the adequacy of counsel issue. However, federal courts have long construed the adequacy of representation requirement to consist of two components—adequacy of class representatives as well as the adequacy of class counsel.[155]

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151. *See, e.g.*, O'Shea v. Littleton, 414 U.S. 488, 94 S. Ct. 669 (1974).

152. *See, e.g.*, Sicinski v. Reliance Funding Corp., 82 F.R.D. 730 (S.D.N.Y. 1979); *but see*, Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 86 S. Ct. 845 (1966).

153. *See, e.g.*, Seidman v. American Mobile Sys., Inc., 157 F.R.D. 354 (E.D. Pa. 1994); *see also* Palmer v. BRG of Georgia, Inc., 874 F.2d 1417 (11th Cir. 1989) (focusing on financial commitment to litigation and correspondent willingness and ability to represent class vigorously), *rev'd on other grounds*, 498 U.S. 46, 111 S. Ct. 401 (1990); McGowan v. Faulkner Concrete Pipe Co., 659 F.2d 554, 559 (5th Cir. 1981) and *compare* Rand v. Monsanto Co., 926 F.2d 596, 599 (7th Cir. 1991) and Sanderson v. Winner, 507 F.2d 477, 479 (10th Cir. 1974), *cert. denied sub nom.* Nissan Motor Corp. v. Sanderson, 421 U.S. 914, 95 S. Ct. 1573 (1975).

154. *See, e.g.*, Compass v. Pan Am. Life Ins. Co., 443 So. 2d 720 (La. App. 4th Cir. 1983), *writ denied*, 446 So. 2d 1231 (1984); Pellerin v. Louisiana Health Serv. and Indem. Co., 460 So. 2d 93 (La. App. 3d Cir. 1984); *see also* Killian v. McCulloch, 873 F. Supp. 938 (E.D. Pa. 1995), *aff'd sub nom.* Stadler v. McCulloch, 82 F.3d 406 (3d Cir. 1996); Anderson v. Bank of the South, N.A., 118 F.R.D. 136 (D. Fla. 1987). *See generally* Verdin v. Thomas, 191 So. 2d 646, 650-51 (La. App. 1st Cir. 1966) (quoting 3 Moore's Federal Practice § 3425 (2d ed. 1948)); *see also* Brown v. New Orleans Pub. Serv., Inc., 506 So. 2d 621 (La. App. 4th Cir.), *writ denied*, 508 So. 2d 67 (1987).

155. Cotton v. Gaylord Container, 691 So. 2d 760, 770 (La. App. 1st Cir. 1997) (citations omitted).

3. Common Character

Louisiana courts have evolved the analysis under the third and final prong of the class action inquiry, the "common character analysis," loosely to track that of their federal counterparts under Federal Rules of Civil Procedure 23(b)(3). As explained by the Louisiana Supreme Court, the analysis is as follows:

> Under Louisiana practice there must be a "common character" among the rights of the representatives and the absent members of the class in order to make for a proper class action. La. C.C.P. art. 591(1). This is not merely a reappearance of the common questions threshold requirement noted above. The requirement of a "common character" restricts the class action to those cases in which it would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. *Cf.* Proposed Amendments to Rules of Civil Procedure for the United States District Courts, Rule 23, Advisory Committee's Note, 39 F.R.D. 69, 102-103. Its object is to identify the cases where a class action promises important advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party. It invites a close look at the case before it is accepted as a class action and even then requires that it be specially treated. *Cf. Kaplan, supra,* at 389-390.
>
> When a "common character" of rights exists, a class action is superior to other available adjudicatory methods for the purpose of promoting the basic aims and goals of a procedural device: (1) effectuating substantive law; (2) judicial efficiency; and (3) individual fairness. *Guste v. General Motors Corp.*, 370 So.2d 477, 488 (La. 1978); *Williams v. State*, 350 So.2d 131, 133-34 (La. 1977); *Stevens v. Board of Trustees*, 309 So.2d 144, 151 (La. 1975). Therefore, if the superiority of a class action is disputed, the trial court must inquire into the aspects of the case and decide whether the intertwined goals of effectuating the substantive law, judicial efficiency, and individual fairness would be better served by some other procedural device.
>
> Many class action related circumstances in a particular case may contribute toward or detract from the intertwined goals. Non-exhaustive lists of some of the factors, which may appear in any given case with varying degrees of intensity, are set forth by Federal Rule 23(b) and the Uniform Class Actions Act and have been suggested for use by this court. *See Stevens, supra,* 309 So.2d at 150-51; Williams, supra, 350 So.2d at 134, n. 3. After identifying the listed factors and any relevant unlisted ones that may be present in the case, the trial court must evaluate, quantify and weigh them to determine to what extent the class action would in each instance promote or detract from the goals of

> effectuating substantive law, judicial efficiency, and individual fairness. Upon arriving at an estimate of the class action's overall effectiveness in furthering the intertwined goals, the court must compare this with its assessment of the effectiveness of other adjudicatory methods and decide whether the class action is the superior procedural device.[156]

As noted earlier, under Federal Rules of Civil Procedure 23(b), Section 23(b)(3), which allows for the maintenance of class actions where questions of law or fact common to the class "predominate" over those relevant only to isolated members and the class action "is superior to other available methods for the fair and efficient adjudication of the controversy," operates as the general or "catch-all" category of class actions. Under *McCastle* and its forbears, this analysis lies at the heart of the Louisiana courts' approach to class action certification, as well.[157]

The "common character" analysis is therefore properly viewed as a two-step inquiry, first requiring a determination as to whether common issues predominate over questions affecting only individual members and second requiring a determination as to whether the class action mechanism is superior to other procedural mechanisms. Both inquiries have been described by Louisiana courts as a "balancing test," designed "to identify the cases where a class action promises important advantages of economy, effort and uniformity of result," all subject to considerations of fairness to individual class members.[158]

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156. McCastle v. Rollins Envtl. Servs. of La., Inc., 456 So. 2d 612, 616-18 (La. 1984) (footnotes omitted). The approach that has evolved in the Louisiana jurisprudence under the so-called "common character" analysis mirrors in some ways the unified treatment many federal courts have given to the predominance, commonality, and typicality prongs of Rule 23. *See, e.g., Elliot*, 1992 U.S. Dist. LEXIS 17340 at § 24 (commonality and predominance are intimately intertwined); Freedman v. Arista Records, Inc., 137 F.R.D. 225 (E.D. Pa. 1991) (typicality, dominance, and superiority elements all overlap); Zupnick v. Thompson Parking Partners, 1990 WL 113197, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,388 (S.D.N.Y., Aug. 1, 1990) (predominance and superiority analyses always subsume discussions of numerosity, commonality, and typicality); Spicer v. Chicago Bd. of Options Exch., Inc., 1990 WL 16983, [1989-90 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,943 at 95,253-54 (N.D. Ill., Jan. 31, 1990) (finding of predominance assumes commonality); Meiresonne v. Marriott Corp., 124 F.R.D. 619, 622 n.7 (N.D. Ill. 1989) (typicality subsumes commonality); Alexander Grant & Co. v. McAlister, 116 F.R.D. 583, 590-91 (S.D. Ohio 1987) (predominance and superiority inquiries incorporate analyses under numerosity, commonality and typicality requirements).

If one goes one small step further and accepts, as many federal courts and commentators have, that Rule 23(b)(3) is the general class action statute and 23(b)(1) and (b)(2) class actions are merely particular examples singled out for special treatment with respect to the opt-out rights of class members, the results reached in the Louisiana case law under the common character analysis can be seamlessly merged with federal case law. Failure to be aware of these points, however, can engender considerable confusion, which in fact infects most of the Louisiana case law addressing the common character prong under *Stevens* and its progeny.

157. *See* Atkins v. Harcross Chems., Inc., 638 So. 2d 302, 304 (La. App. 4th Cir.), *writ denied*, 644 So. 2d 396 (1994).

158. *Atkins*, 638 So. 2d at 304; *see also* Guste v. General Motors Corp., 307 So. 2d 477, 489

The Louisiana Supreme Court recently offered the following overview of its past decisions addressing the common character prong:

> Since *Stevens*, we have applied these factors in three subsequent cases to determine whether "the character of the right sought to be enforced . . . is common to all members of the class . . ." under La. C.C.P. art. 591. In *Williams v. State*, we allowed a class action filed by 600 prisoners against the state for food poisoning they suffered after eating a lunch at a state prison, but held that, for class certification, "[t]he evidence as to the tort itself must be identical for each claim." 350 So.2d 131, 135 (La. 1977). In *State ex rel. Guste v. General Motors Corp.*, we allowed a class action by 1,400 car buyers against GMC for deceptive trade practices, holding that "[t]he mere fact that varying degrees of damages may result from the same legal relationship does not defeat a class action." 370 So.2d 477, 489 (La. 1978) (on rehearing). Finally, in *McCastle v. Rollins Environmental Services of Louisiana, Inc.*, . . ., allowed a class action of 4000 residents against the operator of a hazardous waste facility and the supplier of the hazardous waste alleging that the fumes and odors from the facility on certain dates caused them physical injuries because "there exists as to the totality of issues a common nucleus of operative facts. . . ." 456 So.2d 612, 620 (La. 1984).
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> * * *
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> Of particular relevance . . . is our discussion in *McCastle* of whether common questions predominated over individual issues. In *McCastle*, we held:
>
> > Offering the same facts, all class members will strive to establish that the hazardous waste materials placed in the soil by the defendants emitted gases, fumes and odors capable of causing harm and unreasonable inconvenience to persons in the neighborhood. Each class member stands in an identical position with respect to the following issues: (1) whether hazardous waste materials of the quality and quantity capable of causing the damage and unreasonable inconvenience alleged were present at the land farm on the pertinent dates; (2) whether the land farm emitted harmful and malodorous gases on the dates alleged; (3) whether the probable dispersion patterns of the gases and odors emitted include the areas within which the residences of the members of the class are located. *Id.* at 619-620. We further held that the potential individual issues of whether each member of the class was harmed or inconvenienced on the same dates or sustained the same amount of injury did not defeat the class action because "on all

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(La. 1979).

> of the dates in question the land farm received similar hazardous waste from the same source and that the land farming operations were conducted consistently." *Id.* at 620. "Consequently, there exists as to the totality of issues a common nucleus of operative facts such as would justify allowing the class action to proceed." *Id.* It is important to point out that in *McCastle*, the plaintiffs had already been granted an injunction enjoining the defendant from emitting nauseous odors, thus indicating the court's belief that the plaintiffs would likely succeed on the merits. 415 So.2d 515 (La. App. 1st Cir. 1982). Furthermore, . . . the plaintiffs in *McCastle* alleged 129 discrete acts over an 11-month period that caused their specific and limited injuries. In addition, in *McCastle* we pointed out that there was only one source of odors and fumes . . . .[159]

In *Guste v. General Motors Corp.*,[160] the Supreme Court suggested the following factors—taken from Federal Rules of Civil Procedure 23(b)(3)(A)-(C)—for determining "whether the class action is the *superior procedural vehicle* for the fair and efficient adjudication of the controversy" (emphasis added):

> (1) "[T]he interest of class members in controlling the prosecution of individual actions." This factor takes into consideration cases where individual members may have peculiar interests in maintaining individual actions where they can maintain control of their own suit, as where the individual class members have all suffered severe damages or, in the case of defendant classes, are faced with serious claims.[161]
>
> (2) "[T]he extent and nature of litigation already begun by the class members." As explained by the court in *Guste*, "a class action is more useful when only a limited number of additional suits has been filed."[162]
>
> (3) "[T]he desirability of concentrating the litigation in one forum." This third factor concerns the convenience of litigants and witnesses, the availability of evidence, and the like.
>
> (4) "[T]he difficulties likely to be encountered in the management of a class action." The court in *Guste* had this to say about the "manageability" requirement:

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159. Ford v. Murphy Oil U.S.A., Inc., 703 So. 2d 542, 545, 548 (La. 1997).

160. 370 So. 2d 477, 489 (La. 1978).

161. *See, e.g.*, *McCastle*, 456 So. 2d at 621; *see also* Dumas v. Angus Chem. Co., 635 So. 2d 446, 452 (La. App. 2d Cir. 1994); Spitzfaden v. Dow Corning Corp., 619 So. 2d 795, 798 (La. App. 4th Cir. 1993).

162. *Guste*, 370 So. 2d at 490; *see McCastle*, 456 So. 2d at 620.

> [W]e indicated in Williams that "assuring reasonable notice of incidental episodes in the litigation, as well as . . . distributing any recovery, if awarded," 350 So.2d 131, 136 involved in weighing class manageability.[163]

The foregoing factors are by no means exhaustive. Indeed, in *McCastle v. Rollins Environmental Services*, the Louisiana Supreme Court regrouped the foregoing elements of the "common character" analysis under three headings: (1) Effectuating Substantive Law; (2) Judicial Efficiency; and (3) Fairness of the Parties.[164] In addition, courts may wish to consider other factors, such as the risk of prejudice from separate suits either yielding inconsistent adjudications that could subject a single defendant to irreconcilable standards of conduct, or giving rise to estoppel issues that could affect rights or claims individual to certain class members.

The evolution of the jurisprudence in Louisiana addressing the "common character" inquiry is marked by the court's struggle to determine exactly where the compromise between "true" class actions and the far more amorphous categories of class actions addressed under the pre-1966 version of Rule 23 property should lie. The difficulty of this process is illustrated by two 1970 decisions rendered by the Louisiana Fourth Circuit Court of Appeals: *Caswell v. Reserve National Insurance Co.*,[165] and *Veal v. Preferred Thrift & Loan of New Orleans, Inc.*[166]

In *Caswell*, the plaintiff attempted to bring a putative class action against an insurer that allegedly included in its form health insurance policies a provision allowing for cancellation and renewal of the policy at the option of the insurer, which discretion the insurer apparently had attempted to exploit to force its insureds to execute riders excluding future coverage for catastrophic illnesses suffered during the term of their policies.[167]

The fourth circuit, focusing upon the categories of true, spurious, and hybrid class actions created under Federal Rules of Civil Procedure 23 (1966), construed Article 591 (1997) *et seq.* to ban all but the "true" class action, which the court defined as "one in which except for the use of the class action the joinder of all interested parties would be necessary for the enforcement of the joint or common

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163. *Guste*, 370 So. 2d at 489; *cf.* Metropolitan New Orleans Chapter of La. Consumers' League, Inc. v. Council of City of New Orleans, 391 So. 2d 878 (La. App. 4th Cir. 1980), *writ denied*, 396 So. 2d 898, 899 (1981). Numerous other factors may be relevant to the inquiry, including the size of the proposed class, the complexity and/or number of anticipated legal and evidentiary issues, and the likelihood of additional parties or claims via intervention and incidental demands.

164. 456 So. 2d at 619-21.

165. 234 So. 2d 250 (La. App. 4th Cir.), *writ denied*, 236 So. 2d 499 (1970).

166. 234 So. 2d 228 (La. App. 4th Cir. 1970).

167. *Caswell*, 234 So. 2d at 251-52.

right."[168] Employing this confused construction of Article 591,[169] the court refused to uphold certification of the putative class before it:

> The alleged facts and circumstances presented in this case fail to meet the test of a true class action. The most that can be assumed from plaintiff Caswell's allegations is that there probably are other policy-holders whose contract of insurance was on a printed form similar to that initially issued to him and that as to some of them the company might have exercised its option to refuse renewal or to renew with exclusion. The facts in each such case, if any, will differ in many respects and a judgment on Caswell's demands could not conceivably conclude the rights of other policy holders. At most, they have a common interest in a question of law, a decision concerning which would have value as a judicial precedent only. All policy holders interested in the common question of law may join in Caswell's suit, but they are not required to do so. This might be categorized as a "spurious" class action, but it certainly is not a "true" class action authorized by LSA-C.C.P. art. 591.[170]

The same day that it decided *Caswell*, the Fourth Circuit also decided *Veal v. Preferred Thrift & Loan of New Orleans, Inc.*[171] The *Veal* case concerned a putative class action predicated upon a form loan agreement used by the defendant bank, which the plaintiff alleged contained impermissible open-ended fee provisions that had been used by the defendant to charge illegal late fees.[172] The Fourth Circuit adopted its reasoning from *Caswell* and denied certification to the proposed class because it was not a "true" class action:

> There may be, and indeed there quite probably are, other persons who have been or may be subjected by this defendant to "late charges" or "extension fees" of which plaintiff Veal complaints, but we cannot conceive of any judgment which might be rendered in this case which would be conclusive of the rights of such persons. As in *Caswell*, this suit may be an invitation to other persons similarly situated to join the action, each on an individual basis for the adjudication of such "several" right as each may have against the common defendant. Only such parties as actually join the action will be concluded, and failure or success of the action will not affect the rights of any party not joined. A decision of the question of law common to all persons who have borrowed money from this defendant or any other lending agency which

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168. *Id.* at 255-56.

169. The fourth circuit, although recognizing that the Code's redactors and rejected the categories under old Rule 23, nonetheless used those categories to construe Article 591 (1997).

170. *Veal*, 234 So.2d at 257.

171. 234 So. 2d 228 (La. App. 4th Cir. 1970).

172. *Id.* at 229-30.

imposes late charges or extension fees, will, at most, have only such effect as that usually given to judicial precedent.[173]

In *Stevens v. Board of Trustees of Police Pension Fund of City of Shreveport*,[174] the Louisiana Supreme Court specifically cited *Caswell* as an example of an improper construction of Article 591 (1997), concluding that while it was clear that the redactors of those articles had rejected the categories articulated in the original version of Rule 23, they did not simultaneously and arbitrarily adopt the narrow "true" class action category as the only permissible class action in Louisiana:

> Based upon the intention to adopt only the true class action, the Fourth Circuit held: "The true class action is one in which except for the use of the class action the joinder of all interested parties would be necessary for the enforcement of the joint or common right." Caswell v. Reserve National Insurance Co., La. App., 234 So.2d 250, 255-56 (1970).
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> * * *
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> The original federal class action from which our Article 591 was adapted provided for three kinds of class actions, the so-called "true," "hybrid," and "spurious." The hybrid and spurious class actions generally required no more convexity between the rights of the representative and of the absent members than the existence of a common question of law or fact, whereas the true class action required a stronger relationship between the claims. Thus, we are satisfied that, in rejecting the hybrid and spurious class actions our legislature intended that there be a relationship between the claims greater than simply that of sharing a common question of law or fact.
>
> The thrust of the 1966 revision of the federal class action was to recognize the difficulty of applying a conceptual test to a problem which demands a pragmatic approach. In essence, the federal rule makers have left much discretion to the trial judge in ascertaining whether a class action should be maintained, but they have given the judge a number of guidelines to aid him in determining how the discretion should be exercised.
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> * * *
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> These guidelines emphasize limiting the use of the class action—when a common-based right is at issue and other requirements are met (such as too-numerous parties to join and adequate representation of the class)—to occasions where the class action will be clearly more useful than other available procedures for definitive determination of a common-based right, If such definitive determination in the single

173. *Id.* at 230-31.

174. 309 So. 2d 144 (La. 1975).

> proceedings Should be afforded in the interests of the parties (including both the class and the opponent(s) to it) and of the efficient operation of the judicial system.
>
> In determining how the legislature intended the courts to define and apply the concept of allowing a class action to enforce rights with a common character, we are mindful of the basic goals or aims of any procedural device: to implement the substantive law, and to implement that law in a manner which will provide maximum fairness to all parties with a minimum expenditure of judicial effort. Implicit, then, in decision that rights are of a common character is a consideration of the extent to which a clear legislative policy might be thwarted, or hampered in its implementation, by the lack of availability of the class action device.
>
> But this does not end the inquiry. Fairness to the parties demands at the least that the relationship between the claims of members of the class should be examined to determine whether it would be unfair to the members of the class, or to the party opposing the class, to permit separate adjudication of the claims. In determining 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 injustice 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.[175]

Significantly, although the court rejected the *Caswell* test, it declined to go so far as to question the *result* reached in *Caswell* and *Veal*:

> Although the result may (or may not) have been correct under the facts of each particular case, the test adopted by these decisions negates the availability of the class action in all cases except where indispensable (or perhaps necessary) parties are too numerous to be joined. For reasons to be stated, in our view this stringent test was not intended by the legislature.[176]

A decade after *Stevens*, in *Bergeron v. AVCO Financial Services of New Orleans*,[177] the fourth circuit was again presented with a putative class action predicated upon allegations that a lender had engaged in a common course of conduct that resulted in excessive late charges and/or usurious interest rates. Specifically recognizing that the methodology it had employed in *Veal* and

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175. Stevens v. Board of Trustees, 309 So. 2d 144, 149-51 (La. 1975).

176. *Id.* at 147.

177. 468 So. 2d 1250 (La. App. 4th Cir.), *writ denied*, 474 So. 2d 1308 (1985).

Caswell had been rejected by the Supreme Court in *Stevens* in favor of the "common character" inquiry, the Fourth Circuit nonetheless refused once again to certify the class:

> We believe Stevens means that a "common based right" exists when the class shares a common question of law or fact, not that the facts must be identical. Moreover, even though different recoveries may be sought because of different facts, this alone would not justify denial of a class certification when there are factually similar financial transactions and a common question of law—usury. However, even though we believe there exists a common based right, this does not end the inquiry, nor does it mean a class should have been certified. Other questions remain.
>
> First, we are not at all sure that efficiency, a policy factor to be considered, warrants certification. There is no evidence of other suits against Avco of a similar nature; a multitude of suits cannot be reasonably anticipated in this instance. And the basic goals or aims of class actions, as of other procedural devices, are to "implement the substantive law, and to implement that law in a manner which will provide maximum fairness to all parties with a minimum expenditure of judicial effort." *Stevens, supra*, at 151. Judicial efficiency means consideration of the existence of, or likelihood or improbability of, future similar suits—a judgment decision which the Trial Court is best able to make. In the instant case we cannot say a class certification would result in judicial efficiency because we do not believe numerous suits can reasonably be anticipated, for reasons to be next discussed.
>
> *We are more concerned with a peculiar characteristic we believe is shared by the majority of members of the alleged class; that characteristic is the borrower's desire that financial transactions remain confidential. People have an expectation of privacy as to their finances in general, to their incomes, expenditures, and most of all, to their loans. The Bergerons decided to forego privacy and file suit, but we are not at all certain other customers of Avco would make the same decision. As a matter of fact, no other suits have been filed. To certify this as a class action and to permit the broad discovery sought by the Bergerons is to make public that which other customers of Avco more likely believed would remain confidential: their loan, the amount of the loan, the interest charges, even their delinquent payments, and perhaps more. Most people do not want these matters placed in the public view.*
>
> *This peculiar characteristic distinguishes this alleged class from others such as policemen, firemen, school teachers, union members, and public employees, classes that readily come to mind whose members would not object to disclosure of their membership.*
>
> *People expect privacy in financial matters, and because of this peculiar characteristic, we believe a strong public policy factor—the right to*

> *privacy—would support a decision not to certify the class. Hence, we conclude that the Trial Court did not abuse its discretion when it denied discovery and certification.*
>
> On the surface this decision may appear to insulate financial institutions from class actions. However, we believe other means are available to establish a class action, including, but not limited to, discreet advertisement, which may produce members of the class who wish to forego confidentiality and join the suit.[178]

Recently, however, the First Circuit Court of Appeals cited the *reasoning* of *Caswell* with approval as support for its decision to deny certification to a class of plaintiffs consisting of 700 to 1000 tenants in apartment complexes owned by four defendants who allegedly violated Louisiana law by refusing to attempt timely repairs, pro rate rent, and/or allow revocation of leases in the aftermath of a severe flood in and around New Orleans.[179] Specifically, the *Pulver* court felt that the common character requirement could not be met in that case because class members "would have an option to either demand a diminution of [their rent] or a revocation of the lease" if they were successful on individual claims, while "[a]llowing a class action to proceed . . . would bind all class members to the relief selected by the class representatives, whether that is the type of relief the individual class member in fact wanted."[180]

As noted above, under *Stevens*, the amount or type of *remedy* sought by class members is not a relevant factor, so long as there is a "common character" between the two actions, an inquiry which focuses upon the predominance of common questions of fact and law and the superiority of employing the class action proceeding.[181] And even in *Caldwell*, which in effect adopted the test for mandatory joinder—requiring a strict *identity* of factual and legal issues—as the standard for permissible class actions, there was no requirement that all class members seek identical *relief*.[182] Thus, there is still no shortage of confusion in the case law with respect to when certification is appropriate, particularly in cases involving contractual rights and remedies.

In September of this year, the Louisiana Supreme Court decided *Ford v. Murphy Oil U.S.A., Inc.*[183] In that case, the supreme court spoke again to the common character requisite for class certification:[184]

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178. *Id.* at 1253-54; *see also* Terrebonne Bank & Trust Co. v. Lacombe, 510 So. 2d 78 (La. App. 1st Cir. 1987) (following *Bergeron*).

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

180. *Id.* at 969 (citing Caswell v. Reserve National Insurance Co., 234 So. 2d 250, 257 (La. App. 4th Cir. 1970)).

181. *See supra* note 175 and accompanying text.

182. *See supra* note 170 and accompanying text.

183. Ford v. Murphy Oil Co., 703 So. 2d 542 (La. 1997).

184. In doing so, the court made several statements that appear to confuse analysis. Most curious of these is the following:

> In discussing the term "common character of the right sought to be enforced" [in *Stevens v. Board of Trustees of Police Pension Fund*], we looked to the federal rules and noticed that those rules were revised in 1966 because of the "difficulty of characterization required by this term of indefinite and imprecise meaning" and to describe "in more practical terms the occasions for maintaining class actions." We thus adopted what we then called the "discretionary grant" given to trial judges in amended Federal Rule 23(b) as guidelines to be used by Louisiana courts in determining whether to allow a class action. . . . In addition, we summarized the intertwined values of effectuating substantive law, judicial efficiency, and individual fairness involved in allowing a class action. . . . In sum, in *Stevens* we substantially liberalized the availability of class actions under Louisiana law by giving judges wide discretion in determining whether to allow class actions using the factors listed in Rule 23(b) and the "fairness" factors enumerated in *Stevens*, rather than following the legislative intent of allowing only "true" class actions.[185]

In applying this standard for evaluating the common character of the suit before it, the *Ford* court found that certification was not appropriate.[186] The class in *Ford*, consisting of property owners living near four major petrochemical plants outside of New Orleans, complained that the defendant companies "caused or contributed . . . to a condition or situation which significantly and materially affected and/or adversely affected . . . petitioners' legally protectable rights by virtue of synergistic accumulation or combination of releases, emissions, disbursements, placement, seepage, drainage, migration, or otherwise non-consensual placing of pollutants on the exclusive properties or persons of

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> Although an action may be maintained as a class action in federal court when all the requirements of 23(a) are met and just one of the requirements of 23(b) are met, in *Stevens* we directed Louisiana courts to consider every requirement of 23(b) in determining whether to allow a class action.

Id. at 547. As discussed above, Sections (b)(1)-(3) were intended to address unique situations; while there is certainly overlap, the special opt-out provisions of these subsections means that the analysis appropriate under each of them is by no means co-extensive. *Cf.* DeBoer v. Mellon Mortgage Co., 64 F.3d 1171, 1175 (8th Cir. 1995), *cert. denied sub nom.* Crehan v. DeBoer, 116 S. Ct. 1544 (1996); In re A.H. Robins Co., 880 F.2d 709, 728 (4th Cir. 1989).

Presumably, the supreme court merely wanted to make it clear that Louisiana will recognize class actions equivalent to those qualifying under Rules 23(b)(1) and (b)(2), rather than to limit class actions in Louisiana solely to those that would qualify under all three (assuming one can imagine such a claim). This is, again, consistent with the prevailing opinion that Rule 23(b)(3) represents a broad rule of general application, while Rules 23(b)(1) and (b)(2) are rules of specific application.

185. *Id.* at 546. Again, I think the court does not really mean what it says; that is, it does not really believe itself to be contradicting express legislative intent in incorporating the analysis developed in federal case law under Rule 23(b) into the proper inquiry under Article 591 *et seq.* Obviously, the court is not at liberty to take that position.

186. *Id.*

petitioners" which, although the defendants' emissions individually met all Louisiana DEQ and Federal Clean Air Act standards, in combination constituted a nuisance.[187]

In denying certification, the *Ford* court, citing to *Amchem Products, Inc. v. Windsor*,[188] focused upon a lack of uniformity within the class as to the substantive issues of causation and liability:

> However, far from offering the same facts, each class member will necessarily have to offer different facts to establish that certain defendants' emissions, either individually or in combination, caused them specific damages on yet unspecified dates (which dates may run into the hundreds or even thousands). The causation issue is even more complicated considering the widely divergent types of personal, property and business damages claimed and considering each plaintiffs' unique habits, exposures, length of exposures, medications, medical conditions, employment, and location of residence or business. In addition, each plaintiff will have to prove that the specific harm he suffered surpassed the level of inconvenience that is tolerated under [Louisiana's nuisance laws]. By the very nature of the claims that have been made, the length of time involved, and the vast geographical area in which the class members live, the degree of inconvenience or damage suffered will vary greatly as to the individual plaintiffs. Lastly, the mere finding of "defendants' duty" not to pollute will do little to advance the issues in this case. There appear to be far too many individual liability issues which could not be tried separately, as that is prohibited by article 593.1(C)(1). 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." The individualistic causation and liability issues are further magnified in this case by the claim that four different sources of emissions are involved.[189]

The court in *Ford* also adopted the "novel and immature" tort analysis from *Castano*, concluding that the plaintiff's "synergistic combination" theory (by which several different defendants' individual emissions may combine to create

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187. *Id.* at 542-44.

188. 117 S. Ct. 2231 (1997). In *Amchem*, the Supreme Court decertified a settlement class in a nationwide asbestos class action, explaining that:

> 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. . . . Each has a different history of cigarette smoking, a factor that complicates the causation inquiry. . . .

Amchem Prods., Inc., 117 S. Ct. at 2250, *cited by Ford*, 703 So. 2d at 549.

189. *Ford*, 702 So. 2d at 548-49 (citations omitted).

an actionable nuisance) was so novel and untested as to prevent a court from properly conducting a predominance inquiry.[190] The *Ford* court's construction of *Castano* appears to be somewhat expansive. In *Castano*, the Fifth Circuit focused upon the novelty of addiction as an actionable injury in tort.[191] The plaintiffs in *Ford*, however, neither asserted a novel cause of action (they complained of a nuisance),[192] nor did they complain of a novel injury (they asserted physical injuries and property damages common to pollution cases). The *Ford* court's concerns were instead with the adequacy of the plaintiff's causation theory, which under Louisiana law could have been readily addressed with existing doctrine on that issue.

III. CONCLUSION

By adopting the post-1966 version of Federal Rule of Civil Procedure 23, the Louisiana legislature has clearly given the state's courts an opportunity to clarify a rather disjointed and even confusing thirty-seven years worth of piecemeal case law. The legislature has not, however, removed confusion from this rapidly evolving area of the law. Indeed, with sweeping revisions to the existing Rule 23 long since on the drawing board, Louisiana courts may soon find themselves in the same position they were in after the 1966 revisions to Rule 23, a mere six years after Louisiana enacted its Class Action Statute based upon the 1937 version of that rule. Given the power of the class action, change and innovation are inevitable, and our courts and legislatures must continue to keep apace of development to keep this procedural device from overwhelming the system that created it.

190. *Id.*

191. Castano v. American Tobacco Co., 84 F.3d 734, 737 (5th Cir. 1996).

192. *Compare* In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995) (asserting a novel theory of liability dubbed the "serendipity" theory by the court).