MANAGING
COMPLEX LITIGATION
CLASS ACTIONS AND MASS TORTS

CHAPTER FOUR

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PREFACE

In 1948, in Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948), the Eighth Circuit noted that the class action "was an invention of equity . . . mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs." The most significant benefits of class actions for plaintiffs include a more powerful litigation posture, mootness avoidance, and the tolling of the statute of limitations period for the class. When liability is determined or a dispute settled on a classwide basis, judicial and financial resources are saved, and relief available to class members is maximized.

But class action practice has evolved into a multi-faceted field in which the grasp of the subject at hand is insufficient. Sophisticated knowledge of procedure, management and even bankruptcy law has rendered this valuable procedural device a complex instrument of social change. Over the years the stakes have become higher and the return delayed. Attorneys used to squabble over relatively simple issues such as the effect of the named plaintiff’s poor health on the adequacy of representation. (They still do, but usually at a point of desperation on the part of defendants.) Now disputes, such as how to structure a settlement to protect the future health of class members who have not yet exhibited the effects of relevant exposure, are mind-boggling. It’s a new world, but the motives and results are the same: without the class action device, many people will suffer, both physically and financially, and attorneys must remain motivated and trained to bring these exciting and life-altering suits.

The efficient and effective management of class actions is critical and requires an array of skills and investment unlike any other type of lawsuit. Attorney fee disputes have become second litigations, despite repeated Supreme Court admonitions to the contrary. The trend towards the use of the percentage of the fund method of calculating attorney fees has encouraged lawyers to take on the challenge of class actions by facilitating the ability to calculate risk and promoting efficiency by both parties to the litigation.

These materials provide an important and extensive overview of the class action process and the intricacies of the practice. They cover virtually every issue the class action attorney may need to address, and thoroughly integrate the theory of class action law with the realities of practice.

Modern law practice has become daunting, but there is no substitute for the class action and the power of numbers. Be propelled by the notion of justice for the small claimant and the understanding that because of your work, the world is a better place.

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I. INTRODUCTION

It is essential for counsel filing a complex case involving multiple parties to have a detailed plan for managing the case. Without a detailed plan of action, it is unlikely that a just and speedy resolution of the case will be achieved. Decisions on how to manage complex litigation must start early, even before filing the case.

There are three main types of “group suits”: mass joinders, consolidations, and class actions. Before filing a lawsuit involving numerous parties, the plaintiffs’ lawyer must determine which kind of suit should be filed. Although there are obvious procedural differences among them, many of the comments noted below apply equally to all three. This paper focuses primarily on the use of the class action device to try lawsuits, mainly in federal courts, but with some discussion of and comparison to Texas state courts.

Class actions are rooted in English jurisprudence. “The class action was an invention of equity . . . mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs.”

II. THREE TYPES OF GROUP SUITS

A. Mass Joinders

The joining of two or more plaintiffs in a lawsuit is governed in federal courts by Fed. R. Civ. P. 20, which was adopted in Texas as Tex. R. Civ. P. 40. There is no limit on the number of plaintiffs who can jointly sue a defendant. The only limit imposed by Rule 20 is that all claims must arise out of the same transaction, occurrence, or series of transactions or occurrences.

B. Consolidations

1. Generally

Fed. R. Civ. P. 42, adopted by Texas courts in Tex. R. Civ. P. 174, provides that lawsuits involving common questions of law and fact may be consolidated. Cases may be consolidated upon motion of the parties or the court’s own initiative and can be done at any stage of the action before jury submission, on such terms as are just.

A litigant seeking consolidation of actions must meet certain prerequisites which roughly translate into the requirements of the current class action procedural rules, Federal Rule of Civil Procedure (Fed. R. Civ. P.) 23 and Texas Rule of Civil Procedure (Tex. R. Civ. P.) 42.

Class suits have been a part of American jurisprudence since Justice Story, building upon the doctrines developed in the English courts, formulated and adapted class action standards in this country. Originally adopted in 1938, Fed. R. Civ. P. 23 was substantially amended in 1966. The field of class action law continued to grow by leaps and bounds throughout the 1970s and the 1980s as multi-party suits were brought in such areas as employment discrimination, antitrust, securities, consumer products, and public health and safety. John Greenya, A Passion for Class Action, THE WASHINGTON LAWYER, March/April 1995, at 28. With this growth, however, has come a deluge of complexity and procedural hurdles which can be daunting to the uninitiated. The purpose of this paper is to provide assistance in navigating the pitfalls of class actions and other types of complex cases and to shed a little light on a dense and confusing field.

1. My thanks to the many people who have worked on this paper and discussed it with me in recent years, including Frank Goodrich, who was co-author on an earlier edition of this article published at 48 Baylor L. Rev. 1001 (1996); Professors Sam Issacharoff and Charles Silver of The University of Texas Law School, for their advice and comment; and David Horan and Eric Lockridge, who have rendered yeoman research assistance.
2. Practical Considerations

If the trial court orders consolidation, many questions will need to be addressed, such as who will be lead counsel on the case and whether the parties will use the same complaint. Typically, the trial court will decide to use one complaint. It is then incumbent upon each attorney to be sure his clients’ issues are raised in that complaint and to be sure that the lead counsel will adequately represent the clients. Often, a plaintiffs’ management committee is formed to determine how the case will be prosecuted.

C. Class Actions

Class action lawsuits are governed by Federal Rule 23 or Tex. R. Civ. P. 42 and involve one or more persons (“representatives”) seeking to represent a group of other persons who have similar claims against one or more parties. The class action procedure provides for a global resolution of these common issues affecting an identifiable group of persons (“the class”). Subject to certain criteria set forth below, the court may “certify” the case to proceed as a class action. Class actions often involve thousands of plaintiffs. If traditional management techniques were employed in these cases, their resolution would be greatly delayed.

1. Advantages To Class Actions

From a plaintiff lawyer’s perspective, there are many advantages to bringing a case as a class action. For example, absent class members are better protected from burdensome discovery requests than are plaintiffs in a large mass joinder case. This is because unnamed members of a class action are not necessarily considered as parties for purposes of discovery. In re Worlds of Wonder Sec. Litig., No. C-87-5491, 1992 WL 330411 (N.D. Cal. July 9, 1992); Wainwright v. Kraftco Corp., 54 F.R.D. 532, 534 (N.D. Ga. 1972); Fischer v. Wolfinarger, 55 F.R.D. 129 (W.D. Ky. 1971). In Texas, Tex. R. Civ. P. 42(f) provides for this same protection by rule. Further, since court approval is required at almost every stage of the litigation, the plaintiff lawyer is better insulated from criticism of his prosecution of the case.

2. Disadvantages To Class Actions

In class actions, the court’s maintenance of considerable control over all aspects of the case may be somewhat disadvantageous to the plaintiffs’ lawyer. The attorney-client relationship is not governed by a contract, but rather by the court. If a verdict favorable to the plaintiff or a settlement is reached, the court must approve the amount of attorneys’ fees to be paid to plaintiffs’ counsel.

D. Mass Joinder Versus Class Actions

Assuming that a case can be properly handled on an aggregate basis, a question arises concerning which procedural mechanism — mass joinder or class action — is more efficient, more suitable to the unique aspects of the case, and more likely to maximize recovery. There are often more specific questions that need to be answered as well. For example, if it is important that the case remain in state court, and it is likely that one or more of the defendants may seek to remove it to federal court by bringing in a foreign sovereign, it may be important to consider whether a pre-filing settlement between a defendant and all (or a substantial portion) of the plaintiffs is necessary to place a foreign sovereign out of reach of a potential third-party plaintiff’s action. If such a pre-filing settlement is deemed necessary, a mass joinder is likely to be a better vehicle for prosecuting the case. Such considerations will play a key role in determining how to file the case, and should be evaluated thoroughly before filing suit.

III. CLASS MAINTENANCE

A. Fed. R. Civ. P. 23

Persons seeking to represent a class must satisfy all the requirements of Fed. R. Civ. P. 23(a) and show that the proposed class falls within at least one of the three subsections of Fed. R. Civ. P. 23(b). In Texas, a class must be certified under Tex. R. Civ. P. 42 or putative class representatives may also seek class certification under Article 21.21 § 18 of the Texas Insurance Code (the language in Rule 42 and Article 21.21 § 18(a) & (b) is identical). Both Rule 42 and Article 21.21 § 18 are guided by the decisions of the federal courts in interpreting Fed. R. Civ. P. 23. Dresser Indus. v. Snell, 847 S.W.2d 367 (Tex. App.—El Paso 1993, no writ). The U.S. Supreme Court recently explained the class maintenance requirements of Fed. R. Civ. P. 23 for the first time since the rule was amended in 1966. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 604 (1997).

The requirements to certify a case as a class action are set out below.

1. Rule 23(a)

   a. Rule 23(a)(1): Numerosity

      The first requirement under Fed. R. Civ. P. 23(a) is that the class be so numerous that joinder of all members is impracticable. There is no specific number that satisfies the requirement. B.J. MOORE, MOORE’S FEDERAL PRACTICE § 23.05[1], at 138 (1990).

      “Impracticable” does not mean “impossible.” The class representatives need only show that it is extremely difficult or inconvenient to join all the members of the
class. 7A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROEDURE § 1762 at 159 (2d ed. 1986). The basic question is the practicality of joinder, not the number of interested persons per se. Garcia v. Gloor, 618 F.2d 264, 267 (5th Cir. 1980), cert. denied, 449 U.S. 1113 (1981). The size of the class, the ease of identifying its members and determining their addresses, and the geographic location of the class members are factors that aid the court in its determination of the practicality of joinder. Id.

b. Rule 23(a)(2): Commonality

The commonality element requires a determination that “there are questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2) (emphasis added). The commonality requirement has been characterized as a “low hurdle” that is easily surmounted. Scholes v. Stone, McGuire & Benjamin, 143 F.R.D. 181, 185 (N.D. Ill. 1992); Duhaime v. John Hancock Mut. Life Ins. Co., 177 F.R.D. 54, 62 (D. Mass 1997); Jenkins v. Raymark Indus., 782 F.2d 468, 472 (5th Cir. 1986). The rule does not require that all or even most of the questions be common; it is sufficient that there are some questions of law or fact that are common to the class members. In re Prudential Ins. Co., 148 F.3d 283, 303 (3rd Cir. 1998); Wente v. Georgia-Pacific Corp., 712 S.W.2d 253, 255 (Tex. App.—Austin 1986, no writ). A question is common to the class if, when it is answered as to one class member, it is answered as to all class members. Forbush v. J.C. Penney Co., 994 F.2d 1101, 1106 (5th Cir. 1993); Chevron U.S.A. v. Kennedy, 808 S.W.2d 159, 162 (Tex. App.—El Paso 1991, writ dism’d w.o.j.).

c. Rule 23(a)(3): Typicality

Rule 23(a)(3) requires that the claims or defenses of the representative parties be typical of the claims or defenses of the class. Typicality, as with commonality, has been recognized as a low burden. Lightbourn v. County of El Paso, Texas, 118 F.3d 421, 426 (5th Cir 1997), cert. denied, 118 S. Ct. 700 (1998), Forbush, 994 F.2d at 1106. Typicality essentially requires that the class representatives possess the same interests and suffer the same injury as the unnamed or “absent” class members. Dresser Indus. v. Snell, 847 S.W.2d 367, 372 (Tex. App.—El Paso 1993, no writ). The requirement is met if there is “a nexus between the injury suffered by the representative and the injuries suffered by the other members of the class.” Id; See also In re Prudential Ins. Co. of America Sales Practices Litig., 148 F.3d 283, 304 (3rd Cir. 1998) (typicality was satisfied when the defendant engaged in common course of fraudulent conduct to all the plaintiffs). This issue is resolved by comparing the allegations of the class representatives with those of the rest of the class.

d. Rule 23(a)(4): Adequacy Of Representation

Rule 23(a)(4) requires that the class representative “fairly and adequately protect the interests of the class.” Adequate representation consists of two elements: (1) it must appear that the representative parties, through their attorneys, will vigorously prosecute the class claims and (2) there must be an absence of conflict or antagonism between the interests of the named plaintiffs and those of other members of the proposed class. Twelve John Does v. District of Columbia, 117 F.3d 571, 575 (D.C. Cir. 1997); In re Asbestos Litig., 90 F.3d 963, 977 (5th Cir. 1996), cert. granted, judgment vacated sub nom. Flanagan v. Ahern, 117 S. Ct. 2503 (1997); Microsoft Corp. v. Manning, 914 S.W.2d 602 (Tex. App.—Texarkana 1995, writ dism’d); Reserve Life Ins. Co. v. Kirkland, 917 S.W.2d 836 (Tex. App.—Houston [14th Dist.] 1996, no writ)(citing Gibb v. Delta Drilling Co., 104 F.R.D. 59, 75 (N.D. Tex. 1984)); Wiggins v. Enserch Exploration Inc., 743 S.W.2d 332, 335 (Tex. App.—Dallas 1987, writ dism’d w.o.j.). Whether the representatives will adequately represent the class is a question of fact. Dresser Indus., 847 S.W.2d at 373. Factors affecting this determination include:

1. adequacy of counsel;
2. potential conflicts of interest;
3. personal integrity of the plaintiffs;
4. representatives’ familiarity with the litigation and their belief in the legitimacy of the grievance;
5. whether the class is unmanageable based on geographic limitations; and
6. whether the plaintiffs can afford to finance the class action.

Id.

The primary issue for the court to determine is whether the interests of the class representatives are antagonistic to those of the remainder of the class. Id. The El Paso Court of Appeals held in Dresser Indus. that “only a conflict that goes to the very subject matter of the litigation will defeat a party’s claim of representative status.” Id. (citing Adams v. Reagan, 791 S.W.2d 284 (Tex. App.—Fort Worth 1990, no writ)).

The U.S. Supreme Court recently upheld a Third Circuit decision denying class certification and a proposed settlement agreement that would have bound all present and future asbestos plaintiffs with claims against the defendants. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997). The Court found that the conflicts inherent between presently injured plaintiffs and potential plaintiffs who had not yet developed a compensable injury could not be reconciled and precluded class certification. Id. A federal court in West Virginia relied
on Amchem to deny certification to a nationwide settlement class of all presently injured and future plaintiffs harmed by the defendant’s cigarettes. Walker v. Liggett Group, Inc., 175 F.R.D. 226 (S.D.W. Va. 1997). The Liggett court found that the proposed class representative could not represent tens of millions of class members, and that the conflicts could not be remedied by creating subclasses after certification, as the plaintiffs had requested. Id.

Whether the proponents of a class can finance the litigation is seldom a major issue. Where there is a contingent fee contract, the personal finances of the class representatives are not relevant. See 1 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 3.37, at 3-239 to 240 (3d ed. 1992); Weatherly v. Deloitte & Touche, 905 S.W.2d 642, 652 (Tex. App.—Houston [14th Dist.] 1995, writ dism’d w.o.j.); Franklin v. Donoho, 774 S.W.2d 308, 315 (Tex. App.—Austin 1989, no writ). The Seventh Circuit held in Rand v. Monsanto Co., 926 F.2d 596 (7th Cir. 1991), that there is no per se rule requiring the representative plaintiff in a class action to be willing to bear all costs of the action in order to satisfy the adequacy of representation requirement. Rule 42 does not require a preliminary showing of willingness and ability to bear the costs of representation. Weatherly, 905 S.W.2d at 652 (citing Salvaggio v. Houston Indep. Sch. Dist, 709 S.W.2d 306, 310 (Tex. App.—Houston [14th Dist.] 1986, writ dism’d)).

An additional important aspect of determining whether the class representative meets the adequacy of representation requirement depends on whether class counsel is sufficiently qualified and experienced to vigorously prosecute the action. Adams v. Reagan, 791 S.W.2d 284 (Tex. App.—Fort Worth 1990, no writ). See 1 NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS § 3.22, at 3-126 (3d ed. 1992). Usually, the requirement of vigorous representation refers to class counsel. Adams, 791 S.W.2d at 291; See 1 NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS § 3.22, at 3-126 (3d ed. 1992). In Weatherly, the court stated that “class certification does not require a higher standard of involvement from a proposed class representative than from an individual plaintiff in a non-class suit.” 905 S.W.2d at 652. In Forsyth v. Lake LBJ Inv. Corp., 903 S.W.2d 146, 152 (Tex. App.—Austin 1995, writ dism’d w.o.j.), however, the court observed that the failure of the class representatives to appear at a certification hearing was an issue that could be considered in determining the adequacy of the class representatives.

2. Rule 23(b)

Once the court determines that the threshold prerequisites of 23(a) are met, it must then decide if the class is maintainable under one or more of the categories described in Rule 23(b). If so, the case may be certified to proceed as a class action.

a. Rule 23(b)(1)

A class certified under Rule 23(b)(1) is not an “opt out class.” In other words, the class members are bound by any judgment or settlement approved by the court, and have no option to withdraw from the litigation. There are two types of “(b)(1)” actions.

(1) Rule 23(b)(1)(A) - Inconsistent Or Varying Adjudication

Rule 23(b)(1)(A) provides that a class action can be maintained if “the prosecution of separate actions by or against individual members of the class would create a risk of 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.”

Typically, federal courts have interpreted this rule to be applicable only to plaintiffs seeking injunctive relief. It cannot be used to certify a class of plaintiffs seeking money damages as an exclusive remedy. Green v. Occidental Petroleum Corp., 541 F.2d 1335 (9th Cir. 1976); cf. In re AH Robins Co., 880 F.2d 709 (4th Cir. 1989), cert. denied, 493 U.S. 959 (1989) (mandatory settlement class approved with respect to claims made against manufacturers of Dalkon shield).

Texas courts initially have taken a different stance on this issue. The test used in determining whether certification is appropriate under Texas Rule 42(b)(1)(A) is that if individual suits are conducted before different juries and judges and uniformity of results is not likely even with the same testimony and same facts presented in each case, a class action is appropriate. Adams, 791 S.W.2d at 293. Thus, in Texas state courts, Rule 42(b)(1)(A) may be used to certify a class of plaintiffs seeking money damages as an exclusive remedy.

(2) Rule 23(b)(1)(B) - Class Dispositive Adjudication

Rule 23(b)(1)(B) provides that a class action can be maintained “if the prosecution of separate actions by or against individual members of the class would create a risk that adjudications with respect to individual members of the class would be dispositive of the interests of other members not parties to the lawsuit or would substantially impair or impede their ability to protect their interests.” Rule 23(b)(1)(B) classes are often brought to manage the distribution of a company’s limited resources. For example, this rule may be helpful in a case involving a defendant who has harmed many people but has limited assets to satisfy the various judgments against it. See 1

In reviewing an attempted class settlement of both present and future asbestos claims against Fibreboard Corporation, the U.S. Supreme Court recently offered courts some guidance on the use of limited-funds mandatory settlement classes under 23(b)(1)(B). Ortiz v. Fibreboard Corp., 1999 WL 412604 (U.S.). The court held that parties seeking certification under 23(b)(1)(B) must show that the fund made the basis of the mandatory class is limited by more than the agreement of the parties and that the fund has been allocated to claimants in the class by a process addressing the conflicting interests of class members. Specifically, the court held that the primary certification defect was the uncriticized adoption by both lower courts of figures agreed upon by the parties in defining the fund’s limits. The settling parties must present not only their agreement, but evidence on which the district court may ascertain the fund’s limits, with support in findings of fact following a proceeding in which the evidence is subject to challenge.

Professor Issacharoff of the University of Texas has written that a mandatory class is not necessarily a favorable alternative to bankruptcy proceedings when a defendant’s liability exceeds its assets. Class Action Conflicts, 30 U.C. Davis L. Rev. 805 (1997). Bankruptcy courts have jurisdiction over every concerned party, well-established priorities over the disposition of limited funds, and expertise in dealing with distressed firms. Bankruptcy courts also have the power to install trustees to oversee the financial records and management of the firm.

b. Rule 23(b)(2) - Declaratory Or Injunctive Relief

Rule 23(b)(2) provides that a class action can be maintained if the party opposing the class acted or refused to act on grounds generally applicable to the class, making final injunctive relief or corresponding declaratory relief appropriate with respect to the class as a whole. This portion of Rule 23 was designed for civil rights cases, where broad declaratory or injunctive relief is sought for a large and often unascertainable class. See 1 NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS § 4.11, at 4-39 (3d ed. 1992). This rule has now been used in employment, antitrust, environmental, and securities litigation. Id. at 4-39 to 4-40.

c. Rule 23(b)(3) - Predominance of Common Questions

The overwhelming majority of class actions are certified under Rule 23(b)(3) (or its identical Texas counterpart 42(b)(4)). This rule provides that a class action may be maintained if “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 the other available methods for the fair and efficient adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3).

This rule is used to “achieve economies of time, effort, and expense and to promote uniformity of decision...” Proposed Rules of Civil Procedure, 39 F.R.D. 69, 102-03 (1966). See Life Ins. Co. v. Brister, 722 S.W.2d 764 (Tex. App.—Fort Worth 1986, no writ). While the rule lists four separate areas courts can consider in evaluating b(3) certification — the interests of the members of controlling separate actions, the extent of any existing litigation, the desirability of concentrating the litigation in the particular forum, and the difficulties likely to be encountered in management of the action — as a practical matter the primary focus is on two main issues: predominance and superiority. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); Employers Cas. Co. v. Tex. Ass’n. of Sch. Bd. Workers Compensation Self-Insurance Fund, 886 S.W.2d 470, 473 (Tex. App.—Austin 1994, writ dism’d w.o.j.).

d. Common Issues Predominate

Questions common to the class are those questions which when answered as to one class member, are answered as to all class members. RSR Corp. v. Hayes, 673 S.W.2d 928, 930 (Tex. App.—Dallas 1984, writ dism’d); Amoco Prod. Co. v. Hardy, 628 S.W.2d 813, 816 (Tex. App.—Corpus Christi 1981, writ dism’d). The test for predominance is not whether common issues outnumber individual issues, but whether common issues will be the object of most of the efforts of the litigants and the court. See 1 NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS § 4.25, at 4-84, 4-85 (3d ed. 1992); 7A Wright, Miller & Kane, Federal Practice and Procedure § 1778 (2d ed. 1986); Health & Tennis Corp. v. Jackson, 928 S.W.2d 583, 590 (Tex. App.—San Antonio 1996, writ dism’d w.o.j.). In deciding whether the common issues predominate, the court must first identify the substantive law that will control the outcome of the litigation. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), cert. denied, 487 U.S. 1223 (1998); Hanlon v. Chrysler Corp., No. 96-15043, 1998 WL 296890, at *6 (9th Cir. June 9, 1998), amended and superseded by 150 F.3d 1011 (9th Cir. 1998); Life Ins. Co. v. Brister, 722 S.W.2d 764 (Tex. App.—Fort Worth 1986, no writ); Alabama v. Blue Bird Body Co., 573 F.2d 309, 316 (5th Cir. 1978). Some courts have determined that individual trials should be conducted before the court can decide whether common issues predominate. In re Norplant Contraceptive Prods. Liab. Litig., 168 F.R.D. 577 (E.D. Tex. 1996). The purpose of the court’s inquiry into the substantive law is to determine whether the character and nature of the case satisfies the requirements of the class action procedural rules; the purpose is not to weigh the substantive merits.

The U.S. Supreme Court rejected a trial court’s conclusion that the predominance requirement for certification of a settlement class “was satisfied based on two factors: class members’ shared experience of asbestos exposure and their common interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs” inherent in asbestos litigation. *Amchem*, 521 U.S. at (citation omitted). The Court noted that the predominance inquiry should focus on common questions of law or fact that preexist any settlement, and that a common interest in a fair settlement cannot predominate over disparate legal and factual issues. *Id.* (emphasis added). However, the Court did note that predominance is a test readily met in “certain cases alleging consumer or securities fraud or violations of antitrust laws.” *Id.* at 2250; See also *Cope v. Metro. Life Ins. Co.*, 696 N.E.2d 1001 (Ohio 1998) (holding that class actions are appropriate where standardized forms and routine practices are involved.).

e. Superior To Other Methods

The second requirement of 23(b)(3) is that the class action mechanism must be the superior method of adjudicating the case. Fed. R. Civ. P. 23(b)(3). The rule offers four considerations to assist the court in making these decisions: (1) the degree to which class members have an interest in controlling the prosecution of the case; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability of concentrating the litigation in the particular forum; and (4) the difficulties likely to be encountered in the management of the class action. *Id.*

Many of the arguments against the certification of a case as a class action relate to Fed. R. Civ. P. 23(b)(3)’s consideration of whether a class action is superior to other methods of adjudicating the controversy. Two recent circuit courts have addressed such arguments, *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) and *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), aff’d sub nom. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). Both courts refused to find that the superiority requirement of Fed. R. Civ. P. 23 was met and reversed a trial court’s certification of a class.

In *Castano*, a multistate class action was brought on behalf of all nicotine dependent persons in the United States and their families against several tobacco companies. The plaintiffs estimated that class members numbered in the tens of millions. The court granted certification as to the core issues of liability, including fraud, negligence, breach of warranty, intentional tort, and strict liability. The lower court held that the manageability consideration was the most important of the four considerations and, though the class in the case was extremely large, the adjudication of the class members’ suits individually would be even more problematic.

On appeal, the Fifth Circuit reversed the trial court and determined that the trial court had not properly considered how the variations in state law would affect the superiority requirement. *Castano*, 84 F.3d at 743.

*Georgine v. Amchem Products* involved a proposed settlement of asbestos-related personal injury claims which was approved to avoid unnecessary and repetitive litigation of similar issues.

The lower court detailed the history of asbestos-related litigation to support its reasoning that certification and approval of the proposed settlement in this case would be the best course of action for class members, the defendants and the court system. The court cited a long list of problems associated with individual adjudication of asbestos-related claims, including long delays, clogged dockets, and repetitive litigation of the same issues. 157 F.R.D. 246, 262 (E.D. Pa. 1994), vacated by 83 F.3d 610 (3d Cir. 1996), aff’d sub nom. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

In reversing the trial court, the Third Circuit found that the uncommon issues, particularly the disparate levels of the class members’ knowledge of their injuries, as well as each class member’s relatively large amount at stake in the litigation, required the court to conclude that class treatment was not superior to individual treatment of the plaintiffs’ claims. The Supreme Court affirmed the Third Circuit’s predominance determination. *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997)

A federal district court in Philadelphia recently denied class certification in an action alleging many of the same addiction-based claims as the *Castano* plaintiffs against several tobacco companies. The plaintiffs sought to certify a class of “[a]ll current Pennsylvania residents who are cigarette smokers as of December 1, 1996, and who began smoking before age 19, while they were residents of Pennsylvania.” *Arch v. American Tobacco Co., Inc.*, 175 F.R.D. 469, 475 (E.D. Pa. 1997). The court found that the class would not be superior to other available methods of adjudication because “the individual issues of addiction, causation and affirmative defenses can [not] be determined on a class-wide basis consistent with the rights of the parties” and the court could not “conclude that individual lawsuits by the putative class members would be negative value suits.” *Id.* at 494, 498.
Thus, in *Georgeine, Castano* and *Arch* certification was denied because the courts found that the superiority requirement of Fed. R. Civ. P. 23 could not be met. These cases indicate that when certifying a class, trial courts should be presented with a well-reasoned analysis of how class treatment of the case is superior to individual treatment. This is particularly true in multistate class actions, and with respect to such issues as the application of the discovery rule and the plaintiffs’ interest in individually controlling the prosecution of separate actions.

Although the Texas Supreme Court has yet to rule on the Austin Court of Appeals’ decision in *Ford Motor Co. v. Sheldon*, 965 S.W.2d 65 (Tex. App.—Austin 1998, review granted Dec. 3, 1998), the court is widely expected to write on class certification issues, particularly superiority and manageability. The case is a class action structural issue is the class action issue of superiority.

The issues in the case include whether a trial court may bifurcate the trial process under Rule 42 given Texas trial courts’ traditional aversion to piecemeal trials. The trial structure adopted by the trial court, and found not to be an abuse of discretion by the appeals court, called for a class trial regarding whether the paint process was defective and Ford’s knowledge of defects. Individual trials would then focus on individual factors diminishing or eliminating damage awards, such as individual contributory causation. Closely related to the trial structure issue is the class action issue of superiority. Given the need for potentially 100,000 individual trials following the trial of class issues, Ford argued that the class action device was not superior to individual trials. The appeals court held that the class action was superior, even if individual trials were also necessary, because the individual trials would thereby be made shorter. Moreover, the court reasoned the class action was superior because it allowed an adversarial hearing despite the imbalance in the parties’ economic positions.

Given that this case represents the first time that the Texas Supreme Court will have the occasion to write directly on class certification issues, the opinion is eagerly anticipated by both sides of the bar.

**IV. PLEADING AND CERTIFYING A CLASS ACTION**

**A. Certification Not Based On Merits**

In determining whether a case should proceed as a class action, the court should be reminded that its ruling is a procedural one and does not depend on the merits of the case. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Amerada Hess Corp. v. Garza*, 973 S.W.2d 667 (Tex.App.—Corpus Christi 1996, writ dism’d w.o.j.). But see *In re Rhone-Poulenc Rorer*, Inc., 51 F.3d 1293, 1298-99 (7th Cir. 1995), cert. denied, 116 S. Ct. 184 (1995) (considering the likelihood of success on the merits in reversing a trial court’s certification of a class of HIV-infected hemophiliacs against a manufacturer of blood products whose negligence allegedly caused the plaintiffs’ infection with the virus).

**B. Class Definition**

The definition of the class is extremely important because it identifies the persons who will be bound by the judgment. The definition should, therefore, be precise enough that the class members are ascertainable. *Amerada*, 973 S.W.2d at 681-82. For this reason, subjective terms should not be used in defining the class. MANUAL FOR COMPLEX LITIGATION, § 30.14 (3d ed. 1995).

**C. Multiple Classes/Subclasses**

The court may determine there are differences in class members’ positions that may cause conflicts in conducting the litigation or in settlement. To avoid this problem, the court may certify more than one class or divide a class into subclasses. *Marisola v. Giuliani*, 126 F.3d 372, 379 (2nd Cir. 1997); *Monarch Asphalt Sales Co. v. Wilshire Oil Co.*, 511 F.2d 1073 (10th Cir. 1975); *Wellman v. Dickinson*, 79 F.R.D. 341, 345 (S.D.N.Y. 1978); *Tober v. Charnita, Inc.*, 58 F.R.D. 74 (M.D. Pa. 1973); *Siegel v. Chicken Delight, Inc.*, 271 F. Supp. 722 (N.D. Cal. 1967).

**D. Classes For Special Issues**

Under Fed. R. Civ. P. 23(c)(4), a class action may be brought for limited purposes regarding particular issues. This procedure allows the court to achieve the efficiency of a class action for at least some of the issues in the case. For example, in *Jenkins v. Raymark Indus.*, 782 F.2d 468 (5th Cir. 1986), the Fifth Circuit held that the certification of a class of plaintiffs with asbestos-related claims to determine the viability of the “state of the art” defense was not an abuse of discretion. *See also Microsoft Corp. v. Manning*, 914 S.W.2d 602 (Tex. App.—Texarkana 1995, writ diss’ed) (trial court properly limited certified claims to those for economic damages, thereby excluding claims for consequential damages).

**E. Presumption In Favor Of Class Certification**

Generally, there is a presumption that favors class certification. *See Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968); cert denied 394 U.S. 928 (1969); *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3rd Cir. 1985); *Bara v. Major Funding Corp. Liquidating Trust*, 876 S.W.2d 469, 472 (Tex. App.—Austin 1994, writ denied). From
the moment the petition naming a plaintiff class is filed, the case is a de facto class action. Bara, 876 S.W.2d at 472. From the time such a petition is filed, the court should favor the certification of the class because the class is always subject to modification or decertification. Esplin, 402 F.2d at 99; Dresser Indus., 847 S.W.2d at 376.

F. Burden Of Proof For Certification

At the certification stage, the burden of proof is on the movants to establish their right to maintain an action as a class action. Fleming v. Travenol Labs, Inc., 707 F.2d 829, 832 (5th Cir. 1983); Life Ins. Co. v. Brister, 722 S.W.2d 764, 772 (Tex. App.— Ft. Worth 1986, no writ). In Texas, though class proponents in meeting class action requirements must do more than merely allege that the requirements have been met and must at least show some facts to support certification, class proponents are not required to prove a prima facie case to achieve certification. Aiken v. Neiman-Marcus, 77 F.R.D. 704, 704-05 (N.D. Tex. 1977). The movants are likewise not required to make an extensive evidentiary showing in support of a motion for class certification. Brister, 722 S.W.2d at 772-73. The trial court may base the certification of a class on the pleadings or “other materials” in the record. National Gypsum Co. v. Kirbyville Indep. Sch. Dist., 770 S.W.2d 621, 627 (Tex. App.— Beaumont 1989, writ dism’d w.o.j.). See also Microsoft, 914 S.W.2d at 615 (requiring a trial court to rule on the admissibility of evidence at a certification hearing would require the trial court to delve into the merits of the plaintiffs’ claims, which is not appropriate).

G. Timing Of Certification Hearing

In federal court, a hearing on the certification of the class is not always required, but it may be necessary before a court can reach a decision. General Tel. Co. v. Falcon, 457 U.S. 147 (1982), aff’d, 815 F.2d 317 (5th Cir. 1987). However, if there is an adequate statement of facts which demonstrates that each requirement of Rule 23 is satisfied, then a judge may rule based on the pleadings. In re American Med. Sys., Inc., 75 F.3d 1069, 1079 (6th Cir. 1996).

But in Texas, a certification hearing where the parties opposing certification have an opportunity to be heard is required. Tex. R. Civ. P. 42(c)(1). A trial court abuses its discretion by certifying a class based on the pleadings alone without conducting a hearing, even when the plaintiffs have presented enough evidence to show that the requirements for certification have been met. St. Louis Southwestern Ry. Co. v. Voluntary Purchasing Groups, Inc., 929 S.W.2d 25 (Tex. App.—Texarkana 1996, n.w.h.)

Federal Rule 23(c)(1) directs the court to determine whether an action is to be maintained as a class action “as soon as practicable.” Courts have been given discretion in determining the scope of this language. McKnight v. Circuit City Stores, No. CIV. A. 3:96CV964, 1996 WL 454994, at *3 (E.D. Va. Apr. 30, 1996); Kahan v. Rosentiel, 424 F.2d 161 (3rd Cir. 1970). Opponents of certification of a class may use this language to argue that any delay of putative class counsel to seek certification means counsel is inadequate to represent the class.

While federal courts have accepted this idea in some cases, Texas courts have interpreted this rule liberally. For example, in Angeles/Quinoco Sec. Corp. v. Collison, 841 S.W.2d 511, 514 (Tex. App.—Houston [14 Dist.] 1992, no writ), the court held that a five-year delay in requesting a class certification hearing was not in itself enough to show inadequate representation on the part of the plaintiffs’ counsel. And in Franklin v. Donoho, 774 S.W.2d 308, 315-16 (Tex. App.— Austin 1989, no writ), though the case was dismissed once for want of prosecution and reinstated, the court held that the representation was adequate. Whether a delay in seeking certification demonstrates the inadequacy of plaintiffs’ counsel is a fact determination to be made by the trial court. Id. at 313-315; Angeles/Quinoco, 841 S.W.2d at 514.

The Advisory Committee on the Federal Rules of Civil Procedure has recently proposed eliminating the “as soon as practicable” language altogether. The proposed change to “when practicable” would clarify the court’s authority to decide Rule 12(b)(6) dismissal and Rule 56 summary judgment motions before considering whether to certify the case as a class action.

H. Multi-State Classes

Courts are often asked to certify a class for settlement or trial where the laws of multiple states will apply to members of the class. Managing multi-state class actions is not as daunting as it may appear at first glance. In fact, multi-state classes offer the advantage of reducing the time and cost associated with complex litigation and conserving judicial resources.

Multi-state classes are based on the premise that the proposed class members suffered the same or similar injuries due to the same individual action or similar repetitive actions by the defendant. Class proponents bear the burden of showing that the factual similarities of the plaintiffs injuries and the similarities among the applicable states’ laws predominate over any differences in state law. Walsh v. Ford Motor Co., 807 F.2d 1000, 1016-17 (D.C. Cir. 1986).

Counsel seeking to certify a multi-state class should address any possible differences in state law at or before
the certification hearing. In a recent decision, the Fifth Circuit criticized the attorneys seeking certification of a nationwide class of smoking-related plaintiffs for presenting neither adequate information about the differences in the applicable state laws or a way in which to properly address those differences. Castano v. American Tobacco Co., 84 F.3d 734, 743 (5th Cir. 1996). The plaintiffs’ lack of evidence regarding the similarities in state law precluded the district court from adequately addressing the predominance inquiry under Fed. R. Civ. P. 23(b)(3). Id.

It may be helpful to prepare a grid for the court that clearly shows the lack of contradiction between the law of the forum state and the law of the other states represented in the class. Two federal courts that have approved complex multi-state settlements commended the plaintiffs’ attorneys for preparing charts within the suit. In re Prudential Ins. Co. of America Sales Practices Litig., 148 F.3d 283 (3rd Cir. 1998) (deceptive insurance sales practices); In re School Asbestos Litig., 921 F.2d 1310 (3rd Cir. 1990), cert. denied sub nom. U.S. Gypsum Co. v. Barnwell Sch. Dist., 499 U.S. 976 (1991).

Rather than providing the court with a 50-state analysis of the law applicable to class claims, class counsel may find that the facts of the case support application of a single state’s law to multi-state class members’ claims. As the Supreme Court recognized in Phillips Petrol. v. Shutts, there is no bar to a multi-state class action, so long as the choice of law is not arbitrary or unfair. 472 U.S. 797, 821, 105 S.Ct. 2965, 2979 (1985). For its law to apply, the Supreme Court held the state must have a “significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class, contacts creating state interests.” Arguably, significant contacts exist when a company designs a product, devises its marketing materials, trains its agents, and distributes its product all from its home state. It is neither arbitrary or unfair in those instances to apply the home state’s laws to conduct undertaken from the home forum.

This single-state’s law approach is supported by the “interest analysis” of Texas choice-of-law rules adopted from the Restatement (Second) of Conflicts of Law. Moreover, this approach is supported by the American Law Institute’s special choice-of-law rules on “Mass Torts” and “Mass Contracts,” which direct courts to apply “the law of the state where the conduct causing the injury occurred” and “the law of the state in which the common contracting party has its primary place of business,” respectively. COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS, §§ 6.01 and 6.03 (1994).

Trial courts have the authority to bind all multi-state class members to the court’s judgment in suit brought under a state law claim. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 814 (1985), cert. denied, 487 U.S. 1223 (1998). In a multi-state suit, the forum court has the authority to interpret and apply the laws of foreign states. Sun Oil v. Wortman, 486 U.S. 717, 730-31 (1988). The forum state’s interpretation of the law will be upheld as valid unless that court misconstrued a law that was both clearly established and brought to that court’s attention. Id. This is true even though some class members may never have set foot in the state.

If actual contradictions in state law are present, counsel may request certification of various subclasses to account for the variations under Fed. R. Civ. P. 23(c)(4). In Texas, a trial court may create subclasses pursuant to Tex. Civ. P. 42(d) if it finds that other states’ laws should apply to certain class members. Microsoft Corp. v. Manning, 914 S.W.2d 602 (Tex. App.—Texarkana 1995, writ dism’d). Subclasses are the preferred method of resolving conflicts of law so long as the conflicts do not undermine the attorney’s ability to represent the interests of all class members.

A federal court’s ability to apply state law to other non-state related claims may not be commensurate with a state court’s ability to do so. This is because, under an Erie analysis, the federal court sitting in a case based upon diversity jurisdiction must apply the common law of the state in which the case would normally be tried rather than federal common law. Erie R.R. v. Tompkins, 304 U.S. 64, 78-80 (1938); See In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995), cert. denied, 116 S. Ct. 184 (1995) (“The law of negligence, including subsidiary concepts such as duty of care, foreseeability, and proximate cause, may . . . differ among the states only in nuances, . . . but nuances can be important, and its significance is suggested by a comparison of differing state pattern instructions on negligence and differing judicial formulations of the meaning of negligence and the subordinate concepts.”); In re American Med. Sys., Inc., 75 F.3d 1069, 1084 (6th Cir. 1996) (trial court improperly certified nationwide class because law of negligence differed from jurisdiction to jurisdiction).

In a recent unpublished decision, the Dallas Court of Appeals upheld certification of a nationwide litigation class involving 1400 purchasers of “vanishing premium” life insurance, thereby affirming many of its long-standing interpretations of the Texas class action rule. Security Life of Denver Ins. Co. v. Ferguson, 1999 WL 339017 (Tex. App.-- Dallas). The court held that, unlike the practice under the federal rule, there is no requirement that a trial court file findings of fact and conclusions of law on a motion for class certification. More importantly, however, the court rejected the defendant’s arguments regarding manageability and superiority based on choice-
1. Tolling Of Statutes Of Limitations

1. Pleading A Class May Toll Limitations Against Named Defendants

Upon the filing of a class action, all class members’ claims against named defendants are tolled in that action. American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974). American Pipe is the seminal case on the application of the tolling of limitations doctrine in class action suits. In that case, the court held that statutes of limitations on the claims of the plaintiff class are tolled as soon as a plaintiff class is alleged. See also Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

Texas courts apply the tolling doctrine in the same fashion. See Bara v. Major Funding Corp. Liquidating Trust, 876 S.W.2d 469 (Tex. App.—Austin 1994, writ denied). In Bara, the Austin Court of Appeals held that once a class action was filed, it was a de facto class action, and thus the statute of limitations as to all class members’ individual claims was tolled from the initiation of the suit until they opted out of the class. See also Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983) (recognizing that the commencement of a class action tolls applicable statutes of limitations on claims of all class members). But see Vaught v. Showa Denko K.K., 107 F.3d 1137 (5th Cir. 1997), cert. denied, 118 S.Ct. 67 (1997), (holding that the filing of a putative class action personal injury suit in a federal court outside Texas did not toll the limitations period for a personal injury claim filed in Texas because, inter alia, the defendants did not have notice of the claim during the would-be tolling period).

2. A Defendant Class May Toll Limitations Against Even Unnamed Defendants

In Appleton Elec. Co. v. Graves Truck Line, 635 F.2d 603, 610 (7th Cir. 1980), cert. denied, 451 U.S. 976 (1981), the plaintiffs alleged claims against named defendants as well as unnamed defendants within a defendant class. The court held that the plaintiffs’ claims against both the named and unnamed defendants were tolled upon the filing of the defendant class allegation. The court found that the application of the tolling doctrine to unnamed defendants did not abridge the due process rights of the defendants. Id. at 609. The tolling continued until such time as a defendant was notified of the suit and chose to opt out. It was immaterial that a defendant was not named or served and had no knowledge of the action until after the statute of limitations had run. Id.

The court stated:

[W]e are confronted here with a true conflict between the operation of the statute of limitations and Rule 23. This conflict can be resolved only by the promotion of one rule at the expense of the other, unless due process considerations require a particular result. Our reading of the cases convinces us that due process is not offended by the tolling doctrine, even where a defendant has no notice of a suit until after the limitations period has run . . . .

A contrary rule would sound the death knell for suits brought against a defendant class, nullifying that part of Rule 23 that specifically authorizes such suits. This, in turn, would have a potentially devastating effect on the federal courts. Plaintiffs would, in each case, be required to file protective suits, pending class certification, to stop the running of the statute of limitations. In the present instance, this could have resulted in the filing of a staggering number of complaints.

Id. at 609-610.

Other courts have similarly held that pleading a defendant class tolls the statute of limitations as to unnamed defendants. For example, one court tolled the statute of limitations as to unnamed members of a defendant class even though the defendant class was never certified. In re Prods. Sec. and Antitrust Litig., [1974-1975] Fed. Sec. L. Rep. (CCH) ¶ 95,070 (S.D. Fla. Mar. 21, 1975).

J. Plaintiff’s Right To Nonsuit Before Certification

According to a recent appellate opinion, plaintiffs in a state court class action have an absolute right to nonsuit their case before certification. See Winchester Homes, Inc. v. Osmose Wood Preserving, Inc., 37 F.3d 1053, 1057 (4th Cir. 1994); Ventura v. Banales, 905 S.W.2d 423 (Tex. App.—Corpus Christi 1995, orig. proceeding).
K. Venue

Texas’ new venue statute provides that in a suit in which more than one plaintiff is joined, each plaintiff must, independently of any other plaintiff, establish that venue is proper. TEX. CIV. PRAC. & REM. CODE ANN., § 15.003(a) (Vernon 1996). Does this provision mean that unnamed plaintiffs in class actions must establish that venue is proper as to them as well? This question has not been addressed by any Texas court. One venue expert, Patrick Hazel, Professor of Law at The University of Texas, is confident, however, that the answer to the question is “No.” As former Chair of the Rules Committee of the State Bar of Texas, Professor Hazel stated that “it was the consensus of the members on the Rules Committee that the unnamed plaintiffs in class actions would not have to establish that venue is proper as to them.” Since the unnamed plaintiffs are not “joined” but rather are represented by the named plaintiffs who stand in their stead, and are not considered parties for purposes of discovery in the Texas Rules of Civil Procedure, it appears that they need not establish that venue is proper as to them.

V. DISCOVERY IN COMPLEX LITIGATION

Discovery battles in complex litigation are typically extremely time-consuming. For this reason, many judges have a distaste for the discovery problems that accompany these cases. Counsel should move quickly to counteract these biases by filing a motion for an initial case management order. Judges will usually appreciate the effort to create some sort of streamlining of the discovery process. For a discussion of streamlining discovery and individualized proof in complex litigation, see the excellent article by Judge Robert Parker, Streamlining Complex Cases, 10 REV. LITIG. 547 (1991).

A. The Scope And Nature Of Discovery

Whatever form the initial filing takes — class action or mass joinder — and regardless of the forum, counsel should spend a good deal of time, as early as possible, determining what discovery is needed. Case management orders providing for the scope and timing of discovery require counsel to focus on the essentials of their claims and abandon collateral, unimportant issues. Moreover, incorporating deadlines and requirements into a motion for the entry of a case management order will demonstrate to the court that counsel is not interested in protracted discovery battles that will unnecessarily burden the court.

B. Bifurcation of Discovery

Lawyers who defend companies against class actions often argue for bifurcation of discovery between class certification-related discovery and merits-related discovery. See, e.g., Crump, What Really Happens During Class Certification? A Primer for the First Time Defense Attorney, 10 Rev. Litig. 1, 7 (1990). Crump suggests that a defendant’s best strategy “may be to resist merits discovery while at the same time arguing that plaintiffs have not shown typicality or commonality, which depend somewhat on the merits.” Id.

Recently, the Texas Supreme Court addressed the bifurcation argument in In re Alford Chevrolet-Geo, et al., 42 Tex. Sup. Ct. J. 756, 1999 WL 374136 (Tex.). The Court held that the defendants were not entitled to abate all merits discovery as a matter of law because on the facts the merits and class discovery were intertwined. For example, classwide discovery on dealer misrepresentations, while relevant to the merits, would also be relevant to the court’s typicality and commonality inquiries. Id. at *8. Because the defendants had failed to give the trial court any guidance on how to distinguish the merits from the certification discovery, and instead had argued in general terms, it was no abuse of discretion for the trial court to deny defendants’ request for bifurcation.

In re Alford Chevrolet-Geo is significant for another reason: the court held that in a DTPA class action suit, individual plaintiffs may demand relief on behalf of an entire class of consumers in their DTPA notices. Named plaintiffs are not limited to demanding their own damages. This ruling upheld named plaintiffs’ long-recognized authority to negotiate settlements on behalf of putative classes, including classes that seek damages under the DTPA.

C. Consolidating Discovery

If the case is one involving a large number of plaintiffs and/or defendants, counsel should consider consolidating discovery. For example, plaintiffs’ counsel may argue that although there are specific facts as to particular plaintiffs, broad discovery applicable to the plaintiffs may be best developed through consolidation of defendants’ discovery requests, at least at the outset. Groups of plaintiffs and the respective defendants may, in the interests of justice and fairness, require separate written discovery at a later date.

Plaintiffs may argue that each defendant propounding discovery to each plaintiff results in unnecessarily cumulative discovery. Plaintiffs may wish to urge the development of a master set of written discovery by all defendants. After all, there is no reason for each of the plaintiffs to respond repeatedly to a common set of inquiries, when one set of discovery, drafted and propounded jointly by the defendants to each of the plaintiffs, would accomplish the same objective. Plaintiffs may argue that this is the most fair and efficient method to provide each of the defendants with the needed information given the number of parties in the lawsuit.
D. Discovery From Absent Class Members

The Manual for Complex Litigation states that discovery from absent class members:

[S]hould be permitted only to the extent necessary and should be carefully limited to ensure that it serves a legitimate purpose and is not used to harass either the class representatives or the class members. . . . If discovery from absent members of the class is permissible at all, it should be sharply limited and allowed only on a strong showing of justification.

§ 30.232 (3d ed. 1995) (citation omitted). See also, 3 Newberg & Conte, Newberg on Class Actions §16.02, at 16-16 (3d ed. 1992) (“courts have refused to allow discovery for a number of reasons, including the possibility of prejudicial delay, the abusive nature of the requested discovery, and irrelevance to class issues.”).

If responses to interrogatories are sought from unnamed class members, class members may direct the court’s attention to Wainwright v. Kraftco Corp., 54 F.R.D. 532, 534 (N.D. Ga. 1972) and Fischer v. Wolfenbarger, 55 F.R.D. 129 (W.D. Ky. 1971). Those courts held that defendants in class actions do not have the right to seek answers to interrogatories from absent class members, because such persons are not parties for the purposes of discovery. Other courts have similarly limited discovery. See In re Worlds of Wonder Sec. Litig., No. C-87-5491, 1992 WL 330411 (N.D. Cal. July 9, 1992); Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977), cert. denied, 438 U.S. 916 (1978) (court considered whether information sought was available from other sources, and consequently allowed a limited number of interrogatories to be served upon a showing of need); Transamerican Ref. Corp. v. Dravo Corp., 139 F.R.D. 619, 621 (S.D. Tex. 1991) (discovery of less than 1% of absent class members was permitted); Alexander v. Burris, Cootes & Burris, 24 Fed. R. Serv. 2d (Callaghan) 1313 (4th Cir. 1978) (costs of mailing interrogatories to absent class members was required to be borne by defendants). This is essentially a federal problem though. In Texas Tex. R. Civ. P. 42(f) provides that unnamed class members are not parties for purposes of discovery.

E. Discovery Of Computerized Information

Any discovery plan should consider the discovery of computerized data. Relevant issues to address are: location, manner of production, retrieval, inspection, preservation, and use at trial of information stored in computers. Discovery requests may be sent on a computer disk so that interrogatories may be answered using the same disk, thus avoiding the needless retyping of interrogatories.

F. Obtaining Informal Discovery

Plaintiff’s counsel seeking informal discovery from a defendant’s employees that may be “represented” within the meaning of the disciplinary rules should seek guidance from the court before contacting the employees. In In re Air Crash Disaster Near Roselawn, Ind. on Oct. 31, 1994, 909 F. Supp. 1116 (N.D. Ill. 1995), a mass tort case, plaintiffs’ counsel, through a consulting firm, sent a letter and questionnaire to the defendant airline’s pilots asking them about their training and experience in icing conditions. The defendant objected to the communication, stating that it violated ethical rules forbidding ex parte communications between attorneys and “represented parties” or “unrepresented persons.” The defendant argued that the communication was unethical because it: (1) allowed the pilots to identify themselves unknowingly to the plaintiffs’ attorney; (2) implied that it was endorsed by the FAA; and (3) suggested that it was being conducted by a disinterested party. The court found that some of the pilots were “represented parties” who could bind the defendant airline. By sending the questionnaire, plaintiffs’ counsel violated the rule forbidding ex parte communications with “represented parties.” The court also held that with respect to other pilots, the communication violated the rule prohibiting ex parte communication with “unrepresented persons” because the letter did not disclose that it was sent by an interested party. The court noted that it is difficult for attorneys to identify who is a protected party when the defendant is an entity or corporation. As a result, the court imposed only minor sanctions. The court, however, advised that when attorneys are faced with this issue, they should: (1) follow the more restrictive interpretation of the ethical rule; (2) contact opposing counsel; or (3) seek guidance from the court.

The Texas rule, however, specifically allows such discovery. Tex. Disciplinary R. Prof. Conduct 4.02(c) (1997) (prohibits contact only with persons presently employed).

VI. DOCUMENT CONTROL

Complex litigation typically involves the production and serving of voluminous documents on multiple parties. Efficient management of complex cases, therefore, requires careful planning in the handling of these documents.

A. Identification System

At the beginning of the case, counsel should establish a system for identifying all documents produced or used in the litigation. Counsel should coordinate their
efforts so that each document is assigned a single designation for all purposes throughout the case. The most practical way of doing this is to consecutively stamp every document. To ensure easy identification and retrieval of the documents, a log should be kept recording each document produced as well as the producing and requesting parties and the date of production.

B. CD-ROM Technology

The use of CD-ROM technology and other optical discs on which discovery materials can be recorded in computer-accessible form may result in substantial savings to the parties. The court may direct that the discovery materials be “imaged” on discs, which then may be distributed to parties seeking discovery. Because a single disc can store a large amount of information, voluminous discovery materials can be distributed much more easily and inexpensively. Computerized search and retrieval of information on a disc facilitates the review of extensive discovery materials, particularly if adequately indexed. For example, materials might be indexed by key words, names, dates, document types, or any combination thereof.

C. Electronic Transfer Of Documents

In an effort to minimize the costs of serving pleadings on numerous parties and the court, and to increase the manageability of the case, the court may order that documents be served electronically to a central computer to which all parties and the court have access. See also Manual For Complex Litigation §§ 21.444, 21.446 (3d ed. 1995).

D. Document Depositories

The use of central document depositories can greatly aid in the management of voluminous documents in multiparty litigation. Storing and producing relevant documents in one central location can reduce the expense and burden of document production and inspection. In establishing a document depository, the court will need to ensure that the parties share the costs fairly. Also, the court may desire to appoint an administrator to make certain that the depository is operated properly. The administrator would, with the help of counsel, be responsible for establishing a system for indexing and storing the documents.

VII. PRE-CERTIFICATION CONTACT WITH PUTATIVE CLASS MEMBERS

A. Preventing Misleading Or Abusive Communications

Defendants have an incentive to avoid or minimize the class’s recovery by communicating with absent class members. See, e.g., Knuth v. Erie-Crawford Dairy Coop.
plaintiffs’ counsel may argue that the financial relationship with class members. Thus, exercise maximum coercion by virtue of its ongoing class.

A large majority of the class members were dependent upon the bank for future financing. In reaction to the suit, the bank, through its loan officers, began an active campaign of soliciting class members to opt out of the class action. The strategy proved to be extremely effective. The bank’s communications took place while the trial court’s decision on the plaintiff’s motion for a protective order was pending. Upon discovery of defendant’s solicitation campaign, the trial court not only ruled that the opt-out requests were voidable, but also imposed sanctions on the defendant. See Kleiner v. First Nat’l Bank, 102 F.R.D. 754, 775-76 (N.D. Ga. 1983), modified, 751 F.2d 1193 (11th Cir. 1985).

On appeal, the Eleventh Circuit affirmed the district court’s ruling. The court held that the trial court had discretion under Rule 23 to prohibit the bank’s communications, noting the particular problems that arise when a defendant contacts the members of a plaintiff class. In emphasizing the importance of the class receiving accurate and impartial information regarding the status, purposes, and effects of the action, the court remarked that “[u]nsupervised, unilateral communications with the plaintiff class sabotage the goal of informed consent by urging exclusion on the basis of a one-sided presentation of the facts, without opportunity for rebuttal.” Kleiner v. First Nat’l Bank, 751 F.2d at 1203. The court noted that a defendant’s interest is to minimize its liability by making the class as small as possible, not to disseminate information valuable to the class. Id. at 1202. Moreover, the defendant was able to exercise maximum coercion by virtue of its ongoing financial relationship with class members. Thus, plaintiffs’ counsel may argue that the Kleiner court’s reasoning is apropos to their case.

There is a long line of cases in which the courts have taken affirmative steps to protect the class members from misleading communications. The United States Supreme Court has held that “[u]napproved communications to class members that misrepresent the status or effect of the pending action . . . have an obvious potential for confusion and/or adversely affecting the administration of justice.” Gulf Oil Co. v. Bernard, 452 U.S. 89, 100 n.12 (1981). Accordingly, a court has broad authority to enter appropriate orders to prevent misleading communications to class members concerning the litigation. Thus, even in the absence of unfair attempts to communicate with class members, some courts have prohibited anyone from (a) communicating any information to class members that is inconsistent with the contents of a class notice or (b) soliciting class members to opt out of the case. See e.g., In re Estate of Ferdinand Marcos Human Rights Litig., 910 F.Supp. 1460 (D. Haw. 1995) (barring parties from communicating to class members any information that is inconsistent with class notice).

The potential for defendants in class actions to attempt to sway potential class members was noted with disapproval by the court in Hampton Hardware, Inc., v. Cotter & Co., 156 F.R.D. 630 (N.D. Tex. 1994). In this case, the plaintiff, a buyer of hardware goods, sought to represent similarly situated members of a buying cooperative. The defendant hardware supply company sent three letters to potential class members a short time after the class action lawsuit had been filed. Id. at 631. These letters stated that the defendant would be forced to hire “[t]eams of lawyers” which would be paid for out of “your pocket.” Id. The plaintiffs in Hampton Hardware filed a motion to limit the defendant’s contact with class members. In making its determination, the court first analyzed Gulf Oil and its progeny, and then stated:

“Rule 23 expresses a ‘policy in favor of having litigation in which common interests, or common questions of law or fact prevail, disposed of where feasible in a single lawsuit.’” Gulf Oil, 452 U.S. at 99 n.11, 101 S. Ct. at 2199, n.11. The . . . letters work directly against this principle by attempting to reduce the class members’ participation in the lawsuit based on threats to their pocketbooks. For all of these reasons, communications by Cotter to the members regarding the lawsuit must be prohibited.

Id. at 630. The Hampton court then stated that “[i]t is difficult to conceive of any advice from Cotter regarding the lawsuit that is not rife with the potential for confusion and abuse given Cotter’s interest in the suit.” Id. at 634. Thus, pursuant to Fed. R. Civ. P. 23 and Tex. R. Civ. P. 42, courts have the power to enter a protective order prohibiting any abusive communications to putative class members. MANUAL FOR COMPLEX LITIGATION § 30.24 (3d ed. 1995).

3. Restrictions On Communications To Class Members

A number of courts have granted protective orders in class action litigation in which the defendants were prohibited from making false and misleading statements to absent class members.

In the School Asbestos litigation, for example, a nonparty trade association controlled by the defendant manufacturers was prohibited from distributing a booklet that may have convinced class members to forego asbestos removal in their buildings in favor of some cheaper remedial measure. In re School Asbestos Litig., 921 F.2d 1310 (3d Cir. 1990), cert. denied sub nom. U.S. Gypsum Co. v. Barnwell Sch. Dist., 499 U.S. 976 (1991). The court held that communications to class
members that are “factually or legally incomplete [or] lack objectivity and neutrality . . . will surely result in confusion and adversely affect the administration of justice.” Id. at 682 (quoting Erhardt v. Prudential Group, Inc., 629 F.2d 843, 846 (2nd Cir. 1980)).

Similarly, in Haffer v. Temple Univ. of Commonwealth Sys. of Higher Educ., 115 F.R.D. 506 (E.D. Pa. 1987), the court prohibited defendants from communicating false and misleading information to class members. The court also awarded plaintiffs the costs and attorneys’ fees resulting from the defendants’ improper communications and thwarting of discovery. See also Tedesco v. Mishkin, 629 F. Supp. 1474 (S.D.N.Y. 1986) (prohibiting defendant from sending a letter to class members, written by defendant but signed by class member sympathetic to defendant, attacking class counsel and discouraging participation in the class action); Impervious Paint Indus. v. Ashland Oil, 508 F. Supp. 720 (W.D. Ky. 1981), appeal dismissed, 659 F.2d 1081 (6th Cir. 1981) (prohibiting defendant from advising class members that they would be subjected to discovery).

In Weight Watchers of Philadelphia v. Weight Watchers Int’l., 53 F.R.D. 647 (E.D.N.Y. 1971), supplemented, 55 F.R.D. 50 (E.D.N.Y. 1971), appeal dismissed, 455 F.2d 770 (2d Cir. 1972), the defendant’s chairman of the board sent a letter to its franchisees, all of whom were potential class members, some 14 days after an antitrust complaint was filed. The letter warned that the defendant would vigorously defend “the good name and future of the entire Weight Watchers Organization.” Id. at 649. The defendant in Weight Watchers argued that since Fed. R. Civ. P. 23 was silent regarding with whom it could communicate before class certification, it could not have violated the rule. Id. at 651. The court disagreed:

It would be a strange rule, indeed, where a court would be powerless to deal with what it considered abuses because the litigation had not reached a certain state. To adopt such a rule would be little more than inviting counsel to engage in a race to complete questionable practices before the court acquires power to prevent such abuses. For the purpose of preventing and correcting abuses, once an action is filed as a class action it should be so presumed even prior to a formal determination that it is a class action.

Id. at 651 (emphasis added).

In Local 734 Bakery Drivers Pension Trust Fund v. Continental Ill. Nat’l Bank & Trust Co. of Chicago, 57 F.R.D. 1 (N.D. Ill. 1972), the defendant sought an order allowing it to respond to the inquiries of putative class members with regard to the class action. The court, following Weight Watchers, held that the defendant could not do so “without prior consent and approval of such communications.” Id. at 2. See also In re International House of Pancakes Franchise Litig., 1972 Trade Cas. (CCH) ¶ 73, 797 (W.D. Mo. 1972) (preliminarily enjoining defendant and persons acting for it from threatening to terminate its agreements with putative class members).

Thus, plaintiffs’ counsel may argue that in the face of abusive communications by defendants, the court should prohibit defendants from communicating further with putative class members without the express approval of the court.

4. Curing Abusive Communications

Courts may take a number of steps to cure any misleading communications made to class members. These may include curative notices sent at the expense of those at fault as well as extensions of the deadlines for opting out, intervening, or otherwise responding to a proposed settlement. See e.g., In re School Asbestos Litig., 921 F.2d 1310 (3rd Cir. 1990), cert. denied sub nom. U.S. Gypsum Co. v. Barnwell Sch. Dist., 499 U.S. 976 (1991). More severe sanctions, including fines or the replacement of counsel, may also be warranted. Kleiner v. First Nat’l Bank, 751 F.2d 1193 (11th Cir. 1985).

In Kleiner the court found that the defendant’s contacts with potential class members were improper, and it entered an order directing that a reply to inquiries by class members be drafted jointly by defendants and plaintiffs for dissemination to potential class members. 99 F.R.D. 77 (N.D. Ga. 1983), modified, 751 F.2d 1193 (11th Cir. 1985). Similarly, one district court specifically ordered that an explanatory notice be sent at the expense of the offending attorney. Tedesco v. Mishkin, 629 F. Supp. 1474, 1484-85 (S.D.N.Y. 1986). As one district court recently stated, “[p]ursuant to Rule 23(d) of the Federal Rules of Civil Procedure, the Court has power to order a corrective communication where it is warranted by the facts of a given situation.” O’Neil v. Appel, 897 F. Supp. 995 (W.D. Mich. 1995). This issue has not yet been addressed by any Texas court. Nevertheless, parties may argue to a Texas state court that it has been granted comparable discretion pursuant to the Texas Rules of Civil Procedure.

5. Defendants May Be Required To Keep A Contact Log

Plaintiffs may request that because the potential for overreaching on the part of defendants exists, and in recognition of the fact that absent class members in the litigation may be subject to leverage — economic or
otherwise — applied by the defendants, the court should order the defendants to keep a log of all contacts with putative class members and make it available to the plaintiffs and their counsel.

B. Court Approval To Contact Putative Class Members

1. Precertification Communications With Class Members

The parties may desire to seek authorization from the court to convey information to all putative class members, including the existence of a case filed on their behalf and the identity of plaintiffs’ counsel, who seek to serve as their attorneys in prosecuting the claims. These communications serve the general due process concerns with keeping unnamed class members as actively informed as possible of the adjudication of their claims. This is precisely the type of communication that the U.S. Supreme Court addressed in the seminal case of Gulf Oil Co. v. Bernard, a case that established the indispensability of regular attorney-client communications in class actions. 452 U.S. 89 (1981). The Supreme Court severely curtailed orders restricting communications by holding that such orders should be “based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties.” Id. at 101. In addition, the Court instructed that any restrictive order must first identify the specific abuses being addressed and should be carefully drawn to limit speech as little as possible. The narrow group of such specific abuses is limited to the susceptibilities of nonparty class members to solicitation, the problem of stirring up litigation, and communications that misrepresent the status or effect of the action and may confuse or mislead the recipients. Id. at 100 n. 12 (citing Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782 (E.D. La. 1977), appeal dismissed, 579 F.2d 642 (5th Cir. 1978)).

2. Communications Between Class Representatives And Class Members

It is likely that both the named plaintiffs and unnamed potential class members will greatly benefit from precertification communications. In fact, named plaintiffs who fail to communicate with putative class members to ascertain their interest in the litigation have been criticized for failing to supply information bearing on the class certification determination. 3 NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS § 15.12, at 15-39, n. 101 (3d ed. 1992) (citing Weeks v. Bareco Oil Co., 125 F.2d 84 (7th Cir. 1941); Martin v. Arkansas Arts Ctr., 21 Fair Empl. Prac. Cas. (BNA) 555 (E.D. Ariz. 1979)). This is because communicating with class members and obtaining information from them will enable the named plaintiffs to better prove their allegations that a class action should be maintained. Also, communicating that the filing of a class action tolls the statute of limitations on the class members’ claims “would be of value to class members who may be uncertain on how they may preserve their claims.” 3 NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS § 15.12, at 15-38 (3d ed. 1992). Moreover, allowing the named plaintiffs to contact putative class members may result in a more streamlined litigation process and more focused discovery.

Pre-approval of communications with the class will mitigate all of the negative effects that concerned the Supreme Court in Gulf Oil, will result in increased fairness and judicial economy, and will enable more efficient resolution of the underlying issues in the litigation.

3. Obtaining Information From The Class

Counsel wishing to acquire information from the class may propose that the judge send out a questionnaire on the court’s letterhead that asks class members the relevant questions with a neutral tone. Counsel should be careful to ensure that the statements made and questions asked are in no way misleading.

VIII. SETTLEMENT OF CLASS ACTIONS

Like all litigation, complex cases are more likely to be settled than tried. The stakes in the case and the cost of pretrial activity increase that likelihood. This section discusses the settlement approval procedure in class actions.

A. Settlement Approval Procedure Generally

Ordinarily, a court is not required to review and approve a settlement. The class action, however, is an exception to this rule. No action brought as a class action may be settled or compromised without court approval. Fed. R. Civ. P. 23(e). Judicial experience has led to an exacting procedure and specific criteria for settlement approval. Approval of class action settlements involves a three step process:

1. Preliminary approval of the proposed settlement and plan of distribution of the settlement fund to class members at an informal hearing;

2. Dissemination of notice of the settlement to all affected class members informing them of the proposed settlement and their right to participate in, object to or exclude themselves from the class proceeding; and

3. A formal “fairness hearing” at which class members may be heard regarding the settlement and at which evidence and argument concerning
the fairness, adequacy and reasonableness of the settlement is presented.

This procedure is commonly used by the federal district courts, and is endorsed by the leading class action commentators, Alba Conte and Herbert Newberg, 2 NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS § 11.22 (3d ed. 1992). By adopting this procedure, the court will ensure that class members will have the protection of procedural due process and will fulfill the court’s role as guardian of class interests.

The federal rules (like the Texas rules) do not provide for a formal fairness hearing. Before approving a proposed class settlement, however, most courts follow this procedure. The Advisory Committee on the Federal Rules of Civil Procedure have recently proposed an amendment to Rule 23 providing that there must be such a hearing. If passed, this provision will simply confirm the existing practice.

B. Criteria For Preliminary Settlement Approval

Generally, “courts look with favor on the voluntary resolution of litigation through settlements.” Holden v. Burlington N., Inc., 665 F. Supp. 1398, 1405 (D. Minn. 1987) (citations omitted). This rule has particular force in class actions. In re Corrugated Container Antitrust Litig., 556 F. Supp. 1117, 1157 (S.D. Tex. 1982), aff’d, 687 F.2d 52 (5th Cir. 1982) (“class action suits should be settled whenever possible, as soon as possible.”). Thus, in considering a proposed class settlement, courts generally view facts in a light favorable to settlement. 


The preliminary approval stage is really an initial evaluation of the fairness of the proposed settlement which can be made on the basis of information already known to the court, written submissions, and informal presentations from the settling parties. The MANUAL FOR COMPLEX LITIGATION summarizes the preliminary approval criteria as follows:

If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.

§ 30.44 (3d ed. 1995). Thus, the purpose of the preliminary evaluation is to determine whether the proposed settlement and plan of distribution are within the range of possible approval, and whether notice to the settlement class of its terms and conditions, and the scheduling of a “formal fairness hearing,” also known as a final approval hearing, will be worthwhile. 2 NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS § 11.25 (3d ed. 1992); Liebman v. J.W. Petersen Coal & Oil Co., 73 F.R.D. 531 (N.D. Ill. 1973). 

The preliminary hearing is also used to consider the certification of a settlement class. 2 NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS § 11.22 (3d ed. 1992); In re Baldwin-United Corp., 105 F.R.D. 475 (S.D.N.Y. 1984). It has become accepted practice to seek certification of a temporary plaintiff class for settlement purposes in connection with settlements. 2 NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS §§ 11.22, 11.27 (3d ed. 1992); Weinberger v. Kendrick, 698 F.2d 61 (2d Cir. 1982), cert. denied, 464 U.S. 818 (1983); In re Beef Indus. Antitrust Litig., 607 F.2d 167, 175 (5th Cir. 1979), cert. denied sub nom. Iowa Beef Processors, Inc. v. Meat Price Investigators Ass'n, 452 U.S. 905 (1981). This practice has arisen in recognition of the purposes and policies inherent in Tex. R. Civ. P. 42(e), which requires court approval of all class settlements. Court approval ensures that the interests of the absent class members will be protected. 2 NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS §§ 11.22-11.23 (3d ed. 1992). Certification of the settlement class assures the settling defendant that the release given will bind all interested parties, not just the named plaintiffs. Certification for settlement purposes also enables a settling defendant to withdraw from the litigation with a binding and universal release. 2 NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS § 11.23 (3d ed. 1992).

In its first decision to articulate the proper certification process for settlement classes, the U.S. Supreme Court recently held that actions in which classes are certified for settlement only must meet the Fed. R. Civ. P. 23(a) and 23(b) requirements for certification that are “designed to protect absentees by blocking unwarranted or overbroad class definitions.” Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 608 (1997). However, a district court need not inquire whether the class presented for settlement would present management problems under Rule 23(b)(3)(D) if tried because “the proposal is that there is to be no trial.” Id. The Court also stated that a district court should give heightened attention to the other requirements of Rule 23(a) and 23(b) in its certification inquiry because the court “will lack the opportunity, present when a case is litigated, to
adjust the class, informed by the proceedings as they unfold.” *Id.*

A trial court should consider the settlement terms in conducting its certification inquiry under Rule 23(a) and 23(b). A determination, however, that a proposed class settlement is fair in accordance with Rule 23(e) does not substitute for the requirements of 23(a) and 23(b). Although a settlement only class need not be manageable at a hypothetical trial, it must fulfill the other conditions of certification as do classes certified for litigation. *Id.*

The Court noted that the Advisory Committee on the Federal Rules of Civil Procedure has proposed an amendment to Rule 23 that would allow a court to certify a 23(b)(3) class for settlement purposes even if it could not certify the class for litigation. Absent a definitive rule change by Congress, however, the Court “considered the certification at issue under the rule as it is currently framed.” *Id.*

The Texas Supreme Court held that actions in which classes are certified as settlement classes must meet the same requirements for certification that litigation classes must meet. *General Motors Corp. v. Bloyed,* 916 S.W.2d 949 (Tex. 1996). However, in the case of *In re Asbestos Litigation,* the Fifth Circuit held that the class certification requirements for settlement classes are more lenient than the requirements for litigation classes. *In re Asbestos Litig.,* 90 F.3d 963 (5th 1996), cert. granted, judgment vacated sub nom. Flanagan v. Ahern, 117 S.Ct. 2503 (1997). This opinion was vacated by the U.S. Supreme Court. *Id.* Despite this, the Fifth Circuit affirmed its holding and the case has since been granted certiorari by the Supreme Court. *In re Asbestos Litig.,* 134 F.3d 668, (5th Cir. 1998), cert. granted sub nom. Ortiz v. Fibreboard Corp. 118 S.Ct. 2339 (June 22, 1998)

**C. Notice To The Class**

Once the Court concludes that the proposed settlement and plan of distribution fall within the range of possible approval, the court then will consider the parties’ proposed notice.

1. **Nature And Method Of Class Notice**

The Dallas Court of Appeals held in *American Express Related Travel Servs. Co. v. Walton,* 883 S.W.2d 703 (Tex. App.—Dallas 1994) that Tex. R. Civ. P. 42 requires individual notice of settlement to all class members identifiable through reasonable effort. If a settlement occurs before notice of class certification has been given, the notice of certification and settlement should be combined to reduce the expense of notice and avoid the confusion that separate notification of certification and settlement would produce.

2. **Content Of Class Notice**

The proposed notice should provide the following information:

1. terms and conditions of the settlement;
2. background of the litigation;
3. claims asserted;
4. nature of the release;
5. nature of the class action;
6. identity of class counsel;
7. rights and responsibilities of class members;
8. details of the final settlement approval procedure, including the date, time and place of the final approval hearing;
9. procedure for class members to comment in support of or in opposition to the settlement;
10. that the class members will have an opportunity to be heard at the final hearing; and
11. maximum amount of attorney’s fees sought by class counsel and the proposed method of calculating the award.

Tex. R. Civ. P. 42(c)(2); *General Motors Corp. v. Bloyed,* 916 S.W.2d 949 (Tex. 1996).

The notice should be neutral. 2 NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS § 8.39 (3d ed. 1992). It should summarize the proceedings and conditions of settlement in an informative and coherent manner, in compliance with the MANUAL FOR COMPLEX LITIGATION’S statement that “the notice should be accurate, objective, and understandable to class members.” § 30.211 (3d ed. 1995). It should make clear that the settlement does not constitute an admission of liability by the defendant and emphasize that the court has not yet ruled, one way or another, on the substantive merits of the action. It also should state that the final settlement approval decision has yet to be made.

**D. The Final Approval Hearing**

The last step in the settlement approval process is the formal hearing recommended by the MANUAL FOR COMPLEX LITIGATION, at which the court may pursue any inquiries necessary to obtain all information relevant to its evaluation of the settlement. Proponents of the settlement may explain and describe its terms and
conditions and offer argument and evidence in support of settlement approval. The class members themselves, or their counsel, may be heard regarding the approval or disapproval of the settlement agreement. In determining whether to approve a proposed settlement, the court should consider the following factors: (1) whether the settlement was negotiated at arm’s length or was a product of fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings, including the status of discovery; (4) the factual and legal obstacles that could prevent the plaintiffs from prevailing on the merits; (5) the possible range of recovery and the certainty of damages; (6) the respective opinions of the participants, including class counsel, class representatives, and the absent class members. General Motors Corp. v. Bloyed, 916 S.W.2d 949 (Tex. 1996); Ball v. Farm & Home Sav. Ass’n, 747 S.W.2d 420, 423-24 (Tex. App.—Fort Worth 1988, writ denied).

The final hearing should be “plenary” with the opportunity for questioning by the court and “vigorous cross-examination by counsel representing objecting class members.” Bloyed, 916 S.W.2d at 958.

If final approval is granted, the settlement becomes binding on all settlement class members and the claims of the class members against the defendants are released and dismissed.

E. Standing To Object To Settlement Of Class Actions

1. Generally

The general rule is that non-parties to a settlement do not have standing to object to the settlement of a class action. Gould v. Alleco, 883 F.2d 281 (4th Cir. 1989), cert. denied, 493 U.S. 1058 (1990); In re Sunrise Sec. Litig., 131 F.R.D. 450 (E.D. Pa. 1990), aff’d, 916 F.2d 874 (3d Cir. 1990). Non-settling defendants have no standing to object to a partial settlement with other defendants unless they can show some formal legal prejudice or that the settlement precludes them from seeking indemnification from the settling defendants. Zupnick v. Fogel, 989 F.2d 93 (2d Cir. 1993), cert. denied sub nom. Fogel v. Kopelson, 510 U.S. 945 (1993), and cert denied sub nom. JEM Management Associates, Corp. v. Sperber Adams Associates, 510 U.S. 945 (1993); Agretti v. ANR Freight Sys., 982 F.2d 242 (7th Cir. 1992); In re School Asbestos Litig., 921 F.2d 1310 (3rd Cir. 1990), cert. denied sub nom. U.S. Gypsum Co. v. Barnwell Sch. Dist., 499 U.S. 976 (1991); In re Viatron Computer Sys. Corp. Litig., 614 F.2d 11, 14 (1st Cir. 1980), cert. denied sub nom. Arthur Andersen & Co. v. Stewart, 449 U.S. 826 (1980); Quad/Graphics, Inc. v. Fass, 724 F.2d 1230, 1233 (7th Cir. 1983); Seiffer v. Topsy’s Int’l, Inc., 64 F.R.D. 714 (D. Kan. 1974), appeal dismissed, 520 F.2d 795 (10th Cir. 1975), and cert. denied, 423 U.S. 1051 (1976). Such prejudice will not exist where the settlement contains a provision under which the plaintiffs agree to reduce their claim against nonsettling parties by the amount of any judgment for contribution or indemnity. In re School Asbestos Litig., 921 F.2d 1310 (3d Cir. 1990).

Named plaintiffs who opt out of a settlement have no standing to object to the settlement. Mayfield v. Barr, 985 F.2d 1090 (D.C. Cir. 1993).

2. Objectors Have No Absolute Right To Discovery

An objector does not have an absolute right to discovery from the parties regarding matters affecting the reasonableness of the settlement. The necessity for and extent of discovery permitted is within the discretion of the court. In re Domestic Air Transp. Antitrust Litig., 144 F.R.D. 421, 424 (N.D. Ga. 1992).

An objector does not, by dint of their status as a class member, have a right to discover materials that are protected by the attorney-client and work product privileges. Merely stating that a class member is a client of class counsel does not bestow on the class member the right to inspect the privileged communications of other class members or class counsel’s work product. The relationship between class members and class counsel is simply not the same as the relationship between an individual client and his or her attorney. In re Agent Orange Prod. Liab. Litig., 800 F.2d 14, 19 (2d Cir. 1986). “During the time between the institution of a class action and the close of the opt-out period, the status of plaintiffs’ counsel in relation to class members cannot be stated with precision.” Impervious Paint Indus. v. Ashland Oil, 508 F. Supp. 720, 722-23 (W.D. Ky. 1981), appeal dismissed, 659 F.2d 1081 (6th Cir. 1981). For example, unnamed class members are treated as “clients” for purposes of the rule prohibiting a lawyer from contacting the client of opposing counsel. Model RULE OF PROFESSIONAL CONDUCT 4.2. See 2 G. HAZARD & W. HODES, THE LAW OF LAWYERING § 4.2:102. In contrast, unnamed class members do not have the right to direct the course of litigation to the extent that individual clients have. Most obviously, an unnamed client does not have the right to dictate whether class counsel must accept or reject a settlement offer. Compare Model RULE 1.2 (“A lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter.”).

There is a body of case law that addresses privilege issues in an analogous context to which a court can turn for guidance. This line of cases, read in conjunction with the Texas Supreme Court’s recent decision in Huie v. DeShazo, 922 S.W.2d 920 (Tex. 1996), persuasively indicates that membership in a class does not confer the
right to breach the attorney-client and work product privileges. Consequently, at most, an objector should be permitted to production of documents protected by privileges only if he first establishes that “good cause” exists for overriding these privileges.

In Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), cert. denied sub nom, Garner v. First Am. Life Ins. Co., 401 U.S. 974 (1971), shareholders brought a derivative action on their corporation’s behalf. They argued that because they were the true owners of the corporation and the corporate officers owed them a fiduciary duty, the defendant corporation should be foreclosed absolutely from asserting the attorney-client privilege to block disclosure of its communications with corporate counsel. The Fifth Circuit rejected this argument, but held that the shareholders should be given an opportunity to show good cause why a privilege claim should be disallowed in a particular instance. Id. at 1103-04. The court then listed a number of factors that the lower courts should consider in deciding whether the shareholders had met their burden of demonstrating good cause:

- the number of shareholders and the percentage of stock they represent; the bona fides of the shareholders; the nature of the shareholders’ claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; whether, if the shareholders’ claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether the communication related to past or to prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

Id. at 1104.

Subsequent cases have extended the Garner rationale from derivative shareholder suits to, *inter alia*, non-derivative shareholder suits, *Ward v. Succession of Freeman*, 854 F.2d 780 (5th Cir. 1988), cert. denied, 490 U.S. 1065 (1989); suits by labor union members against union officials, *Mallick v. International Bhd. of Elec. Workers*, 749 F.2d 771 (D.C. Cir. 1984), aff’d, 814 F.2d 674 (D.C. Cir. 1987); and actions by trust beneficiaries against the trust and its trustee, *Helt v. Metro. Dist. Comm’n*, 113 F.R.D. 7 (D. Conn. 1986); *See also Cox v. Administrator U.S. Steel & Carnegie*, 30 F.3d 1347 (11th Cir. 1994). In each of these cases, the rationale for extending Garner was that the party asserting the privilege owed a fiduciary obligation to the party challenging the privilege.

That same reasoning, however, undermines the case for applying Garner at all in Texas. The Texas Supreme Court has unanimously rejected the claim that the existence of a fiduciary relationship allows a beneficiary to pierce the attorney-client privilege. In *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996), the Court held that the trustee’s fiduciary duty to fully disclose all material facts to his beneficiary did not abrogate the trustee’s right to assert the attorney-client privilege against the beneficiary. “Without the privilege, trustees might be inclined to forsake legal advice, thus adversely affecting the trust, as disappointed beneficiaries could later pore over the attorney-client communications in second-guessing the trustee’s actions.” *Id.* at 924.

If any class member is entitled to pore over class counsel’s work product and communications with other class members and second-guess class counsel’s actions, class counsel may well be inclined to communicate less and to commit less to writing, to the detriment of the class as a whole. Further complicating matters in the context of class actions, if any class member is entitled to access privileged material, what is to prevent that class member from revealing it to third parties, thereby waiving the privilege for all the other class members? Indeed, the danger that a dissatisfied (or simply self-serving) class member might seek to put such information to its own purposes alone is reason enough for rejecting the argument that all class members are “clients” entitled to review all of class counsel’s work product and privileged communications with other class members.

Some of the factors considered in the determination of whether discovery should be allowed include the adversarial nature of existing discovery, the objector’s efforts to become familiar with the existing record, the size of the objector’s interest and the reasonableness of his request. *Saylor v. Lindsley*, 456 F.2d 896, 904 (2d Cir. 1972); *Bok v. Ackerman*, 309 F. Supp. 710, 715-16 (E.D. Pa. 1970); 2 NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS § 11.57 (3d ed. 1992).

The lack of a concrete objection to the fairness and adequacy of the proposed settlement also militates against allowing objectors to conduct intrusive discovery. *Malchman v. Davis*, 761 F.2d 893, 897 (2d Cir. 1985), cert. denied sub nom. Mountain Plains Congress of Senior Orgns. v. Malchman, 475 U.S. 1143 (1986) (district court does not have to allow objectors discovery unless they make cogent factual objection to settlement). As one court of appeals stated in rejecting objectors’ discovery request, “[i]n general the position taken by the objectors is that by merely objecting, they are entitled to stop the settlement in its tracks, without demonstrating any factual basis for their objections, and to force the
parties to expend large amounts of time, money and effort to answer their rhetorical questions, notwithstanding the copious discovery available.... To allow the objectors to disrupt the settlement on the basis of nothing more than their unsupported suppositions would completely thwart the settlement process.” Geier v. Alexander, 801 F.2d 799, 809 (6th Cir. 1986) (quoting City of Detroit v. Grinnell Corp., 495 F.2d 448, 464 (2d Cir. 1974)).

3. Discovery Regarding Attorneys’ Fees

Discovery in connection with fee motions should rarely be permitted. MANUAL FOR COMPLEX LITIGATION, § 24.224 (3d ed. 1995). Discovery may be advisable, however, when attorneys make competing claims to a settlement fund designated for the payment of fees. See In re Thirteen Appeals Arising Out Of San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295 (1st Cir. 1995), aff’d sub nom. In re Three Additional Appeals Arising Out of San Juan Dupont Hotel Fire Litig., 93 F.3d 1 (1st Cir. 1996) (individually retained plaintiff’s attorneys not entitled to elaborate discovery, an evidentiary hearing, or cross-examination at the trial court’s hearing regarding the division of a fee award). If appropriate guidelines and ground rules have been established, the materials submitted should normally meet the needs of the court and other parties. If a party requests clarification of material submitted in support of the request for fees, or additional material, the court should determine what information is genuinely needed and arrange for its informal production.

F. Settling Federal Claims In State Courts

Many federal claims are not within the exclusive jurisdiction of the federal courts. There has been no doubt that a state court settlement judgment releasing such federal claims is binding on members of the settlement class. There are a number of federal claims, however, that are within the exclusive jurisdiction of the federal courts. Is a state court settlement judgment releasing claims that could have only been brought in federal court binding on the class members? The United States Supreme Court has recently answered that question in the affirmative in Matsushita Elec. Indus. Co., Ltd. v. Epstein, 516 U.S. 367 (1996). In reversing the Ninth Circuit, the Supreme Court found that a state court settlement judgment releasing claims within the federal courts’ exclusive jurisdiction was a bar to further prosecution of the federal claims and thus the earlier state court judgment was entitled to full faith and credit. Id.

G. Individual Settlement Offers

A defendant facing a certification hearing may, in an attempt to avoid having to defend a class action case, offer to settle the class representatives’ individual claims. This strategy has been sharply criticized by the Fifth Circuit. In Roper v. Consurve, Inc., 578 F.2d 1106 (5th Cir. 1979), aff’d sub nom. Deposit Guar. Nat’l Bank v. Roper, 445 U.S. 326 (1980), two credit card holders brought a class action against a national bank, alleging usurious interest charges. Prior to the certification hearing, the bank, without admitting liability, made an offer of judgment to each of the two named plaintiffs, by depositing the maximum amount that each could recover in the registry of the court. Although the plaintiffs refused to accept this tender, the trial court denied certification based on the defendant’s offer of judgment. The plaintiffs appealed.

The Fifth Circuit reversed, holding that even if the court permitted the bank to pay off the named plaintiffs, “this satisfaction of their claims could not preclude them from appealing the denial of certification, nor would it excuse then from their duty of doing so absent express approval by the trial court.” Id. at 1110. Offering support for this ruling, the court stated, “the notion that a defendant may short-circuit a class action by paying off the class representative either with their acquiescence or, as here, against their will, deserves short shrift. Indeed, were it so easy to end class actions, few would survive.” Id. In addition, the court recognized that by the very act of filing a class action, a class representative assumes responsibilities to the members of the class, and representative should not be allowed to terminate these duties by accepting satisfaction. Thus, “the court itself has special responsibilities to ensure that the dismissal does not prejudice putative members.” Id.

The Supreme Court affirmed stating, “To deny the right to appeal simply because the defendant has sought to ‘buy off’ the individual claims of the named plaintiffs would be contrary to sound judicial administration.” Deposit Guar. Nat’l Bank v. Roper, 445 U.S. 326, 339 (1980). In addition, requiring multiple plaintiffs to bring separate actions, which could be “picked off” by a tender of judgment before an affirmative ruling on class certification, would frustrate the objectives of class actions and would invite waste of judicial resources. Id.

IX. ADMINISTRATION OF CLASS ACTION SETTLEMENTS

Various problems may arise in the administration of a class action settlement. In cases where the settlement provides for a specified payment to each qualifying class member, settling defendants will have an incentive to maximize the extent to which class members are found to be disqualified or have their claims reduced, thereby diminishing the total amount to be paid.

Class members typically are required to file claim forms providing details about their claims and other information needed to administer the settlement. Verification under oath may be required. In some
instances, it may be appropriate to require substantiation of the claims through invoices or brokers’ records and the like. The parties and the court should ensure that completion of the claim forms is not any more burdensome than necessary to administer the settlement. The court need not require the same proof to administer the settlement that might be needed to prove the damages at trial. If notices to class members are returned due to improper addresses or if class members fail to submit claim forms, counsel should, in carrying out their fiduciary duties to the class, require that additional mailings, telephone calls and investigative searches be undertaken to locate and obtain any necessary information from the class members to administer the settlement proceeds to them.

Class counsel should be careful to record the receipt of the claim forms and any other information received from the class members. Information from class members is often directed to a separate mailing address. If common questions are asked about the settlement, counsel may desire to prepare form letters to respond to such inquiries. Counsel should attempt to memorialize any such form letters to minimize the likelihood of disputes over their form and necessity.

In some cases, class counsel will not need to gather information from the class to administer the settlement benefits. For example, the defendants’ records may provide satisfactory information to distribute the settlement.

The court may appoint a claims committee or special master to administer the settlement fund. Such a master may be required to interpret documents received from the class. The special master may require additional hearings to clarify documentation and ensure class members receive the appropriate settlement distribution. The court should provide for judicial review of any of the master’s findings. Furthermore, the court should require the master to submit periodic reports of the status of the distribution of the settlement so that it may properly oversee the distribution process and ensure that it is carried out equitably and in accordance with the settlement terms.

X. ATTORNEYS’ FEE AWARDS IN CLASS ACTIONS

The typical rule in American jurisprudence is that each party bears its own attorneys’ fees. In class actions, however, where a common fund has been created, a court may award attorneys’ fees from the common fund. To the extent possible, a court should advise the parties at the outset of the litigation what method will be used for calculating fees. In re Nineteen Appeals Arising Out Of San Juan Dupont Plaza Hotel Fire Litig., 982 F.2d 603 (1st Cir. 1992) (district court’s fee award vacated, partly because the court used a combined lodestar and percentage recovery structure after it stated its intent at the beginning of the litigation to use a percentage award only). If the percentage method will be used, the court should advise the parties of the likely percentage to be used. This will have a substantial effect on incentives in the litigation. Manual For Complex Litigation § 24.231 (3d ed. 1995). This information then should be communicated to the class members in the certification notice so that they can decide to remain in or opt out of the litigation. General Motors Corp. v. Bloyed, 916 S.W.2d 949 (Tex. 1996).

For a comprehensive study of attorneys’ fees in complex litigation, see Alba Conte, 1 Attorney Fee Awards (2d ed. 1993 & Supp. June 1997).

A. Common Fund Cases

It is established in Texas that when a common fund has been created to be shared by a class, the court, in exercising its equitable jurisdiction, should award a reasonable fee out of the common fund to counsel who prosecuted the suit that created the fund. Knebel v. Capital Nat’l Bank, 518 S.W.2d 795, 799-801 (Tex. 1975); Baja Energy, Inc. v. Ball, 669 S.W.2d 836 (Tex. App.—Eastland 1984, no writ); City of Dallas v. Arnett, 762 S.W.2d 942, 954 (Tex. App.—Dallas 1989, writ denied); Crouch v. Tenneco, Inc., 853 S.W.2d 643, 647 (Tex. App.—Waco 1993, writ denied) (citing In re Terra-Drill Partnerships Sec. Litig., 733 F. Supp. 1127, 1129 (S.D. Tex. 1990)). See also Blum v. Stenson, 465 U.S. 886 (1984); Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980); Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240 (1975). Therefore, the common fund represents a time-honored exception to the general rule that each litigant must bear its own attorneys’ fees. New Amsterdam Casualty Co. v. Texas Indus., 414 S.W.2d 914 (Tex. 1967); Whitten v. Aling & Cory Co., 526 S.W.2d 245 (Tex. Civ. App.—Tyler 1975, writ ref’d); Baja Energy, 669 S.W.2d 836; Knebel, 518 S.W.2d at 799-801; Boeing, 444 U.S. at 478 (1980).

The equitable objective of the common fund method is to distribute the burden of attorneys’ fees proportionately among those who share in a common benefit, and to avoid the unjust enrichment of those who benefit from the fund that is created, protected, or increased by the litigation and would otherwise bear none of the litigation costs. Crouch, 853 S.W.2d at 647; Knebel, 518 S.W.2d at 799-801 (Tex. 1975); Boeing, 444 U.S. at 478; 3 Newberg & Conte, Newberg on Class Actions § 14.02 (3d ed. 1992).

B. Percentage Fee Awards

Texas courts have joined the majority of courts that have recognized it is appropriate to calculate and award attorneys’ fees based on a percentage of the fund in

The Texas Supreme Court has held that in cases involving non-cash settlements where the benefits to class members are hard to quantify, such as coupon settlements, any percentage of the common fund awarded to class counsel should also be analyzed under a lodestar formulation as a comparison to the percentage of recovery method. Bloyd, 916 S.W.2d 949.

In that case, the parties introduced what clearly appeared to be optimistic and perhaps exaggerated valuations of the coupons that would be made available to class members. In addition, and most critically, the attorneys’ fees were to be calculated on a percentage basis of an amount not subject to easy determination. In such circumstances, an obviously skeptical Supreme Court directed trial courts to independently test the legitimacy of the proposed fee award against whatever external measures of fairness were available — most obviously, the hours and expenses expended by plaintiffs’ counsel. Id.

C. The Lodestar Method

1. Generally

While the trend has been to award attorneys’ fees as a percentage of the common fund in class actions, some courts continue to award fees based upon the lodestar method. The lodestar method contemplates an award of fees based upon the hours reasonably expended and a reasonable hourly rate. The court may apply a multiplier to the lodestar figure by the court based upon certain factors. See Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). See also, Longden v. Sunderman, 797 F.2d 1095 (5th Cir. 1992) (continuing to use the lodestar method of calculating attorneys’ fees).

2. Criticism Of The Lodestar Method

The Third Circuit, originator of the lodestar formulation, has come full circle by recommending a return to a percentage of the fund approach. The Circuit appointed a blue-ribbon task force, led by Professor Arthur Miller of Harvard Law School, to study attorney fee awards in the class action context and make recommendations. In its final report, the task force concluded that the lodestar method was a “cumbersome, enervating, and often surrealistic process of preparing and evaluating fee petitions that now plagues the Bench and Bar…” Court Awarded Attorneys’ Fees, Report of the Third Circuit Task Force, October 8, 1985. 108 F.R.D. 237, 258 (1985).

The Johnson multiplier approach has come under even greater criticism because it fails to provide courts with an analytical framework or guidance as to the factors’ relative importance. Court Awarded Attorneys’ Fees, 108 F.R.D. at 245. See also Silver, Unloading The Lodestar: Toward A New Fee Award Procedure, 70 Tex. L. Rev. 865 (1992).

D. Most Courts Have Preferred The Percentage Approach


A federal district court in New Jersey relied upon a percentage fee approach to determine the attorney fee award following the settlement of a nationwide class action against Prudential Insurance for deceptive sales tactics. In re Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 572 (D.N.J. 1997), vacated on other grounds, In re Prudential Ins. Co., 148 F.3d 283 (3d Cir. 1998). Prudential agreed to pay court awarded attorney fees in addition to the amount paid to class members. Although the final amount of the plaintiffs’ recovery could not be estimated accurately at the time of
the fee hearing, the court held that the lodestar method would be inappropriate to use in its initial fee calculation because the case was very similar to a common fund situation. Id. at 584.


E. Legal Scholars Support A Percentage Of The Common Fund

Many legal commentators have argued that a percentage of the gross recovery is the only sensible method of awarding fees in common fund cases because it relies on incentives rather than costly monitoring. Coffee, Understanding the Plaintiffs’ Attorney: The Implications of Economic Theory for Private Enforcement of the Law Through Class and Derivative Actions, 86 Colum. L. Rev. 669, 724-725 (1986). Professor Hornstein wrote in his article, Legal Therapeutics: The “Salvage” Factor In Counsel Fee Awards:

Where success is a condition precedent to compensation, “hours of time expended” is a nebulous, highly variable standard, of limited significance. One thousand plodding hours may be far less productive than one imaginative, brilliant hour. A surgeon who skillfully performs an appendectomy in seven minutes is entitled to no smaller fee than one who takes an hour; many a patient would think he is entitled to more.


As discussed in the Third Circuit Task Force Report, an award of fees based on the lodestar rate only encourages plaintiffs’ attorneys to prolong litigation in order to “milk” as much of a fee as possible out of a case. Allowing a percentage fee award encourages the attorneys involved to concentrate their efforts solely on achieving a high rate of return for their clients in the class, which in turn raises the counsel’s own fee, instead of devoting their efforts to putting enough hours into the case to generate a sizable fee without concern for the best interests of the class members. Mashburn v. National Healthcare, Inc., 684 F. Supp. 679 (M.D. Ala. 1988).

F. The Reasonableness Of The Requested Fee

1. Generally

There is no general rule as to what constitutes a reasonable fee. The amount of any fee must be determined upon the particular facts of each case. In re Chrysler Motors Corp. Overnight Evaluation Program Litig., 736 F. Supp. 1007, 1016 (E.D. Mo. 1990); Mashburn., 684 F. Supp. 679. Usually fifty percent (50%) of a common fund is the upper limit on a reasonable fee award to ensure that fees do not consume a disproportionate part of the recovery obtained for the class, though somewhat larger percentages are not unprecedented. 3 NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS §14.03 (3d ed. 1992) (citing Beech Cinema, Inc. v. Twentieth Century-Fox Film Corp., 480 F. Supp. 1195 (S.D.N.Y. 1979), aff’d, 622 F.2d 1106 (2d Cir. 1980) (approximately 53% of settlement fund awarded)). Some of the factors which may bear on the appropriate percentage fee to be awarded are the results achieved, the time in which the settlement was reached, the lack of substantial objections by class members and other parties to either the settlement terms or to the fee requested by class counsel, the non-monetary benefits conferred upon the class by settlement, the economies of scale involved in prosecuting a class action, and the contingent nature of the fee. Mashburn, 684 F. Supp. at 692. In the first U.S. Supreme Court case to recognize the common fund doctrine, Central R.R. & Banking Co. v. Pettus, 113 U.S. 116, 128 (1885), the court used the fee agreement class counsel had with the named plaintiffs limiting the percentage of their fee as a guideline to determine a “reasonable percentage based fee.”

In In re Crazy Eddie’s Sec. Litig., 824 F. Supp. 320 (E.D.N.Y. 1993), the district court concluded that in light

2. The Empirical Evidence

Although empirical evidence does not necessarily establish what the court should do as a normative matter in every case, it provides both a useful frame of reference and benchmark standards. Benchmarks are important because plaintiffs' attorneys must be able to predict the fee determinations that courts are likely to make years later if they are to undertake lengthy and risky litigation on a contingent fee basis.

The most recent and complete analysis of fee awards in class actions was published in 1995 by the National Economic Research Associates, an economics consulting firm. See generally Frederick C. Dunbar, et al., Recent Trends III: What Explains Settlements in Shareholder Class Actions? (National Economic Research Associates 1995) (hereinafter the Dunbar Study). Using data from 656 shareholder class actions that were settled, dismissed, or resolved by a jury verdict between January 1991 to December 1994, the Dunbar Study reached a number of findings based on more current and reliable data than that underlying other studies. On the central question of attorney fees, the study reported: "[r]egardless of case size, fees average approximately 32 percent of the settlement." Id. at 7.

Table Five from the Dunbar Study is set forth below.

<table>
<thead>
<tr>
<th>Settlement Range (Millions)</th>
<th>No. Of Settlements</th>
<th>Average Atty Fees as % of Settlement</th>
<th>Median Atty Fees as % of Settlement</th>
</tr>
</thead>
<tbody>
<tr>
<td>$0.00-$0.99</td>
<td>27</td>
<td>30.31%</td>
<td>30.00%</td>
</tr>
<tr>
<td>$1.00-$1.99</td>
<td>45</td>
<td>30.99%</td>
<td>33.33%</td>
</tr>
<tr>
<td>$2.00-$9.99</td>
<td>162</td>
<td>31.99%</td>
<td>33.33%</td>
</tr>
<tr>
<td>$10.00-$49.99</td>
<td>53</td>
<td>31.36%</td>
<td>32.00%</td>
</tr>
<tr>
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<td>2</td>
<td>31.67%</td>
<td>31.67%</td>
</tr>
<tr>
<td>Total</td>
<td>289</td>
<td>31.71%</td>
<td>33.33%</td>
</tr>
</tbody>
</table>

When plaintiffs' judicially approved expenses were added to the fee award, the total of fees and expenses averaged 34.74% of the settlement.

Although commentators have sometimes generalized that attorney fees are a declining percentage of the recovery (with the applicable percentage falling once the settlement exceeds $50 million or some similar level), the Dunbar Study indicates that this generalization no longer seems to be valid. Rather, at least during this decade, attorney fees as a percentage of the recovery appear to have hovered near 32%, regardless of the size of the settlement. There have been relatively few recoveries above $100 million, but the post-1990 settlements that fall in this range do not show marked variations from the foregoing pattern.

A Federal Judicial Center Study released in 1996 used a smaller data base than the Dunbar Study, but focused intensively on class actions in four selected federal district courts: the Eastern District of Pennsylvania, the Northern District of California, the Southern District of Florida, and the Northern District of Illinois. See generally Thomas E. Willging, et al., Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules (Federal Judicial Center 1996) (hereinafter the Federal Study). The Federal Study reported findings very similar to those in the Dunbar Study. As to the size of attorney fee awards as a percentage of the recovery, the Federal Study's key...
finding was that, “[m]edian rates ranged from 27% to 30%. Most fee awards in the study were between 20% and 40% of the gross monetary settlement . . .” Id. at 69.

Less data is available about the recent fee award practice in Texas, but those recent examples that exist seem consistent with the federal court pattern. For example, in Transamerican Refining Corporation v. Dravo Corp., the court awarded attorney fees in the amount of 30% of a settlement fund of $35,983,805, plus expenses and costs in the amount of $2,925,039. C.A. No. H-88-789 (S.D. Tex. May 29, 1992). The total of fees plus expenses came to approximately 38% of the recovery. However, not all awards have been this high. In In re First Republic Bank Securities Litigation, CA 3-88-0641-H (S.D. Tex. Feb. 28, 1992), the court awarded class counsel 27.5% of the settlement fund of $58,200,000 (or $16,005,000) plus over $3 million in additional litigation expenses (with fees plus expenses thereby aggregating approximately 33% of the recovery). In a statewide class action suit regarding workers’ compensation insurance overcharges, the state court awarded 31% of a $145 million settlement as reasonable attorneys’ fees and expenses. Weatherford Roofing Co. v. Employers Nat’l Ins. Co., No. 91-05637 (116th Dist. Co., Dallas County, Tex., Nov. 1, 1996).

3. Texas Disciplinary Rule 1.04

According to Rule 1.04 of the Texas Disciplinary Rules, eight factors that may be considered in determining the reasonableness of a fee are:

1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;

2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

3) the fee customarily charged in the locality for similar legal services;

4) the amount involved and the results obtained;

5) the time limitations imposed by the client or by the circumstances;

6) the nature and length of the professional relationship with the client;

7) the experience, reputation and ability of the lawyer or lawyers performing the services; and

8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

G. Statutory Fee Awards

Statutory fee awards involve a shifting of the obligation to pay attorneys’ fees to defendants to serve the public policy of encouraging private enforcement of substantive rights created by the legislature. The fee awards are separate and apart from the amount recovered by the plaintiff. Statutory fees in class actions are generally awarded in the same manner as they are in non-class lawsuits.

H. Ethical Considerations

In ordinary litigation, each party is responsible for his own attorneys’ fees. In class action litigation, however, defendants typically pay a lump sum, leaving the plaintiffs’ counsel to request a fee from the court out of the lump sum. Problems may arise if a defendant agrees to pay attorneys’ fees in addition to the lump sum as part of the settlement agreement. One issue is whether the fee may be negotiated concurrently with the negotiations on the merits. The Supreme Court has refused to invalidate such a joint negotiation. White v. New Hampshire Dept. Of Employment, 455 U.S. 445, 453 n.15 (1982).

Another important ethical consideration in mass tort litigation is the propriety of an aggregate settlement of a group of individual claims. Under Texas Disciplinary Rule of Professional Conduct 1.08(f), a lawyer who represents two or more clients may not make an aggregate settlement of the clients’ claims unless each client has consented after consultation, including disclosure of the existence and nature of all the claims involved and of the nature and extent of the participation of each person in the settlement.

The Texas Supreme Court recently addressed the aggregate settlement issue in Burrow v. Arce, 1999 WL 450770 (Tex.), where forty-nine plaintiffs, former clients, filed suit alleging various violations of rules of professional conduct, including the aggregate settlement rule. The court held that when an attorney breaches his fiduciary duty to his client — as when he or she enters into an aggregate settlement — the attorney may be required to forfeit all or part of the fee, irrespective of whether the breach of fiduciary duty caused the client actual damages. Both the determination of whether there should be a fee forfeiture and the amount of the forfeiture are issues for the trial court, not a jury. While Burrow v. Arce arose in the context of a mass tort aggregate settlement, its implications are far-reaching, and its effect on fees in the class action context is unclear.
XI. INTERLOCUTORY APPEAL OF CERTIFICATION ORDERS

A. Federal Appeals

Appeals from orders certifying or refusing to certify a class have been permitted in the federal system only at the district court’s discretion or by mandamus. The Advisory Committee on the Federal Rules Of Civil Procedure recently has proposed that this rule be changed to allow the circuit courts the discretion to review such orders. See In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1294 (7th Cir. 1995), cert. denied, 116 S.Ct. 184 (1995).

The general rule is that “a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of litigation may be ventilated.” Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712 (1996). However, there is a narrow class of collateral orders which do not meet this definition of finality, but which are nevertheless immediately appealable under 28 U.S.C. § 1291 because “they conclusively determine a disputed question that is completely separate from the merits of the action and that is effectively unreviewable on appeal from a final judgment.” Quakenbush., 517 U.S. at 712. Interlocutory appeals regarding class certification are authorized through 28 U.S.C. § 1292. However, “class action certification is not a final order and hence is not appealable, unless it comes within the collateral order doctrine.” Schlick v. Penn-Dixie Cement Corp., 551 F.2d 531 (2d. Cir. 1977).

Review may also be available through a writ of mandamus. 28 U.S.C. § 1651; Fed. R. App. P. 21. The party requesting the issuance of the writ of mandamus must have no other adequate means to attain the relief he desires and must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable. Kerr v. U.S. Dist. Court for Northern Dist. of California, 426 U.S. 394, 402-03 (1976). Notwithstanding, writs of mandamus are rarely granted by appellate courts. Id. at 402.

B. Texas State Appeals

While in federal court interlocutory orders are generally not appealable, in Texas state court an interlocutory order certifying or refusing to certify a class is appealable. TEX. CIV. P. REM. C. § 51.014 (Vernon 1986). Texas rules provide for an expedited appeals process to provide quick resolution to the certification question. Tex. R. Civ. P. 42. This rule reduces the process to 90 days. Still, in general, the Texas Supreme Court does not have jurisdiction to hear an interlocutory appeal arising from a court of appeals’ order. Coastal Corp. v. Garza, No. 96-1208, 1998 WL 389087, at *1 (Tex. July 14, 1998); Deloitte & Touche, L.L.P. v. The Fourteenth Court of Appeals, 951 S.W.2d 394 (Tex. 1997). Despite this, the Texas Supreme Court recently held that it may have jurisdiction to hear an appeal on a class certification order if the court of appeals hearing the case decides differently than a prior court on a “question of law material to the case.” Coastal Corp., 1998 WL 389087, at *1. However, the court has treated this as a high hurdle. Id. In Coastal Corp., the court allowed the certification of a class suing over property damage due to pollution produced by the defendants, despite the fact that a previous court of appeals decision had held differently on a similar case. Id. at *3-4. The fact that the Coastal Corp. class did not have personal injury damages and did have subclasses, while the class in the other case did have personal injury claims but no subclasses, was enough for the court to determine that the two cases were not dealing with the same material question of law and thus the holdings were not irreconcilable. Id.

An order must clearly certify or refuse to certify a class, otherwise it is not appealable. Pierce Mortuary Colleges, Inc. v. Bjerke, 841 S.W.2d 878, 880 (Tex. App.—Dallas 1992, writ denied) (order amending earlier class certification order by increasing the size of the class is not appealable). When matters related to certification are included in the order, the appellate court has jurisdiction over those matters as well as the court’s ruling on certification. American Express Travel Related Servs. Co. v. Walton, 883 S.W.2d 703, 707 (Tex. App. – Dallas 1994) (since trial court had disposed of issues of class size and notification issues in its order certifying the class, the appellate court had jurisdiction to review those collateral issues).

Appellants have the duty to timely bring forward a record sufficient to disclose error alleged to have been made by the trial court. Chappell Hills, Inc v. Boatwright, 702 S.W.2d 687, 690 (Tex. App.—Houston [14th Dist.] 1985, no writ); Cloer v. Ford & Calhoun GMC Truck Co., 553 S.W.2d 183, 185 (Tex. Civ. App.—Tyler 1977, writ ref’d n.r.e.). If the statement of facts are not filed with the appellate court, the court has no basis to rule on the appellants’ contentions expressed in evidentiary points of error. Chappell Hills, 702 S.W.2d at 690; Rutcliff v. Sherman, 592 S.W.2d 81, 83 (Tex. Civ. App.—Tyler 1979, no writ). Without a statement of facts for the appellate court to review, every presumption will be indulged in favor of and in support of the trial court’s order. Chappell Hills, 702 S.W.2d at 690.

1. Findings Of Fact And Conclusions Of Law

While some courts have held that findings of fact and conclusions of law are helpful to an appellate court reviewing the order of certification, Texas district courts
need not make such findings of facts and conclusions of law, Vinson v. Texas Commerce Bank-Houston, Nat’l Ass’n, 880 S.W.2d 820, 824 (Tex. App.—Dallas 1994, no writ). See TEX. R. APP. P. 42(a) (1997); Varkonyi v. Troche, 802 S.W.2d 63, 64 (Tex. App.—El Paso 1990, orig. proceeding). If the trial court makes such findings and conclusions, they must be filed within 30 days from the date the certification order is entered.

2. Further Proceedings In The Trial Court

TEX. R. APP. P. 29.1 provides that “perfecting an appeal from an order granting interlocutory relief does not suspend such order.” As a result of the 1997 rule changes, the Notes and Comments to Rule 29 state: “The provision in the former rule (TRAP 43) providing that an appeal from an order certifying a class suspends the order is repealed.” Under TEX. R. APP. P. 29.5, the trial court retains jurisdiction of the case and may make further orders during the pendency of the appeal of the order on certification, including one dissolving the appealed-from order, and may proceed with a trial on the merits. The trial court, however, cannot then make an order that is inconsistent with any appellate court temporary order, or grant any order that would interfere or impair the jurisdiction of the appellate court or effectiveness of any relief sought or that may be granted on appeal. Former Rule 43(d) prohibiting the trial court from making an order granting substantially the same relief as the order appealed was repealed as being too broad.

3. The Standard Of Review

On appeal, review of the trial court’s decision is strictly limited to determining whether the trial court abused its discretion in granting or denying the motion for class certification. Wiggins v. Enserch Exploration, Inc., 743 S.W.2d 332, 334 (Tex. App.—Dallas 1987, writ dism’d w.o.j.); RSR Corp. v. Hayes, 673 S.W.2d 928, 930 (Tex. App.—Dallas 1984, writ dism’d w.o.j.). The appellate court may not substitute its judgment for that of the trial court. Viewing the evidence in the light most favorable to the trial court’s action, the appellate court indulges every presumption that would favor the trial court’s ruling. Parks v. U.S. Home Corp., 652 S.W.2d 479, 485 (Tex. App.—Houston [1st Dist.] 1983, writ dism’d). The appellate court may reverse a trial court’s order for abuse of discretion only if after searching the record, it is clear that the trial court’s decision was arbitrary and unreasonable. See Simon v. York Crane & Rigging Co., 739 S.W.2d 793, 795 (Tex. 1987).

Of the 44 reported Texas cases since 1977 where the propriety of class certification was an issue, only 12 appellate courts have reversed a trial court’s order granting certification. An analysis of these 12 reversals indicates that 7 of the reversals were grounded on fairly egregious error by the trial court that would clearly call for a reversal while 5 were reversed based on trial court conduct that was outside the reasonable bounds of discretion. Egregious Error: In the Interest of M.M.O., Nos. 04-96-01012-CV, 04-97-00931-CV, 1998 WL 422283 (Tex.App.—San Antonio, Jul. 29, 1998, no writ) (trial court certified without conducting a sufficient hearing); America Online, Inc. v. Williams, 958 S.W.2d 268 (Tex. App.—Fort Worth, 1992, no writ) (trial court certified during automatic abatement period mandated by DTPA); St. Louis Southwestern Ry. Co. v. Voluntary Purchasing Groups, Inc., 929 S.W.2d 25 (Tex. App.—Texarkana 1996, n.w.h.) (trial court failed to hold a certification hearing); Richards v. Quiroz, 848 S.W.2d 819 (Tex. App.—Corpus Christi 1993, no writ) (substantive goal of lawsuit was moot); Brunswick Corp. v. Bush, 829 S.W.2d 352 (Tex. App.—Fort Worth, 1992, no writ) (only major shareholders, not all shareholders, are entitled to class certification); Tarrant County, Tex., Comm’r’s Ct. v. Markham, 779 S.W.2d 872 (Tex. App.—Ft. Worth 1989, writ denied) (claim of only class representative was moot - and therefore not typical); Mahoney v. Cupp, 638 S.W.2d 257 (Tex. App.—Waco 1982, no writ) (no proper evidence put on at class action hearing) Discretionary Error: Methodist Hospitals of Dallas v. Tall, 972 S.W.2d 894 (Tex. App.—Corpus Christi, 1998, no writ) (certification order based on factual assertions not supported by material in the record); Remington Arms Co., Inc. v. Luna, 966 S.W.2d 641 (Tex. App.—San Antonio, 1998, pet. denied) (trial court’s analysis based on speculation); Cedar Crest Funeral Home v. Lashley, 889 S.W.2d 325 (Tex. App.—Dallas 1993, no writ) (no common questions of fact; none of the class representatives’ claims were typical of the class); RSR Corp. v. Hayes, 673 S.W.2d 928 (Tex. App.—Dallas 1984, writ dism’d) (common questions of law or fact did not predominate); Amoco Prod. Co. v. Hardy, 628 S.W.2d 813 (Tex. App.—Corpus Christi 1981, writ dism’d) (no predominate common issues).

A trial court does not abuse its discretion if it bases its decision on conflicting evidence. RSR Corp., 673 S.W.2d at 930. A trial court does abuse its discretion, however, when it does not properly apply the law to the undisputed facts. Wiggins, 743 S.W.2d at 334; RSR Corp., 673 S.W.2d at 930. The trial court also abuses its discretion when it acts arbitrarily or unreasonably, or when its ruling is based upon factual assertions not supported by material in the record. See Angeles/Quinoco Sec. Corp. v. Collison, 841 S.W.2d 511, 513 (Tex. App.—Houston [14th Dist.] 1992, no writ); Mahoney, 638 S.W.2d at 261.

C. Mandamus In Texas Class Action and Mass Tort Cases

The Texas Supreme Court has maintained a heavy burden for mandamus relief in the context of class action
and mass tort litigation. The Court’s decisions show that mandamus is available only in extraordinary circumstances, and class action and mass tort cases do not meet that requirement simply by involving many parties.

1. Class Certification

The Court does not have the authority to issue a writ of mandamus to overturn an appellate court’s decision on class certification, absent extraordinary circumstances. Deloitte & Touche, L.L.P. v. Fourteenth Court of Appeals, 951 S.W.2d 394 (Tex. 1997). In the underlying litigation, a putative class of investors brought suit against a corporation and its accountants for various causes of action stemming from alleged misrepresentations. The trial court denied class certification, but the court of appeals certified a class on the plaintiffs’ interlocutory appeal. The parties opposed to class certification applied for a writ of mandate. After the Court denied the writ for lack of jurisdiction, the class opponents filed for a writ of mandamus.

The Court held that mandamus relief could not be granted to overturn the interlocutory order granting class certification. According to the Court, the legislature granted final authority over interlocutory class certification decisions to the courts of appeals. For a mandamus order to be issued, the defendants would have to show procedural irregularities, or that the court of appeals’ decision was “so devoid of any basis in law as to be beyond its power.” Id. Under this guideline, the Deloitte & Touche defendants did not meet their burden for mandamus relief.

2. Venue, Discovery, and Trial Plans

Despite arguments that the substantive rights of a multitude of plaintiffs or defendants can be damaged by improper lower court decisions regarding complicated issues such as venue, discovery, and trial plans, the Texas Supreme Court and the Legislature have declined to extended the Court’s mandamus review over these issues in mass tort litigation. Polaris Inv. Mgmt. Corp. v. Abascal, 892 S.W.2d 860 (Tex. 1995). The underlying suit in Polaris was brought by 2,700 plaintiffs seeking damages resulting from the sale of limited partnerships. The defendants challenged the trial court’s selection process for plaintiffs to proceed in an initial separate trial, its abatement of discovery for the remaining plaintiffs, and the propriety of venue in Maverick County. The Court denied review in a per curiam opinion, noting that such decisions had long been immune from mandamus scrutiny. Although it was sympathetic to the defendants’ forum shopping argument, the Court held that the extraordinary relief of mandamus would be inappropriate. Id. at 862.

3. Denial Of Special Appearance

The Texas Supreme Court did grant mandamus relief to overturn the denial of a special appearance by a foreign corporation defending a large number of asbestos cases in Texas. CSR Ltd. v. Link, 925 S.W.2d 591 (Tex. 1996). The Court found that such extraordinary circumstances existed that it should depart from the normal rule against review of such orders.

In CSR, an Australian company had been sued by over 1,600 claimants in 12 separate suits in Harris County alone. The trial court denied this defendant’s special appearance, and CSR petitioned for a writ of mandamus. While mandamus review generally had not extended to denials of special appearances, the Court had previously indicated that “there may be other ‘extraordinary situations[s]’ in which the denial of a special appearance cannot be adequately remedied on appeal.” Id. at 596 (citing Canadian Helicopters Ltd. v. Wittig, 876 S.W.2d 304, 309-10 (Tex. 1994)).

Upon CSR’s petition for mandamus, the Court had little difficulty in concluding that the company had no contacts with Texas, and that it would be extremely unfair and burdensome for it to defend itself in Texas, around the world from its home base. CSR, 925 S.W.2d at 595-96. The Court then turned to whether an appeal of the special appearance denial was an adequate remedy. Finding that extraordinary circumstances existed sufficient to depart from the normal rule against mandamus review, the Court held as follows:

We emphasize that we do not relax or retreat from the requirement that a relator must show an inadequate remedy by appeal. While the question of personal jurisdiction is remediable by appeal in most cases, we hold that under the circumstances of this case, the concerns of judicial efficiency in mass tort litigation combined with the magnitude of the potential risk for mass tort actions against the defendant makes ordinary appeal inadequate.

Id. at 597.

The Court focused upon two factors in evaluating the situation facing the petitioners. First, it discussed the shear volume of the litigation. At the time of the opinion there were over 1,600 cases pending against CSR. The Court also noted the tremendous scale of asbestos litigation generally. In such circumstances, “the magnitude of the potential risk for mass tort actions against the defendant” militates in favor of interlocutory review. Id. at 597.

The Court cited the statement of the Seventh Circuit in In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1297
controversial) case. The perceived pressure in 925 S.W.2d certified, comprising thousands of wrongful death and mass tort claims can create “considerable pressure to end defendants had consistently prevailed in earlier proceedings, extraordinary relief was found warranted. Should liability have been assessed in a classwide trial, it potentially could have bankrupted the defendants.

The Seventh Circuit, in a 2-1 decision, found this threat to the defendants especially unfair given that the defendants had won virtually every one of the dozen individual-plaintiff trials. In such a situation, when crushing liability could result from one trial even though defendants had consistently prevailed in earlier proceedings, extraordinary relief was found warranted.

The Court did not find that CSR faced prospects as problematic as the defendants in Rhone-Poulenc. However, the citation to Rhone-Poulenc may serve as some sort of standard for the complaints of mandamus petitioners.

CSR clearly faced a severe hardship in defending around the world from its home base, and special appearances are designed to avoid exactly such situations. It seemed unfair to commit CSR to such a defense in numerous cases before its appeal could be heard — particularly when CSR appeared to have a strong appeal in the eyes of the majority.

Crucially, the Court had already begun to allow the possibility of mandamus in the special appearance situation. See Canadian Helicopters, Ltd., 876 S.W.2d 304 (Tex. 1994), and National Indus. Sand Ass’n v. Gibson, 897 S.W.2d 769 (Tex. 1995) (orig. proceeding). The holding in CSR can simply be seen as a recognition that, if reviewing special appearances interlocutorily makes sense, at least in clear cut cases, it certainly makes sense when the petitioner’s burdens will be multiplied hundreds or thousands of times. In this sense, CSR is not a qualitative change in the law, but only a quantitative application of existing law.

The second consideration identified by the Court is “[t]he most efficient use of the state’s judicial resources.” CSR, 925 S.W.2d at 596. Examining this factor, the Court simply noted the size of asbestos litigation generally, and found that it posed significance burdens to the state’s judicial system.

As evidenced by the creation of the Master File in Harris County, asbestos litigation in Texas is complicated, potentially involves a multitude of parties, and is usually quite lengthy . . . . As a result, the state expends a large amount of its limited judicial resources resolving these massive controversies. Under these circumstances, a trial on the merits and appeal would further overtax the state’s judicial resources.

Id. at 597. Presumably, all of the cases to which CSR was a party were going to be tried anyway as to the many other defendants. There would be, however, some marginal savings to the system if one party were eliminated before rather than after the trials.

XII. TRIAL OF A COMPLEX CASE

The trial of a complex case presents a number of challenges not encountered in more common litigation. The complex case typically involves subject matter that is difficult for a jury to comprehend. It often involves multiple claims asserted by and against multiple parties. The anticipated trial period usually is lengthy, and the evidence to be introduced, both testimonial and documentary, is voluminous.

To present such cases to a trier of fact in a reasonably organized and comprehensive manner, factual issues should be streamlined as much as possible. A framework for the orderly presentation of the case at trial should be developed to assure that actual trial time is used efficiently and effectively. If a jury is to hear the case, the court and counsel should consider using various methods and techniques to promote comprehension of the evidence.

A. Focus Groups And Mock Trials

To distill the issues and arguments of the parties and to obtain a better understanding of the issues a jury will grapple within its deliberations, counsel would be wise to conduct focus groups or mock trials well in advance of the litigation. For a discussion of how focus groups and mock trials can be conducted to obtain the most benefit for the client, see Misko, The Use of Mock Trials and Focus Groups in Personal Injury Cases: The Advantages of Rehearsal, in 5 TEXAS TORTS AND REMEDIES § 101.102 (J. Hadley Edgar, Jr. and James B. Sales, eds., 1997) (1991).

B. Pretrial Stipulations

It is particularly important in the context of a complex case for the parties and the court to do whatever is necessary before the trial to narrow the issues that will be presented to the trier of fact as much as possible. One of the most common issue-narrowing devices is the pretrial stipulation.

The presentation of evidence at trial often is greatly facilitated by a requirement that the parties negotiate
extensive stipulations of fact, setting forth those matters that are not in dispute, and those which are. Even in the most factually complex cases, a stipulation of disputed and undisputed facts generally is not only possible, but almost essential to streamline the issues for trial and to assist the lawyers in their pretrial and trial preparation. For example, in a case relating to dozens of consolidated securities class actions involving hundreds of defendants, in which the pretrial record consisted of more than three million document pages and over three hundred thousand pages of deposition testimony, and for which the trial was expected to last over a year, the parties were able to negotiate a multi-volume stipulation of facts and legal issues. See In re Washington Pub. Power Supply Sys. Sec. Litig., 720 F. Supp. 1379 (D.Ariz. 1989), aff’d sub nom. Class Plaintiffs v. City of Seattle, 955 F.2d 1268 (9th Cir. 1992), cert. denied sub nom. Hoffer v. City of Seattle, 506 U.S. 953 (1992). This was done despite the almost overwhelming complexity of the litigation. Such a stipulation is an invaluable tool for the efficient resolution of a complex case.

C. Trial Procedure And Trial Plan

In preparing for the trial of a typical complex case, all persons involved should anticipate a heightened need for coordination among the parties and organization and control by the court. This coordination will allow the trial to proceed efficiently, and better ensure the ability of the trier of fact to render a fair and reasonable verdict. There are a number of means by which a complex trial may be made more manageable and comprehensible. See generally The Manual For Complex Litigation (3d ed. 1995).

1. Coordination Among Plaintiffs’ Counsel

Coordination among plaintiffs’ counsel as to trial strategy and the presentation of evidence is essential. The cohesive presentation of the evidence is crucial to the ability of the trier of fact to assimilate and comprehend the issues involved in the case. It is most easily facilitated by the appointment of lead counsel, whose role will vary depending on the nature of the case and the variety of interests among the parties. From the opening statements through the presentation of evidence and examination of witnesses to the final argument, coordination and cooperation among counsel is essential to avoid needless repetition. In addition, it clarifies the evidence, as well as the respective parties’ roles in the case.

2. The Trial Plan

In a complex case, the adoption of a comprehensive trial plan is essential. It provides the guidelines by which the trial is to be conducted, and is designed to streamline the trial process and facilitate the introduction of evidence. See Manual For Complex Litigation, § 21.21 (3d ed. 1995). The plaintiffs’ counsel will have presented a trial plan to the court at the certification hearing.

The trial plan often addresses administrative matters such as the length of the trial, the days of the week and the hours each day that the trial will be held, the holidays and other days when the trial will be in recess, and similar issues. It also governs such matters as the length and number of opening statements, the number of lawyers permitted to present the case and question witnesses on behalf of any one party, the manner in which direct and cross-examination may be conducted, the scheduling of conferences with counsel during the trial and the timing and procedures for objecting to and obtaining rulings on the admissibility of evidence.

The trial plan typically contains provisions which govern the introduction of evidence. In large, complex cases, it is often difficult, as well as impractical, for the parties to designate their witnesses and exhibits and obtain rulings on the admissibility of evidence before trial. Consequently, courts often require the parties to designate the witnesses, documents, deposition testimony, and other evidence they intend to offer before the trial and the timing and procedures for objecting to and obtaining rulings on the admissibility of evidence.

Another means employed by courts to expedite trial proceedings, particularly in nonjury cases, is the submission of prepackaged sworn statements of a witness’ direct testimony, either in narrative or question and answer format, in advance of the trial. This is particularly useful when the credibility of the witness is not at issue and the information to be presented is particularly complicated or technical. At trial, the statement is received into evidence, and the witness is subjected to ordinary cross-examination.

Finally, to assist the trier of fact, the trial plan may provide that the presentation of the evidence will be divided according to issues and claims as they relate to particular parties, if the proof can be reasonably divided along such lines.

D. Assisting The Jury

Many procedures have been developed to assist the jury in assimilating and comprehending the evidence and
issues involved in complex cases. See generally, Parker, Streamlining Complex Cases, 10 Rev. Litig. 547 (1991) and G. Thomas Munsterman, ET AL., JURY TRIAL INNOVATIONS (Nat’l Center for State Courts 1997). Some procedures to be considered include:

1. **Separate Trials And Multiple Juries**

Separate trials of issues or claims, either to the same or a different jury, may assist in streamlining issues for the trier of fact. Another option, used infrequently in the civil context, is the use of multiple juries to decide different issues in the same trial. Depending on the number of issues or parties in the case, separate trials relating to specific issues or claims may help focus the jury’s attention and reduce confusion in the decision-making process. Bifurcation of the trial on issues of liability and damages in federal courts is commonly employed. Fed. R. Civ. P. 42(b); Sellers v. Baisier, 792 F.2d 690, 694 (7th Cir. 1986); and Jenkins v. Raymark Indus., 782 F.2d 468 (5th Cir. 1986) (bifurcated determination of punitive and actual damages allowed for district court’s review of reasonableness of each plaintiff’s punitive damage award and such bifurcation was not unconstitutional). Courts sometimes divide cases along other lines, such as conducting separate trials on discrete liability issues. Separate trials may be heard by different juries, if the issues to be tried are sufficiently separate and distinct that a separate trial would not be unjust. A court may not, however, divide issues between separate trials in such a way that the same issue is reexamined by different juries. In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293,1303 (7th Cir. 1995), cert. denied. 116 S. Ct. 184 (1995) (right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have jury issues determined by the first jury impaneled to hear them).

2. **Juror Note-Taking**

Permitting jurors to take notes, once discouraged, is becoming more widely accepted. Critics argue that absent strict controls, extensive notetaking might cause jurors to miss important testimony or allow some jurors unfairly to influence others in deliberations. Proponents argue, however, that the obvious benefits of permitting notetaking in long and complicated trials are compelling. To minimize the potential hazards associated with permitting jurors to take notes, some judges instruct jurors that notes are only for the individual juror’s use and should not be shown or read to other jurors, that notetaking should not interfere with the juror’s observation of the witnesses, and that notes should be left in the jury room during recesses.

3. **Juror Notebooks**

In addition to the exhibits admitted into evidence during the trial, jurors may be provided with notebooks containing a collection of information about the case to help them better understand the case. For example, the notebook may include witness and exhibit lists, pictures or descriptions of witnesses, a list of exhibits about which each witness testified, a glossary of important terms, chronologies or time lines of important events in the case, an organizational chart of the principal parties, and a written set of the court’s instructions.

4. **Preliminary And Interim Jury Instructions**

In a complex and protracted trial, it is particularly important that jurors be given a framework of the factual and legal issues which are involved in the case to provide a context for the evidence they will see and hear. This context can be provided through the use of preliminary instructions at the outset of the case, covering the substantive nature of the case and the law applicable to the various claims. These instructions need not be comprehensive, but should provide a basic framework for the jurors. Additional instructions may be useful from time to time during the course of the trial, either to clarify the proceedings or to address specific issues as they arise.

E. **Trying Aggregate Claims**

Even though most courts generally agree that class actions provide an efficient means of streamlining litigation, the judiciary often has been reluctant to certify class actions in mass tort cases because of the alleged necessity of individualized proof in such cases. Plaintiffs can alleviate this concern by a clear and early focus on how they will prove damages in the aggregate.

1. **Aggregate Proof Of Damages**

The evidentiary standard for proving damages on a classwide basis is that the proof submitted must be sufficiently reliable to permit a just determination of the defendant’s liability within recognized standards of admissible and probative evidence. 2 NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS §10.02 (3d ed. 1992). There are two circumstances in which proof of aggregate damages for an entire class has been held to be suitable. Id. at § 10.03. One such circumstance is when liability can be demonstrated by a mathematical computation based on a formula common to an identified class. Windham v. American Brands, Inc., 565 F.2d 59, 69 (4th Cir. 1977), cert. denied, 435 U.S. 968 (1978); Ralston v. Volkswagenwerk, 61 F.R.D. 427, 433 (W.D. Mo. 1973); Shaw v. Mobil Oil Corp., 60 F.R.D. 566, 570 (D.N.H. 1973). The classic examples are a uniform price loss in a securities case, or a fixed per unit overcharge in an antitrust case. For example, in Long v. Trans World Airlines, Inc., 761 F. Supp. 1320 (E.D. Ill. 1991), the
court held that employees in a class action were entitled to have discovery on the damages issue proceed on a “sampling” basis. The airline defendants had no absolute right to an individualized determination of damages. Further, the presence of potential individualized issues did not itself render the use of sampling inappropriate.

Similarly, aggregate proof has been held to be suitable when sampling techniques or other reasonable estimates are not available. For example, an assessment of individual damages arising from anti-competitive conduct in the marketplace would be permissible. 2 NEWBERG & CONTE, NEWBERG ON CLASS ACTIONS § 10.03 (3d ed. 1992).

The Fifth Circuit has rejected such sampling techniques, however. In In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990), the Fifth Circuit held that the sampling techniques used to try over 3,000 asbestos cases was violative of Texas law. The district court had ruled that certain representative cases would be tried and, on that basis, the same jury would then decide the total, or “omnibus,” liability to the class. The jury was to decide the percentage of plaintiffs exposed to each defendant’s products, and the percentage of claims barred by statutes of limitation, adequate warnings, and other affirmative defenses. The jury would determine actual damages in a lump sum for each disease category for all plaintiffs in the class, and hear opinions of experts from plaintiffs and defendants regarding the amount of the plaintiffs’ damages. The Fifth Circuit found that the district court’s approach to trying the cases destroyed the requirement that causation on an individualized basis be proved. The court noted that the plaintiff class consisted of persons claiming different diseases, different exposure periods, and different occupations. Moreover, some of the class members’ claims were barred, the severity and type of their injuries were vastly different, and the nature and type of their damage varied. For that reason, the court held that the many variations in the plaintiffs’ claims made the case inappropriate either for class certification or the “sampling” procedure outlined by the district court for trying the cases.

2. Bellwether Trials

One of the ways a mass tort case may be tried is through the bellwether approach. This is a plan whereby the court sets a few cases for trial while staying discovery on the remaining cases. This system conserves scarce judicial resources and cuts defense costs while enhancing settlement possibilities.

The first issues to address when using a bellwether system are which cases to present for trial and what results, if any, will be binding on the untried claims.

The Fifth Circuit recently granted a writ of mandamus to prevent a district court from using a bellwether trial involving 30 of 3,000 toxic tort plaintiffs for “any purpose affecting issues or claims of, or defenses to, the remaining untried cases.” In re Chevron, 109 F.3d 1016 (5th Cir. 1997). The district court had approved a trial plan where the plaintiffs and defendants would each choose fifteen representatives to serve as claimants in a bellwether trial to determine the issues of liability and causation generally on behalf of the remaining plaintiffs. Chevron objected to the claimant selection process and sought a writ of mandamus from the court of appeals. Chevron was also concerned that the damages, if any, awarded to the claimants in the bellwether trial would be used by the court and the plaintiffs’ attorneys as strict guidelines in any settlement with the remaining 2,970 plaintiffs.

The district court’s trial plan did not satisfy the requirements of substantive due process and basic fairness because the bellwether plaintiffs did not represent a scientifically significant sample of the whole. Id. at 1020-21. Before a court may extrapolate the results from a bellwether trial beyond the individual cases tried, the court must use “competent, scientific, statistical evidence that identifies the variables involved and provides a sample of sufficient size so as to permit a finding that there is a sufficient level of confidence that the results obtained reflect results that would be obtained from trials of the whole.” Id. at 1020. See also Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996); Michael J. Saks & Peter David Blanck, Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in Mass Torts, 44 Stan. L. Rev. 815 (1992).

Bellwether trials do not necessarily have to determine liability or other legal issues for the remaining plaintiffs. The trials may be used to assist the court, plaintiffs, and defendants in forming a fair settlement. When this is the case, allowing the plaintiffs’ counsel to select the cases to be tried will allow the defendants to get a thorough picture of the best cases, enabling both sides to thoroughly evaluate the strengths and weaknesses of the entire case and the potential risk involved in trying the remainder of the cases. More likely than not, defendants will fight such a proposal, and will suggest instead that both sides be able to choose which plaintiffs’ cases are to be tried. Therefore, plaintiffs’ counsel may alternatively suggest that the judge, plaintiff’s counsel and defense counsel each pick an equal number of cases to be tried.

Another good compromise is allowing a court-appointed expert to select the bellwether cases to be tried. Depending on the nature of the claims, the court may appoint an appropriate expert to select a representative group of plaintiffs based on written discovery answers and deposition testimony.
F. The Use of Special Masters and Auditors

1. Federal Use

The appointment of a special master in jury trials is authorized through Fed. R. Civ. P. 53. The use of a special master will be the exception, not the rule, and will only be used when the issues are deemed to be complicated. See Fed. R. Civ. P. 53. The appointment of a special master in non-jury trials may only be exercised in extraordinary circumstances. Id. Finally, upon consent of the parties, a special master may be appointed without regard to the provisions of Rule 53(b). Id.

Any order appointing a special master may specify or limit that special master’s powers. Id. Upon appointment, and subject to any specific limitations, the special master is empowered “to regulate the proceedings and to do all acts and take all measures necessary or proper for the efficient performance of the master’s duties.” Id. Additionally, the master may require the production of evidence and may rule on the admissibility of that evidence. Id. Moreover, unless otherwise directed by the appointment, the special master has the authority to put witnesses and parties on oath and examine them. Id.

An illustration that demonstrates the function of a special master can be found in Jenkins v. Raymark Indus., 785 F.2d 1034 (5th Cir. 1986), where, following certification of a class of plaintiffs in personal injury cases arising from exposure to asbestos products, a special master was appointed in order to assist the class action jury in its factual determination of whether a significant disparity existed between claims of the class representatives and other members of the class.

2. The Audit Rule

In complex cases involving numerous accounts that must be audited to determine the plaintiffs’ damages, Tex. R. Civ. P. 172 is a useful tool. This rule provides for the appointment of an auditor. An auditor may be appointed to avoid delay in prosecution of the action, to avoid using the court’s own time to examine the accounts, and generally because of the complex nature of the case. Villiers v. Republic Fin. Servs., 602 S.W.2d 566 (Tex. Civ. App.—Texarkana 1980, writ ref’d n.r.e.).

XIII. PRESENTATION OF EVIDENCE IN A COMPLEX CASE

The presentation and management of evidence at trial in complex litigation requires particular consideration of issues relating to the jurors’ ability to comprehend the information being imparted and their retention of that information over the course of what is often a lengthy trial. There are a number of new technologies that, when imported into the courtroom and used responsibly and creatively, serve the multiple functions of simplifying the evidence, speeding up the trial, and facilitating the jury’s comprehension of the case.

A. Management Of Live Testimony

The first major breakthrough in courtroom recordkeeping technology was in 1935 when the stenographic machine was first used in the Lindbergh trial. Now, over sixty years later, many court reporters are using a new, “real time” method of producing the official record of court proceedings, in which the court reporter’s stenographic keystrokes are translated by computer into English and displayed instantaneously on computer monitors placed throughout the courtroom. As the trial proceeds, the judge and counsel have the ability to scroll through the electronic transcript, flag issues and create notes for themselves for later review, summarize testimony, and have the transcript at their fingertips should evidentiary objections or disputes as to previous testimony arise. All of this allows the judge and trial counsel to be more efficient in the presentation of evidence to the jury. In a complex case, the time-saving features of real-time translation of trial testimony assume even greater importance.

B. Use Of Exhibits

Exhibits generally are offered into evidence for the purpose of communicating to the jury some significant fact. Yet, in a typical complex case, the number of exhibits to be offered to the jury is often overwhelming. Thus, it is important to present exhibits to the jury in a way that will emphasize what is important and de-emphasize or eliminate altogether that which is extraneous or of little or no importance.

Circulation of exhibits among the jurors is time consuming, distracting for the jury, and usually disrupts the examination of witnesses. It can and should be avoided, for example, by displaying the exhibit so that the jurors and the judge can view it while hearing related testimony. Depending on the complexity of the case and the number of exhibits involved, this may be accomplished through the use of individual juror notebooks containing copies of selected exhibits, displaying enlargements of exhibits which are particularly important to the case, or projecting the exhibits onto screens placed strategically throughout the courtroom so as to be easily visible to the witness, judge and jurors. For document-intensive cases, or those in which numerous deposition excerpts must be presented to the jury, computerized imaging systems enable counsel to instantaneously retrieve and display documents, depositions, and computer-generated images on courtroom monitors. Such systems, when used appropriately, can significantly enhance jury comprehension, assist in making the important aspects of
the case more memorable for the jury, and expedite the trial process.

C. Depositions

The reading of deposition transcripts at trial is perhaps the least effective means of communicating information to the jury and should be avoided if at all possible. If the contents of a deposition are important to the case, there are several alternative means of presenting the deposition testimony to the jury in lieu of reading excerpts from the transcript. These include the following: (1) the display of edited excerpts of depositions on video which, when combined with a split-screen display of the specific documents being addressed by a witness in testimony, can be a particularly effective and memorable means of presenting deposition testimony to the jury; or (2) a stipulated summary of the substance of the testimony which can be read to the jury.

D. Demonstrative Aids And Their Admissibility

1. Types Of Demonstrative Evidence

Demonstrative evidence has proven to be an effective tool in communicating a theory or concept to a judge or jury by using sight, sound and touch. The use of demonstrative aids which organize the evidence and emphasize the important aspects of the case can have a significant impact on the ability of the finder of fact to assimilate information. Demonstrative aids are a very powerful tool of persuasion and leave a more lasting impression than arguments and testimony alone.

There are a wide variety of types of demonstrative evidence that can be used in the trial of a complex case, ranging from the traditional two-dimensional exhibits such as photographs, diagrams, charts, and blow-ups to more advanced three-dimensional visual aids such as videotaped reenactments and computer animations. As technology advances, and as trial counsel and trial judges become more comfortable with the adaptation of these advances in the courtroom, additional courtroom applications no doubt will be implemented, with the ultimate goal of increasing speed and accuracy while at the same time reducing cost.

Two of the most recent and important developments in using visual aids in the courtroom to assist in disseminating information are reenactments and computer animations.

Reenactments captured on video, CD-ROM or laser disk offer a unique way to show the jury what happened in a complicated explosion, for example. Although the typical presentation may only last a minute or two, a well-constructed reenactment has the ability to present complicated facts in an understandable fashion which could not be matched even with hours of testimony or conventional exhibits. In addition to presenting the precise detail of the sequence of events, it captures some of the raw emotion often associated with a traumatic event in a way that would be virtually impossible to do otherwise.

Computer animation has many of the same possibilities as reenactments, but is potentially less costly and allows for more precision in production. With computer animation, attorneys are no longer limited to photographic blow-ups and diagrams, but may now vividly reconstruct and demonstrate their versions of complex, technical events or processes to the jury, combining a three-dimensional appearance with the added dimension of time.

2. Admissibility

In practice, courts have great latitude in deciding whether to admit demonstrative evidence. For example, a court might exclude such evidence on the ground that it is cumulative, unfairly prejudicial or misleading. Putting aside the court’s discretionary powers to exclude demonstrative evidence, the offering party additionally must establish: (1) that the exhibit relates to and will assist the trier of fact in understanding the primary evidence introduced in the case; (2) that the exhibit fairly and accurately reflects the primary evidence it is intended to demonstrate; and (3) that the witness whose testimony the exhibit demonstrates is familiar with the exhibit.

The foundation required to admit a reenactment or a computer-generated animation is similar. Such simulations are demonstrative evidence, but they are not merely charts depicting an event; they are graphic illustrations of the event itself, or of an expert’s opinion relating to the event. For example, the simulation may be used to illustrate graphically an object’s speed or direction based on mathematical calculations applied to raw data.

In Texas state courts, the admission of reenactments and computer-generated animations is governed by T.R.E. 403 which embodies the principle of balancing the probative value of the evidence against its potentially prejudicial effects. The guiding principle is simple to state: the exhibit must portray with substantial accuracy the factual circumstances illustrated in the video at the time of the occurrence in question. The predicate for these facts may come from a single expert or eyewitness or the composite testimony of many factual and expert witnesses. For a discussion of the selection and use of expert witnesses for this and other purposes, see Fred Misko, Jr., Videotape for Litigation, 26 S. TEX. L. J. 485 (1985).

Generally, under Texas law, the conditions of the actual event and simulation need not be identical.
It termed a “video animation.” In Fort Worth and Denver Ry. Co. v. Williams, 375 S.W.2d 279 (Tex. 1964), the court found a reenactment of an accident inadmissible because factual dissimilarities with the actual occurrence were not explained to the jury and plaintiffs failed to accurately reconstruct the conditions surrounding the actual accident. The offering parties’ affirmative acknowledgment to the jury of differences and similarities between the videotape reenactment and actual occurrence can serve to alleviate possible unfairness. Comparative discrepancies between the videotape simulation and actual incident bear on the weight of the testimony and not its admissibility. Garga v. Cole, 753 S.W.2d 245, 247 (Tex. App.—Houston [14th Dist.] 1988, writ ref’d n.r.e.).

While there is little case law in Texas courts relating specifically to animations, the concepts are basically the same and the principals for admissibility should generally apply. For computer-generated animations, the proponent should establish not only that the exhibit will assist the jury and that the expert witness is familiar with it, but also (1) that the data used for the simulation was both accurately recorded and correctly input into the computer program, and (2) that the program’s output is an accurate reflection of the events depicted based on the raw data used. There is no need to go into detail about how the animation was produced unless it is presented as an animation in which the computer “calculated” the movements which are seen on the screen rather than merely portrayed them in the means requested by the operator. If the computer has, in effect, been asked to give its “opinion” of the trajectory of an airplane in a collision situation, it will be necessary to prove the capability of the computer hardware and software through appropriate expert testimony.

A recent decision from the Tenth Circuit has further explained the admissibility requirements relating to what it termed a “video animation.” In Robinson v. Missouri Pac. R.R. Co., 16 F.3d 1083, (10th Cir. 1994), a case involving a train-vehicle crash, the trial court placed significant reliance on an animation prepared by the plaintiffs’ expert which was offered for the purpose of illustrating his theory of the accident. Before the jury viewed the tape, the expert explained that he prepared models and fashioned the videotape by incrementally moving the train and car.

The trial court in Robinson explained in its instructions that the purpose of the video was to help the jury understand certain principles about which the expert would testify. In admitting the animation into evidence, the court relied on Brandt v. French, 638 F.2d 209, 212 (10th Cir. 1981) (where an experiment is offered for demonstrative purposes only, the trial judge should make clear to the jury that even though there is some dissimilarity between the events of the accident and the conditions of the experiment, the information is received on a theoretical basis for the limited purposes for which it is offered) and Gilbert v. Cosco, Inc., 989 F.2d 399, 402 (10th Cir. 1993) (experiments which purport to recreate an accident must be conducted under conditions similar to that accident, while experiments which demonstrate general principles used in forming an expert’s opinion are not required to adhere strictly to the conditions of the accident).

The court in Robinson commented that video animation adds a new and powerful evidentiary tool to the trial scene. It then found the video animation admissible, given (1) its solely illustrative purpose; (2) the court’s ability to give precautionary instructions to the jury; and (3) the opportunity for vigorous cross-examination.

XIV. CONCLUSION

To avoid delay in the litigation of a complex case and to ensure that the case proceeds as smoothly as possible, a detailed plan of action should be prepared even before filing the case. In managing a complex case, there are numerous issues for counsel to consider such as streamlining discovery, tracking the production of voluminous documents, obtaining approval of and administering class settlements, whether and how to contact putative class members, obtaining from the court an early determination on how class counsel’s fees will be calculated, and the prosecution and actual trial of the case. If these and the other issues discussed in this paper are addressed early on and there is a plan of action in place, the time spent litigating issues other than the merits of the case will be minimized and counsel will avoid many of the pitfalls associated with complex litigation.
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