

**This chapter
was first
published by
IICLE Press.**



Book containing this chapter and any forms referenced herein is available
for purchase at www.iicle.com or by calling toll free 1.800.252.8062



49

Class Action

JEFFREY D. COLMAN
HOWARD S. SUSKIN
GREGORY M. BOYLE
 Jenner & Block LLP
 Chicago

The authors wish to acknowledge the indispensable assistance provided by Jenner & Block Associate Irina Y. Dmitrieva in the preparation of this chapter.

The contribution of Joan Bretsch Keltner to the prior editions of this chapter is gratefully acknowledged.

A. [49.1] Cause of Action

Class actions are representative lawsuits to which absent members are merely passive parties. Generally, courts are unable to entertain the actual appearance of all members of the class, and it is impractical for each member to prosecute his or her own individual claim. Class actions seek to eliminate repetitious litigation and the possibility of inconsistent adjudication involving requests for similar relief. They are an effective tool for those whose economic position is such that it is unrealistic to expect them to vindicate their rights in separate lawsuits. Class actions may be predicated on numerous underlying causes of action, including, but in no way limited to, statutory claims, contract theories, negligence, breach of warranty, fraud, consumer protection, environmental protection, and shareholder suits.

B. [49.2] What Law Controls

Class actions are now creatures of statutory law and may be brought in Illinois state courts. Sections 2-801 through 2-807 of the Code of Civil Procedure, 735 ILCS 5/2-801 through 5/2-807, control and are essentially a codification of Illinois caselaw. The applicable federal rule for class certification is Federal Rule of Civil Procedure 23, discussed below. Section 2-801 of the Code of Civil Procedure is patterned after Fed.R.Civ.P. 23, and federal decisions interpreting Rule 23 are persuasive authority with regard to questions of class certification in Illinois. *Smith v. Illinois Central R.R.*, 223 Ill.2d 441, 860 N.E.2d 332, 336, 307 Ill.Dec. 678 (2006); *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill.2d 100, 835 N.E.2d 801, 819, 296 Ill.Dec. 448 (2005), *cert. denied*, 126 S.Ct. 1470 (2006).

Diversity jurisdiction. Class action suits filed in Illinois may ultimately be heard in federal court. As an initial matter, a number of causes of action can be filed only in federal court, such as actions under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001, *et seq.*, securities fraud, and federal antitrust claims. Class action suits may also be removed from state court to federal court when federal diversity jurisdiction exists. Federal diversity jurisdiction in general presents a complex issue that goes beyond the confines of this chapter, but a few important issues must be addressed. For instance, pursuant to 28 U.S.C. §1367, in determining the amount in controversy, “[t]he court cannot just add up the damages sought by each member of the class”; rather, “[a]t least one named plaintiff must satisfy the jurisdictional minimum.” *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 607 (7th Cir. 1997), citing *Snyder v. Harris*, 394 U.S. 332, 22 L.Ed.2d 319, 89 S.Ct. 1053 (1969), and *Zahn v. International Paper Co.*, 414 U.S. 291, 38 L.Ed.2d 511, 94 S.Ct. 505 (1973). As the Supreme Court has clarified, however, when “at least one named plaintiff in the action satisfies the amount-in-controversy requirement, §1367 does authorize supplemental jurisdiction over the claims of other plaintiffs in the same Article III case or controversy, even if those claims are for less than the jurisdictional amount [currently \$75,000 under 28 U.S.C. §1332].” *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 162 L.Ed.2d 502, 125 S.Ct. 2611, 2615 (2005).

However, a split of circuits still exists regarding whether a court may determine the amount in controversy from the perspective of the plaintiff, the defendant, or either party. *See, e.g., Garcia v. Koch Oil Company of Texas Inc.*, 351 F.3d 636, 640 n.4 (5th Cir. 2003) (applying “plaintiff’s viewpoint” rule); *Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Electronics, Inc.*, 120 F.3d 216, 219 – 220 (11th Cir. 1997) (same); *In re Brand Name Prescription Drugs Antitrust Litigation*, *supra*, 123 F.3d at 609 – 610 (applying “either viewpoint” rule); *Hatridge v. Aetna Casualty & Surety Co.*, 415 F.2d 809, 814 – 815 (8th Cir. 1969) (viewpoint of party invoking federal jurisdiction). Courts willing to look at the amount from a defendant’s perspective hold that “the cost to the defendant of complying with an injunction counts toward the jurisdictional minimum.” *Synfuel Technologies, Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 652 (7th Cir. 2006), quoting *Rubel v. Pfizer Inc.*, 361 F.3d 1016, 1017 (7th Cir. 2004). For an explanation of the different ways to measure the amount, *see In re Microsoft Corp. Antitrust Litigation*, 127 F.Supp.2d 702 (D.Md. 2001), and *In re Ford Motor Company/Citibank (South Dakota), N.A., Cardholder Rebate Program Litigation*, 264 F.3d 952 (9th Cir. 2001).

Class Action Fairness Act of 2005. The Class Action Fairness Act of 2005 (CAFA), Pub.L. No. 109-2, 119 Stat. 4, amended 28 U.S.C. §1332 and applies to class action suits filed after February 18, 2005. CAFA provides greater opportunities to remove class actions to federal court by extending federal diversity jurisdiction over most cases in which (1) the class consists of at least 100 proposed members, (2) the amount in controversy exceeds \$5 million after aggregating the claims of the proposed class members exclusive of interest and costs, and (3) any of the members of a class of plaintiffs is a citizen of a state different from the defendant. CAFA contains important exceptions. For instance, federal courts may not exercise jurisdiction in certain cases in which a large percentage of the putative class, key defendants, and key events all share a strong nexus with the forum state. Significantly, CAFA may apply to a suit filed before February 18, 2005, if the court finds new claims added after February 18, 2005, constitute commencement of a

new action. *Knudsen v. Liberty Mutual Insurance Co.*, 435 F.3d 755, 758 (7th Cir. 2006). For a thorough discussion of the changes CAFA made to class action litigation, see Gregory P. Joseph, *Federal Class Action Jurisdiction after CAFA*, *Exxon Mobil and Grable*, 8 Del.L.Rev. 157 (2006).

Multiparty, Multiforum Trial Jurisdiction Act of 2002. The Multiparty, Multiforum Trial Jurisdiction Act of 2002 (MMTJA), Pub.L. No. 107-273, Div. C, Title I, §11020, 116 Stat. 1826, also altered the scope of federal diversity jurisdiction over certain class action claims. In particular, the MMTJA extended federal diversity jurisdiction over any civil action involving minimal diversity between adverse parties that arises from a single accident when at least 75 natural persons have died in the accident at a discrete location. 28 U.S.C. §1369(a).

Choice of forum. While a good-faith punitive damage claim might be enough to support federal jurisdiction, most plaintiffs' counsel believe that many cases, consumer cases in particular, are more likely to be successful in state court, rather than in federal court. In fact, §2-801 of the Code of Civil Procedure originated in order to expand the availability of class actions beyond the strict requirements of Fed.R.Civ.P. 23. See Kevin M. Forde, *Class Actions in Illinois: Toward a More Attractive Forum for This Essential Remedy*, 26 DePaul L.Rev. 211 (1977). The same factors that motivate plaintiffs' attorneys to look to state courts as the forum of choice have motivated defendants' aggressive attempts to remove actions to federal courts. For in-depth treatment, see CLASS ACTIONS (ICLE, 2007, Supp. 2010).

Other. Several major amendments to Fed.R.Civ.P. 23 became effective December 1, 2003. For example, in Rule 23(c), the requirement that the court determine whether to certify a class "as soon as practicable after commencement of an action" was changed to "at an early practicable time." Advisory Committee Notes, 2003 Amendments, Subdivision (c), Fed.R.Civ.P. 23. The notice provisions were also substantially revised, and Rule 23(e) was amended in an attempt to strengthen the process of reviewing proposed class action settlements. Advisory Committee Notes, 2003 Amendments, Subdivision (e), Fed.R.Civ.P. 23. Other changes and additions are addressed in §49.8 below.

In 2009, Fed.R.Civ.P. 23(f) was amended to extend the time for filing a petition for permission to appeal an order granting or denying class certification from 10 days to 14 days.

In Illinois, an order granting or denying class certification can be appealed under Supreme Court Rule 306(a)(8) by filing a petition for leave to appeal to the appellate court within 30 days after the entry of the order. See S.Ct. Rule 306(c)(1).

C. [49.3] Elements

Section 2-801 of the Code of Civil Procedure sets forth the elements necessary for the maintenance of a class action:

An action may be maintained as a class action in any court of this State and a party may sue or be sued as a representative party of the class only if the court finds:

(1) The class is so numerous that joinder of all members is impracticable.

(2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.

(3) The representative parties will fairly and adequately protect the interest of the class.

(4) The class action is an appropriate method for the fair and efficient adjudication of the controversy. 735 ILCS 5/2-801.

Numerosity. There is no “magic number” below which there cannot be a class, but above which there can. *Wood River Area Development Corp. v. Germania Federal Savings & Loan Ass’n*, 198 Ill.App.3d 445, 555 N.E.2d 1150, 1153, 144 Ill.Dec. 631 (5th Dist. 1990). The Illinois appellate court, however, stated that, “If the class has more than forty people in it, numerosity is satisfied; if the class has less than twenty-five people in it, numerosity probably is lacking; if the class has between twenty-five and forty, there is no automatic rule and other factors . . . become relevant.” *Id.*, quoting Arthur R. Miller, *An Overview of Federal Class Actions: Past, Present and Future*, p. 22 (Federal Judicial Center, 1977). In *Wood River Area Development*, the Fifth District denied class certification, ruling that 21 members did not render the proposed class “so numerous that joinder of all members is impracticable.” 555 N.E.2d at 1151, quoting Ill.Rev.Stat. (1987), c. 110, ¶2-801-1(1). *But see Board of Education of Community Unit School District 201-U, Will County, Illinois v. Pomeroy*, 47 Ill.App.3d 468, 362 N.E.2d 55, 5 Ill.Dec. 742 (3d Dist. 1977) (46 members not enough to maintain class action).

In determining the size of the proposed class, a trial court “may conduct any factual inquiry necessary to resolve the issue of class certification presented by the record.” *Cruz v. Unilock Chicago, Inc.*, 383 Ill.App.3d 752, 892 N.E.2d 78, 92, 322 Ill.Dec. 831 (2d Dist. 2008). This factual inquiry, however, is limited to the class certification issues and may not “stray [] into resolving the merits of plaintiffs’ claims against defendant.” *Id.* In *Cruz*, the appellate court reversed a trial court’s denial of class certification when the trial court “overstepped its bounds and improperly intruded on the ultimate” merits of the dispute in holding that the proposed class included fewer than 10 employees, rather than more than 200, as the plaintiffs alleged. 892 N.E.2d at 98.

Predominance. Fed.R.Civ.P. 23 differs from §2-801 in that §2-801(2) requires a finding that common questions of fact or law “predominate over any questions affecting only individual members,” whereas Fed.R.Civ.P. 23(a)(2) requires the court to find only that “there are questions of law or fact common to the class.” The predominance requirement of §2-801(2) “is a far more demanding requirement than the commonality requirement of Rule 23(a)(2).” *Smith v. Illinois Central R.R.*, 223 Ill.2d 441, 860 N.E.2d 332, 337, 307 Ill.Dec. 678 (2006). However, Fed.R.Civ.P. 23(a)(3) requires the court to find that “the claims or defenses of the representative parties are typical of the claims or defenses of the class,” whereas §2-801 does not contain the typicality requirement.

“The test for predominance is not whether the common issues outnumber the individual ones, but whether common or individual issues will be the object of most of the efforts of the litigants and the court. . . . Determining whether issues common to the class predominate over individual

issues requires the court to identify the substantive issues that will control the outcome, assess which issues will predominate, and then determine whether these issues are common to the class.” [Citation omitted.] *Smith, supra*, 860 N.E.2d at 337. Satisfaction of §2-108’s predominance requirement necessitates a showing that “successful adjudication of the purported class representatives’ individual claims will establish a right of recovery in other class members.” *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill.2d 100, 835 N.E.2d 801, 821, 296 Ill.Dec. 448 (2005), *cert. denied*, 126 S.Ct. 1470 (2006), quoting *Goetz v. Village of Hoffman Estates*, 62 Ill.App.3d 233, 378 N.E.2d 1276, 1279, 19 Ill.Dec. 401 (1978). When the predominance test is met, “a judgment in favor of the class members should decisively settle the entire controversy, and all that should remain is for other members of the class to file proof of their claim.” *Smith, supra*, 860 N.E.2d at 337, quoting *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 434 (Tex. 2000). In *Smith*, the Illinois Supreme Court reversed a class certification order in a mass tort case on the ground that individual issues of causation and damages predominated over any questions common to the proposed class. Following *Smith*, it appears problematic in Illinois to maintain a class action in a mass tort personal injury context. The *Smith* court pointed out the “unsuitability of the class action device for mass tort personal injury cases,” in which “individual damages cannot be determined by reference to a mathematical or formulaic calculation.” 860 N.E.2d at 338, quoting *Southwestern Refining, supra*, 22 S.W.2d at 436, and *Steering Committee v. Exxon Mobil Corp.*, 461 F.3d 598, 602 (5th Cir. 2006).

Whether a fraud action under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq.*, may be maintained as a class action turns on the individual facts of each case. *Compare Kitzes v. Home Depot, U.S.A., Inc.*, 374 Ill.App.3d 1053, 872 N.E.2d 53, 313 Ill.Dec. 293 (1st Dist. 2007) (denying class certification in consumer fraud action arising out of plaintiffs’ purchases of treated lumber), and *Petrich v. MCY Music World, Inc.*, 371 Ill.App.3d 332, 862 N.E.2d 1171, 308 Ill.Dec. 968 (1st Dist. 2007) (affirming denial of class certification in consumer fraud action brought by concertgoer against concert promoter), *with, e.g., Chultem v. Ticor Title Insurance Co.*, 401 Ill.App.3d 226, 927 N.E.2d 289, 339 Ill.Dec. 748 (1st Dist. 2010) (reversing denial of class certification in consumer fraud action against title insurers), *Ramirez v. Midway Moving & Storage, Inc.*, 378 Ill.App.3d 51, 880 N.E.2d 653, 316 Ill.Dec. 917 (1st Dist. 2007) (affirming class certification in consumer fraud action alleging false billings by moving company), *Ramirez v. Smart Corp.*, 371 Ill.App.3d 797, 863 N.E.2d 800, 309 Ill.Dec. 168 (3d Dist. 2007) (affirming class certification in consumer fraud action alleging overcharging by medical record retrieval and copying company), and *Hall v. Sprint Spectrum L.P.*, 376 Ill.App.3d 822, 876 N.E.2d 1036, 315 Ill.Dec. 446 (5th Dist. 2007) (affirming class certification in consumer fraud action arising out of allegedly unlawful termination fees charged by wireless communications provider).

Adequate representation. The named plaintiffs may adequately represent absent class members if, first, their interests “are the same as those who are not joined,” second, “[t]he attorney for the representative party ‘must be qualified, experienced[,] and generally able to conduct the proposed litigation,’ ” and, third, “[the representative party’s] interest must not appear collusive.” *Hall, supra*, 876 N.E.2d at 1047, quoting *Miner v. Gillette Co.*, 87 Ill.2d 7, 428 N.E.2d 478, 482, 56 Ill.Dec. 886 (1981). A class action fails if the named representative does not have a viable individual cause of action against the defendant. *See Avery, supra*, 835 N.E.2d at 827 (there can be no Illinois class for plaintiffs’ consumer fraud count when named representative has

not proven his claim for consumer fraud). Rather than invalidating all class representatives, however, an inadequate representative may be removed and leave may be granted to the plaintiffs to seek a substitute representative who adequately represents the class. *Cruz, supra*, 892 N.E.2d at 104. See also §§49.6 and 49.7 below.

Appropriateness. Fed.R.Civ.P. 23 differs from §2-801 in that §2-801 requires a finding that the class action is an appropriate method for adjudication of the controversy (735 ILCS 5/2-801(4)), whereas Fed.R.Civ.P. 23(b)(3) requires the court to find that a class action is a superior method to other available methods for the fair and efficient adjudication of the controversy.

To satisfy §2-801(4)'s appropriate method requirement, the plaintiff must demonstrate that the class action (1) can best secure the economics of time, effort, and expense and promote uniformity of decision, or (2) can accomplish the other ends of equity and justice that class actions seek to obtain. *Clark v. TAP Pharmaceutical Products, Inc.*, 343 Ill.App.3d 538, 798 N.E.2d 123, 134, 278 Ill.Dec. 276 (5th Dist. 2003). The *Clark* court held that a trial court's certification of a class will be disturbed only upon a clear abuse of discretion or an application of impermissible legal criteria. 798 N.E.2d at 128.

Decertification. Fed.R.Civ.P. 23 differs from 735 ILCS 5/2-802 in that §2-802(a) provides that a trial court's class certification order "may be amended before a *decision on the merits*," whereas Fed.R.Civ.P. 23(c)(1)(C) provides that a class certification order "may be altered or amended before *final judgment*." [Emphasis added.] In *Rosolowski v. Clark Refining & Marketing*, 383 Ill.App.3d 420, 890 N.E.2d 1011, 1016, 322 Ill.Dec. 92 (1st Dist. 2008), the First District explained that "'decision on the merits' [is] something different from 'final judgment'" and ruled that the trial court lacked the statutory authority to decertify a plaintiffs' class on posttrial motions after it had already entered judgment on the jury's verdict in favor of the plaintiffs' class.

D. [49.4] Relevant Standard Jury Instructions

None specific to class, as class certification is a legal question left to the sound discretion of the trial court. See *Smith v. Illinois Central R.R.*, 223 Ill.2d 441, 860 N.E.2d 332, 336, 307 Ill.Dec. 678 (2006); *Gordon v. Boden*, 224 Ill.App.3d 195, 586 N.E.2d 461, 464, 166 Ill.Dec. 503 (1st Dist. 1991).

E. [49.5] Statute of Limitations

The statute of limitations is dependent on the underlying cause of action. In federal court, commencement of a class action suspends the applicable statute of limitations for all putative class members who timely intervene after the denial of class certification or subsequently file their own individual suits in federal court. See *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 76 L.Ed.2d 628, 103 S.Ct. 2392, 2397 – 2398 (1983); *American Pipe & Construction Co. v. State of Utah*, 414 U.S. 538, 38 L.Ed.2d 713, 94 S.Ct. 756, 766 (1974). Illinois has adopted the *American Pipe* rule. *Steinberg v. Chicago Medical School*, 69 Ill.2d 320, 371 N.E.2d 634, 645, 13 Ill.Dec. 699 (1977). Therefore, the filing of a class action in Illinois state court tolls the running

of the statute of limitations for all purported members of the class who make timely motions to intervene, or who file their own individual suits in state court, after the court has found the suit inappropriate for class action status. *Id.* See also *Hess v. I.R.E. Real Estate Income Fund, Ltd.*, 255 Ill.App.3d 790, 629 N.E.2d 520, 531, 195 Ill.Dec. 935 (1st Dist. 1993).

No “cross-jurisdictional tolling.” The filing of a putative class action in federal court does not toll, or suspend, the running of an Illinois statute of limitations during the pendency of the federal complaint. *Portwood v. Ford Motor Co.*, 183 Ill.2d 459, 701 N.E.2d 1102, 233 Ill.Dec. 828 (1998) (dismissing as time-barred putative class action whose class representatives previously sought unsuccessfully class certification in federal court). *Accord Ottaviano v. Home Depot, Inc., USA*, 701 F.Supp.2d 1005, 1012 – 1013 (N.D.Ill. 2010) (filing of class actions in federal court had no effect on running of limitations period for plaintiffs’ state law claims); *Boxdorfer v. DaimlerChrysler Corp.*, 396 F.Supp.2d 946, 953 n. 3 (C.D.Ill. 2005) (“class action cases filed in other jurisdictions did not toll the [Consumer Fraud] Act’s statute of limitations for Illinois residents”).

F. [49.6] Parties

Proper plaintiff. A class suit may be maintained under proper circumstances, whether brought by plaintiffs or against defendants as a class. *Battles v. Braniff Airways, Inc.*, 146 F.2d 336, 339 (5th Cir. 1944). The Code of Civil Procedure requires that “[t]he representative parties will fairly and adequately protect the interest of the class.” 735 ILCS 5/2-801(3). Section 2-801(3) directs the focus on whether the named representative’s claims have the same essential characteristics as the claims of the class at large, but in contrast to federal law, Illinois does not require “typicality.” *Cf. Krey v. Castle Motor Sales, Inc.*, 241 F.R.D. 608, 615 (N.D.Ill. 2007) (federal “typicality” rule requires that named representatives’ claims advance same legal theory as other class members and arise from same course of conduct). While the interests of the named representative and the class members must be the same (*Miner v. Gillette Co.*, 87 Ill.2d 7, 428 N.E.2d 478, 482, 56 Ill.Dec. 886 (1981)), the factual distinctions between the claims of the named plaintiffs and those of other class members do not disqualify the representative. To be an adequate representative, the named plaintiff must have a valid claim of his or her own. *See Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 835 N.E.2d 801, 827, 296 Ill.Dec. 448 (2005); *Carrao v. Health Care Service Corp.*, 118 Ill.App.3d 417, 454 N.E.2d 781, 790, 73 Ill.Dec. 684 (1st Dist. 1983). The suitability of a class representative must be considered, including the named plaintiff’s honesty, intelligence, and suitability as a fiduciary. The named plaintiff cannot have a conflict with the class’ interests. *Carrao, supra*.

Proper defendant. Defendant classes are specifically authorized by §2-801 of the Code of Civil Procedure, 735 ILCS 5/2-801. A defendant class involves different considerations than a plaintiff class. One who initiates a plaintiff class action does so voluntarily with the hope of receiving a benefit, whereas a representative of a defendant class normally does not enter the lawsuit voluntarily. Nevertheless, unless an agreement is reached with the other members of the defendant class, the defendant class representative must bear the expense of the defense for all of the other members of the class, with nothing to gain except the hope of defeating the claim. *See Ameritech Benefit Plan Committee v. Communication Workers of America*, 220 F.3d 814, 820

(7th Cir. 2000) (listing potential concerns about defendant class actions). One common use of defendant classes occurs in the challenges to the validity of state laws when the class consists of state officials who enforce the laws.

G. [49.7] Special Considerations

Adequate representation. The requirement of adequate representation found in both 735 ILCS 5/2-801(3) and Fed.R.Civ.P. 23 relates not only to the class representative, but also to the attorney for the class. The attorney must be experienced, qualified, and generally able to conduct the proposed litigation. *Miner v. Gillette Co.*, 87 Ill.2d 7, 428 N.E.2d 478, 482, 56 Ill.Dec. 886 (1981). The attorney may not be a representative of the class. Class membership creates a per se disqualification of both the attorney and his or her law firm from continuing as the attorney for the class. *Barliant v. Follett Corp.*, 74 Ill.2d 226, 384 N.E.2d 316, 322, 23 Ill.Dec. 522 (1978). *But see Wool v. LaSalle National Bank*, 89 Ill.App.3d 560, 411 N.E.2d 1135, 1140 – 1141, 44 Ill.Dec. 769 (1st Dist. 1980) (class counsel’s mother-in-law may be proper class representative). The purpose of the adequate representation requirement for class certification is to ensure that all class members will receive proper, efficient, and appropriate protection of their interests in the presentation of the claim. *Clark v. TAP Pharmaceutical Products, Inc.*, 343 Ill.App.3d 538, 798 N.E.2d 123, 133, 278 Ill.Dec. 276 (5th Dist. 2003).

Fed.R.Civ.P. 23(g) was added in 2003 and responds to the reality that the selection and activity of class counsel are critically important to the success of a class action suit. Advisory Committee Notes, 2003 Amendments, Subdivision (g), Fed.R.Civ.P. 23. Rule 23(g)(1) provides, inter alia, that in appointing class counsel a court must consider (1) the work counsel has done in identifying or investigating potential claims, (2) counsel’s experience in handling class actions and other complex litigation, (3) counsel’s knowledge of applicable law, and (4) the resources counsel will commit to representing the class.

Costs. The costs associated with class actions can be huge. Prior to establishing at least some success on the merits, the plaintiff — in actuality, the plaintiff’s attorney — has to bear any costs of notifying class members. Moreover, while in most cases it is desirable to have a deep-pocket defendant so that recovery is possible, this type of defendant will often mount a long and arduous defense, with the goal of wearing down the plaintiff and class counsel.

Jurisdiction. State courts can bind unnamed members of a plaintiff class who do not have minimum jurisdictional contacts with the forum state even if the class member has not been personally served, as long as the due-process requirements of proper notice and adequate representation are satisfied. When a plaintiff class seeks money damages, three requirements must be satisfied before a state court can assert jurisdiction over the claims of members of the class who are not personally subject to its jurisdiction:

1. The best practical notice under the circumstances must be given to the class members. Such notice must describe the action and plaintiffs’ rights in it and provide each class member the opportunity to be heard, either in person or through counsel.
2. The class members must be informed of an opportunity to opt out of the class.

3. The interests of all members of the class must be adequately represented. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 86 L.Ed.2d 628, 105 S.Ct. 2965, 2974 (1985).

Notice. Notice to class members may be required at two stages in the prosecution of a class action: (1) at certification; and (2) prior to the approval of a settlement or dismissal. General notice requirements appear in both the federal and Illinois class action statutes; however, due-process concerns primarily shape the analysis of proper notice. Due process does not require personal notice in all cases.

Personal notice is required when the identities and addresses of class members are readily available. The exact means that must be employed to notify class members of the action depends on the specific circumstances of each case. 735 ILCS 5/2-803, 5/2-806. In most instances, courts have placed the burden of notifying the class on the representative of the class, but in certain situations, the burden of providing notice may be shifted in whole or in part to the party opposing the class (typically, the defendant). *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 57 L.Ed.2d 253, 98 S.Ct. 2380, 2391 (1978). The notice requirements theoretically ensure that potential class members have an opportunity to “opt out” of the class and not be bound by a judgment or settlement in the action.

Choice of law. The question of what law to apply arises in cases dealing with a national class. A forum state may apply its procedural rules uniformly in a multistate action, even if it is applying the substantive laws of other states. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 100 L.Ed.2d 743, 108 S.Ct. 2117, 2125 (1988). As to substantive law, constitutional limitations on choice of law can prevent uniform application of the forum state’s substantive law. Illinois courts follow the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) and apply the broad principle that the rights and liabilities as to a particular issue are to be governed by the jurisdiction that retains the “most significant relationship” to the occurrence and the parties. *Barbara’s Sales, Inc. v. Intel Corp.*, 227 Ill.2d 45, 879 N.E.2d 910, 919, 316 Ill.Dec. 522 (2007). When a forum state has to apply the substantive laws of several different states, a problem arises with satisfying the “commonality” requirement. However, courts have allowed a case to proceed if a putative class is capable of being grouped into subclasses. *See Purcell & Wardrope Chartered v. Hertz Corp.*, 175 Ill.App.3d 1069, 530 N.E.2d 994, 998, 125 Ill.Dec. 585 (1st Dist. 1988). If the subclasses later become unmanageable, Illinois courts can set aside all or a portion of class certification. *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill.2d 100, 835 N.E.2d 801, 826, 296 Ill.Dec. 448 (2005). Nevertheless, if Illinois law and the applicable laws of other states diverge too greatly in a class action, Illinois courts will not certify the class, even with the option of subclasses. *Health Cost Controls v. Sevilla*, 365 Ill.App.3d 795, 850 N.E.2d 851, 863, 303 Ill.Dec. 46 (1st Dist. 2006).

Trends. The requirement of §2-801(2) of the Code of Civil Procedure that common questions of fact or law predominate may be increasingly difficult to satisfy in Illinois state courts. Prior to 2005, a plaintiff satisfied the commonality requirement by alleging (and eventually establishing) that one common issue of fact or law predominates over all other issues. *Gordon v. Boden*, 224 Ill.App.3d 195, 586 N.E.2d 461, 465, 166 Ill.Dec. 503 (1st Dist. 1991). In *Avery, supra*, however, the Illinois Supreme Court refused to certify a nationwide class of plaintiffs alleging violations of the Consumer Fraud and Deceptive Business Practices Act due to, among other things, lack of

commonality. In *Avery*, the court held that the defendant's allegedly nationwide uniform practice of restoring policyholders' cars to "pre-loss" condition did not satisfy the commonality and predominance requirement because the contracts at issue differed from state to state and contained materially different language regarding the defendant's duties to the policyholders. 835 N.E.2d at 829 – 830. *Avery* was widely interpreted as an attempt to discourage (1) inappropriately broad class action lawsuits and (2) improper forum shopping for overtly plaintiff-friendly courts. Subsequent Illinois Supreme Court decisions appear to support this interpretation. *See, e.g., Smith v. Illinois Central R.R.*, 223 Ill.2d 441, 860 N.E.2d 332, 337, 307 Ill.Dec. 678 (2006); *Price v. Philip Morris, Inc.*, 219 Ill.2d 182, 848 N.E.2d 1, 51 – 53, 302 Ill.Dec. 1 (2005).

H. [49.8] Remedies — Special Issues

Relief sought. Compensatory damages, costs, attorneys' fees, expert fees, and punitive damages may be requested. Often, settlements include, especially in consumer cases, discounts on products sold by the defendant. Nonmonetary considerations, such as equitable relief, depend on the particular circumstances of each case. For example, a change in marketing practices or a product's design would be appropriate in the context of a consumer class action. On the other hand, revisions in internal management, a change in directors, the elimination of conflicts of interest, or the liquidation of corporate assets and the appointment of a receiver might be appropriate in class actions against corporations. In class actions designed to rectify the civil rights of disadvantaged groups, the remedies can take numerous forms, such as ordering the formulation of a plan for desegregation of public housing (*Hills v. Gautreaux*, 425 U.S. 284, 47 L.Ed.2d 792, 96 S.Ct. 1538 (1976)), ordering an employer to abandon the use of certain job tests for hiring and promotion purposes when those tests were shown to be unrelated to job performance and the test results had a disparate impact on black applicants and employees (*Albemarle Paper Co. v. Moody*, 422 U.S. 405, 45 L.Ed.2d 280, 95 S.Ct. 2362 (1975)), and prohibiting political spying and harassment (*Alliance To End Repression v. City of Chicago*, 561 F.Supp. 537 (N.D.Ill. 1982)).

Settlements. The named representatives and their lawyers generally negotiate settlements and compromises of a class action. They are considered fiduciaries and must act accordingly, meaning that the interests of the class must take precedence over those of the individual plaintiffs. In order for a settlement to be approved, an Illinois court must find that it is fair, reasonable, and in the best interest of the class. *Steinberg v. System Software Associates, Inc.*, 306 Ill.App.3d 157, 713 N.E.2d 709, 717, 239 Ill.Dec. 178 (1st Dist. 1999). The most important factor when assessing fairness is the strength of the plaintiff's claim on the merits compared to the amount offered in settlement. *Id.* *See also Synfuel Technologies, Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006).

Fed.R.Civ.P. 23(e) was amended in 2003 to strengthen the process of reviewing proposed class action settlements. Advisory Committee Notes, 2003 Amendments, Subdivision (e), Fed.R.Civ.P. 23. As amended, Rule 23(e)(2) requires a reviewing court to hold a hearing and make a written finding that the class action settlement is fair, reasonable, and adequate. The amendment takes into consideration the fact that while settlement may be a desirable means of resolving a class action, court review and court approval are essential to ensure adequate representation of class members who have not participated in shaping the settlement. Similarly,

the Class Action Fairness Act of 2005 took a closer look at settlements and created new restrictions with regard to “coupon” settlements, attorneys’ fees, and settlement notice. For instance, recognizing a conflict of interest between attorneys and their class action clients in coupon settlements, CAFA limited the amount of money paid to attorneys to the amount of coupons actually *redeemed* by customers, as opposed to the amount of coupons *given* to customers. 28 U.S.C. §1712(a).

Settlement notice. Settlement or dismissal of a class action requires notice as the court may direct. See §49.7 above. The question of what notice must be given and in what form will vary from case to case. For example, cases falling under CAFA are subject to its unique, detailed notice requirements. Broadly, any type of notice of class action settlement must inform the class members about the nature of the proposed settlement and the possible options the class members may pursue. *Fox v. Northwest Insurance Brokers, Inc.*, 113 Ill.App.3d 255, 446 N.E.2d 1260, 1262, 68 Ill.Dec. 863 (1st Dist. 1983). Costs associated with settlement notice may be substantial, so settlement agreements often stipulate which party will bear these costs.

Attorneys’ fees. Normally, courts do not interfere with fee arrangements between an attorney and a client, as this is a question of contract to be resolved by the parties. In a class action with unnamed members, however, there can be no express contract between the attorney and the unnamed members of the class. Hence, any award of fees to the attorney for the class must be approved by the court. The practice of negotiating settlement agreements simultaneously with attorneys’ fees has come under increasing fire because of possible conflicts of interest between class counsel and the class. Both Illinois and federal courts have used numerous methods to determine the proper award of attorneys’ fees. Regardless, any award of attorneys’ fees in class actions must be approved by the court. For an enlightening discussion about attorneys’ fees in class action cases and methods of determining appropriate compensation, see *In re Synthroid Marketing Litigation*, 264 F.3d 712 (7th Cir. 2001).

Fed.R.Civ.P. 23(h) is based on the idea that fee awards are a powerful influence on the way attorneys initiate, develop, settle, or otherwise conclude class actions. Advisory Committee Notes, 2003 Amendments, Subdivision (h), Fed.R.Civ.P. 23. It also authorizes an award of reasonable attorneys’ fees and nontaxable costs. Rule 23(h) was designed to work in tandem with Rule 23(g), which deals with the appointment of class counsel and affords the courts an opportunity to set an early framework for an eventual fee award. *Id.* Likewise, CAFA limits the collection of attorneys’ fees in particular settlements, such as “coupon” settlements.

Fluid recovery/cy pres. Illinois permits “fluid recovery” or cy pres when it is not feasible to distribute all of the settlement funds to identifiable class members. See *Gordon v. Boden*, 224 Ill.App.3d 195, 586 N.E.2d 461, 468, 166 Ill.Dec. 503 (1st Dist. 1991). Beginning July 1, 2008, there is a presumption that any unclaimed funds remaining from a class action award will go toward organizations that improve access to justice for low-income Illinois residents. See 735 ILCS 5/2-807, which was added by P.A. 95-479 (eff. July 1, 2008).

I. [49.9] Checklist for Complaint

1. Jurisdictional facts, including facts regarding jurisdiction under the Class Action Fairness Act of 2005, if necessary.
2. Venue.
3. Date, time, and place.
4. Class action allegations.
5. Plaintiffs bring action on their behalf.
6. Definitions of the class.
7. Numerical requirements.
8. Common questions of law and fact exist as to all class members and predominate over any questions that affect only individual members.
9. Named representatives' claims or defenses are typical of the claims of all class members (federal), or named representatives' claims or defenses have same essential characteristics as the claims of the class at large (Illinois).
10. Named representatives will fairly and adequately represent the interests of the class members.
11. Class action treatment is superior to the alternatives for the fair and efficient adjudication of the controversy (federal), or class action treatment is an appropriate method for adjudication of the controversy (Illinois).
12. Causes of action.
13. Damages sustained.
14. Request for relief.

J. [49.10] Affirmative Defenses

Defenses specific to the cause of action on which the class action is predicated. In addition:

1. The class is not so numerous that joinder of all members is impractical.
2. There are questions affecting only individual members; common questions do not predominate.

3. The representative parties will not fairly and adequately protect the interests of the class.
4. A class action is an inappropriate method for the fair and efficient adjudication of the controversy.

K. [49.11] Related Actions

As noted in §49.1 above, class actions are predicated on numerous underlying causes of action. Plaintiffs frequently advance several different theories.

L. [49.12] Sample Form

FORM(S) AVAILABLE BY PURCHASING HANDBOOK OR BY SUBSCRIBING TO SMARTBOOKS® OR SMARTBOOKSPUS.