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Managing Complex Litigation in the Illinois Courts

Mark C. Weber*

I. INTRODUCTION

For more than a generation, the "big case" has been a leading issue in civil procedure. Big cases—complex litigation—stem from the complexity of modern life. For example, mass production of goods causes mass torts, numerous but widely dispersed injuries from the same defective products. Air crashes and building collapses are mass disasters, and lead to mass disaster litigation. Frequently, the only alternative to the big case is hundreds or thousands of duplicative individual cases. The sheer number of cases can paralyze the court sys-

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tem with identical sets of litigants, attorneys, and judges disputing and resolving identical or nearly identical factual and legal issues.⁴

Many authorities have suggested that the judicial system should respond to mass injury and large-scale disaster litigation by consolidating all potential cases and transferring them to federal magnet forums.⁵ Taking this step would be ill-advised.⁶ Transfer and consolidation carry important advantages of judicial economy and consistency in resolution of disputes,⁷ but consolidation into the federal courts would

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4. Note, Class Certification in Mass Accident Cases Under Rule 23(b)(1), 96 HARV. L. REV. 1143, 1144 (1983). Of course, duplicative effort on a large number of individual cases is not the sole alternative. Exercising its power to regulate interstate commerce, Congress could create administrative relief schemes, as it has for workers' accidental injuries and for coal miners' black lung disease, perhaps spreading the cost of injury over an entire industry or the taxpaying public. Under the same authority, Congress could abolish product liability or other causes of action, leaving the cost of the harm on the victims. The judiciary, however, particularly that portion of it operating at the trial level, can efficiently administer the existing law of torts in mass injury situations only by manipulating the configuration of the lawsuits and by adopting managerial initiatives.


distort the proper mission of those tribunals and involve them in the development of state tort law, a task the federal courts are poorly equipped to carry out.  

The preferred course should be the transfer and consolidation of complex civil litigation into the state courts. For the alternative of state adjudication of complex litigation to succeed, however, state courts need to resolve the practical and doctrinal problems involved in deciding the big cases. Large-scale litigation has created suits that preoccupy the court system for decades, trials that take years to complete, and records that fill warehouses. Only by solving the management problems of complex litigation can state courts become a workable alternative to the federal forum.

This Article addresses the issues involved in litigating complex cases in the courts of our sixth largest state, Illinois. This Article begins with an account of the rise of complex civil litigation in the Illinois courts. It next details the efforts of the organized Illinois judiciary.
and individual judges to develop systems and doctrines that facilitate
the litigation of complex civil cases, particularly mass tort cases. It
also describes some of the solutions that Illinois judges have created
for the problems that the cases present. Next, this Article recom-
mends approaches to facilitate the management of complex cases in
Illinois courts. Specifically, it discusses the virtues of case manage-
ment and suggests methods of case management for early organiza-
tion, discovery, settlement, and trial. This Article then comments on
a number of the emerging issues that the Illinois courts must resolve in
order to handle complex civil litigation in a more efficient and just
manner.

II. COMPLEX LITIGATION IN THE ILLINOIS COURTS

Illinois has been the forum for a great deal of complex litigation, and
it is likely to continue to have this role in the future. Illinois was one
of the first states to adjudicate a class action in which many members
of the plaintiff class did not reside in the state. Illinois state courts
have conducted consolidated discovery and trial proceedings in cases
resulting from contaminated milk distributed by a grocery chain and
from a disastrous chemical spill. More recently, a mass trial of in-
juries attributed to a “sick building” took place in the suburbs of
Chicago. Large-scale consolidated proceedings in asbestos cases are
taking place in a number of Illinois venues.

14. See infra part III.
15. See infra part III.
16. See infra part IV.
17. See infra part IV.A.
18. See infra part IV.B.
19. See infra part V.
21. Miner, 428 N.E.2d 478, 485 (holding that the plaintiff could continue to adju-
dicate his claim on behalf of a nationwide class of persons and could adequately represent those parties who were not Illinois residents).
22. In re Salmonella Litig., 556 N.E.2d 593 (Ill. App. 1st Dist. 1990) (involving a consolidated class action by plaintiffs seeking damages due to salmonellosis poisoning traced to milk produced by the defendant grocery chain).
23. Kemner, 492 N.E.2d at 1327 (involving 22 consolidated actions to recover for injuries and property damage allegedly caused by exposure to chemicals released as a result of a railroad car derailment).
25. See, e.g., Alexander v. Anchor Packing Co., No. 91 L 554 (Ill. Cir. Ct. Peoria County, Order Setting Cause on Active Calendar, Nov. 19, 1992); In re All Asbestos
Many factors draw complex cases to the state courts of Illinois. One is the presence of sophisticated plaintiffs' personal injury firms in the major urban areas of the state. All things being equal, lawyers tend to file suit in the jurisdiction in which they feel most comfortable. A second factor is Illinois' liberal long-arm statute. Even when the events that led to the suit have a tenuous connection with Illinois, the presence of large-scale industrial and commercial enterprises in the state minimizes the difficulties of personal jurisdiction in cases against those potential defendants. Third, certain regions of Illinois award some of the highest jury verdicts of any location in the country, and fairly loose intrastate venue rules make it likely that plaintiffs' choices for locating suits in those areas will be honored.

While recent Illinois tort reform legislation—the Civil Justice Reform Amendments—may create disincentives to sue in Illinois, the State will continue to attract complex cases. Other states will not necessarily be better choices of forum for plaintiffs, for any jurisdiction whose choice of law rules point to the application of Illinois law could apply the statute. Moreover, applying Illinois' choice of law rules, Illinois courts might well ignore the tort reform legislation and apply the law of other states to multistate controversies before them.


27. See Ill. Comp. Stat. Ann. ch. 735, § 5/2-209(c) (West 1992). The long-arm provision states that “[a] court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States.” Id.


27. See Ill. Comp. Stat. Ann. ch. 735, § 5/2-209(c) (West 1992). The long-arm provision states that “[a] court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States.” Id.

28. If a defendant has continuous and systematic contacts with a state, jurisdiction may be proper even though the incident giving rise to suit had nothing to do with the state. E.g., Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 445-49 (1952).

29. See Ill. Comp. Stat. Ann. ch. 735, § 5/2-1001.5 (West Supp. 1996) (setting forth procedures whereby a court will grant a change of venue if the court determines that any party may not receive a fair trial in the court in which the action is pending).


32. In choice of law problems, Illinois courts apply the “most significant contact” test, a form of interest analysis based on the Restatement (Second) of Conflicts of Laws. Ingersoll v. Klein, 262 N.E.2d 593, 596 (Ill. 1970); see Restatement (Second) of Conflicts of Laws (1971) (discussing of the principles underlying choice of law problems).

cordingly, despite the statute, it is likely that complex cases will con-
tinue to flow into Illinois.

III. THE RESPONSE OF THE ILLINOIS COURTS TO
COMPLEX LITIGATION

The organized judiciary of Illinois has formulated a response to the
challenges that complex litigation present. As a first step, the Illinois
Supreme Court formed the Study Committee on Protracted Litigation to
recommend solutions to the problem of long, complicated civil
cases. Established by the Illinois Judicial Conference in the late 1980s
and placed under the chairmanship of Judge Philip J. Rarick, this
committee asked what organized reaction the federal courts had made
to the emergence of complex federal litigation in the 1940s and 1950s.
The primary federal activity was a series of conferences that produced
a manual of suggested practices for trial court judges. The Illinois
Committee undertook to create a comparable manual for use by Illinois
courts.

After lengthy committee consideration, the Illinois Manual for
Complex Litigation appeared in late 1991. The first of its kind in the
United States, it provides practical guidance to trial judges in handling
all types of complex civil litigation, with special sections on mass tort
cases, cases with parallel proceedings in other states, parallel federal
proceedings, and parallel criminal proceedings. After completion of
the Manual, the Supreme Court authorized its printing and distribution
to the chief judges of all Illinois circuits. The chief judges and the
Administrative Office of the Illinois Courts have provided copies to all
judges who requested the Manual and other judges who might benefit
from having the Manual available.

34. By 1991, the Supreme Court had renamed the Committee the “Study Committee
on Complex Litigation,” apparently fearing that having a committee on protracted
litigation sent the wrong message.

United States Judicial Conference, Manual for Complex Litigation and
Multidistrict Litigation (1970); United States Judicial Conference, Book of
Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 351 (1960);
(1958); Proceedings of the Seminar on Protracted Cases for United States Circuit and

36. Illinois Judicial Conference Study Committee on Complex Litigation, Illinois
author of this Article has served as Reporter to the Committee on the Manual project
during the completion of the Manual and its revision.
In 1994, the committee revised the *Manual* to take account of several case law developments and statutory changes. Another revision of the *Manual* is now underway, occasioned by the recent Illinois tort reform law and the Supreme Court's revision of the civil discovery rules. The Committee is also working on an Illinois manual for complex criminal cases. The Committee continues to solicit ideas from judges throughout the state for inclusion in the criminal case manual and in further revisions of the civil manual.

The Study Committee on Complex Litigation also proposed a number of changes in Illinois Supreme Court rules. The change of greatest significance, Rule 384, was adopted in 1990. The Rule permits consolidation of "civil actions involving one or more common questions of fact or law [when the civil actions] are pending in different judicial circuits..." According to the Rule, the Supreme Court should approve consolidation when it "serve[s] the convenience of the parties and... promote[s] the just and efficient conduct of such actions." The Supreme Court may act on its own motion or that of any party; the order of transfer and consolidation may include pretrial, trial, or posttrial proceedings. The Rule provides a mechanism for the court or litigants to take the initiative in securing the cost and fairness advantage of simplified, consolidated proceedings before a single Illinois court.

In 1995, the Illinois Judicial Conference built on the efforts of the Study Committee by convening another committee to present a regional seminar on complex litigation for Illinois judges as part of the ongoing educational efforts sponsored by the Supreme Court. This...

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37. See *ILLINOIS MANUAL*, supra note 36. Judges with ideas for management of complex cases in the Illinois courts are encouraged to contact the author at DePaul University College of Law in Chicago, or to contact the Administrative Office of the Illinois Courts' liaison to the Study Committee on Complex Litigation.


40. *ILL. SUP. CT. R.* 384 (formerly codified at *ILL. REV. STAT.* ch. 110A, para. 384 (1991)).

41. Id. at 384(a).

42. Id.

43. Id. The Supreme Court had previously accomplished the same goal by entering supervisory orders on an ad hoc basis.

44. The Committee has made a number of other rule proposals, including one to allow for the designation of cases as complex, another permitting the court to compel parties to have individuals with settlement authority attend pretrial conferences, and a third to permit the expanded use of evidence depositions of experts. These proposals remain pending at the current time.
program, held in Arlington Heights from September 28 to 30, 1995, presented a hypothetical scenario of a mass accident and followed the litigation from the precipitating event to the final disposition, taking up procedural and management choices faced by the trial judge at every step of the case.

IV. RECOMMENDED APPROACHES TO COMPLEX CASES IN ILLINOIS COURTS

The Study Committee on Complex Litigation and the Regional Seminar Committee both suggested an approach to complex litigation that may be summarized as one of affirmative case management. Rather than letting the case develop on its own, the case should be directed so that costs and delays are kept to a minimum and the litigation is shaped into a form capable of resolution.

Under the approach recommended by the committees, Illinois judges do not have to modify case law doctrines or press for the adoption of revolutionary statutes or court rules. Management is much more a matter of attitude and sound practice, a science more practical than doctrinal. Courts, however, must recognize the value of case management, and then adopt specific techniques for dealing with case assignment, pretrial conferences and orders, discovery, settlement, and trial.

A. The Virtues of Case Management

The Illinois Courts have come to recognize the virtues of case management in complex litigation. In the absence of affirmative judicial management, cases that arise from mass disasters or dispersed product injuries are characterized by an absence of definition of contested issues, a surplus of proffered evidence, and tremendous expenditure of material and human resources. Judicial case management minimizes the expenditure of resources while preparing the case for a fair trial that will yield a just result.

45. See infra notes 79-107 and accompanying text.
46. ILLINOIS MANUAL, supra note 36, at 11-14, 17-20, 22-27, 168 (discussing the benefits of having judges in complex litigation cases adopt a managerial approach); see NATIONAL MASS TORT CONFERENCE, MANAGING MASS TORT CASES: A RESOURCE AND REFERENCE BOOK FOR STATE TRIAL COURT JUDGES 17 (discussion draft 1995) ("A high percentage of judges and lawyers strongly endorse the need for and value of judges being managerial in these cases.").
47. JUDICIAL CONFERENCE OF THE U.S., supra note 1, at 63-65.
Active judicial case management, however, does present some risks to impartiality that do not exist with a more passive judicial role. These risks are most acute if the judge takes an active managing role in attempting to fashion a settlement. Nevertheless, careful observance of judicial standards will prevent both the existence and the appearance of impropriety.

Management, of course, is not an end in itself—it is a means to the just and efficient resolution of the large cases created by consolidation of individual claims. The advantages of consolidation are twofold: efficiency and consistency. Consolidated proceedings promote efficiency because they allow evidence and argument to be heard only once. Triers of fact in more than one location need not hear and decide the same matters. As Professor Zecharia Chafee emphasized half a century ago, "In matters of justice, . . . the benefactor . . . makes one lawsuit grow where two grew before." A consolidated proceeding will also promote consistent results in similar cases for the simple reason that the consolidated proceeding has a single result. Conversely, multiple decision-makers may diverge in their results in identical cases. Consistency is sometimes thought of as the very essence of fairness: treating those who are alike the same way.

49. See infra text accompanying notes 91-101.
50. See Robert F. Peckham, A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution, 37 Rutgers L. Rev. 253, 260-61 (1985) (emphasizing the importance of conducting proceedings on the record).
52. Id. §10.1, at 3-4.
53. For a more extended discussion of this issue, see Weber, supra note 6, at 253-55.
55. Weber, supra note 6, at 253-54 (discussing the benefits of more uniform results achieved by case consolidation).
56. See Plato, The Laws 229-30 (Trevor J. Saunders ed., 1975) (discussing the idea of equality). Of course, the position in the text should not be overdrawn. If a consolidated proceeding imposes uniform rules of liability that are insensitive to federalism interests, the consistency is inappropriate. Robert A. Sedler & Aaron Twerski, State Choice of Law in Mass Tort Cases: A Response to "A View from the Legislature," 73 Marq. L. Rev. 625, 630-32 (1990). In addition, a consolidated proceeding that im-
B. The Methods of Case Management in Illinois

Case management occurs throughout the litigation. At each stage in the case, it has several components. The principal stages of a complex case in which specific management steps are desirable include the early organizational phase, the discovery phase, settlement facilitation, and trial. The recommendations of the Committee on Complex Litigation and the Regional Seminar address each of these aspects of the complex civil case.

1. Early Organizational Steps

In the early organizational phase, effective management entails three steps: assignment of the matter to a single judge, the judge's holding of a series of conferences with the lawyers in the case, and the entry of a pretrial order. First, a single judge should be assigned to all aspects of a complex case. A single judge has the opportunity and incentive to plan the conduct of the pretrial and trial proceedings, searching for ways to enhance fairness and efficiency.

There are essentially two methods for choosing the judge: random selection and selection based upon experience or expertise. Random selection has the benefit of providing the appearance of fairness. On the other hand, selection on the basis of experience or expertise increases the likelihood of a fair result at a minimum of judicial time. A judge handling one case that is related to several others may have acquired expertise about the controversy as a whole. The chief judge can take advantage of this experience by consolidating the related cases before that judge. A judge should deny any petition for change of

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57. See infra notes 59-107 and accompanying text.
58. For a more complete discussion of the issues presented in this section, see ILLINOIS MANUAL, supra note 36, at Chapter 2 (Preliminary Problems); Chapter 3 (Pretrial Procedures); Chapter 4 (Discovery); Chapter 6 (Settlement); Chapter 7 (Trial).
59. ILLINOIS MANUAL, supra note 36, at 17.
60. Id.; FEDERAL MANUAL 2D, supra note 35, § 20.12, at 7-10.
61. ILLINOIS MANUAL, supra note 36, at 17; NATIONAL CENTER FOR STATE COURTS, JUSTICE DELAYED 72 (1978).
62. ILLINOIS MANUAL, supra note 36, at 17.
63. Id.
64. Id.
65. Id.; see ILL. COMP. ST. ANN. ch. 735, § 5/2-1006 (West 1992); see also Peck v. Peck, 157 N.E.2d 249, 254-55 (Ill. 1959) (stating that a court may grant consolidation even though one trial has already commenced, as long as the court finds that it is convenient and reasonable to do so, and that no substantial rights have been prejudiced by the consolidation).
venue that comes after trial or hearing begins, or after the judge "has ruled on any substantial issue in the case," in order to ensure that the chief judge can exercise his or her power of consolidation.66

Second, a judge should convene an early conference with the attorneys in the case.67 The main goal of the conference should be to develop a plan for adjudication of the case.68 A written agenda for the conference facilitates progress on the plan.69 The agenda may include recusal or disqualification of the judge; coordination of related litigation in other courts; handling of later filings ("tag-along actions"); designation of lead or trial counsel or committees and compensation arrangements for them; scheduling of pretrial matters and trial;70 identification of contested issues; management of discovery; maintenance of a master file; filing of written status reports; and scheduling of subsequent conferences.71

Third, the judge should issue a detailed order based on the conference.72 The order should provide for additional conferences leading up to the trial.73 In the order or another early order, the judge should establish a firm trial date, and indicate to the parties the last date for dispositive pretrial motions.74 Illinois Supreme Court Rule 191(a)75 permits the court to set the last date for the filing of dispositive motions, including motions for summary judgment under section 2-1005 of the Code of Civil Procedure76 and motions for involuntary dismissal.

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66. ILL. COMP. STAT. ANN. ch. 735, § 5/2-1001.5(c) (West Supp. 1996). Of course, an exception exists for petitions based on grounds that did not occur until after that time. Id. Section 2-1001.5(f) of the Code of Civil Procedure might be interpreted to permit judges to impose reasonable time limits on the exercise of the right to a change of venue. Id. § 5/2-1001.5(f) ("The order for a change of venue may be made subject to such equitable terms and conditions as safety to the rights of the parties may seem to require, and the court in its discretion may prescribe.").

67. ILLINOIS MANUAL, supra note 36, at 22; FEDERAL MANUAL 2D, supra note 35, § 21.21, at 29-30, § 21.24, at 31-33; see ILL. SUP. CT. R. 218(a).

68. ILLINOIS MANUAL, supra note 36, at 22; FEDERAL MANUAL 2D, supra note 35, § 21.24, at 31-33.

69. ILLINOIS MANUAL, supra note 36, at 22.

70. See ILL. SUP. CT. R. 218(c).

71. ILLINOIS MANUAL, supra note 36, at 23.

72. ILL. SUP. CT. R. 218(b).

73. ILLINOIS MANUAL, supra note 36, at 24-25. Telephone conferences might substitute for in-person meetings, however. See ILL. SUP. CT. R. 185. Regular dates and times minimize the possibility of scheduling conflicts. ILLINOIS MANUAL, supra note 36, at 24-25. "Judges should not tolerate failure to attend a conference or disobedience of a scheduling order or other pretrial order." Id. at 25; ILL. SUP. CT. R. 218(d).

74. ILLINOIS MANUAL, supra note 36, at 25-26.

75. ILL. SUP. CT. R. 191(a).

76. ILL. COMP. STAT. ANN. ch. 735, § 5/2-1005 (West 1992).
under section 2-619. A firm and credible trial date encourages the lawyers to do the necessary trial preparation, and is the single most effective tool to promote settlement.

When the complex litigation consists of consolidated actions or other multiple actions assigned to a single judge, the order should designate a lead file and provide that any pleading filed in that case is considered filed in all the other cases within the designation. This step keeps the parties from having to file identical papers in various related cases.

2. Management of Discovery

In the discovery phase of a complex case, effective management requires judicial involvement in the interrogatory, document discovery, and deposition phases of discovery. Special judicial concern must be shown regarding discovery from expert witnesses.

a. Creation of Master Interrogatories

A master set of interrogatories is useful in consolidated cases or those in which there are multiple tag-along actions. In those cases, the court should require counsel to develop a set of interrogatories that can be used in each action. Among the questions most likely to be included are names and addresses of persons with information, the existence and location of documents and product information, and basic information about injuries and treatment.

b. Management of Document Discovery

Establishment of a document depository spares the court clerk and the individual lawyers the burden of holding discovery documents. Often, the parties will agree to arrangements on their own. If the par-

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77. Id. § 5/2-619.
78. See Federal Manual 3D, supra note 35, § 23.13, at 168; National Center for State Courts, supra note 61, at 76; see also Sandra M. Moss, A Response to Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute From a State Judge’s Perspective, 73 Tex. L. Rev. 1573, 1579 (1995) (noting that the setting of realistic trial dates can help resolve litigation).
79. See Illinois Manual, supra note 36, at 33. See generally Schwarzer, supra note 11 (proposing procedures for efficient discovery in both the state and federal forum).
81. Id. at 33-35.
82. Id. at 34-35.
ties cannot agree, the court needs to compel them to make arrange-
ments. Large accounting firms are eager to perform the work. Docu-
ment depositories not only make the pretrial proceedings work more
smoothly, they can also be used to facilitate individual trials of previ-
ously consolidated cases. The judge may require the parties to file at
the depository all the exhibits that they plan to use at each trial, identi-
fied by the document number assigned when filed with the depository,
and to serve a list of the trial exhibits on the other parties in the case.
Each case can then have the benefit of the organizational work with the
papers in a single case.

c. Depositions

Illinois courts have introduced a number of innovations into deposi-
tion practice in complex cases. Some courts have imposed multiple
deposition "tracks," in which parties are required to depose specified
numbers of different categories of witnesses per week until all deposi-
tions are completed. This step keeps discovery on schedule and
keeps the parties from inventing excuses for failing to produce depo-
sants. Judges have limited the repeated deposition of the same witness
by ordering that new parties filing tag-along actions be allowed to join
the suit only if they agree not to depose the same witnesses on issues
covered in previous depositions.

Putting a discovery committee in place is a crucial step towards
making discovery manageable, and takes on critical importance in
keeping deposition practice within reasonable bounds. A discovery
committee consists of selected plaintiffs' and defendants' counsel who
will take the lead in conducting and defending discovery for all parties
with similar interests. The court's order establishing the committee
should provide that during the deposition the inquiries and objections
of one counsel must stand for all parties covered by the order.

d. Discovery from Experts

Initiating expert opinion discovery before information from occur-
rence witnesses is in place may be inefficient. The occurrence wit-
nesses' statements may affect the experts' opinions. Thus, the judge

84. ILLINOIS MANUAL, supra note 36, at 39.
85. Id.
86. Id. at 43. See also Stoll, supra note 83, at 17 (reporting on the use of multiple
track depositions in the Exxon Valdez case).
87. ILLINOIS MANUAL, supra note 36, at 44. See infra note 89 and accompanying text,
discussing limiting expert witnesses to the scope of their previous testimony.
88. ILLINOIS MANUAL, supra note 36, at 48.
may choose to delay expert opinion discovery until the occurrence witnesses have been deposed. This does not prevent the court from establishing a schedule of expert discovery. Although experts often have extremely demanding schedules, if information on availability is provided with identification of the expert, the parties can more easily plan their discovery programs.

A judge may also promote economy and speed by ordering expert witnesses bound by statements made in previous depositions and trials. The court may then restrict further questioning to matters not covered in the previous litigation. Parties may also agree that experts’ evidence depositions be admitted regardless of the availability of the deponent. Such a step allows for more flexible trial scheduling and conserves the parties’ costs. This procedure currently exists by rule for physicians.89

In cases with many parties, there is a high likelihood that some parties will try to rely on co-parties’ experts. A party who intends to rely on another party’s expert must be aware of the risk that the other party will settle before trial and should be encouraged to make fallback arrangements and undertake necessary disclosures to the other parties.90

3. Settlement

Settlement negotiations may take place at any time during a complex case, and judges who manage complex litigation effectively take full advantage of pretrial conferences devoted to settlement.91 Some judges conduct separate conferences with the plaintiffs and the defendants. Although the Illinois Rules of Professional Conduct92 and Code of Judicial Conduct93 forbid ex parte contact on the merits of a case, exceptions exist when the conduct is in the course of official proceedings or otherwise authorized by law. Still, both the risk of prejudice and the appearance of propriety demand that the judge not undertake ex parte conferences without the consent of both parties.94 The greatest danger of prejudice exists when the case will conclude with a

89. ILL. SUP. CT. R. 212(b). A proposed amendment is pending that would implement the change suggested in the text.
91. ILLINOIS MANUAL, supra note 36, at 701-71; FEDERAL MANUAL 3D, supra note 35, § 23.11, at 166-67.
92. ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 3.5(i).
93. ILL. SUP. CT. R. 63(A)(4).
94. ILLINOIS MANUAL, supra note 36, at 75.
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Going beyond the settlement conference, some courts have found success facilitating settlement by encouraging the parties to use mediation, arbitration (especially in cases where individual claims are of modest amount), and summary jury trials. In the summary jury trial, the parties make capsule presentations of their cases either to a neutral individual or to a jury, obtaining a nonbinding decision. This procedure gives the parties a neutral, authentic prediction of trial results, and consumes little judicial time.

A firm, credible trial date also promotes settlement, for only the prospect of trial forces the parties to do the work necessary to predict trial outcomes accurately. Consolidation and severance orders might be needed to establish a firm trial date. In cases consolidated for pretrial proceedings that nonetheless require separate trials, judges can schedule early trial dates for one or more cases representative of others. This step promotes settlement by giving the parties accurate forecasts of results in their own cases.

4. Trial

In trying a complex case, the judge must take a number of steps to keep the expenditure of time and other resources from spiraling out of control. These trial management techniques cover handling of the jury, dealing with counsel, and arranging adequate facilities.

95. See Hubert Will, The Role of the Judge in the Settlement Process, 75 F.R.D. 203, 211-12 (1976). Some judges believe that ex parte conferences should never be undertaken in a nonjury case, even with the parties’ consent. Id.

96. Resnik, supra note 48, at 435. Professor Resnik suggests that a judge should handle the formal adjudication while another assumes responsibility for mediation and settlement negotiations. Id.

97. ILLINOIS MANUAL, supra note 36, at 76-77.

98. Id. at 77.


100. See NATIONAL CENTER FOR STATE COURTS, supra note 61, at 76 (surveying state courts).

101. See FEDERAL MANUAL 2D, supra note 35, § 23.12, at 162-64.
Complex cases that may involve lengthy trials require special techniques for selecting jurors. The judge should devote special attention to the jury questionnaires, in order to ferret out prejudices or conflicts of interest. In any trials that could become lengthy, alternate jurors should be impanelled. The judge should do everything possible to make the case less taxing and more comprehensible to the jury, and should make sure that the jury knows of the judge’s efforts. Note-taking by jurors enhances memory and understanding, and must be permitted under Illinois law. One Illinois judge has permitted jurors to present questions to witnesses during the trial. Jurors’ comprehension of facts and issues may be improved if they are allowed to do so.

In cases involving many parties, the court should appoint lead counsel, or enter an order that objections for one party will stand for objections for all the parties on a given side. Typically, the parties on a side will make their own agreements on which counsel will serve as lead for which part of the case, and which parts of the case should be handled individually. The court should encourage these voluntary arrangements.

Finally, from the most practical perspective, cases with many parties may require larger rooms than those in the courthouses of many Illinois communities. If the parties agree to pay a share of the cost, private facilities may work out best.

102. ILLINOIS MANUAL, supra note 36, at 84-86.
103. Id. at 84. The provision governing preemptory challenges to alternate jurors appears to restrict the number of alternates to “1 or 2.” ILL. COMP. STAT. ANN. ch. 735, § 5/2-1106(b) (West 1992). The parties, however, may stipulate to seat additional alternate jurors. Id. The court may also encourage the parties to stipulate to the decision of the case by fewer than 12 jurors if the number of alternates is inadequate. See id.
104. ILL. COMP. STAT. ANN. ch. 705 § 315/1(b) (West Supp. 1996). A court has held that jurors’ statutory right to take notes exists in criminal cases, see ILL. COMP. STAT. ANN. ch. 725, § 5/115-4(n) (West 1992), and cannot be waived by an agreement of the parties that the jurors not take notes. People v. Layhew, 548 N.E.2d 25 (Ill. App. 5th Dist. 1989), rev’d on other grounds, 564 N.E.2d 1232 (Ill. 1990).
106. ILLINOIS MANUAL, supra note 36, at 89.
V. EMERGING ISSUES IN COMPLEX LITIGATION MANAGEMENT IN ILLINOIS

Despite the consensus in favor of the management approach outlined above, a number of issues important for the judicial management of complex cases in Illinois remain unresolved. These emerging issues include coordination of Illinois cases with parallel federal and other state proceedings, deferral to proceedings in other states, issue separation at trial, and further development of class action procedures. While the issues that have already been dealt with by the Illinois courts and the committees are largely matters of logistics and sound practice, the matters that loom in the future center around legal doctrines. Some of the issues may elude a reasonable resolution unless existing legal doctrines are modified, or new rules or statutes adopted.

A. Coordination of Federal and State Proceedings

One potentially important step in conducting complex litigation is the coordination of discovery with parallel proceedings in the federal courts or the courts of other states. Coordination of discovery is a source of economy for both the Illinois and the parallel proceeding. If the deposition of an expert may be taken only once for use in several cases, the litigants have saved dollars, the expert has saved time, and all of the cases are advanced. Not surprisingly, federal-state discovery coordination is the subject of a leading proposal for efficient management of complex litigation.

Illinois law presents some challenges to coordinated discovery, but the challenges can be surmounted with a modicum of cooperation from the parties. Nothing in Illinois law prohibits the parties from stipulating to use depositions in multiple forums. The problem is that the

108. The Illinois Manual for Complex Litigation contains extensive discussion of these various issues. See Illinois Manual, supra note 36, at Chapter 7 (Trial, discussing issue separation); Chapter 9 (Special Problem—Class Action Cases); Chapter 10 (Special Problem—Mass Tort Cases); Chapter 12 (Special Problem—Cases with Parallel Proceedings in Other States); Chapter 13 (Special Problem—Cases with Parallel Federal Proceedings).


111. See supra part IV.B.2.d.

112. Schwarzer, supra note 11; see Moss, supra note 78; Paul D. Rheingold, Comments on Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute, 73 Tex. L. Rev. 1581 (1995).

parties may wish to employ different questioning strategies in Illinois discovery depositions, whose main use at trial is impeachment, than in federal or other states' depositions, which have a wider range of trial use. Parties may also stipulate to be bound in one case by discovery orders in another case, but there may be strategic reasons for one or another side to refuse to do so. Document discovery would appear to be a fertile ground for stipulated coordination, although the parties need to be aware of distinctions between the Illinois and federal work-product doctrines.

The new discovery rules promulgated by the Illinois Supreme Court and the recently revised Federal Rules of Civil Procedure have converged in ways that should make each system less foreign to those familiar with the other. Both the federal and state rules now provide for exclusion of evidence as one of the sanctions for failure to make a timely disclosure. Both now require meetings to attempt to resolve differences between parties before one may approach the court with a discovery motion.

Illinois judges are free to contact their counterparts assigned to the parallel proceedings in the federal system or in other states. The Illinois judge must simply exercise caution not to delegate any authority over the case to someone other than a duly appointed judicial officer of the State of Illinois. A common step that may facilitate judicial economy is for the Illinois judge and the judge in the parallel proceeding to designate the same individuals as lead discovery and liaison counsel in each case, so that the discovery committees coincide. If the

114. Id. at 151.
115. Compare Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250 (Ill. 1982) (interpreting Illinois attorney work-product privilege) and ILL. SUP. CT. R. 201(b)(2) (establishing Illinois privilege and work product) with Upjohn Co. v. United States, 449 U.S. 383 (1981) (interpreting federal privilege and work product) and FED. R. CIV. P. 26(b)(3) (establishing federal privilege and work product). In brief, the protection in Illinois is both narrower and stronger than that in the federal system. The doctrine protects only materials made by or for a party in preparation for trial that contain or disclose theories, mental impression, or litigation plans. ILL. SUP. CT. R. 201(b)(2). Other materials are available without a special good cause showing. Monier v. Chamberlain, 221 N.E.2d 410, 417 (Ill. 1966). Materials covered by the protection are all but immune from disclosure. Consolidation Coal Co., 432 N.E.2d at 253 (holding that the party seeking disclosure must "conclusively demonstrate the absolute impossibility of securing similar information from other sources"). The federal standard covers a broader range of materials made in preparation for litigation, but allows disclosure upon a weaker showing. FED. R. CIV. P. 23(b)(3).
117. Compare ILL. SUP. CT. R. 201(k) with FED. R. CIV. P. 37(A)(2).
118. ILLINOIS MANUAL, supra note 36, at 151 n.1; see Bernier v. Burris, 497 N.E.2d 763, 769-71 (Ill. 1986).
persons conducting discovery in both cases are the same, they will
know when duplication is taking place and be in a position to avoid it.

B. Deferral to Proceedings in Other States

There are some cases in which the Illinois courts may realize that
consolidation of the case into ongoing litigation in another state would
be the most desirable manner to conduct the entire proceeding. The
cases in the other state might be farther along, or the other state might
be one in which the joinder of more of the relevant parties is possible.
The other state might be the location of more of the parties or important
witnesses.

Courts should expand the doctrines of abatement of proceedings in
favor of prior pending actions and dismissal on the basis of forum non
conveniens, and use these doctrines to induce parties to join their suits
into ongoing litigation in other states.119 Illinois law now provides that
a court may dismiss an action on the ground that there is a prior pend-
ing action between the same parties on the same cause of action.120 It
is a worthwhile extension of this authority to include dismissed when a
case exists elsewhere against the same defendant and the plaintiff can
without injustice join the proceeding.

Similarly, forum non conveniens doctrine could be used to dismiss
actions when there is an action elsewhere in the United States that the
plaintiff could conveniently join. New York law makes the existence
of litigation that could be joined a relevant factor in a forum non
conveniens dismissal.121 Illinois might be well advised to emulate this
development.

A more formal solution to the problem of duplicative cases pending
in multiple jurisdictions, and one that might stimulate encouraging re-
ciprocal developments elsewhere, would be for Illinois to adopt the
Uniform Transfer of Litigation Act, drafted by the National Confer-
ence of Commissioners on Uniform State Laws.122 Under this pro-
posal, transfer of all or part of a case to another state’s courts would be
permitted with the consent of the transferring and receiving court
whenever transfer serves the fair administration of justice and the con-
venience of parties and witnesses.123 Solutions to duplicative litigation

119. This position is explained at greater length in Weber, supra note 6, at 267-68.
120. ILL. COMP. STAT. ANN. ch. 735, § 5/2-619(a)(3) (West 1992).
122. 14 U.L.A. § 78 (Supp. 1992). South Dakota has enacted the bill already, but
larger states have not acted on it. S.D. H.B. 1337 (enacted March 13, 1992).
would still depend on voluntary action by judges, but the mechanism for formal transfer would at least be in place.\footnote{124}

\section*{C. Issue Separation at Trial}

Most authorities on complex litigation argue that some categories of complex cases can best be managed if broken down for trial.\footnote{125} In particular, separating issues such as general causation in product defect cases or negligence in environmental cases enables the trier of fact to focus on a single dispute. The shortened trial may then lead to dismissal of the case or a prompt settlement.\footnote{126}

Most trial lawyers, however, and certainly most plaintiffs' lawyers, believe that separation of liability from damages affects the outcome of a tort case,\footnote{127} and empirical studies support their belief.\footnote{128} Separation prevents the compromise verdict, in which the jury cannot agree on liability, and splits the difference by reducing the damages award.\footnote{129} It also prevents plaintiffs' verdicts in cases in which the jury does not really believe that liability exists but gives a modest award because of sympathy or residual doubt.\footnote{130} Under conventional legal analysis, compromise and sympathy verdicts are not proper, and if issue separation eliminates them as a side-effect, that is all to the good.\footnote{131}

The contrary position, however, argues that unless evidence of damages is presented at the same time as evidence relating to issues of liability, the case is presented in a sterile, unrealistic way.\footnote{126} Thus, the outcome effects of issue separation are not only real, they are bad.

\footnote{124. See generally Edward H. Cooper, Interstate Consolidation: A Comparison of the ALI Project with the Uniform Transfer of Litigation Act, 54 LA. L. REV. 897 (1994) (discussing the Act).}
\footnote{125. E.g., American Law Institute, supra note 5, at 624-29; Federal Manual 3d, supra note 35, § 21.63, at 118-21; National Mass Tort Conference, supra note 46, at 72-73; Joseph Sanders, From Science to Evidence: The Testimony on Causation in the Bendectin Cases, 46 STAN. L. REV. 1, 75 (1993). A recent, exhaustive study of the issue proposes that separation of the general causation issue be undertaken in mass tort cases only when the imposition of liability could lead to destruction of an entire industry or comparable social harms. James A. Henderson et al., Optimal Issue Separation in Modern Products Liability Litigation, 73 TEX. L. REV. 1653 (1995).}
\footnote{126. See sources cited supra note 125.}
\footnote{127. See Jack B. Weinstein, Routine Bifurcation of Jury Negligence Trials: An Example of Questionable Use of Rule Making Power, 14 VAND. L. REV. 831 (1961).}
\footnote{128. See Henderson et al., supra note 125, at 1679 & nn.134-35 (collecting empirical studies); see also Richard L. Marcus & Edward F. Sherman, Complex Litigation 881 (2d ed. 1992) (collecting studies).}
\footnote{129. See Henderson et al., supra note 125, at 1671.}
\footnote{130. See id. at 1692.}
\footnote{131. See Sanders, supra note 125, at 75.}
\footnote{132. See, e.g., Trangsrud, supra note 5, at 81.
This position is buttressed by the claim that bifurcation was unknown at common law and that the constitutional right to a jury trial guarantees a jury trial as it was practiced at common law. There are reasons to question the argument that proceeds from the grounds that bifurcation was an unknown procedure in jury trials at common law and that jury trial rights cannot be altered from those at common law. Any procedural reform may have an impact on jury trial rights. The right to a jury trial has survived as long as it has because of its plasticity. Thus in the federal system, the right to a jury trial expanded with the merger of law and equity and contracted with the evolution of the collateral estoppel doctrine.

Any doctrine that would allow no adaptation of jury trial rights for modern procedural innovations invites calcification and impracticality. Effective bifurcation of civil cases takes place routinely in modern cases when liability or damages is stipulated or determined by motion or when a case is remanded for trial on limited issues. Special interrogatories to the jury also have the effect of requiring individual decisions on subissues pertaining to distinct aspects of liability or damages. It is doubtful that a contemporary court would reject these innovations on the ground that they were not a part of jury trials at common law. Mason v. Dunn, an Illinois Appellate Court case disapproving the bifurcation of the case into liability and damages phases over the defendant's objection, rests its disapproval upon the ground that neither the Illinois Supreme Court by rule nor the legislature by statute has expressly permitted bifurcation, eschewing the constitutional argument and all but inviting high court or legislative intervention.

134. See Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-11 (1959) (holding that under merger of law and equity, law issues tried to a jury should be tried first).
135. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 337 (1979) (rejecting claim of jury trial in application of offensive, nonmutual collateral estoppel, which was unknown at common law, from a nonjury proceeding).
136. See ILL. COMP. STAT. ANN. ch. 735, § 5/2-1005(d) (West 1992) (permitting summary determination of major issues by a court before trial if no genuine issue of material fact exists as to the issues).
137. See id. § 5/2-1108 (permitting the use of special interrogatories on individual issues in a case).
139. Id. at 192-93. The court reasoned further that in other jurisdictions where bifurcated trials are permitted, statutes or court rules allow the practice. Id.
Nevertheless, a rejection of the practice of issue separation may still be a better course for the Illinois courts. Separating out issues such as general causation inevitably transforms proceedings over the injuries of persons into abstract controversies. In such a sterile trial setting, a jury may have difficulty appreciating the gravity of its decision for real individuals. Moreover, courts ought to be cautious about applying a novel procedural device when the overwhelming evidence indicates that it will work significant changes in case outcomes.

Practice as to separation of issues should be determined by weighing considerations of fairness and efficiency, not by pointing to historical antecedents. Ultimately, action by the Illinois Supreme Court or the General Assembly will be needed. Because of the outcome effects of issue separation, a principled decision that applies to all cases is superior to the discretionary, and therefore unpredictable, approach favored by federal courts on the matter.

D. Class Action Problems

“Complex litigation” is not coterminous with “class action litigation.” Nevertheless, class action cases frequently become protracted, and may raise issues of factual, procedural, or substantive complexity. Class action procedure is a formal mechanism to deal with large numbers of individuals who have similar claims to present to the court. Class action status may be the least expensive, quickest, and fairest way to respond to some forms of complex litigation.

Illinois courts, however, will have to resolve difficult problems when handling proposed class actions. Notice is a vexing issue in class action cases. The leading United States Supreme Court case on the issue, Phillips Petroleum Co. v. Shutts, does not require notice to in-state plaintiff class members, nor does it purport to apply
its discussion of notice to cases for non-monetary relief. Although the Illinois statute on class actions gives the trial court discretion whether to give individual notice of certification to the class members, nearly all Illinois courts considering the question have ruled that due process requires notice.

Relief in class cases presents issues that are still emerging in Illinois. A problem that has appeared in other states is that the absence of records or other factors prevent the identification of individuals to whom relief ought to be given. Some states have devised a "fluid recovery" or "cy pres" relief solution. In these schemes, money or other relief is provided to a group of individuals that is identifiable and that is the nearest group to that which would be entitled to the recovery. Basic principles of remedies acknowledge that relief is not always precise and that persons may benefit from group remedies even

146. Id. at 811-12 (limiting holding to class actions for monetary relief).
147. ILL. COMP. STAT. ANN. ch. 735, §§ 5/2-801 to 2-806 (West 1992).

This author has argued elsewhere that if preclusion is imposed on plaintiff class members as to non-monetary claims, due process requires individual notice, but that the court should not ordinarily enter a judgment that requires preclusion of claims unless the defendant is willing to pay for notice. Mark C. Weber, Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions, 21 U. MICH. J.L. REF. 347 (1988).

149. ILLINOIS MANUAL, supra note 36, at 121.

150. Id.; see generally NEWBERG, supra note 3, §§ 13.45-13.47 (discussing various solutions for relief).

though they were not victims of the defendant's unlawful actions.\textsuperscript{152} The fluid recovery approach is a modest extension of those principles to class action relief.\textsuperscript{153}

Increasingly, plaintiffs in Illinois and elsewhere seek to institute class action suits in mass tort situations.\textsuperscript{154} Class action proceedings would bring judicial relief to individuals with tort claims similar to those of others but who have failed to file cases on their own.\textsuperscript{155} They also permit preclusion of those individuals and all others whose cases are embraced by the final judgment in the case.\textsuperscript{156} The class proceeding thus magnifies the ultimate recovery,\textsuperscript{157} but assures the defendant global peace with respect to all those under the court's jurisdiction.\textsuperscript{158}

\textsuperscript{152} See, e.g., Sheet Metal Workers, Local 28 v. EEOC, 478 U.S. 421, 471-75 (1986).
\textsuperscript{155} The unfiled claims might be those of lesser value. See David Rosenberg, Class Actions for Mass Torts: Doing Justice by Collective Means, 62 IND. L.J. 561, 572 (1987) (discussing effects of class proceedings on mass tort litigation). A class action proceeding is an effective means of making those claims economical to litigate. See id.
\textsuperscript{156} See Hansberry v. Lee, 311 U.S. 32, 44-46 (1940) (finding preclusive effect of Illinois class action judgment to violate due process when class member's interest was adverse to that of representative).
\textsuperscript{157} See Rosenberg, supra note 155, at 573 (discussing enhanced incentives to increased care on the part of potential defendants). In In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995), the court granted mandamus to decertify a federal class action involving infection from contaminated blood products, noting among other things that the magnification of damages caused by the class nature of the proceeding placed intense pressure on the defendant to settle, rather than risk bankruptcy from a verdict that covered the entire class. Id. at 1297 (discussing appropriateness of federal mandamus). It should be noted, however, that defendants have frequently prevailed in large-scale consolidated proceedings. Eg., In re Bendectin Litig., 857 F.2d 290 (6th Cir. 1988), cert. denied, 488 U.S. 1006 (1989); In re Salmonella Litig., 556 N.E.2d 593 (Ill. App. 1st Dist. 1990), a fact that may induce the defendants to resist inappropriate settlement demands. Moreover, selection of issues for class treatment might be made so as to avoid conclusive class treatment of those in which disparate results would be likely were the cases handled separately. See infra text accompanying notes 159-65 (discussing class actions on individual issues under Illinois law).
\textsuperscript{158} This feature is a commonly cited benefit of settlement classes, those certified as part of a comprehensive settlement for all victims of a defective product or mass disaster. E.g., In re A.H. Robins Co., 880 F.2d 709, 752 (4th Cir.) (approving the use of set-
Common issues that might support class action status for these cases would be the existence of a defect in a widely marketed product, the negligence of the defendant whose premises were the site of a mass disaster, or the possibility that a medicine or other product could have caused harm.

Opponents of class certification in mass torts typically contend that the common issues in mass tort cases do not predominate over individual issues. They also argue that unlike consumer cases, individual claims in a mass tort are significant enough to merit the services of an attorney without the use of a class action. Although class actions might be the most efficient manner in which to do justice for large numbers of injured persons and achieve a final, global resolution of a mass tort, a formidable benefit exists to having one's own lawyer rather than the lawyer for the entire class. Members of a class have much less formal control over litigation decisions than do plaintiffs in individual cases.

A possible compromise in cases of this type is to have the case proceed as a class with regard to only a few common issues. Illinois law...
permits this procedure.\textsuperscript{165} Effectively, the class action would be used as a substitute for partial consolidation under Illinois Supreme Court Rule 384. The partial class action might also be used as a management device for pretrial proceedings in consolidated cases in which the problems among attorneys for individual plaintiffs are insoluble. In a class action, the class representative is entrusted with all the litigation decisions. Certifying a class as to only a few issues would achieve some gains of judicial economy while still preserving the autonomy of plaintiffs on other aspects of their cases. The individual cases might still be handled in a consolidated fashion for pretrial or trial proceedings on other issues, as appropriate.

VI. CONCLUSION

A judge assigned to a complex case in Illinois has the means to manage the case effectively. By using these means, the judge can achieve the goal of justice for the parties while conserving the resources of the litigants and the judicial system. Illinois law permits recognized management techniques to be employed in the judge’s effort. Nevertheless, the state reviewing courts and the Illinois General Assembly will ultimately have to play a role in resolving doctrinal problems that might otherwise present an obstacle to full achievement of justice and efficiency in complex cases.