

KENTUCKY CLASS ACTIONS AND THE IMPACT OF THE CLASS ACTION FAIRNESS ACT?

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The first signs of trouble appeared at midnight on Tuesday, October 11, 2000. Black sludge from a coal slurry impoundment¹ rushed out of two separate mine portals because the impoundment failed. Despite dozers pushing soil and rock in where the breakthrough occurred, the coal waste continued to surge north and south from the 72 acre slurry pond into Coldwater Fork and Wolf Creek. The residents downstream from the lava-like flow remained unaware of the approaching danger for hours after its discovery by employees of Martin County Coal.² For the next three days, roughly 306 million gallons of the impoundment's 2.2 billion gallons of coal mire travels down the hollows, killing all aquatic life for 20 miles along its path. The spill's taint infiltrated the Ohio River, turning its water black. It contaminated the drinking water of 10 Kentucky counties prompting the governor to declare them disaster areas.³ Many residents remained fearful for years that arsenic and mercury from the coal waste continued to pollute their drinking water.⁴

The fallout from the disaster included eight lawsuits from residents affected by the slurry spill.⁵ One class of 23 residents of Coldwater Fork with property damages

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¹ A coal slurry impoundment is an artificially created pond where water used in the mining or processing of coal, which becomes mixed with coal dust and other minerals, is deposited. Over time, the water and minerals separate. *See generally* 30 C.F.R. § 701.5.

² *See* Stephanie McSpirit, Ph.D. et al., *The Martin County Project: Researching Issues and Building Civic Capacity after an Environmental Disaster*, Ctr. for Appalachian Studies, E. Ky. Univ., p. 1 (2002), at http://www.anthropology.eku.edu/MCSPIRIT/PDF/Final_Report.pdf (last visited Feb. 19, 2005).

³ Ian Frazier, *Coal Country*, *OnEarth*, Spring 2003, <http://www.nrdc.org/onearth/03spr/coal1.asp> at 1 (last visited Feb. 19, 2005).

⁴ *Disaster Critic to be Fired*, 89 *Current Sci.* 11, Jan. 16, 2004, 2004 WL 64520186.

⁵ Alan Maimon, *Coal Slurry Spill Lawsuit is Settled*, *THE COURIER-JOURNAL*, Dec. 25, 2002, at 1B, available at <http://www.courier-journal.com/apps/pbcs.dll/search?category=search>.

settled for an undisclosed amount just over a year after the tragedy occurred.⁶ Another of the eight suits purports to represent a class of over 300 Kentucky plaintiff members suing Martin County Coal and its parent company, Massey Energy.⁷ The potential plaintiffs also include residents in West Virginia since the spill fouled over 100 miles of streams plus the Big Sandy River which flows between both States.⁸ Martin County Coal is registered as a Kentucky corporation⁹ while Massey Energy is registered both in California and Virginia with its headquarters in Richmond, Virginia.¹⁰ Since most plaintiffs, one defendant company, and the event causing the damages were within Kentucky, it appears that Kentucky courts would ideally hear the claims. However, much like the secrecy of the settlement terms in one of the Martin County Coal cases, discerning what makes an appropriate state class action in Kentucky remains shrouded in secrecy.

The proper role of class action lawsuits was the subject of much political rhetoric in 2004 and 2005. Purported class action abuses in state courts fueled the recent passage of the federal Class Action Fairness Act of 2005 (hereinafter “CAFA”).¹¹ This legislation purports to guarantee fair and prompt recoveries on legitimate claims, restore federal diversity jurisdiction for nationally important interstate cases as the framers of the Constitution intended, and benefit society as a whole through lower prices and

⁶ *Id.*

⁷ *New Business*, THE NAT’L L. J., Feb. 5, 2001, LEXIS, Legal News – Other, The National Law Journal.

⁸ *Disaster Critic to be Fired*, *supra* note 4.

⁹ Martin County Coal Corp., Corp. Records & Bus. Registrations, WL 16525674511 (last updated Feb. 18, 2005).

¹⁰ Massey Energy Co., Corp. Records & Bus. Registrations, WL 55712073029 and WL 17439161519 (last updated Feb. 18, 2005) (Massey Energy Co. is also known as the Fluor Corporation).

¹¹ *Cf.*, President George W. Bush, Address at the Signing of the Class Action Fairness Act of 2005 (Feb. 18, 2005) at <http://www.whitehouse.gov/news/releases/2005/02/20050218-11.html> (last visited Feb. 19, 2005); S. 5, 109th Cong. § 2 (2005) (enacted).

encouraging innovation.¹² Since Senator Mitch McConnell, a multi-term Senator from Kentucky, was a major proponent of CAFA¹³, one might infer the handling of class actions in Kentucky to be problematic. This supposition could only rest upon anecdotal evidence or mere bias because Kentucky courts do not track even raw numbers of certifications or settlements for class actions.¹⁴ No comprehensive treatment of class action lawsuits in Kentucky exists by which to test whether local courts engage in the abuses cited for CAFA.¹⁵

This article explores the role of class actions in Kentucky courts by surveying how the Kentucky Court of Appeals and the Kentucky Supreme Court have handled class actions historically. Also, a sample of published and non-published appeals from the past decade will be reviewed to identify any trends, giving particular attention to any signs of abuses. Next, any trends identified will be compared to the abuses and purposes behind the passage of CAFA to weigh the value of that legislation to the Kentucky community. Finally, the changes CAFA will impart to Kentucky and the remaining role of class action lawsuits in Kentucky courts will be outlined. An important role remains for class actions within the Kentucky courts, especially when the plaintiffs and defendants are

¹² 28 U.S.C. § 1711(b)(1)-(3) (2005).

¹³ President George W. Bush, *supra* note 11.

¹⁴ Two e-mails from John Dobson, Manager, Research and Statistics, Administrative Office of the Courts, to Gregory Napier, Student, University of Kentucky School of Law (Feb. 15, 2005, 4:00 PM EST and Apr. 23, 2005 8:58 PM EST) (copy on file with author).

¹⁵ Multiple searches for secondary sources were conducted on Westlaw, LEXIS, and HeinOnline for journal articles or treatises that would provide more than cursory treatment of complex litigation in Kentucky. Searches utilized numerous simple and complex combinations of such terms as: “complex”, “mass!”, “litigat!”, “action”, “Kentucky”, “tort”, “class”, “toxic”, “environment!”, “coal”, etc. One book was located by similarly searching the University of Kentucky’s InfoKat electronic library catalog. That book, A PRACTICAL GUIDE TO ENVIRONMENTAL REGULATION IN KENTUCKY (Kathy G. Becket et al. eds. 1994) does not shed much light on the role of class actions. *See also* James M. Underwood, *Rationality, Multiplicity & Legitimacy: Federalization of the Interstate Class Action*, 46 S. TEX. L. REV. 391, 404 (2004).

mostly Kentucky residents and when the harm caused is relatively localized, such as in mass torts similar to the Martin County slurry disaster.¹⁶

I. HISTORICAL OVERVIEW OF KENTUCKY CLASS ACTIONS

Suits of the class action genre extend into the 1800s in Kentucky.¹⁷ At least as early as 1859, class suits regarding economic and property interests were recognized.¹⁸ At that time, the Kentucky Court of Appeals¹⁹ utilized Civil Code § 37²⁰ to allow one or more stockholders to represent all stockholders in a suit because of the commonality of their interests and the impracticability of all appearing before the court.²¹ The representative suit also applied, in the 1866 case of *Hendrix v. Money*²², to an action on a will and testament and the disposition of real property and slaves. The court described the value of the representative suit where “the persons interested in the object of the suit were so multitudinous as to have vexatiously [sic] prolonged and probably have altogether prevented a full hearing”²³ About 50 descendants, omitted from the will of Peter Hendrix, brought this representative suit to set aside a deed and bill of sale as voidable because of the octogenarian’s “incapacitating imbecility and sinister influence” of his sons and sons-in-law in drafting a will.²⁴

¹⁶ Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157, 163 (1998).

¹⁷ See generally *Louisville & O. Turnpike Road Co. v. Ballard*, 59 Ky. 165 (2 Met.) (Ky. 1859); *Hendrix v. Money*, 64 Ky. 306 (1 Bush) (Ky. 1866).

¹⁸ *Id.*

¹⁹ The Court of Appeals was Kentucky’s highest court until 1976. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 204 (Columbia Law Review Ass’n et al. eds. 17th ed. 2000).

²⁰ CODE OF PRAC. IN CIV. AND CRIM. CASES FOR THE STATE OF KY. § 37 (M. C. Johnson et al. eds., 1854) (The statute read, “Where parties are numerons [sic] one or more may sue or defend for all.” It was revised in 1876 to read, “If the question involve a common or general interest of many persons, or if the parties be numerous and it is impracticable to bring all of them before the court within a reasonable time, one or more may sue or defend for the benefit of all.” CIV. AND CRIM. CODES OF PRAC. OF KY. § 25 (Bullitt’s Codes, 1876)).

²¹ 59 Ky. 165 (2 Met.).

²² 64 Ky. 306 (1 Bush) (Ky. 1866).

²³ *Id.* at 306.

²⁴ *Id.*

A handful of other cases decided around the turn of the century solidified representative suits regarding trusts, sureties, and taxes.²⁵ In *Commonwealth v. Scott*²⁶, the court creatively determined that wrongfully collected taxes were, in essence, a trust fund and that the sheriff holding the taxes was a trustee so that they could find a common interest reflecting ownership. The circuit court originally found lack of jurisdiction on the action because Mr. Scott's part of the excess *ad valorem* property tax collection was less than \$50.00. In finding that the representative suit could proceed, the Court of Appeals cited the "ancient rule of equity that [the class suit's] jurisdiction exists in order to prevent a multiplicity of suits concerning the same subject-matter."²⁷ Clearly the class action, referred to as "representative suits" or "class suits" in early years, enjoyed respect as a useful tool throughout early Kentucky jurisprudence.

The ownership aspect of "common interest" played a determinative role in the early class action cases. In *Alexander v. Gish*²⁸, two individuals represented an unspecified number of bondholders for interest due to them on bonds issued by Muhlenberg County. That suit followed an action by about 700 persons seeking an injunction on levying taxes to pay off the bond debt.²⁹ The court approved the class suit via § 25 of the Kentucky Civil Code of Practice³⁰ (a rule very similar to its predecessor, § 37)³¹ which provided: "If the question involve a common or general interest of many persons, or if the parties be numerous and it is impracticable to bring all of them before

²⁵ See e.g., *Commonwealth v. Scott*, 23 K.L.Rptr. 1488, 65 S.W. 596 (Ky. 1901).

²⁶ *Id.* at 598.

²⁷ *Id.* at 596.

²⁸ *Alexander v. Gish*, 10 Ky.L.Rptr. 989, 88 Ky. 13, 9 S.W. 801 (Ky. 1888).

²⁹ *Id.* at 801-802.

³⁰ *Id.* at 802.

³¹ CODE OF PRAC., *supra* note 20.

the court within a reasonable time, one or more may sue or defend for the benefit of all.”³² The decisions from these class suits bound the entire class.³³

The application of class suits pursuant to § 25 of the Kentucky Civil Code of Practice appears limited in application to financial issues connected to an ownership interest. In *Lile v. Kefauver*³⁴, the Court of Appeals refused to extend class suits to individual creditors seeking recovery of their debt. The court referred to the absence of a common security or fund in which the putative class shared an interest.³⁵ This was despite the fact that there were over 1,500 individual depositors and creditors who could file individual, similar claims against the defendant, an insolvent bank.³⁶ The literal text of § 25 certainly covered these suits since it used the disjunctive “or” in its text allowing for: 1) suits involving a common interest, *or* 2) suits that involve parties too numerous to use joinder. However, the Court of Appeals refused to extend the reach of class suits and seemed to read “and” in place of the “or” in the code. They premised this notion on an erroneous need that § 83³⁷, governing joinder, and § 25 “must be considered together.”³⁸ Another example of this underdeveloped conceptualization of class actions as a tool distinct from joinder included a suit where a county clerk allegedly overcharged hundreds of persons \$3.20 each.³⁹ The exact same question of law and of fact existed in each claim, the amount of damages to each person was identical (aggregating to \$20,000), and

³² *Black v. Elkhorn Coal Corp.*, 233 Ky. 588, 26 S.W.2d 481, 483 (Ky. 1930) (quoting the Kentucky Civil Code of Practice § 25).

³³ *Id.* at 484 (citing *Stone v. Winn*, 165 Ky. 9, 176 S.W. 933 (Ky. 1915)).

³⁴ *Lile v. Kefauver*, 244 Ky. 486, 51 S.W.2d 473 (Ky. 1932).

³⁵ *Id.* at 475.

³⁶ *Id.* at 473.

³⁷ CARROLL’S CIV. AND CRIM. CODES OF PRAC. OF KY. § 83 (Baldwin Law Book Co., 1919) (which reads, “Several causes of action may be united, if each affect all the parties to the action, may be brought in the same county, and may be prosecuted by the same kind of action . . .”).

³⁸ 51 S.W.2d at 474.

³⁹ *Garfein v. Stiglitz*, 260 Ky. 430, 86 S.W.2d 155, 156 (Ky. 1935).

hundreds of persons pursuing an action for such a small amount (small even for 1935) clearly was impracticable but, the court insisted on the narrow form of requiring a security-type interest because, in their view, “the claims were separate, distinct, and individual.”⁴⁰ The Court of Appeals apparently forgot its own decision from the 1901 *Scott* case, where a constructive trust was found,⁴¹ or had entered into a more conservative trend during the 1920s and depression era early 30s.

The formalistic distinction prohibiting class suits on taxation due to an absence of ownership interest relaxed just two years later. The court allowed a class to challenge an occupational license fee ordinance and sought the return of the \$7,700 already collected.⁴² It was not until 1947 that a class suit on a matter unrelated directly to bonds or taxes found its way into reported Kentucky case law.⁴³ In *Bobbitt v. Hoffman*⁴⁴, the Cincinnati Division and the Eastern Kentucky Division of the L & N trainmen squared off in a turf battle. The two divisions fought over whom should work the trains as they traveled between the towns of Patio and Ravenna, Kentucky.⁴⁵ However, even in that action, an analogy could be drawn between a property interest and an interest in a grant of territory where one practiced their trade.⁴⁶

An attempt to assert non-economic rights through a class suit arose in *Board of Registration Comm’rs v. Campbell*⁴⁷ in 1933. The petitioner sought to represent other legal voters and Democratic candidates in challenging the constitutionality of voter registration practices in Louisville, Kentucky. The court was not yet prepared to broaden

⁴⁰ *Id.*

⁴¹ *Commonwealth v. Scott*, 23 K.L.Rptr. 1488, 65 S.W. 596 (Ky. 1901).

⁴² *Comm’rs of Sinking Fund of City of Louisville v. Weis*, 269 Ky. 554, 108 S.W.2d 515, 516 (Ky. 1937).

⁴³ *Bobbitt v. Hoffman*, 304 Ky. 196, 200 S.W.2d 303 (Ky. 1947).

⁴⁴ *Id.*

⁴⁵ *Id.* at 304.

⁴⁶ *Cf. Id.*

⁴⁷ *Board of Registration Comm’rs v. Campbell*, 251 Ky. 597, 65 S.W.2d 713 (Ky. 1933).

the role of § 25 to the civil rights arena even though the requirements of numerosity and impracticability were facially satisfied.⁴⁸

In 1953, during § 25's final days before replacement by the modern civil rule, the court recognized that a class suit could challenge predominantly political issues such as what form of government a municipality used.⁴⁹ The *Payne v. Davis*⁵⁰ action addressed whether two city commissioners of Hopkinsville should remain on as the city's legislative body until the original end of their terms even though the commission form of government had already been supplanted by the council form of government. The plaintiffs sought declaratory judgment and the court approved utilizing the class suit to that end.⁵¹ The court found support for this use of a class suit by citing five cases where multiple parties challenged some aspect of governmental operation. Each of the five brought declaratory actions but, none was clearly identified as a class suit⁵² though an analogy could be drawn to a modern equitable relief class action⁵³ The Court of Appeals strayed no further from tradition than this under § 25.

A. The New Class Action Rule

⁴⁸ *Id.* at 715.

⁴⁹ *Payne v. Davis*, 254 S.W.2d 710 (Ky. 1953).

⁵⁰ *Id.* at 711-712.

⁵¹ *Id.* at 712.

⁵² *Id.* citing *Hardin v. City of St. Matthews*, 240 S.W.2d 554 (Ky. 1951) (where *Hardin* and others brought a remonstrance action regarding annexation ordinance); *Veith v. Tinnell*, 306 Ky. 484, 207 S.W.2d 325 (Ky. 1947) (taxpayer suing for declaratory judgment on jurisdiction of fiscal court); *Friley v. Becker*, 300 Ky. 749, 190 S.W.2d 355 (Ky. 1945) (stating Declaratory Judgment Act did not give residents standing to challenge nomination in political primary); *Ex parte Bd. Of Educ. Of Montgomery County*, 260 Ky. 246, 84 S.W.2d 59 (Ky. 1935) (action brought by a board, its members, superintendent, and four citizens seeking declaration of rights); *Dietz v. Zimmer*, 231 Ky. 546, 21 S.W.2d 999 (Ky. 1929) (two plaintiffs sought declaration of law regarding four defendant candidates for office).

⁵³ FED. R. CIV. P. 23(b)(2) (which reads, "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . .").

A new class action rule, Kentucky Rules of Civil Procedure Rule (CR) 23.01-23.02, came into effect on July 1, 1953.⁵⁴ Kentucky revised the class action rules again in 1969 to conform its language to the Federal Rule of Civil Procedure (FRCP) 23 as amended in 1966 to provide more practical guidance on handling such suits.⁵⁵ The minor amendment in 1978 only changed numbering to lettering so that it currently reads:

Subject to the provisions of Rule 23.02, one or more members of a class may sue or be sued as representative parties on behalf of all only if (a) the class is so numerous that joinder of all members is impracticable, (b) there are questions of law or fact common to the class, (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (d) the representative parties will fairly and adequately protect the interests of the class.⁵⁶

CR 23.01 read together with CR 23.02⁵⁷ captures the entire procedure as it existed in FRCP 23(a) and (b)⁵⁸ at that time. In adopting the Federal rule for class actions, Kentucky incorporated the same principle requirements of numerosity, commonality, typicality and adequacy of representation. This adoption included the extra-textual requirements of having a definable class and that the representative must be a class member.⁵⁹ Also, the trial court must make specific findings that a class meets each requirement for certification to occur.⁶⁰

CR 23.01 “substantially broaden[ed] the scope of class actions formerly allowed under [the] Civil Code.”⁶¹ The Court of Appeals employed this broadened scope to tackle one of its earliest class action civil rights cases in *Rawlings v. Butler*.⁶² Wasting no

⁵⁴ 6 KY. PRAC. R. CIV. PROC. ANN. R. 23.01 (5th ed. 1995).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 6 KY. PRAC. R. CIV. PROC. ANN. R. 23.02 (5th ed. 1995) (see Appendix A for text).

⁵⁸ FED. R. CIV. P. 23(a), (b).

⁵⁹ See generally 6 KY. PRAC. R. CIV. PROC. ANN. R. 23.01 *supra* note 54.

⁶⁰ *Dorsey v. Bale*, 521 S.W.2d 76, 78 (Ky. 1975).

⁶¹ *Bridges v. F. H. McGraw & Co.*, 302 S.W.2d 109, 114 (Ky. 1957).

⁶² *Rawlings v. Butler*, 290 S.W.2d 801 (Ky. 1956).

further time narrowly defining a common interest as requiring shared ownership, the plaintiff and representative of the class of taxpayers from multiple counties were allowed to sue the Superintendent of Public Instruction in Kentucky and the Boards of Education for Casey, Marion, Washington, Nelson, Meade and Grayson Counties. The certified class action alleged violation of the Establishment Clause of the U.S. Constitution's First Amendment and similar protections in the Kentucky Constitution. The class sought an injunction to prohibit the school board's from paying teacher's salaries to Catholic nuns if they wore their habits in the classroom.⁶³ Also, alcohol beverage corporations found the expanded class action a useful tool in challenging administrative regulations that prohibited lighted advertisements, even if they were hung inside a liquor store. The certified class consisted of domestic beer brewers and on retail liquor store and they convinced the court to invalidate the regulation because it had no rational connection to enforcing liquor laws.⁶⁴

Even with the expanding scope of class actions under CR 23.01, the vast majority of class actions remained focused on economic issues, especially taxation. A survey of cases brought as class actions from 1953 until 1995 revealed the following data:⁶⁵

⁶³ *Id.* at 803-804.

⁶⁴ *Portwood v. Falls City Brewing Co.* 318 S.W.2d 535, 535-537 (Ky. 1958).

⁶⁵ The numbers of cases was arrived at by searching Westlaw's database of Kentucky cases using "'class suit' 'class action'". Not all of the cases utilized maintained certified classes and not all cases from the search result were included. Those excluded were so treated because it appeared that the action did not actually involve a class action, the case was not reported, it was a Court of Appeals case heard also in the Supreme Court, or the case merely addressed the certification of the class and did not illuminate on the underlying cause of action. The cases surveyed appear in Appendix B.

Type of Underlying Claim	# Cases
Challenge to taxation	30
Real property rights	15
Public official – mismanagement	15
Claims to financial assets – pensions, insurance, etc.	8
Corporate governance and fiduciary duties	6
Civil rights	4
Creditor actions	2
Challenges to status of elected official	2
Misuse of roadways	1
Mass tort – negligence	1

While not involving a comprehensive analysis of these cases, this general overview indicates that Kentucky courts remained true to their tradition of narrowly defining the types of cases considered for class actions.

Such a conclusion relies on certain underlying assumptions, the testing of which is beyond the scope of this article. Since the readily available cases are appellate level decisions, the belief that the number of each type of case reaching appellate courts reflects the numbers of those same types of cases heard in lower courts is assumed. This suggests the less tenable proposition that, on average, each type of case lends itself equally well to settlement. Environmental tort cases and product liability cases are probably more prone to settlement due to the additional extra-judicial costs to companies of bad press and juries sympathetic to plaintiffs. This may explain the absence of environmental tort cases among state class actions.

An alternative explanation for the absence of mass tort claims entails plaintiffs' preference for filing in federal courts because of unfavorable treatment in the state courts. This reduces the opportunity for state appellate treatment and development of

jurisprudence around mass tort class actions. Plaintiffs filed at least two of the Martin County slurry spill actions in federal court.⁶⁶ The class action resulting from a devastating fire at the Beverly Hills Supper Club in Southgate, Kentucky in 1977 is an additional example of this preference for the Federal forum.⁶⁷ So, the federal forum preference theory better explains the absence of mass tort class actions in Kentucky courts than the settlement possibility.

Despite the aforementioned weaknesses of this survey, and short of visiting each county courthouse, the information needed for a more thorough analysis simply does not exist.⁶⁸ With the technology available today, capturing and analyzing such data should precede sweeping legislative changes such as CAFA. Based on the historical evidence uncovered thus far, Congress had little reason to fear abuse of class actions in Kentucky.⁶⁹

B. Contemporary Class Actions

A closer look at the class actions pursued between 1996 and 2005 will demonstrate whether the conservative approach of the Kentucky courts continues under the contemporary State Court of Appeals and Supreme Court. Since Kentucky's judicial branch began posting Court of Appeals decisions on the internet in 1996 and Supreme Court decisions in 1999, whether published or not, 39 decisions⁷⁰ reflecting 31 class

⁶⁶ Kirk v. Martin County Coal Corp., 7:00-cv-00438-JMH (E.D. Ky. 2001) (federal question jurisdiction); Moore v. Martin County Coal Corp., 7:00-cv-00446-DCR (E.D. Ky. 2001) (federal question jurisdiction).

⁶⁷ Coburn v. 4-R Corp., 77 F.R.D. 43 (D.C. Ky. 1977).

⁶⁸ See E-mail from John Dobson, *supra* note 14.

⁶⁹ See President George Bush, *supra* note 11.

⁷⁰ Six of the 39 decisions were from the Court of Appeals and the Supreme Court also heard the case. Two of the 39 included an appeal to the Court of Appeals, then to the Supreme Court which remanded back to the Court of Appeals. For the remainder of the article, only the most recent decision is used unless stated otherwise.

action suits appear.⁷¹ Of the 31 distinct actions, 15 were certified by the lower court⁷² and 16 were denied certification⁷³. In examining these 31 cases, the underlying action that initiated the suit was analyzed rather than the issue on appeal. This approach better achieved the goal of determining what types of claims Kentucky courts deem appropriate for class action.

Once again, cases involving financial issues exhibit the largest number of class actions filed. Eight of the 31 cases related to taxation⁷⁴ and two cases addressed rights to

⁷¹ All cases were located at http://www.kycourts.net/Supreme/SC_Opinions.shtm (last visited March 19, 2005) using the “Opinions of both Courts” option and searching “class action”. Published opinions were then located via Westlaw and cited accordingly. For convenience, this article will forego including the internet address for non-published opinions. See Appendix C for the complete list.

⁷² *City of Somerset v. Bell*, 2005 WL 119894 (Ky.App. 2005); *Roman Catholic Bishop of Louisville v. Burden*, 2004 WL 2827093 (Ky.App. 2004); *D.F. v. Codell*, 127 S.W.3d 571 (Ky. 2003); *Rockwell Int'l Corp. v. Wilhite*, 143 S.W.3d 604 (Ky.App. 2003); *Commonwealth v. Whitworth*, 74 S.W.3d 695 (Ky. 2002); *Fleming v. City of Shepherdsville*, 2001-CA-000550-MR (Ky.App. 2002); *Woods v. Ky. W.Va. Gas Co.*, 1999-CA-000013-MR (Ky.App. 2001); *Wiley v. Adkins*, 48 S.W.3d 20 (Ky. 2001); *Huff v. Bane Coal Corp.*, 1999-CA-000793-MR (Ky.App. 2000); *Preston v. Johnson County Fiscal Court*, 27 S.W.3d 790 (Ky. 2000); *Garrard County Bd. of Educ. v. Jackson*, 12 S.W.3d 686 (Ky. 2000); *Hasken v. City of Louisville*, 1996-CA-001773-MR; 1996-CA-002091-MR (Ky.App. 1999); *Long v. Ky. Corrections Cabinet*, 1997-CA-002148-MR (Ky.App. 1999); *Allen v. United Parcel Service Co.*, 95-CA-2168-MR (Ky.App. 1997); *Commonwealth v. St. Ledger*, 955 S.W.2d 539 (Ky.App. 1997).

⁷³ *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815 (Ky. 2005); *Coffman v. Ky. Dept. of Education*, 2001-CA-002110-MR (Ky.App. 2004); *City of Bromley v. Smith*, 149 S.W.3d 403 (Ky. 2004); *Johnson v. General Assembly*, 2002-CA-000091-MR (Ky.App. 2003); *Kelley v. Toyota Motor Manufacturing, Ky., Inc.*, 2000-CA-002781-MR (Ky.App. 2002); *Wood v. Wyeth-Ayerst Laboratories*, 82 S.W.3d 849 (Ky. 2002); *Schilling v. Farmers Bank & Capital Trust Co.*, 2001-CA-000229-MR (Ky.App. 2002); *Light v. City of Louisville*, 2001-CA-001310-MR (Ky.App. 2002); *Bowen v. Hewlett-Packard Co.*, 2001-CA-001815-MR (Ky.App. 2002); *Arnold v. Microsoft Corp.*, 2000-CA-002144-MR (Ky.App. 2001); *Harms v. Helmer*, 2000-CA-002706-MR (Ky.App. 2001); *Crouch v. Champion Enterprises, Inc.*, 1999-CA-001540-MR (Ky.App. 2000); *Garrett v. USG Annuity and Life Co.*, 1999-CA-002145-MR (Ky.App. 2000); *Barnett v. Verdi*, 1997-CA-002373-MR (Ky.App. 1999); *Anderson v. Parker*, 964 S.W.2d 809 (Ky.App. 1997); *Calbough v. Commonwealth of Ky.*, 95-CA-2683-MR (Ky.App. 1996).

⁷⁴ *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815 (Ky. 2005) (Whether owner or owner of record on a certain date owed taxes on car.); *City of Somerset v. Bell*, 2005 WL 119894 (Ky.App. 2005) (Challenge to collection of ad valorem taxes by Somerset of persons in an area annexed by city.); *Coffman v. Ky. Dept. of Education*, 2001-CA-002110-MR (Ky.App. 2004) (Liability for occupational license fee. One issue was challenge of court to certify as class when class would have been over 100 and thus gave defendant undue advantage.); *City of Bromley v. Smith*, 149 S.W.3d 403 (Ky. 2004) (Challenge of life-squad tax and whether entitled to class certification.); *Light v. City of Louisville*, 2001-CA-001310-MR (Ky.App. 2002) (Challenge of cities ad valorem real property taxes.); *Fleming v. City of Shepherdsville*, 2001-CA-000550-MR (Ky.App. 2002) (Statute of limitations and whether classes can be certified to pursue refunds.); *Preston v. Johnson County Fiscal Court*, 27 S.W.3d 790 (Ky. 2000) (Unconstitutionality of occupational fee ordinance which failed to provided taxpayer with right to take a credit for it on county taxes.); *Commonwealth v. St. Ledger*, 955 S.W.2d 539 (Ky.App. 1997) (Challenge of temporary injunction requiring Rev.Cab. To deposit certain percentages of refunds won by respondent to pay attorney fees.).

financial assets of pensions and bonds.⁷⁵ After these more typical categories, a more even distribution of other types of cases emerged. Five of the 31 cases addressed civil rights issues: three of these were related to criminal proceedings and sentences while the other two were purely civil.⁷⁶ Four cases asserted class actions for violations of the state Consumer Protection Act⁷⁷ which overlapped to a certain extent with three mass tort and negligence actions.⁷⁸ Of those seven cases related to consumer protection and tortious business conduct claims, at least six had the potential to be national suits.⁷⁹ Four cases related to real property rights⁸⁰ and one of those was an environmental pollution case.⁸¹ Three cases were filed for employment contract and workplace environment issues.⁸²

⁷⁵ Schilling v. Farmers Bank & Capital Trust Co., 2001-CA-000229-MR (Ky.App. 2002) (Action related to bonds.); Hasken v. City of Louisville, 1996-CA-001773-MR; 1996-CA-002091-MR (Ky.App. 1999) (Challenge of settlement regarding transition of firefighters from FPF to CERS.).

⁷⁶ Johnson v. General Assembly, 2002-CA-000091-MR (Ky.App. 2003) (Challenge to way consecutive sentencing carried out violates civil rights.); Long v. Ky. Corrections Cabinet, 1997-CA-002148-MR (Ky.App. 1999) (Constitutionality of SOTP program requiring admission of guilt violates protection against self-incrimination plus ex-post facto effect of law.); Calbough v. Commonwealth of Ky., 95-CA-2683-MR (Ky.App. 1996) (Criminal convictions at Jefferson Circuit Court due to jurors & witnesses sharing potties.); Allen v. United Parcel Service Co., 95-CA-2168-MR (Ky.App. 1997) (Age discrimination of captains & flight engineers (50 max age) and 1st officers (45 max).); D.F. v. Codell, 127 S.W.3d 571 (Ky. 2003) (Constitutionality of the No Pass - No Drive law.).

⁷⁷ Bowen v. Hewlett-Packard Co., 2001-CA-001815-MR (Ky.App. 2002); Arnold v. Microsoft Corp., 2000-CA-002144-MR (Ky.App. 2001) (Sought class certification for Microsoft violation Ky Consumer Protection Act.); Wiley v. Adkins, 48 S.W.3d 20 (Ky. 2001); Garrett v. USG Annuity and Life Co., 1999-CA-002145-MR (Ky.App. 2000) (Breach of contract of interest rate adjustment provisions. Violation of Ky. Consumer Protection Act.).

⁷⁸ Roman Catholic Bishop of Louisville v. Burden, 2004 WL 2827093 (Ky.App. 2004) (This case part of the priest sex abuse class action but separated to pursue damages individually.); Wood v. Wyeth-Ayerst Laboratories, 82 S.W.3d 849 (Ky. 2002) (Fen-Phen suit.); Crouch v. Champion Enterprises, Inc., 1999-CA-001540-MR (Ky.App. 2000) (Mobile home manufacturers concealing inherent dangers of product.).

⁷⁹ See *supra* notes 77 & 78.

⁸⁰ Rockwell Int'l Corp. v. Wilhite, 143 S.W.3d 604 (Ky.App. 2003) (Trespass and nuisance pollution case.); Harms v. Helmer, 2000-CA-002706-MR (Ky.App. 2001) (Declaration had been sought that lots not subject to residential restrictions.); Woods v. Ky. W.Va. Gas Co., 1999-CA-000013-MR (Ky.App. 2001) (Challenge to part of settlement that was computed differently by court for one party of a class.); Huff v. Bane Coal Corp., 1999-CA-000793-MR (Ky.App. 2000) (Declaration of construction of a title to mineral rights.).

⁸¹ Rockwell Int'l Corp. v. Wilhite, 143 S.W.3d 604 (Ky.App. 2003). Garrard County Bd. of Educ. v. Jackson, 12 S.W.3d 686 (Ky. 2000) (Students and faculty subjected to school building's unhealthy environment.).

⁸² Kelley v. Toyota Motor Manufacturing, Ky., Inc., 2000-CA-002781-MR (Ky.App. 2002) (Violation of wage/labor laws because forced to work 15 - 30 minutes unpaid to don and remove protective gear.);

One case claimed mismanagement by public officials.⁸³ Finally, one case alleged a toxic exposure suit because of toxic substances in a school building.⁸⁴ All that can really be hypothesized from these raw numbers of types of claims, regardless of whether they were certified, is that attorneys began testing whether Kentucky courts would be more willing to entertain class actions for a broader range of issues than in preceding decades.

To more precisely ascertain the temper of the judiciary towards these various types of class actions, one must examine what the courts were willing to certify. Interestingly, only half of the taxation cases⁸⁵ and half of the financial interest classes were certified.⁸⁶ The majority of civil rights⁸⁷, consumer protection⁸⁸, and employee⁸⁹ classes were not certified by the lower court. Combining the product liability case with the mass tort and negligence cases⁹⁰ also indicates an unwillingness of Kentucky courts to allow class actions in those arenas because two of those three failed certification. The only one of the three mass tort and negligence cases to survive certification involved sexual abuse by a Roman Catholic priest.⁹¹ What does remain consistent with pre-CR 23.01 practice is the certification of classes with the clearest ownership interest in the object of suit; three of the four real property rights cases were certified.

Commonwealth v. Whitworth, 74 S.W.3d 695 (Ky. 2002) (Breach of contract for temporary employees.); Barnett v. Verdi, 1997-CA-002373-MR (Ky.App. 1999) (Sexual harassment in workplace.).

⁸³ Anderson v. Parker, 964 S.W.2d 809 (Ky.App. 1997) (Abuse of discretion in granting good time credit.).

⁸⁴ Garrard County Bd. of Educ. v. Jackson, 12 S.W.3d 686 (Ky. 2000) (Students and faculty subjected to school building's unhealthy environment.).

⁸⁵ See *supra* note 74.

⁸⁶ See *supra* note 75.

⁸⁷ See *supra* note 76.

⁸⁸ See *supra* note 77.

⁸⁹ See *supra* note 82.

⁹⁰ See *supra* note 78.

⁹¹ Roman Catholic Bishop of Louisville v. Burden, 2004 WL 2827093 (Ky.App. 2004).

Count of Certified Classes Type of Claim	Certified?		
	No	Yes	Total
Civil rights – criminal	2	1	3
Civil rights – employment		1	1
Civil rights – noncriminal		1	1
Consumer protection	3	1	4
Employee	2	1	3
Financial - pension, securities	1	1	2
Mass tort – negligence	1	1	2
Product liability	1		1
Public official – mismanagement	1		1
Real property (including 1 certified environment/pollution case)	1	3	4
Taxation	4	4	8
Toxic Tort		1	1
Grand Total	16	15	31

The appellate level courts discussed the certification in seven of the 31 cases and, for the most part, they left lower court certification decisions undisturbed.⁹³

The Kentucky Court of Appeals either affirmed the denial of certification or did not reach that issue because of the absence of a sustainable cause of action in three cases.⁹⁴ The Supreme Court affirmed one certification and so did the Court of Appeals.⁹⁵ The Court of Appeals criticized one certification and would have reversed on that point if it had been reached.⁹⁶ The Supreme Court reversed the denial of certification by the

⁹² See *supra* notes 72-80.

⁹³ See *infra* notes 94-97.

⁹⁴ *Coffman v. Ky. Dept. of Education*, 2001-CA-002110-MR (Ky.App. 2004) (Affirmed as not certified.); *Arnold v. Microsoft Corp.*, 2000-CA-002144-MR (Ky.App. 2001) (Dismissed for lack of standing.); *Calbough v. Commonwealth of Ky.*, 95-CA-2683-MR (Ky.App. 1996) (Dismissed as a collateral attack upon conviction.).

⁹⁵ *City of Somerset v. Bell*, 2005 WL 119894 (Ky.App. 2005) (Affirmed as certified.); *Wiley v. Adkins*, 48 S.W.3d 20 (Ky. 2001) (The court noted that the objection to certification was not preserved but, it went on to state that common questions did not require identical claims.).

⁹⁶ *Fleming v. City of Shepherdsville*, 2001-CA-000550-MR (Ky.App. 2002) (Commented that certification was inappropriate but case reversed on another matter.).

lower court in only one case.⁹⁷ Arguably, a measure of consistency exists between lower courts and the appellate level courts in treating class actions conservatively. A few of these decisions bear closer scrutiny.

These cases give sparse treatment of the certification issue. In *Coffman v. Ky. Dept. of Education*⁹⁸, an unpublished case, the plaintiff argued error because the trial court refused to certify the majority of over 100 employees, causing them to settle without the benefit of counsel. The Court of Appeals rejected the argument because each of those settling employees could have sought counsel on their own prior to settlement. The court determined that the remaining 12 plaintiffs were not too numerous for joinder.⁹⁹ In *City of Bromley v. Smith*¹⁰⁰, the Kentucky Supreme Court confirmed the availability of class action relief as a remedy regarding non-*ad valorem* taxes.¹⁰¹ Later, the *City of Somerset v. Bell*¹⁰² case recognized that class actions could now stand in *ad valorem* tax challenges also because the revised applicable statute omitted the “in each case” phrase.¹⁰³ Though an objection to certification was not preserved, the court in *Wiley v. Adkins*¹⁰⁴, the court stressed that complete overlap of questions of law or fact were not necessary; only that the “questions . . . common to the members of the class predominate over the questions which affect individual members.”¹⁰⁵

⁹⁷ *City of Bromley v. Smith*, 149 S.W.3d 403 (Ky. 2004) (Reversed and granted certification.).

⁹⁸ 2001-CA-002110-MR.

⁹⁹ *Id.* at 8-10.

¹⁰⁰ 149 S.W.3d 403.

¹⁰¹ *Id.* at 406.

¹⁰² 2005 WL 119894.

¹⁰³ *Id.* at 4.

¹⁰⁴ 48 S.W.3d 20.

¹⁰⁵ *Id.* 22-23.

The Supreme Court of Kentucky gave a more comprehensive treatment of class action practice in *Garrard County Bd. of Educ. v. Jackson*.¹⁰⁶ The defendants (now appellants) in the original action, which alleged toxic exposure in an unsafe school building, sought writs of mandamus to compel the decertification of the class from the Court of Appeals. Relief was denied and they appealed to the Supreme Court. The appellants argued that certification “risk[ed] a miscarriage of justice . . .” by unfairly prejudicing them due to the publication of the allegations that would ensue.¹⁰⁷ Alternatively, Garrard County argued that litigating a class action would unduly burden them due to increased expenses and the time involved.¹⁰⁸ The court rejected the appellants’ underlying assumption that certifying a class action “impermissibly augments a lawsuit’s notoriety”¹⁰⁹ The court recognized that adopting such a notion would create a “small community exclusion” that the class action rule simply did not encompass.¹¹⁰ They further found that the burden alleged by the appellants did not justify the extraordinary remedy of mandamus.¹¹¹ The *Jackson* case suggests no overt hostility to class actions¹¹², but a preference for filing mass tort class actions in the federal forum does appear to exist.

The apparent penchant for certification in financial property interest cases may explain the federal court preference. Anyone looking at the type of cases most likely to be certified in Kentucky would seek certification in federal courts for mass tort cases. This could create a self-reinforcing misconception, though: plaintiffs file in federal

¹⁰⁶ See *Garrard County Bd. of Educ. v. Jackson*, 12 S.W.3d 686 (Ky. 2000).

¹⁰⁷ *Id.* at 689-690.

¹⁰⁸ *Id.* at 690.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (quotations in original).

¹¹¹ *Id.*

¹¹² See generally 12 S.W.3d 686.

courts because few mass tort claims are certified in Kentucky, but few are certified in the state courts because plaintiffs file in federal courts. This would retard the state courts development of jurisprudence for that type of class action.

Another potential explanation lies in Kentucky's substantive treatment of tort claims. *Wood v. Wyeth-Ayerst Laboratories*¹¹³ involved a class action suit seeking recovery for persons who had used the Fen-Phen diet drug combination. The class members opted out of a nationwide settlement because it offered nothing for primary pulmonary hypertension and then asserted this state court claim. The suit sought medical monitoring as well as punitive damages, but the court dismissed the action for failure to state a claim because, as the court asserted, Kentucky law precludes relief on a tort claim unless the plaintiff can prove a physical injury. Since the class representative (and the class members) showed no current symptoms of physical injury from the use of Fen-Phen, no relief could be granted, including medical monitoring.¹¹⁴ Therefore, Kentucky courts would not be a choice forum for plaintiffs seeking recovery for increased risk due to exposure claims.

Although state substantive law should be applied by federal courts if bringing a suit in diversity, other pressures come to bear when choosing the federal forum. After all, “[m]anipulating claims to obtain a State or federal forum is one of the most significant powers that a plaintiff in the American system enjoys.”¹¹⁵ First, assuming the plaintiff can meet the necessary personal and subject matter jurisdictional requirements, selecting

¹¹³ *Wood v. Wyeth-Ayerst Laboratories*, 82 S.W.3d 849 (Ky. 2002).

¹¹⁴ *Id.* at 850-851.

¹¹⁵ JAY TIDMARSH & ROGER H. TRANGSURD, *COMPLEX LITIGATION: PROBLEMS IN ADVANCED CIVIL PROCEDURE* 52 (Foundation Press 2002).

a court with more favorable law advantages the plaintiff.¹¹⁶ The federal forum, when possible, also allows for escalating the class size because of the available venue options when filing originally or through transfer.¹¹⁷ These pressures operate to encourage settlements that include damages unrecoverable in Kentucky. For example, had the class in *Wood* remained part of the nationwide Fen-Phen settlement, they may have received the medical monitoring and punitive damages they sought.¹¹⁸

Another example of Kentucky's cautious approach to tort class actions is *Rockwell Int'l Corp. v. Wilhite*.¹¹⁹ The 50 plaintiffs originally enjoyed a jury award of over \$7.5 million in compensation and \$210 million in punitive damages for Rockwell's release of polychlorinated biphenyls (PCBs), a known carcinogen that infiltrated their land.¹²⁰ The evidence indicated a "minimal presence" of PCBs on each of the 54 acres of land in question.¹²¹ The court feared "open[ing] the proverbial floodgates of litigation . . . [by] allowing a suit to proceed any time a landowner can show the presence, however minute, of a substance known to be harmful in greater concentrations."¹²² Therefore, the Court of Appeals reversed and denied the class compensatory damages. Going further, the court also denied the punitive damages because plaintiffs' counsel used improper statements to "inflame the passions and excite the prejudices of the [jurors]"¹²³ Hydraulic fluid containing PCBs and used by Rockwell entered into Kentucky waterways and were deposited onto plaintiffs land¹²⁴, but the company paid no compensatory or

¹¹⁶ *Id.* at 23-24.

¹¹⁷ *Id.* at 21.

¹¹⁸ *See* 82 S.W.3d at 850.

¹¹⁹ *See generally* *Rockwell Int'l Corp. v. Wilhite*, 143 S.W.3d 604 (Ky.App. 2004).

¹²⁰ *Id.* at 606.

¹²¹ *Id.* at 621.

¹²² *Id.*

¹²³ *Id.* at 631 (quotes in original).

¹²⁴ *Wilhite v. Rockwell Int'l Corp.* 83 S.W.3d 516, 518 (Ky. 2002).

punitive damages.¹²⁵ No class action defendant could ask for a better result and plaintiffs certainly would avoid such a forum.

Nationally, the certification of mass tort class actions “ceased to be extraordinary . . .” since the 1980s.¹²⁶ Kentucky courts stay behind this federal trend by continuing to remain close to the historical practice of utilizing class actions mostly for economic and property interest cases. With the adoption of CR 23.01, which mirrors the federal Rule 23, a narrow openness towards mass tort actions very slowly emerged. The Kentucky plaintiff preference for federal forums in these types of cases reflects that the state courts continue to lag behind, although other dynamics, such as a bad reputation where plaintiffs avoid the forum and prevent the jurisprudence to develop, may also account for this phenomenon. Comparing this broad overview of the State class action jurisprudence to various criticisms of class action suits should help gauge whether CAFA appropriately responds to Kentucky practice.

II. COMMON CLASS ACTION PROBLEMS PROMPTING CAFA

Perhaps the most repeated refrain in the liturgy against the evils of class action lawsuits concludes that they blackmail defendant businesses into overly generous settlements.¹²⁷ Those espousing this view argue that a class action suit “can easily be turned into an instrument of judicial torture or terrorism”¹²⁸ This particular criticism most often accompanies settlement class actions.¹²⁹ The certification of a class for purposes of settlement only is one method of avoiding repetitive future litigation when it

¹²⁵ 143 S.W.3d at 632.

¹²⁶ Mary J. Davis, *supra* note 16 at 186.

¹²⁷ *Cf. id.* at 187 (Mary J. Davis notes that much recent criticism of class actions focuses on “blackmail settlements” without commenting on the validity of the criticism. The article argues for an appropriate role for class action suits.).

¹²⁸ James M. Underwood, *supra* note 15 at 403.

¹²⁹ *Cf.* Mary J. Davis, *supra* note 16 at 187.

would be impracticable for a defendant to identify each class member or future member to settle on individual injuries.¹³⁰ The sheer number of claims represented in these settlement class actions pressure companies to the negotiation table regardless of the underlying individual merits.

A suit cited as an example of the “blackmail settlement” class action involves the claims regarding silicone breast implants from 1994.¹³¹ The Judicial Panel on Multidistrict Litigation (hereinafter “JPML”), deciding on transfer of the many related cases, stressed that over one million women had received breast implants. After the Food and Drug Administration conducted hearings on the safety of the implants, “a rush to the courthouse [] ensued”¹³² The JPML indicated 78 directly related court actions with roughly 200 other potential cases that could be transferred pursuant to 28 U.S.C. § 1407.¹³³ By the end of the litigation process, a \$4.2 billion fund was established, but it was inadequate to cover thousands of claims. Also, Dow Corning Corp. went into bankruptcy (though the litigation probably should not be blamed entirely). Furthermore, the press portrayed it all as a “vision of greedy, unmeritorious claimants fueled by similarly greedy plaintiffs lawyers forcing an otherwise respectable company into bankruptcy”¹³⁴ Interestingly all the pending cases noted in the silicone breast implant litigation were already in federal courts.¹³⁵

The coupon settlement with Blockbuster, Inc. also illustrates a perceived abuse of the settlement class action practice, this time involving state court actions. The plaintiffs

¹³⁰ JAY TIDMARSH & ROGER H. TRANGSURD, *supra* note 113 at 196-97.

¹³¹ Mary J. Davis, *supra* note 16 at 186 (citing *In re Silicone Gel Breast Implants Products Liability Litigation*, 793 F.Supp1098 (J.P.M.L. 1992)).

¹³² 793 F.Supp at 1098.

¹³³ *Id.* at 1098 n.1, 1099.

¹³⁴ Mary J. Davis, *supra* note 16 at 187 (citing *In re Silicone Gel Breast Implants Products Liability Litigation*, 1994 WL 578353 (N.D. Ala. 1994)).

¹³⁵ 793 F.Supp. at 1098 n.1.

in the *Blockbuster* cases¹³⁶ sought to recover excessive fees charged for returning rentals late.¹³⁷ Similar contemporaneous class suits progressed in Illinois state courts.¹³⁸ Both the Texas and the Illinois *Blockbuster* settlements provided members of the class with coupons for money off future rentals as compensation.¹³⁹ The infamy arose because class members received a few dollars worth of coupons while the attorneys in the Texas litigation split \$9.25 million dollars.¹⁴⁰ The legislative history behind a CAFA forerunner, the Class Action Fairness Act of 2003 (hereinafter “CAFA of 2003”) cited this particular settlement, along with numerous other cases, as an example of the abuse of class actions that they wished to prevent.¹⁴¹

A. The Four Horsemen of the Class Action

The legislative history for CAFA of 2003 succinctly states the perceived abuses of class action suits¹⁴² and, since they are identical to the concerns prompting the CAFA that passed in 2005,¹⁴³ the earlier articulated concerns will be described. The Committee on the Judiciary (hereinafter “Committee”) cited four types of abuses behind “the explosion in State court class action filings”¹⁴⁴ The four abuses consisted of: lax certification

¹³⁶ The group of cases consisted of three appeals: *Sanders v. Blockbuster, Inc.*, 127 S.W.3d 382 (Tex. Ct. App. 2004); *Johnson v. Scott*, 113 S.W.3d 366 (Tex. Ct. App. 2003); and *Scott v. Blockbuster, Inc.*, 65 S.W.3d 295 (Tex. Ct. App. 2001). The case pertinent to this discussion is *Johnson v. Scott*, 113 S.W.3d 366 where the settlement was determined to be fair. *Id.* at 378.).

¹³⁷ 113 S.W.3d at 369 (The fees were known as “extended viewing fees”).

¹³⁸ *Cohen v. Blockbuster Entm’t, Inc.*, 814 N.E.2d 933 (Ill. App. Ct. 2004); *Cohen v. Blockbuster Entm’t, Inc.*, 814 N.E.2d 933 (Ill. App. Ct. 2004); and *Cohen v. Blockbuster Entm’t, Inc.*, 787 N.E.2d 846 (Ill. App. Ct. 2003).

¹³⁹ 113 S.W.3d at 371 (The Illinois settlement arrived at one coupon per past visit and the Texas settlement agreed to one coupon per prior transaction.).

¹⁴⁰ *Id.* (The attorneys demanded \$20 million while Blockbuster, Inc. offered \$2 million in attorney fees. The settlement fell close to the middle.).

¹⁴¹ H.R. REP. NO. 108-144, at 16-18 (2003).

¹⁴² *Id.* at 11-19.

¹⁴³ *See generally* 151 CONG. REC. S996-02 (2005); 151 CONG. REC. H723-01 (2005).

¹⁴⁴ H.R. REP. NO. 108-144, at 12.

by state judges, erroneously applying the forum state's law in nationwide suits, the filing of multiple "copy-cat" suits, and blackmail settlements.¹⁴⁵

Since blackmail settlements were just discussed, we will start with it even though that abuse covers Committee's fourth concern. They declared that the "most widely recognized form of abuse is the approval of class settlements that provide no real relief for class members – and only benefit their lawyers."¹⁴⁶ This concern appears to ignore, however, that in many instances individual injuries in class actions have too small a dollar value to pursue unless combined with other, similarly situated persons. Legal fees and time expenditures prevent an individual person from seeking remedy for a wrong worth only a few hundred dollars, but the injury remains real.¹⁴⁷ After all "[t]he class action was an invention of equity, mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs."¹⁴⁸ Preventing class actions with low dollar recovery for individual members throws that equation out of balance so that defendants are effectively immune from suit. The other abuses may not have the notoriety of this one but, they still deserve discussion.

First, the Committee expressed concern that certain state judges ignored procedural requirements governing class actions. Due to lax treatment of certification requirements, these judges essentially "render[ed] virtually any controversy subject to class action treatment, regardless of whether the plaintiffs actually present sufficiently

¹⁴⁵ *Id.* at 12-16.

¹⁴⁶ *Id.* at 16

¹⁴⁷ See Manuel L. Real, *What Evil Have We Wrought: Class Action, Mass Torts, and Settlement*, 31 LOY. L.A. L. REV. 437, 443 (1998).

¹⁴⁸ *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 187 (8th Cir. 1948).

common claims.”¹⁴⁹ The legislative report supported this allegation with an anecdote of a Tennessee case where the plaintiff filed documents inches thick with their complaint, but the judge certified the 23 million member nationwide class that same day, even before defendants were served with the original complaint.¹⁵⁰ A problematic assumption appears to be that federal court judges would all consistently apply the certification requirements rigorously as opposed to state judges. Such an assumption is facially flawed; if anything, Article III judges, lacking fear of being voted out of their position, could become even more lax in the scrutiny they apply to the certification requirements. One can assume that state court judges reflect the will of their constituents in liberal certification practices or they will be removed from office at the next election.

The second abuse listed involves certifying nationwide classes and then only applying the home state’s laws. The Committee asserted that this practice “flies in the face of basic federalism principles by embracing the view that one State court can trump the contrary policy choices made by other States.”¹⁵¹ The primary example cited to demonstrate this misuse of class actions entailed a jury verdict of \$1.18 billion against an insurance company that required the use of less expensive, non-original parts in automobile repairs. The breach of policyholder contracts included policies governed by States with substantively different insurance regulations on the matter in issue.¹⁵² By applying only one state’s law, any policy differences reflecting the will of the voters in every other state was nullified. However, the U.S. Supreme Court already addressed this issue by ruling that

¹⁴⁹ H.R. REP. NO. 108-144 at 12.

¹⁵⁰ *Id.* at 13.

¹⁵¹ *Id.* at 14.

¹⁵² *Id.* (citing *Avery v. State Farm Mut. Auto Ins. Co.*, 746 N.E.2d 1242 (Ill. App. Ct. 2001)).

[W]hile a State may, for the reasons we have previously stated, assume jurisdiction over the claims of plaintiffs whose principal contacts are with other States, it may not use this assumption of jurisdiction as an added weight in the scale when considering the permissible constitutional limits on choice of substantive law. It may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a "common question of law." The issue of personal jurisdiction over plaintiffs in a class action is entirely distinct from the question of the constitutional limitations on choice of law; the latter calculus is not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the State proposes to adjudicate and which have little connection with the forum.¹⁵³

Thus, any state judge committing this abuse could ultimately be overruled by the U.S. Supreme Court. Defendants should take heart from this and appeal when this abuse appears rather than settling.

Additionally, relying on the federal forum for deference to federalism in choice of law decisions is no guarantee either. As an extreme example, consider *In re Agent Orange Prod. Liab. Litig.* where Judge Weinstein determined there to be "ample justification for application of federal common law to this litigation . . ." ¹⁵⁴ which would require judicially creating such laws. Adequate protection against the abuse of applying only the forum's substantive law in multi-state class actions already exists with the U.S. Supreme Court's choice of law jurisprudence and the federal forum offers no absolute guarantee of appropriate choice of law.

Allowing "copy-cat" class actions, where lawyers file almost identical claims in numerous courts around the country constitutes the third type of abuse in the legislative history. Lawyers file these suits for the purpose of vying for the role of lead attorney when and if the suits are removed and transferred together via § 1407. Also, this practice

¹⁵³ Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821 (1985)

¹⁵⁴ *In re Agent Orange Prod. Liab. Litig.*, 506 F.Supp. 737, 749 (D.C.N.Y., 1979) *rev'd by* 635 F.2d 987 (2d Cir. 1980) (rejecting applicability of federal common law to the action).

serves as a method of forum shopping because the same lawyers filing numerous suits would likely find a judge friendly to their cause eventually.¹⁵⁵ This implies that seeking the forum where a client's claim has its best chance of success is a bad thing. The American Bar Association's Model Rules of Professional Conduct suggests otherwise in demanding that "[a] lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."¹⁵⁶ Any of the legislators drafting CAFA would expect just such zealous advocacy should a need arise in their own lives.

The Committee believed these four types of abuse resulted in a multitude of harms against individuals and the nation:

- (2) Over the past decade, there have been abuses of the class action device that have--
 - (A) harmed class members with legitimate claims and defendants that have acted responsibly;
 - (B) adversely affected interstate commerce; and
 - (C) undermined public respect for our judicial system.
- (3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where--
 - (A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;
 - (B) unjustified awards are made to certain plaintiffs at the expense of other class members; and
 - (C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.
- (4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are--
 - (A) keeping cases of national importance out of Federal court;
 - (B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

¹⁵⁵ H.R. REP. NO. 108-144 at 15.

¹⁵⁶ MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2002)

http://www.abanet.org/cpr/mrpc/rule_1_3_comm.html (last visited April 2, 2005).

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.¹⁵⁷

The anecdotal evidence assembled by the Committee pointed to abuses occurring predominantly in a small number of “magnet” states.¹⁵⁸ Studies reviewed highlighted Madison County, Illinois; Jefferson County, Texas; and Palm Beach County, Florida as particularly nefarious abusers of nationwide class action certifications.¹⁵⁹ Apparently Kentucky committed one class action sin by granting injunctive relief to a class prior to the defendant receiving notification of the lawsuit.¹⁶⁰ Kentucky courts otherwise remained unmentioned by the Committee as did the majority of states.¹⁶¹

Kentucky failed to achieve infamy in the Committee’s report because its courts appear more cautious than federal courts in the class actions they certify. Their treatment of the *Wood v. Wyeth-Ayerst Laboratories* claims related to Fen-Phen indicates an unwillingness to engage in the kind of extortionate nationwide settlement class actions that worried the Committee.¹⁶² The low numbers of class actions rising to the appellate court level implies that Kentucky courts usually exercise due diligence in applying the procedural requirements for certification. The *Coffman v. Ky. Dept. of Education* refusal to include all 100 plus employees as potential plaintiffs exemplifies this judicial restraint.¹⁶³ The survey of class actions outlined previously did not reveal any cases where judges abusively applied Kentucky law only. The absence of that particular concern may indicate that Kentucky judges appropriately choose the correct laws or it

¹⁵⁷ 28 U.S.C. § 1711 (2005).

¹⁵⁸ H.R. REP. NO. 108-144 at 8.

¹⁵⁹ *See id.* at 12.

¹⁶⁰ *Id.* at 13 (citing an order dated Aug. 18, 2000 and issued in *Farkas v. Bridgestone/Firestone, Inc.*, 00-CI-5261 (Cir. Ct., Jefferson County, Ky. 2000)).

¹⁶¹ *See generally id.*

¹⁶² *See generally* 82 S.W.3d 849.

¹⁶³ *See generally* 2001-CA-002110-MR.

may merely result from the small number of multi-state class actions they have entertained. The last abuse of “copy cat” filings is attributable to lawyers rather than the behavior of courts so it is inapplicable to this inquiry. None of the abuses prompting passage of CAFA occur prevalently in Kentucky courts nor in the vast majority of state courts,¹⁶⁴ and yet they are now restricted by this law.

B. The Missing Fifth Horseman of Class Actions

The litany of abuses by the Committee all focused on those that overtly favored plaintiffs. The Committee declined to consider abuses of class actions that fall on the pro-defendant end of the spectrum.¹⁶⁵ Perhaps they did not realize such abuses existed or maybe the groups lobbying Congress failed to mention them. Pro-defendant abuses do occur in class action certifications and one such abuse is under inclusiveness of class definitions. Under-inclusive class actions can deny potential plaintiffs “any promise or hope of an alternative route to a day in court.”¹⁶⁶ Exclusion from a class action, while not theoretically barring a person or group from seeking their own legal redress, may block any practical access to justice. This could occur because the excluded persons lack the information, sophistication, or means of securing legal representation. They may not realize a legal remedy exists for their injury while the included class members probably learned of their rights from the class counsel seeking members. The injury of the excluded person may be too small or the possibility of winning may be too slim to attract the attention of an attorney to represent their cause. Also, the excluded group of injured

¹⁶⁴ H.R. REP. NO. 108-144 at 8 (by specifying a small number of “magnet” states that abuse class actions, the negative implication is that the vast majority of states handle class actions appropriately).

¹⁶⁵ *See generally id.*

¹⁶⁶ Nancy Morawitz, *Underinclusive Class Actions*, 71 N.Y.U. L. REV. 402, 403 (1996).

individuals may be too small to meet requirements for numerosity to be certified in their own class action.¹⁶⁷

Class counsel and defendants alike may benefit from narrowly defining a class. If the attorney expects compensation using the lodestar method where fees are based on hours expended, she may be unwilling to take greater risks in litigating larger classes when the same hours would be involved. Larger classes can enhance the risk of early defeat and also capture closer attention at the appellate level. What's more, larger classes require greater expenditures on notifications which would reduce the attorney's profit margin.¹⁶⁸ Defendants may prefer smaller classes because they may avoid adverse publicity to some extent. Also, a defendant may wish to settle with different levels of relief for sub-classes and fewer conflicts with such a regimen are likely to occur with fewer class members.¹⁶⁹ However, under-inclusive class actions predominately favor defendants because "[t]he principal harm caused by defining a class narrowly is the potential of denying similarly situated persons the same opportunity for relief for similar claims."¹⁷⁰

Two junctures in seeking class certification can act to limit members of a class. The first juncture, and most influential, transpires when the class representative and counsel decide the breadth of the class.¹⁷¹ Ordinarily, an attorney for the class representative would seek a broad class definition to maximize class size and thus, their fees.¹⁷² CAFA, though, encourages lawyers to define class size very narrowly if they

¹⁶⁷ *Id.* at 420-425.

¹⁶⁸ *Id.* at 415-419.

¹⁶⁹ *Id.* at 419.

¹⁷⁰ *Id.* at 420

¹⁷¹ *Id.* at 402-403

¹⁷² Nancy Morawitz, *supra* note 166 at 402-403.

wish to remain in state court. This can be achieved by qualifying for one of the exceptions within the amended 28 U.S.C. § 1332, such as where the application of minimum diversity is removed from classes of less than 100 members.¹⁷³

The second juncture for narrowing of the class happens when the judge decides certification issues and might modify the class definition.¹⁷⁴ Modifying the class definition to exclude potential members simplifies the judge's life by eliminating certain questions of law or fact. By eliminating potential members, the judge may avoid creating sub-classes that would require additional attention. This would motivate judges to make such excluding modifications and decrease the complexity of the case before them. Such exclusions, either by the representative's attorney or the judge, would rarely receive challenge due to the absence of notice to the potential plaintiffs cut from the class.¹⁷⁵

Of all the abuses described, the one applicable to Kentucky is under inclusiveness of class definitions. Aside from the cautious nature of the state courts, the Kentucky Appalachian communities reflect a "culture of acquiescence"¹⁷⁶ that discourages aggressively pursuing reparations for harms suffered. Consequently, this allows under-inclusiveness to thrive because excluded injured individuals are unlikely to either know of their rights or believe they can challenge the exclusion. This malaise regarding redressing wrongs may well come from the people "feel[ing] defeated by the coal industry"¹⁷⁷ which has historically wielded enormous power in Kentucky.

¹⁷³ See, e.g., 28 U.S.C. § 1332(d)(5)(B).

¹⁷⁴ Nancy Morawitz, *supra* note 166 at 403.

¹⁷⁵ *Id.* at 404.

¹⁷⁶ Hannah C. Halbert, *From Picket Line to Courtroom: The Changing Forum for Regional Resistance, Environmental Reform and Policy Change in Appalachia*, 25 *HAMLIN J. PUB. L. & POL'Y* 375, 399 (2004).

¹⁷⁷ See *id.* at 398.

Regardless of the source, the outcome leaves many without recourse for damages incurred from any industry.¹⁷⁸

As an example of the effects of under-inclusion, if the class actions in the Martin County coal spill incident included only persons injured on the day of the spill or immediately thereafter, then persons whose well-water turned up polluted months later would be excluded. For sake of this hypothetical, those polluted wells would be scattered about in surrounding counties that saw none of the surface sludge from the spill. Further, while making the water black for a few weeks, the dollar amount for each claim would only amount to a few hundred dollars each. Unless an attorney already representing the class of person harmed by the spill sought out these clients, they would never receive compensation. Most likely, they would lack the information to know where the pollution came from or their right to redress. Additionally, if any of them did realize the connection and that they could receive compensation, the cost of individual litigation would outweigh any award. Lastly, no attorney would tackle representing them as a class because they are too widely dispersed in different counties and the dollar value of the claims would be too low to justify the expenses. Under-inclusion would effectively remove their chance to seek a remedy.

The plaintiff in *Coffman v. Ky. Dept. of Educ.* essentially alleged that the Franklin County Circuit Court committed abuse of under-inclusion by refusing to certify the proposed class of 100 plus members because they refused to include in the definition those employees who allegedly settled due to underhanded tactics by the defendant

¹⁷⁸ See Nancy Morawitz, *supra* note 166 at 403.

company.¹⁷⁹ Another example, suggestive of an under inclusiveness tendency in Kentucky courts was *Allen v. United Parcel Service Co.*¹⁸⁰ where 101 persons alleging age discrimination were removed from a class. The court excluded unhired persons aged 40 to 58 because they lacked sufficient showing of evidence that the court would find convincing, but those 59 and older remained certified.¹⁸¹ There was evidence, however, that these persons had been promised a job and evidence that the company was concerned with hiring persons of advance age¹⁸² and should have survived summary judgment. Kentucky's conservative rule that "[e]ven though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is *any* issue of material fact . . ." ¹⁸³ in dispute provides escape from summary judgment if there is even a "scintilla" of "evidence on which a jury could reasonably return a verdict in the respondent's favor."¹⁸⁴ There was at least a scintilla of disputed facts from which a jury could have inferred discrimination in this case. Since evidence of disputed facts material to the case existed, it is hard to justify the summary judgment unless the court disfavored large class actions.

The data collected from the appellate courts over the last decade indicate that most classes (where an actual number of claimants was available) consisted of relatively small class sizes. Of the 15 certified class actions, six had classes under 100 members,¹⁸⁵

¹⁷⁹ 2001-CA-002110-MR at 9 (The plaintiffs' asserted that the settling employees should be included due to "nefarious and underhanded" practices used to force those settlements. *Id.*).

¹⁸⁰ 95-CA-2168-MR (Ky.App. 1997).

¹⁸¹ *Id.* at 4-5.

¹⁸² *Id.* at 5.

¹⁸³ *Steelvest, Inc. v. Scansteel Service Center, Inc.* 807 S.W.2d 476, 480 (Ky. 1991) (emphasis added).

¹⁸⁴ *Id.* at 482.

¹⁸⁵ *Woods v. Ky. W.Va. Gas Co.*, 1999-CA-000013-MR (Ky.App. 2001) (20 in certified class); *Huff v. Bane Coal Corp.*, 1999-CA-000793-MR (Ky.App. 2000) (21 in certified class); *Hasken v. City of Louisville*, 1996-CA-001773-MR; 1996-CA-002091-MR (Ky.App. 1999) (36 in certified class); *Commonwealth v. Whitworth*, 74 S.W.3d 695 (Ky. 2002) (50 in certified class); *City of Somerset v. Bell*,

and only one certified a class of over 100 members.¹⁸⁶ The remaining certified classes did not specify the number of members.¹⁸⁷ The largest attempted class action found, *Crouch v. Champion Enterprises, Inc.*¹⁸⁸, sought to redress injury to over 126,000 mobile home owners in Kentucky against 41 manufacturers for “fraudulently misrepresent[ing] the safety of manufactured housing.”¹⁸⁹ The Court of Appeals affirmed the dismissal of this case because the “appellants failed to make out an actionable claim for fraud.”¹⁹⁰ While nothing overtly stated in the *Crouch* decision indicates purposeful under-inclusion, the court did take time to note that “the named appellants did not own mobile homes manufactured by each named appellees.”¹⁹¹ Absent a clearer explanation by the court on why they found no actionable claim of fraud, one can speculate that the court was uncomfortable with the sheer size of the class. Anyway, the typical Kentucky class size is small enough to avoid implicating CAFA.¹⁹²

III. HOW CAFA IMPACTS KENTUCKY COURTS

CAFA incorporates many changes to handling class action suits on both the federal and state level.¹⁹³ It sets forth the general rule that class counsel’s fees in coupon

2005 WL 119894 (Ky.App. 2005) (62+ in certified class); *Rockwell Int’l Corp. v. Wilhite*, 143 S.W.3d 604 (Ky.App. 2003) (75 in certified class).

¹⁸⁶ *Wiley v. Adkins*, 48 S.W.3d 20 (Ky. 2001) (300+ in certified class).

¹⁸⁷ *Roman Catholic Bishop of Louisville v. Burden*, 2004 WL 2827093 (Ky.App. 2004) (unspecified in certified class); *Allen v. United Parcel Service Co.*, 95-CA-2168-MR (Ky.App. 1997) (101 dismissed; unspecified number remaining. 101 appealing. in certified class); (Unspecified in certified class); *Preston v. Johnson County Fiscal Court*, 27 S.W.3d 790 (Ky. 2000) (Unspecified in certified class); *D.F. v. Codell*, 127 S.W.3d 571 (Ky. 2003) (Unspecified in certified class); *Garrard County Bd. of Educ. v. Jackson*, 12 S.W.3d 686 (Ky. 2000) (Unspecified in certified class); *Fleming v. City of Shepherdsville*, 2001-CA-000550-MR (Ky.App. 2002) (Unspecified in certified class).

¹⁸⁸ 1999-CA-001540-MR (Ky.App. 2000).

¹⁸⁹ *Id.* at 3-4.

¹⁹⁰ *Id.* at 11.

¹⁹¹ *Id.* at 4.

¹⁹² 28 U.S.C. § 1332(d)(5)(B) (excluding classes under 100 members from the operation of minimal diversity and aggregation of damages).

¹⁹³ Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Sta. 4 (codified in scattered sections of 28 U.S.C).

settlements derive from the value of those coupons to class members.¹⁹⁴ Use of the lodestar method remains an option¹⁹⁵ and determining a fee based on time reasonably spent on the action can still occur in some circumstances.¹⁹⁶ At first, basing fees on the value of the coupons seems no different than a standard contingency provision, but the law adds that expert witnesses may be used to “provide information on the *actual* value to the class members of the coupons that *are redeemed*.”¹⁹⁷ This excludes from the fee base the value of coupons that are unlikely to be redeemed. If the parties settle upon \$1 billion worth of coupons, but only \$500 million coupons are claimed or redeemed, then the lawyer’s base their fee only on the \$500 million. No coupon settlements appeared in the survey of Kentucky class actions so this measure impacts Kentucky courts minimally.

Another interesting aspect of CAFA requires all class action defendants participating in a proposed settlement to provide notification of the settlement to appropriate state and federal officials.¹⁹⁸ The officials to receive notification usually would be the Attorney General of the United States and the State Attorney General where any class member resides.¹⁹⁹ Notice includes a copy of the complaint, any proposed final notification to class members, any scheduled hearings, any proposed or final settlement agreements, any final judgments, any written judicial opinions, and the names of class members residing in that state if feasible.²⁰⁰ This notice requirement seems to serve the purpose of binding class members to the settlement agreement even if they do not receive

¹⁹⁴ 28 U.S.C. § 1712(a).

¹⁹⁵ *Id.* at § 1712(b)(2).

¹⁹⁶ *Id.* at § 1712(b)(1).

¹⁹⁷ *Id.* at § 1712(d) (emphasis added).

¹⁹⁸ 28 U.S.C. § 1715(b).

¹⁹⁹ *Id.* at § 1715(a)(1)(A) & (a)(2).

²⁰⁰ *Id.* at § 1715(b)(1)-(8).

individual notice as long as the proper government officials receive notice.²⁰¹ The force of this falls on Kentucky legislators, and not the courts, because the only way to protect class member rights regarding settlements would be to mandate the Attorney General to promptly forward notice to all Kentucky resident class members.

The weightiest change from CAFA amends diversity jurisdiction requirements by altering 28 U.S.C. § 1332 to now include:

(d)(1) In this subsection--

...

(D) the term 'class members' means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which--

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of [six factors]

²⁰²
.....

By allowing for the aggregation of the value of claims, class actions that aggregate small dollar claims, such as the *Blockbuster* litigation,²⁰³ can now easily meet diversity jurisdiction requirements.²⁰⁴ Plaintiffs can no longer defeat diversity jurisdiction in class actions because the requirement now entails only minimum diversity. One class

²⁰¹ *Id.* at § 1715(e)(2).

²⁰² 28 U.S.C. § 1332(d)(1)-(3).

²⁰³ 113 S.W.3d at 371.

²⁰⁴ 28 U.S.C. § 1332(d)(2).

member's diverse citizenship from any defendant meets the requirement.²⁰⁵ Fortunately, CAFA allows for district judges to exercise discretion to decline jurisdiction, but only in the narrow circumstance that over one-third of plaintiffs and defendants are citizens of the state of origination.²⁰⁶ The judge must weigh six separate factors, further constricting the permissible discretion.²⁰⁷

This brings us back to the beginning and discussion of the Martin County coal slurry spill. The damage wrought by the spill extended into West Virginia, opening the pool of potential class members to establish minimum diversity.²⁰⁸ In reality, none of this mattered since the two known suits filed in the federal court relied upon federal question jurisdiction.²⁰⁹ The federal question most probably arose from the Surface Mining Control and Reclamation Act of 1977²¹⁰. Altering the facts slightly to create a hypothetical situation, though, sheds light on the effect of CAFA on such jurisdictional matters. Assuming no federal question exists, the case would only be prevented from removal to federal court prior to CAFA because many plaintiffs and one defendant were Kentucky citizens preventing complete diversity.²¹¹ Further assuming that the vast majority of those injured were Kentucky citizens, this uniquely Kentucky mass tort

²⁰⁵ *Id.* at § 1332(d)(2)(A).

²⁰⁶ *Id.* at § 1332(3).

²⁰⁷ *Id.* at § 1332(3)(A)-(F) (the factors are: (A) whether the claims asserted involve matters of national or interstate interest; (B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States; (C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction; (D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants; (E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and (F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.).

²⁰⁸ *Disaster Critic to be Fired*, *supra* note 4.

²⁰⁹ *Kirk v. Martin County Coal Corp.*, 7:00-cv-00438-JMH (E.D. Ky. 2001); *Moore v. Martin County Coal Corp.*, 7:00-cv-00446-DCR (E.D. Ky. 2001).

²¹⁰ 30 U.S.C. §§ 1201-1328 (2005).

²¹¹ *Martin County Coal Corp., Corp. Records & Bus. Registrations*, *supra* note 9.

perpetrated by a Kentucky company, harming Kentucky land and its citizens, should only be determined by Kentucky courts. This conforms to traditional notions of our federalism by respecting “the state's right to enforce its own laws in its own courts.”²¹²

CAFA appears to destroy this protection of federalism because the existence of a single West Virginia plaintiff creates minimum diversity (assuming the dollar amount is also reached).²¹³ Defining ‘class member’ to include both named and unnamed persons who meet the definition of the class²¹⁴ raises the specter that just adding a residential requirement could not prevent federal jurisdiction. For example, confining the class definition to “Kentucky residents injured by the Martin County slurry spill” may be construed as reading “persons injured by the Martin County slurry spill” thus creating federal jurisdiction because of the West Virginian victims even if unnamed.

Additional protections of federalism do exist in CAFA. For example, CAFA excludes federal court jurisdiction when over two-thirds of the plaintiffs are citizens of the state where the action was originally filed, at least one significant defendant is also a citizen of that state, and the principal injuries occurred in that same state.²¹⁵ This exception to diversity jurisdiction appears to encompass the Martin County spill, but only if two-thirds of the plaintiffs are Kentucky citizens, otherwise it would be up to the judge’s discretion. The fact that injury was not confined to Kentucky alone may prevent this exception from covering the Martin County spill litigation. However, even more protection exists for mass tort actions unique to a specific state.

²¹² BLACK’S LAW DICTIONARY 1128 (7th ed. 1999) (“our federalism” defined as “The doctrine holding that a federal court must refrain from hearing a constitutional challenge to state action if federal adjudication would be considered an improper intrusion into the state's right to enforce its own laws in its own courts.”).

²¹³ 28 U.S.C. § 1332(d)(2)(A).

²¹⁴ *Id.* at § 1332(d)(1)(D).

²¹⁵ *Id.* at § 1332(d)(4)(A).

Another exception afforded by CAFA takes mass class actions outside of the operation of minimal diversity if “all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State”²¹⁶ Surely this squarely applies to the Martin County spill to prevent removal. Unfortunately, though, CAFA limits this exception to class actions with less than 100 members.²¹⁷ At least one of the Martin County suits would fall outside this exception since the members numbered over 300.²¹⁸ The typical Kentucky class action, though, would not be affected by CAFA because they included less than 100 class members.

Because CAFA affects Kentucky’s handling of class actions only on the margins, the Kentucky courts will not alter their approach to these suits noticeably. The jurisprudence for class actions developed so gradually and cautiously in Kentucky that continuation along the same lines is assured. Kentucky courts will continue to favor class actions with property interests of local concern and eschew large, nationwide mass tort cases. Although CAFA became law in February of 2005, a few years of court decisions and appeals will be needed to accurately assess the actual impact on Kentucky and the other 49 states. The entire Act should be revisited as appellate decisions accumulate in both state and federal courts.

IV. CONCLUSION

Kentucky courts recognized the value of the class action mechanism for enhancing judicial efficiency when numerous plaintiffs shared common interests in a suit. Originally, the courts looked for both the elements of numerosity and common interest

²¹⁶ *Id.* at § 1332(d)(11).

²¹⁷ *Id.* at § 1332(d)(11)(B)(i).

²¹⁸ *New Business, supra* note 7.

before recognizing a class suit. Also, those early courts insisted that the common interest equal an ownership interest in financial or real property matters. Kentucky courts remained true to these principals until the adoption of CR 23.01 and 23.02 in 1958. With the advent of the modern class action rules, Kentucky courts expanded the types of cases they certified into civil rights, mass tort, and other areas, but they still continued the tradition of caution.

President Bush signed CAFA in February, 2005, which responds to four primary concerns of class action abuses. Legislators perceived that many class actions amounted to extortion when huge classes were certified in mass tort cases. In these circumstances, the members received relatively little or no relief, but lawyers' fees amounted to a bonanza. In certain states, judges certified class actions without proper consideration of the requirements set forth by the local rule. This amounted to an extreme rise in the number of certifications of state class actions. Another abuse cited involved judges approving multi-state class actions, but applying only the forum states' substantive law and thereby eviscerating federalism. A final concern of Congress consisted of lawyers filing repeat lawsuits in multiple forums in order to secure the role of representative counsel should the cases transfer and to find a judge friendly to the cause.

Congress omitted a fifth type of abuse that benefits defendants. One form of pro-defendant abuse is the under inclusive class action. Whereas the four abuses prompting passage of CAFA benefited plaintiffs, certifying classes that exclude significant numbers of injured individuals leads to unattainable justice for many. CAFA actually encourages under inclusiveness because lawyers may try to qualify for an exception to federal jurisdiction with classes of less than 100 persons. Restricting class definitions makes a

judge's job easier because it eliminates questions of law or fact, but this is another way in which under inclusion occurs. Kentucky's cautious approach to class action certification and cultural aspects of Appalachian communities combine to make under-inclusiveness the class action abuse found in this state's courts.

Because of the traditionally conservative tendency of class action jurisprudence in Kentucky, CAFA minimally impacts how those courts address such claims. Actually, many mass tort class actions arising in Kentucky are originally filed in federal courts. This may happen because the federal forum more liberally certifies those types of actions or, it may simply result from the cautious reputation of Kentucky courts. Regardless, Kentucky, and most states, avoided the abuses criticized by the drafters of CAFA, but are now bound by its impact. Most of the types of class actions certified by Kentucky prior to CAFA will remain unaffected due to their nature and size. Some mass tort actions where Kentuckians are injured by actions occurring predominantly within the state should remain in the hands of Kentucky courts. CAFA, though such an event may rarely occur, threatens to ignore the very federalist concerns it purports to support by removing those claims to federal courts. Due to the impatience of pro-defendant legislators and the President, legislation that poorly addresses most class action abuses and exacerbates another precludes the states from finding a more appropriate balance in their certification approaches.

Regardless of nationwide trends that have alternately favored and then disfavored class actions, Kentucky maintained a steady course regarding class actions and gradually embraced some expansions in their use over the last decades. With CAFA impacting Kentucky class action jurisprudence minimally, the cautious stance set by the Kentucky

courts will continue into the foreseeable future. The accumulation of federal and state appellate decisions over the next few years will offer the best analysis of CAFA's impact on Kentucky and all states.

APPENDIX A

Kentucky Rules of Civil Procedure Rule 23.02

An action may be maintained as a class action if the prerequisites of Rule 23.01 are satisfied, and in addition:

(a) The prosecution of separate actions by or against individual members of the class would create a risk of

(i) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(b) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(c) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (i) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (ii) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (iii) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (iv) the difficulties likely to be encountered in the management of a class action.

APPENDIX B

Survey of Cases 1953 to 1995

Dep't of Corr. v. Courier-Journal and Louisville Times, 914 S.W.2d 349 (Ky.App., 1996); Maddox v. Williams, 1995 WL 569425 (Ky.Cir.Ct., 1995); Comm'r v. Thomas Heavy Hauling, Inc., 889 S.W.2d 807 (Ky., 1994); Comm'r, Revenue Cabinet v. Gossum, 887 S.W.2d 329, 18 Employee Benefits Cas. 2094 (Ky., 1994); Keeton v. City of Ashland, 883 S.W.2d 894 (Ky.App., 1994); McCullar v. Credit Bureau Sys., Inc., 832 S.W.2d 886 (Ky., 1992); Rosenbalm v. Commercial Bank of Middlesboro, 838 S.W.2d 423 (Ky.App., 1992); Revenue Cabinet v. Barbour, 836 S.W.2d 418 (Ky.App., 1992); City of Louisville v. McDonald, 819 S.W.2d 319 (Ky.App., 1991); Russell County Fiscal Court v. Kelley, 823 S.W.2d 941 (Ky.App., 1991); Barrett v. Reynolds, 817 S.W.2d 439 (Ky., 1991); Shobe v. EPI Corp., 815 S.W.2d 395 (Ky., 1991); Unknown Heirs, Devisees, Legatees and Assigns of Devou v. City of Covington, 815 S.W.2d 406 (Ky.App., 1991); Ky. Unemployment Ins. Comm'n v. Kaco Unemployment Ins. Fund, Inc., 793 S.W.2d 845 (Ky.App., 1990); Clevinger v. Bd. of Educ. of Pike County, 789 S.W.2d 5, 60 Ed. Law Rep. 1012 (Ky., 1990); Long Run Baptist Ass'n, Inc. v. Louisville and Jefferson County Metro. Sewer Dist., 775 S.W.2d 520 (Ky.App., 1989); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 60 Ed. Law Rep. 1289 (Ky., 1989); Griggs v. Dolan, 759 S.W.2d 593, 50 Ed. Law Rep. 255 (Ky., 1988); Campbell County v. Com., Kentucky Corrections Cabinet, 762 S.W.2d 6 (Ky., 1988); Bischoff v. City of Newport, 733 S.W.2d 762 (Ky.App., 1987); Daniel Boone Clinic, P.S.C. v. Dahhan, 734 S.W.2d 488 (Ky.App., 1987); Louisville and Jefferson County Metro. Sewer Dist. v. Simpson, 730 S.W.2d 939 (Ky., 1987); City of Louisville v. Gnagie, 716 S.W.2d 236, 27 Wage & Hour Cas. (BNA) 1425 (Ky., 1986); Duff v. Bank of Louisville & Trust Co., 705 S.W.2d 920 (Ky., 1986); Bd. of Educ. of Fayette County v. Taulbee, 706 S.W.2d 827, 31 Ed. Law Rep. 1032 (Ky., 1986); Trabue v. Tichenor, 695 S.W.2d 432 (Ky.App., 1985); Yeager v. Paul Semonin Co., 691 S.W.2d 227 (Ky.App., 1985); Comm'r v. Mountain Truckers Ass'n, Inc., 683 S.W.2d 260 (Ky.App., 1984); Pyro Mining Co. v. Kentucky Comm'n on Human Rights, 678 S.W.2d 393, 57 Fair Empl.Prac.Cas. (BNA) 1585 (Ky., 1984); Orms v. City of Louisville, 686 S.W.2d 464, 27 Wage & Hour Cas. (BNA) 110 (Ky.App., 1984); Lexington-Fayette Urban County Gov't v. Hayse, 684 S.W.2d 301 (Ky.App., 1984); *In re* Beverly Hills Fire Litigation, 672 S.W.2d 922 (Ky., 1984); Lamar v. Office of Sheriff of Daviess County, 669 S.W.2d 27 (Ky.App., 1984); Bellarmine College v. Hornung, 662 S.W.2d 847 (Ky.App., 1983); Conrad v. Lexington-Fayette Urban County Gov't, 659 S.W.2d 190 (Ky., 1983); Sowders v. Atkins, 646 S.W.2d 344 (Ky., 1983); Jim Host & Associates, Inc. v. Sharpe, 639 S.W.2d 784 (Ky.App., 1982); Comm'r *ex rel.* Beshear v. ABAC Pest Control, Inc., 621 S.W.2d 705 (Ky.App., 1981); Brockman v. Jones, 610 S.W.2d 943 (Ky.App., 1980); Varney v. Varney, 609 S.W.2d 704 (Ky.App., 1980); Fayette County Ed. Ass'n v. Hardy, 626 S.W.2d 217, 2 Ed. Law Rep. 305 (Ky.App., 1980); Layson v. Brady, 576 S.W.2d 223 (Ky.App., 1978); Lee v. Com., 565 S.W.2d 634 (Ky.App., 1978); Ky. Bar Ass'n v. LaBach, 564 S.W.2d 11 (Ky., 1978); Kelley v. City of Ashland, 562 S.W.2d 312 (Ky., 1978); City of Monticello v. Wayne County Fiscal Court, 562 S.W.2d 88 (Ky.App., 1978); Am. Collectors Exch., Inc. v. Ky. State Democratic Cent. Executive Comm., 566

S.W.2d 759 (Ky.App., 1978); *Jacobs v. Lexington-Fayette Urban County Gov't*, 560 S.W.2d 10 (Ky., 1977); *Miller v. Lexington-Fayette Urban County Gov't*, 557 S.W.2d 430 (Ky.App., 1977); *Beth-Elkhorn Corp. v. Ross*, 552 S.W.2d 656 (Ky., 1977); *City of Ashland v. Kelley*, 555 S.W.2d 821 (Ky.App., 1977); *McCloud v. City of Cadiz*, 548 S.W.2d 158 (Ky.App., 1977); *Redmond v. Wheeler*, 554 S.W.2d 391 (Ky.App., 1977); *Hyde v. Haunost*, 530 S.W.2d 374 (Ky., 1975); *Lester v. City of Fort Thomas*, 531 S.W.2d 490 (Ky., 1975); *Dorsey v. Bale*, 521 S.W.2d 76 (Ky., 1975); *Ky. Mun. League v. Comm'r of Ky. Dept. of Labor*, 1975 WL 19984, 22 Wage & Hour Cas. (BNA) 121, 76 Lab.Cas. P 53,629 (Ky.Cir.Ct., 1975); *Covington Prof'l Firefighters Union, Local No. 38 Int'l Ass'n of Firefighters v. City of Covington*, 1974 WL 18219, 22 Wage & Hour Cas. (BNA) 97, 76 Lab.Cas. P 53,607 (Ky.Cir.Ct., 1974); *Carrico v. City of Owensboro*, 511 S.W.2d 677 (Ky., 1974); *Holsclaw v. Stephens*, 507 S.W.2d 462 (Ky., 1973); *Flincheum v. Hickman County Kentucky Bd. of Ed.*, 503 S.W.2d 752 (Ky., 1973); *Hancock v. Terry Elkhorn Mining Co., Inc.*, 503 S.W.2d 710 (Ky., 1973); *Little v. Comm'r*, 495 S.W.2d 498 (Ky., 1973); *Stortz v. Siebenaler*, 490 S.W.2d 728 (Ky., 1973); *Floyd County Bd. of Educ. v. Layne*, 474 S.W.2d 397 (Ky., 1971); *Lamar v. Bd. of Educ. of Hancock County School Dist.*, 467 S.W.2d 143 (Ky., 1971); *Greer v. Ky. Health and Geriatric Auth.*, 467 S.W.2d 340 (Ky., 1971); *Akers v. Stephenson*, 469 S.W.2d 704 (Ky., 1970); *Lowery v. Jefferson County*, 458 S.W.2d 168 (Ky., 1970); *First Sec. Nat'l Bank & Trust Co. of Lexington v. Peter*, 456 S.W.2d 46 (Ky., 1970); *Louisville Prof'l Fire Fighters, Local Union 345, I.A.F.F. v. Burke*, 1970 WL 7622, 75 L.R.R.M. (BNA) 2001, 64 Lab.Cas. P 52,412 (Ky.Cir.Ct., 1970); *Second St. Prop.s, Inc. v. Fiscal Court of Jefferson County*, 445 S.W.2d 709 (Ky., 1969); *Layne v. Board of Ed. of Floyd County*, 442 S.W.2d 587 (Ky., 1969); *Hankins v. Cambridge Shores, Inc.*, 442 S.W.2d 562 (Ky., 1969); *Shelton v. Simpson*, 441 S.W.2d 421 (Ky., 1969); *Carson Park Riding Club v. Friendly Home for Children*, 421 S.W.2d 832 (Ky., 1967); *Theobald v. Board of Comm'rs of Buechel Water Dist.*, 288 Ky. 720, 157 S.W.2d 285 (Ky., 1941); *Barnes v. Jacobsen*, 417 S.W.2d 224 (Ky., 1967); *Fitzpatrick v. Patrick*, 410 S.W.2d 143 (Ky., 1966); *Fayette County Bd. of Educ. v. White*, 410 S.W.2d 612 (Ky., 1966); *Floyd County v. Ky.-W.Va. Gas Co.*, 407 S.W.2d 721 (Ky., 1966); *Massey v. City of Franklin*, 384 S.W.2d 505 (Ky., 1964); *Griffey v. Bd. of Educ. of Washington County*, 385 S.W.2d 319 (Ky., 1964); *City of Mt. Vernon v. Banks*, 380 S.W.2d 268 (Ky., 1964); *Absher v. Ill. Cent. R. Co.*, 371 S.W.2d 950 (Ky., 1963); *Bus. Realty, Inc. v. Noah's Dove Lodge No. 20*, 375 S.W.2d 389 (Ky., 1963); *Graves v. Sec. Trust Co.*, 369 S.W.2d 114 (Ky., 1963); *Sec. Trust Co. v. Dabney*, 372 S.W.2d 401 (Ky., 1963); *Dartmouth-Willow Terrace, Inc. v. MacLean*, 371 S.W.2d 937 (Ky., 1963); *Carpenter v. Evans*, 363 S.W.2d 108 (Ky., 1962); *Brown v. Hardin County Bd. of Educ.*, 358 S.W.2d 488 (Ky., 1962); *Moore v. Local Union No. 89, Intern. Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 356 S.W.2d 241 (Ky., 1962); *Farler v. Perry County Bd. of Educ.*, 355 S.W.2d 659 (Ky., 1961); *Ky. Dept. Store, Inc. v. Fidelity-Phenix Fire Ins. Co. of N. Y.*, 351 S.W.2d 508 (Ky., 1961); *Kupper v. Fiscal Court of Jefferson County*, 346 S.W.2d 766 (Ky., 1961); *Puckett v. Ginter*, 339 S.W.2d 874 (Ky., 1960); *Stull v. Webster County Bd. of Educ.*, 339 S.W.2d 189 (Ky., 1960); *Hannah v. City of South Shore*, 332 S.W.2d 247 (Ky., 1959); *Portwood v. Falls City Brewing Co.*, 318 S.W.2d 535 (Ky., 1958); *Clark v. Wilson*, 316 S.W.2d 693 (Ky., 1958); *Cole v. Ky. Unemployment Ins. Comm'n*, 315 S.W.2d 457 (Ky., 1958); *City of Henderson v. Todd*, 314 S.W.2d 948 (Ky., 1958); *Glass*

v. Van Zant, 307 S.W.2d 175 (Ky., 1957); McBrayer v. Davis, 307 S.W.2d 14 (Ky., 1957); Bridges v. F. H. McGraw & Co., 302 S.W.2d 109, 39 L.R.R.M. (BNA) 2641, 32 Lab.Cas. P 70,654 (Ky., 1957); Day v. Skinner, 300 S.W.2d 48 (Ky., 1957); City of St. Matthews v. Stallings, 298 S.W.2d 676 (Ky., 1957); Standiford Civic Club v. Comm'r, 289 S.W.2d 498 (Ky., 1956); Rawlings v. Butler, 290 S.W.2d 801, 60 A.L.R.2d 285 (Ky., 1956); Davis v. Commonwealth Life Ins. Co., 284 S.W.2d 809, 54 A.L.R.2d 1286 (Ky., 1955); Sinclair Mines, Inc. v. Southern Land & Coal Co., 280 S.W.2d 153 (Ky., 1955); City of St. Matthews v. Trueheart, 274 S.W.2d 52 (Ky., 1954); Local Union No. 500 of Bhd. of Painters, Decorators and Paper Hangers of America v. Wise, 269 S.W.2d 721, 34 L.R.R.M. (BNA) 2418, 26 Lab.Cas. P 68,523 (Ky., 1954); City of Lexington v. Wilburn, 265 S.W.2d 777 (Ky., 1954); Guthrie v. Curlin, 263 S.W.2d 240 (Ky., 1953).

APPENDIX C

Survey of Cases 1996 to 2005

Coffman v. Ky. Dept. of Education, 2001-CA-002110-MR (Ky.App. 2004); Arnold v. Microsoft Corp., 2000-CA-002144-MR (Ky.App. 2001); Calbough v. Commonwealth of Ky., 95-CA-2683-MR (Ky.App. 1996); City of Somerset v. Bell, 2005 WL 119894 (Ky.App. 2005); Wiley v. Adkins, 48 S.W.3d 20 (Ky. 2001); Fleming v. City of Shepherdsville, 2001-CA-000550-MR (Ky.App. 2002); Garrard County Bd. of Educ. v. Jackson, 12 S.W.3d 686 (Ky. 2000); City of Bromley v. Smith, 149 S.W.3d 403 (Ky. 2004); Revenue Cabinet v. O'Daniel, 153 S.W.3d 815 (Ky. 2005); Roman Catholic Bishop of Louisville v. Burden, 2004 WL 2827093 (Ky.App. 2004); Johnson v. General Assembly, 2002-CA-000091-MR (Ky.App. 2003); D.F. v. Codell, 127 S.W.3d 571 (Ky. 2003); Rockwell Int'l Corp. v. Wilhite, 143 S.W.3d 604 (Ky.App. 2003); Bowen v. Hewlett-Packard Co., 2001-CA-001815-MR (Ky.App. 2002); Kelley v. Toyota Motor Manufacturing, Ky., Inc., 2000-CA-002781-MR (Ky.App. 2002); Commonwealth v. Whitworth, 74 S.W.3d 695 (Ky. 2002); Schilling v. Farmers Bank & Capital Trust Co., 2001-CA-000229-MR (Ky.App. 2002); Wood v. Wyeth-Ayerst Laboratories, 82 S.W.3d 849 (Ky. 2002); Light v. City of Louisville, 2001-CA-001310-MR (Ky.App. 2002); Harms v. Helmer, 2000-CA-002706-MR (Ky.App. 2001); Woods v. Ky. W.Va. Gas Co., 1999-CA-000013-MR (Ky.App. 2001); Garrett v. USG Annuity and Life Co., 1999-CA-002145-MR (Ky.App. 2000); Crouch v. Champion Enterprises, Inc., 1999-CA-001540-MR (Ky.App. 2000); Huff v. Bane Coal Corp., 1999-CA-000793-MR (Ky.App. 2000); Preston v. Johnson County Fiscal Court, 27 S.W.3d 790 (Ky. 2000); Long v. Ky. Corrections Cabinet, 1997-CA-002148-MR (Ky.App. 1999); Barnett v. Verdi, 1997-CA-002373-MR (Ky.App. 1999); Hasken v. City of Louisville, 1996-CA-001773-MR; 1996-CA-002091-MR (Ky.App. 1999); Allen v. United Parcel Service Co., 95-CA-2168-MR (Ky.App. 1997); Anderson v. Parker, 964 S.W.2d 809 (Ky.App. 1997); Commonwealth v. St. Ledger, 955 S.W.2d 539 (Ky.App. 1997).