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State and Federal Class Actions

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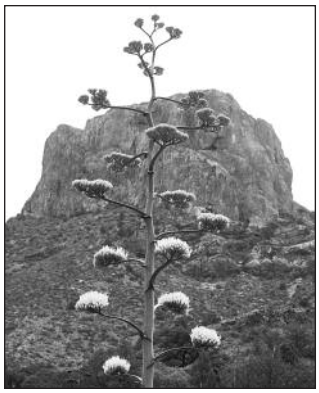

COVER: Century Plant (Agave americana) in bloom. Chisos Mountain, Texas. Photograph by Larry Gustafson, Dallas.

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Dear Section Members:

The Journal's Winter edition focuses on updating members on recent class action matters at both the state and federal levels. Thanks to Section members Barry M. Golden and Nicholas G. Peters for their article on recent class action cases before the Fifth Circuit and Mark W. Bayer for his article on class actions in the Texas state courts. I also want to thank Larry Gustafson for the cover photograph.

The Journal is always on the lookout for articles. Writing an article can improve your visibility within the legal community. Articles can also impact the development of the law, as Section members and others see and respond to your statements. (Note: the Section is now sending copies of the Journal to all federal judges in Texas, as well as all Texas state appellate judges.) Please see the note from Mike Ferrill, the Journal editor, for information on how to submit original articles. Also, remember the Journal is also open to reprinting articles that would benefit section members.

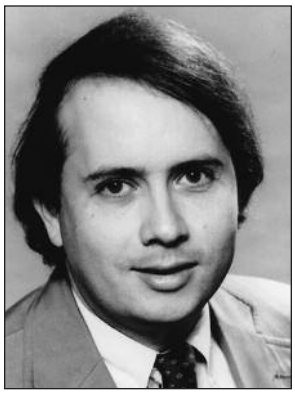
The Section's annual business meeting will be held in on Friday morning, June 22, in conjunction with the State Bar Convention, which this year is scheduled for San Antonio. After breakfast and a short business meeting, Professor Marc Steinberg of SMU's Dedman School of Law will present a program on ethics and business litigation (which will qualify for State Bar ethics credit). I hope to see you for breakfast in San Antonio.

In the next few weeks Section members will receive an e-mail survey asking how the Section can improve it services to members. The survey will focus in large part on the Section's annual "Updates" program. I think these programs have been excellent. In particular, our "Conversations with the Regulators" format provides attendees with information and insights that are not available elsewhere. However, I have asked the Council to consider whether the attendance at the program is worth the efforts and expense involved in putting it together. Your feedback is critical to the Council's decision-making process. Please respond promptly when you receive the survey.

Lastly, one of the tasks at the annual business meeting will be to elect new Council members. It is not an idle position; Council members serve a three-year term, and give of their own time to perform the work involved in governing the Section and providing benefits to its members. If you are interested in working as a Council member, or wish to nominate another Section member for a Council position, please let me know and send me a resume or other biographical material. (E-mails and attachments are preferred.) I will forward all materials to the nominations committee, which will be named shortly.

Sincerely,
Justice Jim Moseley
Section Chair
(214) 712-3413
jim.moseley01@5thcoa.courts.state.tx.us

FROM ▪ THE ▪ EDITOR



This issue of the Journal features the annual survey articles on state and federal court class actions. As the articles reflect, in the wake of recent legislative and judicial initiatives, certifying a class has become a daunting, if not quixotic, undertaking.

As always, we solicit written contributions to the Journal. We currently have commitments for annual survey articles on antitrust, securities, RICO, business torts, class actions, D&O and expert witness developments. If you have an idea for a survey article in another area of business litigation, or an article focusing on a particular aspect of or development in the law (even if it falls within one of the broad survey categories), contact me at 112 E. Pecan, Suite 1800, San Antonio, Texas 78205 (210) 554-5282; (210) 226-8395 (fax), amferril@coxsmith.com.

A. Michael Ferrill
Editor

2006 Annual Survey of Texas Class Action Cases

by Mark W. Bayer[1]

The number of cases addressing class action issues in Texas continued to drop this year. In 2006, Texas appellate courts decided only nine cases that substantively addressed Tex. R. Civ. P. 42,[2] down from 13 cases decided in 2005 and 23 in 2004. In three cases, the Corpus Christi Court of Appeals approved class certification. The remaining six cases rejected certification. However, many of the opinions forged relatively new ground in exploring Rule 42(b)(3)'s predominance and superiority requirements. Despite the relatively small number of class action decisions, Texas courts continued to refine Rule 42's application and scope in 2006.

A. Texas Supreme Court Opinions

In 2006, the Texas Supreme Court published only one opinion discussing class issues. In *Cameron Appraisal Dist. v. Rourk*,[3] the court determined whether a class action can be used to circumvent a statutory requirement that taxpayers exhaust administrative remedies before filing a civil action.

A group of taxpayers filed suit against the Cameron Appraisal District for assessing ad valorem taxes against owners of travel trailers in the 2000 and 2001 tax years. The trial court denied certification but the court of appeals reversed. The Supreme Court reversed the court of appeals, holding that the taxpayers were required to exhaust administrative remedies before filing a class action.

Under the Texas Tax Code, a taxpayer contesting property taxes is required to pursue administrative remedies. Failure to do so "deprives the courts of jurisdiction to decide" ad valorem tax matters.[4] Thus, by granting class certification, the court of appeals "allowed taxpayers to bypass the statutorily required administrative remedies."[5] As such, the court of appeals erred by granting certification and allowing the plaintiffs to circumvent administrative procedure, and the Supreme Court reversed the ruling granting certification.

B. Court of Appeals Opinions Denying Certification

As in every year since the Supreme Court decided *Southwestern Refining Co. v. Bernal*[6] in 2000, opinions denying certification predominated. In 2006, five of the eight courts of appeals addressing class issues denied certification. For example, in *Clark v. Strayhorn*,[7] the Austin Court of Appeals followed the teaching of the Supreme Court's 2004 opinion in *State Farm Mut. Auto. Ins. Co. v. Lopez*[8] by approving the trial court's treatment of dispositive issues before ruling on certification.

In *Clark*, the plaintiffs filed suit claiming that the Comptroller's failure to pay interest on returned unclaimed property was an unconstitutional taking. Subsequently, they moved to certify a class of persons who received over $100 pursuant to the Unclaimed Property Act. At the certification hearing, the State's expert testified that no interest was earned on the unclaimed property because it was placed into an account with a negative balance. As such, the district court found that the plaintiffs failed to state a viable takings claim and denied certification. The court of appeals found that the Unclaimed Property Act does not require the State to pay interest to the owners of unclaimed property and affirmed the district court's denial of certification.

The court of appeals concurred with the trial judge's reliance on *State Farm Mut. Auto. Ins. Co. v. Lopez*.[9] In *Lopez*, the Supreme Court held that "case dispositive issues, such as might be raised by special exception or a motion for summary judgment, should be resolved before a court considers the question of class certification under Rule 42."[10] The court of appeals noted, however, that it would be inappropriate to decide the merits of the case before determining whether a class should be certified. Consequently, the trial court was correct to consider "prior rulings on the State's motion for summary judgment before ruling on class certification."[11] The court affirmed the district court's entry of summary judgment and denial of class certification.

In *Hotels.com, L.P. v. Canales*,[12] the San Antonio Court of Appeals reversed a decision certifying a nationwide class. Reservation purchasers filed a class action suit against Hotels.com alleging breach of contract. The trial court certified the class, finding that it met the requirements of Rules 42(a) and 42(b)(3).

Hotels.com contracts with hotels throughout the country at a special negotiated rate. Persons who make reservations at a specific

hotel through Hotels.com pay a "published [room] rate" that is higher than the negotiated rate Hotels.com pays.[13] The nature of the breach of contract action focused on the addition of a surcharge to the published rate. In addition, the purchasers are notified of a User Agreement that contains "both an arbitration provision and a Texas choice of law provision."[14] While the named plaintiff purchased a reservation over the telephone, the majority of the class used the Internet to make their reservations. Internet purchasers view the User Agreement prior to finalizing their purchase, but telephone purchasers are mailed a written confirmation referring to a link at Hotels.com where they can access the User Agreement.

On appeal, Hotels.com contended that the trial court did not adequately apply *Bernal's* "rigorous analysis" standard to determine whether the named plaintiff met the typicality requirement.[15] Specifically, it argued that "rigorous analysis of typicality and even commonality requires a review of the potential enforceability of the arbitration provision contained in the User Agreement."[16] At an earlier hearing, the trial court determined that telephone purchasers were not subject to the arbitration clause because they purchased reservations without first being furnished a copy of the User Agreement. The trial court did not, however, determine whether the arbitration clause applied to the Internet purchasers. Hotels.com argued that if the User Agreement provided sufficient notice of the arbitration clause to even some of the Internet purchasers, the named plaintiff could not be typical of the class.[17]

Further, the court of appeals noted that in addition to the rigorous analysis standard, Rule 42(c)(D) requires courts granting certification pursuant to Rule 42(b)(3) to state: "other available methods of adjudication that exist for the controversy" and "why a class action is or is not superior to other available methods for the fair and efficient adjudication of the controversy."[18] The court of appeals held that the trial court's failure to determine whether the User Agreement applied to the Internet purchasers fell short of the required analysis mandated by *Bernal* and Rule 42(c)(D) as to the issue of typicality. Consequently, "the possibility of antagonism within the class exists," and the trial court's certification was an abuse of discretion.[19] The class certification was reversed and the case was remanded for further proceedings.

The Fort Worth Court of Appeals decided whether a trial court abused its discretion by granting certification of a nationwide class of insureds in *All Am. Life & Cas. Ins. Co. v. Vandeventer*.[20] The named plaintiff filed suit on behalf of approximately 500 insureds for breach of contract against All American Life & Casualty Insurance Company. The plaintiff alleged that American Insurance Company of Texas, a subsequent purchaser of All American's farmers' and ranchers' disability insurance, breached contracts with the putative class members when it notified them it was "canceling their policies and denying any return of premiums for that ten-year period."[21] In 2000, the trial court denied the plaintiff's application for class certification and granted All American's motion for summary judgment. On appeal, the court of appeals reversed the summary judgment and remanded. On remand, the trial court granted class certification. Subsequently, All American brought an interlocutory appeal challenging the certification decision.

All American argued that the class representative failed to establish numerosity pursuant to Rule 42(a) and predominance pursuant to Rule 42(b). The Fort Worth Court of Appeals reversed the certification upon finding that the trial court failed to conduct *Bernal's* rigorous analysis test.[22] Particularly, the court held that the trial court must determine the appropriate choice of law for each class member before ruling on the predominance issue. Consequently, the court of appeals reversed the class certification and remanded.

With regard to the numerosity issue, All American did not dispute that numerous class members existed. Rather, it argued that the class members' claims were barred by the relevant statute of limitations and that the numerosity component could not be met. The court of appeals, however, refused to review the limitations issue in the interlocutory appeal. The court noted that "a defendant moving for a summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense, including the accrual date of the cause of action."[23] Such issues are typically dealt with on direct appeal, rather than interlocutory appeal.[24] Consequently, the court did not assess the validity of the defense and overruled All American's first issue on appeal.

The court did, however, find in favor of All American with regard to the predominance issue. Rule 42(b)(3)'s predominance requirement "prevent[s] class action litigation when the sheer complexity and diversity of the individual issues would overwhelm or confuse a jury or severely compromise a party's ability to present viable claims or defenses."[25] A court must establish the commonality of substantive issues that will likely be outcome determinative to determine which common issues predominate. Consequently, "[c]hoice of law issues must be resolved for the trial court to accurately make its predominance determination."[26] Here, the trial court failed to "conduct an extensive state-by-state choice of law analysis before determining factual predominance, superiority, cohesiveness, and even manageability."[27] As a result, the court sustained All American's second issue. The trial court's decision granting class certification was reversed, and the matter was remanded.

The Fort Worth Court of Appeals also denied certification in *Ridgeway v. Burlington N. Santa Fe Corp*.[28] The court determined that the trial court did not abuse its discretion by refusing to deny class certification to a group of shareholders alleging negligence per se, common law negligence, breach of contract, and breach of fiduciary duty.

The appellants, a group of Burlington North shareholders, appealed an order denying class certification in a suit against Burlington Northern Santa Fe Corp. and the Burlington Northern and Santa Fe Railway Company (collectively, "BNSF"). In 1988, BNSF made a $4.7 billion distribution to its shareholders in an

attempt to prevent a hostile takeover. Portions paid out of the company's earnings and profits were taxed to the shareholders as ordinary income. Parts of the distributions that exceeded earnings and profits, however, were treated as non-taxable returns of capital and credited against the shares' basis. Consequently, these payments reduced "the investment deducted from the sales price of the shares for tax purposes in the event the shares were sold" and the shareholders claimed that taxes were overpaid.[29] The shareholders filed suit alleging negligence per se, common law negligence, breach of contract, and breach of fiduciary duty, and moved for class certification. The trial court denied certification, and the court of appeals affirmed.

In denying certification, the trial court held that although Delaware law would apply to the substantive issues, the class certification issue was governed by Texas law, and the shareholders failed to meet Rule 42's elements because common issues did not predominate and the actual damages issues were not manageable. Before discussing the merits of the case, the court of appeals noted that under Texas law, a trial court is not required to grant certification, even where the plaintiff proves all of the elements of Rule 42. Thus, parties challenging an order denying certification have the "formidable task" of demonstrating that Rule 42's requirements were met and that the trial court's denial of certification was "legally unreasonable under the facts and circumstances of the case."[30]

The trial court held that the shareholders failed to establish predominance because the issue of actual damages was unmanageable and common issues would not predominate over individual concerns. On appeal, the shareholders attempted to satisfy the predominance element by arguing for the certification of the class as either a nominal damages class or a liability-only class, and argued that damages should be determined by an aggregate damages model. The court rejected each argument.

First, although nominal damages are available for Delaware breach of contract and breach of fiduciary duty claims, they are not available for negligence claims. Under negligence per se and common law negligence, the plaintiff must prove actual damages. Thus, each class member would have the burden of proving that BNSF's conduct caused actual damages. As such, common issues could not be said to predominate over individual issues. While certifying a nominal damages class could be feasible with regard to the breach of contract and fiduciary duty claims, the trier of fact would still encounter difficulties determining actual damages for the individual class members in the two negligence related claims.

Next, the shareholders argued that certification as a liability-only class would be appropriate pursuant to Rule 42(d)(1). The court disagreed. "[W]hen appropriate . . . an action *may* be brought or maintained as a class action with respect to particular issues."[31] Thus, Rule 42(d)(1)'s permissive language does not require the court to certify subparts of a cause of action. Further, the court held that certifying a liability-only class would not settle the damages issues previously discussed. After resolving the liability issues, the court or jury would still have to determine the individual damages issues. "If, after common issues are resolved, presenting and resolving individual issues is likely to be an overwhelming or unmanageable task for a single jury, then common issues do not predominate" and certification is inappropriate.[32]

Finally, the court discussed the shareholders' assertion that the trial court should have used an aggregated damages model to calculate class-wide damages. The shareholders claimed that the use of such a model incorporating statistical evidence could be employed to demonstrate by how much the total taxes were overpaid. The court, however was concerned that an aggregate damages model would "improperly shift the burden of proof to BNSF" to prove causation and damages.[33] Under Delaware law, the plaintiff must prove causation and actual damages. Due to various "highly individualized factors" concerning which class members were over or under-paid, BNSF would essentially be required "to prove that some class members were not damaged at all by the alleged misreporting and that other class members' damages were less than those calculated by the model . . . ."[34] Class action devices, the court held, cannot be employed in such a manner as to shift a party's burden.

Consequently, the court held that in light of the manageability issues concerning actual damages, the trial court did not abuse its discretion by denying the shareholders' motion for class certification.

In *Rodriguez v. Medicredit.com, Inc.*,[35] the Corpus Christi Court of Appeals affirmed a trial court's order denying certification. John Rodriguez filed suit against Medicredit.com, Inc. alleging that the company violated the Texas Finance Code by attempting to collect a debt from him. Rodriguez attempted to certify two potential classes, the trial court denied certification, and Rodriguez brought an interlocutory appeal.

First, Rodriquez argued that the court of appeals did not have jurisdiction to hear the appeal because the order denying certification did not comply with Rule 42(c)(1)(D), which states that an order lacking findings and explanations is not a final order that can be appealed. The court disagreed, noting that Rule 42(c)(1)(D) "only applies to an order granting or denying certification under [R]ule 42(b)(3)."[36] Rodriguez alleged that the class could be certified pursuant to either Rule 42(b)(2) or Rule 42(b)(3). The order simply stated that the motion was denied, and did not specify the subsection upon which the court relied. Thus, Rodriguez failed to show that Rule 42(c)(1)(D) applied. Further, the court noted that "any failure to fully comply with the requirements of the rule does not affect the finality of the order" or the court's jurisdiction.[37] The Texas Civil Practice and Remedies Code states that an appellate court has jurisdiction over interlocutory appeals certifying or denying a class.[38] Although a trial court's failure to include findings and explanations may be an abuse of discretion, it does not strip an appellate court of jurisdiction. Thus, the court held that it had jurisdiction to consider the appeal.

Second, Rodriguez argued that the denial of certification was an abuse of discretion. Rule 42 states that a court "may" certify a class if all of the requirements of the rule are met.[39] Thus, "[e]ven in circumstances where the granting of certification may have been proper, denial of certification is not necessarily an abuse of discretion."[40] The party claiming abuse of discretion has the burden of showing that the evidence contradicts any rationale the trial court could use to deny certification. Rodriguez argued that he supplied the trial court with all of the evidence needed to grant certification. Nevertheless, he failed to detail what evidence supported this assertion and how it favored certification. Consequently, the court held that Rodriguez failed to meet his burden and it affirmed the trial court's denial of certification.

C. Court of Appeals Opinions Approving Certification

As in 2005, the Corpus Christi Court of Appeals was the only Texas appellate court to approve certification of a class action, doing so in three cases. In *Magic Valley Elec. Coop. v. City of Edcouch*,[41] the City of Edcouch brought suit on behalf of itself and 26 municipalities against Magic Valley, an electric utility company. The suit alleged that Magic Valley miscalculated a series of statutory franchise fees and underpaid the municipalities. The trial court certified the class, holding that the plaintiffs met the requirements of Rule 42(a) and (b). Magic Valley filed an interlocutory appeal and the court of appeals affirmed.

After holding that the city had standing to sue, the court considered whether the plaintiff adequately established the numerosity, typicality, commonality, and adequacy requirements of Rule 42(a). The majority of the court's discussion, however, focused on the numerosity and adequacy requirements. "To satisfy the numerosity requirement, the proposed class must be so numerous that joinder of all members is impracticable."[42] The court noted that the test for numerosity considers the size of the class, judicial economy, geographical concerns, the cause of action, and whether the individual members of the class "would be unable to prosecute individual lawsuits."[43] The court of appeals held that the city adequately established numerosity because: (1) the city and the municipalities were spread throughout three counties that covered approximately 4,000 square miles; (2) the smaller members of the class would not likely prosecute their claims due to the costs of litigation and their limited resources; and (3) joinder would be impracticable due to the inefficiency of litigating the common issues in 27 individual claims.

With regard to Rule 42(a)'s adequacy element, Magic Valley argued that the City, as class representative, was unfamiliar with the class members and their claims and that there was a potential conflict between the members of the class. The court stated that there is no requirement that the class representative "know in advance all the members of the class" and that classes containing unknown or potential members have been certified in the past.[44] Furthermore, the class counsel knew the identity and potential claims of all the class members because all of the class members were identified through discovery. The court noted that case law required a representative who could zealously prosecute the class claims and provide "personal knowledge of the facts underlying the complaint."[45] At the certification hearing, the city manager demonstrated she was sufficiently familiar with the facts of the City's complaint and detailed the actions class counsel took in prosecuting the class claims.

As to the possibility of conflict between the City and class members, the court stated that "[a] conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status.[46] Magic Valley suggested there was a possibility of conflict, but it did not present evidence indicating an actual conflict between the City and the class members. Speculation, the court noted, will not substitute for evidence of actual conflict. Consequently, the court held the City was an adequate class representative.

Magic Valley also argued that the trial court erroneously held that the City satisfied Rule 42(b)(3)'s predominance and superiority requirements. The court noted that the predominance issue focuses on whether individual substantive issues engulf the common underlying question. Here, however, the single substantive issue to be addressed was whether Magic Valley undercalculated the statutory fees it owed to the class. Although the amount of damages could differ for individual members of the class, "the underlying issue would be resolved in exactly the same way for each class member."[47] Consequently, the class representative adequately established predominance.

Finally, the court found that a class action would be the superior method of adjudication. Magic Valley argued that the better alternative to class certification would be a joinder of all plaintiffs. A class action, however, would prevent duplication of litigation costs, result in fewer management problems that would result from the joinder of the 27 municipalities, and generally increase efficiency in light of limited judicial resources and the resources of the municipalities. Thus, the court overruled Magic Valley's Rule 42(b)(3) appeal. The trial court's decision to grant class certification was affirmed.

The Corpus Christi Court of Appeals also affirmed certification in *Stonebridge Life Ins. Co. v. Pitts*.[48] The defendants, a life insurance company and its marketing service groups, brought an interlocutory appeal of a trial court order granting class certification. The defendants marketed and sold life insurance policies to individual consumers. In doing so, they called consumers whose information was purchased from third parties and used a standardized telemarketing script to offer insurance policies. The plaintiffs claimed that they were never told that their credit cards would be automatically billed if they failed to withdraw from the plans after the trial period. Consequently, the plaintiffs filed suit asserting the claim of money had and received and the trial court certified a class of Texas consumers.

The defendants appealed, arguing that the plaintiffs failed Rule 42's predominance, superiority, and typicality requirements. Additionally, they argued that the trial court failed to conduct *Bernal's* rigorous analysis.[49]

The court of appeals noted that the test for predominance under Rule 42(b)(3) was whether "common or individual issues will be the object of most of the efforts of the litigation."[50] Thus, "judgment for the named plaintiffs should settle the entire controversy, and all that should remain is for other class members to file proofs of claim."[51] Despite the use of a standardized script to market the policies, the defendants argued that individual questions of consent to automatic billing predominated over the common issues.

Rule 42(b)(3) requires that common issues predominate, but it does not mandate that all issues must be common to the class. The court found that the equitable nature of the defendants' reliance on the plaintiffs' enrollment in the trial program to automatically bill their credit cards predominated over individual issues of consent. Thus, the plaintiffs satisfied the predominance requirement.

Next, the court considered whether the trial court conducted the rigorous analysis required by *Bernal*. Rule 42(c)(1) requires that an order granting certification show:

(i) the elements of each claim or defense asserted in the pleadings;

(ii) any issues of law or fact common to the class members;

(iii) any issues of law or fact affecting only individual class members;

(iv) the issues that will be the object of most of the efforts of the litigants and the court;

(v) other available methods of adjudication that exist for the controversy;

(vi) why the issues common to the members of the class do or do not predominate over individual issues;

(vii) why a class action is or is not superior to other available methods for the fair and efficient adjudication of the controversy; and

(viii) if a class is certified, how the class claims and any issues affecting only individual members, raised by the claims or defenses asserted in the pleadings, will be tried in a manageable, time efficient manner.[52]

After reviewing the contents of the trial court's certification order, the court determined that the order satisfied the rule.

Before moving to the issue of superiority, the court considered whether the trial plan afforded the defendants their due process right to "take appropriate discovery of absent class members and to present evidence at trial reasonably calculated to defeat the class members' claims."[53] Money had and received is an equitable remedy that requires the plaintiff to prove that the defendant holds money that in equity belongs to the plaintiff. The court noted that the defendants possessed all of the information needed to defend a money had and received claim because they held the relevant phone records and confirmation letters.

With regard to superiority, the court observed that the trial court should consider whether a class action is superior to other methods of adjudication such as joinder, intervention, and individual suits. Additionally, a trial court should determine whether: "(1) class members have an interest in resolving the common issues by class action, (2) class members will benefit from discovery already commenced, and (3) the court has invested time and effort in familiarizing itself with the issues in dispute."[54] Where a class action eliminates the threats of inconsistent or repetitive litigation and provides individuals redress for claims that might not be "economically viable," it is superior to alternative methods.[55]

Here, the court found that the plaintiffs' case met all of these requirements. The litigation had been pending over four years, significant discovery had occurred, it would not be economically feasible to bring an individual claim that probably would result in an award of less than $100 each, and a finding of liability or no liability would "efficiently dispose of all members' claims against [the defendants] in a single proceeding."[56] Thus, a class action was the superior method of adjudication.

Finally, the court considered whether the plaintiffs satisfied Rule 42(a)(3)'s typicality requirement. The defendants argued that some of the named plaintiffs were not typical of the class because they either forgot about receiving the original call from the telemarketers or denied the call. At the certification hearing, however, a representative of one of the defendants testified that if a class representative's credit card was charged, one could assume that a licensed agent of the defendant enrolled them on the phone. As such, the recollection of the original call was irrelevant, and the representatives were typical of the class.

Finding that the plaintiffs satisfied Rule 42's predominance, superiority, and typicality requirements, the court affirmed the order granting class certification.

In *Best Buy Co., Inc. v. Barrera*,[57] a class of Texas consumers seeking return of a 15% restocking fee was certified by the trial court. Best Buy imposed the restocking fee on all customers who returned certain categories of products in an opened box. The Corpus Christi Court of Appeals affirmed the certification order.

The trial court found, and the Court of Appeals agreed, that common issues predominated with respect to the plaintiffs' claim for money had and received, despite the fact that Best Buy's affirmative defense of unclean hands might be peculiar to certain class members. The trial court's 23 page trial plan was approved because that court adequately set out, step-by-step, how trial of the common

issues would proceed. A class action was a superior method of adjudication because litigation of the relatively small dollar clams could be resolved expeditiously in a single forum. The court of appeals also found that the named plaintiff would adequately represent the absent class members and asserted claims that were typical of the class.

ENDNOTES

1 Mark W. Bayer is a partner in the Dallas office of Gardere Wynne Sewell LLP. The author would like to thank Nicholas G. Peters for his assistance in preparing this article.

2 This article surveys opinions substantively dealing with class action issues as of November 30, 2006.

3 194 S.W.3d 501 (Tex. 2006).

4 *Id.* at 502.

5 *Id.*

6 22 S.W.3d 425 (Tex. 2000).

7 184 S.W.3d 906 (Tex. App.—Austin 2006, no pet.).

8 156 S.W.3d 550, 556-57 (Tex. 2004).

9 184 S.W.3d at 909.

10 *Id.*

11 *Id.*

12 195 S.W.3d 147 (Tex. App.—San Antonio 2006, no pet.)

13 *Id.* at 150.

14 *Id.*

15 *Id.* at 153 (citing *Bernal*, 22 S.W.3d at 435).

16 *Id.* at 156.

17 *Id.* at 156.

18 *Id.* at 153 (quoting Tex. R. Civ. P. 42(c)(D)).

19 *Id.* at 157.

20 No. 2-05-016-CV, 2006 WL 742452 (Tex. App.—Fort Worth Mar. 23, 2006, no pet.).

21 *Id.* at *1.

22 *Id.* (citing *Bernal*, 22 S.W.3d at 435).

23 *Id.* at *3.

24 *Id.* (citing Grant Thornton LLP v. Suntrust Bank, 133 S.W.3d 342, 363 (Tex. App.—Dallas 2004, pet. filed)).

25 *Id.* (quoting BMG Direct Mktg., Inc. v. Peake, 178 S.W.3d 763, 777 (Tex. 2005)).

26 *Id.* at *4.

27 *Id.*

28 No. 2-05-253-CV, 2006 WL 2440786 (Tex. App.—Fort Worth Aug. 24, 2006, no pet.).

29 *Id.* at *1.

30 *Id.* at *2.

31 *Id.* at *4 (quoting Tex. R. Civ. P. 42(d)(1)) (internal quotations omitted).

32 *Id.* at *4 (citing *Bernal*, 22 S.W.3d at 434).

33 *Id.* at *5.

34 *Id.* at *6.

35 No. 13-05-00307-CV, 2006 WL 2507443 (Tex. App.—Corpus Christi Aug. 31, 2006, no pet.).

36 *Id.* at *1.

37 *Id.*

38 *Id.* (citing Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)).

39 *Id.* at *2 (citing *Bernal*, 22 S.W. 3d at 439).

40 *Id.*

41 No. 13-05-202-CV, 2006 WL 733960 (Tex. App.—Corpus Christi Mar. 23, 2006, pet. filed).

42 *Id.* at *2 (citing Tex. R. Civ. P. 42(a)(1)).

43 *Id.*

44 *Id.* at *5.

45 *Id.* at *5 (quoting Forsyth v. Lake LBJ Inv. Corp., 903 S.W.2d 146, 152 (Tex. App.—Austin 1995, writ dism'd w.o.j.)).

46 *Id.* at *6.

47 *Id.* at *7.

48 No. 13-05-131-CV, 2006 WL 1360835(Tex. App.—Corpus Christi May. 18, 2006, no pet.

49 *Id.* at *2 (citing to *Bernal*, 22 S.W.3d at 439).

50 *Id.* at *3 (internal quotations omitted).

51 *Id.*

52 TEX. R. CIV. P. 42(c)(1).

53 *Id.* at *5.

54 *Id.* at *7.

55 *Id.*

56 *Id.*

57 ____ S.W.3d ____, 2006 WL 3438521 (Tex. App. – Corpus Christi, November 30, 2006).

2006 Annual Survey of Fifth Circuit Class Action Cases

by Barry M. Golden and Nicholas G. Peters[1]

Barry M. Golden

Nicholas G. Peters

In 2006, the Fifth Circuit Court of Appeals and its various district courts saw moderate activity with regard to class action suits. In all, only 17 cases substantively addressed Rule 23.[2] Attempts to certify classes were split, with certification being granted in six cases and denied in six cases. Five cases discussed the Rule in other respects.

Interestingly, class action suits concerning the Enron scandal continue to flourish while claims stemming from Hurricane Katrina appear to be gearing up. Despite such headline-worthy cases, little changed with respect to Rule 23's interpretation and analysis.

Nonetheless, some new light was shed on a couple of the Rule's more nebulous areas. One district court elaborated on Rule 23(e) settlement issues, and another court determined whether filing a federal class action can toll a plaintiff's individual state law claims. Additionally, all of the rulings provide vital insight into the Fifth Circuit requirements for pleading and arguing class issues.

A. Fifth Circuit Opinions

With respect to class action issues, 2006 was a slow year for the Fifth Circuit. The court made only two rulings substantively addressing class certification, denying certification in one case and granting it in another.

In *Baker v. Washington Mutual Finance Group, LLC*,[3] the court determined whether the district court abused its discretion by certifying the class pursuant to Rule 23(b)(1)(B).

The litigation originated out of a claim against Washington Mutual by individuals who borrowed money and bought insurance from the bank in Mississippi. The plaintiffs alleged that Washington Mutual employed the use of fraudulent and deceitful disclosures to persuade thousands of people to take out worthless loans and insurance policies.

The plaintiffs brought suit and immediately moved for approval of a class settlement. The settlement agreement "establish[ed] a $7 million fund for class members who file claim forms" as opposed to moving for injunctive or declaratory relief.[4] Additionally, the fund assigned $3.5 million as punitive damages and $3.5 million as compensatory damages. The district court approved the settlement and certified the "mandatory punitive damages class under subdivision (b)(1)(B)."[5] Washington Mutual appealed, arguing that certification under (b)(1)(B) was improper.

Washington Mutual conceded that the class satisfied Rule 23(a)'s elements, so the district court focused its analysis on (b)(1)(B). The court noted that the "subdivision is usually applied when a 'limited fund' exists, such that non-class members seeking damages would likely deplete the fund and deprive members of any recovery."[6] Further, the court stated there are three "presumptively necessary" characteristics for "[c]ases in which mandatory class treatment is proper on a limited fund theory": (1) the fund totals are inadequate to pay all of the claims; (2) the entire fund is devoted to the "overwhelming claims"; and (3) the claimants will be "treated equitably among themselves."[7]

Here, the first prong was relevant. Washington Mutual argued that the plaintiffs failed to establish the fund's inadequacy to pay the claims and that they failed to demonstrate "the upper limit" of the fund. The plaintiffs argued, on the other hand, that the $3.5 million punitive damages settlement established inadequacy. The district court noted that Washington Mutual's net worth was plummeting

and that "if the class is not certified, it is likely that tens of thousands of individual lawsuits will ensue."[8]

Ultimately, the Fifth Circuit held that the district court did not abuse its discretion by determining $3.5 million the upper limit, and it affirmed the district court's Rule 23(b)(1)(B) class certification.

Going the other way, the Fifth Circuit affirmed the denial of class certification in *Steering Committee v. Exxon Mobil Corporation*.[9]

In the summer of 1994, a faulty control valve at an Exxon Chemical plant caused an oil leak that ignited, causing a fire that burned for three days. Subsequently, hundreds of suits for various personal injuries and emotional distress claims were filed, and, upon consolidation, the plaintiffs moved for class certification pursuant to Rule 23(b)(3). The district court denied certification, finding that the plaintiffs failed to establish typicality, adequacy, predominance, and superiority as required by Rule 23(a) and (b)(3).

Upon review, the Fifth Circuit concurred with the district court that the plaintiffs failed to establish predominance and superiority. Thus, it did not address Rule 23's other requirements. Consequently, the court began its analysis by examining the predominance issue. At trial, Exxon provided expert witnesses who testified that several primary issues remained unsolved, including those involving exposure, duration, dose, susceptibility to illness, and a variety of other personal questions. In addition, the court noted that "where individual damages cannot be determined by reference to a mathematical or formulaic calculation, the damages issue may predominate over any common issues shared by the class."[10] In this case, the claims for damages could not be determined by such calculation.

The Fifth Circuit continued, noting that the predominance inquiry is "more rigorous than the commonality requirement."[11] As such, the plaintiffs "failed to demonstrate that the class issues of negligence or strict liability predominate[d] over the vastly more complex individual issues of medical causation and damages."[12] The Fifth Circuit concluded that the district court did not abuse its discretion by finding that the plaintiffs failed to establish the predominance element of (b)(3).

Having found that the plaintiffs failed to prove predominance, the court declined to rule on the superiority issue. Nevertheless, it did address the "interrelationship between predominance and superiority."[13] Rule 23(b)(3)'s Advisory Committee notes indicate that "mass accident" cases are not appropriate for class certification because various issues tied to liability and damages would apply to each plaintiff differently.[14] The court found that the predominance of these individual issues nullified "the superiority of the class action device."[15] Thus, it affirmed the denial of the plaintiffs' motion for Rule 23(b)(3) certification.

B. Louisiana District Court Decisions

Louisiana district courts weighed in on class action issues seven times, four of which dealt with classes seeking certification in the wake of Hurricane Katrina. Three such decisions centered on an oil spill caused by Katrina.

In *Turner v. Murphy Oil USA, Inc.*,[16] the court grappled with whether it should grant a motion to certify a class of plaintiffs consisting of homeowners and business owners who suffered damages as the result of an oil spill.

Following Hurricane Katrina, an oil refinery owned by the defendant, Murphy Oil USA, Inc., spilled over 25,000 gallons of oil into a Louisiana parish. Residents and business owners in the parish filed separate suits that were later consolidated. Since the spill, Murphy developed a "settlement zone" and undertook a "massive settlement program with residents of the area near the spill."[17] The EPA also established a modifiable oil spill boundary, based upon its own testing. In their complaint, the plaintiffs alleged a variety of state and common law claims. The plaintiffs moved for class certification on all counts.

The court began its analysis with an overview of the Rule 23(a) elements for class certification. Regarding the first element, numerosity, Murphy argued that its settlement program "greatly reduced the number of potential class members, and that joinder of the existing plaintiffs is not impracticable."[18] The court disagreed, stating that the "numerosity requirement is clearly met in this litigation," citing the number of impacted properties (over 1,800) and the dispersion of the residents following Hurricane Katrina.[19]

Additionally, Murphy argued that since the plaintiffs' homes and businesses suffered varying degrees of oil contamination, they did not meet the commonality requirement. Furthermore, Murphy argued that the proof required for some plaintiffs' personal injury and mental anguish claims would require separate hearings and therefore would not be common issues of law or fact. The court disagreed, noting that Rule 23(a)(2) only required that "one issue's resolution will affect all or most of the potential class members" and that requirement was met in this case.[20] The court cited several issues that would affect all class members in the case, including whether the affected area would experience long-term contamination and whether the defendant had adequate hurricane safety plans. It concluded that "there are enough common issues regarding [Murphy's] liability that class treatment would be appropriate."[21]

As for the typicality requirement, the court noted that typicality "does not require that the claims of the class are identical, but rather that they share the same essential characteristics — a similar course of conduct, or the same legal theory."[22] After evaluating the claims of the six class representatives, the court concluded that their claims

and damages "are fairly similar, if not identical, to the those of other plaintiffs," and that typicality was satisfied.[23]

Shifting to the requirements of Rule 23(b)(3), the court held that to decide the issue of predominance, it needed to examine each of the plaintiffs' claims individually. The plaintiffs' complaint alleged that the torts may be available under the common law of multiple states, making it "impossible for the Court to determine how this count may be tried or whether common issues predominate over individual ones."[24] The court therefore withheld certification on those issues.

Murphy also argued that Rule 23(b)(3) superiority was not met because Murphy's private settlement program was a "superior method of resolving this dispute."[25] The court ruled that the correct analysis was "not whether a class action is superior to an out-of-court, private settlement program," but rather "whether the class action format is superior to other methods of *adjudication*."[26] Under that standard, the court found a class action to be "superior to consolidation of individual cases."[27] As such, the court granted the plaintiffs' motion for class certification.

The Eastern District of Louisiana touched on *Turner* again when it ruled on whether class members should be presented with the opportunity to opt-out of the litigation at its current stage.[28]

After the court certified the class, Murphy filed an appeal under Rule 23(f). In the interim, Murphy petitioned the court to establish an opt-out procedure and provide the class with notice pursuant to Rule 23(c)(2). The plaintiffs objected to the right of class members to opt-out of the litigation as well as the form of notice required.

The first question the court addressed was whether "class members should be provided the opportunity to opt-out of the litigation at this stage."[29] The plaintiffs argued that because an appeal was pending and the class definition was not yet final, class members were not entitled to exclude themselves from litigation. The court disagreed, "find[ing] no legal justification to deny class members the right to exclude themselves from this litigation at this stage, provided they are thoroughly informed of their options and the consequences of their actions."[30] Since an active settlement program was underway, the court felt that class members who wanted to participate "should be notified of the consequences of such participation."[31] The court did not believe the status of the appeal was a cause for concern as such appeals were discretionary only and were not intended to impede the progress of litigation.

Furthermore, the parties disagreed as to the form of the notice required. There are two options for notice: Rule 23(c)(2) notice, which contains detailed requirements and must be the best notice practicable; and Rule 23(d)(2) notice, which provides for discretionary notice on the part of the court, can "contain whatever information the Court believes is important," and is not required to be the best notice practicable.[32] The plaintiffs argued that Rule 23(d)(2) notice was appropriate, but the court disagreed. "Because the Court finds that class members should be allowed to opt-out at this stage, the Court believes that the required notice under Rule 23(c)(2) is appropriate."[33] The court found that potential prejudice to the class members who would exclude themselves without sufficient understanding of the consequences of their actions outweighed any burden upon the plaintiffs to produce a satisfactory Rule 23(c)(2) notice. Hence, the court ordered that Rule 23(c)(2) notice be distributed to class members to afford them the opportunity to opt-out of the litigation.

Finally, the *Turner* court decided whether it should grant the plaintiffs' motion for an order to set aside a percentage of all settlements for class counsels' attorneys' fees and costs.[34] Several of the class members who opted out, as well as some individuals outside the class boundary, filed independent suits. The plaintiffs filed a motion for an order to set aside fifteen percent of the gross of any settlement of represented persons who fell within the class boundary for class counsel's attorneys' fees, and an additional seven percent for class counsel's costs. Murphy and several individual plaintiffs objected. The motion was granted in part and denied in part.[35]

The plaintiffs claimed they were entitled to compensation for common-benefit work in a class action setting. Murphy argued, among other things, that the plaintiffs failed to show their efforts inured to the benefit of the class, and the common-benefit doctrine did not apply. The district court found that Rule 23(d) creates the power for courts to set aside such funds. The court specifically noted that it was "common practice in the federal courts to impose set-asides in the early stages of complex litigation in order to preserve common-benefit funds for later distribution."[36] The court then held that although the plaintiffs' attorneys would eventually need to demonstrate the existence of a common fund to receive payment, they need not do so for the motion to be granted.

Murphy also objected on the grounds that the imposition of a set-aside would burden a plaintiff's right to opt out and the individual's choice of his or her own counsel. The district court found that *In re Linerboard Antitrust Litigation*[37] was persuasive on both issues. Regarding the burden on the opt-out right, the court found that only if the plaintiffs could later prove that their work was for the common benefit, as was the case in *Linerboard*, could they receive compensation from the set-aside funds. This would ensure that any payment received was for work that actually benefited the opt-out plaintiff.[38] Regarding the burden on the individual's choice of counsel, the court applied *Linerboard's* reasoning that the "substantial benefits of consolidation and the appointment of a lead counsel outweighed the lesser interest that a plaintiff may have in obtaining his or her own representation."[39]

Additionally, the court rejected the plaintiffs' "lodestar" formula for the calculation of fees and costs, finding it "difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation."[40] The court chose instead to adopt the percentage-fee

method. Though the district court noted that the Fifth Circuit had "not explicitly adopted the percentage-fee method . . . it [had] not explicitly rejected it either."[41] Nevertheless, the court granted the plaintiffs' motion to set aside attorneys' fees and costs with some modification to the percentage of funds set aside.

Similarly, in *McWaters v. Federal Emergency Management Agency*,[42] a Louisiana district court considered whether to grant class certification to a group of plaintiffs who sued the Federal Emergency Management Agency ("FEMA"). The plaintiffs were a group of Alabama, Louisiana, and Mississippi residents who lost their homes in Hurricane Katrina. They filed suit against FEMA for injunctive and declaratory relief due to the agency's "illegal and unconstitutional denial of housing benefits" and sought certification under Rule 23(b)(1)(A) and (b)(2).[43] The court granted certification pursuant to Rule 23(b)(2).

In summarizing the relevant law as well as the plaintiffs' and defendant's arguments, the court noted that the provisions of Rule 23 are "designed to promote the efficient and economical conduct of litigation."[44] Next, the court summarily ruled that the plaintiffs established all of the elements needed for Rule 23(a) certification.[45] In addition, it found that certification was proper pursuant to Rule 23(b)(2), noting that (b)(2) certification is appropriate where the plaintiffs seek injunctive relief.[46] Ultimately, the court granted certification. Certification was, according to the court, "appropriate to insure that the granted relief will apply to all affected persons."[47] The court used its "substantial discretion" to manage cases by "redefining the class and creating sub-classes, in order to properly manage litigation."[48]

In *In re Educational Testing Service Praxis Principles of Learning & Teaching: Grades 7-12 Litigation*,[49] the class of plaintiffs was a group of test takers who took a test administered by the defendant and received incorrect failing scores. As a result, many of the test takers were unable to timely receive their teaching credentials and could neither remain employed nor gain employment as licensed teachers. The court certified a settlement class and ultimately decided the issue of whether to approve the settlement. The terms of the settlement agreement called for the test administrator to pay the class $11.1 million. Under Rule 23(e), a class action cannot be settled "without the district court's approval."[50] Consequently, the court recognized that it must consider a list of factors to determine whether the settlement "is in the interest of the class, does not unfairly impinge on the rights and interests of dissenters, and does not merely mantle oppression."[51] In the Fifth Circuit, these six factors are:

> (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the factual and legal obstacles to prevailing on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent class members.[52]

The court then considered each factor in relation to the facts of the case.

In regard to fraud or collusion, the court found that there was no evidence that either condition existed in this case. Thus, the court deliberated on the complexity and expense issue. The court noted that the case would not be too document intensive and that the case was not "one of sprawling complexity."[53] Both of these facts weighed in favor of accepting the settlement agreement, especially when coupled with the elimination of litigation delays. The first and second factors tilted in favor of approval.

As for the stage of the proceeding and the amount of discovery completed, the court noted that "the Fifth Circuit has explicitly rejected the proposition that the parties must always undertake extensive formal discovery" before the settlement.[54] Here, however, the parties stated at a hearing that they had participated in enough discovery to be cognizant of the strengths and weaknesses of their cases. The court held that the third factor weighed in favor of settlement.

In considering the factual and legal obstacles to prevailing on the merits, the class counsel admitted in a hearing that the plaintiffs would face "causation and mitigation issues."[55] In addition, the plaintiffs probably would not be able to recover non-contract damages. As a result, these factors favored authorization of the settlement.

With respect to the range of possible recovery, the court noted that it "need not consider recoveries that are beyond the range of the most minimal probability."[56] Thus, it did not have to consider "best case scenarios in the hundreds of millions of dollars."[57] Instead, the court decided to use the median value of the possible individual settlements to determine the range of recovery. Ultimately, it determined the high end of the range was $37 million and the lower end was $11.7 million. This, the court found, leaned toward acceptance of the settlement.

Finally, the court briefly considered the opinions of the class counsel, representative, and absent class members, noting that most were favorable toward the settlement. Ultimately, the court found that thoughtful consideration of the Fifth Circuit factors favored acceptance of the settlement agreement. Thus, the court approved the settlement agreement pursuant to Rule 23(e).[58]

C. Mississippi District Court Decisions

In *Guice v. State Farm Fire & Casualty Co.*,[59] the named plaintiff's Mississippi residence was destroyed in 2005 during Hurricane Katrina. She filed a claim with State Farm, and the insurance company subsequently tendered to her a check for $11,466.39. State Farm refused to pay for the rest of her damages, claiming that they resulted from flooding and were not covered by her policy. The plaintiff filed suit and requested class certification. In limited discussion, the court denied the motion for class certification. Noting that "the nature

and extent of the property damage the owners sustain from the common cause, Hurricane Katrina, will vary greatly in its particulars," the court found that common issues of fact would not predominate over individual questions.[60] In addition, the court held that due to the "variety package" of individual factors that would be fleshed out in litigation, a class action was not the superior method of litigation.[61] The court denied the plaintiff's motion for class certification.

In *Smith v. City of Tupelo*,[62] the plaintiff was arrested by the City of Tupelo for possessing methamphetamine. While in jail, he was in an altercation with a fellow inmate and subsequently broke his jaw. He filed suit against the city asserting various causes of action and moved to certify a class of people who may be arrested by the Tupelo Police Department in the future. After briefly describing the four requirements of Rule 23(a), the court found that the plaintiff failed to establish that the class was so numerous that joinder of all claims would be impracticable. "It is axiomatic that in order to satisfy Rule 23(a)'s numerosity requirement, the plaintiff must 'demonstrate some evidence or reasonable estimate of the number of purported class members.'"[63] The court found that mere conclusory allegations that the class is too numerous do not satisfy Rule 23(a), and therefore denied certification.

D. Texas District Court Decisions

In *Tittle v. Enron Corp. (In re Enron)*,[64] the issue was whether the court should grant the plaintiffs' motion to certify two classes: (1) the Enron Corporation Savings Plan class (the "Savings Plan"); and (2) the Enron Corporation Employee Stock Ownership Plan class (the "ESOP"). The plaintiffs alleged breaches of fiduciary duty relating to the Savings Plan and the ESOP plan against Jeffrey Skilling and Kenneth Lay. The plaintiffs sought class certification pursuant to Rule 23(a) and (b) for the claims stemming from both plans.

After discussing the various prerequisites for class certification under Rule 23(a) and (b), the court wasted little time in holding that the plaintiffs satisfied the "undemanding" tests of numerosity, commonality, and adequacy.[65] The court's discussion regarding Rule 23(a)'s typicality requirement, however, provided more depth. The court noted that the "test for typicality is satisfied if the class representatives' claims or defenses are typical of, but not necessarily identical to, those of the class."[66] The claims, however, "need not be completely identical to satisfy the typicality requirement."[67] In this case, the plaintiffs' Savings Plan and ESOP claims arose from similar allegations of fraudulent behavior. Lay and Skilling allegedly violated their fiduciary duties by misrepresenting "Enron's actual financial condition" and allowing the "the ESOP to invest in Enron stock when they knew or should have known that doing so was not prudent . . . ."[68] Consequently, the court found these allegations met the typicality requirement even though some facts among the individual claimants would differ.

The court then focused its attention on Rule 23(b), finding that the plaintiffs could certify both claims under Rule 23(b)(1)(A) and (B). Rule 23(b)(1)(B) certification, the court observed, is appropriate in cases where there is a charge of a breach of trust by a fiduciary that affects "members of a large class of security holders."[69] The court found that the facts warranted certification under (b)(1)(B). Further, the court found that Rule 23(b)(1)(A) certification was sustainable because the Savings Plan plaintiffs would only be able to recover on behalf of the plan. Thus, the court found that allowing the prosecution of separate actions would lead to inconsistent recoveries among the plaintiffs and prejudice the defendants.[70]

The court declined, however, to grant certification under Rule 23(b)(2). Rule 23(b)(2) class certification is, according to the court, appropriate where injunctive relief is sought and should not apply when monetary relief predominates over other bases of relief. Monetary relief predominates "when the monetary relief being sought is less of a group remedy and instead depends more on the varying circumstances and merits of the potential class member's case."[71] Here, the court noted that the relief sought was "wholly monetary" and that it was "not incidental to any other remedy."[72] Thus, Rule 23(b)(2) certification was inappropriate.

Next, the court determined whether Rule 23(b)(3) certification was appropriate. With little discussion, it noted that (b)(3)'s superiority requirement was met. The court struggled, however, over the predominance issue. To determine predominance, the court recognized that it should "inquire into the substance and structure of underlying claims without passing judgment on their merits."[73] The court found that the plaintiffs can meet the predominance requirement when there is a "common nucleus of operative fact."[74] Here, the court found that the plaintiffs' claims could not be met with respect to the reliance element. Nevertheless, several issues regarding the fiduciary duties of care, prudence, and diversification predominated over individual issues, making the Savings Plan and ESOP claims "amenable to class treatment under Rule 23(b)(3)."[75]

As certification was appropriate under Rule 23(b)(1) and (3), the court endeavored to decide under which theory the class should be certified. Noting "strong precedent" that courts should certify under (b)(1) as opposed to (b)(3), the court opted to certify the class pursuant to Rule 23(b)(1).[76] Subdivision (b)(1) is a "specialized categor[y]" of certification, and is preferable to (b)(3), which is a general means of certification.[77] Thus, the court certified the Savings Plan class and the ESOP class pursuant to Rule 23(a) and (b)(1).

Outside the Enron universe, Texas district courts considered a variety of other class related issues. For example, in *Barrie v. Intervoice-Brite, Inc.*,[78] the plaintiffs filed suit against Intervoice-Brite for violations of sections 10(b) and 20(a) of the Securities Exchange Act of 1934. These violations allegedly stemmed from falsely maintaining the success of a proposed merger. The plaintiffs sought class certification, and the court granted their motion.

At the outset, the court described the various requirements of Rule 23(a) and found that the plaintiffs proved numerosity,

commonality, typicality, and adequacy with little substantive debate.[79] The parties conceded that the numerosity and adequacy requirements were undisputed, and, as for commonality, the court noted that the plaintiffs met the undemanding burden of establishing "at least one common question of law or fact between all potential class members."[80] Additionally, in finding that the plaintiffs met the typicality requirement, the court noted that it calls for "similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent."[81] Thus, the court found that the plaintiffs established Rule 23(a)'s requirements.

Further, the plaintiffs argued that certification was appropriate pursuant to Rule 23(b)(3). Thus, the court engaged in a discussion of predominance and superiority. The court initially noted that the individual plaintiffs' burden to prove reliance on the fraudulent assertions would not meet the predominance requirement. These individual issues would outweigh issues common to the class. The reliance requirement could be met, however, if the plaintiffs demonstrated a "class-wide presumption of reliance permitted by the fraud-on-the-market theory."[82] The fraud-on-the-market theory permits investors to prove reliance to "maintain their fraud claims by 'interpreting the reliance requirement to mean reliance on the integrity of the market price rather than reliance on the challenged disclosure.'"[83] Consequently, the court engaged in a lengthy discussion of the fraud-on-the-market theory and ultimately found that the plaintiffs were entitled to the presumption.[84] Thus, the plaintiffs could satisfy the predominance requirement.

As for superiority, the court stated that "[c]lass actions are considered superior when individual actions would be wasteful, duplicative, present managerial difficulty, and be adverse to judicial economy."[85] Not only would the multitude of legal and factual issues make the filing of hundreds of individual claims wasteful and illogical, but also the resolution of such claims would be economically prohibitive to some individual class members.[86] As a result, a class action lawsuit would be the superior form of litigation. Thus, the district court granted class certification pursuant to Rule 23(a) and (b)(3).

Certification was denied, however, in *Colindres v. Quietflex Manufacturing*.[87] In that case, the plaintiffs proposed three classes for certification: (1) current and former Latino employees who had worked in specific departments at the Quietflex plant for any amount of time since October 10, 1997 and would seek back pay for work not performed; (2) those who would not seek back pay for work not performed; and (3) those who were fired in January of 2000 following a walk-out to protest discriminatory conditions.[88] Quietflex contested class certification on a number of grounds, including the numerosity of the class, commonality, and typicality. In addition, it alleged that because the plaintiffs were willing to forego compensatory damages to achieve class certification, they failed to adequately represent the interests of other members of the class.[89]

Initially, the court noted that few employment discrimination class actions had been certified in the Fifth Circuit since the decision of *Allison v. Citgo Petroleum Corp*.[90] *Allison* dealt with, among other things, the problems of certification in employment discrimination suits when the plaintiffs sought compensatory or punitive damages. There, the court held that "monetary damages predominated over the injunctive relief that plaintiffs sought, precluding certification under Rule 23(b)(2), because the compensatory and punitive damages require[d] individualized proof of injury for each class member."[91] In addition, certification was denied because individualized determinations for monetary damages meant that class issues did not predominate.[92] "Against this backdrop," the court began its analysis with Rule 23(a), noting that the plaintiffs satisfied the numerosity, commonality, and typicality requirements.[93] The requirement of adequate representation under Rule 23(a)(4), however, mandated a more in-depth analysis of the willingness and ability of the class representatives to take control of the litigation and protect the interests of the absent members of the class. The court focused on the representative's decision to forego compensatory damages in order to increase the likelihood of class certification. As the decision not to pursue claims for compensatory damages would likely waive the right of individual class members to pursue such a claim, the court found that the representatives were inadequate because they failed to protect the interests of the absent class members.[94]

Additionally, since a number of the putative class members were former employees, the abandonment of monetary damages in favor of primarily declaratory and injunctive relief could create a conflict between the interests of those members of the class and the representatives. The plaintiffs argued that providing notice and opt-out rights to class members who wanted to pursue individual claims would mitigate such conflicts, but the court rejected this argument. Although finding such measures may alert class members that they can pursue individual damage claims, the court ruled that they "are not a substitute for the adequate, conflict-free representation required under Rule 23(a)(4)."[95]

The court then turned to an evaluation of certification under Rule 23(b), focusing first on Rule 23(b)(2).[96] Although Rule 23(b)(2) does not prevent plaintiffs from seeking monetary damages if the predominant relief is equitable, the Fifth Circuit previously held that monetary relief will always be predominant unless it is incidental to the requested equitable relief.[97] Whether damages are incidental is determined by three factors: (1) whether such damages are of a kind to which class members would be automatically entitled; (2) whether such damages can be computed by "objective standards" and are not based upon intangible differences of each member's circumstances; and (3) whether determining the damages would require additional hearings.[98] Applying those three factors, the court found two problems with the plaintiffs' request to certify the punitive damages. First, the court stated that punitive damages could not be computed without proof of liability to individual class members.[99] Second, punitive damages required a finding that each plaintiff was affected by the challenged policies in the exact same

way.[100] Since the representatives could not claim that the actions of the defendant affected each plaintiff in the same way, the court noted that a separate hearing would have to be held to determine individual damages. Based on these factors, the court found the damages could not be incidental and hence predominated. Consequently, the court ruled that certification under Rule 23(b)(2) was inappropriate.

Finally, the court addressed certification under Rule 23(b)(3) and the more stringent requirements that the plaintiffs prove both predominance of questions common to the class and that class resolution was the superior method of resolving the claim. Regarding the predominance issue, the court immediately rejected certification of the class for punitive damages, again noting the highly individualized and independent proof of injury that would be required for each class member.[101] Since these were "individual issues that [would] predominate over questions common to the class as a whole," the predominance requirement could not be met.[102] Furthermore, the court noted that the parties failed to examine issues relating to manageability and superiority. As such, the class could not be certified under Rule 23(b)(3).[103]

Klein v. O'Neal, Inc.[104] considered whether the plaintiffs could convert their class action suit from an opt-out class under Rule 23(b)(3) to a non-opt-out class pursuant to Rule 23(b)(1)(B). The plaintiffs initially filed a class action lawsuit against manufacturers of a pharmaceutical product ("E-Ferol") that allegedly was not properly researched or tested before its introduction to the market. Originally, the class was certified in 2004 under Rule 23(b)(3). The plaintiffs sought to modify the class to a limited fund class action suit under Rule 23(b)(1)(B), which aggregates claims made by numerous persons against a fund insufficient to satisfy all claims. They alleged that following discovery, more recipients of E-Ferol had been located than anticipated and that the insurance coverage was insufficient to cover the claims.

The district court began by noting that the Supreme Court described classic limited fund actions as "involving 'claimants to trust assets, a bank account, insurance proceeds, company assets in a liquidations sale, process of a ship sale in a maritime accident, and others.'"[105] In addition, the court noted there were "serious concerns about the application of Rule 23(b)(1)(B) to mass tort class actions."[106] The plaintiffs, however, contended that *Ortiz* was distinguishable because it dealt with certification of a settlement class. The district court rejected that argument, stating that "[a]lthough *Ortiz* involved certification of a settlement class, the Court did not limit its discussion of the historical roots of limited fund classes to settlement classes."[107] Additionally, *Ortiz* "strongly admonished lower courts to read Rule 23(b)(1)(B) itself narrowly."[108] Based on these findings, the court concluded "that plaintiffs must demonstrate the 'presumably necessary' characteristics of a limited fund case" detailed in *Ortiz* if they wished to modify their litigation class.[109]

The "'first and most distinctive' characteristic of limited fund is that the totals of the aggregated liquid claims and the funds available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay the claims."[110] Assuming, *arguendo*, that the plaintiffs' claims were liquidated within the meaning of *Ortiz*, the court still found that they "failed to meet the first recognized characteristic."[111] The plaintiffs relied on a calculation of the average settlement value of prior death and non-death claims involving the product to arrive at a total claim value. The court, however, found that the plaintiffs' estimate did "not provide the court any comfortable certainty of the total value of the claims."[112] The value arrived at was "at best, very rough" and the court was unable to reach a sufficiently reliable conclusion regarding the probable total of aggregated liquid damages.[113]

The plaintiffs faced similar problems in computing the amount of funds available to satisfy the claims. The parties disagreed as to the amount available and the plaintiffs did not offer sufficient evidence to support their side of the argument. "In sum, plaintiffs have failed to demonstrate adequately that the aggregate policy limits are insufficient, especially when coupled with the unconvincing evidence" that the plaintiffs provided regarding the total claim amounts.[114] Consequently, "the court decline[d] to convert plaintiffs' class action to a Rule 23(b)(1)(B) limited fund class action."[115]

Finally, in *Newby v. Enron Corporation*,[116] the court decided the issue of whether the *American Pipe* tolling doctrine allows a federal class action to toll a plaintiff's Texas state law claims. Under *American Pipe & Construction Co. v. Utah*[117] and its progeny, filing a Rule 23 class action tolls the statute of limitations "from the time the class action is filed to the time the class certification is denied, as to all purported class members who waited to file suit, not just those who earlier filed motions to intervene."[118] Further, the court noted that a common issue with regard to the tolling doctrine is what relationship an individual claim must have with the claims in the class action suit for the *American Pipe* tolling doctrine to apply. The court found that the tolling doctrine does not undermine a defendant's rights to notice of the claims against him if the individual claims and the class action claims "share a common factual basis and legal nexus so that the defendant would rely on the same evidence and witness in his defense."[119] As applied to this case, the court found that the individual and class action claims shared the same or similar elements and that Enron had notice of the claims against it.

The *American Pipe* tolling doctrine applies, however, to toll individual federal claims where a federal class action is brought. Thus, the court considered whether the doctrine applies to individual state law claims where the plaintiffs file a federal class action. Although Texas courts have adopted the *American Pipe* tolling doctrine, the court found that whether a federal class action can toll state law claims is a question of state law. The court cited a line of Texas state court cases stating that Texas does not recognize cross-jurisdictional tolling of state statute of limitations by a Rule 23

class action. Ultimately, the court held that "the filing of the complex federal *Newby* class action, grounded in federal securities law and involving a not easily discernible class of plaintiffs, *does not toll* the Texas state-law claims" the plaintiffs asserted.[120]

ENDNOTES

1 Barry M. Golden is a partner in the Dallas office of Gardere Wynne Sewell LLP. Nicholas G. Peters is an associate in the Dallas office of Gardere Wynne Sewell LLP. Mr. Golden and Mr. Peters would also like to thank Caleb Patterson (University of Arkansas School of Law, May 2007) for his help on the article.

2 This article surveys opinions substantively dealing with class action issues as of December 15, 2006.

3 No. 05-60572, 2006 WL 2051264 (5th Cir. Jul. 24, 2006).

4 *Id.* at *1.

5 *Id.* at *2.

6 *Id.*

7 *Id.* (quoting Ortiz v. Fibreboard Corp., 527 U.S. 815, 838-42 (1999)).

8 *Id.* at *3.

9 461 F.3d 598 (5th Cir. 2006).

10 *Id.* (page numbers unavailable).

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.* (citing Fed. R. Civ. P. 23(b)(3) advisory committee's note).

15 *Id.*

16 Civ. A. No. 05-4206, 2006 WL 267333 (E.D. La. Jan. 30, 2006).

17 *Id.* at *1.

18 *Id.* at *4.

19 *Id.* at *4.

20 *Id.*

21 *Id.*

22 *Id.* at *5.

23 *Id.*

24 *Id.* at *9.

25 *Id.* at *11.

26 *Id.*

27 *Id.*

28 Turner v. Murphy Oil USA, Inc., No. Civ. A. 05-4206, 2006 WL 286009 (E.D. La. Feb. 6, 2006).

29 *Id.* at *1.

30 *Id.* at *2.

31 *Id.*

32 *Id.* at *1-2.

33 *Id.* at *3.

34 422 F. Supp. 2d 676 (E.D. La. 2006).

35 *Id.* at *6.

36 *Id.* at *3.

37 292 F. Supp. 2d 644 (E.D. Pa. 2003).

38 *Id.*

39 *Turner* 2006 WL at *4.

40 *Id.* at *5.

41 *Id.*

42 237 F.R.D. 155 (E.D. La. 2006).

43 *Id.* at 157.

44 *Id.* at 160.

45 *Id.* at 162.

46 *Id.*

47 *Id.*

48 *Id.* at 163.

49 MDL No. 1643, 2006 WL 2513005 (E.D. La. Aug. 31, 2006).

50 *Id.* at *7 (citing Fed R. Civ. P. 23(e)).

51 *Id.* (quoting Reed v. General Motors Corp., 703 F.2d 170, 172 (5th Cir. 1983)).

52 *Id.*

53 *Id.* at *8.

54 *Id.*

55 *Id.* at *10.

56 *Id.*

57 *Id.*

58 *Id.* at *22.

59 Civ. Action No. 1:06CV1-LTS-RHW, 2006 WL 2359474 (S.D. Miss. Aug. 14, 2006).

60 *Id.* at *5.

61 *Id.*

62 No. 1:05CV266-D-D, 2006 WL 2850525 (N.D. Miss. Oct. 2, 2006).

63 *Id.* at *2 (quoting Pederson v. Louisiana State Univ., 213 F.3d 858, 868 (5th Cir. 2000)).

64 No. MDL 1446, Civ. A. H-01-3913, 2006 WL 1662596 (S.D. Tex. June 7, 2006).

65 *Id.* at *9-12.

66 *Id.* at *10.

67 *Id.* at *11.

68 *Id.* at *10, *12.

69 *Id.* at *14 (citing Fed. R. Civ. P. 23(b)(1)(B) advisory committee's note).

70 *Id.* at *15 (citing In re Williams Cos. ERISA Litig., 231 F.R.D. 416, 425-26 (N.D. Okla. 2005)).

71 *Id.* at *15 (quoting Texaco v. Louisiana Land & Exploration Co., 995 F.2d 43, 44 (5th Cir. 1993)).

72 *Id.* at *16.

73 *Id.* (quoting Robinson v. Texas Auto Dealers, Assoc., 387 F.3d 416, 421 (5th Cir. 2004)).

74 *Id.*

75 *Id.* at *18.

76 *Id.* at *18-*19.

77 *Id.* at *19.

78 Civ. Action No. 3:01-CV-1071-K, 2006 WL 2792199 (N.D. Tex. Sept. 26, 2006).

79 *Id.* at *3-*4.

80 *Id.* at *3.

81 *Id.* at *4.

82 *Id.* at *5.

83 *Id.*

84 *Id.* at *9.

85 *Id.* at *11.

86 *Id.*

87 No. Civ. H-01-4319, 2006 WL 846367 (S.D. Tex. Mar. 31, 2006).

88 *Id.* at *18.

89 *Id.* at *19.

90 151 F.3d 402 (5th Cir. 1998).

91 2006 WL 846367 at *18.

92 *Id.*

93 *Id.* at *20-*22.

94 *Id.* at *24.

95 *Id.* at *25.

96 *Id.*

97 *Id.* (citing *Allison*, 151 F.3d at 412).

98 *Id.*

99 *Id.* at *26.

100 *Id.* at *27.

101 *Id.* at *30.

102 *Id.*

103 *Id.* at *32.

104 No. 7:03-CV-102-D, 2006 WL 325766 (N.D. Tex. Feb. 13, 2006).

105 *Id.* at *2 (citing Ortiz v. Fibreboard Corp., 527 U.S. 815, 834 (1999)).

106 *Id.*

107 *Id.* at *3.

108 *Id.* at *4.

109 *Id.*

110 *Id.* (quoting *Ortiz*, 527 U.S. at 838).

111 *Id.* at *6.

112 *Id.* at *5.

113 *Id.*

114 *Id.* at *6.

115 *Id.*

116 Civil Action Nos. H-01-3624, H-02-4788, 2006 WL 3582139 (S.D. Tex. Dec. 8, 2006).

117 414 U.S. 538 (1974).

118 *Id.*

119 *Id.* at *24.

120 *Id.* at *27 (emphasis added).

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