TEXAS BUSINESS LITIGATION JOURNAL

State and Federal Class Actions

WINTER 2009 ▪ Volume 31 ▪ Number 1

TABLE ▪ OF ▪ CONTENTS

SECTION OFFICERS and COUNCIL MEMBERS

COVER: "Wind Farm, Wildorado, Texas."
Photograph by Larry Gustafson, Dallas.

Publication Layout - State Bar of Texas Graphics Department

Dear Section Members:

I would like to update you on some of the Section's programming activities.

First, the Section presented its first CLE program via teleconference on December 2, 2008. Close to 100 listeners heard Todd Murray provide an update on Delaware fiduciary law, Randy Gordon provide an update on RICO litigation, Andrew Yung provide an update on the stock options backdating litigation, and Peter Stokes provide an update on securities litigation. We're working on a similar program addressing new topics for this Spring.

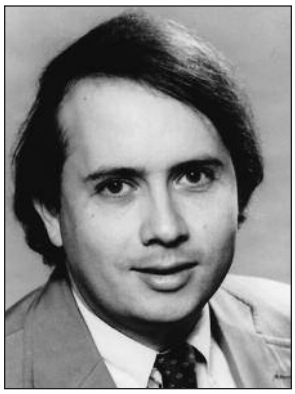
Second, we have a great program planned for the 2009 State Bar Annual Meeting in Dallas on June 25, 2009, from 11:00 a.m. to Noon. Two former United States Attorneys – Don J. De Gabrielle and Richard B. Roper – will be presenting *New Trends in Complex White Collar Crime Enforcement and Corporate Responsibility in a New Administration*. This is sure to be an interesting and informative program, and we hope that you will be able to join us.

The *Journal* continues to provide Section members with valuable news and scholarship covering a wide variety of topics of interest to business litigators. Thanks to Barry Golden and Peter Loh for their annual survey article on class action cases in the Fifth Circuit, and Mark Bayer for his annual survey article on class action cases in the Texas state courts. As always, thanks also to Larry Gustafson for his cover photograph. If you have an article in mind, please contact Mike Ferrill (amferrill@coxsmith.com) – we're always on the lookout for interesting articles touching on any aspect of business litigation.

In closing, I hope that you enjoy this issue of the *Journal* and that you will be able to join us in Dallas at the Annual Meeting.

Best regards,
Bill Katz
Section Chair
214.969.1330
william.katz@tklaw.com

FROM ▪ THE ▪ EDITOR



This issue of the Journal features the annual survey articles on Fifth Circuit and Texas state court class action developments.

As always, we solicit written contributions to the Journal. We currently have commitments for annual survey articles on antitrust, securities, RICO, business torts, arbitration, 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

2008 Annual Survey of Fifth Circuit Class Action Cases

By Barry M. Golden and Peter L. Loh[1]

Barry M. Golden

Peter L. Loh

The Fifth Circuit Court of Appeals and its various district courts saw a dramatic increase in class action activity in 2008.[2] Fifth Circuit courts decided 24 cases in 2008 that substantively address Federal Rule of Civil Procedure 23 ("Rule 23").[3] By way of contrast, Fifth Circuit courts in 2007 decided only 17 cases that substantively addressed Rule 23. In 2007, Fifth Circuit courts certified five classes. Ironically, this year they certified just two.

This year, Fifth Circuit courts addressed Rule 23 issues impacting securities litigation, the Employee Retirement Income Security Act of 1974 ("ERISA"), the Class Action Fairness Act, Vioxx and Fen-Phen drug litigation, prisoners' rights, and immigration law. Like last year, several Hurricane Katrina and Rita-related class action cases made their way onto Louisiana and Mississippi dockets.

Below is a summary of Fifth Circuit, Texas, Mississippi, and Louisiana district court opinions substantively addressing Rule 23. Although few, if any, of these cases substantially alter the Rule 23 landscape, several address some of the Rule's more litigated features, including class certification pursuant to Rules 23(b)(2) & (3). The following cases provide valuable insight into litigating class action issues in the Fifth Circuit.

A. Fifth Circuit Cases

In re Katrina Canal Litigation Breaches,[4] presented two primary issues: (1) whether the Class Action Fairness Act ("CAFA") is applicable to a class action brought by a state and (2) whether the State of Louisiana is immune from removal of a class action it brought to enforce state law.

The State of Louisiana advanced money to Louisiana homeowners under its "Road Home Program" for reconstruction of homes damaged or destroyed by Hurricanes Katrina and/or Rita.[5] The state loaned money to homeowners in exchange for a partial assignment of the homeowner's insurance policy in an amount not to exceed the amount loaned by the state.[6] The individual homeowners retained claims against the insurance company for money owed under the policy that exceeded the sum granted by the state; however, the program granted the state the right to sue the insurer on the insured's behalf for the amount the state had advanced under the program.[7]

The Louisiana Attorney General filed a class action on behalf of the state and its citizens against the defendant insurance carriers for failing to pay insurance claims for which the state was the partial assignee.[8] Louisiana citizens also joined the suit as individual plaintiffs.[9] Several defendants removed the case to district court in the Eastern District of Louisiana pursuant to CAFA.[10] The district court denied the state's motion to remand the case to state court because the minimal diversity required under CAFA was present.[11]

On appeal, Louisiana argued that CAFA was inapplicable to this claim because the state is not a person for diversity jurisdiction purposes and the state never filed a class action as that term is defined in CAFA.[12] The Fifth Circuit found that although the state is not a person for diversity purposes, the addition of private citizens as plaintiffs created the minimal diversity required for removal.[13] Furthermore, the court determined that CAFA applies to any civil action filed under a state statute that authorizes class actions to be brought by a person, and although the state is not considered a person, the statute under which it brought suit authorized a person to bring a class action.[14] Therefore, CAFA applied to this case.[15]

Louisiana also argued that it was immune from removal of the case to federal court.[16] The district court refused to decide whether a state, suing defendants subject to its regulatory authority in state court and under state laws, may have its claim removed to federal court under CAFA.[17] Rather, the court found that the state waived any immunity it could have claimed by adding private citizens as plaintiffs and that any immunity from removal enjoyed by the state could not extend to the citizen class members.[18]

Ultimately, the Fifth Circuit upheld the district court's decision not to remand the case to state court.[19] The Fifth Circuit did, however, remand the case to the district court and suggested it consider whether to split the claims so that the state's claims would be remanded to state court and the private citizens' claims would remain in federal court.[20]

In *Luskin v. Intervoice-Brite, Incorporated*,[21] the Fifth Circuit considered whether the plaintiffs could employ the presumption of fraud on the market in order to satisfy the predominance requirement of Rule 23(b)(3).

The plaintiffs alleged securities fraud against an interactive voice software company, claiming that the company misrepresented the success of its merger with another company in the industry.[22] The district court concluded that the common issue of reliance predominated over individual issues in the case because the plaintiffs could invoke the fraud on the market theory.[23] Accordingly, the district court granted the plaintiffs' motion for certification under Rule 23(b)(3).[24]

On appeal, the Fifth Circuit relied on *Oscar Private Equity Investments v. Allegience Telecom, Incorporated*, a recent opinion unavailable to the lower court when it granted the plaintiffs' certification motion.[25] The Fifth Circuit in *Oscar* held that in order to invoke the fraud on the market presumption, a plaintiff must show loss causation.[26] Loss causation, the Fifth Circuit found in *Oscar*, must be shown by a "preponderance of all admissible evidence" at the class certification stage even if doing so requires consideration of the merits of the case.[27] Thus, the Fifth Circuit vacated the certification and remanded the case to the district court to determine whether the plaintiffs had produced enough evidence to establish loss causation.[28]

In *Reynolds v. New Orleans City*,[29] the Fifth Circuit considered whether a district court abused its discretion in denying class certification of two separate classes of individuals alleging various claims of property damage and civil rights violations arising from the City of New Orleans' mandatory evacuation order after Hurricane Katrina. The first class was to be composed of individuals who incurred property damage after the hurricane because they were denied access to their homes.[30] The second class was to include all people who resided in areas of the city that were not flooded by the hurricane and who allege violations of their Constitutional rights by state agents who enforced the evacuation order.[31]

The district court denied the certification motion based on a finding that the class definition was "illogical" and "unworkable."[32] Specifically, the court found that the class representatives were not typical and did not adequately represent the absent class members.[33] The Fifth Circuit determined that the district court did not commit an error in denying certification because it was clear that individual issues regarding damages, causation, and liability would predominate over any common issues.[34]

McClain v. Lufkin Industries[35] presented the Fifth Circuit with two issues of class action law in the context of alleged racial discrimination against African-Americans at an East Texas manufacturing company. First, the court examined whether the purported class representative had standing to represent the purported class with regard to his disparate impact claims.[36] Second, the court examined whether the district court committed error in denying certification of the plaintiffs' disparate treatment claims.[37]

African-American employees brought Title VII class action claims against Lufkin Industries asserting disparate-impact and disparate-treatment employment discrimination.[38] The district court certified the disparate-impact claims for 700 current and former African-American employees based on Lufkin's "systems of administering hiring, wages, salaries, job assignments, training, evaluations, promotions, demotions, terminations, layoffs, recalls, and rehires."[39] The district court denied certification of the disparate-treatment claims.[40] After extensive pretrial proceedings and a bench trial, the court ultimately awarded the plaintiffs $3.4 million in back pay and attorneys' fees, as well as injunctive relief.[41] Both sides appealed.[42]

On appeal, Lufkin asserted that the plaintiffs had not sufficiently exhausted their administrative remedies, and therefore could not represent the class based on the disparate-impact claims.[43] The court ultimately determined that one of the two named plaintiffs had sufficiently exhausted his administrative remedies.[44] The court, however, also found that neither of the named plaintiffs had worked in Lufkin's Foundry division; therefore, neither could represent the class based on alleged discriminatory assignment of African-Americans to that division.[45] Accordingly, the court vacated the judgment awarding damages and injunctive relief to the class derived from alleged discriminatory assignments to the Foundry division.[46]

Conversely, the plaintiffs claimed the district court committed error in denying certification of their disparate-treatment claims.[47] The district court denied Rule 23(b)(2) certification because the individual monetary damages claims predominated over claims for injunctive and declaratory relief.[48] The district court also denied certification because the class representatives would be inadequate if the class members' demands for compensatory and punitive damages were dropped in "order to protect the 'predominance' of nonmonetary claims."[49]

The Fifth Circuit found no error in the trial court's denial of certification because class members would not have the opportunity

to opt out of the Rule 23(b)(2) class and would be barred from bringing subsequent damages claims.[50] The Fifth Circuit declared that "if the price of a Rule 23(b)(2) disparate treatment class both limits individual opt outs and sacrifices class members' rights to avail themselves of significant legal remedies, it is too high a price to impose."[51]

In *Doiron v. Conseco Health Insurance Company*,[52] the Fifth Circuit reviewed a district court's certification of two sub-classes for abuse of discretion. The named plaintiff, Diana Doiron, filed suit on behalf of approximately 198 Conseco Health Insurance Company policy holders, claiming that Conseco was in breach of its policy obligations.[53] Specifically, Doiron claimed that Conseco had a uniform corporate policy of denying claims under a specific "Radiation/Chemotherapy Benefit Provision" for certain charges that she and other class members incurred as a part of their radiation and chemotherapy treatments.[54] Doiron proposed two sub-classes: (1) policy holders who incurred specific charges as part of their radiation treatment and whose claims were or would be denied by Conseco, and (2) policy holders who incurred specified charges as part of their chemotherapy treatment and whose claims were or would be denied by Conseco.[55] On a motion for class certification, the district court found that the proposed sub-classes satisfied the necessary requirements of Rules 23(a) and 23(b)(3).[56]

On appeal, Conseco argued that the district court committed error because the individuals in the sub-classes either demonstrated a common legal issue or that common issues did not predominate because the court could not determine liability by simply interpreting the language of the Radiation/Chemotherapy Benefit Provision.[57] Conseco argued that, for each sub-class member, the court would have to do a claim-by-claim analysis to determine whether a given claim was denied because it fell under the Radiation/Chemotherapy Benefit provision or some other reason.[58] The Fifth Circuit agreed.[59] The court held that although a sample group of class members all had a claim against Conseco for denying coverage under the Radiation/Chemotherapy provision, it would be impossible to know whether commonality extended to every class member.[60] The sub-classes, as defined, were too broad because they could have included persons who had claims denied for reasons other than not being covered under the Radiation/Chemotherapy Benefit Provision.[61] Accordingly, the court vacated and remanded so that the district court could narrow the sub-classes to include only policy holders whose claims were denied because they were not covered under the Radiation/Chemotherapy Benefit Provision.[62]

In *Robertson v. Monsanto Company*,[63] the Fifth Circuit denied class certification in a case involving a gas release that occurred at a chemical manufacturing plant in Luling, Louisiana on September 18, 1998. Various individuals in the community reported skin and throat irritation, burning eyes and nose, coughing, nausea, and labored breathing after gas drifted off the Monsanto plant grounds.[64] Minnie and Robert Robertson sued Monsanto Company in Louisiana state court for negligence.[65] After an unsuccessful attempt to separate the issues of liability and damages, the plaintiffs amended their state court claims to include class action allegations.[66] Monsanto removed the case to the United States District Court for the Eastern District of Louisiana.[67] The plaintiffs then moved for class certification, and the district court granted the motion.[68] On appeal, Monsanto argued that the district court abused its discretion in granting the plaintiffs' motion for certification because: (1) the plaintiffs lacked standing; (2) the requirements of Rule 23(a) and (b)(3) were not met; and (3) the district court abused its discretion in selecting the class boundary.[69]

The court first addressed Monsanto's standing argument. Rule 23(f) generally allows a party to appeal only the issue of class certification.[70] The court, however, stated that the question of Article III standing is a threshold question that must be resolved before addressing the issue of class certification.[71] Plaintiffs must satisfy three elements in order to have standing: (1) injury in fact, (2) causation, and (3) redressability by a favorable decision.[72]

Monsanto argued, as a threshold matter, that the plaintiffs lacked standing because they did not sustain an "injury in fact."[73] Relying on the Fifth Circuit's decision in *Riviera v. Wyeth-Ayerst Laboratories*, Monsanto contended that the plaintiffs were never exposed to enough gas to cause physical harm, and therefore, they lacked the concrete injury required to establish injury in fact.[74]

In *Riviera*, a nationwide class of purchasers of a prescription pain killer sought to recover damages after the drug manufacturer removed the drug from the market because it caused liver damage.[75] The plaintiffs in *Riviera*, however, did not claim that they were physically injured by the drug.[76] Instead, they claimed economic injury stemming from the manufacturer's sale of defective product and failure to list sufficient warnings.[77] The district court in the *Riviera* case thus concluded that the plaintiffs lacked standing because they failed to show injury in fact.[78] Unlike the plaintiffs in *Riviera*, the *Robertson* plaintiffs brought claims for their own physical injuries.[79] The court therefore concluded that Monsanto's reliance on *Riviera* was misplaced and that the standing requirement did not bar the plaintiffs from pursing this class action.[80]

The court next considered Rule 23(b)'s superiority requirement. Rule 23(b)(3) asks whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[81] The superiority analysis is very fact-specific and varies depending on the circumstances of any given case.[82] In the instant case, the court found that "several facts and circumstances unique to this case ma[de] it clear that the superiority requirement [was] not met."[83] For example, the proposed class was defined to include only individuals who already were named in the Robertsons' original petition, and the district court granted summary judgment in favor of those plaintiffs in a previous proceeding.[84] Since the issue of Monsanto's liability was already resolved on a classwide basis, there was no gain

to be had from using the class action form.[85] The court thus held that the trial court had abused its discretion in granting certification because the unique facts and circumstances of the case precluded a finding that the superiority requirement was satisfied.[86]

B. Texas District Court Cases

Humphrey v. United Way of Texas Gulf Coast[87] dealt with issues concerning whether individuals were members of a court-certified class action. This case arose out of the language of a revised early retirement pension plan that supposedly entitled participants to pension benefits accrued under both an earlier plan and a revised plan.[88] The defendants claimed that the benefits due were only the greater of those owed under the prior or revised plan.[89]

The plaintiff proposed that the class be defined as all participants under the pension plan and their beneficiaries who: (1) had accrued pension under the prior plan, (2) were or would be eligible for early retirement pension, and (3) either received early retirement pension, were eligible to receive early retirement pension, or would become eligible to receive early retirement pension.[90] The court certified the class, finding that the plan applied to the class as a whole and that monetary damages were incidental to the declaratory relief sought.[91]

The parties eventually stipulated that participants who had received either a direct or deferred-vested early retirement pension were members of the class.[92] The parties disputed, however, whether the following participants were part of the certified class: (1) active or former participants currently eligible or who might become eligible for early retirement pension, (2) active or former participants who accrued benefits under the two plans but no longer were eligible to elect an early retirement pension, and (3) participants who received either a normal retirement pension or a late retirement pension.[93]

The court determined that the first category of disputed class members was part of the class because a determination of the proper pension calculation would directly affect their rights.[94] Conversely, the second category of participants was not part of the class because those people would not be affected by the court's determination of the proper pension calculation.[95] Finally, the third category of participants also was not part of the class because those purported class members were not similarly situated to the class representative or eligible for an early retirement pension.[96]

In *Rahim v. Bureau of Prisons*,[97] the court took up the issue of whether to certify a class of prison inmates complaining of conditions during and after Hurricane Rita. In a cursory review of the class action requirements, the magistrate judge conceded that the plaintiffs likely could meet the numerosity requirement of Rule 23(a), but likely would fail to meet the remaining 23(a) prerequisites of typicality, commonality, and adequacy of representation.[98] The magistrate found that the conditions each inmate experienced and the injuries sustained likely varied for each individual inmate, defeating commonality.[99] The magistrate further held that the class representative's claims most likely were not typical of the other class members.[100] Finally, the court found that the *pro se* inmates could not adequately represent the interests of the entire class.[101]

In *Broadhead Limited Partnership v. Goldman, Sachs & Company*,[102] the court addressed whether to certify a class of investors claiming that the defendant violated the Investment Advisers Act ("IAA") by failing to disclose all material facts regarding the purchase and sale of bond investments. The plaintiff was a business entity seeking to represent a nationwide class of current and former investors who entered into investment advisory agreements with the defendant, Goldman, Sachs & Company.[103] The plaintiff claimed that Goldman Sachs failed to disclose markups and markdowns on bond purchases and sales to class members, and that those failures to disclose constituted a violation of the IAA.[104] The IAA provides only a limited private right of action, and primarily vests the power to enforce the statute in the SEC.[105] This limited private cause of action allows only for rescission of the contract and restitution of any consideration given, less any value conferred by the violating party.[106] The plaintiff sought this remedy.[107]

In addressing certification, the court cursorily addressed the Rule 23(a) prerequisites of numerosity, commonality, and typicality, and found that the plaintiff could fulfill its burden under each of these subsections.[108] The court then assumed, for the purposes of the opinion only, that the plaintiff could adequately represent the interests of the absent class members.[109] Despite this assumption, the court expressed concerns regarding the remedy sought, *i.e.* rescission of the contracts, and its effect on the adequacy prerequisite.[110]

The court noted that the plaintiff was only a client of the defendant for a short period and had terminated the relationship years prior to filing suit.[111] Accordingly, an inter-class conflict existed because the plaintiff sought rescission of the investment advisory agreements while other class member with no standing, and ongoing relationships with the defendant might not wish "to have their contracts rescinded."[112] Despite this threat of inter-class conflict, the court inexplicably did not deny certification on this ground.[113]

The court next addressed the Rule 23(b)(3) requirements of predominance and superiority.[114] The court noted that, aside from rescission of the investment agreements, the plaintiff also sought restitution of the class members' fees less the value of the particular advisor's services.[115] This damages claim would require "'separate mini-trials' of an overwhelmingly large number of individual claims," defeating predominance.[116] Thus, the court denied certification.[117]

In *Finley v. Washington Mutual Bank*,[118] the court examined whether a class should be certified under Rule 23(b)(1) or (b)(3) for claims of wrongful loan processing and collection practices against a number of lenders. The *Finley* court reviewed a magistrate judge's report and recommendation to deny certification in a class action

against a number of lenders for wrongful loan processing and collection practices.[119]

The district court found that the plaintiff's motion for certification was "conclusory" and did not satisfy the Rule 23(a) prerequisites or any of the 23(b) requirements.[120] Specifically, the plaintiff's claim that "there are potentially hundreds of thousands of consumers" was insufficient to meet the numerosity requirement of Rule 23(a)(1) because it did not provide a reasonable estimate of the number of purported class members.[121] Second, a "blanket statement" of typicality did not satisfy Rule 23(a)(3) because "too many potential unique defenses and legal theories that could be implicated by any classwide claims regarding [the] alleged wrongful loan processing and collection practices."[122] Third, the plaintiff's adequacy showing was insufficient because it failed to demonstrate class counsel's experience and ability to represent the interests of the class.[123] The court noted its duty to review the adequacy of class counsel under Rule 23(g) as part of a comprehensive adequacy analysis.[124] Finally, the plaintiff failed to show that a "limited fund" existed or that individual issues would not predominate at a class action trial.[125] Accordingly, the plaintiff failed to satisfy either Rule 23(b)(1)(B) or (b)(3).[126]

In *City of San Antonio v. Hotels.com*,[127] the court certified a class of 175 Texas municipalities against online travel companies that had allegedly been paying less than the required hotel taxes pursuant to ordinances enacted by the municipalities. Specifically, the defendants entered into contracts with hotels in the municipalities, negotiated wholesale rates, determined mark-ups, set retail rates that customers would pay, and then sold the rooms to customers.[128] This arrangement was of particular importance because the municipal ordinances applied only to persons "owning, operating, managing, or *controlling* any hotel."[129] The defendants then paid taxes on the wholesale rate, rather than the retail rate charged to customers.[130] The municipalities alleged that the defendants underpaid those taxes, and brought claims for reclamation of those taxes and for common law conversion.[131]

The court found that the municipalities satisfied the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation.[132] The fact that 175 municipalities were involved easily satisfied the numerosity requirement.[133] Regarding commonality, the essential issues to the case were (1) whether the defendants were required to collect and remit hotel occupancy taxes based on their "control" over hotel operations, and (2) whether hotel occupancy taxes should be paid on the wholesale rate charged by hotels or the retail rate paid by hotel customers.[134] Because these issues were common to all the defendants and would be determined based on municipal ordinances with the same or substantially similar provisions, commonality of claims and proof existed.[135] The court found typicality to be satisfied as well because the municipalities asserted identical claims "aris[ing] from the same uniform business practice" and sought the same remedy of monetary damages.[136] No conflicts existed between the City of San Antonio or any of the other municipalities, and none seemed likely to arise.[137] Additionally, lead counsel for the plaintiffs were well-versed in complex litigation, and had substantial staff support and financial resources.[138] Thus, the court found that the class was adequately represented.[139]

Regarding the Rule 23(b) requirements of predominance and superiority, the court gave close consideration to several issues.[140] The issue of whether the defendants' alleged "control" of hotel operations was susceptible to common proof for all defendants.[141] The key to this determination was that the defendants' "business practices [were] virtually identical," and could be derived from common sources of proof that would not be different among the class members.[142] Furthermore, the issue of whether the retail amount was "what was taxed" under the ordinances at issue predominated amongst the municipalities despite minor differences in language of the ordinances themselves[143]

The court found damages to be a "simple mathematical formula" for which defendants need only "supply…the numbers": (room mark-up) + (service fees) + (tax rate) = (tax underpayment)."[144] Because individual lawsuits would have "negative value" for small municipalities and because the value of any individual claim would be minimal, a class action provided the superior vehicle for redress.[145] Despite the defendants' claims of the lack of a "nexus" between the defendants and municipalities, that was a non-issue since the defendants had already paid taxes.[146] The only issue was the amount owed.[147] Finally, the court reiterated the well-established principle that municipalities can be members of a class.[148]

In *Meyers v. State of Texas*,[149] the plaintiff sued the state of Texas, the Texas Department of Transportation, and the executive director of the department of transportation, claiming that the $5 charge for handicap parking placards violated federal law prohibiting surcharges on the disabled to cover the cost of guaranteeing non-discriminatory treatment, *i.e.* access to public accommodations. The plaintiff sought to represent a statewide class of plaintiffs.[150] After a prolonged series of litigation over subject matter jurisdiction and the defendants' ability to raise a defense of sovereign immunity, the court finally took up the issue of class certification.[151]

The court found that the plaintiffs satisfied the requirements of Rule 23(a).[152] In doing so, the court observed that the potential class members numbered in the hundreds of thousands, easily satisfying the numerosity requirement in Rule 23(a).[153] The court also found that the same legal claims would be at issue for the entire class and there was adequate representation by counsel.[154]

The court then ruled that the defendants acted similarly towards the entire class by charging each member $5 for a placard.[155] This treatment satisfied the Rule 23(b)(2) requirement that the defendants act in a way generally applicable to the entire class.[156] The court also ruled that Rule 23(b)(3) was satisfied because common issues of law and fact predominated over questions unique to individual class members.[157] Ultimately, the court certified the

class under Rule 23(b)(2) to avoid the notice requirements of Rule 23(b)(3) and to provide greater res judicata effect.[158]

In *Karnes v. Fleming*,[159] the court denied the plaintiff's motion for class certification, in great part due to the inadequacy of the plaintiff to serve as a class representative. This case arose from an earlier class action settlement on behalf of approximately 8,000 persons residing in all 51 jurisdictions of the United States related to the use of the weight-loss drug FenPhen.[160] Karnes was one of those 8,000 persons, and she brought the current action against the attorney who represented them in the FenPhen litigation.[161] Karnes alleged that certain expenses were impermissibly charged to the class members in the underlying FenPhen litigation.[162]

The court found that Karnes did not adequately represent the interests of the purported class because (1) she could not identify any of the expenses she claimed were unreasonable and were impermissibly charged to purported class members; (2) she was only vaguely aware that the plaintiffs in the FenPhen litigation had faced significant challenges to epidemiological evidence; and (3) she was unaware of the financial benefit the attorney who referred her case to the defendant received after the settlement of the FenPhen litigation.[163]

In addition to Karnes' inadequacy as a class representative, the court found that disparate choice of law issues in the contracts between purported class members and the defendant also weighed against class certification.[164] Each purported class member would have sustained his economic damage from the impermissible charges in his own state of residence, and thus the laws of all 51 jurisdictions would be at issue.[165] Additionally, the "multitude of contracts" at issue in the purported class action had significantly different provisions regarding charging of expenses, referral fees, and arbitration requirements.[166] Thus, common issues of law did not predominate.[167] Finally, on reconsideration, the court admonished Karnes' counsel that there were "concerns about whether counsel has consistently demonstrated the type of diligence, zeal, and competence required."[168] Specifically, the motion for reconsideration was based in part on counsel's having initially filed an extraneous document, instead of a reply to the opposition to the motion to certify a class.[169] Karnes' counsel then filed a 93-page reply without first asking permission to file a brief in excess of page limits.[170] After admonishing counsel, the court found the motion to be meritless.[171]

In *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Company*,[172] the court denied the plaintiffs' motion to certify in a securities litigation case. The plaintiffs satisfied Rule 23 as to numerosity, commonality, typicality, and adequacy of representation.[173] The plaintiffs, however, did not meet a factor unique to class action securities litigation: that loss causation must be proven at the class certification stage.[174]

The plaintiffs asserted that, during the period between June 3, 1999 and December 12, 2001, Halliburton Company made material misrepresentations with respect to three issues: (1) the expense of asbestos litigation, (2) changes to Halliburton's accounting methodology and their effect on earnings, and (3) the benefits of Halliburton's merger with Dresser Industries.[175] Using a "fraud on the market" theory, the plaintiffs were required to show that (a) Halliburton made corrective disclosures that both (i) caused a decrease in Halliburton stock value and (ii) were related to non-confirmatory positive statements previously made by Halliburton, and (b) it was more probable than not that this corrective statement, and not any other unrelated negative statement, caused the stock price to decline.[176]

Regarding the asbestos litigation, Halliburton initially estimated its asbestos liability at $30 million in certain SEC filings, financial statements, press releases, and communications with analysts.[177] However, in what the plaintiffs characterized as "partial corrective disclosures" during the class period, Halliburton subsequently reassessed its asbestos liability at over $120 million and shifted reserves in that amount to an asbestos liability fund.[178] The plaintiffs alleged that Halliburton's initial assessment was intended to drive up the value of its stock, and that the subsequent reassessment and reserve-shift drove the stock price down.[179] Refusing to "'infer loss causation' from mere speculation of fraud," the court found that Halliburton's reassessment and reserve-shift merely reflected an adjustment to changes in condition, particularly to higher-than-anticipated jury verdicts in asbestos litigation, rather than fraud on the market.[180]

The plaintiffs alleged that, sometime in late 1997 or early 1998, Halliburton changed its accounting methodology to add cost overruns that Halliburton was unlikely to collect in order to pad its revenues and seem more profitable than it really was.[181] The court found, instead, that the plaintiffs failed to show any earlier, related misrepresentations by Halliburton in regard to the probability of collecting such cost overruns.[182]

The court further found that plaintiffs relied on evidence outside the relevant class period and that Halliburton's higher than expected losses in 2000 did not make earlier profit projections "fraudulent."[183] Specifically, the court reiterated an earlier holding that securities fraud suits cannot be used as an "insurance policy for investors," using hindsight to determine what the market knew and when.[184]

The plaintiffs alleged that Halliburton's initial announcement that the Dresser merger would result in $500 million in savings/profits was fraudulent and that subsequent disclosures of that falsity devalued Halliburton's stock.[185] Specifically, Halliburton subsequently revealed that Dresser would have to be restructured, and certain analysts then readjusted their earnings forecasts for Halliburton.[186] After these announcements, Halliburton's stock value diminished.[187] Once again, the court found that the plaintiffs failed to reveal any fraudulent scheme based on Halliburton's disclosures subsequent to the initial announcement.[188] Rather, just as Halliburton's failure to meet profit projections did not make earlier financial statements "fraudulent," Halliburton's subsequent disclosures that the Dresser merger would be less profitable than expected, and that Dresser would need to be

restructured, did not act as a fraud on the market.[189] In noteworthy language, the court found "that the Fifth Circuit has placed an extremely high burden on plaintiffs seeking class certification in a securities fraud case," and thus the court was "unable to certify the class because of [the plaintiffs'] failure to meet this stringent loss causation requirement."[190]

Albanil v. Coast 2 Coast, Incorporated[191] involved a claim for violation of the Fair Labor Standards Act ("FLSA") concerning overtime compensation. The plaintiffs were 15 current and former Coast 2 Coast, Incorporated employees whose job was to chip away and remove hardened concrete ("chippers").[192] The plaintiffs alleged that the defendant paid all chippers on an hourly basis, but failed to pay them overtime for hours worked in excess of 40 per week or for attending mandatory meetings and traveling to, from, and between worksites.[193] The plaintiffs filed suit for themselves and similarly situated chippers who worked without receiving overtime pay.[194] The plaintiffs also moved for conditional class certification for the group of chippers employed by the defendant in the last three years.[195]

The court first addressed whether to certify the class conditionally and give notice to potential class members.[196] At the notice stage, the decision to conditionally certify a class is "fairly lenient" because the court has minimal evidence at that point.[197] The plaintiff must simply provide the court with some evidence, usually pleadings and affidavits, that the defendants subjected a group of similarly situated potential class members to a "single decision, policy or plan."[198] The plaintiffs can accomplish this by showing three things: (1) there is a reasonable basis for crediting the assertion that aggrieved individuals exist, (2) those aggrieved individuals are similarly situated to the plaintiff in relevant respects, given the claims and defenses asserted, and (3) those individuals want to opt into the lawsuit.[199]

The court held that the *Albanil* plaintiffs met this burden.[200] The defendants admitted that all chippers were subject to the common pay policy of not receiving overtime pay.[201] The existence of the 15 named plaintiffs and the three unnamed plaintiffs established that "aggrieved individuals [existed]."[202] And the plaintiffs, through affidavits, provided a minimal basis that other chippers would join the lawsuit.[203]

The defendant argued that conditional certification was not appropriate because the Motor Carrier Act exempted these employees from overtime pay requirements.[204] The court found, however, that because application of the Motor Carrier Act would address the merits of whether the chippers were exempt from overtime pay requirements, this argument was premature without providing the plaintiffs some opportunity to take discovery.[205]

In *Orozco v. Chertoff*,[206] Ronald Orozco claimed that the Department of Homeland Security improperly denied him a "law enforcement certification" necessary for his application for a "non-immigrant U visa."[207] The "law enforcement certification" states that an alien has been or is likely to be helpful in the investigation of specific criminal activity.[208] An alien may not submit an application for a U visa without the certification.[209]

Orozco voluntarily departed the United States in June 2006 only to return illegally with his brother in April 2007 with the assistance of smugglers.[210] Orozco's brother died after the smugglers abandoned him and Orozco in Texas.[211] Orozco contended that he was eligible for the U visa under 8 U.S.C. §1101(a)(15)(U)(iii) because he was the victim of the smugglers' criminal acts and subsequently cooperated with law enforcement in its investigation.[212]

Among the various claims Orozco brought against the Department of Homeland Security, he also moved for certification of a class action.[213] The court, however, ruled that Orozco could not demonstrate the "typicality prerequisite" due to the "discretionary nature of the issuance of" a law enforcement certification and "the wide range of crimes and associated varied impacts on victims that could possibly lead to" its issuance.[214]

In *Boos v. AT&T, Incorporated*,[215] the court certified two classes in an ERISA benefits action against BellSouth Corporation and AT&T, Incorporated alleging that (1) a benefit known as the telephone concession constituted a benefit pension plan under ERISA; and (2) BellSouth/ AT&T violated ERISA in administering and maintaining the telephone concession plan. The two classes certified were: (a) the "plan claims class," consisting of current employees, former employees, and retirees eligible to receive the telephone concession outside BellSouth/AT&T's local service areas; and (b) the "benefit claims class," consisting of all participants and beneficiaries of the telephone concession plan.[216]

Because both classes were "intricately connected," the court analyzed them together for purposes of Rule 23(a).[217] Both classes satisfied the numerosity requirement because (a) each class was comprised of more than 33,000 members, (b) class members resided in at least three states, and (c) neither party could easily identify all class members.[218] The common question of law facing both classes was "whether the telephone concession for retirees constitutes a pension plan under ERISA."[219] Both classes sought the same relief: a declaratory judgment that the telephone concession was a defined retirement plan, and injunctive relief regarding management of that plan.[220] Because both classes brought the same claims and sought the same relief, and because plaintiffs' counsel was both competent and experienced in class action practice, the class was adequately protected.[221]

The court certified the plan claims class under Rule 23(b)(1) and (2), and the benefit claims class under Rule 23(b)(3).[222] Under Rule 23(b)(1), the court found that separate trials brought in different courts to determine whether the telephone concession constituted an ERISA plan could result in different, perhaps contradictory findings, for plan claims class members. BellSouth/AT&T would then be in

the untenable position of having to provide ERISA benefits to some participants but not others, and similarly situated plaintiffs would be treated differently.[223] Under Rule 23(b)(2), individualized hearings would be fruitless since any remedy granted would be on behalf of the class and paid into the plan.[224]

Under Rule 23(b)(3), the benefit claims class satisfied the requirements of predominance and superiority.[225] Because benefit claims class members sought the same relief under the same legal theories, those issues predominated.[226] Furthermore, because the relief each member sought was relatively small, and small relief is ideally suited to class action treatment, that treatment provided the superior vehicle for these claims.[227] Without providing additional reasons, the court modified its order to grant certification to the benefits claims class under Rule 23(b)(2).[228] Presumably, the court recognized that individualized hearings would be fruitless for that class since any remedy also would be on behalf of the entire class.

In *Mounce v. Wells Fargo Home Mortgage, Incorporated*,[229] the plaintiff alleged claims for misrepresentation, breach of contract, and coercion. Wells Fargo Home Mortgage, Incorporated was the servicing agent for the plaintiff's home loan prior to the plaintiff's declaring bankruptcy.[230] During the bankruptcy, the plaintiff fell behind on her mortgage payments, and Wells Fargo moved for relief from the bankruptcy stay.[231] That motion resulted in an agreed order, in which the plaintiff agreed to pay Wells Fargo's post-petition attorneys' fees and costs in the amount of $600.[232] After paying these fees, the plaintiff brought suit, alleging that Wells Fargo did not actually incur $600 in fees to its attorneys, Brice, Vander, Linden & Wernick, P.C. ("Brice").[233] Instead, the plaintiff argued that Wells Fargo essentially had a pre-packaged scheme in which it charged this amount to all individuals: (1) who had a mortgage loan serviced by Wells Fargo, (2) who filed for bankruptcy in Texas, (3) whose loans Wells Fargo referred to Brice for bankruptcy services, (4) against whom Wells Fargo filed a motion for relief from stay, and (5) from whom Wells Fargo demanded and/or collected fees and costs in connection with the motion for relief from stay.[234]

The court found that the plaintiff had satisfied the four-part test of Rule 23(a).[235] Because the proposed class was estimated to contain between 91 and 400 members spread throughout the four judicial districts of Texas, numerosity was easily satisfied.[236] Regarding commonality, the court found that the breach of contract claim turned on the common issues of "whether the operative language in the putative class members' contracts in fact authorized the fees that were charged, and whether those charges were actually necessary and proper in light of the agreements between Wells Fargo and the putative class members."[237] These common issues would affect the outcome for all, or most, of the putative class members, and therefore satisfied the undemanding burden for commonality.[238] With regard to the fraud claim, the fact that the fees were incurred by the same law firm and billed to Wells Fargo, and that the agreed orders at issue contained essentially identical terms regarding those fees, raised common issues.[239]

Interestingly, the court expressly noted that "coercion" had never been recognized as a distinct cause of action by the Fifth Circuit or the Supreme Court of Texas, and therefore could not serve as the basis for class certification.[240] Because the plaintiff's situation defined the class and because Wells Fargo could not draw any distinction between putative class members' situations, the court found that typicality was met.[241] Finally, Wells Fargo did not challenge the plaintiff's adequacy as a representative of the putative class.[242]

The court certified the class under Rule 23(b)(3), but because the plaintiff's claims amounted to "simply a request for money judgment," rather than true declaratory or injunctive relief, the court found that certification of the class under Rule 23(b)(2) would be improper.[243] In regard to the requirements of Rule 23(b)(3), the court found that three factors clearly favored certification: (1) there was a very small monetary return for individual class members; (2) the litigation was pending before the court for several years, and considerable discovery had already been completed; and (3) litigation in the Western District of Texas was desirable.[244]

A fourth factor—the likely difficulties in managing a class action—required the court to look closely at four sub-factors: (a) whether and how the plaintiffs could prove reliance on the fraud/misrepresentation for the class as a whole, (b) the applicability of the prior, Fifth Circuit decision in *Sandwich Chef of Texas, Incorporated v. Reliance National Indemnity Company*,[245] (c) the determination of damages for class members, and (d) whether Wells Fargo's defenses of waiver, estoppel, and acquiescence would cause individual issues to predominate.[246]

In analyzing the reliance sub-factor, the court found that Texas law did not require direct evidence of each fraud victim's actual reliance and could be established using only circumstantial evidence.[247] In this case, Wells Fargo's use of standard form orders for motions for relief from stay could be used as classwide evidence.[248] Additionally, the common issues of (i) whether Wells Fargo made false representations intending that someone rely on them and (ii) whether Wells Fargo had information that was reasonably likely to reach certain persons and influence their conduct, also predominated over any issues of individualized reliance by particular class members.[249]

The court found that the *Sandwich Chef* decision, which dealt with a "target wing" theory of fraud in a RICO context, was inapplicable to the current case.[250] According to the court, the *Sandwhich Chef* case and concept were inapplicable because RICO fraud requires direct causation between the illegal activity and the harm to the plaintiff.[251] Texas common law fraud contemplates schemes where the misrepresentation is made to third parties in order to cause harm to the intended victim of the fraud, and allows for circumstantial proof of such schemes, thus making *Sandwich Chef* inapplicable.[252]

Finally, damages could be established case-wide by analyzing Brice's bills to Wells Fargo, and plugging that information into a "simple formula" to allocate damages to each class member.[253] Wells Fargo's defenses of waiver, estoppel, and acquiescence did not prevent certification.[254] The uniformity of the agreements between class mem-

bers and Wells Fargo eliminated any issues of individual negotiations, and Wells Fargo's use of the court to induce overpayment of fees was common to the class as a whole.[255]

C. Mississippi District Court Cases

In *Roberts v. FFP Advisory Services, Incorporated*,[256] the court considered whether class certification was proper for a novel cause of action. Under Rule 23(b)(3), the plaintiffs sought certification of a class spanning 38 states and claiming that a group of financial services providers fraudulently misrepresented the viability of an investment product and the insurance backing the product.[257] The plaintiffs settled with two other defendants, agreed to certify a class against another defendant — FFP Advisory Services, Inc. — for one of their claims, and sought certification of all remaining claims against all the remaining defendants.[258]

The plaintiffs advanced what the court deemed a novel claim "based on a new agency/fraud theory that had not been specifically adopted in any state."[259] The plaintiffs claimed they were not required to show that the remaining defendants made any direct misrepresentation or induced any individual reliance on such a misrepresentation.[260] Instead, the plaintiffs argued they only needed to show the remaining defendants made material misrepresentations to FFP.[261] The court, however, noted the Fifth Circuit's disfavor toward litigating novel claims in a class action context.[262] Accordingly, the court denied certification based on Rule 23(b)(3)'s superiority requirement and observed that the efficiencies of class treatment can be squandered when dealing with novel claims since there is greater potential to waste judicial resources than create the efficiencies sought by aggregation.[263]

The district court for the Southern District of Mississippi, in *Middleton v. Arledge*,[264] decided whether (1) two classes of plaintiffs defined as all persons who settled legitimate diet drug cases in first and second Fen-Phen settlements in 2000 ("Fen-Phen I and II"), were adequately defined and clearly ascertainable and (2) the proposed class representatives from Fen-Phen I and II could adequately represent the interests of the entire class. *Middleton* consolidated these issues from Fen-Phen I and II into one ruling.[265] The primary defendants in these consolidated cases, the "Gallagher Defendants," were the attorneys that originally handled these settlements.[266] Both settlements involved two phases: a proof-of-use phase and a damage phase.[267]

During the proof-of-use phase, the Gallagher Defendants took referrals from across the country for potential claimants and forwarded them to the defendant in the Fen-Phen cases.[268] These referrals were supposed to include proof of each claimant's use of the drug; however, it became clear that some proof of use claims were fraudulent and lacked proof by medical records.[269] Next, the Gallagher Defendants negotiated a lump sum settlement for members of the Fen-Phen I and II settlements, respectively.[270] In the damage phase, a special master reviewed the Gallagher Defendants' findings regarding each claimant's proof of use to determine the portion of the lump sum to which each was entitled.[271] The master did not conduct an independent review of each claimant's proof of use, and there were disparities in the awards of identical claims.[272] Finally, the master sent out checks and release forms to all referring attorneys who delivered the checks and secured the releases.[273]

In 2006 and 2007, two separate class actions were filed against the Gallagher Defendants as well as other law firms and attorneys who participated in the settlement process.[274] The first, the Middleton Action, sought relief for a class defined as all persons who settled legitimate drug cases in the Fen-Phen I settlement.[275] The second, the Buschardt Action, involved a similarly-defined class of persons who settled legitimate claims in the Fen-Phen II settlement.[276] Both of the lawsuits alleged that the Gallagher Defendants were liable for breach of their fiduciary duties, negligence, legal malpractice, and unjust enrichment.[277] Both of the suits were based on the central allegation that the Gallagher Defendants and other attorneys involved in the settlement failed to secure the amount of damages that should have been awarded.[278]

The Gallagher Defendants claimed the proposed classes were not adequately defined or ascertainable because they encompassed only those persons who settled legitimate diet drug claims in the Fen-Phen I and II settlements.[279] This definition would require the court to do an independent inquiry into the legitimacy of each purported class member's original claim for damages.[280] The plaintiffs countered that the legitimacy of a plaintiff's claim should be assumed unless the individual had pled guilty to filing a false claim.[281]

The court rejected the plaintiffs' argument and found that a number of fraudulent settlement claims had already gone undetected.[282] Furthermore, the court determined that assuming the claims' legitimacy only perpetuated the fraud.[283] The court also found that the administrative burden imposed on the court by having to review the legitimacy of each claim made the cases inappropriate for class certification.[284] Therefore, the court denied certification due to the lack of an identifiable class, a basic certification requirement.[285]

The court also denied certification based on the plaintiffs' failure to meet the adequacy of representation requirement of Rule 23(a)(4).[286] The court ruled that the proposed representatives of both classes had insufficient knowledge of their claims as well as their duties as class representatives.[287] Therefore, according to the court, the plaintiffs were "simply lending [their] name[s] to a suit controlled entirely by the class attorney," which made class certification inappropriate.[288]

In *Association Casualty Insurance Company v. Allstate Insurance Company*,[289] the plaintiffs sought certification of a class of more than one hundred insurance companies against the insurance company members of the Mississippi Windstorm Underwriting Association (the "MWUA")'s board of directors and their representatives. The Mississippi legislature created the MWUA as "an insurer of last resort to assure an adequate market for windstorm and hail insurance in the coast area of Mississippi."[290] Essentially, by purchasing reinsurance

for its members, the MWUA makes windstorm and hail insurance available to residents of coastal communities in Mississippi who otherwise would not have been able to obtain such insurance in the normal insurance market.[291]

Participation in the MWUA is mandatory, and its members include all insurers authorized to write and engaged in writing property insurance within the state of Mississippi.[292] In 2004, the MWUA's board of directors decided to purchase $175 million in reinsurance per catastrophe, above a $10 million layer of retained losses.[293] Thus, the MWUA was reinsured up to $185 million per catastrophe.[294] The plaintiffs claimed that self-dealing amongst the MWUA members led the defendants to inadequately reinsure risks associated with certain coastal communities.[295] The plaintiffs alleged damages of more than $525 million in under-reinsured losses as a result of Hurricane Katrina.[296]

The court denied the plaintiffs' motion for class certification because the plaintiffs (1) failed to show numerosity and (2) made questionable showings regarding predominance.[297] The numerosity requirement of Rule 23(a)(1) mandates that the class be so numerous that joinder of all members is impracticable.[298] Because there are no "steadfast rules controlling the number of class members required," the numerosity requirement is to be applied to each case based on the specific circumstances.[299] The plaintiffs argued that because their class was over 100 members, numerosity was satisfied.[300] The court pointed out, however, that the Fifth Circuit in *Mullen v. Treasure Chest Casino, LLC* approved a class of 100-150 former casino employees because of the transient nature of employment in the gambling business and the likelihood that some putative class members were dispersed and unavailable for joinder.[301] The plaintiffs failed to show that such factors were present here, and without more detailed allegations, they could not show that joinder of all members was impracticable.[302]

Next, the court examined the predominance and superiority requirements of Rule 23(b).[303] The defendants argued that proving negligence would require individualized inquiries because each plaintiff would have to show reliance to prove that the defendant's breach caused its damages.[304] The court disagreed because generally, reliance is not an issue in a negligent breach of fiduciary duty case.[305] Notably, however, the court acknowledged that, to the extent reliance proves to be an issue arising out of any intentional or fraudulent conduct, predominance would not be met.[306] Accordingly, because the plaintiffs failed to show numerosity and made what the court called "questionable showings" regarding predominance, the court held that the plaintiffs failed to meet the requirements of Rule 23 and denied the plaintiffs' motion for class certification.[307]

In *Robinson v. Wal-Mart Stores, Incorporated*,[308] the court dismissed the class action certification claims against the defendant. This case arose out of an alleged policy of Wal-Mart Stores, Incorporated that required employees to work hours "off the clock," for which they were not paid.[309] The plaintiffs, 289 current and former employees, brought suit against Wal-Mart for alleged breach of contract and conversion of the unpaid wages.[310] The putative class consisted of "all current and former hourly-paid employees of Wal-Mart Stores, Inc. in the State of Mississippi that were employed from May 28, 1999 until the present."[311]

As an initial matter, Wal-Mart challenged subject matter jurisdiction, claiming that the plaintiffs did not satisfy the $5,000,000 amount in controversy requirement for class actions under 28 U.S.C. §1332(d).[312] Specifically, Wal-Mart claimed that, because it could defeat the plaintiffs' claims for conversion, the amounts alleged in those claims could not be counted.[313] The court rejected this argument in favor of the "long-standing rule" that events occurring after suit is filed cannot eliminate jurisdiction.[314] The $5,000,000 minimum amount in controversy was satisfied because the plaintiffs alleged that at least 25,240 members formed the putative class and each expected $420.00 in damages.[315] The court agreed.[316]

In regard to class certification, the court assumed that the requirements of Rule 23(a) were met and instead focused on the requirements of Rule 23(b).[317] Regarding Rule 23(b)(1), which seeks to preserve uniformity of treatment among the individual class members, the court found that "Plaintiffs' breach of contract and conversion claims may result in differing findings of liability and/or damage awards," and therefore were not sufficient grounds for certification.[318] Because the plaintiffs sought primarily (if not entirely) monetary damages, certification under Rule 23(b)(2) was inappropriate.[319]

In regard to the predominance requirement of Rule 23(b)(3), the court analogized the *Robinson* case to *Basco v. Wal-Mart Stores, Incorporated*.[320] The court presiding over the Basco case found the predominance requirement not to be met because Wal-Mart could, and was entitled to, present any of a host of defenses to the claims of each individual plaintiff's claims that he was forced to work off the clock.[321] Additionally, each individual plaintiff would need to present individualized proof of damages, precluding the determination of damages in any simple manner.[322] The result would risk having the class action degenerate into a series of mini-trials, defeating the purpose of the class action as a procedural vehicle.[323] Thus, the court found that the plaintiffs did not meet the predominance requirement of Rule 23(b)(3) and dismissed the class action claims.[324]

D. Louisiana District Court Cases

In *Majoria v. UPS*,[325] the court confronted the issue of whether plaintiffs had properly pled a class action lawsuit under Rule 23(b)(3). The plaintiffs alleged that UPS hired them as permanent full time employees after Hurricane Katrina but later terminated them, reduced their status to part time, or removed them from positions as UPS drivers following the holiday season.[326] UPS filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim for class certification, arguing that the plaintiffs did not adequately plead a class action under Rule 23(b)(3).[327]

The court dismissed the lawsuit based on a number of pleading deficiencies: (1) failure to assert any facts to support Rule 23(b)(3) certification, (2) failure to identify questions of law or fact common to the entire class, (3) lack of sufficient facts in support of the adequacy of representation requirement, and (4) failure to explain why the plaintiffs' claims were typical of the proposed class.[328] Finally, the court found the plaintiffs' allegation that "at least 70 post-Katrina new hires" were affected by UPS' practice to be deficient.[329] Specifically, this allegation failed to allege why joinder of these parties would be impracticable.[330]

Perrin v. Expert Oil and Gas, LLC[331] required the court to consider whether to certify, under Rule 23(b)(3), a class containing two subclasses of different types of fisherman alleging damages arising out of an oil spill. The plaintiffs were crabbers and shrimpers working in parts of the Louisiana coastline affected when a boat struck an oil well.[332] The plaintiffs sought to certify two subclasses of fishermen alleging damage to equipment and subsequent loss of earnings.[333] The defendant oil company, which owned and operated the leaking well, pursued a third-party claim against a boat-towing company.[334] The oil company argued that one of the boat-towing company's boats damaged the oil well, causing the leak and consequently, the plaintiffs' alleged damages.[335]

The plaintiffs sought certification of a class.[336] The court assumed for the purposes of this case that the plaintiffs could meet the "less strenuous" requirements of Rule 23(a), and instead, the court focused its analysis on the requirements of subsection (b)(3).[337]

The court found that the predominance standard is "rather unforgiving" and held that common issues must constitute a significant part of the individual cases.[338] The court ruled that a Rule 23(b)(3) analysis required (i) the identification of substantive issues that would control the outcome and (ii) a determination as to whether such issues were common to the class.[339] This analysis, coupled with the superiority requirement of Rule 23(b)(3), demands a consideration of the case's merits to determine the dominant issues and the superiority of a class action as a procedural device.[340]

In applying these legal standards, the court found that despite the existence of the arguably common issue of the defendant's liability, the remaining negligence elements of causation and damages would require scrutiny of numerous individual factors.[341] The court also noted that the plaintiffs did not suggest how each of the individual issues surrounding the causation and damages elements would be handled on a classwide basis.[342]

The court went on to reference the oft-cited Advisory Committee Note to Rule 23, suggesting that mass accidents are generally not suitable for class action treatment because of the great potential that individual issues will overwhelm and predominate common ones.[343] In relying on this comment, the court articulated the many individual issues that would permeate a trial of the case, including each fisherman's use of the affected portion of the water, efforts to mitigate damages, and intervening or superseding causes that would uniquely affect each fisherman's claim.[344] The court also noted that each fisherman's damages would require individual determination, and that the plaintiffs did not suggest how damage calculations would focus on the class as a whole.[345] Ultimately, the court found that the plaintiffs failed to demonstrate why a class action device was superior to individual determinations of each plaintiff's claim.[346]

In *Phillips v. Severn Trent Environmental Services*,[347] the Eastern District of Louisiana examined a motion to certify a class of people complaining of exposure to contaminated water for five days in 2007. The proposed class included all people living in Plaquemines Parish who used contaminated tap water between May 15, 2007, and May 20, 2007.[348] The plaintiff argued that the proposed class could satisfy any of the 23(b) categories.[349]

The court, however, found the plaintiff's pleadings entirely inadequate and lacking any viable arguments that the class fulfilled the requirements of Rule 23(b).[350] Specifically, the court noted that (1) the pleadings did not allege any entitlement to a limited fund, (2) there was no risk of individual adjudications establishing incompatible standards of conduct for the defendant, and (3) the plaintiff was not seeking declaratory relief.[351] Therefore, the proposed class did not satisfy the requirements for Rule 23(b)(1) or (2). Furthermore, the court found that the plaintiff's pleading did not address the commonality and superiority requirements of Rule 23(b)(3).[352] The court therefore denied the motion to certify.[353]

In *Deemer v. Stalder*,[354] a *pro se* action, a magistrate judge considered whether to recommend certification for a proposed class of prison inmates making claims of inadequate facilities and improper treatment. The magistrate judge found that the plaintiffs failed to satisfy the numerosity, commonality, and typicality requirements of Rule 23(a).[355] Specifically, the magistrate judge focused on the transient nature of inmates in a prison and the fact that only one plaintiff could allege a mental illness or handicap, despite claims of inadequate services for inmates with such disabilities being in the class action complaint.[356]

Most notably, the court addressed Rule 23's adequacy requirement.[357] The court held that a lay person generally cannot serve as class counsel because that person will be unable to adequately protect the interests of the class members.[358] Thus, courts are typically reluctant to certify a class represented by a *pro se* litigant.[359] In this case, the class representative was unable to articulate grounds for certification and therefore was unable to adequately represent the class.[360]

In *Ancar v. Murphy Oil, U.S.A., Inc.,*[361] the court denied the plaintiffs' motion for class certification based largely on the inherent individuality of the plaintiffs' claims. This case arose from a fire at the Murphy Oil, U.S.A., Incorporated refinery in St. Bernard Parish on June 10, 2003.[362] Following the fire, which caused no structural or physical damage outside the refinery itself, residents in the surrounding area made claims seeking payment for property damage

and mental anguish.[363] Fifteen class actions were filed, and they were all eventually consolidated into the *Ancar* action.[364]

The court stated it would assume that the plaintiffs could meet the requirements of Rule 23(a), but found that the plaintiffs could not meet the Rule 23(b) predominance and superiority requirements.[365] The plaintiffs argued that their claims arose from a single defined incident, and they could be managed via a bifurcated trial on liability and damages.[366] The court, however, found that the plaintiffs' claims more closely resembled those in *Steering Committee v. ExxonMobil Corporation*, in which the Fifth Circuit held that "individual issues of damages and causation that are inherent in mass tort actions almost invariably predominate over any issues common to the class . . . especially . . . when the claims at issue are for mental distress and intangible injuries."[367] The *Ancar* plaintiffs' claims were predominantly based on mental anguish and "demonstrated a wide variation in the ways in which different claimants experienced the events," whereas the mental anguish claims in *Turner* were relatively minor.[368] Finally, the court in *Ancar* found that "individualized evidence [would] be required to establish exposures to any ground level emissions from the fire and any effects that were caused," and therefore were not appropriate for classwide treatment.[369]

In *Nguyen v. St. Paul Travelers Insurance Company*, the court granted the defendant's motion to strike class allegations.[370] The dispute arose from a property insurance claim due to damage from Hurricanes Katrina and/or Rita.[371] Specifically, the plaintiffs owned property in New Orleans, Louisiana, and that property was covered by an insurance policy providing that the defendant would "pay the cost to repair or replace" property damaged by a covered loss, including windstorm or hurricane, but would pay "no more than the actual cash value of the damage until actual repair or replacement is complete."[372] In adjusting the plaintiffs' loss, the defendant determined that it would require the involvement of more than three trades (*e.g.* roofer, handyman, carpet installer, etc.) to repair the damage.[373] The defendant, however, did not include general contractor overhead and profit ("GCOP") in its actual cash value payment to plaintiffs.[374] The plaintiffs alleged that this nonpayment breached the insurance contract and constituted bad faith.[375]

Because the parties did not contest the presence of the requirements under Rule 23(a), the court focused on the predominance requirement under Rule 23(b), and determined that individual issues predominated over common questions of law or fact.[376] The court determined that whether an insured's damages indicated the services of a general contractor, regardless of the number of trades involved, was a factual matter to be decided on a case-by-case basis, and therefore was not appropriate for class treatment.[377] For that reason, the court struck the class allegations, but allowed the case to move forward individually.[378]

In re Vioxx Products Liability Litigation[379] involved several motions arising out of the Vioxx multidistrict litigation. The drug manufacturer, Merck, researched, designed, marketed, and distributed Vioxx to relieve pain and inflammation resulting from various medical conditions.[380] Following clinical reports that Vioxx led to an increased risk of heart attacks and strokes, however, Merck pulled Vioxx from the market on September 30, 2004.[381] Thousands of plaintiffs asserted various tort and products liability claims against Merck in state and federal courts throughout the country.[382]

After an apparent settlement, a group of 48 sponsors and administrators of ERISA health benefit plans filed this class action complaint against defendants BrownGreer PLC, the law firm serving as claims administrator, certain known and unknown law firms representing Vioxx claimants, and unknown Vioxx claimants who have enrolled or will enroll in the Vioxx settlement program.[383] According to the plaintiffs, many of the claimants participating in the settlement program were beneficiaries of ERISA health plans, and therefore had an obligation to notify and reimburse their health plan for any Vioxx related medical benefits they received by participating in the settlement agreement.[384]

The plaintiffs asserted that there are "hundreds, and likely thousands" of ERISA health benefit plans that have paid medical benefits to plan beneficiaries who enrolled or will enroll in the Vioxx settlement program.[385] In response, the Negotiating Plaintiffs' Counsel and BrownGreer filed motions to strike the plaintiffs' class action allegations.[386] They argued that the proposed class (1) was not ascertainable, (2) was not cohesive, and (3) lacked typicality.[387] The court agreed.[388]

The plaintiffs alleged that there were "hundreds, and likely thousands" of ERISA health benefit plans that fit within the proposed class definition, but could not determine how many plans, or even which plans, the class would encompass because they did not know which claimants were participating the settlement program.[389] The court held, therefore, that that the proposed class was not yet ascertainable.[390]

The court found that the proposed class was not cohesive because the putative class members might have significant individual interests that would undermine the class interest.[391] For instance, each class member would have to rely on individualized evidence because each ERISA plan uses different policy language and there will be different issues of causation for each claimant.[392] Similarly, some expenses under a plan may reimbursable, whereas others may not.[393] Consequently, the court concluded that the proposed class would not be a "homogenous and cohesive group as contemplated by Rule 23."[394]

Despite the fact that ERISA governed all of the proposed class members' claims, the court found that the typicality requirement could not be met.[395] Depending on the language of an individual's policy, certain class members could advance legal theories that would sacrifice another class member's claims.[396] Additionally, because the class was neither ascertainable nor clearly defined, the court could not adequately analyze the circumstances surrounding

each plan to determine whether the claims of each class member would be typical.[397] Accordingly, the court held that the plaintiffs failed to demonstrate typicality, and granted the defendants' motion to strike the class action allegations.[398]

ENDNOTES

1 Barry M. Golden is a partner in the Dallas office of Gardere Wynne Sewell LLP. Peter L. Loh is an associate in the Dallas office of Gardere Wynne Sewell LLP. Mr. Golden and Mr. Loh would like to thank Brett Ackerman and Andrew Spaniol (associates in the Dallas office of Gardere Wynne Sewell LLP) and Luke Wohlford (University of Kansas School of Law, Spring 2009) for their help on the article.

2 *See* Barry M. Golden and Nicholas G. Peters, 2007 Annual Survey of Fifth Circuit Class Action Cases, 29 TEX. BUS. LIT. J. 1 (Winter 2008).

3 This article surveys opinions substantively addressing class action issues as of December 10, 2008.

4 No. 08-30145, 2008 WL 1118176, at *1 (5th Cir. Apr. 11, 2008).

5 *Id.* at *2.

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.* at *3.

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.* at *4.

17 *Id.* at *8.

18 *Id.* at *4.

19 *Id.* at *8.

20 *Id.*

21 261 Fed.Appx. 697, 2008 WL 104273, at *1 (5th Cir. Jan. 8, 2008).

22 *Id.*

23 *Id.* at *2.

24 *Id.*

25 *Id.*

26 *Id.* at *3.

27 *Id.* at *3-4 (citing *Oscar*, 487 F.3d at 269.).

28 *Id.* at *4.

29 No. 06-31122, 2008 WL 853591, at *1 (5th Cir. Apr. 1, 2008).

30 *Id.* at *2.

31 *Id.*

32 *Id.*

33 *Id.* at *2.

34 *Id.* at *8.

35 519 F.3d 264 (5th Cir. 2008).

36 *Id.* at 271-72.

37 *Id.* at 272.

38 *Id.* at 271.

39 *Id.* at 272.

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.* at 272-74.

44 *Id.* at 275.

45 *Id.*

46 *Id.*

47 *Id.* at 282.

48 *Id.* at 282-83.

49 *Id.* at 283.

50 *Id.*

51 *Id.*

52 279 Fed. Appx. 313, 314 (5th Cir. 2008).

53 *Id.* at 315.

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.* at 316.

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.* at 318.

63 287 Fed. Appx. 354, 356 (5th Cir. 2008).

64 *Id.* at 356.

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.* at 357.

69 *Id.* at 359.

70 *Id.*

71 *Id.* (citing *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 721 (5th Cir. 2007)).

72 *Robertson*, 287 Fed. Appx. at 359 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

73 *Robertson*, 287 Fed. Appx. at 359.

74 *Id.* (citing *Riviera*, 283 F.3d 315 (5th Cir. 2002)).

75 *Id.* (citing *Riviera*, 283 F.3d at 317).

76 *Id.* at 360.

77 *Id.* at 359.

78 *Id.* (citing *Riviera*, 283 F.3d at 320-21.)

79 *Robertson*, 287 Fed.Appx. at 360.

80 *Id.* at 361.

81 *Id.*

82 *Id.*

83 *Id.* at 361-62.

84 *Id.* at 362.

85 *Id.*

86 *Id.* at 363.

87 No. H-05-0758, 2008 WL 447552, at *1 (S.D. Tex. Feb. 19, 2008).

88 *Id.*

89 *Id.*

90 *Id.* at *2.

91 *Id.*

92 *Id.* at *3.

93 *Id.*

94 *Id.*

95 *Id.*

96 *Id.*

97 No. 1:07-CV-385, 2008 WL 724091, at *1 (E.D.Tex. Feb. 22, 2008).

98 *Id.* at *2.

99 *Id.*

100 *Id.*

101 *Id.*

102 No. 2:06-CV-009, 2008 WL 920308, at *1 (E.D. Tex. Mar. 31, 2008).

103 *Id.*

104 *Id.* at *2.

105 *Id.*

106 *Id.* (*citing Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979)).

107 *Id.*

108 *Broadhead*, 2008 WL 920308, at *3.

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.*

113 *Id.*

114 *Id.* at *4.

115 *Id.*

116 *Id.*

117 *Id.*

118 No. 4:07-cv-225, 2008 WL 2008850, at *1 (E.D. Tex. May 8, 2008).

119 *Id.*

120 *Id.* at *4.

121 *Id.* at *2.

122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.* at *3.

126 *Id.*

127 Civil No. SA-06-CA-381-OG, 2008 WL 2486043 at *1 (W.D. Tex. May 27, 2008).

128 *Id.* at *2.

129 *Id.* at *2-3 (emphasis in original).

130 *Id.* at *3.

131 *Id.* at *2.

132 *Id.* at *5-8.

133 *Id.* at *5 (citing *Mullen v. Treasure Chest Casino, LLC*, 186 F. 3d 620, 624 (5th Cir. 1999) (a class of 100-150 members satisfies numerosity)).

134 *Id.*

135 *Id.*

136 *Id.* at *6.

137 *Id.* at *8.

138 *Id.*

139 *Id.*

140 *Id.* at *9-15.

141 *Id.* at *9-10.

142 *Id.* at 10.

143 *Id.* at *11.

144 *Id.* at *12.

145 *Id.* at *13.

146 *Id.* at *14.

147 *Id.*

148 *Id.* (citing *City of San Benito v. Rio Grande Valley Gas Co.*, 109 S.W. 3d 750, 757-58 (Tex. 2003)).

149 No. A-00-CA-430-SS, slip op. at 2-3 (W.D. Tex. June 7, 2008).

150 *Id.* at 3.

151 *Id.* at p. 6.

152 *Id.* at 8-9.

153 *Id.* at 8.

154 *Id.* at 8-9.

155 *Id.* at 11.

156 *Id.*

157 *Id.*

158 *Id.*

159 Civil Action No. H-07-0620, 2008 WL 4528223 at *3 (S.D. Tex. July 31, 2008).

160 *Id.* at *1.

161 *Id.*

162 *Id.*

163 *Id.* at *3.

164 *Id.* at *4-8.

165 *Id.* at *4-5.

166 *Id.* at *7-8.

167 *Id.*

168 *Id.* at *10.

169 *Id.* at *9.

170 *Id.* at *9-10.

171 *Id.* at *10.

172 Civil Action No. 3:02-CV-1152-M, 2008 WL 4791492 (N.D. Tex. Nov. 4, 2008).

173 *Id.*

174 *Id.* at *1.

175 *Id.*

176 *Id.* at *2-3 (citing *Ryan v. Flowserve Corp.*, 245 F.R.D. 560, 569 (N.D. Tex. 2007)).

177 *Id.* at *4.

178 *Id.* at *4-6.

179 *Id.*

180 *Id.* at *7-12 (citing *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F. 3d 261, 271 (5th Cir. 2007)).

181 *Id.* at *12.

182 *Id.* at *13.

183 *Id.* at *13-16.

184 *Id.* at *16 (citing *Flowserve*, 245 F.R.D. at 574).

185 *Id.* at *17.

186 *Id.* at *18.

187 *Id.* at *18-19.

188 *Id.* at *20.

189 *Id.* at *19-20.

190 *Id.* at *20.

191 Civil Action No. H-08-486, 2008 WL 4937565, at *1 (S.D. Tex. Nov. 17, 2008).

192 *Id.*

193 *Id.*

194 *Id.*

195 *Id.*

196 *Id.* at * 2.

197 *Id.* (citing *Badgett v. Texas Taco Cabana, L.P.*, No. H-05-3624, 2006 WL 2934265, at *1-2 (S.D. Tex. Oct. 12, 2006)).

198 *Id.* (citing *Mooney v. Aramco Servs. Co.*, 354 F.3d 1207, 1214 (5th Cir. 1995)).

199 *Id.* at * 3 (citing *Maynor v. Dow Chem. Co.*, No. G-07-504, WL 2008 220394 at * 6 (S.D. Tex. May 28, 2008)).

200 *Id.* at *6.

201 *Id.*

202 *Id.*

203 *Id.*

204 *Id.* at *7.

205 *Id.* at *8.

206 Civil Action No. B-07-153, 2008 WL 5155728 (S.D. Tex. Dec. 8, 2008).

207 *Id.* at *1.

208 *Id.*

209 *Id.*

210 *Id.*

211 *Id.*

212 *Id.*

213 *Id.* at *5.

214 *Id.*

215 252 F.R.D. 319, 321 (W.D. Tex. 2008).

216 *Id.*

217 *Id.*

218 *Id.* at 322.

219 *Id.* at 322-23.

220 *Id.* at 323.

221 *Id.*

222 *Id.* at 324.

223 *Id.* at 325.

224 *Id.*

225 *Id.*

226 *Id.*

227 *Id.* at 326.

228 *Id.*

229 390 B.R. 233 (W.D. Tex 2008).

230 *Id.* at 238.

231 *Id.*

232 *Id.*

233 *Id.* at 238-39.

234 *Id.* at 239.

235 *Id.* at 241-44.

236 *Id.* at 241-42.

237 *Id.* at 242.

238 *Id.* at 243.

239 *Id.*

240 *Id.* at 241.

241 *Id.* at 243-44.

242 *Id.* at 244.

243 *Id.* at 245.

244 *Id.* at 246.

245 319 F. 3d 205 (5th Cir. 2003).

246 *Mounce*, 390 B.R. at 246-56.

247 *Id.* at 248-49.

248 *Id.* at 250.

249 *Id.* at 249-50.

250 *Id.* at 250-55 (citing 319 F. 3d 205 (5th Cir. 2003)).

251 *Id.* at 250-52.

252 *Id.* at 252-55.

253 *Id.* at 255.

254 *Id.* at 256.

255 *Id.*

256 No. 1:05CV38-D-D, 2008 WL516716 (N.D. Miss. February 25, 2008).

257 *Id.* at *1.

258 *Id.*

259 *Id.* at *2.

260 *Id.* at *2.

261 *Id.*

262 *Id.*

263 *Id.*

264 Nos. 3:06-cv-303-WHB-LRA, 3:07-cv-350-TSL-JCS, 2008 WL 906525 (S.D. Miss. Mar. 31, 2008).

265 *Id.*

266 *Id.* at *2.

267 *Id.*

268 *Id.*

269 *Id.*

270 *Id.*

271 *Id.*

272 *Id.*

273 *Id.*

274 *Id.* at *3.

275 *Id.*

276 *Id.* at *5.

277 *Id.* at *3-6.

278 *Id.*

279 *Id.* at *8-9.

280 *Id.*

281 *Id.* at *9.

282 *Id.*

283 *Id.*

284 *Id.* at *10.

285 *Id.*

286 *Id.* at *11.

287 *Id.* at *11-*12.

288 *Id.* at *12.

289 Civil Action No. 3:07-CV-525K-JCS, 2008 WL 2954977, at *1 (S.D. Miss. July 29, 2008).

290 *Id.* at * 2.

291 *Id.*

292 *Id.*

293 *Id.* at * 4.

294 *Id.*

295 *Id.*

296 *Id.*

297 *Id.*

298 *Id.* at *5 (citing *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980)).

299 *Id.* at *5.

300 *Id.* at * 5-6 (citing *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620 (5th Cir. 1999)(potential classes within the 100 to 150 class member range are generally sufficient to meet Rule 23(a)(1)'s requirement)).

301 *Id.* at *6 (citing *Mullen*, 186 F.3d at 624).

302 *Id.*

303 *Id.* at *11.

304 *Id.* at *11-13.

305 *Id.* at *13.

306 *Id.*

307 *Id.* at * 15-16.

308 253 F.R.D. 396 (S.D. Miss. 2008).

309 *Id.* at 397-98.

310 *Id.*

311 *Id.* at 398.

312 *Id.*

313 *Id.* at 399.

314 *Id.*

315 *Id.*

316 *Id.* at 399.

317 *Id.* at 400.

318 *Id.* at 401.

319 *Id.* at 402.

320 *Id.* (citing 216 F. Supp. 2d 592 (E.D. La. 2002)).

321 *Id.*

322 *Id.*

323 *Id.*

324 *Id.*

325 No. 06-11266, 2008 WL 169776, at *1 (E.D. La. Jan. 17, 2008).

326 *Id.*

327 *Id.*

328 *Id.*

329 *Id.*

330 *Id.*

331 No. 07-2878, 2008 WL 339684, at *1 (E.D. La. Feb. 6, 2008).

332 *Id.*

333 *Id.*

334 *Id.*

335 *Id.*

336 *Id.*

337 *Id.* at *2 n.3 (stating that a Rule 23(a) analysis is not necessary because plaintiffs cannot meet the requirements of (b)(3)).

338 *Id.* at *2 n. 4.

339 *Id.* at *3.

340 *Id.*

341 *Id.* at *4.

342 *Id.*

343 *Id.*

344 *Id.*

345 *Id.* at *5.

346 *Id.*

347 No. 07-3889, 2008 WL 417697, at *1 (E.D. La. Feb. 13, 2008).

348 *Id.*

349 *Id.*

350 *Id.*

351 *Id.*

352 *Id.* at *2.

353 *Id.*

354 No. 06-cv-1775, 2008 WL 781925, at *1 (W.D. La. Mar. 5, 2008).

355 *Id.*

356 *Id.*

357 *Id.* at * 2.

358 *Id.*

359 *Id.*

360 *Id.* at *3.

361 Civil Action Nos. 06-3246 to 06-3262, 2008 WL 2951794, at *1 (E.D. La. July 25, 2008).

362 *Id.*

363 *Id.*

364 *Id.*

365 *Ancar*, 2008 WL 2951794, at *2 n. 7.

366 *Id.* at *2, *5 (citing *Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 596 (E.D. La. 2006)).

367 *Id.* at *5 (citing 461 F. 3d 598, 602 (5th Cir. 2006)).

368 *Id.* at *5-6.

369 *Id.* at *6.

370 Civil Action No. 06-4130, 2008 WL 4534395, at *1 (E.D. La. Oct. 6, 2008).

371 *Id.*

372 *Id.*

373 *Id.*

374 *Id.*

375 *Id.*

376 *Id.* at *8.

377 *Id.* at *9.

378 *Id.* at *9-10.

379 Civil Action No. 08-3267, 2008 WL 4681368, at *1 (E.D. La. Oct. 21, 2008).

380 *Id.*

381 *Id.*

382 *Id.*

383 *Id.* at *3.

384 *Id.*

385 *Id.* at *4.

386 *Id.*

387 *Id.* at *9.

388 *Id.* at *9-12.

389 *Id.* at *10.

390 *Id.*

391 *Id.* at *11.

392 *Id.*

393 *Id.*

394 *Id.*

395 *Id.* at * 13.

396 *Id.*

397 *Id.*

398 *Id.*

2008 Annual Survey of Texas Class Action Cases

By Mark W. Bayer[1]

Since the Texas Supreme Court's opinion in *Southwestern Refining Co. v. Bernal*,[2] the number of class actions that has survived appellate scrutiny have plummeted. As the lower courts have applied the teachings of *Bernal*, and they have been further reviewed by the supreme court, the number of class action cases surviving review has slowed to a trickle. As a result, commentators from both side of the docket have concluded that Texas class actions are an endangered species.[3]

The small number of appellate decisions this year supports the notion that the Texas class action is on life support. There were fewer opinions addressing class certification issues in 2008 than in any other year of this decade.[4]

The few appellate decisions addressing certification issues in 2008[5] placed additional barriers to class actions in this state. In a closely divided decision, the supreme court held that a putative class action case should be dismissed before certification for lack of standing because a named plaintiff's claim was too remote. The supreme courts also decertified two of three proposed subclasses in a case brought by royalty owners against a natural gas producer. In the courts of appeals around the state, less than a handful of decisions addressed certification issues this year. The few decisions all rejected class actions.

Texas Supreme Court Decisions

In *DaimlerChrysler Corp. v. Inman*,[6] the Texas Supreme Court held that the claims asserted by three putative class representatives were so remote that the plaintiffs lacked standing. As a result, the court's 5-4 majority dismissed the case for want of jurisdiction.

In 2000, Inman sued DaimlerChrysler, alleging that the Gen-3 seat belt buckle used by DaimlerChrysler was defective because it was too easy to press the release button and unlatch the buckle without intending to do so. Along with two other plaintiffs, Inman sought replacement of all of the allegedly defective buckles. The total replacement cost for the class was estimated at $8 billion.

The named plaintiffs admitted that they had not been injured by their seat belts, and two of the three admitted that they had never experienced an accidental release of their seat belt. As Justice Hecht observed on behalf of the majority, "[t]hey do not contend that this is unavoidable, probable, or even eventual, only that it is possible. Two of the plaintiffs have never experienced anything like what they claim might happen, and the third is not sure whether he has or not, but he has never been injured."[7] Inman testified that he did not know of anyone who was ever harmed by a Gen-3 buckle.[8]

The County Court of Law of Nueces County granted the plaintiffs' motion for class certification. The trial court's order was reversed by the Corpus Christi Court of Appeals on the grounds that the trial court had failed to consider which jurisdictions' laws would govern the class members' claims.[9] However, the court of appeals rejected DaimlerChrysler's argument that the plaintiffs' fear of possible injury from the accidental release of a seatbelt was so remote that they lacked standing to assert their claims. Although the court of appeals reversed the certification order, DaimlerChrysler appealed to advance its standing argument.

Although the plaintiffs agreed that they could not succeed on their claims without showing that they suffered a legally compensable injury, they argued that they need not prove that injury until after the trial court considered the motion for class certification. In response, DaimlerChrysler argued that the claimed injury was "so hypothetical, so iffy, that the plaintiffs do not have standing to assert it and the court does not have jurisdiction to hear it."[10]

Writing for the majority, Justice Hecht found that although it was possible that there may be owners of DaimlerChrysler vehicles who suffered injury as a result of the Gen-3 seatbelt buckle, the named plaintiffs had not shown any injury.[11] The majority made it clear that it was not rendering judgment that the plaintiffs take nothing. Rather, it concluded that the case should be dismissed for lack of jurisdiction due to the hypothetical nature of the named plaintiffs' claim.[12]

The court observed that a plaintiff does not lack standing simply because he cannot prevail on the merits of his claim; rather, "he lacks standing because his claim of injury is too slight for a court to afford redress."[13] Fleshing out the concept, the court cited *M.D. Anderson*

Cancer Center v. Novak[14] for the proposition that standing requires a "concrete injury."[15] For the majority, the mere possibility of injury in the future was insufficient to show "concrete injury."

The dissent, authored by Chief Justice Jefferson, argued that the majority was evaluating the merits of the underlying claim without a full record and, as a result, was improperly conflating the standing analysis with the merits of the case. The Chief Justice observed that "we have never before held that any time a plaintiff's claims fail as a matter of law, the trial court is deprived of jurisdiction" and that "defendants who lose at trial may now, under the guise of standing, raise affirmative defenses that were never pleaded in, or considered by, the trial court."[16] The dissent went on to argue that "we have never before held that if class representatives cannot prove their case at the class certification stage, the trial court lacks jurisdiction."[17]

The differences between the majority opinion and the dissent may be explained by their different view of the allegations. The majority believed that the named plaintiffs did not allege any plausible economic injury that would support jurisdiction. The dissent, however, concluded that the plaintiffs alleged concrete economic harm stemming from breach of express and implied warranties. Rather than dismiss the case, the minority would have remanded the case to the trial court for further consideration of the choice of law issues identified by the court of appeals.

In *Bowden v. Phillips Petroleum Co.*,[18] the supreme court considered whether it was appropriate to certify three subclasses of royalty owners who asserted underpayment of royalties by a natural gas producer and its subsidiaries. The plaintiffs contended that the defendants engaged in various inter-affiliate transactions that resulted in an underpayment of royalties. The trial court certified all three subclasses. The Houston Court of Appeals reversed, finding that individual issues of liability would predominate over common issues for all three classes and that the class representatives for the first and third subclasses were inadequate because they failed to assert all possible claims under the leases. The supreme court found that only one of the three subclasses should have been certified.

The first subclass was brought on behalf of royalty owners who had "amount realized" clauses in their leases that required the defendants to calculate the royalty as a percentage of the proceeds the defendants actually received for the sale of the gas. The plaintiffs alleged that the defendants sold gas at below market prices to an affiliate, thereby reducing the royalties paid. The supreme court held that the jury would have to conduct a well-by-well analysis to determine whether a market rate was paid for the gas. As a result, individual issues would predominate and class certification was inappropriate.

The second subclass was brought on behalf of royalty owners whose leases provided for the calculation of royalties under a uniform formula. The members of the second subclass contended that the defendants failed to pay royalties for natural gas liquids that were separated during downstream processing. Analyzing the contracts in question, the court held that they unambiguously provided that royalties should be paid on all components of the gas extracted from the wells, including the separated liquids. As a result, the supreme court reversed the court of appeals, finding that common issues would predominate and that class certification was appropriate for the second subclass.

The third subclass was brought on behalf of royalty owners whose leases provided for royalties either under an amount-realized/proceeds basis or under a market-value basis, in which the defendants sold gas under a percentage of the proceeds contract to its affiliate. In calculating royalties, the defendants paid 20% of the proceeds to the affiliate which, the plaintiffs contended, was an unreasonable and fraudulent post-production fee. The supreme court affirmed the denial of class certification on the grounds that the analysis of a amount-realized/proceeds royalty required an individual analysis of whether a particular fee was reasonable and a market-value royalty required an individual analysis of whether the price paid at a particular well was fair.

Court of Appeals Decisions

In *Texas South Rentals, Inc. v. Gomez*,[19] the Corpus Christi Court of Appeals reversed the certification of a class of car rental customers who were charged a "fuel and service charge" ("FSC") when they returned a rental car without a full tank of gas. The car rental company offered three fuel options for its customers. A customer could: (1) return the car with a full tank of gas; (2) pre-pay for a full tank of gas; or (3) return the car without refueling and pay a fuel and service charge of $3.99 per gallon to have the car refilled. Gomez sought to represent a class of customers who chose the third option, alleging common law fraud, violation of the Uniform Commercial Code, and breach of contract. The trial court certified a class of "[a]ll Texas residents who were charged an FSC after February 6, 2000."[20]

The court of appeals first considered certification of the fraud claim. The rental company contended that the fraud claim required an individualized inquiry into whether the alleged misrepresentations were material to the class members and whether the class members justifiably relied on the alleged misrepresentations. The court agreed, observing:

> Gomez has failed to point us to any evidence in the record demonstrating that the class as a whole relied on representations by Hertz and Texas South that the FSC constituted only a charge for fuel and service . . . . Moreover, under the facts of this case, it is not hard to imagine how individual issues of reliance could arise. There are numerous circumstances in which a customer might choose the convenience of the FSC regardless of his or her knowledge of the FSC's composition.[21]

Accordingly, the court concluded that Gomez failed to meet his burden of showing that reliance issues would not predominate and reversed the certification of the fraud claim.

The court then considered the plaintiffs' illegal penalty claim under the Uniform Commercial Code. The rental company raised the voluntary payment doctrine to defeat the U.C.C. claim and Gomez responded by invoking the fraud exception to the doctrine. Because the court of appeals already had held that fraud could not be determined on a classwide basis, it found that individual issues likewise would predominate the U.C.C. claim.

The court of appeals also rejected the certification of claims that the FSC was unconscionable under the U.C.C. The court observed that "customers have varying degrees of knowledge, ability, experience, and capacity that would affect what they knew or cared to know about the FSC."[22] Citing *Stonebridge Life Insurance Co. v. Pitts*[23] and *Wall v. Parkway Chevrolet, Inc.*[24] the court held that the individualized inquiries that would be required to support a claim for unconscionability rendered the claim unsuitable for class certification.

After rejecting the use of the voluntary payment doctrine, the court addressed the certification of the breach of contract claim. Because the plaintiffs brought claims against both Hertz and its franchisee, Texas South Rentals, the defendants argued that the trial plan submitted by Gomez did not explain how the claims would proceed against each defendant in light of the authority, agency, ratification, partnership, conspiracy, and other theories alleged to try to create joint liability. As the court of appeals observed, "here, the trial plan is entirely devoid of any discussion of how the claims against Texas South and Hertz will proceed, given that Gomez did not rent directly from Hertz. Without such an analysis, it is difficult, if not impossible, for us to determine if the class should have been certified."[25]

In *Dallas Fort Worth International Airport Board v. Cox*,[26] the Dallas Court of Appeals found that employees bringing breach of contract claims against an owner, general contractor, and several subcontractors lacked standing to assert claims on behalf of a putative class and dismissed their class action claims. The plaintiffs, claiming widespread wage-rate violations involving thousands of workers, brought a mandamus action in the district court to require the Airport Board to make an initial determination concerning their claims. They also filed a class action petition.

In the trial court, the defendants filed pleas to the jurisdiction arguing that the court did not have jurisdiction to determine the underpayment of claims because of the statutory requirement that disputes remaining after the initial determination are subject to arbitration. The trial court granted the pleas and dismissed the class action claim. The Airport Board also filed a plea to the jurisdiction in the mandamus action. The plaintiffs filed a motion for summary judgment, arguing that the Airport Board had refused and should be required to make an initial determination for the putative class. The trial court granted summary judgment and ordered an initial determination on the claims of the class.

Addressing the mandamus issue first, the court of appeals held that the trial court should not have granted summary judgment in favor of the plaintiffs. Because the Airport Board made the requested initial determination concerning the named plaintiffs' wage claims, there was no controversy that justified mandamus. Mandamus also was inappropriate with regard to the wage claims brought on behalf of the putative class. As the court of appeals observed, no class was ever certified and "it is axiomatic that relief may not be afforded a putative class that does not exist."[27]

The court of appeals then addressed the dismissal of the class action. The plaintiffs conceded that the wage-rate statute requires arbitration in accordance with the Texas General Arbitration Act. As a result, the petition failed to affirmatively demonstrate the trial court's jurisdiction to hear the case and the trial court did not err when it granted the pleas to the jurisdiction.[28]

Other Issues Considered by Courts of Appeals

Rule 42 does not apply to an unauthorized practice of law case brought by the State.

In *Molano v. State*,[29] the Corpus Christi Court of Appeals held that the State was not required to satisfy the elements of Rule 42 when pursuing an action against a notary public for the unauthorized practice of law under the Deceptive Trade Practices-Consumer Protections Act and the Texas Government Code. The defendant filed a plea in abatement claiming that the State failed to comply with the requirements of Rule 42. The trial court denied the plea in abatement and the court of appeals affirmed.

The defendant cited *Farmers Group, Inc. v. Lubin*[30] for the proposition that the State must comply with Rule 42. The case was easily distinguished by the court, however, because in *Lubin*, the State was asserting damage claims under the Insurance Code, which explicitly provides for class actions whereas the DTPA does not provide for the use of class actions brought by the Attorney General.[31]

Plea in abatement resolved before class certification.

Lopez v. State Farm Mutual Automobile Ins. Co.,[32] a class action case seeking damages for nonpayment of adequate dividends, made its second appearance at the Corpus Christi Court of Appeals in 2008. The trial court had initially certified a class and the court of appeals affirmed. However, the supreme court held that the trial court should have resolved "dispositive issues" before addressing class certification and returned the case to the trial court.[33]

As a result, the trial court considered, and granted, the defendants' plea in abatement. After an evidentiary hearing, the trial court found that the plaintiffs lacked standing because the insurance contract did not *promise* dividends and because the plaintiffs participated in dividends to the extent they were provided for in their contracts.

The court of appeals rejected the plaintiffs' argument that it was inappropriate for the trial court to hold an evidentiary hearing on the plea in abatement:

Here, in reversing the trial court's certification order, the supreme court stated, "[i]f it is true, as State Farm contends, that no class member can state a viable claim, dispositive issues should be resolved by the trial court before certification is considered." In accordance with the supreme court's instruction, the trial court considered State Farm's evidence and argument that appellants lacked standing, a "dispositive issue." We conclude the trial court did not err in "hear[ing] evidence as necessary to determine the issue [of standing] before proceeding with the case."[34]

Disposition of the merits moots class certification.

In *Newsome v. Dretke*,[35] two inmates appealed the failure of the trial court to consider their motion for class certification. The trial court had dismissed their claim against the director of the Texas Department of Criminal Justice as frivolous. Their claim that the trial court erred in failing to rule on their motion for class certification fell on deaf ears. The Tyler Court of Appeals held that once the plaintiffs' claims were dismissed as frivolous, the motion for class certification was moot.[36]

Likewise, in *K.M. Van Zandt Land Co. v. Whitehead Equities, JV*,[37] the Fort Worth Court of Appeals held that once a motion for summary judgment was granted for the defendants, it was not error for the trial court to grant the defendants' motion to strike a request for class certification.

No automatic right to appeal class certification decision made by arbitration panel.

In *O'Quinn, P.C. v. Wood*,[38] a dispute between a prominent Texas trial attorney and the women he represented in breast implant litigation, returned to the Tyler Court of Appeals. The former clients claimed that O'Quinn improperly deducted 1.5% of their settlement proceeds for expenses common to all clients. The case proceeded to arbitration and the arbitrator was authorized to "determine all class action issues." O'Quinn filed a motion to vacate the arbitration panel's class determination award, which was denied by the trial court.

O'Quinn sought review of the denial of the motion to vacate the class award. The Tyler Court of Appeals found that the denial of the motion to vacate was an interlocutory decision and held that no statutory exception existed to grant a right of appeal. Although section 51.014 of the Texas Civil Practice and Remedies Code provides for interlocutory review of orders that certify or refuse to certify a class, the court of appeals held that section 51.014 does not apply to interlocutory appeals of class certification decisions made by an arbitration panel.[39]

O'Quinn also sought mandamus relief from the order denying his motion to vacate. Mandamus was denied because the court of appeals found that "this case will very shortly be ripe for an ordinary appeal" because the arbitration panel had issued a final award and there were motions both to confirm and to vacate the award pending before the trial court.[40]

ENDNOTES

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

2 22 S.W.3d 425 (Tex. 2000).

3 *See, e.g.*, Roger L. Mandel & Martin Woodward, *Navigating the Rough Terrain: Class Actions in Texas After HB4 and CAFA*, THE ADVOCATE, Fall 2008, at 70 ("[I]t is fair to conclude that the combination of HB4 and recent case law has made the Texas state courts an exceedingly hostile place for class action litigation); Alistair B. Dawson & Geoff A. Gannaway, *In Memoriam: Texas Class Actions*, THE ADVOCATE, Fall 2008, at 78 ("The Texas class action is, for the most part, feeble and on its last legs. A moment of silence may be in order . . . .").

4 This article focuses on issues relating to the certification of class cases, rather than all class cases generally. For example, in a trilogy of cases, the Texas Supreme Court held that insurers had a duty to defend and/or indemnify cell phone manufacturers sued in putative class actions alleging that radiation emitted by the telephones caused biological injury. But, those cases did not consider whether it was appropriate to certify the cases as class actions. *Zurich Am. Ins. Co. v. Nokia, Inc.*, Civ. Action No. 06-1030, 2008 WL 3991183 (Tex. Aug. 29, 2008); *Trinity Universal Ins. Co. v. Cellular One Group*, Civ. Action No. 07-0140, 2008 WL 4000811 (Tex. Aug. 29, 2008); *Federal Ins. Co. v. Samsung Elec. Am.*, Civ. Action No. 06-1040, 2008 WL 4000812 (Tex. Aug. 29, 2008).

5 This article addresses opinions issued from December 1, 2007 through December 15, 2008.

6 252 S.W.3d 299 (Tex. 2008).

7 *Id.* at 300.

8 *Id.* at 301.

9 *DaimlerChrysler Corp. v. Inman*, 121 S.W.3d 862 (Tex. App.—Corpus Christi 2003, no pet.).

10 *DaimlerChrysler Corp.*, 252 S.W.3d at 303.

11 *Id.* at 307 ("[I]f injury is only hypothetical, there is no real controversy.").

12 *Id.* ("If the named plaintiffs in a putative class action do not have standing to assert their own individual claims, the entire actions [sic] must be dismissed.").

13 *Id.* at 305.

14 52 S.W.3d 704 (Tex. 2001) (person who did not respond to an allegedly deceptive fundraising letter does not have standing to sue). *See also Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315 (5th Cir. 2002) (plaintiff who suffered no physical or emotional harm from the use of a drug has no standing to sue).

15 *DaimlerChrysler Corp.*, 252 S.W.3d at 305.

16 *Id.* at 314.

17 *Id.* at 313.

18 247 S.W.3d 690 (Tex. 2008).

19 Civ. Action No. 13-06-629-CV, 2008 WL 2764520 (Tex. App.–Corpus Christi July 17, 2008, no pet.).

20 *Id.*, at *5.

21 *Id.*, at *9.

22 *Id.*, at *14.

23 236 S.W.3d 201 (Tex. 2007).

24 176 S.W.3d 98 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

25 *Texas South Rentals*, 2008 WL 2764520, at *16.

26 261 S.W.3d 378 (Tex. App.—Dallas 2008, no pet.).

27 *Id*. at 384.

28 *Id*. at 387.

29 262 S.W.3d 554 (Tex. App.—Corpus Christi 2008, no pet.).

30 222 S.W.3d 417 (Tex. 2007).

31 *Molano*, 262 S.W.3d at 560.

32 Civ. Action No. 13-06-276-CV, 2008 WL 2744609 (Tex. App.—Corpus Christi June 30, 2008, no pet.).

33 *State Farm Mut. Auto Ins. Co. v. Lopez*, 45 S.W.3d 182, 185 (Tex. App.—Corpus Christi 2001), *rev'd*, 156 S.W.3d 550, 557 (Tex. 2004).

34 *Lopez*, 2008 WL 2744609, at *4 (citations omitted).

35 Civ. Action No. 12-08-00105-cv, 2008 WL 4335111 (Tex. App.—Tyler Sept. 24, 2008, no pet.).

36 *Id.*, at *3.

37 Civ. Action No. 2-06-294-cv, 2008 WL 2510602 (Tex. App.—Ft. Worth June 19, 2008, pet. denied).

38 244 S.W.3d 549 (Tex. App. –Tyler 2007, no pet.).

39 *Id*. at 553.

40 *Id*. at 555.

MONOGRAPH ALERT

By Gregory S.C. Huffman

To Subscribers to Monograph Texas Antitrust and Related Statutes

The Section has the Monograph in stock. The Monograph, which is in loose-leaf format, comes with an embossed three-ring binder. It includes sections covering legislative history, recent judicial interpretations and newly-filed cases.

The Monograph, which was produced by Greg Huffman and his Monograph Committee, may be purchased for $43. An order form appears below.

Order Form
Monograph-Texas Antitrust and Related Statutes

SEND TO:
State Bar of Texas Sales Desk, P.O. Box 12487, Austin, Texas 78711-2487
OR Call 1-800-204-2222 (ext. 1411). In Austin: 463-1463 (ext. 1411) Mon. - Fri. 8:00 am to 5:00 pm
FAX YOUR ORDER TO: 512-463-1604

Please send the indicated number of copies of Monograph-Antitrust and Related Statutes

(9305) _____copies @ $43 each $ _____

Postage & Handling $ 5.00
SUBTOTAL $ _____
7.25% Sales Tax on Subtotal $ _____
(8% Tax in Austin area)

PLEASE INCLUDE TAX OR EXEMPTION CERTIFICATE. (OMIT IF OUT OF STATE)

TOTAL **$** _____

Make check payable to: State Bar of Texas
or charge: ___ MasterCard ___ Visa _____ _____
account number expiration date

Print name as it appears on card _____

Authorized signature _____

Name _____

Law firm account number or Bar card number _____
(required to process order)

Firm Name _____ Telephone (_____) _____

Address _____

City & State _____ Zip _____

Order placed by _____

PLEASE ALLOW 2-3 WEEKS FOR DELIVERY

State Bar of Texas
Antitrust & Business Litigation Section
P.O. Box 12487
Austin, TX 78711-2487