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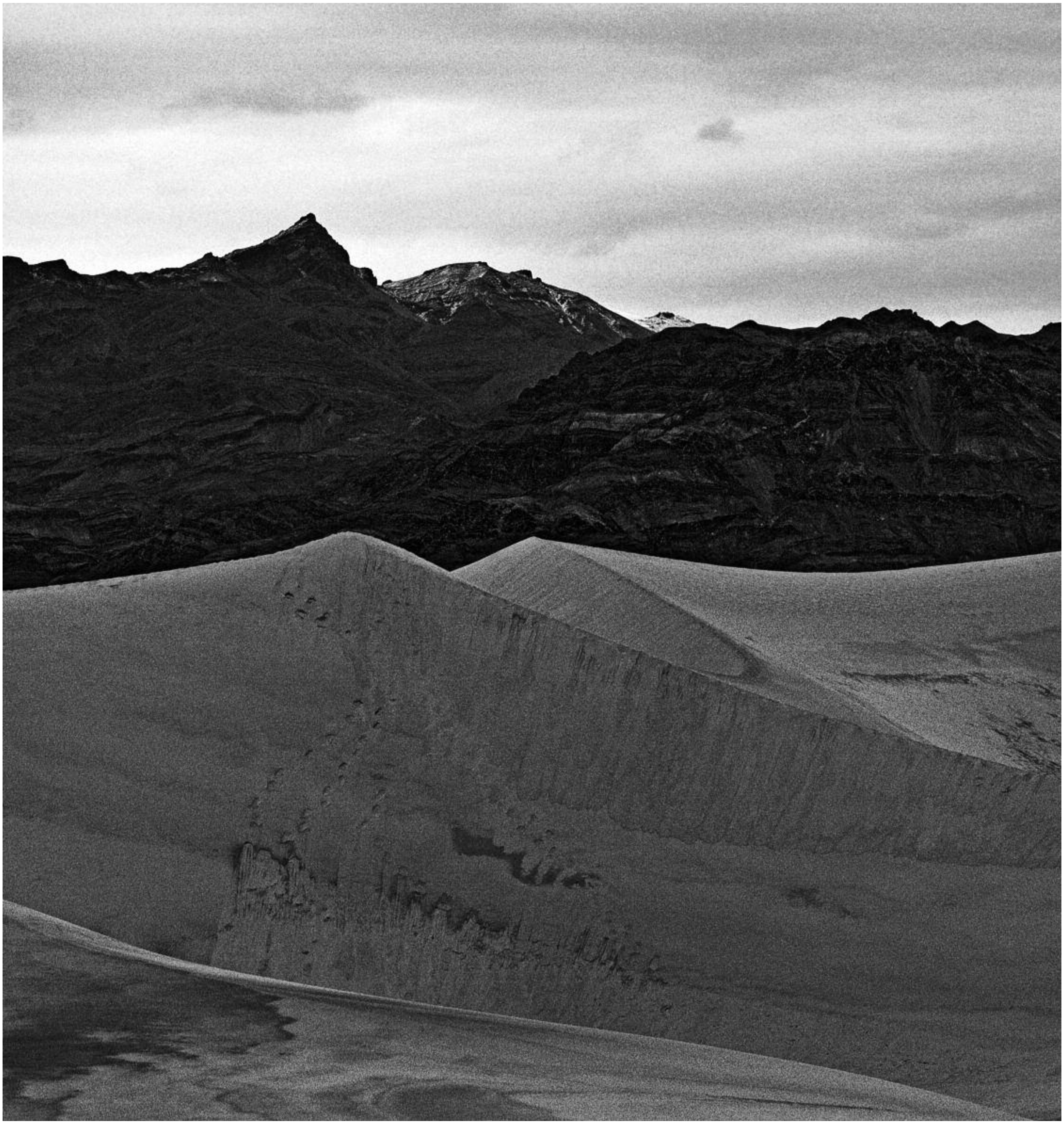

Class Action Developments

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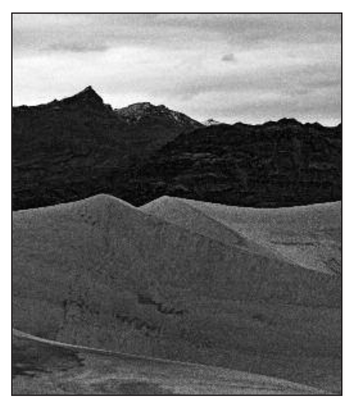

COVER: "Dunes, Death Valley California."
Photograph by Larry Gustafson, Dallas.

Publication Layout - State Bar of Texas Graphics Department

Dear Section Members:

I want to begin this letter by taking a moment to express my thanks to Hon. W. Royal Furgeson. Judge Furgeson, who happens to be a past chair of this Section, continues to ride circuit throughout Texas delivering his talk on multidistrict litigation on our behalf. He has spoken on this topic in Dallas, San Antonio, Austin, Houston, and El Paso. We are deeply indebted to Judge Furgeson for his continued service to the bar.

Keep an eye on your inbox for our upcoming CLE teleconferences. We are in the process of scheduling the next one, which will focus on electronic discovery and data mining, with a particular focus on PDAs. And you will be able to get ethics credit!! If you are interested in participating as a speaker in future teleconference programs, please contact me to discuss your suggested topics.

The Section's annual membership meeting will be at 9:00 a.m., Thursday, June 23, 2011, during the State Bar Annual Meeting in San Antonio. Our CLE program this year will be entitled "Foreign Data Privacy v. US Discovery Obligations: Stuck Between a Rock and a Hard Place." This program will address the challenges U.S. litigants (particularly multinational corporations) face in obtaining foreign discovery for use in U.S. proceedings. Foreign privacy rules and blocking statutes may prevent the discovery sought, but U.S. courts may nonetheless enforce U.S. discovery obligations. This conflict puts the responding party in the unenviable position of choosing which set of laws to comply with and which set to (at least potentially) violate. Danielle Fitzpatrick and Juan Alcala from King & Spalding will identify and discuss the issues and provide practical advice on how to minimize the risks involved. Following the CLE program, the Section's Distinguished Counselor Award will be presented during that meeting. I hope you will be able to join us for both the meeting and the CLE.

As always, the *Journal* continues to provide Section members with valuable news and scholarship covering a wide variety of topics of interest to business litigators. The focus of this issue is class actions. Thanks go to Barry Golden and Peter Loh for their article addressing class actions in the Fifth Circuit and to Mark Bayer for his piece on class actions in Texas state courts. And we continue to have Larry Gustafson to thank for his cover photograph. If you have an idea for an article for a future *Journal*, please contact Mike Ferrill (amferrill@coxsmith.com) – we're always on the lookout for interesting articles touching on any aspect of business litigation.

I look forward to hearing from you with your suggestions for the Section.

Regards,

Michael D. Rubenstein
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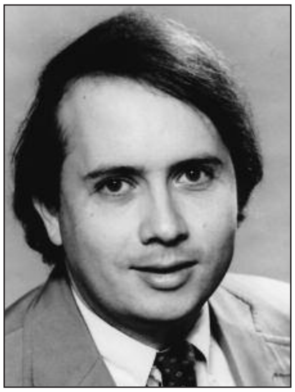
FROM ▪ THE ▪ EDITOR



This issue of the Journal features the annual survey articles on class action developments in the Fifth Circuit, Texas federal district courts and Texas state courts.

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

2010 Annual Survey of Texas Class Action Cases

By Mark W. Bayer[1]

Although few bread and butter class certification decisions were issued in Texas last year, several courts did address interesting issues of class representative standing and the intersection of class actions and arbitrations. The changes made to class action practice since *Southwestern Refining Co., Inc. v. Bernal*,[2] and its progeny have now been fully ingrained in the lower courts and few unique legal issues remain concerning Rule 42 standards. But, cases in 2010 addressed some issues of interest relating to the qualifications of class representatives.

A. Standing

1. Southwestern Bell Telephone Co. v. Marketing On Hold, Inc.

Perhaps the most interesting class certification opinion of 2010 was *Southwestern Bell Telephone Co. v. Marketing On Hold, Inc.*[3] In that case, a class action was brought on behalf of customers of Southwestern Bell who alleged that certain fees were passed through to them in violation of state of law. The named plaintiff, Marketing On Hold, audited its customers' telephone bills and represented them in seeking refunds from Southwestern Bell. During the course of its audits, Marketing On Hold discovered that improper charges had allegedly been made by Southwestern Bell. Some of its customers assigned their claims to Marketing On Hold and, although Marketing On Hold was never a subscriber to the services in issue, it sought to bring a class action on behalf of all of those who had.

After a four day class certification hearing, the trial court granted the plaintiff's motion for class certification and certified a class of subscribers who were improperly charged by Southwestern Bell. The court specifically found that Marketing On Hold was a proper representative by virtue of its ownership of the assigned claims. The trial court found that Southwestern Bell's billing practices were consistent from customer to customer and, therefore, common issues would predominate because the collection of an overcharge, if any, could be determined by reference to Southwestern Bell's billing records.

On appeal, Southwestern Bell challenged Marketing On Hold's standing as well as its adequacy as a class representative. Southwestern Bell also claimed that individual issues would predominate and that there were potential conflicts of interest between Marketing On Hold and class members.

In 2005, the Corpus Christi Court of Appeals concluded that the trial court conducted the required "rigorous analysis" mandated by *Bernal* and rejected Southwestern Bell's arguments.[4] First, the court of appeals considered the ability of Marketing On Hold to represent an entire class where it had not personally sustained any injury and would not have participated at all but for the assignments of its customers' claims. Relying preliminarily on federal cases, the court of appeals concluded that Marketing On Hold had standing by virtue of the assignments. The court also found that Marketing On Hold's claims were typical and substantially similar to the claims brought on behalf of all class members.

Next, the court of appeals found that Marketing On Hold was an adequate class representative. The trial court had found that Marketing On Hold had knowledge and expertise that gave it a superior ability to pursue the litigation and supervise class counsel. The court of appeals found that the evidence, including hearing and deposition testimony, supported the trial court's findings as to adequacy. The court of appeals also found that because Marketing On Hold had received assignments from class members with both large and small claims, it had an interest in asserting the rights of all members of the class.

The court of appeals next considered whether individual issues of reliance and damages would predominate. Among other things, Marketing On Hold asserted a claim for breach of express warranty. Because reliance is an element of proof of such a claim, Southwestern Bell contended that individual issues of reliance would predominate. The court of appeals held, however, that even if Southwestern Bell was correct, such reliance would be class-wide and not individualized. In other words, any such reliance would have affected each class member in the same manner.

Finally, the court of appeals concluded that the trial court correctly found that individual damages issues would not predominate.

The court of appeals held that the accumulation of evidence from Southwestern Bell's own records was manageable and could be used to identify members of the class and calculate damages.

The case was appealed to the Supreme Court and argued in 2007. The court did not announce its decision until nearly three years later in a relatively close 5-3 decision, reversing the certification of a class (Justice Guzman did not participate). The majority held that although Marketing On Hold had standing to act on behalf of a class as a result of the assignments it had secured, it was not an adequate class representative.[5] Accordingly, the Supreme Court reversed the certification of the class.

The Supreme Court began its analysis by observing that before Rule 42's requirements could be considered, Marketing On Hold must first satisfy the special requirement of individual standing. *See, e.g., M.D. Anderson Cancer Center v. Novak*.[6] Southwestern Bell argued that the assignments were void as a matter of law and public policy and, therefore, Marketing On Hold did not have the requisite standing. The Supreme Court held that because Marketing On Hold held contractually valid assignments, it stepped into the shoes of its customers and was considered under the law to have suffered the same injury as did the assignors.[7] As a result, the plaintiff had standing to pursue the claims. The court refused to invalidate the assignments on public policy grounds, finding that the plaintiff was not a "stranger/entrepreneur" as it had represented customers of Southwestern Bell for years attempting to recover alleged overcharges.[8] Perhaps anticipating a potential blizzard of class actions financed by third parties, the court observed that:

> Class actions are not intended to serve as vehicles for commercial investment and desired large recoveries as avenues for entrepreneurial development … the courts of this state must scrutinize the circumstances on a case-by-case basis to determine if the arrangement undermines the tenets and purpose of the class action vehicle or otherwise violates public policy.[9]

After ruling that Marketing On Hold did have standing, the court turned to the requirements of Rule 42. Southwestern Bell argued that Marketing On Hold's claims were atypical because it never paid any of the disputed charges. The Supreme Court easily disposed of this argument, holding that although Marketing On Hold was an assignee, its claims were the same as those of the rest of the class and, therefore, its claims were typical as required by Rule 42(a).[10]

Southwestern Bell then argued that individualized issues of reliance and damages would predominate the case, thereby preventing certification. The Supreme Court, however, found that the trial court did not abuse its discretion in finding that because Southwestern Bell employed a standard format for its bills and that the challenged "municipal charge" was uniformly calculated and applied, the class met its burden of establishing class-wide proof of reliance because the plaintiffs had no choice but to rely on the misrepresentation.[11] The Supreme Court went on to hold that the trial court did not abuse its discretion when it found that proof of damages could be managed in a timely, efficient and fair manner.[12]

After finding that the plaintiff's claims were typical of those of the remainder of the class and that common issues predominated over individual issues, the court focused on the plaintiff's adequacy as a class representative. Although an assignee's interests are not necessarily antagonistic solely because it is an assignee, the court stated that it should scrutinize carefully the motivating interests and incentives of the parties to determine whether the plaintiff was an adequate class representative.[13]

To determine whether Marketing On Hold was an adequate class representative, the court focused on three factors to ensure that its interests were aligned with the class: (1) Marketing On Hold's connection to the class-wide injury; (2) the benefits Marketing On Hold received from the assignments; and (3) Marketing On Hold's motivation in asserting claims on behalf of the assignors.[14]

The court found that Marketing On Hold was not an adequate class representative because its interests conflicted with those of the absent class members. Observing that the plaintiff voluntarily assumed the class-wide injury by assignment in order to serve as the class representative, the court found that it had a materially lesser interest in making itself and the class whole because it was never personally aggrieved by the alleged overcharges. The court concluded that the plaintiff's incentive in settling quickly in order to minimize litigation expenses differed from class members who might be willing to hold out for larger damages.[15]

The court appeared to be persuaded by the testimony of Linda S. Mullenix, a professor at the University of Texas School of Law and the author of a well known treatise on class action law, who testified at the class certification hearing that she "had never seen anything like this before …."[16] She opined that the trial court would be dealing with a scenario in which "class counsel will either be litigating, negotiating, or bargaining the rights of one group [of class members] against another."[17]

Although the court found that Marketing On Hold's status as an assignee did not deprive it of standing, its lack of any claim of its own made it unique among members of the class.[18] Because Marketing On Hold's interest in the litigation by assignment "removes it and its counsel one step further from the class members, enhancing the risk of conflicts …" the court held that Marketing On Hold had not established that it could adequately represent the class.[19]

In a strong dissent authored by Justice O'Neal, three members of the court found that the plaintiff "holds valid assignments of claims typical to the class, has standing to assert its claims as a class member, is neither a stranger to the litigation, nor a class-action entrepreneur, and will not disrupt the class-suit vehicle or distort the judicial process."[20] The dissent criticized the majority for deciding that Marketing On Hold was not an adequate class representative "based on the potential for hypothetical conflicts that have no basis on the record."[21]

The dissenters believed that Marketing On Hold had superior knowledge about Southwestern Bell's billing procedures, information retrieval systems, and the tariffs that govern the telecommunications industry. They argued that Marketing On Hold had no conflicts that would impact its adequacy as a class representative. In fact, the dissenters believed that Marketing On Hold's unique expertise made it a better class representative than any of the class members.[22] In summary, the dissenters believed that "if [Marketing On Hold] doesn't qualify [as a class representative] it is hard to imagine who would."[23]

2. Williamson County v. Heckman

In another case addressing standing of a putative class representative, the Austin Court of Appeals held in *Williamson County v. Heckman*,[24] that a group of plaintiffs whose individual claims have become moot no longer have standing to pursue claims on behalf of a putative class. Accordingly, the court vacated the district court's order denying a plea to the jurisdiction and rendered judgment dismissing the claims.

In *Heckman*, the plaintiffs were a group of indigent misdemeanor defendants charged with crimes punishable by imprisonment. The plaintiffs asserted that they were deprived, among other things, of the right to counsel. The plaintiffs purported to act on behalf of a class of "all individuals who are accused of a misdemeanor crime in Williamson County who face the possibility of incarceration as a punishment if convicted of such crime and who cannot afford counsel."[25] The case arose from an alleged "systematic and deliberate" scheme to deprive persons accused of misdemeanor offenses in Williamson County of their right to be represented by counsel.

The record showed that counsel had ultimately been appointed for each of the named plaintiffs and/or that the criminal proceedings against them had been finally concluded. The plaintiffs conceded that the conclusion of the criminal proceedings against them mooted their individual claims for relief.

Since the named plaintiffs had no live claims remaining, the court of appeals held that they lacked standing and could not assert claims on behalf of the putative class. Citing *Texas Commerce Bank, N.A. v. Grizzle*.[26] The court held that:

> Any justicable interest that these appellees had in such a claim was thus largely theoretical. In sum, the record establishes that appellees, both individually and collectively, have never had standing to pursue the full claims of the putative class. Consequently they lack standing to litigate whether that class should be certified. Thus, there is no plaintiff with standing to pursue the claims of the putative class nor there can be. The claims are, therefore, moot.[27]

Because the plaintiffs' individual claims were moot and each of them lacked standing to act on behalf of the putative class, the court of appeals held that the suit was moot and dismissed the claims for lack of subject matter jurisdiction.

B. Arbitration

Several cases decided in 2010 blocked class action cases when arbitration clauses applied.

1. In re Merrill Lynch

The Texas Supreme Court considered the intersection of arbitration and class actions in *In re Merrill Lynch & Co., Inc.*[28] There, two sister companies – one of which had signed an arbitration agreement with Merrill, and one that had not – claimed that Merrill had misrepresented the risk of investments sold to the companies. Merrill moved to compel arbitration of the signatory's claims, and moved to stay the litigation, even against the non-signatory.

The trial court granted the motion to compel arbitration of the signatory's claims, but did not grant the stay against the non-signatory. When the Dallas Court of Appeals denied Merrill's petition for writ of mandamus, Merrill petitioned for a writ of mandamus from the Supreme Court.

The Supreme Court characterized the issue before it as "whether the trial court abused its discretion when it refused to stay litigation that could moot the potential arbitration claims in the same lawsuit."[29] Relying on *In re Merrill Lynch Trust Co. FSB*,[30] it held that the pending litigation posed a threat of mooting the potential arbitration and, therefore, the trial court abused its discretion by failing to stay the litigation.[31] The Supreme Court did not want the signatory's bargained for arbitration rights to be nullified by collateral litigation.

2. Obra Homes v. Gonzalez

In Obra Homes, Inc. v. Gonzalez,[32] the Corpus Christi Court of Appeals reversed a class certification order and found that the trial court abused its discretion by denying a motion to compel arbitration.

In *Gonzalez*, the plaintiff had contracted to purchase a home from Obra Homes, but claimed that the contract was defective because it did not include a disclosure statement required by section 27.007 of the Texas Property Code. Obra Homes filed motions to compel arbitration and abate the litigation pursuant to an arbitration clause in the contract. The trial court denied the motion to compel arbitration and, the next day, granted Gonzalez's motion for class certification. Obra Homes filed a notice of accelerated appeal and a petition for writ of mandamus.

The court of appeals found that a valid agreement to arbitrate existed and that Gonzalez's claims were related to the underlying contract because the substance of his claims was based on the failure to include a proper disclosure in the contract itself. The court then considered and rejected Gonzalez's claims that the arbitration clause was unconscionable, unsupported by mutual consideration, burdensome, or contrary to public policy. Having decided that Gonzalez's claims were subject to arbitration, the court then turned to the trial court's certification of a class. Relying on *Green Tree Financial Corp. v. Bazzle*,[33] the court found that a broad arbitration clause like this one required that the arbitrator – not the courts – decide the issue of class certification. The court of appeals therefore reversed the class certification order.

3. In re Nationwide Credit, Inc.

The Corpus Christi Court of Appeals also ordered the dismissal of a class action and certified an arbitration award in *In re Nationwide Credit, Inc.*[34] In that case, the plaintiff, Flanagan, contended that Nationwide violated the Texas Debt Collection Act while collecting a debt on behalf of Direct TV. The trial court certified a class and ordered Nationwide to distribute notice to the class members.

Nationwide filed a motion to decertify the class and compel arbitration based on an arbitration clause in Flanagan's contract with Direct TV. The trial court denied the motion and the court of appeals denied the subsequent petition for mandamus relief.[35] While the case was under review by the Supreme Court, Nationwide and Flanagan agreed to arbitrate their disputes and Nationwide agreed to drop its appeal.

The arbitrator ruled that the matter could not proceed in arbitration as a class action because Flanagan was the only potential class member who had entered into an arbitration agreement. Flanagan then returned to the trial court and asked it to enforce its order that Nationwide distribute notices to the class. The trial court granted the request and the case returned to the court of appeals where the court held that the class action should be stayed until Flanagan was replaced as class representative or Flanagan's individual arbitration was concluded, whichever came earlier.[36]

The trial court then removed Flanagan as the class representative and gave class counsel six months to find a new class representative. Soon after, the arbitrator rendered a final award denying Flanagan any relief. Nationwide then filed an original proceeding with the court of appeals asking it to confirm the arbitration award against Flanagan and to compel the trial court to dismiss the class action or decertify the class.

After that long, tortured, procedural history spanning nearly six years, the court of appeals held that the trial court abused its discretion by denying Nationwide's motion to dismiss the class action or decertify the class.[37] The petition for writ of mandamus was granted and the trial court was ordered to dismiss the class action, without prejudice. The court reached this conclusion because once Flanagan was removed as class representative and no replacement was named, there was no longer a live case or controversy.[38]

ENDNOTES

1 Mark W. Bayer is a partner in the Dallas office of Gardere Wynne Sewell LLP. The author would like to thank Brett Ackerman for his assistance in preparing this article. Any opinions expressed herein are not to be attributed to Gardere Wynne Sewell LLP or its clients.

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

3 308 S.W.3d 909 (Tex. 2010).

4 *Southwestern Bell Telephone Co. v. Marketing On Hold, Inc.*, 170 S.W.3d 814 (Tex. App. – Corpus Christi 2005).

5 308 S.W.3d at 925-927.

6 52 S.W.3d 704, 710 (Tex. 2001).

7 *Id.* at 916.

8 *Id.* at 917.

9 *Id.* at 918.

10 *Id.* at 920.

11 *Id.* at 922.

12 *Id.* at 925.

13 *Id.*

14 *Id.*

15 *Id.* at 925-26.

16 *Id.* at 926, n.11.

17 *Id.*

18 *Id.* at 927.

19 *Id.*

20 *Id.* (O'Neil, J., dissenting)

21 *Id.* at 928.

22 *Id.* at 929.

23 *Id.* at 928.

24 No. 03-06-00600-CV, 2010 WL 1632901 (Tex. App. – Austin, April 23, 2010).

25 *Id.* at *1.

26 96 S.W.3d 240, 255 (Tex. 2010).

27 2010 WL 1632901 at * 12 (citations omitted).

28 315 S.W.3d 888 (Tex. 2010).

29 *Id.* at 889.

30 235 S.W.3d 185 (Tex. 2007).

31 *In re Merrill Lynch & Co, Inc.*, 315 S.W.3d 888, 892 (citing *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d at 195-96).

32 2010 WL 2224662 (Tex. App. Corpus Christi, June 3, 2010).

33 539 U.S. 444, 123 S. Ct. 2402 (2003).

34 No. 13-03-00644-CV, 2010 WL 596809 (Tex. App. Corpus Christi, Feb. 18, 2010).

35 *In re Nationwide*, No. 13-06-521-CV, 2006 WL 2979334 (Tex. App. Corpus Christi, Oct. 19, 2006).

36 *In re Nationwide*, No. 13-08-00717-CV, 2009 WL 866833 (Tex. App. Corpus Christi, March 31, 2009).

37 *In re Nationwide Credit, Inc.,* 2010 WL 596809, at * 4.

38 *Id*.

2010 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 the four federal district courts in Texas saw almost the same amount of class action activity in 2010 as they did in 2009. In 2009, these courts decided 13 cases substantively addressing Rule 23. The courts in 2009 certified five of the proposed classes. The same courts in 2010 decided 14 cases that substantively addressed Rule 23, certifying only four of the proposed classes.

This past year, the Fifth Circuit and district courts in Texas addressed class actions involving Rule 23 issues impacting areas such as the Securities Exchange Act of 1934, the Fair Debt Collection Practices Act, the Real Estate Settlement Procedures Act, bankruptcy laws, arbitration, and mass torts. The following is a summary of decisions from the Fifth Circuit and the Texas district courts that substantively addressed Rule 23. Hopefully, this will provide some valuable insight into litigating class action issues in the Fifth Circuit.

A. Fifth Circuit Cases

1. Securities Exchange Act of 1934

Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton, Co. was a private securities fraud-on-the-market class action case in which the Fifth Circuit considered whether the district court abused its discretion in finding that the lead plaintiff, the Archdiocese of Milwaukee Supporting Fund, Inc. ("AMSF"), failed to met its burden for proving loss causation at the class certification stage under Rule 23.[2] As lead plaintiff, AMSF filed this putative securities fraud class action against Halliburton in the Northern District of Texas, alleging violations of the Exchange Act.[3] Specifically, AMSF claimed that Halliburton made misrepresentations regarding the following three areas of its business: (i) its potential liability in asbestos litigation; (ii) the accounting of revenue in its engineering and construction business; and (iii) its benefits from a merger with another company.[4] For loss causation, AMSF argued that the class members lost money when Halliburton issued subsequent disclosures constituting negative news that corrected the previous misrepresentations, causing Halliburton's stock price to decline.[5] The district court disagreed, however, and denied class certification, finding that AMSF failed to meet its burden of establishing loss causation.[6]

On appeal, AMSF first argued that the district court applied the wrong loss causation standard by incorrectly requiring AMSF to prove actual fraud on the part of Halliburton at the class certification stage.[7] The Fifth Circuit disagreed, however, concluding that the district court did apply the correct loss causation legal standard of actual fraud since it "understood the need for the corrective disclosures to reveal the actionable truth about prior misstatements."[8] Second, AMSF argued that the district court erred in denying class certification because, as proof of loss causation, (i) it identified specific misrepresentations that were made by Halliburton and (ii) it specifically linked these misrepresentations to corrective disclosures.[9] Based on the allegations in AMSF's complaint and expert report, however, the court disagreed. Instead, it found that none of the subsequent disclosures had corrected any previously alleged misrepresentations.[10] Accordingly, the Fifth Circuit affirmed the district court's denial of class certification, holding that AMSF failed to meet the requirements for proving loss causation at the class certification stage.[11]

2. Bankruptcy

In *Wilborn v. Wells Fargo Bank, N.A.*, the Fifth Circuit considered two issues: (i) whether a bankruptcy court can certify a class action made up of debtor-plaintiffs; and (ii) whether the bankruptcy court's certification of this class of debtor-plaintiffs was proper.[12] The individual named plaintiffs alleged in an adversary proceeding in the U.S. Bankruptcy Court for the

Southern District of Texas that Wells Fargo Bank, N.A. "charged, or charged and collected, unreasonable and unapproved post-petition professional fees and costs during the pendency of their bankruptcies" in violation of the U.S. Bankruptcy Code.[13] Even though these post-petition professional fees and costs were permitted in the plaintiffs' individual loan documents, the plaintiffs argued that Wells Fargo still had to disclose the fees and costs to the court because the nondisclosure of the fees and costs interfered with their ability to complete bankruptcy and emerge having cured all arrearages.[14]

Accordingly, the plaintiffs moved for class certification, seeking: (i) a declaratory judgment that the undisclosed fees and costs were unreasonable; (ii) disgorgement of the fees and costs actually collected by Wells Fargo; (iii) an injunction barring Wells Fargo from charging the mortgage accounts of its debtors for post-petition professional fees and costs without first seeking the bankruptcy court's approval; and (iv) statutory sanctions against Wells Fargo.[15] The bankruptcy court granted the plaintiffs' motion for class certification.[16] Wells Fargo then filed an interlocutory appeal challenging the bankruptcy court's certification of the class on both jurisdictional and procedural grounds.[17]

On appeal, Wells Fargo argued first that the bankruptcy court did not have jurisdiction to certify this class because the individual bankruptcy cases of the named plaintiffs and putative class members were before different bankruptcy judges in the Southern District of Texas.[18] The Fifth Circuit disagreed, however, noting that under Wells Fargo's view, "a bankruptcy court would never be able to certify a class action of debtors unless the individual bankruptcy cases of all debtors happened to be before a single bankruptcy judge."[19] The court instead found that the Federal Bankruptcy Rules expressly allow class action proceedings in bankruptcy court.[20] Therefore, the court held that the bankruptcy court has "authority to certify a class action of debtors whose petitions are filed within its judicial district."[21]

Alternatively, Wells Fargo argued that the bankruptcy court abused its discretion in certifying the class since it did not satisfy the Rule 23 requirements.[22] The Fifth Circuit agreed, holding that class certification was not proper under Rules 23(b)(2) or 23(b)(3).[23] First, the court found class certification was improper under Rule 23(b)(3)'s predominance requirement because the individual issues for each class member predominated over common issues to the class members.[24] Specifically, the court focused on the individualized circumstances of post-petition professional fees and costs charged by or paid to Wells Fargo that varied from debtor-plaintiff to debtor-plaintiff in terms of amount, purpose, and reasonableness.[25] Additionally, the court found that class certification was also not proper under Rule 23(b)(2)'s requirement that the putative class defendant act on grounds that apply generally to the class members so that declaratory or injunctive relief is appropriate to the whole class.[26] The court stated that for a Rule 23(b)(2) class to be certified: (i) the declaratory or injunctive relief sought must predominate over any claims for monetary relief sought (*i.e.*, any claims for monetary relief must be incidental to the class-wide declaratory or injunctive relief sought); and (ii) "[t]he monetary relief [sought] must be 'capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances.'"[27] Here, the Fifth Circuit concluded that: (i) the plaintiffs' request for disgorgement of the post-petition professional fees and costs actually collected by Wells Fargo "was not merely incidental to the sought-after injunction and declaration"; and (ii) the amount to be disgorged by Wells Fargo would "depend on the specific circumstances of each class member and whether and how fees were imposed."[28] Accordingly, the court vacated the bankruptcy court's certification order.[29]

3. Other Decisions

In *In re Katrina Canal Breaches Litigation*, the Fifth Circuit determined whether a class of policyholder plaintiffs satisfied the predominance requirements for certification under Rule 23(b)(3).[30] The plaintiffs, policyholders of various insurance company defendants, brought a class action lawsuit in the Eastern District of Louisiana for statutory penalty claims under state law stemming from the defendants' alleged bad faith adjustments of their Katrina-related insurance claims.[31] The district court denied certification of the class on grounds that the claims required an analysis of a myriad of "individualized, fact-specific issues."[32]

On appeal, the plaintiffs argued that class certification was proper because (i) the defendants' bad faith adjusting of claims was an "over-arching scheme" and (ii) the reasonableness of the defendants' actions could be evaluated by relying on minimal standards of conduct established by state law.[33] The Fifth Circuit disagreed, however, and found that even under such a scheme, "individualized issues will predominate, such as the nature and extent of a class member's damage, whether and how much a class member was paid and for what type of damage, and whether any payment was sufficient and timely."[34] Additionally, the court found that the predominance requirement was not met because even minimal standards of conduct under state law still required "detailed and individualized considerations of each class members' claim."[35] Therefore, the Fifth Circuit upheld the district court's denial of certification since the proposed class failed to satisfy the predominance requirement of Rule 23(b)(3).[36]

In another Katrina-related case, also styled *In re Katrina Canal Breaches Litigation*, the Fifth Circuit addressed the following issues: (i) whether the district court properly certified a mandatory, limited-fund class of plaintiffs damaged or injured by Hurricanes Rita or Katrina; and (ii) whether a proposed settlement of the class action was fair, reasonable, and adequate.[37]

Numerous plaintiffs filed complaints against public and private entities for damages caused by the flooding that resulted from the failure of levees and floodwalls during Hurricanes Rita and Katrina.[38] These complaints were consolidated in the Eastern District of Louisiana where the plaintiffs sought certification of a limited-fund mandatory-settlement class under Federal Rule of Civil Procedure 23(b)(1)(B).[39] The plaintiffs also sought approval of a settlement with the defendants, which included levee districts and their insurers.[40] Despite objections by class members, the district court certified the class, finding that it met the Rule 23(a) prerequisites and the "stringent standards" for a mandatory limited-fund class under Rule 23(b)(1)(B).[41] The court also approved the settlement, finding that notice was reasonable and the settlement, under the Fifth Circuit's six-factor test articulated in *Reed v. General Motors,* was fair, adequate, and reasonable.[42] The same class members who had opposed the original certification and settlement appealed.

The Fifth Circuit first reviewed the district court's certification of the mandatory class under Rule 23(b)(1)(B), finding that certification was improper because of significant concerns over the fairness of distribution of the funds.[44] In reaching its holding, the court relied on the Supreme Court's decision in *Ortiz v. Fibreboard Corporation,* in which the Court identified three "presumptively necessary" characteristics of traditional limited fund classes.[45] In particular, the *Ortiz* Court focused on intra-class equity, where it required pro rata, or at the least, fair distribution of the remedy among the plaintiffs such as "providing for procedures to resolve the difficult issues of treating such differently situated claimants with fairness among themselves."[46] While the Fifth Circuit found that the present case did not suffer from the same defects of temporal intra-class conflicts as *Ortiz* did since it involved "an identifiable class that has suffered a presently identifiable harm," it did find the lack of procedures for dealing with the issue of equitable distribution to be a fatal defect.[47] Specifically, the court found that simply appointing a special master to deal with the issue of treating differently situated claims only "punt[ed] the difficult question of equitable distribution . . . without providing any more clarity as to how fairness will be achieved."[48] Therefore, the Fifth Circuit found certification was improper because the class failed the requirement of equitable distribution and thus "stray[ed] too far from the historical model to avoid the Court's constitutional concerns."[49]

Second, the court addressed the objecting class members' challenge that the district court erred in approving the settlement as fair because (i) it did not benefit the class, (ii) it allowed counsel to seek an enhancement of actual costs amounting to fees, and (iii) notice was inadequate and misleading.[50] First, the court agreed with the objectors that the settlement provided no benefit to the class, and the district court erred in approving it because there was no "assurance that attorneys' costs and administrative fees w[ould] not cannibalize the entire $21 million settlement."[51] Next, the court agreed that allowing the "enhancement" of the attorneys' costs "is the functional equivalent of a fee."[52] Consequently, the court found it was an abuse of discretion to approve the settlement without determining the reasonableness of attorneys' fees, especially since there was no assurance that any funds would remain for disbursement to the plaintiffs after payment of costs and fees.[53] Finally, the court also agreed that notice was inadequate and misleading because it failed to address the potential for a cy pres distribution instead of a direct distribution to the class and inaccurately asserted that the attorneys would not request fees when the "enhanced" costs actually amounted to fees.[54] The court did, however, disagree with the objectors that notice about the legal limits to the fund (as imposed by statutory limits for state entities) was clearly misleading.[55] Though the court acknowledged the notice was "less than one hundred percent accurate," it still found the notice to be "accurate in its essential point" regarding the maximum amount of the settlement.[56]

In *Gene & Gene, L.L.C. v. BioPay, L.L.C.*, the Fifth Circuit determined: (i) whether the law of the case doctrine prevented a district court from recertifying a class on remand after an interlocutory appeal when the Fifth Circuit had already reversed the district court's original class certification; and (ii) whether the "substantially different" evidence exception to the law of the case doctrine applied to allow recertification.[57]

The plaintiffs, Gene & Gene, L.L.C. ("Gene"), filed a class action suit in the Middle District of Louisiana against BioPay, L.L.C. for violations of the Telephone Consumer Protection Act of 1991 ("TCPA") stemming from the transmission of unsolicited advertisement faxes to Gene and other unidentified class members.[58] Gene moved for certification of a class that included all recipients of unsolicited faxes in Louisiana but excluded any recipients who had expressly consented to receive such faxes from the defendants.[59] The district court determined that the class satisfied the requirements of Rule 23(a) and Rule 23(b)(3) and certified the class.[60] BioPay, however, filed an interlocutory appeal under Rule 23(f), and the Fifth Circuit reversed the certification and remanded to the district court, finding that common issues did not predominate since consent could not be established on a class-wide basis.[61] On remand, the district court reopened discovery on the limited issue of class certification and found that "new" evidence revealed during discovery created a "common method of establishing the issue of consent."[62] Therefore, finding that the new evidence resolved the issues of predominance, the district court recertified the class and BioPay filed another interlocutory appeal.[63]

On appeal for the second time, BioPay argued that under the law of the case doctrine, the Fifth Circuit's decision in *BioPay I* barred further discovery and recertification of the class on remand.[64] The Fifth Circuit agreed, finding that under the law of the case doctrine, its earlier decision that certification was improper because common issues did not predominate was "expressly decided" and therefore "should be the end of the matter."[65] While the court acknowledged that in some cases, a district court may change a certification order that is on remand from an interlocutory appeal, such as when discovery was only preliminary, it found this was not so in the present case since discovery had been completed when the plaintiff moved for certification.[66] Accordingly, the court found that the district court had misinterpreted its mandate and abused its discretion since "*BioPay I* foreclosed the relitigation of the class certification."[67] The court also found in the alternative that even if the district court's decision to reopen discovery had been proper, the evidence for certification presented on remand did not fall under the "substantially different" exception to the law of the case doctrine since there was no showing that the "newly discovered evidence could not have been discovered by proper diligence."[68]

The Fifth Circuit in *Casa Orlando Apartments, Ltd. v. Federal National Mortgage Association* determined whether the district court abused its discretion in denying class certification under any of the three grounds for certification in Rule 23(b).[69] The plaintiffs, mortgagees of loans for low-income multi-family housing, filed suit in the Eastern District of Texas against the mortgage holder and servicer, the Federal National Mortgage Association ("Fannie Mae") and the mortgage insurer, the Department of Housing and Urban Development.[70] The plaintiffs claimed that the defendants (i) had breached their fiduciary duty and (ii) were unjustly enriched as a result of their breach.[71] Specifically, the plaintiffs alleged that the defendants engaged in self-dealing of a special reserve fund that was created as part of the mortgage process and was used to set aside funds for repairs on the HUD-insured properties.[72] The plaintiffs moved for certification of a class that would include nearly 4,000 mortgagees from all 50 states and be governed by the law of the District of Columbia.[73] The district court found that the plaintiffs satisfied the Rule 23(a) prerequisites but denied certification under all categories of Rule 23(b).[74] The plaintiffs then filed an interlocutory appeal.

On appeal, the Fifth Circuit upheld the district court's denial of certification, finding that choice of law issues in particular made certification improper under all three potential categories of classes under Rule 23(b).[75] First, the plaintiffs argued that certification of a (b)(3) opt-out class was proper because the common issues of whether the agreement establishing the set-aside fund created a fiduciary duty and whether that duty was breached were treated the same across all jurisdictions.[76] The court, however, disagreed and found that denial of certification as a (b)(3) class was proper because, "in order for common issues to predominate and justify a (b)(3) certification, each state must have the same standards for establishing a fiduciary relationship and breaching the resulting duty."[77] In contrast, the court found that there were significant variations in the law of fiduciary duty across the jurisdictions and that the plaintiffs failed to demonstrate how these variations did not preclude certification.[78]

The plaintiffs next argued that certification under (b)(1)(A) was proper since "multiple lawsuits would impose incompatible standards of conduct upon Fannie Mae."[79] The court rejected this argument, finding that: (i) there is never inconsistency of treatment when dealing with the award of varying monetary compensation to different plaintiffs; and (ii) injunctive remedies would not establish incompatible standards of conduct since there would be no chance of one court ordering Fannie Mae to cease self-dealing and another ordering it to continue self-dealing.[80] Furthermore, the court found that the various state laws would not be incompatible since they would only "reflect diverse state fiduciary law" and, additionally, "under Rule 23(b)(1)(A), dissimilar outcomes that result from differing state laws are insufficient to justify class certification."[81] Finally, the court also held as a general matter that, with respect to (b)(1)(A) classes, a defendant's veto of certification is not required if certification is otherwise proper under the rule.[82]

Finally, the plaintiffs urged that the class should be certified as a mandatory (b)(2) class seeking predominately injunctive relief. [83] While the court agreed that the defendant's behavior was generally applicable to the class as a whole, it disagreed that the monetary relief was only incidental and did not predominate.[84] Specifically, the court found that the monetary damages were not merely incidental (*i.e.*, did not "flow directly to the class members as a whole") because the choice of law differences meant that "equitable relief [was] dependent on subjective differences of each class member's circumstances."[85] Thus, a mandatory class was not appropriate since it did not afford the procedural safeguards of an opt-out class.[86] In addition, the court found that certification under (b)(2) was not proper because potentially only 40 percent of the class would actually benefit from an injunction.[87]

In *Ditcharo v. United Parcel Service, Inc.*, the Fifth Circuit determined whether the plaintiffs met the adequacy of representation requirement for class certification under Rule 23(a).[88] United Parcel Service, Inc. removed the lawsuit from Louisiana state court to the U.S. District Court for the Eastern District of Louisiana.[89] The named plaintiffs alleged that UPS had promised to them and 70 others full-time, permanent, non-seasonal driver positions only to later terminate or demote them to part-time or non-driver jobs. The plaintiffs sought class certification of their claims against UPS for breach of contract, detrimental reliance, and violation of the Louisiana law of obligations.[90] The district court, however, denied class certification, holding that the named plaintiffs did not adequately allege facts sufficient for class certification.[91]

On appeal, the plaintiffs argued that the district court erred by failing to grant class certification.[92] The Fifth Circuit disagreed, however, finding that under Rule 23(a)'s threshold inquiry, the plaintiffs failed to meet their burden of showing that they were adequate representatives of this proposed class.[93] In support of this finding, the court determined that the named plaintiffs had demonstrated they would not adequately represent the proposed class—specifically those unnamed class members seeking more than $75,000 in damages—because they had attempted to restrict the amount of damages available to each class member by limiting their damages to less than $75,000.[94] Additionally, the court determined that the calculations for each class member's damages were individual issues of fact because (i) some were terminated while others were demoted and (ii) those terminated were fired at different times.[95] Therefore, the court affirmed the district court's denial of class certification, holding that the named plaintiffs failed to allege sufficient facts showing that they were capable of adequately representing the class.[96]

B. Texas District Court Cases

1. Securities Exchange Act of 1934

The court in *In re Dell Inc.* determined whether (i) class certification under Rule 23(b)(3) was proper, (ii) a proposed settlement of the class was fair, reasonable, and adequate, and (iii) attorneys' fees and expenses were reasonable.[97] The plaintiffs, persons who purchased Dell common stock between May 16, 2002, and September 8, 2006, brought suit in the Western District of Texas against Dell, its chief officers, and its auditing firm, PricewaterhouseCoopers, claiming violations of sections 10(b) and 20(a) of the Exchange Act.[98] Various pending suits were consolidated and the plaintiffs alleged that the defendants inflated reported revenues, engaged in erroneous accounting, and disseminated false and misleading information that, when revealed, resulted in a loss to shareholders of $45.7 billion.[99] The court, however, dismissed these complaints, but soon after the parties entered a stipulation of settlement and sought to certify the class.[100] After a fairness hearing, the district court certified the class and approved the settlement in the amount of $40 million and for attorneys' fees and expenses with minor modifications.[101]

First, the court determined that the proposed class satisfied the certification prerequisites of Rule 23(a) because: (i) numerosity "is generally assumed to have been met in class action suits involving nationally traded securities;" (ii) the claims of the class all arose out of the same set of facts and legal theories regarding the violation of securities law even though damages are concerned since this is "an objective question that can be decided definitively based on evidence of [the class member's] stock holding" during the relevant period; (iii) the lead plaintiff's claims of securities violations were the same as the rest of the class; and (iv) the class representatives and counsel had been involved in the litigation and had shown their respective ability to represent the class.[102] The court also found that certification of a class under Rule 23(b)(3) was proper because: (i) a class action was "undoubtedly the best available method for litigating the case" since the issues of law and fact were common to all class members and many class members would have no incentive to litigate outside of the class context; and (ii) the liability issues were common to the class members and predominated over any individual issues of damages, which the court noted were easily identifiable through proof of stock transactions.[103]

Next, the court analyzed the settlement agreement under the Fifth Circuit's six *Reed* factors to determine if it was fair, reasonable, and adequate.[104] Although the court did express concern that "the settlement was essentially made in the dark" since the plaintiffs' claims were dismissed before any discovery was allowed and little was known about the actual merits of the case, it determined that the outside investigation done by the plaintiffs regarding the claims provided them with enough information to value the case.[105] Additionally, the court addressed the numerous objections to a *de minimis* provision, which limited the minimum amount of recovery to ten dollars or more, by eliminating it and replacing it with a provision that limited each claimant to one check negotiable within 60 days.[106] Finally, the court dismissed the other minor objections and approved the settlement plan allocating each class member's pro rata share based on his or her recognized losses as fair, reasonable, and adequate.[107]

Finally, the court determined whether the amount of the attorneys' fees requested at 25% and expenses of $450,000 were reasonable.[108] The court found that the fee of range of 18% to 25% as set by the retainer agreement was presumptively reasonable but adopted a hybrid approach, in which it "examine[d] the requested 25% fee in light of the twelve factors articulated in *Johnson v. Georgia Highway Express, Inc.* to determine whether a deviation from the requested percentage is appropriate and to test the overall reasonableness of the fee."[109] After applying the *Johnson* factors, the court found that a downgrade in the fee percentage from 25% to 18% was warranted primarily because of (i) the relatively low amount of time and labor required;[110] (ii) the low amount of skill required to pursue the case since it never proceeded beyond the complaint into discovery;[111] and (iii) the "undeniably poor" results achieved by lead counsel in litigation.[112] Therefore, the court awarded lead counsel $7.2 million in fees and $450,000 in expenses.[113]

In *In re Superior Offshore International, Inc. Securities Litigation*, the court determined specifically (i) whether under the Rule 23(a) prerequisites, the class representative would "fairly and adequately protect the interests of the class" and (ii) whether common issues of law or fact predominated over individual issues to allow certification as an opt-out class under Rule 23(b)(3).[114] The plaintiffs, investors in an initial public offering ("IPO") of defendant Superior Offshore International, Inc., brought suit in the Southern District of Texas against Superior and the lead underwriters of the IPO, Merrill Lynch and J.P. Morgan Securities, Inc., alleging that the defendants violated section 11 of the Securities Act of 1933[115] by distributing materially false and misleading information and omitting material information in connection with the IPO.[116] The cases were consolidated and Charles Ognar was appointed lead plaintiff for the proposed class action.[117]

First, the defendants challenged the plaintiffs' ability to satisfy the adequacy requirement of Rule 23(a), urging that Ognar could not sufficiently serve as class representative because he did not understand the claims of the suit, was unable to control his behavior, and had not adequately supervised the litigation.[118] The court disagreed, noting that the defendants' portrayal of the lead plaintiff was based mostly on his deposition testimony and was taken out of context.[119] The court found instead that despite the lead plaintiff's obvious frustration during his deposition and his sometimes flippant answers, he was "rational, intelligent, and capable of understanding and guiding the litigation" and had, in fact, been an active participant, spending over 400 hours communicating with counsel about the case.[120] Accordingly, the court found that the plaintiffs satisfied the Rule 23(a) requirements.[121]

Next, the court determined whether the proposed class satisfied the predominance requirement for Rule 23(b)(3) classes.[122] The court first found that the existence of a material omission or misrepresentation—the requirement for a section 11 claim—was common to all class members.[123] It also found, however, that the issue of whether any investor had knowledge at the time of purchase that the information was materially misleading or false was an issue that could only be "determined on an individualized basis as to each investor."[124] Because there was relevant knowledge available in the marketplace before the IPO that contradicted information released in the IPO materials and the plaintiffs did not satisfy their burden to show that common issues predominated, the court found that the "issue of knowledge permeates the case."[125] Therefore, it "is an individual issue over which no common issues of law and fact predominate.[126] Accordingly, the court denied certification under Rule 23(b)(3).[127]

2. Bankruptcy

In *In re Rodriquez*, the United States Bankruptcy Court for the Southern District of Texas determined whether Countrywide Home Loans, Inc.'s fee collection practices violated Rule 2016(a) of the Federal Rules of Bankruptcy Procedure on a scale sufficient to merit class certification under Rule 23.[128] The named plaintiffs, all former bankruptcy debtors with mortgage contracts serviced by Countrywide, brought a class action lawsuit against Countrywide.[129] In the suit, the named plaintiffs claimed that they (i) cured all of their pre-petition mortgage arrearages; (ii) completed all of their bankruptcy plans; and (iii) received a discharge from the bankruptcy court.[130] Despite this, the plaintiffs claimed that Countrywide still sought foreclosure on their homes after they were discharged.[131] According to the plaintiffs, Countrywide improperly charged undisclosed and unauthorized fees to their mortgage accounts during the pendency of their bankruptcy cases.[132] Then, after discharge, Countrywide allegedly threatened to foreclose on their homes if these fees were not paid.[133] Simply put, the named plaintiffs claimed that they were illegally forced into default after discharge instead of receiving bankruptcy's promised fresh start after discharge.[134] Thus, the named plaintiffs alleged that Countrywide's internal systems and collection practices violated Rule 2016(a) of the Federal Rules of Bankruptcy Procedure culminating in Countrywide's attempts to foreclose on the named plaintiffs' homes after discharge.[135] The plaintiffs then moved for class certification.[136]

In determining class certification, the court concluded that the plaintiffs satisfied the four threshold prerequisites of Rule 23(a).[137] First, the court held that the plaintiffs satisfied Rule 23(a)(1)'s numerosity requirement that the class be so numerous that the joinder of all class members is impracticable since (i) the class consisted of approximately 125 individuals; (ii) the size of the claims in each individual class member's case were relatively small; and (iii) it was judicially economical to conduct one class action lawsuit instead of 125 individual lawsuits.[138] Second, the court held that the plaintiffs satisfied Rule 23(a)(2)'s commonality requirement that questions of law or questions of fact common to the class must be present since (i) the question of whether Countrywide systematically violated Rule 2016(a) by charging undisclosed and unauthorized fees was a common question of fact affecting all class members and (ii) the question of Rule 2016(a)'s scope (*i.e.*, whether Countrywide's collection practices violated Rule 2016(a)), was a common question of law affecting all class members.[139] Third, the court held that the plaintiffs satisfied Rule 23(a)(3)'s typicality requirement that the plaintiffs' claims must be typical of the putative class members' claims.[140] The named plaintiffs' claims had the same essential characteristics of the putative class members' claims since (i) the putative class members' claims arose from Countrywide's same course of conduct (*i.e.*, Countrywide's collection practices); (ii) the putative class members' shared the same legal theory as the named plaintiffs (*i.e.*, that Countrywide's collection practices violated Rule 2016(a)); and (iii) there were no divergent interests between the named plaintiffs and the putative class members since the injunctive relief sought by the named plaintiffs would benefit the entire class.[141] Lastly, the court held that the plaintiffs satisfied Rule 23(a)(4)'s adequacy of representation requirement that the named plaintiffs must fairly and adequately protect the interests of the class.[142] In particular, the court found adequacy of representation because (i) the named plaintiffs' counsel represented the class with sufficient zeal and competency and (ii) the named plaintiffs were sufficiently active and informed.[143]

Next, the named plaintiffs had to come under one of Rule 23(b)'s three categories in order to attain class certification.[144] In the class action suit, the plaintiffs sought: (i) a declaratory judgment that Countrywide's conduct violated Rule 2016(a); (ii) an injunction prohibiting Countrywide from attempting to collect these undisclosed and unauthorized fees; (iii) compensatory damages, including disgorgement and restitution; (iv) punitive damages; and (v) sanctions.[145] Under Rule 23(b)(2), the court determined that the following two requirements must be met for class certification: (i) the defendant's behavior was generally applicable to the class as a whole; and (ii) the injunctive relief predominated over damages.[146] With regard to the first requirement of Rule 23(b)(2), the court found that Countrywide acted on grounds generally applicable to the class as a whole because it "assessed and charged fees to the class according to its understanding that its conduct was not regulated by Rule 2016(a), and Countrywide did not file Rule 2016(a) applications during the relevant period."[147]

With regard to the second requirement of Rule 23(b)(2), however, the court denied class certification of all of the plaintiffs' damages claims.[148] Under this second requirement, the court determined that any monetary relief sought in addition to injunctive relief sought must be incidental, meaning that the monetary relief sought must be "capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances."[149] Specifically, under this standard, the court denied class certification of the plaintiffs' disgorgement compensatory damages as not incidental because: (i) they required the court to consider the specific circumstances of each class member's case; and (ii) Countrywide raised viable defenses to some of the plaintiffs' claims involving the fees imposed, necessitating the possibility for individualized hearings with regard to disgorgement of compensatory damages.[150] Additionally, under this standard, the court denied class certification of the plaintiffs' restitution compensatory damages, punitive damages, and sanctions sought because the court could not objectively calculate these damages on a class-wide basis without considering the unique facts and legal issues in each class member's case.[151] The court also denied class certification for all of the named plaintiffs' damages claims under Rule 23(b)(3), which requires a finding that "questions of law or fact common to the class members predominate over any questions affecting only individual members . . . ."[152]

As for the injunctive relief, the court determined that Rule 23(b)(2)'s second requirement was easily met when only injunctive relief was sought and thus granted class certification on this basis.[153] Under this second requirement, the court determined that class certification was "appropriate only if members of the proposed class would benefit from the injunctive relief they request."[154] The court held that, indeed, the class had sufficiently demonstrated that it would benefit from the injunctive relief requested, which was specifically that "Countrywide shall not collect or attempt to collect any fees that (1) were incurred during the pendency of a class member's bankruptcy case; (2) are governed by Rule 2016(a); and (3) have not yet been authorized pursuant to Rule 2016(a)."[155] Therefore, the court denied the named plaintiffs' motion for class certification as to all of their damage claims but granted class certification for injunctive relief and ordered the named plaintiffs to give notice to the class members regarding the class action and potential injunction.[156]

3. Fair Debt Collection Practices Act

In *Eatmon v. Palisades Collection, Inc.*, the court determined whether to certify a class brought under the Fair Debt Collections Practices Act ("FDCPA") and its Texas state law counterpart, the Texas Debt Collection Act ("TDCA").[157] Two plaintiffs brought suit in the Eastern District of Texas against Palisades Collection, LLC, alleging that Palisades violated the FDCPA and TDCA by engaging in prohibited debt collection when it attempted to collect debts without the appropriate license as required by Texas law.[158] The plaintiffs sought certification of a proposed class under Rule 23(a) and (b)(3).[159]

The court first determined whether the proposed class satisfied the four certification prerequisites of numerosity, typicality, commonality, and adequacy under Rule 23(a).[160] The defendant argued that the class did not satisfy the numerosity requirement because the plaintiffs failed to prove that all the subclasses met the Rule 23(a) requirements and they did not provide evidence of numerosity.[161] The court, however, rejected these arguments because (i) the plaintiffs never suggested any need for subclass division and (ii) evidence from the defendant itself suggested a potential class of 40,000 members.[162] The court then found commonality was admitted by the defendant.[163] Next, the defendant urged that the class representatives were not typical because their cases involved actual lawsuits where other class members may have only received demand letters.[164] The court rejected this argument, finding that factual differences in the actual act of debt collection are "of no consequence as the legal theories and remedies would remain the same."[165] Also, the court disagreed that the issue of class members being potentially barred from recovery due to settlement or release of their claims had any effect on the findings under Rule 23(a), concluding that only similar issues related to the class representative would have any effect.[166] Finally, the court found that the class representatives had sufficient knowledge of the case and that the class counsel was adequate, despite having a history of "settling other putative class actions on individual bases."[167]

Next, the court found that common issues predominated such that certification was proper under Rule 23(b)(3).[168] In particular, the court noted that the mere existence of actual damages that must be sought on an individual basis does not preclude certification "where the defendant is alleged to have acted wrongfully in the same basic manner towards an entire class."[169] Also, the court rejected the defendant's argument that certification should be denied simply because the plaintiffs lacked a trial plan.[170] Finally, the court found that the predominating issue of the defendant's failure to acquire the proper license was one that would determine liability for the class and, thus, certification under Rule 23(b)(3) was proper.[171]

4. Arbitration

In *Botello v. COI Telecom, L.L.C.*, the court determined whether an arbitration agreement prevented certification of a class under Rule 23.[172] The plaintiffs, field service technicians, brought suit in the Western District of Texas, alleging that the defendants, COI Telecom, LLC, and Time Warner Cable, were, among other things, unjustly enriched when they improperly classified the plaintiffs as independent contractors.[173] The plaintiffs sought certification of the unjust enrichment class under Rule 23.[174]

Before addressing the certification question, however, the court took on the issue of whether an arbitration provision effective in April 2008 barred class certification since this provision would bar some class members from litigation but not others.[175] The court found that under the recent Supreme Court decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[176] the agreement did not by itself preclude the plaintiffs from seeking a class action,[177] since the arbitration agreement was silent as to whether (i) the parties had agreed to class arbitration, and (ii) they had intended to preclude individuals from asserting class actions. The court, however, ultimately found that certification of the unjust enrichment class was not proper under Rule 23 because the proposed class members were not harmed in "substantially the same manner" as the class representatives.[178]

5. Other Decisions

The court in *Hamilton v. First American Title Insurance Co.* determined whether class certification of an opt-out class was proper under the prerequisites of Rule 23(a) and Rule (b)(3).[179] The plaintiffs, persons who refinanced their home mortgage and were required to purchase a title insurance policy from First American Title Insurance Company, filed suit against First American in the Northern District of Texas, alleging that the premiums for their title insurance policies were unlawfully high.[180] Specifically, the plaintiffs claimed that First

American failed to apply properly premium discounts for certain types of "reissue" policies as required by Texas law.[181] Accordingly, the plaintiffs brought four causes of action for (i) money had and received; (ii) unjust enrichment; (iii) violation of section 8(b) of the Real Estate Settlement Procedures Act ("RESPA"); and (iv) breach of implied contract.[182] The plaintiffs moved for class certification under Rule 23(b)(3).[183]

The court first reviewed the proposed class under the four 23(a) requirements of (i) numerosity; (ii) commonality; (iii) typicality; and (iv) adequacy.[184] Even though the plaintiffs estimated the class to include 50,000 potential members, First American challenged the numerosity requirement on the grounds that the plaintiffs did not meet their required burden to provide admissible evidence of the number of potential class members.[185] The court disagreed, however, finding that the requirement of direct evidence of class size applied only in the narrow context of securities fraud-on-the-market cases and thus, the present class of over 50,000 members satisfied the numerosity requirement, even if "overestimated . . . by 90 percent."[186] Next, although the court found that three questions of law were common to the class, it also noted that other factual questions relating to details of the mortgages and policies appeared to be individual in nature.[187] The court, however, ultimately found that the apparently individualized questions specific to each mortgage were in fact common to the class because they could be answered on a class-wide basis through inferences based on easily identifiable pieces of information in each class member's mortgage closing file.[188] The court also found that the plaintiffs' claims were typical of the class since they arose from a similar course of conduct and involved the same legal theories.[189] Finally, the court found that the adequacy of representation was met since five of the six plaintiffs had an "adequate layperson's understanding" of the case.[190]

Then, the court determined if under Rule 23(b)(3), common issues would predominate in the questions of (i) whether the class members unlawfully overpaid their premiums; (ii) whether the plaintiffs could recover under section 8(b) or RESPA; and (iii) whether the plaintiffs could recover under their state law claims.[191] Regarding the first question of overpayment, the court found that while individualized inquiries of fact were required to answer this question, these inquiries could "be answered with information contained in documentary evidence."[192] Additionally, the court found that the issue of individualized damage calculations did not predominate because damages could be calculated in a "mathematical, mechanical, and straightforward" manner based on evidence from each member's file, such that there would "be no need for additional hearings or the gathering of individualized evidence or subject evidence" or individualized mini-trials on damages.[193] The court then found that the plaintiffs had framed the RESPA question as a common question of law since it inquired into the legality of the title agents' actions in such a way that did not require individualized factual inquiries into the specific services the agents performed for each class member.[194] Further, the court found that common questions regarding the state law claims predominated because the transactions were structurally identical for all class members and thus the liability determination was based on a common question of law.[195] The court further noted that the only factual variations would be regarding damages and these, as it found earlier, did not predominate.[196]

Finally, the court found that a class action under Rule 23(b)(3) was the superior method for adjudicating the matter because the claims were virtually identical and each member's damages claim was relatively small.[197] The court also rejected the defendant's argument that a class action was not superior because of the availability of treble damages and attorneys' fees under RESPA, finding that it would not be in the interests of judicial economy to separate the RESPA claims and state law claims.[198] The court disagreed with the defendant's assertion that the class action would be unmanageable because of its size and the amount of third party discovery that would be required, stating that "the mere fact that a class will be large in size is not a reason to deny certification."[199] Accordingly, the court granted the motion to certify the class under Rule 23(b)(3).[200]

In *Bertholet v. American Postal Workers Union, Local 185*, the court determined whether to certify a class of postal workers relating to violations of a collective bargaining agreement ("CBA").[201] The plaintiff, an employee of the United States Postal Service, brought suit in the Southern District of Texas against the defendants, USPS and American Postal Workers Union, Local 185 (the "Union").[202] In his suit the plaintiff claimed that: (i) USPS breached the CBA when, after he suffered an injury, it eliminated his position, pressured him to violate his medical restrictions, removed certain accommodations related to his injury, and eliminated a higher pay grade for his position; and (ii) the Union breached its duty of fair representation when it mishandled the grievance related to his complaints against USPS.[203] The plaintiff then sought to certify a class of USPS employees who were "classified in permanent rehabilitation status as a result of an on the job injury with [USPS]," including employees reassigned from Houston and another individual USPS employee.[204]

First, the court determined whether the proposed class satisfied the prerequisites for certification under Rule 23(a). Regarding the numerosity requirement, the plaintiff argued that the class would include between 150 and 250 members.[205] The court, however, found that he failed to satisfy this requirement since the claims were unique only to the plaintiff and, thus, he would be the only class member.[206] Next, the court found that there were no questions of law or fact common to the class because the plaintiff had "not produced probative evidence sufficient to raise a genuine fact issue on commonality;" the plaintiff was not reassigned like the Houston employees, and the defendants produced clear evidence that the Houston reassignments were based on seniority, not injury status.[207] The court also found that the plaintiff's complaints were "highly personalized" and that "significant factual and legal differences between Plaintiff's claim and proposed class members defeat Plaintiff's effort to meet his burden to demonstrate" that his claims were typical of the class.[208] Finally, the court found that the plaintiff would not adequately represent the class since the highly personalized nature of his claims would not give him any "genuine incentive to pursue the claims of the other class members."[209]

Even though it found the proposed class failed the Rule 23(a) prerequisites, the court still examined whether certification would be proper under Rule 23(b). First, the court found that a Rule 23(b)(1)(B) class, which focuses on "whether individual actions would prejudice other class members," would not be proper because the individual, fact specific inquiry required for each of the class members' claims would not prejudice the other class members.[210] The court then determined that a Rule 23(b)(2) class seeking predominately injunctive relief would not be proper since the plaintiff was seeking only equitable relief and did not specify any injunctive relief.[211] Lastly, the court found that an opt-out class under Rule 23(b)(3) would not be proper since the plaintiff's only argument for meeting the requirement that common issues predominate over individual ones was that each member's claims would focus on the same policies regarding injured workers, and the court had earlier found he failed to show that the reassignment of the Houston employees occurred under these same policies.[212] The court also noted that common issues did not predominate because the case would focus on questions unique to the plaintiff, namely whether the breaches occurred with relation to his particular grievance and his particular work assignment.[213] Accordingly, the court denied certification.[214]

ENDNOTES

1 Barry M. Golden and Peter L. Loh are partners in the Dallas office of Gardere Wynne Sewell LLP. Mr. Golden and Mr. Loh would like to thank Tate Hemingson (Southern Methodist University Dedman School of Law, Spring 2011) for his help on this article.

2 597 F.3d 330, 339-44 (5th Cir. 2010).

3 *Id*. at 334.

4 *Id*.

5 *Id*. With regard to the alleged misrepresentations made by Halliburton about its potential exposure to liability in asbestos litigation and its reserves for such asbestos litigation, AMSF alleged that Halliburton made subsequent corrective disclosures in press releases and SEC filings, in which Halliburton reported that it would need to increase its reserves for such asbestos litigation. *Id*. at 339. As for the alleged misrepresentations made by Halliburton about its accounting of revenue from construction and engineering contracts, which AMSF contended included improperly recorded forms of revenue, AMSF alleged that Halliburton made subsequent corrective disclosures in its announcements that it would undertake a massive restructuring of its construction business. *Id*. at 342. And regarding the alleged misrepresentations made by Halliburton about its benefits from a merger with another company, AMSF alleged that Halliburton made subsequent corrective disclosures in its announcement and analyst reports, which, according to AMSF, exposed the inaccuracy of Halliburton's earlier positive statements about the merger with respect to annualized cost savings from the merger. *Id*. at 341.

6 *Id*. at 334.

7 *Id*. at 337. The Fifth Circuit also dismissed AMSF's argument that Supreme Court and sister circuit precedent has overruled the controlling Fifth Circuit precedent, *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*, 487 F.3d 261, 269 (5th Cir. 2007), which requires proof of loss causation at the class certification stage. *Id*. at 334 n.2.

8 *Id*. at 338 n.35 (finding that a plaintiff must prove only "that the defendant is responsible for the error of the misrepresentation" for loss causation at the class certification stage, not intentional fraud by the defendant).

9 *Id*. at 339.

10 *Id*. at 339-44.

11 *Id*. at 344.

12 609 F.3d 748, 750 (5th Cir. 2010).

13 *Id*. at 750-51.

14 *Id*. at 751.

15 *Id*.

16 *Id*. (determining that this class had approximately 1,236 members and defining the class as "[a]ll individuals who filed for bankruptcy under Chapter 13 in the Southern District of Texas between November 16, 2002 through November 16, 2007 who owed Wells Fargo, as servicer or holder, on a mortgage debt secured by real property, and upon whom Wells Fargo either charged, or both charged and collected, professional fees and costs during the pendency of each of their respective bankruptcy cases which were never disclosed to this Court, the debtors, or other parties-in-interest nor approved by this Court by written order entered on the docket in their respective bankruptcy cases").

17 *Id*. at 752.

18 *Id*. at 753.

19 *Id*. at 753-54 (concluding that "[t]he placement of jurisdiction in the bankruptcy court here was proper, and . . . the scope of the bankruptcy court's jurisdiction was unrestricted" because under the broad authority granted to district courts by the Federal Rules of Bankruptcy Procedure, the Southern District of Texas properly issued a general order of reference that automatically referred all bankruptcy cases and proceedings to the district's bankruptcy judges).

20 *Id*. at 754.

21 *Id*.

22 *Id*. at 754-55.

23 *Id*. at 755-57.

24 *Id*. at 756-57.

25 *Id*.

26 *Id*. at 757.

27 *Id*. (quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998)).

28 *Id*.

29 *Id*.

30 No. 09-31071, 2010 WL 4561378, at *1 (5th Cir. Nov. 11, 2010).

31 *Id*.

32 *Id*.

33 *Id*. at *2.

34 *Id*.

35 *Id*.

36 *Id*. In addition, the court found the district court did not abuse its discretion in denying the plaintiffs' request that the defendants be required to notify individual policy holders of the denial of class certification. *Id*. The Fifth Circuit concluded that there is "nothing [in Rule 23] that requires a court to order notice of denial of class certification." *Id*.

37 — F.3d —, Nos. 09-31156, 09-31188, 2010 WL 5128640, at *1 (5th Cir. Dec. 16, 2010).

38 *Id*.

39 *Id*.

40 *Id*. The putative class consisted of persons with property interests who suffered damages as a result of the two hurricanes and was further divided into geographical subclasses in relation to the particular levee defendant. *Id*. at *2.

41 *Id*.

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

43 *Id*.

44 *Id*. at *3. Satisfaction of the Rule 23(a) prerequisites was not at issue. *Id*.

45 *Id*. at *3-5 (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842, 845 (1999)). Like the Supreme Court in *Ortiz*, the Fifth Circuit also deliberately avoided the constitutional question of "whether a mandatory limited fund rationale could–under some circumstances–be applied to a settlement class of tort claimants." *Id*. at *3 (citing *Ortiz*, 527 U.S. at 864).

46 *Id*. at *4 (citing *Ortiz*, 527 U.S. at 855-56).

47 *Id*. at *5.

48 *Id*. (noting the complex injury grids discussed during the fairness hearing never made it into the settlement).

49 *Id*.

50 *Id*. at *6.

51 *Id*. at *7.

52 *Id*. at *8 (citing Fogleman v. ARAMCO, 920 F.2d 278, 286 (5th Cir. 1991)).

53 *Id*.

54 *Id*. at *9-10.

55 *Id*.

56 *Id*. at *11.

57 624 F.3d 698, 700 (5th Cir. 2010).

58 *Id*.

59 *Id*.

60 *Id*.

61 *Id*. (citing *Gene & Gene LLC v. BioPay LLC, (BioPay I)*, 541 F.3d 318, 329 (5th Cir. 2008)).

62 *Id*. at 701. The "new evidence" consisted of a database that showed which companies had consented to receiving faxes from BioPay. Id. at 704.

63 *Id*. at 701-02.

64 *Id*. at 702. The law of the case doctrine prevents reexamination of an issue of law or fact decided on appeal. *Id*. at 702.

65 *Id*. at 703.

66 *Id*.

67 *Id*. at 704. The court also noted that its holding was "narrowly limited to the facts and procedural posture" of the present case. *Id*. at 704 n.4. In addition, Judge Southwick disagreed with the majority's interpretation of *BioPay I* as precluding all reconsideration by the district court, though he did agree that there was no "substantially different" evidence to warrant certification. *Id*. at 705-06 (Southwick, J., concurring).

68 *Id*. at 705 (quotation omitted). The court found this "new" evidence was not "substantially different" than the evidence provided before the plaintiff moved for certification because in the original discovery the defendant had provided screenshots of the very same database, from which the court concluded it could have developed the same theory advanced on recertification. *Id*. at 704-05.

69 624 F.3d 185, 189 (5th Cir. 2010).

70 *Id*.

71 *Id*. at 189-90.

72 *Id*. at 189.

73 *Id*. at 190-194, 196, 198, 201.

74 *Id*.

75 *Id*. The court undertook an extensive choice of law analysis, concluding that no single jurisdiction's law could apply to the class as a whole because each plaintiff interacted with different regional offices, and some jurisdictions had different standards regarding the formation of a fiduciary duty and different remedies stemming the breach of a fiduciary duty. *Id*. at 191-94. The court found the same for the plaintiffs' unjust enrichment claim. *Id*. at 193-94.

76 *Id*.

77 *Id*. at 194.

78 *Id*. at 195-96.

79 *Id*. at 196.

80 *Id*. at 197-98.

81 *Id*. at 198.

82 *Id*. at 196-97.

83 *Id*. at 198.

84 *Id*. at 198–200.

85 *Id*. at 199 (quotation omitted).

86 *Id*. at 199-200.

87 *Id*. at 200.

88 No. 09-30993, 2010 WL 1752159, at *4-5 (5th Cir. Apr. 29, 2010).

89 *Id*. at *1.

90 *Id*.

91 *Id*. at *2.

92 *Id*. at *4.

93 *Id*.

94 *Id*. at *1, *3-4. This limitation to damages only under $75,000 in their complaint was made in a failed attempt to avoid removal from Louisiana state court. *Id*. at *3.

95 *Id*. at *4. The court also upheld the district court's dismissal of the plaintiffs' claim for failure to state a claim. *Id*. at *5.

96 *Id*.

97 No. A-06-CA-726-SS, 2010 WL 2371834, at *1 (W.D. Tex. June 11, 2010).

98 *Id*.

99 *Id*.

100 *Id*. at *2.

101 *Id*. at *20.

102 *Id*. at *3-4.

103 *Id*. at *4.

104 *Id*. at *6 (citing Reed v. General Motors Corp., 703 F.2d 170, 172 (5th Cir. 1983)).

105 *Id*. at *7.

106 *Id*. at *9. The purpose of the original de minimis provision was to avoid issuing claims where the administrative cost would be greater than the actual value of the claim. Id. at *8. The replacement provision was intended to reduce these administrative costs. Id. at *9.

107 *Id*. at *10-11.

108 *Id*. at *11-19.

109 *Id*. at *14. The twelve *Johnson* factors are "(1) the time and labor required; (2) the novelty and difficulty of the issues; (3) the skill required to perform the legal service adequately; (4) the preclusion of other employment by the attorney because he accepted this case; (5) the customary fee for similar work in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." *Id*. (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974)).

110 *Id*. at *15.

111 *Id*. at *16-17 (finding that lead counsel "would have had much more leverage in the settlement had Lead Counsel drafted a complaint sufficient to survive the motion to dismiss" and that lead counsel "did not adequately plead its claims in the first place").

112 *Id*. at *18.

113 *Id*. at *20. The court found that the amount of expenses was reasonable because the records indicated that far much more had actually been spent. *Id*. at *19.

114 No. A.H-08-0687, 2010 WL 2305742, at *1 (S.D. Tex. June 8, 2010).

115 15 U.S.C. § 77k, 77o (2006).

116 *In re Superior Offshore*, 2010 WL 2305742, at *1-2.

117 *Id*. at *2.

118 *Id*. at *3. The defendants did not challenge the other three Rule 23(a) requirements of numerosity, commonality, and typicality. *Id*.

119 *Id*.

120 *Id*. at *3-4.

121 *Id*. at *4.

122 *Id*.

123 *Id*. at *5.

124 *Id*.

125 *Id*.

126 *Id*.

127 *Id*. at *6

128 432 B.R. 671, 679 (Bankr. S.D. Tex. 2010).

129 *Id*. at 678.

130 *Id*.

131 *Id*.

132 *Id*. at 679.

133 *Id*.

134 *Id*. at 678.

135 *Id*. at 679. In the court's prior ruling on Countrywide's motion for summary judgment, it held that under Rule 2016(a) a mortgage lender must file an application with the bankruptcy court disclosing and seeking the bankruptcy court's approval of fees and expenses charged by the mortgage lender to the debtor post-petition and before discharge. *Id*. at 680.

136 *See id*. (citing *Wilborn v. Wells Fargo Bank, N.A.*, 609 F.3d 748 (5th Cir. 2010), discussed above, for the bankruptcy court's authority to certify a class action).

137 *Id*. at 690.

138 *Id*. at 692-94.

139 *Id*. at 694-96.

140 *Id*. at 696-97.

141 *Id*. at 696.

142 *Id*. at 699.

143 *Id*. at 697-99 (finding that the named plaintiffs were sufficiently active and informed because they: (i) had "a keen awareness of Countrywide's alleged improper collection practices"; (ii) showed "a strong devotion to pursuing their claims not just on their own behalves but also on behalf of the entire class"; (iii) had been active participants in the class action lawsuit by willingly producing documents, answering interrogatories, participating in depositions, and testifying at the class certification hearing; and (iv) "communicated with the class's attorneys on a regular basis" regarding the class action's status, strategy, and potential settlement).

144 *Id*. at 699.

145 *Id*. at 691.

146 *Id*. at 700.

147 *Id*. at 701.

148 *Id*. at 702-06.

149 *Id*. at 701 (quoting *In re Monumental Life Ins. Co.*, 365 F.3d 408, 416 (5th Cir. 2004)).

150 *Id*. at 703-05 (citing *Wilborn v. Wells Fargo Bank, N.A.*, 609 F.3d 748, 757 (5th Cir. 2010)).

151 *Id*. at 705-06.

152 *Id*. at 710-11 (quoting Fed. R. Civ. P. 23(b)(3)).

153 *Id*. at 706-10.

154 *Id*. at 706 (quoting *Monumental Life*, 365 F.3d at 416).

155 *Id*. at 707 (finding that this proposed injunction (i) "would provide case-specific relief by protecting the class members from the primary harm alleged by [the named plaintiffs]," (ii) allowed Countrywide to easily comply, and (iii) was properly tailored to protect all of the class members, *i.e.*, those class members actually charged unauthorized fees, those class members who had payments misapplied, and those class members previously charged unauthorized fees but now deemed current on their payments).

156 *Id*. at 724.

157 No. 2:08-CV-306-DF-CE, 2010 WL 1189571, at *1 (E.D. Tex. Mar. 5, 2010) (magistrate's report and recommendation), *adopted by* 2010 WL 1189574, at *1 (E.D. Tex. Mar. 24, 2010). The Texas statute is the Texas Debt Collection Act, Tex. Fin. Code Ann. § 392 et. seq. (Vernon's 2006).

158 *Eatmon*, 2010 WL 1189571, at *1.

159 *Id*. at *2.

160 *Id*. at *4-7.

161 *Id*. at *4-5.

162 *Id*.

163 *Id*. at *5.

164 *Id*. at *6.

165 *Id*.

166 *Id*.

167 *Id*. at *7.

168 *Id*. at *8-10.

169 *Id*. at *8 (quoting *Randolph v. Crown Asset Mgmt., LLC*, 254 F.R.D. 513, 519-20 (N.D. Ill. 2008)).

170 *Id*.

171 *Id*. at *9.

172 No. SA-10-CV-305-XR, 2010 WL 5464824, at *1 (W.D. Tex. Dec. 30, 2010). The court also determined that certification of a class based on ERISA claims was not proper because the court had granted summary judgment for the defendant dismissing those claims. *Id*. at *5. In addition, the court also determined that conditional certification of a collective action under the Fair Labor Standards Act was not proper because the named plaintiffs were not similarly situated to the proposed class. *Id*. at *6-7.

173 *Id*. at *2-3.

174 *Id*. at *3.

175 *Id*. at *4. The defendants argued in part that certification was not proper because the class did not meet the typicality requirement of Rule 23(a) since the named plaintiffs were not bound by arbitration agreements but all proposed members after April 2008 would be bound. *Id*. at *3.

176 559 U.S. —, 130 S. Ct. 1758, 1775 (2010) ("[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the parties agreed to do so.").

177 *Botello*, 2010 WL 5464824, at *4 (citing *Quinonez v. Empire Today, LLC*, No. 10-02049 WHA, 2010 WL 4569873 (N.D. Cal. Nov. 4, 2010) ("If the company had wanted a class arbitration, it should have written a provision that explicitly contemplated class proceedings and laid out the appropriate protections.")).

178 *Id*. at *5.

179 266 F.R.D. 153, 156 (N.D. Tex 2010).

180 *Id*.

181 *Id*. at 156-57.

182 *Id*. at 157.

183 *Id*.

184 *Id*. at 158-65.

185 *Id*. at 159 (citing *Unger v. Amedisys Inc.,* 401 F.3d 316, 319 (5th Cir. 2005)).

186 *Id*.

187 *Id*. at 159-60.

188 *Id*. at 160-63.

189 *Id*. at 163.

190 *Id*. at 164-65.

191 *Id*. at 165.

192 *Id*. at 166.

193 *Id*. at 166-67.

194 *Id*. at 168-69.

195 *Id*. at 169-70.

196 *Id*.

197 *Id*. at 170-72.

198 *Id*. at 171.

199 *Id*. at 172.

200 *Id*. at 173.

201 No. H-10-0018, 2010 WL 4639050, at *1 (S.D. Tex. Nov. 8, 2010).

202 *Id*.

203 *Id*.

204 *Id*.

205 *Id*. at *2.

206 *Id*.

207 *Id*. at *3.

208 *Id*. at *4.

209 *Id*.

210 *Id*. at *6.

211 *Id*.

212 *Id*. at *7.

213 *Id*.

214 *Id*. at *8.

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