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# TABLE ▪ OF ▪ CONTENTS

## SECTION OFFICERS and COUNCIL MEMBERS





*COVER:* "Clouds over John Dunn Bridge, Rio Grande River." Photograph by Larry Gustafson, Dallas.


Publication Layout - State Bar of Texas Graphics Department

Dear Section Members:

This issue of the *Journal* contains several of our annual surveys. Barry Golden and Peter Loh have prepared our annual survey of Fifth Circuit class action decisions while Mark Bayer's article reviews Texas state court class action developments over the past year. Andrew Wooley has authored a piece on arbitration developments. Thanks to all of our authors for their articles. As always, the Council wants to thank Mike Ferrill for his editorial work and Larry Gustafson for his cover photograph of the clouds over John Dunn Bridge, Rio Grande River.

We are always on the lookout for articles concerning business litigation matters of interest to our membership. If you are interested in submitting an article for publication, please contact Mike Ferrill (amferrill@coxsmith.com or 210-554-5282).

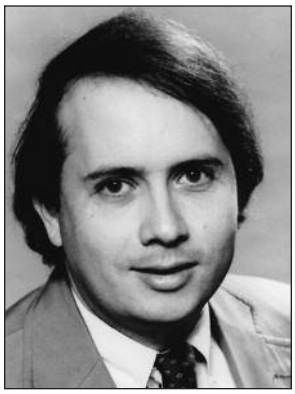
Finally, I want to announce an exciting change to the *Journal's* format. We are in the process of shifting to an electronic version of the *Journal*, which will allow us to include hyperlinks to all of the authorities cited in the articles. The Council is excited about this change, and believes that it will provide another useful benefit to our members.

Of course, if you have any questions or comments, please feel free to call me.

Regards,

Wallis Hampton
Section Chair
713-655-5116
wallis.hampton@skadden.com

# FROM ▪ THE ▪ EDITOR



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

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

# 2011 Arbitration Update

*By Andrew Wooley*[1]

In the time since a survey of developments in the law of arbitration last appeared in this Journal, the United States Supreme Court, the Fifth Circuit Court of Appeals, and the Supreme Court of Texas each decided significant arbitration–related issues.

## I. Recent Arbitration Decisions from the United States Supreme Court

The same five-justice majority of the Supreme Court decided three significant arbitration-related cases in 2010 and 2011.[2] The Court addressed who decides threshold or "gateway" issues under the Federal Arbitration Act ("FAA") in *Rent-A-Center, West, Inc. v. Jackson*, decided June 21, 2010, and the availability of class action arbitration under the FAA in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, decided April 27, 2010, and *AT&T Mobility LLC v. Concepcion*, decided April 27, 2011.

A. The FAA does not permit a court to consider the enforceability of an agreement to arbitrate that explicitly delegates enforceability issues exclusively to the arbitrator, unless the challenging party specifically challenges the enforceability of the provision delegating enforceability issues to the arbitrator.

*Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010).

The dispute in *Rent-A-Center* arose from an individual's employment discrimination lawsuit against his former employer. The employer moved to dismiss the lawsuit and compel arbitration. The district court ruled for the employer but the Ninth Circuit Court of Appeals reversed on the issue of who had authority to decide whether the arbitration agreement was enforceable and remanded the case, directing the district court to consider the employee's arguments that the arbitration agreement was unconscionable and unenforceable under Nevada law.[3] The Supreme Court granted certiorari.

### Majority Opinion

Writing for the majority, Justice Scalia framed the issue for decision in *Rent-A-Center* broadly, as follows:

> We consider whether, under the Federal Arbitration Act, a district court may decide a claim that an arbitration agreement is unconscionable, where the agreement explicitly assigns that decision to the arbitrator.[4]

The Court had previously held that whether an agreement containing an arbitration provision is valid and enforceable is a decision for the arbitrator, but if the validity and enforceability of the arbitration provision itself is disputed, the challenge regarding that provision is for the court to decide.[5]

However, the "Mutual Agreement to Arbitrate Claims" at issue in *Rent-A-Center* was a standalone arbitration agreement that provided for arbitration "of all 'past, present or future' disputes arising out of Jackson's employment with *Rent-A-Center*, including 'claims for discrimination' and 'claims for violation of any federal … law.'"[6]

It also provided that "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or part of this Agreement is void or voidable."[7]

The majority referred to the immediately foregoing portion of the arbitration agreement in *Rent-A-Center* as the "delegation provision" and held that only if the employee had specifically challenged the validity and enforceability of that particular provision of the arbitration agreement could a court resolve the employee's challenge.[8]

After concluding that "none of Jackson's substantive unconscionability challenges was specific to the delegation provision," the majority reversed the Ninth Circuit's judgment, thereby reviving the district court's judgment dismissing Jackson's lawsuit and compelling arbitration.[9]

### Dissenting Opinion

Justice Stevens wrote the dissenting opinion in *Rent-A-Center*.[10] In his view, "questions regarding the existence of a legally binding

and valid arbitration agreement, as well as questions regarding the scope of a concededly binding arbitration agreement," are questions of arbitrability that the FAA assigns to courts.[11] He observed further that two different lines of precedent bear on "*who* decides a question of arbitrability …, such as whether an arbitration agreement is unconscionable."[12]

The focus of the first line of precedent is the parties' intent—did they clearly and unmistakably intend to delegate the question of arbitrability to the arbitrator?[13] The focus of the second line of precedent is the *Prima Paint* rule that the majority invoked to support its holding in *Rent-A-Center*. Under the *Prima Paint* rule, a court examines whether a party is challenging specifically the validity of an arbitration provision within a contract or the validity generally of the contract within which the arbitration provision resides.[14] Unless the challenge is specific to the validity of the arbitration provision, the issues raised by the challenge are for the arbitrator.[15]

Justice Stevens would have decided the issue in *Rent-A-Center* by searching the record for "clear and unmistakable evidence" that the parties intended to arbitrate questions of arbitrability. "[I]t is necessary for the court to resolve the merits of respondent's unconscionability claim in order to decide whether the parties have a valid arbitration agreement under § 2 [of the FAA]. Otherwise, that section's preservation of revocation issues for the Court would be meaningless."[16] He believed the Ninth Circuit correctly applied that test, and he would have affirmed its decision accordingly.

As explained in the majority opinion in *Rent-A-Center*, the *Prima Paint* rule relates to severability, not intent, and before the decision in *Rent-A-Center*, the rule had never been applied in the context of a standalone arbitration agreement. Justice Stevens described *Prima Paint* as a likely erroneous decision, disagreed that it was controlling authority in the circumstances present in *Rent-A-Center,* and, even assuming it was controlling authority, disagreed with the *Rent-A-Center* majority's application of the *Prima Paint* rule in the context of a standalone arbitration agreement.[17]

B. Under the FAA arbitrators may not infer an implicit agreement authorizing class-action arbitration.

*Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010).

The dispute in *Stolt-Nielsen* arose from an alleged price-fixing conspiracy among several shipping companies that served a large share of the world market for compartmentalized parcel tankers. Parties, like AnimalFeeds, who desire to ship small quantities of liquids can separately charter one or more compartments on a parcel tanker pursuant to a standard contract known in the maritime trade as a charter party. Charter parties vary depending on the particular trades and business needs of the parties, but are commonly drafted using standardized forms.

After a Department of Justice investigation led to criminal charges against Stolt-Nielsen and several other shipping companies, AnimalFeeds filed a putative class action lawsuit asserting antitrust claims against them. Other shipping customers brought similar lawsuits, and in one of those lawsuits, the shipping companies moved to compel arbitration. The district court denied their motion but the Second Circuit reversed the district court's decision. In the meantime, all of the pending antitrust lawsuits against the shipping companies had been consolidated as a multidistrict litigation action in the District of Connecticut. The standard charter party used by AnimalFeeds for its shipments contained an arbitration provision, and the shipping companies and AnimalFeeds agreed that prevailing law required them to arbitrate AnimalFeed's claims.[18]

AnimalFeeds served a demand on the shipping companies for class arbitration, and the parties entered into a supplemental agreement referring the question of class arbitration to a three-member arbitration panel. They selected three arbitrators and stipulated that their agreement was silent with respect to class arbitration. After hearing evidence and argument, the arbitrators concluded the shipping companies had not shown any intent to preclude class arbitration and accordingly entered an order allowing the arbitration to proceed on behalf of a class. The shipping companies filed an application to vacate the class-determination award, which a district court granted, holding that the award was made in "manifest disregard" of the law. AnimalFeeds appealed to the Second Circuit, which reversed the district court's judgment. The Supreme Court granted the shipping companies' petition for certiorari.[19]

**Majority Opinion**

A five-justice majority reversed the court of appeals judgment and remanded the case "for further proceedings consistent with this opinion."[20] Although the Court did not literally render judgment that no class arbitration could proceed, Justice Alito's opinion for the majority leaves no room for any other conclusion.

> [P]arties may specify *with whom* they choose to arbitrate their disputes.
>
> [T]he arbitration panel imposed class arbitration even though the parties concurred that they had reached "no agreement" on that issue. … [T]he panel regarded the agreement's silence on the question of class arbitration as dispositive. The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.
>
> In certain contexts, it is appropriate to presume that parties that enter into an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the parties' agreement.
>
> [C]lass-action arbitration changes the nature of arbitration to such a degree [however] that it cannot be presumed the parties

consented to it by simply agreeing to submit their disputes to an arbitrator.

Here, where the parties stipulated that there was "no agreement" on this question, it follows that the parties cannot be compelled to submit their dispute to class arbitration.[21]

**Dissenting Opinion**

Justice Ginsburg wrote for the three dissenting justices in *Stolt-Nielsen*.[22] She would have dismissed the shipping companies' petition due to lack of ripeness, or, failing that, would have affirmed the court of appeals' judgment, which rejected the shipping companies' plea for vacation of the arbitrators' decision.[23]

In the dissent's view, the unanimous decision of the arbitrators that the parties' arbitration clause permitted the arbitration to proceed as a class arbitration was an "abstract and highly interlocutory" preliminary decision that left open for decision which claims would be arbitrated and who might ultimately be included as class members. Hence, the dissent concluded the arbitrators' decision was not a reviewable "award or partial award" within the meaning of § 16 of the FAA.[24]

Even assuming that the shipping companies' plea was ripe for review, the dissent would have rejected it on the merits and affirmed the court of appeals' decision based on the parties' express written agreement referring the class arbitration issue to the arbitrators.

The question properly before the Court is not whether the arbitrators' ruling was erroneous, but whether the arbitrators "exceeded their powers." The arbitrators decided a threshold issue, explicitly committed to them … about the procedural mode available for presentation of AnimalFeeds' antitrust claims. … This Court, therefore, may not disturb the arbitrators' judgment, even if convinced that "serious error" infected the panel's award.[25]

C. The FAA preempts state statutes and case law that would render unenforceable a class action waiver in an arbitration agreement subject to the FAA.

*AT&T Mobility v. Concepcio*n, 131 S. Ct. 1740 (2011).

The dispute in *AT&T Mobility* arose from a $30.22 charge to the Concepcions for sales tax based on the retail value of two mobile telephones advertised as "free" by AT&T. Their cellular telephone service agreement with AT&T included an arbitration provision requiring them to bring claims against AT&T "in their individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."[26] Notwithstanding the arbitration provision in their agreement, the Concepcions filed suit against AT&T in federal district court alleging false advertising and fraud. Their suit was later consolidated with a putative class action.

As Justice Scalia observed for the majority in *AT&T Mobility*, "[u]nder California law, courts may refuse to enforce a contract found 'to have been unconscionable at the time it was made,' or may 'limit the application of any unconscionable clause.'"[27] In 2005, the California Supreme Court had done just that with respect to a class action waiver in an arbitration agreement between Discover Bank and one of its credit card holders. In *Discover Bank v. Superior Court* the California court held that the waiver was unconscionable and unenforceable under the circumstances:

[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then ... the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another." Under these circumstances, such waivers are unconscionable under California law and should not be enforced.[28]

Relying on the holding in *Discover Bank*, the federal district court in *AT&T Mobility* denied a motion by AT&T to compel bilateral arbitration of the Concepcions' claims, "because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions."[29] The Ninth Circuit affirmed, holding that (i) the AT&T arbitration provision was unconscionable under California law, and (ii) because the rule announced in *Discover Bank* was "simply a refinement of the unconscionability analysis applicable to contracts generally in California," the FAA did not preempt its application.[30]

**Majority Opinion**

The Supreme Court granted AT&T's petition for certiorari, and held that the *Discover Bank* rule was preempted by the FAA because it interfered with the fundamental attributes of arbitration. The holding in *AT&T Mobility* is philosophically consistent with the same five-justice majority's earlier holding in *Stolt-Nielsen*. In the latter, they held that the FAA precluded inference of an agreement for class arbitration when the parties' agreement was silent on the subject, and in *AT&T Mobility* they held that the FAA preempted enforcement of the California case precedent that would permit a court to invalidate the express waiver of class arbitration contained in the Concepcions' agreement with AT&T.

The specific legal issue in *AT&T Mobility* was whether the *Discover Bank* rule and the California statutes from which it was derived were "grounds as exist at law or in equity for the revocation of any contract" or were, instead, defenses applicable only to arbitration or which derived their meaning from the fact that an agreement to arbitrate was at issue.[31] Tacitly acknowledging that the California unconscionability doctrine underlying the *Discover Bank* rule did

not "prohibit[] outright the arbitration of a particular type of claim," the *AT&T Mobility* majority nonetheless found the *Discover Bank* rule had been "applied in a fashion that disfavors arbitration" and stands as an obstacle to the accomplishment of the FAA's objectives.[32] In their view even a state law not directed specifically at arbitration is preempted if it "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[33] As support for this holding, however, the majority cited a case that involved a statute directed specifically at arbitration and described several hypothetical state statutes directed specifically at arbitration.

*Perry v. Thomas*[34] is the case authority the *AT&T* majority cited for its "as applied" preemption theory. But *Perry* involved a California statute that authorized actions for the collection of wages in California state courts *without regard* to the existence of *any private agreement to arbitrate*.[35] The three hypothetical state statues that the *AT&T* majority suggested as support for their "as applied" holding were also directed specifically at arbitration, *e.g.*, a requirement that arbitration include judicially monitored discovery, that the Federal Rules of Evidence be applied in all hearings, or that a jury or panel of 12 "lay arbitrators" decide the arbitration.[36] Neither *Perry* nor the hypothetical statutes squarely support the majority's conclusion. What appear to be the principal reasons for their holding are found in Justice Scalia's discussion of class arbitration and in Justice Thomas' concurring opinion. The following comments are from the majority opinion:

> The overarching purpose of the FAA … is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.
>
> …
>
> The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.
>
> California's *Discover Bank* rule … interferes with arbitration. … The rule is limited to adhesion contracts, but the times in which consumer contracts were anything other than adhesive are long past.
>
> …
>
> First, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment. …
>
> Second, class arbitration requires procedural formality. …
>
> Third, class arbitration greatly increases risks to defendants. … [W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. …[37]

**Concurring Opinion**

Based on a textual analysis of the language in §§ 2 and 4 of the FAA, Justice Thomas would limit the savings clause to "grounds related to the making of the agreement." [38]

> Reading §§ 2 and 4 harmoniously, the "grounds … for the revocation" preserved in § 2 would mean grounds related to the making of the agreement. This would require enforcement of an agreement to arbitrate unless a party successfully asserts a defense concerning the formation of the agreement to arbitrate, such as fraud, duress, or mutual mistake. Contract defenses unrelated to the making of the agreement—such as public policy—could not be the basis for declining to enforce an arbitration clause. [39]

**Dissenting Opinion**

Justice Breyer wrote the dissenting opinion.[40] He pointed out that the FAA does not preempt state law invalidation of an agreement to arbitrate if the ground for invalidation would apply to any contract, not just an arbitration provision or a contract that includes an agreement to arbitrate.[41] Since the two California statutes from which the *Discover Bank* rule is derived apply to *all* contracts, not just arbitration provisions or contracts containing an arbitration provision, he reasoned that the rule fell squarely within the parameters of the savings clause in § 2 of the FAA. Justice Breyer observed further that the *Discover Bank* rule does not constitute a blanket prohibition against all class action waiver provisions in the consumer context, only those that fail to satisfy general unconscionability standards under California law.

Justice Breyer also took issue with the majority's assertion that the main purpose behind the FAA was to facilitate speedy resolution of disputes through bilateral, individual arbitration at the expense of everything else. He cited Supreme Court precedent rejecting the notion that the overriding goal of the FAA was to promote expeditious disposition of claims and pointed out that class-wide arbitration is recognized as a valid form of arbitration in many areas, including California, and has been endorsed by the American Arbitration Association.[42]

D. Class arbitration of consumer claims under the FAA appears to be foreclosed by the holdings in *Stolt-Nielsen* and *AT&T Mobility*.

The five-justice majority in *Stolt-Nielsen* and *AT&T Mobility* expressed the unequivocal view that class arbitration is incompatible with the FAA. In *AT&T Mobility*, they expressed a corollary view

that class arbitration in the consumer context would be unfair to any defendant subjected to it. Also in *AT&T Mobility*, Justice Scalia observed, without any apparent concern, that "the times in which consumer contracts were anything other than adhesive are long past."[43] And in his concurring opinion in *AT&T*, Justice Thomas seems to say, at least implicitly, that a contract of adhesion imposed in a consumer transaction does not constitute duress.[44] Given the foregoing, there is no foreseeable likelihood of class arbitrations involving consumer claims under the FAA unless Congress amends the act.

**II. Recent Arbitration Decisions from the Fifth Circuit**

Since the last review of arbitration developments in this Journal, the Fifth Circuit considered whether an appeal from the denial of a motion to compel arbitration automatically stays proceedings in the district court–an issue of first impression in the circuit. The court also considered whether nonsignatories to agreements containing arbitration provisions can be compelled to arbitrate.

A. An appeal to the Fifth Circuit from the denial of a motion to compel arbitration does not automatically stay proceedings in the district court, but the district court nonetheless has discretion to grant a stay.

*Weingarten Realty Investors v. Miller*, 661 F.3d 904 (5th Cir. 2011).

In *Weingarten Realty*, an individual who guaranteed a portion of an entity's debt moved to compel arbitration when the lender sued to enforce the guaranty. There was no arbitration provision in the guaranty, but the agreement for the loan that was guaranteed contained a broad arbitration provision. The guarantor was not a signatory to the loan agreement in his individual capacity, however, which led the district court to deny his motion to compel arbitration.

The guarantor appealed the denial of his motion to compel arbitration and requested a stay pending disposition of his appeal. The district court denied the requested stay, which the guarantor also appealed. In an opinion filed November 1, 2011, a motions panel of the Fifth Circuit held that an appeal on arbitrability does not automatically stay proceedings in a district court.[45] The federal circuits are divided on this issue, and the holding in *Weingarten Realty* aligns the Fifth Circuit with the Second and Ninth Circuits.[46]

After reviewing the four considerations pertinent to a discretionary stay, the motions panel also affirmed the district court's decision not to grant a discretionary stay pending the guarantor's appeal.[47] The panel declined to rule on the lender's motion for summary affirmance of the district court's denial of the motion to compel arbitration, however, observing that the "merits panel" to which the arbitrability appeal was assigned would be better suited to address that issue.[48]

B. A party may not be compelled to arbitrate if the party (i) did not sign the contract containing the arbitration clause at issue, (ii) did not knowingly obtain any direct benefits from the contract, and (iii) is not seeking any direct benefits from the contract or to enforce it directly or indirectly.

*Noble Drilling Services, Inc. v. Certex USA, Inc.*, 620 F.3d 469 (5th Cir. 2010); *DK Joint Venture 1 v. Weyand*, 649 F.3d 310 (5th Cir. 2011); and *Covington v. Aban Offshore Ltd.*, 650 F.3d 556 (5th Cir. 2011).

In *Noble Drilling Services, Inc. v. Certex USA, Inc.*, the Fifth Circuit held that Noble, the purchaser of wire mooring ropes, could not be compelled to arbitrate its negligent design claim against Bridon International, Ltd., the manufacturer of the ropes, or its breach of contract claim against Bridon's distributor, Certex USA, Inc., pursuant to an arbitration provision contained in the terms and conditions between Bridon and Certex.[49] The district court had found that Noble obtained a direct benefit from the purchase order between Bridon and Certex, and was therefore bound by the terms and conditions agreed between them. The Fifth Circuit disagreed, finding that because Noble had no knowledge of the terms and conditions between Bridon and Certex and because none of Noble's claims were based on the agreement between Bridon and Certex, the direct-benefit estoppel theory could not be invoked to require Noble to arbitrate its claims. "Noble's claims—by its own admission—rise or fall on the pre-purchase representations and whatever duties a manufacturer and distributor have by law." The Fifth Circuit accordingly reversed the district court's order compelling arbitration and remanded the case.[50]

In *DK Joint Venture 1 v. Weyand*, the Fifth Circuit reversed a district court's order confirming an arbitration award against two corporate officers in their individual capacities. The controversy involved multiple entities on both sides of the dispute—at least some of which were parties to agreements containing an identical arbitration provision, multiple lawsuits, a series of procedural maneuvers, and eventually an arbitration proceeding, followed by an action in federal district court to enforce the arbitral award.[51]

Richard Weyand and Peter Thiessen were respectively the chief executive officer and chief financial officer of several corporations on the defense side of the controversy. A federal district court overruled their contention that they were not properly parties to the arbitration in their individual capacities and, after substantial arbitration awards were made against them, confirmed the awards and entered judgment ordering them to pay the amounts awarded by the arbitrators.

The Fifth Circuit rejected the prevailing parties' argument that the court was bound by the arbitrators' determination of their own jurisdiction over the two individuals and held that neither of the individuals was personally bound to the arbitration agreements. Concluding that the arbitrators had therefore exceeded their powers by entering awards against individuals who had not agreed to arbitrate, the court vacated the awards against them.[52]

Less than a week after the decision in *DK Joint Venture 1*, the same panel decided *Covington v. Aban Offshore Ltd.*, and again reversed a district court's judgment compelling two corporate officers to arbitrate in their individual capacities.[53] The dispute in *Covington* arose from a contract for rig workover services. Beacon Maritime, Inc., entered into an agreement with Aban Offshore Limited that included an arbitration provision. Russell and Guy Covington were Beacon's President and Vice President for Sales and Marketing, respectively. Guy signed the agreement with Aban only as Beacon's Vice President. Russell did not sign the agreement at all.

Aban initiated arbitration against Beacon and the Covingtons after a dispute arose concerning Beacon's performance. The Covingtons filed an action in Texas state court for a declaration that they were not required to arbitrate, which Aban removed to federal court. After removal, Aban moved to compel the Covingtons to arbitrate. Holding that the Covingtons were bound by the arbitration provision under both Texas and federal law, the district court granted Aban's motion to compel them to arbitrate. The Covingtons appealed. The Fifth Circuit agreed that federal law and Texas law were identical in this instance, but reached a conclusion opposite from the district court concerning whether the Covingtons were personally bound to arbitrate.

> In summary, both the Texas and federal courts have recognized that in determining whether a party can be compelled to arbitrate, "it matters whether the party resisting arbitration is a signatory or not." In this case, the parties resisting arbitration—the Covingtons, in their individual capacities—are not signatories. Under ordinary principles of agency law, their positions as Vice–President and President of Beacon are insufficient to personally bind them to the arbitration agreement. Aban points to nothing that indicates that the Covingtons empowered Beacon to bind them individually. Therefore, we conclude that they are not parties to, or bound by, the arbitration agreement.[54]

The Fifth Circuit accordingly reversed the district court's judgment in *Covington*.

### III. Recent Arbitration Decisions from the Supreme Court of Texas

The Supreme Court of Texas' decisions in the last several years concerning arbitration-related issues have favored arbitration. The court's most significant recent decision is *Nafta Traders v. Quinn*.[55] In that case, the court construed the Texas General Arbitration Act to allow arbitrating parties wide latitude in fashioning their own appellate remedies, instead of severely limiting their appellate options as the United States Supreme Court did with regard to the Federal Arbitration Act in *Hall Street Associates, L.L.C. v. Mattel, Inc.*[56] A discussion of the decision in *Nafta Traders* appears in the Summer 2011 issue of this Journal.[57]

A. Parties to an arbitration agreement can grant third parties the right to enforce arbitration as though they had signed the agreement themselves.

*In re Rubiola*, 334 S.W.3d 320 (Tex. 2011).

In *Rubiola*, the court addressed whether parties who did not sign an agreement containing an arbitration provision could compel parties who did sign the agreement to arbitrate. The court held that under the circumstances of that case, the nonsignatories could compel the parties who signed the agreement to arbitrate.

*Rubiola* arose from the sale and financing of a home. The sellers were Greg Rubiola and his wife. Greg's brother, J.C. Rubiola, was the listing broker for the property. Greg and J.C. together operated a number of real estate related businesses, including Rubiola Mortgage Company. The purchasers of the Rubiolas' home elected to finance their purchase through Rubiola Mortgage Company. As part of the purchase and financing, they executed an arbitration agreement with Rubiola Mortgage Company. The arbitration agreement provided the following:

> Arbitrable disputes include any and all controversies or claims between the parties of whatever type or manner, including without limitation, all past, present and/or future credit facilities and/or agreements involving the parties. This arbitration provision shall survive any termination, amendment, or expiration of the agreement in which this agreement is contained, unless all of the parties expressly agree in writing.

The agreement defined "parties" to include all of the following:

> Rubiola Mortgage Company, and each and all persons and entities signing this agreement or any other agreements between or among any of the parties as part of this transaction. "The parties" shall also include individual partners, affiliates, officers, directors, employees, agents, and/or representatives of any party to such documents, and shall include any other owner and holder of this agreement.

J.C. Rubiola signed the agreement on behalf of Rubiola Mortgage Company.

Several months after closing the transaction and moving into the house, the purchasers sued the Rubiolas and others involved in repairing the house. They alleged fraud, DTPA violations, and negligent repairs. They sought to rescind the transaction or collect damages. All of the defendants moved to compel arbitration based on the arbitration agreement signed by the purchasers and Rubiola Mortgage Company. The trial court denied the motion and the court of appeals denied the Rubiolas' petition for mandamus.

The supreme court concluded that the Federal Arbitration Act ("FAA") governed the arbitration provision involved due to interstate

commerce implications and that under § 4 of the FAA, a party aggrieved by the refusal of another party to arbitrate under a written agreement for arbitration could petition for mandamus. The court also concluded that whether a nonsignatory could compel arbitration was subsumed within whether there was a valid arbitration provision and was therefore a question for the court, not for an arbitrator. Having thereby determined its power to address the ultimate issue, the court held that the Rubiolas, who had not signed the arbitration agreement, could compel the purchasers, who had signed the agreement, to arbitrate.[58]

> [T]he arbitration agreement's broad definition of parties, at a minimum, made J.C. and Greg Rubiola parties to the arbitration agreement. Rubiola Mortgage Company signed the arbitration agreement, and the Rubiola brothers are clearly officers and representatives of the mortgage company and thus non-signatory parties to the arbitration agreement under the agreement's terms. Because the arbitration agreement expressly provides that certain non-signatories are considered parties, we conclude that such parties may compel arbitration under the agreement.

The court found further that the claims made by the purchasers were within the scope of the arbitration agreement and conditionally granted the petition for mandamus to compel arbitration.

B. If an interlocutory appeal concerning an arbitration-related order is unavailable, an appellate court should treat the appeal as a petition for mandamus and eliminate the need for a party to pursue both an appeal and a petition for mandamus.

*CMH Homes v. Perez*, 340 S.W.3d 444 (Tex. 2011).

In *CMH Homes*, the supreme court interjected a welcome dose of pragmatism into arbitration jurisprudence in Texas courts. Prior to the Texas Legislature's 2009 amendment of the Texas General Arbitration Act ("TAA") adding § 51.016, interlocutory appeals of orders related to an arbitration proceeding subject to the FAA were not available in Texas courts. Consequently, Texas practitioners seeking review of an order refusing to compel arbitration under an agreement subject to the FAA (or even arguably subject to the FAA) commonly filed two separate appellate proceedings, an interlocutory appeal and a petition for writ of mandamus, to avoid the risk of being fatally trapped between an absence of jurisdiction for one remedy and potentially a missed filing deadline for the other remedy.[59]

Adding § 51.016 to the TAA partially remedied the parallel proceedings problem, because § 51.016 authorizes an appeal of a judgment or interlocutory order "under the same circumstances that an appeal from a federal district court's order or decision would be permitted by [section 16 of the FAA]."[60] The order at issue in *CMH Homes* was the appointment of an arbitrator, however, and that is not an order from which an appeal is authorized by § 16 of the FAA, or by § 51.016 through incorporation. CMH Homes had not filed a parallel mandamus action in the court of appeals; it had instead asked the court to consider its appeal as a mandamus proceeding in the alternative. The court of appeals determined it lacked jurisdiction of the appeal and dismissed it, ignoring the request for alternative treatment as a petition for mandamus.[61]

The supreme court agreed that the court of appeals lacked jurisdiction of an interlocutory appeal of the trial court's order appointing an arbitrator, but held that the lower court abused its discretion in refusing to consider the appeal as a petition for mandamus in the alternative.

> [N]othing in the procedures for interlocutory appeals and mandamus actions prevents us from treating this appeal as a petition for writ of mandamus. …
>
> We will not unnecessarily waste the parties' time and further judicial resources by requiring CMH Homes to file a separate document with the title "petition for writ of mandamus" listed on the cover where the party has expressly requested mandamus treatment of its appeal in an uncertain legal environment. Because CMH Homes specifically requested mandamus relief in the court of appeals and preserved that issue in this Court, and because judicial efficiency militates against requiring CMH Homes to file a separate original proceeding, we instruct the court of appeals to consider this appeal as a petition for writ of mandamus.[62]

Henceforth, Texas practitioners should not have to pursue parallel proceedings when there is a reasonable basis for an interlocutory appeal—by properly perfecting the interlocutory appeal and including a request that the appeal be treated as a petition for writ of mandamus in the alternative.

C. A reference to "the arbitration laws in your state" does not exclude applicability of the Federal Arbitration Act, but a reference to "the Texas General Arbitration Act" does.

D. An arbitration agreement is substantively unconscionable if it imposes costs so excessive that the costs prevent a party from effectively vindicating his or her rights in the arbitral forum.

*In re Olshan Foundation Repair Co.*, 328 S.W.3d 883 (Tex. 2010).

Olshan Foundation Repair Company filed four petitions for writs of mandamus arising out of separate lawsuits in which its motions to compel arbitration (and its petitions for mandamus in the courts of appeals) had been denied. All of the underlying lawsuits involved complaints about allegedly defective residential foundation repairs performed by Olshan. The supreme court consolidated the mandamus petitions for argument and issued a consolidated opinion.[63]

In each instance the repairs were performed pursuant to a written contract that included an arbitration clause. The arbitration clause was identical in three of the four contracts, and the only variance in the fourth contract was the choice of law provision. The following clause appeared in three of the contracts:

> Notwithstanding, any provision in this agreement to the contrary, any dispute, controversy, or lawsuit between any of the parties to this agreement about any matter arising out of this agreement, shall be resolved by mandatory and binding arbitration administered by the American Arbitration Association ("AAA") *pursuant to the arbitration laws in your state* and in accordance with this arbitration agreement and the commercial arbitration rules of the AAA.…[64]

The arbitration clause in the fourth contract was identical to the one in the other three except the choice-of-law phrase stated "*pursuant to the Texas General Arbitration Act*" instead of "pursuant to the arbitration laws in your state."[65]

Section 2(a)(2) of the Texas General Arbitration Act ("TAA") specifies that arbitration agreements in service contracts for less than $50,000 must be in writing and be signed by all parties and their attorneys.[66] None of the Olshan repair agreements had been signed by the parties' attorneys, and one reason cited by the trial courts and courts of appeals for denying Olshan's motions to compel arbitration was that the arbitration provisions were subject to the TAA and unenforceable under § 2(a)(2).[67]

The supreme court agreed with the lower courts regarding the agreement that contained the phrase "pursuant to the Texas General Arbitration Act," holding that the parties to that agreement effectively chose to arbitrate pursuant to the TAA, and the agreement therefore was unenforceable. But as to the other three agreements, the supreme court held that the phrase "pursuant to the arbitration laws of your state" effectively included both the FAA and the TAA, and those agreements were therefore enforceable under the FAA.[68]

The court then turned to the second basis for the lower courts' rulings—that enforcement of the arbitration provisions would be prohibitively expensive. First it acknowledged that "Texas law renders unconscionable contracts unenforceable."[69] Then the court observed that the homeowners' prohibitive-cost claim in *Olshan* was "grounded in substantive unconscionability."[70] And, after some discussion of the doctrine, the court stated that "excessive costs imposed by an arbitration agreement render a contract unconscionable if the costs prevent a litigant from effectively vindicating his or her rights in the arbitral forum."[71]

To establish that the cost of arbitration renders it unconscionable, however, the party opposing arbitration bears the burden to show that it "will likely incur arbitration costs in such an amount as to deter enforcement" of the party's rights in the arbitral forum.[72] After reviewing approaches formulated in other jurisdictions, the court in *Olshan* described the evidence required to prove unconscionability based on prohibitive arbitration costs:

> If the total cost of arbitration is comparable to the total cost of litigation, the arbitral forum is equally accessible. Thus, a comparison of the total costs of the two forums is the most important factor in determining whether the arbitral forum is an adequate and accessible substitute to litigation. Other factors include the actual cost of arbitration compared to the total amount of damages the claimant is seeking and the claimant's overall ability to pay the arbitration fees and costs. These factors may also show arbitration to be an inadequate and inaccessible forum for the particular claimants to vindicate their rights. However, these considerations are less relevant if litigation costs more than arbitration.[73]

The court added that evidence of "possible costs" would not be sufficient; there must be "specific evidence that a party will actually be charged excessive arbitration fees."[74]

> Thus, for evidence to be sufficient, it must show that the plaintiffs are likely to be charged excessive arbitration fees. While we do not mandate that claimants actually incur the cost of arbitration before they can show its excessiveness, parties must at least provide evidence of the likely cost of their particular arbitration, through invoices, expert testimony, reliable cost estimates, or other comparable evidence. Evidence that merely speculates about the risk of possible cost is insufficient.[75]

After analyzing the evidence in the record in the case before it, the *Olshan* court concluded that there was legally insufficient evidence to establish that the homeowners there could not effectively pursue their claims in the arbitral forum.

The court denied relief in the case involving the arbitration provision that it had held was unenforceable under the TAA. In the other three cases, involving the arbitration provisions the court had held were enforceable under the FAA and had further held that the homeowners had not produced sufficient evidence to prove that arbitration would be excessively expensive, the court conditionally granted mandamus requiring the trial courts to grant Olshan's motions to compel arbitration.[76]

**Conclusion**

The holdings of the Supreme Court of Texas in *Nafta Traders, Rubiola, CMH Homes*, and *In re Olshan* evince a pragmatic, flexible, and forward-looking view of arbitration. The court's decisions should make it easier for parties to define how they want to resolve their disputes and encourage courts to help facilitate, not frustrate, parties' choice of arbitration to resolve their disputes. In contrast, the holdings of the United States Supreme Court in *Rent-A-Center, Stolt-Nielsen*, and *AT&T Mobility* appear constrained by a frozen-in-time, narrow, and rigid view of what arbitration can encompass and the extent to which it should be free to evolve.

The FAA's reach to the limits of interstate commerce coupled with the desire of national enterprises to avoid jury trials, punitive damage exposure, and class actions and to standardize their defense against consumer claims ensures the FAA will continue to dominate consumer complaint arbitration. Parties with other types of disputes, however, may eventually decide that arbitration under state arbitration statutes, particularly in states with well developed arbitration jurisprudence, is preferable.

## ENDNOTES

1 Andrew Wooley is Of Counsel with Liskow & Lewis in Houston. He would like to express appreciation to Joshua Downer, a student at Louisiana State University Paul M. Hebert Law Center, who was a summer associate at Liskow & Lewis in 2011, for his research assistance in connection with this article.

2 The five-justice majority in all three cases consisted of Chief Justice Roberts, Justice Alito, Justice Kennedy, Justice Scalia, and Justice Thomas.

3 130 S. Ct. 2772, 2775-76 (2010).

4 *Id*. at 2775 (citations omitted).

5 *See, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444-45 (2006); *Preston v. Ferrer*, 552 U.S. 346, 353-54 (2008).

6 *Id*. at 2775.

7 *Id*.

8 The pertinent language in the majority opinion is the following:

> The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement. We have recognized that parties can agree to arbitrate "gateway" questions of "arbitrability," such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. This line of cases merely reflects the principle that arbitration is a matter of contract. An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other. The additional agreement is valid under § 2 [of the FAA] "save upon such grounds as exist at law or in equity for the revocation of any contract," and federal courts can enforce the agreement by staying federal litigation under § 3 [of the FAA] and compelling arbitration under § 4 [of the FAA]. The question before us, then, is whether the delegation provision is valid under § 2 [of the FAA].
>
> There are two types of validity challenges under § 2 [of the FAA]: "One type challenges specifically the validity of the agreement to arbitrate," and "[t]he other challenges the contract as a whole, either on a ground that directly affects the entire agreement (*e.g.*, the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid." In a line of cases neither party has asked us to overrule, we held that only the first type of challenge is relevant to a court's determination whether the arbitration agreement at issue is enforceable. That is because § 2 states that a "written provision" "to settle by arbitration a controversy" is "valid, irrevocable, and enforceable" *without mention* of the validity of the contract in which it is contained. Thus, a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate. "[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."
>
> …
>
> Here, the "written provision ... to settle by arbitration a controversy," that Rent-A-Center asks us to enforce is the delegation provision—the provision that gave the arbitrator "exclusive authority to resolve any dispute relating to the ... enforceability ... of this Agreement." The "remainder of the contract" is the rest of the agreement to arbitrate claims arising out of Jackson's employment with Rent-A-Center. To be sure this case differs from *Prima Paint, Buckeye*, and *Preston*, in that the arbitration provisions sought to be enforced in those cases were contained in contracts unrelated to arbitration …. In this case, the underlying contract is itself an arbitration agreement. But that makes no difference. Application of the severability rule does not depend on the substance of the remainder of the contract. Section 2 [of the FAA] operates on the specific "written provision" to "settle by arbitration a controversy" that the party seeks to enforce. Accordingly, unless Jackson challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator.
>
> *Rent-A-Center,* 130 S. Ct. at 2777-79 (footnotes and citations omitted).

9 *Id*. at 2781.

10 Justices Breyer, Ginsburg, and Sotomayor joined in the dissenting opinion.

11 *Rent-A-Center*, 130 S. Ct. at 2782 (Stevens, J., dissenting).

12 *Id*. at 2783.

13 The authorities cited for the first line were *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986), and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

14 *See Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 403-04 (1967).

15 *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006).

16 130 S. Ct. at 2785 (Stevens, J., dissenting).

17 "Rather than apply [the precedents focusing on the parties' intentions], the Court takes us down a different path, one neither briefed by the parties nor relied upon by the Court of Appeals. In applying *Prima Paint*, the Court has unwisely extended a 'fantastic' and likely erroneous decision." *Rent-A-Center*, 130 S. Ct. at 2785 (Stevens, J., dissenting) (footnotes and citations omitted).

> *Prima Paint* and its progeny allow a court to pluck from a potentially invalid *contract* a potentially valid *arbitration agreement*. Today the Court adds a new layer of severability—something akin to Russian nesting dolls-into the mix: Courts may now pluck from a potentially invalid *arbitration agreement* even narrower provisions that refer particular arbitrability disputes to an arbitrator. I do not think an agreement to arbitrate can ever manifest a clear and unmistakable intent to arbitrate its own validity. But even assuming otherwise, I certainly would not hold that the *Prima Paint* rule extends this far.
>
> In my view, a general revocation challenge to a standalone arbitration agreement is, invariably, a challenge to the " 'making' " of the arbitration agreement itself, and therefore, under *Prima Paint*, must be decided by the court. … [B]ecause we are dealing in this case with a challenge to an independently executed arbitration agreement--rather than a clause contained in a contract related to another subject matter—any challenge to the contract itself is also, necessarily, a challenge to the arbitration agreement. They are one and the same.
>
> *Id*. at 2786-87 (footnotes and citations omitted).

18 The arbitration provision in the charter party that AnimalFeeds used provided the following:

> Arbitration. Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and

> Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act [*i.e.*, the FAA], and a judgment of the Court shall be entered upon any award made by said arbitrator.

130 S. Ct. at 1765.

19 130 S. Ct. at 1765-67.

20 130 S. Ct. 1777.

21 *Id*. at 1774-76.

22 Justices Breyer and Stevens joined in the dissenting opinion. Justice Sotomayor took no part in the consideration or decision of the case.

23 *Id*. at 1777 (Ginsburg, J., dissenting).

24 130 S. Ct. at 1778-79. The dissent acknowledged "the parties [had] agreed that the arbitrators would issue a 'partial final award [on the issue of class arbitration],' and then 'stay all proceedings … to permit any party to move a court of competent jurisdiction to confirm or to vacate' the award," but observed that the Court's holding in *Hall Street Associates, L.L.C. v. Mattel, Inc.,* 552 U.S. 576, 587 (2008), precluded expansion of judicial review of an arbitration award by agreement of the parties. *Stolt-Nielsen*, 130 S. Ct. at 1779 n.7.

25 *Id*. at 1781-82.

26 131 S. Ct. at 1744.

27 *Id*. at 1746 (quoting from Cal. Civ. Code Ann. § 1670.5(a) (West 2011)).

28 *Discover Bank v. Superior Court*, 223 P.3d 1100, 1110 (Cal. 2005).

29 *Laster v. T-Mobile USA, Inc.*, 2008 WL 5216255, *14 (S.D. Cal., Aug. 11, 2008).

30 *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 857 (9th Cir. 2009).

31 *AT&T Mobility*, 131 S.Ct. at 1746, 9 U.S.C. § 2.

32 *Id*. at 1747, 1753. Based apparently on law review articles rather than evidence in the record, the majority noted that "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." *AT&T Mobility*, 131 S. Ct. at 1747 (citing Broome, An Unconscionable Applicable [sic] of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act, 3 HASTINGS BUS. L.J. 39, 54, 66 (2006); Randall, Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability, 52 BUFFALO L. REV. 185, 186-187 (2004)).

33 *Id*. at 1748. "Although the [*Discover Bank*] rule does not *require* class-wide arbitration, it allows any party to a consumer contract to demand it *ex post*." *AT&T Mobility*, 131 S. Ct. at 1750. It therefore "interferes with arbitration." *Id*.

34 482 U.S. 483 (1987)

35 *Id*. at 484 (citing Cal. Lab. Code Ann. § 229 (West 1971)).

36 *AT&T Mobility*, 131 S.Ct. at 1747.

37 *AT&T Mobility*, 131 S. Ct. at 1748, 1749, 1750, 1751 & 1752.

38 *Id*. at 1754-55 (Thomas, J. concurring).

39 As Justice Breyer noted in his dissent, this is not the law in Texas. *Id*. at 1760. (Breyer, J., dissenting) (citing *In re Poly—America, L.P.*, 262 S.W.3d 337, 348 (Tex. 2008) ("Unconscionable contracts, however—whether relating to arbitration or not—are unenforceable under Texas law.")).

40 Justices Ginsburg, Kagan, and Sotomayor joined in the dissenting opinion.

41 *Id*. at 1756 (Breyer, J., dissenting) (emphasis in original) (quoting 9 U.S.C. § 2).

42 *Id*. at 1757-61.

43 Justice Scalia not only observed that "the times in which consumer contracts were anything other than adhesive are long past," he explained in a footnote that whatever steps states might take to address class action waiver provisions in adhesive arbitration agreements, those steps "cannot conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms." *AT&T Mobility,* 131 S. Ct. at 1750 n.6.

44 *AT&T Mobility*, 131 S.Ct. at 1755 (Thomas, J., concurring).

45 The panel explained that a determination as to arbitrability goes only to who—court or arbitrator—will decide the merits, not to the merits themselves. 661 F.3d at 909.

46 The Third, Fourth, Seventh, Tenth, and Eleventh Circuits have held that a notice of appeal concerning arbitrability automatically stays proceedings in a district court. 661 F.3d at 908.

47 The four factors the panel considered were (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure other parties interested in the proceedings; and (4) whether the public interest favors a stay. 661 F.3d at 910.

48 *Id*. at 913-14.

49 620 F.3d at 464-75.

50 620 F.3d at 474-75. The Fifth Circuit affirmed a district court's order compelling a nonsignatory to arbitrate his claims pursuant to the direct benefits estoppel theory in *Blaustein v. Huete*, No. 11-30057, 2011 WL 5103759, at *4 (5th Cir. Oct. 26, 2011), but elected not to publish its opinion. In *Blaustein*, an individual who had formed an entity for the purpose of marketing a newly-invented device sued a law firm that had been engaged to assist in the prosecution of a patent application for the device.

The law firm moved to compel arbitration of the individual's claims based on a clause in its fee agreement that required arbitration of disputes related to the agreement. The individual opposed the law firm's motion on the ground that he was not a party to the agreement for the law firm's services. This was in fact true, the agreement for the law firm's services was with the marketing entity, and the individual's signature on the agreement was only on behalf of the entity. *Id*. at *1. The district court granted the motion to compel arbitration nonetheless, based on its finding that the individual "knowingly sought and obtained direct benefits from the fee agreement and asserted claims stemming from that agreement." *Id*. at *2.

The Fifth Circuit likewise concluded the individual had "embraced" the agreement for the law firm's services and "obtained the same sort of benefits from the fee agreement that a client would have received." *Id*. at *3. It accordingly affirmed that district court's order dismissing the individual's claims in the lawsuit. *Id*. at *4.

51 649 F3d 310, 312-13 (5th Cir. 2011).

52 *Id*. at 314-15, 317, 320.

53 650 F.3d 556 (5th Cir. 2011). There is no discussion of appellate jurisdiction in the opinion, but the court's earlier decision in *American Heritage Life Insurance Co. v. Orr,* 294 F.3d 702 (5th Cir. 2002), which does explain the basis for jurisdiction in similar circumstances, is cited with regard to the applicable standard of review. Covington, 650 F.3d at 558.

54 *Id*. at 561 (citations omitted).

55 339 S.W.3d 84 (Tex.), *cert. denied*, 132 S. Ct. 455 (2011).

56 552 U.S. 576 (2008).

57 Andrew Wooley, *The Texas General Arbitration Act Allows Traditional Judicial Review of Arbitration Awards—Nafta Traders, Inc. v. Quinn*, TEX. BUS. LIT. J., p. 18 (Summer 2011).

58 334 S.W. 3d at 224-25. The holding and the basis of the holding are consistent with the Fifth Circuit's observation in *Covington* that "in determining whether a party can be compelled to arbitrate, 'it matters whether the party resisting arbitration is a signatory or not.'" *Covington*, 650 F.3d at 561.

59 Some arbitration provisions are within the scope of the FAA, some are within the scope of the TAA, and some are within the scope of both the FAA and TAA, at least potentially. Moreover, some arbitration provisions do not mention the FAA or the TAA, and sometimes the FAA is not applicable or preempts the TAA, irrespective of what is mentioned in the arbitration provision. Due to the limited jurisdiction of federal courts, parties to arbitration agreements subject to the FAA sometimes have no choice but to seek assistance from state courts to compel or stay arbitration or for other non-final intervention related to their agreement to arbitrate.

60 Act of May 27, 2009, 81st Leg., R. S., ch. 820, §§ 1, 3, 2009 Tex. Gen. Laws 2061 (codified at TEX. CIV. PRAC. & REM.CODE § 51.016).

61 340 S.W.3d at 446-47.

62 *Id*. at 453-54.

63 328 S.W.3d at 886.

64 *Id*. (emphasis added).

65 *Id*. (emphasis added).

66 TEX. CIV. PRAC. & REM. CODE § 171.002(a)(2).

67 *Id*. at 887.

68 *Id*. at 891. Texas courts recognize that the FAA preempts state law that would otherwise render an arbitration agreement unenforceable in a contract involving interstate commerce. *Olshan*, 328 S.W.3d at 888 (citing 9 U.S.C. § 2).

69 *Id*. at 892 (citing *In re Poly—America*, L.P., 262 S.W.3d 337, 347 (Tex. 2008)). Whether the majority in *AT&T Mobility* would see the Texas rule that unconscionable arbitration contracts are unenforceable any differently than they saw the *Discover Bank* rule in *AT&T Mobility* remains to be seen.

70 *Olshan*, 328 S.W.3d at 892.

71 *Id*. at 893 (citing *Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79, 90 (2000)).

72 *Olshan*, 328 S.W.3d at 893 (citations omitted).

73 *Olshan*, 328 S.W.3d at 894-95.

74 *Id*. at 895 (citations omitted).

75 *Id*.

76 *Id*. at 897-99.

# 2011 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, the four federal district courts in Texas, and the two federal district courts in Louisiana saw almost the same amount of class action activity in 2011 as they did in 2010. In 2010, these courts decided 14 cases substantively addressing Rule 23. The courts in 2010 certified four of the proposed classes. The same courts in 2011 decided 15 cases that substantively addressed Rule 23, certifying six of the proposed classes and two class action settlements.

This past year, the Fifth Circuit and district courts in Texas and Louisiana addressed class actions impacting areas such as the Securities Exchange Act of 1934, the Fair Debt Collection Practices Act, the Real Estate Settlement Procedures Act, the Electronic Funds Transfer Act, federal RICO laws, the Americans with Disabilities Act, civil rights violations, trademark infringement, negligence, breach of contract, and mass torts. The following is a summary of decisions from the Fifth Circuit and the Texas and Louisiana federal district courts that substantively addressed Rule 23. Hopefully, this will provide some valuable insight into litigating class action issues in the Fifth Circuit.

**A. Supreme Court Cases**

1. Securities Exchange Act of 1934

As an update to last year's survey, we have included the Supreme Court's decision in *Erica P. John Fund, Inc. v. Halliburton Co.* to vacate and remand the Fifth Circuit's denial of class certification in *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*[2] Petitioner Erica P. John Fund, Inc. (EPJ Fund) was the lead plaintiff in this putative securities fraud class action alleging that Halliburton made deliberately misleading statements designed to inflate its stock price.[3] The Northern District of Texas held that EPJ Fund had satisfied Rule 23(a)'s requirements, but that it could not satisfy Rule 23(b)(3) because Fifth Circuit precedent required securities fraud plaintiffs to prove "loss causation," which EPJ Fund failed to establish.[4] As described in this opinion, loss causation is proof that a misrepresentation caused subsequent economic loss.

The Fifth Circuit affirmed the district court's denial of certification under Rule 23(b)(3). In deciding whether questions of law or fact common to class members predominated, the court focused on the elements of fraud, and on reliance in particular.[5] Noting how the traditional method of proving reliance can create an "unnecessarily unrealistic evidentiary burden" on a §10(b)(5) plaintiff, the court allowed the plaintiffs to use a fraud-on-the-market theory.[6] However, the Fifth Circuit required EPJ Fund to establish loss causation in order to invoke the fraud-on-the-market theory, which it failed to do. As such, the court held that reliance was not capable of resolution on a common, class-wide basis as required by Rule 23(b)(3).[7]

The Supreme Court granted certiorari to address the question of whether a securities fraud plaintiff must also prove loss causation in order to obtain class certification under Rule 23(b)(3). The Court first noted that loss causation and reliance address different matters. Reliance in a §10(b)(5) fraud claim refers to "transaction causation," which focuses on the facts surrounding the investor's decision, while "loss causation," as described above, addresses whether the misrepresentation actually caused the subsequent economic loss.[8] According to the Court, the fact that a subsequent loss can be caused by factors other than a misrepresentation has no bearing on whether an investor relied on that misrepresentation in the first place, either directly or presumptively through the fraud-on-the-market theory.[9] As such, the Court vacated and remanded the decision, as "[l]oss causation has no logical connection to the facts necessary to establish the efficient market predicate to the fraud-on-the-market theory."[10]

**B. Fifth Circuit Cases**

1. Real Estate Settlement Procedures Act

In *Benavides v. Chicago Title Insurance Co.*, the Fifth Circuit determined whether a district court abused its discretion in denying class certification under Rule 23(b)(3) for Real Estate Settlement Procedures Act (RESPA) and state law claims against a title insurer who failed to grant mandatory title insurance discounts.[11] Texas Insurance Code Rate Rule 8 (R-8) provides a mandatory discount on title insurance when a borrower renews, extends, or satisfies an old mortgage with a new mortgage, as long as the new one is issued within seven years of the initial mortgage, and the initial one was also covered by a title insurance policy.[12] Plaintiff Benavides alleged that Chicago Title improperly denied her the discount when she refinanced two years after taking out her initial mortgage.[13] Pursuant to Rule 23(b)(3), she moved to certify a class of all individuals who had refinanced their existing mortgages within seven years and for whom Chicago Title failed to apply the reissue discount.[14]

After dismissing Benavides's RESPA claims, the district court denied certification of the state law claims, finding that the questions purportedly common to the class (whether the plaintiffs refinanced within seven years, whether the plaintiffs qualified for the discount, what should have been the applicable discount amount for each plaintiff, and whether Chicago Title breached other legal duties to each plaintiff) were fact-specific questions that could not be determined "on a class-wide basis using class-wide proof."[15]

On the same day, the Fifth Circuit decided *Mims v. Stewart Title Guaranty Co.*, a factually similar case that denied certification of federal RESPA claims, but affirmed certification of the state law claims.[16] Benavides filed a motion for reconsideration, arguing *Mims* controlled the decision.[17] However, the district court denied the motion, noting that the issue on appeal in the *Mims* case was whether a class could be certified even if it were to include some members who were ineligible for the discount because Stewart Title relied upon its own underwriting guidelines for eligibility, which varied from R-8's legal requirements (*i.e.*, a class definition issue).[18] According to the district court, even if it were to have relied on Mims and accepted Benavides's proposed class definition, it would still have had to deny class certification because there were no common questions capable of class-wide determination.[19]

The Fifth Circuit affirmed the district court's decision, noting that "[a]ll that *Mims* held . . . was that the class definition was appropriate; not that there were any common class-wide questions, that those questions would predominate trial, or that mere membership in the class was sufficient to establish liability en masse."[20] Since the sole issue common to all plaintiffs was whether the R-8 discount applied to everyone who qualified, and Chicago Title conceded that it would apply, the only issues to be determined were individualized inquiries that were inappropriate for a Rule 23(b)(3) class.[21] Thus the district court did not abuse its discretion in denying class certification.

2. Mass Torts

In *Madison v. Chalmette Refining, L.L.C.*, the Fifth Circuit determined whether the district court abused its discretion by failing to analyze rigorously the predominance and superiority requirements of Rule 23(b)(3).[22] The plaintiffs were a group of children, parents, and teachers who attended a historical reenactment at the Chalmette National Battlefield when the adjacent Chalmette Refinery released an amount of petroleum coke dust into the air that migrated over the battlefield.[23] The named plaintiffs filed suit on behalf of themselves and all other individuals who were exposed to the coke dust, seeking a variety of damages.[24]

The district court certified the class, finding that Rule 23(b)(3)'s predominance requirement was satisfied because one set of operative facts would determine liability—the plaintiffs "were either on the battlefield and exposed to the coke dust or they were not."[25] The district court stated that the common liability issues could be tried in a single class action and any individual issues of damages could be reserved for individual treatment.[26]

On interlocutory appeal, the Fifth Circuit disagreed that Rule 23(b)(3)'s predominance requirement was so easily met. To satisfy this requirement, the court stressed that district courts must determine how a trial on the merits would be conducted if the class were certified, which in turn requires them to (1) identify the substantive issues that will control the outcome, (2) assess which issues will predominate, and (3) determine whether the issues are common to the class.[27] The Fifth Circuit compared the district court's "figure-it-out-as-we-go-along approach" to prior district court decisions that required three- or four-phase trial plans before deciding to certify a 23(b)(3) class.[28] The Fifth Circuit also highlighted the district court's failure to consider case management tools to narrow the claims and potential plaintiffs and failure to establish the applicable state law before certifying the class.[29] In contrast to the district court's statement that liability rests on the plaintiffs being "either on the battlefield and exposed to the coke dust or they were not," the Fifth Circuit pointed out that even among the named class representatives, significant disparities existed in terms of exposure, location, and whether mitigative steps were taken.[30] While not ruling out class treatment on the issue of liability, the Fifth Circuit reversed and remanded after determining the district court's limited 23(b)(3) analysis was an abuse of discretion.[31]

**C. Texas District Court Cases**

1. Securities Exchange Act of 1934

*Buettgen v. Harless* involved a § 10(b) securities fraud claim by the plaintiff-investors, alleging that current and former executives of yellow page publisher Idearc, Inc. misrepresented the company's accounts receivables and cash flow situation and then made corrective disclosures that caused the stock price to fall.[32] The plaintiffs moved under Rule 23(b)(3) to certify a class consisting of all investors who

purchased Idearc stock during the time the misrepresentations and corrective disclosures were made.[33]

The court first determined that the four Rule 23(a) requirements were satisfied, which the defendant did not dispute: (i) Idearc's average trading volume was 2.9 million shares, satisfying numerosity, (ii) all of the plaintiffs' claims were based on the same misleading statements, satisfying commonality, (iii) all of the claims stemmed from the same misrepresentations and the type of proof required to support the named plaintiffs' claims, satisfying typicality, and (iv) the named plaintiffs demonstrated an ability and willingness to take an active role in the litigation and protect the rights of the absent plaintiffs, satisfying adequacy of representation.[34]

The court then analyzed the predominance and superiority requirements under Rule 23(b)(3). As for predominance, the court recognized that to prove class-wide reliance, a required element of a § 10(b) fraud claim, plaintiffs may establish a class-wide presumption using the fraud-on-the-market theory.[35] The court first determined that the plaintiffs satisfied the three-prong test established by the Fifth Circuit in *Greenberg v. Crossroads Systems, Inc*.[36] because (i) the defendants made a public, material misrepresentation, (ii) sufficient evidence showed, and the defendants did not dispute, that Idearc's shares were traded in an efficient market, and (iii) all plaintiffs traded shares between the time the misrepresentations were made and the time the truth was revealed.[37] The court then found that the plaintiffs satisfied loss causation, which at the time of the opinion was required under Fifth Circuit precedent in order to rely on a fraud-on-the-market theory.[38] Finally, the court found that the plaintiffs satisfied superiority, as (i) there was no indication that the class members wished to pursue actions individually, (ii) the case had been pending in the Northern District of Texas for two years with substantial time and resources expended, and it would promote judicial efficiency to concentrate the litigation in a single forum, and (iii) "[t]he same types and methods of proof would be used in a case with a single plaintiff or one with hundreds of plaintiffs."[39] Consequently, the court granted the plaintiffs' motion for class certification.

2. Civil Rights Violations

a. Morrow v. Washington

In *Morrow v. Washington*, the Eastern District of Texas determined several class certification issues surrounding a discriminatory "interdiction program," in which racial minorities were targeted for pretextual traffic stops, including (i) the affect of adverse inferences on class certification, (ii) whether the plaintiffs' class satisfied Rule 23(a), (iii) whether certification under Rule 23(b)(2) was appropriate, (iv) whether Rule 23(b)(2) allows for monetary relief, and (v) whether res judicata would bar subsequent monetary claims for individual damages.[40]

The plaintiffs were a group of individuals who characterized themselves as racial minorities. The plaintiffs alleged that law enforcement officials in Tenaha, Texas, implemented an illegal interdiction program that was designed to target minorities for traffic stops in order to look for other criminal activity, primarily narcotics trafficking.[41] The plaintiffs moved for class certification under Rule 23(b)(2) and sought declaratory, injunctive, and monetary relief.

As an initial matter, the court first determined whether to draw an adverse inference from (i) the failure of Tenaha's law enforcement agencies to collect and report racial profiling information, in violation of state law, and (ii) two defendants' refusal to answer any substantive questions pertaining to class certification issues; and what effect each of these adverse inferences would have on class certification.[42] The court determined that the failure to collect required information gave rise to an inference that the defendants were trying to conceal the illegal tactics, which justified an adverse inference on Rule 23(a) issues of numerosity, commonality, typicality, and adequacy.[43] Moreover, the court found that the two defendants' decision to invoke the Fifth Amendment did not imply a lack of information but that the information was withheld for fear of incrimination, and because the defendants acted in concert, justified an inference that all of the defendants acted on grounds generally applicable to the members of the proposed class.[44]

The court then analyzed the four Rule 23(a) requirements. First, the court found numerosity, as the high end of putative members (829) and the low end of putative members (136) made joinder impractical, especially because the class members were travelers on interstate highway U.S. 59, with six of the class representatives located outside of Texas.[45] Second, the court found commonality satisfied. The court stated that this case was "quite different" from the recent Supreme Court decision in *Wal-Mart Stores, Inc. v. Dukes*,[46] where the plaintiffs attempted to use anecdotal evidence of discrimination in a few locations as evidence of a nation-wide policy of discrimination.[47] Here, in contrast, there was a specific, city-wide policy targeting racial minorities, conceived by a small number of police officers within a specified time period.[48] The statistics provided "significant proof" that the program operated as a "general policy of discrimination," and combined with the adverse inferences discussed above, showed that a class-wide proceeding would "generate common answers apt to drive the resolution of the litigation."[49] Third, although each traffic stop may have involved a slightly different factual scenario, one defendant's assertion that "[T]hat's the way we do it," combined with evidence that all members who were stopped were treated the same, showed that the class representatives' claims were typical of the class. Finally, the court rejected the defendants' assertion that some class representatives no longer wished to remain in that role, which implied that many of the class members no longer wanted to pursue the claims, finding that this had no bearing on the ability or willingness of the remaining named plaintiffs to adequately represent the class.[50]

Next, the court found that injunctive and declaratory relief were appropriate, as this type of class-wide racial discrimination was precisely the type of class for which Rule 23(b)(2) was created.[51] The court rejected the defendants' claim that the injunctive relief requested was not specific enough, finding that the "precise terms of the injunction need not be decided at this stage, only that the allega-

tions are such that . . . relief [is] appropriate and that . . . an injunction can be crafted that meets the specificity requirements of Rule 65(d).[52] The court also dismissed the defendants' mootness argument that because the program no longer existed and there was no evidence that the class members would travel through Tenaha in the future, then prospective injunctive relief was unnecessary. The court found sufficient evidence that there was both a cognizable danger of recurrent violations and that the class representatives' decisions to take longer routes around Tenaha (even though they would prefer to travel through Tenaha) were typical of the class members as a whole.[53]

The court then determined that monetary relief under this Rule 23(b)(2) class would be inappropriate. Relying on the Fifth Circuit's holding in *Allison v. Citgo Petroluem Co.*, the court stated that monetary relief is permissible in a (b)(2) class so long as it is "incidental" to injunctive or declaratory relief, and is "incidental" if it "flow[s] directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief."[54] However, equitable restitution, as well as compensatory and punitive damages, are not "incidental" to injunctive relief and would cause individualized determinations to predominate over the injunctive relief.[55]

Finally, the court looked to decisions from other jurisdictions and the Fifth Circuit to determine that res judicata would not bar any putative class members from pursuing individual claims for damages based on the individual circumstances of a particular stop, even though the court chose to certify the class only for injunctive and declaratory relief.[56]

b. Texas Medical Providers Performing Abortion Services v. Lakey

The plaintiffs in *Texas Medical Providers Performing Abortion Services v. Lakey* challenged the constitutionality of Texas House Bill Number 15, which requires abortion providers to perform sonograms and to display both the images and make audible any heartbeat of the fetus to the woman before performing an abortion.[57] The plaintiffs made eight separate claims primarily involving violations of the First and Fourteenth Amendment.[58] The plaintiffs sought certification of a plaintiff class under Rule 23(b)(2) consisting of all medical providers performing abortion services in Texas and their patients, as well as a defendant class under Rule 23(b)(1)(A) consisting of all county and district attorneys in Texas with the authority to prosecute misdemeanors.[59]

The court first considered the certification of the plaintiff class and the defendants' three arguments against certification. The defendants first argued that the "necessity doctrine" precluded certification because a finding of unconstitutionality would be binding across the state, and state officials would not enforce an invalid law against non-parties to the litigation.[60] Rejecting this argument, the court noted that (1) while final declaratory relief may be binding on all state officials, preliminary injunctive relieve may not be, and (2) the court is "disinclined to leave to chance" the possibility that one or more of the hundreds of district and county attorneys may "test the scope of [this] ruling."[61] The court summarily dismissed the defendants' second argument that the named plaintiffs and class counsel did not adequately represent that class due to possible conflicts of interests, stating that the plaintiffs' aligned interests and the single statute at issue made these "conjectural conflicts" unpersuasive.[62] Finally, the defendants argued that a severability clause[63] within the Act precluded class-wide injunctive relief under Rule 23(b)(2).[64] However, the court disagreed, stating that this argument would allow any legislature to preclude Rule 23(b)(2) certification simply by including a similar severability clause, and that the best way to handle any non-class-wide injunctive relief would be to amend the order to create subclasses. Accordingly, the court granted certification of the plaintiff class.

The court next considered the certification of a defendant class under Rule 23(b)(1)(A) due to the risk of inconsistent adjudication and incompatible standards of conduct for the party opposing the class (the state attorneys).[65] Again, the defendants made several arguments, all of which were rejected by the court.

First, the defendants argued that *James v. City of Dallas*[66] mandated that at least one named plaintiff have standing to seek injunctive relief on each claim against the defendants, which did not occur here.[67] However, the court noted that exceptions exist when the defendant class is composed of public officials.[68] The court adopted the "juridical link" doctrine, which says that if the plaintiff class "suffered an identical injury at the hands of several parties . . . 'juridically related in a manner that suggests a single resolution of the dispute would be expeditious,' the claim[s] could go forward."[69] Thus, the Texas prosecutors were juridically related and were the "relevant legal entity" for purposes of standing concerns.[70]

The court then rejected the defendants' second attempt at the "necessity doctrine," stating that certification is not unnecessary where "hundreds of individual state actors, properly accustomed to exercising their prosecutorial discretion, might choose to disregard a non-binding ruling from a federal court."[71]

Next, the court concluded that certification under Rule 23(b)(1)(A) was proper. The court first rejected the defendants' claims that their consent was needed for class certification.[72] The court then reiterated that the possibility the act would be upheld in some lawsuits and struck down in others would subject all relevant parties to inconsistent standards of conduct (*i.e.*, precisely what Rule 23(b)(1)(A) is designed to prevent.)

Finally, the defendants argued that prosecutorial discretion made it impossible to determine which state attorneys would actually enforce the act, and thus Rule 23(a) requirements of numerosity, typicality, commonality, and adequacy of representation could not be met. Disagreeing, the court noted that the plaintiffs may rely on the assumption that "Texas prosecutors will enforce Texas law."[73] Accordingly, the court certified the proposed defendant class.

3. Fair Debt Collection Practices Act

*Eatmon v. Palisades Collection, LLC* involved a class of plaintiffs alleging that defendant Palisades Collection, LLC's motor vehicle retail installment debt collection practices violated the Fair Debt Collection Practices Act (FDCPA) and the Texas Debt Collection Practices Act (TDCPA) because Palisades tried to collect debts without the license required by Texas law.[74] The case was included in last year's Annual Survey, in which the district court adopted the magistrate court's recommendation to certify a Rule 23(b)(3) class.[75] However, in its Memorandum Opinion and Order from May 19, 2011, the court granted the defendant's motion for reconsideration and considered the merits of numerous objections.

The defendants made three arguments for why the plaintiffs failed to identify adequately the class members and establish numerosity. Contrary to the defendants' first claim, the court found that the defendants' lack of records regarding who received illegal demand letters was not a basis for precluding a class due to lack of specificity or numerosity, as no evidence suggested that further discovery would fail to reveal the recipients of the demand letters, which might exceed 40,000.[76] Next, the court rejected the defendants' claim that they lacked current addresses of the class members because the retail contracts reflected only the debtors' addresses at the time of signing, finding that Rule 23 only requires individual notice to be given to members who can be identified through reasonable effort, and that difficulty in identifying potential class members actually militates in favor of numerosity.[77] Finally, the court dismissed the claim that individual trials were needed to determine which class members used their cars for consumer purposes as required under both Acts, stating that this requirement could be satisfied by the written contracts themselves, which include a "check box" labeled "personal." [78]

The defendants next made three arguments against finding commonality. First, the defendants argued that the two-year statute of limitations in the TDCPA caused the class definition to reach too far back compared to the one-year period of the FDCPA, thus rendering the claims uncommon. The court disagreed, citing other cases that granted certification of FDCPA classes even though the state claim had a longer statute of limitations.[79] The court next rejected the defendants' claim that individual examinations of each file were necessary because some of the plaintiffs had entered into settlement agreements or had declared bankruptcy, finding that "the overarching common questions remain regarding Defendant's lack of a debt collection license during the relevant time period."[80] Finally, the court rejected the claim that individual proceedings were necessary to determine actual damages, as the FDCPA permits a uniform statutory damages amount for class action lawsuits.[81]

The court summarily affirmed the finding of typicality, rejecting the defendants' claim that sub-classes were necessary for the plaintiffs who (i) were sued by the defendants and (ii) received demand letters from the defendants, because to the court, both instances "'arise from a similar course of conduct and share the same legal theory' . . . that Defendant illegally engaged in unlicensed debt collection activities."[82]

The court affirmed the magistrate court's finding of adequacy, stating that the named plaintiff, Ms. Eatmon, demonstrated "a sufficient lay understanding of the . . . case and a willingness to represent the putative class," rejecting the defendants' claim that Ms. Eatmon did not know what a class action was.[83] The defendants then claimed that class counsel was inadequate because (i) class counsel made a settlement offer to the defendants without notifying the named plaintiffs, (ii) class counsel acted in conflict with the proposed class because he objected to the defendants' filing for a Texas debt collection license, perpetuating the act he claimed he was attempting to prevent, and (iii) Ms. Eatmon showed such a lack of knowledge during her deposition that class counsel failed to adequately prepare her.[84] The court rejected all three arguments, finding that (i) Ms. Eatmon did not acknowledge the settlement offer because her attorney instructed her not to on privilege grounds, (ii) class counsel opposed the defendants' license application because the continued halt in collection efforts was in the best interest of the class, and (iii) as noted earlier, Ms. Eatmon was not required to possess "extraordinary expertise, intellect, or understanding of the issues in the litigation."[85]

Finally, the court affirmed the finding of predominance and superiority as required by Rule 23(b)(3). The court determined that the possibility that individual evidence would be necessary to calculate actual damages was not a persuasive argument against predominance, because the plaintiffs were seeking only statutory damages, and under a Rule 23(b)(3) class, any putative members who are not satisfied with counsel's strategy have an opportunity to receive notice and opt out.[86] Furthermore, the evidence indicating that the potential class might have more than 40,000 members made a class action the superior vehicle for resolving the disputes.[87]

4. Other Decisions

a. FPX, LLC v. Google, Inc.

In *FPX, LLC v. Google, Inc.*, a magistrate judge issued a Report and Recommendation denying class certification in plaintiff FPX, LLC's trademark infringement and unfair competition claims against defendant Google, Inc. because (i) the class failed to meet Rule 23(a)(2)'s commonality requirement, (ii) the individualized nature of the claims precluded Rule 23(b)(2) certification, and (iii) the plaintiffs' claims for disgorgement were inappropriate for class certification.[88] Finding the magistrate's conclusions correct, the district court adopted the report in its entirety.[89]

FPX sued Google for trademark infringement and unfair competition over Google's practice of selling the FPX trademark to competitors as part of its AdWords and Keyword Suggestion Tool advertising programs.[90] FPX moved to certify a Rule 23(b)(2) class consisting of all individuals whose trademarks were sold by Google as a Keyword and/or an AdWord since May of 2005.[91]

First, the court denied certification under Rule 23(a)(2)'s requirement of commonality. According to the Supreme Court's

recent decision in *Wal-Mart Stores, Inc. v. Dukes*, the commonality analysis "requires the court to determine (1) whether the class members' claims 'will in fact depend on the answers to common questions,' and (2) whether class-wide proceedings have the capacity to 'generate common answers apt to drive the resolution of the litigation.'"[92] Both trademark infringement and unfair competition require a finding of a likelihood of consumer confusion, which is a highly fact-intensive inquiry that is unique to every trademark.[93] As such, even if the court found Google's policy resulted in a likelihood of confusion with regard to FPX's trademark, it might not lead to confusion with regards to the other putative class members' trademarks. Thus "the common contention . . . is not capable of classwide resolution and . . . does not meet Rule 23(a)(2)'s commonality requirement."[94]

Second, the court held that the putative class was not a cohesive Rule 23(b)(2) group under Fifth Circuit law because "resolution of the claims at issue would require 'complex individualized determinations' and 'numerous individualized hearings.'"[95] The court found this to be true for three separate reasons: (i) trademark infringement depends on trademark validity, which involves a "distinctiveness" classification that requires a highly individualized analysis for each putative members' trademark, (ii) the necessary likelihood of confusion analysis mentioned above, and (iii) affirmative defenses require fact-specific inquiries for each trademark.[96]

Finally, the court rejected the plaintiffs' request for equitable disgorgement under Rule 23(b)(2). Relying on the Fifth Circuit's holding in *Allison v. Citgo Petroluem Co.,* the court stated that monetary relief is permissible in a Rule 23 (b)(2) class so long as it is "incidental" to injunctive or declaratory relief, and is "incidental" if it "flow[s] directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief."[97] Here, however, because of the fact-specific inquiries mentioned above, liability could not be proven for the proposed class as a whole. "Without the ability to prove class-wide liability, class-wide disgorgement is also not feasible."[98]

b. Witt v. Chesapeake Exploration, L.L.C.

In *Witt v. Chesapeake Exploration, L.L.C.*, the Eastern District of Texas determined whether the predominance requirement was met under Rule 23(b)(3). The plaintiffs, a group of landowners who claimed that Chesapeake failed to pay signing bonuses related to the execution of oil and gas leases, brought suit alleging (i) breach of contract, (ii) tortious interference, and (iii) violations of Chapter 12 of the Texas Civil Practice and Remedies Code.[99] The plaintiffs sought to certify a class under Rule 23(b)(3) of all persons who executed an oil and gas lease to Chesapeake between March 2008 and July 2009, with subclasses for lessors receiving (1) no lease bonus, (2) only part of the lease bonus, and (3) their full, but untimely, bonuses.[100]

The court began by analyzing the breach of contract claim. Under Texas law, a contemporaneously exchanged bank draft (the bonus in consideration for signing the lease) and lease must be construed together.[101] Here, because the drafts specified payment would be made 15 days after approval of title, a condition precedent to the leases was created.[102] Thus, the plaintiffs would have to prove that Chesapeake either approved of their title or waived the condition precedent—an individual inquiry inappropriate for a Rule 23(b)(3) class.[103] In response, the plaintiffs argued that the draft and lease were *not* executed contemporaneously, and that the leases stood on their own and were binding when executed.[104] However, this too would require individual inquiries to determine whether the documents were in fact executed separately.[105] And even if they were executed separately by putative class members, Chesapeake had not yet signed many of the leases, which created a statute of frauds defense requiring individual inquiries into each case.[106]

The plaintiffs then argued that Chesapeake was equitably estopped from questioning the validity of the leases because Chesapeake received significant financial benefits from the same leases. But once again, the court determined that the issue of whether Chesapeake received benefits from each particular lease would be an individualized inquiry.[107] Finally, the plaintiffs claimed that Chesapeake waived its defenses on a class-wide basis.[108] However, according to the Supreme Court in *Wal-Mart Stores*, because "the Rules Enabling Act forbids interpreting Rule 23 'to abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims."[109] Accordingly, "litigating each of Chesapeake's potential defenses to the breach of contract claim as to each individual class member would require numerous mini-trials, defeating predominance."[110]

The court next determined that class certification was inappropriate for the tortious interference claim. Because individual issues predominated the breach of contract claim, and the plaintiffs' tortious interference claim also depended on the formation of a contract, the same individual inquiries discussed above would also predominate the tortious interference claim.[111]

Finally, the court analyzed the plaintiffs' claim under Chapter 12 of the Texas Civil Practice and Remedies Code, which states that a person may not make, use, or present a document with (1) knowledge it is a fraudulent claim against an interest in real property, (2) intent that the document be given legal effect, and (3) intent to cause the plaintiffs financial injury.[112] Damages include the greater of $10,000 or actual damages.[113] Here, however, the court determined that the plaintiffs would have to prove that Chesapeake knew that each lease it filed for recording was fraudulent, not just invalid, which requires individual inquiries into each case.[114] Furthermore, individual damages calculations would be required if each plaintiff was entitled to the minimum $10,000 award or actual damages.[115] Accordingly, class certification under Rule 23(b)(3) would be inappropriate.

c. Bridgewater v. Double Diamond-Delaware, Inc.

In *Bridgewater v. Double Diamond-Delaware, Inc.*, the Northern District of Texas examined whether the proposed plaintiff class satisfied the predominance requirement of Rule 23(b)(3).[116] The plaintiffs, property owners at the White Bluff Resort at Lake Whitney, filed suit against the developer, Double Diamond, claiming they were forced to join the White Bluff Property Owners' Association (WBPOA) and pay mandatory assessments that were not governed by the WBPOA bylaws.[117] The plaintiffs claimed that these assessments (golf course maintenance fees and "food and beverage" assessments) were pursuant to a scheme to enrich the defendants and generate revenue for their other business interests, in violation of state law and also constituting RICO predicate acts of mail and wire fraud.[118]

The court focused its analysis on whether Rule 23(b)(3)'s predominance requirement was met, and because this issue was dispositive, assumed that Rule 23(a)'s requirements were satisfied. First, the court determined that the Supreme Court's holding in *Bridge v. Phoenix Bond & Indemnity Co*.[119] required the plaintiffs to show either first-party or third-party reliance, on an individual basis, in order to satisfy the causation element of RICO mail fraud.[120] While the plaintiffs argued for an "invoice theory" of reliance (*i.e.*, the act of paying the assessment invoices that contained the misrepresentations could establish circumstantial evidence of reliance), the court cited a prior Fifth Circuit case rejecting this theory and requiring individual proof of reliance as to each class member.[121] Thus, the plaintiffs failed to establish that common issues would predominate at trial on their RICO claims.

The court then determined that class certification as to damages was inappropriate under Rule 23(b)(3)'s predominance requirement.[122] Because the plaintiffs received free rounds of golf and food and beverage credits, and the defendants did not keep records of this activity, any calculation of damages would require an individual inquiry into the benefits received, which then would have to be deducted from each individual damages award.[123] Accordingly, damages, like liability, did not satisfy Rule 23(b)(3)'s predominance requirement.

d. Mabary v. Hometown Bank, N.A.

In *Mabary v. Hometown Bank, N.A.*, the court determined whether to certify a Rule 23(b)(3) class of plaintiffs who were charged ATM fees by Hometown Bank in violation of the Electronic Funds Transfer Act (EFTA).[124] The named plaintiff, Ms. Mabary, alleged that she was charged a $2.00 ATM fee but was not informed of the fee because Hometown did not post a notice "on or at" the ATM. Accordingly, she sought to certify a class of all non-customers of Hometown Bank who were charged fees before Hometown became compliant with the EFTA.

The court found that the four requirements of Rule 23(a) were satisfied, as (i) Mabary's discovery likely would find the number of individuals who were charged fees to be considerable, and "at the very least greater than 30 to 40," satisfying numerosity, (ii) common issues of whether Hometown was an ATM operator, whether Hometown complied with the notice requirements, and whether the class would be entitled to statutory damages satisfied commonality, (iii) Mabary's claims were typical of the class because they derived from an identical factual predicate and were based upon the same legal theory, and (iv) Mabary and class counsel would adequately represent the class and the fact that Mabary was seeking only statutory damages would not undermine her ability to represent the class, even though some members might want to seek actual damages.[125]

Next, the court found the Rule 23(b)(3) requirements satisfied, as the potential class members claimed the same statutory injury by the same course of conduct, which were issues subject to generalized proof that predominated over questions affecting individual members, and a class action was the superior method in order to "overcome the problem that small recoveries do not provide the incentive for any individual to bring solo action prosecuting his or her rights."[126] Accordingly, the court granted the plaintiffs' motion for class certification.

5. Class Action Settlements

a. Billitteri v. Securities America, Inc.

In *Billitteri v. Securities America, Inc.* the Northern District of Texas determined whether a proposed class action settlement after the collapse of two Ponzi schemes satisfied Rule 23's requirements.[127] The plaintiffs, a group of investors who purchased securities from Provident Royalties, LLC and Medical Capital Holdings, Inc., brought suit against the broker-dealers who sold the securities, including Securities America, Inc. (Securities America), Securities America Financial Corporation (SAFC), and Ameriprise, Inc., alleging violations of state and federal securities laws, negligence, and breach of fiduciary duties.[128] The proposed settlement would establish an $80 million settlement fund to be distributed to over 2,000 investors, a recovery of approximately 40 cents on the dollar.[129]

The court first found that Rule 23(a)'s threshold requirements were satisfied because the proposed class included over 2,000 investors (numerosity), all the class members invested in the two Ponzi schemes through Securities America, with the claims "replete with common questions of law" (commonality), the representative plaintiffs and class members both asserted claims that required proving similar facts about Securities America making false statements or omissions regarding the securities (typicality), and class counsel had substantial experience, the representative plaintiffs took an active role and exerted control over the prosecution, and no conflicts of interest existed between the named plaintiffs and class members (adequacy of representation).[130]

The court next determined that the Rule 23(b)(3) requirements of predominance and superiority were met. Predominance was satisfied as to each claim, as (i) federal and state securities laws required the plaintiffs to prove misrepresentations or omissions regarding the investments, with analysis of each claim being remarkably similar, (ii) the negligence and breach of fiduciary duty claims involved class-wide issues of whether Securities America had a duty or fiduciary relationship with the class members, and (iii) the amount of damages was easily obtainable and distributable on a *pro rata* basis, with little chance of the case degenerating into a series of individual trials.[131] Superiority was satisfied, as only 30 members of the over 2,000 investors decided to opt out, the cases were consolidated in the Northern District of Texas for settlement negotiations, which succeeded, and there were no difficulties present with managing the class action.[132]

After finding the notice requirements of Rule 23(c) and (e) satisfied, the court turned to whether the settlement was fair, reasonable, and adequate under Rule 23(e)(2) according to the Fifth Circuit's six factors from *Reed v. General Motors Corp*.[133] The court found that (i) the settlement was negotiated at arms' length, (ii) the complexity of the case would subject the plaintiffs to years of delays before recovery if a trial was held, (iii) sufficient information to frame the issues had been collected offsetting the lack of formal discovery, (iv) the difficulty of recovering from the bankrupt Ponzi organizations favored the settlement, (v) the recovery of forty cents on the dollar far exceeded the normal amount recovered in securities class actions, and (vi) class counsel and class members had "enthusiastically endorsed the proposed settlement."[134] Accordingly, the court found the settlement fair, reasonable, and adequate, and granted the motion for class action settlement.[135]

b. Stott v. Capital Financial Services, Inc.

*Stott v. Capital Financial Services, Inc*. involved the same collapse of Provident Royalties, LLC and Medical Capitol Holdings, Inc. as *Billitteri*, with the plaintiffs in *Stott* suing broker-dealer Capital Financial Services, Inc. for violations of federal and state securities laws, negligence, and breach of fiduciary duty. [136] However, in addition to determining whether the requirements of Rule 23(a) and (b)(3) were satisfied and whether the settlement was fair, reasonable, and adequate, the court in *Stott* also had to determine whether a "limited fund" existed under Rule 23(b)(1)(B), and if so, whether the court had the authority under the All Writs Act to enjoin arbitrations brought by individual class members to preserve the "limited fund."[137]

First, using an analysis identical to that of *Billitteri* the court found Rule 23(a)'s four threshold requirements satisfied, the only difference being that the *Stott* class size was 650, compared to over 2,000 in *Billitteri*.[138]

Next, the court determined whether a "limited fund" settlement[139] for a mandatory no opt-out class existed pursuant to the three requirements set out by the Supreme Court in *Ortiz v. Fibreboard Corp.*, which are: (1) the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all claims; (2) the whole of the inadequate fund is to be devoted to the overwhelming claims; and (3) the claimants identified by a common theory of recovery are treated equitably among themselves.[140] The court found the second and third requirements satisfied, as the entire $1.52 million fund would be distributed on a *pro rata* basis to the class members.[141]

Turning to the first *Ortiz* requirement, the court determined that (i) the totals of the aggregated liquidated claims could be calculated based on each claimant's concrete losses from the purchase of Provident Securities, a figure exceeding $65 million, and (ii) the $1.52 million proposed settlement fund was clearly ascertained from the remaining insurance sublimit ($1.4 million) and a contribution from Capital Financial ($120,000), and was inadequate to pay all claims.[142] Next, the court determined whether the two components of the "limited fund" were "set definitively at [their] maximum . . .."[143] The court found that the $1.4 million of insurance remaining under the sublimit was at its maximum, disagreeing with the class members' argument that the $5 million aggregate policy applied instead of the "related claims" sublimit.[144] In the court's view, full litigation would be necessary for a definitive ruling on the issue, but because the insurance policy was a "wasting" policy, the costs of additional litigation would be deducted from the fund itself—ultimately to the detriment of the class members' recovery. Similarly, the court held that the $120,000 contribution from Capital Financial was at its maximum, as this was the amount FINRA determined could be paid without violating SEC net capital requirements or threatening Capital Financial with insolvency.[146] The court disagreed with the class members' argument that a "limited fund" settlement must include the entire remaining net worth of Capital Financial, looking for guidance from other district courts and the Fifth Circuit to conclude that this settlement "favors the interests of the class members and the entity performing regulatory oversight."[147] Finally, the court determined that the "limited fund" settlement was at its maximum even though the assets of certain Capital Financial individual registered representatives were excluded, and the settlement would release these individual defendants from liability, because "pursuing claims against these individuals would incur substantial expense for very little in terms of assets that could be recovered."[148] Accordingly, the court concluded that the "limited fund" model applied to the case and that it could approve the settlement under Rule 23(b)(1)(B).[149]

Because of the existence of a "limited fund" that would not permit class members to opt-out, the court then had to determine whether the All Writs Act permitted it to permanently enjoin all FINRA-governed arbitration claims brought by individual class members against Capital Financial. Noting that this would implicate class members' contractual rights under the Federal Arbitration Act and due process rights to opt-out or pursue their claims individually, as protected by the Rules Enabling Act, the court nonetheless held that the All Writs Act permitted the injunction.[150] The court noted

that the Supreme Court in *Ortiz* acknowledged that a "limited fund" under Rule 23(b)(1)(B) would by its nature abridge the constitutional rights of class members in order to preserve the fund, and concluded that if the All Writs Act did not apply, "the proposed 'limited fund' would have been depleted, undermining the Court's ability to approve the proposed settlement and ensuring that the vast majority of class members, if not all class members, received nothing."[151]

After determining that the appointed class counsel satisfied Rule 23(g) and notice to class members was proper under Rule 23(c) and (e), the court turned to whether the proposed settlement satisfied Rule 23(e)'s requirement that it be fair, reasonable, and adequate. The court found the first four *Reed* factors all to be in favor of the settlement, with an analysis almost identical to that of the related *Billitteri v. Securities America, Inc.* case.[152] However, in contrast to *Billitteri*, here, the "class members largely object[ed] to the amount of the recovery, which admittedly amount[ed] to a mere fraction of the losses."[153] After weighing this minimal recovery with the fact that "if this litigation were to continue and the class was to emerge victorious, they would possess a judgment worth millions with no one to collect it from," the court held that the fifth *Reed* factor (the range of possible recovery by the class) weighed only slightly in favor of approving the settlement.[154] The final *Reed* factor (opinions of class counsel, class representatives, and absent class members) was subject to similar conflicting arguments, but the court found the balance weighed in favor of approving the settlement, as class counsel admitted it was "simply the most that [he] could gather for the class from Capital Financial," and class representative Stott indicated his approval as well.[155] Consequently, the court granted final approval of the class action settlement. Because the class was proper under Rule 23(a) and (b)(3), a "limited fund" existed under Rule 23(b)(1)(B); the All Writs Act permitted the court to enjoin individual arbitrations to preserve the "limited fund" for the class members; and the settlement was fair, reasonable, and adequate under Rule 23(e).[156]

**D. Louisiana District Court Cases**

1. Americans with Disabilities Act

In *Pitts v. Greenstein*, the plaintiffs brought suit against the Louisiana Department of Health and Human Services (LDHHS) seeking declaratory and injunctive relief against a new law that lowered the maximum weekly long-term personal care services (LT-PCS) offered to disabled citizens from 42 hours per week to 32 hours per week.[157] The plaintiffs alleged that the reduction in hours discriminated against disabled individuals by depriving them of at-home assistance necessary to remain integrated in the community in violation of Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 (Section 504).[158] Accordingly, the plaintiffs sought to certify a class under Rule 23(b)(2), claiming that LDHHS acted on grounds that apply generally to the class.[159]

The court first concluded that the plaintiffs satisfied the four threshold requirements of Rule 23(a). First, the plaintiffs satisfied numerosity because (i) over 3,300 individuals receiving LT-PCS received over 32 hours per week, (ii) there were countless potential future members who may wish to preserve their rights, and (iii) due to their conditions, many of the proposed class members faced severe financial hardship and lacked the financial resources to bring suit individually.[160] Next, the plaintiffs satisfied commonality because any individual requiring more than 32 hours of LT-PCS was at risk of being forced into a nursing home, with the common question of whether this violated the ADA's integration mandate.[161] The defendants objected to typicality on the grounds that (a) they had atypical defenses to apply to several named plaintiffs who had declined placement into a waiver program, which would have avoided institutionalization, whereas (b) most class members who were offered the waivers accepted them.[162] However, the court disagreed that minor differences in possible defenses precluded typicality, as all members made the same claim that the reduction in LT-PCS hours subjected them to the threat of institutionalization.[163] Finally, the court found adequacy of representation by both the named plaintiffs and class counsel.[164] Although the named plaintiffs and remaining class members might have disagreed as to whether the state should offer greater services, at the risk of the state eliminating the program for financial reasons, or offer lesser, more sustainable services, "the suit makes clear the interest of the class: to return to a 42 hour weekly maximum."[165] The court found class counsel sufficiently competent, having over 30 years of experience with both class action suits and litigation involving the rights of disabled individuals.[166]

Finally, the court held that the state had acted on grounds that apply generally to the class such that injunctive or declaratory relief would be appropriate, as the 32 hour maximum applied not just to members of the class, but to all Louisiana citizens seeking home and community based health services.[167]

2. Negligence

In *Bevrotte v. Caesars Entertainment Corp.,* the court determined whether the proposed class of plaintiffs satisfied the predominance and superiority requirements of Rule 23(b)(3).[168] Plaintiff Denise Bevrotte brought a negligence suit[169] on behalf of her deceased son, alleging that as a result of his 15 years of employment at Harrah's casino, in which he was continuously exposed to second-hand smoke, he suffered health problems including cancer, coughing and sore throat, shortness of breath, dizziness, wheezing, and headaches.[170] Accordingly, the plaintiff sought to certify a class under Rule 23(b)(3) of "[a]ll former, current, and future nonsmoking employees of [Harrah's Casino] who were, are or in the future will be exposed to unsafe levels of second-hand smoke."[171]

The court began its analysis with Rule 23(b)(3)'s predominance requirement. Conceding that Louisiana's workers' compensation laws impose a duty that is common to the class, the court noted that whether Harrah's breached its duty to provide a "reasonably safe" workplace depended on conduct that changed over a period of time.[172] Because plaintiff's class definition did not include temporal

limitations, and in recent years, Harrah's took steps to minimize smoke on the gaming floor, determining breach would require individualized analysis based on when each class member worked at the casino.[173] Turning to causation, the court compared the present case to *Steering Committee v. Exxon Mobil Corp.*,[174] in which the Fifth Circuit found predominance lacking despite the injuries all having resulted from smoke exposure from a single fire at a chemical plant, as the "individual issues surrounding exposure, dose, health effects, and damages [would] dominate at the trial."[175] Here, the court found that the putative class members' claims would devolve into the same series of individual mini-trials as those of *Steering Committee*, but to a further extent because the injuries stem from a pattern of exposure over a period of time.[176] Even if causation could be tried collectively, the court found that the damages claims would predominate over common issues, as mere "exposure" was all that was required to become a member of the class, with damages ranging from basic respiratory problems to serious illness and eventual death.[177]

Next, the court found superiority lacking, as "whatever advantages might follow from class treatment on the duty issue would surely be overwhelmed by the confusion, time and expense resulting from the countless minitrials on breach, causation and damages."[178] Because the court found that plaintiff failed to satisfy her burden under Rule 23(b)(3), the court found it unnecessary to address the threshold requirements of Rule 23(a) and granted the defendant's motion to strike the class allegations under Rule 23(d)(1)(D).[179]

3. Breach of Contract

In *Iberia Credit Bureau, Inc. v. Cingular Wireless* the court determined whether to certify a class of both governmental entities and non-governmental individuals over a breach of contract dispute.[180] The named governmental entities brought suit against two wireless phone companies, claiming that the government plaintiffs' phone contracts did not contain "rounding up minutes" language, but their minutes were rounded up anyway.[181] Accordingly, the plaintiffs sought to certify a Rule 23(b)(3) class of all governmental entities, natural persons, and businesses who contracted for wireless service under several different standard form contracts.[182]

The court first determined whether the four Rule 23(a) requirements were satisfied. The court found numerosity was not seriously in dispute, as the plaintiffs far exceeded the Fifth Circuit's presumption that 100 to 150 members could satisfy numerosity.[183] Next, the court found commonality satisfied as to the governmental entities, as their contracts all lacked "rounding up minutes" language and included the same provision referring customers to the wireless companies' offices to view other terms and conditions.[184] However, there was significant variation in individual customers' contracts defeating commonality—a) some had express "rounding up minutes" language, b) some incorporated it by reference, and c) some were hard copy contracts while others were signed electronically.[185] For the same reasons, the court found that the government entities could satisfy typicality and adequacy of representation, but the individual customers could not.[186]

Next, the court determined whether to allow the plaintiffs to use offensive collateral estoppel from two state court judgments to estop the defendants from opposing class certification.[187] Based on the general rules set out by the Supreme Court in *Parklane Hosiery Company Inc. v. Shore*,[188] the court determined that offensive collateral estoppel would be inappropriate here since the defendants were not parties to one state lawsuit, and the other state lawsuit was for settlement purposes only, and thus the class certification issues were never fully litigated.[189]

Finally the court determined that while the government entities could satisfy predominance and superiority under Rule 23(b)(3), due to the common fact that their contracts lacked "rounding up minutes" language, for the same reasons as above, the individualized issues surrounding the individual customers' contracts would predominate over common issues, and no workable subclasses could overcome this problem.[190] Thus, class certification was granted for the named governmental entities within Louisiana, but denied for all other potential class members.

## 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 Cole St. Clair Davis (Southern Methodist University, Spring 2012) for his help on this article.

2 *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011) (vacating *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, 597 F.3d 330 (5th Cir. 2010)).

3 *Id.* at 2183.

4 *Id.*

5 *Id.* at 2184.

6 *See id.* (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988)). This theory creates a rebuttable presumption of reliance because "the market price of shares traded on well-developed markets reflects all publicly available information," which includes material misrepresentations, and that it can be assumed an investor relies on the misrepresentation whenever he buys or sells stock at the market price. *Id.* at 2185.

7 *Id.* at 2184.

8 *Id.* at 2186.

9 *Id.*

10 *Id.*

11 *Benavides v. Chicago Title Ins. Co.*, 636 F.3d 699, 700 (5th Cir. 2011).

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.* at 701.

16 *See Mims v. Stewart Title Gaur. Co.*, 590 F.3d 298 (5th Cir. 2009).

17 *Benavides*, 636 F.3d at 701.

18 *Id.* at 702.

19 *Id.*

20 *Id.*

21 *Id.* at 703.

22 *Madison v. Chalmette Ref., L.L.C.*, 637 F.3d 551 (5th Cir. 2011).

23 *Id.* at 553.

24 *Id.*

25 *Id.* at 556.

26 *Id.*

27 *Id.* at 557.

28 *Id.* at 556-57.

29 *Id.*

30 *Id.* at 557.

31 *Id.*

32 *Buettgen v. Harless*, 2011 WL 1938130, at *1-2 (N.D. Tex. May 19, 2011).

33 *Id.* at *3.

34 *Id.* at *4-5.

35 *Id.* at *6.

36 *Greenberg v. Crossroads Sys., Inc.*, 364 F.3d 657, 661 (5th Cir. 2004) (*citing Basic Inc. v. Levinson*, 485 U.S. 224, 248 n.27 (1988)).

37 *Buettgen*, 2011 WL 1938130, at *6.

38 *Id.* at *7. However, the Supreme Court overruled this requirement one month later in *Erica P. John Fund, Inc. v. Halliburton Co*. discussed earlier in the survey. *See supra* text accompanying notes 2-10.

39 *Buettgen*, 2011 WL 1938130, at *9

40 *Morrow v. Washington*, No. 2-08-cv-288-TJW, 2011 WL 3847985, at *1 (E.D. Tex. Aug. 29, 2011).

41 *Id.* at *1-2.

42 *Id.* at *9.

43 *Id.* at *13.

44 *Id.*

45 *Id.* at *17.

46 *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

47 *Id.* at *18.

48 *Id.*

49 *Id.* at *20 (*quoting Wal-Mart Stores, Inc.,* 131 S. Ct. at 2552).

50 *Id.* at *22.

51 *Id.* at *24.

52 *Id.* at *25.

53 *Id.* at *29.

54 *Id.* at *30 (*quoting Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 411 (5th Cir. 1998)). The court noted how the recent Supreme Court decision in *Wal-Mart* overruled, at least in part, Fifth Circuit precedent under *Allison* that allowed claims for monetary relief in a Rule 23(b)(2) class so long as injunctive or declaratory relief was the predominant relief sought. *Id.* As the Supreme Court stated, "[t]he mere 'predominance' of a proper (b)(2) injunctive claim does nothing to justify elimination of Rule 23(b)(3)'s procedural protections . . . We fail to see why the Rule should be read to nullify these protections whenever a plaintiff class, at its option, combines its monetary claims with a request—even a 'predominant' request—for an injunction." *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2559. However, the district court also noted how the Supreme Court left open the more specific question of whether damages that are merely "incidental" to the injunctive or declaratory relief can be awarded to a 23(b)(2) class as outlined in *Allison. Morrow*, 2011 WL 3847985, at *30.

55 *Morrow*, 2011 WL 3847985, at *30.

56 *Id.* at *31; *See Wilson v. Tinicum Township*, No. CIV. A. 92-6617, 1993 WL 280205, at *8 (E.D. Pa. July 20, 1993) (class certification for plaintiffs subjected to an illegal interdiction program targeting African Americans for pretextual traffic stops "is appropriate since the liability which the plaintiffs seek to establish is based on the operation itself rather than on the circumstances surrounding each individual stop or arrest"); *James v. City of Dallas*, 254 F.3d 551, 572-73 (5th Cir. 2001) (certifying a Rule 23(b)(2) class for injunctive relief and finding "no concern that the legitimate interests of potential class members who might wish to pursue their monetary [damages] claims individually would be interfered with by this class certification").

57 *Texas Med. Providers Performing Abortion Servs. v. Lakey*, No. A-11-CA-486-SS, 2011 WL 3818879, at *1-3 (W.D. Tex. Aug. 30, 2011); *See* Tex. H.B. 15, § 2, 82nd Leg., R.S. (2011) (amending TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2011)).

58 *Texas Med. Providers*, 2011 WL 3818879, at *2.

59 *Id.* at *3, *6.

60 *Id.* at *4.

61 *Id.*

62 *Id.* at *5. The court does note, however, that in the unlikely event that conflicts of interest do arise, such conflicts can be adequately addressed through an amendment of the certification order under Rule 23(c)(1). *Id.*

63 The severability clause reads: "Every provision in this Act and every application of the provisions in this Act are severable from each other. . . . All constitutionally valid applications of this Act shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force . . . ." *Id.* (*quoting* Tex. H.B. 15, § 15, 82nd Leg., R.S. (2011)).

64 *Id.* at *5.

65 *Id.* at *6.

66 *James v. City of Dallas*, 254 F.3d 551 (5th Cir. 2001).

67 *Texas Med. Providers*, 2011 WL 3818879, at *7

68 *Id.*

69 *Id.* (*quoting Audler v. CBC Innovis, Inc.*, 519 F.3d 239, 248 (5th Cir.2008)).

70 *Id.* at *8.

71 *Id.*

72 *Id.*

73 *Id.* at *9. Again, the court notes that "[i]f the Court receives credible evidence in the future that one or more individual prosecutors will not enforce the Act, it may of course amend its certification order accordingly." *Id.*

74 *Eatmon v. Palisades Collection LLC*, No. 2:08-CV-306-DF-CE, 2011 WL 147680, at *1 (E.D. Tex. Jan. 18, 2011).

75 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).

76 *Eatmon*, 2011 WL 147680, at *4.

77 *Id*. at *4-5.

78 *Id*. at *5.

79 *Id*. at *7; *See, e.g., Randolph v. Crown Asset Mgmt.*, LLC, 254 F.R.D. 513 (N.D. Ill. 2008) (including FDCPA claim as well as claim under Illinois Collection Agency Act, which had a five-year statute of limitations).

80 *Eatmon*, 2011 WL 147680, at *8.

81 *Id*. at *8-9.

82 *Id*. at *8 (*quoting James v. City of Dallas*, 254 F.3d 551, 571 (5th Cir. 2001)).

83 *Id*. at *9.

84 *Id*. at *9-10.

85 *Id*.

86 *Id*. at *11.

87 *Id*. at *12.

88 *FPX, LLC v. Google, Inc.*, Nos. 2:09-CV-142-TJW-CE, 2:09-CV-151-TJW-CE, 2011 WL 4783376, at *1, *11 (E.D. Tex. Sept. 29, 2011).

89 *Id*. at *1.

90 *Id*. at *2-3; *see Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 125-26 (2d Cir. 2009).

91 *FPX*, 2011 WL 4783376 at *3.

92 *Id*. at *5 (*quoting Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541, 2551 (2011).

93 *Id*. at *5-7.

94 *Id*. at *7.

95 *Id*. (q*uoting Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 317 (5th Cir. 2007)).

96 *Id*. at *7-9.

97 *Id*. at *9. The court pointed out the same issue discussed in *Morrow v. Washington* that the Supreme Court partly overruled Fifth Circuit precedent from Allison v. Citgo Petroleum Corp. *See supra* note 54.

98 *Id*. at *10 (*citing Casa Orlando Apartments, Ltd. v. Federal Nat. Mortg. Ass'n*, 624 F.3d 185, 199 (5th Cir. 2010)).

99 *Witt v. Chesapeake Exploration, L.L.C.*, No. 2:10-cv-22-TJW, 2011 WL 4027385, at *1-3 (E.D. Tex. Sept. 12, 2011).

100 *Id*. at *4.

101 *Id*. at *7 (*citing Sun Exploration and Prod. Co. v. Benton*, 728 S.W. 2d 35, 37 (Tex. 1987).

102 *Id*. at *7.

103 *Id*.

104 *Id*.

105 *Id*.

106 *Id*. at *8.

107 *Id*.

108 *Id*. at *9.

109 *Id*. (*quoting Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011)).

110 *Id*.

111 *Id*.

112 *Id*. at *10; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 12.002(a) (West 2011).

113 TEX. CIV. PRAC. & REM. CODE ANN. § 12.002(b) (West 2011).

114 *Witt*, 2011 WL 4027385, at *10.

115 *Id*.

116 *Bridgewater v. Double Diamond-Delaware, Inc.*, No. 3:09-CV-1758-B ECF, 2011 WL 1671021, at *1 (N.D. Tex. April 29, 2011).

117 *Id*. at 1.

118 *Id*. at 2.

119 *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008).

120 *Bridgewater*, 2011 WL 1671021, at *11.

121 *Id*. at *11-12; *see Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 221 (5th Cir. 2003).

122 *Bridgewater*, 2011 WL 1671021, at *13.

123 *Id*.

124 *Mabary v. Hometown Bank, N.A.*, No. 4:10–cv–3936, 2011 WL 5864325, at *1 (S.D. Tex. Nov. 22, 2011).

125 *Id*. at *3. The court cited *Redmon v. Uncle Julio's of Illinois, Inc*. for the proposition that "requiring class counsel to seek actual damages for each individual class member would make the class action unmanageable because actual damages . . . are likely to be small" and that "[c]lass members with individual claims for actual damages may always opt out of the class to pursue these claims on their own." *Id*. (*quoting Redmon v. Uncle Julio's of Illinois, Inc.*, 249 F.R.D. 290, 295 (N.D. Ill. 2008)).

126 *Id*. at *3-4 (*quoting Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997)).

127 *Billitteri v. Securities America, Inc.*, No. 3–11–cv–00191–F, 2011 WL 1033647, at *1 (N.D. Tex. March 21, 2011).

128 *Id*.

129 *Id*. at *2-3.

130 *Id*. at *4-6.

131 *Id*. at *7-8.

132 *Id*. at *9.

133 *Id*. at *10. The six *Reed* factors to consider in determining if a settlement satisfies the fair, reasonable, and adequate standard are: (1) evidence that the settlement was obtained by fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the litigation and available discovery; (4) the probability of plaintiffs' prevailing on the merits; (5) the range of possible recovery and certainty of damages; and (6) the opinions of class counsel, class representatives, and absent class members. *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983).

134 *Billitteri*, 2011 WL 1033647, at *10-15.

135 *Id*. at *16.

136 *Stott v. Capital Fin. Servs., Inc.*, No. 3:11–cv–2073–F, 2011 WL 4047666, at *1 (N.D. Tex. Sept. 12, 2011).

137 *Id*. at *5.

138 *Id*. at *5-8.

139 "The basic concept of a 'limited fund settlement' in a class action is that there is a definite, limited amount of capital that is available to class members, and that such a fund is insufficient to cover all claims." *Id*. at *8.

140 *Id*. (*quoting Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999)).

141 *Id*. at *9.

142 *Id*. at *9-10.

143 *Id*. at *11.

144 *Id*.

145 *Id*. at *12.

146 *Id*. at *12-13

147 *Id*. at *14. *See Williams v. Nat'l Sec. Ins. Co.*, 237 F.R.D. 685, 692 (M.D. Ala. 2006); *Baker v. Wash. Mut. Fin. Group, LLC*, 193 F. App'x 294 (5th Cir. 2006). Although *Baker* was an unpublished opinion, the court found it persuasive and applicable to the case. *Stott*, 2011 WL 4047666, at *15 n.8. In *Baker*, the Fifth Circuit agreed that a $3.5 million contribution from Washington Mutual to a "limited fund" settlement of punitive damages claims was appropriate, even though its net worth was argued to be upwards of $50 million. *Baker*, 193 F. App'x at 297. The court stressed that if the settlement was not approved, Washington Mutual would be subjected to a "breathtaking cost" of defending tens of thousands of individual lawsuits which could ultimately leave class members with no recovery. *Id*. at 298.

148 *Stott*, 2011 WL 4047666, at *17.

149 *Id*. at *18.

150 *Id*. at *23.

151 *Id*. at *24. The court noted that "[i]t is true that other cases involving enjoining claims under the 'All Writs Act' have largely involved enjoining litigation, not arbitration. However, the reasoning behind enjoining other proceedings in a "limited fund" situation is the same regardless of whether those proceedings are litigations or arbitrations. . . . [T]he Court would feel very uncomfortable endorsing a legal structure that allows a court to approve a "limited fund" class action that abridges one's constitutional right to a jury trial, but renders a court powerless to abridge one's contractual right to arbitration under the exact same circumstances. Such a result may imply that a contractually-provided right is more protected than rights provided by the Fifth or Seventh Amendments to the Constitution." *Id*. at *23.

152 *Id*. at *25-27. *See supra* text accompanying note 134.

153 Stott, 2011 WL 4047666, at *28.

154 *Id*.

155 *Id*.

156 *Id*. at *29-30.

157 *Pitts v. Greenstein*, No. 10–635–JJB–SR, 2011 WL 2193398, at *1 (M.D. La. June 6, 2011).

158 *Id*.

159 *Id*. at *7.

160 *Id*. at *4.

161 *Id*.

162 *Id*. at *5.

163 *Id*.

164 *Id*. at *6.

165 *Id*.

166 *Id*. at *7

167 *Id*.

168 *Bevrotte v. Caesars Entm't Corp.*, No. 11–543, 2011 WL 4634174, at *1 (E.D. La. Oct. 4, 2011).

169 The court noted that while not specifically stated as such, plaintiff's claim "sounds in negligence" based on her "propose[d] . . . common questions: (a) Whether Defendant has a duty to provide a safe workplace; (b) Whether, as part of its duty . . . to provide a safe workplace, Defendant had to mitigate the dangers posed by second-hand smoke; (c) Whether Defendant took adequate steps to curtail the danger of second-hand smoke; and (d) Whether the Plaintiff and the Class are entitled to relief, and the nature of such relief." *Id*. at *2.

170 *Id*. at *1.

171 *Id*.

172 *Id*. at *3.

173 *Id*.

174 *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 601 (5th Cir. 2006).

175 *Bevrotte*, 2011 WL 4634174, at *3 (*quoting Steering Comm.*, 461 F.3d at 602).

176 *Id*. at *4.

177 *Id*.

178 *Id*. at *5.

179 *Id*.

180 *Iberia Credit Bureau, Inc. v. Cingular Wireless,* No. 6:01–2148, 2011 WL 5553829, at *1-2 (W.D. La. Nov. 9, 2011).

181 *Id*.

182 *Id*.

183 *Id*. at *3.

184 *Id*. at *4.

185 *Id*.

186 *Id*.

187 *Id*. at *5.

188 *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322, 331 (1979).

189 *Id*.

190 *Id*. at *6.

# 2011 Annual Survey of Texas Class Action Cases

*By Mark W. Bayer*[1]

## I. Introduction

The number of class certification opinions in Texas appellate courts slowed to a trickle in 2011. It appears that trial courts around the state have now adapted to the strict class certification standards announced by the Texas Supreme Court more than a decade ago in *Southwestern Refining Co., Inc. v. Bernal*.[2] As a result, for the first time in recent memory, the Texas Supreme Court did not issue a single opinion addressing class certification standards. Furthermore, only two lower appellate court cases addressed class certification. Class action jurisprudence has matured in Texas and as a result, the long predicted demise of Texas class actions may have become a reality.[3]

## II. Overview of 2011 Case Law

### A. Class Certification Standards

Only one court of appeals addressed class certification standards in 2011. In *Riemer v. The State of Texas*,[4] the Amarillo Court of Appeals addressed potential conflicts in a proposed class before affirming the trial court's denial of a motion for class certification. The appeal concerned an interlocutory order denying class certification in a dispute between landowners and the State of Texas over the boundaries of the Canadian River.[5]The plaintiffs alleged an unconstitutional taking of their property by the State when it redefined the centerline and banks of the river.[6]

After concluding that the trial court incorrectly found that the plaintiffs did not have standing, the court of appeals turned to class certification.[7] Focusing on the adequacy of representation by the named plaintiffs, the court of appeals held that the named plaintiffs had two conflicts with the class that precluded a finding of adequacy. First, the court observed that the claims of the representatives conflicted with the claims of other proposed class members who signed an agreement with the state setting the river's boundaries.[8] Second, the court found that the named plaintiffs had a conflict with proposed class members who owned land on the opposite side of the river because their interests were inherently antithetical.[9]

The *Riemer* opinion is also noteworthy for its observation that a judge may deny class certification even if the requirements of Rule 42 have been satisfied.[10] The court of appeals held that the refusal to certify must be legally unreasonable under the facts and circumstances of the case, and the court was unwilling in this instance to find that the trial court abused its discretion in denying certification.[11]

The adequacy requirement for named plaintiffs and their counsel is an often overlooked prong of class certification analysis. Defense attorneys are sometimes loath to challenge the adequacy of opposing counsel, and their clients and some courts are even more reluctant to consider such challenges. The *Riemer* opinion may signal a move toward a more serious consideration of the adequacy requirement. The same may be true in federal courts, as evidenced by the Seventh Circuit's recent opinions emphasizing the necessity for a rigorous examination of the adequacy of counsel and class representatives.[12]

### B. Class Certification in Arbitration

The San Antonio Court of Appeals addressed the issue of class certification in arbitration in *NCP Finance Limited Partnership v. Escatiola*.[13] The named plaintiff, Escatiola, was a borrower who sued a credit services organization and lender for usury, violation of the Deceptive Trade Practices Act, and for violation of the Credit Services Organization Act.[14] He purported to bring the case on behalf of a class of borrowers. The trial court denied the lender's motion to compel individual arbitrations and, instead, granted the plaintiff's motion for class certification.[15]

The court of appeals overturned the decision of the trial court after examining the arbitration clause at issue. Escatiola had signed an arbitration agreement that provided: "… no party may participate in a class action in court or in class-wide arbitration…."[16] He also agreed that in arbitration, "the arbitrator shall have no authority to conduct a class-wide arbitration."[17] Because the arbitration clause expressly provided that the court, and not the arbitrator, would determine any dispute about the validity of the prohibition on class proceedings, the court of appeals determined that it was appropriate for the trial court to decide the motion to compel arbitration.[18] Furthermore, because the arbitration clause expressly forbade class certification in arbitration, and because the U.S. Supreme Court had previously held that a party cannot be compelled to submit to class arbitration in the absence of its express consent, the court of

appeals held that it was error for the trial court to deny the motion to compel arbitration and to permit Escatiola to seek class certification before arbitration.[19]

Coincidentally, on the same day that *Escatiola* was decided by the San Antonio Court of Appeals, the U.S. Supreme Court issued its own opinion on the same subject in *AT&T Mobility LLC v. Concepcion*.[20] Like the San Antonio Court of Appeals, the U. S. Supreme Court, in an opinion written by Justice Scalia, held that an arbitration clause that disallowed class arbitration was enforceable and, as a result, that AT&T could require its cellular customers to individually arbitrate their claims for alleged fraudulent advertising.[21] The Supreme Court rejected the Ninth Circuit's view that the arbitration clause was unconscionable.[22]

**III. Conclusion**

As illustrated, 2011 saw a dearth of case law concerning class certification. Barring a seismic shift in the composition of the state judiciary, this trend is unlikely to change in the coming years. Thus, the extinction of Texas class actions that some have predicted may be inevitable.

**ENDNOTES**

1 Mark W. Bayer is a partner in the Dallas office of Gardere Wynne Sewell LLP. Any opinions expressed herein are not attributable to Gardere Wynne Sewell LLP or its clients. The author thanks Melissa Holman, an associate at Gardere, for her assistance.

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

3 *See, e.g.*, Alistair Dawson & Geoff A. Gannaway, *In Memoriam: Texas Class Actions*, THE ADVOCATE (Texas State Bar Litigation Section Report), Fall 2008, at 78.

4 342 S.W.3d 809 (Tex. App.—Amarillo 2011, pet. filed).

5 *Id.* at 811-812.

6 *Id.* at 815.

7 *Id.* at 814.

8 *Id.* at 815.

9 *Id.* at 815-816.

10 *Riemer*, 342 S.W.3d at 815.

11 *Id.* at 817-18.

12 *See Creative Montessori Learning Centers v. Ashford Gear, LLC*, 662 F.3d 913 (7th Cir. 2011) (vacating trial court's certification of a class on the ground that class counsel's misconduct raised serious concerns about its adequacy); *CE Design, Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721 (7th Cir. 2011) (vacating class certification due to inadequacy of class representatives).

13 350 S.W.3d 152 (Tex. App.—San Antonio 2011, no pet.).

14 *Id.* at 153.

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.* at 155.

19 *NCP Finance Ltd. Partnership*, 350 S.W.3d at 155.

20 131 S. Ct. 1740 (2011).

21 *Id.* at 1750-53.

22 *Id.* at 1753.

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