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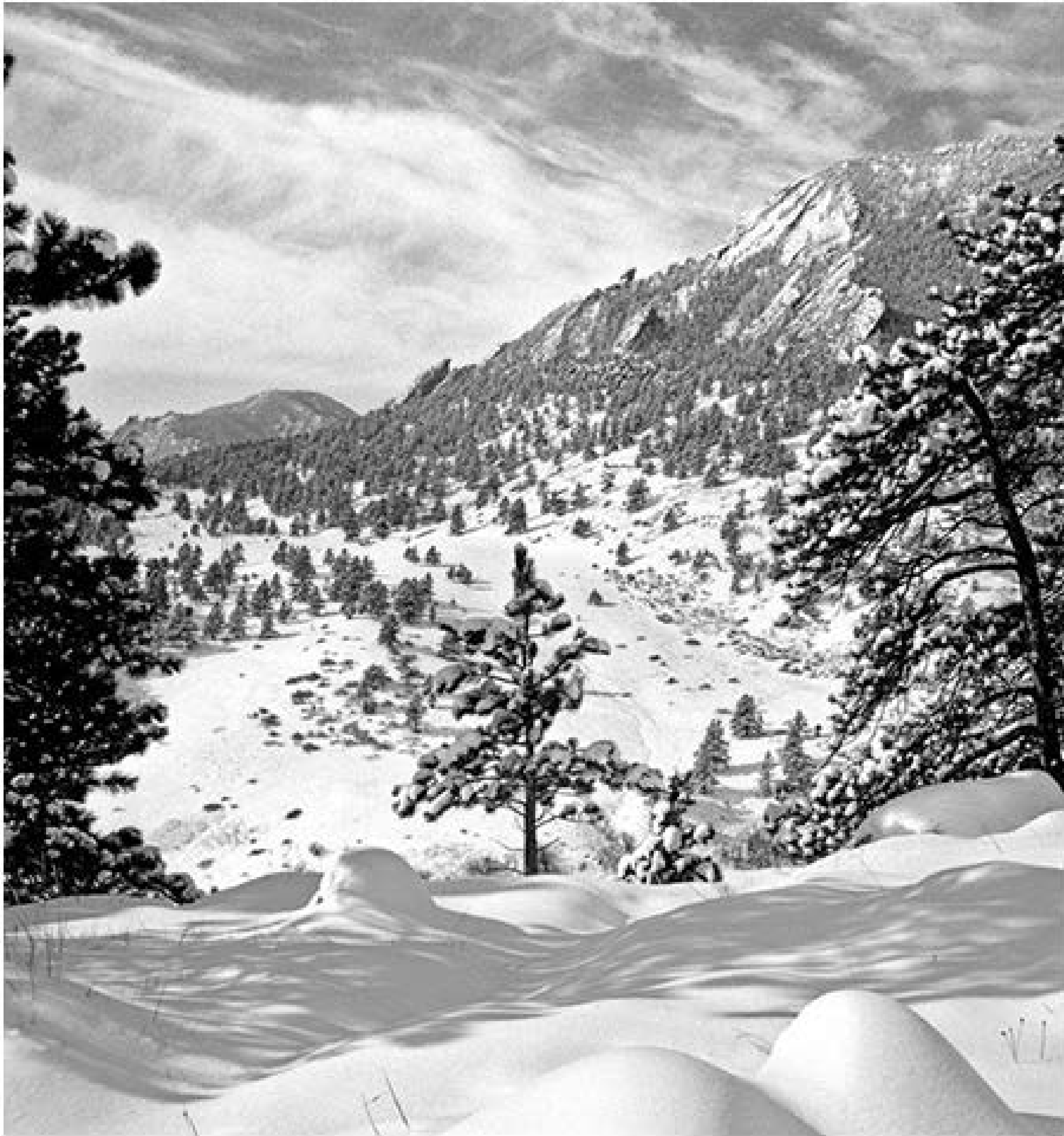

CLASS ACTIONS

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Cover: The Flat Irons in Winter, Boulder Colorado.
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This issue of the Journal features the annual survey article on class action developments.

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

A. Michael Ferrill
Editor

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2012 Annual Survey of Fifth Circuit Class Action Cases

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

The Fifth Circuit Court of Appeals and the federal district courts in Texas, Louisiana, and Mississippi saw a slight increase in class action activity in 2012 compared to 2011. In 2011, these courts decided thirteen cases substantively addressing Rule 23 litigation classes and two settlement classes, certifying seven of the proposed litigation classes and approving both of the class action settlements. The same courts in 2012 decided fifteen cases that substantively addressed Rule 23 litigation classes and four settlement classes, certifying only two of the proposed litigation classes but approving all four class action settlements.

This past year, the Fifth Circuit and district courts in Texas, Louisiana, and Mississippi addressed class actions involving Rule 23 issues impacting federal laws such as the Sherman Act, ERISA, the Securities Exchange Act of 1934, the Real Estate Settlement Procedures Act, and the Electronic Fund Transfer Act, among others. The courts also addressed class actions involving violations of state law, including negligence, breach of warranty, fraud, and various statutory causes of action. The following is a summary of decisions by the Fifth Circuit and associated district courts that substantively addressed Rule 23. Hopefully, this will provide some valuable insight into litigating class action issues in the Fifth Circuit.

A. Fifth Circuit Cases

1. Federal Law

a. Funeral Consumers Alliance, Inc. v. Service Corporation International

In *Funeral Consumers Alliance, Inc. v. Service Corporation International*, 695 F.3d 330, 335 (5th Cir. 2012), a group of plaintiffs consisting of consumers and a consumer rights organization filed an antitrust lawsuit against the largest U.S. casket manufacturer, Batesville Casket Company, and the three largest funeral home chains and distributors of Batesville caskets, alleging that the defendants conspired to reduce competition and engaged in a group boycott of independent casket retailers. The magistrate judge issued a Memorandum and Recommendation, adopted in full by the district court, that denied the plaintiffs' motion for class certification due to a failure to meet Rule 23(a)(3)'s typicality requirement and Rule 23(b)(3)'s predominance and superiority requirement. On appeal, the Fifth Circuit first clarified the scope of a Rule 23 analysis in an antitrust class action, and then agreed with the district court that the plaintiffs could not satisfy the predominance and superiority requirement.

First, the Fifth Circuit rejected the plaintiffs' claim that district courts are precluded from rendering merits-based conclusions at the class certification stage.[2] The court stated that "there are no hard and fast rules . . . regarding the suitability of a particular type of antitrust case for class action treatment," and that "[t]he unique facts of each case will generally be the determining factor governing certification."[3] Most importantly, a district court must rigorously analyze Rule 23's prerequisites before class certification, which requires an understanding of the claims, defenses, facts, and substantive law presented in the case.[4] The court looked to the Supreme Court's recent decisions in *Erica P. John Fund, Inc. v. Halliburton Co.,* 131 S. Ct. 2179 (2011), and *Wal–Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (20110), for the proposition that

"rigorous Rule 23 analysis frequently will 'entail some overlap with the merits of the plaintiff's underlying claim.'"[5] Indeed, the Supreme Court in *Wal-Mart* noted that the plaintiffs in *Halliburton* were required to prove a merits issue (an efficient market for securities fraud claims) at the class certification stage, which was "an issue they will surely have to prove *again* at trial in order to make out their case on the merits."[6]

With regard to the Rule 23(b)(3) predominance and superiority requirement, the Fifth Circuit stated that this inquiry begins with the elements of the underlying cause of action, and, agreed with the district court that the plaintiffs failed to present classwide proof to establish the elements of an antitrust violation. Because the plaintiffs alleged a nationwide class action based on a nationwide conspiracy, common issues of law or fact that predominate must be nationwide in scope. In other words, to be consistent with the Fifth Circuit's "well-settled approach" set forth in *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 328 (5th Cir. 1978), the proposed national class cannot include "different sizes of buyers operating under different conditions in various regions . . . and the products involved [cannot be] marketed under different arrangements at different times."[7] The court agreed that the plaintiffs' evidence did not satisfy the *Blue Bird* framework, as the conditions surrounding casket sales, such as price and consumer preference, varied extensively across different regions, and that the plaintiffs "fail[ed] to explain how statements made by one association in one area of the country equate[d] to a nationwide conspiracy."[8]

b. Rodriguez v. Countrywide Home Loans, Inc. (*In re* Rodriguez)

Rodriguez v. Countrywide Home Loans, Inc., 695 F.3d 360, 362-63 (5th Cir. 2012), involved a putative class of former Chapter 13 debtors who received a discharge from bankruptcy but were then forced to pay unapproved and outstanding fees to defendant Countrywide Home Loans under the threat of foreclosure, in violation of Federal Rule of Bankruptcy Procedure 2016(a). The plaintiffs moved for certification of both Rule 23(b)(2) and (b)(3) classes. The bankruptcy court denied certification of the damages claims, but granted a narrow Rule 23(b)(2) class based on the plaintiffs' claim for injunctive relief. On appeal, Countrywide challenged the class certification order, arguing that (1) Rule 23(b)(2) and Fifth Circuit precedent precluded certification, and (2) the bankruptcy court did not define an ascertainable class.

First, the Fifth Circuit determined whether Rule 23(b)(2) was satisfied, and whether the court's recent decision in *Wilborn v. Wells Fargo Bank, N.A.*, 609 F.3d 748 (5th Cir. 2010), mandated the denial of certification. The court recited the two requirements for a Rule 23(b)(2) class: (1) that the defendant's actions are generally applicable to the class as a whole, and (2) that injunctive relief predominate over any damages sought. With regard to the first element, the court agreed with the bankruptcy court's finding that Countrywide's practice of "systematically ignor[ing] Rule 2016(a) by charging unauthorized fees" led to the class members being harmed in the same way. Countrywide argued that *Wilborn* dictated a different result, because in that case, the Fifth Circuit rejected a Rule 23(b)(2) class that sought both injunctive relief and disgorgement, as the disgorgement would have required an individual assessment of each claim. To Countrywide, this meant that because liability rested on an individualized assessment of each plaintiff's file in Countrywide's database, certification of a Rule 23(b)(2) class was precluded, notwithstanding the fact that it was limited to injunctive relief. The Fifth Circuit disagreed,

finding that the bankruptcy court properly focused on Countrywide's fee collection *practices* and not the individualized manner in which each class member could have been affected by those practices. Moreover, the "unique fact" that Countrywide's database was searchable and the information was easily ascertainable persuaded the court to conclude that it would not need to determine on a loan-by-loan basis whether fees were properly discharged, which would have weighed against certification of a Rule 23(b)(2) class.

Countrywide then claimed that its conduct could not be generally applicable to the class because (1) it had no policy concerning Rule 2016(a) compliance, and (2) there was no legal consensus regarding whether Rule 2016(a) applied to this specific situation. The Fifth Circuit was not persuaded, concluding that (1) no official policy for compliance was necessary to prove liability, as Countrywide had a consistent practice of assessing fees without concern for Rule 2016(a)'s requirements, and (2) legal uncertainty had no impact on the general applicability of Countrywide's behavior because it treated all class members the same, with no contradictory or sporadic treatment of Rule 2016(a) that would militate against class certification.

With regard to the second element of a Rule 23(b)(2) class—that damages be incidental to injunctive relief—the court summarily concluded that "[s]ince no monetary relief [was] sought, monetary relief cannot be more than incidental to injunctive relief."

Finally, the court disagreed with Countrywide's claim that the bankruptcy court did not define an ascertainable class. Countrywide argued that the class was an improper "fail-safe class" that required a decision on the merits of the claims in order to determine who the class members were—in other words, a class that precluded an adverse judgment against class members because they either won or were not in the class. The court stressed that Countrywide had not cited any cases in which the Fifth Circuit rejected this so called "fail-safe class," and noted that in two prior cases, the Court had specifically rejected a rule *against* fail-safe classes.[9] Accordingly, the Fifth Circuit affirmed the bankruptcy court's certification of a narrow Rule 23(b)(2) class.

c. M.D. *ex rel.* Stukenberg v. Perry

In *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 835 (5th Cir. 2012), the Fifth Circuit determined whether the district court properly certified a Rule 23(b)(2) class in light of the Supreme Court's 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). The named plaintiffs, a group of nine children in the custody of Texas's Permanent Managing Conservatorship ("PMC"), filed suit on behalf of approximately 12,000 similarly situated children against three Texas government officials in their official capacity. The plaintiffs alleged that Texas had violated their constitutional rights, including substantive due process, procedural due process, and right of association, due to "systemic failures" of the PMC, such as failing to maintain a sufficiently large caseworker staff. Finding common questions of both law and fact that could be remedied through a series of injunctions, the district court certified a Rule 23(b)(2) class of "all children who are now and all those who will be in the [PMC] of Texas's Department of Family and Protective Services."

On appeal, the Fifth Circuit examined (1) whether the district court failed to conduct the "rigorous analysis" required to determine if the class satisfied Rule 23(a)(2)'s commonality requirement, and (2) whether the putative class satisfied the cohesiveness requirement of Rule

23(b)(2). First, the Fifth Circuit explained how *Wal-Mart* affected Rule 23(a)(2)'s commonality requirement. Before *Wal-Mart*, commonality in the Fifth Circuit was satisfied when "there is 'at least one issue whose resolution *will affect all or a significant number of the putative class members,*'"[10] and "[t]he fact that some of the Plaintiffs may have different claims, or claims that may require some individualized analysis, is not fatal to commonality."[11] However, after *Wal-Mart*, the test for commonality is whether the claims depend on a common issue of law or fact whose resolution "will *resolve* an issue *that is central to the validity* of each one of the [class member's] claims in one stroke."[12] Furthermore, the rigorous analysis of Rule 23 frequently will "entail some overlap with the merits of the plaintiff's underlying claim," and requires "look[ing] beyond the pleadings to 'understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.'"[13]

According to the Fifth Circuit, the district court erred in its commonality analysis in several respects. With regard to common questions of fact, the district court failed to indicate how the resolution of certain factual issues, such as whether the PMC caseworker size was sufficient, would decide an issue that was central to the substantive due process, procedural due process, or family association claims "of every class member at the same time."[14] Similarly, the court found the district court's analysis of common questions of law insufficient in light of *Wal-Mart*, concluding that (1) the alleged common questions of law—such as whether "systemic deficiencies" in the PMC resulted in violations of the plaintiffs' constitutional rights—were too general for effective appellate review,[15] and (2) the district court failed to rigorously analyze the elements of and defenses to the plaintiffs' constitutional claims, and did not adequately explain how the claims depended on a common legal issue whose resolution would decide an issue that was central to each of the individual's claims in one stroke.[16] Finally, the Fifth Circuit found that individualized issues prevented certification, rejecting the district court's holding that, regardless of individualized issues, each class member shared the same legal claim that systemic deficiencies resulted in violations of their constitutional rights.[17] To the Fifth Circuit, when proof of commonality necessarily overlaps with the merits, *Wal-Mart* requires district courts to explain their reasoning with specific reference to the claims, defenses, relevant facts, and applicable substantive law.[18] If the proffered common issue is a "somewhat amorphous claim of systemic or widespread misconduct," then "[m]ere allegations of systemic violations of the law . . . will not automatically satisfy Rule 23(a)'s commonality requirement."[19] Thus, because the proposed class's proffered common issues "'stretched the notions of commonality' by attempting to aggregate several amorphous claims of systemic or widespread conduct into one 'super-claim,'" the Fifth Circuit concluded that the district court abused its discretion by failing to perform the required "rigorous analysis" of Rule 23(a)(2).

Second, the Fifth Circuit held that the district court abused its discretion by certifying a Rule 23(b)(2) class that sought individualized relief, and thus lacked cohesiveness. The court stated that *Wal-Mart* limited Rule 23(b)(2) certification to situations in which a *single* injunction or declaratory judgment would provide relief to each class member, and that Rule 23(b)(2) does not apply when each class member would be entitled to a *different* injunction against the defendant.[20] The court pointed out that the named plaintiffs' requested relief for a "special expert panel" to review individual cases of class members and advise on appropriate remedial steps belied their claim that they sought to remedy group injuries.[21]

2. State Law

a. Ackal v. Centennial Beauregard Cellular, L.L.C.

In *Ackal v. Centennial Beauregard Cellular, L.L.C.*, 700 F.3d 212, 213 (5th Cir. 2012), the Fifth Circuit determined whether a putative class of Louisiana government entities could satisfy Rule 23(b)(3), even though Louisiana law effectively required the class to be an "opt in" class. Plaintiffs, a group of 299 different Louisiana government entities, alleged that defendant Centennial Beauregard Cellular, L.L.C., which provided the government entities with cellular telephone service, violated Louisiana's unfair trade practices law[22] by rounding up the government entities' partial minute phone calls to the next full minute. Finding all requirements of Rule 23(a) satisfied, the district court certified a Rule 23(b)(3) class.[23] Centennial appealed, claiming that under Louisiana Revised Statute section 42:263, government entities cannot retain private representation until they (1) establish that a "real necessity exists" for the retention of private counsel, (2) enact a resolution "stating fully the reasons for the action and the compensation to be paid," (3) receive the attorney general's approval of the resolution, and (4) publish the resolution in their minutes and the official journal of the applicable parish.[24] Because only the named plaintiffs had satisfied the procedural requirements *before* certification, Centennial argued that the class required other members to affirmatively act and "opt in" to the Rule 23(b)(3) class.

The Fifth Circuit agreed and reversed the class certification order. The court noted that Rule 23 has an "opt out" clause which provides that "[f]or any class certified under Rule 23(b)(3), the court must direct to class members . . . notice . . . that the court will exclude from the class any member who requests exclusion."[25] To the court, this express inclusion of an "opt out" requirement meant Congress intended to prohibit "opt in" classes by implication.[26] Thus, even if the government entities wanted to join the class, they were prohibited from doing so until they satisfied the four procedural requirements of section 42:263. To the court, these were not mere "procedural issues" that could be addressed *after* certification. On the contrary, the default position of each class member was that it was *not* in the class until it satisfied section 42:263, effectively creating an impermissible "opt in" class.[27]

b. Ahmad v. Old Republic National Title Insurance Co.

Ahmad v. Old Republic National Title Insurance Co., 690 F.3d 698, 698 (5th Cir. 2012), involved a group of plaintiffs who alleged that Old Republic National Title Insurance Co. violated Texas Insurance Code Rate Rule R-8 ("R-8"), which requires title insurance companies to provide discounts on refinanced mortgages if the mortgage was originally insured and the new policy was issued within seven years of the initial policy. In certifying a Rule 23(b)(3) class, the district court found four questions of law or fact that were common to the class that predominated: (1) whether the plaintiffs qualified for the mandatory reissue discount, (2) what evidence was sufficient to qualify a borrower for the R-8 discount, (3) whether Old Republic could lawfully keep the amount of R-8 credit not given to eligible borrowers, and (4) whether Old Republic breached other legal duties to class members by failing to give them discounted reissue rates. Old Republic then filed an interlocutory appeal challenging the certification due to the recently released opinion in *Benavides v. Chicago Title Insurance Co.*, 636 F.3d 699 (5th Cir. 2011), a Fifth Circuit case discussed in last years' class action survey in which factually similar

claims were held insufficient for a Rule 23(b)(3) class. In *Benavides*, the Fifth Circuit held that the question of whether a plaintiff qualified for the R-8 discount would require at trial a series of individual inquiries rather than a single, classwide determination.

The Fifth Circuit agreed with Old Republic, and concluded that *Benavides* dictated a finding of insufficient commonality under both Rule 23(a)(2) and the more demanding Rule 23(b)(3) predominance requirement. Indeed, two of the questions the district court identified as common—whether the plaintiff qualified for the reissue discount, and whether Old Republic breached other legal duties—were identical to questions in *Benavides* that were held to be individual to each class member.

The Fifth Circuit then rejected the district court's two attempts to distinguish *Benavides*. First, the district court claimed that the question of what evidence was sufficient to demonstrate R-8 eligibility was common to the class, and because this question was not at issue in *Benavides*, it was not precluded. The Fifth Circuit disagreed, stating that this question did not invite a "yes" or "no" answer that could be given by the jury at trial, and that the answer would not "resolve an issue that is central to the validity of each one of the claims in one stroke."[28] Second, the district court claimed that *Benavides* did not control because there, the Fifth Circuit had not found any common questions, whereas in the present case the district court had identified four. The Fifth Circuit was not persuaded, concluding that none of the four questions were actually common: two were identical to *Benavides*; the sufficiency of the evidence question would not resolve an issue central to each claim; and the final question (whether Old Republic could lawfully keep the amount of R-8 credit not given to eligible borrowers) presupposed the answer to whether the plaintiff qualified for the discount in the first place, which itself "cannot be answered on a class-wide basis with class-wide proof."[29] Accordingly, the court decertified the class.

B. Texas District Court Cases

1. Federal Law

a. Pfeffer v. HSA Retail, Inc.

In *Pfeffer v. HSA Retail, Inc.*, 2012 WL 1910034, at *1 (W.D. Tex. 2012), plaintiff Pfeffer alleged that HSA Retail, Inc. violated the Electronic Fund Transfer Act ("EFTA") by failing to include a physical notice on the ATM the plaintiff used, which would have alerted him to a $1.50 transaction fee. Accordingly, the plaintiff sought to certify a Rule 23(b)(3) class of all non-customers who withdrew funds from the defendant's ATM "between October 31, 2011 through the date on which Defendant came into compliance with the ATM Fee posting requirements of the EFTA."

The district concluded that neither the numerosity requirement of Rule 23(a)(1) nor the "implied prerequisite that the class be adequately defined and clearly ascertainable" was satisfied, and thus did not discuss the remaining Rule 23(a) or Rule 23(b)(3) requirements. First, the court found numerosity lacking due to the plaintiff's mere allegation that "[g]iven the probable size of the class, it is clear that joinder of all members will be impracticable and that the numerosity requirement of Rule 23(a) is satisfied." While the plaintiff intended to supplement this allegation with supporting materials, at the time of the opinion he had not done so, leaving

the court with no evidence to indicate the probable number of class members nor any explanation of how many individuals the class might ultimately contain.

Second, the court found that the plaintiff failed to demonstrate an ascertainable class, as he alleged a class of all users of the defendant's ATM from October 31, 2011 through the date on which the defendant came into compliance with the EFTA—but then omitted a compliance date. Thus, "[w]ithout an exact date on which to cut off class membership, the Court [had] no way of properly identifying those consumers who should be included in the class and those who should be excluded." Furthermore, the court concluded that the class definition would require an inappropriate two-step, individualized factual inquiry to ascertain individual class members, involving (1) identifying consumers who used the ATM and (2) determining whether the consumers' accounts were primarily for personal, family, or household purposes, as required by the EFTA. The court rejected the plaintiff's argument that consumers could be identified by their personal account number or bank identification number, as neither of these provided a way to determine whether the account was used for consumer rather than commercial purposes.[30] The court also rejected the plaintiff's policy argument that "Congress recognized the importance of class actions in protecting consumers under [the EFTA] by expressly authorizing class action remedies," finding instead that "the EFTA merely authorizes class action litigation; it does not necessarily advocate it." The court concluded by noting that while class action litigation is a powerful mechanism, it may only be exercised within the framework of Rule 23, and that the text of the EFTA did not provide otherwise.

b. Tolbert v. RBC Capital Markets, Corp.

Tolbert v. RBC Capital Markets, Corp., 2012 WL 1067629 (S.D. Tex. 2012), involved ERISA claims brought by Tolbert against RBC Capital Markets. The plaintiff argued that the lawsuit turned on a single issue—whether the defendant's employee pension benefit plan was a valid "top hat" plan exempt from certain ERISA requirements—and that resolution of this issue would determine whether all present and former plan participants had valid ERISA claims. Accordingly, the plaintiff sought to certify a Rule 23(b)(1), (b)(2), or (b)(3) class of all RBC Capital Markets employees who, within the past four years, had at least five years of service with the defendant and were participants in the benefit plan.

The district court denied the motion for certification, concluding that the plaintiff failed to prove she could adequately represent the class under Rule 23(a)(4), due to a lack of commonality under Rule 23(a)(2). The court began by summarizing the "enhanced contours" of the rigorous analysis of Rule 23 required by the Supreme Court's decision in *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011), as well as the Fifth Circuit's interpretation of it in *M.D. ex rel. Stukenberg v. Perry*, 2012 WL 974878 (5th Cir. 2012). According to the district court, *Wal-Mart* and *Perry* held that the commonality test is no longer met when the proposed class merely proves there is one issue that will affect all or a significant number of class members. Instead, it requires common issues whose resolution "will *resolve* an issue that *is central to the validity* of each one of the class member's claims in one stroke," which will "frequently . . . entail some overlap with the merits of the plaintiff's underlying claim."[31] Furthermore, district courts are to "look to the dissimilarities among the proposed class members, as '[d]issimilarities within the proposed class are what have the potential to impede the generation of common answers.'"[32]

The court held that because there was an outstanding issue—whether the plaintiff complied with ERISA's administrative exhaustion requirement before bringing the ERISA claim—which was *not* common to the class as a whole under the heightened Rule 23(a)(2) analysis, then the plaintiff could not fairly and adequately protect the interests of the putative class under Rule 23(a)(4).

c. Teta v. TWL Corp.

In *Teta v. TWL Corp.*, 2012 WL 469872 (E.D. Tex. 2012)[33] Teta filed suit against employer TWL for violations of the WARN act after Teta and approximately 130 other employees were laid off. Soon after terminating the group of 130 employees, TWL filed for bankruptcy under Chapter 11, which was then converted to Chapter 7. Teta filed a motion for class certification on behalf of himself and the other "similarly-situated former employees" for violations of the WARN act, but the bankruptcy court denied certification for lack of both numerosity under Rule 23(a)(1) and superiority under Rule 23(b)(3). Teta appealed the bankruptcy court's order to the U.S. District Court for the Eastern District of Texas pursuant to 28 U.S.C. § 158(a)(1).

The district court agreed with the bankruptcy court that Teta could not establish numerosity or superiority. The district court affirmed that individual WARN act claims would be manageable and numerosity was lacking, as the entire potential class was limited to 130 employees and only a few of them had filed individual claims before the deadline to file proofs of claims in the TWL bankruptcy cases had passed. The district court agreed with the bankruptcy court that a class action was not the superior method of adjudication, as any existing WARN Act claims were already concentrated in the bankruptcy court (because former employees were required to seek allowance of WARN Act claims in order to share in any distribution from the defendants' estates). Thus, it would be a waste of resources to allow a class action adversary proceeding when Teta was the only employee who asserted a timely WARN Act claim, and Teta's claim could move faster down a parallel track.

d. Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.

Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co., 2012 WL 565997 (N.D. Tex. 2012), was originally filed in 2002 as a securities fraud class action, but due to Fifth Circuit law at that time pertaining to loss causation, the district court denied certification, which was upheld on appeal to the Fifth Circuit.[34] However, on appeal to the Supreme Court in *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011),[35] the Court reversed the Fifth Circuit and concluded that the plaintiffs were not required to prove loss causation as a prerequisite to certification, and remanded to the Fifth Circuit, which in turn remanded back to the district court.

On remand, the district court found all of Rule 23(a) requirements satisfied and certified a Rule 23(b)(3) class. With respect to the four Rule 23(a) prerequisites, the court determined: (1) numerosity was satisfied because lead plaintiff Archdiocese of Milwaukee Supporting Fund ("AMSF") estimated there were "tens, if not hundreds, of thousands of class members," (2) commonality was satisfied, as there were multiple questions of law or fact common to the class, such as whether the defendants misrepresented material facts or violated federal securities laws,

and the defendants did not dispute the satisfaction of this element,[36] (3) lead plaintiff AMSF's claims were typical of the class members' claims, as all plaintiffs allegedly suffered economic losses from their transactions in Halliburton stock,[37] and (4) adequacy of representation was satisfied, as class counsel had extensive experience litigating securities class actions, and lead plaintiff AMSF demonstrated a willingness to take an active role in the litigation due to its "vigor in challenging a settlement advocated by former Lead Plaintiffs and rejected by the Court, replacing counsel charged with, and later convicted of, crimes, and appealing the loss causation issue to the Fifth Circuit and Supreme Court."

The court held that common questions of law or fact would predominate, as the fraud-on-the-market theory applied and rendered proof of individual class member reliance unnecessary. Furthermore, although the extent of damages suffered by each class member would vary, this would not preclude a finding of predominance, as individual damages could be calculated. Finally, the court found a class action to be the superior method of adjudication, as it would promote judicial economy and avoid the risk of inconsistent judgments.

e. Conrad v. General Motors Acceptance Corp.

In *Conrad v. General Motors Acceptance Corp.*, 283 F.R.D. 326, 327 (N.D. Tex. 2012), Conrad filed suit against Ally Financial, Inc. (formerly General Motors Acceptance Corporation) for violations of the Telephone Consumer Protection Act ("TCPA"). Conrad alleged that Ally attempted to collect payment on an auto loan by repeatedly calling his cellular phone after he had made seven requests for the calls to cease. Accordingly, Conrad sought to certify Rule 23(b)(2) and (b)(3) classes of all persons who received a non-emergency call from Ally to a cellular phone and who did not provide prior express consent for the calls.

The district court denied certification based on a lack of numerosity, predominance, and cohesiveness. First, the court rejected Conrad's argument that numerosity may be found based on extrapolating potential plaintiffs from Ally's call record logs. Unlike the cases Conrad cited to support this argument, in which even a fraction of the consumer-debtors who were contacted would create enough putative class members for numerosity,[38] in the present case, the only evidence Conrad provided showed a maximum of two potential class members—himself and a Jane Doe who was the new owner of his telephone number after he terminated use of that number. Thus, "[e]ven if [the] Court decided that it may legally infer numerosity in the first place, two putative class members [was] too few to give rise to such an inference."

The court also declined to certify the class based on a lack of Rule 23(b)(2) cohesiveness and Rule 23(b)(3) predominance. With regard to predominance, the court noted that one of the substantive issues that would control the outcome of the litigation was whether the putative class members consented to Ally contacting them via their cellular phones, as a finding of consent precluded liability under the TCPA. Because putative class members could have given their consent in various ways (or could have withdrawn and re-granted consent during their course of dealing with Ally), "the consent issue would necessitate individual inquiries regarding each putative class member's account and the circumstances surrounding each call or contact." In addition, because the consent issue also had the potential to separate class members from each other, the class lacked the cohesiveness required by Rule 23(b)(2).

2. State Law

a. Forte v. Wal-Mart Stores, Inc.

In *Forte v. Wal-Mart Stores, Inc.*, 2012 WL 2886711 (S.D. Tex. 2012), a group of optometrists who leased office space in Wal-Mart and Sam's Club stores sued Wal-Mart for "controlling or attempting to control the professional judgment, manner of practice, or practice of an optometrist," in violation of the Texas Optometry Act ("TOA"). The plaintiffs sought to certify a Rule 23(b)(3) class of all current and former optometrists who have had or currently have with Wal-Mart lease or licensing agreements that contain terms referencing the hours and/or days of operation of the optometrists' practices. The court denied the plaintiffs' first motion for class certification without prejudice, and after a trial on the merits, the plaintiffs filed a motion for reconsideration of their earlier motion for certification.

The district court denied the motion for reconsideration, concluding that the plaintiffs could not satisfy the requirements of commonality, adequacy of representation, or predominance. First, commonality under Rule 23(a)(2) was lacking under the heightened standard set forth by the Supreme Court in *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541 (2011) and adopted by the Fifth Circuit in *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832 (5th Cir. 2012). While all of the plaintiffs signed leases containing the same basic provision regarding hours of operation, the inclusion of the provision itself was not a *per se* violation of the TOA (and if it were, the court stated that commonality would indeed be satisfied). Instead, "[d]ue to the individual circumstances of each Plaintiff—such as negotiations of lease terms with regional or district managers or an understanding with these managers on the enforcement of the challenged lease provision—there [was] not a single common question that [would] resolve an issue central to Plaintiffs' claim in a single stroke."

With respect to Rule 23(a)(4) adequacy of representation, the court held that the plaintiffs failed to present affidavits or testimony that the named plaintiffs were adequately informed and ready and able to vigorously pursue litigation on behalf of the proposed class members' interests. Four of the plaintiffs who went to trial would not be a part of the class, and of the remaining named plaintiffs, some brought suit out of principle while others sought monetary compensation—leaving the court with no evidence that the remaining named plaintiffs' interests were aligned with each other or the putative class.

Finally, the court held that the plaintiffs failed to satisfy Rule 23(b)(3) according to the Fifth Circuit's predominance hurdle set out in *Madison v. Chalmette Refining, L.L.C.*, 637 F.3d 551, 555 (5th Cir. 2011). The court stated that *Madison* required district courts to consider how a trial on the merits would be conducted if the class were certified, and prohibited a "figure-it-out-as-we-go-along-approach."[39] The court found that the plaintiffs presented an inadequate trial management plan, as they had simply listed the elements of the TOA, written sample jury questions, and "merely put forth the rule of law supporting the Court's discretion to structure a trial." Furthermore, the calculation of penalties under the TOA included various components that must be applied differently to each plaintiff, and the plaintiffs did not address how they could be resolved effectively in a class action.[40]

b. Dallas County, Texas v. MERSCORP, Incorporated

In *Dallas County, Texas v. MERSCORP, Inc.*, 2012 WL 6208385, at *1 (N.D. Tex. 2012), Dallas County sued MERSCORP and a group of mortgage banks, title companies, and title insurance companies over the defendants' creation and use of the Mortgage Electronic Registration System ("MERS"). MERS allowed mortgage lenders to become "members" of the system, which then allowed the title companies to list MERS as the "grantee" or "grantor" on the county deed record. When a mortgage was sold or securitized, as long as the new mortgagee was a MERS "member," there was no need to record the transfer in the county deed records, as the "grantee" or "grantor" name (MERS) did not change. Dallas County brought claims for fraudulent misrepresentation and unjust enrichment, alleging that the defendants were part of a conspiracy to avoid the costs associated with properly recording the creation and transfer of liens on real property in Texas. Accordingly, Dallas County sought to certify a class of all Texas counties in which the defendants had utilized the MERS system to avoid having to properly record the transfer and assignment of mortgages.

The district court denied certification, agreeing with the defendants that the plaintiffs had effectively created an "opt in" class, which was prohibited by Rule 23. The district court noted how the present case was procedurally and factually similar to the Fifth Circuit's recent opinion in *Ackal v. Centennial Beauregard Cellular L.L.C.*, 2012 WL 5275441 (5th Cir. 2012), and concluded that *Ackal* controlled the determination of the action. In *Ackal*, a group of Louisiana governmental entities sought class certification in a dispute against their cellular telephone provider, but were denied certification because Louisiana law created various procedural hurdles for government entities to retain private counsel. To the Fifth Circuit, only the class representatives had satisfied the procedural requirements (and thus were class members), meaning the default position of the remaining government entities was that they were *not* members of the class until and unless they satisfied the requirements—resulting in a prohibited "opt in" class.

The district court noted that, as in Louisiana, the State of Texas also has specific procedural requirements for counties to retain private counsel.[41] In addition, the court highlighted how the State of Texas strictly regulates its counties' ability to use contingent fee contracts for legal services, including provisions governing expense records, how the fee will be computed, how expenses will be paid, and the source of the state funds available to pay the fee. Because only Dallas County, as representative plaintiff, satisfied the procedural requirements to retain private counsel on a contingent fee basis, "[t]he default position of each county is that it is not in the class until it successfully completes the procedural requirements for retaining outside counsel."[42] Accordingly, the district court denied certification due to the creation of an impermissible "opt in" class.

3. Class Action Settlements

a. *In re* Heartland Payment Systems, Inc. Customer Data Security Breach Litigation

In re Heartland Payment Systems, Inc. Customer Data Security Breach Litigation, 851 F. Supp. 2d 1040, 1047 (S.D. Tex. 2012), involved a class of over one hundred million consumer credit cardholder plaintiffs whose personal financial information was compromised by a

sophisticated hacking operation. The plaintiffs filed suit against Heartland Payment Systems, a payment processing company, alleging breach of contract, negligence, violations of various state laws, and violations the Fair Credit Reporting Act. In December 2009, the plaintiffs and Heartland reached a settlement agreement, with a preliminary Rule 23(b)(3) settlement class approved in April 2010.[43] In its March 20, 2012 opinion, the district court addressed (1) whether certification of the Rule 23(b)(3) settlement class was appropriate, including whether Rule 23(a)'s prerequisites were satisfied, and (2) whether the settlement was fair, reasonable, and adequate.

The court began its Rule 23 analysis by emphasizing that certification requires a "rigorous analysis" of Rule 23's prerequisites, which "does not diminish in the settlement-class context,"[44] and that a district court "may not 'substitut[e] the fairness inquiry of Rule 23(e) for the certification requirements of Rule 23(a) and (b).'"[45] With respect to Rule 23(a), the district court found all four prerequisites satisfied. First, the proposed class encompassed at least one hundred million individuals, sufficient for numerosity. Commonality was established because (1) the common question of fact was what actions Heartland took before, during, and after the data breach to protect the consumers' information, answers to which would be common to all class members and would "inform the resolution of the litigation if it were not being settled,"[46] and (2) the common questions of law included whether Heartland violated the Fair Credit Reporting Act, answers to which would "assist in reaching classwide resolution."[47] Typicality was satisfied for both the federal and state law claims. With respect to the Fair Credit Reporting Act, the court found that "[b]ecause this claim revolves around Heartland's conduct, as opposed to the characteristics of a particular class member's claim, no individualized proof will be necessary to determine Heartland's liability under the Act."[48] The state law claims were typical because negligence, breach of contract, and violations of consumer protection laws are recognized in some form in all jurisdictions and would be available to all class members. Because these claims arose from a single course of conduct by Heartland and a single set of legal theories, the fact that there could be state-by-state variations in the elements of the claims was not fatal to typicality.[49] Finally, the court found adequacy of representation because (1) class counsel were competent and zealous in their representation, demonstrated by the successful negotiation of a settlement with Heartland (which initially was reluctant to settle), and (2) there were no conflicts between the class representatives and the class members. The district court determined that the so-called *Berger* requirement (*i.e.*, that class representatives "show themselves sufficiently informed about the litigation to manage the litigation effort")[50] was inapplicable to the present case, because in negative-value class actions, no single class member has a sufficient stake to be closely involved in the litigation.[51] To the court, it was "far more important to the determination of adequacy" to have both adequate class counsel and no intraclass conflicts than whether or not the plaintiffs had submitted "perfunctory declarations or brief deposition testimony" proving that the class representatives were sufficiently informed about the litigation.[52]

The court then held that Rule 23(b)(3)'s predominance and superiority requirements were satisfied. Regarding predominance, the court had to determine whether variations in state law would render certification inappropriate.[53] The court compared two Fifth Circuit cases—one of which certified a *settlement* class despite variations in state law, and another which decertified a *litigation* class due to variations in state law[54]—and stated that "[w]hen '[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no

trial.'"[55] The district court concluded that because the present case was a settlement class and the state law variations here did not preclude class members in certain states from stating a claim, "any variations that might be present [were] well within the range of those affecting only trial manageability."[56] With regard to superiority, the court noted how the predominance and superiority inquiries are closely related,[57] and that "'[t]he most compelling rationale for finding superiority in a class action' is 'the existence of a negative value suit[.]'"[58] Accordingly, because predominance was satisfied and the suit was indeed a consumer-based negative-value suit, superiority was satisfied.[59]

Finally, the court granted its approval of the five Rule 23(e) requirements for a class settlement, with emphasis on whether the settlement was fair, reasonable, and adequate.[60] The court applied the Fifth Circuit's *Reed* factors to determine whether the settlement was fair, reasonable, and adequate, and concluded that (1) negotiations between the parties were lengthy and at arms-length, with no evidence of fraud or collusion,[61] (2) litigating the case would be costly and time consuming, with an inevitable appeal further prolonging recovery by the class members, (3) the parties had conducted sufficient discovery for class counsel to determine the settlement's adequacy compared to the probability of success on the merits, (4) the likelihood of success on the merits at trial, or whether the class could even reach the trial stage, was uncertain, as a jury could find an essential element of the negligence and Fair Credit Reporting Act claims—that Heartland's security measures were unreasonable—was lacking,[62] (5) the upper band of recovery was much smaller, and certainly no higher, than the upper amount offered in the settlement,[63] and (6) class counsel "enthusiastically endorsed the settlement," and of the millions of absent class members, only one objected—with the sole objection being that the settlement was unfair to Heartland, as opposed to being unfair to the class.[64] Because all six *Reed* factors favored the proposed settlement, the court approved the terms pursuant to Rule 23(e)(2).

C. Louisiana District Court Cases

1. State Law

a. MP Vista, Inc.v. Motiva Enterprises, LLC

In *MP Vista, Inc. v. Motiva Enterprises, LLC*, 2012 WL 4322606 (E.D. La. 2012), a group of gas station owners filed suit against defendants Motiva Enterprises and Shell Oil Company, alleging negligence and breach of the implied warranties of fitness for use and merchantability under the UCC. The incident that spurred the lawsuit occurred in 2004, when the defendants learned that some of the fuel they had refined and distributed to certain gas stations was contaminated, which led the defendants to order all stations with possible contamination to shut down while the fuel was tested. The plaintiffs claimed that the ordered closures caused economic damages including lost gasoline sales, lost convenience store and ancillary sales, and decreased consumer confidence in all Shell branded gas stations. Accordingly, the plaintiffs sought to certify a Rule 23(b)(3) class of all gas station owners who purchased and received contaminated gas from the defendants during May 2004.

The district court denied the motion, concluding that the predominance requirement of Rule 23(a)(3) was lacking.[65] The court rejected the plaintiffs' argument that certain common "central issues" predominated, such as whether the fuel was contaminated and whether the

defendants ordered the plaintiffs to stop selling contaminated fuel. Instead, the court agreed with the defendants that it must first evaluate "the relevant claims, defenses, facts, and substantive law presented in the case,"[66] and that the sole issue that would predominate in both the negligence and UCC claims—proximate cause as to liability and damages—was not capable of classwide determination with classwide proof. The court compared the present case to *Steering Committee. v. Exxon Mobil Corp.*, 461 F.3d 598, 602 (5th Cir. 2006), in which the Fifth Circuit denied class certification because proximate causation of personal injuries due to an oil spill required individual analysis of many issues, such as susceptibility to illness and types of physical injuries. In the present case, the court found that the plaintiffs' expert had merely assumed that all decreases in fuel sales were caused by the possible contamination, and ignored other causes such as a hurricane, road closures, and construction near gas stations.[67] Furthermore, the court noted that even if it were to ignore the causal variables that were excluded from the plaintiffs' expert witness's analysis, his methodology would still require review of each individual station's business records—giving no formulaic way to calculate the putative class members' damages.

The district court also found predominance lacking with regard to the plaintiffs' trial plan, which was hastily created and called for a bifurcated trial in which liability would be litigated by a jury in phase I and damages would be established by a separate jury in phase II. The court noted that the plan adopted a "figure-it-out-as-we-go-along" approach, which the Fifth Circuit had previously rejected in *Madison v. Chalmette Refinery, L.L.C.*, 637 F.3d 551, 556-57 (5th Cir. 2011), and also raised Seventh Amendment concerns, in that "a second phase jury would be unable to determine damages without revisiting an earlier jury's determination of causation."[68] Thus, because individual issues of proximate causation predominated, and the plaintiffs had not provided a workable method for managing the case, "class certification in this action would result in the case 'degenerating into a series of individual trials,' and defeat the very purposes of a class action."[69]

b. Brandner v. Abbott Laboratories, Inc.

Brandner v. Abbott Laboratories, Inc., 2012 WL 195540 (E.D. La. 2012), involved a lawsuit stemming from defendant Abbott Laboratories' September 2010 recall of contaminated Similac infant formula. Brandner filed suit against Abbott for (1) violations of the Louisiana Products Liability Act ("LPLA") and (2) the Louisiana Civil Code articles on redhibition,[70] alleging that her daughter became ill after ingesting the recalled Similac and it caused her (Brandner) severe emotional distress. Accordingly, Brandner moved to certify a Rule 23(b)(3) class consisting of all persons in Louisiana who purchased Similac during the recall period.

The court analyzed the appropriateness of class certification separately for the LPLA and redhibition claims and concluded that both failed for lack of Rule 23(b)(3) predominance and superiority. Regarding the LPLA claim, the court gave three separate reasons why individual issues would predominate over issues common to the class. First, because the LPLA requires a plaintiff to prove that the product was unreasonably dangerous when it left the manufacturer's control, "[w]hether each class member purchased contaminated Similac [was] subject to individualized, not collective proof."[71] Second, all putative class members must establish that Abbott's actions proximately caused their injuries, which requires proof of medical causation. Medical causation, in turn, requires (1) general causation (*i.e.*, the substance was capable of causing the injury) and (2) specific causation (*i.e.*, the substance actually caused the particular

injury to the particular individual). Because specific causation would require a "highly individualized inquiry" into each individual's family and medical history, age, gender, timing of ingestion of the product, and type of injury suffered, issues common to the class would not predominate. Finally, in order to recover for emotional distress, each class member would have to prove both distress and accompanying damages. To prove distress, each plaintiff must show "a particular likelihood of genuine and serious mental distress arising from special circumstances," which turned on a highly individualized assessment.[72] Likewise, the damages issue would require a determination of "whether plaintiffs sought medical treatment [or] psychiatric treatment, the degree to which plaintiffs manifested generalized fear, and the severity of plaintiffs' emotional distress," all of which would "entail the exact type of 'mini-trials' the Fifth Circuit has cautioned against."[73] The court then summarily concluded that superiority was lacking, as Brandner made no showing of how she would try the claims on a classwide basis and failed to demonstrate how she would manage the problems posed by claims involving such disparate proof.

With respect to the redhibition claim, the court stated that a plaintiff must establish the existence of an actual defect at the time of sale, meaning every class member must have purchased Similac with a "physical imperfection or deformity."[74] Because Brandner did not demonstrate that she could prove, with common proof, that each class member bought a defective product, the court concluded that common issues of fact did not predominate in the redhibition claim.[75]

2. Class Action Settlements

a. Burford v. Cargill, Inc.

In *Burford v. Cargill, Inc.*, 2012 WL 5472118 (W.D. La. 2012), a group of dairy farmers sued Cargill for RICO violations and state law fraud, claiming that Cargill sold them dairy feed that was supposed to be of a special customized formula but was actually made of cheaper ingredients. After the parties reached a tentative settlement, the district court determined (1) whether a Rule 23(b)(3) class should be certified for settlement purposes only, including whether Rule 23(a)'s prerequisites were satisfied, and (2) whether the settlement was fair, reasonable, and adequate.

First, the court concluded that all four of Rule 23(a) prerequisites were satisfied. Citing the Fifth Circuit's statement in *Mullen v. Treasure Chest Casino, LLC*, 1867 F.3d 620, 624 (5th Cir. 1999), that "any class consisting of more than forty members should raise a presumption that joinder is impracticable," the court found numerosity, as notice was sent to 12,076 potential class members. Commonality was satisfied for both the federal and state law claims, as (1) issues common to the RICO claim included whether Cargill represented a certain nutritional content of dairy feed that was actually untrue, and (2) issues common to the state law fraud claim included whether Cargill intended to deceive its customers.[76] The class representatives' claims were typical of the class, as all class members were dairy farmers who purchased the same product (dairy feed) from Cargill for the same purpose (to feed their herds) and received the same representation that the feed was a specialized formula, but was in fact made of inferior ingredients.[77] Finally, the court found adequacy of representation, as (1) class counsel was

experienced, and (2) all plaintiffs sought the same relief, with no conflicts between the named plaintiffs and the rest of the class members.

The court found predominance and superiority under Rule 23(b)(3), as the plaintiffs' memorandum in support of class certification analyzed in great detail the common issues of each claim, and persuaded the court that "the only alternative to a class action in this case [was] a series of repetitive trials, which would require many judges and juries to hear the same lengthy factual and expert testimony on liability over and over, since no number of adverse jury verdicts would ever bind Cargill for any other case."[78]

Finally, the court applied the Fifth Circuit's six *Reed* factors and concluded that all six indicated a settlement that was fair, reasonable, and adequate: (1) the parties had vigorously litigated hotly contested issues at arms-length, with no evidence of fraud or collusion; (2) continued litigation would be lengthy, complex, and expensive; (3) the parties reached their settlement "late enough in the process to be well-informed but early enough that settlement will conserve enormous party and judicial resources"; (4) the outcome as to certification of a litigation class and as to the merits was highly uncertain, and proceeding in the matter would be costly and risky for all parties; (5) the benefits of a guaranteed monetary recovery and related non-monetary benefits in the form of a clear disclosure of Cargill's dairy feed philosophy were superior to the class members having to prove their own individual damages absent a settlement; and (6) not a single class member objected to the settlement, only two timely opt-outs were received, and class counsel fully endorsed the settlement after eight years of investigation, motion practice, and discovery.[79] Accordingly, the court granted final class certification and approved the settlement.

b. *In re* Chinese-Manufactured Drywall Products Liability Litigation

In re Chinese-Manufactured Drywall Products Liability Litigation, 2012 WL 92498 (E.D. La. 2012), involved alleged property damage and personal injuries caused by tainted drywall that was manufactured in China and used for construction in the United States during a drywall shortage from 2005 to 2008. Numerous state and federal lawsuits were designated as Multidistrict Litigation 2047, and were consolidated and transferred to the U.S. District Court for the Eastern District of Louisiana. The parties came to a tentative settlement agreement and jointly asked the district court to certify a conditional Rule 23(b)(3) settlement class for settlement purposes only. In its order addressing the parties' joint motion, the district court determined whether (1) to grant preliminary certification of a Rule 23(b)(3) settlement class, and (2) the settlement appeared fair, reasonable, and adequate.

Because none of the parties disputed that Rule 23 was satisfied, the district court summarily concluded that the requirements of Rule 23(a) and Rule 23(b)(3) were met. With respect to Rule 23(a), the court found that (1) numerosity was satisfied because the potential class was very large, and "a good-faith estimate should be sufficient when the number of class members is not readily ascertainable";[80] (2) there were questions of law or fact common to the class, given that the Panel on Multidistrict Litigation ordered the cases to be consolidated based on common facts and legal issues; (3) the class representatives' claims were typical of the class members' claims because each plaintiff sought money from the defendants for costs of remediation and other damages; and (4) representation was adequate, as the named

representatives did not possess interests antagonistic to the class, and class counsel had significant expertise (evidenced by their selection by the court to serve on the plaintiffs' Steering Committee). Concerning Rule 23(b)(3), the court simply agreed with the parties' argument that "common questions of law and fact predominate because the . . . defendants' liability predominates over any individual issues involving plaintiffs, and the Settlement Agreement will insure that funds are available to remediate the Affected Properties."[81] The court held that this was sufficient for purposes of preliminary settlement approval.

Finally, the court held that for purposes of a preliminary fairness determination, none of the objections to the settlement raised obstacles to preliminary approval, as none of the objections came from class members (they were instead raised by non-class members whose objections were comprised of "mere clarification and comments").[82] The court noted that any remaining concerns about fairness could be addressed at the final fairness hearing.

c. *In re* FEMA Trailer Formaldehyde Product Liability Litigation

In re FEMA Trailer Formaldehyde Product Liability Litigation, 2012 WL 4513344 (E.D. La. 2012), involved a class action settlement of personal injury claims after victims of hurricanes Katrina and Rita were exposed to formaldehyde in their FEMA-issued emergency trailers. The district court had previously certified a preliminary Rule 23(b)(3) settlement class, and now had to determine whether (1) to grant final certification of the settlement class, and (2) the settlement was fair, reasonable, and adequate.

First, the court found all four Rule 23(a) prerequisites were satisfied. Numerosity was present, as the class included many plaintiffs spread throughout four states that were affected by the two hurricanes. Commonality was satisfied because the plaintiffs alleged numerous questions common to the class, including negligent installation, maintenance, and/or refurbishment of FEMA trailers, product liability, and failure to warn of the dangers of long-term occupancy and formaldehyde exposure. The court combined the typicality and adequacy of representation elements of Rule 23(c) and (d), and concluded both were present: (i) the interests of the named plaintiffs and nature of their claims were consistent with those of the class members, (ii) there were no conflicts between named plaintiffs and class members, (iii) the named plaintiffs were capable of being active participants in the settlement negotiations, and (iv) class counsel were experienced with mass tort settlements.

The district court also found Rule 23(b)(3) easily satisfied. Common issues predominated over individual ones because (i) the common alleged source of injury was formaldehyde, (ii) any individual differences due to variations in state laws were less important to a settlement class, as opposed to a litigation class, (iii) the settlement sufficiently addressed issues of product identification, causation, injury, and damages, which would have been considered individually in a litigation class, and (iv) the science underlying the general issue—whether formaldehyde causes injuries and if so, what injuries—was common to all the defendant-contractors. The court found a class action to be superior to other methods of adjudication because it avoided the need for individual lawsuits, and the management of the class would be much easier than mass joinder of actions.

Finally, the court applied the Fifth Circuit's six *Reed* factors and found the settlement to be fair, reasonable, and adequate: "(i) there was no fraud or collusion among the Parties [and] the Settlement Agreement was the result of extensive arms-length negotiations among highly experienced counsel . . . [ii] there [was] a high probability of further complex, extensive, costly litigation extending over a period of many years; [iii] the proceedings [were] at an advanced stage, with exhaustive discovery, extensive motion practice, and three bellwether trials already completed; [iv] Class Members [had] a low individual likelihood of success on the merits given the fact that the three bellwether trials conducted [had] all resulted in complete defense verdicts; . . . [v] the potential range of recovery may seem to be high for some individuals, but the three bellwether trials to date . . . all resulted in defense verdicts with no recovery to the plaintiffs; [and] [vi] the Class Representatives and the experienced counsel in the [plaintiffs' steering committee] approved this settlement, with little significant or relevant opposition to the settlement."[83] Accordingly, the district court granted final approval of the Rule 23(b)(3) certification class and the settlement.

d. *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010

In *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, 2012 WL 6652608 (E.D. La. 2012), the U.S. District Court for the Eastern District of Louisiana provided an exhaustive analysis of the class action settlement that resolved thousands of claims for economic loss and property damage from the BP Deepwater Horizon oil spill. The district court had previously granted preliminary approval of the settlement and conditionally certified a Rule 23(b)(3) settlement class, and now had to determine whether to grant final class certification and whether the proposed settlement was fair, reasonable, and adequate.

The court began its analysis with the four Rule 23(a) prerequisites and the implied requirement that the class be adequately defined and clearly ascertainable. The court found a clearly ascertainable class, stating that the settlement was "nearly the epitome of how a class in a mass tort action ought to be defined, as it is objective, precise, and detailed, and does not turn on the merits."[84] The court easily found numerosity, comparing the approximately 110,000 persons who had filed short form joinders to classes that had been certified by the Fifth Circuit that were a mere fraction of this size.[85] The court also noted how "[i]n addition to the sheer size of the class, members are 'geographically dispersed, decreasing the practicability of joinder into one action.'"[86]

The court reserved a more detailed commonality analysis for its analysis on Rule 23(b)(3) predominance but noted that commonality was easily satisfied, as the overarching questions of law and fact related to the liability of BP and its contractors. Typicality was satisfied, as the class representatives—like all class members—alleged damages from the Deepwater Horizon spill, a single-event, single-location disaster, in which the focus at trial would be on BP's conduct. The court found adequacy of representation, as (i) class counsel were selected by the court from a diverse group of lawyers who "diligently prosecuted this litigation, consulted widely among class members in negotiating the Settlement, and aggressively represented the interests of their clients," and (ii) the class representatives participated in the settlement negotiations and sought to ensure that similarly-situated plaintiffs would receive adequate compensation.[87] The court emphasized the fact that there were no conflicts among the named plaintiffs or the class

members, noting that "[p]erhaps most importantly, this Settlement does not involve a limited fund with no ability for class members to opt out," which prohibited certification in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 864-65 (1999), and *In re Katrina Canal Breaches Litigation*, 628 F.3d 185, 194 (5th Cir. 2010).

Next, the court found predominance under Rule 23(b)(3), and it emphasized how the phased trial structure "reflected the central importance of common issues to this case," with phase one focusing on which defendants were responsible for the well blowout, phase two focusing on who bore responsibility for the defendants' inability to control the oil flow, and phase three focusing on the final resting place of discharged oil and how efforts to disperse oil from the well proceeded.[88] Specifically regarding common questions of fact, the court concluded that the heightened standard of *Wal-Mart* and *M.D. ex rel. Stukenberg v. Perry* was satisfied, as the case arose "from the blowout of one well, on one date, and the discharge of oil from one location," with all key factual questions common among the class members.[89]

With respect to common questions of law, the court emphasized how essentially all legal questions would be determined under a common framework of federal law (since federal maritime casualty law preempted state law), with no concerns that the class could be "fragmented by a multiplicity of state laws that control the viability of claims."[90] The court also underscored the importance of the numerous jurisdictional issues that were common to the class, noting that "it is well established that jurisdictional issues can raise questions that satisfy the commonality standard."[91] The court explained that even though certain causation issues would have to be decided on an individual basis if the cases were not settled—such as the extent to which the oil spill versus other factors caused a decline in the income of individuals or businesses—these would not defeat predominance, as the damages could be fairly calculated through formulaic methodology within the comprehensive claims framework in the settlement agreement. Finally, the court emphasized that in certain scenarios, common issues often predominate over individual issues in environmental and mass tort cases, and "[t]his is one of those cases."[92]

In contrast to its lengthy predominance analysis, the court summarily concluded, "[t]here can be no serious doubt that a class action is a superior method of resolving this litigation."[93] The court then analyzed the four enumerated factors within Rule 23(b)(3), and found each satisfied: (1) most plaintiffs would have little interest in litigation outside of a class action context due to the enormous expenses of individual litigation compared to a modest possible recovery, (ii) a significant amount of litigation was remaining and "[t]here are no plaintiffs whose litigation efforts will be wasted by the Court's certification decision," (iii) virtually all Deepwater Horizon related litigation was centralized in the Eastern District of Louisiana, and "[g]iven the Court's familiarity with the myriad legal and factual issues at issue in this litigation, concentration is a desirable result for all parties," and (iv) the class settlement was far easier to manage than thousands of individual actions.[94]

Finally, the court cited the strong presumption in favor of finding settlements fair, reasonable, and adequate due to the public policy of favoring voluntary settlements of class actions,[95] and then it found all six of the Fifth Circuit's *Reed* factors weighing in favor of the settlement: (i) there was no evidence of fraud or collusion, as the settlement was reached after months of hard-fought negotiations that were conducted simultaneously with adversarial trial

preparation, that "enabled the parties to consider and negotiate a settlement fully informed by unfolding discovery and expert opinions," (ii) the litigation was "extraordinarily complex and expensive," and similar to the *Exxon Valdez* and *Amoco Cadiz* oil spill litigations that took 15-20 years to resolve, the appeals process could extend this litigation for a decade or more, (iii) the parties clearly had sufficient information to evaluate the merits of their competing positions, as there were over 90 million pages of documents produced in discovery, and the parties negotiated with the benefit of investigations conducted by the U.S. government,[96] (iv) *and* (v) the settlement met or exceeded the fourth and fifth *Reed* factors because the benefits were available now, there were many types of risks that individual plaintiffs would face in litigation, and immediate settlement payouts provided benefits that might not be obtained in litigation, since BP argued it had no legal obligation to provide them, and (vi) class counsel, class representatives, and the vast majority of absent members agreed that the settlement was fair which was "perhaps best illustrated by the extraordinary number of putative objectors (non-class members) who wish[ed] to be included within the Settlement[,] . . . [demonstrating] 'the fact that this settlement is viewed as so desirable that people are clamoring to get in.'"[97]

D. Mississippi District Court Cases

1. Combined Federal and State Law

a. Burkett v. Bank of America, N.A.

Burkett v. Bank of America, N.A., 2012 WL 3811741 (S.D. Miss. 2012), involved a lawsuit stemming from the HomeSaver Forbearance Program ("HSF Program"), a six-month program offered by Fannie Mae to allow home-loan borrowers who were in default to reduce their monthly payments by fifty percent. Plaintiffs—homeowners with a mortgage guaranteed by Fannie Mae and serviced by defendant Countrywide Home Loans, Inc. (later acquired by Bank of America)—claimed they were enrolled in the HSF Program without their consent. The plaintiffs alleged the defendant loan servicers did this to (1) take advantage of a $200 incentive fee offered by Fannie Mae to any servicer who enrolled borrowers in the plan, and (2) increase interest payments and late fees owed (due to the defendants' practice of withholding the application of partial payments until the payments added up to a full payment as defined in the original loan documents), among other deceitful tactics. Plaintiffs asserted fifteen separate causes of action, including violations of the federal Truth in Lending Act ("TILA") and Real Estate Settlement Procedures Act ("RESPA"), and state law negligence, breach of contract, and fraud. Accordingly, the plaintiffs sought to certify a Rule 23(b)(3) class of all consumers whose mortgages were serviced by the defendants and whose loans either qualified for the HSF Program or were offered enrollment in the plan, and/or whose loans were actually enrolled in the HSF Program.

The district court denied certification due to a lack of typicality and commonality under Rule 23(a), as well as a lack of predominance under Rule 23(b)(3). The court began its analysis with typicality, noting that "[t]hough the test for typicality is not demanding, 'if proof of the representatives' claims would not necessarily prove all the proposed class members' claims, the representatives' claims are not typical of the proposed members' claims.'"[98] The court observed that even though the focus of the plaintiffs' claims was that they were enrolled without their consent, their proposed class definition was broad enough to include borrowers who did give

consent, or who qualified for the HSF Program but were never enrolled. The plaintiffs argued that this problem could be overcome by creating two subclasses (*i.e.*, those who consented to enrollment and those who did not), but the court disagreed, noting that the plaintiffs failed to explain whether members of both subclasses would pursue the remaining fifteen claims, and if so, how the plaintiffs would be fair representatives of both subclasses.

Concerning commonality, the court first examined the heightened standard imposed by *Wal-Mart* and the Fifth Circuit's adoption of it in *M.D. ex rel. Stukenberg v. Perry*. The court compared the facts of *Wal-Mart* to those of the present case, and determined that unlike *Wal-Mart*, in which the Supreme Court held that Wal-Mart's policy of giving local managers broad discretion to grant promotions did not constitute a company-wide policy, Countrywide and Bank of America administered the HSF Program in a uniform and non-discretionary way. However, despite this distinction, the court still found commonality lacking, as no single policy of the defendants affected every member of the proposed class: those who were "qualified for" or "offered enrollment," but were never enrolled, were not affected at all. Furthermore, those who enrolled after *giving* consent were also not affected by the defendants' policies to enroll borrowers *without* consent.

The court found Rule 23(b)(3) predominance lacking for three separate reasons. First, the court noted that in multistate class actions, variations in state law can "swamp common issues and defeat predominance," and that "a plaintiff must 'credibly demonstrate, through an extensive analysis of state law variances, that class certification does not present insuperable obstacles.'"[99] In the present case, the plaintiffs had not analyzed any variances in state law or offered a proposal as to how the court could manage such variations at trial, despite the fact that the plaintiffs had proposed a nationwide class action with fourteen separate causes of action under state law. The court summarily rejected the plaintiffs' argument that state law variances could be overcome because the defendants' policies did not differ by state, concluding instead that "[r]egardless of whether Defendants' policies were uniform nationwide, state laws do vary, requiring individualized application of the appropriate state law to each claim."[100]

Second, determining the validity of each proposed members' claims would require separate, individualized inquiries. The court noted how resolution of the plaintiffs' federal claims would result in a myriad of mini-trials: (1) RESPA claims required individualized proof of the terms of the loan agreements and the premiums each borrower was required to pay into escrow, and (2) TILA claims required an analysis of each member's loan account to determine how payments were credited and whether late fees were improperly imposed, among other inquiries. The state law claims of fraud and misrepresentation also failed predominance since: (1) "[r]esolving the misrepresentation claims would require proof of the individual statements made to each member, as well as proof of the basis for each member's reliance on those representations,"[101] and (2) fraud claims require proof of individual reliance, and the Fifth Circuit has held that a fraud class action cannot be certified if individual reliance will be an issue.[102]

Finally, even if liability were proven, "[d]amages resulting from money wrongfully withheld or charged, unwarranted credit reporting, emotional distress, and punitive damages, [were] not capable of mechanical and formulaic calculation, and [were] individualized to each

proposed class member."[103] Because the plaintiffs had not proposed an adequate formula for calculating these damages, the court concluded that individual damages would predominate.

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[2] The court also rejected the plaintiffs' two procedural claims that the district court (1) ignored opinions of the plaintiffs' expert witness and (2) failed to review the evidence *de novo*. 695 F.3d at 347. The court found that the district court had three months to review both the magistrate judge's memorandum and recommendation ("M&R") and the plaintiffs' objections to it, and there was no reason to assume this review did not include the testimony of the plaintiffs' expert witness. The court also found no issue with the district court's review of the M&R, stating "It is only required that, '[a] judge of the court shall make a *de novo* determination of those portions of the [magistrate's] report or specified proposed findings or recommendations to which objection is made.'" *Id.* (citing Hernandez v. Estelle, 711 F.2d 619, 620 (5th Cir. 1983)). To the Fifth Circuit, the district court's unambiguous statement that it reviewed the plaintiffs' objections and made a *de novo* review of the parts of the M&R to which the plaintiffs objected clearly satisfied this requirement. *Id.*

[3] *Id.* at 345 (quoting Robinson v. Tex. Auto. Dealers Ass'n, 387 F.3d 416, 420-21 (5th Cir. 2004)).

[4] *Id.* at 345-46 (citing Allison v. Citgo Petroleum Corp., 151 F.3d 402, 419 (5th Cir. 1998)).

[5] *Funeral Consumers Alliance,* 695 F.3d at 346 (quoting *Wal-Mart*, 131 S. Ct. at 2551-52).

[6] *Id.* (quoting *Wal-Mart*, 131 S. Ct. at 2552 n.6).

[7] *Funeral Consumers Alliance,* 695 F.3d at 349 (citing *Blue Bird*, 573 F.2d at 321-23).

[8] *Id.* at 349 (quoting Funeral Consumers Alliance, Inc. v. Serv. Corp. Int'l, 2008 WL 7356272, at *14 (S.D. Tex. 2008)). The court rejected the plaintiffs' claim that *United States v. Grinnell Corp.,* 384 U.S. 563 (1966), stood for the proposition that localized sales activity cannot defeat a finding of a national market. To the contrary, in *Grinnell* the Supreme Court affirmed a finding of a national market due to a company's national operations, national schedule of prices, national contracts, and national agreements with competitors, even though that company could sell its product only to local customers. In contrast, the plaintiffs' evidence showed that (1) the prices the funeral homes charged for caskets were not national and varied considerably by funeral home, (2) each funeral home had different contracts with Batesville, and (3) marketing strategies varied greatly among the different funeral homes.

[9] 695 F.3d at 370 (citing Mullen v. Treasure Chest Casino, 186 F.3d 620 (5th Cir. 1999); Forbush v. J.C. Penney Co., 994 F.2d 1101 (5th Cir. 1993)). In *Forbush*, the Fifth Circuit certified a class defined as "employees 'whose pension benefits have been, or will be, reduced or eliminated as a result of the overestimation of their Social Security benefits.'" 994 F.2d at 1105. Rejecting the defendant's claim that the class was insufficiently specific and "hopelessly circular," the Fifth Circuit held that the plaintiffs were "linked by [a] common complaint, and the possibility that some may fail to prevail on their individual claims will not defeat class membership." *Id.* In *Mullen*, the class was defined as "all members of the crew of the M/V Treasure Chest Casino who have been stricken with occupational respiratory illness caused by or exacerbated by the defective ventilation system in place aboard the vessel." 186 F.3d at 623. The Fifth Circuit rejected the defendant's claim that the class was unascertainable because it

depended on ultimate issues of causation, concluding instead that "because the class is similarly linked by a common complaint, the fact that the class is defined with reference to an ultimate issue of causation does not prevent certification." *Id.*

[10] *Id.* at 840 (quoting Forbush v. J.C. Penney Co., 994 F.2d 1101, 1106 (5th Cir. 1993)).

[11] *Id.* (citing James v. City of Dallas, 254 F.3d 551, 570 (5th Cir. 2001)).

[12] *Id.* (quoting Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011)).

[13] *Id.* at 840-41 (quoting McManus v. Fleetwood Enters., Inc., 320 F.3d 545, 548 (5th Cir. 2003)).

[14] *Id.* at 841.

[15] *Id.* at 842. The Fifth Circuit summarized, "Some of the Plaintiffs' legal claims may depend on common contentions of law capable of classwide resolution, and some may not. But as it stands, we cannot affirmatively identify the scope of the 'common questions of law' found by the district court, let alone determine whether they are capable of classwide resolution under *Wal–Mart*." *Id.*

[16] *Id.* at 843 (citing *Wal-Mart*, 131 S. Ct. at 2551).

[17] *Id.*

[18] *Id.* For instance, the Fifth Circuit found persuasive Texas's contention that "the individual class member's substantive due process claims are not capable of classwide resolution because deciding each plaintiff's claim requires an individualized inquiry regarding whether the State's conduct 'shocks the conscience.'" *Id.* To the court, "If the State's assertion is accurate . . . then it is not clear how a 'classwide proceeding' on those claims has the 'capacity . . . to generate common answers apt to drive the resolution of the litigation." *Id.* (quoting *Wal-Mart*, 131 S. Ct. at 2551). The court noted that the district court *may* have properly rejected Texas's argument, but "on remand, it must do so with reference to the elements and defenses and requisite proof for each of the proposed class claims in order to ensure that differences among the class members do not preclude commonality." *Id.* at 843-44.

[19] *Id.* at 844 (quoting DG *ex rel.* Stricklin v. Devaughn, 594 F.3d 1188, 1195 (10th Cir. 2010)).

[20] *Id.* at 846 (quoting *Wal-Mart*, 131 S. Ct. at 2557).

[21] *Id.* at 846-57 (citing Casa Orlando Apartments, Ltd. v. Fed. Nat'l Mortg. Ass'n, 624 F.3d 185, 198 (5th Cir. 2010)). However, the court did not completely agree with Texas's claim that the proposed class could only be certified under Rule 23(b)(2) if its claims were based on a "specific policy [of the State] uniformly affecting—and injuring—each child." *Id.* at 857. The court concluded, "rather, the class claims could conceivably be based on an allegation that the State engages in a pattern or practice of agency action or inaction—including a failure to correct a structural deficiency within the agency, such as insufficient staffing—'with respect to the class,' so long as declaratory or injunctive relief 'settling the legality of the [State's] behavior with respect to the class as a whole is appropriate.'" *Id.* (quoting FED. R. CIV. P. 23(b)(2) advisory committee's note). The court concluded that in addition to demonstrating cohesiveness, on remand, the named plaintiffs must give content to what it would mean to provide adequate relief, or what "appropriate" levels of services are so that "final injunctive relief may be crafted to 'describe in reasonable detail the acts required.'" *Id.* (quoting Shook v. Bd. of Cnty. Comm'rs, 543 F.3d 597, 605-06 (10th Cir. 2008)).

[22] *See* LA. REV. STAT. ANN. § 51:1405 (2012).

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

[24] *Ackal*, 700 F.3d at 218; *see* LA. REV. STAT. ANN. § 42:263(A) (2010).

[25] *Ackal*, 700 F.3d at 216 (quoting FED R. CIV. P. 23(c)(2)(B)(v)).

[26] *Id.* (citing Kern v. Siemens Corp., 393 F.3d 120, 124 (2d Cir. 2004)).

[27] *Id.* at 219. The court also noted that "nothing in section 42:263 suggests that private representation of entities subject to the statute may be undertaken *while* the entities pursue satisfaction of the statute's requirements," and emphasized that the procedural requirements of section 42:263 must be complete *before* class certification. *Id.* The court clarified that "[h]ad Plaintiffs received authorization under section 42:263 for all class members to retain private counsel prior to seeking certification of the class, the outcome of this class certification issue might have been different." *Id.*

[28] *Id.* (quoting Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011)).

[29] *Id.* at 705.

[30] *Id.* at *3. The plaintiff also argued that *Cobb v. Monarch Finance Corp.*, 913 F. Supp. 1164, 1174-75 (N.D. Ill. 1995), supported his argument that determining the personal nature of potential class members' accounts would not require individualized inquiries. However, the district court distinguished the facts of *Cobb* from the present case, because in *Cobb* all the putative class members' personal bank accounts were created "through a similar mechanism for a similar purpose, and because funds were transferred to and from all of the accounts for a similar reason, it was possible for the *Cobb* court to make one class-wide determination regarding the personal nature of each consumer's account." In contrast, this case involved accounts that were established "independently by different consumers, at different banks, and for different purposes," rendering the *Cobb* court's decision to certify an EFTA class "largely inconsequential."

[31] *Id.* (citing *Perry*, 2012 WL 974878, at *6).

[32] *Id.* (citing Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011)).

[33] The Worker Adjustment and Retraining Notification Act (WARN) requires most employers with 100 or more employees to provide notification sixty calendar days in advance of plant closings and mass layoffs. *See* 29 U.S.C. § 2101 (2012).

[34] *See* 2008 WL 4791492, at *1 (N.D. Tex. 2008), *aff'd*, 597 F.3d 330 (5th Cir. 2010).

[35] In this case the Supreme Court vacated the Fifth Circuit's decision in Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co., 597 F.3d 330 (5th Cir. 2010); which was summarized in last year's survey.

[36] *Archdiocese of Milwaukee Supporting Fund, Inc.*, 2012 WL 565997, at *1. It should be noted that because the district court released its opinion before the Fifth Circuit decided *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832 (5th Cir. 2012), it relied on prior Fifth Circuit precedent regarding the standard for commonality that was later overruled by *Perry*. The district court cited the test for commonality as "'not

requir[ing] complete identity of legal claims among the class members'—only that they have 'at least one issue whose resolution will affect all or a significant number of the putative class members.'" 2012 WL 565997, at *1 (quoting Stewart v. Winter, 669 F.2d 328, 335 (5th Cir. 1982)). However, the court in *Perry* noted that after *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the test for commonality is whether the claims depend on a common issue of law or fact whose resolution "will *resolve* an issue *that is central to the validity* of each one of the [class member's] claims in one stroke." M.D. *ex rel.* Stukenberg v. Perry, 675 F.3d 832, 840 (5th Cir. 2012).

[37] The court rejected the defendants' assertion that AMSF's claims were not typical of the class because AMSF used money managers, concluding instead that most of the other class members "no doubt used advisors, brokers, and/or research in making their investments." 2012 WL 565997, at *1.

[38] *See* Castro v. Collecto, Inc., 256 F.R.D. 534, 540 (W.D. Tex. 2009); Hicks v. Client Servs., Inc., 2008 WL 5479111, at *4 (S.D. Fla. 2008).

[39] *Forte*, 2012 WL 2886711, at *3 (quoting *Madison*, 637 F.3d at 556).

[40] *Id.* The elements for TOA penalties include (1) the seriousness of the violation, including the nature, circumstances, extent, and gravity of any prohibited act, and the hazard or potential hazard created to the health, safety, or economic welfare of the public; (2) the economic harm to property or the environment caused by the violation; (3) the history of previous violations; (4) the amount necessary to deter future violations; (5) efforts to correct the violation; and (6) any other matter that justice may require, including the conduct of the plaintiffs. *Id.*

[41] *Dallas County*, 2012 WL 6208385, at *7.

[42] *Id.* The court also rejected the plaintiffs' attempts to distinguish *Ackal*. The plaintiffs cited "a handful" of Texas cases in which certification of a class of *cities* was allowed, even though the cities could not satisfy the statutory requirements for retaining outside counsel. *See, e.g.*, City of San Benito v. Rio Grande Valley Gas Co., 109 S.W.3d 750 (Tex. 2003); Magic Valley Elec. Coop. v. City of Edcouch, 2006 WL 733960 (Tex. App.—Corpus Christi 2006). The district court was not persuaded, concluding that these cases were not controlling for several reasons. *Dallas County*, 2012 WL 6208385, at *10. First, municipalities and counties are treated differently under Texas law, with cities created to regulate internal concerns of its inhabitants and counties created by the sovereign for the purpose of civil administration of the state. The court noted that counties' powers are more strictly construed than those of municipalities, and that counties "may exercise only those powers expressly given by either the Texas Constitution or the Legislature." *Id.* at *9 (quoting City of San Antonio v. City of Boerne, 111 S.W.3d 22, 28 (Tex. 2003)). Furthermore, the cases on which the plaintiffs relied were decided under Rule 42 of the Texas Rules of Civil Procedure, "which is interpreted by an entirely different set of case law than Rule 23." *Id.* at *10. The court concluded that it was bound by the Fifth Circuit's interpretation of Rule 23 in *Ackal*, which prohibited classes that effectively functioned as "opt in" classes.

[43] *Id.* at 1047-48. The settlement class consisted of "all persons in the United States who had or have a payment card that was used in the United States between and including December 26, 2007 and December 31, 2008 (the 'Settlement Class Period'), and who allege or may allege that they have suffered any of the Losses defined herein." *Id.* at 1051.

[44] *Id.* (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997)).

[45] *Id.* (quoting Thomas v. Albright, 139 F.3d 227, 235 (D.C. Cir. 1998)).

[46] *Id.* at 1054 (citing Sullivan v. DB Invs., Inc., 667 F.3d 273, 299-300 (3d Cir. 2011)).

[47] *Id.* The court discussed the heightened commonality standard of *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011), and noted that "[t]he focus in the settlement context should be on the conduct (or misconduct) of the defendant and the injury suffered as a consequence." 851 F. Supp. 2d at 1053 (citing *Sullivan*, 667 F.3d. at 335 (Scirica, J., concurring)). In reaching its conclusion that commonality was satisfied, the court compared the present case to two recent circuit court cases in which commonality was satisfied. The court first analyzed *Sullivan v. DB Investments, Inc.*, 613 F.3d 134 (3d Cir. 2010), in which the Third Circuit found commonality due to common questions of fact (whether defendant De Beers engaged in anticompetitive activity, and whether that activity resulted in artificially inflated diamond prices), and common questions of law (whether defendant De Beers's anticompetitive activity violated federal and state antitrust law). *Id.* at 1053. To the Third Circuit, the questions of fact were "unaffected by the particularized conduct of individual class members, as proof of liability and liability itself would depend entirely upon De Beers's allegedly anticompetitive activities," while the questions of law "would entail generalized common proof as to the implementation of De Beers's conspiracy . . . ." *Id.* (quoting *Sullivan*, 613 F.3d at 300). The Third Circuit concluded that these questions satisfied the heightened *Wal-Mart* standard because the answers would be common to all class members and would "inform the resolution of the litigation if it were not being settled." *Id.* (quoting *Sullivan*, 613 F.3d at 299–300). Next, the court analyzed *Ross v. RBS Citizens, N.A.*, 667 F.3d 900 (7th Cir. 2012), in which the Seventh Circuit found commonality. In *Ross*, a group of over 1,000 employees of a bank asserted violations of the Fair Labor Standards Act, alleging that the bank maintained an unofficial policy of denying overtime to its employees. The district court in *Heartland* noted how the Seventh Circuit distinguished *Wal-Mart* from *Ross*, because unlike *Wal-Mart*, *Ross* "involved a central, if unofficial, policy of denying employees' overtime pay [which was] 'the common answer that potentially [drove] the resolution of [the] litigation.'" *Id.* at 1054 (quoting *Ross*, 667 F.3d at 903).The district court concluded that the present case was more similar to *Sullivan* and *Ross* than to *Dukes*, and thus found commonality. *Id.* at 1054.

[48] *Id.*

[49] 851 F. Supp. 2d at 1055. The court noted that in *Stirman v. Exxon Corp.*, 280 F.3d 554, 562 (5th Cir. 2002), the Fifth Circuit held that significant variations in state law may preclude typicality. However, the district court emphasized that in *Stirman*, certain states did not recognize the claim that the class representatives asserted. To the district court, '[s]uch claim-dispositive variations [were] readily distinguishable from such differences as dissimilarities in specific claim elements that must be proven at trial, or differences in burdens of proof." *Id.* at 1055.

[50] *See* Unger v. Amedisys Inc., 401 F.3d 316, 321 (5th Cir. 2005) (citing Berger v. Compaq Computer Corp., 257 F.3d 475, 482 (5th Cir. 2001)).

[51] *Heartland*, 851 F. Supp. 2d at 1057.

[52] *Id.* The court noted that "[g]iven the minimal individual stakes, Heartland's general denial of wrongdoing, and the complexities of crafting a class-action settlement, individual class members cannot plausibly be expected to have significant involvement." *Id.*

[53] The court noted that this is a threshold issue, and that "[a] district court's '[f]ailure to engage in an analysis of state law variations is grounds for decertification.'" *Id.* (citing Cole v. Gen. Motors Corp., 484 F.3d 717, 724 (5th Cir. 2007)).

[54] *See* Sullivan v. DB Invs., Inc., 667 F.3d 273, 299-300 (3d Cir. 2011) (certifying settlement class despite variations in state law); *Cole*, 484 F.3d at 724 (decertifying litigation class due to variations in state law).

[55] *In re Heartland*, 851 F. Supp. 2d at 1059 (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997)).

[56] *Id.* at 1059.

[57] *Id.* at 1060 (citing Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc., 601 F.3d 1159, 1184 (11th Cir. 2010)).

[58] *Id.* (quoting Castano v. Am. Tobacco Co., 84 F.3d 734, 748 (5th Cir. 1996)).

[59] *Id.*

[60] *Id.* at 1060-69. Rule 23(e) states: (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal; (2) if the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate; (3) the parties seeking approval must file a statement identifying any agreement made in connection with the proposal; (4) if the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so; and (5) any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval. FED. RULE CIV. P. 23(e). While the court analyzed all five factors, this article's discussion is limited to the court's treatment of the Rule 23(e)(2) requirement that the settlement be fair, reasonable, and adequate.

[61] *In re Heartland*, 851 F. Supp. 2d at 1063-64. The court noted how it is common practice for class counsel to negotiate a fee after they have negotiated the class's recovery and that just because the parties had not yet agreed to a range of attorney's fees, it did not mean there was a threat of this issue tainting the fairness of the settlement bargaining. *Id.* (citing Turner v. Murphy Oil USA, Inc., 472 F. Supp. 2d 830, 844 (E.D. La. 2007)).

[62] The court also noted that the plaintiffs would have a difficult time proving their breach of contract claim because they were not parties to the contracts and would have to prove they were third-party beneficiaries to the contracts between Heartland and the retail merchants. *Id.* at 1066. In addition, absent settlement, the state law variations would have to be carefully analyzed presenting further challenges to certifying the class. *Id.*

[63] The court concluded that "[t]he cy pres provision [of the settlement] is essentially the damages award," which would "indirectly benefit not just the class members, but all payment-card holders." *Id.* at 1067. Because there were a very small number of claims filed after an extensive settlement notice campaign, the upper range of the settlement far outweighed the highest recovery possible at trial.

[64] *Id.* at 1068-69.

[65] The court noted that even if all the other requirements for class certification were met, such as the four Rule 23(a) prerequisites, the predominance factor was dispositive. As such, the court limited its analysis to a discussion of predominance and addressed only the arguments advanced by the parties.

[66] *Id.* (quoting Allison v. Citgo Petroleum Corp., 151 F.3d 402, 419 (5th Cir. 1998)).

[67] *MP Vista, Inc.*, 2012 WL 4322606, at *10. The court also found persuasive the defendants' expert's analysis which showed that "even markets that did not potentially receive contaminated gasoline also experienced a sales decline during the relevant period." *Id.*

[68] *MP Vista, Inc.*, 2012 WL 4322606, at *11.

[69] *Id.* (quoting O'Sullivan v. Countrywide Home Loans, Inc., 319 F.3d 732, 738 (5th Cir. 2003)).

[70] Redhibition is a civil action that is unique to Louisiana law that allows "[t]he voidance of a sale as the result of an action brought on account of some defect in a thing sold, on grounds that the defect renders the thing either useless or so imperfect that the buyer would not have originally purchased it." BLACK'S LAW DICTIONARY (9th ed. 2009).

[71] *Brandner,* 2012 WL 195540, at *4.

[72] *Id.* (quoting Bonnette v. Conoco, Inc., 837 So.2d 1219, 1235 (La. 2003)).

[73] *Id.* (citing Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 307 (5th Cir. 2003)).

[74] *Brandner*, 2012 WL 195540, at *8 (quoting Levin v. May, 887 So. 2d 497, 503 (La. App. 2004)).

[75] *Id.* The court similarly rejected Brandner's other arguments that she could prove the required defects using classwide proof. The court emphasized the fact that even Brandner's expert concluded there was no scientific way to evaluate contamination in the 117,390,152 units that were recalled but not tested by Abbott, and that just because a product satisfied the FDA's definition of "adulterated" under the Federal Food, Drug, and Cosmetic Act ("FDCA"), that did not mean it was *actually* contaminated for purposes of redhibition (as the FDCA definition of "adulterated" included products that *may* have been contaminated or *may* have been rendered injurious to health). *Id.* at *9.

[76] It should be noted that although the district court's opinion came out after the Fifth Circuit's opinion in *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832 (5th Cir. 2012), which adopted the heightened commonality standard of *Wal-Mart*, the district court cited old Fifth Circuit precedent to state that commonality was met when "there is at least one issue whose resolution will affect all or a significant number of the putative class members." *Burford,* 2012 WL 5472118, at *2 (citing *Mullen*, 186 F.3d at 625). However, this standard was explicitly overruled by the Fifth Circuit in *Perry*. *See* 675 F.3d at 840. This discrepancy might be explained by the fact that *Perry* and *Wal-Mart* were both litigation classes, whereas certification in the present case was strictly for settlement purposes.

[77] *Burford*, 2012 WL 5472118, at *2.

[78] *Id.* at *3. The court also looked to the four factors listed in Rule 23(b)(3) and concluded all four weighed in favor of certification. *Id.* The court held that (1) only three opt-outs were filed, and the absence of a desire to proceed with a separate action favored certification; (2) there were no other actions pending by class members; (3) the court had invested several years in resolving contested issues and developed "considerable familiarity" with the case; and (4) the case presented no challenges that could not be adequately managed by the court with the assistance of competent counsel. *Id.* at *3-4.

[79] *Id.* at *3-5.

[80] *Id.* at *9 (citing 1 NEWBERG ON CLASS ACTIONS § 3:3 (4th ed. 2010)).

[81] *Id.* at *11.

[82] *Id.*

[83] *Id.* at *2.

[84] *Id.* at *14. The class definition was included as an appendix to the court's order describing the class in great detail and spanning over four pages. *See id.* at *65-70.

[85] *Id.* at *15; *See, e.g.*, Mullen v. Treasure Chest Casino LLC, 186 F.3d 620, 624 (5th Cir. 1999) (between one hundred and one hundred fifty); Sagers v. Yellow Freight Sys., 529 F.2d 721, 734 (5th Cir. 1976) (approximately one hundred ten).

[86] *In re Oil Spill*, 2012 WL 6652608, at *15 (citing Stott v. Cap. Fin. Servs., 277 F.R.D. 316, 324 (N.D. Tex. 2011)).

[87] *Id.* at *16-17.

[88] *In re Oil Spill*, 2012 WL 6652608, at *21.

[89] *Id.* at *23. The court also emphasized the difficulties individual plaintiffs would have if the class was not certified, noting that "[i]f this case is not resolved as a class action, in theory each plaintiff might have to individually litigate each of these fact questions. Each claimant might need to repetitively present factual evidence about BP's well design, source control, and pollution containment. Moreover, each individual plaintiff would need to use expert modeling and testimony to establish BP's negligence or other culpable conduct. In sum, litigation of these issues would 'involve the same cast of characters, events, discovery, documents, fact witnesses, and experts.'" *Id.*

[90] *Id.* at *24.

[91] *Id.* (citing Baxter Healthcare Corp. v. United States, 925 F. Supp. 794, 797 (Ct. Int'l Trade 1996)).

[92] *Id.* at *26.

[93] *Id.* at *29.

[94] *Id.* at *29-31.

[95] *Id.* at *31; *See* Kincade v. Gen. Tire & Rubber Co., 635 F.2d 501, 507 (5th Cir. 1981); Collins v. Sanderson Farms, Inc., 568 F. Supp. 2d 714, 720 (E.D. La. 2008).

[96] *In re Oil Spill*, 2012 WL 6652608, at *33. The court conceded that the government investigations were conducted outside the multidistrict litigation and might not be admissible in evidence but claimed they were still relevant to whether the parties were sufficiently informed to reach a settlement. *Id.* (citing DeHoyos v. Allstate Corp., 240 F.R.D. 269, 292 (W.D. Tex. 2007)).

[97] *Id.* at *35 (quoting Declaration of Court Appointed Expert Arthur R. Miller ¶ 44, *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, 2012 WL 6652608 (E.D. La. 2012)).

[98] *Id.* at *4 (quoting Warnock v. State Farm Mut. Auto. Ins. Co., 2011 WL 1113475, *9 (S.D. Miss. 2011)).

[99] *Id.* at *7 (citing Castano v. Am. Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996)).

[100] *Id.*

[101] *Id.* at *8.

[102] *Id.* at *9; *see* Simon v. Merrill Lynch, Pierce, Fenner & Smith, 482 F.2d 880, 884-85 (5th Cir. 1973) (holding that a fraud class action cannot be certified when individual reliance is at issue); Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co., 319 F.3d 205, 220 (5th Cir. 2003) ("A class cannot be certified when evidence of individual reliance will be necessary.").

[103] *Burkett*, 2012 WL 3811741, at *9. The court relied on Fifth Circuit precedent for guidance, noting that "[c]lass treatment 'may not be suitable where the calculation of damages is not susceptible to a mathematical or formulaic calculation, or where the formula by which the parties propose to calculate individual damages is clearly inadequate.'" *Id.* at *9 (quoting Bell Atl. Corp. v. AT&T Corp. 339 F.3d 294, 307 (5th Cir. 2003)).

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