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CLASS ACTION DEVELOPMENTS

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Cover: "Weeping Moss on Oak Creek Cliff Face, near Sedona, Arizona"
Photograph by Larry Gustafson, Dallas, Texas

April 22, 2015

Dear Section Members:

It is time for the winter edition of the *Journal*. This edition of the *Journal* features Barry Golden's annual survey of Fifth Circuit class action cases. Thank you Barry for once again preparing this interesting article.

The Section is hard at work on planning the annual meeting at the State Bar's conference this summer in San Antonio on June 18 and 19. The program, called *Inside the Insider Trading Trial of Mark Cuban*, will be presented by Tom Melsheimer. In addition, we will also be awarding our annual Distinguished Counselor Award. We hope you will make plans to attend the annual meeting and our section meeting on Thursday, June 18 in particular. We look forward to seeing you in San Antonio in June.

The Antitrust and Business Litigation council is constantly looking for ways to improve our service to our members. To do that effectively, we need your suggestions for ways the Section could assist you or your practice. Please send your comments to me or any other council member. For a complete list of our council and for other important Section information, I invite you to visit the Section's website, http://texbuslit.org.

I hope you enjoy this edition of the *Journal*. If you are interested in submitting an article in a future edition, please contact Mike Ferrill (amferrill@coxsmith.com).

I await your thoughts and suggestions.

Regards,

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2014 Annual Survey of Fifth Circuit Class Action Cases

By Barry M. Golden[1]

The Fifth Circuit Court of Appeals and the district courts in Texas, Louisiana, and Mississippi that make up the Fifth Circuit saw a nominal increase in class action activity in 2014 compared to 2013. In 2013, the courts of the Fifth Circuit decided twelve cases that addressed Rule 23 class certification, including one class action settlement. In 2014 the same courts decided thirteen cases that addressed Rule 23 certification. Once again, the *Deepwater Horizon* litigation played a prominent role in class action settlement activity in the Fifth Circuit.

In 2014, the Fifth Circuit and its constituent district courts in Texas, Louisiana, and Mississippi addressed a wide spectrum of class actions involving Rule 23 issues impacting federal laws such as the Securities Exchange Act, the Fair and Accurate Credit Transactions Act (FACTA), the Fair Labor Standards Act (FLSA), Title VII Employment Discrimination, the Electronic Funds Transfer Act (EFTA), the Federal Arbitration Act (FAA), and the Americans with Disabilities Act (ADA). The district courts in all three states also addressed several certification issues involving state law. The following is a summary of decisions from the court of appeals and constituent district courts that addressed Rule 23's requirements for litigating class actions in the Fifth Circuit.

A. Fifth Circuit Cases

1. Federal Law

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

In *Odle v. Wal-Mart Stores, Inc.*, 747 F.3d 315 (5th Cir. 2014), the plaintiff-appellant Stephanie Odle was originally a member of the class of plaintiffs in *Wal–Mart Stores, Inc v. Dukes*, 131 S. Ct. 2541 (2011), "one of the most expansive class actions" certified in the United States (former employees who alleged violations of Title VII).[2] Following several years of litigation over certification, the Supreme Court finally decertified the *Dukes* class in June 2011.[3] Odle subsequently filed a putative class action suit in the Northern District of Texas.[4] The district court dismissed Odle's individual claims because they were not tolled and, therefore, were time barred.[5] On appeal, the Fifth Circuit reversed, holding that under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the statute of limitations was tolled when Odle filed her complaint in this case.[6] The court held that the Ninth Circuit's decision in prior class action litigation that excluded former Wal-Mart employees from the class was not a final determination.[7]

Originally, the *Dukes* plaintiffs filed a motion for certification under Rule 23(b)(2), or alternatively, under Rule 23(b)(3).[8] The California district court certified a class of female employees seeking damages under Title VII under Rule 23(b)(2).[9] Wal-Mart then appealed the certification to the Ninth Circuit, which held that employees who were no longer working for the company lacked standing under Rule 23(b)(2).[10] But the court noted: "this does not mean that former employees are ineligible to receive any form of relief . . . they may be eligible to receive

back pay and punitive damages." Class members who were employees when the suit was filed were certified under Rule 23(b)(2) "with respect to claims for injunctive relief, declaratory relief, and back pay."[11] On appeal, the Supreme Court held that, even as narrowed to include only current employees, the Rule 23(b)(2) class did not meet the Rule 23(a) commonality requirement.[12] The *Dukes* plaintiffs moved to extend tolling of the statute of limitations, and the California district court granted a limited period of additional tolling in the interest of justice and to avoid any confusion that may have existed among former class members.[13]

Odle then filed suit on October 28, 2011, as a putative class action against Wal-Mart in the Texas district court on behalf of herself and all others similarly situated who had been subjected to gender discrimination as a result of specific policies and practices in Wal-Mart's regions located in whole or in part in Texas.[14] Odle and the other named plaintiffs alleged that Wal-Mart had denied them equal opportunities for promotion and equal pay for retail store positions.[15] Wal-Mart moved to dismiss, stating that, because Odle did not file the complaint until October 28, 2011 the lawsuit was not timely filed, so the claims were extinguished by the running of the statute of limitations.[16] The Texas district court granted that motion and dismissed Odle's individual claims.[17]

The Fifth Circuit rejected Wal-Mart's contention, stating that "for Odle, as a member of the putative Rule 23(b)(3) class of former Wal-Mart employees, the Ninth Circuit's en banc *Dukes* opinion was not a final adverse determination. . ., so tolling did not cease as to her when the mandate issued."[18] The court held that since Odle had filed this suit before the California district court's October 28, 2011, filing deadline, her action was timely. Dismissal would "frustrate *American Pipe's* careful balancing of the competing goals of class action litigation on the one hand and statutes of limitation on the other, by requiring former class members to file duplicative, needless individual lawsuits before the court could resolve the class certification issue definitively."[19]

b. Mabary v. Home Town Bank, N.A.

In *Mabary v. Home Town Bank*, N.A., 77 F.3d 820 (5th Cir. 2014), Lisa Mabary filed a class action against Home Town Bank, claiming that the defendant violated the Electronic Funds Transfer Act 15 U.S.C. 1963, et seq., ("EFTA") when it failed to post an external notice of fees on automatic teller machines. Prior to class certification, however, Congress amended the EFTA to eliminate the external notice requirement.[20] Thus the district court dismissed the claim and denied class certification.[21] The Fifth Circuit reversed the dismissal, and vacated the denial of class certification.[22]

On October 19, 2010, Mabary sued Home Town Bank on behalf of herself and others similarly situated, alleging that Home Town violated the EFTA. The EFTA requires that an ATM operator provide notice that a fee will be charged for a withdrawal and the amount of the fee.[23] At the time, the statute required the notice to be posted in two places.[24] If the fee is charged without notice, the Act allows consumers to recover actual damages, statutory damages, costs, and fees.[25]

On October 5, 2011, Home Town filed a motion to dismiss, or alternatively, for a stay. Home Town argued that Mabary lacked standing because she did not suffer an injury-in-fact.[26] On November 22, 2011, however, the district court certified the class.[27] But on December 21, the

court decertified the class, concluding that it did not properly resolve Home Town's motion to dismiss. Home Town also requested a stay while the Supreme Court reviewed a similar case, *First American Financial Corporation v. Edwards*, 132 S. Ct. 2536 (2012). The district court granted the stay, but the Supreme Court dismissed *First American*. The district court then found that Mabary did have standing because the injury may exist solely by virtue of the invasion of legal rights.[28] But on December 20, Congress enacted H.R. 4367 (the "EFTA amendment"), which repealed the notice requirement.[29] On July 15, 2013, the district court then denied Mabary's motion for class certification and dismissed the suit, finding that the claim did not survive passage of H.R. 4367.[30]

Turning to whether the EFTA amendment applied to Mabary's claims, which were based on withdrawals that pre-dated the amendment, the court stated that "our starting point is the deeply rooted presumption against retroactivity . . . We first determine whether Congress unambiguously has prescribed the statute's proper reach, determined by applying normal rules of statutory construction to the express language to determine Congress's intent. Failing that, we then look to whether the new statute would have retroactive effect."[31] The court held that a statute which "takes away rights under then-existing laws, creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."[32]

c. Ticknor v. Rouse's Enterprises L.L.C.

In *Ticknor v. Rouse's Enterprises, LLC,* No. 14-30550, 2014 WL 6440397 (5th Cir. 2014), three plaintiffs filed a motion to certify a class action, alleging that a grocery chain violated the Fair and Accurate Credit Transactions Act ("FACTA"). The United States District Court for the Eastern District of Louisiana denied class certification based on Rule 23 predominance and superiority grounds.[33] Using an abuse of discretion standard of review, the Fifth Circuit affirmed denial of certification.

The plaintiffs asserted that Rouse's Enterprises, a New Orleans-based grocery chain, violated section 1681c(g) of FACTA by allowing credit card expiration dates to be printed on receipts. The pertinent FACTA provision states, "No person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction."[34] After discovery, the plaintiffs moved under Rule 23(b)(3) to certify a nationwide class of persons who made in-store purchases using a debit or credit card in a transaction occurring from May 8, 2010 through May 10, 2012.[35]

The district court denied certification because the plaintiffs failed to show that common issues predominated, inasmuch as it would be necessary to determine if each class member was a "cardholder," a "consumer," and someone who actually received a receipt.[36] The court also found that individual "mini-trials" necessary to resolve each class member's claims would "be impracticable and a waste of judicial resources" and, therefore, the plaintiffs had "not carried their burden of showing a class action is a superior method for adjudicating this case."[37] The plaintiffs took an interlocutory appeal. The Fifth Circuit affirmed, noting that "Certification of a class under Rule 23(b)(3) requires that: (1) the questions of law or fact common to class members predominate over any questions affecting only individual members, and (2) a class

action is superior to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3)."[38]

Relying on *Mims v. Stewart Title Guaranty Co.,* 590 F.3d 298, 307 (5th Cir. 2009), the court held that class issues do not predominate when "transaction-by-transaction" determinations are needed.[39] These issues thus created predominance and manageability problems.[40] Additionally, the court recognized that "the availability of attorney's fees and punitive damages is a common basis for finding non-superiority, as the aggregation of claims is not necessary to facilitate suits in such instances."[41] The court also stated, "The most compelling rationale for finding superiority in a class action—the existence of a negative value suit—is missing in this case."[42]

2. Class Action Settlements

a. Background: In re Deepwater Horizon Litigation (*In re Deepwater Horizon 1*)

A prominent feature of class action activity in the Fifth Circuit in 2013, litigation collateral to the Deepwater Horizon oil spill in the Gulf of Mexico continued to work its way through the court of appeals in 2014. Before proceeding to decisions handed down in 2014, the following is a recap—featured in last year's survey—of where the previous year's litigation has brought us.

In *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, No. 2:10-MD-02179-CJB-SS, 2012 WL 6652608, at *1 (E.D. La. Dec. 21, 2012), the U.S. District Court for the Eastern District of Louisiana provided an analysis of the class action settlement that resolved thousands of claims for economic loss and property damage from the Deepwater Horizon oil spill. The court began its analysis with the four Rule 23(a) prerequisites, finding 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."[43] The court also engaged in a detailed commonality analysis, noting that commonality was easily satisfied, as the overarching questions of law and fact related to the liability of BP and its contractors.[44] The court also found predominance under Rule 23(b)(3). With respect to common questions of law, the court emphasized how legal questions would be determined under a common framework of federal law.[45] The court underscored the importance of the numerous jurisdictional issues, noting, "it is well established that jurisdictional issues can raise questions that satisfy the commonality standard."[46] 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."[47] The district court concluded its analysis by stating, "There can be no serious doubt that a class action is a superior method of resolving this litigation."[48]

The court then analyzed the four factors within Rule 23(b)(3*)*: (1) most plaintiffs would have little interest in litigation outside of a class action due to the enormous expense of individual litigation compared to a modest recovery, (2) 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," (3) 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 (4) the class settlement was far easier to manage than thousands of individual actions.[49] The court

cited a strong presumption in favor of finding settlements fair, reasonable, and adequate due to the public policy of favoring voluntary settlements of class actions.[50]

Prior to the court's ruling BP requested that the administrator convene a panel to consider the issue of the proper assignment of revenue. The claims administrator issued a statement on January 15, 2013, stating that he would consider both revenues and expenses in the periods in which those revenues and expenses were recorded at the time.[51] On January 30, 2013, the district court affirmed the administrator's announcement, and BP filed a motion to reconsider, which the court denied on March 5.

On appeal to the Fifth Circuit (*In re Deepwater Horizon I*), BP argued that the district court disregarded the plain meaning of the settlement by interpreting it to allow for recovery of fictitious and inflated losses. The court of appeals addressed accounting principles that were fundamental to the meaning of the agreement, differentiating between accrual-basis claimants and cash-basis claimants.[52] With respect to the issue of "fictitious claims," the court of appeals held that "if a claimant has suffered a loss, but it has no colorable claim that the loss was caused by the spill, it also lacks standing and cannot state a claim.[53] In order to avoid dismissal, the court must find that the class as well as the representatives have suffered injury, and therefore the court held that the district court had no authority to approve a settlement of a class that contained members who had not suffered losses related to the oil spill. Under such circumstances, the settlement would be unlawful.[54]

The court held that: (1) remand was appropriate for the proper interpretation of an ambiguous exhibit as to whether claims for business losses that were not based on matched revenues and expenditures were to be matched; (2) the district court had no authority to approve the settlement of a class action which included members that had not sustained losses, or had sustained losses unrelated to the oil spill; and (3) the balance of equities favored a tailored stay pending appeal of the denial of BP's request for a preliminary injunction.[55] After consideration of the arguments, the panel in *Deepwater Horizon I* remanded the case for further proceedings to reexamine the contractual interpretation questions arising under Exhibit 4C.[56] The district court issued an additional ruling on December 24, 2013,[57] which BP challenged once again, setting off a new round of interlocutory appeals.

b. In re Deepwater Horizon II

In re Deepwater Horizon II, 739 F.3d 790 (5th Cir.), *cert. denied sub nom.*, BP Exploration & Prod., Inc. v. Lake Eugenie Land & Dev., Inc., 135 S. Ct. 754 (2014), was an interlocutory appeal from the district court's order certifying a class action and approving a settlement under Rule 23. The court of appeals held: (1) the named plaintiffs had Article III standing; (2) the district court correctly found that the plaintiffs' allegations satisfied Rule 23's commonality requirement; (3) the district court did not abuse its discretion by declining to require subclasses for claimants based in Texas, Louisiana, Alabama, Florida, and Mississippi; and (4) the district court did not abuse its discretion by ruling that the class notice was sufficient.

BP's argument with respect to standing was that Article III "preclude[s] certification of a settlement class that includes members that have suffered no injury" or "who suffered no harm caused by the *Deepwater Horizon* incident."[58] BP argued that because an unidentified number of

individuals had received and may continue to receive payments under the class settlement, Article III required reversal of the district court's order.[59]

After a thorough analysis of Article III standing precedent, the court noted that, "had the class in this case been certified under Rule 23 for further proceedings on the merits rather than for settlement, the district court might ultimately have had occasion to apply a stricter evidentiary standard. As the district court said explicitly, 'certain causation issues . . . would have to be decided on an individual basis were the cases not being settled,' including 'for example, the extent to which the *Deepwater Horizon* incident versus other factors caused a decline in the income of an individual or business.'"[60]

The court took note that it was impractical to require evidence of a claim in the context of the parties seeking settlement under Rule 23(e). "Logically, requiring absent class members to prove their claims prior to settlement under Rule 23(e) would eliminate class settlement because there would be no need to settle a claim that was already proven."[61] And, "such a rule would thwart the overriding public interest in favor of settlement that we have recognized."[62] Under 28 U.S.C. §§ 1711–15, "defendants are entitled to settle claims pending against them on a class-wide basis even if a court believes that those claims may be meritless, provided that the class is properly certified under Rules 23(a) and (b) and the settlement is fair under Rule 23(e)."[63] The court noted that the evidentiary standard applied by the claims administrator was not a question of Article III standing, but rather was a question of interpreting the settlement agreement and applying it to each claim.[64]

BP raised a host of Rule 23 objections to class certification, to which the court responded by concluding, "The numerous arguments that BP and the Objectors have raised with respect to each of the provisions of Rule 23 are variants, for the most part, of a single argument. Based on our previous decisions, we would reject this argument even if we could consider BP's evidence and accept its factual premise, which we cannot. Under *Mims* and *Rodriguez*, '[c]lass certification is not precluded simply because a class may include persons who have not been injured by the defendant's conduct.'"[65]

The court noted that because it assumed *arguendo* the merits of petitioner's claims, the district court's order was affirmed.[66] Following the court's affirmation of the settlement agreement in *Deepwater Horizon II*, BP again filed an appeal with respect to certain issues arising under the agreement approved by the district court in December 2012.[67] Specific to this appeal was the mechanism provided by the settlement for presenting and processing claims for business losses caused by the oil spill.[68] As directed by the court's October 2013 remand, the district court made two rulings: The first concerned a specific accounting question with respect to claims, which was resolved in a satisfactory manner; the second ruling was that the settlement agreement did not require evidence of causation on the part of those submitting claims for business losses.[69] This second aspect of the ruling, however, was appealed by BP, arguing that an injunction was required to stop payments on such claims.[70]

The court of appeals affirmed the district court's December 24, 2013 order interpreting the settlement agreement.[71] The court also vacated an injunction, which had been in place preventing payment of BEL claims pending the resolution of these legal issues.[72] The court stated, "Between the certification panel's decision of January 10 and ours today, all issues presented to this panel have been resolved."[73] BP immediately petitioned for a rehearing. The

court held that the settlement agreement did not expand class membership to claimants whose injuries lacked a causal nexus as would violate Article III's standing requirements, and the petition was therefore denied.[74] On the same day, May 19, 2014, the court also denied BP's petition for an *en banc* rehearing of its appeal.[75]

B. Texas District Court Cases

1. Federal Law

a. Gilkerson v. Chasewood

In *Gilkerson v. Chasewood Bank*, 1 F. Supp. 3d 570 (S.D. Tex. 2014), Victoria Gilkerson, a blind customer, and Blind Ambitions Groups ("BAG"), an organization that represented members of the blind community brought a putative class action suit against the bank, alleging the bank failed to make its automated teller machine ("ATM") accessible to the blind and other visually impaired persons by adding voice guidance and universal tactile key pads in violation of Title III of the Americans with Disabilities Act ("ADA"),[76] its implementing regulations,[77] the Texas Human Resource Code ("THRC"),[78] the Texas Architectural Barrier Act ("TABA"), and its Texas Accessibility Standards ("TAS").[79] Chasewood Bank filed several motions to dismiss. The district court denied the motions, holding: (1) the customer had standing to bring the action; (2) BAG had associational standing; but (3) BAG lacked organizational standing to bring action on its own behalf.[80]

With respect to standing, the district court noted that for each claim, a plaintiff must demonstrate that she satisfies the Article III requirements: (1) injury in fact; (2) causation; and (3) redressibility.[81] The injury-in-fact requirement is qualitative, not quantitative.[82] An "injury in fact" must be "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."[83] A plaintiff may demonstrate causation by showing that the injury is traceable to the action of the defendant, and not merely the result of the independent actions of a third party.[84] To demonstrate redressibility, the plaintiff must be able to demonstrate that it is likely, not speculative, that a favorable ruling will redress the injury.[85] The court found as both "tester" and "patron," the plaintiff had standing to bring the class action under Rule 23(a) and 23(b)(3).[86]

b. In re Kosmos Energy Ltd. Securities Litigation

In re Kosmos Energy Ltd. Securities Litigation, 299 F.R.D. 133 (N.D. Tex. 2014), was a securities class action brought under sections 11, 12(a)(2), and 15 of the Securities Act of 1933 ("the Act"). The chief issue before the district court was whether to grant the lead plaintiff's motion to certify a class of investors who had purchased common stock from Kosmos Energy Ltd., through its initial public offering, and were financially damaged.[87] The court found that the lead plaintiff failed to satisfy the requirements of Rule 23. Specifically, the court held: (1) the investor failed to demonstrate that he could adequately represent the interests of the entire class of investors; and (2) the investor could not show that common questions of law or fact predominated over any questions affecting only individual members. On that basis, the court denied the motion to certify the class.[88]

In its analysis, the court took note that the lead plaintiff bears the burden of establishing all four general elements for class certification under Rule 23(a): numerosity, commonality, typicality, and adequacy.[89] The plaintiff also bears the burden of establishing two additional certification requirements under Rule 23(b)(3): "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[90] The district court examined whether the plan satisfied its burden for the two elements central to this dispute—the lead plaintiff's adequacy under Rule 23(a)(1), and predominance under Rule 23(b)(3).[91]

The court engaged in a lengthy and sophisticated analysis of Rule 23's adequacy and predominance doctrines, applying a particularly rigorous standard in the arena of securities law, calling for the analysis to be "particularly searching."[92] The court found that the lead plaintiff failed to meet the burden of showing that common issues of fact and law predominate over individual issues.[93] Taking note that "while Defendants offered a 107–page Expert Report demonstrating the need for individual inquiries into investor knowledge, Lead Plaintiff offered no proof from which to draw an inference that individual inquiries may not be required if the court were to certify this putative class that is likely to number in the thousands."[94] And, "Since Lead Plaintiff ignored the burden placed on it by *Comcast* and related cases, the court must deny certification for failure to show predominance under Rule 23(b)(3)."[95]

c. In re Wells Fargo Wage and Hour Employment Practices Litigation

In re Wells Fargo Wage and Hour Employment Practices Litigation, 18 F. Supp. 3d 844 (S.D. Tex. 2014), was a multi-district litigation incorporating five cases in which the plaintiffs (home mortgage consultants, mortgage consultants, loan originators, loan consultants, or similar positions) asserted that they were not paid overtime compensation, and for failure to allow employee meal and break periods under Washington state law. Lead plaintiffs moved for reconsideration of the order granting a motion for approval of settlement on behalf of the Fair Labor Standards Act (FLSA).[96] This litigation involved three of the five cases: *Richardson v. Wells Fargo Bank, N.A.*, No. 10–CV–4949, *Chaplin v. Wachovia Mortgage Corp.*, No. 11–CV–638, and *Chan v. Wells Fargo Home Mortgage, Inc.*, No. 11–CV–3275. The *Chaplin* and *Richardson* cases asserted claims for violation of the FLSA on behalf of the named plaintiffs and those similarly situated throughout the nation.[97]

The district court conditionally certified nationwide classes of plaintiffs in *Chaplin* and *Richardson*, and also approved a notice of collective action on behalf of current and former mortgage loan officers employed by Wells Fargo or Wachovia.[98] Following the required notice period, more than 4,000 opt-in plaintiffs became members of the FLSA collective action, and after mediation, the parties agreed to settle the wage-and-hour claims of the plaintiffs who opted in to the *Richardson* and *Chaplin* classes.[99] According to the terms of the settlement, each plaintiff was entitled to a proportionate share of the fund according to tenure and compensation.[100]

In exchange for these funds, the defendants required a release, which included "any claims derived from or based upon or related to or arising out of the same factual predicate of the *Richardson* Complaint and the *Chaplin* Complaint, whether known or unknown."[101] Lead counsel filed a motion for approval of the settlement on March 25, 2014. But on March 31, the

Chan plaintiffs filed objections to the proposed settlement.[102] Subsequently, the hearing to approve the settlement was held on April 4, 2014. The defendants asserted that the plaintiffs did not have standing to object, as the named plaintiffs did not opt into the FLSA action, and no class had yet been certified in *Chan*.[103] The court agreed, and granted the motion approving the settlement on April 4, 2014.[104]

In this action, the *Chan* plaintiffs requested reconsideration of the order, claiming that they lacked sufficient time to fully develop their argument, they have standing due to a fiduciary duty to the class members, and the class notice did not inform the Washington opt-in plaintiffs that they may be giving up their state law claims.[105] The plaintiffs also claimed that the court should not have approved the settlement since it did not enter a final order certifying the collective action.[106]

The court overruled the *Chan* plaintiffs' objection to the settlement primarily because the plaintiffs lacked standing.[107] The court also found the settlement to be fair and reasonable, and not a due process violation.[108] Regarding the issue of a final order, the court stated that it had conditionally certified the class on August 10, 2012, and even though there is a second stage in FLSA collective actions during which the court may decertify the class if necessary, there was no need here since the parties settled the case.[109] The court stated, "The *Chan* Plaintiffs cite cases from district courts outside of the Fifth Circuit indicating that a 'final' certification is required prior to approving an FLSA collective action settlement . . . However, courts in the Fifth Circuit have never imposed such a requirement and the court is not persuaded that it is necessary or appropriate."[110]

2. State Law

a. McPeters v. LexisNexis

In *McPeters v. LexisNexis*, 11 F. Supp. 3d 789 (S.D. Tex. 2014), the plaintiffs filed a putative class action in Texas state court against LexisNexis as provider of e-filing services, alleging that certain charges violated the Texas Deceptive Trade Practices–Consumer Protection Act ("DTPA"), the Texas Free Enterprise and Antitrust Act ("TFEAA"), the Texas Theft Liability Act, state tort law, and the Texas Constitution. Following removal, the plaintiff's TFEAA claim was dismissed, and the plaintiffs moved for reconsideration and for class certification.[111] The defendant moved for summary judgment. The court held: (1) the defendant was not entitled to judicial immunity; (2) the plaintiffs lacked antitrust standing to assert a TFEAA claim; (3) class certification of the DTPA claim was not warranted; (4) the filing fees charged by the defendant were not unconscionable; and (5) the filing fees did not violate the Texas Constitution's open courts provision.[112]

The plaintiff sought to certify a class under Rule 23(b)(3). In addition to the standard Rule 23(a) factors—numerosity, commonality, typicality, and adequacy—Rule 23(b)(3) "requires a court to find that the questions of law or fact common to class members predominate over any questions affecting only individual members."[113] A plaintiff seeking certification must also show that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[114] Citing *Erica P. John Fund*, 718 F.3d 423, 431 (5th Cir. 2013), the court stated, "In short, 'the focus of the 23(b)(3) class certification inquiry—predominance—is not whether the plaintiffs will fail or succeed, but whether they will fail or succeed *together.*'"

The plaintiffs also asserted that because class members were taken advantage of to a grossly unfair degree, and that the exorbitant fee, not the class member matters in that regard.[115] Because the question of the fee is capable of a single class-wide answer, the plaintiffs insisted that the court certify the class.[116] But, the court stated that, "these arguments flout well-established understandings of unconscionability claims"—an action only takes advantage of a consumer to a grossly unfair degree if the unfairness was "glaringly noticeable, flagrant, complete and unmitigated."[117]

The court therefore held that common issues did not predominate over questions affecting only individual class members; that the individualized inquiries were too numerous to certify a class.[118]

C. Louisiana District Court Cases

1. State Law

a. Pitre v. Yamaha Motor Co., Ltd.

In *Pitre v. Yamaha*, No. CIV.A. 13-5327, 2014 WL 4926318, at *1 (E.D. La. Sept. 30, 2014), the plaintiffs brought a putative consumer class action against Yamaha Motor Co. ("YM") and Yamaha Motor Corp., USA ("YMUSA"), alleging violations of the Louisiana Products Liability Act ("LPLA"), the Louisiana Unfair Trade Practices Act ("LUTPA"), and the Magnuson–Moss Warranty Act, because Yamaha used a defective engine coating in their outboard motors, resulting in damage of the exhaust system. Yamaha moved to dismiss. The court held: (1) the plaintiffs stated a claim for defect; (2) the plaintiffs did not allege unreasonable dangerousness under LPLA; (3) the exclusivity provision of LPLA precluded LUTPA claims; (4) the plaintiffs did not state fraudulent concealment claim; (5) one of the plaintiffs alleged equitable tolling of the prescriptive period; (6) the plaintiffs alleged violation of Magnuson–Moss Warranty Act; and (7) the plaintiffs had standing to bring a class complaint for defect and breach of warranty.[119]

In its motion to dismiss YMUSA argued that the court should dismiss the plaintiffs' class action claims because: "(1) nationwide class actions are disfavored; and (2) the named plaintiffs lacked standing to bring claims that were not cognizable under Louisiana law."[120] But the plaintiffs maintained that: "(1) federal appellate courts continue to certify consumer claim class actions, and (2) that the standing of absent class members is irrelevant at the pleading stage."[121] Citing to *In re Deepwater Horizon*, the court noted, "The elements of Article III standing are constant throughout litigation: injury in fact, the injury's traceability to the defendant's conduct, and the potential for the injury to be redressed by the relief requested."[122] YMUSA's argument was that the plaintiffs were residents of Louisiana, and therefore were precluded under state law from bringing certain claims on their own behalf.[123] The plaintiffs countered that argument by saying that the court should not dismiss their class allegations before certification because "such a remedy is not appropriately addressed prior to class certification."[124]

Applying *In re Deepwater Horizon*, the court found that plaintiffs had alleged a viable action under Louisiana law and did state a claim.[125] But, to the extent that the plaintiffs "seek to proceed on behalf of a nationwide class under theories of negligence, unfair trade practices,

fraudulent concealment, breach of implied warranties, and unjust enrichment, plaintiffs have failed to allege any cognizable injury under Louisiana law, and therefore may not proceed on behalf of absent class members who may have been so injured under other states' dissimilar laws."[126] The court, therefore, dismissed the plaintiffs' class claims under these theories of liability.

D. Mississippi District Court Cases

1. Federal Law

a. Jenkins v. Trustmark National Bank

In *Jenkins v. Trustmark National Bank*, 300 F.R.D. 291 (S.D. Miss. 2014), the holders of debit cards brought a class action against the issuing bank, challenging the bank's debit-sequencing overdraft practices (the plaintiffs alleged that because Trustmark manipulated its customers' debit card transactions, balances were reduced more rapidly than they should have been, and thus members of the class were assessed more overdraft fees than they should have been), and seeking monetary damages, restitution, and declaratory relief. The plaintiffs and class counsel filed a motion for final approval of opt-out settlement, as well as service awards and attorneys' fees and expenses. The district court granted the settlement since it would avoid years of complex and expensive litigation, and its terms were fair and adequate.

When deciding whether to approve the settlement, the court analyzes whether it is "fair, adequate, and reasonable and is not the product of collusion between the parties."[127] A class settlement is fair, reasonable, and adequate when "the interests of the Plaintiff Settlement Class, as a whole, will be better served if the claims against these Defendants are resolved by the Settlement rather than pursued."[128] The court noted that the Fifth Circuit has identified six factors which are to be considered when analyzing the fairness, reasonableness, and adequacy of a class settlement under Rule 23(e):[129] (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of the plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent class members.[130]

Therefore, the court: (1) granted final approval of the settlement; (2) certified the settlement class under Rule 23(a), 23(b)(3), and 23(e); (3) appointed the seven plaintiffs as class representatives; (4) appointed the law firms and attorneys listed in the agreement as class counsel; (5) approved service awards of $5,000 each, for each of the seven plaintiffs; (6) awarded class counsel attorney's fees of $1,333,333.00 (one third of the $4,000,000 settlement fund, plus reimbursement of litigation costs and expenses of $181,213.18; (7) directed class counsel, plaintiffs, and Trustmark to implement the settlement according to its terms and conditions; (8) retained continuing jurisdiction over the plaintiffs, the settlement class, and Trustmark to implement and enforce the settlement; and (9) separately entered final judgment, dismissing the suit with prejudice.[131]

[1] Barry M. Golden is a partner in the Dallas office of Gardere Wynne Sewell LLP. Mr. Golden would like to thank Charles North (Southern Methodist University, 2015) for his help on this article.

[2] 747 F.3d at 316.

[3] *Dukes*, 131 S. Ct. 2541.

[4] *Odle v. Wal-Mart Stores Inc.*, No. 3:11-CV-2954-O, 2012 WL 5292957, at *1 (N.D. Tex. Oct. 15, 2012) *rev'd and remanded*, 747 F.3d 315 (5th Cir. 2014).

[5] *Id.*

[6] *Odle*, 747 F.3d at 316.

[7] *Id.*

[8] *Dukes v. Wal–Mart Stores, Inc.*, 222 F.R.D. 137, 188 (N.D. Cal. 2004) (certifying a class of "all women employed at any Wal–Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal–Mart's challenged pay and management track promotions policies and practices").

[9] *Id.*

[10] *Dukes v. Wal–Mart Stores, Inc.*, 603 F.3d 571, 623 (9th Cir. 2010) ("We agree with Wal-Mart that those putative class members who were no longer Wal-Mart employees at the time Plaintiffs' complaint was filed do not have standing to pursue injunctive or declaratory relief.)

[11] *Id.* at 622-24.

[12] *Dukes*, 131 S. Ct. 2541.

[13] *Odle*, 747 F.3d at 318.

[14] *Odle*, 2012 WL 5292957, at *1.

[15] *Id.*

[16] *Odle*, 747 F.3d at 319.

[17] *Id.*

[18] *Id.* at 323.

[19] *Odle*, 747 F.3d at 323.

[20] Public Law No. 112–216.

[21] *Mabary v. Hometown Bank, N.A.*, No. 4:10-CV-3936, 2013 WL 1124026, at *1 (S.D. Tex. Mar. 18, 2013), *vacated and remanded sub nom.*, *Mabary v. Home Town Bank, N.A.*, 771 F.3d 820 (5th Cir. 2014).

[22] *Mabary*, 771 F.3d at 820.

[23] 15 U.S.C. § 1693b(d)(3)(A).

[24] *Id.* § 1693b(d)(3)(B).

[25] *See id.* § 1693m(a).

[26] *Mabary*, 771 F.3d at 822.

[27] *Id.*

[28] *Mabary v. Hometown Bank, N.A.*, 888 F. Supp. 2d 857 (S.D.Tex. 2012).

[29] Public Law No. 112–216.

[30] *Mabary*, 771 F.3d at 823.

[31] *Id.* at 825.

[32] *Id.* at 826.

[33] *Ticknor v. Rouse's Enterprises, LLC*, No. 12-1151, 2014 WL 1764738, at *11 (E.D. La. May 2, 2014), *aff'd sub nom., Ticknor v. Rouse's Enterprises, L.L.C.*, No. 14-30550, 2014 WL 6440397 (5th Cir. Nov. 18, 2014).

[34] 15 U.S.C. § 1681c(g)(1).

[35] *Ticknor*, WL 1764738, at 11.

[36] *Id.* at 8.

[37] *Id.* at 10.

[38] *Ticknor*, WL 6440397, at 2.

[39] *Ticknor*, WL 6440397, at 2.

[40] *Id.*

[41] *Id.* at 3.

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

[43] 2012 WL 6652608, at *14. The class definition was included as an appendix to the court's order describing the class in detail. *See id.* at *65-70.

[44] *Id.*

[45] *Id.* at *24.

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

[47] *Id.* at *26.

[48] *Id.* at *29.

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

[50] *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).

[51] *Id*. at 331 (quoting *In re Oil Spill*, 2013 U.S. Dist. LEXIS 29235 (E.D. La., March 5, 2013).

[52] *In re Deepwater Horizon*, 732 F.3d at 333-36.

[53] *Id*. (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

[54] *Id.*

[55] *In re Deepwater Horizon*, 732 F.3d at 326.

[56] *Id.* at 346.

[57] Order of December 24, 2013 (Rec. Doc. 12055) ("Responding to Remand of Business Economic Loss Issues").

[58] 739 F.3d at 799.

[59] *Id.*

[60] *Id.* at 806.

[61] *Id.* at 807.

[62] *Id.*

[63] *Id.*

[64] *Id.* at 808.

[65] *Id.* at 822 (*quoting Mims*, 590 F.3d at 308).

[66] *Id.*

[67] *In re Deepwater Horizon*, 744 F.3d 370, 373 (5th Cir.), *reh'g denied*, 753 F.3d 509 (5th Cir. 2014), and *cert. denied sub nom., BP Exploration & Prod. Inc. v. Lake Eugenie Land & Dev., Inc.*, 135 S. Ct. 754 (2014).

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* at 378.

[72] *Id.*

[73] *Id.*

[74] *In re Deepwater Horizon*, 753 F.3d 509 (5th Cir. 2014).

[75] *In re DEEPWATER HORIZON-Appeals of Econ. & Prop. Damage Class Action Settlement*, 756 F.3d 320 (5th Cir. 2014).

[76] 42 U.S.C. § 12101 et seq.

[77] 28 C.F.R. §§ 36.101 et seq.

[78] Tex. Hum. Res. Code Ann. § 121.001 et seq.

[79] *Gilkerson*, 1 F. Supp. 3d at 572.

[80] *Id.* at 570.

[81] See *Bennett v. Spear*, 520 U.S. 154, 167, 117 S.Ct. 1154, 137 L. Ed. 2d 281 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); *Cox*, 256 F.3d at 303; *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 473 (5th Cir. 2013).

[82] See *Cramer v. Skinner*, 931 F.2d 1020, 1027 (5th Cir.1991).

[83] *Gilkerson*, 1 F. Supp. 3d at 581.

[84] *Id.*

[85] *Id.*

[86] *Id.* at 597.

[87] 299 F.R.D. at 135.

[88] *Id.*

[89] *Id.* at 144.

[90] FED. R. CIV. P. 23(b)(3).

[91] *In re Kosmos Energy*, 299 F.R.D. at 144.

[92] *Id.* at 146.

[93] *Id.* at 154.

[94] *Id.*

[95] *Id.*

[96] 18 F. Supp. 3d at 847.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.* at 848.

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.* at 849-51.

[108] *Id.* at 851-53.

[109] *Id.* at 853.

[110] *Id.*

[111] 11 F. Supp. 3d 789.

[112] *Id.*

[113] *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013).

[114] *In re BP p.l.c. Sec. Litig.*, No. 10–MD–2185, 2013 WL 6388408, at *4 (S.D. Tex. Dec. 6, 2013).

[115] *McPeters*, 11 F. Supp. 3d at 803.

[116] *Id.*

[117] *Id.*

[118] *Id.* at 809.

[119] 2014 WL 4926318, at *1.

[120] *Id.* at *18.

[121] *Id.*

[122] *Id. quoting In re Deepwater Horizon—Appeals of the Economic and Property Damage Class Action Settlement*, 739 F.3d 790, 799 (5th Cir.2014) (quoting *Lewis v. Casey*, 518 U.S. 343, 358, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996)).

[123] *Pitre*, WL 4926318, at *18.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *See Newby v. Enron Corp.*, 394 F.3d 296, 301 (5th Cir. 2004) (quoting *Cotton*, 559 F.2d at 1330).

[128] *In re Granada P'ship Secs. Litig.*, 803 F.Supp. 1236, 1244 (S.D. Tex. 1992).

[129] *Jenkins*, 300 F.R.D. at 302-03.

[130] *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 639 n.11 (5th Cir. 2012).

[131] *Jenkins*, 300 F.R.D. at 311.

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