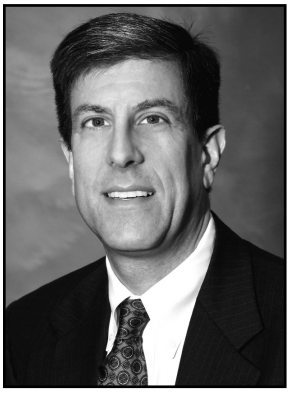

2002 ANNUAL REVIEW OF TEXAS CLASS ACTION CASES

By Mark W. Bayer[1]

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Class actions are not dead in the State of Texas. Although the Supreme Court has strongly reaffirmed the standards of *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000), this survey of appellate court decisions[2] shows that many cases still qualify for class treatment. Of eleven court of appeals opinions addressing contested class actions this year, seven either affirm the trial court's certification of a class or reverse the denial of class certification.

Texas Supreme Court Reaffirms the Bernal Standard

The most significant case of the year was the Supreme Court's opinion in *Henry Schein, Inc. v. Stromboe*, No. 00-1162, 2002 WL 31426407 (Tex. Oct. 31, 2002). Over a vigorous dissent authored by Justice O'Neill, the majority found that it had jurisdiction over an interlocutory appeal of class certification because the lower court's opinion was in conflict with *Bernal*. The Supreme Court then decertified the class, and remanded the case to the trial court for further proceedings.

In *Schein*, five buyers filed suit against a software manufacturer and two subsidiaries ("Schein") alleging that software purchased by the buyers was defective. The buyers asserted a number of claims, including: (1) breach of contract, (2) breach of express and implied warranties, (3) fraudulent and negligent misrepresentations, and (4) violations of the Deceptive Trade Practices — Consumer Protection Act. The buyers requested class certification, and the trial court certified a nationwide class of 20,000 purchasers. Schein appealed.

Affirming certification, the Austin Court of Appeals noted that it would "view the evidence in the light most favorable to the trial court's action and entertain every presumption in favor of [the trial court's] judgment." Schein again appealed. Although the Supreme Court initially dismissed Schein's petition for want of jurisdiction, it accepted the case for review after a motion for rehearing.

The majority held that it had jurisdiction over the appeal because the court of appeals' decision conflicted with *Bernal* in two ways. First, the Supreme Court found that the court of appeals failed to indicate how all of the claims would be tried because neither the trial court's order nor the Austin court indicated how the non-breach of contract and damage claims were going to be tried. Second, by "entertain[ing] every presumption in favor of the trial court's judgment," the court of appeals' holding conflicted with the standard of review described in *Bernal*. As a result of these conflicts, the majority concluded that it had jurisdiction and moved to the substantive issues. The dissent, authored by Justice O'Neill and joined by Justices Enoch and Hankinson, argued that the Supreme Court did not have conflicts jurisdiction. Although the dissent expressed sympathy for Schein's arguments on the certification issue, the dissent ultimately concluded that "we cannot ignore the limits the Legislature has placed on our jurisdiction."

Considering the merits, the Supreme Court found that individual issues regarding reliance, damages and applicable law would predominate at trial, precluding certification under Rule 42(b)(4). With regard to the reliance issue, the court noted that all 20,000 class members should be "held to the same standards of proof of reliance . . . that they would be required to meet if each sued individually." Although the buyers contended that they established "class-wide reliance" on misrepresentations made by Schein, there was evidence that the buyers "relied on recommendations from colleagues and others rather than any statements made directly or indirectly by Schein." *Id.* at *14. Thus, the Supreme Court held that the buyers "failed to show that individual issues of reliance [did] not preclude the necessary finding of predominance under Rule 42(b)(4)."

The majority also accepted Schein's argument that individual damage issues predominated. While the buyers' claims for restitution could be proved from Schein's records, their other damage claims could not. For example, the Supreme Court indicated that consequential damages would have to be determined class member-by-class member. Similarly, it was not clear from the certification order "how exemplary or statutory damages [could] be determined on a classwide basis or prior to determinations of liability and actual damages." Therefore, the majority found that the buyers "failed to show that common fact questions regarding damages predominate[d]."

With regard to Schein's choice-of-law argument, the Supreme Court determined that "Schein's presence in Texas was just one factor to be considered in determining the applicable law and does not, by itself, dictate that Texas law will govern the non-contract claims of class members in other states." Thus, the court held that the buyers "failed to show that legal issues predominate[d]."

Finally, the Supreme Court adopted an interesting analysis of the superiority of a class action from *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002). To determine whether class treatment is superior to other forms of resolution, the court adopted a free market efficiency analysis:

> Efficiency is a vital goal in any legal system—but the vision of 'efficiency' underlying this class certification is the model of the central planner. . . . The central planning model—one case, one court, one set of rules, one settlement price for all involved—suppresses information that is vital to accurate resolution. . . . Markets instead use diversified decisionmaking to supply and evaluate information. . . . This method looks 'inefficient' from the planner's perspective, but it produces more information, more accurate prices, and a vibrant growing economy. . . . When courts think of efficiency, they should think of market models rather than central–planning models.

(quoting *Bridgestone*, 288 F.3d at 1020). The Supreme Court held that the buyers failed to show that a class action was superior to other methods of adjudication in these circumstances.

In another case decided the same day, the Supreme Court found that it did not have jurisdiction over an interlocutory appeal of the certification of a class in *State Farm Mutual Automobile Insurance Co. v. Lopez*, No. 01-0540, 2002 WL 31426668 (Tex. Oct. 31, 2002) (per curiam). In this case, an insurer argued that the certification of a class was in conflict with *Bernal* because the court of appeals: (1) had failed to consider the merits of the plaintiffs' claim before certifying a class, and (2) had not required the trial court to adopt a trial plan for the class. The Supreme Court rejected these arguments because: (1) "*Bernal* does not require a trial court to evaluate the merits of the plaintiffs' claims[,]" and (2) the trial plan issue had been waived because it was not raised until appellant's motion for rehearing.

Appellate Court Opinions Approving Certification

Notwithstanding the pronouncements in *Schein* and *Bernal*, appellate courts are still willing to approve the certification of class actions. In all of the surveyed cases supporting certification, the court of appeals found that common issues predominate—typically because of the application of a common written contractual clause or statute.

In *Snyder Communications v. Magana*, No. 13-02-076-CV, 2002 WL 31662860 (Tex. App.–Corpus Christi Nov. 27, 2002, no pet.), the Corpus Christi Court of Appeals affirmed the certification of a class of employees who were allegedly not paid compensation due them pursuant to written, contractual representations made by their employer. Specifically acknowledging the standards set by *Bernal*, the court found that *Bernal* did not modify the abuse of discretion standard or establish a "*de facto* presumption against certification."

Arguing that individual issues predominated, the employer claimed that the trial court should have considered the summary judgment motion that it had filed shortly before the class hearing. In the absence of any indication in the record that the employer asked the trial court to consider the summary judgment materials in making its certification determination or that the trial court actually considered the materials, however, the trial court was not required to consider the summary judgment materials. Additionally, the court of appeals noted that: (1) the putative class of approximately 500 employee-members was dispersed throughout the United States in 20-25 offices; (2) it was impracticable for a class member in California, New York, Chicago or Florida to join as a named plaintiff in the Hidalgo County litigation in order to recover a small sum of money; (3) Snyder's problem with paying commissions was company-wide throughout the United States; and (4) the alleged breach of contract and misrepresentations were uniform to all class members. Thus, the Corpus Christi court determined that all of the issues in this case were common to the class, and the employees satisfied the requirements set forth in Rules 42(a) and 42(b)(4).

In *Alford Chevrolet-Geo v. Jones*, No. 06-02-00058-CV, 2002 WL 31398397 (Tex. App.—Texarkana Oct. 25, 2002, no pet.), the Texarkana Court of Appeals affirmed the certification of a class of car buyers who allegedly paid a "dealer inventory tax." The purchasers alleged that the dealers represented the "dealers inventory tax" as one that the customer was required to pay rather than a tax the dealers paid on their inventory. The consumers also alleged the dealers, as a group, engaged in a civil conspiracy to force, coerce, or confuse consumers into paying a tax that was levied against, and was properly payable by, the dealers.

The Texarkana court found that common issues predominated. Reviewing the evidence, the court found that "[a] common question [was] raised in this case: the nature of the alleged wrongdoing and the way in which it was accomplished—through the shifting of a tax against the dealer to the purchaser of the vehicle." Moreover, the court indicated that the "conspiracy issue [was] common to all plaintiffs" and that the "differences in the sales contract [were] relatively minor, and the claims raised against the [dealers were] substantially identical." Lastly, the court rejected the dealers' reliance argument, finding that the "allegations [were] that the consumers paid a tax they did not owe because they were billed for the tax by the [dealers,]" and therefore, "[t]hat alone [was] an allegation of reliance."

The certification of a class of insurance agents who were allegedly duped out of their bonuses was affirmed in *Farmers Insurance Exchange v. Leonard*, No. 03-01-00649-CV, 2002 WL 1994193 (Tex. App.—Austin Aug. 30, 2002, no pet.). The agents claimed that Farmers uniformly breached four bonus contracts by improperly calculating and awarding the bonuses due. After a six-day certification hearing, the trial court certified the class, and Farmers appealed.

First, the Austin Court of Appeals approved splitting the class into four subclasses based on expert testimony indicating that subclasses would provide superior means for trying the breach of contract issues and found that "no conflict existed because, by definition, the subclass excluded agents with a potential conflict of interest." Second, referring to the six-day hearing and the seven-volume record that it generated, the court found that a rigorous examination of class issues had been conducted by the trial court. Finally, the Austin court approved the trial court's trial plan.

In *National Western Life Insurance Co. v. Rowe*, 86 S.W.3d 285 (Tex. App.—Austin 2002, pet. filed), the Austin Court of Appeals affirmed the certification of a class of insureds who were allegedly not refunded child rider premiums after coverage had terminated. The policies in question provided that a $1,000 child death benefit terminated on the child's 25th birthday. The insurer argued that the trial plan permitted a class member to prove damages merely by remaining silent about whether additional children existed, thus vitiating the insurer's ability to calculate final damages. After reviewing the record, however, the Austin court determined that all class members had entered into an agreement for insurance coverage using virtually identical contracts issued by the insurer. Moreover, the insurer's alleged tortious conduct was uniform for all class members. In sum, because the insurer engaged in a common course of conduct and entered into virtually identical contracts with each class member, the court found no abuse of discretion with respect to the trial court's commonality determination.

In *Bailey v. Kemper Casualty Insurance Co.*, 83 S.W.3d 840 (Tex. App.—Texarkana 2002, pet. dism'd w.o.j.), the Texarkana Court of Appeals affirmed certification of a class under Rule 42(b)(4) for declaratory and injunctive relief. The plaintiffs claimed that Kemper misdirected Personal Injury Protection benefits by naming health care providers as sole or additional payees on benefit checks. The insurer raised eight issues on appeal.

Perhaps of greatest interest, the court of appeals rejected the insurer's contention that the trial plan was insufficient because it did not identify the causes of action certified or address how liability would be determined. While the Texarkana court agreed that the trial plan should contain such information, it indicated that a "detailed plan is not required in every class action and may not be necessary for every certification," especially where a plaintiff's claims stemmed from identical contractual language and a uniform pattern of misconduct. Thus, the court determined that the trial court' analysis and trial plan satisfied the requirements of Rule 42.

With respect to the insurer's typicality argument, the Texarkana court stated: "The typicality requirement is satisfied when the evidence establishes that the class representative's claims have the same essential characteristics as those of the class as a whole." Because the language of the insurance agreement and statutes was the same for all members of the class, the court noted that the language had one meaning that applied to all the class. Additionally, the court found that the insured's claims arose out of the same course of conduct that affected the other members.

The denial of class certification was reversed in *O'Hara v. North American Mortgage Co.*, No. 12-01-00193-CV, 2002 WL 1428848 (Tex. App.—Tyler June 28, 2002, pet. filed). The trial court refused to certify a class of borrowers who claimed a lender's "computer/clerical" fee for the preparation of loan documents constituted an unauthorized practice of law. Focusing on the predominance issue, the Tyler Court of Appeals found that "[t]he key issue . . . [was] whether the lender's conduct in charging a fee for preparing documents affecting title to real estate, which admittedly is the same in the case of each class member, does or does not violate the provisions of [the Texas Government Code]." Since there were no individual questions that needed to be answered by each of the putative class members, the court of appeals held that the common issues predominated over the individual issues, and thus the predominance requirement of 42(b)(4) was satisfied.

The Beaumont Court of Appeals affirmed the certification of a class of consumers who claimed that computers manufactured and sold by Compaq had a defective floppy disk controller in *Compaq Computer Corp. v. Lapray*, 79 S.W.3d 779 (Tex. App.—Beaumont 2002, pet. filed). Although the appellants raised 10 issues on appeal, the court of appeals found that certification was appropriate because, among other things, the manufacturer had not been deprived of the opportunity to present defenses to the plaintiffs' claims.

Appellate Court Opinions Denying Certification

In *Wal-Mart Stores, Inc. v. Lopez*, No. 14-02-00451-CV, 2002 WL 31526438 (Tex. App.—Houston [14th Dist] Nov. 14, 2002, no pet.), decided two weeks after *Schein*, the Houston Court of Appeals reversed the certification of a class of employees who were allegedly required to work through rest and meal breaks and to work "off-the-clock" without pay. The employees claimed that Wal-Mart: (1) entered into oral contracts with its hourly employees at the time of hiring, agreeing to provide rest and meal breaks and pay them for all hours worked, and (2) breached the oral agreements through a uniform policy requiring the employees to miss rest and meal breaks and work off-the-clock. The employees sought certification of a class of approximately 350,000 current and former employees.

The Houston court found that the individual issues concerning the formation of 350,000 oral contracts and any subsequent breach by Wal-Mart would predominate over any common issues. Next, it stated that Wal-Mart had the right to inquire into each class member's claim that off-the-clock work was required, and thus determined that individual inquiries as to fact situations surrounding each claim for missed breaks and off-the-clock work would predominate over common issues. Lastly, the court determined that because "the trial plan [did] not allow a determination of Wal-Mart's liability and damages as to each employee, thereby violating Wal-Mart's right to a trial before a jury, it [was] not a superior method to litigate [the employees'] claims for missed breaks and off-the-clock work." Since individual issues would predominate over any common issues, and class certification was not the superior method for litigating the employees' claims, the Houston court held that the trial court abused its discretion in granting class certification.

A class of insurance agents who executed an independent contractor agreement with a life insurance company that contained a non-competition provision was decertified in *American National Insurance Co. v. Cannon*, 86 S.W.3d 801 (Tex. App.—Beaumont 2002, no pet.). In *Cannon*, the Beaumont Court of Appeals found that individual issues predominated because the geographical and time restrictions contained in the non-competition agreements varied from agent to agent. As a result of the contractual variations, "reasonableness determinations [could not] be made on a class-wide scale."

McLean v. MFC Financial Co. of Texas, No. 05-01-00798-CV, 2002 WL 1424444 (Tex. App.—Dallas July 2, 2002, no pet.) affirmed the denial of a class of consumers who were charged for "force placed" property damage insurance. One putative class representative had a direct relationship with MFC while the other was a subsequent purchaser. The Dallas Court of Appeals affirmed the trial court's finding that the plaintiffs' claims were not typical of the class. Only the original purchaser was charged for the force-placed insurance, but he never paid it, and the subsequent purchaser was not a party to the contract when the insurance charges were imposed. The Dallas court found that the trial court did not abuse its discretion when it held that plaintiffs' claims were sufficiently atypical to deem them unsuitable class representatives.

Physicians who alleged that health insurers had unilaterally changed a reimbursement formula in their contracts with approximately 4,500 physicians unsuccessfully appealed the denial of their motion for class certification in *Samuelson v. United Healthcare of Texas, Inc.*, 79 S.W.3d 706 (Tex. App.—Fort Worth 2002, no pet.). The Fort Worth Court of Appeals found that individual issues would predominate at trial because: (1) the insurers contracted with many of the physicians and their associations over the years; (2) the physician filing suit was a low-volume provider whose claim history was not representative of the majority of the physicians in the insurers' network; (3) only a detailed physician-by-physician, claim-by-claim analysis could accurately calculate damages; and (4) the plaintiffs' proposed trial plan did not sufficiently identify the substantive issues of all the parties that would control the trial's outcome. In sum, the Fort Worth court reasoned that the evidence in the record supported the trial court's unchallenged findings, and therefore each of the trial court's conclusions of law were correct.

Classwide Settlement Approved

In *Northrup v. Southwestern Bell Telephone Co.*, 72 S.W.3d 16 (Tex. App.—Corpus Christi 2002, pet. filed), the Corpus Christi Court of Appeals affirmed the approval of a settlement over claims by objectors that insufficient notice was provided and the settlement was unfair. The court found that notice sent to current SWBT customers as an insert in their monthly bill along with publication in several Texas newspapers was the "best notice practicable" for advising the unnamed class members of the pendency of the class action.

Assessing the fairness of the settlement amount, the court addressed the six "fairness factors" gleaned from the Texas Supreme Court's opinion in *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 955 (Tex. 1996). During the fairness hearing, evidence was introduced showing that because of the way SWBT's records were kept, determining the exact amount of damages for each plaintiff would be time-consuming and excessively difficult. Moreover, the amount owed to each plaintiff would be very small—*i.e.*, around one dollar. Expert testimony indicated that the *cy pres* settlement used in this case was appropriate under these circumstances. After reviewing the record of the fairness hearing, the court of appeals determined that the "trial court based its approval of the settlement on consideration of the appropriate factors."

No Jurisdiction To Consider Class Notice

The Corpus Christi Court of Appeals dismissed the interlocutory appeal of an order approving class notice for lack of jurisdiction. In *Citgo Refining and Marketing, Inc. v. Garza*, No. 13-02-330-CV, 2002 WL 31769504 (Tex. App.—Corpus Christi Dec. 12, 2002, no pet.), the court considered whether an order approving notice to class members amounted to an order that "certifies or refuses to certify" a class. The court of appeals held that it did not. Although the class defined in the approved notice was different than the class previously certified, the court found that "an order that merely alters attributes of a class and does not affect the underlying certification . . . is not an order subject to interlocutory appeal under article 51.014(a)(3)."

Endnote

1 Mr. Bayer is a partner in the Dallas office of Gardere Wynne Sewell LLP. The author would like to thank Sam Joyner for his valuable assistance in preparing this article.

2 This article surveys all appellate court decisions addressing class certification issues published from January 1 through December 13, 2002.