



2003 Annual Survey of Texas Class Action Cases

by Mark W. Bayer¹

Class actions did not fare well this year in the appellate courts of this state. Of 20 court of appeals decisions included in this survey,² 16 either affirm the denial of class certification or reverse the certification of a class.³ Apparently, the guidance contained in recent decisions in *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000), and *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675 (Tex. 2002), has been taken to heart by lower courts.

Notwithstanding the dramatic turn against certification in the appellate courts, the most significant development in class actions may turn out to be the changes in class action practice resulting from House Bill 4 and the proposed changes to Rule 42 propounded by the Texas Supreme Court.

House Bill 4 And The Resulting Amendments To Rule 42

House Bill 4, which became effective on September 1, 2003, mandates four changes to class action rules. Although few in number, the changes may play a significant role in reshaping class actions in Texas.

First, if a defendant claims that an administrative agency has exclusive or primary jurisdiction over a case, the trial court must issue a written opinion on the plea to the jurisdiction prior to ruling on the class issue. If the plea to the jurisdiction is denied, the defendant is entitled to an interlocutory appeal at the same time it appeals the class certification ruling. This places a significant hurdle before any putative class action involving a claim that may be subject to an administrative agency's jurisdiction.

Second, the Texas Supreme Court has been given jurisdiction over any interlocutory appeal of a class ruling, whether the class is certified or not. As a result, that court will no longer be required to find conflicts jurisdiction to reach a class case as it did in *Schein*.

Third, all trial court proceedings are stayed pending interlocutory appeal of a certification ruling. Consequently, all actions on the merits, including discovery, will come to a halt. The pressure on a defendant to settle while a class appeal is pending to avoid litigation cost may be somewhat diminished as a result of this change.

Finally, the Texas Supreme Court was ordered to adopt rules requiring: (a) the adoption of the lodestar method of calculating attorneys fees; and (b) that class counsel accept payment of fees in non-cash benefits in the same proportion that the total class recovery is in the form of non-cash benefits. By reducing the financial incentives to class counsel, fewer cases may be brought. When class cases are brought, however, class counsel now has an incentive to vigorously litigate to increase his or her lodestar. As a result, there is less incentive for plaintiffs to settle early.

In accordance with House Bill 4, on October 9, 2003 the Texas Supreme Court promulgated proposed revisions to Rule 42 of the Texas Rules of Civil Procedure. Public comments were solicited by December 31, 2003 and the Rules were to be effective on January 1, 2004.

As promulgated, the proposed rules make some interesting changes to class action litigation. First, proposed Rule 42(c) has been revised to delay the consideration of a class motion. The former rule required that the class determination be made "as soon as practicable after the commencement of an action . . ." The new rule provides instead that the determination be made "at an early practicable time." This subtle change in language suggests a more deliberate approach to the certification decision. Although the comment to this amendment suggests that it is not intended to permit undue delay or excessive discovery, it seems inevitable that more discovery and preparation will now precede class motions.

Second, proposed Rule 42(c)(1)(D) now sets forth in detail additional findings that must be explicitly made by the trial court. Among other things, the order must state: (a) the elements of each claim or defense asserted in the pleadings; (b) common issues of law or fact; (c) individual issues of law or fact; (d) issues that will be the subject of most of the efforts of the litigants; (e) other available methods of adjudication; (f) why common adjudication is superior; and (g) how the case will be managed. This change appears designed to codify recent decisions requiring that a court consider the trial ramifications of a certification decision.

Next, the proposed rules change the class notice requirements after certification. Class notice must now include the class definition as well as a description of the class claims, issues and defenses.

The proposed rules include a detailed description of settlement requirements. The standard for approval of a settlement, as well as the disclosures that must be made to the settlement class are clearly stated.

Proposed Rule 42(g) adopts a new procedure for selection of class counsel. When appointing class counsel, the trial court must consider: (a) the work done by counsel; (b) counsel's previous experience with similar claims; (c) counsel's knowledge of the law; and (d) the resources available to the proposed counsel. The court may designate interim counsel to act on behalf of the class prior to certification. When more than one counsel seeks appointment, the court must appoint the lawyer best able to represent the class.

Finally, proposed Rules 42(h) & (i) specify the procedures for determining attorneys' fees to class counsel. Class counsel must move for the award of fees and provide reasonable notice to the members of the class. Class members, as well as a "party from whom payment is sought," may object to the motion. After hearing, the court must state its findings and conclusions for its award. As required by House Bill 4, the proposed rules provide that class counsel's fees be based on the lodestar method and that the ultimate fee fall in a range of 25% to 400% of the lodestar.

Texas Supreme Court Opinion

The only class action opinion issued by the Texas Supreme Court in 2003 reversed an order granting class certification. In *Union Pacific Resources Group, Inc. v. Hankins*, 111 S.W.3d 69 (Tex. 2003), several royalty owners filed a class action against a gas lessee ("UPRG") and several of its affiliates alleging, among other things, that UPRG sold gas to affiliated companies at preferential index prices and that the UPRG affiliates then sold the gas to third parties at higher prices. The trial court granted class certification, and UPRG appealed. The court of appeals abated the case so that the trial court could develop a trial plan.

After the trial court developed its trial plan and the case returned to the court of appeals, the Texas Supreme Court decided *Yzaguirre v. KCS Resources, Inc.*, 53 S.W.3d 368 (Tex. 2001), which distinguished between market-value leases and proceeds leases. The court of appeals declined to consider the implications of Yzaguirre for class certification and affirmed the trial court's certification order.

On interlocutory appeal, UPRG asserted that "the court of appeals' failure to analyze Yzaguirre's impact on the Rule 42 requirements conflicted with Bernal's requirement that courts require certification orders to demonstrate 'actual, not presumed' conformance with the requirements of Rule 42." The Supreme

Court agreed, stating that "[b]y choosing to delay analysis of Yzaguirre until 'another stage of litigation,' the court of appeals ignored applicable substantive law crucial to understanding the claims and defenses in this case . . . [which] must be taken into consideration in determining whether the purported class can meet the certification prerequisites under Rule 42" In the absence of such an analysis, the plaintiffs could not meet the commonality requirement of Rule 42 and, as a result, certification was reversed.

Appellate Court Opinions Denying Certification

In *DaimlerChrysler Corp. v. Inman*, No. 13-02-415-CV, 2003 WL 22762713 (Tex. App.—Corpus Christi Nov. 20, 2003, no pet. h.), the Corpus Christi Court of Appeals found that a nationwide class of automobile owners who did not suffer any physical injury or property damage as a result of the installation of allegedly defective seatbelt buckles could not maintain a class action against the manufacturer.⁴ Relying on *Schein*, the court concluded that because the owners failed to demonstrate that Texas law should apply to the claims of all of the putative nationwide class, common legal issues did not predominate. Moreover, the appellate court noted that the owners carried the burden of establishing the appropriate law.

In *General Electric Company v. Jewell*, No. 14-02-00796-CV, 2003 WL 22176623 (Tex. App.—Houston [14th Dist.] Sept. 23, 2003, no pet. h.), the Houston Court of Appeals remanded the certification of a nationwide class of consumers to the trial court.⁵ After successfully seeking certification of breach of contract, fraud and Kentucky Consumer Protection Act claims, the class representative withdrew his request for certification of fraud and consumer protection claims and requested remand of the contract claim to the trial court for reconsideration in light of the Supreme Court's decision in *Schein*.

As a result of class representative's abandonment of the fraud and consumer protection claims, however, the appellate court held that certification of the remaining contract claim had to be remanded for further consideration. To reach this conclusion, the appellate court noted that "[i]n some (but not all) states, the abandoned claims entitle[d] consumers to damages far beyond those available in a contract action." Given that the claims were not abandoned until after the appeal, the appellate court determined that the trial court was unable to consider "whether the waiver of such damages renders a class action inferior to other alternatives, or whether the class representative is typical of other members in his willingness to forego them." These circumstances, in light of *Schein*, required the appellate court to reverse and remand the contract claim to enable the trial court to consider whether class certification was appropriate.

The Austin Court of Appeals reversed the certification of another class of automobile owners in *Ford Motor Company v. Sheldon*, 113 S.W.3d 839 (Tex. App.—Austin 2003, no pet.). The plaintiffs alleged that Ford failed to apply spray primer in the painting process for certain 1984-1993 vehicle models, making the paint susceptible

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to peeling when exposed to sunlight. The trial court issued an order certifying the lawsuit as a class action in 1997. The court of appeals initially modified the owners' proposed class definition and upheld the certification. On appeal, however, the Texas Supreme Court reversed on the ground that the amended class definition was not readily ascertainable and remanded the case to trial court. In 2001, the owners again moved to certify a class action, and the trial court issued another certification order. Ford appealed again.

In its second review of this case, the Austin Court of Appeals found that individual issues predominate because "[w]hile the vehicles at issue were all painted with some version of high-build electrocoat primer rather than spray primer, these vehicles were not painted using one uniform paint process." Rather, the paint process in the vehicles reflected "four types of body materials, three different electrocoats, eight plants in different locations, five models, ten model years, and several dozen colors." *Id.* at 847. According to the appellate court, it was a combination of these factors that determined whether extended exposure to sunlight would cause the paint to peel, and thus be defective. The court concluded that "the jury would be given the unmanageable task of separately examining numerous paint systems, assessing their different failure rates, and making separate determinations about which combination of processes, if any, [was] defective." The court also observed that causation issues would predominate because Ford was "entitled to conduct separate discovery concerning how each owner treated his vehicle, and then enlist a paint expert to inspect the owner's vehicle and give an opinion about what caused the paint to peel." Accordingly, the appellate court held that individual issues would predominate at trial.

A class of jet ski owners was rejected in *Polaris Industries, Inc. v. McDonald*, No. 12-010-00372-CV, 2003 WL 21940115 (Tex. App.—Tyler Aug. 13, 2003, no pet.). The owners alleged that jet skis manufactured by Polaris lacked adequate collision avoidance capabilities, and therefore were defective, unmerchantable and unfit for their ordinary purposes. The Tyler Court of Appeals reversed the trial court's order granting class certification because, among other things, the plaintiffs lacked standing.

Although the plaintiff jet ski owner admitted that he had never been injured by the lack of off-throttle steering and braking, he claimed that he and putative class members were injured by the loss of value of each jet ski caused by the lack of collision avoidance capability and a passenger kill-switch. The appellate court concluded, however, that since the jet ski owner purchased a jet ski was warranted as a product with no off-throttle steering or braking system, he suffered no injury. For this reason, the appellate court held that it was error for the trial court to conclude that jet ski owner had standing to bring implied warranty and Magnuson Moss Act claims on behalf of himself or a putative class. Accordingly, the appellate court reversed the trial court's judgment and dismissed the suit for want of jurisdiction.

Given that no other Texas court had ever held that standing was an issue in implied warranty suits where no plaintiff had suffered a concrete injury, the appellate court went on to address the requirements of Rule 42(b)(4). With respect to the predominance requirement, the appellate court noted that an individualized inquiry of each customer and his particular circumstances and knowledge when he purchased the jet ski would be necessary to try the breach of implied warranty claim. For that reason, the appellate court concluded that: "[a]n implied warranty claim is individual to each person; thus, common issues rarely predominate over individual issues and the predominance requirement is not satisfied." Lastly, the appellate court held that a class action was not a superior method of resolving this dispute after contemplating the effects of claim preclusion, collateral estoppel and a United States Coast Guard investigation (and possible recall).

A class of head lice medication purchasers was vacated by the Beaumont Court of Appeals in *Warner-Lambert v. Mills*, 117 S.W.3d 488 (Tex. App.—Beaumont 2003, no pet.), because their claims were pre-empted by federal law and, as a result, the trial court lacked subject matter jurisdiction. The appellate court found that the class members' claims, as certified by the trial court, conflicted with the FDA's specific requirements for active ingredient labeling. Because the claims were pre-empted by federal law, the trial court was without subject matter jurisdiction to certify the case.

In *Enron Oil & Gas Company, EOG v. Joffrion*, 116 S.W.3d 215 (Tex. App.—Tyler 2003, no pet.), the Tyler Court of Appeals reversed certification of a class of royalty owners who claimed that Enron failed to: (1) pay proper royalties, (2) market gas in a reasonable manner, and (3) satisfy certain notification requirements of the Royalty Reporting Standards. The court found that common issues did not predominate.

The first question certified by the trial court was "whether EOG charged production expenses to royalty owners in breach of an express covenant." The court of appeals noted that "a jury would have to look at forty-five individual leases and determine that each lease contained an express covenant not to deduct compression charges as a production expense from royalties." According to the appellate court, this question had to be resolved on a case-by-case basis, and thus common questions of fact did not predominate.

The second question certified by the trial court was "whether EOG charged post-production expenses to royalty owners in breach of an implied covenant to charge expenses no greater than those which a reasonably prudent operator would have charged." Relying on the Texas Supreme Court's holding in *Union Pacific*, the appellate court stated that "each lease in this case must be analyzed to determine if there [was], in fact, an implied duty not to charge post-production expenses greater than would a reasonably prudent operator." According to the court, "[t]he possible permutations of the leases [were] endless." For this reason, the royalty owner could not establish that common questions predominated over individual questions.

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Finally, the appellate court sustained Enron's contention that the certification order was deficient because it did not include a *Bernal* trial plan. Since the order simply reiterated the two causes of action which the trial court agreed to certify, the appellate court held that the order was not sufficiently detailed to serve as a *Bernal* trial plan.

The Dallas Court of Appeals reversed certification of a class of fax recipients because individual issues would predominate at trial in *Kondos v. Lincoln Property Company*, 110 S.W.3d 716 (Tex. App.—Dallas 2003, no pet.). The appellate court noted that the finder of fact must “ascertain whether each class member gave or did not give express permission to receive the faxes in question.” Since “[t]he individualized issues of whether each of the 63,760 class members gave or did not give express permission [was] not likely to be a ‘relatively easy’ task for a single jury or the trial court to resolve,” the appellate court held that the trial court abused its discretion by certifying the class and sustained Lincoln's cross-point without addressing the remainder of Lincoln's arguments concerning the merits of the case.

In *Vincent v. Bank of America, N.A.*, 109 S.W.3d 856 (Tex. App.—Dallas 2003, pet. filed), the Dallas Court of Appeals found that the trial court did not abuse its discretion by not certifying a class of mortgagors. In *Vincent*, mortgage borrowers filed suit against Bank of America, N.A. (the “Bank”) after a dispute arose regarding the proper allocation of principal and interest in a home equity loan. The plaintiffs sought, among other things, class certification and forfeiture of all principal and interest on the loan. After a hearing, the trial court denied class certification and the case proceeded to trial. After the trial court entered a final judgment, both parties appealed.

Each loan agreement included a provision for notice and opportunity to cure in the event of a breach by the lender. In the order denying class certification, the trial court concluded that “notice by individual class members and an opportunity to cure by the Bank are not suitable for class treatment.” The court of appeals agreed. Since the borrowers failed to demonstrate that they suffered any compensable damages as a result of the Bank's actions and because of the importance of the notice and right to cure provision in the Texas Constitution (a substantive right that trumps the procedural benefits of Rule 42), the appellate court concluded that the mortgagors failed to demonstrate that the trial court's refusal to certify was legally unreasonable.

The Tyler Court of Appeals found that the trial court abused its discretion by granting an arbitrator authority to determine class certification issues in *In re John M. O'Quinn, P.C.*, No. 12-02-00352-CV, 2003 WL 21468619 (Tex. App.—Tyler June 25, 2003, orig. proceeding). Several former clients of a prominent Houston lawyer filed a class action suit claiming that he overcharged them in connection with a breast-implant class action settlement. Since the clients' fee agreements provided that any dispute would be submit-

ted to the American Arbitration Association for binding arbitration, the trial court granted the lawyer's motion to turn the clients' claims over to arbitration. The trial court later amended its order to provide that the arbitrator was “authorized to have the *full limit of authority to determine the issues related to class action . . . and to determine all class action issues*, including, without limitation, the issue of class certification, the issue of the definition of class certification, and the issue of whether proceeding on class or individual claims is proper.”⁶

Asserting that the trial court abused its discretion because “the arbitrator [did] not have, and cannot be given, the authority to determine class certification issues,” the lawyer sought to vacate the trial court's order. Because the American Arbitration Association had no procedure for certifying a class, a class arbitration could not proceed unless the trial court first certified the class. Accordingly, the appellate court held that “[t]he trial court's attempt to give the arbitrator that authority contravene[d] the designated rules, thereby constituting an abuse of discretion.”

In *Phillips Petroleum Company, GPM v. Bowden*, 108 S.W.3d 385 (Tex. App.—Houston [14th Dist.] 2003, no pet.), the Houston Court of Appeals found that the trial court abused its discretion by certifying three subclasses of royalty owners who claimed that Phillips engaged in various inter-affiliate transactions that resulted in an underpayment of royalties.

The first subclass claimed that Phillips breached both (1) express lease provisions addressing Phillips' duty to market the gas, and (2) the implied duty to diligently market the gas. Specifically, the royalty owners asserted that their royalties were based on the price at which Phillips sold the gas to its subsidiary rather than on the higher price at which the subsidiary sold the gas to third parties. According to the appellate court, individual issues predominated because “[t]he task of determining which leases contain[ed] provisions expressly addressing Phillips' duty to market the gas [could not] be accomplished without an individual examination of each lease.” Moreover, the court found that even among the leases containing an express covenant with respect to Phillips' duty to market the gas, there were differences among the clauses. Lastly, the appellate court noted that “a number of leases [did] not contain an express clause setting forth Phillips' duty to market the gas[,]” and thus the jury would have “to ascertain Phillips' duty with respect to marketing the gas under the implied covenant to market the gas before it [could] make any determination as to whether Phillips breached the implied covenant.” Since the implied covenant to market gas included a duty to obtain the best price reasonably possible for the marketed production, the appellate court concluded that “[d]etermining the best reasonably attainable price under same or similar circumstances necessarily contemplate[d] a fact specific, location-by-location inquiry for each lease.”

The second subclass claimed that a Phillips affiliate improperly calculated royalties based on the weighed average sales price

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received for the dry residue gas, without considering the proceeds it received from the sale of natural gas liquids in breach of the gas royalty agreements (“GRA’s”). The appellate court agreed with Phillips that “the GRA’s [were] ambiguous.” As a result, individual questions would predominate with regard to what each royalty owner and Phillips intended when they entered into the GRA’s. In addition, the appellate court found there was a conflict between many of the members of Subclass 2 and the putative class representative because some class members would be harmed by the royalty owners’ proposed interpretation of the GRA’s.

The third proposed subclass claimed that Phillips breached the implied covenant to manage and administer their leases as a reasonably prudent operator by charging excessive post-production processing fees based on a percentage of proceeds. The appellate court determined that the trial court abused its discretion in certifying the third proposed subclass because claims under the percentage of proceeds contracts (“POP contracts”) would predominate over any common issues. In support, this conclusion the court noted that there were hundreds of POP contracts with different percentages between Phillips and the affiliate at issue. To determine if Phillips breached its duty to manage and administer the royalty owners’ leases, the jury would have “to conduct an intensive factual inquiry into the circumstances surrounding each POP contract.”

Finding that individual issues predominated, a putative class of cruise ship passengers who endured a hurricane at sea was rejected by the Houston Court of Appeals in *Stobaugh v. Norwegian Cruise Line Ltd.*, 105 S.W.3d 302 (Tex. App.—Houston [14th Dist.] 2003, no pet.). The passengers alleged that they and the proposed class “suffered physical injuries such as seasickness, bumps, bruises, and worse, and . . . suffered the serious mental distress and fear caused by being at sea in a hurricane.” After the certification hearing, the trial court denied the passengers’ motion to certify, and the passengers appealed.

On appeal, the Houston court observed that the evidence demonstrated that the cruise contract was not the same for all passengers. As a result, the court determined that the passengers had not shown that common fact questions predominated. Likewise, individual issues predominated the passengers’ express warranty, negligent misrepresentation, oral misrepresentation, and DTPA claims because reliance was an element for each of those claims. Finally, because “the Passengers themselves had very different responses to their shared experience at sea . . . with resulting injuries and sickness falling along a continuum varying from mild to more severe[.]” the court concluded that individual fact questions predominated regarding damages and exemplary or statutory damages.

In *Capital One Bank v. Rollins*, 106 S.W.3d 286 (Tex. App.—Houston [1st Dist.] 2003, no pet.), two nationwide classes of credit card holders were rejected by the Houston Court of Appeals because individual issues predominated.

On appeal from an order granting certification, Capital One contended that one of the class definitions was fatally defective because it created an impermissible fail-safe class—*i.e.*, a class that cannot be defined until the case is resolved on its merits. The appellate court agreed, noting that the trial court’s class definition was defective because it could not be determined by objective criteria; rather, it was stated as a legal conclusion. In other words, the appellate court concluded that the class definition depended on the resolution of the predicate legal issue at the heart of the representative’s breach of contract claim.

The second class was rejected because the trial court failed to determine the propriety of a statistical methodology to determine liability and damages. Thus, at the time the trial court signed the certification order, it was not determinable whether statistical evidence could overcome the need for individualized proof to be offered at trial. By failing to make a determination regarding the viability of the representative’s statistical methodology, the appellate court held that “the trial court adopted an approach disavowed by *Bernal* and improperly relied on counsel’s mere assurances that the predominance problem could be overcome by statistical evidence or by a spoliation instruction.”

Choice of law issues undermined certification of a nationwide class of pontoon boat purchasers in *Tracker Marine, L.P. v. Ogle*, 108 S.W.3d 349 (Tex. App.—Houston [14th Dist.] 2003, no pet.). The plaintiffs alleged that the plywood decks used on the boats had a propensity to rot when exposed to water. The only claim asserted by the class was affirmative misrepresentations or omissions in Tracker Marine brochures that allegedly violated the Missouri Unlawful Merchandising and Practices Act. On appeal, Tracker Marine challenged the trial court’s conclusion that Missouri law applied to all class members’ claims. After considering various factors, the appellate court concluded that the trial court erred by finding Missouri law applicable to all claims by the class.

In *Lebron v. Citicorp Vendor Finance, Inc.*, 99 S.W.3d 676 (Tex. App.—Eastland 2003, no pet.), the Eastland Court of Appeals held that it was not an abuse of discretion to decline certification to a putative class of office equipment renters whose aggregate lease payments were alleged to exceed the vendor’s purchase price for the equipment. The defendant lessee filed an amended counterclaim one month prior to trial seeking to allege a class action against the plaintiff lessor. According to the court, the equipment renter’s class motion “simply tracked the language of Rule 42” without any supporting materials. Since the equipment renter did not allege any facts in support of its claim that the action satisfied the four requirements of Rule 42(a), the appellate court concluded that the class action allegations were mere conclusions and thus failed.

Certification of a class of genetically enhanced cotton seed purchasers was reversed in *Monsanto Company v. Davis*, 97 S.W.3d 642 (Tex. App.—Waco 2002, no pet.). The Waco Court of Appeals found that the plaintiffs failed to meet the prerequisite of typicality

ty because their claims were not subject to the same claims as the members of the class. The named plaintiffs had opted out of a nationwide class settlement in Louisiana. Because the members of the putative class who had not opted out of the Louisiana settlement were subject to defenses of *res judicata*, release, and accord and satisfaction that did not apply to the putative class representatives, certification was inappropriate.

Individual issues involving restrictive covenants covering 1,550 different lots in the Horseshoe Lake Property Owners Association predominated and prevented class certification in *Hardy v. Wise*, 92 S.W.3d 650 (Tex. App.—Beaumont 2002, no pet.). In *Hardy*, the Association sought to determine the validity of claimed restrictive covenants on 1,550 lots. The Beaumont Court of Appeals found that individual issues predominated because individual reviews of chain of title would be required to determine if current property owners had notice of the assessments in question and because individual defenses, such as erroneous calculation of the amount of the assessments, must be resolved.

Appellate Court Opinions Approving Certification

In *Pate v. Elloway*, No. 01-03-00187-CV, 2003 WL 22682422 (Tex. App.—Houston [1st Dist.] Nov. 13, 2003, no pet. h.), the Houston Court of Appeals held that the trial court did not abuse its discretion by finding the plaintiffs in a breach of fiduciary duty case were adequate class representatives. The appellate court refused to consider a challenge to the typicality of the plaintiffs' claims because the issue had not been raised in the trial court.

Declaring that “[a]dequacy of representation is a question of fact that must be determined by reference to the individual circumstances of each case,” the appellate court then reviewed the class representative’s testimony in detail. In particular, the representative testified that:

[H]e had reviewed Pennzoil’s annual reports, financial statements, 10-Ks, 10-Qs, quarterly statements, and proxy statement. He had read articles relating to the merger in the Houston Chronicle and Forbes Magazine. He got involved in the litigation after reading about the merger in the Houston Chronicle. He talked to the attorney mentioned in the article (now [his] attorney), reviewed some documents in the attorney’s office, attended the stockholders’ meeting, and, after the board of directors decided not to pay a dividend, decided to become involved in the lawsuit. . . . He stated that he reviewed documents that were produced by [the stockholders], had met to review interrogatory answers, and had provided the information in the interrogatories that specifically concerned him[,] . . . that he understood that it was the duty of a representative plaintiff to ensure that the class [had] adequate and expert counsel[,] . . . that he understood that he represented the other stockholders at

the time of the merger and that he was willing to represent them adequately and fairly.⁷

The stockholders countered this testimony by arguing that the representative’s knowledge of the facts in the case originated from his attorney and thus he did not meet the adequacy test. In the end, the appellate court determined that the financial complexities of the case were such that “it was unreasonable to expect the class representative to have detailed knowledge of the facts underlying the claims.” And since the trial court “observed [the representative’s] demeanor and determined his credibility,” the appellate court held that the trial court did not abuse its discretion in determining that the representative satisfied the adequacy requirement and in finding him to be an adequate class representative.

The Beaumont Court of Appeals found that a consumer class of music club members was properly certified in *BMG Direct Marketing, Inc. v. Peake*, No. 09-02-509-CV, 2003 WL 1989413 (Tex. App.—Beaumont May 1, 2003, pet. filed). BMG invoked the voluntary payment doctrine to argue that individual issues would prevail in the class trial of the case. The appellate court found, however, that whether BMG disclosed all of the material facts to club members necessary to invoke the voluntary payment doctrine was a common issue that would predominate.

In *Citizens Insurance Company of American v. Hakim Daccach*, 105 S.W.3d 712 (Tex. App.—Austin 2003, pet. filed), the Austin Court of Appeals rejected a challenge that the class definition resulted in a fail-safe class as well as challenges to the predominance, typicality, adequacy of representation and superiority requirements of Rule 42.

First, the appellate court found that a class definition excluding all persons who, within the time period established by the judgment, did not surrender their insurance policies and take the other actions required to obtain the relief awarded by the trial court, did not run afoul of *Intratex Gas Co. v. Beeson*, 22 S.W.3d 398 (Tex. 2000). The appellate court determined that the class definition was not prohibited because the class members were “presently ascertainable by reference to objective criteria.” Moreover, the appellate court concluded that the definition did not “create a fail-safe class whereby the class would be bound only by a judgment favorable to the plaintiffs.”⁸

Citizens attacked the predominance finding from three directions. First, Citizens contended that choice-of-law issues were a barrier to commonality and predominance because of potential differences in the applicable securities laws of foreign jurisdictions. Specifically, Citizens argued that the trial court abused its discretion by failing to conduct a “most significant relationship” analysis pursuant to § 6(2) of the Restatement (Second) of Conflict of Laws and thereby applying the securities laws of the jurisdictions where the class members reside. The appellate court found, however, that the “most significant relationship” analysis was inapplicable. Sec-

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ond, Citizens challenged the trial court's predominance finding by arguing that, because all the claims except for the securities claims had been abandoned by the class, the Insured improperly sought to resolve a single issue by way of the class action rather than the entire controversy. The appellate court disagreed, stating that whether Citizens violated the Securities Act's registration requirements was not a single issue or element of a controversy, but rather a complete cause of action that constitutes "entire controversy" unto itself. Lastly, Citizens challenged predominance by arguing that, should the class claims succeed, individual issues will predominate over the question of whether the class was entitled to recover attorneys' fees pursuant to the Securities Act. The appellate court disagreed, finding Citizens' claim irrelevant under the circumstances.

Next, Citizens argued that the plaintiff's claims were not typical of the class because (1) his securities claim was barred by the statute of limitations, and (2) he purchased his life insurance policy without relying on Citizens' website, which repeatedly characterized the package as an "investment." The appellate court determined that the presence of an arguable defense peculiar to the plaintiff did not destroy the entire class and, given the overall scheme, the plaintiff's securities claims were typical of the class he sought to represent. The appellate court also found that reliance was not an element of a cause of action based on article 581-33A(1) of the Securities Act, and thus Citizens' argument was irrelevant.

Citizen also challenged the plaintiff's ability to adequately represent the class by asserting that (1) an inter-class antagonism existed because the plaintiff sought statutory rescission of the policies, and (2) the plaintiff lacked knowledge concerning the details of the class action and passively acquiesced to class counsel's decision to seek class certification only for the Securities Act claims. The appellate court declared no inter-class antagonism existed because those insureds interested in keeping their life insurance coverage could choose to reject the rescission remedy. Furthermore, since the record revealed evidence that the plaintiff was familiar with the class action and would vigorously prosecute the securities claims, the appellate court concluded that the district court did not abuse its discretion.

Finally, Citizens disputed the trial court's finding of superiority, given that individual suits were being pursued by all but one

named plaintiff. The appellate court disagreed, indicating that merely identifying four suits brought by four individual members of a putative class of over 25,000 members was not convincing enough to say that class members had a significant interest in controlling the prosecution of their claims.

In *Farmers Insur. Exchange v. Leonard*, No. 03-01-00649-CV, 2003 WL 1831928 (Tex. App.—Austin Apr. 10, 2003, pet. filed), the Austin Court of Appeals revisited its 2002 opinion affirming certification of a class of insurance agents, but reached the same result after considering the Texas Supreme Court's opinion in *Schein*.

The trial court certified four subclasses of insurance agents who claimed Farmers uniformly breached four bonus contracts by improperly calculating and awarding the bonuses due. The appellate court rejected as speculative Farmers' argument that the plaintiffs had a conflict of interest. Expert testimony indicated that dividing the class into four subclasses would provide a superior means for trying the breach of contract issues, and that "no conflict existed because, by definition, the subclass excluded agents with a potential conflict of interest."

The appellate court found that class adjudication was superior to individual actions due to: (1) the economic benefit, (2) the avoidance of inconsistent results, and (3) the ability to "quell the fears of retaliation by Farmers if individual lawsuits were filed." Based on this reasoning, the appellate court determined that class treatment was superior to the pursuit of 13,000 individual actions.

Endnotes

- 1 Mark W. Bayer is a partner in the Dallas office of Gardere Wynne Sewell LLP. The author would like to thank Sam Joyner for his invaluable assistance in preparing this article.
- 2 This article surveys appellate court decisions addressing class certification issues published from December 14, 2002 through December 17, 2003.
- 3 In 2002, by contrast, only 4 of 11 Court of Appeals decisions surveyed resulted in the denial of class certification.
- 4 This opinion dealt primarily with DaimlerChrysler's contention over the automobile owners' lack of standing to sue on all the causes of action asserted in the class petition.
- 5 This unpublished memorandum opinion does not recite the underlying facts of this case.
- 6 Emphasis in original.
- 7 Footnote omitted.
- 8 Emphasis in original.