2004 Annual Survey of Texas Class Action Cases

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2004 was a not a good year for lawyers and their clients seeking class treatment of their cases. Of 23 reported appellate court opinions,[2] including five in the Texas Supreme Court, only two resulted in a certified class. It appears that the rigorous examination of cases mandated by *Southwestern Refining Co., v. Bernal*,[3] and its progeny, has limited the number of cases that qualify for class treatment.

Looking beyond the statistics, several interesting issues were resolved this year. First, the Supreme Court found that in cases where arbitration is mandated by contract, the arbitrator - and not a court - decides whether class treatment is appropriate. Second, in connection with Rule 42(b)(2) cases, the Supreme Court found that although predominance and superiority analyses are not required, a class proponent must demonstrate "a rigorous analysis of 'cohesiveness' " of the class. Third, the Supreme Court decided that if "no class member can state a viable claim, dispositive issues should be resolved by the trial court before certification is considered." These rulings provide lawyers with new strategic issues to contemplate in the coming years.

I. 2004 Texas Class Action Cases

A. Texas Supreme Court Opinions

The Texas Supreme Court was very active this year in addressing class action issues. The Court issued five opinions.

In *State Farm Mutual Automobile Insurance Co. v. Lopez*,[4] the Court considered whether a trial court abused its discretion by certifying a class of policyholders without formulating a trial plan. The Supreme Court reversed the court of appeals' judgment and remanded the case to the trial court for further proceedings. Addressing an issue that has confounded the trial bar for years, the court made it clear that it is appropriate for the trial court to resolve a potentially dispositive issue before reaching the certification question.

State Farm appealed the trial court's order certifying a class of automobile insurance policyholders. The court of appeals affirmed the certification order. On rehearing, the court of appeals held that: (1) State Farm waived any argument that *Bernal* required a trial plan for certification and (2) *Bernal* did not require a trial plan in every certification order, particularly when predominance and superiority are not challenged. The Supreme Court initially dismissed State Farm's petition for review for want of jurisdiction.

On State Farm's motion for rehearing, the Supreme Court granted the petition to reconsider its jurisdiction over the appeal. State Farm argued that the court had jurisdiction over the appeal because the court of appeals' decision was in conflict with *Bernal*. Specifically, State Farm claimed that the court "failed to apply the standard for distinguishing between alternative holdings and dicta" that the Supreme Court applied in *Texas Natural Resources Conversation Commission v. White*.[5] The Supreme Court agreed for two reasons. First, the court determined that the standard for conflicts jurisdiction was satisfied since the appellate court made and relied on two holdings, one of which (i.e., a trial plan was not necessary in this case) was in conflict with *Bernal*. Second, the court concluded that the court of appeals' holding was irreconcilable with *Bernal* because it limited the intended reach of the decision.[6] According to the court, a trial plan is a necessary part of a certification order because it "allows a reviewing court to meaningfully evaluate whether certification of the class conforms with *all* Rule 42 prerequisites."[7] Because the trial court's certification order did not address State Farm's choice-of-law issues and the potential antagonism between present and past policyholders, the Supreme Court determined that it failed to reflect the rigorous analysis required for all class certification cases. For these reasons, the Supreme Court held that it had jurisdiction over State Farm's interlocutory appeal.[8]

State Farm argued, among other things, that the trial court abused its discretion by "failing to

conduct a rigorous analysis of class-certification requirements indicating how the claims can and will likely be tried."[9] Specifically, State Farm argued that the trial court (1) developed no plan to assure that the fundamentally conflicting economic interests among Texas policyholders were adequately represented, (2) failed to consider protecting the interests of policyholders from states other than Texas, and (3) failed to consider application of Illinois law to the policyholders' claims. The Supreme Court agreed that "the trial court's certification order [infirm in each of these respects," and rejected the policyholders' argument that *Bernal's* rigorous analysis requirement applies only to predominance and superiority.[10] According to the Supreme Court, "a trial plan is required in every certification order to allow reviewing courts to assure that *all* requirements for certification under Rule 42 have been satisfied."[11] Although State Farm raised significant choice of law issues and argued that the interests of the class representatives and other class members were antagonistic, the court found nothing in the certification order suggesting that the trial court "took those issues into account when it certified the class."[12] Accordingly, the Supreme Court held that the court of appeals erred in affirming the certification order.

Lastly, State Farm requested the dismissal of the policyholders' claims on the merits for a number of reasons. According to State Farm, the class representatives could not satisfy Rule 42(a)(3)'s typicality requirement because they failed to state any viable claims. After reviewing the record, the Supreme Court declined to resolve the issues that State Farm identified. However, the court stated: "If it is true, as State Farm contends, that no class member can state a viable claim, dispositive issues should be resolved by the trial court before certification is considered."[13] This single sentence is likely to serve as the lasting legacy of this case.

The ruling in *Lopez* was correctly anticipated by the Corpus Christi Court of Appeals in In *re H & R Block*.[14] In that case, the court of appeals found that the trial court did not abuse its discretion by hearing a motion for partial summary judgment before deciding whether a class could be certified. H & R Block filed a petition for writ of mandamus and an emergency motion to stay proceedings arguing, among other things, that the trial court abused its discretion by hearing a motion for partial summary judgment before deciding whether a class may be certified. According to H & R Block, the trial court committed two abuses of discretion that each warranted relief by writ of mandamus. First, the trial court's order denying H & R Block's motion for continuance violated Rule 42(c)(1) because it "allow[ed] a decision on the merits impermissibly to precede a certification determination."[15] Second, H & R Block argued that the order was an abuse of discretion because "notice must be given to the class members prior to a determination on the merits."[16] According to the appellate court, the phrase "as soon as practicable" does not mean "before anything else" or "before a merits determination."[17] Rather, ' "as soon as practicable' indicates a discretionary authority in the trial court to determine the appropriate time for ruling on a motion for class certification."[18] Regarding H & R Block's second argument, the court concluded that Rule 42(c)(2) imposes on the trial court the duty to direct notice to class members only " 'after the court has determined that a class may be maintained' "[19] Here, no class had been certified, and thus no notice was owed to potential class members.[20]

In a case that has been closely watched as it makes its way through the courts, the Supreme Court, in *Compaq Computer Corp. v. Lapray*,[21] determined whether the trial court abused its discretion by certifying a Rule 42(b)(2) class of computer purchasers who allegedly bought defective computers. Reversing the lower court's approval of class certification, the Supreme Court found that the plaintiffs had not satisfied the requirements of Rule 42(b)(2).

In *Compaq*, several computer purchasers filed a class action alleging that some of the computers manufactured and sold by Compaq had a defective floppy disk controller ("FDC"). The trial court certified a nationwide class under Rule 42(b)(2) and (b)(3). Compaq appealed.

The court of appeals affirmed the certification order. The court analyzed the certification of a Rule 42(b)(2) class and held that declaratory relief was appropriate. The court then concluded that it was unnecessary to address the issues challenging the requirements of predominance and superiority because the trial court only alternatively certified the class under Rule 42(b)(3). Compaq again appealed.[22]

Before the Supreme Court, the parties vigorously debated whether the class properly fell under Rule 42(b)(2) or (b)(3). Compaq argued that "the breach of warranty declaratory judgment claim [was] merely a predicate to a claim for damages and an attempt to 'shoehorn' a damages claim into a (b)(2) claim for declaratory relief."[23] The purchasers claimed that "(b)(2) certification [was] proper because they [had] disclaimed consequential damages and primarily [sought] a declaration that the FDC [was] defective and falls within Compaq's limited warranty."[24] After much discussion, the Supreme Court held that "trial courts considering certification under (b)(2) must consider, and due process may require, individual notice and opt-out rights to class members who seek monetary damages under any theory."[25]

In this case, all claims and all remedies were certified under both (b)(2) and (b)(3). The Supreme Court determined that the trial court failed to examine the possibility of notice and opt-out for the (b)(2) class. "Because notice and opt-out must be determined before the parties can ascertain what their respective rights will be," the court declared that "an appellate court cannot effectively review a certification order that does not state how, if at all, these rights will be provided."[26] As to the (b)(2) claims for declaratory relief to the exclusion of damages, the Supreme Court concluded that the purchasers "have tried to 'shoehorn' their damages action into the '(b)(2) framework, depriving class members of notice and opt-out protections.' "[27]

Next, the Supreme Court addressed whether plaintiffs may evade the rigorous analysis requirement enunciated in *Bernal* by seeking (b)(2) certification. Although recognizing that (b)(2) does not explicitly include the predominance and superiority requirements of Rule 42(h)(3), the court determined that (h)(2) does require "a rigorous analysis of 'cohesiveness.' "[28] Since the trial court did not rigorously analyze cohesiveness, the court reversed that part of the court of appeals' judgment affirming certification of the (b)(2) class.[29]

Regarding the (b)(3) class, the Supreme Court began its analysis by determining whether the trial court conducted a proper choice of law analysis and correctly decided that Texas law controlled. Despite the extensive choice of law analysis presented by the parties, the Supreme Court found that neither the trial court nor the court of appeals analyzed the differences, if any, of the laws of other states.[30] The court then demonstrated the differences in the Uniform Commercial Code from state to state regarding notice, reliance and remedies.[31] Lastly, the Supreme Court determined that the trial court abused its discretion "in holding that Texas law bore the most significant relationship to, and therefore governed, all class members' claims."[32] Accordingly, the court concluded that Rule 42(b)(3)'s predominance requirement was not satisfied.

The Supreme Court rejected another court of appeals opinion affirming certification in *Snyder Communications, L.P. v. Magaña*.[33] In that case, the Court considered whether the trial court abused its discretion by certifying a class of employees who were allegedly not paid compensation due them pursuant to written, contractual representations made by their employer. Although contract cases often are more susceptible to certification than some other types of cases, the Court found that the lower court failed to conduct the required rigorous analysis.

Several employees filed suit individually against Snyder alleging that it failed to pay compensation due to them pursuant to written, contractual representations made at the time of employment. The employees claimed that the compensation scheme provided that sale associates would receive commissions for each valid Letter of Authorization ("LOA") they obtained from residential consumers to transfer long distance carrier service to AT&T. Subsequently, the employees asserted a class action, filed a motion for certification, and submitted a proposed trial plan. The trial court conducted a 30-minute certification hearing, and eight months later, issued an order certifying a class. Snyder appealed.

On appeal, Snyder argued, among other things, that the trial court erred when certifying the class because it erroneously concluded that common issues predominated over individual issues and did not determine that a class action was a superior method for fair and efficient resolution of the claims. Rejecting Snyder's challenges, the court of appeals affirmed the certification order. Snyder appealed to the Supreme Court.

On appeal, Snyder argued that the court of appeals failed to address in any meaningful way how individual issues would be tried and therefore affirmed the certification order even though the trial court did not perform the rigorous analysis required by Bernal and its progeny. Specifically, Snyder argued, that each claim by each class member of non-payment of commission or bonus was subject to one or more of Snyder's defenses and must be determined on a case-by-case basis. Therefore, Snyder concluded that individual issues predominated over common issues.[34]

According to the Supreme Court, the court of appeals accepted the trial court's "findings at face value, without ensuring that, in fact, common issues predominate[d]."[35] In assessing whether common issues predominate, the Supreme Court stated that "courts must identify the controlling substantive issues of the case and assess which issues will predominate to determine whether those issues are in fact common to the class . . . If there are some common questions of law or fact, but the focus of the litigation will be mainly on individual issues, the court cannot certify the class under Rule 42(b) (3)."[36] In this case, the primary issue in dispute - whether Snyder failed to pay earned commissions to its sales associates - was "highly individualized because of the many criteria a particular LOA had to meet before Snyder and then AT&T accepted it."[37] Evaluating whether a class member was improperly denied commissions required "an examination of not only *each* disputed LOA but also Snyder's and perhaps AT&T's records because a determination of whether commissions were due and owing [would] not be apparent from the face of an LOA."[38] However, the trial court provided "no meaningful answer as to how these issues could be tried 'in a manageable, time-efficient, yet fair manner.' "[39] Since the record did not demonstrate that the predominant issue in this case was common to the class, the Supreme Court concluded that ' "individual issues [would] be the object of most of the efforts of the litigant and the court.' "[40]

The Supreme Court addressed an interesting procedural issue in *In re Wood*.[41] In that case, the court considered the vexing question of who decides whether an arbitration agreement permits class arbitration: a court or an arbitrator? In this case, the court determined that it was up to the arbitrator.

Several former clients filed a class action suit against John O'Quinn, P.C. alleging that the law firm overcharged them in a breast implant class action settlement. Since the client's fee agreement provided that any dispute arising from that agreement would be submitted to the American Arbitration Association for binding arbitration under that entity's rules, the trial court granted the client's motion to refer all claims, including class claims, to arbitration. The order specifically authorized the arbitrator to decide the class certification issue.[42]

O'Quinn sought mandamus relief in the court of appeals, requesting that the trial court be ordered to refer each of the claims to a separate arbitration. Instead, the court of appeals directed the trial court to "determine whether the parties' agreement permitted

class arbitration and, if so, whether to certify the class."[43] The trial court vacated the order authorizing the arbitrator to decide the class certification issue.[44]

Shortly before the court of appeals issued its opinion, the United States Supreme Court held, in *Green Tree Financial Co. v. Bazzle*,[45] that "where parties agreed to submit all disputes to an arbitrator under the Federal Arbitration Act, issues of class arbitration are for the arbitrator to decide."[46] However, the court of appeals dismissed *Green Tree's* application in a footnote stating: " 'We do not address whether, as a general proposition, class certification is a matter for the trial court or for the arbitrator. Furthermore, the holding in *Green Tree Fin. Corp. v. Bazzle* is inapplicable here.' "[47]

Relying on *Green Tree*, the clients sought mandamus relief in the Supreme Court, contending that the court of appeals abused its discretion in directing the trial court to vacate its order. In response, O'Quinn argued, among other things, that *Green Tree* was inapplicable because the AAA "did not have rules for class arbitration at the time that this lawsuit was filed[,] . . . the date when the trial court referred the case to arbitration, or the date arbitration was initiated, all of which occurred before the [AAA's class certification] rules were promulgated."[48] The Supreme Court disagreed, stating that "whether the pre- or post-*Green Tree* rules govern is itself a question of contract interpretation, a task committed to the arbitrator."[49] Accordingly, the court held that the court of appeals erred in directing the trial court to determine whether a class should be certified.

In *North American Mortgage Co. v. O'Hara*,[50] the Supreme Court held that it was error to certify a class before a trial plan was prepared. In O'Hara, a mortgage lender appealed the court of appeals' decision ordering the trial court to certify a class of borrowers before preparing a trial plan. With little discussion, the Supreme Court concluded that the judgment was in direct conflict with *Bernal* because it ordered class certification before any trial plan had been developed.[51] The court declared that the court of appeals "should have remanded the case to the trial court for further certification proceedings in light of its opinion, as it did in the first appeal, without dictating the result."[52] "Because the appeal was from the denial of certification," the Supreme Court determined that "the court of appeals was constrained to address the issues raised without benefit of a practical, specific determination by the trial court regarding trial of the case as a class action."[53] Specifically, the court stated that the *Bernal* requirements did not allow the court of appeals "to foreclose the further certification analysis that preparation of a trial plan provides."[54] The Supreme Court instructed the trial court to "reconsider the class action requirements in light of the court of appeals' opinion and, consistent with that court's rulings, conduct such further proceedings as may be necessary to determine whether and how class claims can be tried in light of that opinion."[55] In the absence of a trial plan, the court rejected the mortgage lender's invitation to examine whether certification was proper in this case and refused to express any opinion on the court of appeals' resolution of the class certification issues it had addressed.

B. Court of Appeals Opinions Denying Certification

In *Compaq Computer Corp. v. Albanese*,[56] the Beaumont Court of Appeals reversed the certification of a nationwide class of computer purchasers who received a written limited warranty that allegedly violated the Magnuson Moss Warranty Act. During the pendency of this appeal, the Supreme Court issued its opinion in *Compaq Computer Corp. v. Lapray*,[57] which reversed the Beaumont Court of Appeal's judgment and found, among other things, that a trial court must rigorously analyze the cohesiveness of the class and notice and opt-out rights of the putative class members. Although the record in this case reflected that the trial court carefully reviewed numerous issues presented by the parties, the court of appeals determined that the certification order did not provide opt-out rights to the class and thus violated the requirements of *Lapray*.[58] The court then declared that the trial court abused its discretion by also certify the class under Rule 42(b)(1)(A) for two reasons. First, there was "an insufficient showing of a palpable risk that Compaq's conduct, absent certification of this class, would be bound by irreconcilably conflicting judgments."[59] Second, the court of appeals acknowledged that the "class must be cohesive" and thus "certification under (b)(l)(A) should be analyzed the same as under (b)(2) for purpose of notice and opt-out rights and the effect of the judgment on absent class members."[60]

The Beaumont Court of Appeals found that in a case that required the jury to make thousands of individual damage calculations, class certification was inappropriate. In *Rent-A-Center, Inc. v. Duron*,[61] the defendant appealed the trial court's order certifying a class of equipment renters who were charged and paid a "late fee" or "reinstatement fee." On appeal, the defendant raised several issues: (1) whether the trial court erred in certifying a class because individual issues predominated over common issues; (2) whether the trial court failed to establish a trial plan to ensure that individual defensive issues could be fairly and efficiently determined in a class action; and (3) whether the plaintiff was typical of any class of defendant's customers and whether there is a class of persons so numerous as to warrant class treatment.[62]

The court of appeals focused on the details in the certification order. The order stated that the trial court had "not found a single significant individual issue presented in this case . . ."[63] The order later provided, however, that "the precise amount of each class member's actual damages and statutory penalty is admittedly individual . . . [T]he actual damages, as well as the statutory penalty amount, for each of the class members can be ministerially calculated from RAC's own electronic records . . . Plaintiff can submit to the jury an individual damage award for each class member prepared in a ministerial fashion from RAC's own records."[64] The appellate court concluded that the "required damage and penalty calculation cannot be both 'ministerial' and an issue for the jury" because a "ministerial calculation would assume the facts are determined and undisputed."[65] Moreover, the court determined that the "damage - finding procedure described by the certification order-submitting an 'aggregate' damage award to the jury, and then if the answer is 'no', 'the jury will be asked to answer a second question for each class member' - clearly anticipates that the jury will be required to make thousands of individual damage determina-

required to make thousands of individual damage determinations."[66] Since the trial plan anticipated the need to ask the jury for individual damage findings, the Beaumont court concluded that the class could not be certified under Rule 42(b)(4).

In another computer defect case, the Beaumont Court of Appeals reversed the certification of a nationwide class of computer purchasers who claimed that they had purchased defective machines. In *eMachines, Inc. v. Packard*,[67] the manufacturer appealed the trial court's order certifying a nationwide class of computer purchasers under Rule 42(b)(2) and (b)(3). During the pendency of the appeal, the Supreme Court issued its opinion in *Compaq Computer Corp. v. Lapray*,[68] which reversed the Beaumont court judgment and found, among other things, that the trial court erred in determining that Texas law governed all class members' claims.[69] Heeding the Supreme Court's opinion in *Lapray*, the Beaumont Court of Appeals concluded that the trial court's finding that " 'no true conflict of law' exists between Texas law and the law of the various jurisdictions affected [was] in direct conflict with the identical issue analyzed by the Texas Supreme Court in *LaPray*," and it therefore was an abuse of discretion to certify the class under Rule 42(b)(3).[70] Regarding certification under Rule 42(b)(2), the appellate court was "unable to locate any finding by trial court regarding the necessity for 'notice and opt-out' opportunity to be given to the unnamed certified class members," and the record therefore did not satisfy "the *LaPray* requirements for a 'rigorous analysis' of cohesiveness of the potential class prior to certification under Rule 42(b) (2)."[71]

In *Wall v. Parkway Chevrolet, Inc.*,[72] the Houston Court of Appeals affirmed the trial court's refusal to certify a class of automobile purchasers who challenged a customer service fee allegedly imposed by two car dealerships. According to the purchasers, the dealerships deceptively included a "fee for 'customer service' " on the purchase invoice with no explanation other than that it was part of the price of the vehicle, and thus violated certain provisions of the DTPA.[73] In their motion for class certification, the purchasers alleged that "the following common issues predominate: (1) whether the plaintiff class were consumers; (2) whether the charging of a fee under the designations such as 'NACC,' 'Consumer Benefits & Services (ECBP),' 'NADW,' 'Intelesys,' and/or other similar designations is an unconscionable, false, misleading or deceptive act or practice as defined in the DTPA; (3) whether such acts were a producing cause of damages; and (4) the amount of the damages.' "[74] After the class certification hearing, the trial court denied the purchasers' request for certification. The purchasers appealed.

On interlocutory appeal, the parties conceded that all buyers were consumers as defined in the DTPA. However, the dealers disputed the purchasers' contention that any other questions could be answered on a classwide basis.[75] Specifically, the dealers argued that "an individualized inquiry into each buyer's circumstances was required to answer the question 'whether the charging of a fee under the designations such as 'NACC,' 'Consumer Benefits & Services (ECBP),' 'NADW,' 'Intelesys,' and/or other similar designations is an unconscionable, false, misleading or deceptive act or practice as defined in the DTPA.' "[76] The dealers also argued that individualized inquiries were required "to answer questions of causation of damages and of the amount of damages, if any, suffered by each buyer."[77]

After reviewing the evidence, the Houston Court of Appeals determined that "the two dealers used different terms to describe their benefit packages, made different oral and written disclosures, charged different amounts for their coupon books and offered different coupons to their customers, running from different dates, by methods that varied over time."[78] Accordingly, the court concluded that the trial court did not abuse its discretion in concluding that there was no commonality of issues between the two subclasses such that the claims against the dealers could be tried together. Additionally, the court found that individualized inquiries regarding the alleged misrepresentations and failure to disclose, the application of the law to those facts, and questions related to damages characterized each subclass.[79] Thus, the court held that the trial court did not abuse its discretion in concluding that questions of fact requiring individualized inquiry predominated over any issues common to the class as a whole or to either subclass.

In another post-*Lapray* opinion, the Beaumont Court of Appeals reversed the certification of a Rule 42(b)(2) class in *Farmers Group, Inc. v. Geter*.[80] In that case the insurance company defendant appealed the trial court's order certifying a class of Texas home owner's insurance policyholders under Rule 42(b)(2). On interlocutory appeal, Farmers argued that the trial court improperly certified the class under Rule 42(b)(2). In reviewing this issue, the appellate court applied the principles enunciated by the Supreme Court in *Compaq Computer Corp. v. Lapray*.[81] The court of appeals concluded that the trial court "did not examine the notice and opt out issues as required by *LaPray*, an examination that could affect the class's composition" and "had no opportunity to analyze the cohesiveness that [would] exist if the court orders notice and opt out for the (b)(2) class members."[82] Accordingly, the court of appeals reversed those parts of the judgment that determined that Geter carried her burden under Rule 42(b)(2).

In yet another rejection of a Rule 42(b)(2) certification, the Texarkana court in *Vanderbilt Mortgage & Fin., Inc. v. Posey*,[83] affirmed the trial court's refusal to certify a Rule 42(b)(2) class and reversed the certification of a Rule 42(b)(4) class.

The Texarkana court began its analysis by determining whether there were common legal issues. Specifically, the court determined whether the trial court erred in deciding that Tennessee law applied to the claims of the entire class.[84] The court of appeals reviewed the trial court's choice of law analysis in three steps. First, the court determined if the laws of the 44 jurisdictions were different. Since Posey only presented the trial court with an analysis of the laws of Texas and Tennessee, the court concluded that Posey failed to meet his burden of proving that the laws of Tennessee and the other 43 states did not differ.[85] The next step in deciding choice of law was to determine which state had the "most significant relationship."

The trial court only considered two jurisdictions - Texas and Tennessee. Since Posey did not present an analysis of the other 42 states, the appellate court concluded that Posey did not meet his burden of providing a choice of law analysis from which the trial court could determine if Tennessee had the "most significant" contacts of all of the 44 states.[86] The last step in deciding choice of law was to determine if any exceptions applied that would prevent the application of the law of the state with the "most significant contacts." Posey argued that "Tennessee law applie[d] due to the Full Faith and Credit Clause of the United States Constitution and because Tennessee law [did] not conflict with Texas public policy."[87] The court of appeals disagreed. According to the court, the application of Tennessee law was not required by the Full Faith and Credit Clause because Texas, as well as other states, had significant contacts with the transaction. Furthermore, the court determined that the fact that Tennessee law was not contrary to Texas public policy did not mean that Tennessee law applied.[88]

The court of appeals rejected the remaining common issues of law arguments presented by the parties. Vanderbilt asserted that "the Texas Supreme Court has held that a nationwide class concerning deceptive trade practice cannot be certified as a matter of law."[89] The Texarkana court disagreed, concluding "[a] nationwide state law class action can be theoretically certified in two ways. Either the law of a single state must apply to all of the plaintiffs' claims or the laws of the various states must be sufficiently similar that common issues of law predominate."[90] Posey claimed there was "no conflict between the laws of Tennessee and Texas because all of Texas' interests [were] protected under Tennessee law."[91] The court of appeals rejected Posey's argument, declaring that the "most significant relationship" doctrine, rather than the "False Conflicts" doctrine, was the standard for choice of law in Texas.[92]

The Texarkana court then determined whether the trial court erred in concluding that there were common issues of fact. Vanderbilt argued that common issues did not predominate. The court of appeals agreed for two reasons. First, Posey did not properly demonstrate that Tennessee law applied. Second, Posey did not present the trial court with any evidence that the class members (absent himself) received misrepresentations. For these reasons, the Texarkana court determined that the trial court abused its discretion by certifying a class that did not share common issues of law or facts.[93]

Finally, Posey argued that "the trial court erred by reading into the Tennessee statute conditions that were not part of the statute, by refusing to implement the scheme of remedies available under the [Tennessee Consumer Protection Act], and by ruling on the merits of the case."[94] Relying on *Lapray*, the Texarkana court rejected Posey's cross-appeal because he failed to satisfy the commonality requirement of Rule 42(a) and the requirement of "cohesiveness."[95]

As it did in *Albanese* and *eMachines*, the Beaumont Court of Appeals followed the teachings of the Supreme Court in *Lapray* and rejected a Rule 42(b)(2) class in *Hewlett-Packard Co. v. Alvis*.[96] In that case, Hewlett-Packard appealed the trial court's order certifying a nationwide class of computer purchasers under Rule 42(b)(2). During the pendency of this appeal, the Supreme Court issued its opinion in *Compaq Computer Corp. v. Lapray*.[97] In light of *Lapray*, the Beaumont court requested further briefing from the parties regarding the certification of the class. Both parties agreed that *Lapray* precluded a nationwide certification in this instance. Without applying the principles enunciated in *Lapray*, the court of appeals agreed with the parties and concluded that the trial court erred in certifying the nationwide class.

In *J.C. Penney Co. v. Pitts*,[98] the Corpus Christi Court of Appeals reversed the certification of a national class of consumers who had purchased accidental death and dismemberment insurance. After the trial court certified the class, the plaintiff on appeal abandoned her claims for violations of the Texas Theft Liability Act, civil conspiracy and exemplary damages in an attempt to comply with *Henry Schein, Inc. v. Stromboe*.[99] Because the plaintiff did not amend her pleadings, however, the court of appeals considered all of the claims in determining if she satisfied Rule 42(b)(4).[100]

J.C. Penney argued that the trial court erred: (1) in applying Texas law to the entire class because Pitts failed to show any differences between the laws of Texas and other jurisdictions, and (2) in finding Texas had the most significant interest in applying its law to the class action.[101] The Corpus Christi court concluded that "the trial court improperly presumed there were no conflicts of law for [Pitts'] claims of agency, ratification, joint enterprise, damages, penal code violations, and attorney's fees because [Pitts] failed to provide a sufficient choice of law analysis."[102] Moreover, the court determined that the trial court's choice of law analysis was incomplete because it only considered that J.C. Penney was headquartered in Texas and that its acts originated in Texas. Relying on Schein, the court stated that "the substantial relationship test requires courts to consider not only the defendants' contacts with other states, but also the interest of other states in having their laws apply."[103] Accordingly, the court determined that Pitts failed to show that the predominance requirement was satisfied.

Another nationwide class was rejected in *Ford Motor Co. v. Ocanas*.[104] Ford appealed the trial court's order certifying a Texas class and a nationwide class of consumers who purchased Ford trucks with an optional towing package. On interlocutory appeal, Ford argued that the trial court abused its discretion in determining that Ocanas met his burden in establishing the predominance and superiority requirements of Rule 42(b)(4). Specifically, Ford asserted that individualized evidence from each class member was necessary to prove Ocanas' claims for breach of express and implied warranties and for violations of the DTPA. Additionally, Ford argued that the trial court failed to consider which substantive state laws applied to the plaintiffs' claims and how variations in state laws would be managed in the nationwide class.

To determine whether common issues of law or fact predomi-

nated, the Corpus Christi court analyzed Ocanas' claims for breach of express warranties and violations of the DTPA. Relying on *Schein*, the court noted that each class member must prove reliance as a prerequisite to recovery. [105] While there was evidence that Ford intended for customers to rely on representations that F-150s with a Class III towing package would come with larger radiators, " 'there [was] no evidence that purchasers *actually did rely*' " on Ford's statements ' "so uniformly that common issues of reliance predominate over individual issues.' "[106] Furthermore, the court determined that the nationwide class compounded the defects of the Texas class because it improperly applied Michigan law. Specifically, Ocanas "failed to properly address choice of law issues in seeking class certification including how variances among states' consumer protection laws could or would be handled."[107]

Finally, the court of appeals concluded that Ocanas failed to satisfy the superiority requirement of Rule 42(b)(4). The court's decision turned on the certification order, which stated that " '[a] class action is superior to other available methods for fair and efficient adjudication of this controversy.' "[108] The certification order did not discuss, however, "how individual issues, such as reliance, [would] be addressed to fairly allow [Ford] to present viable claims or defenses."[109]

The Houston Court of Appeals affirmed the denial of a class of mobility-impaired cruise ship passengers in *Spector v. Norwegian Cruise Line Ltd.*[110] In that case, several mobility-impaired passengers filed class action against a cruise line ("NCL") alleging, among other things, violations of the DTPA, breach of contract, unjust enrichment and violations of Chapter 121 of the Texas Human Resources Code. After a hearing, the trial court denied certification without stating the grounds and denied the passengers' request for fact findings and legal conclusions.

On appeal, the passengers argued that the trial court abused its discretion in denying their motion to certify two classes. The Houston Court of Appeals began its analysis by examining predominance in light of each cause of action on which the passengers sought certification. Regarding the alleged DTPA violations, the passengers argued that individual issues would not predominate because the alleged misrepresentations were found in " 'virtually identical language in [NCL's] publications and documents' " and arose from " 'NCL's failure to inform [the passengers] about the lack of access to vessel facilities, ports and shore excursions.' "[111] The passengers claimed that "the statements in these materials violated the DTPA because they constituted both laundry-list violations and unconscionable conduct."[112] "[G]iven the varied ways in which NCL advertised and responded to potential customers' questions," however, the court of appeals concluded that "there was evidence that [the passengers] received the representations on which they based their claims in different ways, including orally."[113] Additionally, the court found that the class members were required to show detrimental reliance to establish their laundry-list DTPA claims. For these reasons, the court determined that the trial court could have reasonably concluded that determining what representations were made to which class members would involve individual inquiries that would predominate over common ones.[114]

Regarding the breach of contract claim, the passengers relied on the same oral and written statements that they claimed violated the DTPA. For the passengers, the alleged contractual terms were partially oral and based on answers to individual questions. This required the trial court to look at individual communications to determine contract terms. Additionally, given the varied written materials that NCL used, and the fact that some of the passengers viewed different written materials, the court determined that the trial court would have acted within its discretion if it determined that the written contractual terms might vary for each potential class member.[115]

In alleging that NCL was unjustly enriched, the passengers made claims that generally encompassed reliance on the part of the passengers or wrongful conduct by NCL, which implicated the same representations that the passengers asserted for their DTPA and contract claims.[116] Accordingly, the court of appeals determined that the trial court did not abuse its discretion by denying certification under an unjust enrichment theory of recovery.

Finally, given the class definitions, the evidence, and the fact that the passengers did not explain what law applied to the class members who sailed solely outside Texas waters or whether the applicable laws differed materially, the court of appeals held that the trial court did not abuse its discretion in refusing to certify the Chapter 121 claims.[117]

In a case where the plaintiffs claimed that the discovery rule saved their claims from the statute of limitations, the Austin Court of Appeals found that individual issues predominated and precluded certification. In *King v. City of Austin*,[118] police officer King appealed the trial court's order denying certification. The parties disputed whether King established adequacy of representation under Rule 42(a)(4) and predominance and superiority under Rule 42(b)(4). The Austin Court of Appeals determined that there was conflicting evidence regarding King's willingness and ability to take an active role in and control of the litigation. The court was able to avoid the issue by concluding that individual issues predominated. This was because King asserted the discovery rule in response to the City's argument that the statute of limitations barred most of the proposed class's recovery. According to the court, "[i]ndividual discovery rule questions could therefore require individual answers that would be a focus at the trial and consume most of the efforts of the litigants and the court." [119] The Austin court rejected King's characterization of the action as a negative value suit and noted that joinder and intervention were available, practicable methods of adjudication in this case.[120]

In *Philadelphia American Life Insurance Co. v. Turner*,[121] the Fort Worth Court of Appeals reversed the certification of two multistate classes of insurance policyholders. In Turner, a policyholder filed a class action alleging that Philadelphia American Life

Insurance Company breached an insurance contract by charging an administrative fee not authorized by the contract. The trial court granted class certification and the insurance company appealed.

On appeal, the insurance company claimed that the trial court erred by certifying an "Administrative Fee Class" because the policyholder failed to establish typicality and adequacy of representation under Rule 42(a) and predominance and superiority under Rule 42(b)(4). The insurer alleged that the policyholder's claim was atypical of the class members defined in the trial court's trial plan because his claim was "based on subjective factors particular to his own agreement with [the insurer] - whether he believed that the administrative fee applied only to the first month or every month."[122] The Fort Worth court agreed for two reasons. First, the policyholder did not offer any evidence of the other class members' knowledge regarding the administrative fee that demonstrated that they shared his view. Second, and more importantly, the insurance contracts did not have uniform language relating to the monthly administrative fee.[123] The insurer claimed that the policyholder did not establish the adequacy requirement because (1) he was unfamiliar with the issues facing the proposed class, and (2) his admission that he agreed to pay the monthly premium amount that included the administrative fee. In light of the evidence presented, the Fort Worth court concluded that the trial court did not abuse its discretion on the issue of adequacy.[124]

The insurance company also argued that class certification was inappropriate for the "Administrative Fee Class" because common factual and legal issues did not predominate. Here, the court of appeals determined that due to the ambiguity regarding the definition of "premium," the predominance requirement could not be met without analyzing whether each state permitted an insurance company to charge a premium that included a component that is treated internally as an administrative fee. Since the policyholder failed to present an analysis of state law evaluating the differences between the states listed in the class definition, the Fort Worth court concluded that he failed to demonstrate that Texas law should apply to so many of those claims that common legal issues would predominate.[125] The sole factor that the trial court discussed in its superiority analysis was the small economic value of the class members' individual claims. According to the court of appeals, this was not enough to establish that a class action was the superior method of adjudication.[126]

The insurer claimed that the trial court also failed to adequately establish the class certification requirements for the "Cancellation Class," including commonality, typicality and adequacy of representation. The trial court found that the policyholder demonstrated that he would fairly and adequately protect the interests of the class because he had already obtained an agreed temporary injunction that protected every class member from having their insurance policies cancelled. The Fort Worth court determined that the temporary injunction would have affected each insured differently. Due to the potential conflicts between the interests of the policyholder and the interests of the absent class members, the court concluded that the policyholder had not demonstrated that he would fairly and adequately protect the interests of the class. The court then found that the policyholder did not establish the typicality, commonality and predominance requirements because he did not demonstrate that he suffered any financial harm and admitted that he did not take steps to finding replacement cover after receiving the insurer's non renewal letter.[127]

In two "fax class" cases, the Dallas Court of Appeals reversed trial court certification decisions because it was not administratively feasible to identify the members of the purported classes.

In *Apartment Investment and Management Co. v. Suggs & Associates, P.C.*, [128] the trial court defined the class as "the holders of telephone numbers on the date they are confirmed to have received AIMCO's fax ads as confirmed by the American Blast Fax daily fax confirmation logs."[129] On interlocutory appeal, AIMCO argued that it was not administratively feasible for a court to determine whether a particular individual was a member of the class.[130] The Dallas court concluded that the class definition failed to show that the class members were presently ascertainable because fax confirmation logs could not be used to determine the names of the class members.[131]

Likewise, in the second fax case, *Pinnacle Realty Management Co. v. Kondos*,[132] an apartment property manager appealed the trial court's order certifying a class of fax recipients, complaining that the class was improperly defined. The trial court defined the class as "the holders of telephone numbers on the day they are confirmed to have received Settler's Gate, Tree Tops or Park Place fax ads, when those properties were managed by Pinnacle, as confirmed by the American Blast Fax daily fax confirmation logs."[133] The Dallas court concluded that the class definition failed to show that the class members were presently ascertainable because the confirmation logs could not be used to determine the names of the class members.[134]

In *Texas Parks & Wildlife Department v. Dearing*,[135] the Texas Parks and Wildlife Department appealed the trial court's order certifying a class of game wardens on the grounds that the disparate impact claims - the only cause of action for which the class was certified - were not viable under the Texas statute prohibiting age discrimination. After holding that there is no disparate impact theory of liability under the Texas Commission on Human Rights Act, the court of appeals vacated the certification order.[136]

C. Court of Appeals Opinions Approving Certification

Just two reported appellate cases approved class certifications in 2004.

In *Rourk v. Cameron Appraisal District*,[137] the Corpus Christi Court of Appeals found that the trial court abused its discretion by not certifying a class of travel trailer owners who brought a declaratory judgment action claiming that their trailers are personal property and, therefore, are exempt from taxation under the Texas Constitution and Tax Code. Without explanation, the trial court held generally that the proposed class was not clearly ascertainable

and the class action procedure would alter the substantive prerequisites of a showing of a de novo appeal pursuant to the Texas Tax Code as a basis for jurisdiction, and thus denied class certification. The trial court rendered summary judgment in favor of county tax appraiser, and the travel trailer owner appealed.[138]

The court of appeals found that the class members would be easily ascertainable from the class definition because they were on the tax rolls in Cameron County during the relevant time period. The court concluded that the common predominance issue was whether the county tax appraiser "unconstitutionally assessed the members' vehicles for ad valorem taxation and denied applicable exemptions from taxation," and found that a class action was the superior method of adjudication.[139] The court found that the class action satisfied the requirements of Rule 42(b)(1)(A), (b)(2), (b)(3), and (b)(4).[140]

In a case arising from alleged misrepresentations included in a company's registration statement in connection with its initial public offering, the Dallas Court of Appeals affirmed the certification of a stockholder class in *Grant Thornton LLP v. Suntrust Bank*.[141] In that case, the accounting firm defendant argued that the trial court erred in certifying a class because (1) the class representatives would not adequately protect the interests of the class, (2) res judicata would bar class members from bringing individual claims based on causes of action that were not certified, (3) assertion of a knowledge defense defeated predominance, (4) common legal issues did not predominate with respect to the state securities act claim, (5) a class action was not the superior method of adjudication and (6) the class representatives' claims were not typical of the class.

The court of appeals determined that the limiting of the federal securities act class to those who did not have to prove reliance did not affect the ability of the plaintiffs to represent the class adequately because all of the plaintiffs had both federal and state securities act claims.[142] The court concluded that "the trial court considered the adequacy of class representation in the context of claims splitting and authorized the class to proceed with safeguards designed to protect absent class members whose non-certified claims may be affected by the outcome of the class action."[143]

For these reasons, the court declared that "the doctrine of res judicata did not show the class action [was] inappropriate."[144]

After reviewing the record, the court determined that the trial court properly concluded "the knowledge defense presented issues common to the class members inasmuch as they all lacked access to information showing the misrepresentations and omissions."[145] According to the court of appeals, Texas was the state with "the most significant relationship to the litigation" and thus the trial court did not error in determining that Texas law applied to all class members.[146] The court rejected the accounting firm's contentions that the class members' claims would not be "negative value" suits and the class representatives' claims were not typical of the class.[147]

Lastly, the court of appeals stated that "[t]he existence of a defense against a named party that may not exist against the rest of the class does not necessarily destroy typicality."[148]

Since the defenses in this case did not appear to involve disputed facts, the court concluded that the trial court did not abuse its discretion in finding the class representative's claims typical of the class.

ENDNOTES

1 Mark W. Bayer is a partner in the Dallas office of Gardere Wynne Sewell LLP. Samuel E. Joyner is an associate in the Dallas office of Gardere Wynne Sewell LLP
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5 46 S.W.3d 864, 868 (Tex. 2001).
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9 Id. at *5.
10 Id.
11 Id. (emphasis in original).
12 Id.
13 Id. at *6.
14 No. 13-04-059-CV, 2004 WL 575211 (Tex. App-Corpus Christi Mar. 24, 2004, orig. proceeding).
15 Id. at *2.
16 Id.
17 Id.
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21 135 S.W.3d 657 (Tex. 2004)
22 Id. at 662.
23 Id. at 663.
24 Id. at 664.
25 Id. at 667.
26 Id. at 668.
27 Id. at 670.
28 Id.
29 Id. at 671.
30 Id. at 673.
31 Id. at 674-80.
32 Id. at 681.
33 142 S.W.3d 295 (Tex. 2004) (per curiam).
34 Id. at 300.
35 Id. at 299.
36 Id. at 299-300.
37 Id. at 300.
38 Id. at 301 (emphasis in original).
39 Id.
40 Id. at 302.
41 140 S.W.3d 367 (Tex. 2004) (per curiam).
42 Id. at 368.
43 Id.
44 Id.
45 539 U.S. 444 (2003)
46 Id. (citing Green Tree).
47 Id. at 369 (citing the appellate opinion).
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54 Id.

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65 Id.
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80 Nos. 09-03-404-CV, 09-03-396-CV, 2004 WL 2365394 (Tex. App.-Beaumont Oct. 21, 2004, no pet.).
81 135 S.W.3d 657 (Tex. 2004).
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85 Id. at 314.
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89 Id. at 317.
90 Id.
91 Id. at 318.
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93 Id. at 320-22.
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100 Id. at 459-60.
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102 Id. at 461.
103 Id.
104 138 S.W.3d 447 (Tex. App.-Corpus Christi 2004, no pet.). This opinion addressed two interlocutory appeals challenging the certification of two class actions arising from the same underlying facts and involving the same causes of action.
105 Id. at 453.
106 Id. (emphasis in original).
107 Id.
108 Id. at 454.
109 Id.
110 No. 01-02-00017-CV, 2004 WL 637894 (Tex. App.-Houston [1st Dist.] Mar. 30, 2004, no pet.).
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112 Id.
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122 Id. at 588.
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124 Id. at 591-92.
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128 129 S.W.3d 250 (Tex. App.-Dallas 2004, no pet.).
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139 Id. at 301-02.
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141 133 S.W.3d 342 (Tex. App.-Dallas 2004, pet. filed).
142 Id. at 351.
143 Id. at 353.
144 Id.
145 Id. at 357.
146 Id. at 361.
147 Id. at 362-63.
148 Id. at 363.