WINTER 2008 ■ Volume 30 ■ Number 1

TEXAS BUSINESS LITIGATION JOURNAL

2007 Annual Survey of Fifth Circuit Class Action Cases

By Barry M. Golden and Nicholas G. Peters[1]

Barry M. Golden

Nicholas G. Peters

The Fifth Circuit Court of Appeals and its various district courts saw modest class action activity in 2007, continuing last year's trend.[2] Just like in 2006, the Fifth Circuit courts decided seventeen cases in 2007 that substantively address Federal Rule of Civil Procedure 23.[3] Much like 2006, in which Fifth Circuit courts certified six classes, in 2007 they certified five classes.

This year, Fifth Circuit courts tackled Rule 23 issues involving the securities laws, the Employee Retirement Income Security Act of 1974 ("ERISA"), the Federal Credit Reporting Act ("FCRA"), and federal antitrust law.Only one Enron-related lawsuit substantively addressed Rule 23, and several Hurricane Katrina-related class action cases made their way onto Louisiana and Mississippi dockets. With respect to cases stemming from the Hurricane Katrina disaster, it is becoming apparent that litigants attempting to certify classes of landowners who suffered property loss in the hurricane face an increasingly uphill battle due to the highly individualized nature of their claims.

Below is a summary of Fifth Circuit and Texas district court opinions substantively addressing Rule 23. Although few, if any, of these cases substantially alter the Rule 23 landscape, several fine-tune some of the Rule's more litigated features, including class certification pursuant to Rules 23(b)(2) & (3). The following cases provide valuable insight into litigating class action issues in the Fifth Circuit.

A. Fifth Circuit Opinions

The Fifth Circuit heard five cases substantively addressing class action issues, up from only two 2006 opinions. In each case, the Fifth Circuit ultimately barred class certification. Whereas last year, the court denied certification in one case and granted it in another, this year, the court vacated or remanded three district court orders denying certification, vacated an order granting class certification, and affirmed a district court opinion denying certification.

1. Oscar Private Equity Investments. v. Allegiance Telecom, Inc.

In *Oscar Private Equity Investments. v. Allegiance Telecom, Inc.*,[4] the court faced the issue of whether the district court abused its discretion by certifying a class and allowing a presumption of the reliance element in a Rule 10b-5 action.

The plaintiffs were purchasers of common stock sold by Allegiance Telecom, Inc. Plaintiffs alleged that Allegiance's former CEO and former Executive Vice President made fraudulent misrepresentations in Allegiance's quarterly announcements, which violated § 10(b) of the Securities Exchange Act (hereinafter "§ 10(b)") and Rule 10b-5 of the Securities and Exchange Commission (hereinafter "Rule 10b-5")).[5] The Northern District certified the class based on the Supreme Court decision in *Basic, Inc. v. Levinson*, which established the "fraud-on-the-market presumption" that allows a court to presume that each class member has satisfied the reliance element in a Rule 10b-5 action.[6]

The Firth Circuit previously applied the rule set forth in the *Basic* decision in another case, *Greenberg v. Crossroad Systems, Inc.*,[7] which made attaining the *Basic* presumption more difficult. To trigger the fraud-on-the market presumption under *Greenberg*, a plaintiff must prove loss causation, meaning that a defendant's nondisclosure actually affected the market price of the security.

Here, the first issue was whether the plaintiffs must prove loss causation at the class certification stage. The question was unsettled because both

Basic and *Greenberg* were summary judgment cases. The Fifth Circuit previously held that "Rule 23 mandates a complete analysis of fraud-on-the-market indicators."[8] Based on *Unger v. Amedisys*,[9] the court held that the plaintiffs must prove loss causation *at the class certification stage* by a preponderance of all admissible evidence.[10]

The second issue, therefore, was the sufficiency of evidence the plaintiffs must provide to establish loss causation. Here, the plaintiffs' expert provided studies showing that Allegiance's stock dropped based on multiple items of negative information in the quarterly report.[11] The court found these studies insufficient and stated that "mere proximity" between the stock price drop and the negative announcement is insufficient to prove loss causation.[12] To prove loss causation, plaintiffs must offer some empirically-based showing linking specific information in the announcement to the stock price movement.[13] The court declared that it will not infer loss causation simply because an announcement contains multiple negative items of information.

Ultimately, the court vacated the lower court's ruling and remanded for an order denying class certification because the plaintiffs' expert did not establish loss causation. Judge Dennis dissented, however, arguing that *Basic* gives class plaintiffs a rebuttable presumption of the reliance element; that the majority position misapplies *Greenberg*; and that the majority opinion stands for an "unwarranted realignment of securities class action procedure."[14]

2. Cole v. General Motors Corporation.

The Fifth Circuit also denied class certification in *Cole v. General Motors Corporation*, in which the court faced the issue of whether the district court abused its discretion by certifying a class under Rule 23(b)(3).[15] The plaintiffs purchased Cadillac vehicles equipped with defective air bag systems and subsequently sued manufacturer General Motors ("GM") for breach of express and implied warranties in failing to replace or repair the air bags within a reasonable time.[16] The district court for the Western District of Louisiana exercised diversity jurisdiction and certified the class.GM appealed the class certification.

After determining that the plaintiffs had standing to sue, the Fifth Circuit addressed only Rule 23(b)(3) in finding that the district court abused its discretion.Rule 23(b)(3) states that a class action may be maintained if "the court finds that the questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for the fair and efficient adjudication of the controversy."[17] Courts commonly refer to the Rule 23(b)(3) requirements as "predominance" and "superiority."[18]

The Fifth Circuit has held that "variations in state law may swamp any common issues and defeat predominance under Rule 23(b)(3)."[19] The plaintiffs must provide an "extensive analysis" of state law variations so that the district court may consider how those variations affect predominance.

The court first determined that Louisiana law applied in this diversity action.[20] Louisiana law states that a breach of contract action is governed by the laws of the state where the vehicle is used and where the contract of repair is to be performed. Here, the laws of every state applied because the class was so large that a Cadillac vehicle was used in every state.

The court then turned to the plaintiffs' analysis of state express and implied warranty law variations. The plaintiffs' analysis consisted of providing the court with the statutory text of the warranty laws of every state and arguing the laws were "virtually the same."[21] The Fifth Circuit, however, refuted the plaintiffs' analysis by laying out several variations in the substantive express and implied warranty law of the states. The court found that the plaintiffs' "largely textual presentation of legal authority oversimplified the required analysis and glossed over the glaring substantive legal conflicts among the [laws of each state]."[22] As such, the variations in state law swamped the plaintiffs' predominance claim, and the court reversed and remanded for an order denying class certification because the plaintiffs did not satisfy Rule 23(b)(3).

3. Regents of the Unviersity of California v. Credit Suisse First Boston (USA), Inc.

In the only Enron-related class action case it substantively addressed in 2007, the Fifth Circuit denied a Southern District of Texas district court order certifying a class of investors in Enron securities.[23] In *Regents of the Unviersity of California v. Credit Suisse First Boston (USA), Inc.*, the plaintiffs sued several of Enron's former banks, alleging that the banks allowed Enron to misstate its financial condition in violation of § 10(b) and Rule 10b-5.[24] The district court certified the class. A Fifth Circuit motions panel granted the defendants leave to appeal the class certification order.

The first issue was whether the Fifth Circuit's grant of leave to appeal was proper under Rule 23(f). The commentary to Rule 23(f) establishes that leave to appeal is proper where: (i) the "certification turns on a novel or unsettled question of law" or where (ii) an "order granting certification . . .[25] may force a defendant to settle . . . ." The court found both situations existed here. First, the case contained unsettled questions of law (discussed below). Second an order granting certification would put settlement pressure on the banks because liability for the entirety of losses from the Enron collapse would be so large.[26]

The court went on to establish the scope of its review, noting that, while it could not conduct an independent inquiry into the factual or legal merit of the case, it could "address arguments that implicate the merits of [the] plaintiffs' cause of action insofar as those arguments also implicate the merits of the class certification decision."[27]

The banks did not challenge whether plaintiffs satisfied Rule 23(a), so the court turned to Rule 23(b)(3). The plaintiffs sought for the court to presume the reliance element of their Rule 10b-5 action. The court noted that, if there is no presumption of the reliance element on a classwide basis, individual issues of reliance predominate and the court should not certify the class.[28]

The district court found that the plaintiffs met the reliance element based on two presumptions. The district court's definition of "deceptive" act under § 10(b) was the basis for granting these presumptions. First, the district court relied on the Supreme Court's decision in *Affiliated Ute Citizens v. United States*,[29] which allows a Court to presume reliance for an *omission* or *failure to disclose*, but only if the plaintiff's case is based on omissions and the defendant owed plaintiff a duty to disclose.[30] The Fifth Circuit found *Affiliated Ute* did not apply because the banks did not owe the plaintiffs a duty to disclose. Here, Enron owed a duty to provide its shareholders information; the banks did not.[31]

The district court also gave the plaintiffs the fraud-on-the-market presumption established in *Basic, Inc. v. Levinson*,[32] which allows a presumption of reliance based on a *material misrepresentation*, rather than an omission as in *Affiliated Ute*. The court also found this presumption erroneous because the plaintiffs must prove that the defendant made material misrepresentations to earn the presumption. Here, even if Enron owed a duty to its shareholders, the banks merely aided and abetted Enron in making material misrepresentations and, therefore, owed no duty because the banks were secondary actors.[33]

The court then turned to whether the banks' acts constituted "manipulation" under § 10(b). The Fifth Circuit has held that an actor is guilty of "manipulation" when he introduces an unmarketable security into the market.[34] The court found this did not occur here because the banks only allegedly gave a misleading impression of the Enron securities' value. The banks did not engage in manipulation.

Ultimately, the Fifth Circuit reversed and remanded for an order denying class certification. Judge Dennis concurred, first arguing against the majority that the question of whether the banks could be liable under § 10(b) was unrelated to whether plaintiffs were entitled to the fraud-on-the-market presumption.[35] As such, Judge Dennis argued, the plaintiffs were entitled to the *Basic* presumption. However, Judge Dennis agreed with the outcome because he believed the district court should have considered whether the plaintiffs could prove that the banks engaged in an overarching scheme.Such a scheme allowed the plaintiffs to recover from the banks jointly and severally, and proof of a scheme would have satisfied Rule 23(b)(3).Judge Dennis would have remanded for the district court to determine whether the banks engaged in an overarching scheme.

4. Langbecker v. Electronic Data Systems Corporation.

The Fifth Circuit also reversed an Eastern District of Texas district court order granting class certification in *Langbecker v. Electronic Data Systems Corporation*.[36] The plaintiffs in *Langbecker* were employees who participated in Electronic Data Systems Corporation's ("EDS") 401(k) plan.[37] As part of the 401(k) package, the plaintiffs could invest in a stock fund comprised mostly of the EDS's stock. After EDS's stock suffered a large price drop, the plaintiffs sued under the ERISA, claiming the fund was an imprudent investment that EDS never should have offered.[38] The plaintiffs sought damages in the form of reimbursement to their individual accounts and an injunction to remove the fund as an investment option or to replace the fund's current fiduciaries. The district court certified the class and EDS appealed.

The two Rule 23(a) issues on appeal were typicality and adequacy. Rule 23(a) states in relevant part that:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (3) the claims or defenses of the representative parties are *typical* of the claims or defenses of the class, and (4) the representative parties will fairly and *adequately* protect the interests of the class.[39]

EDS argued that the plaintiffs did not satisfy typicality because one of the named class representatives, Smith, continued to invest in the stock even after it declined, while another named representative, Mizell, actually made money on the stock. The court, however, found the plaintiffs did, in fact, satisfy typicality based on the following rule: a plaintiff class member's post-disclosure trading in the defendant's stock does not preclude him from asserting claims. Post-disclosure trading is harmless because after the company makes adverse disclosures the stock price reverts to valuation based on an efficient market.[40]

The court next considered adequacy. EDS argued that the plaintiffs could not meet adequacy because there were conflicts of interest between the named plaintiffs and the class they sought to represent.[41] The court agreed. For example, many plaintiffs, including Smith, continued to invest in the fund even after the stock price dropped. Such action undermines the claim that the stock was an imprudent investment.[42] Further, several thousand class members, including Mizell, actually made money on the fund investment. This creates a conflict with potential class members who lost money. The court instructed the district court on remand to consider whether Smith and Mizell were adequate representatives and, if it again certified the class, to consider certifying sub-classes to represent the class members with conflicting interests.[43]

The court next considered Rule 23(b)(2), which states that an action may be maintained as a class action if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." The district court certified the class under Rule 23(b)(2), finding that the plaintiffs sought predominantly equitable remedies.[44]

Rule 23(b)(2) class certification is appropriate if monetary relief is incidental to the requested equitable or declaratory relief.[45] The court found that the plaintiffs did not satisfy Rule 23(b)(2). Many potential class members had nothing to gain from an injunction because they continued to invest in the fund, and, by inference, did not want the fund closed. Furthermore, some potential class members actually profited from stock swings allegedly caused by the fiduciary violations. Finally, reimbursement to each class member's account could total millions of dollars, which means monetary damages were not incidental.

The court noted a division in other circuits over whether the Rule 23 requirements must be satisfied in a derivative action on behalf of an employee plan. Without finding a general rule, the court determined that the nature of the claims, the intraclass conflicts, and the individual nature of potential defenses in this case made a Rule 23 analysis proper.[46]

The court finally considered Rule 23(b)(1)(A), which states that an action may be maintained as a class action if "(1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." The district court certified the class under Rule 23(b)(1)(A), concluding that separate actions would be subject to "incompatible standards" because an injunction removing a fiduciary in one case would be inconsistent with another case allowing a fiduciary to stay.[47] On appeal, the court disagreed, finding that the class' focus on monetary damages precluded this case from Rule 23(b)(1)(A) certification. The court instructed the district court on remand to consider the due process concerns (such as notice and opt-out considerations) inherent in a Rule 23(b)(1)(A) certification and whether Rule 23(b)(1)(A) is appropriate where damages are the primary remedy sought.[48]

The court vacated class certification and remanded for further inquiry because the plaintiffs did not meet the Rule 23(a) adequacy requirement or Rule 23(b)(2) or (b)(1)(A).

5. Maldonado v. Ochsner Clinic Foundation.

The Fifth Circuit affirmed a decision out of the Eastern District of Louisiana denying certification in *Maldonado v. Ochsner Clinic Foundation*.[49] The plaintiffs in *Maldonado* sued Ochsner Clinic Foundation, a medical clinic, and asserted various state law causes of action, including breach of contract, arising from Ochsner's alleged charging of unreasonable rates. Specifically, the plaintiffs, all of whom were uninsured at the time they received treatment at Ochsner, claimed that they were improperly charged standardized "chargemaster" rates for their care that differed from discounted rates offered to patients with private insurance plans. The "chargemaster" rate was "an exhaustive and detailed price list for each of the thousands of services and items provided by Ochsner."[50] Upon removal of the case to federal court, the plaintiffs moved to certify a class of plaintiffs composed of:

> [A]ll persons who received any form of health care treatment and were charged an undiscounted amount for the services at Ochsner from September 1, 1993, through the date of commencement of class notice or entry of judgment and who were uninsured at the time of treatment.[51]

The district court denied certification and the plaintiffs appealed pursuant to Federal Rule of Civil Procedure 23(f).

As the district court found that the plaintiffs satisfied the requirements of Rule 23(a), the Fifth Circuit focused its inquiry on whether they satisfied the requirements of Rules 23(b)(2) and (3). The Fifth Circuit held that the plaintiffs failed to meet these requirements and affirmed the district court's rulings.[52]

To certify a class under Rule 23(b)(2), a plaintiff must satisfy Rule 23(a) and demonstrate that the defendant "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."[53] Class certification under this standard requires that the class members "have been harmed in essentially the same way, and injunctive relief must predominate over monetary damage claims."[54] The plaintiffs sought injunctive relief requiring Ochsner to provide "mutually affordable health care" as opposed to services at rates higher than those charged to insured customers.[55]

The Fifth Circuit seized on the fact that the plaintiffs could not articulate what "mutually affordable health care" actually entailed and found that individualized issues would necessarily predominate over "class cohesiveness."[56] A reasonable rate, for instance, would certainly vary depending on each class member's specific treatment, the difference between the chargemaster and the amount paid by each class member, and the fact that many of the uninsured plaintiffs paid nothing. The Fifth Circuit also noted that injunctive relief was inappropriate because the overwhelming majority of the class members would not face the risk of future harm. Accordingly, the Fifth Circuit declined to extend Rule 23(b)(2) certification.[57]

The Fifth Circuit also held that Rule 23(b)(3) certification was inappropriate. The court ruled that the fact-specific nature of the class members' claims destroyed any chance that common, "class-oriented" claims would predominate.[58] Given that the reasonableness of medical fees turn on the services rendered, each patient's financial status, and the customary fee charged, no "two patients' care and financial circumstances are hardly ever comparable." The plaintiffs, therefore, failed to demonstrate predominance and superiority, sounding the death knell of their Rule 23(b)(3) certification claim.

Finding that the plaintiffs failed to satisfy the requirements of Rules 23(b)(2) and (3), the court affirmed the district court's ruling denying class certification.

B. Texas District Court Opinions.

Texas district courts were similarly hostile to plaintiffs' attempts to certify classes, granting certification in three cases and denying it in five. Some of the more interesting opinions are discussed below.

1. Dehoyos v. Allstate Corporation.

In *Dehoyos v. Allstate Corporation*, the Western District of Texas analyzed whether to certify a settlement class, approve a settlement, and approve attorneys' fees.[59] The plaintiffs sued Allstate for deficiencies in Allstate's credit scoring procedure that plaintiffs claimed discriminated against African-American and Hispanic customers.[60] After extensive litigation, the plaintiffs moved for final approval of the settlement.

The first issue was whether a court must apply the Rule 23 requirements equally in certifying settlement classes and litigation classes. The court expressed uncertainty, citing Fifth Circuit cases that apparently conflicted over the issue.[61] The court ultimately concluded that it must apply the Rule 23 requirements equally to settlement class certification.[62]

The court found that the plaintiffs satisfied each Rule 23(a) requirement. Rule 23(a) states "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so *numerous* that joinder of all members is impracticable, (2) there are questions of law or fact *common* to the class." The plaintiffs satisfied the numerosity requirement because the class had over four million members spread out over a large geographical dispersion, which made joinder impossible.[63] Similarly, the plaintiffs satisfied commonality because Allstate's alleged practice of unlawful discrimination was common to all class members.[64]

A class satisfies typicality if the named plaintiffs' claims arise from the same common nucleus of operative facts as the claims of absent class members.[65] The plaintiffs satisfied typicality because the named and unnamed class members suffered the same adverse affects from Allstate's alleged discriminatory practice.[66] Finally, a class satisfies the adequacy requirement if the named plaintiff shows: (1) the class counsel's zeal and competence; and (2) the willingness of the representatives to protect the interests of the absentees.[67] The class satisfied this requirement because its counsel was highly qualified in class action litigation and the class representatives had interests that were "sufficiently aligned" with the absentee class members. [68]

The court next found that the plaintiffs satisfied Rule 23(b)(2). Racial discrimination cases seeking injunctive relief "are the paradigm of Rule 23(b)(2) class action cases."[69] Here, injunctive relief was appropriate because Allstate's alleged racial discrimination affected the class in the same way.[70] Further, Rule 23(b)(2) allows certification of claims for monetary damages if they are incidental to the injunctive relief sought. The plaintiffs sought monetary damages in an amount only incidental to the injunctive relief sought.

The next issue was whether the proposed settlement was "fair, reasonable, and adequate" under Rule 23(e)(1)(C). District courts typically use the *Reed v. General Motors Corporation* factors to determine this.[71] The *Reed* factors are:

> (1) the existence of fraud or collusion behind the settlement; (2) the probability of plaintiffs' success on the merits; (3) the range of possible recovery; (4) the complexity, expense and likely duration of the litigation; (5) the stage of the proceedings and the amount of discovery completed; and (6) the opinions of class counsel, class representatives, and absent class members.

The court first considered factor (1) and determined that it could presume the absence of fraud because no one alleged fraud.[72] Turning to (2), the court found that the plaintiffs faced substantial factual and legal obstacles. For example, evidence showed that Allstate had no knowledge of its customers' race.[73] As to (3), the settlement ensured the class substantial and immediate benefits that outweighed the risk of uncertain and lengthy litigation.[74] With respect to (4), this litigation had already proceeded for over five years, which convinced the court that any more litigation would be complex, expensive, and lengthy.[75] As to (5), the court was satisfied that the parties had enough information to make an informed settlement because they negotiated and exchanged information for 23 months. As to (6), class counsel endorsed the settlement and only ten class members objected, which the court found minimal considering the class size.[76] The *Reed* factors, therefore, weighed in favor of approving the settlement.

Finally, the court considered whether the agreed upon attorney's fees were reasonable under Rule 23(h). The court determined that the Fifth Circuit uses the "lodestar method" to calculate attorney's fees.[77] "The lodestar is computed by multiplying the number of hours reasonably expended by the prevailing hourly rate in the community for similar work."[78] The court continued, stating that "[t]he court then adjusts the lodestar upward or downward depending on the respective weight of the twelve factors set forth in."[79] The *Johnson* factors are:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorneys; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitation imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the length and nature of the attorney-client relationship; and (12) awards in similar cases.

The court computed the lodestar, and then applied the *Johnson* factors.[80] The court then found that class counsels' request for $11,720,000 in attorneys' fees and expenses was reasonable.[81] As such, the court certified the settlement class, approved the proposed settlement, and found the attorney's fees request fair, reasonable and adequate.

2. Humphrey v. United Way of the Texas Gulf Coast.

In *Humphrey v. United Way of the Texas Gulf Coast*, the Southern District of Texas faced the more complex issue of whether it should certify a class of plaintiffs seeking declaratory relief that the United Way of the Texas Gulf Coast and the United Way of the Texas Gulf Coast Cash Balance Plan (the "Plan") (collectively, the "United Way") "misinterpreted the plain language of a defined benefits plan."[82]

The named plaintiff, Ann Humphrey, was a beneficiary of her deceased husband's (Frederick B. Blackmer) pension benefits. Throughout his career at the Center for the Retarded, Inc., Mr. Blackmer accrued benefits under the Plan. Mr. Blackmer elected early retirement at the age of 63 and sought to receive the benefits due under the Plan in a lump sum distribution of $40,700.25 directly into an IRA account. Prior to his retirement, Mr. Blackmer exhausted all administrative remedies in disputing the amount of his pension benefits, arguing that his benefits were negatively impacted by subsequent amendments to the Plan that allegedly decreased the amount he was due to receive. Under a previous version of the Plan, participants electing early retirement were entitled to receive the benefits they were entitled to under the "89 Plan" *plus* any benefits accrued under the "96 Plan."[83] In 2002, the United Way amended the Plan and removed the "plus" language without providing notice to plan beneficiaries. Ms. Humphrey filed suit and sought an order enforcing the "plus" methodology on behalf of the following proposed class:

> All Participants or Former Participants (as those terms are defined in the Plan), and beneficiaries of such Participants or Former Participants, who (1) as of 12/31/95, had accrued a pension under the Prior Plan . . ., (2) were or hereafter are eligible for an Early Retirement Pension under the Plan ("ERP"), and (3) either received an ERP or are eligible to receive an ERP or hereafter become eligible to receive an ERP.[84]

The court granted Ms. Humphrey's motion for class certification, finding certification appropriate under either Rule 23(b)(1)(A) or (2).[85]

The court found that Ms. Humphrey easily satisfied the Rule 23(a) factors. With respect to the numerosity requirement, the court noted that "a class size of more than forty members satisfies the numerosity requirement."[86] Ms. Humphrey reasonably calculated the class size to be at least sixty members by estimating that, on average, six members a year qualified as class members. The court found this methodology to be reasonable and, therefore, held that Ms. Humphrey satisfied the numerosity requirement. With little discussion, the court also found that Ms. Humphrey satisfied the commonality and typicality requirements.[87]

Next, the court provided an in-depth analysis of the adequacy factor. "To be an 'adequate' representative of the class, Humphrey must show that she, her counsel, and the relationship between the two are adequate to protect the interests of the absent class members.[88] As such, Ms. Humphrey needed to prove that she would take "an active role in and control of the litigation" and that her counsel would zealously and competently advocate for the class members.[89] The court delved into Ms. Humphrey's deposition testimony to show that she actively participated in the litigation.[90] Moreover, Ms. Humphrey monitored the status of the case and had "a good faith knowledge and understanding of the issues" involved.[91] The court also noted that Ms. Humphrey's stated goal was to have the other class members be rewarded portions of the pensions she thought they were due.[92]

With respect to Ms. Humphrey's attorneys, the court noted that the plaintiff's counsel and her firm, Hertz, Schram & Saretsky, P.C., are experienced class action litigators. The court observed that lead counsel alone has participated in ten pension plan class action cases in addition to her non-class action ERISA experience. Given these facts, the court found that Ms. Humphrey and her attorneys were "more than adequate to represent the class action."[93]

Finding that Ms. Humphrey satisfied the Rule 23(a) requirements, the court then moved on to consider whether she satisfied Rule 23(b)'s more exacting standards. The court found Rule 23(b)(2) certification to be the most appropriate means of certifying the class. As noted above, "[a] class can be certified under Rule 23(b)(2) if 'the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.'"[94] The court noted that monetary relief is available in a Rule 23(b)(2) class action, but only if the monetary relief is incidental to the requested injunctive or declaratory relief.[95] Monetary relief is incidental when "damages flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief."[96] The district court has the discretion to determine whether the monetary relief is, indeed, incidental.

Here, Ms. Humphrey requested a class-wide remedy of recalculating the class members' benefits under the "plus" language methodology.[97] "Assuming liability is established, this remedy does not require individualized determinations of disparate claims, but can be calculated using objective criteria like length of service and age."[98] As such, the "plus" language variables were ascertainable on a class-wide, rather than individual, basis, making the damage calculation a "'virtually . . . mechanical task.'"[99] Additionally, all class members are potentially harmed by the use of the amended Plan methodology as opposed to the "plus" language, further limiting the need for an individualized analysis.

Finally, the United Way argued that Ms. Humphrey sought monetary relief that was not incidental to her claims for injunctive or declaratory relief.[100] The court quickly dismissed this argument, noting that "[d]amages flow mechanically from the potential declaration" that the language substituted for the "plus" methodology was in error.[101] The monetary relief sought, therefore, was incidental to the "declaration that the [P]lan's method of computing the early retirement benefits is unlawful."[102] The court found that Rule 23(b)(2) certification was appropriate.

Alternatively, the court found that certification would also be appropriate under Rule 23(b)(1)(A).[103] The court found that "certification of the Humphrey class would prevent incompatible standards of conduct" that would create the risk of "inconsistent or varying adjudications" if the individual class members filed separate lawsuits[104]. For instance, individual suits may lead to the possibility of varying orders with respect to whether the "plus" language applied to the Plan. "This is precisely the type of incompatible conduct that Rule 23(b)(1)(A) aims to prevent.[105] That none of the other proposed class members noticed the alleged mistake or pursued administrative remedies did not sway the court. "Indeed, the fact that no other plaintiff has come forward only favors class certification."[106]

The United Way further argued that certification under Rule 23(b)(1)(A) is inappropriate where, as here, the relief sought is primarily monetary. The court disagreed, stating:

> To hold that "broad declaratory or injunctive relief must be primarily sought before Rule 23(b)(1)(A) applies to avoid the risk of inconsistent adjudications," a court would be implementing "guidelines [that] coincide with those expressly called for in Rule 23(b)(2) class actions, thus rendering Rule 23(b)(1)(A) superfluous or redundant.[107]

Rather, the court found that "the more consistent interpretation of (b)(1)(A)" is that certification is allowed *when* the class seeks monetary damages.[108] Finding that the risk of inconsistent verdicts is sufficient to satisfy the requirements of Rule 23(b)(1)(A), the court held that it would also certify the class under this subdivision.[109]

In a related issue, the court considered whether the exhaustion of administrative remedies by all class members is required for class certification.[110] Although the Fifth Circuit has not addressed this issue, the court noted that Justice Posner and the Seventh Circuit "held that unnamed class members in an ERISA class action need not always exhaust their plan remedies to be included in the class."[111] Finding this reasoning persuasive, the court found that Ms. Humphrey was not required to show that the unnamed class members had exhausted their administrative remedies.[112]

3. Wheeler v. Pilgrim's Pride Corporation.

A district court from the Eastern District of Texas denied class certification of antitrust claims in *Wheeler v. Pilgrim's Pride Corporation*.[113] The plaintiffs in *Wheeler* were a group of chicken "growers" who brought suit against Pilgrim's Pride Corporation ("Pilgrim") and Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Farms of Texas, Inc., Tyson Chicken, Inc., and Hudson Foods, Inc. (collectively, "Tyson") alleging violations of the Sherman Act and sought to establish civil liability under section 4 of the Clayton Act. A chicken "grower" is a farmer who performs the function of growing chicks into quality birds for purchase by poultry buyers, also called "integrators."[114] Typically, contracts between growers and integrators base grower compensation on the "tournament system," which ranks growers against each other based on the number and quality of the birds they supply to the integrators. A grower's compensation is ultimately tied to his or her rank in the tournament system. The proposed class consisted of Pilgrim growers in Northeast Texas and Arkansas who alleged that the defendant integrators "illegally made market allocation agreements and price-fixing agreements" in violation of federal antitrust laws and also "conspired to suppress grower compensation via exchange of confidential price information . . . ."[115] The court denied the plaintiffs' motion to have this class certified. [116]

After finding that the plaintiffs had standing to maintain their class action complaint, the court considered whether class certification of their antitrust claims was warranted. Noting that a court may demur as to whether the proposed class meets the elements of Rule 23(a), the court moved on to consider whether the plaintiffs met their burden of proving the "more demanding" Rule 23(b)(3) requirements and found that they did not.[117]

In determining whether "questions common to the class members predominate[d] over questions affecting only individual members," the court first considered the elements needed to prove a cause of action for violating the antitrust laws. "'[A] plaintiff must first prove the fact of antitrust damages, some 'element of actual damages caused by the defendant's violation of the antitrust laws.'" [118] In other words, the antitrust violation must have been a material cause of the plaintiffs' alleged injuries. If the plaintiffs prove "fact of damage," then the court must also determine the appropriate "amount of damages."[119] Ultimately, the court found that either analysis would require such highly individualized scrutiny as to destroy predominance or superiority under Rule 23(b)(3).[120]

With respect to the fact of damages issue, the court found that the plaintiffs could not prove fact of damages "without delving into the individualized traits of each [integrator] complex and/or growing locale."[121] The court seized on the fact that the base price for compensation in one tournament typically varies from the base price in another tournament.[122] Additionally, integrator complexes differ in terms of their competitive radii. As such, a conspiracy affecting growers in the Dallas, Texas area would not necessarily benefit integrators in other locales. The plaintiffs would need to produce individualized evidence regarding complexes run by not only the defendant integrators, but also other integrators operating within the relevant area. As the fact of damages inquiry necessitated individualized evidence, the court found "that class-wide issues do not predominate over individual ones."[123]

Even if the plaintiffs could prove fact of damages with class-wide evidence, the court found that the "more relaxed" amount of damages burden could not be met without individualized proof.[124] The court noted that the two primary methods of calculating the amount of antitrust damages are the "'before and after' and 'yardstick'" measurements of lost profits.[125] The plaintiffs' damages expert presented a formulaic damage model that, in short, required the computation of each grower's opportunity costs for raising chickens. These opportunity costs included "the growers' time as managers and laborers" and the costs for multiple resources. The expert then used these opportunity cost computations as the basis for the "total cost of production per pound in a competitive market" and the antitrust violation base price.[126]

The court found that the plaintiffs' damage model insufficiently captured the true facts of this case, noting that it did not take into account cost shifts that were inherent from complex to complex and grower to grower. The court further criticized the formulaic damage model, noting that it relied heavily on assumptions built upon assumptions. Further, the model "oversimplif[ied] the damage methodology" and ignored individualized facts.[127] The court ruled that this individualized proof "require[d] a multitude of mini-trials and preclude[d] class-certification."[128]

ENDNOTES

1 Barry M. Golden is a partner in the Dallas office of Gardere Wynne Sewell LLP. Nicholas G. Peters is an associate in the Dallas office of Gardere Wynne Sewell LLP. Mr. Golden and Mr. Peters would like to thank Matthew C. Crockett (California Western School of Law, Fall 2007) for his help on the article.

2 *See* Barry M. Golden and Nicholas G. Peters, *2006 Annual Survey of Fifth Circuit Class Action Cases*, 29 Tex. Bus. Litig. J. 10 (Winter 2007).

3 This article surveys opinions substantively addressing class action issues as of December 11, 2007.

4 No. 05-10791, 2007 WL 1430225 (5th Cir. May 16, 2007).

5 *Id.* at *1.

6 *Id.* at *2 (citing to 485 U.S. 224 (1988)).

7 364 F.3d 657 (5th Cir. 2004)

8 *See Oscar*, 2007 WL 1430225 at *5 (citing *Unger v. Amedisys Inc.*, 401 F.3d 316, 321 (5th Cir. 2005)).

9 401 F.3d 316 (5th Cir. 2005).

10 *Oscar*, 2007 WL 1430225 at *6.

11 *Id.* at *8.

12 *Id.*

13 *Id.* at *8-9.

14 *Id.* at *10, 15.

15 484 F.3d 717 (5th Cir. 2007).

16 *Id.* at 718-21.

17 Fed. R. Civ. P. 23 (emphasis added).

18 *See Cole*, 484 F.3d at 717.

19 *Id.* at 724 (citing *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996)).

20 *Id.* at 725.

21 *Id.*

22 *Id.* at 725-26.

23 *Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 379 (5th Cir. 2007).

24 *Id.* at 377-78.

25 *Id.* at 379 (citations omitted).

26 *Id.* at 380.

27 *Id.*

28 *Id.* at 383 (citing *Castano*, 84 F.3d at 745).

29 406 U.S. 128 (1972).

30 *Regents*, 482 F.3d at 384.

31 *Id.* at 384.

32 485 U.S. 224 (1988).

33 *Id.* at 386-91 (recognizing a split among sister circuits regarding secondary liability and determining that holding the banks primarily liable was inappropriate because the banks did not participate in "deceptive" acts under § 10(b)).

34 *Id.* at 391.

35 *Id.* at 397.

36 476 F.3d 299 (5th Cir. 2007).

37 *Id.* at 303.

38 *Id.* at 304.

39 Fed. R. Civ. P. 23(a) (citations omitted) (emphasis added).

40 476 F.3d at 304.

41 *Id.* at 315.

42 *Id.*

43 *Id.* at 316.

44 *Id.*

45 *See id.* (citing *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998)).

46 *Id.* at 317.

47 *Id.* at 318.

48 *Id.*

49 493 F.3d 521 (5th Cir. 2007).

50 *Id*. at 523.

51 *Id*.

52 *Id*. at 526.

53 *Id*. at 524 (citing FED. R. CIV. P. 23(b)(2)).

54 *Id*.

55 *Id*.

56 *Id*.

57 *Id*. at 525.

58 *Id* at 526.

59 240 F.R.D. 269 (W.D. Tex. Feb. 21, 2007).

60 *Id*. at 275.

61 *Id*. at 280.

62 *Id*.

63 *Id*.

64 *Id*. at 281.

65 *Id*. (citation omitted).

66 *Id*. at 282.

67 *Id*. (citation omitted).

68 *Id*. at 283.

69 *Id*. (citation omitted).

70 *Id*. at 284.

71 *Id*. at 286-87 (see *Reed v. General Motors Corp*., 703 F.2d 170, 172 (5th Cir. 1983)).

72 *Id*. at 287.

73 *Id*. at 288 (also stating other factual and legal problems).

74 *Id*. at 291.

75 *Id*. at 292.

76 *Id*. at 293.

77 *Id*. at 333 (citing *Londgren v. Sunderman*, 979 F.2d 1095, 1099 (5th Cir. 1992)).

78 *Id*.

79 *Id*. (citing to *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)).

80 *Id*. at 324-40.

81 *Id*. at 340.

82 *Id*. 2007 WL 2330933, Civil Action No. H-05-0758 (S.D. Tex. Aug. 14, 2007).

83 *Id*. at *1-3.

84 *Id*. at *4.

85 *Id*. at *14.

86 *Id*. at *4.

87 *Id*. at *5.

88 *Id*. (citing to FED. R. CIV. P. 23(a)(4)).

89 *Id*.

90 *Id*. at *6.

91 *Id*.

92 *Id*. at *7.

93 *Id*.

94 *Id*. at *8 (citing to FED. R. CIV. P. 23(b)(2)).

95 *Id*.

96 *Id*.

97 *Id*. at *9.

98 *Id*.

99 *Id*. (quoting *Bratcher v. Nat'l Standard Life Ins. Co. (In re Monumental Life Ins. Co.)*, 365 F.3d 408, 419-20 (5th Cir. 2004)).

100 *Id*.

101 *Id*.

102 *Id*.

103 *Id*. at *10.

104 *Id*. (quoting FED. R. CIV. P. 23(b)(1)(A)).

105 *Id*. (citing *In re Citigroup Pension ERISA Litig*., 241 F.R.D. 172, 179-80 (S.D.N.Y. 2006)).

106 *Id*. (citing *In re Citigroup Pension ERISA Litig.*, 241 F.R.D. at 180).

107 *Id*. (citing HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 4:5 (4th ed. 2002)).

108 *Id*.

109 In dicta, the court also stated that it disagreed with the United Way's claim that Rule 23(b)(1)(A) was drafted for the benefit of parties opposing class certification. The court commented that all parties, and not just parties opposing class certification, benefit from avoiding the inconsistent adjudication of the claims of individual class members. *Id*. at *11.

110 *Id*. at *12.

111 *Id*. (citing to *In re Household Int'l Tax Reduction Plan*, 441 F.3d 500, 501 (7th Cir. 2006) ("If the complaint or subsequent filings adequately identify the class members' claims and demonstrate that they are indeed very similar to those of the named plaintiff, the defendant knows what he is facing and can make efforts to settle the full array of claims. In such a case, requiring exhaustion by the individual class members would merely produce an avalanche of duplicative proceedings and accidental forfeitures, and so is not required").

112 *Id*. at *13.

113 2007 WL 3085798, No. 5:06-CV-004-DF (E.D. Tex. Sept. 28, 2007)

114 *Id*. at *1.

115 *Id*.

116 *Id*. at *11.

117 *Id*. at *5.

118 *Id*. at *6 (quoting *Eleven Line, Inc. v. N. Texas State Soccer Ass'n, Inc.*, 213 F.3d 198, 206 (5th Cir. 2000)).

119 *Id*.

120 *Id*. at *7-10.

121 *Id*. at *6.

122 *Id*. (noting that "the base prices at some Tyson complexes [were] more than five times the base price from other complexes").

123 *Id*. at *7.

124 *Id*.

125 *Id*. at *8 (quoting *Eleven Line, Inc.*, 213 F.3d at 207).

126 *Id*.

127 *Id*. at *9 (stating that there is "no basis to believe that Plaintiffs' methodology will accurately reflect class-wide injury without considering evidence specific to each complex").

128 *Id*. at *10.