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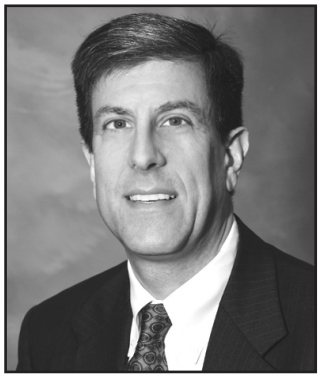

2007 Annual Survey of Texas Class Action Cases

By Mark W. Bayer[1]

In 2007, the Texas Supreme Court was unusually active, issuing five opinions addressing various class issues. Two of those opinions reversed certifications that had been affirmed by the Corpus Christi Court of Appeals in 2006. The supreme court also addressed the appropriate scope of class discovery, arbitration issues, and class actions brought by the Texas Attorney General. In 2007, as in prior years, the Corpus Christi Court of Appeals was one of the only appellate courts to affirm the certification of a class action.

A. Texas Supreme Court Opinions

Two of the supreme court's opinions resulted in the reversal of class certification of consumer classes that asserted claims for "money had and received." Both of the cases were on appeal from the Corpus Christi Court of Appeals.

In *Best Buy Co. v. Barrera*,[2] consumers brought a class action for "money had and received" to recover a stocking fee that was deducted from refunds made on certain returned merchandise. The trial court certified a state-wide class, and the Corpus Christi Court of Appeals affirmed. The Texas Supreme Court concluded that individualized inquiries would predominate over common issues of proof, making the claim for "money had and received" inappropriate for class certification.

In 2003, Best Buy had a policy providing that certain returned items would be subject to a 15% restocking fee. The policy was disclosed on Best Buy's receipts. Barrera brought this action in an attempt to recover the restocking fee charged for the return of notebook computers, camcorders, digital cameras and radar detectors. Barrera disavowed an unjust enrichment theory of recovery and relied solely upon her claim for "money had and received."

Citing *Stonebridge Life Insurance Co. v. Pitts*,[3] decided three months earlier, the supreme court held that a claim for "money had and received" is equitable in nature. Therefore, a defendant may present any facts and raise any defense that would deny the claimant's right or show that the claimant should not recover.[4] As a result, Best Buy was entitled to present facts or defenses that tend to show that the restocking fee was "in equity and good conscience" reasonable.[5]

Factors relevant to the assessment of the equities included: (a) a consumer's knowledge that they were being charged; (b) the consumer's desire for the product irrespective of how the charge was made; and (c) the consumer's knowledge of and consent to the policy. Best Buy also contended that some consumers purchased expensive electronics with the intention of using them and then returning them, which presented an equitable unclean hands defense. As the result of these equitable defenses the court found that, "the vast majority of the litigation could be spent trying to determine which individuals should recover their [restocking fees] under the equities presented and which should not."[6]

Because the majority of the litigation would be engaged in an individual determination of Best Buy's equitable defenses, plaintiffs could not show that common issues predominated and, therefore, class certification was inappropriate.[7]

In S*tonebridge*,[8] decided approximately three months before *Best Buy*, consumers brought a class action suit for "money had and received" to recover premiums they were charged pursuant to an allegedly misleading telemarketing scheme involving accidental death and dismemberment insurance. The trial court certified a state-wide class and the Corpus Christi Court of Appeals affirmed. The supreme court reversed, however, decertifying the class because individual issues predominated the case.[9]

Stonebridge purchased personal information about potential customers, including credit card and bank account numbers. Telemarketers then called customers on behalf of Stonebridge using a standardized script to describe the insurance and enrollment process. Customers who indicated that they wanted the insurance were transferred to a licensed agent who enrolled them in the insurance program without disclosing that Stonebridge already had their account information or explaining that there would be no further contact from the company before the customer's account was charged.

The supreme court agreed with Stonebridge that class certification was inappropriate because the equitable claim asserted by the plaintiffs required resolution of individual issues that would predominate at trial despite Stonebridge's use of a uniform script. Because the

plaintiffs' claim was equitable in nature, Stonebridge could present any facts and raise any defenses that would show that in equity and in good conscience that the consumer should not recover.[10]

For example, evidence that individual class members understood they would be charged without further notice, or that individual members consented to the charges after they were made, or that a policyholder wanted the coverage irrespective of how premiums were charged, would all be relevant to the equitable defenses asserted by Stonebridge. The court observed that it would be impossible to determine how many customers may have knowingly consented to the charges. Therefore, the vast majority of the litigation could be spent trying to determine which individuals should recover their premiums under the equities and which should not.[11] As a result, the court reversed the Corpus Christi Court of Appeals.[12]

In *In re SCI Texas Funeral Services, Inc.*,[13] the supreme court considered the appropriate scope of class-wide discovery before a class was certified. The trial court had ordered class-wide discovery (and class-wide sanctions) long before it certified the class. In two separate appeals, the El Paso Court of Appeals upheld the discovery and sanctions but reversed certification. The supreme court granted a writ of mandamus and ordered the trial court to vacate its discovery orders in light of the decertification.

The plaintiffs in *SCI* claimed that SCI had violated both federal and state disclosure requirements applicable to funeral providers. They sought broad discovery, including every SCI contract between 1998 and 2004. After granting a series of motions to compel based on asserted gaps in SCI's production, the County Court at Law of El Paso County entered a sanctions order that deemed SCI had breached the class members' contracts.[14]

One year later, the El Paso Court of Appeals reversed the trial court's certification order, finding that no private cause of action existed under either the federal or state funeral disclosure rules, and barring the plaintiffs' damage claims as their contracts were not illegal. The court of appeals also decertified the class.[15]

Citing *In re Alford Chevrolet-Geo*,[16] the supreme court held that the trial court should have limited precertification discovery to the particular issues governing certification of the case.[17] The court found that the trial court's discovery orders were overbroad and did not comply with the rule in *Alford*. The court went on to hold that the trial court abused its discretion by compelling discovery that was not narrowly tailored to the relevant dispute, to wit: whether or not a private cause of action was provided in the state or federal statutes. The court observed that the plaintiffs were neither prejudiced nor entirely innocent, as the massive discovery they sought was based on damage claims that they had no standing to assert and evidence that they did not need for the class certification hearing. Accordingly, the supreme court vacated the sanction orders in light of the court of appeals' decertification of the class.[18]

In *In re U.S. Home Corp.*,[19] the supreme court considered whether the case should have been sent to arbitration rather than certified by the trial court. The plaintiffs brought claims on behalf of themselves and others similarly situated alleging that their homes were built without shower pans. In the trial court, the defendants moved to compel arbitration, and the plaintiffs moved to certify their class claims. The trial court denied the motion to compel arbitration and granted the motion to certify a class action.[20]

While the class question was pending in the court of appeals, the supreme court considered the arbitration issue. The court found that none of the defendants had a duty to supply shower pans in the homes they built absent a requirement in their contracts with the home buyers. Because the defendants' liability arose from the construction contract rather than general obligations imposed by law, the suit was subject to the contract's arbitration provisions. Consequently, the court granted U.S. Homes' writ of mandamus and directed the trial court to grant the motion to compel arbitration.[21]

The defendants also asked the supreme court to reverse the trial court's class certification order, citing the U.S. Supreme Court's holding in *Greentree Finance Corp. v. Bazzle*,[22] which held an arbitration clause covering all disputes relating to a contract to include disputes about class certification. The Texas Supreme Court declined to reverse the class certification as premature because the certification order was still pending in the court of appeals.[23]

Finally, in *Farmers Group, Inc. v. Lubin*,[24] the supreme court considered whether a class action brought by the Texas Attorney General pursuant to the Texas Insurance Code required the identification of an individually named plaintiff to serve as the class representative.

The Attorney General sued various Farmers entities alleging inadequate disclosure and discrimination in its homeowners rating practices.[25] The Attorney General, without naming an individual class member as class representative, sought class certification in the trial court over the objections of five policyholders and Farmers. The trial court certified the class. The Austin Court of Appeals reversed, but the supreme court upheld the trial court's certification order.

The Insurance Code provides, among other things, that the Attorney General may bring a judicial class action for damages and attorneys' fees. The state argued that the doctrine of *parens patriae* allows it to represent a class without designating representative parties. The supreme court disagreed as to the *parens patriae* doctrine. Nevertheless, it found that the Insurance Code did not require the naming of a representative party. The court stated that:

> We agree courts must rigorously analyze whether a party has strictly complied with all requirements for class certification. But those requirements cannot be applied in a way that renders attorney general class actions impossible . . . .[26]

As a result, the Court held, the prerequisites for all class actions contained in Rule 42 must be applied to the damage claims asserted by the Attorney General, rather than to the Attorney General personally.[27]

B. Court of Appeals Decisions Denying Certification

In a departure from its usual course,[28] the Corpus Christi Court of Appeals reversed a trial court's order granting class certification in *GEICO v. Patterson*.[29] The trial court certified a class of patients and a class of physicians alleging that GEICO had libeled chiropractors by implying that the chiropractors gave patients medically unnecessary treatment and charged too much.

First considering the patient class, the Corpus Christi Court of Appeals reversed the certification order, finding that the chiropractor plaintiff did not have standing to bring a claim on behalf of the patient class.[30]

The court of appeals then reversed the certification of a physician class. The court found that the trial court had certified a multi-state class of physicians without conducting a proper choice of law analysis as required by *Compaq Computer Corp. v. Lapray*.[31] As a result, the court of appeals found that it was also improper to certify a class without knowing how the claims can and will be tried. The court of appeals concluded that the trial court's trial plan did not adequately address how the individual issues would be considered and, therefore, held that the trial court had abused its discretion.[32]

In *Intercontinental Hotels Corp. v. Girards*,[33] the Dallas Court of Appeals reversed the trial court's order certifying a class action under the Telephone Consumer Protection Act and the Texas Fax Act.

Intercontinental Hotels contracted with American Blast Fax to send faxes on behalf of Intercontinental. The trial court certified a class of "persons or entities billed by Southwestern Bell for a number at the time that number was confirmed to have received an Intercontinental fax."[34]

On appeal, the court of appeals held that the actual recipients of the faxes were not ascertainable and that individual issues of consent would predominant in the action thereby precluding class certification.[35] The trial court's certification order was reversed.

Under the Texas Fax Act, only "a person who receives a communication that violates 47 U.S.C. §227 . . . may bring an action against the person who originates the communication." TEX. BUS. & COMM. CODE ANN. § 35.47(f). While the plaintiff could identify the numbers to which faxes were sent, Southwestern Bell did not have records to sufficiently identify the actual recipients of the faxes. As a result, class certification had to be denied because the class members could not be ascertained by reference to objective criteria.

In *Texas Parks & Wildlife Department v. Dearing*,[36] game wardens brought a disparate-impact age discrimination action against the Texas Parks & Wildlife Department relating to a pay level reclassification of their positions.

The trial court originally certified a class action but, on appeal, the court of appeals found that the class certification should be reversed on the ground that the law did not recognize disparate-impact age discrimination claims. The case was remanded to the trial court with the mandate "for further proceedings consistent with [our] opinion."[37] Later, however, the U.S. Supreme Court held in *Smith v. City of Jackson*[38] that disparate-impact age discrimination claims could be asserted under the Age Discrimination and Employment Act.[39] The trial court then re-certified the class action despite the court of appeals' mandate in the prior appeal. The trial court relied on the same underlying petition and evidence, without modification or amendment, on which it had originally certified the class. The district court simply stated that the prior certification order "is hereby reinstated."[40]

The Austin Court of Appeals reversed the re-certification of the class.

The court of appeals first held that the district court abused its discretion in re-certifying the class on the same pleadings, evidence, and trial plan on which it had originally relied. The trial court had received the court of appeals' mandate and it had no discretion to review or interpret the mandate. Because the court of appeals had not withdrawn its mandate in light of *Smith*, nor had the judgment underlying it been reversed or vacated by a higher appellate court, the district court was bound to deny certification.[41]

Although the U.S. Supreme Court had, after the court of appeals' mandate, held that disparate-impact age discrimination claims could be brought, it was not for the district court to reconsider the underlying legal question. To do so would overlook the implications of the law of the case doctrine.[42]

The court of appeals went on to consider the impact of the U.S. Supreme Court's ruling and found that the district court's trial plan did not sufficiently address the elements of the cause of action as defined by the U.S. Supreme Court in *Smith*. Nor did it consider the burden shifting framework required by the new precedent. As a result, the certification was reversed.[43]

C. Court of Appeals Decisions Approving Certification

In *Exxon Mobil Corp. v. Gill*,[44] current and former Exxon service station dealers complained that Exxon cheated them out of the economic benefit of gasoline rebates by adding back the average per gallon cost of the rebate programs to the tank truck price of gasoline sold to dealers. The trial court certified a state-wide class of service station dealers making claims for breach of contract, breach of the duty of good faith and fair dealing, and breach of a promise to provide economic benefits under rebate programs.[45]

On appeal, the Corpus Christi Court of Appeals affirmed.

This case turned, primarily, on the determination of what type of action had been certified. Exxon characterized the case as a fraud case in contract clothing.[46] Exxon argued that individual issues of reliance would therefore dominate the trial, rendering the case unfit for certification. The court of appeals disagreed, however, finding that the claims were based in contract not in tort.[47]

Exxon also attempted to rely on the voluntary payment rule to create an issue regarding individual knowledge of the rebates. The trial court rejected the voluntary payment rule as a defense, stating that it did not apply to claims for breach of contract. As a result, the trial court reasoned that the controlling issues in the case could be proven through common evidence. The court of appeals agreed. [48]

After a careful review of all of the Rule 42 elements, the court found that there had been no abuse of discretion in the class certification order.[49]

In *Farmers Group, Inc. v. Geter*,[50] Farmers was faced with a private class action brought by homeowners' insurance policyholders making claims concerning the same policies that were the subject of the Texas Attorney General's action in *Farmers Group, Inc. v. Lubin*.[51] The Beaumont Court of Appeals affirmed the trial court's class certification order and declined to consider whether the case should be dismissed in light of the supreme court's opinion in *Lubin*. It left that issue for the trial court.[52]

Farmers raised four issues in challenging the trial court's certification order, but the Beaumont Court of Appeals rejected them all. First, the court of appeals stated that "the trial court properly conducted the cohesiveness analysis [under Rule 42(b)(2)]."[53] Second, the court (without comment) rejected Farmer's argument that its contract was ambiguous and, therefore, destroyed predominance.[54] Third, the court found that because the issues raised did not usurp the role of the Texas Department of Insurance, it was a superior method of adjudicating the claims.[55] Fourth, the court of appeals held that the trial plan was sufficient because it was not necessary that the exact wording of the class notice be specified.[56]

D. Other Issues Considered by Courts of Appeals

1. Trial Court Rulings on Motions to De-Certify are not Subject to Interlocutory Appeal.

In *Rainbow Group, Ltd. v. Wagoner*,[57] hairstylists employed by a hair salon chain brought a class action for breach of contract arising from allegations of non-payment of wages. The trial court certified a class of hair stylists to pursue the breach of contract claim. The case then embarked on a tortured procedural course.[58]

In the initial appeal of the certification order, the court of appeals affirmed the original certification and remanded the case to the trial court. That decision, however, predated the seminal decision of *Southwestern Refining Co. v. Bernal*.[59]

On remand, the plaintiffs filed a second amended petition, which added *quantum meruit* as an alternative theory of recovery. The original class certification order, however, was not amended to add *quantum meruit* as a claim certified for class-wide adjudication.[60]

Following the bench trial, the trial court issued a judgment awarding individual damages on the basis of *quantum meruit* to 13 hairstylists who appeared and testified at the trial. The remaining members of the class filed a motion to certify the *quantum meruit* claim as a class action. Before the motion to certify was heard or ruled on, the hairstylists styled a third amended petition abandoning the breach of contract claims originally filed and asserting *quantum meruit* as the only basis for recovery.[61]

In response, the defendant filed both an opposition to the motion to certify and a plea to the jurisdiction. The trial court granted the plea to the jurisdiction resulting in another appeal. The court of appeals reversed the trial court's decision on the plea to the jurisdiction.[62]

On remand, Rainbow Group filed a motion to de-certify the class arguing, in part, that because the class had only been certified to pursue breach of contract claims, the class was effectively de-certified when plaintiffs filed their third amended petition non-suiting their claim for breach of contract. The trial court denied the motion to de-certify the class and issued a separate order granting a motion to amend the class certification to include the *quantum meruit* claims.[63]

Again returning to the Austin Court of Appeals, the Rainbow Group sought review of both orders. In response, the plaintiffs filed a motion to dismiss the appeal on the grounds that the court of appeals lacked jurisdiction.[64]

The court of appeals held that it did not have jurisdiction over the appeal because an order denying a motion to de-certify a class is not within the scope of the statute authorizing interlocutory appeals of class determinations.[65] Tex. Civ. Prac. & Rem. Code § 51.014(a)(3).[66] The court also found that the appeal of the order granting the motion to amend the class certification was untimely.[67]

2. *Trial Courts Retain Jurisdiction of Class Cases Sent to Arbitration.*

In *John M. O'Quinn, PC v. Wood*,[68] the court considered the appropriate appellate treatment of a class case that had been sent to arbitration. O'Quinn had represented approximately 3,000 women in breast implant litigation. Those clients signed contingent fee agreements with O'Quinn requiring that all disputes be resolved by arbitration. When the former clients filed suit complaining about O'Quinn's allocation of the settlement proceeds, he filed a motion to compel arbitration, which was granted by the trial court. The

trial court also entered a second order authorizing the arbitrator to determine all class action issues. O'Quinn filed a writ of mandamus with the court of appeals which was initially granted, but later reversed by the Texas Supreme Court.[69]

The case then proceeded to arbitration and the panel decided to certify a class on behalf of O'Quinn's former clients. O'Quinn filed a motion in the trial court to vacate the class determination, but that motion was dismissed because the trial court believed it did not have jurisdiction over the motion. O'Quinn challenged the trial court's order by filing an interlocutory appeal and a writ of mandamus with the court of appeals.[70]

The court of appeals first held that section 51.014(a)(3) of the Civil Practice and Remedies Code did not provide for an interlocutory appeal of a class certification award by an arbitration panel or a decision by the trial court not to review the merits of the class certification award.[71] The court of appeals did, however, consider the petition for writ of mandamus. It went on to hold that the trial court retained continuing jurisdiction of the case even though the merits would be resolved through arbitration. The trial court, therefore, was authorized to review the class determination. As a result, it was an abuse of discretion to deny the motion to vacate.[72]

ENDNOTES

1 Mark W. Bayer is a partner in the Dallas office of Gardere Wynne Sewell LLP. The author would like to thank Andrew Howard for his assistance in preparing this article.

2 No. 07-0028, 2007 WL 4216615 (Tex. Nov. 30, 2007).

3 236 S.W.3d 201 (Tex. 2007).

4 2007 WL 4216615, at *3.

5 *Id.*

6 *Id.* (citing *Stonebridge Life Ins. Co. v. Pitts*, 236 S.W.3d 201, 206 (Tex. 2007)).

7 The supreme court reached its decision without hearing oral argument pursuant to Rule 59.1 of the Texas Rules of Appellate Procedure. *Id.*, at *4.

8 236 S.W.3d 201 (Tex. 2007).

9 *Id.* at 207.

10 *Id.* at 205.

11 *Id.*

12 *Id.* at 207. The supreme court reached its decision without hearing oral argument pursuant to Rule 59.1 of the Texas Rules of Appellate Procedure. *Id.*

13 236 S.W.3d 759 (Tex. 2007).

14 *Id.* at 760.

15 *Id.*

16 997 S.W.2d 173, 185 (Tex. 1999).

17 236 S.W.3d at 760.

18 *Id.* at 761. The supreme court reached its decision without hearing oral argument pursuant to Rule 59.1 of the Texas Rules of Appellate Procedure. *Id.*

19 236 S.W.3d 762 (Tex. 2007).

20 *Id.* at 763.

21 *Id.* at 765.

22 539 U.S. 444 (2003).

23 236 S.W.3d at 765. The supreme court reached its decision without hearing oral argument pursuant to Rule 59.1 of the Texas Rules of Appellate Procedure. *Id.*

24 222 S.W.3d 417 (Tex. 2007).

25 *Id.* at 420.

26 *Id.*

27 *Id.*

28 In both 2005 and 2006, the Corpus Christi Court of Appeals was the only court of appeals to affirm the certification of a class in Texas.

29 Nos. 13-06-258-CV, 13-06-259-CV, 2007 WL 4225504 (Tex. App.—Corpus Christi Nov. 29, 2007, no pet.).

30 *Id.*, at *7.

31 *Id.*, at *9 (citing 135 S.W.3d 657 (Tex. 2004)).

32 *Id.*, at *10.

33 217 S.W.3d 736 (Tex. App.—Dallas 2007, no pet.).

34 *Id.* at 738.

35 *Id.*

36 240 S.W.3d 330 (Tex. App.—Austin 2007, no pet.).

37 *Id.* at 335.

38 544 U.S. 228 (2005).

39 240 S.W.3d at 344.

40 *Id.* at 345.

41 *Id.* at 347.

42 *Id.* at 348.

43 *Id.* at 356.

44 221 S.W.3d 841 (Tex. App.—Corpus Christi 2007, no pet.).

45 *Id.* at 846.

46 *Id.* at 848.

47 *Id.* at 849.

48 *Id.* at 855.

49 *Id.* at 865.

50 No. 09-05-386 CV, 2006 WL 4674359 (Tex. App.—Beaumont July 26, 2007, no pet.).

51 222 S.W.3d 417 (Tex. 2007).

52 2006 WL 4674359, at *5.

53 *Id.*, at *4.

54 *Id.*

55 *Id.*, at **4-5.

56 2006 WL 4674359, at *5.

57 219 S.W.3d 485 (Tex. App.—Austin 2007, no pet.).

58 *Id.* at 487.

59 22 S.W.3d 425 (Tex. 2000).

60 219 S.W.3d at 488.

61 *Id.* at 489.

62 *Id.*

63 *Id.* at 491.

64 *Id.*

65 *Id.*

66 Section 51.014(a)(3) of the Civil Practice and Remedies Code provides that "A person may appeal from an interlocutory order of a [trial] court . . . that certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure."

67 219 S.W.3d at 494.

68 Nos. 12-06-00151-CV, 12-06-00188-CV, 2006 WL 3735617 (Tex. App.—Tyler Dec. 20, 2006, no pet.).

69 *Id.*, at *2.

70 *Id.*

71 *Id.*

72 *Id.*, at *5.