TEXAS BUSINESS LITIGATION JOURNAL

Federal and State Class Actions

WINTER 2010 ▪ Volume 32 ▪ Number 1

TABLE ▪ OF ▪ CONTENTS

COVER: "Apple Orchard," Photograph by Larry Gustafson, Dallas.

Publication Layout - State Bar of Texas Graphics Department

Dear Section Members:

The last Section teleconference CLE program was on February 24 and covered updates on Delaware fiduciary duty law, securities law, and RICO activity. More than 80 of you were able to participate from the comfort of your own offices. We plan on continuing these teleconferences every few months. Keep an eye out for announcements via the Section listserv. If you are interested in participating as a speaker in one of these teleconference programs, please contact me to discuss your suggested topics.

On April 16, 2010, the Section is co-sponsoring a luncheon CLE with the Austin Chapter of the Federal Bar Association. Senior United States District Judge, and Former Section Chair, W. Royal Furgeson will present his talk on Multidistrict Litigation. As I mentioned in my last letter, Judge Furgeson sits on the United States Judicial Panel on Multidistrict Litigation and will share insights on MDL from that unique perspective. Plans are underway for Judge Furgeson to present his talk in San Antonio this fall and we're looking into co-sponsorship opportunities in Houston and El Paso as well. Additional times and locations for his talk will be announced in the upcoming months.

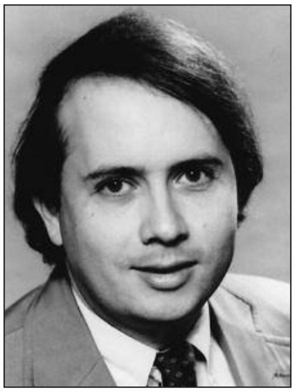
The Section's annual membership meeting will be at 9:00 a.m., Thursday, June 10, 2010, during the State Bar Convention in Fort Worth. The Section's Distinguished Counselor Award will be presented during that meeting. Following the meeting portion of the morning, the Section will be presenting a two-hour CLE featuring Toby M. Galloway, Chief Trial Counsel, Securities and Exchange Commission, Fort Worth Regional Office, and J. Kevin Edmundson, Assistant Director, Enforcement, Fort Worth Regional Office, speaking on Current Enforcement Trends in the SEC, including their recent insider trading case, and the SEC's Restructuring Process. I hope you will be able to join us for both the meeting and the CLE.

As always, the *Journal* continues to provide Section members with valuable news and scholarship covering a wide variety of topics of interest to business litigators. Thanks to Barry Golden and Peter Loh for their annual survey of federal court class action cases, to Mark Bayer for his annual survey of state court class actions, and to Larry Gustafson for his cover photograph. If you have an idea for an article for a future *Journal*, please contact Mike Ferrill (amferrill@coxsmith.com) – we're always on the lookout for interesting articles touching on any aspect of business litigation.

I look forward to hearing from you with your suggestions for the Section.

Best regards,
Leslie Sara Hyman
Section Chair
(210) 554-5294
lshyman@coxsmith.com

FROM ▪ THE ▪ EDITOR



This issue of the Journal features the annual survey articles on federal and state court class action decisions.

As always, we solicit written contributions to the Journal. We currently have commitments for annual survey articles on antitrust, securities, RICO, business torts, arbitration, class actions, D&O and expert witness developments. If you have an idea for a survey article in another area of business litigation, or an article focusing on a particular aspect of or development in the law (even if it falls within one of the broad survey categories), contact me at 112 E. Pecan, Suite 1800, San Antonio, Texas 78205 (210) 554-5282; (210) 226-8395 (fax), amferril@coxsmith.com.

A. Michael Ferrill
Editor

2009 Annual Survey of Fifth Circuit Class Action Cases

By Barry M. Golden and Peter L. Loh[1]

Barry M. Golden

Peter L. Loh

The Fifth Circuit Court of Appeals and the four federal district courts in Texas saw virtually the same amount of class action activity in 2009 as they did in 2008. In 2008, these courts decided 18 cases that substantively addressed Rule 23 of the Federal Rules of Civil Procedure, certifying five of the proposed classes. The same courts in 2009 again decided 18 cases that substantively addressed Rule 23, this time certifying only four of the proposed classes.

This past year, the Fifth Circuit and district courts in Texas addressed class actions involving Rule 23 issues impacting among other things the Class Action Fairness Act, the Securities Exchange Act of 1934, the Real Estate Settlement Procedures Act, the Fair Debt Collection Practices Act, the Fair Labor Standards Act, the Private Securities Litigation Reform Act of 1995, bankruptcy laws, and arbitration. Below is a summary of decisions from the Fifth Circuit Court of Appeals and the Texas district courts that substantively addressed Rule 23. Although few, if any, of these cases substantially alter the Rule 23 landscape, these cases do provide valuable insight into litigating class action issues in the Fifth Circuit and Texas.

A. Fifth Circuit Cases

1. Class Action Fairness Act.

In *Alaska Electrical Pension Fund v. Flowserve Corporation*,[2] the Fifth Circuit determined the following three issues: (i) whether the plaintiffs met their burden of proof in order to obtain class certification under the Securities Exchange Act; (ii) whether the district court applied the proper legal standard when it denied the plaintiffs' motion for class certification under the Securities Exchange Act; and (iii) whether the district court erred when it granted the defendants' motion for summary judgment.

The plaintiffs, Alaska Electrical Pension Fund and Massachusetts State Carpenters Pension Fund (collectively, "Alaska"), brought a class action lawsuit in federal district court in the Northern District of Texas for violations of the Securities Exchange Act of 1934 and the Securities Act of 1933 against the following defendants: Flowserve Corporation and its CEO and CFO; Banc of America Securities, LLC; PricewaterhouseCoopers, LLP; and Credit Suisse First Boston, LLC (collectively, "Flowserve").[3] Alaska alleged that, in the face of financial difficulties, Flowserve "schemed to misrepresent [Flowserve Corporation's] financial condition by making 'inextricably related' false statements concerning (1) earnings forecasts, (2) historical financial performance, (3) past and future integration costs and savings related to the acquisitions of [two companies], and (4) debt-covenant compliance."[4] Alaska filed a motion for class certification, defining the class as "[a]ll persons who purchased the publicly-traded equity securities of Flowserve Corporation between February 6, 2001 and September 27, 2002 . . . ."[5]

In a single decision, the district court denied Alaska's motion for class certification and granted Flowserve's motion for summary judgment.[6] Alaska timely appealed both the denial of its motion for class certification and the court's judgment.[7] On appeal, Alaska argued that the district court erred by refusing to certify the class because the court (i) conducted the certification hearing under a preponderance of the evidence standard instead of a reasonable trier of fact standard under Rule 56 of the Federal Rules of Civil Procedure and (ii) applied the wrong standard of loss causation to its Securities Exchange Act claims.[8] Alaska claimed that these two errors resulted in an incorrect determination of predominance under Rule 23(b)(3).[9]

The Fifth Circuit found that Alaska's Securities Exchange Act's claim required it to show that the defendants made "(1) a misstatement or omission, (2) of a material fact, (3) with scienter, (4) on which Alaska relied, and (5) that proximately caused Alaska's loss."[10] Further, the court determined that Alaska needed to use the "fraud on the market theory" in order to establish a classwide rebuttable presumption of reliance.[11] Otherwise, if each class member's alleged reliance on the defendants' misrepresentations differed, then each class member would have had to prove reliance individually, causing the class to fail for lack of predominance.[12]

In order to establish this classwide rebuttable presumption using the "fraud on the market theory," Alaska needed to prove (i) Flowserve made material misrepresentations to the public; (ii) Flowserve's shares were exchanged in a qualifying efficient market; (iii) the class members traded shares between the time the misrepresentations were made and the time the truth was revealed; and (iv) loss causation occurred.[13] To establish loss causation, the court stated that Alaska needed to prove by a preponderance of the evidence "(1) that the negative 'truthful' information causing the decrease in [stock] price [was] related to an allegedly false, non-confirmatory positive statement made earlier and (2) that it is more probable than not that it was this negative statement, and not other unrelated negative statements, that caused a significant amount of the decline."[14] Therefore, the court held that the district court failed to apply this two-prong standard for assessing loss causation.[15]

Alaska also argued that the district court (i) was prohibited from deciding the merits of Alaska's claims while its class certification appeal was pending and (ii) erred by concluding that the merits of its Securities Exchange Act claim were resolved in the district court's decision concerning loss causation, for the purposes of determining class certification.[16] The Fifth Circuit found that the district court did not determine the issue of loss causation as to the merits of Alaska's claims when it denied class certification.[17] Therefore, the court determined that the district court's summary judgment order was not an issue on appeal.[18] The court held, however, that (i) the district court's entry of summary judgment was erroneous because its loss causation decision under Rule 23(b)(3)'s preponderance requirement did not govern the merits of Alaska's Securities Exchange Act claim and (ii) there existed a genuine issue of fact concerning loss causation because a reasonable trier of fact could conclude that Flowserve's earlier statement concerning earnings caused some of Alaska's loss after the truth came out later.[19] Ultimately, the Fifth Circuit reversed the district court's grant of summary judgment, vacated the district court's denial of class certification, and remanded the case for further proceedings in the district court.[20]

In *Admiral Insurance Co. v. Abshire*,[21] the Fifth Circuit considered two primary issues: (i) whether the filing of the plaintiffs' ninth amended complaint commenced a new lawsuit under the Class Action Fairness Act (the "CAFA"), entitling the defendant to remove the case to federal court and (ii) whether the federal district court in the Middle District of Louisiana abused its discretion in denying the plaintiffs' claims for attorneys' fees and costs associated with their efforts in seeking remand.

The plaintiffs, including Abshire and eventually a total of 1,383 plaintiffs, bought life insurance policies, annuities, and corporate notes from three companies based in Louisiana, and all three companies failed.[22] Consequently, the plaintiffs sued the State of Louisiana in the early 1990s, alleging that state's negligent, intentional, and criminal acts contributed to the failure of these three companies.[23] Ultimately, these actions were all consolidated in a Louisiana state district court.[24] After efforts to settle were unsuccessful, the state district court granted the plaintiffs leave to amend their complaint a ninth time in order to seek class certification under the reasoning "that only class certification could give the attorneys the authority needed to participate in mediation and to settle the case if possible."[25] As a result, the plaintiffs filed their ninth amended complaint on May 30, 2009, in which the plaintiffs (i) defined their proposed class and (ii) sought to recoup their reasonable attorneys' fees.[26]

Immediately thereafter, Louisiana removed the action to federal court on the ground that the case satisfied CAFA's amount in controversy and minimum diversity requirements.[27] The plaintiffs sought a remand, arguing that removal was not proper because the ninth amended complaint did not constitute the commencement of a new suit allowing for removal under the CAFA.[28] The federal district court for the Middle District of Louisiana remanded the case back to the state district court, holding that the plaintiffs' action commenced before CAFA's effective date.[29]

Louisiana appealed the remand order, arguing that the plaintiffs commenced the putative class action after CAFA's effective date.[30] The Fifth Circuit found that (i) state law determines the date on which a civil action is commenced under the CAFA and (ii) the default rule in Louisiana states that, absent special circumstances, a civil action is commenced at the time that the original petition is filed.[31] Therefore, the court held that the plaintiffs had commenced this suit when they filed at least one of their petitions for damages in a competent state district court on or about December 11, 1991, which was long before the CAFA's effective date of February 18, 2005.[32]

Louisiana also argued, in the alternative, that at least one exception applied to the state's default rule when there are special circumstances present, such as the plaintiffs' ninth amended complaint seeking class certification for the first time, which exposes Louisiana to additional liability.[33] The plaintiffs countered by claiming that adding class allegations is not enough to constitute the commencing of a civil action under the CAFA.[34] The Fifth Circuit acknowledged that it has recognized at least one exception to the state's default rule where it has held that the addition of a new defendant to an action is considered a commencement of a new civil action against the new defendant.[35] The court, however held that this narrow exception did not apply in this case, and it declined to create another exception to the state's default rule.[36]

The plaintiffs also requested attorneys' fees and costs associated with their motion for remand, arguing that Louisiana's removal attempt was objectively unreasonable.[37] The federal district court determined that the plaintiffs were not entitled to these attorneys' fees and costs because the law was unsettled at the time of removal as to whether the plaintiffs' ninth amended complaint constituted a new civil action under the CAFA, entitling Louisiana to remove the case to federal court in good faith with reason.[38] The plaintiffs appealed the district court's denial of attorneys' fees and costs.[39] The Fifth Circuit found that, absent unusual circumstances, attorneys' fees and costs should not be awarded if "the removing party has an objectively reasonable basis for removal."[40] Therefore, the court held that even though it was arguable that Louisiana's removal attempt was objectively unreasonable, the federal district court's decision reaching the opposite conclusion and denying the award of attorneys' fees and costs to the plaintiffs associated with their seeking of remand back to state district court was not an abuse of discretion.[41] Ultimately, the Fifth Circuit affirmed the federal district court's decisions to (i) remand the action back to the state district court and (ii) deny the plaintiffs' claims for attorneys' fees and costs associated with their seeking of remand.[42]

2. Securities Exchange Act of 1934.

In *Fener v. Operating Engineers Construction Industry and Miscellaneous Pension Fund*,[43] the Fifth Circuit considered whether the plaintiffs, who brought a securities fraud action against the defendants, presented enough evidence to prove loss causation at the class certification stage under Rule 23.

The plaintiffs, including Fener and others, filed a class action lawsuit alleging securities fraud in violation of the Exchange Act against Belo Corporation and some of its officers (collectively, "Belo").[44] The plaintiffs generally alleged that Belo, a media company that owns the Dallas Morning News (the "DMN"), engaged in securities fraud by inflating the DMN's circulation numbers at a time when there was a downward trend nationally in newspaper circulation, which led to higher advertising revenue and larger profits for Belo.[45] Specifically, the plaintiffs alleged that Belo inflated the DMN's circulation numbers in an announcement stating that the DMN's circulation in the future would be declining on daily newspapers by 2.5% and on the Sunday newspaper by 3.5%.[46] Shortly thereafter, Belo admitted in a press release that it had uncovered questionable practices concerning the calculation of the DMN's circulation, resulting in even greater future declines in the DMN's circulation.[47] The press release concluded that these future declines coupled with the circulation declines first announced and the anticipated lower circulation for the next six months would result in a predicted total decline in circulation of approximately 5% on daily newspapers and 11.5% on Sunday newspapers.[48] After the New York Stock Exchange opened the day following the press release, Belo's stock finished down $1.66 from the previous day.[49] Consequently, the plaintiffs sued Belo for securities fraud on behalf of all those who held stock in Belo during the time period of May 12, 2003, and August 6, 2004.[50]

The plaintiffs specifically alleged that the class (i) had purchased stock in Belo at a time when the stock's price was artificially and fraudulently inflated by Belo's manipulation of the DMN's circulation numbers and (ii) was injured when Belo disclosed the fraud publicly, which caused its stock price to fall.[51] At the class certification hearing before the federal district court in the Northern District of Texas, Belo presented an expert witness, who testified that class certification was inappropriate because the plaintiffs allegedly "could not show that the fraudulent disclosure in the press release was the primary cause of the stock price decline."[52] The plaintiffs countered by presenting their own expert witness, who testified that the decline was almost entirely the direct result of Belo's revelation of the relevant truth in the press release.[53] Ultimately, the federal district court denied the plaintiffs' motion for class certification.[54] The plaintiffs appealed, alleging that the federal district court abused its discretion in denying class certification.[55]

On appeal, the Fifth Circuit applied the same "fraud on the market theory" and "loss causation" analysis laid out in *Alaska Electrical Pension Fund*, discussed above, holding that the plaintiffs did not present enough evidence to prove loss causation at the class certification stage under Rule 23.[56] Specifically, the court found that it was important to determine if Belo's press release should be viewed as one complete disclosure, as the plaintiffs argued, or as three separate disclosures, as Belo argued.[57] The court concluded that if more than one item of negative information is released together along with a corrective disclosure, then the plaintiffs must prove that "it [was] more probable than not that it was [these] negative statement[s], and not other unrelated negative statements, that caused a significant amount of the decline."[58] Therefore, the court sided with Belo and determined that the press release should be viewed as three separate items of news regarding the reasons for the DMN's possible future decline in circulation, divided into fraudulent and non-fraudulent information.[59] The court found that (i) the fraudulent information in the press release consisted of the fraudulent overstatements and (ii) the non-fraudulent information in the press release consisted of the statement recognizing that the fraudulent disclosure was coupled with the earlier reduction announcement and the anticipated lower circulation over the next six months.[60]

The Fifth Circuit found the plaintiffs' submission of analyst reports, SEC reports, stock price charts, and expert testimony unpersuasive.[61] Thus, the court ultimately held that the plaintiffs needed expert testimony that included some analytical research or an event study, showing how Belo's stock reacted to the fraudulent information and the non-fraudulent information, which was required to prove loss causation in this specific case.[62] The Fifth Circuit affirmed the federal district court's denial of the plaintiffs' motion for class certification, concluding that the district court did not abuse its discretion in denying the plaintiffs' motion.[63]

3. Real Estate Settlement Practices Act.

In *Mims v. Stewart Title Guaranty Company*,[64] the Fifth Circuit determined whether the district court for the Northern District of Texas abused its discretion in granting the plaintiffs' motion for class certification with regard to a claim under the Real Estate Settlement

Procedures Act (the "RESPA") and pendent state law claims. The members of the putative class were consumers who refinanced their home mortgages, claiming that the defendant Stewart Title Guaranty violated the RESPA and failed to give them legally-mandated discounts on their new title insurance premiums acquired from Stewart.[65] The district court granted the plaintiffs' motion for class certification for both the federal law claim under RESPA and the state law claims.[66] Stewart appealed the district court's decision.[67]

First, with regard to the plaintiffs' federal law claim under RESPA, Stewart argued that the district court abused its discretion in concluding that the plaintiffs stated a claim under section 8(b) of RESPA.[68] Section 8(b) prohibits a person performing a real estate settlement service from giving any portion of the service charge to any other person who did not perform a real estate settlement service.[69] However, an exception to this general rule under section 8(b) of RESPA allows a title company to pay its appointed agent for services rendered in the issuance of a title insurance policy.[70] The Fifth Circuit concluded that while Rule 23(f) did not allow the court to perform a general inquiry into the merits of the plaintiffs' claim, it could address any of Stewart's arguments that implicated the merits of the plaintiffs' RESPA claim to the extent the merits also affected a determination of predominance for class certification purposes.[71] Specifically, the court determined that each individual class member would have had to prove that the agent from whom they purchased their title insurance policy charged an unreasonable fee in violation of RESPA.[72] This would require the court to investigate the facts of each class member's title insurance policy, resulting in the predominance of individual issues.[73] Therefore, the court held that the district court abused its discretion in certifying the class with respect to the plaintiffs' federal law claim under the RESPA.[74]

Second, with regard to the plaintiffs' state law claims for money due, unjust enrichment, and implied contract, Stewart argued that the district court abused its discretion in defining the class by improperly relying on classwide inferences and ignoring individual issues relating to the eligibility of each class member for the state-mandated discounts on their new title insurance policy premiums.[75] The district court had defined the class as all eligible borrowers that met three certain prerequisites.[76] Specifically, Stewart argued that the class as defined might have possibly included plaintiffs who were not even eligible for the discount.[77] The Fifth Circuit concluded that the district court did not abuse its discretion in certifying the class with respect to the state law claims because there were no individual issues with regard to the eligibility of individual class members where the district court established class membership prerequisites, which provided sufficient evidence that a jury could use to infer entitlement to the state-mandated discount.[78] Additionally, the court found that "[c]lass certification is not precluded simply because a class may include persons who have not been injured by the defendant's conduct."[79]

Ultimately, the Fifth Circuit reversed the district court's order certifying the plaintiffs' class regarding their RESPA claim and remanded the case back to the district court to consider whether the district court should continue discretionary supplemental jurisdiction over the plaintiffs' state law claims.[80]

B. Texas District Court Cases

1. Arbitration.

In *Dealer Computer Services, Inc. v. Randall Ford, Inc.*,[81] the court considered whether it was the appropriate time to review a corporation's motion to vacate an arbitration panel's award, finding that the contracts between the corporation and several car dealerships did not preclude these dealerships from proceeding to class arbitration with the corporation.

Dealer Computer Services, Inc. ("DCS") sued Randall Ford, Inc. and several other car dealerships for breach of contract, alleging that the dealerships failed to pay for software upgrades.[82] DCS filed a demand for arbitration seeking more than $660,000 in damages from Randall Ford.[83] Randall Ford then filed a demand for class arbitration before an arbitration panel that was already in the process of dealing with several other dealerships (the "DMS Class Arbitration").[84] Meanwhile, the arbitration panel that DCS requested was formed (the "Randall Panel"), and Randall Ford then filed counterclaims with the Randall Panel against DCS, adopting the same class allegations made in the DMS Class Arbitration.[85] The Randall Panel granted an award in favor of Randall Ford, finding that the arbitration clauses in the contracts between DCS and the dealerships did not prohibit class certification.[86] Therefore, DCS asked the court to vacate the award in an attempt to prevent the Randall Panel from further considering whether class certification was appropriate.[87] Randall Ford, however, argued that the award was not ripe for review and filed a motion to dismiss.[88]

In determining whether DCS's motion was ripe, the court reasoned that a case is ripe where (i) any remaining questions are purely legal questions and (ii) the plaintiff shows some hardship that is not contingent on future events occurring.[89] Thus, the court held that DCS's motion was not ripe because DCS lacked a concrete injury where the Randall Panel "merely held that the distinct arbitration clauses in the various contracts between DCS and the dealers[hips] did not preclude class arbitration" but "did not conclusively determine that Randall Ford's claims should proceed as a class arbitration."[90]

The court held that DCS did not show the requisite hardship necessary to establish ripeness since its potential hardship was contingent on the Randall Panel's certification of Randall Ford's class, which was not guaranteed by the Randall Panel's arbitration award decision.[91] If the Randall Panel had denied class certification, then the defendants in Randall Ford's putative class would have been forced to arbitrate individually against DCS.[92] If the class was certified by the Randall Panel, then DCS would have been able to obtain judicial review of both the arbitral award and the class certification because, according to Rule 5(d) of the AAA Supplemental Rules, an arbitration panel must stay proceedings for at least 30 days after the panel certifies a class in order to allow a party to obtain judicial review by a court with jurisdiction to determine whether to confirm or vacate the arbitral award and the class certification.[93] Consequently, Randall Ford's motion to dismiss was granted because the issue of class certification was not yet ripe for judicial review.[94]

2. Fair Debt Collection Practices Act.

In *Castro v. Collecto, Inc.*,[95] the court considered the plaintiff's motion for class certification under Rules 23(a) and 23(b). Castro sued Collecto, Inc. for violations of the Fair Debt Collection Practices Act (the "FDCPA") after Collecto sought to collect a two-year old delinquent cell phone service debt from Castro.[96] Castro sought to certify a class of others similarly situated.[97] Collecto claimed "that the class [was] 'not clearly ascertainable' and individual issues predominated over issues common to the proposed class."[98]

The court stated that in order to proceed as a class in an FDCPA action, Rules 23(a) and 23(b) must first be met.[99] Rule 23(a) requires the class to meet the numerosity, commonality, typicality, and adequacy of representation requirements.[100] Rule 23(b)(3) requires that "[c]ommon questions must 'predominate over any questions affecting only individual members' . . . and class resolution must be 'superior to other available methods for the fair and efficient adjudication of the controversy.'"[101] The court further held that in order to determine if a putative class meets the requirements of Rule 23(b)(3), the court must understand "the relevant claims, defenses, facts, and substantive law presented in the case."[102] Thus, the court found that it must "consider how a trial on the merits would be conducted if a class were certified."[103] The court also stated that a Rule 23(b)(3) class action "was intended to dispose of all other cases in which a class action would be 'convenient and desirable,' including those involving large-scale, complex litigation for money damages."[104] The court concluded that if money damages are sought, then an action brought under Rule 23(b)(3), rather than Rules 23(b)(1) or (b)(2), is best because it automatically provides the right of notice and opt out to individuals who do not want their money claims decided in a class action.[105]

The court held that Castro clearly established Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy of representation.[106] The main issue surrounding the Rule 23(b)(3) requirement was whether Collecto violated FDCPA by mailing the collection letter Castro received in an attempt to collect a time-barred cell phone debt.[107] Consequently, the court held that Castro also established the predominance and superiority requirements of Rule 23(b) because of the narrow definition of the class, the specific allegation made, and the primary form of relief sought being monetary relief.[108] Therefore, Castro's motion for class certification was granted.[109]

3. Fair Labor Standards Act.

On August 4, 2009, in *Gandhi v. Dell, Inc.*,[110] the district court for the Western District of Texas adopted a report and recommendation from a United States magistrate judge in which the magistrate recommended the conditional certification of a class of plaintiffs who were current and former employees of Dell, Inc., alleging claims arising under the Fair Labor Standards Act (the "FLSA"). As a result, the court adopted the *Lusardi* two-stage approach recommended by the magistrate judge for determining whether to grant class certification under the FLSA, which the court found was uniformly used in the Fifth Circuit.[111]

Under the first notice stage of the *Lusardi* approach, the court stated that it would use a lenient standard in determining whether the plaintiffs were similarly situated so as to give notice of the conditional class action to any potential class members.[112] Under the second stage of the *Lusardi* approach, the court stated that it would use a stricter standard in making a factual determination of whether the plaintiffs were similarly situated.[113] The court clarified that this second stage is usually precipitated by a defendant's motion for decertification.[114] Furthermore, the court stated that it would use several factors under the stricter standard of the second stage, including: "(1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; and (3) fairness and procedural considerations."[115]

The plaintiffs were current and former business sales representatives of Dell, who alleged that Dell's employment practices and policies with regard to them violated their rights under the FLSA as a class of similarly situated employees.[116] The plaintiffs sought certification pursuant to the FLSA for a class of business sales representatives who were employed in this capacity at Dell from April 1, 2005, to present.[117] Additionally, the plaintiffs filed this same motion for class certification pursuant to Rule 23 for all persons who worked in Dell's call center located in Oklahoma City, Oklahoma, from December 14, 2004, to present.[118]

The plaintiffs sought conditional class certification under the FLSA on the basis of Dell's alleged (i) improper classification of its business sales representatives as nonexempt salaried employees and improper application of the fluctuating workweek method of payment for its business sales representatives; (ii) failure to pay its business sales representatives for all of the time they worked; and (iii) unlawful incentive policies.[119] In arguing for class certification in both respects, the plaintiffs argued that Dell treated all of its business sales representatives uniformly with regard to both their (a) general job duties and related tasks and (b) challenged employment practices.[120] Dell argued, however, that its business sales representatives were either not treated uniformly or there existed a broad spectrum of different sales positions with different job duties and tasks.[121]

Applying the first notice stage of the *Lusardi* two-stage approach to determine whether to grant the plaintiffs' class conditionally under the FLSA, the court found that conditional class certification was appropriate for the plaintiffs' first two allegations but not appropriate for the plaintiffs' third allegation.[122] Specifically, the court concluded that the plaintiffs had set forth substantial allegations for conditional class certification, in that the putative class members were together the victims of a single decision, policy, or plan by Dell. The court, however, concluded that the plaintiffs failed to meet their burden with regard to Dell's alleged unlawful incentive policies because the plaintiffs failed to produce any testimonial or documentary evidence to support this specific allegation.[123]

The court denied the plaintiffs' motion for class certification under Rule 23 without prejudice to refiling (after the period for opting in to the collective action under the FLSA for the plaintiffs' first two allegations had expired).[124] The court noted that this is a common way for a court to approach such a situation when plaintiffs file a motion for class certification under both the FLSA and Rule 23, reasoning that it "mitigates potential confusion for prospective class members who would otherwise be faced both with the opportunity to opt-in to the FLSA collective action and opt-out of the Rule 23 class action."[125] Additionally, the court reasoned that this approach would allow the court potentially to determine class certification under Rule 23 after discovery had largely been completed, giving both parties and the court a better understanding of the underlying dispute and allowing the court to make a more informed decision regarding class certification.[126]

Escobedo v. Dynasty Insulation, Inc.[127] dealt with the issue of whether the original plaintiffs and the opt-in plaintiffs were similarly situated, so that their claims could proceed as a collective action under the FLSA. Five insulation installers (collectively, the "Original Plaintiffs") sued Dynasty Insulation, Inc., alleging that Dynasty had willfully violated the FLSA by failing to pay them overtime that the FLSA required.[128] Later, the Original Plaintiffs filed a motion to proceed as a collective action on behalf of all Dynasty employees performing insulation work, and the court granted the motion to proceed, conditionally certifying the class of plaintiffs with possible decertification at a later phase of the litigation.[129] The court, however, limited the Original Plaintiffs' class to only those Dynasty employees that worked on a particular Dynasty project in which these allegations arose.[130] As a result, 10 additional plaintiffs (collectively, the "Opt-In Plaintiffs") timely filed their written consent to opt-in to this conditionally certified class.[131]

In response, Dynasty filed a motion to decertify the class on the ground that the FLSA's statute of limitations barred the Opt-In Plaintiffs' claims.[132] The plaintiffs countered that (i) the Opt-In Plaintiffs were similarly situated to the Original Plaintiffs, (ii) the court should equitably toll the FLSA's statute of limitations because the Opt-In Plaintiffs were unaware of their rights under the FLSA, and (iii) Dynasty was equitably estopped from claiming that the Opt-In Plaintiffs' claims were barred by the FLSA's statute of limitations because Dynasty misrepresented and concealed from the Opt-In Plaintiffs facts that were relevant to their cause of action.[133] Dynasty replied that its statute of limitations argument was rightly brought in its motion to decertify because it proved that Dynasty had different defenses available against the Opt-In Plaintiffs (*i.e.*, that the Opt-In Plaintiffs were outside both of the FLSA's statute of limitations) that they did not have against the Original Plaintiffs (*i.e.*, that the Original Plaintiffs were within one of the FLSA's statute of limitations), causing class certification to be inappropriate.[134]

The court found that the FLSA requires a collective action to proceed on behalf of employees who are similarly situated against an employer.[135] The court then employed the Fifth Circuit's two-stage *Lusardi* approach, which states that (i) at the notice stage, the court will conditionally certify a FLSA class under a fairly lenient standard, with the action proceeding as a representative action through discovery, and (ii) at the second stage, the court will, upon a defendant's motion to decertify, make a determination on the question of whether the plaintiffs are similarly situated in order to determine whether a collective action is justified under the FLSA.[136] Under this approach, if the plaintiffs were found to be similarly situated, then the court would allow the plaintiffs to proceed to trial as a class.[137] The court also applied the following three factors that the Fifth Circuit has adopted when applying the second stage of the *Lusardi* approach: "(1) the similarity or disparity of the 'factual, employment, and discharge histories of the individual [p]laintiffs[;]' (2) the similarity or dissimilarity of the defenses available to the employer; and (3) the fairness and procedural efficacy of allowing a collective action to proceed."[138]

Applying these three factors, the court first determined that the Original Plaintiffs and the Opt-In Plaintiffs' employment histories were nearly identical because they were all employed by Dynasty on the same project (which had an identifiable ending date), and thus the first factor weighed heavily toward the plaintiffs being considered similarly situated.[139] Second, the court concluded that the possibility of slightly different defenses available to Dynasty against the Original Plaintiffs and the Opt-In Plaintiffs with regard to the FLSA's statute of limitations would only go to the issue of damages, while Dynasty's alleged violation of the FLSA pertained to all plaintiffs; therefore, the second factor weighed heavily toward the plaintiffs being considered similarly situated.[140] Lastly, the court found that the third factor of fairness and procedural efficiency considerations weighed heavily toward the plaintiffs being considered similarly situated because (i) allowing the plaintiffs to proceed as a class was exceedingly fair and consistent with the FLSA's goals and (ii) dismissing the Opt-In Plaintiffs' claims without prejudice would only create the real possibility that the court would eventually face several lawsuits against Dynasty's overtime policies used during one of their construction projects.[141] Consequently, the court denied Dynasty's motion to decertify, holding that the lawsuit could proceed as a collective action.[142]

Morales v. Thang Hung Corporation[143] also involved the FLSA and the court's determination of whether the plaintiff made a showing that there are similarly situated employees who wanted to opt-in to this collective action. Florencio Morales, the named plaintiff, was an employee at a supermarket owned by the defendants.[144] Morales alleged that he was a salaried employee who often worked more than 40 hours per week without overtime pay.[145] Morales claimed that at least 18 other salaried employees of the defendants also should have received overtime pay, and Morales provided the court with the names of three of these other salaried employees whom he believed would join the action upon notice.[146] Therefore, Morales filed a motion for conditional class certification for a class consisting of all the salaried employees of the defendants who worked more than 40 hours per week at the defendants' supermarket.[147]

Since this case was in the notice stage, the court applied the first prong of the *Lusardi* two-part test, under which—as stated above in the analysis of the *Gandhi* and *Escobedo* cases—a court uses a rather lenient standard in making its decision of whether to conditionally certify the class and give notice to potential class members, basing its decision solely on the pleadings and submitted affidavits.[148] The court, however, reasoned that the notice stage standard is not automatic, as the named plaintiff has the burden to make a preliminary factual showing that there exists a similarly situated group of potential plaintiffs.[149] To meet its burden, "the [named] plaintiff must make a minimal showing that: '(1) there is a reasonable basis for crediting the assertion that aggrieved individuals exist; (2) those aggrieved individuals are similarly situated to the plaintiff in relevant respects given the claims and defenses asserted; and (3) those individuals want to opt-in to the lawsuit.'"[150]

In determining whether the potential plaintiffs were similarly situated to Morales, the court determined that it could deny conditional certification and notification if the cause of action arose from a situation that was completely personal to the named plaintiff and not from a situation in which a general rule, policy, or practice applied.[151] The court, however, noted that a court does not need to find uniformity in every single aspect of each potential class member's employment in order to determine that they are similarly situated.[152]

First, the court held that Morales failed to make a minimal showing that all members of his class were similarly situated in terms of their job requirements and payment procedures because Morales' potential class consisted of all salaried employees of the defendants who worked more than 40 hours per week, including managers of the defendants' supermarket.[153] Second, the court held that Morales did not make a minimal showing that aggrieved individuals in his proposed class wanted to opt-in to the lawsuit, finding that Morales gave no indication that any of the 18 individuals whom he claimed were aggrieved in this case wanted to join the lawsuit.[154] The court made this determination even though one affidavit containing a potential plaintiff's consent to join the lawsuit had been filed with the court, reasoning that "[o]ne affidavit is not enough to establish that the collective action, along with the expensive notice it requires, is the most efficient way to proceed with litigation."[155] As a result, the court denied the motion for conditional certification and notice to the potential class members without prejudice.[156]

In *Pedigo v. 3003 South Lamar, LLP*,[157] the court determined whether the plaintiffs could proceed as a conditional class under the FLSA. The class representative was a former waitress and bartender at the defendant's "Alligator Grill" restaurant who filed a lawsuit under the FLSA, claiming that Alligator Grill (i) failed to pay the potential class members the minimum wage and overtime pay required under the FLSA and (ii) made deductions from the potential class members' paychecks for required uniforms in violation of the FLSA.[158] Additionally, the plaintiffs filed a motion asking the court to conditionally certify the case as a collective action.[159]

Applying the first notice stage of the above referenced *Lusardi* two-stage approach, the court conditionally certified the class, specifically determining that (i) a putative class existed and (ii) the class representative and the potential class members were similarly situated in terms of job requirements and payment provisions.[160] Specifically, the court identified four main factors leading to its determination to conditionally certify the class.[161]

First, potential class members had submitted affidavits consenting to join the collective action, which the court found was persuasive evidence that a putative class existed.[162] Second, Alligator Grill acknowledged that it (i) underpaid overtime wages and (ii) may have wrongfully charged employees for their required uniforms during the time period in question.[163] Third, the plaintiffs presented evidence of Alligator Grill's plan to violate the FLSA through the mandatory participation in an invalid tip pool, which the court found was sufficient to grant conditional certification.[164] Fourth, the plaintiffs presented evidence from Alligator Grill's employee manual requiring employees of Alligator Grill to purchase uniforms that the employees were required to wear at work, which the court found might have reduced the potential class members' wages further below the minimum wage requirement of the FLSA.[165]

The court conditionally certified the class because it found that the plaintiffs made the requisite substantial allegations, under the first notice stage of the *Lusardi* two-stage approach, that the putative class members were the victims of a single decision, policy, or plan that violated the FLSA.[166] Ultimately, the court decided that the conditional class to be notified included all waiters, waitresses, and bartenders who (i) worked at this specific restaurant owned by Alligator Grill from October 28, 2005, to the present and (ii) suffered from the FLSA violations alleged.[167]

Maynor v. Dow Chemical Company[168] involved another collective action brought under the FLSA in which the court applied the second stage of the *Lusardi* two-stage approach in determining whether to grant or deny the defendant's motion to decertify the class. Roy Maynor was the named plaintiff who sued Dow Chemical Company under the FLSA for unpaid wages and overtime.[169] Specifically, Maynor claimed that Dow failed to pay him and similarly situated employees for the time that they spent training for and actually taking various skills assessment tests in order to comply with a requirement from Dow that these employees had to advance two levels per year in the various areas tested by the skills assessment tests.[170] In an earlier decision, the court conditionally certified this class of employees under the first notice stage of the *Lusardi* two stage approach.[171] As a result of this conditional certification, approximately 130 employees joined Maynor in this collective action.[172]

Therefore, since this collective action had reached the second stage of the *Lusardi* two-stage approach, Dow moved to decertify the class.[173] Dow argued that (i) this class of plaintiffs was not similarly situated because Dow had no common policy or plan requiring its employees to train for these various skills assessment tests and (ii) there were individualized defenses present that made treating the plaintiffs as a class improper.[174] The court applied the following three factors to determine whether to decertify the class: (i) the factual settings of the individual plaintiffs, (ii) the individualized defenses available to the defendant that are individual to each plaintiff, and (iii) the various fairness and procedural concerns from proceeding as a collective action.[175]

As for the first factor, the court found that "[t]he presence of a common policy, plan, or practice affecting all class members, although not necessarily required, is helpful to showing a similar factual setting."[176] The court concluded that this first factor did not preclude the plaintiffs from proceeding as a collective action because (i) all of these plaintiffs, as employees, were subjected to Dow's requirement to take these various skills assessment tests and (ii) the differences in the type of test training and the amount of time spent on test training did not undermine the conclusion that the class of plaintiffs were similarly situated.[177] Further, the court determined that subclassing and bifurcation of liability and damages provided a means for addressing these differences.[178]

As for the second factor, the court found that individualized liability differences in what the plaintiffs were claiming as compensation did not defeat the collective action all by itself.[179] Dow's main argument was that it did not know what kind and how much test training many of the plaintiffs used.[180] Specifically, Dow argued that the court would have to make individualized inquiries into what some of these plaintiffs reported to Dow concerning their hours spent on test training because some of these plaintiffs claimed to have self-studied on their own instead of using the more formal online training that Dow provided at a local community college.[181] The court, however, determined that there existed common issues that predominated over these individualized liability issues, such as (i) whether Dow knew or should have known that self-study was a test training option and (ii) whether training time spent by employees while on the clock working at Dow qualified for extra compensation.[182] Again, the court determined that subclassing and bifurcation of liability and damages provided a means for addressing these differences in liability.[183]

As for the third factor, the court found that there were no fairness or procedural concerns with proceeding as a collective action although (i) there were no records of the self-study test training time of some plaintiffs and (ii) the online test training time of some plaintiffs were inflated since they could log on and leave the clock running while not actually test training.[184] Additionally, the court concluded that it was fair to proceed as a collective action because Dow would have the ability to present its various individualized arguments and defenses at the liability phase of the collective action.[185]

The court therefore denied Dow's motion to decertify the class, holding that the plaintiffs' actions should proceed collectively because these plaintiffs were similarly situated.[186]

4. Bankruptcy.

In *Mounce v. Wells Fargo Home Mortgage*,[187] the court considered whether the United States Bankruptcy Court for the Western District of Texas had subject matter jurisdiction over the named plaintiffs' claims. This lawsuit arose from a promissory note that the named plaintiffs, Andrew and Valerie Mounce, executed with Wells Fargo Home Mortgage, with the loan secured by a lien on the Mounces' residence.[188] Then, about a year later, the Mounces filed for bankruptcy in the United States Bankruptcy Court for the Western District of Texas, and the Mounces claimed their residence as an exempt homestead.[189] The Mounces, however, failed to make two of their required post-petition monthly payments to Wells Fargo, so Wells Fargo moved for relief from the bankruptcy court's automatic stay, with Wells Fargo's law firm of Brice, Vander Linden & Wernick (the "Brice Law Firm") preparing the motion.[190] As a result of this motion, the Mounces and Wells Fargo memorialized in an agreed order with the bankruptcy court that the Mounces would pay Wells Fargo the amount of the two outstanding monthly payments due on the loan, attorneys' fees and costs, and late charges.[191]

After the Mounces received a letter from Wells Fargo demanding additional outstanding fees and costs, the Mounces filed a class action complaint against Wells Fargo, which alleged misrepresentation of fees and costs incurred from the Brice Law Firm, breach of contract, and coercion.[192] Shortly thereafter, the Mounces filed a motion for class certification in which the Mounces asked to represent a class of plaintiffs (i) who have had a home mortgage with Wells Fargo, (ii) who filed for bankruptcy in Texas, (iii) for whose bankruptcy Wells Fargo used the Brice Law Firm for legal services, and (iv) from whom Wells Fargo collected fees and costs due to a lift of stay, all of which occurred within five years prior to the filing of the Mounces' complaint.[193] The bankruptcy court granted the Mounces' motion for class certification under Rule 23(b)(3) for the Mounces' misrepresentation and breach of contract claims; however, the bankruptcy court denied the motion for the Mounces' coercion claim.[194] Wells Fargo appealed the decision to the district court, arguing that the bankruptcy court lacked subject matter jurisdiction in order to certify the Mounces' class.[195]

The court found that "bankruptcy courts derive their power to exercise jurisdiction from district courts' bankruptcy jurisdiction and district courts' power to refer those matters to bankruptcy courts . . . ."[196] The court concluded, however, that the bankruptcy jurisdiction of district courts is not without limits and is confined to (i) bankruptcy cases, (ii) proceedings "arising under" bankruptcy, (iii) proceedings "arising in" a bankruptcy case, and (iv) proceedings "related to" a bankruptcy case.[197] The court determined that the claims in this case must either come from "arising in" or "related to" jurisdiction; otherwise, the claims must be dismissed because the bankruptcy court lacked subject matter jurisdiction.[198]

As for "arising in" jurisdiction, the court held that proceedings "arising in" bankruptcy cases are administrative proceedings that arise only in bankruptcy cases.[199] The court then used a two-step inquiry to determine if the Mounces' claims "arise in" a bankruptcy case.[200] First, the court asked if the Mounces' claims were created by the bankruptcy statute, and the court found that they were not.[201] Second, the court asked if the Mounces' claims could have been the subject of a lawsuit outside the filing of their bankruptcy case, and the court found that they could because the Mounces' breach of contract and misrepresentation claims were contractual claims that were not inextricably intertwined with their bankruptcy case.[202]

As for "related to" jurisdiction, the court held that proceedings are "related to" bankruptcy cases "if the outcome of the proceeding would have an effect on the debtor and the estate."[203] The court concluded that the Mounces' claims were not "related to" their bankruptcy case because the Mounces' claims relating to the Mounces' homestead would have no effect on the Mounces or the Mounces' bankruptcy estate since the Mounces claimed their homestead as exempt, which effectively removed it from the bankruptcy estate.[204] Therefore, the court dismissed the Mounces' class action claims without prejudice as the bankruptcy court lacked subject matter jurisdiction over the Mounces' class action claims.[205]

5. Securities Exchange Act of 1934.

In *Barrie v. InterVoice-Brite, Inc.*,[206] the court determined specifically whether the classwide issues involved would predominate over the individual issues of reliance under the requirement that the lead plaintiffs needed to establish loss causation by a preponderance of the evidence at the class certification stage. After filing a complaint against InterVoice-Brite, Inc. ("IVB") for violations of the Exchange Act, the lead plaintiffs filed a motion for class certification on behalf of all persons who purchased the common stock of IVB between October 12, 1999, and June 6, 2000.[207] Specifically, the plaintiffs alleged that IVB misled the public about an unsuccessful merger and IVB's 2000 and 2001 revenue and earnings projections.[208]

The plaintiffs claimed that as a result of these misrepresentations, IVB's stock price grew from $11.00 per share to $38.00 per share from October 1999 to March 2000.[209] The plaintiffs alleged that IVB subsequently issued a press release on June 6, 2000, in which IVB stated that it had been affected by attrition to its sales staff and was predicting only approximately $68 million (down from $89 million) in revenues in the first quarter of 2001.[210] Consequently, analysts reduced their estimates of IVB's earnings per share from $1.19 per share to $0.00 per share, and IVB's stock closed at $6.125 per share on June 7, 2000, which was down from a closing price on the previous day of $13.5625 per share.[211]

The court initially granted class certification, but the Fifth Circuit remanded the case back to the court for reconsideration and further analysis of the class certification issues.[212] Applying two recent Fifth Circuit decisions, the court concluded that in order to have their class certified for this case involving alleged violations of federal securities laws, the lead plaintiffs were "required . . . to set forth sufficient evidence that common issues of loss causation predominate in order to meet the requirements" of Rule 23(b)(3).[213]

The court analyzed whether the plaintiffs had met their burden of showing predominance under Rule 23(b)(3) through loss causation by a preponderance of the evidence.[214] The court stated that the plaintiffs could establish loss causation by showing that IVB's alleged misrepresentations actually affected the market price of its shares in one of the following ways: (i) by demonstrating an increase in IVB's stock price after IVB released the false positive news, or (ii) by demonstrating a decrease in IVB's stock price after IVB released the corrective disclosure in its press release.[215] Additionally, the court stated that if the plaintiffs decided to rely on establishing a decrease in IVB's stock price, then they would also have to pass the "relatedness test," under which they would have to demonstrate by a preponderance of the evidence "that the stock price declined due to the revelation of the truth and not the release of other unrelated negative information."[216]

The court found that none of the allegations met the "relatedness test."[217] Ultimately, the court held the plaintiffs did not establish loss causation by a preponderance of the evidence, and, thus, could not rely on a classwide presumption of reliance that the "fraud on the market theory" provides.[218] The court concluded that Rule 23(b)(3)'s predominance requirement was not met because the individual class member issues of reliance and causation would predominate over common class member issues of law or fact.[219] Consequently, the court denied class certification.[220]

Buettgen v. Harless[221] involved a consolidated class action for securities fraud where the court chose which of the four plaintiff groups to appoint as lead plaintiff. The four plaintiff groups consisted of the Buettgen Group, the Lyman Group, the Aldan Ag Group, and the Pension Trust Fund Group. These plaintiffs sued the defendant, Idearc, Inc., for securities fraud in violation of the Exchange Act.[222] Specifically, the plaintiffs alleged that (i) they purchased stock in Idearc during the purported class period and (ii) that Idearc caused a significant inflation and ultimate decrease in its stock price as a result of its false statements.[223]

Each of the four plaintiff groups moved for appointment as lead plaintiff.[224] The court determined that the Private Securities Litigation Reform Act of 1995 (the "PSLRA") governed the appointment of the lead plaintiff in class actions brought under the Exchange Act, with the PSLRA requiring the "court to presume that the most adequate plaintiff is the person or group of persons that: (1) filed the complaint or a motion in response to a notice; (2) has the largest financial interest in the relief sought by the class; and (3) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure."[225] The court also found that this presumption could be rebutted with evidence that the plaintiff presumed most adequate either would not fairly and adequately protect the class interests or is subject to unique defenses.[226]

The court concluded that it only needed to address the second and third presumptive factors in determining the most adequate lead plaintiff, since all four plaintiff groups had properly filed motions requesting the court to appoint them.[227] As for the second factor, the court found that the Buettgen Group sustained the largest loss in the matter, with the Aldan Ag Group, the Lyman Group, and the Pension Trust Fund Group following in this respective order.[228]

As for the third presumptive factor, the court found that the only two relevant factors under Rule 23 in determining which plaintiff group was presumed most adequate to serve as lead plaintiff were typicality and adequacy.[229] The court concluded that typicality is met when the claims of the lead plaintiff have the same essential characteristics as the claims of the other class members in that the claims "arise from the same event or course of conduct, and are based on the same legal theory."[230] The court also concluded that adequacy is met when (i) no conflicts of interest exist between the lead plaintiff and other class members and (ii) the lead plaintiff is prepared to prosecute the class action vigorously.[231]

Applying the third presumptive factor, the court determined that the Buettgen Group and the Lyman Group were not entitled to the presumption of being the most adequate to serve as lead plaintiffs because they both failed to demonstrate the cohesiveness in their respective plaintiff groups necessary for representation of the class.[232] Specifically, in making this determination, the court found that both the Buettgen Group and the Lyman Group (i) consisted of very few plaintiffs who did not communicate with each other in any meaningful way and (ii) invited the court to hand pick one of its members to serve as lead plaintiff if the court deemed their plaintiff group inadequate (which suggested to the court that both plaintiff groups were loosely put together).[233]

Also, the court determined that the Aldan Ag Group was not entitled to the presumption of being the most adequate to serve as lead plaintiff because the presumption as to the Aldan Ag Group was rebutted with evidence that they were subject to unique defenses.[234] Specifically, the court found that there was a risk that the Aldan Ag Group, a Switzerland entity, would be subject to unique res judicata issues jeopardizing the interest of the entire class because no treaty existed between these two countries requiring either the U.S. or Switzerland to recognize and enforce the other country's judgments.[235] In other words, the court concluded that its judgment on the merits would not protect Idearc or the Aldan Ag Group if either prevailed because the Aldan Ag Group (i) could still sue Idearc again in Switzerland if Idearc prevailed and (ii) could not enforce a damage action against Idearc in Switzerland if the Aldan Group prevailed.[236]

The court determined that the Pension Trust Fund Group was entitled to the presumption of being the most adequate to serve as lead plaintiff because it met both the typicality and adequacy requirements of Rule 23 where (i) it demonstrated typicality in that it purchased shares of stock in Idearc during the class period which subsequently lost significant value, (ii) it demonstrated adequacy in that there was no evidence of any conflicts of interests between it and other class members, and (iii) there was no rebuttal to the presumption since it was not subject to any unique defenses.[237] Accordingly, the court granted the Pension Trust Fund Group's motion for appointment as lead plaintiff.[238]

6. Other decisions.

In *Hancock v. Chicago Title Insurance Company*,[239] the court considered whether the plaintiffs met the predominance requirement of Rule 23(b)(3). The named plaintiffs, including Emma Benavides, brought a putative class action against defendant Chicago Title Insurance Company ("CTIC"), alleging that CTIC did not apply mandatory discounts to some of its title insurance policy premiums charged in Texas.[240] The court subsequently granted CTIC's motion for summary judgment dismissing some of the plaintiffs' claims, which left the court to decide only the plaintiffs' claims for money had and received and breach of implied contract.[241] Benavides then moved for class certification.[242] Specifically, Benavides sought to represent a class of plaintiffs who, as borrowers, did not receive these mandatory discounts from CTIC as required by the rate-setting guidelines set by the Texas Department of Insurance when they obtained a mortgage within seven years of a prior mortgage received, which was also covered by title insurance.[243]

In determining whether Benavides met her burden of showing that questions of law or fact common to the class predominated over any individual class member issues, the court found that each of Benavides' proposed common questions presented the individual inquiry of whether the mandatory discount was applied or withheld in each individual plaintiff's particular case.[244] Specifically, the court concluded that individual class member issues predominated because of two reasons.[245] First, class certification required individual inquiries to sort out the factual details of each plaintiff's particular case.[246] Second, there were no truly common classwide questions that needed class treatment.[247] In reaching this conclusion, the court cited a recent Fifth Circuit decision, *Gene and Gene, LLC v. BioPay LLC*, which states that "where the general question of liability is undisputed, and the only task for the district court is to conduct a case-by-case factual analysis to determine where that liability attaches, class certification is inappropriate."[248]

Ultimately, the court denied Benavides' motion for class certification, holding that she failed to meet the predominance requirement of

Rule 23(b)(3) because (i) her proposed questions required individual inquiries in order to identify and calculate the alleged overages charged by CTIC and (ii) there was no classwide proof available to show which plaintiffs were owed a refund by CTIC.[249]

In *Arevalo v. Fidelity National Financial, Inc.*,[250] the court considered whether the named plaintiffs' breach of contract claims were moot and non-justiciable when a defendant made a valid, unconditional tender for the full amount that the plaintiffs claimed as damages, plus statutory interest, before class certification and before the plaintiffs had attained the status of named plaintiffs. Plaintiffs Arevalo and Rash sued defendants Fidelity National Financial, Inc. and other title companies for breach of contract, unjust enrichment, and breach of fiduciary duty, specifically alleging that the defendants overcharged them for recording fees related to their real estate closings.[251] Arevalo was eventually removed as a party, but the Murrays were later added as named plaintiffs in the second amended complaint.[252]

During class certification discovery and before the class certification hearing, various dispositive and nondispositive issues arose among the parties, halting the class certification question.[253] For example, the defendants filed a motion for summary judgment seeking the dismissal of the claims brought by plaintiff Rash because she lacked standing, and the court granted this motion on the ground that the defendants conducted no business with Rash.[254] Also, the defendants filed a motion to dismiss, alleging that the Murrays lacked standing and that the Murrays' claims were moot and non-justiciable.[255] The court found that these motions of the defendants took precedence over the plaintiffs' motion to certify the class, reasoning that the representative plaintiffs must establish standing before seeking class certification.[256] The court also stated that any rulings against the Murrays prior to certification would only bind the Murrays and not the entire class.[257]

In their motion to dismiss, the defendants alleged that the Murrays' claims were moot because before Arevalo and Rash were granted leave to amend, and before the Murrays became named parties to the class action lawsuit, Chicago Title Insurance Company ("CTIC"), one of the defendants, tendered a check to the Murrays for the full amount that they claimed as damages, plus statutory interest.[258] The Murrays contended that (i) they sent the check back to CTIC; (ii) the tender was incomplete because it did not include their attorney's fees; and (iii) since the motion to certify was still pending, rendering an individual claim moot would prohibit the putative class from making any future justiciable claims.[259]

The court concluded that (i) the tender was complete and (ii) the timing of the tender ultimately determines whether it moots a claim.[260] The court applied the general rule stating that "'the named plaintiffs must have a justiciable case or controversy both at the time the complaint is filed and at the time the class is certified . . . .'"[261] The court explained that if a class has not yet been certified and the claims of all named plaintiffs become moot, then the class action must be dismissed.[262] The court, however, noted that "[o]nce a case has certified as a class action, it is clear that mooting of the class representative's claim does not moot the entire action" because the class now has a distinct legal status apart from the interest asserted by its named plaintiff.[263] Essentially, the court reasoned that certification of a class action saves the class action lawsuit from dismissal only if certification occurs before all of the named plaintiffs' claims become moot.[264] The court granted the defendants' motion to dismiss and denied the plaintiffs' motion for class certification because the Murrays' claims were moot.[265]

Clower v. Wells Fargo Bank, N.A.[266] decided whether the plaintiffs' first supplemental motion for class certification should be granted or denied after considering the parties' filings and oral arguments, and the applicable case law. Clower and Clevenger sued Wells Fargo Bank, N.A. on behalf of a putative class made up of either grantors or beneficiaries with property interests in trusts administered by Wells Fargo.[267] When the plaintiffs' trusts were originally created, the First-Wichita National Bank of Wichita Falls was named as trustee.[268] Wells Fargo eventually came to manage these trusts through a series of sales and acquisitions, but the named plaintiffs asserted that Wells Fargo was acting without authority as it was not named trustee in the trusts' documents.[269] Wells Fargo claimed that federal and state banking laws allowed the trusts' authority to pass to it through the sales and acquisitions that had occurred.[270]

In addressing certification, the court cursorily addressed the Rule 23(a) prerequisites of numerosity, commonality, and typicality, finding that the plaintiffs could fulfill their burden under each of these subsections.[271] The court further found that the adequacy of representation requirement under Rule 23(a)(4) requires the class representative to (i) be competent, (ii) have the willingness and ability to take an active role in and control of the litigation, and (iii) protect the interests of absentee class members.[272] Wells Fargo argued that Clower and Clevenger could not possibly be adequate representatives because differences existed between them and the putative class members.[273] The court noted, however, that differences between the class representatives and the class members would render the class representatives inadequate representatives only if those differences were to create conflicts between their interests and the class members' interests.[274] While the court found that differences did exist between Clower and Clevenger and the purported class, the court held that these differences were not so different as to create a conflict.[275] The court explained that the class members were trust beneficiaries just like Clower and Clevenger and that there would still not be such a conflict of interest to bar Clower from meeting the adequacy-of-representation requirement of Rule 23(a)(4) just because Clower had an impending state-court action asserting the same claims and defenses.[276]

In addressing the predominance inquiry, the court held that damages would be easy to calculate for each individual beneficiary by using a uniform formula because Wells Fargo maintained accurate documentation of all the fees it charged for administering each trust.[277] The court further reasoned that common questions predominated over individual ones because there were not individual injuries that would result in a series of mini-trials on damages.[278]

In addressing the superiority inquiry, the court discussed the following relevant factors: (i) interest of class members in pursuing their own claims; (ii) extent and nature of any other litigation concerning the controversy; (iii) desirability of concentrating the litigation of the claims in the particular forum; and (iv) difficulties likely to be encountered in the management of the class action.[279] The court briefly addressed the first three factors and discussed in detail the difficulties likely encountered in the management of the class action. The court determined "that failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and should be the exception rather than the rule."[280] The court concluded that if liability were to be determined, then the court would provide notice to all class members who have not opted out to affirmatively opt in to the class.[281]

As a result, the court granted the motion for class certification, holding that certification was a better and more efficient method of litigating this case rather than litigating a series of individual trials.[282]

In the next phase of *Clower v. Wells Fargo Bank, N.A.*,[283] the court determined whether the defendant's motion for reconsideration of the order granting the plaintiffs' first supplemental motion for class certification should be granted. Wells Fargo presented four main arguments to the court as to why its motion for reconsideration should be granted.

First, Wells Fargo reargued that the plaintiffs' proposed class certification was inappropriate because each class member would need their own "mini-trial" in order to resolve their individual issues.[284] Wells Fargo claimed that the equitable remedies of quantum meruit and unjust enrichment possibly applied to work already performed by Wells Fargo on the trusts at issue in this case; therefore, the court would have to make an individual determination of equitable remedies for each trust, creating several "mini-trials" for the court to evaluate.[285] However, the court disagreed with Wells Fargo, finding that Wells Fargo had no clear entitlement to statutory relief posing severe complexity to the court in determining any remedies for Wells Fargo.[286] Further, the court found that even if Wells Fargo were entitled to equitable remedies, it was likely that Wells Fargo kept detailed records about its efforts in managing these trusts, making any determinations for relief to Wells Fargo merely a mechanical calculation.[287] Therefore, the court held that even though the damages in this case may very well be vastly different among the class members, this was not enough reason standing alone to defeat class certification.[288]

Second, Wells Fargo argued that if a final determination were made that Wells Fargo is not an authorized trustee, then Wells Fargo would (i) stop managing the trust and (ii) transfer the trusts' assets to the court's registry.[289] In effect, Wells Fargo argued that this would leave the trusts without a functional trustee.[290] The court reasoned, however, that appointing an interim trustee for the trusts would not be difficult.[291] Therefore, the court held that Wells Fargo's concerns over this potential complexity of managing the trusts' assets upon its removal as trustee did not outweigh the advantages of allowing the plaintiffs to proceed as a class.[292]

Third, Wells Fargo argued that the court's definition of the class was imprecise because it allowed a faulty opt-in method.[293] The court disagreed with Wells Fargo, however, finding that the opt-in method it proposed would only be useful at the remedy stage of this class action.[294] Therefore, the court held that its definition of the class was adequate because there was no class-membership ambiguity.[295]

Fourth, Wells Fargo argued that the named plaintiffs would not adequately represent the other class members, pointing out that there were satisfied beneficiaries in the class that would have a conflict of interest with the unsatisfied named plaintiffs.[296] The court, however, held that the named plaintiffs would adequately represent the other class members because the entire class would be composed of current beneficiaries of these various trusts.[297]

Therefore, the court denied Wells Fargo's motion for reconsideration of the order granting the plaintiffs' first supplemental motion for class certification, finding that there was no reason to reconsider its earlier decision to certify the plaintiffs' class.[298]

ENDNOTES

1 Barry M. Golden is a partner in the Dallas office of Gardere Wynne Sewell LLP. Peter L. Loh is an associate in the Dallas office of Gardere Wynne Sewell LLP. Mr. Golden and Mr. Loh would like to thank Nick Arrott (associate in the Dallas office of Gardere Wynne Sewell LLP) and Blake Brownshadel (University of Texas School of Law, Spring 2010) for their help on the article.

2 572 F.3d 221, 227-35 (5th Cir. 2009).

3 *Id*. at 224.

4 *Id*. at 225.

5 *Id*. at 226.

6 *Id*. at 227.

7 *Id*.

8 *Id*. at 224.

9 *Id*.

10 *Id*. at 227 (citing *Greenberg v. Crossroads Sys., Inc.*, 364 F.3d 657, 661 (5th Cir. 2004)).

11 *Id*. (citing *Unger v. Amedisys Inc.*, 401 F.3d 316, 322 (5th Cir. 2005)).

12 *Id*.

13 *Id*. at 227-28 (citations omitted).

14 *Id*. at 228 (quoting *Greenberg*, 364 F.3d at 666).

15 *Id*. at 232.

16 *Id*. at 224-25.

17 *Id*. at 233.

18 *Id*.

19 *Id*.

20 *Id*. at 235.

21 574 F.3d 267, 270 (5th Cir. 2009).

22 *Id*.

23 *Id*.

24 *Id*.

25 *Id*.

26 *Id*. at 271.

27 *Id*.

28 *Id*. at 272.

29 *Id*.

30 *Id*. at 273.

31 *Id*.

32 *Id*.

33 *Id*.

34 *Id*.

35 *Id*. (citing *Braud v. Transp. Svc. Co. of Ill.*, 445 F.3d 801, 804 (5th Cir. 2006)).

36 *Id*. at 278-79.

37 *Id*. at 272.

38 *Id*.

39 *Id*. at 280.

40 *Id*. (quoting *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 136 (2005)).

41 *Id*. at 280-81.

42 *Id*. at 281.

43 579 F.3d 401, 407 (5th Cir. 2009).

44 *Id*. at 404.

45 *Id*. at 404-05.

46 *Id*. at 405.

47 *Id*.

48 *Id*.

49 *Id*.

50 *Id*.

51 *Id*.

52 *Id*.

53 *Id*.

54 *Id*. at 406.

55 *Id*.

56 *Id*. at 407, 411.

57 *Id*. at 409.

58 *Id*. (quoting *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007)).

59 *Id*. at 407.

60 *Id*. at 409.

61 *Id*. at 409-10.

62 *Id*. at 409.

63 *Id*. at 411.

64 No. 09-10127, 2009 WL 4642631, at *1 (5th Cir. Dec. 9, 2009).

65 *Id*. at *1-2.

66 *Id*. at *2.

67 *Id*.

68 *Id*.

69 *Id*. at *4 (citation omitted).

70 *Id*.

71 *Id*. at *2-3.

72 *Id*. at *2.

73 *Id*.

74 *Id*. at *6.

75 *Id*.

76 *Id*. at *7.

77 *Id*.

78 *Id*.

79 *Id*. (citing *Kohen v. Pacific Inv. Mgmt. Co., LLC*, 571 F.3d 672, 677 (7th Cir. 2009)).

80 *Id*. at *8.

81 No. H-08-2033, 2009 WL 277557, at *1 (S.D. Tex. Feb. 4, 2009).

82 *Id*.

83 *Id*.

84 *Id*.

85 *Id*. at *1-2.

86 *Id*. at *2.

87 *Id.*

88 *Id.*

89 *Id.* at *3.

90 *Id.*

91 *Id.* at *4.

92 *Id.*

93 *Id.* at *5.

94 *Id.*

95 256 F.R.D. 534, 534 (W.D. Tex. 2009).

96 *Id.*

97 *Id.* at 536.

98 *Id.*

99 *Id.* (citing *Washington v. CSC Credit Servs. Inc.*, 199 F.3d 263, 265 (5th Cir. 2000)).

100 *Id.*

101 *Id.* at 538 (quoting *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 525 (5th Cir. 2007)).

102 *Id.* at 534 (quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 419 (5th Cir. 1998)).

103 *Id.* (quoting *Maldonado*, 493 F.3d at 525).

104 *Id.* at 539 (quoting *Allison*, 151 F.3d at 412).

105 *Id.*

106 *Id.* at 540-42.

107 *Id.* at 543.

108 *Id.*

109 *Id.* at 543-44.

110 No. 1:08-CV-248-JRN, 2009 WL 3427218, at *1 (W.D. Tex. Oct. 20, 2009).

111 No. A-08-CA-248-JRN, 2009 WL 1940144, at *3 (W.D. Tex. July 2, 2009) (citing *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 359 (D.N.J. 1987)).

112 *Id.*

113 *Id.* at *4.

114 *Id.*

115 *Id.* (citations omitted).

116 *Id.* at *1.

117 *Id.*

118 *Id.*

119 *Id.* at *6.

120 *Id.* at *1.

121 *Id.* at *2.

122 *Id.* at *6-7.

123 *Id.* at *7.

124 *Id.*

125 *Id.* (citation omitted).

126 *Id.*

127 No. EP-08-CV-137-KC, 2009 WL 2382982, at *5 (W.D. Tex. July 31, 2009).

128 *Id.* at *1.

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.* at *2.

133 *Id.* at *2-3.

134 *Id.* at *4.

135 *Id.* at *5.

136 *Id.* (citing *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213-14 (5th Cir. 1995)).

137 *Id.* (quoting *Mooney*, 54 F.3d at 1214).

138 *Id.* (quoting *Mooney*, 54 F.3d at 1215).

139 *Id.* at *6.

140 *Id.* at *8.

141 *Id.* at *9.

142 *Id.* at *10.

143 No. 4:08-2795, 2009 WL 2524601, at *3 (S.D. Tex. Aug. 14, 2009).

144 *Id.* at *1.

145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.* at *2.

149 *Id.*

150 *Id.* (quoting *Maynor v. Dow Chem. Co.*, No. G-08-504, 2008 WL 2220394, at *6 (S.D. Tex. May 28, 2008)).

151 *Id.*

152 *Id.*

153 *Id.* at *3.

154 *Id.*

155 *Id.*

156 *Id.* at *4.

157 No. A-08-CA-803-JRN, 2009 WL 3496038, at *2 (W.D. Tex. Oct. 30, 2009).

158 *Id*.

159 *Id*.

160 *Id*. at *3-5.

161 *Id*. at *4-5.

162 *Id*. at *4.

163 *Id*.

164 *Id*.

165 *Id*. at *5.

166 *Id*.

167 *Id*. at *5-6.

168 No. G-07-0504, 2009 WL 4280837, at *26 (S.D. Tex. Nov. 25, 2009).

169 *Id*. at *1.

170 *Id*.

171 *Id*.

172 *Id*.

173 *Id*. at *1, 26.

174 *Id*. at *27.

175 *Id*.

176 *Id*. (citing *Falcon v. Starbucks Corp.*, 580 F.Supp.2d 528, 534-35 (S.D. Tex. 2008)).

177 *Id*.

178 *Id*.

179 *Id*. at *28.

180 *Id*.

181 *Id*.

182 *Id*. at *28-31.

183 *Id*. at *31.

184 *Id*.

185 *Id*. at *32.

186 *Id*. at *33.

187 No. SA-08-CA-816-XR, 2009 WL 2767134, at *4 (W.D. Tex. Aug. 26, 2009).

188 *Id*. at *1.

189 *Id*.

190 *Id*.

191 *Id*.

192 *Id*.

193 *Id*.

194 *Id*. at *2.

195 *Id*.

196 *Id*. at *3.

197 *Id*.

198 *Id*.

199 *Id*. at *5 (quoting *In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987)).

200 *Id*. at *6.

201 *Id*.

202 *Id*. at *6-7.

203 *Id*. at *7 (citing *In re Wood*, 825 F.2d 90, 93 (5th Cir. 1987)).

204 *Id*. at *8.

205 *Id*.

206 No. 3:01-CV-1071-K, 2009 WL 3424614, at *4 (N.D. Tex. Oct. 26, 2009).

207 *Id*. at *2.

208 *Id*.

209 *Id*. at *1.

210 *Id*.

211 *Id*.

212 *Id*. at *3.

213 *Id*. at *1 (citing *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007); *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221 (5th Cir. 2009)).

214 *Id*. at *14.

215 *Id*.

216 *Id*.

217 *Id*. at *17-19.

218 *Id*. at *19.

219 *Id*.

220 *Id*. at *21.

221 Nos. 3:09-CV-0791-K, 3:09-CV-0938-K, 3:09-CV-1049-K, 3-09-CV-1552-K, 2009 WL 3747223, at *1 (N.D. Tex. Nov. 9, 2009).

222 *Id*.

223 *Id*.

224 *Id*.

225 *Id*.

226 *Id*.

227 *Id*.

228 *Id.* at *2.

229 *Id.*

230 *Id.* (citations omitted).

231 *Id.* (citation omitted).

232 *Id.* at *3.

233 *Id.*

234 *Id.* at *4.

235 *Id.*

236 *Id.*

237 *Id.*

238 *Id.*

239 No. 3:07-CV-1441-D, 2009 WL 4665343, at *1 (N.D. Tex. Dec. 9, 2009).

240 *Id.*

241 *Id.*

242 *Id.*

243 *Id.* at *1-2.

244 *Id.* at *5.

245 *Id.* at *6.

246 *Id.*

247 *Id.* at *5.

248 *Id.* (citing *Gene and Gene, LLC v. BioPay LLC*, 541 F.3d 318, 325 (5th Cir. 2008)).

249 *Id.* at *6-7.

250 No. SA-06-CA-0265-OG, 2009 WL 563726, at *6 (W.D. Tex. March 4, 2009).

251 *Id.* at *1.

252 *Id.*

253 *Id.*

254 *Id.* at *5.

255 *Id.*

256 *Id.* at *1 (citing *Grant v. Gilbert*, 324 F.3d 383, 390 (5th Cir. 2003)).

257 *Id.*

258 *Id.* at *5.

259 *Id.*

260 *Id.* at *6.

261 *Id.* (quoting *Zeidman v. McDermott*, 651 F.2d 1030, 1046 (5th Cir. 1981)).

262 *Id.*

263 *Id.* (citing *Lusardi v. Zerox Corp.*, 975 F.2d 964, 974 (3rd Cir. 1992)).

264 *Id.* (quoting *Zeidman v. McDermott*, 651 F.2d 1030, 1046 (5th Cir. 1981)).

265 *Id.* at *7.

266 No. 2:07-CV-510 (TJW), 2009 WL 901486, at *1 (E.D. Tex. March 30, 2009).

267 *Id.*

268 *Id.*

269 *Id.*

270 *Id.*

271 *Id.* at *3-5.

272 *Id.* at *5 (citing *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 481 (5th Cir. 2001)).

273 *Id.*

274 *Id.* at *6.

275 *Id.*

276 *Id.*

277 *Id.*

278 *Id.*

279 *Id.* at *7.

280 *Id.* at *8 (quoting *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 140-41 (2d Cir. 2001)).

281 *Id.*

282 *Id.* at *9.

283 No. 2:07-CV-510 (TJW), 2009 WL 2424101, at *1 (E.D. Tex. Aug. 5, 2009).

284 *Id.*

285 *Id.* at *2.

286 *Id.*

287 *Id.*

288 *Id.*

289 *Id.* at *3.

290 *Id.*

291 *Id.*

292 *Id.*

293 *Id.* at *4.

294 *Id.*

295 *Id.*

296 *Id.*

297 *Id.*

298 *Id.*

2009 Annual Survey of Texas Class Action Cases

By Mark W. Bayer[1]

As has been the trend over the decade, fewer class certification decisions were reviewed by the Texas state appellate courts in 2009. Less than a handful of opinions reviewed certification decisions, and all of them resulted in the denial of certification. Thus, last year's suggestion that Texas class actions are an endangered species remains valid.[2] Although fewer appellate cases addressed class certification issues directly, a few decisions in 2009 considered other interesting issues, such as the requirements for class settlements, multidistrict class actions, and class arbitrations.

I. Texas Supreme Court Decisions

In its only opinion of the year addressing class certification issues, the Texas Supreme Court vacated a lower court order certifying a class of Exxon dealers in *Exxon Mobil Corp. v. Gill*.[3] The dealers complained that Exxon surreptitiously added the cost of rebate programs back into the wholesale price Exxon charged them for gasoline. However, the Texas Supreme Court determined that the dealers' complaint lacked merit.

The dealers initially moved to certify a nationwide class, but after the Texas Supreme Court's decision in *Compaq Computer Corp. v. Lapray*,[4] they amended their claim to seek certification of a statewide class only. Exxon dealers located in states other than Texas then brought similar claims in New York federal court, but the claims were dismissed on a motion for summary judgment.[5] In the meantime, the Texas trial court certified a class of all Texas Exxon dealers, and the court of appeals affirmed.[6]

It was undisputed that each dealer's sales agreement with Exxon contained essentially the same "open-price" provision, which obligated the dealer to pay Exxon's "established" price at any point in time. The dealers conceded that they were charged Exxon's "established" price and did not claim that Exxon's prices were unreasonable or discriminatory. Instead, they alleged that they did not gain any economic benefit from promised rebate programs because the rebates were recouped in Exxon's wholesale prices.

Careful to cast their claim as one for breach of contract rather than fraud, the dealers contended that Exxon's failure to disclose that it was setting its wholesale prices to recoup rebate costs violated the good faith requirement in section 2.305 of the Texas Business and Commerce Code. The court of appeals distinguished the Texas Supreme Court's opinion in *Shell Oil Co. v. HRN, Inc.*,[7] stating that the plaintiffs here made "specific claims of dishonesty in fact based on Exxon's promise of a rebate and acts allegedly taken to remove the benefit promised."[8]

The Texas Supreme Court rejected the court of appeal's efforts to distinguish *HRN*, finding that:

> The dealers' claims of dishonesty in *HRN* – that Shell was setting prices to drive them out of business – were just as specific, and certainly as reprehensible, as those asserted by the Dealers in the present case. Here, as in *HRN*, there is no claim that the open prices charged were commercially unreasonable in amount or discriminatory. The dealers here point to nothing in the contracts that prohibited Exxon from taking rebate costs into account in setting price.[9]

The Texas Supreme Court determined that the court of appeals had misconstrued the holding in *HRN* and misapplied it to this case. As a result, it concluded that the dealers' claims lacked merit.[10]

Having determined that the plaintiffs' claim lacked merit, the Texas Supreme Court vacated the certification of the class. The court previously found that "the substantive law . . . must be taken into consideration in determining whether the purported class can meet the certification prerequisites under [Texas Rule of Civil Procedure] 42."[11] The court found that the lower courts had approved certification of a class based on a significant misunderstanding of the law. Accordingly, the certification order was vacated, and the case was remanded for further proceedings.

II. Court of Appeals Decisions

This year in Texas, only two published court of appeals decisions addressed class certification standards. In both instances, certification was ultimately denied.

In *HICA Education Loan Corp. v. Sullivan*,[12] the Corpus Christi Court of Appeals reversed a trial court order granting class certification because the plaintiffs did not prove the numerosity element of Rule 42(a) of the Texas Rules of Civil Procedure.

HICA owned the promissory notes for Sullivan's student loans. When Sullivan defaulted, HICA sued to collect the outstanding balance. Sullivan counterclaimed, asserting class action claims for unlawful debt collection practices and usury. The trial court certified the following two classes: (i) one on behalf of borrowers who received collection letters from HICA's servicing agent and (ii) one on behalf of borrowers who received collection letters or were sued by HICA's law firm.

HICA raised 13 points of error in the court of appeals, but the court only considered one—whether Sullivan had met his burden of proving that the class was so numerous that joinder of all members was impractical as required by Rule 42(a). Citing *Methodist Hosp. of Dallas v. Tall*,[13] the court of appeals observed that the numerosity requirement is not based on numbers alone because the court also considers whether "joinder of all class members is practicable in light of the size of the class and factors such as judicial economy, the nature of the action, geographical location of class members, and the likelihood that class members would be able to prosecute individual lawsuits."[14]

Sullivan pled that the numerosity requirement had been satisfied on its face due to HICA's use of form letters. However, the court of appeals, citing *Southwestern Refining Co., Inc. v. Bernal*,[15] observed that the trial court was required to look beyond the pleadings. At the class certification hearing, Sullivan's counsel conceded that "because I haven't gotten any discovery answers . . . I don't know how many persons are in the class."[16] To the court of appeals, this was a fatal admission. As a result, the court of appeals found that "the record does not support the factual assertions made by Sullivan regarding numerosity."[17] Despite Sullivan's claim that the defendant's inadequate discovery responses prevented him from proving numerosity, the court of appeals placed the blame on Sullivan. The court observed that if HICA's discovery responses were inadequate, then it was incumbent on Sullivan to move to compel. In the absence of any evidence supporting the numerosity requirement of Rule 42(a), the court of appeals reversed the trial court's certification order.

In *Cyganek v. A.J.'s Wrecker Service of Dallas, Inc.*,[18] the Dallas Court of Appeals affirmed the trial court's denial of a motion for class certification because it agreed that individual issues predominated over common issues.

The plaintiffs in *Cyganek* complained that the defendant towing companies charged excessive and unlawful fees in connection with the towing of vehicles without the owners' consent. The court of appeals found that the common question of "how much appellees could legally charge the class members for towing, storage, and any other services rendered,"[19] would be overwhelmed by the numerous individual issues that would have to be determined. For example, the fact finder would need to determine the following: (i) how much each class member actually paid; (ii) whether an individual class member consented (expressly or implicitly) to having their vehicle towed; or (iii) whether class members had already recovered their damages by invoking a streamlined judicial procedure provided under the Occupations Code. In addition, the plaintiffs failed to show how they could prove the reliance element of their fraud claim on a classwide basis. In essence, the court viewed each instance of towing as a separate and distinct act rather than a single event that could be assessed on a classwide basis for liability purposes.[20]

III. Other Issues Considered by Courts of Appeals

A. Class Settlements

In *Lubin v. Farmers Group, Inc.*,[21] the court of appeals upheld the trial court's approval of a class settlement. In 2001, Farmers Group, Inc., an insurance provider, stopped offering "all-risk" homeowners polices and began offering instead "stated-peril" homeowners policies. Various policy holders complained that the new policies offered reduced coverage at unfair rates. The Texas Attorney General then filed a lawsuit on behalf of the Texas Commissioner of Insurance. Around the same time, the Texas Department of Insurance (the "TDI") initiated an administrative proceeding against Farmers in which the TDI issued a cease and desist order against Farmers requiring it to change certain practices. Shortly thereafter, the Texas Attorney General, the TDI, and Farmers agreed to settle the administrative proceeding and the pending lawsuit (the "Global Settlement"). As part of the Global Settlement, the Texas Attorney General agreed to amend its pleadings to allege a "settlement class action." The purpose of the amendment was to ensure that the Global Settlement had the effect of a "universal release" in which the class members released all potential claims against Farmers. Shortly before the Attorney General filed the amended petition, however, various policyholders objected to the settlement and intervened in the case. The district court conducted a lengthy hearing on class certification and preliminarily approved the class settlement.

The policy holders appealed the order on the basis that not all of the prerequisites for certification were met. Specifically, they argued that the Texas Attorney General could not serve as a class representative. The court of appeals agreed and held that the prerequisites for class certification were not satisfied because the Texas Attorney General cannot act as a class representative. The Texas Attorney General then appealed to the Texas Supreme Court, which held (i) that it was not necessary for the Texas Attorney General to recruit a class representative and (ii) that the Texas Attorney General could serve as a class representative on behalf of the policyholders. Accordingly, the Texas Supreme Court remanded the case to the Austin Court of Appeals with a directive to determine whether the other requirements for class certification were met.

On remand, the Austin Court of Appeals concluded that all the prerequisites were met and upheld the trial court's approval of the settlement class. Notably, the court rejected the argument that there were fatal conflicts within various groups involved that prevented class certification. The objecting policyholders argued that certain policyholders would benefit while others would be negatively impacted. Specifically, they argued that although some policyholders were required to pay more for their premiums than they otherwise should have been, other policyholders were charged premiums that actually were less than what they would have been charged under the old system. The court rejected this argument on the basis that the conflict was purely speculative because some policyholders "might" see an increase in their premiums. The court held that the unsubstantiated nature of the potential conflict was insufficient to find that the trial court abused its discretion by failing to conclude that there was a fatal conflict rendering certification inappropriate.

Likewise, in *Hall v. Pedernales Electric Cooperative*,[22] a class settlement was approved. In *Pedernales*, members of an electrical cooperative sought declaratory and injunctive relief based on allegations of mismanagement, self-dealing, and excessive compensation. The plaintiffs also sought disgorgement of allegedly misappropriated funds, removal of the cooperative's board and management, and damages. While the suit was pending, the cooperative began taking steps to remedy issues raised by the plaintiffs.

Ultimately, the parties reached agreement on a settlement. The cooperative agreed to retire $23 million in "patronage capital," undergo a financial and management review by Navigant Consulting, and pay attorneys' fees to class counsel of up to $4 million.

The trial court held an evidentiary hearing to consider the fairness of the settlement and the certification of a settlement class. Notwithstanding objections by more than 200 cooperative members, the trial court approved the settlement and the certification of a settlement class. The settlement was challenged by a *pro se* class member who alleged that the notice provided to the class was inadequate and that the settlement was not fair, adequate, or reasonable. The court of appeals affirmed the trial court's approval of the settlement and the certification of a settlement class.

In addressing the notice to the class, the court of appeals held that it was adequate. The notice was mailed to each of the cooperative members, and it was also published in 33 local and regional newspapers. In addition to the summary provided in the notice, it also referred to a website that included the entire settlement agreement and a telephone number that could be called for additional information.

The objection also claimed that class members were not given adequate time to object to the settlement. The court of appeals found, however, that allowing class members 24 days to object was sufficient.

The court of appeals also approved the process that led to the settlement. Dismissing the objector's complaints as impractical, the court of appeals found that it was not necessary for all 20,000 class members to participate in the settlement negotiations. Likewise, it was not necessary for separate "settlement counsel" to be appointed to represent the class.

Finally, the court of appeals agreed that the settlement was fair and not the result of fraud or collusion. Considering the six factors required by the Texas Supreme Court in *General Motors Corp. v. Bloyed*,[23] the court emphasized the absence of evidence of fraud or collusion, the likelihood of disruption that would be caused by continued litigation, and the fact that the parties had engaged in substantial discovery that allowed them to make an informed settlement decision. Significantly, the court emphasized the legal obstacles facing the class, quoting the trial judge's statement that "there has not been a class action approved by the Texas Supreme Court since 2000, that I know of."[24]

B. Multidistrict Litigation

In a case of first impression in Texas, the Texas Judicial Panel on Multidistrict Litigation (the "MDL Panel") considered whether putative class action cases filed in three different counties should be transferred to a pre-trial court for consolidated pre-trial proceedings. In *In re Petroleum Wholesale Litigation*,[25] three putative class actions were filed in three counties alleging that gasoline dealers operated pump devices that dispersed less fuel than consumers paid for in violation of the Texas Deceptive Trade Practices Act – Consumer Protection Act. Rule 13 of the Texas Rules of Judicial Administration authorizes the MDL Panel to transfer "related" cases to a single pretrial judge if the transfer serves the convenience of the parties and witnesses and promotes the just and efficient conduct of the litigation.[26]

The MDL Panel held that the cases had common issues of fact and were "related" within the meaning of Rule 13. The MDL Panel found that the statewide attempt to deceive consumers alleged by each of the plaintiffs constituted a single causative event that was "related."[27] Therefore, consolidation was appropriate in order to avoid duplicative discovery and to avoid "the proverbial race to the courthouse for class certification . . . ."[28]

Although the defendant argued that the consolidated cases should be heard in Harris County, the MDL Panel rejected the recommendation, stating the following:

> In this case, as in many of the motions to transfer recently filed, the movants have suggested transfer to a particular county and even a particular judge. **We disfavor this practice.**[29]

Accordingly, the MDL Panel promised to appoint a transferee court by separate order.

Arbitration.

The Corpus Christi Court of Appeals considered the intersection of arbitration with class actions in *In re Nationwide Credit, Inc.*[30] The trial court certified a class of Direct TV subscribers who alleged violations of the Texas Debt Collection Practices Act. After the trial court certified the class of subscribers, but before the class notice was mailed, it was discovered that the class representative's contract with the defendants included an arbitration clause. As a result, the defendants moved to decertify the class. The trial court denied the motion to decertify, and the court of appeals denied a writ of mandamus. While the defendants sought mandamus relief in the Texas Supreme Court, they reached agreement with the class representative to arbitrate their disputes.

During the course of the arbitration, the arbitrator ruled that there should be no class because there was no evidence that any other class member had an arbitration agreement with the defendants. Although the named plaintiff's claim continued before the arbitrator, the plaintiff also asked the trial court to enforce its original certification order and require that notice be distributed to the class. The trial court ordered the defendants to mail the class notice to class members. The defendants sought mandamus, which was granted by the court of appeals.

The court of appeals held that it was an abuse of discretion to allow the plaintiff to serve as a class representative in court while at the same time pursuing his individual claims in arbitration. Therefore, the court of appeals stayed the litigation in order to allow for a new class representative to be appointed or for the plaintiff to conclude his individual arbitration.

ENDNOTES

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

2 *See 2008 Annual Survey of Texas Class Action Cases*, Tex. Bus. Lit. J. (Winter 2009).

3 No. 07-0404, 2009 WL 3969129, at *1 (Tex. Nov. 20, 2009).

4 135 S.W.3d 657 (Tex. 2004).

5 Flagler Auto., Inc. v. Exxon Mobil Corp., 582 F. Supp. 2d 367, 381 (E.D.N.Y. 2008).

6 Exxon Mobil Corp. v. Gill, 221 S.W.3d 841 (Tex. App.—Corpus Christi 2007, no pet.).

7 144 S.W.3d 429 (Tex. 2004).

8 *Gill*, 2009 WL 3969129, at *3.

9 *Id*.

10 *See also Flagler Auto.*, 582 F. Supp. 2d at 379.

11 Union Pac. Res. Group, Inc. v. Hankins, 111 S.W.3d 69, 72-73 (Tex. 2003).

12 No. 13-08-00736-CV, 2009 WL 3210954, at *3 (Tex. App.—Corpus Christi Oct. 8, 2009, no pet.) (mem. op.).

13 972 S.W.2d 894, 898 (Tex. App.—Corpus Christi 1998, no pet.).

14 *Sullivan*, 2009 WL 3210954, at *1.

15 22 S.W.3d 425, 435 (Tex. 2000).

16 *Sullivan*, 2009 WL 3210954, at *2.

17 *Id*. at *3.

18 No. 05-08-01346-CV, 2009 WL 1942184, at *5 (Tex. App.—Dallas July 8, 2009, no pet.) (mem. op.).

19 *Id*. at *3.

20 *Id*. at *4.

21 No. 03-03-00374-CV, 2009 WL 3682602, at *32 (Tex. App.—Austin Nov. 6, 2009, no pet.) (mem. op.).

22 278 S.W.3d 536, 538 (Tex. App.—Austin 2009, no pet.).

23 916 S.W.2d 949, 955 (Tex. 1996).

24 *Hall*, 278 S.W.3d at 551.

25 No. 08-0956, 2009 WL 887988, at *1 (Tex. Jud. Pan. Mult. Lit. Feb. 10, 2009).

26 Tex. R. Jud. Admin. 13.2(f), 13.3(a), 13.3(l).

27 *Id*. at *2.

28 *Id*. at *4.

29 *Id*. at *4 (emphasis added).

30 No. 13-08-00717-CV, 2009 WL 866833, at *1 (Tex. App.—Corpus Christi March 31, 2009, no pet.).

MONOGRAPH ALERT

By Gregory S.C. Huffman

To Subscribers to Monograph Texas Antitrust and Related Statutes

The Section has the Monograph in stock. The Monograph, which is in loose-leaf format, comes with an embossed three-ring binder. It includes sections covering legislative history, recent judicial interpretations and newly-filed cases.

The Monograph, which was produced by Greg Huffman and his Monograph Committee, may be purchased for $43. An order form appears below.

Order Form

Monograph-Texas Antitrust and Related Statutes

SEND TO:
State Bar of Texas Sales Desk, P.O. Box 12487, Austin, Texas 78711-2487
OR Call 1-800-204-2222 (ext. 1411). In Austin: 463-1463 (ext. 1411) Mon. - Fri. 8:00 am to 5:00 pm
FAX YOUR ORDER TO: 512-463-1604

Please send the indicated number of copies of Monograph-Antitrust and Related Statutes

(9305) ________copies @ $43 each $ ______________

Postage & Handling	$	5.00
SUBTOTAL	$	
7.25% Sales Tax on Subtotal (8% Tax in Austin area)	$	

PLEASE INCLUDE TAX OR EXEMPTION CERTIFICATE. (OMIT IF OUT OF STATE)

TOTAL **$** ______________

Make check payable to: State Bar of Texas
or charge: ___ MasterCard ___ Visa ______________________ ______________
account number expiration date

Print name as it appears on card ______________________________

Authorized signature ______________________________

Name ______________________________

Law firm account number or Bar card number ______________________________
(required to process order)

Firm Name ______________________ Telephone (_____) ______________

Address ______________________________

City & State ________________ Zip ____________

Order placed by ______________________________

PLEASE ALLOW 2-3 WEEKS FOR DELIVERY

NOTES

NOTES

State Bar of Texas
Antitrust & Business Litigation Section
P.O. Box 12487
Austin, TX 78711-2487

NON PROFIT ORGANIZATION
U.S. POSTAGE
PAID
PERMIT NO. 1804
AUSTIN, TEXAS