

# **WHITHER THOU GOEST CLASS ACTIONS?**

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# WHITHER THOU GOEST CLASS ACTIONS?

## I. INTRODUCTION

The poetry reflected in this title finds its origin in the Book of Ruth: “Whither thou goest, I shall go, \* \* \* and where thou lodgest, I will lodge: \* \* \*. Where you die, I will die, and there will I be buried \* \* \*.” Ruth 8: 16-17. Arising from such language spring songs, poetry, plays, and even commercial advertisements. Indeed, other religious writings mirror this language, implying a dedication to either a concept, spirituality, or person that overcame tribulations posed by fact-specific circumstances. The eloquent statement of “Whither Thou Goest, I Will Go” and its dazzling image of commitment, however, finds challenge in the evolving world of class actions. The more appropriate reaction to “Whither Thou Goest Class Actions?” signals of potential loss as parties chase down this ever-more-elusive mechanism of conflict resolution.

The class mechanism of conflict resolution began simply enough. “Courts of equity have long recognized ‘class suits’. Where the persons who are interested in a subject matter of litigation are very numerous, it is impractical if not impossible to make all of them parties and prosecute the suit to judgment; and hence, in order to prevent a failure of justice, and for the sake of convenience, the court permits less than all of the members of the class to act as representatives of the entire body.” *Humphrey v. Knox*, 244 S.W.2d 309, 312 (Tex. Civ. App.—Dallas 1951, writ ref’d n.r.e.) (quoting 17 TEX. JUR. 25, § 22). This seeming early simplicity began to be illusive as soon as Texas expressed the procedural requirements in 1941 by the adoption of Texas Rule of Civil Procedure 42.

## II. THE PATH OF RULE 42

In order to attempt resolution of the question posed by this title, the rugged path already traveled by Rule 42 and the current cliff upon which it stands foreshadows a questionable future. Although the evolution of Rule 42 makes for interesting history in some arcane way, for purpose of this presentation we fast-forward to the language of Rule 42 at the time of *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000).

### A. Rule 42(a)

The general requirements for class actions are described in seemingly simple terms in Rule 42. A party seeking certification must show that the class satisfies four threshold requirements: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. TEX. R. CIV. P. 42(a). These four threshold requirements, however, possess a long history of application that is far from simplistic. For

purpose of this presentation, only a basic recitation of the requirements is included:

#### 1. Numerosity

The proponent must plead and prove that it is difficult or inconvenient to join all the members of the class. TEX. R. CIV. P. 42(a)(1); *Bernal*, 22 S.W.3d at 433. The class must be “so numerous that joinder of all members is impracticable.” TEX. R. CIV. P. 42(a)(1). In determining whether joinder of all class members is impractical, the court will consider such factors as the size of the proposed class, judicial economy, the nature of the action, geographical locations of class members, and the likelihood that the class members would be unable to prosecute individual lawsuits. *Rainbow Group, Ltd. v. Johnson*, 990 S.W.2d 351, 357 (Tex. App.—Austin 1999, pet. dismissed w.o.j.).

#### 2. Commonality

There must be questions of law or fact that are common to the entire class. TEX. R. CIV. P. 42(a)(2). Texas considers “common questions” to be questions “which when answered as to one class member are answered as to all class members.” *Bailey v. Kemper Cas. Ins. Co.*, 835 S.W.3d 840, 853 (Tex. App.—Texarkana, 2002, pet. dismissed w.o.j.). Commonality requires “at least one issue of law or fact ‘that inheres in the complaints of all class members.’” *Union Pac. Res. Group, Inc. v. Hankins*, 111 S.W.3d 69, 74 (Tex. 2003) (quoting *Phillips Petroleum Co. v. Bowden*, 108 S.W.3d 385, 394 (Tex. App.—Houston [14th Dist.] 2003, pet. filed)).

#### 3. Typicality

The claims or defenses of the representative party must be typical of the claims or defenses of the class. TEX. R. CIV. P. 42(a)(3). Class representatives’ claims must arise from the same event or course of conduct that gives rise to the claims of the other class members and must also be based on the same legal theories. *Hi Lo Auto Supply, L.P. v. Beresky*, 986 S.W.2d 382, 387 (Tex. App.—Beaumont 1999, no pet.).

#### 4. Adequacy

Plaintiffs also must demonstrate that “the representative parties will fairly and adequately protect the interests of the class.” TEX. R. CIV. P. 42(a)(4). Speculative claims regarding potential conflicts are insufficient to show the trial court abused its discretion in finding representativeness. *State Farm Mut. Auto. Ins. Co. v. Lopez*, 45 S.W.3d 182, 192 (Tex. App.—Corpus Christi 2001, pet. dismissed). Only a conflict that goes to the very subject matter of the litigation will defeat a party’s claim of representative status. *Id.* at 193.

**B. Rule 42(b)**

If a class proponent satisfies each of the requirements of Rule 42(a), the proponent must then turn to the hazards posed by Rule 42(b) before the class may be certified. At the time of *Bernal*, Rule 42 proposed four options for a class to choose from in meeting this requirement: (1) inconsistent adjudications; (2) injunctive or declaratory relief; (3) specific property claims; or (4) predominance of common issues over individual issues combined with a superiority concern. As of January 1, 2004, Rule 42 no longer includes class actions for suits affecting specific property. Now, the options as so appropriately framed by Dorsaneo's Texas Litigation Guide are as follows:

- Rule 42(b)(1)(A): When the prosecution of separate actions would pose a risk of inconsistent adjudications with incompatible standards of conduct for the opposing party.
- Rule 42(b)(1)(B): When the prosecution of separate actions would pose a risk of adjudications that would be dispositive of the interests of the individual members.
- Rule 42(b)(2): When an opposing party has acted or refused to act on grounds generally applicable to the class, making final injunctive or declaratory relief for the entire class appropriate.
- Rule 42(b)(3): When questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

The first three types listed above are often referred to as “mandatory” classes because the class members cannot withdraw from the class or file individual actions. In contrast, a Rule 42(b)(3) class under the new rules is referred to as an “opt-out” or “non-mandatory” class because the members may request exclusion from the class and thereby not be bound by the judgment. TEX. R. CIV. P. 42(b)(3), (c)(2)(B).

**C. Standard of Review**

Before *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000), class action plaintiffs relied heavily on the “abuse of discretion” review required of certification orders. District courts were informed they enjoyed a broad discretion in determining whether a lawsuit should be maintained as a class action. *Spera v. Flemming, Hovencamp & Grayson, P.C.*, 4 S.W.3d 805, 810 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1999, no pet.). Although the burden of proof is on the class plaintiffs to establish their right to maintain the action

beyond making mere allegations, class proponents were generally not required to prove a prima facie case or make an extensive evidentiary showing in support of a motion for class certification. *Id.* at 810; *see also Clements v. League of United Latin Am. Citizens*, 800 S.W.2d 948, 952 (Tex. App.—Corpus Christi 1990, no writ). The trial court was permitted to base its decision on the pleadings or other material in the record, and in reviewing the trial court's ruling on certification, the appellate court was required to view the evidence in a light most favorable to the trial court's action and indulge every presumption in favor of such action. *See id.*

The standard of review was utilized to not only separate arguments focusing on the merits of the defenses, but also permitted amendments to the class definition either by the Court of Appeals or upon remand to continue the case as a class action. Such ease in protecting the decisions of the trial court or the abuse of discretion standard, however, found new barricades in the year 2000.

In 2000, the Supreme Court of Texas ruled on three important class action appeals: *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444 (Tex. 2000); *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000); and *Intratex Gas Co. v. Beeson*, 22 S.W.3d 398 (Tex. 2000). As many commentators have noted, the decisions from these cases marked a new conservative approach to the certification of class actions under the Texas Rules of Civil Procedure. The tremendous flexibility in obtaining certification for class action lawsuits made a significant shift in the wake of these cases.

**III. JUDICIAL DETOURS IN INTERPRETING RULE 42**

Historically, class action lawsuits were viewed to serve as a powerful weapon for groups of plaintiffs wishing to participate in the legal system, but whose claims otherwise may be too small to warrant adjudication, or whose financial means affected the ability to pursue an individual suit. Many appellate courts were proponents of the flexibility offered the trial court, proposing that initially certifying a class and dissolving the certification later in the proceedings, if necessary, constituted the most efficient certification method. *See, e.g., Rainbow Group, Ltd. v. Johnson*, 990 S.W.2d 351, 360 (Tex. App.—Austin 1999, pet. dismiss'd w.o.j.); *Nat'l Gypsum Co. v. Kirbyville I.S.D.*, 770 S.W.2d 621, 627 (Tex. App.—Beaumont 1989, writ dismiss'd w.o.j.); *Life Ins. Co. of the Southwest v. Brister*, 722 S.W.2d 764, 775 (Tex. App.—Fort Worth 1986, no writ). This “certify now, and worry later” custom propelled settlements because of the potentially devastating consequences of large negative judgments. A clamor for reform by defendants resulted in the dramatic shift reflected in the “Triad” cases of 2000.

In *Southwestern Ref. Co. v. Bernal*, 904 plaintiffs sought class certification pursuant to Rule 42 in their suit against a refining company and others alleging personal injuries resulting from a tank explosion at a refinery. The extent of the personal injuries varied greatly among the class members. The trial court's certification order contemplated a three-phase trial. Phase I would address liability, Phase II would address punitive damages if the defendants were found grossly negligent during Phase I, and Phase III would address proximate cause and actual damages.

Defendants brought an interlocutory appeal in the Corpus Christi Court of Appeals arguing that the trial court abused its discretion for two reasons: (1) the trial court erred in certifying the class action because common issues among the plaintiffs did not predominate over the individual issues to be determined at trial and (2) the trial court erred in dividing the trial in a manner that would have fault and punitive damages decided before causation and actual damages. The court of appeals affirmed the trial plan after making modifications. Defendants then petitioned the Texas Supreme Court to review the class certification, contending that the trial court's plan was an abuse of discretion because common issues did not predominate over individual issues; therefore, the requirements of Rule 42(b)(4) were not met and class certification was improper.

The Supreme Court of Texas stated in its opinion that trial courts must perform a "rigorous analysis" of the predominance requirement before certifying a class. *Bernal*, 22 S.W.3d at 435. The Court specifically rejected the "certify now and worry later" approach to class certification employed by many of the courts of appeals, and required that the findings from this "rigorous" predominance analysis be reflected in the trial court's certification order by indicating how the plaintiffs' "claims will likely be tried so that conformance with Rule 42 may be meaningfully evaluated," *id.*, a concept explored more in the significant case of *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675 (Tex. 2002).

*Ford Motor Co. v. Sheldon* also constituted one of the Triad cases. Decided on the same base as *Bernal*, *Sheldon* involved similar issues involving the predominance requirement of Rule 42(b)(4). *Sheldon*, however, possessed its own unique twist as the Supreme Court revisited the class definition analysis of its *Intratex Gas v. Beeson* opinion penned two months prior, which focused on the adequacy of the class definition.

*Sheldon* involved a group of car and truck owners who sued Ford for multiple causes of action arising from an alleged defective car painting process that caused peeling and flaking paint. On Ford's appeal to the Austin appellate court, the class definition and certification order were modified *sua sponte*, causing

Ford to appeal to the Supreme Court of Texas. Ford asserted two primary arguments worthy of note for this presentation: (1) the class definition represented a "fail safe class" in violation of *Intratex Gas v. Beeson*, and (2) the individual—and not common—issues would predominate. Based on Ford's first argument, the certification order was reversed. The Supreme Court noted that the proposed class "allow[ed] the named plaintiffs to proceed in a class action before showing that a class exists." *Sheldon*, 225 S.W.3d at 454. Based on the class certification order, a full trial of specified issues must first be conducted before the definition could be solidified and fully ascertained.

The Triad of *Beeson*, *Sheldon*, and *Bernal* paved the way for significant changes by instructing trial courts to no longer employ the practice of "certify now, worry later," by requiring a full "rigorous analysis" before certification that many courts extend into a review on the merits of the case, and by requiring the inclusion of a trial plan with any class certification order.

#### IV. FOLLOWING THE LEAD OF THE SUPREME COURT

##### A. Post-*Bernal* Judicial Changes in Class Action

The Triad indicated the Supreme Court of Texas' trend for class action reform and signified an unequivocal retreat from prior class action jurisprudence. Accordingly, since the Texas Supreme Court's decision in *Bernal*, very few class proponents have been able to satisfy the high standard for class certification, and Texas courts of appeals are now routinely reversing trial courts' class certification orders under *Bernal*, *Sheldon*, and *Beeson*. A survey outlining the disposition of published class action cases since *Bernal* is included as Appendix "A" to this paper.

The reform of the Triad cases and subsequent appellate opinions, coupled with the Legislature's efforts to corral some additional issues, demonstrate that the path of the class action still exist, but the road blocks are many. Setting aside momentarily the precise language of the rules and new legislation, judicial interpretations and legislative alterations indicate some continuing issues for resolution for those who choose to track class certification.

##### 1. Standing

Lack of standing deprives a trial court of subject matter jurisdiction over the plaintiff's claims as well as those of the class. *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 711 (Tex. 2001). To establish standing, the burden is on the plaintiff to show "a distinct injury to the plaintiff and a real live controversy which will actually be determined by the judicial declaration sought." *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001). A plaintiff lacks standing if his alleged injury is not "likely to be

redressed by the requested relief.” *MET-Rx, Inc. v. Shipman*, 62 S.W.3d 807 (Tex. App.—Waco 2001, pet. denied). Stated another way, the plaintiff must have a “personal stake in the outcome.” *TCI Cablevision of Dallas, Inc. v. Owens*, 8 S.W.3d 837, 848 (Tex. App.—Beaumont 2000, pet. dismissed by agr.).

These same standing requirements apply to class actions. *M.D. Anderson Cancer Ctr.*, 52 S.W.3d at 710. A named plaintiff, for instance, who does not have standing to sue individually cannot represent a class, and the court will not have jurisdiction over the class. *M.D. Anderson Cancer Ctr.*, 52 S.W.3d at 706. Because a court must dismiss the class action for lack of jurisdiction if the class representative does not have standing, it is important to recognize and assert any standing issues at the outset of the case, which could result in dismissal of the class action.

For example, the Waco Court of Appeals dismissed a class action on the basis that the class representative did not have standing to pursue claims on behalf of the class. See *MET-Rx*, 62 S.W.3d at 807. *MET-Rx*, involved a class action suit alleging that the defendants misrepresented the safety of their products, which the plaintiff contended resulted in his kidney problems. *Id.* at 809. The plaintiff sought both declaratory and injunctive relief. The trial court certified a class, and the defendants appealed, alleging that the plaintiff lacked standing to pursue the lawsuit because the plaintiff disavowed in his petition the use of any MET-Rx products in the future. *Id.* at 811. The court of appeals agreed, dismissing the appeal on the basis that the plaintiff did not have standing to pursue future injunctive and declaratory relief because it would not redress the injuries he allegedly suffered from using defendants’ products in the past. *Id.*

Several Texas courts have recently addressed the standing of unnamed class members to appeal final judgments. These courts have concluded that, where the “settlement class” device is not used, unnamed class members must intervene in the lawsuit in order to appeal the final judgment. See *In re City of San Benito*, 63 S.W.3d 19, 24-25 (Tex. App.—Corpus Christi 2001, orig. proceeding) (unnamed class members who did not intervene in class action suit did not have standing to appeal the final judgment); *but cf.*, *Northrup v. Southwestern Bell Tel. Co.*, 72 S.W.3d 1, 10 (Tex. App.—Corpus Christi 2001, no pet.) (holding that, when settlement class device is used, an unnamed class member is not required to have formally intervened in the lawsuit prior to final judgment in order to have standing to appeal the settlement).

Issues surrounding standing will continue to plague courts in the class action field. Because standing is a jurisdictional requirement, it may be addressed for the first time on appeal, resulting in an insufficient record in order to maintain the class action suit. See *Polaris Indus. v. McDonald*, 119 S.W.3d 331,

338 (Tex. App.—Tyler 2003, no pet.). Citing to the opinion of *MD Anderson Cancer Ctr. v. Novak*, the Tyler Court of Appeals noted that in order to demonstrate standing “a named plaintiff in a class action must show that the threat of injury \* \* \* is ‘real and immediate,’ not ‘conjectural’ or ‘hypothetical.’” *Id.* at 339 (quoting *Novak*, 52 S.W.3d at 710). Looking to federal case law for insight, the Court of Appeals noted that the standing inquiry required careful judicial examination of the allegations in order to ascertain whether the particular plaintiff is entitled to an adjudication on the specific claims asserted. *Id.* Such a legal standard opened the door into a review of the merits of the case in order to determine whether a judicable case or controversy existed for which standing could be applied. The standing issue is inextricably interwoven with the type of injury, as well as the general nature of the case. Cases like *Polaris Industries* highlight the confusing need to balance evaluating the merits of the case and simultaneously setting aside those same merits for purposes of ultimately determining class certification.

A trial court must understand the claims, defenses, relevant facts, and applicable substantive law to make a meaningful determination of certification issues. Although declared such is a “far less searching than a trial on the merits,” the interaction of standing and other issues surrounding injuries will demand a much more intensive factual analysis than contemplated before the Triad cases. See *Union Pac. Res. Group v. Hankins*, 111 S.W.3d 69, 72-73 (Tex. 2003).

## 2. Ripeness

Likewise, ripeness is a “threshold issue that implicates subject matter jurisdiction, and similar to standing, emphasizes the need for a concrete injury for a justiciable claim to be presented.” *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000). While standing focuses “on the issue of *who* may bring an action, ripeness focuses on *when* that action may be brought.” *Id.* (emphasis in original). Ripeness focuses on whether the case involves “uncertain or contingent future events that may not occur as anticipated or may not occur at all.” *Id.*

The Supreme Court of Texas addressed both standing and “ripeness” issues in the class action context in *McAllen Medical Ctr. v. Cortez*, 66 S.W.3d 227 (Tex. 2001). *Cortez* involved a class action suit against a doctor and the hospital where he practiced alleging that they had misrepresented the doctor’s qualifications. *Id.* at 230. The plaintiff settled with the doctor, and the trial court certified a “settlement only” class, approved the settlement, and scheduled a fairness hearing. The hospital attempted to appeal the trial court’s ruling, but the court of appeals dismissed the appeal on the basis that the hospital lacked standing to appeal the order, and because the challenge to the

certification and settlement were premature since the fairness hearing had not occurred. *Id.*

The Supreme Court reversed the court of appeals' dismissal, finding that the certification challenge was ripe for appellate review because the court's order allowed issuance of class notice before any determination was made with respect to Rule 42's requirements. *Id.* at 233. The Court likewise held that the hospital, a non-settling defendant, had standing to contest certification of a settlement class because it showed that it would be adversely affected by the order broadly defining the class. *Id.* at 235.

In summary, class action practitioners should be mindful of standing and ripeness concerns. Whether seeking certification or opposing certification, standing and ripeness could be independent grounds affecting certification prior to the application of Rule 42's requirements.

### 3. Grappling With Trial Plans

A more comprehensive review of the merits also comes in the form of trial plan requirements. The *Bernal* court mandated that trial courts "perform a rigorous analysis before ruling on class certification to determine whether all prerequisites to certification have been met." *Id.* at 435. The court concluded that "the trial court's certification order must indicate how the claims will likely be tried so that conformance with Rule 42 may be meaningfully evaluated." *Id.* Departing from earlier class action jurisprudence, the Texas Supreme Court stated, "[t]o make a proper analysis '[g]oing beyond the pleading is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.'" *Id.* (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996)).

Since *Bernal*, courts are no longer able to certify a class unless they understand how any individual issues will be addressed during the trial. It is now necessary for trial courts to create trial plans and explain the methods they will use to handle any class members' individual issues that may arise. For example, in *West Teleservices, Inc. v. Carney*, the trial court certified a class without the appropriate trial plan. 37 S.W.3d 36 (Tex. App.—San Antonio 2000, no pet.). The San Antonio Court of Appeals reversed and remanded the case stating, "[t]he certification order does not identify the causes of action, how those causes of action would be tried, how liability for each of the four defendants would be determined, or how damages for each of the 90,000 plaintiffs would be determined." *Id.* at 42; see also *Reynolds Metal Co. v. Mumphord*, 47 S.W.3d 141, 146 (Tex. App.—Corpus Christi 2001, no pet.) (reversing and remanding case in the absence of a trial plan); *Charlie Thomas Courtesy Leasing, Inc. v. Taylor*, 44 S.W.3d 684, 689 (Tex. App.—Houston

[14th Dist.] 2001, no pet.) (same); *Nissan Motor Co. v. Fry*, 27 S.W.3d 573, 592 (Tex. App.—Corpus Christi 2000, pet. denied) (same).

Texas courts could not agree, however, on how to implement the Supreme Court's mandate in *Bernal* for a trial plan. For example, *Becton Dickinson & Co. v. Usrey*, 57 S.W.3d 488 (Tex. App.—Fort Worth 2001, no pet.), involved a challenge to the trial court's class action management plan. *Usrey* involved a class action suit by health care workers who sustained a needlestick from syringes manufactured by the defendant. The plan provided that the comparative responsibility of absent class members would not be tried to a jury but decided by the court on summary judgment based solely on the use of "claim forms" to be completed by absent members. *Id.* at 492, 497. In cases where the trial court decided that there was sufficient evidence to go to a jury, those claims would be excluded from the class for a "*de novo* trial." *Id.* at 497. The defendants challenged the plan on several grounds, including that it would deprive the defendants of full discovery and that it excluded claimants whose claims may raise triable comparative responsibility defenses. *Id.* The court of appeals agreed, concluding in part that the certification order was an abuse of discretion because the "summary judgment scheme adopted by the trial court in this case does not exist anywhere in the universe of Texas law." *Id.* at 497.

The First Court of Appeals, however, held that a minimal trial plan was not necessary for class certification where it was apparent how liability and damage issues would be tried. See *American Home Shield of Texas, Inc. v. Kortz*, No. 01-99-00380-CV, 2001 WL 220245, at \*2-3 (Tex. App. — Houston [1<sup>st</sup> Dist.] Mar. 1, 2001, no pet.) (not designated for publication). *Kortz* involved home renewal services contracts that were identical for each class member. The court distinguished *Bernal*, noting that, in that case, the causation and damages issues were uniquely individual to each class member, making the issue of predominance uncertain. *Id.* at 3. Therefore, the court concluded that "the brevity of the certification order" was not an impediment to a "determination that common issues predominate." *Id.*

The requirements of trial plans, therefore, became an issue prone for legislative reform in light of the generalized requirement going undefined. In *Bernal*, the trial court actually formulated a plan for the trial of the case, setting out the issues in the order in which they would proceed. That plan was still deficient. At the time of the *Henry Schein* case, Rule 42 did not require adoption of a trial plan as a mere formality, with articulated elements to be included. 102 S.W.3d 675. Clarification of what is meant by "a specific explanation of how class claims are to proceed to trial" is now clarified explicitly in the Texas Rules of Civil Procedure. *Id.* at 689.

## V. POST-BERNAL LEGISLATIVE CHANGES

The Texas Legislature noted the shifting winds of class action judicial reform and included class actions as a portion of House Bill 4. The new rules apply to cases filed on or after September 1, 2003.

By order of the Supreme Court of Texas, amendments to the Texas Rules of Civil Procedure, Misc. Docket No. 03-9160 (October 9, 2003, effective January 1, 2004), these class action provisions conformed Texas Rule of Civil Procedure 42 to House Bill 4's requirements. Additionally, the Legislature imposed a new "exhaustion" requirement of class certifications: trial courts are now required to rule of whether a claim should be before an agency rather than the court prior to ruling on class certification. *See* TEX. CIV. PRAC. & REM. CODE §26.051 (Vernon Supp. 2004). Additionally, TEX. R. CIV. P. 42 now includes *Bernal's* rulings regarding a trial plan, requiring the trial court's ruling on a motion to certify to be written, define the class, the class claims, issues, defenses, and expressly appoint class counsel. These orders certifying or refusing to certify a class is now a type of interlocutory order from which petition for review is allowed. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(3) (Vernon Supp. 2004).<sup>1</sup> The Texas Civil Practice and Remedies Code was also amended to provide that all proceedings are now stayed pending such appeal. TEX. CIV. PRAC. & REM. CODE §51.014(b) (Vernon 2004).

House Bill 4 also required reformation of the mechanism by which to calculate attorney's fees in these class action causes. Prior to these amendments, the trial court was permitted to use its discretion in deciding whether to avoid a contingency percentage or use the lodestar method of calculation. The lodestar method discussed in TEX. R. CIV. P. 42(i)(1) eliminates this prior discretion. The fees awarded must be in a range of 25% to 400% of the lodestar figure. *Id.*<sup>2</sup> Additionally, if a portion of the recovery is paid in coupons, attorney's fees must be paid in coupons proportionally to the recovery for the class. TEX. R. CIV. P. 42(i)(2).

## VI. WHERE DO WE GO FROM HERE?

The much awaited case of *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657 (Tex. 2004) stands as the most recent announcement from the Supreme Court of Texas on the appropriateness of class certification. In *Lapray*, purchasers claimed the computer system

latencies could lead the FDC to fail to identify data that had been written incorrectly to the floppy disk, resulting in a loss of data. *Id.* at 661. The court initially noted that the Court of Appeals' failure to analyze predominance and superiority conflicted with the progeny of *Bernal*. Additionally, the *Lapray* court noted that both the Court of Appeals and trial court erred in failing to conduct a state-by-state analysis of various questions of law raised by the merits of the case. The Supreme Court of Texas reversed the judgment of the Court of Appeals, which had affirmed the trial court's certification order, and remanded the case for further proceedings. *Id.* Although the new legislative changes did not govern the *Lapray* appeal, the effect of *Lapray* is not so procedural in nature as exemplified by legislative changes as much as a statement by the Supreme Court on the high bar of class certification.

In *Lapray*, the parties vehemently argued the application of former Rule 42(b)(2) as compared to Rule 42(b)(3) class actions, with *Compaq* arguing that the breach of warranty and declaratory judgment claim found in the case was merely a predicate to a claim for damages. The *Lapray* case is detailed as to the comparison between these two types of class actions, and a careful review by each individual class action attorney is necessary—the scope of the procedural history of *Lapray* and the final appellate opinion in same is much too detailed for close review in this presentation. Attention must also be paid, however, to the comprehensive choice of law discussion found in the *Lapray* case.

The Supreme Court of Texas noted that the trial court's order should be reviewed for abuse of discretion, but determined an evaluation of the claims, defenses, relevant facts, and applicable substantive law required a comprehensive choice of law analysis before certification. *Id.* at 672. The class certification record must demonstrate that trial court critically analyze how variations and state law would effect predominance, as well as reflect the analysis necessary to a proper choice of law determination. *Id.* at 672-73.

The Courts of Appeals were almost preemptively falling in line with the *Lapray* decision regarding the various detours that must be taken by class action plaintiffs in order to reach the ultimate destination of certification—a point in the road of litigation that in the history of class action was traditionally the starting point rather than the ultimate destination. Although the issue surrounding damages, personal injury claims, and "reliance" based causes of action were already finding themselves almost uniformly parked alongside the road of class action certification, the trend for causes of action such as breach of contract or breach of warranty are also skidding out of control in light of the comprehensive choice of law, conflict of law and overall merit analysis now performed in reviewing

<sup>1</sup> The Texas Supreme Court now has jurisdiction over interlocutory appeals relating to class certification pursuant to TEX. GOV. CODE ANN. § 22.225(d) (Vernon 2004).

<sup>2</sup> The trial court is also required to consider the factors specified in Rule 1.04(b) of the Texas Disciplinary Rules of Professional Conduct. TEX. R. CIV. P. 42(i)(1).

certification orders. *See, e.g., Lapray*, 135 S.W.3d 657; *Philadelphia American Life Ins. v. Turner*, 131 S.W.3d 576 (Tex. App.—Fort Worth 2004, no pet.).

The Supreme Court of Texas concluded its last term by two cases, one that affirmed the difficulty of class certification and a second that offered a new twist to class work. First, in *Snyder Communications., L.P. v. Magaña*, 47 Tex. Sup. Ct. J. 734, 738, 2004 WL 1434797 (Tex. June 25, 2004) (per curiam) the court reaffirmed the difficulties facing class certification by holding that plaintiffs failed to demonstrate compliance with the predominance element. The road remains steep, and the hurdles high. Second, in *In re Wood*, 47 Tex. Sup. Ct. J. 888, 889, 2004 WL 1535237 (Tex. July 9, 2004) (per curiam), the court held that the arbitrators should rule on class certification issues when the contracts at issue committed all disputes arising out of the contracts to arbitration. Perhaps class certification before arbitrators would be an easier path. Perhaps not.

Although the mechanism for class actions still exist, the trend of judicial interpretation and legislative changes almost forecloses multi-state class action scenarios, and certainly requires a much more comprehensive level of work to be accomplished prior to certification. While “abuse of discretion” remains the announced standard of review, and although all these cases repeat that appellate courts must not replace the trial court’s decision with their own absent such abuse of discretion, maintainable class actions are more elusive than ever. Whither thou goest class actions? Or for many class action attorneys, is it still possible to follow?



## APPENDIX A

	TEXAS SUPREME COURT CASES	CERTIFIED?	REASONING
1	<i>In re Wood</i> , 47 Tex. Sup. Ct. J. 888, 2004 WL 1535237 (Tex. July 9, 2004) (per curiam)	Arbitrator to decide class cert.	Contract committed all disputes to arbitrator
2	<i>Snyder Communications, L.P. v. Magaña</i> , 47 Tex. Sup. Ct. J. 734, 2004 WL 1434797 (Tex. June 25, 2004) (per curiam)	No	Failed to show common issues predominate
3	<i>Compaq Computer Corp. v. Lapray</i> , 135 S.W.3d 657 (Tex. 2004)	No	Texas law does not govern all class members
4	<b>Union Pac. Res. Group, Inc. v. Hankins</b> , <b>111 S.W.3d 69 (Tex. 2003)</b>	No	Commonality req. not satisfied
5	<i>Henry Schein, Inc. v. Stromboe</i> , 102 S.W.3d 675 (Tex. 2002)	No	Issues of reliance, damages, and applicable law do not predominate
6	<i>Texas Commerce Bank, N.A. v. Grizzle</i> , 96 S.W.3d 240 (Tex. 2002)	No	Summary judgment for defendants prior to class certification
7	<i>M.D. Anderson Cancer Ctr. v. Novak</i> , 52 S.W.3d 704 (Tex. 2001)	No	Plaintiff lacked standing
8	<i>McAllen Med Ctr. v. Cortex</i> , 66 S.W.3d 227 (Tex. 2001)	Remanded to CA	Class cert could be reached by CA because $\Delta$ had standing to challenge
9	<i>Ford Motor Co. v. Sheldon</i> , 22 S.W.3d 444 (Tex. 2000)	No	Class is not clearly ascertainable
10	<i>Southwestern Ref. Co. v. Bernal</i> , 22 S.W.3d 425 (Tex. 2000)	No	Failed to show common issues predominate
11	<i>Intratex Gas Co. v. Beeson</i> , 22 S.W.3d 398 (Tex. 2000)	No	Class insufficiently defined
	TEXAS COURT OF APPEALS CASES	CERTIFIED?	REASONING
1	<i>Texas Mut. Ins. Co., v. East Side Surgery Ctr., Inc.</i> , No. 13-02-278-CV, 2004 WL 1576588 (Tex. App.—Corpus Christi July 15, 2004, no pet. h.)	Yes	Petition established that claims arose from the same series of transactions
2	<i>J.C. Penney Co. v. Pitts</i> , No. 13-02-540-CV, 2004 WL 1576520 (Tex. App.—Corpus Christi July 15, 2004, no pet. h.)	No	Failed to show common issues predominate
3	<i>Grant Thornton LLP. v. Suntrust Bank</i> , 133 S.W.3d 342 (Tex. App.—Dallas 2004, pet. filed)	Yes	TC performed rigorous analysis of requirements
4	<i>Ford Motor Co. v. Ocanas</i> , Nos. 13-02-015-CV and 13-02-215-CV, 2004 WL 874939 (Tex. App.—Corpus Christi April 22, 2004, no pet.)	No	Failed to show common issues predominate
5	<i>King v. City of Austin</i> , No 03-03-00173-CV, 2004 WL 578940 (Tex. App.—Austin March 25, 2004, no pet.)	No	No predominance and insufficient class rep.
6	<i>Philadelphia Am. Life Ins. Co. v. Turner</i> , 131 S.W.3d 576 (Tex. App.—Fort Worth 2004, no pet.)	No	No adequate class rep, predominance, typicality, or superiority
7	<i>Rourk v. Cameron Appraisal Dist.</i> , 131 S.W.3d 285 (Tex. App.—Corpus Christi 2004, pet. filed)	Yes	Class met reqs. of rule 42
8	<i>Intercontinental Hotels Corp. v. Girards</i> , No. 05-02-01604-CV, 2004 WL 423115 (Tex. App.—Dallas March 2, 2004, no pet.)	No	Class not ascertainable (telephone numbers and not names)

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9	<i>Apartment Inv. &amp; Mgmt. Co. v. Suggs &amp; Assocs., P.C.</i> , 129 S.W.3d 250 (Tex. App. 2004, no pet.)	No	Class not ascertainable (same)
10	<i>Pinnacle Realty Mgmt. v. Kondos</i> , 130 S.W.3d 292 (Tex. App.—Dallas 2004, no pet.)	No	Class not ascertainable (same)
11	<i>Sanders v. Blockbuster, Inc.</i> , 127 S.W.3d 382 (Tex. App.—Beaumont 2003, pet. filed)	Bar to class members from future claims	TC interpretation of settlement agreement was proper
12	<i>Texas Parks &amp; Wildlife Dep't v. Dearing</i> , No. 03-03-00131-CV, 2004 WL 35543 (Tex. App.—Austin Jan. 8, 2004, pet. denied)	No	Theory of liability on cause of action no longer available
13	<i>Shell Cortez Pipeline Co. v. Shores</i> , 127 S.W.3d 286 (Tex. App.—Fort Worth 2004, no pet.)	No	Probate ct. lacked jurisdiction over class claims
14	<i>DaimlerChrysler Corp. v. Inman</i> , 121 S.W.3d 862 (Tex. App.—Corpus Christi 2003, pet. filed)	No	TC failed to address choice-of-law issues
15	<i>Warner-Lambert Co. v. Mills</i> , 117 S.W.3d 488 (Tex. App.—Beaumont 2003, pet. filed)	No	TC was without jurisdiction to certify
16	<i>Fort Motor Co. v. Sheldon</i> , 113 S.W.3d 839 (Tex. App.—Austin 2003, no pet.)	No	Failed to show common issues predominate
17	<i>Polaris Indus. v. McDonald</i> , 119 S.W.3d 331 (Tex. App.—Tyler 2003, no pet.)	No	No standing, superiority, or predominance
18	<i>Johnson v. Scott</i> , 113 S.W.3d 366 (Tex. App.—Beaumont 2003, pet. struck)	Remand class settlement	Settlement gap for some class members & attorney's fees should be determined
19	<i>Enron Oil &amp; Gas Co. v. Joffrion</i> , 116 S.W.3d 215 (Tex. App.—Tyler 2003, no pet.)	No	Insufficient <i>Bernal</i> trial plan
20	<i>Kondos v. Lincoln Prop. Co.</i> , 110 S.W.3d 716 (Tex. App.—Dallas 2003, no pet.)	No	Failed to show common issues predominate
21	<i>Vincent v. Bank of Am.</i> , 109 S.W.3d 856 (Tex. App.—Dallas 2003, pet denied)	No	Failure to demonstrate compensable damages
22	<i>BMG Direct Mktg., Inc. v. Peake</i> , No. 09-02-509, 2003 WL 1989413 (Tex. App.—Beaumont May 1, 2003, pet. granted)	Yes	Common issues predominate
23	<i>Stobaugh v. Norwegian Cruise Line Ltd.</i> , 105 S.W.3d 302 (Tex. App.—Houston [14th Dist.] 2003, no pet.)	No	Failed to show common issues predominate
24	<i>Phillips Petroleum Co. v. Bowden</i> , 108 S.W.3d 385 (Tex. App.—Houston [14th Dist.] 2003, pet. filed)	No	No predominance & no adequate class rep.
25	<i>Capital One Bank v. Rollins</i> , 106 S.W.3d 286 (Tex. App.—Houston [1 <sup>st</sup> Dist.] 2003, no pet.)	No	Failed to show common issues predominate
26	<i>Citizens Ins. Co. of Am. v. Hakim Daccach</i> , 105 S.W.3d 712 (Tex. App.—Austin 2003, pet. filed)	Yes	Predominance & adequate class rep.
27	<i>Autonation USA Corp. v. Leroy</i> , 105 S.W.3d 190 (Tex. App.—Houston [14th Dist.] 2003, no pet.)	No	Suit violated arbitration clause

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28	<i>Tracker Marine, L.P. v. Ogle</i> , 108 S.W.3d 349 (Tex. App.—Houston [14th Dist.] 2003, no pet.)	No	Failed to show common issues predominate
29	<i>Farmers Ins. Exch. v. Leonard</i> , 125 S.W.3d 55 (Tex. App.—Austin 2003, pet. denied)	Yes	Met Rule 42 requirements
30	<i>Lebron v. Citicorp Vendor Fin., Inc.</i> , 99 S.W.3d 676 (Tex. App.—Eastland 2003, no pet.)	No	Failed to meet all 4 Rule 42 requirements
31	<i>Monsanto Co. v. Davis</i> , 97 S.W.3d 642 (Tex. App.—Waco 2002, pet. denied)	No	Typicality failed because defenses to claims not the same
32	<i>Hardy v. Wise</i> , 92 S.W.3d 650 (Tex. App.—Beaumont 2002, no pet.)	No	Separate factual issues for plaintiffs was a failure to comply with class action requirements & resulted in a denial of due process
33	<i>Wal-Mart Stores, Inc. v. Lopez</i> , 93 S.W.3d 548 (Tex. App.—Houston [14th Dist.] 2002, no pet.)	No	NO PREDOMINANCE OR SUPERIORITY
34	<i>Alford Chevrolet-Geo v. Jones</i> , 91 S.W.3d 396 (Tex. App.—Texarkana 2002, pet. denied)	Yes	COMMON ISSUES PREDOMINATE AND THERE IS SUPERIORITY
35	<i>Am. Nat'l Ins. Co. v. Cannon</i> , 86 S.W.3d 801 (Tex. App.—Beaumont 2002, no pet.)	No	Resolution of claims requires individual inquiry
36	<i>Nat'l W. Life Ins. Co. v. Rowe</i> , 86 S.W.3d 285 (Tex. App.—Austin 2002, pet. filed)	Yes	Commonality present & Texas law applies
37	<i>Bailey v. Kemper Cas. Ins. Co.</i> , 83 S.W.3d 840 (Tex. App.—Texarkana 2002, pet. dism'd w.o.j.)	Yes, under 42(b)(2), not under (b)(4)	Certified under 42( b)(2) because class definition not overly broad. Not certified under 42(b)(4) because common issues do not predominate.
38	<i>Samuelson v. United Healthcare of Tex., Inc.</i> , 79 S.W.3d 706 (Tex. App.—Fort Worth 2002, no pet. h.)	No	Detailed individual analysis required to calculate damages
39	<i>Union Pac. Res. Group, Inc. v. Neinast</i> , 67 S.W.3d 275 (Tex. App.—Houston [1st Dist.] 2002, no pet.)	No	Failed to show common issues predominate
40	<i>Northrup v. Southwestern Bell Tel. Co.</i> , 72 S.W.3d 1 (Tex. App.—Corpus Christi 2002, no pet.)	Yes	When settlement class device used, class member not required to formally intervene in order to have standing on appeal
41	<i>Dairyland County Mut. Ins. Co. of Tex. v. Casburg</i> , 63 S.W.3d 590 (Tex. App.—Beaumont 2001, pet. dism'd w.o.j.)	No	Whether members knowingly rejected insurance coverage are individual issues
42	<i>Peters v. Blockbuster, Inc.</i> , 65 S.W.3d 295 (Tex. App.—Beaumont 2001, no pet.)	Yes	Rigorous analysis, typicality, & adequate class rep. present
43	<i>MET-Rx USA, Inc. v. Shipman</i> , 62 S.W.3d 807 (Tex. App.—Waco 2001, pet. denied)	No	Plaintiff lacked standing

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44	<i>West Teleservices, Inc. v. Carney</i> , 75 S.W.3d 455 (Tex. App.—San Antonio 2001, no pet.)	No	Failed to show common issues predominate
45	<i>Wood v. Victoria Bank &amp; Trust Co.</i> , 69 S.W.3d 235 (Tex. App.—Corpus Christi 2001, no pet.)	No, class decertified	Increased difficulty in managing litigation made class member claims more appropriately handled individually
46	<i>Becton Dickinson &amp; Co. v. Usrey</i> , 57 S.W.3d 488 (Tex. App.—Fort Worth 2001, no pet.)	No	Failed to show common issues predominate
47	<i>Reynolds Metals Co. v. Mumphord</i> , 47 S.W.3d 141 (Tex. App.—Corpus Christi 2001, no pet.)	No	Failure to specify trial plan dealing with individual issues
48	<i>Charlie Thomas Courtesy Leasing, Inc. v. Taylor</i> , 44 S.W.3d 684 (Tex. App.—Houston [14th Dist.] 2001, no pet.)	No	Failure to specify a trial plan
49	<i>Texas Dep't of Transp. v. Barrier</i> , 40 S.W.3d 153 (Tex. App.—Houston [14th Dist.] 2001, no pet.)	No	Failed to show common issues predominate
50	<i>State Farm Mut. Auto Ins. Co. v. Lopez</i> , 45 S.W.3d 182 (Tex. App.—Corpus Christi 2001), <i>pet. dismiss'd</i> , 46 Tex. Sup. Ct. J. 129, 2002 WL 31426668 (Tex. Oct. 31, 2002) (per curiam)	Yes	Typicality satisfied, adequate class rep. & court has jurisdiction
51	<i>Peltier Enters., Inc. v. Hilton</i> , 51 S.W.3d 616 (Tex. App.—Tyler 2000, <i>pet. denied</i> )	No	Common issues do not predominate & no superiority
52	<i>State Indus., Inc. v. Fain</i> , 38 S.W.3d 167 (Tex. App.—Waco 2000, <i>pet. denied</i> )	No	Nationwide class as defined was too broad
53	<i>Nissan Motor Co. v. Fry</i> , 27 S.W.3d 573 (Tex. App.—Corpus Christi 2000, <i>pet. denied</i> )	No	Failed to show common issues predominate
54	<i>Entergy Gulf States, Inc. v. Butler</i> , 25 S.W.3d 359 (Tex. App.—Texarkana 2000, no pet.)	No	Failed to show common issues predominate
55	<i>Graebel/Houston Movers, Inc. v. Chastain</i> , 26 S.W.3d 24 (Tex. App.—Houston [1st Dist.] 2000, <i>pet. dismiss'd w.o.j.</i> )	Yes	Common issues predominate and there is superiority

Scorecard	
Not Certified	49
Certified	13
Others	5