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## CLASS ACTIONS: DEVELOPMENTS AT THE STATE AND FEDERAL LEVEL

### I. SCOPE OF PAPER

This paper will present a brief history of Texas class action law and discuss developments that took place in Texas class action law and federal class action law from January 2003 through April 2004. This paper will also include a description of the class action prerequisites in T.R.C.P. 42 and F.R.C.P. 23 and identify cases that may be helpful to a lawyer pursuing or defending a class action case.<sup>1</sup>

### II. TEXAS CLASS ACTION HISTORY

#### A. The good/bad old days (depending upon your point of view)

Once upon a time in Texas, the odds were stacked in favor of class certification. Trial courts were instructed to "err in favor" of certification. See Life Insurance Co. of Southwest v. Brister, 722 S.W.2d 764, 774 (Tex. App. – Fort Worth 1986, no writ); National Gypsum v. Kirbyville I.S.D., 770 S.W.2d 621, 627 (Tex. App. – Beaumont 1989, writ dismissed w.o.j.). The courts of appeal reviewed interlocutory class certification decisions on an abuse of discretion standard. The appellate courts were "required to view the evidence in the light most favorable to the trial court's action, and indulge in every presumption which would favor the trial court's action." Adams v. Reagan, 791 S.W.2d 284, 287 (Tex. App. – Fort Worth 1990, no writ); Angeles/Quinoco Securities v. Collison, 841 S.W.2d 511, 513 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1992, no writ). Even if the appellate court would have decided the certification issue differently, it would not necessarily find that the trial court abused its discretion. Dresser Industries, Inc. v. Snell, 847 S.W.2d 367, 371 (Tex. App. – El Paso 1993, no writ). The confluence of these principles resulted in a number of certified classes being affirmed on appeal.

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<sup>1</sup> For a more detailed discussion of Texas class action law, see "Class Actions in Texas in the Wake of Bernal and Schein, 26<sup>th</sup> Annual Advanced Civil Trial Course, 2003. This paper borrows liberally from the 2003 Advanced Civil Trial paper.

The Texas Supreme Court was unable to weigh in on class action issues for jurisdictional reasons. Although the Texas legislature amended the Texas Civil Practice and Remedies Code in 1985 to allow for interlocutory review of class action decisions (Tex. Civ. Prac. & Rem. Code § 51.014(3)), the Court had authority to review class certification decisions only if there was a dissent or if conflict jurisdiction existed. See Tex. Gov't Code §§ 22.225(b)(c); 22.001(a)(1), (2).

#### B. The Texas Supreme Court enters the fray: Intratex, Sheldon, and Bernal

The Texas Supreme Court got into the class action game in a big way in 2000 with three decisions: Intratex Gas Co. v. Beeson, 22 S.W.3d 398 (Tex. 2000); Ford Motor Co. v. Sheldon, 22 S.W.3d 444 (Tex. 2000); and Southwestern Refining Co., Inc. v. Bernal, 22 S.W.3d 425 (Tex. 2000).

Intratex was brought by natural gas producers who alleged Intratex did not purchase gas ratably from them. The trial court certified the class and the court of appeals affirmed. The Court had jurisdiction by virtue of a dissent in the court of appeals.

The Court acknowledged that the trial court is "accorded discretion in determining whether to grant or deny a class certification." Intratex, 22 S.W.3d at 406. Finding that the trial court should "first consider the appropriateness of the certified class definition" before it analyzed the Rule 42(a) and (b) requirements (Id. at 403), the Court announced several important rules for class definitions. First, the definition must identify who is entitled to notice and the right to opt out. Second, class members must be "presently ascertainable by reference to objective criteria." Id. Third, the class definition cannot be premised upon a merits determination.

The trial court defined the class as producers "whose natural gas was taken by the defendant in quantities less than their ratable proportions." Id. at 405. The Court held this definition was an improper "fail-safe" class because "the parties will

have to await the outcome of the litigation to determine who, if anyone, is in the class because whether Intratex took nonratably is the central issue to be determined at trial." *Id.* Since the class definition was improper, the Court held that the trial court abused its discretion in certifying the class.

*Sheldon* was brought by consumers who claimed Ford painted their vehicles with a defective paint process. Again, the Court's focus was on the class definition. The class definition described the class as persons "who suffered past and/or future damages as a result of peeling or flaking paint on these vehicles **who allege the peeling or flaking was caused by a defective paint process.**" *Sheldon*, 22 S.W.3d at 454 (emphasis in original). The Court, following *Intratex*, held that the class definition was improper: "Including the defect theory as an element of the class definition impermissibly requires a determination of the merits before the court can ensure the existence of the class." *Id.*<sup>2</sup>

*Intratex* and *Sheldon* made it a bit more difficult to certify a class action, but not appreciably so. Class counsel could comply with the class definition requirements established by these two cases by amending the class definition. Neither *Intratex* nor *Sheldon* addressed the nuts and bolts of what a trial court should do when faced with a motion to certify a class action under Rule 42.

*Bernal*, however, radically changed (or clarified) the principles governing how a trial court should view a motion for class certification. The end result is that the odds are no longer stacked in favor of certification.

Plaintiffs in *Bernal* were individuals who alleged they received personal injuries as a result of a tank explosion at a refinery. The trial court certified a class. The court of appeals modified the court's order and affirmed. The Supreme Court, over a dissent from three justices, found it had jurisdiction over the appeal because the court of appeal's decision conflicted with *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994).

The Court criticized the approach taken in previous cases that a trial court should err in favor of certification. The Court rejected "this approach of certify now and worry later." *Bernal*, 22 S.W.3d at 435. The Court also concluded that a trial court must perform a "rigorous analysis" before ruling on class certification" and that a "cautious approach to class certification is essential." *Id.*

The Court also emphasized that although Rule 42 was flexible, class proponents still were constrained by the text of the rule. The Court then proceeded to add a class certification requirement not included in the text of Rule 42: "**A trial court's certification order must indicate how the claims will likely be tried so that conformance with Rule 42 may be meaningfully evaluated.**" *Bernal*, 22 S.W.3d at 435. (emphasis added).

The Court's decision in *Bernal* focused upon Rule 42(b)(4)'s (now Rule 42(b)(3)) predominance and superiority requirements. The Court held that the predominance requirement "is intended to **prevent** class action litigation when the sheer complexity and diversity of the individual issues would overwhelm or confuse a jury or severely compromise a party's ability to present viable claims or defenses." *Bernal*, 22 S.W.3d at 434 (emphasis added). To insure that the trial court properly analyzed the predominance requirement, the Court required the trial court to look at all of the facts, claims and defenses presented by the parties to see whether individual or common issues would predominate at trial. "If it is not determinable from the outset that the individual issues can be considered in a manageable, time-efficient yet fair manner, then certification is not appropriate." *Id.* at 436. The Court concluded that the causation and damage issues of the personal injury claims raised by the plaintiffs "are uniquely individual to each class member", and therefore the predominance requirement was not satisfied. *Id.*

The Court also found that the superiority requirement was not satisfied because "Southwestern is entitled to a fair opportunity to individual determinations of causation and damages for each of the 904 plaintiffs - a difficult undertaking for any jury." *Id.* at 437. This means that South-

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<sup>2</sup> The Appendix lists 2003-2004 cases which focus on the class definition issue.

western had the right to "challenge the credibility of and its responsibility for each personal injury claim individually." *Id.* In other words, Southwestern had the right to assert whatever defenses it had to the claim of each individual class member. Since this could not be done on a classwide basis, "what may nominally be a class action initially would degenerate in practice into multiple lawsuits separately tried." *Id.*

Finally, plaintiffs argued that denial of class certification meant that many of the claims asserted would never be litigated, because they were too small to justify the cost of individual litigation. The Court found this argument unpersuasive, because "there is no right to litigate a claim as a class action. Rather, Rule 42 provides only that the court may certify a class action if the plaintiff satisfies the requirements of the rule." *Bernal*, 22 S.W. 3d at 439.

### **C. An attempt to distinguish *Bernal*: *Schein v. Stromboe***

Plaintiffs in *Schein v. Stromboe*, 28 S.W.3d 196 (Tex. App. – Austin 2000) alleged they were sold defective software. Plaintiffs asserted claims for breach of contract, breach of express and implied warranties, negligent misrepresentation, fraud, promissory estoppel and violations of the DTPA. The trial court certified the class after a five day evidentiary hearing.

On appeal, defendants argued the trial court abused its discretion because individual issues involving reliance, the substance of the alleged misrepresentations, and consequential damages would prevail over common issues. The court of appeals rejected defendants' arguments and affirmed the trial court. The court of appeals held that the trial court observed *Bernal*'s "rigorous analysis" requirement by holding a five day hearing and issuing comprehensive findings of fact and conclusions of law. The court of appeals also noted that *Bernal* was a personal injury action "and that the facts and issues in this case are quite different from those noted by the court in *Bernal*." *Schein*, 28 S.W.3d at 205. The court of appeals further held that reliance was not an element of a DTPA claim. Finally, the court of appeals determined that defendants were reading *Bernal*'s predominance too broadly:

If we were to accept Easy Dental's argument, we believe that the class action mechanism would be rendered virtually useless. Easy Dental overstates plaintiffs' burden and would demand that **every** issue be readily ascertainable from the class as a whole and that **no individual issues** remain in order to permit certification. However, Rule 42 only mandates that **common issues** predominate . . . Certainly, class certification would be practically impossible if a finding of complete commonality with respect to all issues were required.

*Id.* at 207. (emphasis in original)

### **D. The Texas Supreme Court reverses *Schein v. Stromboe*.**

The Court reversed the court of appeals in a wide-ranging opinion that touched on a number of issues. *Schein v. Stromboe*, 102 S.W.3d 675 (Tex. 2002). First, the Court expended a great deal of energy on why it had conflict jurisdiction to take the appeal. Second, the Court held that the court of appeals applied the wrong standard of review. The court of appeals stated: "In our review of the trial court's decision, we view the evidence in the light most favorable to the trial court's action and entertain every presumption in favor of its judgment." *Schein*, 28 S.W.3d at 201. The Court held that this standard of review was improper. The Court stated:

In *Bernal*, we expressly stated that the trial court's decision to certify a class was to be reviewed for an abuse of discretion, but we likewise expressly refused to indulge every presumption in favor of the trial court's ruling. A trial court has discretion to rule on class certification issues, and some of its determinations—like those based on its assessment of the credibility of witnesses, for example—must be given the benefit of the doubt. But the trial court's exercise of discretion cannot be supported by every presumption that can be made in its favor.

Schein, 102 S.W.3d at 691.

Third, the Court held that the trial court's order did not satisfy Bernal because it did not show how all of the claims and defenses in the case could be tried. The trial court's order focused only on plaintiffs' primary cause of action and primary remedy. The Court held this was not sufficient:

Even if the court were correct that the plaintiffs' primary action is for breach of contract and their primary damage claim disgorgement—and it is far from clear to us that this is an accurate assessment of the plaintiffs' contentions—the plaintiffs have not abandoned their other actions and damage claims, and there is nothing in the trial court's order or the court of appeals' opinion to indicate how these other issues are to be tried.

Schein, 102 S.W.3d at 688.

Fourth, the Court emphasized that issues of individual reliance would preclude certification. However, the Court left the door open for class-wide proof of reliance:

Thus, the 20,000 class members in the present case are held to the same standard of proof of reliance – and for that matter all the elements of their claims – that they would be required to meet if each sued individually. This does not mean, of course, that reliance or other elements of their causes of action cannot be proved class-wide with evidence generally applicable to all class members; class-wide proof is possible when class-wide evidence exists.

Schein, 102 S.W.3d at 693.

Finally, the Court looked at the value of the putative class members' claims, which counsel estimated to be worth \$5,000-\$8,000, with the possibility of exemplary damages and attorneys' fees. The Court concluded there was nothing to indicate that individual claims were not worth pursuing. Id. at 700.

### **III. T.R.C.P. 42(a)/F.R.C.P. 23(a) REQUIREMENTS**

The purpose of this section is to give the reader a general overview of the Texas Rule 42(a) and Federal Rule 23(a) requirements. Cases decided in 2003-2004 which discuss these requirements are listed in the Appendix.

#### **A. Numerosity**

To meet this requirement, the class representative must establish that “the class is so numerous that joinder of all members is impracticable.” In theory at least, this requirement “is not based on numbers alone.” Rio Grande Valley Gas v. City of Pharr, 962 S.W.2d 631, 641 (Tex. App.—Corpus Christi 1997, pet. dismissed w.o.j.). “Rather, the test is whether joinder of all members is practicable in view of the size of the class and such factors as judicial economy, the nature of the action, geographical locations of class members, and the likelihood that class members would be unable to prosecute individual lawsuits.” Weatherly v. Deloitte & Touche, 905 S.W.2d at 653.

From a practical standpoint, however, the biggest factor in numerosity is, not surprisingly, numbers. Numerosity is generally not difficult to satisfy. Texas courts have found that the numerosity prerequisite is satisfied with relatively few class members. See Chevron U.S.A., Inc. v. Kennedy, 808 S.W.2d 159, 161 (Tex. App.—El Paso 1991, writ dismissed w.o.j.) (twenty class members); National Gypsum v. Kirbyville I.S.D., 770 S.W.2d at 624 (sixty-six class members); Hutchins v. Grace Tabernacle U.P. Church, 804 S.W.2d 598, 601 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1991, no writ) (seventy-six class members).

#### **B. Commonality**

To meet this requirement, the class representative must establish that “there are questions of law or fact common to the class.” The Texas Supreme Court described commonality in Union Pacific Resources Group, Inc. v. Hankins, 111 S.W.3d 69, 74 (Tex. 2003) in the following language:

In evaluating whether these issues satisfy the commonality requirement, we note that “the threshold for commonality is not high.” Phillips Petroleum Co. v. Bowden, – S.W.3d – (Tex. App.—Houston [14<sup>th</sup> Dist.] 2003, no

pet. h.). Yet it does require at least one issue of law or fact “that inheres in the complaints of all class members.” Id.; see also Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 472 (5<sup>th</sup> Cir. 1986). Graebel/Houston Movers, Inc. v. Chastain, 26 S.W.3d 24, 33 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2000, pet. dismissed w.o.j.). A common issue must also be “applicable to the class as a whole” and be “subject to generalized proof.” Nichols v. Mobile Bd. of Realtors, Inc., 675 F.2d 671, 676 (5<sup>th</sup> Cir. 1982).

### **C. Typicality**

To meet this requirement, the class representative must establish that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” “Like commonality, the test for typicality is not demanding.” Mullen v. Treasure Chest Casino, L.L.C., 186 F.3d 620, 625 (5<sup>th</sup> Cir. 1999) cert. denied Treasure Chest Casino v. Mullen, 120 S. Ct. 1169 (2000). The typicality requirement is satisfied “when the evidence shows that the claims or defenses of the class representative have the same essential characteristics as those of the class as a whole.” Cedar Crest Funeral Home v. Lashley, 889 S.W.2d 325, 331 (Tex. App.—Dallas 1993, no writ).

The claims “need not be identical or perfectly coextensive, only substantially similar.” Wiggins v. Enserch Exploration, Inc., 743 S.W.2d 332, 335 (Tex. App.—Dallas 1987, writ dismissed w.o.j.). There must be a nexus between the injuries suffered by the representative and the injuries suffered by other members of the class. Dresser Industries, Inc. v. Snell, 847 S.W.2d at 372. The rationale for the typicality prerequisite is that a plaintiff with claims typical to the class will advance the interests of the other class members while pursuing his or her own self interest in the litigation. Herbert Newberg and Albe Conte, Newberg on Class Actions, § 3.13, at 3-71, 75 (3d. Ed. 1992).

### **D. Adequacy**

To meet this requirement, the class representative must establish that he/she “will fairly and adequately protect the interests of the class.” “Adequacy of representation is a question of fact

and must be determined by reference to the individual circumstances of each case.” Entex v. City of Pearland, 990 S.W.2d 904, 915 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1999, no pet.). The two primary adequacy requirements are: (1) the absence of antagonism between the representative and the class members, and (2) the assurance that through class counsel, the representative will vigorously prosecute the class’s claim. Glassell v. Ellis, 956 S.W.2d 676, 682 (Tex. App.—Texarkana 1997, pet. dismissed w.o.j.). Factors affecting the adequacy determination include:

- (1) adequacy of counsel;
  - (2) potential conflicts of interest;
  - (3) the personal integrity of the plaintiffs;
  - (4) the representatives’ familiarities with the litigation and their belief in the legitimacy of the grievance;
  - (5) whether the class is unmanageable based on geographical limitations; and
  - (6) whether the plaintiffs can afford to finance the class action.
- Forsyth v. Lake LBJ Investment Corp., 903 S.W.2d 146, 150 (Tex. App.—Austin 1995, writ dismissed w.o.j.).

## **IV. T.R.C.P. RULE 42(b)(3)/F.R.C.P. 23(b)(3) REQUIREMENTS**

### **A. Predominance**

Predominance is the class action defendant’s best friend. It is the most difficult class action requirement to meet. The Texas Supreme Court held in Bernal that the predominance requirement “is intended to **prevent** class action litigation when the sheer complexity and diversity of the individual issues would overwhelm or confuse a jury or severely compromise a party’s ability to present viable claims or defenses.” Bernal, 22 S.W.3d at 434. (emphasis added).

The predominance requirement is tied to the commonality requirement. “Courts determine if common issues predominate by identifying the substantive issues of the case that will control the outcome of the litigation, assessing which issues will predominate, and determining if the predominating issues are, in fact, those common to the class.” Bernal, 22 S.W.3d at 434. In determining whether common issues predominate, the trial court must consider how a trial on the merits would be conducted if a class were certified.

Castano v. American Tobacco Co., 84 F.3d 734, 740 (5<sup>th</sup> Cir. 1996). If common issues indeed predominate, “a judgment in favor of the class members should decisively settle the entire controversy, and all that should remain is for other members of the class to file proof of their claim.” Bernal, 22 S.W.3d at 434.

The most significant contribution of Bernal to the predominance analysis is that the Court required the trial court to look at all of the viable claims and defenses and insure that these claims and defenses could be tried on a class-wide basis. “Any proposal to expedite resolving individual issues must not unduly restrict a party from presenting viable claims or defenses without that party’s consent.” Bernal, 22 S.W.3d at 435.

### **B. Superiority**

To meet this requirement, the class representative must prove “that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” The United States Supreme Court has held that the superiority requirement is subject to a “close look.” Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997). A class action is superior to other methods of adjudication “where any difficulties which might arise in the management of the class are outweighed by benefits of class-wide resolution of common issues.” Nissan Motor Co., Ltd. v. Fry, 27 S.W.3d at 585-86. However, the class action “is not meant to alter the parties’ burdens of proof, right to a jury trial, or the substantive prerequisites to recovery under a given tort.” Bernal, 22 S.W.3d at 437.

Class certification is not appropriate where there are “significant factual considerations” that may create “fact-specific mini-trials.” Vinson v. Tex. Commerce Bank-Houston, N.A., 880 S.W.2d at 826. The class action is not the superior way to handle a dispute unless “the splintering into numerous individual trials can be avoided.” Brister, 772 S.W.2d at 772. “The greater the number of individual issues, the less likely superiority can be established.” Castano v. American Tobacco Co., 84 F.3d 734, 745, fn. 19 (5<sup>th</sup> Cir. 1996).

In Bernal, the Court determined that efficiency did not always equate to superiority. The Court held that while one of the benefits of a

class action may be judicial efficiency, this efficiency should not trump the right of the defendant to put on all of its defenses. In other words, if a class action means that the defendant does not get a fair trial, the class action is not superior. “The systemic urge to aggregate litigation must not be allowed to trump our dedication to justice, and we must take care that each individual plaintiff’s—and defendant’s—cause not be lost in the shadow of a towering mass litigation.” Id. at 437.

One of the justifications for a class action is that, in the absence of a class action, small claims may not be worth pursuing and would go unremedied. In Bernal, plaintiffs argued that the class action was appropriate for this very reason. The Court held that smaller claims do not, in and of themselves, justify a class action:

We do not second-guess plaintiffs’ contention that, from a financial perspective, some claims may not be worth pursuing if class-action treatment is denied. But proceeding as a class action may very well cost more in the long run, if, as can be expected here, the class must ultimately be dissolved because there is no manageable way, fair to both parties, to resolve the individual issues. And ‘there is no right to litigate a claim as a class action. Rather, Rule 42 provides only that the court may certify a class action if the plaintiff satisfies the requirements of the Rule.

Bernal, 22 S.W.3d at 439.

In Schein, plaintiffs’ counsel advised the Court that most of the plaintiffs’ claims would be in the \$5,000-\$8000 range, with the possibility of exemplary damages and the recovery of attorneys’ fees. Plaintiffs argued that these claims were too small to assert on an individual basis. The Court found there was no evidence to support the trial court’s conclusion that these claims would not be prosecuted on an individual basis:

There is nothing to indicate that many individual claims are not worth pursuing. We cannot find in the record any basis for the trial court’s conclusion that claims of the size indicated would

not be prosecuted individually simply because the plaintiffs are small businesses.

Schein, 102 S.W.3d at 700.

## **V. 2003-2004 TEXAS CLASS ACTION LAW DEVELOPMENTS**

### **A. Texas Supreme Court Decisions**

#### 1. Union Pacific Resources Group, Inc. v. Hankins, 111 S.W.3d 69 (Tex. 2003)

The trial court certified a class of gas royalty owners who claimed Union Pacific had breached an implied duty to obtain the best current price reasonably available. The class included royalty owners with both proceeds leases and market value leases.

Union Pacific argued it did not owe an implied duty to royalty owners under market value leases, citing Yzaguirre v. KCS Res., Inc., 53 S.W.3d 368 (Tex. 2001). The court of appeals held it was unnecessary to address the impact of Yzaguirre, because “an appellate court’s review of a class certification order should not include examining the merits of claims or defenses asserted by the parties.” Union Pacific Resources Group, Inc. v. Hankins, 51 S.W.3d 741, 750 (Tex. App.—El Paso, 2001).

The Court held the trial court was obligated to consider the impact of Yzaguirre on class certification issues. The Court examined the purported common questions and held that since an implied covenant did not exist in market value leases, the purported common questions were not common to both market value and proceeds leases:

Questions (4), (5), (7), and (8) ask specifically whether the defendants “breached the implied covenant to reasonably market” by failing to obtain arm’s length prices. Since Yzaguirre held that market-value leases have no such implied covenant, these questions cannot satisfy the commonality requirements in a class that includes both proceeds leases and market-value leases.

Union Pacific, 111 S.W.3d at 74.

Union Pacific is significant because the Court’s commonality determination is based upon

the Court’s analysis of the merits of the case. In essence, the Court held that since plaintiffs did not have a valid cause of action, they did not meet the commonality requirement.

#### 2. City of San Benito v. Rio Grande Valley Gas Co., 109 S.W.3d 750 (Tex. 2003)

Unnamed class members not required to intervene in order to appeal a trial court’s judgment approving a class settlement.

### **B. Rule 42 Amendments**

A number of changes have been made to Rule 42. This paper will just hit the highlights.

Rule 42(c) has been significantly expanded in several respects. First, Rule 42(c)(1)(B), (D) states specifically what an order granting or denying certification must include:

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 42(g).

...

(D) An order granting or denying certification under Rule 42(b)(3) must state:

(i) The elements of each claim or defense asserted in the pleading;

(ii) any issues of law or fact common to the class members;

(iii) any issues of law or fact affecting only individual class members;

(iv) the issues that will be the object of most of the efforts of the litigants in the court;

(v) other available methods of adjudication that exist for the controversy;

(vi) why the issues common to the members of the class do or do not predominate over individual issues;

(vii) why a class action is or is not superior to other available methods for the fair and efficient adjudication of the controversy; and

(viii) if the class is certified, how the class claims and any issues affecting only individual members, raised by the claims or defenses asserted in the pleadings, will be tried in a manageable, time efficient manner.

This language is consistent with the Texas Supreme Court's decisions in Bernal and Schein that the trial court make a "rigorous analysis" of the issues related to certification. The new language quoted above will, at least in theory, force the trial court to address each of the issues which the Texas Supreme Court considers important to certification.

Rule 42(c)(2) focuses on notice to the class. The new rule does not require notice to a class certified under Rule 42(b)(1) or (2). Rule 42(c)(2)(A) states that the court "may" direct appropriate notice to Rule 42(b)(1) or (2) class members. This is a departure from the old rule, which required class action notice to classes certified under these rules.

With regard to Rule 42(b)(3) classes, the new rule includes several new notice requirements. A class action notice for a Rule 42(b)(3) class must now include the definition of the class certified and identify the class claims, issues or defenses. The rule also states that the notice must be concise and written in plain, easily understood language.

Rule 42(e), regarding the settlement, dismissal or compromise of class actions, has been completely rewritten. The new rule states:

**(e) Settlement, Dismissal, or Compromise**

(1) (A) The court must approve any settlement, dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) Notice of the material terms of the proposed settlement, dismissal or compromise, together with an explanation of when and how the members may elect to be excluded from the class, shall be given to all members in such manner as the court directs.

(C) The court may approve a settlement, dismissal, or compromise that

would bind class members only after a hearing and on finding that the settlement, dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, dismissal, or compromise under Rule 42(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 42(b)(3), the court may not approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4) (A) Any class member may object to a proposed settlement, dismissal, or compromise that requires court approval under Rule 42(e)(1)(A).

(B) An objection made under Rule 42(e)(4)(A) may be withdrawn only with the court's approval.

Most of these changes do not add much of significance to existing law. Two of the changes, however, have practical significance with regard to settlements. The 42(e)(2) requirement of "identifying any agreement made in connection with the proposed settlement, dismissal, or compromise" mean the parties can no longer fail to identify separate agreements among counsel, their clients, and objectors and their counsel. In other words, an agreement among defendants as to how much each defendant pays pursuant to the settlement apparently must be disclosed. Likewise, if an objector's claims have been settled separately for additional compensation, that agreement must be disclosed. In addition, if an objection is withdrawn, Rule 42(e)(4)(B) requires that the objection be withdrawn only with the court's approval. This means the court has the opportunity to inquire regarding how an objector's claim was settled.

Rule 42(h) and (i) are both new. These sections, which deal with attorney's fees, provide as follows:

**(h) Procedure for determining Attorney Fees Award.** In an action certified as a class action, the court may award attorney fees in accordance with subdivision (i) and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) **Motion for Award of Attorney Fees.** A claim for an award of attorney fees and nontaxable costs must be made by motion, subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) **Objections to Motion.** A class member, or a party from whom payment is sought, may object to the motion.

(3) **Hearing and Findings.** The court must hold a hearing in open court and must find the facts and state its conclusions of law on the motion. The court must state its findings and conclusions in writing or orally on the record.

Generally speaking, information regarding attorney's fees in a class action settlement is identified in the class action notice. As I read this rule, it is unclear whether this practice will still suffice, or if a separate motion, notice and hearing is required.

In a contested class action trial, this rule would appear to require, after the trial has concluded, that a separate motion for attorney's fees be filed and a notice be sent to all class members. This seems to add another cumbersome step to an already lengthy process.

**(i) Attorney's fees award.**

(1) In awarding attorney fees, the court must first determine a lodestar figure by multiplying the number of hours reasonably worked times a reasonable hourly rate. The attorney fees award must be in the range

of 25% to 400% of the lodestar figure. In making these determinations, the court must consider the factors specified in Rule 1.04(b), TEX. DISCIPLINARY R. PROF. CONDUCT.

(2) If any portion of the benefits recovered for the class are in the form of coupons or other noncash common benefits, the attorney fees awarded in the action must be in cash and noncash amounts in the same proportion as the recovery for the class.

This rule officially adopts the lodestar method for calculating attorney's fees and probably puts an end to coupon settlements.

### **C. Texas Civil Practice & Remedies Code Amendments**

Chapter 26, entitled "Class Actions" has been added to the Texas Civil Practice & Remedies Code. Section 26.051 provides the parties opposing class certification with an argument to defeat, or at least delay, class certification. Section 26.051 provides:

#### **§26.051. State Agency With Exclusive or Primary Jurisdiction**

(a) Before hearing or deciding a motion to certify a class action, a trial court must hear and rule on all pending pleas to the jurisdiction asserting that an agency of this state has exclusive or primary jurisdiction of the action or a part of the action, or asserting that a party has failed to exhaust administrative remedies. The court's ruling must be reflected in a written order.

(b) If a plea to the jurisdiction described by Subsection (a) is denied and a class is subsequently certified, a person may, as part of an appeal of the order certifying the class action, obtain appellate review of the order denying the plea to the jurisdiction.

(c) This section does not alter or abrogate a person's right to appeal or pursue an original proceeding in an appellate court in regard to a trial court's order granting or denying a plea to the jurisdiction if the right exists un-

der statutory or common law in effect at the time review is sought.

This statute prohibits the trial judge from ruling on a motion for class certification without first ruling on a pending plea to the jurisdiction.

It is unclear whether section 26.051 changes existing law regarding exclusive jurisdiction. The exclusive jurisdiction doctrine has been applied by the Texas courts in the class action context. See Burgess v. Gallery Model Homes, Inc., 101 S.W.3d 550 (Tex. App.—Houston [1<sup>st</sup> Dist.], pet. denied) (taxpayer pursuing class action over sales tax refund failed to exhaust her administrative remedies with Comptroller, depriving trial court of subject matter jurisdiction over taxpayer's lawsuit); Serna v. H.E. Butt Grocery Co., 21 S.W.3d 330 (Tex. App.—San Antonio, 2000, no pet.) (trial court had no subject matter jurisdiction over putative sales tax refund class action because plaintiff had not exhausted her administrative remedies with Comptroller).

#### **D. Texas Government Code Amendments**

Section 22.225(d) of the Texas Government Code was amended to give the Texas Supreme Court jurisdiction over a class action interlocutory appeal:

A petition for review is allowed to the supreme court for an appeal from an interlocutory order described by Section 51.014(a)(3) or (6), Civil Practice & Remedies Code.

Given the Texas Supreme Court's decisions in Bernal and Schein, this amendment is probably unnecessary, but it lays to rest any argument over whether the Court has jurisdiction over a class action interlocutory appeal.

## **VI. 2003-2004 FEDERAL CLASS ACTION LAW DEVELOPMENTS**

### **A. Case Law**

1. Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003)

The question of whether an arbitration agreement permits or prohibits class arbitration is for the arbitrator, not the court, to decide.

2. Mejdrech v. Met-Coil Systems Corp., 319 F.3d 910 (7<sup>th</sup> Cir. 2003)

Residents sued factory owner for monetary and injunctive relief, alleging that leaking storage tanks contaminated their soil and groundwater. Trial court granted certification on the core questions of whether or not and to what extent the defendant caused contamination. Whether a particular class member was harmed was reserved for individual hearings.

Judge Posner affirmed, holding:

If there are genuinely common issues, issues identical across all the claimants, issues moreover the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve those issues in one fell swoop while leaving the remaining, claimant – specific issues to individual follow-on proceedings.

Mejdrech, 319 F.3d at 911. Judge Posner concludes: “We can see, in short, no objection to the certification other than one based on a general distaste for the class action device.” Id. at 912.

3. In re Monumental Life Ins. Co., 2004 WL 718806 (5<sup>th</sup> Cir. 2004)

Black policyholders challenged life insurers' alleged practices of paying lower benefits and charging higher premiums. Trial court denied certification. Fifth Circuit reversed, holding that the damages sought were consistent with a Rule 23(b)(2) certification.

4. McManus v. Fleetwood Enterprises, Inc., 320 F.3d 545 (5<sup>th</sup> Cir. 2003)

Trial court certified class of motor home purchasers who brought breach of warranty and fraudulent concealment claims against seller. Fifth Circuit reversed the certification of the fraudulent concealment, negligent misrepresentation and breach of express warranty claims, finding that individual reliance questions predominated. Fifth Circuit affirmed certification of breach of implied warranty claim.

5. Bell Atlantic Corp. v. AT&T Corp., 339 F.3d 294 (5<sup>th</sup> Cir. 2003)

Businesses allegedly injured by the refusal of AT&T to permit the passage of caller identification information across its long distance network

brought antitrust class action. Trial court denied certification. Fifth Circuit affirmed, finding that the individualized nature of damages inquiry precluded certification.

6. O’Sullivan v. Countrywide Home Loans, 319 F.3d 732 (5<sup>th</sup> Cir. 2003)

In two separate cases, trial courts certified classes of borrowers against lenders, alleging that lenders accepted kickbacks from law firms in violation of Real Estate Settlement Procedures Act and Texas Unauthorized Practice of Law Statute. Fifth Circuit reversed both cases on predominance grounds, stating that liability cannot be established “by presuming fire where this is smoke.”

7. Sandwich Chef of Texas, Inc. v. Reliance Nat. Indem. Ins. Co., 319 F.3d 205 (5<sup>th</sup> Cir. 2003), cert denied 124 S. Ct. 101 (2003)

Trial court certified nationwide Rule 23(b)(3) RICO fraud case. Fifth Circuit reversed, finding that individual reliance issues would predominate over common issues.

8. Pedcor Management Co., Inc. v. Nations Personnel of Texas, 343 F.3d 355 (5<sup>th</sup> Cir. 2003)

Trial court certified class for arbitration proceeding. Fifth Circuit reversed, holding that the arbitrator, not the trial court, should decide whether class arbitration is available or forbidden.

## **B. Rule 23 Amendments**

Rule 23 was significantly amended in 2003. This paper will just hit the highlights. Rule 23(c) now reads as follows:

### **(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.**

(1)(A) When a person sues or is sued as a representative of a class, the court must—at an early practicable time—determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2)(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

The provision that a class certification “may be conditional” is deleted from Rule 23(c). The explanation for this change in the Comment states: “A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met.”

The amendment also expressly permits the court to direct notice to a Rule 23(b)(1) or (b)(2) class. The Comment states, however, that this authority “should be exercised with care.”

The new Rule 23(c)(1)(B) states that notice to the class must be written “in plain, easily understood language” and must provide specific information, including the definition of the class and the class claims, issues or defenses. The Comment notes: “It is difficult to provide information about most class actions that is both accurate and easily understood by class members who are not themselves lawyers.”

Rule 23(e), dealing with settlements, voluntary dismissal, or compromise, was significantly expanded. The new rule requires that a statement identifying any agreements made in connection with a proposed settlement be filed with the court. According to the Comment, this requirement aims at “related undertakings that although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages to others.”

Rule 23(g) is new. It focuses on the appointment of class counsel. Rule 42(f), also new, deals with attorney fee awards.

### **C. Class Action Fairness Act**

The Class Action Fairness Act of 2004, S. 2062, is currently pending before Congress. Generally speaking, this law (1) restricts what class attorneys would receive in coupon settlements (2) requires that certain federal and state officials be notified of a class action settlement (3) extends the diversity jurisdiction of federal courts to include class actions meeting certain requirements and (4) instructs the Judicial Conference of the United States to prepare a report on class action settlements.

## **VII. MISCELLANEOUS ISSUES**

### **A. Standing**

Union Pacific Resources Group v. Hankins, 111 S.W.3d 69 (Tex. 2003); DaimlerChrysler Corp. v. Inman, 121 S.W.3d 862 (Tex. App.—Corpus Christi 2003, pet. filed); City of San Benito v. Rio Grande Valley Gas Co., 109 S.W.3d 750 (Tex. 2003); Polaris Industries, Inc. v. McDonald, 119 S.W.3d 331 (Tex. App.—Tyler 2003, no pet.); G-

rant ex rel. Family Eldercare v. Gilbert, 324 F.3d 383 (5<sup>th</sup> Cir. 2003)

### **B. Settlements/Notice**

Sanders v. Blockbuster, 127 S.W.3d 382 (Tex. App.—Beaumont 2004, pet. filed).

Richard v. Hoechst Celanese Chemical Group, Inc., 355 F.3d 345 (5<sup>th</sup> Cir. 2003)

Ayers v. Thompson, 358 F.3d 356 (5<sup>th</sup> Cir. 2004)

### **C. Communications with Class Members**

Belt v. Emcare, Inc., 299 F. Supp. 2d 664 (E.D. Tex. 2003).

### **D. Arbitration**

Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003); AutoNation U.S.A. Corp. v. Leroy, 105 S.W.3d 190 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2003, no pet.); Pedcor Management Co., Inc. v. Nations Personnel of Texas, 343 F.3d 355 (5<sup>th</sup> Cir. 2003)

### **E. Jurisdiction**

Warner-Lambert Co. v. Mills, 117 S.W.3d 488 (Tex. App.—Beaumont 2003, pet. filed).

Shell Cortez Pipeline Co. v. Shores, 127 S.W.3d 286 (Tex. App.—Fort Worth, no pet. h.).

Burgess v. Gallery Model Homes, Inc., 101 S.W.3d 550 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2003, pet. denied)

### **F. Multi-State class action**

General Elec. Co. v. Jewell, 2003 WL 22176623 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2003, no pet.)

DaimlerChrysler Corp. v. Inman, 121 S.W.3d 682 (Tex. App.—Corpus Christi 2003, pet. filed)

Farmers Ins. Exchange v. Leonard, 125 S.W.3d 55 (Tex. App.—Austin 2003, pet. denied)

Trader Marine, L.P. v. Ogle, 108 S.W.3d 349 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2003, no pet.)

Philadelphia American Life Ins. Co. v. Turner, 2004 WL 393155 (Tex. App.—Forth Worth, no pet. h.)

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Spector v. Norwegian Cruise Line, Ltd., 2004 WL 637894 (Tex. App.—Houston [1<sup>st</sup>. Dist.], no pet. h.)

Sandwich Chef of Texas, Inc. v. Reliance Nat. Indem. Ins. Co., 319 F.3d 205 (5<sup>th</sup> Cir. 2003), cert. denied 124 S. Ct. 101 (2003)

In re Monumental Life Ins. Co., 2004 WL 718806 (5<sup>th</sup> Cir. 2004)

**G. Federal court enjoining state court class action**

Corley v. Entergy Corp., 297 F. Supp.2d 915 (E.D. Tex. 2003)

**H. Federal court – amount in controversy**

Garcia v. Koch Oil Co. of Texas, Inc., 351 F.3d 636 (5<sup>th</sup> Cir. 2003)

## **APPENDIX**

### **NUMEROSITY**

#### **Meets numerosity requirement**

Rourk v. Cameron Appraisal District, 2004 WL 396605 (Tex. App.—Corpus Christi, no pet. h.)

#### **Does not meet numerosity requirement**

Lebron v. Citicorp Vendor Finance, Inc., 99 S.W.3d 676 (Tex. App.—Eastland 2003, no pet.)

### **COMMONALITY**

#### **Meets commonality requirement**

Rourk v. Cameron Appraisal District, 2004 WL 396605 (Tex. App.—Corpus Christi, no pet. h.)

### **TYPICALITY**

#### **Meets typicality requirements**

Rourk v. Cameron Appraisal District, 2004 WL 396605 (Tex. App.—Corpus Christi, no pet. h.)

#### **Does not meet typicality requirement**

General Elec. Co. v. Jewell, 2003 WL 22176623 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2003, no pet.)

Philadelphia American Life Ins. Co. v. Turner, 2004 WL 393155 (Tex. App.—Fort Worth, no pet. h.)

### **ADEQUACY**

#### **Meets adequacy requirement**

Rourk v. Cameron Appraisal District, 2004 WL 396605 (Tex. App.—Corpus Christi, no pet. h.)

Citizen Ins. Co. v. Hakim Daccach, 105 S.W.3d 712 (Tex. App.—Austin 2003, pet. filed)

Farmers Ins. Exchange v. Leonard, 125 S.W.3d 55 (Tex. App.—Austin 2003, pet. denied)

Enron Oil & Gas Co. v. Joffrion, 116 S.W.3d 215 (Tex. App.—Tyler 2003, no pet.)

Snyder Communications v. Magana, 94 S.W.3d 213 (Tex. App.—Corpus Christi 2002, pet. filed)

Pate v. Elloway, 2003 WL 22682422 (Tex. App.—Houston [1<sup>st</sup> Dist.], pet. filed)

Philadelphia American Life Ins. Co. v. Turner, 2004 WL 393155 (Tex. App.—Fort Worth, no pet. h.)

**Does not meet adequacy requirement**

Phillips Petroleum Co. v. Bowden, 108 S.W.3d 385 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2003, pet. filed)

King v. City of Austin, 2004 WL 578940 (Tex. App.—Austin, no pet. h.)

**PREDOMINANCE**

**Meets predominance requirement**

Farmers Ins. Exchange v. Leonard, 125 S.W.3d 55 (Tex. App.—Austin 2003, pet. denied)

Citizens Ins. Co. of America v. Hakim Daccach, 105 S.W.3d 712 (Tex. App.—Austin 2003, pet. filed)

BMG Direct Marketing, Inc. v. Peake, 2003 WL 1989413 (Tex. App.—Beaumont, pet. granted)

Rourk v. Cameron Appraisal District, 2004 WL 396605 (Tex. App.—Corpus Christi, no pet. h.)

**Does not meet predominance requirement**

Polaris Industries Inc. v. McDonald, 119 S.W.3d 331 (Tex. App.—Tyler 2003, no pet.)

Ford Motor Co. v. Sheldon, 113 S.W.3d 839 (Tex. App.—Austin 2003, no pet.)

Phillips Petroleum Co. v. Bowden, 108 S.W.3d 385 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2003, pet. filed)

Enron Oil & Gas Co. v. Joffrion, 116 S.W.3d 215 (Tex. App.—Tyler 2003, no pet.)

Capital One Bank v. Rollins, 106 S.W.3d 286 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2003, no pet.)

Stobaugh v. Norwegian Cruise Line, Ltd., 105 S.W.3d 302 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2003, no pet.)

Kondos v. Lincoln Property Co., 110 S.W.3d 716 (Tex. App.—Dallas 2003, no pet.)

Philadelphia American Life Ins. Co. v. Turner, 2004 WL 393155 (Tex. App.—Fort Worth, no pet. h.)

Spector v. Norwegian Cruise Line, Ltd., 2004 WL 637894 (Tex. App.—Houston [1<sup>st</sup> Dist.], no pet. h.)

Bell Atlantic Corp. v. AT&T Corp., 339 F.3d 294 (5<sup>th</sup> Cir. 2003)

O’Sullivan v. Countrywide Home Loans, 319 F.3d 732 (5<sup>th</sup> Cir. 2003)

Sandwich Chef of Texas, Inc. v. Reliance Nat. Indem. Ins. Co., 319 F.3d 205 (5<sup>th</sup> Cir. 2003), cert. denied 124 S. Ct. 101 (2003)

## **SUPERIORITY**

### **Meets superiority requirement**

Rourk v. Cameron Appraisal District, 2004 WL 396605 (Tex. App.—Corpus Christi, no pet. h.)

Farmers Ins. Exchange v. Leonard, 125 S.W.3d 55 (Tex. App.—Austin, 2003 pet. denied)

### **Does not meet superiority requirement**

Stobaugh v. Norwegian Cruise Line, Ltd., 105 S.W.3d 302 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2003, no pet.)

Tracker Marine, L.P. v. Ogle, 108 S.W.3d 349 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2003, no pet.)

General Elec. Co. v. Jewell, 2003 WL 22176623 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2003, no pet.)

Philadelphia American Life Insurance Co. v. Turner, 2004 WL 393155 (Tex. App.—Fort Worth, no pet. h.)

King v. City of Austin, 2004 WL 578940 (Tex. App.—Austin, no pet. h.)

## **PROPER CLASS DEFINITION**

Citizens Ins. Co. v. Hakim Daccach, 105 S.W.3d 712 (Tex. App.—Austin, pet filed)

Rourk v. Cameron Appraisal District, 2004 WL 396605 (Tex. App.—Corpus Christi, no pet. h.)

## **IMPROPER CLASS DEFINITION**

Apartment Inv. and Management Co. v. Suggs & Associates, P.C., 129 S.W.3d 250 (Tex. App.—Dallas, no pet. h.)

Pinnacle Realty Mgmt Co. v. Kondos, 2004 WL 243786 (Tex. App.—Dallas, no pet. h.)

Capital One Bank v. Rollins, 106 S.W.3d 286 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2003, no pet.)

Intercontinental Hotels Corp. v. Girards, 2004 WL 423115 (Tex. App.—Dallas, no pet. h.)