

CIVIL LITIGATION

The Texas Supreme Court Continues To Tighten the Noose on Class Actions

By Mark R. Trachtenberg and Warren W. Harris

THIS YEAR MARKED THE SOLIDIFICATION of prior trends in class action law, particularly the "rigorous" nature of the predominance inquiry for damage class actions under Texas Rule of Civil Procedure 42(b)(4). Most of the 2002 cases built upon *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000), cementing Bernal's place in Texas class action jurisprudence. See, e.g., *Wal-Mart Stores, Inc. v. Lopez*, No. 14-02-00451-CV, 2002 Tex. App. LEXIS 8131 (Tex. App. — Houston [14th Dist.] Nov. 14, 2002, no pet. h.); *American Nat'l Ins. Co. v. Cannon*, 86 S.W.3d 801 (Tex. App. — Beaumont 2002, no pet.).

The most significant class action case of 2002 was *Schein v. Stromboe*, 46 Tex. Sup. Ct. J. 103, 2002 Tex. LEXIS 718 (Oct. 31, 2002). As it did in *Bernal*, the supreme court conducted a "rigorous analysis" of Rule 42(b)(4)'s predominance requirement (whether questions of law or fact common to the members of the class predominate over questions affecting only individual members) in decertifying a class composed of 20,000 dental practice management software purchasers.

Schein constitutes a warning that class action proceedings will not survive the predominance inquiry if they: (1) bring causes of action in which reliance is an element without class-wide proof of reliance; (2) seek consequential damages or other measures of damages requiring individualized proof; or (3) seek a nationwide class or bring claims that would necessitate the application of multiple states' laws.

First, the court in *Schein* found that the reliance element in many of plain-

tiffs' causes of action (for fraud, breach of express warranty, negligent misrepresentation, promissory estoppel, and DTPA) raised individual issues that could not be "proved class-wide with evidence generally applicable to all class members." 2002 Tex. LEXIS 718 at 49. While the court declined to adopt the Fifth Circuit's categorical rule, the court hinted that claims involving a reliance element would rarely, if ever, be certified. *Id.* at 51 (citing *Perrone v. General Motors Acceptance Corp.*, 232 F.3d 433, 440 (5th Cir. 2000)).

Second, the court held that the plaintiffs' request for consequential, exemplary, and statutory damages also raised individual issues that would predominate at trial. *Id.* at 52-55. The court acknowledged that had the plaintiffs pursued only restitutionary damages, the damages determination likely would have been common to the class and could have been established through the defendant's own records. Significantly, however, the court implied that a named plaintiff's willingness to abandon other available damages in order to survive the predominance inquiry might imperil class certification under the other requirements of Rule 42. *Id.* at 51.

Finally, the court held that the plaintiffs could not survive the predominance inquiry because the laws of multiple states would have to be applied to the claims of the out-of-state class members. *Id.* at 56-64. The tort claims of the non-Texas resident class members were not impacted by the contractual choice-of-law provision and instead required the application of the laws of multiple other states.

Schein is noteworthy in at least one

other respect. While it reaffirmed that the standard of review of an order granting or denying class certification is "abuse of discretion," it reiterated that appellate courts should not indulge every reasonable presumption in favor of the trial court's ruling. *Id.* at 40-41. While some of a trial court's determinations will still be given the benefit of the doubt, such as assessing the credibility of witnesses, other rulings should not be treated so deferentially. *Id.* at 41. A trial court's exercise of discretion cannot be supported by every presumption that can be made in its favor. *Id.* The court observed: "Compliance with Rule 42 must be demonstrated; it cannot merely be presumed." *Id.*

Another significant class action decision in 2002 was *Compaq Computer Corp. v. LaPray*, 79 S.W.3d 779, 783-84 (Tex. App. — Beaumont 2002, pet. filed). In that case the plaintiffs brought breach of contract, breach of express warranty, and declaratory judgment claims against Compaq, alleging that computers sold or manufactured by Compaq contained defective floppy disk controllers. *Id.* at 783-84.

The plaintiffs in *Compaq Computer* obtained certification of a declaratory judgment class under Rule 42(b)(2), which does not explicitly contain the predominance and superiority requirements set out in Rule 42(b)(4). The warranty at issue required the plaintiffs to notify Compaq of any defect within the warranty period, at which point Compaq would be obligated to repair or replace the defective part or instead pay damages. To avoid the potential

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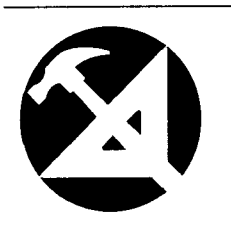
CONSTRUCTION LAW

Subcontractor Liability: Control is Key

By Benny Agosto, Jr. and Shakira Cruz

THE AREA OF CONSTRUCTION LAW/ contractor liability was shaken up a bit back in December of 2001 by the Texas Supreme Court with its decision in the *Lee Lewis Constr., Inc. v. Harrison* case, 70 S.W.3d 778 (Tex. 2001). Depending on what side of the bar you sit on, you were either happy or troubled by the court's opinion.

Once again, the Texas Supreme Court has revisited the area of construction law/contractor liability in the year 2002, in its opinion of *Dow Chemical Company v. Bright*, (delivered October 17, 2002, S.W.3d_2002, WL 31318023 (Tex.)). Both



cases presented the question of whether the general contractor owes a duty of care to its subcontractor's employees. The court revisited the issues and held that a duty is governed by the Texas law concerning a general contractor's duties to a subcontractor's employees.

The facts in this case state that Larry Bright was a carpenter employed by Gulf States who was an independent contractor retained by Dow Chemical in the construction of an off-gas compressor in Freeport. While working at the job site, Mr. Bright was injured when an overhead pipe became unstable and fell on him. The pipe was put into place and improperly secured by one of Mr. Bright's coworkers. Both Bright and Dow Chemical filed traditional motions for summary judgment asking the trial court to decide whether or not Dow Chemical owed a duty as a matter of law to Bright to protect him

from hazards associated with the work Gulf States was retained to perform.

The trial court granted Dow Chemical's motion for summary judgment and denied Bright's motion. The court of appeals reversed and remanded in an opinion which concluded that the summary judgment evidence raised a fact issue about the extent of supervisory control retained by Dow Chemical.

A party can prove the right to control in two ways: first, by evidence of a contractual agreement that explicitly assigns the premises owner their right to control; and second, in the absence of a contractual agreement, by evidence that the premises owner actually exercised control in the manner in which the independent contractor's work was performed. For a general con-

tractor to be liable for its independent contractor's acts, it must have the right to control the means, methods, or details of the independent contractor's work. Further, the control must relate to the injury the negligence causes, and the contract must grant the contractor at least the power to direct the order in which work is to be done. Determining whether a contract gives a right of control is generally a question of law for the court rather than a question of fact for the jury.

Litigators in the area of construction law/contractor liability were anxiously awaiting the Texas Supreme Court's opinion in the *Dow Chemical v. Bright* case because it appeared that, unlike the *Lee Lewis v. Harrison* case,

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individual issues associated with the notice requirement, the plaintiffs sought only a declaration that the floppy disk controller was defective and that the plaintiff class had the right to the repair or replacement remedy under the warranty. *Id.* at 785-86. In addition, the plaintiff class did not bring any claim for consequential damages, which also would have required individualized proof. *Id.* at 789, 793.

After the Beaumont Court of Appeals affirmed the Rule 42(b)(2) class, Compaq sought review in the Texas Supreme Court. (No. 02-0705). The supreme court has requested briefs on the merits. The supreme court's decision may

determine whether future plaintiffs try to shoehorn their class claims into Rule 42(b)(2) when the predominance or superiority inquiries would otherwise present an insurmountable obstacle. The case has obviously attracted much interest: seven amicus briefs already have been filed. If the court grants Compaq's petition for review, this case will be one to watch in 2003.

Mark R. Trachtenberg is an associate in the appellate section at Haynes and Boone, L.L.P. and Warren W. Harris is a partner in the appellate section at Bracewell & Patterson, L.L.P. Both practice in Houston.