

Rule 42 Class Actions: Recent Developments

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INTRODUCTION

This paper addresses the requirements and evidentiary considerations of class actions under Texas Rule of Civil Procedure 42, and focuses on developments in the area of Texas class actions in the recent Texas Supreme Court opinions. Although the specific requirements of class actions have not changed over the years, recent opinions from the Texas Supreme Court have greatly changed the interpretation of Rule 42. These changes have affected not only the procedural requirements of class certification, but have reduced the number of class certifications primarily in personal injury and some property damages cases.

Beginning in 2000, the Texas Supreme Court has announced several class action decisions addressing a broad spectrum of class certification and appellate issues:

- *Intratex Gas Co. v. Beeson* set out the parameters for avoiding a “fail safe” class definition.
- *Southwestern Refining Co., Inc. v. Bernal* refined the predominance requirement under Rule 42(b)(3).
- *Ford Motor Co. v. Sheldon* revisited and applied the holding in *Intratex Gas* regarding the requirements of a class definition.
- *Wagner & Brown, Ltd. v. Horwood*, a dissent from the denial of the petition for review, examined the minority justices’ belief that a split among the courts of appeals exists as to the interpretation of Rule 42(b)(1)(A).
- *Bally Total Fitness Corp. v. Jackson* addressed the requirements of an interlocutory appeal under TEX. CIV. PRAC. & REM. CODE § 51.014(a)(3), which provides appellate jurisdiction when challenging certain class certification orders.
- *M.D. Anderson Cancer Center v. Novak* examined the issue of standing in the context of a case involving both individual and class action claims.

These cases and the issues they examine are discussed in the sections that follow.

I. EVIDENTIARY REQUIREMENTS OF CLASS ACTIONS

In the trial court, the party seeking certification—almost always the plaintiff—has the burden of establishing the right to proceed as a class, and is not required to make an extensive evidentiary showing in support of the motion for certification. *Texas Commerce Bank Nat’l Ass’n v. Wood*, 994 S.W.2d 796, 801 (Tex. App.—Corpus Christi 1999, pet. dismissed w.o.j.); *Union Pac. Resources Co. v. Chilek*, 966 S.W.2d 117, 120 (Tex. App.—Austin 1998, pet. dismissed w.o.j.); *Clements v. LULAC*, 800 S.W.2d 948, 952 (Tex. App.—Corpus Christi 1990, no writ). In so doing, the class proponent does not have to prove a prima facie case of liability to be entitled to class certification, but must show “at least some facts” to support certification. *Central Power & Light v. City of San Juan*, 962 S.W.2d 602, 608 (Tex. App.—Corpus Christi 1998, pet. dismissed w.o.j.); *Microsoft Corp. v. Manning*, 914 S.W.2d 602, 607 (Tex. App.—Texarkana 1995, writ dismissed); *Weatherly v. Deloitte & Touche*, 905 S.W.2d 642, 647 (Tex. App.—Houston [14th Dist.] 1995, writ dismissed w.o.j.); *Life Ins. Co. of the Southwest v. Brister*, 772 S.W.2d 764, 773 (Tex. App.—Fort Worth 1986, no writ).

Certification may be established through materials that do not meet all of the requirements of admissibility at trial. *Wood*, 994 S.W.2d at 801; *Health & Tennis Corp. of Am. v. Jackson*, 928 S.W.2d 583, 587 (Tex. App.—San Antonio 1996, writ dismissed w.o.j.); *Vinson v. Texas Commerce Nat'l Bank*, 880 S.W.2d 820 (Tex. App.—Dallas 1994, no writ); *Dresser Indus., Inc. v. Snell*, 847 S.W.2d 362, 376 (Tex. App.—El Paso 1993, no writ).

In deciding class certification, the trial court should identify the substantive law issues and determine whether the character and nature of the class satisfies the requirements of a class action. *FirstCollect*, 976 S.W.2d at 299; *Central Power & Light*, 962 S.W.2d at 627; *Rio Grande Valley Gas Co.*, 962 S.W.2d at 640. The “no evidence” and “insufficient evidence” standards do not apply to the initial certification order. *Rio Grande Valley Gas*, 962 S.W.2d at 640.

II. THE STANDARD OF REVIEW APPLIED TO THE CERTIFICATION DECISION

There is no right to bring a lawsuit as a class action. *Spera v. Fleming, Hovenkamp & Grayson, P.C.*, 4 S.W.3d 805, 809 (Tex. App.—Houston [14th Dist.] 1999, no pet. h.) (citing *Vinson*, 880 S.W.2d at 824). However, a trial court enjoys broad discretion in determining whether to grant or deny class certification. *Entex v. City of Pearland*, 990 S.W.2d 904, 909 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Chilek*, 966 S.W.2d at 120. So long as the plaintiff satisfies the necessary requirements of the rule, the trial court may certify a class action. *Sheldon*, 22 S.W.3d at 453, citing *Weatherly*, 905 S.W.2d at 647; *Spera*, 4 S.W.3d at 809.

A class certification order will be reversed only if the record shows a clear abuse of discretion. *Bloyed*, 916 S.W.2d at 955; *FirstCollect*, 976 S.W.2d at 298; *Chilek*, 966 S.W.2d at 120; *Central Power & Light*, 962 S.W.2d at 607; *Salvaggio v. Houston Indep. Sch. Dist.*, 709 S.W.2d 306, 309-10 (Tex. App.—Houston [14th Dist.] 1986, writ dismissed); *RSR Corp. v. Hayes*, 673 S.W.2d 928, 930 (Tex. App.—Dallas 1984, writ dismissed). “There is an abuse of discretion if the record clearly shows that (1) the trial court misapplied the law to the established facts, (2) the material in the record does not reasonably support the findings, or (3) the trial court acted arbitrarily or unreasonably.” *Sun Coast Resources, Inc. v. Cooper*, 967 S.W.2d 525, 529 (Tex. App.—Houston [1st Dist.] 1998, pet. dismissed w.o.j.), citing *Weatherly*, 905 S.W.2d at 647. See *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 242 (Tex. 1985); *Entex*, 990 S.W.2d at 909; *FirstCollect*, 976 S.W.2d at 298; *Wood*, 994 S.W.2d at 801; *Hi Lo Auto Supply, L.P. v. Beresky*, 986 S.W.2d 382, 386 (Tex. App.—Beaumont 1999, writ mand. denied).

In applying this standard, the reviewing court must defer to the trial court’s factual determinations, so long as they are properly supported by the record, while reviewing its legal determinations de novo. *Entex*, 990 S.W.2d at 909; *Remington Arms Co., Inc. v. Luna*, 966 S.W.2d 641, 643 (Tex. App.—San Antonio 1998, pet. denied). The reviewing court also views the evidence in the light most favorable to the trial court’s ruling and indulges every presumption in favor of that ruling. *Wood*, 994 S.W.2d at 801; *Entex*, 990 S.W.2d at 908; *FirstCollect*, 976 S.W.2d at 299. A trial court does not abuse its discretion when it bases its decision on conflicting evidence. *Weatherly*, 905 S.W.2d at 648; *Vinson*, 880 S.W.2d at 823.

III. RULE 42 REQUIREMENTS FOR CLASS CERTIFICATION

Class action suits furnish an efficient means for numerous claimants with a common complaint to obtain a remedy where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages. *Bloyed*, 916 S.W.2d at 952-53, citing *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). They also facilitate the spreading of litigation costs among numerous litigants with similar claims. *Bloyed*, 916 S.W.2d at 952-53, citing *U. S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980). However, the class device may not unduly restrict a party from presenting viable claims or defenses without that party’s consent. *Southwest Refining Co. v. Bernal*, 22 S.W.3d 425, 437 (Tex. 2000), citing TEX. R. CIV. P. 815 and TEX. GOV'T CODE § 22.004(a) (Vernon Supp. 2000) (stating that the procedural rules may not abridge, enlarge, or modify the substantive rights of a litigant). Neither may the class device alter the parties’ burdens of proof, rights to a jury trial, or substantive prerequisites to recovery. *Bernal* at 437. This balance between the rights of all parties serves as the backdrop against which the Rule 42 requirements are measured.

A. Standing – The Initial Hurdle for Class Certification

Standing is an element of a court's subject matter jurisdiction. See *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 444-45 (Tex. 1993). More specifically, "[t]he standing requirement stems from two limitations on subject matter jurisdiction: the separation of powers doctrine and, in Texas, the open courts provision." *Id.* at 443. Generally, the plaintiff in a lawsuit has the burden of alleging facts that affirmatively demonstrate the trial court's jurisdiction to hear the case. See *id.* at 446.

To demonstrate standing, the plaintiff must allege some individual interest peculiar to the cause, and not simply as an interest that inures to a member of the general public. *Brown v. Todd*, No. 00-0061, 2001 Tex. LEXIS 64, *12 (Tex. June 21, 2001); *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984); *Lake Medina Conservation Soc., Inc./Bexar-Medina Atascosa Counties WCID No. 1 v. Texas Natural Resource Conservation Comm'n*, 980 S.W.2d 511, 515 (Tex. App.—Austin 1998, pet. denied). In other words, standing requires an actual, not merely a hypothetical or generalized grievance. *Texas Ass'n of Bus.*, 852 S.W.2d at 444. The plaintiff has standing to sue if:

- (1) the plaintiff has sustained, or is immediately in danger of sustaining, some direct injury as a result of the complained-of wrongful act;
- (2) there is a direct relationship between the alleged injury and the claim to be adjudicated;
- (3) the plaintiff has a personal stake in the controversy;
- (4) the challenged action has caused the plaintiff some injury in fact, either economic, recreational, environmental, or otherwise; or
- (5) the plaintiff is an appropriate party to assert the public interest in the matter as well as the plaintiff's own interest.

See *Lake Medina*, 980 S.W.2d at 515-16; *Billy B., Inc. v. Board of Trustees*, 717 S.W.2d 156, 158 (Tex. App.—Houston [1st Dist.] 1986, no writ); *Housing Auth. v. State ex rel. Velasquez*, 539 S.W.2d 911, 913-14 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.). There are exceptions to this general rule. See, e.g., *Osborne v. Keith*, 177 S.W.2d 198, 200 (Tex. 1944) (allowing "a taxpaying citizen to maintain an action in a court of equity to enjoin public officials from expending public funds under a contract that is void or illegal").

The Texas Supreme Court recently examined the issue of standing in the context of a class action in a case styled *M.D. Anderson Cancer Center v. Novak*, No. 00-0643, 2001 Tex. LEXIS 57 (Tex. June 14, 2001). More specifically, the Court addressed the issue of whether a plaintiff who lacked individual standing to pursue his individual claim could nevertheless maintain a class action suit on behalf of injured class members who do have standing. *M.D. Anderson*, 2001 Tex. LEXIS 57 at *1. In its unanimous decision, the Court held that such a plaintiff, who lacks individual standing at the time a class action suit is filed, deprives the trial court of subject matter jurisdiction over his claims on behalf of the class. *Id.* at *1, *15-16.

Henry J. Novak, an attorney, received a form letter from the M.D. Anderson Cancer Center soliciting donations. The letter, signed by John Mendelsohn as president of M.D. Anderson, stated that "well over 50% of people with cancer who are cared for at The University of Texas M.D. Anderson Cancer Center return home cured." Novak declined the Center's request for a donation. Instead, he sued M.D. Anderson, Mendelsohn, and ten other defendants identified only as John Does 1-10, contending that the cure-rate representation was false and that the defendants had conspired to fraudulently induce the recipients of the letter to contribute money. Novak filed suit in his individual capacity and as representative of the class of persons to whom M.D. Anderson mailed its 1998 annual fund-raising letter. *Id.* at *2.

After several procedural moves unrelated to class certification or standing, the trial court addressed the defendants' motion to dismiss the suit, which had been reduced to fraud claims by individuals who received the solicitation and—unlike Novak—actually donated money. In this motion, the defendants argued that the trial court lacked jurisdiction because Novak lacked standing to sue. The trial court granted the motion. *Id.* at *3. On appeal, the Austin Court of Appeals concluded that Novak lacked individual standing, but nevertheless held that the trial court erred in dismissing the class claims. The appellate court reasoned

that Novak's lack of standing did not disqualify him from acting as class representative, but instead was simply "a relevant factor in judging whether he should properly represent the class," presumably under the Rule 42(a)(3) typicality and Rule 42(a)(4) adequacy of representation requirements for a class certification. *Id.* at *4.

On appeal before the Texas Supreme Court, M.D. Anderson argued that Novak's lack of individual standing prohibited him from acting as class representative. Although this issue was one of first impression for the Court, the United States Supreme Court already had embraced the rule that a plaintiff who lacks individual standing when suit is filed cannot maintain a class action. *Id.* at *9, citing *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). In addition, five Texas courts of appeals had adopted the rule in *O'Shea* and held that before the trial court addresses certification under Rule 42, it must first address the threshold requirement of standing. *Id.* at *11-15.

According to the Texas Supreme Court, the proper inquiry in resolving the standing issue is to determine whether *the named plaintiff* has individual standing, not whether *the class* does. Indeed, the fact that unnamed class members have standing adds nothing to the inquiry of whether the named plaintiff is a proper party with standing to raise issues on behalf of himself and the class. Moreover, because the Texas Constitution requires the presence of a proper party to raise issues before the Court, standing is a threshold inquiry regardless of whether the plaintiff brings an individual or class action. Before the typicality and adequacy of representation requirements are considered, a named plaintiff must first satisfy the threshold requirement of individual standing at the time suit is filed, without regard to the class claims. Accordingly, a named plaintiff's lack of individual standing at the time suit is filed deprives the court of subject matter jurisdiction over the plaintiff's individual claims and claims on behalf of a class. Because Novak lacked individual standing at the time he filed suit, he lacked standing to bring class claims, and the entire suit was dismissed.

B. Texas Rule of Civil Procedure 42(a) – The Four-Prong Test of Class Certification

Based on the exact language in Federal Rule 23, Texas Rule of Civil Procedure 42 allows a class member to sue or be sued as a representative party of the class if the following requirements are satisfied:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

TEX. R. CIV. P. 42(a); FED. R. CIV. P. 23; see *Cedar Crest Funeral Home, Inc. v. Lashley*, 889 S.W.2d 325, 329 (Tex. App.—Dallas 1993, no writ); *Smith v. Lewis*, 578 S.W.2d 169, 172 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.). In addition, at least one requirement of Rule 42(b) must be met.

1. Rule 42(a)(1): Numerosity

The first requirement under Texas Rule of Civil Procedure 42(a) is also the easiest to fulfill. Rule 42(a)(1) allows a class to be certified if "the class is so numerous that joinder of all members is impracticable." TEX. R. CIV. P. 42(a)(1). "Impracticable" does not mean "impossible." *Chevron U.S.A., Inc. v. Kennedy*, 808 S.W.2d 159, 161 (Tex. App.—El Paso 1991, writ dismissed w.o.j.). See *Ardrey v. Federal Kemper Ins. Co.*, 142 F.R.D. 105, 110-11 (E.D. Pa. 1992) (providing that joinder of all class members need not be impossible, only difficult and inconvenient to do so). Instead, the court simply reviews the size of the proposed class. *Chilek*, 966 S.W.2d at 120-21.

In addition, the court determines whether joinder of all members is impractical 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 the class members would be unable to prosecute individual lawsuits. *Id.*

at 121; *Weatherly*, 905 S.W.2d at 653; *National Gypsum Co. v. Kirbyville Indep. Sch. Dist.*, 770 S.W.2d 621, 624 (Tex. App.—Beaumont 1989, writ dismissed w.o.j.). See *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir. 1981) (holding that the number of members in a proposed class is not determinative of whether joinder is impracticable because “the geographical dispersion of the class” also matters in the numerosity analysis). Indeed, there is no mechanical rule for determining when class size reaches that threshold. *Employers Cas. Co. v. Texas Ass’n of Sch. Bds. Workers’ Comp. Self Ins. Fund*, 886 S.W.2d 470, 474 (Tex. App.—Austin 1994, writ dismissed w.o.j.). Finally, numerosity may be established by the number of *potential* class members, not those proven to have been affected. *Rainbow Group, Ltd. v. Johnson*, 990 S.W.2d 351, 357 (Tex. App.—Austin 1999, pet. dismissed w.o.j.).

2. Rule 42(a)(2): Commonality

Under rule 42(a)(2), a class action requires that “questions of law or fact [are] common to the class.” TEX. R. CIV. P. 42(a)(2). To satisfy the commonality criterion, Texas courts generally do not require all or even a substantial portion of the legal and factual questions be common to the class. *Rainbow Group*, 990 S.W.2d at 358; *FirstCollect*, 976 S.W.2d at 372; *Dresser Indus.*, 847 S.W.2d at 372. Instead, commonality requires only that some legal or factual questions be common to the class. *Rainbow Group*, 990 S.W.2d at 358; *Reserve Life Ins. Co. v. Kirkland*, 917 S.W.2d 836, 842 (Tex. App.—Houston [14th Dist.] 1996, no writ). See *San Antonio Hispanic Police Officers’ Org. v. City of San Antonio*, 188 F.R.D. 433, 1999 WL 649092 at *6 (“As long as class members are allegedly affected by a defendant’s general policy, and the general policy is the crux or focus of the litigation, the commonality prerequisite is satisfied.”). In other words, commonality means that an issue of law or fact is inherent in the complaints of all the class members. *Entex*, 990 S.W.2d at 919; *Microsoft*, 914 S.W.2d at 611.

Questions common to the class are those that, when answered as to one class member, are answered as to all class members. *Entex*, 990 S.W.2d at 919; *Chilek*, 966 S.W.2d at 122; *Weatherly*, 905 S.W.2d at 648. The common issue may be one of law or fact; there is no requirements that both legal and factual issues be common. *FirstCollect*, 976 S.W.2d at 300; *Wente v. Georgia-Pac. Co.*, 712 S.W.2d 253, 255 (Tex. App.—Austin 1986, no writ). Indeed, a single common question may provide grounds for class action. *FirstCollect*, 976 S.W.2d at 300; *Rio Grande Valley Gas*, 962 S.W.2d at 641; *Microsoft*, 914 S.W.2d at 611.

Finally, in cases that require more complex evidence, the commonality requirement is generally considered satisfied where (1) many members of the class are subject to the same misrepresentation or omissions by reason of common documents, or (2) the defendant is alleged to have engaged in a common course of conduct. *Rio Grande Valley Gas*, 962 S.W.2d at 643; *Weatherly*, 905 S.W.2d at 651, citing *Adams v. Reagan*, 791 S.W.2d 284, 289 (Tex. App.—Fort Worth 1990, no writ).

3. Rule 42(a)(3): Typicality

Typicality is the first of the two parts of Rule 42(a) that focus on appointing a lead plaintiff or “class representative.” While the trial court must conduct a rigorous analysis of the Rule 42 requirements for purposes of determining class certification, *Bernal*, 22 S.W.3d at 437; *Castano v. American Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996), an analysis of the typicality and adequacy of representation requirements is needed to properly appoint a lead plaintiff or class representative. See *Gluck v. Cellstar Corp.*, 976 F. Supp. 542, 546 (N.D. Tex. 1997).

Typicality requires that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” TEX. R. CIV. P. 42(a)(3); *Spera*, 4 S.W.3d at 811. Like the commonality requirement, typicality is not a demanding requirement. *Mullen*, 186 F.3d at 625 (“Like commonality, the test for typicality is not demanding.”).

A two-pronged test, “typicality” mandates that the class representatives possess the same interests and suffer the same injury as the class. *Chilek*, 966 S.W.2d at 121; *Dresser Indus.*, 847 S.W.2d at 373. Only a conflict that goes to the very subject matter of the litigation will defeat a party’s claim of representative status. *Dresser Indus.*, 847 S.W.2d at 373.

a. The class representative must have the same interests as the class members.

First, the class representatives must possess the same interests as the class. This generally means that the class representative must not have interests antagonistic to those of the rest of the class. *Hi Lo Auto Supply*, 986 S.W.2d at 388; *Central Power & Light*, 962 S.W.2d at 609. For this reason, the analysis of typicality is often collapsed into an analysis of intra-class antagonism under Rule 42(a)(4). See *Employers Cas.*, 886 S.W.2d at 475. In any event, the antagonism here must be actual and present. Speculative claims regarding potential conflicts are insufficient to show the trial court abused its discretion in finding representativeness, even though claims that the possibility of significant disagreement within a proposed class may support the denial of certification. *Id.*; *Forsyth v. Lake LBJ Inv. Corp.*, 903 S.W.2d 146, 151 (Tex. App.—Austin 1996, writ dismissed w.o.j.). And as stated previously, only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status. See *Adams*, 791 S.W.2d at 291. In determining whether one can adequately represent the interest of the class, the court considers the named plaintiff's ability to vigorously prosecute the class claims and an absence of conflict or antagonism between the interests of the named plaintiffs and the interest of the class. See *Kalodner v. Michaels Stores, Inc.*, 172 F.R.D. 200, 204-05 (N.D. Tex. 1997).

b. The class representative must suffer the same injury as the class members.

Second, the class representatives must suffer the same injury as the class. Although the class representative need not suffer precisely the same injury as the other class members, there must be a nexus between the injury suffered by the representative and the injuries suffered by the class members. *Rainbow Group*, 990 S.W.2d at 358; *Hi Lo Auto Supply*, 986 S.W.2d at 387; *Chilek*, 966 S.W.2d at 121; *Weatherly*, 905 S.W.2d at 653 (discussing the burden of the party seeking representative status). This nexus requires that the representative's claims arise from the same event or course of conduct giving rise to the claims of other class members and be based on the same legal theories. *Spera*, 4 S.W.3d at 811; *Hi Lo Auto Supply*, 986 S.W.2d at 387; *FirstCollect*, 976 S.W.2d at 301. See *Mullen*, 186 F.3d at 625 (holding that the typicality requirement focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent).

Although the claims need not be identical or perfectly coextensive (just substantially similar), the presence of even an arguable defense peculiar to the class representative or a small subset of class members may destroy typicality. *Spera*, 4 S.W.3d at 811; *Lashley*, 889 S.W.2d at 331. However, in most Texas cases, different defenses do not destroy typicality. See, e.g., *Graebel / Houston Movers, Inc. v. Chastain*, 26 S.W.3d 24, 31 (Tex. App.—Houston [1st Dist.] 2000, pet. dismissed w.o.j.) (“even if Graebel has a defense against certain class members, i.e., release or accord and satisfaction because their damage claims have been paid, typicality is not destroyed”), citing *Sun Coast Resources*, 967 S.W.2d at 537.

c. The typicality requirement has its limitations.

The observation that the typicality requirement is easy to satisfy has one important caveat: it is easy as long as it is done correctly. For example, if the claims asserted by the class representative and those of the class members are different, then typicality does not exist. Typicality problems like this occur more often in multiple claim, multiple defendant class actions.

Distilled to its essence, typicality evaluates the sufficiency of the named representatives to represent the class, and is a very different inquiry from commonality. *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 632 (3d Cir. 1996) (citing *Hassine v. Jeffes*, 846 F.2d 169, 176 n.4 (3d Cir. 1988) (“‘commonality’ like ‘numerosity’ evaluates the sufficiency of the class itself, and ‘typicality’ like ‘adequacy of representation’ evaluates the sufficiency of the named plaintiff[s]. . .”). A representative plaintiff's claim is not “typical” if the representative has no cause of action against one or more of the defendants sued by the class. TEX. R. CIV. P. 42(a)(3).

Essentially, a class representative cannot represent class members who have a claim against a defendant that the representative has no cause of action against and from whom the class representative suffered no injury. *Lashley*, 889 S.W.2d at 331 (citing *La Mar v. H & B Novelty Loan Co.*, 489 F.2d 461, 462 (9th Cir. 1973)); see, e.g., *Hurd v. Monsanto Co.*, 164 F.R.D. 234, 239 (S.D. Ind. 1995) (“ . . . no single proximate cause inquiry applies equally to each putative class member; no one set of operative facts establishes liability.”). In *La Mar*—favorably cited by Texas courts—the Ninth Circuit Court held that a plaintiff

with no cause of action against a defendant could not “fairly and adequately protect the interests” of those who do have such causes of action. *La Mar*, 489 F.2d at 465. The court ultimately dismissed the action against those defendants with whom the plaintiff had not dealt. *Id.* at 470. The *La Mar* rule applies even if the representative party’s injuries are identical to those of the class members. *Lashley*, 889 S.W.2d at 331; *La Mar*, 489 F.2d at 466. In addition, the *La Mar* rule has two exceptions: (1) situations in which all injuries are the result of a conspiracy or concerted scheme among the defendants; and (2) instances in which all defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious. *La Mar*, 489 F.2d at 470.

4. Rule 42(a)(4): Fair and Adequate Representation

As the final requirement under Rule 42(a), a class action requires that “the representative parties will fairly and adequately protect the interests of the class.” TEX. R. CIV. P. 42(a)(4). In determining “adequacy,” the trial court must inquire into the zeal and competence of class counsel and into the willingness and ability of the representatives to take an active role in and control the litigation, and to protect the interests of the absentees. *Adams*, 791 S.W.2d at 291.

Adequacy of representation is a fact question, must be determined based on the individual circumstances of each case and made at the sound discretion of the court. *Weatherly*, 905 S.W.2d at 651. Factors affecting this determination include: (1) adequacy of counsel, (2) potential for conflicts of interest, (3) personal integrity of the plaintiffs, (4) whether the class is unmanageable because of geographical limitations, (5) whether the plaintiffs can afford to finance the class action, and (6) the representative’s familiarity with the litigation and his or her belief in the legitimacy of the grievance. *Id.* The two adequacy of representation 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’ claims. *Glassell v. Ellis*, 956 S.W.2d 676, 682 (Tex. App.—Texarkana 1997, pet. dism’d w.o.j.).

a. “Fair and adequate representation” requires the absence of antagonism between the class members and their class representatives.

Only conflicts that go to the very heart of the litigation will defeat representative status. *See Jackson*, 928 S.W.2d at 589, quoting *Microsoft*, 914 S.W.2d at 614. Individual computation of damages for each class member will not prevent class certification. *See Angeles/Quinoco Sec. Corp. v. Collison*, 841 S.W.2d 511, 516 (Tex. App.—Houston [14th Dist.] 1992, no writ). “Although the individual amount of damages may vary from class member to class member, the standard conduct of appellants is relative to all potential class members.” *Amerada Hess*, 973 S.W.2d at 674.

For example, in *Entex v. City of Pearland*, the trial court certified a class of municipalities on their claim that they were overcharged by Entex. 990 S.W.2d 904 (Tex. App.—Houston [14th Dist.] 1999, no pet.). On appeal, Entex argued that certification was improper due to the “potential conflict” between Pearland and the other municipalities “based on differences in political goals in setting franchise taxes” that the municipalities may or may not pass on to their customers. *Id.* at 917. The appellate court rejected this argument because (1) it was a potential, not an actual, conflict; and (2) the conflict was not based on a core issue. *Id.*

Finally, in the absence of any evidence that some class members do not desire the relief sought by the class representatives, the mere possibility of disagreement is insufficient to demonstrate a lack of adequate representation. *See Employers Cas. Co.*, 886 S.W.2d at 476. *See also Remington Arms*, 966 S.W.2d at 644 (decertifying a class because “[a] careful reading of the entire record suggests a lack of interest beyond the four named plaintiffs and even some indifference among them”).

b. “Fair and adequate representation” also requires the assurance that class counsel will vigorously prosecute the class claims.

The qualifications and experience of the class counsel is of greater consequence than the knowledge of the class representatives. *Microsoft*, 914 S.W.2d at 614. A district court cannot certify a class without

determining that class counsel is sufficiently qualified and experienced to vigorously prosecute the action. *Employers Cas.*, 886 S.W.2d at 475; *see also Adams*, 791 S.W.2d 284. In addition, class counsel must serve the interests of the entire class. *Glassell*, 956 S.W.2d at 685.

If the class representatives rely heavily on their counsel for the representative capacity to be assumed by the class representative, this will weigh against certification. *See, e.g., Forsyth* at 152, citing *Adams*, 791 S.W.2d at 291 (providing that trial court must consider whether representatives will “take an active role in and control the litigation . . . to protect the interests of absentees” in determining adequacy of representation prerequisite). However, even some unusual circumstances between class counsel and the class representative have not prompted the trial court to deny class certification. Class certification has been approved in a case where the class representative was the mother of a member of the class counsel’s firm; *Kirkland*, 917 S.W.2d at 844; where the class representative’s knowledge of the facts of the alleged scheme to defraud originated from his attorneys; *Weatherly*, 905 S.W.2d at 654; where class representatives were hand-picked as representatives by the class counsel; *Adams*, 791 S.W.2d at 291; and where a non-party formed a corporation for the express purpose of pursuing litigation, then sent 2,000 letters to royalty owners, pledged to fund the litigation, and took an assignment of recovery. *Dresser Industries*, 847 S.W.2d at 373.

C. Texas Rule of Civil Procedure 42(b) – The Last Requirement for Class Certification

Once the class proponent satisfies the requirements of Rule 42(a), the party must satisfy one of the subsections under Rule 42(b). The Rule 42(b) requirements tend to be more complex than their 42(a) counterparts. In addition, the Rule 42(b) requirements often mandate an extensive, multi-faceted analysis in order to determine whether the class proponent has satisfied each element of the test.

1. Rule 42(b)(1)(A): Risk of Inconsistent Adjudications

Rule 42(b)(1)(A) allows class certification if

- (1) the prosecution of separate actions by or against individual members of the class would create a risk of
 - (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class.

TEX. R. CIV. P. 42(b)(1)(A).

As recently pointed out by Justice Hecht's dissent from the denial of a petition for review in *Wagner & Brown, Ltd. v. Horwood*, the courts of appeals are split over whether the risk required by Rule 42(b)(1)(A) "is that individual actions may result in a legal quagmire of judgments so inconsistent that compliance with one would violate another, or only that in individual actions some plaintiffs might recover and others not." No. 99-0946, 2001 Tex. LEXIS 25, *2-3 (Tex. April 12, 2001). For example, the Texarkana Court of Appeals has held that a class of plaintiffs complaining of discharges from a toxic waste dump could not be certified under Rule 42(b)(1)(A):

When the only risk is that some plaintiffs may win while others may lose on identical facts, the problem of inconsistent or varying adjudications is not raised. That portion of the rule applies to situations where inconsistent judgments in separate suits places a defendant in the position of not being able to comply with one judgment without violating the terms of another.

St. Louis Southwestern Ry. v. Voluntary Purchasing Groups, Inc., 929 S.W.2d 25, 32 (Tex. App.—Texarkana 1996, no writ). Moreover, the holding in *St. Louis* indicates that if no defendant seeks the protection of Rule 42(b)(1)(A), then it is inapplicable to class certification and may not be used by the class proponents to secure class certification. The Tyler Court of Appeals has similarly interpreted Rule 42(b)(1)(A), which is consistent with the federal courts' stringent construction of Federal Rule of Civil Procedure 23(b)(1)(A), the prototype for the Texas rule. See, e.g., *Peltier Enters., Inc. v. Hilton*, No. 12-00-00053-CV, 2000 Tex. App. LEXIS 8451 (Tex. App.—Tyler Dec. 20, 2000, pet. denied). Such an interpretation supports the notion that Rule 42(b)(1)(A) is a defense-oriented safeguard against improper certification.

On the other hand, the Fort Worth, Corpus Christi, and Fourteenth Court of Appeals in Houston have held that the risk required by Rule 42(b)(1)(A) is only that in individual actions some plaintiffs might recover and others not. See, e.g., *Adams v. Reagan*, 791 S.W.2d 284, 293 (Tex. App.—Fort Worth 1990, no writ); *FirstCollect, Inc. v. Armstrong*, 976 S.W.2d 294, 303 (Tex. App.—Corpus Christi 1998, pet. dismissed w.o.j.); *Reserve Life Ins. Co. v. Kirkland*, 917 S.W.2d 836, 845 (Tex. App.—Houston [14th Dist.] 1996, no writ). For example, the test used in determining whether certification is appropriate under Rule 42(b)(1)(A) is, according to *Adams v. Reagan*, as follows:

if individual suits are conducted before different juries and judges and uniformity of results is not likely even with the same testimony and same facts presented in each case, a class action is appropriate.

See *Adams*, 791 S.W.2d at 293 (rejecting the federal interpretation of this requirements and establishing a "better Texas rule" that allows mandatory certification when judicial economy so requires).

2. Rules 42(b)(1)(B): Risk of Adjudicating Dispositive Issues as to Non-class Members

Rules 42(b)(1)(B) allows class certification when:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of . . .

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

TEX. R. CIV. P. 42(b)(1)(B). Essentially, Rule 42(b)(1)(B) allows class certification involving members who will have no right to withdraw when the prosecution of separate actions would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. Indeed, Rule 42(b)(1) class actions do not provide for absent class members either to receive notice or to exclude themselves from class membership as a matter of right. This is why Rule 42(b)(1)(B) class actions are often called “mandatory” class actions.

Embodying the representative interpretation of this rule, *St. Louis Southwestern Railway Company v. Voluntary Purchasing Groups, Inc.* involved a class action certified under Rule 42(b)(1)(B). 929 S.W.2d 25 (Tex. App.—Texarkana 1996, no writ). The court observed that in cases in which a showing of a limited fund has been made, subsection (b)(1)(B) requires a mandatory class in order to provide all claimants some portion of whatever recovery is available. *St. Louis*, 929 S.W.2d at 32. In so doing, the class proponents must offer evidence supporting the existence of a limited fund, which is usually accomplished through documentary evidence of the declining financial condition of the defendant company. *Id.* at 32-33.

3. Rule 42(b)(2): Need for Injunctive or Declaratory Relief

Texas Rule 42(b)(2) allows class certification in cases in which:

the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

TEX. R. CIV. P. 42(b)(2).

The requirements of Texas Rule 42(b)(2) were most recently examined in *TCI Cablevision of Dallas, Inc. v. Owens*, 8 S.W.3d 837 (Tex. App.—Beaumont 2000, pet. abated). This case addressed the purported class claims against several television cable services providers who charged allegedly illegal late fees. *Owens*, 8 S.W.3d at 841. In deciding whether the trial court correctly certified the class, the court of appeals weighed the impact of two federal cases analyzing federal rule 23(b)(2): *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998); and (2) *Heartland Communications, Inc. v. Sprint Corp.*, 161 F.R.D. 111, 117 (D. Kan. 1995). Both *Allison* and *Heartland Communications* held that a (b)(2) class action requires that the predominant remedy be injunctive or declaratory relief. *Allison*, 151 F.3d at 425; *Heartland Communications*, 161 F.R.D. at 117. As stated in *Allison*,

We recognize that, as a matter of degree, whether a given monetary remedy qualifies as incidental damages will not always be a precise determination. Nor is it intended to be. “Complex cases cannot be run from the tower of the appellate court given its distinct institutional role and that it has before it printed words rather than people.” *Richardson v. Byrd*, 709 F.2d 1016, 1019 (5th Cir.), cert. denied, 464 U.S. 1009, 104 S. Ct. 527, 78 L. Ed. 2d 710 (1983). The district courts, in the exercise of their discretion, are in the best position to assess whether a monetary remedy is sufficiently incidental to a claim for injunctive or declaratory relief to be appropriate in a (b)(2) class action.

Allison, 151 F.3d at 416.

After reviewing the federal cases on subsection (b)(2), the *Owens* court held that certification under 42(b)(2) was appropriate because the plaintiff substantially demonstrated that the request for injunctive relief was a “significant” issue, and because he sought injunctive relief to prohibit TCI from charging excessive late

fees in the future. *Owens*, 8 S.W.3d at 847-48. The court also noted that if the requirements of subsection (a) have been met and declaratory or injunctive relief is requested, the action should be allowed to proceed under (b)(2) because of the trial court's power under rule 42(d)(1)—the counterpart to federal rule 23(c)(4)(A)—to confine the class action to those issues pertaining to the declaratory aspects of the case and to cause the damage claims to be tried separately, if appropriate. *Id.*, citing Wright's FP&P, § 1775; Tex. R. Civ. P. 42(d)(1).

4. Rule 42(b)(3): Adjudication Affects Specific Property

Rule 42(b)(3) originated in the former version of rule 42(a)(2)—which itself originated from the federal rule 23(a)(2)—and omits the reference to the character of the right as “several.” Compare former TRCP 42(a)(2) with current TRCP 42(b)(3); *but see* Tex. R. Civ. P. 42 note (stating that current version of 42(b)(3) originated from former rule 42(a)(3)). Under the current and drastically revised version, Rule 42(b)(3) provides that a proposed class action may be certified if the “the object of the action is the adjudication of claims which do or may affect specific property involved in the action.” Tex. R. Civ. P. 42(b)(3).

No Texas case has examined or applied this subsection. *Life Ins. Co. of the Southwest v. Brister*, 722 S.W.2d 764, 771 (Tex. App.—Fort Worth 1986, no writ) (observing in passing that 42(b)(3) was inapplicable to the subject matter of the case, workers' compensation benefits). In order to provide some context for the requirements of this provision—and, indeed, how this rarely used provision may be implemented in the future—we examine cases involving the formative provision from which Rule 42(b)(3) emerged: former Rule 23(a)(2).

An example of a Rule 23(a)(2) class action is a creditors' action for liquidation or reorganization of a corporation. Fed. R. Civ. P. 23 advisory committee note. Unfortunately, very few federal cases allude to former rule 23(a)(2), and only one unremarkable opinion plainly assesses the rule as follows: “Rule 23(a)(2) permits a class action where the rights of the members of the class are several and the action involves claims to specific property.” *Carroll v. American Federation of Musicians*, 241 F. Supp. 865, 886 (S.D.N.Y. 1965). From the limited case law, this provision appears to encompass both real and personal property. Without more guidance from the courts or the advisory committee notes, a perpetually hazy and incomplete understanding of Rule 42(b)(3) will likely remain.

5. Rule 42(b)(4), Part 1: Predominance of Common Issues over Individual Issues

“Predominance” under Rule 42(b) requires a finding that “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members.” Tex. R. Civ. P. 42(b)(4). As provided in the rule, “questions of law or fact” that are common to the class are “questions which when answered as to *one class member* are answered as to *all class members*.” *Amoco Prod. Co. v. Hardy*, 628 S.W.2d 813, 816 (Tex. App.—Corpus Christi 1981, writ *dism'd*) (emphasis added).

While the commonality requirement under Rule 42(a)(2) represents a low threshold of proof, the predominance requirement is a more difficult threshold of proof. However, courts frequently analyze the predominance requirement of Rule 42(b)(4) as a step following their commonality analysis. Indeed, the predominance requirement is frequently—and incorrectly—subsumed in the court's commonality analysis. *Bernal*, 22 S.W.3d at 434. Because the existence of a common question alone will not support class certification, the court must “stringently” evaluate the predominance element to determine certification under Rule 42(b)(4). *Rainbow Group*, 990 S.W.2d at 360; *E. & V. Slack v. Shell Oil Co.*, 969 S.W.2d 565, 569 (Tex. App.—Austin 1998, no *pet.*).

a. Well-settled concepts of “predominance”

The requirements of “predominance” have been the focus of recent case law. Nevertheless, some concepts of this element are well-established:

- In determining whether common issues predominate, the trial court need only identify substantive law issues that will control the litigation. *Bernal* at 434; *Central Power & Light*, 962 S.W.2d at 610; *Brister*, 722 S.W.2d at 772.

- The test for predominance is not whether common issues outnumber the individual issues, but instead whether common or individual issues will be the object of most of the efforts of the litigants and the court. *Rainbow Group*, 990 S.W.2d at 360; *Hi Lo Auto Supply*, 986 S.W.2d at 387; *Entex*, 990 S.W.2d at 919; *Central Power & Light*, 962 S.W.2d at 610; *Brister*, 722 S.W.2d at 772.
- 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.

b. What “predominance” IS NOT.

The following practices of “certify now and worry later” have been condemned by the Texas Supreme Court in *Southwest Refining Co., Inc. v. Bernal*, 22 S.W.3d 425 (Tex. 2000):

- When confronted by serious individual issues, merely noting that creative means may be designed to deal with them, without identifying those means or considering whether they would vitiate the parties' ability to present viable claims or defenses.
- Indulging every presumption in favor of the trial court's ruling while conceding that if the court erred, it should be in favor of certification anyway.
- Speculating that because a settlement or a verdict for the defendant on the common issues could end the litigation before any individual issues would be raised, predominance need not be evaluated until later.
- Suggesting that predominance is not really a preliminary requirement at all because a class can always later be decertified if individual issues are not ultimately resolved.

Bernal, 22 S.W.3d at 434-35 (citations omitted).

c. *Bernal* mandates a “rigorous” predominance analysis.

Relying on the more discriminating analysis of the federal courts, the Texas Supreme Court rejected the short-cut of “certify now and worry later” and endorsed a more cautious and strict approach to certification. *Bernal*, 22 S.W.3d at 435, citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (“Courts must be mindful that the rule as now composed . . . limits judicial inventiveness”). Now, the predominance requirement mandates a rigorous analysis at the initial certification hearing to determine whether all the prerequisites to certification are met and determining how the case will be tried. *Id.*

Indeed, the supreme court held that certifying a class without knowing how the claims will likely be tried is improper. The trial court must move beyond the pleadings and the assurances of class counsel, and “understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.” *Id.* Any proposal to rush the determination of individual issues should not unduly restrict any party from advancing its claims or defenses. “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 435-36. Finally, the Texas Supreme Court has made it very clear that the trial court must conduct this rigorous predominance analysis *at the time class certification is sought*. *Id.* at 436.

d. Recent examples of the *Bernal* predominance analysis.

Bernal has had a very significant impact on class action jurisprudence. Cases that were certified as class actions before *Bernal*, have since on re-hearing been de-certified. The following is a discussion of the issues that are emerging after *Bernal*.

▸ ***Entergy Gulf States, Inc. v. Butler***

In *Entergy Gulf States, Inc. v. Butler*, 25 S.W.3d 359 (Tex. App.—Texarkana 2000, pet. filed 01/02/01) (opin. on reh'g), plaintiffs attempted to bring a class action suit arising out of damages sustained in connection with a substantial power outage triggered by a major ice storm in Southeast Texas in January, 1997. The class proponents claimed that because of Entergy's failure to properly maintain the system before the storm, the power outages lasted an unreasonably lengthy period of time.

In an opinion issued March 14, 2000, the Texarkana Court of Appeals originally affirmed the trial court's class certification. However, after the *Bernal* opinion was issued, the Texarkana Court withdrew its original opinion and reversed the class certification order. In so doing, the Court stated that, "in light of *Bernal* and *Sheldon*, we must sustained Entergy's contention that individual issues will predominate over common issues, and we must reverse the trial court's order granting class certification." Additionally, the Court confirmed that the question of predominance is not answered by a quantitative comparison of common and individual issues. Of significance, the trial court initially found over *fourteen common questions* of law. Despite this large number of common questions, the Texarkana Court of Appeals held that the two individual issues of causation and damages would predominate over the more than fourteen commons questions of law. Most significantly, the Texarkana Court held that the trial court failed to explain its plan for trying the individual issues. Quoting *Bernal*, the *Entergy* Court explained that, "it is improper to certify a class without knowing how claims can and will likely be tried If it is not determinable from the outset that the individual issues can be considered in manageable, time efficient, yet fair manner, then certification is not appropriate."

▸ ***Nissan Motor Co. v. Fry***

Another case in which the court of appeals initially favored class certification, only to reject it after *Bernal*, is *Nissan Motor Co. v. Fry*, 27 S.W.3d 573 (Tex. App.—Corpus Christi 2000, pet. denied) (opin. on reh'g). In this case, plaintiffs sued Nissan for economic damages arising out of alleged defects in the seat belt systems of certain Nissan vehicles. Plaintiffs asserted a variety of claims against Nissan including breach of implied warranty of merchantability, violations of the Texas Deceptive Trade Practices Act, and breach of express warranties. The suit contained no claims for personal injury. In deciding to certify a plaintiffs' class, the trial court found that the class claims were based on a common course of conduct of manufacturing and selling a defective product. Therefore, the certified class consisting of "all residents of the State of Texas who own a Nissan vehicle equipped with a two-point passive restraint system equipped with a separate manual lap belt."

Class certification was originally affirmed on appeal. *Nissan Motor Co., Ltd. v. Fry*, 2000 Tex. App. LEXIS 3601 (Tex. App.—Corpus Christi May 25, 2000) (opin. withdrawn). However, subsequent to and in light of *Bernal*, the Corpus Christi Court of Appeals granted a rehearing in the appeal and reversed the class certification. *Nissan Motor Co. v. Fry*, 27 S.W.3d 573 (Tex. App.—Corpus Christi 2000, pet. denied) (opin. on reh'g). To obtain this result, Nissan attacked the class certification by alleging that the trial court incorrectly found that the purported class members were typical because of two of the class representatives purchased used Nissan vehicles and, therefore, these class representatives could not state a cause of action for breach of implied warranty of merchantability. (This warranty attaches only to the sale of new vehicles.) In its first opinion, the Court found that there was sufficient nexus for typicality among the class representatives because the alleged defect in the seat belt system was manufactured and marketed through a common course of conduct by Nissan. Moreover, any difficulties that arose while litigating the claims under the class device could be ironed out as the suit progressed.

On rehearing, however, the court of appeals rejected the "certify now and worry later" approach and concluded that "the trial court abused its discretion in finding commonality because the class members who purchased used vehicles may have no claim for breach of implied warranty of merchantability." In addition, the Court noted that the existence of a common question was insufficient to satisfy the predominance requirement for class certification. "The court has a duty to evaluate the relationship between common and individual issues." Once again, the court compared class certification jurisprudence prior to the *Bernal* and noted that recently redefined predominance analysis:

Bernal clearly requires that the certification order contain a plan for dealing with individual issues, and for the specifics of the plan to be considered by the trial court in determining whether common issues will predominate over individual issues. In light of *Bernal*, we conclude that the trial court erred in finding that common issues predominate because class counsel (1) did not submit a trial plan and (2) did not otherwise indicate a method for resolving individual issues."

Because the trial court abused its discretion in finding commonality and predominance, the *Nissan* Court reversed the class certification.

▸ ***Schein v. Stromboe***

In *Schein v. Stromboe*, 28 S.W.3d 196 (Tex. App.—Austin 2000, pet. filed), plaintiffs brought suit against a dental office supply and equipment company in connection with two computer software packages designed to aid dentists in office management. Plaintiffs brought suit against Schein and its subsidiaries, Easy Dental Systems, Inc. and Dentisoft, Inc., for alleged breach of contract, breach of express and implied warranties, fraud, negligent misrepresentation, promissory estoppel and violations of the Texas Deceptive Trade Practices Act. Plaintiffs also alleged that the Windows versions of the software were defective. The trial court certified the class, and the Austin Court of Appeals affirmed that order on appeal.

The Austin Court discussed the *Bernal* opinion, particularly the predominance analysis, at length. Significantly, the Court stated that, "the Supreme Court's holding in *Bernal* applies with equal force to all class actions, whether they may be personal injury suits or suits based on claims of breach of contract or fraud. . . ." The Austin Court also felt that the breach of contract question was common to all of the class members.

Once the question of whether the software contained a programming defect was answered as to one class member, it would be answered as to all. The court rejected the defendant's argument that the individual questions involving reliance, the form and substance of every misrepresentation, and the amount of the consequential damages would overshadow the common issues and result in an unmanageable proliferation of individual issues.

► ***West Teleservices, Inc. v. Carney***

West Teleservices, Inc. v. Carney, 37 S.W.3d 36 (Tex. App.—San Antonio 2000, no pet. h.) addressed the *Bernal* requirements of a trial plan upon class certification. *Carney* involved a class of employees of three related telemarketing firms who, asserting a variety of claims, alleged that their employers underpaid them for work performed. The class size was estimated to number as many as 90,000 past and present employees.

The class members claims targeted two employment practices that, according to them, resulted in the underpayment of wages. Some of the employees claimed that their clock-in and clock-out times were illegally rounded to the nearest quarter hour, therefore resulting in them not being paid for all the time they worked. Other employees claimed that they were not paid for the time between when they clocked in and the start of their shift. The employees asserted claims of quantum meruit, fraud, conspiracy to commit fraud, common law debt, conversion, conspiracy to commit conversion, civil theft, and conspiracy to commit civil theft. After disposing of the other claims on the employers' summary judgment motion, the trial court certified a class for the claims of quantum meruit, conspiracy to commit fraud, and common law debt. The certification order stated, in pertinent part, that:

The common questions of law and fact to be determined are those relating to all aspects of activities that affect billable or payable time for said hourly compensated shift workers beginning with training and through actual work, including, but not limited to, "pre-shift" or "post-shift" activities which benefitted the Defendant employers, "rounding down" or "rounding up" or alteration of time records, and time paid for working extra hours. The class-wide issues of fact and law shall not include any other complaints of the employees that are not related to billable or payable time, such as bonuses, incentives or discriminatory practices, if any.

The employers brought an interlocutory appeal. Bringing three points of error, the employers first asserted that the trial court erred in certifying the class because the certification order does not identify the causes of action, the factual claims, the common questions of law or fact, or a trial plan. The San Antonio Court of Appeals agreed based on the dictates under *Bernal*.

Under *Bernal*, a trial court's certification order must indicate how the claims will likely be tried so an appellate court may meaningfully evaluate conformance with Rule 42. *Bernal*, 22 S.W.3d 425, 435 (Tex. 2000). The *Bernal* Court also held that the trial court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues. *Id.* Any proposal to expedite resolving individual issues must not unduly restrict a party from presenting viable claims or defenses without that party's consent. *Id.* "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 *Carney* court noted several shortcomings of the trial court's certification order which warranted reversal. First, the order did 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. Second, because the trial court failed to identify the substantive issues that would control the outcome of the trial, there was no meaningful way for the appellate court to evaluate whether the order met the requirements of Rule 42. Finally, there was no meaningful way to determine whether the trial court understood the claims, defenses, relevant facts, and applicable substantive law. Essentially, because the trial court's order failed to identify the substantive issues that would control the outcome of the trial, the order also failed to comply with the requirements of Rule 42.

6. Rule 42(b)(4), Part 2: Superiority of Class Action

The second part of the “predominance” element under Rule 42(b)(4) requires the proposed class action to be “superior” to other forms of litigating the claims under the proviso of four factors:

(4) the court finds . . . that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

TEX. R. CIV. P. 42(b)(4).

Just as the language of the rule provides, this requirement demands that class treatment be superior for the fair and efficient adjudication of the controversy. *Bernal*, 22 S.W.3d at 435-36. Essentially, class actions are superior to multiple, individual actions when the individual actions are economically infeasible to litigate because of the small size of the individual claims, or when the common issues would be extremely expensive to litigate because they would require extensive discovery. Class treatment of consumer claims is proper when the harm alleged is common to all purchasers of a product that is claimed to be defective. The class action procedure is appropriate for the pursuit of consumer protection claims since it allows consumers to aggregate small claims and bring them on behalf of the class when the amount at stake for an individual consumer would not warrant filing suit and when they might not be able to do so on an individual basis. That is, it permits consumers to pursue their claims in the aggregate—consumers who, standing alone, would lack both the incentive and the ability to act with such curative effect. *Shaw*, 91 F. Supp. 2d at 952.

For example, class certification is appropriate where repeated litigation of the common issues in individual actions is grossly inefficient, exorbitantly costly, and a waste of judicial resources. *Rainbow Group*, 990 S.W.2d at 360; *FirstCollect*, 976 S.W.2d at 303. In addition, 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. *Central Power & Light*, 962 S.W.2d at 611; *Weatherly*, 905 S.W.2d at 655; *National Gypsum*, 770 S.W.2d at 626. See, e.g., *Boyed*, 916 S.W.2d at 952 (holding that class actions are efficient means for numerous claimants with common complaint to obtain remedy where it is not economically feasible to obtain relief by traditional method of multiplicity of small individual suits); *Rainbow Group*, 990 S.W.2d at 360 (get parenthetical on superiority requirement); *FirstCollect*, 976 S.W.2d at 303 (class certification is appropriate where repeated litigation of the common issues in individual actions is grossly inefficient, exorbitantly costly, and a waste of judicial resources); *Central Power & Light*, 962 S.W.2d at 612 (a factor in determining the superiority of the class action method is that the trial court has invested time and effort in familiarizing itself with the issues in dispute during several hearings).

However, despite the four criteria for determining the superiority requirement, the goal to resolve lawsuits efficiently must not be done at the expense of the courts in providing a just, fair, equitable and impartial adjudication of the rights of all litigants. *Bernal*, 22 S.W.2d at 439. This means that convenience and economy must yield to the paramount concern for a fair and impartial trial. *Id.* This concept of fairness and impartiality applies equally to both plaintiffs and defendants. *Bernal* at 438 (“Aggregating claims can dramatically alter substantive tort jurisprudence. Under the traditional tort model, recovery is conditioned on defendant responsibility. The plaintiff must prove, and the defendant must be given the opportunity to contest, every element of a claim.”). Although the class device may be a more efficient method of adjudicating multiple claims, these concerns are secondary to the issues of fairness and satisfaction of the class requirements. See, e.g., *Nissan Motor Co. Ltd. v. Fry*, 27 S.W.3d 573 (Tex. App.—Corpus Christi 2000, no pet. h.) (decertifying class despite evidence that denying class certification would leave many class members without any meaningful remedy, given the impracticability of each member suing for his individual small monetary claim against Nissan).

IV. PROPERLY DEFINING THE CLASS

Both Texas and federal class certification orders require a class definition that is “precise, objective, and presently ascertainable.” MANUAL FOR COMPLEX LITIG. (THIRD) §30.14 (1995); see *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 453-54 (Tex. 2000).

The requirements of a class certification order were analyzed in two recent Texas Supreme Court cases: *Intratex Gas Co. v. Beeson*, 22 S.W.3d 398 (Tex. 2000), and *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444 (Tex. 2000). In both these cases, the supreme court relied on federal case law that addressed the standards for proper class definitions.

A. The guidelines of properly defining class membership.

Implicit in Rule 42 is the requirement that the trial court first determine whether there is an identifiable class, susceptible to a precise definition. *Intratex*, 22 S.W.3d at 403; *Graebel/Houston*, 2000 Tex. App. LEXIS 2660, *7. The class members must be clearly ascertainable by reference to objective criteria. *Sheldon*, 22 S.W.3d at 453; *Intratex* at 403. In other words, the required objectivity and certainty by which class membership is known *at the time of certification*. See *Intratex* at 403. In addition, the order may not rely on the ultimate issue of liability for class membership. *Sheldon* at 453; *Intratex* at 403, 404. Thus, deciding the merits of the suit in order to determine the scope of the class or its maintainability as a class action is not appropriate. *Intratex* at 404. Finally, *Bernal* requires that the certification order contain a plan for dealing with individual issues, and for the specifics of the plan to be considered by the trial court in determining whether common issues will predominate over individual issues. *Bernal* at 435. 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. *Id.* at 435-36.

B. Avoid creating a "fail safe" class.

Although a class definition need not be so specific that every potential member can be identified at the commencement of the action, a class cannot be defined by criteria that are subjective or that require an analysis of the merits of the case because class membership cannot be presently ascertainable. *Sheldon* at 453-54. Because class determinations generally involve considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action, the trial court must be able to make a reasoned determination of the certification issues. *Intratex* at 404. The supreme court has clarified this standard as follows:

A proposed class definition that rests on the paramount liability question cannot be objective, nor can the class members be presently ascertained; when the class definition is framed as a legal conclusion, the trial court has no way of ascertaining whether a given person is a member of the class until a determination of ultimate liability as to that person is made. . . . Certifying a fail-safe class inevitably creates one-sided results. If the defendant is found liable, class membership is then ascertainable and the litigation comes to an end. A determination that the defendant is not liable, however, obviates the class, thereby precluding the proposed class members from being bound by the judgment.

Intratex at 404-05.

In addition, using state-of-mind language in a class definition "serves as a shorthand method of alerting the court and the parties that there might be difficulty in identifying class members." *Sheldon* at 454, citing *Simer v. Rios*, 661 F.2d 655, 670 n. 25 (7th Cir. 1981). For example, *Sheldon* involved a class initially defined by the trial court as purchasers of certain vehicles whose peeling paint "was caused by a defective paint process," and then redefined by the court of appeals as the purchasers of certain vehicles with peeling paint "who allege the peeling or flaking was caused by a defective paint process." *Id.* at 448-49. The supreme court held that the trial court's definition created an impermissible "fail-safe" class, and that the court of appeals' definition was also defective because there were no realistic means for the trial court to determine which class members "allege that the peeling or flaking was caused by a defective paint process." *Id.* at 454-55. In other words, the trial court would have had to inquire into each proposed class member's state of mind to ascertain class membership under the approved definition. *Id.* at 454.

V. CONTESTING AN UNFAVORABLE TRIAL COURT DECISION ON CLASS CERTIFICATION – JURISDICTION FOR INTERLOCUTORY APPEAL

Section 51.014(a)(3) of the Texas Civil Practice and Remedies Code allows a party to appeal an interlocutory order that certifies or refuses to certify a class action. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(3). Included in this group of appealable interlocutory orders are those that change the fundamental nature of the class. See, e.g., *De Los Santos v. Occidental Chem. Corp.*, 933 S.W.2d 493, 495 (Tex. 1996) (holding that an interlocutory order that changed a certified class from opt-out to mandatory and created conflict between the class and its counsel altered the fundamental nature of the class and was appealable under the statute).

Recently, the Texas Supreme Court dismissed a class certification appeal based on its failure to satisfy the criteria under section 51.014(a)(3). *Bally's Total Fitness Corp. v. Jackson*, No. 99-1002, 2001 Tex. LEXIS 26 (Tex. April 19, 2001). In this case, Keith Jackson filed a class action lawsuit against Bally's Total Fitness. In his suit, Jackson claimed that Bally's violated several consumer protection statutes by charging customers fees that were deemed excessive by law. After the class was certified, several discovery disputes arose regarding class membership. These disputes delayed the delivery of class notice required under Rule 42(c). In spite of this delay and the resulting lack of notice, the trial court heard—and granted—Jackson's motion for partial summary judgment that Bally's had violated the Texas Consumer Credit Code and the DTPA. In response, Bally's filed two motions to decertify the class, complaining primarily that the partial summary judgment granted by the court should not have been determined before proper notice was delivered to the purported class members. Nevertheless, the trial court denied Bally's two motions.

To contest the result on the three motions—the partial summary judgment order and the two orders denying the requested decertification of the class—Bally's filed an interlocutory appeal in the San Antonio Court of Appeals. However, the court determined that it lacked jurisdiction under section 51.014(a)(3) because none of these orders fit the necessary criteria of the statute. This decision was affirmed by the Texas Supreme Court. The Court held that the interlocutory orders did not alter the fundamental nature of the class, as required by section 51.014(a)(3). Because the statute allows interlocutory appeals only of orders certifying or refusing to certify a class action, the appellate courts lacked jurisdiction to consider the three orders. See, e.g., *Union Pac. Resources Group, Inc. v. Hankins*, 2001 Tex. App. LEXIS 3966 (Tex. App.—El Paso June 14, 2001, no pet. h.) (denying jurisdiction under section 51.014(a)(3) to review three interlocutory orders: a trial plan order, an order to compile the supplemental clerk's record and transmit a record to the court of appeals, and an order denying appellant's request for a hearing on their motion for reconsideration of class certification and objections to a proposed supplemental class certification order).