EXHIBIT Q

APPENDIX OF NON-FEDERAL AND UNPUBLISHED FEDERAL AUTHORITIES CITED IN DEFENDANT DELL INC.'S REPLY IN SUPPORT OF ITS MOTION FOR ORDER DISMISSING PLAINTIFFS' SECOND AMENDED COMPLAINT WITH PREJUDICE AND STRIKING PLAINTIFFS' CLASS ACTION ALLEGATIONS

Court of Appeals of Texas,
Corpus Christi-Edinburg.

SOUTHWESTERN BELL TELEPHONE COMPANY, Appellant,
v.
MARKETING ON HOLD, INC. d/b/a Southwest Tariff Analyst, Appellee.

No. 13-03-287-CV.

Aug. 4, 2005.

Background: Auditor of telephone bills brought class action as customers' assignee to challenge telephone company's pass-through and collection of fees charged by municipalities. The 138th District Court, Cameron County, Roberto Garza, J., certified class. Company appealed.

Holdings: The Court of Appeals, Castillo, J., held that: (1) the auditor had standing and satisfied typicality requirement for claims of class representative; (2) the assignments were valid; (3) the auditor could adequately represent the interests of customers; (4) any reliance element did not defeat predominance of common issues; and (5) calculation of damages did not defeat predominance of common issues.

Affirmed and remanded.

West Headnotes

[1] Appeal and Error 949
30k949
Review of an interlocutory appeal from a class certification order is limited to determining whether the trial court's order constituted an abuse of discretion.

[2] Appeal and Error 946
30k946
In reviewing a trial court's decision under an abuse of discretion standard, the Court of Appeals must determine whether the trial court acted without reference to any guiding rules or principles.

[3] Appeal and Error 941
30k941
The exercise of discretion is within the sole province of the trial court, and an appellate court may not substitute its discretion for that of the trial judge.

[4] Appeal and Error 946
30k946
An "abuse of discretion" occurs only when the trial court reaches a decision that is so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.

[5] Parties 35.35
287k35.35
The trial court must conduct a rigorous analysis to determine whether class certification requirements have been met; this rigorous analysis includes indicating how the claims will likely be tried so that conformity with class action rule can be meaningfully evaluated. Vernon's Ann.Texas Rules Civ.Proc., Rule 42.

[6] Parties 35.35
287k35.35
Courts are to go beyond the pleadings and understand the claims, defenses, relevant facts, and applicable substantive law when determining whether the requirements for class certification have been met. Vernon's Ann.Texas Rules Civ.Proc., Rule 42.

[7] Appeal and Error 913
30k913
On class certification issues, the appellate court is not bound by presumption favorable to the trial court's ruling, and the appellate court must independently determine whether the requirements of class action rule have been fully satisfied. Vernon's Ann.Texas Rules Civ.Proc., Rule 42.

[8] Parties 35.5
287k35.5
Every class action must satisfy four threshold requirements: numerosity, commonality, typicality, and adequacy of representation. Vernon's Ann.Texas Rules Civ.Proc., Rule 42(a).

[9] Parties 35.13
287k35.13
Typicality requires that the claims or defenses of the representative parties are typical of the claims or defenses of the class. Vernon's Ann.Texas Rules Civ.Proc., Rule 42(a).

[10] Parties 35.13

287k35.13
A class representative must possess the same interests and suffer the same injury as unnamed or absent class members. Vernon's Ann.Texas Rules Civ.Proc., Rule 42(a).

[11] Parties 35.13
287k35.13
To be typical, class representatives' claims need not be identical, but must arise from the same event or course of conduct giving rise to the claims of other class members and must also be based on the same legal theories. Vernon's Ann.Texas Rules Civ.Proc., Rule 42(a).

[12] Parties 35.71
287k35.71
Auditor of telephone bills had standing as assignee of customers' claims against telephone company and satisfied typicality requirement for claims of class representative. Vernon's Ann.Texas Rules Civ.Proc., Rule 42(a).

[13] Assignments 22
38k22
Assignment of certain causes of action is per se void, as against public policy.

[14] Assignments 26
38k26

[14] Telecommunications 940(1)
372k940(1)
Municipal ordinances which permitted telephone company to pass fees to its customers and prohibited assignment of rights or privileges under ordinances without city's consent did not invalidate customers' assignments of claims that the company improperly passed the charges to customers; a customer's right to challenge the methodology as applied in implementing the pass-through was not derivative of the contract or ordinance limiting the ability of either the company or the city to make any assignment of its rights or privileges.

[15] Assignments 22
38k22
Assignments made prior to assignee's filing of lawsuit were not invalidated by statute permitting sale of an interest in a cause of action if the transfer was in writing; the statute was not a direct effort by the legislature to limit assignability of causes of action to only those situations where suit had already been filed. V.T.C.A., Property Code § 12.014(a).

[16] Parties 35.71
287k35.71
Permitting assignee of customers' claims against telephone company to function as the class representative would not violate public policy in suit for improper pass-through and collection of fees.

[17] Parties 35.71
287k35.71
Evidence supported conclusion that auditor of telephone bills could adequately represent the interests of customers in class action against telephone company for improper pass-through and collection of fees; the auditor had taken assignments of claims, and no conflict went to subject matter of the litigation. Vernon's Ann.Texas Rules Civ.Proc., Rule 42(a).

[18] Parties 35.13
287k35.13

[18] Parties 35.35
287k35.35
Adequacy of representation in class action is a question of fact left to the sound discretion of the trial court, and the trial court does not abuse its discretion in finding adequacy if there is evidence to support the finding. Vernon's Ann.Texas Rules Civ.Proc., Rule 42(a).

[19] Parties 35.13
287k35.13
Only a conflict that goes to the very subject matter of the litigation will defeat a finding of adequacy of class representative. Vernon's Ann.Texas Rules Civ.Proc., Rule 42(a).

[20] Parties 35.17
287k35.17
The test for establishing predominance of common issues is whether those issues will be the object of most efforts of the parties and the court, not whether common issues outnumber individual issues in the class action. Vernon's Ann.Texas Rules Civ.Proc., Rule 42(b)(3).

[21] Implied and Constructive Contracts 3
205Hk3

A person may recover under an unjust enrichment theory when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage.

[22] Implied and Constructive Contracts 3
205Hk3
Fraud is not a requisite component for a recovery on a theory of unjust enrichment.

[23] Implied and Constructive Contracts 3
205Hk3
Unjust enrichment is not a distinct independent cause of action, but a theory of recovery.

[24] Implied and Constructive Contracts 4
205Hk4
Unjust enrichment is based on the equitable principle that one who receives benefits unjustly should make restitution for those benefits.

[25] Implied and Constructive Contracts 4
205Hk4
To be entitled to restitution under a theory of unjust enrichment, the plaintiff must show the party sought to be charged had wrongfully secured a benefit or had passively received one which would be unconscionable for that party to retain.

[26] Parties 35.71
287k35.71
Any reliance element in causes of action for breach of express warranty and unjust enrichment did not defeat predominance of common issues in telephone customers' class action challenging pass-through and collection of fees charged by municipalities; any reliance would have been class-wide, not individualized, and would have affected each class member in the same manner. Vernon's Ann.Texas Rules Civ.Proc., Rule 42(b)(3).

[27] Parties 35.71
287k35.71
Calculation of damages did not defeat predominance of common issues in telephone customers' class action challenging pass-through and collection of fees charged by municipalities. Vernon's Ann.Texas Rules Civ.Proc., Rule 42(b)(3).

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Before Justices YANEZ, CASTILLO and GARZA.

OPINION

Opinion by Justice CASTILLO.

This interlocutory appeal is brought, pursuant to Texas Civil Practice and Remedies Code section § 51.014(a)(3), [FN1] from the trial court's order of May 6, 2003, certifying a class. We affirm.

FN1. Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(3) (Vernon Supp.2004-05).

I. Background

The underlying class action is brought on behalf of customers of Southwestern Bell Telephone, L.P. ("Southwestern Bell") for improper pass-through and collection of certain fees. The fees are initially assessed against Southwestern Bell under various city ordinances to compensate the cities for costs of administering public rights-of-way. The ordinances recognize Southwestern Bell's authority to pass the fees through to its telephone subscribers, but provide that Southwestern Bell is neither to profit nor to sustain any loss therefrom. The class charges that some fees were improperly "passed through" or charged to subscribers of certain services, specifically SmartTrunk, Digital Loop, and Hotel/Motel measured service (all designed for different classes of business customers).

Marketing on Hold, Inc., d/b/a Southwestern Tariff Analyst ("STA") is a company that audits its customers' telephone bills and represents them in seeking refunds from the service provider. In the course of those audits, STA discovered the improper

charges. Some of STA's customers assigned their claims to STA, [FN2] and STA then brought the underlying suit in its own name, seeking to be identified as class representative for nearly 7,000 customers. [FN3] STA itself was never a subscriber to the services in issue and never paid any of the disputed fees.

FN2. STA owns 100% of the claims, but the customers retain an overriding interest in 70% of any recovery realized by STA.

FN3. Claims brought by STA included breach of contract, unjust enrichment, breach of express warranty for services, and negligence per se.

The trial court held a four-day hearing on the issue of class certification. All parties were represented at the hearing and significant volumes of evidence were introduced and reviewed. The parties were given the opportunity to file additional and supplemental briefs, which the trial court reviewed and considered. The court issued a 28-page order on May 6, 2003, certifying the class. The class was defined to include subscribers to the services identified above, who "made payment(s) to Southwestern Bell...." The trial court found that the requisites of rule 42(a), numerosity, commonality, typicality and ***818** adequacy of representation, were satisfied. Tex. R. Civ. P. 42(a). Extensive discussion in the order is directed to the suitability of STA as a class representative. The court found STA to be a proper representative by virtue of its ownership of the assigned claims. [FN4] The court found no conflicts of interest between the representative and the class, or between sub-classes.

FN4. The trial court noted numerous depositions and testimony, none of which supported allegations of barratry or impropriety in securing the assignments.

The court also reviewed evidence and found that, under rule 42(b)(4) (Tex. R. Civ. P. 42(b)), questions of law and fact common to the members of the class predominated over any questions affecting only individual members, and that the class action was superior to other available methods to adjudicate the controversy. The trial court noted damages derived solely from economic injury, and found that evidence of those damages is susceptible to class-wide proof because billing practices of Southwestern Bell are consistent from customer to customer. The trial court further noted:

> Plaintiff [STA] is not seeking either consequential damages or punitive damages but is seeking economic damages in the form of a refund of the alleged overcharge. The collection of an overcharge, if any, can be determined by reference to the billing records ...

With respect to the claim of unjust enrichment, the trial court observed that a party must demonstrate that another obtained a benefit through fraud, duress or the taking of an undue advantage, but that plaintiff did not allege any fraud or duress. Therefore, the question of the taking of an undue advantage is a common issue which can be answered the same for all members of the class. The trial court also addressed the claim of breach of express warranty, finding that (1) Southwestern Bell presents its bills for services in substantially the same form to all its customers, including class members; (2) each bill contains a separate charge for municipal charges; (3) the bills, on their face, constitute representations that the bills are true and accurate; and (4) no independent inquiry is required into what representations were relied upon by each class member because the representation is uniform to all members of the class. [FN5] The trial court proceeded to review in detail its rationale for concluding that class certification was proper in the face of the challenges raised in this appeal.

FN5. The trial court further noted that "[t]he question of whether or not the bills themselves, and the individual items in them, constitute representations that the bills are accurate and can be relied on is a question that is common to all members of the class.... The legal effect of the representation on the bill that certain charges are due and owing is a question the Court will address at the appropriate time. The Court's ruling will affect all members of the class equally.... If the Court determines that the bill is not a written representation of its accuracy and does not constitute an express warranty, then that ruling will apply equally to all members of the class.... The questions involved in this legal theory are class wide questions susceptible to class wide proof."

II. Issues on Appeal

Southwestern Bell urges that the certification of the class was improper because the prerequisites of

rule 42 of the Texas Rules of Civil Procedure have not been satisfied. Southwestern Bell (1) challenges the class representative's standing as well as its ability to adequately represent the class; (2) challenges the predominance of common questions where (a) causes of action include the element of reliance, and (b) assessment of damages will require individualized review of customer ***819** bills and other records; and (3) contends that inherent conflicts of interest exist between (a) the class representative and class members, and (b) sub-groups of the class.

III. Standard of Review

[1][2][3][4] Our review of an interlocutory appeal from a class certification order is limited to determining whether the trial court's order constituted an abuse of discretion. Ford Motor Co. v. Ocanas, 138 S.W.3d 447, 451 (Tex.App.-Corpus Christi 2004, no pet.); see also Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 690-91 (Tex.2002). In reviewing a trial court's decision under an abuse of discretion standard, we must determine whether the trial court acted without reference to any guiding rules or principles. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241-42 (Tex.1985). The exercise of discretion is within the sole province of the trial court, and an appellate court may not substitute its discretion for that of the trial judge. Johnson v. Fourth Ct.App., 700 S.W.2d 916, 918 (Tex.1985). Rather, an abuse of discretion occurs only when the trial court reaches a decision that is "so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." Id. at 917.

Although we discuss the propriety of the class certification in light of the claims asserted by the named plaintiffs, we in no way evaluate the merits of these claims. See Intratex Gas Co. v. Beeson, 22 S.W.3d 398, 404 (Tex.2000) ("Deciding the merits of the suit in order to determine its maintainability as a class action is not appropriate.").

[5][6] The trial court must conduct a "rigorous analysis" to determine whether certification requirements have been met. Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 435 (Tex.2000). This rigorous analysis includes indicating how the claims will likely be tried so that conformity with rule 42 can be meaningfully evaluated. Schein, 102 S.W.3d at 690. Courts are to "go beyond the pleadings" and understand the "claims, defenses, relevant facts, and applicable substantive law" when determining whether the requirements of certification should be met. Bernal, 22 S.W.3d at 435.

[7] Typically, under this standard of review, the appellate court must indulge every presumption favorable to the trial court's ruling. Fidelity and Guar. Life Ins. Co. v. Pina, 165 S.W.3d 416, 422 (Tex.App.-Corpus Christi 2005, no pet. h.) [FN6] (citing Graebel/Houston Movers, Inc. v. Chastain, 26 S.W.3d 24, 29 (Tex.App.-Houston [1st Dist.] 2000, pet dism'd w.o.j.)). On certification issues, however, the appellate court is not bound by this presumption and must independently determine whether the requirements of rule 42 have been fully satisfied. Pina, 165 S.W.3d at 422; Ocanas, 138 S.W.3d at 451; see also Schein, 102 S.W.3d at 691; Bernal, 22 S.W.3d at 435 (determining that actual compliance with rule 42 "must be demonstrated; it cannot be presumed").

FN6. Fidelity and Guar. Life Ins. Co. v. Pina, 165 S.W.3d 416 (Tex.App.-Corpus Christi 2005, no pet. h.) has been designated as an opinion.

IV. Rule 42

[8] Under rule 42(a), every class action must satisfy four threshold requirements: numerosity, commonality, typicality, and adequacy of representation. See Tex.R. Civ. P. 42(a). In addition, a proposed class action must also satisfy at least one of the subparts of rule 42(b). See Tex. R. Civ. P. ***820** 42(b). The trial court certified the class under rule 42(b)(4), [FN7] which permits class actions to be maintained when common questions of law or fact predominate and a class action is superior to other forms of adjudication. See id.

FN7. At the time this class was certified, rule 42 contained four subdivisions. On January 1, 2004, the amendments to Rule 42(b), which now contains only three subdivisions, became effective. See Tex. R. Civ. P. 42(b). At the time of certification, rule 42(b)(4) read as follows: (4) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and 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) (1977, amended 2004).

V. Analysis

After reviewing the record, we conclude that the trial court conducted the requisite "rigorous analysis," demonstrated in the detailed order which included its findings of fact and conclusions of law. We now review the challenged issues, applying the abuse of discretion standard, to independently determine whether the requirements of rule 42 have been fully satisfied, i.e., demonstrated and not presumed. See Ocanas, 138 S.W.3d at 451; see also Schein, 102 S.W.3d at 691; Bernal, 22 S.W.3d at 435.

A. The Class Representative

Southwestern Bell challenges the typicality of STA as class representative, and its standing to represent the class. STA acquired ownership of causes of action by virtue of assignments and is not, independent of those assignments, a member of the class. [FN8] The assignments are from businesses falling within two of the three sub-classes, and pre-date the commencement of this litigation.

FN8. Prior to this litigation, there was a separate case involving virtually the same facts and circumstances, Mireles v. Southwestern Bell Tel. Co., Cause No. 98-07-3003-E, in the 357th Judicial District Court, Cameron County, Texas. The putative class in Mireles included both residential and business customers of Southwestern Bell. STA was identified as a class member in that matter. (STA's brief states only that STA was a class member, "as were all of the businesses which assigned causes of action to STA.") The settlement in Mireles involved an agreement which did not encompass either distributed cash or service credits to class members, but which did encompass a broad release. STA formally objected to the settlement because it would eliminate claims of the business customers, filed a petition in intervention seeking to represent that group, and contacted business customers of STA who were members of that group. Five of those customers, for whom STA provided auditing services, gave STA an assignment of their claims. Prior to entry of the settlement, the parties in that suit agreed to modify the release so that it would not affect the business customers' claims, which were then "carved out" and brought separately in this litigation.

Southwestern Bell contends that (1) STA lacks standing because it is not, independent of the assignments, a member of the class and has sustained no class injury; (2) the assignments are (a) void under the municipal ordinances permitting the pass-through of charges, (b) unenforceable under section 12.014(a) of the Texas Property Code (Tex. Prop. Code Ann. § 12.014(a) (Vernon 2004)), and (c) void as against public policy. Southwestern Bell also challenges ***821** the adequacy of representation by STA, in light of asserted conflicts of interest.

1. Typicality or Standing

[9][10][11] Typicality requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Bernal, 22 S.W.3d at 433. A class representative must possess the same interests and suffer the same injury as unnamed or absent class members. Gen. Tel. Co. v. Falcon, 457 U.S. 147, 156, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982); State Farm Mut. Auto. Ins. Co. v. Lopez, 45 S.W.3d 182, 191 (Tex.App.-Corpus Christi 2001), rev'd on other grounds, 156 S.W.3d 550 (Tex.2004). To be typical, class representatives' claims need not be identical, but must arise from the same event or course of conduct giving rise to the claims of other class members and must also be based on the same legal theories. Weatherly v. Deloitte & Touche, 905 S.W.2d 642, 653 (Tex.App.-Houston [14th Dist.] 1995, writ dism'd w.o.j.). Other courts have described this as a requisite "nexus between the injury suffered by the representative and the injuries suffered by other members of the class." Dresser Indus., Inc. v. Snell, 847 S.W.2d 367, 372 (Tex.App.-El Paso 1993, no writ).

[12] Southwestern Bell argues that STA's status is not only atypical, but that STA lacks standing,

inasmuch as STA was never a member of the class in its own right, and thus never sustained any of the injuries for which the suit is brought. STA counters that, by virtue of the assignments, it "stands in the shoes" of the assignors and has every entitlement to pursue the interests it now owns.

[13] The court, in State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696, 705-08 (Tex.1996), extensively explored the assignability of causes of action. While causes of action may be generally assignable, with notable exceptions, [FN9] the Gandy court nevertheless observed:

> FN9. Assignment of certain causes of action are per se void, as against public policy. See State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696, 707-11 (Tex.1996).

> Practicalities of the modern world have made free alienation of choses in action the general rule, but they have not entirely dispelled the common law's reservations to alienability, or displaced the role of equity or policy in shaping the rule. Even today, the general rule is that a contractual assignment may be "inoperative on grounds of public policy."

Gandy, 925 S.W.2d at 707 (citing Restatement (Second) Of Contracts § 317(2)(b) (1981). The Gandy court, noting that the Restatement identifies numerous limitations on alienation of choses in action, continued:

> The increase in litigation caused by assignments remains a matter of concern. So does the effect of alienability on the parties and circumstances in the original transaction or occurrence. As Holmes succinctly summarized, "the history of early law everywhere shows that the difficulty of transferring a mere right was greatly felt when the situation of fact from which it sprung could not also be transferred. Analysis shows that the difficulty is real."

Id. (citing Oliver W. Holmes, Jr., THE COMMON LAW 340, 409 (Boston; Little, Brown, and Company 1881)).

Texas courts recognize that many causes of action are property rights which may be assigned. Pineda v. PMI Mortgage Ins. Co., 843 S.W.2d 660, 675 (Tex.App.-Corpus Christi 1992, writ denied). However, assignability ***822** as a general proposition is not in contention with respect to this issue as raised by Southwestern Bell. Rather, it is the ability of the assignee STA to represent an entire class in an action where it has not personally sustained any injury, and in which it would not participate at all but for the assignments.

STA cites to federal cases from Indiana, Michigan, and various other jurisdictions for the proposition that an assignee may properly stand in the shoes of the assignor and represent the interests of the class. [FN10]

> FN10. See Jackson v. Thweatt, 883 S.W.2d 171, 174 (Tex.1994) (cert. denied sub nom.) (concluding that assignees, as the FDIC's successors in interest, were "entitled to the benefits of section 1821(d)(14) pursuant to the common law maxim that 'an assignee stands in the shoes of his assignor.' ").

We note that application of Texas Rule of Civil Procedure 42, dealing with class actions, has been modeled after Federal Rule of Procedure 23, and "federal decisions and authorities interpreting current federal class action requirements are persuasive in Texas actions." Ford Motor Co. v. Sheldon, 22 S.W.3d 444, 452 (Tex.2000). STA directs us to several federal cases which support that an assignee may serve as a class representative.

McDaniel v. N. Am. Indemnity, 2003 WL 260704, 2003 U.S. Dist. LEXIS 1663 (S.D.Ind. Jan. 27, 2003) involved a class action brought by participants or beneficiaries of welfare benefit plans. Id. 2003 WL 260704 at *2, *2-*3. Claims included breach of fiduciary duties and other ERISA violations. Id. 2003 WL 260704 at *2, *5. Pedcor, one of the identified class representatives and an assignee of claims for benefits, brought the same claims as other members of the class. Id. 2003 WL 260704 at *3-*4, *10-*11. "Each of Plaintiffs' claims arises from Defendants' alleged course of conduct toward the class, and each of Plaintiffs' claims is based upon the same legal theory as the class members. Plaintiffs' claims are typical of the class, and the typicality requirement of Rule 23(a) is satisfied." Id. 2003 WL 260704 at * 4, *11. The court found no problem with Pedcor serving as a class representative, despite argument that it was not typical by virtue of the assignments. Id. 2003 WL 260704 at *3-*4, *10-*11.

In re Cardizem CD Antitrust Litigation, 200

F.R.D. 297 (E.D.Mich.2001) dealt with antitrust claims under the Sherman Antitrust Act. Id. at 300. Plaintiffs seeking certification of the class were either direct purchasers, or their assignees. Id. The court focused not on the characteristics of the class representative, but on the claims asserted to assess typicality:

> Typicality refers to the nature of the claims of the representative, not the individual characteristics of the plaintiff.... As one court noted: 'there is nothing in Rule 23(a)(3) which requires named plaintiffs to be clones of each other or clones of other class members.'
>
> * * *
>
> The assignment issue Defendants raise presents a question of law that can readily be resolved by the Court without skewing the focus of the litigation or creating a significant danger of distracting [the identified class representative's] ability to pursue the interests of the absent class members. Contrary to Defendants' arguments, it does not present a unique defense that will consume the merits of this litigation.

Id., 200 F.R.D. at 304-05 (citations omitted). Because the class representative stood in the shoes of the absent class members, and its claims arose from the ***823** same agreement that gave rise to the other class members' claims, Id. at 305, typicality was satisfied and the class was certified. [FN11]

> FN11. STA also cites Pavano v. Shalala, 95 F.3d 147 (2d Cir.1996), out of New York, in which plaintiffs included Medicare beneficiaries "and their assignees." Id. at 148. Typicality of the class representative was not raised as an issue; the class was certified.

In Hobbs v. Blue Cross Blue Shield of Alabama, 276 F.3d 1236 (11th Cir.2001), physicians' assistants brought state insurance violation claims for failure to pay for services. Id. at 1239. The matter was transferred to federal court under the ERISA preemption provisions, Id. at 1239-40, where it was contended that preemption did not apply because this was not an ERISA claim--the physicians assistants lacked standing to proceed under ERISA as they were not participants or beneficiaries of an employee health benefit plan. Id. at 1240. The eleventh circuit noted it had previously held that nothing in the federal statutes prohibited the assignment of these types of rights, which provided a plaintiff with derivative standing. Id. at 1241. However, in Hobbs, the court faced a situation which was the opposite of the situation presented here: because there was no evidence of assignments to the physicians assistants, the class action could not proceed. Id. at 1241.

We conclude that the result reached in Hobbs does not support an argument that assignees may not act as class representatives. Id. As the courts did in these federal class actions, we have focused on the nature of the claims brought, rather than the characteristics of the class representative. In light of the deference we accord to the trial court's "rigorous analysis" and decision, and in light of our own analysis, we are in accord with the trial court that (1) the claims brought are typical and substantially similar to claims advanced on behalf of all class members, and (2) STA has standing, by virtue of the assignments, to bring those claims. [FN12]

> FN12. We note the trial court further expressly found "nothing improper about the methods by which Plaintiff acquired the assignments."

2. Applicability of the Ordinances to the Class Representative

[14] Southwestern Bell contends that language contained in the municipal ordinances, which authorize Southwestern Bell's pass-through of the various fees to its customers, invalidates the assignments to STA. Language in the ordinance included in the record, tendered as typical of the various applicable ordinances, provides: "This Ordinance and any rights or privileges hereunder shall not be assignable to any other entity without the express consent of the CITY." Southwestern Bell argues that because the class members' claims derive from and depend on the criteria in each ordinance, the assignments are barred by those ordinances. [FN13]

> FN13. Relevant claims include that Southwestern Bell "is charging so-called 'municipal charges' on certain customer services charges ... when such customer services charges do not satisfy all of the required conditions under the applicable ordinances or franchise agreements."

The pleadings allege that Southwestern Bell has

improperly "passed-through" various charges to its customers. We reject the contention that a customer's right to challenge the methodology applied in implementing the "pass-through" is derivative of the contract or ordinance limiting the ability of either Southwestern Bell or the City to make any assignment of its ***824** rights or privileges. [FN14]

> FN14. We further note that a suit brought against Southwestern Bell for improper levying of charges is not a "right or benefit" of Southwestern Bell under the ordinance.

> We are required to discern and give effect to the intent of the enacting body. To achieve this goal, we must first attempt to discern that intent must come [sic] from the plain language of the ordinance. Our obligation, however, to enforce the plain language of the ordinance does not authorize us to employ a "bloodless literalism in which text is viewed as if it had no context." We are required to consider the context and the consequences that would follow from a particular interpretation, and we must avoid interpretations that would produce absurd results or render other language mere surplusage.

City of Pearland v. Reliant Energy Entex, 62 S.W.3d 253, 255 (Tex.App.-Houston [14th Dist.] 2001, pet. denied) (citations omitted).

The fact that the ordinance permits a "pass through" of the fees does not subject all customers of Southwestern Bell who are subsequently billed for the "pass-through" fees to the restrictive terms of the ordinance that are binding upon either Southwestern Bell or the City.

3. The Texas Property Code

[15] Southwestern Bell urges that section 12.014 of the property code precludes the assignment of a cause of action prior to the date on which suit is filed. See Tex. Prop. Code Ann. § 12.014(a) (Vernon 2004). The statute provides that "a judgment or part of a judgment of a court of record or an interest in a cause of action on which suit has been filed may be sold, regardless of whether the judgment or cause of action is assignable in law or equity if the transfer is in writing." Id.

Southwestern Bell contends that this statute is an express effort by the legislature to limit assignability of causes of action to only after a suit is filed. The case relied upon by Southwestern Bell, McLaury v. Watelsky, 39 Tex.Civ.App. 394, 87 S.W. 1045 (1905, no writ), clearly dealt with the assignment of a cause of action on which suit had already been brought. Id. at 1046. Our sister court observed that under the old common law, causes of action for personal injuries were not assignable at all. Id. at 1049. "It has been held that under said article [the new statute] such an assignment to attorneys as compensation for prosecuting the suit, is valid as against those having notice, though made before a suit was commenced, and not filed or noted on the docket." Id.

We do not find that the statute in issue here was a direct effort by the legislature to limit assignability of causes of action to only those situations where suit has already been filed, but, rather, that its purpose was to require adequate notice of any such assignment:

> In the meantime the Legislature, in 1889, had enacted article 6833, [FN15] which provided that the sale of any cause of action or interest therein after suit had been filed should be evidenced by written transfer filed among the papers of the cause, and that said article should apply to all suits, claims, and causes of action, whether assignable in law and equity, or not. This statute is one of notice, and is also legislative recognition of the right to barter and sell interests in ... suits.

> FN15. We note that Texas revised civil statute article 4647 (enacted in 1895) and article 6833 (enacted in 1911) are both predecessor statutes to Tex. Prop. Code Ann. § 12.014(a) (Vernon 2004). ***825** McCloskey v. San Antonio Traction Co., 192 S.W. 1116, 1119 (Tex.Civ.App.-San Antonio 1917, writ ref'd) (citing Gulf, Colorado & Santa Fe Ry. Co. v. Wooten, 10 Tex.Civ.App. 54, 30 S.W. 684 (1895, writ dism'd) ("the Texas statute regulating the transfer of judgments, causes of action, and interests therein, is merely one of notice")). [FN16]

> FN16. The McCloskey court continued: From the foregoing, there can be no doubt that causes of action for personal injuries are property subject to sale, barter, contract, or gift as any other property, and that the common and civil law inhibition and condemnation of dealing in causes of action is obsolete in Texas. Since a claimant has the right to

> assign all or any part of his cause of action, and all persons have the right to buy or acquire the same or any part thereof, it is not unlawful for the appellant to acquire an interest in any claim or claims. McCloskey v. San Antonio Traction Co., 192 S.W. 1116, 1120 (Tex.Civ.App.-San Antonio 1917, writ ref'd); see also Hunter v. B.E. Porter, Inc., 81 S.W.2d 774, 775 (Tex.Civ.App.-Dallas 1935, no writ).

We conclude that nothing in the statute cited by Southwestern Bell precludes or invalidates the assignments at issue in this matter simply because they were made prior to the filing of suit.

4. Public Policy

[16] Southwestern Bell argues that permitting an assignee to function as the class representative in the circumstances of this case will open the floodgates to improper solicitation of causes of action and "entrepreneurial" class actions. We note the trial court examined this issue at length, finding that (1) STA only took assignments from pre-existing customers, (2) those customers were all previously members of the Mireles class action from which the claims in this case were carved, and (3) STA did not improperly solicit the customers. The trial court concluded, in detailed findings reflecting a considered and rigorous analysis, that "under the facts of this case, the dangers asserted by the Defendant are unfounded." The Texas Supreme Court has identified limited situations in which an assignment should be declared void as against public policy. [FN17] None of those situations are presented under the facts of this case. We decline to overrule the trial court's findings on the basis of Southwestern Bell's public policy arguments.

> FN17. See Gandy, 925 S.W.2d at 707-11; see also PPG Indus., Inc. v. JMB/Centers Partners, Ltd., 146 S.W.3d 79, 87 n. 31 (Tex.2004) (noting the distinction between DTPA claims, which are personal and punitive, and warranty claims, which are property-based).

5. Adequacy of Representation

[17] Southwestern Bell argues that STA is inadequate as a class representative for several reasons. First, it argues there is inherent antagonism between STA's representation of all the various class members, because payment or credit to one group will necessarily entail additional charges to other portions of the group when any charges found to have been improper are reallocated amongst the customers. Southwestern Bell also argues that inherent conflicts exist because (1) STA has only a financial motivation to pursue the class action and, therefore, will not be amenable to alternative non-monetary remedies; (2) assignments given to STA do not include the group of business interests who paid for the Hotel/Motel measured service, and STA therefore cannot be relied upon to adequately represent that sub-class; and (3) a corporate class representative is inappropriate.

[18][19] Adequacy of representation is a question of fact left to the sound discretion ***826** of the trial court, and the trial court does not abuse its discretion in finding adequacy if there is evidence to support the finding. Farmers Ins. Exch. v. Leonard, 125 S.W.3d 55, 66 (Tex.App.-Austin 2003, pet. denied) (citing Glassell v. Ellis, 956 S.W.2d 676, 681-82 (Tex.App.-Texarkana 1997, pet. dism'd w.o.j.). Only a conflict that goes to the very subject matter of the litigation will defeat a finding of adequacy. Id. (citing Nissan Motor Co., Ltd. v. Fry, 27 S.W.3d 573, 583 (Tex.App.-Corpus Christi 2000, pet. denied)).

The trial court, after a rigorous analysis and four days of hearing and testimony, made several express findings, including that:

(1) Evidence of STA's knowledge and expertise about the billing procedures and information retrieval systems of Southwestern Bell gives STA a superior ability to pursue this litigation and supervise activities of class counsel;

(2) STA has taken assignments of claims ranging from small to large, STA therefore has an interest in asserting the rights of all members of the putative class, and "there is sufficient evidence to rule that the interests of STA are aligned with and not antagonistic to unnamed putative class members;"

(3) Claims related to the Hotel/Motel business subclass arise out of the same unauthorized charge of municipal fees for services as the claims advanced for the rest of the class, are substantially similar to the claims of the putative classes as a whole, there is no evidence of any conflict between the subclasses, and the claims are not competing;

(4) There is no basis for allegations of impropriety or barratry on the part of individual employees/ experts of STA, including Mr. Wilder, Mr. Shelton, [FN18] and Mr. Clapsaddle, these individuals can adequately speak for STA as representative of the class, and defenses of Southwestern Bell can be resolved without skewing the focus of the litigation or degrading STA's ability to pursue interests of the absent class members; [FN19]

FN18. Southwestern Bell made no attack on the credibility of Mr. Shelton, STA's president, as a witness.

FN19. The trial court found "no evidence that these issues [suitability of Mr. Wilder and Mr. Clapsaddle] are relevant to the claims of the litigation such that they could become the focus of the litigation to the detriment of the actual class claims."

(5) There is no basis for finding a conflict or antagonism between STA and the rest of the class, and any alleged intra-class conflict is too speculative and hypothetical to bar class certification;
(6) Sufficient evidence was presented to find that "STA will vigorously prosecute this cause of action on behalf of the putative class as class representative," and that, but for the efforts of STA, the class members' claims would have been included in the Mireles settlement which would have paid them nothing.

The record contains evidence, including hearing and deposition testimony, to support the trial court's findings as to adequacy. [FN20] We conclude there is no conflict going "to the very subject matter of the litigation," see Leonard, 125 S.W.3d at 66, and we will not, on this basis, disturb the ***827** conclusion of the trial court that STA can adequately represent the interests of absent class members as class representative. [FN21]

FN20. We note Southwestern Bell's arguments that the persons who represent STA are "facially inadequate" to represent the interests of the class and control the litigation. The trial court squarely addressed these contentions and in its order made specific and extensive findings that dispensed with objections pertaining to Wilder, Shelton and Clapsaddle, finding no impropriety or barratry, that Shelton has been an active and credible participant, and that STA has and will continue to vigorously pursue the interests of the class.

FN21. In addition, we find no basis for the contention that a corporation may not serve as a class representative.

B. Predominance Issues

Even if all requisites of rule 42(a) are satisfied, STA is required to demonstrate that a class action is maintainable because it satisfies one of the requisites of rule 42(b). See Tex. R. Civ. P. 42(a); 42(b)(3). [FN22] In this suit, STA has argued, and the trial court concluded, that a class action is appropriate because common issues of fact and law predominate. Southwestern Bell argues, to the contrary, that the litigation effort will be predominated by individualized rather than common inquiries and analyses, both as to liability and as to damages. It argues that (1) causes of action for breach of express warranty and fraud (as part of the unjust enrichment claim) include the element of reliance which militates against a class action, and (2) damages cannot be determined absent an individualized review and analysis of each class member's own billings and payments. [FN23]

FN22. See n. 5 above.

FN23. We note Southwestern Bell also argues that core liability issues "will most likely be a question of law for the court, or at least a mixed question of law and fact, that can be resolved with a minimum of proof and effort. The bulk of the litigation effort will be devoted to determining and assessing damages, if any."

[20] We note that predominance is one of the most stringent requirements to be satisfied. Bernal, 22 S.W.3d at 433-35. The test for establishing predominance of common issues is whether those issues will be the object of most of the efforts of the parties and the court, not whether common issues outnumber individual issues. Id. at 434.

1. The Element of Reliance

Southwestern Bell argues that the existence of reliance as an element precludes a finding of

predominance of common issues. Several causes of action are identified in the live pleadings, including unjust enrichment and breach of express warranty.

Reliance may be a requisite element of a claim for breach of express warranty.

> While 'particular' reliance may not be necessary, we have held several times that something rather like it is. The basis-of-the-bargain requirement 'loosely reflects the common-law express warranty requirement of reliance,' and 'reliance is also not only relevant to, but an element of proof of, plaintiffs' claims of breach of express warranty (to a certain extent).

PPG Indus., Inc. v. JMB/Houston Centers Partners, Ltd., 146 S.W.3d 79, 99 (Tex.2004). [FN24]

> FN24. In PPG, the majority noted the distinctions between DTPA claims, which are personal and punitive, and warranty claims, which are property-based and therefore assignable. PPG Indus., Inc. v. JMB/Houston Centers Partners, Ltd., 146 S.W.3d 79, 87-92 (Tex.2004).

[21][22][23][24][25] Southwestern Bell also asserts that reliance is a requisite element of the cause of action for unjust enrichment. We agree that a person may recover under an unjust enrichment theory when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage. Heldenfels Bros., Inc. v. City of Corpus Christi, 832 S.W.2d 39, 41 (Tex.1992). Fraud is not a requisite component for such a recovery. Indeed, unjust enrichment ***828** is not a distinct independent cause of action, but a theory of recovery. Mowbray v. Avery, 76 S.W.3d 663, 679 (Tex.App.-Corpus Christi 2002, pet. denied). Unjust enrichment is based on the equitable principle that one who receives benefits unjustly should make restitution for those benefits. Villarreal v. Grant Geophysical, Inc., 136 S.W.3d 265, 270 (Tex.App.-San Antonio 2004, pet denied); Mowbray, 76 S.W.3d at 679; Bransom v. Standard Hardware, Inc., 874 S.W.2d 919, 927 (Tex.App.-Fort Worth 1994, writ denied). To be entitled to restitution under a theory of unjust enrichment, the plaintiff must show the party sought to be charged had wrongfully secured a benefit or had passively received one which would be unconscionable for that party to retain. Villarreal, 136 S.W.3d at 270; Matagorda County v. Texas Ass'n of Counties County Gov't Risk Mgmt. Pool, 975 S.W.2d 782, 785 (Tex.App.-Corpus Christi 1998), aff'd, 52 S.W.3d 128 (Tex.2000). The taking of an undue advantage does not necessarily encompass the element of reliance.

[26] Even if we assume, without deciding, that reliance is a requisite element of one of these claims, a class action is not necessarily defeated. The issue is whether that element will become the focus of the litigation, consuming the attention of the parties and the court and thereby defeating the predominance of common issues. Bernal, 22 S.W.3d at 434. Here, Southwestern Bell asserts that presentation of its bills to customers, which include a charge for franchise or municipal fees, is a representation that the charge is due and owing, and one upon which customers necessarily relied. Even if true, it is clear that such reliance would have been class-wide, not individualized. We agree with the trial court that any such reliance would have affected each class member in the same manner, [FN25] and we therefore conclude that neither the cause of action for breach of express warranty nor the theory of unjust enrichment is a bar to certification of the class.

> FN25. The trial court extensively analyzed and made findings with respect to these reliance issues, including the following: (1) billing procedures are uniform for each member of the class; (2) whether or not Southwestern Bell took an undue advantage is a common issue to be answered the same for all members of the class; (3) Southwestern Bell presents bills for services in substantially the same form to all its customers; (4) any representation based on those bills is a written representation which is uniform to all members of the class; and (5) if the charges were unauthorized for one member, they were unauthorized for all. In short, the trial court found these to be common issues to be resolved by the trier of fact.

2. Assessment of Damages

[27] Southwestern Bell also urges that, in the event of a finding of liability, any calculation of damages will require such an individualized analysis of each customer's bill and payment schedule that any predominance of common issues will be defeated. A long list of potential individualized inquiries is suggested by Southwestern Bell. However, those contentions were directly addressed

at the certification hearings. Testimony was presented that a computer program can be constructed to review the bills and payments and perform the requisite mathematical calculations to determine damages and their allocation to class members. Southwestern Bell rejects that testimony and contends it is entitled to a fair opportunity to individual determination of damages for each of the claims. Southwestern Bell certainly retains the right to dispute accuracy of calculations generated by a computer model. Nevertheless, the trial court concluded that:

> ***829** [I]nformation required for the identification of class members, the determination of the amount of unauthorized municipal charges, if any, collected by Defendant from each class member, and the calculation of damages, is available in electronically or visually recoverable form from SWBT [Southwestern Bell] records. Extensive testimony was introduced on the subject of the information which might not be available through defendants' records in electronic format.... After evaluating the testimony presented by both sides, the Court finds that the accumulation of evidence from Defendants' records is manageable and can be accomplished without undue delay. The Court finds that the records of Defendant can be used to identify members of the class and calculate damages should that become necessary.

We remain mindful that our role is to indulge every presumption favorable to the trial court's ruling. Pina, 165 S.W.3d at 422 (citing Graebel/ Houston Movers, Inc. v. Chastain, 26 S.W.3d 24, 29 (Tex.App.-Houston [1st Dist.] 2000, pet. dism'd w.o.j.)), and then not to be bound by that presumption, but to independently determine whether the requirements of rule 42 have been fully satisfied. Id.; Ocanas, 138 S.W.3d at 451; see also Schein, 102 S.W.3d at 691; Bernal, 22 S.W.3d at 435 (determining that actual compliance with rule 42 "must be demonstrated; it cannot be presumed").

We conclude, based upon our independent review, that the trial court performed a rigorous analysis of the various aspects that must be satisfied before a class action can be certified under rule 42, that the trial court found a basis in the evidence for its conclusions and findings, that the trial court did not err as a matter of law in reaching its conclusions, and that the class was properly certified. [FN26] We make no conclusions as to the merits of any of the claims presented.

> FN26. We also note the trial court's attention to how the matter would be tried and find that it adequately presented a viable trial plan.

VI. Conclusion

We affirm the order of the court certifying the underlying matter as a class action and remand for further proceedings on the merits.

170 S.W.3d 814

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EXHIBIT R

APPENDIX OF NON-FEDERAL AND UNPUBLISHED FEDERAL AUTHORITIES CITED IN DEFENDANT DELL INC.'S REPLY IN SUPPORT OF ITS MOTION FOR ORDER DISMISSING PLAINTIFFS' SECOND AMENDED COMPLAINT WITH PREJUDICE AND STRIKING PLAINTIFFS' CLASS ACTION ALLEGATIONS

Court of Appeals of Texas,
Houston (1st Dist.).

Carl WALL and Thomas E. Swaney, Individually and on Behalf of all Other Similarly Situated Consumers, Appellants,
v.
PARKWAY CHEVROLET, INC. and Mac Haik, G.P., LLC, d/b/a Mac Haik Ford, Appellees.

No. 01-03-00005-CV.

Oct. 28, 2004.

Background: Car buyers brought action against two car dealerships for Deceptive Trade Practice Act (DTPA) violations, alleging that they were charges a $199 "fee" for the purchase of a benefits package consisting of coupons for services. Buyers brought motion to certify class action. The 61st District Court, Harris County, John Donovan, J., denied the motion. Buyers appealed.

Holdings: The Court of Appeals, Evelyn V. Keyes, J., held that: (1) there was no commonality of issues so that claims against dealers could be tried together; (2) common issues did not predominate over individual issues in connection with one dealership; and (3) questions of fact requiring individualized inquiry predominated over any issues common to the class as to other dealership.

Affirmed.

West Headnotes

[1] Parties 35.5
287k35.5
Every class action must satisfy four threshold requirements: (1) numerosity, in that the class is so numerous that joinder of all members is impracticable, (2) commonality, in that there are questions of law or fact common to the class, (3) typicality, in that the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) adequacy of representation, in that the representative parties will fairly and adequately protect the interests of the class. Vernon's Ann.Texas Rules Civ.Proc., Rule 42(a).

[2] Appeal and Error 949
30k949
Review of an interlocutory appeal from a denial of a motion for class certification is limited to determining whether the trial court's denial of the motion constituted an abuse of discretion. Vernon's Ann.Texas Rules Civ.Proc., Rule 42.

[3] Parties 35.17
287k35.17
When a predominance-of-common-questions class action is asserted, the commonality determination is subsumed under the predominance determination. Vernon's Ann.Texas Rules Civ.Proc., Rule 42(a).

[4] Parties 35.17
287k35.17
"Common questions" are those questions of law or fact common to the class. Vernon's Ann.Texas Rules Civ.Proc., Rule 42(a).

[5] Parties 35.17
287k35.17
A common question exists when the answer as to one class member is the same as to all. Vernon's Ann.Texas Rules Civ.Proc., Rule 42(a).

[6] Parties 35.17
287k35.17
Common questions that do not produce common answers do not satisfy class action rule requiring predominance of common questions. Vernon's Ann.Texas Rules Civ.Proc., Rule 42(a).

[7] Parties 35.17
287k35.17
A three-step inquiry is required to determine whether common issues predominate in a proposed class action lawsuit: the trial court must (1) identify the substantive issues that will control the outcome of the case, a requirement which implies that the court must correctly identify the elements of each of the plaintiffs' causes of action, (2) assess which issues will predominate in the trial of the merits of the case, and (3) determine whether the predominating issues are, in fact, common to the class.

[8] Parties 35.17
287k35.17
Common questions of fact or law predominate over individual issues in a proposed class action if

common issues of law or fact will be the object of most of the efforts of the litigants and the courts. Vernon's Ann.Texas Rules Civ.Proc., Rule 42(a).

[9] Antitrust and Trade Regulation 134
29Tk134
(Formerly 92Hk34, 92Hk4 Consumer Protection)
To prevail under the Deceptive Trade Practices Act (DTPA), a plaintiff must show that (1) the plaintiff was a consumer, (2) the defendant committed, among other things, a "laundry-list" violation on which the plaintiff detrimentally relied or any unconscionable action or course of action, and (3) the wrongful act was a producing cause of the plaintiff's economic or mental-anguish damages. V.T.C.A., Bus. & C. §§ 17.46(b), 17.50(a).

[10] Antitrust and Trade Regulation 135(1)
29Tk135(1)
(Formerly 92Hk4 Consumer Protection)
To prove unconscionability under the Deceptive Trade Practices Act (DTPA), a plaintiff must prove (1) an act or practice that, (2) to a person's detriment, (3) takes advantage of his lack of knowledge, ability, experience, or capacity, (4) to a grossly unfair degree; the plaintiff must show what the consumer could or would have done if he had been informed. V.T.C.A., Bus. & C. § 17.46.

[11] Parties 35.71
287k35.71
There was no commonality of issues between two subclasses which brought class actions against two automobile dealers for Deceptive Trade Practice Act (DTPA) violations so that claims against dealers could be tried together; the two dealers used different terms to describe their benefit packages, made different oral and written and disclosures, charged different amounts for their coupon books, and offered different coupons to their customers, running from different dates, by methods that varied over time. V.T.C.A., Bus. & C. § 17.46; Vernon's Ann.Texas Rules Civ.Proc., Rule 42(a).

[12] Parties 35.71
287k35.71
Common issues did not predominate over individual issues in proposed class action against automobile dealership for violations of Deceptive Trade Practices Act (DTPA) in connection with alleged "fee" which dealership charged vehicle customers for benefits package; dealership contended that it explained numbers behind each customer's purchase order and presented evidence that class representative could and did decline to purchase benefits package when he purchased a second car, and there was evidence that some buyers could have wanted the package, as the alleged benefits may have outweighed the cost. V.T.C.A., Bus. & C. § 17.46; Vernon's Ann.Texas Rules Civ.Proc., Rule 42(a).

[13] Parties 35.71
287k35.71
Questions of fact requiring individualized inquiry predominated over any issues common to the class in proposed class action against car dealership for violations of the Deceptive Trade Practices Act (DTPA) in connection with alleged "fee" charged for benefits package; dealership alleged that its sales people were trained to explain the charge, that some buyers were required to sign disclosure forms as to the packages, that many buyers were satisfied with the packages, and even sought them out, and that many buyers redeemed benefits coupons. V.T.C.A., Bus. & C. § 17.46; Vernon's Ann.Texas Rules Civ.Proc., Rule 42(a).

***100** Curt M. Langley, H. Victor Thomas, Richard E. Griffin, Fred A. Simpson, Jackson Walker L.L.P., Houston, for Appellant.

Henry L. Robertson, Law Office of Henry L. Robertson, Philip S. Gordon, Heidi Ferenz, Gordon Law Firm, Robert L. Robertson, Houston, for Appellee.

***101** Panel consists of Justices NUCHIA, JENNINGS, and KEYES.

OPINION

EVELYN V. KEYES, Justice.

This is an interlocutory appeal of the trial court's order denying certification of a class action [FN1] pursuant to Rule 42 of the Texas Rules of Civil Procedure. [FN2] In their sole issue, appellants Carl Wall and Thomas E. Swaney, individually and on behalf of all other similarly situated consumers (collectively, the buyers), contend that the trial court misapplied the law and abused its discretion by refusing to certify a class of persons who purchased vehicles from Parkway Chevrolet, Inc. and Mac

Haik, G.P., LLC, d/b/a Mac Haik Ford (Mac Haik Ford) (collectively, the dealers) and were charged for service-and-benefits coupon books. We affirm.

FN1. See Tex. Civ. Prac. & Rem.Code Ann. § 51.014(a)(3) (Vernon Supp.2004-2005) (permitting interlocutory appeal of trial court's determination of whether to certify a class).

FN2. See Tex.R. Civ. P. 42(a),(b) (governing certification of class actions).

Background

In the spring of 2001, Houston television reporter Marvin Zindler presented a story about car buyers being charged for coupon books. Wall sued Parkway Chevrolet in the summer of 2001, seeking actual and punitive damages for himself and similarly situated consumers. The petition alleged that Parkway deceptively included a "fee for 'consumer services' " on the purchase invoice with no explanation other than that it was part of the price of the vehicle. Wall alleged that the "fee" was for a book of "coupons that are worthless and that cannot be used by Wall or the Class members," that Parkway knew the coupons were worthless, and that, if Parkway had informed him and other class members that the book was worthless, they would not have purchased it. Instead, Wall alleged, he and the other class members relied on Parkway's misrepresentations to their detriment. Wall alleged that this practice constituted both laundry-list violations under section 17.46(b)(12) of the Deceptive Trade Practices Act Consumer Protection Act (DTPA) and unconscionable conduct under section 17.45(5) of the DTPA. [FN3] In his original petition, Wall defined the class of plaintiffs as "all customers who have purchased a vehicle from Parkway Chevrolet, Inc. ('Parkway') and who were charged a fee for a discount coupon book, disguising the charge as 'Consumer Services,' 'Intelesys,' 'NACC,' or other such non-descriptive or misleading terms (hereinafter collectively referred to as 'Consumer Services')." He sought actual and exemplary damages for himself and the class.

FN3. Tex. Bus. & Com.Code §§ 17.46(b)(12), 17.45(5) (Vernon 2002); see also Tex. Bus. & Com.Code §§ 17.50(a)(1) and (a)(3) (Vernon 2002) (permitting a consumer to maintain an action when "the use or employment by any person of a deceptive act or practice" enumerated in section 17.46(b) is a producing cause of economic or mental anguish damages and is relied on by the consumer to the consumer's detriment, or where "any unconscionable action or course of action by any person" is a producing cause of such damages).

In a third amended petition, appellants Wall and Swaney, who had joined the class action as a named plaintiff and joined dealer Mac Haik Ford as a defendant, alleged that both dealers were "engaged in a deceptive act and practice involving the charging of a fee in connection with the sale of automobiles which is deceptively included without explanation on the purchase invoice." They alleged that, "in exchange ***102** for the fee of several hundred dollars, the consumer receives a 'coupon book' which purports to offer 'free' services at the dealer," but it is not disclosed that the customers has paid hundreds of dollars for these purportedly free services. They alleged that, despite numerous complaints and investigations by television reporter Marvin Zindler and the Texas Attorney General's office, the dealers continued to engage in this "misleading, deceptive, fraudulent, and apparently highly lucrative scheme to defraud the trusting consumers." Wall and Swaney alleged that this practice constituted a number of "laundry list" violations of sections 17.50(a)(1) and 17.46(b) of the DTPA, [FN4] as well as unconscionable conduct under sections 17.50(a)(3) and 17.45(5) of the DTPA.

FN4. Tex. Bus. & Com.Code Ann. § 17.46(b)(1) (Vernon 2002) ("passing off goods or services as those of another"); id. § 17.46(b)(2) ("causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods and services"); id. § 17.46(b)(3) ("causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another"); id. § 17.46(b)(5) ("representing that goods or services have sponsorship, approval, characteristics, ... uses, benefits, or quantities which they do not have ..."); id. § 17.46(b)(7) ("representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another"); id. § 17.46(b)(9) ("advertising goods or services with intent not to sell them as advertised"); id. § 17.46(b)(12) ("representing that an agreement confers or involves rights, remedies, or obligations which it does not

have or involve, or which are prohibited by law"); id. § 17.46(b)(24) ("the failure to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction which the consumer would not have entered had the information been disclosed").

Wall and Swaney defined the plaintiff class as consisting of two subclasses. They defined subclass A(1) as "all Texas consumers who have purchased a vehicle from Parkway Chevrolet, Inc. ('Parkway'), on or after July 23, 1999 and were charged a fee under the designations such as 'NACC,' 'Consumer Benefits & Services (ECBP),' 'NADW,' 'Intelesys,' and/or other similar designations in connection with the purchase of the vehicle." They defined subclass A(2) as "all Texas consumers who have purchased a vehicle from Mac Haik Ford on or after March 8, 2001 and were charged a fee under the designations such as 'NACC,' 'Consumer Benefits & Services (ECBP),' 'NADW,' 'Intelesys,' and/or other similar designations in connection with the purchase of the vehicle." Excluded from both subclasses were those persons who had already received a full refund of the fee charged. The only differences between the subclasses were that one subclass included customers of Parkway Chevrolet and the other, customers of Mac Haik Ford, and that the alleged wrongdoing ran from different dates at the two dealerships.

Motion for Class Certification

[1] Wall and Swaney moved for class certification under Texas Rule of Civil Procedure 42. Under rule 42(a), every class action must satisfy four threshold requirements: "(1) numerosity ('the class is so numerous that joinder of all members is impracticable'); (2) commonality ('there are questions of law or fact common to the class'); (3) typicality ('the claims or defenses of the representative parties are typical of the claims or defenses of the class'); and (4) adequacy of representation ('the representative parties will fairly and adequately protect the interests of the class')." Southwestern Refining Co. v. Bernal, 22 S.W.3d 425, 433 (Tex.2000) (quoting Tex.R. Civ. P. 42(a)).

In addition to satisfying all the requirements of rule 42(a), the class must also ***103** satisfy at least one of the subparts of rule 42(b). See Tex.R. Civ. P. 42(b). In their motion for class certification, appellants alleged that their class action was maintainable pursuant to former rule 42(b)(4), which permits class actions when common questions of law or fact predominate and a class action is superior to other forms of adjudication. [FN5]

FN5. See Tex.R. Civ. P. 42, 553-554 S.W.2d (Tex.Cases) XXXV-XXXVIII (1977, amended 2003) [hereinafter "former rule 42"]. We refer to "former rule 42(b)(4)" throughout this opinion because of the renumbering of the former rule's subsection (b)(4) in 2003 as subsection (b)(3). See current text of Tex.R. Civ. P. 42. The provisions of former rule 42 pertinent to this appeal were not substantively changed when the rule was amended. See Order of the Supreme Court of Texas, Amendments to the Texas Rules of Civil Procedure, Misc. Docket No. 03-9160 (Oct. 9, 2003, effective Jan. 1, 2004).

Wall and Parkway Chevrolet

At the class certification hearing, evidence was presented that in 1999, Wall purchased a vehicle and a benefits package from Parkway Chevrolet and signed a purchase order that contained three preprinted charges--a documentary fee, a title and inspection fee, and a $199 "NACC" charge. The Purchase Order indicated that the buyer understood and agreed to the terms of the order. Wall also signed an "Intelesys Information Form," which stated, "This $199.00 charge has been explained to me and I understand that the special benefits are in addition to the goods and services ordinarily provided in connection with the purchase of the vehicle described above." After he purchased his car, Wall received a coupon booklet in the mail, together with a document entitled "Parkway Chevrolet," which stated,

> Consumer laws covering the sale of motor vehicles require the full disclosure of all charges associated with the purchase. All vehicles retailed by our dealership have a charge which is printed on the retail buyer's order.
>
> This charge is to compensate for various additional consumer services and unreimbursed dealership costs....
>
> To add more value, and to assure your continued satisfaction with our services and products, you will receive a special customer relations program,

the "NACC Consumer Services Program." When fully utilized, the benefits provided should result in substantial savings while providing you, our valued customer with:

. $1,726.00 Preferred Customer Checks

. Critical Problem Response Program

This announcement was followed by a "Benefits Package Tabulation" listing total potential savings of $1,726 and approximately 50 coupons in various amounts paid to the order of Parkway Chevrolet. Wall put his benefits package in his glove compartment and never used it.

In 2001, Wall purchased another car from Parkway Chevrolet. This time, he declined to pay for the NACC package (then being sold for $229); and the 2001 invoice reflects a line drawn through and striking the NACC charge. Evidence was presented that Parkway's salesmen were required to explain the coupon books to customers and to make sure that the customers understood the numbers behind their orders, and that buyers were given the opportunity to decline the coupon books and some did, but that many customers liked and used the coupons. Around the beginning of October 2001, Parkway switched from the coupon books to a customer "loyalty card" that was given for free to all customers, but which could be upgraded to obtain discounts from the dealer.

*104 Swaney and Mac Haik Ford

Evidence was also presented that appellant Swaney purchased a car from Mac Haik Ford in 2001. On the "Vehicle Purchase Order and Invoice" that Swaney signed were several fees: a state tax, a vehicle inventory tax, a license and title tax, a deputy fee, and a documentary fee, which was crossed out. The Vehicle Purchase Order and Invoice also contained a $249 "Consumer Benefits & Services (ECBP)" charge. Evidence was presented that every Mac Haik customer who purchased a vehicle was charged for the benefits package and received the package; that Mac Haik trained its salespersons to explain to each customer that the Consumer Benefits and Services package entitled the customer to a coupon book containing coupons for reduced prices on various services and products from Mac Haik; and that, in the fall of 2001, Mac Haik began sending out written explanations of the benefits along with the coupons themselves. There was also evidence that 80-90% of Mac Haik customers who had their vehicles serviced by Mac Haik used the coupons; that some customers came in and asked for the book; and that the customers liked the books.

After the class certification hearing, the trial court denied Wall's and Swaney's request for class certification, and this interlocutory appeal ensued.

Standard of Review

[2] Our review of an interlocutory appeal from a denial of a motion for class certification is limited to determining whether the trial court's denial of the motion constituted an abuse of discretion. Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 690-91 (Tex.2002); Bernal, 22 S.W.3d at 439. A trial court abuses its discretion only if the record (1) clearly shows that the trial court misapplied the law to the established facts, (2) does not reasonably support the ruling, or (3) shows that the trial court acted arbitrarily or unreasonably. Sun Coast Res. v. Cooper, 967 S.W.2d 525, 529 (Tex.App.-Houston [1st Dist.] 1998, pet. dism'd w.o.j.). We must review the evidence in the light most favorable to the trial court's ruling and indulge every presumption favorable to that ruling. Graebel/ Houston Movers, Inc. v. Chastain, 26 S.W.3d 24, 29 (Tex.App.-Houston [1st Dist.] 2000, pet. dism'd w.o.j.). We must not substitute our judgment for that of the trial court. Tana Oil & Gas Corp. v. Bates, 978 S.W.2d 735, 740 (Tex.App.-Austin 1998, no pet.).

No findings of fact or conclusions of law were made in the trial court's order denying class certification. Therefore, all questions of fact are presumed found in support of the judgment, and we will uphold the judgment of the trial court on any legal theory supported by the pleadings and the evidence. See Grant v. Austin Bridge Const. Co., 725 S.W.2d 366, 369 (Tex.App.-Houston 1987, no pet.). In determining whether there is evidence to support the judgment and implied findings of fact, we must consider only the evidence favorable to the implied findings and disregard any contrary evidence. Id.

Class Certification

In their sole issue, the buyers contend the trial court abused its discretion when it refused to certify

the class.

Prerequisites to Class Certification

[3][4][5][6][7][8] When, as here, a predominance-of-common-questions class action is asserted, the commonality determination is subsumed under the predominance determination. Bernal, 22 S.W.3d at 435. Common questions are those "questions of law or fact common to the class." Id. at 433. A common question exists when the answer as to one class member is the same as to ***105** all. Spera v. Fleming, Hovenkamp & Grayson, P.C., 4 S.W.3d 805, 810 (Tex.App.-Houston [14th Dist.] 1999, no pet.). Common questions that do not produce common answers do not satisfy rule 42. Wente v. Georgia-Pacific Corp., 712 S.W.2d 253, 257 (Tex.App.-Austin 1986, no writ). A three-step inquiry is required to determine whether common issues predominate: the trial court must (1) identify the substantive issues that will control the outcome of the case, a requirement which implies that the court must correctly identify the elements of each of the plaintiffs' causes of action; (2) assess which issues will predominate in the trial of the merits of the case; and (3) determine whether the predominating issues are, in fact, common to the class. Bernal, 22 S.W.3d at 434. Common questions of fact or law predominate over individual issues if common issues of law or fact will be the object of most of the efforts of the litigants and the courts. Schein, 102 S.W.3d at 689. Ideally, a judgment in favor of the named plaintiffs should decisively settle the entire controversy, and all that should remain is for the individual members of the class to file proof of their claim. Bernal, 22 S.W.3d at 435; Graebel/Houston Movers, 26 S.W.3d at 33.

Commonality and Predominance

In their motion for class certification, Wall and Swaney alleged that "the following common issues predominate: (1) whether the plaintiff class were consumers; (2) whether the charging of a fee under the designations such as 'NACC,' 'Consumer Benefits & Services (ECBP),' 'NADW,' 'Intelesys,' and/or other similar designations is an unconscionable, false, misleading or deceptive act or practice as defined in the DTPA; (3) whether such acts were a producing cause of damages; and (4) the amount of the damages."

[9][10] To prevail under the DTPA, a plaintiff must show that (1) the plaintiff was a consumer; (2) the defendant committed, among other things, a "laundry-list" violation under DTPA section 17.46(b) on which the plaintiff detrimentally relied or any unconscionable action or course of action; and (3) the wrongful act was a producing cause of the plaintiff's economic or mental-anguish damages. See Tex. Bus. & Com.Code Ann. § § 17.46(b), 17.50(a) (Vernon 2002); see also id. § 17.50(a)(1)(A)-(B) (Vernon 2002) (expressly requiring detrimental reliance for these violations); Schein, 102 S.W.3d at 686. To prove unconscionability under the DTPA, a plaintiff must prove "(1) an act or practice that, (2) to a person's detriment, (3) takes advantage of his lack of knowledge, ability, experience, or capacity, (4) to a grossly unfair degree." Peltier Enterprises, Inc. v. Hilton, 51 S.W.3d 616, 623 (Tex.App.-Tyler 2001, pet. denied). The plaintiffs must show what the consumer could or would have done if he had been informed. See id.

The parties concede that all buyers are consumers as defined in the DTPA. However, the dealers dispute Wall's and Swaney's contention that any other questions can be answered on a class-wide basis. Specifically, they argue that an individualized inquiry into each buyer's circumstances is required to answer the question "whether the charging of a fee under the designations such as 'NACC,' 'Consumer Benefits & Services (ECBP),' 'NADW,' 'Intelesys,' and/or other similar designations is an unconscionable, false, misleading or deceptive act or practice as defined in the DTPA." Likewise, the dealers argue that individualized inquiries are required to answer questions of causation of damages and of the amount of damages, if any, suffered by each buyer. We agree with the dealers.

***106** Subclasses A(1) and A(2)

[11] Neither the pleadings nor the evidence identifies any specific misrepresentation, set of misrepresentations, or course of conduct common to the practices of both dealers. Rather, the record reflects that the two dealers used different terms to describe their benefit packages, made different oral and written and disclosures, charged different amounts for their coupon books, and offered different coupons to their customers, running from different dates, by methods that varied over time.

Thus, the trial court did not abuse its discretion in concluding that there is no commonality of issues between the two subclasses such that the claims against these dealers could be tried together.

Similarly individualized inquiries characterize each subclass.

Parkway Chevrolet

[12] Parkway Chevrolet produced evidence that its salesmen were trained to explain the numbers behind each customer's purchase order; it also produced disclosure forms signed by Wall acknowledging his understanding and acceptance of the charge for the coupon books; and it demonstrated that Wall could and did decline to purchase a benefits package when he purchased a second car. This evidence undermines Wall's contentions that Parkway charged a "fee" to each customer for the benefits package, that Parkway violated the DTPA by making an identifiable false or deceptive representation on which each buyer relied, and that Parkway took advantage of each customer's "lack of knowledge, ability, experiences, or capacity ... to a grossly unfair degree," giving rise to a common cause of action for a deceptive trade practice; rather, the evidence demonstrates the necessity of an individualized inquiry with respect to each customer to resolve these issues.

Parkway also produced evidence that the benefit packages of the type Wall purchased for $199 provided a variety of services with a total value of $1,726. Because that amount is much greater than the cost of the package, this evidence undermines Wall's contentions that the receipt of the package was a producing cause of damages to each buyer in Subclass A and that the calculation of damages would be a mere mechanical matter. There is evidence that at least some buyers wanted the coupon books. Thus, the trial court could have reasonably concluded that an indeterminate number of buyers realized greater value from the use of the coupons than they paid for the book and that they knowingly and voluntarily purchased the coupon book. The trial court could have further concluded that, for those buyers found to have been deceived, the determination as to which buyers purchased which coupons, what values the coupons had, whether any were redeemed, which ones were redeemed, and what economic loss was suffered by the buyer, if any, would all have to be made on a case-by-case-basis.

Mac Haik Ford

[13] Mac Haik Ford produced evidence that the EBCP charge was identified on the invoice as a consumer benefits charge; that its sales representatives were trained to explain the charge; that its practice changed over time; that buyers during part or all of the class period had been required to sign disclosure forms as to the benefits packages; that many of its buyers were satisfied with the packages, and even sought them out; and that its buyers redeemed a number of coupons each month for valuable savings in services. Thus, as it did with Parkway Chevrolet, the trial court could have reasonably concluded that a fact-finder would first have to determine with respect to each buyer whether any misrepresentation or deceptive omission as to the cost or value of the coupons was ***107** made; what the misrepresentation or omission was; who made it; and whether the buyer relied on it and was harmed, or whether he signed a disclosure form indicating that he understood and accepted the charge. The trial court could also have reasonably concluded that, for each person found to have relied on an alleged misrepresentation or deceptive charge, the fact-finder would have to analyze whether and to what extent the deceptive representation or practice was a producing cause of that person's damages, a determination that would differ based on the coupons the buyer received, the amount he paid for the coupons, the value of the coupons, and whether he redeemed the coupons.

The situation here is not analogous to that in Alford Chevrolet-Geo v. Jones, 91 S.W.3d 396 (Tex.App.-Texarkana 2002, pet. denied, pet. for rehearing filed), as appellants contend. In Alford, a class action was brought against more than 600 new car dealerships that allegedly conspired to use a designation such as "vehicle inventory tax" on sales documents to pass on a dealer's tax to the customer. Id. at 399. The court held that, although the specific terms used varied from dealer to dealer, all of the dealers conspired together to ensure that they charged the tax in the same manner in order to add $30 to $50 to the sale of each vehicle. Id. at 402; see also Graebel/Houston Movers, Inc., 26 S.W.3d at 33 (holding that predominant issue was whether defendant uniformly billed customers for storage

insurance and failed to procure insurance, not whether he made misrepresentations to each individual class member).

Unlike this case, in which reliance on an indeterminate course of conduct is alleged, proof of the class's conspiracy claims in Alford turned on proof that the dealers knew the object of the conspiracy, took action in unison to further it, and enjoyed the fruits of the transactions. Id. at 403. Moreover, as the Alford court pointed out, there was "no indication from the discovery that there were any material variations in the written representations made." Id. at 405. Rather, the documents and depositions obtained in discovery clearly showed that the dealers' trade organizations designed the mode in which the tax would be presented to customers and established the purpose of the conspiracy, to add $30 to $50 to the bottom line. Id. at 402.

This case is much more like Peltier, 51 S.W.3d 616, a class action suit brought against a named car dealership, Peltier, other unnamed dealerships, and several banks that was grounded in the dealer's practice of selling a car, providing dealer financing, and shopping the commercial paper to financial institutions for purchase at a discount. The plaintiffs alleged that the defendants' failure to disclose to buyers that the rate of interest they were charged was higher than that charged by the financial institution to whom their financing was sold and that the differential was paid to the dealer gave rise to claims of fraudulent concealment, failure to disclose, unconscionability in violation of the DTPA, and tortious interference with potential contracts.

The Peltier court held, with respect to the buyers' fraud claim, that both the materiality of the misrepresentation or concealment and a putative class member's reliance on the information to his detriment required individualized proof. 51 S.W.3d at 623. Likewise, the unconscionability claims required individualized proof as to what the buyer would have done had he had the information. Id. at 624. The court pointed out that not all situations involving fraud and misrepresentation claims are appropriate for class action treatment because of differences in the ***108** materiality of the representations to the plaintiff and the kinds or degrees of reliance. Id. Such is the case here.

We hold that the trial court did not abuse its discretion in concluding that questions of fact requiring individualized inquiry predominated over any issues common to the class as a whole or to either subclass.

Conclusion

The trial court could have reasonably concluded that the necessity of individualized determinations regarding alleged misrepresentations and failure to disclose, the application of the law to those facts, and questions related to damages reasonably foreclosed certification of the class. According, we hold that the trial court did not abuse its discretion in refusing to certify the class. We overrule appellants' sole issue. Because our holding is dispositive of the case, we need not address the other factors which must be demonstrated before class certification is justified.

We affirm the trial court's ruling.

176 S.W.3d 98

END OF DOCUMENT

EXHIBIT S

APPENDIX OF NON-FEDERAL AND UNPUBLISHED FEDERAL AUTHORITIES CITED IN DEFENDANT DELL INC.'S REPLY IN SUPPORT OF ITS MOTION FOR ORDER DISMISSING PLAINTIFFS' SECOND AMENDED COMPLAINT WITH PREJUDICE AND STRIKING PLAINTIFFS' CLASS ACTION ALLEGATIONS

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The First Circuit had originally ruled that *Crawford-El* supported the imposition of a heightened pleading standard to protect the qualified immunity defenses of public officials.[28] After *Swierkiewicz,*[29] however, the First Circuit joined the growing majority of courts and reversed itself. It ruled that prior precedents with respect to heightened pleading standards had been abrogated. The First Circuit noted that, in *Swierkiewicz,* the Supreme Court signaled its disapproval of *all* heightened pleading standards except those based on specific statutes or rules. In the absence of a statute or rule authorizing a heightened pleading standard, *Swierkiewicz* requires federal courts to stick by the notice pleading requirements of Rule 8.[30] The First Circuit concluded that, as suggested in the dicta in *Crawford-El,*[31] courts should rely on other procedural devices to deal with baseless claims.[32]

In short, while the issue is by no means settled, it seems preferable to judge the complaint by the liberal, notice pleading standard applicable to all claims. Then, if the affirmative defense of qualified immunity is raised by an official sued in his or her individual capacity, the court may call for supplemental (and, if need be, more particularized) submissions as needed to evaluate the claim.

[2] Court Will Consider Only Pleadings and Matters of Judicial Notice

In deciding whether to dismiss, the court may consider only the facts aleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings, and matters of which the judge may take judicial notice.[33]

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	a higher standard than complaints in other civil litigation).
10th Circuit	Currier v. Doran, 242 F.3d 905, 916 (10th Cir. 2001) ("We conclude that this court's heightened pleading requirement cannot survive *Crawford-El*").
D.C. Circuit	*See* Harbury v. Deutch, 233 F.3d 596, 611 (D.C. Cir. 2000), *rev'd on other grounds sub nom.* Christopher v. Harbury, 536 U.S. 403 (2002) (*Crawford-El* held that plaintiffs making constitutional claims based on improper motive need not meet any special heightened pleading standard).

[28] *See* Judge v. City of Lowell, 160 F.3d 67, 72–75 (1st Cir. 1998).

[29] *See* Swierkiewicz v. Sorena, N.A., 534 U.S. 506, 515, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002).

[30] *See* 534 U.S. at 515.

[31] *See* Crawford-El v. Britton, 523 U.S. 574, 592–592, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998).

[32] **First Circuit.** Educadores Puertorriqueños en Acción v. Hernandez, 367 F.3d 61, 63–67 (1st Cir. 2004) (citing **Moore's,** no heightened pleading standards for civil rights cases regardless of availability of qualified immunity defense).

[33] **Court may consider only pleadings.** Lovelace v. Software Spectrum Inc., 78 F.3d 1015, 1017–1018 (5th Cir. 1996) (courts must limit inquiry to facts stated in complaint and documents

The courts may consider the following:

- Documents attached to complaint.[34]

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either attached to or incorporated in complaint; however, courts may also consider matters of which they may take judicial notice).

2d Circuit — Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1088, 1092 (2d Cir. 1995) (court may consider all papers appended as well as matters of judicial notice); Paulemon v. Tobin, 30 F.3d 307, 308–309 (2d Cir. 1994) (court is limited to consideration of factual allegations in complaint); Allen v. Westpoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991) (appended documents and matters of judicial notice may be considered); Cable v. New York State Thruway Auth., 4 F. Supp. 2d 120, 124 (N.D.N.Y. 1998) (court may consider, as part of pleadings on motion to dismiss, plaintiff's administrative charge).

5th Circuit — Lovelace v. Software Spectrum Inc., 78 F.3d 1015, 1017–1018 (5th Cir. 1996) (courts must limit inquiry to facts stated in complaint and documents either attached to or incorporated in complaint; however, courts may also consider matters of which they may take judicial notice).

7th Circuit — Menominee Indian Tribe of Wisc. v. Thompson, 161 F.3d 449, 456 (7th Cir. 1998) (court may consider judicially-noticed documents, like Indian treaties, without converting motion to dismiss to motion for summary judgment); *see* Alioto v. Marshall Field's & Co., 77 F.3d 934, 936 (7th Cir. 1996) (when dismissing complaint for failure to state claim under Fed. R. Civ. P. 12(b)(6), district court may not look to materials beyond pleading itself; citing *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680, 684 & n.8 (7th Cir. 1994)).

[34] **Documents attached to complaint.** *See* Fed. R. Civ. P. 10(c) (documents attached to pleadings are part of pleadings); *see also* Ch. 10, *Form of Pleadings*.

2d Circuit — Cortec Indus., Inc. v. Sum Holding, L.P., 949 F.2d 42, 47 (2d Cir. 1991) (if plaintiff's claims are predicated on document, defendant may attach document to Fed. R. Civ. P. 12(b)(6) motion even if plaintiff's complaint does not explicitly refer to it).

3d Circuit — Steinhardt Group Inc. v. Citicorp., 126 F.3d 144, 145 & n.1 (3d Cir. 1997) (court properly considered copies of letter agreement between parties, mortgage loan agreement, partnership agreement, and service agreement attached to defendant's motion to dismiss).

7th Circuit — Menominee Indian Tribe of Wisconsin v. Thompson, 161 F.3d 449, 456 (7th Cir. 1998) (documents attached to motion to dismiss are considered part of pleadings if they are referred to in the plaintiff's complaint and are central to claim, so that court properly considered Indian treaties in deciding motion to dismiss).

8th Circuit — Stahl v. USDA, 327 F.3d 697, 700–701 (8th Cir. 2003) (district court properly considered contract documents that were attached to motion to dismiss without converting motion into one for summary judgment); Meehan v. United Consumers Club Franchising Corp., 312

- Undisputed documents alleged or referenced in complaint.[35]

F.3d 909, 913 (8th Cir. 2002) (court did not convert motion to dismiss to motion for summary judgment by considering franchise agreement and circular that were attached to complaint).

11th Circuit — *See* Taylor v. Appleton, 30 F.3d 1365, 1370 (11th Cir. 1994) (reliance on document attached to pleadings did not convert motion to dismiss to motion for summary judgment); Allen v. Newsome, 795 F.2d 934, 938 (11th Cir. 1986) (INS report attached to complaint considered part of pleadings for all purposes, including Fed. R. Civ. P. 12(b)(6) motion).

[35] **Documents alleged or referenced in complaint.**

1st Circuit — Young v. Lepone, 305 F.3d 1, 11 (1st Cir. 2002) (district court was entitled to consider letters that were not attached to complaint when complaint contained extensive excerpts from letters and references to them; when factual allegations of complaint revolved around document whose authenticity is unchallenged, that document effectively merges into pleadings).

2d Circuit — Faulkner v. Beer, 463 F.3d 130, 133–135 (2d Cir. 2006) (materials outside complaint may be considered without converting motion to summary judgment if they are "integral" to complaint and it is clear on record that no dispute exists regarding authenticity or accuracy of materials); Cortec Indus., Inc. v. Sum Holding, L.P., 949 F.2d 42, 47 (2d Cir. 1991) (if plaintiff's claims are predicated on document, defendant may attach document to Fed. R. Civ. P. 12(b)(6) motion even if plaintiff's complaint does not explicitly refer to it).

6th Circuit — Greenberg v. Life Ins. Co. of Va., 177 F.3d 507, 514 (6th Cir. 1999) (insurance policies attached to motion to dismiss did not require conversion to summary judgment motion when policies were referred to repeatedly in complaint and were central to plaintiffs' claims; illustration that insurance agent had allegedly presented to plaintiffs when policies were sold was not considered by district court in ruling on motion, so conversion to summary judgment was not required on this ground).

7th Circuit — 188 LLC v. Trinity Indus., Inc., 300 F.3d 730, 734–735 (7th Cir. 2002) (district court properly considered liability limitation that was arguably incorporated by reference in contract in dispute).

9th Circuit — Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998) (in ruling on motion to dismiss, district court may consider document not explicitly incorporated in complaint and not attached to complaint, but authenticity of which is not questioned and on which complaint necessarily relies); In re Stacs Elecs. Sec. Litig., 89 F.3d 1399, 1405 n.4 (9th Cir. 1996) ("documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered," quoting *Fecht v. The Price Co.*, 70 F.3d 1078, 1080 n.1 (9th Cir. 1995).

- Public records.[36]

The court may not, for example, take into account additional facts asserted in a memorandum opposing the motion to dismiss, because such memoranda do not constitute pleadings under Rule 7(a).[37]

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[36] **Public records.**

2d Circuit — Day v. Moscow, 955 F.2d 807, 811 (2d Cir. 1992) (supporting affirmative defense of res judicata, court considered previously dismissed complaint whose dismissal was affirmed on appeal).

3d Circuit — Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group, Ltd., 181 F.3d 410, 426–427 (3d Cir. 1999) (court may take judicial notice of public records including judicial proceedings; thus, court could take judicial notice of another court's opinion, not for truth of facts in opinion, but for existence of opinion).

4th Circuit — Norfolk S. Ry. Co. v. Shulimson Bros., 1 F. Supp. 2d 553, 555 n.1 (W.D.N.C. 1998) (defendants submitted information in brief supporting motion to dismiss that was not contained in complaint, but because information was matter of public record, court could consider information without converting motion to dismiss to motion for summary judgment).

5th Circuit — *See* Lovelace v. Software Spectrum Inc., 78 F.3d 1015, 1017–1018 (5th Cir. 1996) (SEC filings); Cinel v. Connick, 15 F.3d 1338, 1343 n.6 (5th Cir. 1994) (consent judgment).

8th Circuit — Stahl v. USDA, 327 F.3d 697, 700–701 (8th Cir. 2003) (in case concerning agreement with USDA, district court properly considered copy of instructions regarding agreement that had been published in CFR, copy of USDA regulation, and copy of administrative notice published by USDA, as these were public records).

11th Circuit — Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1278 (11th Cir. 1999) (court, when considering motion to dismiss in securities fraud case, was permitted to take judicial notice of relevant public documents required to be filed with SEC, for purpose of determining what statements the documents contain and not to prove truth of documents' contents).

[37] **Brief opposing motion not a pleading.** Shanahan v. City of Chicago, 82 F.3d 776, 781 (7th Cir. 1996) (plaintiff may not amend complaint in opposition brief).

2d Circuit — In re Colonial Ltd. Partnership Litig., 854 F. Supp. 64, 79 (D. Conn. 1994) ("Allegations made outside of the complaint are not properly before the court on a motion to dismiss"); *cf.* Cortec Indus., Inc. v. Sum Holding, L.P., 949 F.2d 42, 47 (2d Cir. 1991) (if plaintiff's claims are predicated on document, defendant may attach document to Fed. R. Civ. P. 12(b)(6) motion even if plaintiff's complaint does not explicitly refer to it).

3d Circuit — Pennsylvania ex rel. Zimmerman v. Pepsico, Inc., 836 F.2d 173, 181 (3d Cir. 1988) ("legal theories set forth in Pennsylvania's brief are

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§ 23.21 Implied Condition: Identifiable Class Must Exist

[1] Class Definition Must Be Sufficiently Specific to Determine If Name Plaintiffs Are Members

It is axiomatic that in order for a class action to be certified, a class must exist.[1] Although the text of Rule 23(a) is silent on the matter,[2] a class must not only exist, the class must be susceptible of precise definition.[3] There can be no class action if the proposed class is "amorphous" or "imprecise."[4]

The standard for measuring whether a class has been defined with sufficient precision is whether the definition makes it administratively feasible for the court to determine whether a particular individual is or is not a member of the proposed class. A class action is possible only when the class definition provides a court with tangible and practicable standards for determining who is and who is not a member of the class.[5]

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[1] **Class must exist.** Simer v. Rios, 661 F.2d 655, 669 (7th Cir. 1981).

[2] *See* Fed. R. Civ. P. 23(a).

[3] *Cf.* Fed. R. Civ. P. 23(c)(1)(B) (although Fed. R. Civ. P. 23 never explicitly requires existence of definite class, Rule does require court's certification order to expressly "define the class and the class claims, issues, or defenses").

[4] **Class must be susceptible of precise definition.** Lewis v. National Football League, 146 F.R.D. 5, 8 (D.D.C. 1992).

3d Circuit	In re Sch. Asbestos Litig., 56 F.3d 515, 519 (3d Cir. 1995).
4th Circuit	In re A.H. Robins Co., Inc., 880 F.2d 709, 728 (4th Cir. 1989) (Fed. R. Civ. P. 23 implicitly requires existence of identifiable class).
5th Circuit	John v. National Sec. Fire & Cas. Co., 501 F.3d 443, 445 (5th Cir. 2007) ("The existence of an ascertainable class of persons to be represented by the proposed class representative is an implied prerequisite of Federal Rule of Civil Procedure 23"; citing **Moore's**).
7th Circuit	Elliott v. ITT Corp., 150 F.R.D. 569, 573 (N.D. Ill. 1992); Lewis v. Tully, 96 F.R.D. 370, 376–377 (N.D. Ill. 1982).
8th Circuit	Ad-Hoc Comm. v. City of St. Louis, 143 F.R.D. 216, 216 (E.D. Mo. 1992); Esler v. Northrop Corp., 86 F.R.D. 20, 32 (W.D. Mo. 1979).
D.C. Circuit	Lewis v. National Football League, 146 F.R.D. 5, 8 (D.D.C. 1992).

[5] **Class is definite when it is feasible to determine class membership.**

1st Circuit	Crosby v. Social Sec. Admin., 796 F.2d 576, 580 (1st Cir. 1986).
2d Circuit	*See* Adames v. Mitsubishi Bank, Ltd., 133 F.R.D. 82, 88 (E.D.N.Y. 1989) (class must be sufficiently defined to permit identification of potential class members).
7th Circuit	*See* Alliance to End Repression v. Rochford, 565 F.2d 975, 977 (7th Cir. 1977) (class must be sufficiently definite to permit ascertainment of class members).
8th Circuit	*See* Esler v. Northrop Corp., 86 F.R.D. 20, 32 (W.D. Mo. 1979) (potential class members must be identifiable from definition).
10th Circuit	Cook v. Rockwell Int'l Corp., 151 F.R.D. 378, 382–383 (D. Colo. 1993);

For a class action to proceed, the court must apply the class definition to each proposed class representative and find that the class representative is a member of that class. In other words, a corollary of the requirement that a definite class exists is the requirement that the class representative have proper standing by being a member of the class. In order to have standing to sue as a class representative, each named plaintiff must possess an interest or suffer an injury that is shared by all members of the class that he or she seeks to represent.[6] The constitutional and prudential dimensions of the standing requirement generally are discussed in Ch. 101, *Issues of Justiciability.*

[2] Class Definition May Encompass Future Members and Class Members May Change

Although a class must be precisely defined, it is not necessary that every potential member of the class be identifiable at the commencement of the action.[7] A class may include future members as long as the court will be able to determine, at any given time, whether a particular individual is a member of the class at that time.[8]

Joseph v. General Motors Corp., 109 F.R.D. 635, 638 (D. Colo. 1986).

11th Circuit — *See* Pottinger v. City of Miami, 720 F. Supp. 955, 958 (S.D. Fla. 1989) (court must be able to determine if particular individual is member of class).

D.C. Circuit — Lewis v. National Football League, 146 F.R.D. 5, 8 (D.D.C. 1992).

[6] **Class representative must have standing.** Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216, 94 S. Ct. 2925, 41 L. Ed. 2d 706 (1974).

2d Circuit — Cordes Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 99–103 (2d Cir. 2007) (assignees of antitrust claims had standing to sue as class representatives).

5th Circuit — Bertulli v. Independent Ass'n of Cont'l Pilots, 242 F.3d 290, 294 (5th Cir. 2001) (constitutional requirement of constitutional standing may be raised in Fed. R. Civ. P. 23(f) appeal).

11th Circuit — Murray v. Auslander, 244 F.3d 807, 810–811 (11th Cir. 2001) (at least one named class representative must have Article III standing to raise each class subclaim; court remanded for fact-specific inquiry necessary to resolve challenge to standing on grounds of mootness); Prado-Steiman v. Bush, 221 F.3d 1266, 1279–1280 (11th Cir. 2000) ("before undertaking any formal typicality or commonality review, the district court must determine that at least one named class representative has Article III standing to raise each class subclaim").

[7] **Not every class member need be identified immediately.**

2d Circuit — Ashe v. Board of Elections, 124 F.R.D. 45, 47 (E.D.N.Y. 1989).

8th Circuit — In re Tetracycline Cases, 107 F.R.D. 719, 728 (D. Mo. 1985).

10th Circuit — Davoll v. Webb, 160 F.R.D. 142, 144 (D. Colo. 1995); Cook v. Rockwell Int'l Corp., 151 F.R.D. 378, 382–383 (D. Colo. 1993); Joseph v. General Motors Corp., 109 F.R.D. 635, 638 (D. Colo. 1986).

[8] **Class may include future members.**

1st Circuit — Mayburg v. Heckler, 574 F. Supp. 922, 928 (D. Mass. 1983), *aff'd in part, vacated in part on other grounds,* 740 F.2d 100 (1st Cir. 1984).

Correspondingly, the membership of a class may change over time as long as there is an administratively feasible method of identifying the class members at any particular time.[9]

[3] Established Standards Exist for Evaluating Sufficiency of Class Definition

[a] Class Definition Must Be Measured by Objective Standards

For a class to be sufficiently defined, the court must be able to resolve the question of whether class members are included or excluded from the class by reference to objective criteria.[10] In some circumstances, a reference to damages or injuries caused by particular wrongful actions taken by the defendants will be sufficiently objective criterion for proper inclusion in a class definition.[11] Similarly, a reference to fixed,

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2d Circuit	Ashe v. Board of Elections, 124 F.R.D. 45, 47 (E.D.N.Y. 1989) (class definition may include future members).
8th Circuit	White v. National Football League, 822 F. Supp. 1389, 1403 (D. Minn. 1993).
9th Circuit	Probe v. State Teacher's Ret. Sys., 780 F.2d 776, 780 (9th Cir. 1986) (including future members in class does not render class definition vague).

[9] **Class membership may change.**

7th Circuit	Johnson v. Brelje, 482 F. Supp. 121, 123 (N.D. Ill. 1979).
8th Circuit	Esler v. Northrop Corp., 86 F.R.D. 20, 32 (W.D. Mo. 1979).

[10] **Objective criteria must determine membership in class.** MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.222 (2004) ("An identifiable class exists if its members can be ascertained by reference to objective criteria. The order defining a class should avoid subjective standards (e.g., plaintiff's state of mind) or terms that depend on resolution of the merits (e.g., persons who were discriminated against). The order should use objective terms in defining persons to be excluded from the class, such as affiliates of the defendants, residents of particular states, persons who have filed their own actions, or members of another class." [fn omitted]).

1st Circuit	Crosby v. Social Sec. Admin., 796 F.2d 576, 580 (1st Cir. 1986).
3d Circuit	Forman v. Data Transfer, Inc., 164 F.R.D. 400, 403 (E.D. Pa. 1995) (class definition unacceptable because "defining the purported class as 'all residents and businesses who have received *unsolicited facsimile advertisements*' requires addressing the central issue of liability" [emphasis in original]).
6th Circuit	Garrish v. United Auto., Aerospace, & Agric. Implement Workers, 149 F. Supp. 2d 326, 331 (E.D. Mich. 2001) (citing **Moore's,** "The identity of class members, moreover, must be ascertainable by reference to objective criteria.").
7th Circuit	Elliott v. ITT Corp., 150 F.R.D. 569, 573–574 (N.D. Ill. 1992) ("An identifiable class exists if its members can be ascertained by objective criteria, but not if membership is contingent on the prospective member's state of mind"); Gomez v. Illinois State Bd. of Educ., 117 F.R.D. 394, 397 (N.D. Ill. 1987).

[11] **Defendants' actions may shape class.**

7th Circuit	Alliance to End Repression v. Rochford, 565 F.2d 975, 977 (7th Cir. 1977)

geographic boundaries will generally be sufficiently objective for proper inclusion in a class definition.[12]

[b] Subjective Consideration May Not Define Class

A class definition is inadequate when class members can be identified only by reference to subjective criteria. For example, a reference to as a potential class member's state of mind is too subjective to be a proper criterion included in a class definition.[13]

[c] Class Definition Should Not Depend on Merits

A class definition is inadequate if a court must make a determination of the merits of the individual claims to determine whether a particular person is a member of the class. In other words, the class should not be defined in terms of whether its members were treated "properly," "adequately," "reasonably," or "constitutionally," because then class membership depends on a determination of the merits as to each potential class member.[14] This conclusion follows from the rule that courts may not decide the

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(class limited to people who were allegedly subjected to unconstitutional harassment by defendants upheld because contours of class were defined by defendants' conduct); Lewis v. Tully, 96 F.R.D. 370, 376 (N.D. Ill. 1982) (class is sufficiently ascertainable if it is defined by contested practices of defendant).

9th Circuit — International Molders & Allied Workers' Local Union No. 164 v. Nelson, 102 F.R.D. 457, 464–465 (N.D. Cal. 1983) (class defined as all persons of Hispanic or Latin American ancestry who were affected by defendants' allegedly discriminatory practices).

10th Circuit — In re Copley Pharm., Inc., 158 F.R.D. 485, 493 (D. Wyo. 1994) (class defined as "all persons . . . who suffered damages as a result of the inhalation of Albuterol manufactured, supplied, distributed[,] or place in commerce by [defendant]").

[12] **Geographic boundaries may be part of definition.**

7th Circuit — Midwest Cmty. Council, Inc. v. Chicago Park Dist., 87 F.R.D. 457, 460 (N.D. Ill. 1980) (class defined as residents of city wards with fixed geographic boundaries).

10th Circuit — Cook v. Rockwell Int'l Corp., 151 F.R.D. 378, 382–384 (D. Colo. 1993) (classes of people within specific areas that were exposed to toxic materials); *but see* Daigle v. Shell Oil Co., 133 F.R.D. 600, 603 (D. Colo. 1990) (class was inadequately defined because plaintiffs failed to show any logical reason for drawing boundaries where they did).

11th Circuit — Pottinger v. City of Miami, 720 F. Supp. 955, 958 (S.D. Fla. 1989) (class of homeless people who resided within narrowly drawn geographic boundaries within Miami).

[13] **Class based on state of mind is improper.** Simer v. Rios, 661 F.2d 655, 669 (7th Cir. 1981) (class included individuals eligible for federal assistance who were discouraged from applying because of an allegedly invalid regulation); Harris v. General Dev. Corp., 127 F.R.D. 655, 659 (N.D. Ill. 1989) (class included individuals who were discouraged from applying for employment because of allegedly discriminatory hiring policies).

[14] **Class membership should not depend on merits.**

underlying merits of the claims at the class certification stage (*see* § 23.84).[15]

[d] Requirement That Class Be Definite Serves Variety of Crucial Purposes

The requirement that a class be defined objectively and with sufficient precision serves a wide variety of purposes. Having a precisely defined class makes it possible for a court to determine whether the proposed class satisfies the other requirements of Rule 23.[16] As a consequence, courts commonly examine whether a class is adequately defined before turning to the other requirements for class certification.[17]

The court and the parties make use of the class definition at several stages in the litigation. For example, Rule 23(c) requires a class definition to be a part of any order certifying an action as a class action.[18] In addition, defining the class definition

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1st Circuit	Crosby v. Social Sec. Admin., 796 F.2d 576, 580 (1st Cir. 1986) (class inadequately defined as those claimants who did not have hearing within reasonable time because reasonableness would need to be determined on individualized basis).
2d Circuit	Catanzano by Catanzano v. Dowling, 847 F. Supp. 1070, 1079 (W.D.N.Y. 1994) (class definition too general if it would require court to decide whether person's constitutional rights had been violated to determine whether person was class member); *but see* Barnett v. Bowen, 794 F.2d 17, 23 (2d Cir. 1986) (class adequately defined as claimants who did not have hearing within reasonable time even though reasonableness of delay would need to be determined on individualized basis).
3d Circuit	Forman v. Data Transfer, Inc., 164 F.R.D. 400, 403 (E.D. Pa. 1995) (class definition unacceptable because "defining the purported class as 'all residents and businesses who have received *unsolicited facsimile advertisements*' requires addressing the central issue of liability" [emphasis in original]).
9th Circuit	Hagen v. City of Winnemucca, 108 F.R.D. 61, 63–64 (D. Nev. 1985) (class definition was insufficient because court would have to decide whether person's constitutional rights were violated to determine class membership).
10th Circuit	Davoll v. Webb, 160 F.R.D. 142, 144 (D. Colo. 1995) (class that included people who had disabilities and were denied reasonable accommodations under Americans With Disabilities Act was inadequately defined because whether particular person had disability required case-by-case determinations).

[15] **Class indefinite because court may not decide merits.** Hagen v. City of Winnemucca, 108 F.R.D. 61, 63–64 (D. Nev. 1985).

[16] **Definition permits court to determine suitability of class action.** Simer v. Rios, 661 F.2d 655, 670 (7th Cir. 1981).

[17] **Definition of class is initial inquiry in suitability determination.**

8th Circuit	Ad-Hoc Comm. v. City of St. Louis, 143 F.R.D. 216, 216 (E.D. Mo. 1992) (describing requirement as threshold inquiry).
10th Circuit	Davoll v. Webb, 160 F.R.D. 142, 144 (D. Colo. 1995).

[18] Fed. R. Civ. P. 23(c)(1)(B).