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Class Dismissed: The Conservative Class Action Revolution of the Texas Supreme Court.

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COMMENTS

CLASS DISMISSED: THE CONSERVATIVE CLASS ACTION REVOLUTION OF THE TEXAS SUPREME COURT

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I. INTRODUCTION

Class action lawsuits serve as a powerful weapon for groups of plaintiffs wishing to participate in the legal system. For some plaintiffs whose claims otherwise may be too small to warrant adjudication, joining a class offers the only opportunity for recovery.[1] Other plaintiffs have neither the time nor financial means to pursue an individual suit.[2] The ability to form a class gives potential plaintiffs a viable option in seeking legal redress.[3]

Forming a class has numerous advantages for plaintiffs. The creation of a class creates a "more powerful litigation posture," as aggregation strengthens plaintiffs'.[4] Indeed, this newly attained strength can force defendants to consider settlement, thus promoting judicial efficiency.[5] In addition, the consistency of results found in class litigation avoids situa-

1. *See* Deposit Guar. Nat'l Bank v. Roper, 446 U.S. 326, 326 (1980).

2. *See id.*

3. *See* Califano v. Yamasaki, 442 U.S. 682, 701 (1979) (asserting that use of the class action device allows a lawsuit involving several claims "to be litigated in an economical fashion").

4. *See* Kenneth S. Canfield, Advantages and Disadvantages of Class Actions from a Plaintiff's Lawyer's Perspective, Brief, Summer 1999, at 58 (stressing that "strength can come from numbers . . . [because] defendants are more likely to take seriously a class action . . . [which] increas[es] the opportunities for settlement"), WL 28-SUM BRIEF 58.

5. *See id.* (discussing the power attained by a newly formed class that can pose a serious threat to defendants because of potential financial loss in a negative class action judgment).

tions where some plaintiffs, if trying claims separately, might not attain a remedy for the same injury as a successful plaintiff in another suit.[6]

Despite its obvious advantages, numerous disadvantages also exist in the formation of a certified class. First, seeking class certification dwindles precious time and money because of fierce challenges by defendants.[7] Furthermore, once a class achieves certification, individual plaintiffs lose some power to direct the litigation.[8] For instance, attorneys must confront intra-class conflicts regarding strategy and advice and adhere to the newly assigned class counsel's recommendations.[9] More importantly, initial claimants could receive diluted compensation upon successful litigation because of the need to spread earnings throughout the class.[10] Award spreading has typically resulted in an "averaging effect" that makes the best claims collect minimal damages while the meritless claims collect undeserved damages.[11] Similarly, transaction costs create another serious drawback.[12] In 1995, figures indicated that successful litigants normally received less than half of every dollar won from the action.[13] Finally, class members also face the unenviable task of noti-

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6. *See id.* (contending that "[e]very lawyer knows that nearly identical claims may result in widely varying verdicts when tried separately").

7. *See id.* (urging that almost all defendants in a potential class action suit challenge certification, causing a certification dispute that can extend for over a year). Precious resources and time have to be devoted to the certification hearings, dwindling needed resources for the upcoming trial. *See id.*

8. *See* Kenneth S. Canfield, Advantages and Disadvantages of Class Actions from a Plaintiff's Lawyer's Perspective, Brief, Summer 1999, at 58 (arguing that "the plaintiffs and their lawyers have may [*sic*] less ability to direct the litigation than they would with individual cases"), WL 28-SUM BRIEF 58.

9. *See id.* (providing that an attorney has a fiduciary duty to the entire class). Besides the loss of control for the attorney handling a class action, some attorneys may be eliminated from control when the class is certified due to the selection of "class counsel." *See id.*

10. *See id.* (stating that because of the formation of the class, new claimants now exist that are in need of compensation that in other circumstances they would not have sought on their own).

11. *See* Barry F. McNeil, *Class Actions: A Time for Change*, 23 No. 2 LITIG. 1, 1 (1997) (asserting that there can be negatives to forming a class for plaintiffs as well, most notably that "[s]trong claims are weakened, weak claims are strengthened, and unmeritorious claims suddenly appear").

12. *See* John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990, 1000 (1995) (arguing that transaction costs can reach the level of unconscionability in the mass-tort situation).

13. *See id.* (delineating litigation-related expenses in mass-tort litigation that significantly reduce a winning plaintiff's recovery).

fying absent class members, which can often cost great amounts of both time and money.[14]

Imagine the scenario a defendant's attorney faces in a potentially large personal injury class action resulting from a refinery explosion.[15] The attorney must immediately seek to determine if the putative class holds a valid claim. To the attorney's surprise, however, the petition lists numerous far-fetched claimants as members of the putative class. Indeed, some named class members have obviously questionable ties to the class. For example, some members were not in the same town as the incident at the time of the explosion.[16] In fact, in order for one individual to have received injuries, the debris and smoke must have spread from South Texas to California.[17] Additionally, one "victim" admits to have suffered no harm from the explosion.[18] Similarly, another member admits to having been imprisoned in a different town at the time of the alleged harm.[19] Finally, one class member believed the suit concerned a chemical release rather than an explosion.[20]

Under this fact scenario, most defense attorneys would feel confident that the class could not muster certification.[21] In Texas, however, an attorney might not feel so confident. Despite the fact that the class appears uncertifiable, a Texas trial court certified, and a Texas court of appeals later affirmed, a class similar to the one described in *Southwestern Refin-*

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14. *See* Kenneth S. Canfield, Advantages and Disadvantages of Class Actions from a Plaintiff's Lawyer's Perspective, Brief, Summer 1999, at 58, 62 (noting that under Texas Rule of Civil Procedure 42(b)(3), notice must be sent to all potential members of the class "who can be identified with reasonable effort"), WL 28-SUM BRIEF 58.

15. *See generally* Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425 (Tex. 2000) (setting forth the facts of an actual refinery explosion in South Texas in 1994). Combining claims provides ample opportunities to divide costs and aggregate legal and tactical ideas; however, the combination also provides a binding judgment that affects the entire class. *See* Kenneth S. Canfield, Advantages and Disadvantages of Class Actions from a Plaintiff's Lawyer's Perspective, Brief, Summer 1999, at 58, 58, WL 28-SUM BRIEF 58. Plaintiffs must carefully balance these strengths and weaknesses before pursuing potential certification. *See id.*

16. *See Bernal*, 22 S.W.3d at 436 (establishing that some putative class members were in locations different from than explosion).

17. *See id.* (stating that a class member was in California at the time of the accident).

18. *See id.* (discounting the quality of the putative class by giving an example of one member that believed the refinery explosion caused him no physical harm).

19. *See id.* (explaining that one class member was incarcerated in a distant town when the explosion occurred).

20. *See Bernal*, 22 S.W.3d at 436 (referring to a deposition where the putative class member stated that he was suing for a benzene release in 1993).

21. *See generally* TEX. R. CIV. P. 42 (outlining the necessary requirements that a putative class must meet in order to attain certification).

ing Co. v. Bernal.[22] The described class provides a microcosm of the established liberal certification practice applied in Texas. Lower courts merely followed a widespread class action custom in Texas of "certify now, and worry later."[23]

The Texas judiciary traditionally regarded certification of putative classes as simple pre-trial procedural speed bumps.[24] Such a custom often forced defendants to consider settlement because of the potentially devastating consequences of large negative judgments.[25] As such, defendants would rather settle and avoid such consequences than risk potential certification granted by a court.[26] Consequently, because of this silent

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22. *See Bernal*, 22 S.W.3d at 428 (describing the trial and appellate court's holdings).

23. *See id.* at 434-35 (stating that it has been common practice for Texas appellate courts to allow certification without thoroughly analyzing the strength of the putative class' collective claim).

24. *See, e.g.*, Rainbow Group, Ltd. v. Johnson, 990 S.W.2d 351, 360 (Tex. App.—Austin 1999, pet. dism'd w.o.j.) (proposing that initially certifying a class and dissolving the certification later in the proceedings is the most efficient certification method); Nat'l Gypsum Co. v. Kirbyville Indep. Sch. Dist., 770 S.W.2d 621, 627 (Tex. App.—Beaumont 1989, writ dism'd w.o.j.) (noting that a certified class can easily be dissolved later if the predominance of common issues do not hold more worth than individual issues); Life Ins. Co. of the Southwest v. Brister, 722 S.W.2d 764, 775 (Tex. App.—Fort Worth 1986, no writ) (arguing that the proper approach is to allow certification and dissolve the class if "common questions are not predominant at trial").

25. *See* Barry F. McNeil, *Class Actions: A Time for a Change*, 23 No. 2 LITIGATION 1, 1 (1997) (urging that a successful certification often results in a forced settlement).

26. *See id.* (quoting Judge Posner in a discussion of the dangers facing defendants from newly certified classes). A glaring example of a defendant avoiding the potential consequences of a successful class action is reflected in a settlement reached by a certified class against Toshiba Corp., a laptop computer manufacturer. *See Outlook—Lawsuits and Lawyers Like This? No Place but Texas*, HOUS. CHRON., Nov. 29, 1999 (discussing the Toshiba settlement that took a large "byte out of the laptop computer industry"), *available at* http://www.tortreform.com/web/show_article.asp?articleID=74. Although Toshiba's case was considered easily defensible, the company's president, Taizo Nishimuro, chose to settle for $2.1 billion rather than risk a $9.5 billion loss at trial, which would virtually decapitate Toshiba. *See id.* (referring to Nishimuro's fear of Texas lawyers winning sympathy from juries). This "phantom class-action lawsuit" forced Nishimuro to pay $2.1 billion for a microchip design flaw that had never before been complained about. *See id.* (noting that NEC Corp., the producer of the alleged flawed chip, did not receive a single consumer complaint); *see also* Holman W. Jenkins, Jr., *If Tort Reform Disappears, Think 'Florida'*, WALL ST. J., Feb. 14, 2001, at A23 (discussing the "megabuck [Toshiba] suit . . . [that was] so trivial that even the victims don't claim to have been harmed"), WL 2/14/01 WSJ A23. The two lead plaintiffs never suffered any actual loss of data or other malfunctions due to the *billion dollar* flaw. These lead plaintiffs each received $25,000 from the settlement. *See Outlook—Lawsuits and Lawyers Like This? No Place but Texas*, HOUS. CHRON., Nov. 29, 1999 (describing the settlement terms), *available at* http://www.tortreform.com/web/show_article.asp?articleID=74. The rest of the class members received cash rebates between $210 and $443, or discount coupons. *See id.* (explaining the compensation most class members received). The plaintiffs' small group of attorneys, however, collected a $147.5

predator, class certification eventually became, in many respects, the single most important step in class action litigation.[27]

Concerns arose throughout Texas when news spread of outlandish certifications and settlements. Different entities in Texas voiced concern about the growing liberal methodology courts used to evaluate putative classes during certification.[28] As a result, federal influence,[29] state lobbies,[30] and legislative pressure[31] led the Texas judiciary, through application of the Texas Rules of Civil Procedure, to render a dramatic shift in class action methodology by way of a trio of decisions herein referred collectively as the "Triad": *Southwestern Refining v. Bernal*,[32] *Intratex Gas Co. v. Beeson*,[33] and *Ford Motor Co. v. Sheldon*.[34] Proponents of the new approach to class certification claim this method will have a positive fiscal impact on Texas's business climate.

The Texas Supreme Court's shift, however, has not evaded controversy. Indeed, conservative putative class evaluation has met a firewall of anger and controversy from plaintiffs' attorneys and liberal lobbyists.[35] Oppo-

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million contingency fee without possessing any proof of damages. *See id.* (relating the attorney's contingency fee award). Plaintiffs did not come banging on lead attorney Wayne Reaud's door, demanding justice. The "flaw" was discovered by an IBM engineer in the 1980s, which Reaud learned about by chance. *See id.* (noting the genesis of the lawsuit). The loss Toshiba was forced to absorb will most likely be passed on to consumers. As a result of this outlandish settlement, consumers will, in effect, supplement a $147.5 million payday to a few zealous attorneys in Beaumont. *See id.* (describing the attorney's fee in the case).

27. *See* Ken Hoagland, *Consumers Haven't Lost Access to Texas Courts*, DALLAS MORNING NEWS, Sept. 3, 2000 at 6J (arguing that the "reality is that the certification process essentially becomes 99 percent of the fight"), WL 9/3/00 DALLASMN 6J.

28. *See* Texans for Lawsuit Reform, *Point of View*, at http://www.tortreform.com (last visited Mar. 13, 2001) (explaining the group's concern over lawsuit abuse); Texas Watch Online, *at* http://www.texaswatch.org (last visited Mar. 13, 2001) (protecting citizens against special interest groups).

29. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 591 (1997) (providing the backbone to serious tort reform efforts eventually implemented by the Texas Supreme Court).

30. *See, e.g.*, THE PERRYMAN GROUP, THE IMPACT OF JUDICIAL REFORMS ON ECONOMIC ACTIVITY IN TEXAS, Citizens for a Sound Economy, *at* http://www.cse.org/informed/867.html (last visited Mar. 13, 2001); Texans for Lawsuit Reform, *Point of View*, *at* http://www.tortreform.com (last visited Mar. 13, 2001) (favoring judicial reform of the Texas tort system); Texas Watch Online, *at* http://www.texaswatch.org (last visited Mar. 13, 2001) (lobbying against anti-consumer legislation).

31. *See* Richard J. Trabulsi, Jr., *Legislative Tort Reform from a Reformer's Perspective*, TEX. B.J., Apr. 1, 2000 (summarizing the Texas Legislature's 1999 tort reform efforts), http://www.tortreform.com/web/show_article.asp?articleID=23.

32. 22 S.W.3d 425 (Tex. 2000).

33. 22 S.W.3d 444 (Tex. 2000).

34. 22 S.W.3d 398 (Tex. 2000).

35. *See* Dan Lambe, *Consumer Group Blasts Texas Supreme Court Decision Against Texas Truck Owners*, Texas Watch Online, May 11, 2000, *at* http://www.texaswatch.org/con-

nents believe that a strict approach to certification, while possibly spurring the growth of Texas business, will come at the expense of Texas citizens.[36]

This Comment analyzes the new conservative approach toward class action certification established by the Texas Supreme Court. Part II examines Texas Rule of Civil Procedure 42 and considers judicial treatment of Rule 42 leading to the supreme court's shift. Part III analyzes the Triad and discusses post-Triad case development. Part III also analyzes the future of Texas's judicial climate in regard to class certification. Part IV proposes potential modifications to the new certification formula created by recent supreme court case law. Part IV also suggests that the court's new approach positively improves the health of Texas class action jurisprudence and effectively rejuvenates Texas business. Finally, Part V concludes that, although the new approach contains some imperfection, the previous judicial treatment of class actions created a bastion of judicial arbitrariness and potential indiscretion.

II. CLASS ACTIONS IN TEXAS

Historically, Texas plaintiffs enjoyed tremendous flexibility in gaining certification for class action lawsuits because of a liberal approach employed by trial courts.[37] Because certification assignment occurred early in the proceedings, Texas case law encouraged trial courts to grant certifi-

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sumerlaw_article2.html (opining that "[t]he court, with the stroke of their pens, has just taken away the ability of thousands of Texans to hold Ford responsible"); *see also* Ken Hoagland, *Consumers Haven't Lost Access to Texas Courts*, DALLAS MORNING NEWS, Sept. 3, 2000, at 6J (asserting that "high-profile, politically powerful lawyers have pulled out every stop in an attempt to return Texas to the old days—'a lawyer's paradise,' as described by the Wall Street Journal"), WL 9/3/00 DALLASMN 6J.

36. *See* Dan Lambe, *Consumer Group Blasts Texas Supreme Court Decision Against Texas Truck Owners*, Texas Watch Online, May 11, 2000, *at* http://www.texaswatch.org/consumerlaw_article2.html (asserting that "'thousands of hard working Texans . . . take a back seat to corporate interests at the Texas Supreme Court'"). *But see* Ken Hoagland, *Consumers Haven't Lost Access to Texas Courts*, DALLAS MORNING NEWS, Sept. 3, 2000, at 6J (declaring that "[h]ysterical pronouncements that Texans will be shortchanged on justice because of recent reforms are calculated to inflame the public but have no basis in fact"), WL 9/3/00 DALLASMN 6J. Hoagland also claims that many of the consumer groups opposing the Texas Supreme Court's new approach are actually "front groups" for Texas plaintiffs' lawyers. *See id.* (explaining how plaintiff's lawyers have attempted to maintain the status quo); Richard J. Trabulsi, Jr., *Tort Reform Won't Deflate Rightful Firestone Claims*, HOUS. BUS. J., Sept. 8, 2000 (claiming that consumer advocates in opposition of tort reform measures should be referred to as "spokesmen for personal injury trial lawyers"), *available at* http://www.tortreform.com/web/show_article.asp?articleID=11.

37. *See* Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing For Class Actions in Gulf Waters?*, 74 TUL. L. REV. 1709, 1715 (2000) (stating that "the prevailing sense among some practitioners is that in many venues in . . .

cation of a class.[38] Putative classes chose to seek relief in state court because of the state's lax view regarding class actions, particularly when compared to federal courts.[39] With the supreme court's decisions in the Triad, however, Texas has seen revolutionary changes in class action jurisprudence.[40]

A. *Texas Rule of Civil Procedure 42*

Texas codified the law of class action jurisprudence in the Texas Rules of Civil Procedure.[41] Specifically, a putative class must adhere to the re-

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Texas . . . judges are more than willing to certify almost anything that walks through the courtroom doors").

38. *See* Nissan Motor Co. v. Fry, 27 S.W.3d 573, 589 (Tex. App.—Corpus Christi 2000, pet. filed) (citing FirstCollect, Inc. v. Armstrong, 976 S.W.2d 294, 299 (Tex. App.—Corpus Christi 1998, pet. dism'd w.o.j.)); Union Pac. Res. Co. v. Chilek, 966 S.W.2d 117, 123 (Tex. App.—Austin 1998, pet. dism'd w.o.j.) (holding that class certification in the early stage is the best practice); Dresser Indus., Inc. v. Snell, 847 S.W.2d 367, 375 (Tex. App.—El Paso 1993, no writ) (intimating that trial courts should certify the class at the beginning of proceedings because certification is later revocable by the trial court). This approach, however, spawned heated debate over the past decade. *See, e.g.*, Texans for Lawsuit Reform, *Point of View*, *at* http://www.tortreform.com (last visited Mar. 13, 2001) (lobbying for stronger tort reform efforts in Texas, including support for recent supreme court action creating a conservative class action approach); Texas Watch Online, *at* http://www.texaswatch.org (last visited Mar. 13, 2001) (arguing that recent conservative supreme court actions will drastically hurt Texas consumers); THE PERRYMAN GROUP, THE IMPACT OF JUDICIAL REFORMS ON ECONOMIC ACTIVITY IN TEXAS, Citizens for a Sound Economy, *at* http://www.cse.org/informed/867.html (last visited Mar. 13, 2001) (asserting statistics that support the argument that class actions have hindered the business climate in Texas). The controversy partially stemmed from the increased traffic to Texas of putative classes seeking redress fueled, in part, by a more stringent federal approach to class action litigation. *See* Alex Wilson Albright, *Class Warfare*, TEX. LAW., Dec. 16, 1996, at S27 (recognizing that federal courts, beginning in 1995, began to heavily dissect class action certification procedures). The Texas Supreme Court's conservative shift mirrored a similar shift in federal class action jurisprudence that culminated in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). *See id.*

39. *See* Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?*, 74 TUL. L. REV. 1709, 1709 (2000) (noting that Texas has "earned the reputation as [a] 'magnet forum[ ]' for class action litigation").

40. *See, e.g.*, Ford Motor Co. v. Sheldon, 22 S.W.3d 444, 455 (Tex. 2000) (discussing class certification); Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 435 (Tex. 2000) (opining on class certification); Intratex Gas Co. v. Beeson, 22 S.W.3d 398, 403 (Tex. 2000) (reviewing the requirements of class certification).

41. *See* TEX. R. CIV. P. 42 (outlining the guidelines of class action practice in Texas); *see also* FED. R. CIV. P. 23 (outlining the guidelines for class action lawsuits at the federal level); Ford Motor Co. v. Sheldon, 22 S.W.3d 444, 452 (Tex. 2000) (stating that because Rule 23 and Rule 42 carry virtually identical meaning, "federal decisions and authorities interpreting current federal class action requirements are persuasive in Texas actions"); Patrice Pujol, *"Rigorous" Evaluation of Certification Evidence Required for Class Actions:*

quirements of Rule 42 to receive a grant of certification.[42] Trial courts have the initial discretion to grant or deny certification in accordance with the standards set forth in Rule 42.[43] Often, certification rulings represent the most important step in class action development.[44] Accordingly, the Texas Supreme Court set forth a two-pronged blueprint in Rules 42(a) and 42(b).[45] Texas courts may apply these rules strictly or liberally at their discretion.[46]

The Texas Supreme Court Raises the Bar in Southwestern Refining Company v. Bernal *and* Ford Motor Company v. Sheldon, 38 HOUS. LAW. 53, 53 (2000) (noting that Rule 42 is "[p]atterned after Federal Rule of Civil Procedure 23"), WL 38-AUG HOUSLAW 53. Federal Rule of Civil Procedure 23 constitutes persuasive authority in Texas because the content of Federal Rule 23 provided the outline for the Texas rule. *See Sheldon*, 22 S.W.3d at 452 (explaining that the content of Rule 42 of the Texas Rules of Civil Procedure was systematically adopted from Rule 23 of the Federal Rules of Civil Procedure); *see also* Ventura v. Banales, 905 S.W.2d 423, 425 (Tex. App.—Corpus Christi 1995, orig. proceeding [leave denied]) (stating that the Federal Rules provide authoritative guidance for Texas jurisprudence); RSR Corp. v. Hayes, 673 S.W.2d 928, 931-32 (Tex. App.—Dallas 1984, writ dism'd) (recognizing that Federal class action decisions, although persuasive, are not binding authority). Furthermore, after a 1966 revision of Rule 23, Texas adopted an identical revision into Rule 42, albeit eleven years later. *See Sheldon*, 22 S.W.3d at 452 (establishing that Texas has not only adopted the content of Federal Rule 23 in the Texas Rules of Civil Procedure, but has also adopted the revisions that followed). Rule 23 was originally adopted into the Federal Rules of Civil Procedure in 1938. *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 376 (1967) (referring to the historical development of class action jurisprudence). Although the federal revision occurred in 1966, Texas did not adopt the revisions until 1977.

42. TEX. R. CIV. P. 42.

43. *See* Tana Oil & Gas Corp. v. Bates, 978 S.W.2d 735, 740 (Tex. App.—Austin 1998, no pet.) (manifesting that it is the trial courts' duty to determine certification of classes per Texas Rule of Civil Procedure 42).

44. *See id.* (providing an excellent example of the requirements of and standard of review for class certification); *see also* Scott S. Partridge & Kerry J. Miller, Note, *Some Practical Considerations for Defending and Settling Products Liability and Consumer Class Actions*, 74 TUL. L. REV. 2125, 2126 (2000) (detailing that the "single most important event in [a class action] case—the class certification hearing—occurs very early in litigation").

45. *See* TEX. R. CIV. P. 42 (setting forth two separate, required prongs to determine whether an action may be maintained as a class action).

46. *See, e.g.*, Amerada Hess Corp. v. Garza, 973 S.W.2d 667, 680 (Tex. App.—Corpus Christi 1996, writ dism'd w.o.j.) (upholding certification without identifying the means used for the predominance standard); Franklin v. Donoho, 774 S.W.2d 308, 312-13 (Tex. App.—Austin 1989, no writ) (granting the trial court tremendous latitude in interpreting and applying Rule 42). *But cf.* Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 435 (Tex. 2000) (mandating that the trial court must perform a rigorous analysis before certifying a putative class).

1. Texas Rule of Civil Procedure 42(a)

Rule 42(a) requires plaintiffs to satisfy four criteria prior to class certification: numerosity, commonality, typicality, and adequacy of representation.[47] Moreover, plaintiffs must meet each of these requirements separately.[48] Rule 42(a), however, usually does not create a major obstacle for a class seeking certification.[49]

a. Texas Rule of Civil Procedure 42(a)(1): Numerosity

First, to satisfy numerosity, the sheer number of complainants in the putative class must preclude joinder.[50] No bright-line numerical standard exists, either statutorily or in case law, to determine when numerosity merits the formation of a class.[51] To the contrary, outside factors usually establish numerosity.[52] Such factors include judicial efficiency, physical location of putative members, and the chance that legitimate claims will remain unanswered if pursued individually.[53] If joinder occurs without formation of a judicially certified class, however, the putative class fails to satisfy the numerosity element.[54]

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47. *See* TEX. R. CIV. P. 42(a) (addressing that in order to pursue a lawsuit a class must meet all four requirements listed in subsection (a)); *see also Sheldon*, 22 S.W.3d at 453 (assigning a name to each of the four requirements in Rule 42); RSR Corp. v. Hayes, 673 S.W.2d 928, 930 (Tex. App.—Dallas 1984, writ dism'd) (listing prerequisites that must be in place for "[o]ne or more members of a class [to] sue or be sued as representative parties on behalf of all").

48. *See* TEX. R. CIV. P. 42(a) (emphasizing that all the elements of Rule 42(a) must be met in order to attain class certification).

49. *See* Kenneth S. Canfield, Advantages and Disadvantages of Class Actions from a Plaintiff's Lawyer's Perspective, Brief, Summer 1999, at 58, 58 (referring to the ease with which classes pass Rule 23(a) of the Federal Rules of Civil Procedure), WL 28-SUM BRIEF 58.

50. TEX. R. CIV. P. 42(a)(1). The most important demonstrative factor is whether joinder is impracticable. *See* Weatherly v. Deloitte & Touche, 905 S.W.2d 642, 653 (Tex. App.—Houston [14th Dist.] 1995, writ dism'd w.o.j.) (declaring that the test for numerosity focuses on whether joinder is impracticable).

51. *See* Sun Coast Res., Inc. v. Cooper, 967 S.W.2d 525, 530 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd w.o.j.) (stating that "[d]etermining whether numerosity is met is not based on numbers alone").

52. *See* Employers Cas. Co. v. Tex. Ass'n of Sch. Bd. Workers' Comp. Self-Ins. Fund, 886 S.W.2d 470, 474 (Tex. App.—Austin 1994, writ dism'd w.o.j.) (stating that there is not a set rule regarding the actual numbers in numerosity while upholding certification of a class that included all past and present members of the fund).

53. *See Weatherly*, 905 S.W.2d at 653 (listing outside factors that trial courts consider when ruling upon Rule 42(a)(1)).

54. *See* TEX. R. CIV. P. 42(a)(1) (requiring joinder to be impracticable).

b. Texas Rule of Civil Procedure 42(a)(2): Commonality

The commonality requirement represents the second obstacle a putative class must overcome to attain certification.[55] To satisfy this requirement, disputed questions of law or fact must be the same for all class members.[56] The class need only share one common issue of law or fact, however, to overcome the commonality requirement.[57] Further, the common issues, when answered individually, must be answered as to the remaining class members.[58] Thus, in effect, the resolution attained for the class representatives must apply equally to the remainder of the class.[59]

c. Texas Rule of Civil Procedure 42(a)(3): Typicality

Third, under the typicality requirement, class members must suffer the same harm and have the same legal interests as other class members.[60] Typicality does not require individuals to suffer "precisely" the same harm. Rather, courts must simply find a correlation between the harm suffered by the potential class members.[61]

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55. TEX. R. CIV. P. 42(a)(2).

56. *Id.*; *see also* Entex v. City of Pearland, 990 S.W.2d 904, 919 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (reiterating that an issue of law or fact must be the same in all class members' claims).

57. *See* FirstCollect, Inc. v. Armstrong, 976 S.W.2d 294, 300 (Tex. App.—Corpus Christi 1998, pet. dism'd w.o.j.) (establishing the necessity of the commonality requirement set forth in the Texas Rules of Civil Procedure); *see also* Health & Tennis Corp. of Am. v. Jackson, 928 S.W.2d 583, 590 (Tex. App.—San Antonio 1996, writ dism'd w.o.j. [leave denied]) (advancing that a single issue of law or fact in common can affirmatively satisfy the commonality requirement); Dresser Indus., Inc. v. Snell, 847 S.W.2d 367, 372 (Tex. App.—El Paso 1993, no writ) (ruling that commonality does not require that all questions of the putative class be the same).

58. *See* Chevron U.S.A., Inc. v. Kennedy, 808 S.W.2d 159, 162 (Tex. App.—El Paso 1991, writ dism'd w.o.j.) (noting the importance and effect of a common bond in claims for each class member).

59. *See* Vinson v. Tex. Commerce Bank-Houston, 880 S.W.2d 820, 823 (Tex. App.—Dallas 1994, no writ) (relating the post-judgment binding effect that encompasses the entire certified class).

60. *See* TEX. R. CIV. P. 42(a)(3) (requiring that "the claims or defenses of the representative parties are typical of the claims or defenses of the class"); *see also* Nissan Motor Co. v. Fry, 27 S.W.3d 573, 582 (Tex. App.—Corpus Christi 2000, pet. filed) (expounding that "typicality requires that a class representative possess the same interest and possess the same injury as the members of the class").

61. *See Fry*, 27 S.W.3d at 1 (refraining from a stringent approach that would require a demonstration of the exact harm suffered by each individual); *see also Dresser Indus. Inc.*, 847 S.W.2d at 372 (indicating that "there must be a nexus between the injury suffered by the representative and the injuries suffered by other members of the class").

d. Texas Rule of Civil Procedure 42(a)(4): Adequacy of Representation

Finally, in order to satisfy adequacy of representation, the parties responsible for representing the class must "fairly and adequately" protect the interests of the class.[62] The representatives for the class must not have interests in the litigation hostile to other members' interests.[63] Factors considered when measuring fairness and adequacy include: (1) capacity of counsel; (2) conflicts of interest; (3) the integrity of the plaintiff; (4) the representative's knowledge of the issue and belief that the claims have merit; (5) geographic manageability of the class; and (6) whether litigation is financially possible for the plaintiffs.[64] Furthermore, the trial court must find that counsel representing the class will competently and zealously pursue all members' claims.[65]

2. Texas Rule of Civil Procedure 42(b)

After satisfying Rule 42(a), a class seeking certification must further meet one of the four criteria established in Rule 42(b).[66] Rule 42(b) represents the most difficult obstacle for a class seeking certification.[67] As such, much of the new transformation in Texas class action jurisprudence involves stricter interpretation of Rule 42(b).[68]

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62. *See* TEX. R. CIV. P. 42(a)(4) (establishing a burden on the representatives to vigorously pursue the desires of other class members).

63. *See* Henry Schein, Inc. v. Stromboe, 28 S.W.3d 196, 210 (Tex. App.—Austin 2000, pet. filed) (noting that claims of the representatives cannot be "antagonistic to . . . the remaining class members, and class counsel must be sufficiently qualified and experienced to prosecute the action vigorously").

64. *See* Forsyth v. Lake LBJ Inv. Corp., 903 S.W.2d 146, 150 (Tex. App.—Austin 1995, writ dism'd w.o.j.) (outlining enumerated guidelines to determine fairness and adequacy of counsel).

65. *See* Adams v. Reagan, 791 S.W.2d 284, 291 (Tex. App.—Fort Worth 1990, no writ) (warning that the trial court must determine if the representative counsel displays "willingness and ability . . . to take an active role in and control the litigation and to protect the interests of absentees").

66. *See* TEX. R. CIV. P. 42(b); *see also* Ford Motor Co. v. Sheldon, 22 S.W.3d 444, 453 (Tex. 2000) (claiming that a class must meet one of the requirements set forth in Rule 42(b) after meeting all the requirements of Rule 42(a)).

67. *See* Kenneth S. Canfield, Advantages and Disadvantages of Class Actions from a Plaintiff's Lawyer's Perspective, Brief, Summer 1999, at 58, 59 (commenting that the "second set of prerequisites [in the rules] is much more difficult to satisfy"), WL 28-SUM BRIEF 58.

68. *See* Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 435 (Tex. 2000) (providing stronger standards trial courts must use in evaluating predominance under Rule 42(b)).

a. Texas Rule of Civil Procedure: 42(b)(1), (2), and (3)

Rule 42(b)(1) requires that the class representative have a claim as strong as or stronger than the rest of the class.[69] Rule 42(b)(1) also mandates that, in consideration of class members potentially filing separate suits, the class representative's claim must not create a risk of decisional inconsistency or harm the interests of individuals with potentially stronger claims.[70] Rule 42(b)(2) states that the opposing party must have "acted or refused to act on grounds generally applicable to the class."[71] The Rule 42(b)(2) requirement creates a situation where a final judgment involving the members of a class effectuates a just outcome.[72] Rule 42(b)(3) requires that "the object of the action [be] the adjudication of claims which do or may affect specific property involved in the action."[73]

b. Texas Rule of Civil Procedure 42(b)(4): Predominance

The predominance inquiry constitutes the last, potential hurdle to obtain Rule 42(b) approval.[74] Pursuant to Rule 42(b)(4), the relevant issues common to the class in the impending suit must predominate over any individual issues of law or fact.[75] In analyzing a class for predominance, the court must find that issues common to the class, when resolved for one class member, will resolve the claim for all class members.[76]

To begin a predominance inquiry, the trial court must first inventory the relevant questions posed by the putative class and determine the com-

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69. *See* Harris v. Logue, 544 S.W.2d 932, 936 (Tex. App.—Fort Worth 1976, writ ref. n.r.e.) (providing that a proper representative is one who "fairly insures" adequate representation for those who would be defendants).

70. *See* TEX. R. CIV. P. 42(b)(1) (noting that a risk of inconsistency must not be present if claims were filed individually, as opposed to an aggregate claim as a class); *see also* Reserve Life Ins. Co. v. Kirkland, 917 S.W.2d 836, 845 (Tex. App.—Houston [14th Dist.] 1996, no writ) (supporting Rule 42(b)(1)(A), which requires a demonstration that separate prosecution of the class members' claims would result in inconsistent adjudication).

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

72. *See id.* (referring to a situation where the opposition acts or refuses "to act on grounds generally applicable to the class").

73. *See* TEX. R. CIV. P. 42(b)(3).

74. *See* TEX. R. CIV. P. 42(b)(4) (indicating that to qualify under Rule 42(b)(4) "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members").

75. *See id.*

76. *See* Amoco Prod. Co. v. Hardy, 628 S.W.2d 813, 816 (Tex. App.—Corpus Christi 1981, writ dism'd) (explaining that before determining whether the commonality element of the predominance requirement has been met, the court must find common questions in the case).

mon issues.[77] Such an analysis includes a determination of which claims involve individual issues that class members should litigate separately. The test is not solely a numerical balancing test, but instead concerns whether the litigation *focuses* on individual or common claims.[78] Furthermore, when the court reaches a resolution of common issues, the remaining individual issues must not be so numerous as to overwhelm a single jury and prevent resolution.[79]

In addition to the predominance requirement established by Rule 42(b)(4), a class action must be "superior to other available methods for the fair and efficient adjudication of the controversy."[80] For example, economic viability for involved parties renders support to class action utilization as a superior means of litigation.[81] Superiority may also triumph where "any difficulties which might arise in the management of the class are outweighed by the benefits of class-wide resolution of common issues."[82] Although economy and efficiency play a major role in a superiority evaluation, equality of justice must wield more authority.[83] As a result, guaranteeing all class members a fair and impartial trial should supersede class certification decisions when a court cannot achieve equality for all class members.[84]

Rule 42(b)(4) establishes four factors to help determine whether a class satisfies the predominance and superiority requirements.[85] The factors that may affect class acceptance under Rule 42(b)(4) include: (1) the interest of class members to individually control the litigation of separate issues;[86] (2) the occurrence of any litigation concerning parties involved or issues involved previously initiated by or against members of the

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77. *See* RSR Corp. v. Hayes, 673 S.W.2d 928, 930-31 (Tex. App.—Dallas 1984, writ dism'd) (stating that the trial court must perform this breakdown of issues to test predominance under Rule 42(b)(4)).

78. *See* Glassell v. Ellis, 956 S.W.2d 676, 686 (Tex. App.—Texarkana 1997, pet. dism'd w.o.j.) (stating that the test used by courts is a more complex measure of the relevant issues that will be the focus of litigation).

79. *See* Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 434 (Tex. 2000) (explaining that ideally after a judgment in favor of the class, the only action left would be for the remaining members to file their claims, not for decisions to be made on individual claims).

80. *Id.*

81. *See* Nissan Motor Co. v. Fry, 27 S.W.3d 573, 585 (Tex. App.—Corpus Christi 2000, pet. filed) (noting an economic disadvantage to individual litigation when the important issues are "factual, requiring substantial discovery, expert testimony, and trial time").

82. *Id.* at 585-86.

83. *See id.*

84. *See id.* at 586.

85. *See* Sun Coast Res., Inc. v. Cooper, 967 S.W.2d 525, 535 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd w.o.j.) (emphasizing that Rule 42(b)(4) has established four factors to determine if the qualifications of the rule have been met).

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

class;[87] (3) the interest of parties to litigate their concerns in the forum at hand;[88] and (4) potential difficulties that may arise in managing the lawsuit as a class action.[89]

B. *Judicial Leeway: Application and Interpretation of Rule 42*

Assuming the court chooses to certify the putative class, a defendant often settles before going to trial in order to avoid a potentially massive judgment in favor of the newly formed collective plaintiff.[90] Therefore, certification may create a winning situation for the putative class without having to face trial.[91] Indeed, a certified class can lead to a virtual mob-intimidation of the defendant.[92] In that regard, a seemingly powerful corporate giant can become a meek defendant as a result of a trial judge's affirmative certification.[93]

Appellate courts will overrule a trial court's certification only upon a showing of an abuse of discretion.[94] A trial court's abuse of discretion may include misapplication of the law to disputed facts, acting arbitrarily, or ignoring guiding laws and relevant case precedent.[95] The putative

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

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

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

90. *See* Scott S. Partridge & Kerry J. Miller, Note, *Some Practical Considerations for Defending and Settling Products Liability and Consumer Class Actions*, 74 TUL. L. REV. 2125, 2128 (2000) (claiming that a successful certification can "propel the stakes of a case into the stratosphere"). Corporations are often unwilling to risk the potential damaging loss in trial if the class is certified since the decision's binding effect can often critically damage the corporation. *See id.* (acknowledging the dramatic damage a corporation may encounter if it loses at trial to a large class).

91. *See* Ken Hoagland, *Consumers Haven't Lost Access to Texas Courts*, DALLAS MORNING NEWS, Sept. 3, 2000, at 6J (asserting that after a class is certified, in almost every case "the defendant immediately pursues a settlement at almost any cost because an adverse outcome would jeopardize the very existence of the company"), WL 9/3/00 DALLASMN 6J.

92. *See id.*

93. *See id.*

94. *See* Vinson v. Tex. Commerce Bank-Houston, 880 S.W.2d 820, 823 (Tex. App.—Dallas 1994, no writ) (stating that an appellate court can only review a certification order set forth by a trial court for an abuse of discretion and the court cannot replace the trial court's opinion with its own). Trial courts have the benefit of reviewing extensively the relevant facts and laws regarding the particular certification in question. *See id.* This benefit, in combination with the lack of information and time the appellate court is given to review the certification, lends support to the stronger discretionary responsibility the trial court possesses. *See* Henry Schein, Inc. v. Stromboe, 28 S.W.3d 196, 208 (Tex. App.—Austin 2000, pet. filed).

95. *See* Rainbow Group, Ltd. v. Johnson, 990 S.W.2d 351, 356-61 (Tex. App.—Austin 1999, pet. dism'd w.o.j.) (setting forth examples of a trial court's abuse of discretion leading to appellate court action).

class carries the burden of proof in a certification hearing, which historically did not demand an extensive showing of evidence.[96] The Texas Supreme Court's new conservative approach to class certification, however, has increased the burden.[97]

C. *Throwing Fuel on the Fire: Influential Developments Before the Conservative Shift of the Texas Supreme Court*

During the 1980s and early 1990s, Texas became known as a trial lawyer's sanctuary.[98] Much of this characterization resulted from the Texas Supreme Court's friendly approach to mass-tort litigation.[99] The court took many liberties to allow plaintiffs a smoother path to healthy judgments.[100] Consequently, the judiciary's liberal sway inflicted severe damage to many defendants, most notably Texas businesses.[101] For example, in 1992, Texas courts handed down four decisions in excess of $100 million each.[102] In contrast, courts throughout the rest of the country rendered only three decisions topping $100 million.[103] Furthermore, in 1993, Texas courts handed down five additional $100 million decisions.[104]

Eventually, frustration about the high court's approach boiled over to the Texas Legislature and Governor's office.[105] Serious concern arose

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96. Clements v. League of United Latin Am. Citizens, 800 S.W.2d 948, 952 (Tex. App.—Corpus Christi 1990, no writ) (noting that the burden of proof that is on the putative class does not require a powerful evidentiary display).

97. *See* Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 435 (Tex. 2000) (rejecting the "certify now and worry later" approach to class certification). In this new standard set forth in *Bernal*, a stronger evidentiary representation may now be required since emphasis has been placed on a proper certification at the beginning of proceedings. *See id.*

98. *See Opportunities for Abuse as Big as Ever in Lone Star State*, Citizens Against Lawsuit Abuse, *at* http://www.calahouston.org/asbig.html (last visited Mar. 13, 2001) (bemoaning Texas's reputation as the "epicenter of lawsuit abuse").

99. *See generally id.* (pointing to the court's methodical stripping of defendants' protections, allowing plaintiffs to reap large rewards). At the time, the *Christian Science Monitor* stated that "Texas juries hand out high-dollar awards like windshield flyers on a mall parking lot." *Id.*

100. *See* Charles B. Camp, *Business Leaders Lobby to Cut Punitive Damages*, DALLAS MORNING NEWS, Mar. 20, 1994, at 1A (arguing that "Texas is currently a leader in jaw-dropping punitive awards"), 1994 WL 682736.

101. *Opportunities for Abuse as Big as Ever in Lone Star State*, Citizens Against Lawsuit Abuse, *at* http://www.calahouston.org/asbig.html (last visited Mar. 14, 2001) (relating the negative impact of the liberal judicial shift that began in the 1970s).

102. Charles B. Camp, *Business Leaders Lobby to Cut Punitive Damages*, DALLAS MORNING NEWS, Mar. 20, 1994, at 1A, 1994 WL 6862736.

103. *Id.*

104. *Id.*

105. *See Opportunities for Abuse as Big as Ever in Lone Star State*, Citizens for Lawsuit Abuse, at http://www.calahouston.org/asbig.html (last visited Mar. 14, 2001) (referring

about the state of the business climate in Texas.[106] Texas courts had become known as an oasis for trial lawyers because of the ease and simplicity of suing businesses.[107] As a result, a bipartisan tort reform package attempted to "end the frivolous and junk lawsuits that . . . threaten [Texas's] small business owners and entrepreneurs."[108] Accordingly, an executive and legislative coalition implemented sweeping tort reform in 1995.[109]

In 1996, the first signs of a judicial shift in class action jurisprudence appeared in two decisions, *De Los Santos v. Occidental Chemical Corp.*[110] and *General Motors Corp. v. Bloyed.*[111] *De Los Santos* and *Bloyed* represented the most important Texas civil procedure decisions of the year.[112] The supreme court expressed frustration about the state of class action affairs in Texas and addressed the matter for the first time in fourteen years.[113] As one commentator predicted, the two cases acted as warning flares for the subsequent conservative invasion in class action procedure.[114]

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to the coalition created by House Speaker Pete Laney, Lt. Governor Bob Bullock and Governor George W. Bush to institute several major tort reforms in Texas).

106. *See* GEORGE W. BUSH, A CHARGE TO KEEP 25 (1999) (discussing Governor Bush's desire to implement a tort reform package to resuscitate the business climate).

107. *See id.* (proclaiming that the balance of fairness tilted heavily in favor of personal injury attorneys because Texas became a "great place for people to sue one another").

108. *See id.* at 116 (pointing to Governor Bush's tort reform package, which he declared a legislative emergency to show its importance).

109. *See Opportunities for Abuse as Big as Ever in Lone Star State*, Citizens Against Lawsuit Abuse, *at* http://www.calahouston.org/asbig.html (last visited Mar. 13, 2001) (challenging that because of demand from the public, Governor George W. Bush and the legislature implemented a large-scale effort for tort reform).

110. 933 S.W.2d 493 (Tex. 1996).

111. 916 S.W.2d 949 (Tex. 1996).

112. *See* Alex Wilson Albright, *Class Warfare*, 12 TEX. LAW., Dec. 16, 1996, at S27 (illustrating the potential impact that *De Los Santos* and *Bloyed* could have on civil procedure in the state and referring to the two cases as the "single most significant development" in Texas civil jurisprudence at that time), WL 12/16/1996 TEXLAW S27. Albright's prediction about the significance of the two cases came to fruition in three Texas Supreme Court decisions in 2000. *See generally Bernal*, 22 S.W.3d at 425; Ford Motor Co. v. Sheldon, 22 S.W.3d 444 (Tex. 2000); Intratex Gas Co. v. Beeson, 22 S.W.3d 398 (Tex. 2000).

113. *See* Alex Wilson Albright, *Class Warfare*, 12 TEX. LAW., Dec. 16, 1996, at S27 (echoing the frustration of the Texas Supreme Court in appellate decisions that most likely resulted in class certification), WL 12/16/1996 TEXLAW S27.

114. *See id.* (anticipating the impact of the two cases). Professor Albright predicted "*Bloyed* and *De Los Santos* are only the beginning" of a new conservative approach by the Texas Supreme Court that "almost surely will narrow the circumstances in which class-action certification is appropriate." *Id.*

D. *Federal Influence*

Federal courts experienced a similar evolution in class action jurisprudence during the 1990s. In 1997, the United States Supreme Court handed down *Amchem Products, Inc. v. Windsor*,[115] sending ripples through the judicial waters of Texas. In *Amchem*, the Supreme Court rejected an asbestos litigation class based partially on a problem with the class satisfying the predominance requirement found in Federal Rule of Civil Procedure 23(b)(3).[116] Justice Ginsburg's opinion refers to the class as "sprawling" and notes that the certification of such a class "does not follow the counsel of caution."[117]

The Texas Supreme Court reacted to *Amchem*'s conservative approach to the predominance requirement with the Triad. The court implemented *Amchem*-style federal jurisprudence into Texas by altering the weight given to predominance analysis under Texas Rule of Civil Procedure 42(b)(4).[118] More specifically, the Texas Supreme Court focused on the United States Supreme Court's determination regarding the importance of properly defining a class and adhering to the predominance requirement.

III. The Conservative Shift Represented by "Triad"

The Texas Supreme Court made a strong statement for class action reform with the issuance of three consecutive limiting opinions.[119] The Triad signifies a retreat from traditional liberal class action jurisprudence. Moreover, the court has created a new climate where frivolous suits and undeserving plaintiffs have no refuge.

The three decisions, viewed in unity, strongly limit class action certification opportunities in Texas.[120] Under the new approach of the Triad, trial courts must: (1) assign a precise class definition to the putative class before moving forward in the court's certification determination,[121] (2)

115. 521 U.S. 591 (1997).

116. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997).

117. *Id.* at 624-25.

118. *See* Ford Motor Co. v. Sheldon, 22 S.W.3d 444, 454 (Tex. 2000); Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 436 (Tex. 2000); Intratex Gas Co. v. Beeson, 22 S.W.3d 398, 403 (Tex. 2000).

119. *See generally Sheldon*, 22 S.W.3d at 444; Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425 (Tex. 2000); Intratex Gas Co. v. Beeson, 22 S.W.3d 398 (Tex. 2000).

120. *See generally Sheldon*, 22 S.W.3d at 453-54 (examining the criteria for a properly defined class); *Bernal*, 22 S.W.3d at 435 (stating "it is improper to certify a class without knowing how the claims can and will be tried"); *Intratex*, 22 S.W.3d at 404-05 (reviewing class definition).

121. *See Intratex*, 22 S.W.3d at 403 (stating that a class must be precisely defined in order to advance in certification proceedings).

perform a "rigorous analysis" to determine if necessary class prerequisites, most importantly the predominance inquiry, are present to avoid abuse of discretion,[122] (3) indicate the claims likely determination before issuing a certification ruling,[123] and (4) in mass-tort personal injury situations, deny certification if highly individualistic variables are involved.[124] As a result, the days of trial courts' "certify now and worry later" approach seem to be in Texas's past.[125]

A. Southwestern Refining Co. v. Bernal

Texas reacted to *Amchem* at a leisurely pace.[126] Before the Triad, the Texas judiciary seemed to work "in an isolation bubble," ignoring the conservative leanings of the federal judicial system.[127] Nevertheless, after turning its back on federal class action jurisprudence throughout the 1990s,[128] the Texas Supreme Court cited to *Amchem* in *Bernal* and noted the importance of having an exacting standard of certification at the beginning of the proceedings.[129]

On an early morning in late January, 1994, a "slop tank" exploded at a Corpus Christi refinery owned by Southwestern Refining Company.[130] A putative class of 904 members formed as a result of the explosion and claimed that "the ensuing fire sent a plume of toxic smoke into the air and that soot and ashes from the smoke descended on their homes in the

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122. *See Bernal*, 22 S.W.3d at 435 (introducing a stronger analysis standard to be imposed on trial courts).

123. *See id.* (citing *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996) for the proposition that a certification is invalid if allowed without having knowledge of how the class' claim will likely be decided).

124. *See id.* at 436 (ruling that because of extremely individualized variables, class actions are rarely the proper means of attaining a resolution).

125. *See id.* at 435 (rejecting the prior Texas class action regime that allowed certification to proceed without proper critical analysis).

126. *See* Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?*, 74 TUL. L. REV. 1709, 1768-69 (2000) (discussing the sparseness of Texas citations to *Amchem* since the 1997 decision was handed down).

127. *See id.* at 1768 (noting that Texas has ignored conservative federal class action decisions including, most notably, *Amchem*).

128. *See id.* at 1767 (proclaiming that "[u]ntil spring 2000, the Texas Supreme Court had not yet decided a major post-*Amchem* class action appeal"). Actions taken in the spring of 2000 included *Bernal, Sheldon,* and *Intratex*. *Id.* at 1769-72.

129. *See Bernal*, 22 S.W.3d at 435 (discussing the Supreme Court's decision in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997)).

130. *See id.* at 428-29 (describing the events that led to the putative class seeking redress).

surrounding neighborhoods."[131] As a result, class members asserted that severe physical ailments developed, plants deteriorated, and animals died.[132]

The trial court certified the class and ordered the trial to continue in three phases.[133] The first phase addressed Southwestern Refinery's liability for negligence, strict liability, nuisance, gross negligence, and toxic trespass.[134] The second phase assessed punitive damages for applicable gross negligence.[135] Finally, the third phase gave the individual litigants opportunity to show specific damages, including injuries proximately caused by the explosion.[136] Where an individual failed to provide satisfactory proof of specific injury, the court reduced punitive damages.[137]

In an interlocutory appeal, Southwestern challenged the trial court's certification decision.[138] The appellate court modified the three-phase approach instituted by the trial court, requiring a resolution of actual damages before an assessment of punitive damages.[139] In an opinion written by Justice Gonzales, the Texas Supreme Court used Southwestern

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131. *See id.* at 429 (intimating the alleged aftermath from the explosion at the refinery).

132. *See id.* (listing the alleged effects to include respiratory problems, skin and eye irritation, headaches, nausea, plant death, and traumatic pet deaths).

133. *See id.* at 429-30 (noting that the lower court certified the putative class of individuals claiming to have suffered harm from the explosion).

134. *See Bernal*, 22 S.W.3d at 429.

135. *See id.*

136. *See id.*

137. *See id.* (surveying the trial court's final phase, which allowed a potential decrease in punitive damages if members of the class could prove that they suffered actual harm).

138. *See id.* (asserting that the appeal occurred before the actual trial had been determined). More specifically, Southwestern Refining challenged the trial court's ruling that common issues predominated over individual issues of class members. *See Bernal*, 22 S.W.3d at 429 (stating that Southwestern Refining "argued . . . most notably [in the appeals claim that] the requirement that common issues predominate over individual ones" was not met). The Texas Supreme Court considered predominance during its certification analysis because "it is one of the most stringent prerequisites to class certification." *Id.* at 433.

139. *See Bernal*, 22 S.W.3d at 298-99 (noting that "[a] better plan . . . is to delay assessment of punitive damages until . . . actual damages . . . have been proven"). The court was unhappy with the situation where the jury would decide upon punitive damages before any attaining familiarity in regard to actual damages suffered. *See id.* at 298 (urging the importance of a proper evaluation of actual damages to reach an accurate punitive damages assignment). A prohibited scenario is created when the jury decides punitive damages, but cannot determine their proportionality to actual damages. *See* Alamo Nat'l Bank v. Kraus, 616 S.W.2d 908, 910 (Tex. 1981) (ruling that punitive damages must be in proportion to actual damages).

Refining's predominance challenge as the key to moving towards a more conservative class action jurisprudence.[140]

The *Bernal* court chose to focus on the increased importance placed on the predominance test set forth in *Amchem.*[141] *Amchem* placed a direct emphasis on strongly enforcing the predominance inquiry, distinguishing predominance from the more lax commonality requirement.[142] The Texas Supreme Court expressly rejected the certify now, worry later approach and adopted most of *Amchem's* strict adherence to the guidelines of the predominance rules.[143] After noting that the predominance rule "limits judicial inventiveness,"[144] the *Bernal* court stated that predominance constitutes a step that courts cannot avoid during certification.[145] The court further noted that predominance also acts as a "check on the flexible commonality test under Rule 42(a)(2)."[146]

To implement the desired change to class action certification, the supreme court instructed future Texas courts to apply a "rigorous analysis" under Rule 42.[147] In applying this new rigorous analysis standard, courts must strictly adhere to Rule 42 and provide *de minimus* opportunity for judicial creativity in class certification.[148] The court methodically denounced prior trial court opinions regarding class certification, asserting that courts previously have taken a lackadaisical approach to certification.[149] The *Bernal* court further stated that courts should rarely allow

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140. *See id.* at 435 (stating that the court installed a *rigorous analysis standard*, invalidated the "certify now and worry later" approach, and denounced the use of class actions for personal injury situations).

141. *See id.* at 435 (enforcing a rejection of the "certify now and worry later" approach by using *Amchem* as an example in how the Supreme Court has vigorously applied the predominance standard).

142. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997) (noting that the predominance requirement is "far more demanding" than the commonality requirement). The Court was comparing the predominance requirement to Federal Rule 23(a)'s commonality requirement, which is a mirror image of the commonality requirement in Rule 42(a) of the Texas Rules.

143. *See Bernal*, 22 S.W.3d at 435.

144. *See id.* (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) for the purpose of detailing the importance of maintaining focus on the actual wording of the rule, thereby avoiding judicial activism).

145. *Id.*

146. *See id.* (declaring the dual importance of the predominance standard as not only a primary rule that the putative class must pass, but also a secondary check on the lax commonality requirement of Rule 42(a)).

147. *Bernal*, 22 S.W.3d at 435.

148. *See id.* (manifesting that if the standard is followed properly, the class action device's usefulness is utilized).

149. *See id.* at 434 (bemoaning that "[w]hen presented with significant individual issues, some courts have simply remarked that creative means may be designed to deal with them, without identifying those means or considering whether they would vitiate the par-

class actions in mass-tort personal injury situations.[150] The court reasoned that in scenarios involving numerous personal injuries, "individualistic variables" often necessitate individual determinations.[151]

The Texas Supreme Court intended predominance to eliminate class action use when the diversity and complexity of class members' individual issues would render a jury confused and ineffective because of the intricacy of numerous individual claims.[152] In a proper class action with common issues predominating, a decision in favor of the class should "decisively settle the entire controversy."[153] If individual issues still remain after resolution of common issues, the courts should try the claims individually.[154]

The court delivered a strong statement regarding Rule 42(b)(4)'s predominance requirement. As a result, the court considers predominance "one of the most stringent prerequisites to class certification."[155] Furthermore, the court emphasized the test for predominance as more than a simple equation that measures whether common issues clearly outnumber uncommon issues.[156] To the contrary, the test measures whether the litigation focuses on common issues or individual issues.[157]

Under this new approach, courts may not grant certification without formulating a hypothesis about how the class' claims will likely be tried.[158] Moreover, courts must look beyond the pleadings of counsel in order to render a proper judgment because the court must understand the

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ties' ability to present viable claims or defenses"). The supreme court further provided that some courts historically acknowledged that if an error was made, the error should create a certified class. *See id.* Finally, the supreme court noted that other courts have decided that "predominance need not be evaluated until later." *Id.*; *see also* Patrice Pujol, *"Rigorous" Evaluation of Certification Evidence Required for Class Actions: The Texas Supreme Court Raises the Bar in* Southwestern Refining Company v. Bernal *and* Ford Motor Company v. Sheldon, 38 HOUS. LAW. 53, 54 (2000) (opining that the Court "denounced several opinions whose analyses exhibited a lax view toward the 'rigorous' predominance requirement"), WL 38-AUG HOUSLAW 53.

150. *See Bernal*, 22 S.W.3d at 436 (proclaiming that "personal injury claims often present thorny causation and damage issues with highly individualistic variables that a court or jury must individually resolve").

151. *See id.*

152. *See id.* at 434.

153. *Id.*

154. *See id.* at 433-34 (emphasizing that, pursuant to Rule 42(b)(4)'s predominance requirement, common issues must predominate for a class to receive certification).

155. *See Bernal*, 22 S.W.3d at 433.

156. *See id.* at 434 (dismissing a simple formula that measures whether there are more common issues than individual ones).

157. *See id.*

158. *Id.* at 435 (concluding that it is essential to take "a cautious approach to class certification").

relevant facts and law at issue together with the claims and defenses of both sides.[159] Consequently, the requirement that the court analyze the substantive issues regarding the laws and facts at hand before certifying the class has superceded the trial lawyer's ability to use tactical pleadings and a skillful oral presentation in establishing the claim.[160] Because of the new rigorous analysis standard that avoids premature certification, issues must consist of common claims that will allow a jury to determine the facts and render a fair and efficient verdict.[161] If a jury cannot make such a determination, the trial court should not certify the putative class.[162]

B. Intratex Gas Co. v. Beeson

In *Intratex Gas Co. v. Beeson*, a group of over 900 producers of natural gas claimed that in a period of over ten years, Intratex failed to collect natural gas ratably from the producers' wells.[163] The trial court held a three-day certification hearing to determine whether a viable class existed.[164] The court used a study compiled by the plaintiffs' expert asserting that Intratex took disproportionate amounts of natural gas during the period in question.[165] Intratex's expert argued against certification, stating that under the rules the court could not grant certification because the class definition was "derived from a suspect study."[166]

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159. *See id.* (citing Castano v. Am. Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996)).

160. *See Bernal*, 22 S.W.3d at 435 (indicating that the court must not rely on the assurances of counsel but must look beyond the pleadings to understand the substantive law, claims, defenses, and facts at issue).

161. *See id.* at 436 (providing that class certification is not appropriate "[i]f it is not determinable from the outset that the individual issues can be considered in a manageable, time-efficient, yet fair manner").

162. *See id.* (pointing to the new rigorous analysis standard, which requires that a class should not attain certification if individual issues are overwhelming).

163. *See* Intratex Gas Co. v. Beeson, 22 S.W.3d 398, 400 (Tex. 2000) Texas law requires that intrastate pipeline companies ratably buy natural gas. *See id.* (explaining that companies like Intratex must buy gas without discrimination). Likewise, producers must also supply gas ratably. *Id.* The ratability laws derive from the Texas Common Purchasers Act. *See also* TEX. NAT. RES. CODE ANN. §§ 111.081-.097 (Vernon 1993) (establishing the ratability rules that regulate gas producers).

164. *See id.* at 401 (referring to the process that the trial court used to eventually certify the class).

165. *See id.* (reporting that plaintiff's expert testified that Intratex was ratably taking natural gas to prove the plaintiffs compiled a certifiable class). The expert testified that during the years in question, 1978-88, Intratex violated the ratability laws for over 970 wells. *See id.*

166. *See Intratex*, 22 S.W.3d at 401 (commenting that Intratex's expert set forth a challenge in his testimony that the proposed class was improperly formed because Rule 42 was not fulfilled by the proposal).

The trial court certified the class with a modified definition despite Intratex's expert's testimony.[167] The definition emphasized that the class included all individuals whose "gas was taken by [Intratex] in quantities less than their ratable proportions."[168] The court of appeals found that the class had been properly defined and certified.[169] Furthermore, the appellate court noted that although the class may eventually require decertification, "merits-based issues should not defeat certification at such an early stage of the litigation."[170] In Intratex's petition for review, the company claimed that the trial court erred in granting the certification, including an argument claiming an invalid class definition.[171] Intratex argued that if the supreme court adhered to the trial court's modified definition, a "fail-safe class" resulted.[172]

The Texas Supreme Court overruled the appellate court and found that the trial court abused its discretion.[173] Most importantly, the supreme court found that the trial court certified a fail-safe class.[174] The court's decision demonstrates the irony of certifying a fail-safe class. If Intratex won at trial, the class would fail because the class definition focused on identifying plaintiffs Intratex had not taken from ratably.[175] Accordingly, a negative judgment would not bind plaintiffs because a correctly certified class would not exist.[176] The supreme court correctly noted that such a scenario is "clearly impermissible."[177] Thus, the court ruled that because the class definition lacked precision and the modified definition by

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167. *See id.* (noting that the trial court certified the class on the ratability issue). The record implied that certification had been granted largely in part to the study compiled by the plaintiff's expert. *See id.* at 402.

168. *Id.* at 402.

169. *Id.*

170. *Id.*

171. *Intratex*, 22 S.W.3d at 402.

172. *See id.* (asserting that it is improper for the definition of a class to turn on liability). A court creates a fail-safe when the class is bound only by a successful ruling for the class. *See id.* (clarifying the elements of a fail-safe class, noting that a fail-safe class is "bound only by judgment favorable to Plaintiffs, but not an adverse judgment"). Intratex argued that a fail-safe class is not defined by objective criteria because the class cannot be properly defined until the final ruling. *See id.*

173. *See id.* at 400 (condemning the prior rulings and stating that the class should not have been certified).

174. *See id.* at 405 (explaining that the trial court's definition of a class in this case focused on whether Intratex had taken improper portions of natural gas from the producers creating a situation where class is only viable if the defendant is found liable).

175. *See id.* (demonstrating a peculiar situation when, at all times, if the defendants win a case involving a fail-safe class, the class was improper from the commencement of the proceedings).

176. *See Intratex*, 22 S.W.3d at 405.

177. *See id.*

the trial court created a fail-safe class, the trial court violated the parameters of certification discretion.[178]

The *Intratex* court discussed several reasons why class definition deserves increased attention during the certification process.[179] First, fairness requires that potential class members have an opportunity to opt out or become part of the suit.[180] The individual's decision becomes extremely important because the repercussions of that decision will determine whether the individual will be bound by the judgment in the class suit.[181] Second, class definition identifies which parties can seek redress in the court system and the "nature of the relief that can be awarded" to those class members.[182] Third, class definition will establish, if the class loses, which parties are bound to the final judgment and, if the class wins, which parties will have the opportunity to become whole by the decision.[183]

The genesis of an inquiry regarding certification involves establishing the criterion of the class.[184] A flawed class definition creates a problem for judicial efficiency, undermining one of the founding principles of the class action format.[185] The *Intratex* Court noted that the plaintiffs must show the class "susceptible to precise definition."[186] Furthermore, the court expressed that an undefined class creates an impossible evaluation under Rule 42.[187] Indeed, the two prongs of Rule 42 cannot be applied to the putative class without having a definition to which the rule may actually apply.

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178. *See id.*

179. *See generally id.* at 398 (identifying the importance of a definition of the class).

180. *See id.* at 403 (indicating that class members cannot effectively exercise their rights to opt in or out when the class is not precisely defined).

181. *See Intratex*, 22 S.W.3d at 403 (reiterating the potential for an overly broad class to unfairly subject tenuous class members to a court judgment).

182. *See id.* (citing 5 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE §§ 23.20-.21 (3d ed. 2000)).

183. *See Intratex*, 22 S.W.3d at 403 (citing Simer v. Rios, 661 F.2d 655, 670 (7th Cir. 1981)).

184. *See id.* (citing Ad Hoc Comm. v. City of St. Louis, 143 F.R.D. 216, 219 (E.D. Mo. 1992)).

185. *See id.* at 404 (citing 5 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 23.02 (3d ed. 2000)).

186. *See id.* at 403 (declaring that Rule 42 has set forth an implicit requirement that classes must be defined in order to obtain certification); *see also* DeBremaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970) (ruling "that in order to maintain a class action, the class . . . must be adequately defined");

187. *See Intratex*, 22 S.W.3d at 403 (articulating that "absent a cognizable class, evaluating whether the putative class representatives satisfy the rule 42(a) and (b) requirements would be impossible").

Notably, Rule 23 of the Federal Rules of Civil Procedure does not require specificity in its class definition.[188] Caselaw, however, has suggested that "vague and amorphous definitions do not meet the requirement of a sufficiently definite class definition."[189] In spite of the vague federal approach, Texas, pursuant to *Intratex*, requires that a court must precisely define the class before certification can proceed.[190]

In setting forth the proper approach to class definition, the *Intratex* court relied heavily upon the federal influence of *Amchem*.[191] Indeed, in almost remorseless admiration of the federal approach, the court methodically cited decision after decision of federal jurisprudence regarding class definition.[192] Upon exhausting citations to federal decisions, putative classes in Texas must now show that an identifiable class exists.[193] Moreover, the class must be "susceptible to precise definition."[194] The primary focus must constitute defining the class before any certification considerations are investigated.[195] Furthermore, this definition must derive from objective criteria.[196] Continuing to rely on federal case law, the court asserted that if the court cannot identify a precise definition, judi-

188. *See* Reserve Life Ins. Co. v. Kirkland, 917 S.W.2d 836, 839-40 (Tex. App.—Houston [14th Dist.] 1996, no writ) (noting that Rule 23 does not contain a clause requiring specification in the definition).

189. *See id.* at 840 (citing *Hendrickson v. Philadelphia Gas Works*, 672 F. Supp. 823, 840-41 (E.D. Pa. 1987) for the proposition that a class will be denied certification for not being adequately defined).

190. *See Intratex*, 22 S.W.3d at 403 (noting the necessity of an exact definition in Texas courts).

191. *See generally id.* at 403-05; *see also* Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?*, 74 TUL. L. REV. 1709, 1767 (2000) (asserting the reliance of the *Intratex* court on federal jurisprudence). The *Intratex* court relied on several federal opinions in establishing the structure of a proper class definition. The court cited *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982) for the proposition that a failure to properly define a class affects class members' ability to opt out of the lawsuit. *Id.* at 404. The court also cited *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) for the rationale behind a court's need to make reasonable determination of certification issues. *Id.* at 404. Finally, the court referred to *Richardson v. Byrd*, 709 F.2d 1016 (5th Cir. 1983) as an example of a court needing to redefine a class because the contours of the case changed. *Id.* at 407.

192. *See generally Intratex*, 22 S.W.3d at 398 (recognizing the changes regarding class definition in federal opinions).

193. *See id.* at 403 (stating that the rules require "the representative plaintiffs to demonstrate" that an identifiable class exists).

194. *Id.* (interpreting Rule 42 to require a precise definition in defining a class and providing federal precedent of explicit definition use for a putative class).

195. *See* Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?*, 74 TUL. L. REV. 1709, 1772 (2000) (reiterating the viewpoint of the *Intratex* Court that established the importance of finding a class definition before proceeding to potential certification of a putative class).

196. *See id.*

cial economy requires no further investigation of other certification factors.[197]

C. Ford Motor Co. v. Sheldon

In *Sheldon,* the court reinforced its stand regarding class definition.[198] The owners of different versions of Ford automobiles brought a class action claiming that Ford failed to use a proper spray primer resulting in premature paint peeling.[199] Sheldon and the putative class claimed that Ford failed to use the proper primer because of a previous cost-saving measure implemented a decade earlier.[200] The putative class also argued that Ford knew of the paint peeling defect but continued to use the technique into the early 1990s.[201]

The trial court certified the class for trial.[202] The class definition provided that the class must comprise of individuals who owned Ford vehicles with peeling or flaking paint as a result of Ford's failure to use spray primer.[203] The appellate court modified the definition set forth by the

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197. *See Intratex*, 22 S.W.3d at 403 (citing Davoll v. Webb, 160 F.R.D. 142, 146 (D. Colo. 1995); Metcalf v. Edelman, 64 F.R.D. 407, 409 (N.D. Ill. 1974); and Hettinger v. Glass Specialty Co., 59 F.R.D. 286, 296 (N.D. Ill. 1973)). The court in *Webb* recognized that if a class definition can not be obtained, there is no need to measure other forms of certification for the putative class. *See* Davoll v. Webb, 160 F.R.D. 142, 146 (D. Colo. 1995) (restating that the court refused to investigate other forms of certification because attainment of a correct definition was not possible for the failed class).

198. *See* Ford Motor Co. v. Sheldon, 22 S.W.3d 444, 453 (Tex. 2000) (echoing the court's view in *Intratex* that class definition must be precise to attain successful certification).

199. *Id.* at 447.

200. *See id.* (outlining Sheldon's claim that Ford began using a medium or high-build electrocoat and then sprayed the enamel paint directly on the electrocoat without the application of a primer). Sheldon claims that the enamel topcoat is not weather-resistant and that primer would have protected the paint from delaminating. *See id.* The allegations further noted that Ford used the proper primer before the cost-saving elimination of primer happened in the early 1980s. *See id.*

201. *See id.* at 448 (advancing the contention by Sheldon that Ford concealed the problem and continued to sell affected cars to consumers).

202. *See id.* (reporting that the class was certified under Rule 42(b)(4)).

203. *See Sheldon*, 22 S.W.3d at 448 (setting forth the class definition). The class definition approved by the trial court read as follows:

> All persons who purchased a new 1987-1993 Ford F-Series Truck, 1987-1993 Ford Bronco, 1987-1989 Ford Bronco II, 1987-1992 Ford Ranger or 1987-1989 Ford Mustang in Texas after March 8, 1988 which was painted with high build electrocoat or medium build electrocoat and no spray primer and who suffered past and/or future damage as a result of peeling or flaking paint on these vehicles caused by a defective paint process (i.e., high build electrocoat or medium build electrocoat and no spray primer) excluding persons who purchased vehicles pursuant to a fleet account or fleet identification number.

trial court and inserted the phrase "who allege the peeling or flaking was" before the original clause in the definition that said "caused by a defective paint process."[204] Nevertheless, the supreme court held the appellate court's modified definition invalid because the inclusion of the 'defect theory' required a decision regarding the merits before the actual class certification.[205] Moreover, the inclusion of the defect theory would have resulted in a fail-safe class.[206] Thereafter, the appellate court attempted to correct the fail-safe certification and assert a valid certification.[207] Consequently, Ford filed an interlocutory appeal claiming the modified definition remained invalid.[208]

The supreme court agreed with the appellate court in assessing the trial court's certification invalid because of the defect theory.[209] The court, however, also invalidated the modified definition created by the appellate court.[210] Reaffirming the court's new found class action conservatism, the court remanded the case to the trial court for decertification.[211]

D. *Tightening the Noose:*[212] *Post-Triad Development*

The effects of the Triad have begun to find a foundation in Texas class action jurisprudence. Texas appellate courts have rendered a handful of

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Id.

204. *See* Ford Motor Co. v. Sheldon, 965 S.W.2d 65, 74 (Tex. App.—Austin 1998), *rev'd*, 22 S.W.3d 444 (Tex. 2000) (modifying the original definition established by the trial court).

205. *See Sheldon*, 22 S.W.3d at 449 (quoting *Intratex v. Beeson*, 22 S.W.3d 398, 404, for the proposition that "when the class definition is framed as a legal conclusion, [there is] no way of ascertaining whether a given person is a [class member] until a determination of ultimate liability as to that person is made").

206. *See id.* at 454 (arguing that "basing the class definition on [the defect theory] creates a fail-safe class because if the defendants prevail at trial and Purchasers are unable to prove their theory, then there was never a class to begin with and certification was inappropriate").

207. *See Sheldon*, 965 S.W.2d at 74 (attempting to make the class properly certifiable by expanding the class definition to include those customers who alleged that the defective paint process was the cause of the peeling and flaking).

208. *See Sheldon*, 22 S.W.3d at 449 (acknowledging that Ford sought for the Supreme Court to reverse the appellate decision and decertify the class because of an invalid definition).

209. *See id.* at 454 (finding that the trial court's definition of the true class failed to meet the Rule 42 requirement that the class be clearly ascertainable).

210. *See id.* at 455 (changing the appellate court's ruling because its "definition also fails to satisfy the clearly-ascertainable requirement").

211. *Id.* at 455.

212. *See* Gronwaldt v. McClelland, Nos. 09-99-125-CV, 09-99-591-CV at *5 (Tex. App.—Beaumont Jun. 22, 2000, pet. dism'd w.o.j.) (not designated for publication) (expounding that "[i]t is clear our highest court is 'tightening the noose' on class certification orders"), 2000 WL 800572.

major decisions since the Triad.[213] These opinions indicate that the viewpoints expressed by the supreme court in the Triad will have staying power.

Of the first ten post-Triad decisions, seven reversed the trial court's certification on abuse of discretion grounds because of the new conservative approach.[214] All ten decisions focused upon either: (1) Rule 42(b)(4) predominance, (2) class definition, (3) the trial court's necessity to determine how the claim will likely be tried before certification, (4) the supreme court's rejection of the certify now, worry later approach,[215] or (5) personal injury class actions.[216] Of these five class certification problems, two have garnered significant early criticism—predominance and personal injury class actions.

1. The New Dominance of Rule 42(b)(4) Predominance

Liberal class certification proponents have raised fears that putative classes now face an almost impossible task in overcoming the rigorous analysis of the Rule 42(b)(4) predominance inquiry.[217] *Bernal* and some

213. *See, e.g.*, West Teleservices, Inc. v. Carney, 37 S.W.3d 36 (Tex. App.—San Antonio 2000, no pet.); Tracker Marine, L.P. v. Ogle, No. 14-00-00230-CV (Tex. App.—Houston [14th Dist.] Oct. 26, 2000, no pet. h.) (not designated for publication), 2000 WL 1588115; Henry Schein, Inc. v. Stromboe, 28 S.W.3d 196 (Tex. App.—Austin 2000, pet. filed); Am. Home Shield of Tex. v. Kortz, No. 01-99-00380-CV (Tex. App.—Houston [1st Dist.] Sept. 7, 2000, no pet. h.) (not designated for publication), 2000 WL 1262617; Nissan Motor Co. v. Fry, 27 S.W.3d 573 (Tex. App.—Corpus Christi 2000, pet. filed); Entergy Gulf States, Inc. v. Butler, 25 S.W.3d 359 (Tex. App.—Texarkana 2000, no pet.); Monsanto Co. v. Davis, 25 S.W.3d 773 (Tex. App.—Waco 2000, pet. dism'd w.o.j.); Gronwaldt v. McClelland, No. 09-99-125-CV, 09-99-591-CV (Tex. App.—Beaumont Jun. 22, 2000, pet. dism'd w.o.j.) (not designated for publication), 2000 WL 800572; Inland Royalty Co. v. Heruth, No. 05-99-01684-CV (Tex. App.—Dallas Jun. 21, 2000, no pet.) (not designated for publication), 2000 WL 792406; Graebel/Houston Movers, Inc. v. Chastain, 26 S.W.3d 24 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

214. *See, e.g.*, *Carney*, 37 S.W.3d at 36; *Tracker Marine*, No. 14-00-00230-CV, 2000 WL 1588115; *Fry*, 27 S.W.3d at 573; *Butler*, 25 S.W.3d at 359; *Davis*, 25 S.W.3d at 773; *Gronwaldt*, Nos. 09-99-125-CV, 09-99-591-CV, 2000 WL 800572; *Heruth*, No. 05-99-01684-CV, 2000 WL 792406. *But see*, *Stromboe*, 28 S.W.3d at 205-06 (distinguishing *Bernal* and approving of the trial court's certification); *Chastain*, 26 S.W.3d at 31 (distinguishing *Intratex* and ruling in favor of the trial court's certification of the putative class).

215. Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 435 (Tex. 2000).

216. *See id.* at 436 (concluding that injured individuals in a mass-tort context should not utilize the class action device because of the individualized nature of each individual's injuries).

217. *See* Ken Hoagland, *Consumers Haven't Lost Access to Texas Courts*, DALLAS MORNING NEWS, Sept. 3, 2000 (reporting that the recent *Bernal* decision spurred powerful lawyers to allege that class action lawsuits virtually will end in Texas), WL 9/13/00 DALLASMN 6J; John Council, *Supreme Court Divided by Term's Parental Notification Cases*, TEX. LAW., Aug. 28, 2000 (addressing the three Texas Supreme Court opinions on class

of its judicial offspring have implicitly argued that plaintiffs *must* meet the predominance requirement.[218] In fact, *Bernal* seems to over-emphasize the predominance inquiry, arguing that the rule is "'far more demanding' than the commonality requirement."[219] The court claimed that the predominance "requirement" should act as a "check" on the flexible commonality rule.[220]

The *Bernal* approach appears to distort the true intent of Rule 42. To attain certification, a trial court must determine whether a putative class has adhered to the two-pronged requirements of Rule 42.[221] The commonality requirement of Rule 42(a)(2) represents an absolute requirement that plaintiffs must meet as part of satisfying Rule 42(a).[222] On the other hand, the predominance inquiry constitutes one of four separate opportunities for a putative class to meet the second prong of certification in Rule 42(b). Yet, the *Bernal* Court suggests that the predominance inquiry should act as a "check" on Rule 42(a)'s commonality requirement.[223]

The supreme court's "check" proposition is difficult to accept. The court has attempted to elevate the predominance check from a wholly optional element of Rule 42(b) to a requirement.[224] Supposing plaintiffs

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certification and appellate lawyers' reactions that it will be "decidedly tougher to certify a class"), WL 8/28/00 TEXLAW 33.

218. *See Bernal*, 22 S.W.3d at 434-35 (dispelling trial courts' "creative means" used to certify classes, by arguing that courts should instead scrutinize predominance of common claims to assure class worthiness); *see also Carney*, 37 S.W.3d at 36 (urging that the "trial court had a duty to evaluate the relationship between the common and individual issues in this case before certifying it under Rule 42(b)(4)"); *Heruth*, No. 05-99-01684-CV, *2 (noting that since "common issues [did] not predominate the trial court's decision to certify this case as a class action was arbitrary, unreasonable, and an abuse of discretion"), 2000 WL 792406; *Butler*, 25 S.W.3d at 369 (recognizing the emphasis that the *Bernal* Court placed on predominance by stating "[t]he Texas Supreme Court has made it very clear that the trial court must conduct this rigorous predominance analysis at the time class certification is sought").

219. *See Bernal*, 22 S.W.3d at 435 (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997)).

220. *See id.* (recognizing that the predominance standard is more demanding than the commonality requirement).

221. *See* TEX. R. CIV. P. 42 (detailing how a class seeking certification must meet the requirements to establish a class action).

222. *See* TEX. R. CIV. P. 42(a) (demanding that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if . . . there are questions of law, or fact common to the class").

223. *See Bernal*, 22 S.W.3d at 435 (discussing *Amchem Products, Inc.* in which "the Supreme Court emphasized the importance of carefully scrutinizing the predominance standard to ensure the proposed class is 'sufficiently cohesive'").

224. *See* TEX. R. CIV. P. 42(b) (adding that one of the four requirements of Rule 42(b) must be met).

meet the requirements of 42(b)(1), (2), or (3), courts typically can ignore a predominance inquiry.[225] Nevertheless, the supreme court wishes to require the optional predominance test of 42(b)(4) as a mandatory check on the absolute necessity of commonality in Rule 42(a).[226] The supreme court's comments contradict the historical application of the judicially created Rule 42.

The majority has overstepped its bounds in *Bernal*, rejecting its own rule-formulated strictures that place more importance on the commonality requirement.[227] The supreme court even ventured so far as to refer to Rule 42(b)(4) as the "predominance requirement."[228] Even if trial courts narrowly interpret the supreme court's references to predominance, allowing appellate courts the availability of quotable *dicta* referring to predominance as a requirement remains dangerous. To the court's credit, however, in outlining Rule 42 at the beginning of *Bernal*, the majority noted that a putative class must only meet one of the Rule 42(b) options.[229] Nonetheless, this passive reference to Rule 42's text does not support the sudden importance placed on predominance.[230]

Notwithstanding *Bernal*, liberal proponents of loose certification standards still maintain several certification options. Once a putative class satisfies Rule 42(a), the text of Rule 42(b) still plainly states that plaintiffs need only satisfy one of the four options in Rule 42(b).[231] If a putative class can demonstrate a risk of inconsistency in trying the claims separately, the court will certify the class, regardless of predominance.[232] Additionally, if a putative class can demonstrate that individual litigation would cause the interests of claimants to hinder the claims of other individuals in the putative class, the court will certify the class.[233] Alterna-

225. *See id.*

226. *See Bernal*, 22 S.W.3d at 435 (referring to the Supreme Court's notation in *Amchem* that a plaintiff might meet the commonality requirement, but fail to predominate on the individual issues).

227. *See* TEX. R. CIV. P. 42 (directing trial courts to determine if the putative class meets the requirements of every step of Rule 42(a), while requiring satisfaction of only one of the four elements of Rule 42(b) before certification can continue).

228. *See Bernal*, 22 S.W.3d at 433-35 (referring to Rule 42(b)(4) in the text of the opinion several times as a "predominance requirement").

229. *See id.* at 433 (setting forth the guidelines of Rule 42).

230. *See id.* at 434 (referring to predominance as a "requirement" and ignoring the fact that it is one of four options that may be used to satisfy and maintain a class action certification).

231. TEX. R. CIV. P. 42(b)(1)-(4).

232. *See* TEX. R. CIV. P. 42(b)(1)(A) (stating that inconsistency of adjudication must be avoided).

233. *See* TEX. R. CIV. P. 42(b)(1)(B) (avoiding conflict of interests involving putative class members).

tively, if the opposing party "has acted or refused to act on grounds generally applicable to the class," then the court will grant certification.[234] Finally, when the element of a specific property enters the litigation, a court may certify the class.[235]

As a plain reading of Rule 42(b) indicates, predominance is not the center to all class action litigation. Unfortunately, several appellate decisions read *Bernal* as raising predominance to a level of importance above that given to the rest of Rule 42(b).[236] For example, in *Inland Royalty Co. v. Heruth*, the appellate court ruled that the trial court abused its discretion because common issues did not predominate over individual issues.[237] In *Heruth*, the trial court based its certification upon letters containing material misrepresentations the defendant mailed to class members.[238] The appellate court ruled that the trial court abused its discretion because a class member suffered harm only if not knowing of the misrepresentation before selling the property involved.[239] Previously, such a slight factual difference between class members would survive the appellate court.[240] *Bernal*, however, has caused an appellate court that arguably would have ignored the slight factual difference to state that the trial court acted in an arbitrary and unreasonable fashion and, as a result, abused its discretion.[241]

The new predominance standard apparently has taken hold in Texas jurisprudence. As such, a danger exists in over-emphasizing the importance of one optional step in the second prong of Rule 42. Nonetheless, since predominance represents a popular option for plaintiffs seeking certification, *Bernal* has drastically reduced opportunities to attain certification in Texas.

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234. *See* TEX. R. CIV. P. 42(b)(2) (emphasizing the importance of equal treatment to individuals in a putative class, if their claims are tried separately).

235. *See* TEX. R. CIV. P. 42(b)(3).

236. *See* Entergy Gulf States, Inc. v. Butler, 25 S.W.3d 359, 362 (Tex. App.—Texarkana 2000, no pet.) (stating that "[t]he Texas Supreme Court has made it very clear that the trial court must conduct this rigorous predominance analysis at the time class certification is sought").

237. *See* Inland Royalty Co. v. Heruth, No. 05-99-01684-CV, 2000 WL 792406, at *1 (Tex. App.—Dallas Jun. 21, 2000, no pet.) (not designated for publication).

238. *See id.* (referring to the grounds upon which the trial court based its predominance finding).

239. *See id.* (noting that the Texas Securities Act invokes liability if there is a material misrepresentation or omission and the complainant does not know of the particular misrepresentation or omission before proceeding with a transaction).

240. *See* Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 435 (Tex. 2000) (acknowledging the previous approach utilized by Texas courts was to certify a case initially and later determine if certification was improper).

241. *See Heruth*, 2000 WL 792406, at *2 (criticizing the trial court's opinion regarding predominance as an abuse).

2. Personal Injury Class Actions

The American judicial system operates under the central idea that "[t]he plaintiff must prove, and the defendant must be given the opportunity to contest, every element of a claim."[242] Moreover, the tort system rests on the bed of "individual justice."[243] The recently debunked liberal tort system, however, implicitly disagreed.[244] In a class action with a massive number of injured class members, courts often tiptoed around necessary elements of proof.[245] For example, in *Cimino v. Raymark Industries, Inc.*,[246] the trial court collected a sample of less than 200 members from a personal injury class of over 2000.[247] The court subsequently ordered the jury to "assume" that the litigants suffered harm.[248] The court then imputed the damages assigned to these litigants to the entire class, including 2,100 unsampled class members.[249] The failure in *Cimino* to allow the defense to contest individual claims took away the filtering device that eliminates unfounded claims.[250]

Personal injury cases in a mass-tort situation have generally become class actions due to the sheer number of injured plaintiffs.[251] Yet, the new conservative standards set forth in *Bernal* regarding personal injury claims may forever change the old approach.[252] The court declared that

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242. *Bernal*, 22 S.W.3d at 438.

243. *See* David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 561 (1987) (noting that class actions are "alien" to the torts system).

244. *See* Cimino v. Raymark Indus., Inc., 151 F.3d 297, 304 (5th Cir. 1998) (certifying an asbestos-injury class of over two-thousand members in which damages were to be awarded from the results of a sampling of only 160 individual asbestos claims within the class).

245. *See* John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990, 993 (1995) (recognizing the temptation to find a short-cut resolution in a mass-tort, mass injury scenario).

246. 151 F.3d 297 (5th Cir. 1998).

247. *See Cimino*, 151 F.3d at 300 (noting the minimal evaluation of plaintiffs' claims).

248. *See id.* at 304-05.

249. *See id.* (providing a shocking opinion that did not allow the defense to put forth a contest against any of the claims from the sample, allowing the plaintiff to avoid proving causation).

250. *See* Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 438 (Tex. 2000) (stating that removing individual considerations hinders "a valuable method for screening out marginal and unfounded claims").

251. *See* David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 567 (1987) (asserting that better opportunities for justice are attained in a mass-tort situation through the use of class actions, as opposed to the "tort system's private law, disaggregative processes").

252. *See Bernal*, 22 S.W.3d at 436 (challenging the approach of certifying personal injury class actions when personal injuries involve highly individualistic injuries that should be tried individually).

in mass-tort personal injury cases "the class action will rarely be an appropriate device for resolving" personal injury claims.[253]

Bernal represents a prime example of a mass-tort personal injury case with highly individualistic claims. Nonetheless, the trial court certified the class, and the appellate court affirmed.[254] In *Bernal*, the slop tank's location to homes ranged from less than 800 meters to almost nine miles, and some class members lived in areas as far from Corpus Christi as Beaumont, Texas.[255] Class members varied from people who admitted to believing that they did not suffer any harm from the explosion, to people who thought the lawsuit concerned an entirely different event that occurred in 1993.[256] Shockingly, at least one class member was in prison at the time of the explosion, while another was not even in Texas.[257]

The Texas Supreme Court acknowledged that common issues predominated over individual variables to the extent of determining Southwestern Refining's responsibility for the release of potentially harmful fumes and debris.[258] The supreme court quickly noted, however, that in order to obtain a sound judgment, the court must individually examine the highly distinctive characteristics involved with the personal injuries.[259] The defense retains the right to challenge the individual credibility of the class members in order to refute its responsibility for the party's personal injuries.[260] Still, with over 900 claimants, Southwestern

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253. *See id.* (explaining that because personal injury claims "present thorny causation and damage issues with highly individualistic variables," class action certification is inappropriate).

254. *See generally* Southwestern Ref. Co. v. Bernal, 960 S.W.2d 293 (Tex. App.—Corpus Christi 1997), *rev'd*, 22 S.W.3d 425 (Tex. 2000) (ruling that the class established the requirements of certification and should proceed because of the common claims by the putative members).

255. *See Bernal*, 22 S.W.3d at 436 (recognizing the range of damage created from the refinery explosion). Not all class members were homeowners, however, the class also included people who were at work, driving, or pedestrians at the time of the explosion. *See id.* (describing the vast range of qualified class members certified by the trial court).

256. *See id.* (criticizing the formed putative class because many members should not have been involved in the litigation).

257. *See id.*

258. *See id.* (acknowledging that there are common issues that could be tried together).

259. *See id.* at 436-37 (emphasizing the importance of establishing "to what extent each class member was exposed"). The court listed examples of individual variables that were improperly considered common. *See id.* at 437. The variables included "each class member's dosage, location, activity, age, medical history, sensitivity, and credibility." *Id.*

260. *See In re* Colonial Pipeline, 968 S.W.2d 938, 942 (Tex. 1998) (asserting that the defendant must have the opportunity to defend herself against individual claims in a mass-tort context); *see also* TEX. R. CIV. P. 1 (valuing the importance of a fair adjudication of all parties' claims and defenses). *See generally* Able Supply Co. v. Moye, 898 S.W.2d 766 (Tex.

Refining would have a difficult time arguing these claims before a single jury.[261]

Two appellate decisions, *Entergy Gulf States, Inc. v. Butler*[262] and *Henry Schein, Inc. v. Stromboe*,[263] discussed *Bernal's* recommendation that personal injury claims not aggregate into class actions.[264] The *Butler* court argued that some personal injury class actions could still survive as a class and pass certification.[265] The court determined that the unsuitableness of personal injury class actions constitutes only a "factor to consider."[266] Although the appellate court commented on the narrow window allowed by the *Bernal* court to certify personal injury claims,[267] the court nevertheless followed *Bernal* and ruled that the class should not attain certification.[268]

As in *Butler*, the *Stromboe* appellate court narrowly interpreted *Bernal*.[269] The *Stromboe* court, however, achieved a different result.[270] Ironically, the court recognized that "*Bernal* applies with equal force to all class actions."[271] Nonetheless, the court distinguished the factual dif-

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1995) (echoing the importance of the right to put forth an adequate defense in a mass-tort claim).

261. *See In re* Brooklyn Navy Yard Asbestos Litig., 971 F.2d 831, 853 (2d Cir. 1992) (protecting a defendant's right to present a defense against all the plaintiffs' claims so that some defenses are not sacrificed due to the overwhelming amount of claims in a mass-tort situation).

262. 25 S.W.3d 359 (Tex. App.—Texarkana 2000, no pet.).

263. 28 S.W.3d 196 (Tex. App.—Austin 2000, pet. filed).

264. *See* Entergy Gulf States, Inc. v. Butler, 25 S.W.3d 359, 363 (Tex. App.—Texarkana 2000, no pet.) (discussing *Bernal's* recommendation that when there are personal injury claims by the putative class, certification should most likely not be rendered); Henry Schein, Inc. v. Stromboe, 28 S.W.3d 196, 205 (Tex. App.—Austin 2000, pet. filed) (distinguishing *Bernal* based on factual differences that involved personal injury claims in *Bernal* and not in *Stromboe*).

265. *See Butler*, 25 S.W.3d at 363 (concluding that personal injury claims in the class action context should be a negative factor, but should not deny certification).

266. *See id.* (indicating that a court should find *Bernal's* rationale instructive before moving forward with certification of a class).

267. *See Bernal*, 22 S.W.3d at 436 (stating that "[p]ersonal injury claims will often present thorny causation and damage issues with highly individualistic variables that a court or jury must individually resolve").

268. *See Butler*, 25 S.W.3d at 363 (determining that the "reasoning [in *Bernal*] is instructive to the case at hand" even though personal injuries were not involved in the power outages).

269. *See Stromboe*, 28 S.W.3d at 205 (establishing that "the facts and issues in this case are quite different from those noted by the [*Bernal*] court").

270. *Compare id.* at 208 (failing to find that the trial court abused its discretion), *with Bernal*, 22 S.W.3d at 439 (finding that the trial court abused its discretion in certifying the class).

271. *Stromboe*, 28 S.W.3d at 205.

ferences between *Bernal* and *Stromboe* and utilized these differences to create a narrow opportunity for certification to remain intact.[272] Of those differences, the key distinction the court attacked involved the personal injury claims in *Bernal*.[273] Because *Stromboe* involved misrepresentations regarding computer software, the court determined that *Bernal's* ruling in a personal injury case did not apply to *Stromboe's* facts.[274]

Although variances existed in the assignment of damages,[275] the *Stromboe* court allowed certification for a class of approximately 20,000.[276] It seems overwhelming for a single jury to determine different levels of damages for a class with a membership of 20,000.[277] Yet, the court avoided *Bernal* decertification by arguing that the standard narrowly applies to putative classes with extreme individual differences.[278]

The *Bernal* court noted that a defendant has a right to vigorously defend each damage claim.[279] A defense of 20,000 claims, however, would drastically deplete precious funds of both parties, as well as the limited time of the court.[280] The *Stromboe* court appears misguided in its limit-

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272. *Id.*

273. *See id.* (noting that the factual differences between the two cases revolve around personal injuries in *Bernal* and a misrepresentation regarding software in the case at hand).

274. *See id.* (displaying that the central issues of resolution in *Bernal* involved extremely individual personal injury claims from the explosion). The *Stromboe* court avoided much of *Bernal's* commands by taking the facts out of the mass-tort personal injury sphere. *See id.* In *Stromboe*, the appellants used several different methods of misrepresentation on class members; however, the court ruled that these varying methods do not defeat predominance of common issues. *See Stromboe*, 28 S.W.3d at 207 (arguing that "predominance is [not] defeated merely due to the varying methods by which similar misrepresentations were made"). As a result, the *Stromboe* Court apparently created a certification window by asserting factual differences between the cases to lessen *Bernal*'s strong demands for predominance of common claims.

275. *See id.* at 207 (claiming that although "some damages may have to be computed separately for different class members[, it] does not preclude class certification").

276. *Stromboe*, 28 S.W.3d at 200 (establishing the approximate number of class members).

277. *See* Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 436 (Tex. 2000) (asserting that the trial court's certification was invalid due to difficulty assigning damages for numerous class members).

278. *See Stromboe*, 28 S.W.3d at 205 (distinguishing the "thorny causation and damages issues" that must be resolved in a mass-tort personal injury case).

279. *See Bernal*, 22 S.W.3d at 437 (stating that "the systematic urge to aggregate litigation must not be allowed to trump [the court's] dedication to justice, and the . . . defendant's cause must not be lost in the shadow of a towering mass of litigation").

280. *See id.* (ruling that the class action is actually used to enhance judicial economy). Determining each of the aggregated damage claims in *Stromboe* would work directly against this rationale. *See Stromboe*, 28 S.W.3d at 200 (acknowledging a presence of approximately 20,000 class members, all with individual claims).

ing of *Bernal* due to the sheer complexity of determining damages for the entire class and the parties' need for an in depth, impartial determination.

Although *Stromboe* attempts to narrow much of *Bernal's* holding to personal injury class actions, the revolutionary class action giant will remain strong. Properly read, *Bernal* represents a series of limitations on all class actions. In fact, the court does not mention personal injury commentary until late in the opinion.[281] The *Bernal* court tackles personal injury scenarios because the particular facts of that case required such a discussion.[282] *Bernal's* rejection of the judiciary's former approach affects all future certification opportunities.[283] Courts must now rigorously apply the predominance inquiry to all putative classes. Consequently, *Bernal* should continue to carry weight in every class action certification ruling, regardless of personal injury claims.

E. *A Change for the Better: Taking Texas Courts in the Right Direction*

With the ink still drying on the rulings from the Triad, predicting the ultimate effect the decisions will have on the judicial climate in Texas remains impossible. Still, Texas appellate courts have chosen initially to adhere to the high court's demands, denying several trial court certifications due to abuse of discretion.[284] This new standard requiring strict compliance with Rule 42, however, does not limit deserving plaintiffs from proper redress.[285] To the contrary, the new standard balances the

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281. *See Bernal*, 22 S.W.3d at 436 (mentioning personal injury class actions in the sixth of seven parts in the opinion).

282. *See id.* at 428 (stating that the class contained individuals supposedly harmed from a refinery explosion).

283. *See id.* at 435.

284. *See, e.g.*, West Teleservices, Inc. v. Carney, 37 S.W.3d 36 (Tex. App.—San Antonio 2000, no pet.); Tracker Marine L.P. v. Ogle, No. 14-00-00230-CV (Tex. App.—Houston [14th Dist.] Oct. 26, 2000, no pet. h.) (not designated for publication), 2000 WL 1588115; Nissan Motor Co. v. Fry, 27 S.W.3d 573 (Tex. App.—Corpus Christi 2000, pet. filed); Entergy Gulf States, Inc. v. Butler, 25 S.W.3d 359 (Tex. App.—Texarkana 2000, no pet.); Monsanto Co. v. Davis, 25 S.W.3d 773 (Tex. App.—Waco 2000, pet. dism'd w.o.j.); Gronwaldt v. McClelland, No. 09-99-125-CV, 09-99-591-CV (Tex. App.—Beaumont Jun. 22, 2000, pet. dism'd w.o.j.) (not designated for publication), 2000 WL 800572; Inland Royalty Co. v. Heruth, No. 05-99-01684-CV (Tex. App.—Dallas Jun. 21, 2000, no pet.) (not designated for publication), 2000 WL 792406.

285. *See, e.g.*, *Stromboe*, 28 S.W.3d at 208 (distinguishing *Bernal* and approving of the trial court's certification); Am. Home Shield, Inc. v. Kortz, No. 01-99-00380-CV (Tex. App.—Houston [1st Dist.] Sept. 7, 2000, no pet. h.) (not designated for publication) (setting apart *Bernal* and recognizing that the trial court did not abuse it's discretion), 2000 WL 1262617; Graebel/Houston Movers, Inc. v. Chastain, 26 S.W.3d 24 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (distinguishing *Intratex* and ruling in favor of the trial court's certification of the putative class).

scales, providing defendants with an opportunity to put forth a full defense against all charges.

1. The Liberal Approach Negatively Impacted Business in Texas

Defendants face a heightened risk of liability in a class action.[286] Moreover, defendants face a stronger probability of higher damages in a class action setting.[287] For every healthy judgment that fills the pockets of plaintiffs, Texas businesses suffer dramatically.[288] Indeed, major business publications referred to Texas as "tort heaven."[289] Nearly one-third of all businesses that reported to the Texas Public Policy Foundation affirmed that the threat of judgments handed down by the liberal judiciary had a direct impact on their decision to expand business in Texas.[290] One-fourth of these businesses suggested that the judicial history in Texas changed the implementation of product designs.[291] In addition, over ten percent reported having to lay off workers because of the liberal judicial activism.[292] As a result, Texas desperately needed a conservative shift of the judiciary, and the Triad could not have come at a better time.

2. The Importance Placed on a Proper Certification Will Help Eliminate the "Tort Tax"

Less class certifications will ultimately mean fewer large judgments awarded to classes at the expense of the business community and, ultimately, consumers. An independent research group in Texas determined that in the year 2000 alone, consumers would save approximately $1,078

286. *See* Barry F. McNeil, *Class Actions: A Time for Change*, 23 No. 2 LITIG. 1 (1997) (arguing that defendants face a greater chance of a negative verdict in a class action with a large number of plaintiffs).

287. *See id.* (urging that when a large number of plaintiffs win a verdict against a defendant in a class action, history suggests that damages will be higher).

288. *See Opportunities for Abuse as Big as Ever in Lone Star State*, Citizens Against Lawsuit Abuse, *at* http://www.calahouston.org/asbig.html (last visited Mar. 13, 2001) (referring to a survey done by the Texas Public Foundation in 1993 that showed dramatic effects on businesses).

289. *See* GEORGE W. BUSH, A CHARGE TO KEEP 25 (1999) (noting the national impact to businesses from Texas's judicial treatment of torts).

290. *Opportunities for Abuse as Big as Ever in Lone Star State*, Citizens Against Lawsuit Abuse, *at* http://www.calahouston.org/asbig.html (last visited Mar. 13, 2001) (noting that the liberal slant of the Texas judiciary had a noticeable effect upon Texas businesses).

291. *Id.*

292. *See id.* (challenging that the Texas Supreme Court's approach caused businesses to face cutbacks and design changes because of fear created by Texas decisions).

each due to tort reforms.[293] The research group considers the money saved by Texas consumers a reduction in the "tort tax."[294] The total cost for the 2000 tort system was $15.482 billion.[295] Without recent tort reforms, including the conservative class action overhaul, costs potentially may have reached nearly $26 billion.[296] As a consequence of massive changes in the tort system in Texas, the state enjoyed savings of over $10.5 billion.[297] Furthermore, Texas consumers saved $1.796 billion per annum, through the medium of reduced prices. In addition, economic productivity increased by 2.56%.[298]

These reform-generated fiscal savings translated into 195,727 new jobs in Texas.[299] Moreover, Texas citizens have enjoyed other immeasurable benefits such as "enhanced consumer choice, greater innovation, higher output, and lower prices."[300] Manufacturers and businesses that previously threatened to take operations elsewhere, now develop operations in Texas.[301]

The citizens and businesses of Texas will continue to benefit from a stricter approach to class action certification.[302] Nevertheless, injured consumers and businesses can still seek redress through class actions if suffering actual, common harms. The Triad allows Texas courts to protect the injured without exposing the rest of the public to an increase in the tort tax.

IV. PROPOSAL

The Triad demonstrates that the supreme court has not shown apprehension about curtailing liberal class certifications. Consumer savings es-

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293. THE PERRYMAN GROUP, THE IMPACT OF JUDICIAL REFORMS ON ECONOMIC ACTIVITY IN TEXAS, Citizens for a Sound Economy, *at* http://www.cse.org/informed/867.html (last visited Mar. 13, 2001).

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. THE PERRYMAN GROUP, THE IMPACT OF JUDICIAL REFORMS ON ECONOMIC ACTIVITY IN TEXAS, Citizens for a Sound Economy, *at* http://www.cse.org/informed/867.html (last visited Mar. 13, 2001).

299. *Id.*

300. *Id.*

301. *See* Dick Trabulsi, *Tort Reform in Texas*, ENERGY HOUSTON, July 1, 2000 (discussing the benefits to Texas's economy due to elimination of frivolous lawsuits from tort reform measures), *at* http://www.tortreform.com/web/show_article.asp?articleID=22.

302. *See generally* THE PERRYMAN GROUP, THE IMPACT OF JUDICIAL REFORMS ON ECONOMIC ACTIVITY IN TEXAS, Citizens for a Sound Economy, *at* http://www.cse.org/informed/867.html (last visited Mar. 13, 2001) (demonstrating a continuing trend of savings for Texas consumers due to tort reforms).

timates only lend sustenance to the new judicial approach.[303] Texas, previously defined as a safe harbor for putative classes, now practices a respectable approach to certification. Nevertheless, for every conservative proponent elated by the new approach, many liberal opponents remain equally frustrated. The supreme court can take steps to appease both sides of the debate, while still guaranteeing justice for defendants and plaintiffs.

A. *Lighten Predominance Rhetoric*

The supreme court has assigned too much importance to the predominance "requirement."[304] In future decisions, the supreme court should instead refer to predominance solely as the predominance *inquiry.* No matter the importance placed on predominance by the supreme court, Rule 42 maintains that predominance constitutes only one of four options in the rule's second prong.[305] In addition, the rules state that courts should apply the options with a liberal construction.[306] Alternatively, the supreme court should assert the importance of the commonality step of Rule 42(a). Although close similarities exist between commonality and predominance, commonality represents a necessary element for classes to meet in order to attain certification.[307]

B. *Provide a Limited Strike Option at the Culmination of Certification Proceedings to Eliminate Obviously Unqualified Putative Class Members*

In addition to limiting the predominance language, the supreme court should infuse a complementing bookend to the Triad. The court should create, either through caselaw or amendment to the rules, a limited option to strike unqualified class members from the putative class. An option to strike would allow trial courts greater opportunity to assign class certification compared to the limited opportunities approved by the Triad, yet still affect the narrowing of certification established in the trial. Ultimately, this modification minimizes the opportunity for the kinds of error at trial that lead to an abuse of discretion. Such a result serves as a

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303. *See id.* (proposing hard numbers representing massive savings for consumers in Texas).

304. *See* Southwestern Refining Co. v. Bernal, 22 S.W.3d 425, 435 (Tex. 2000) (referring to predominance as a "requirement").

305. *See* TEX. R. CIV. P. 42(b) (stating that there are three other routes a putative class can seek to pass the second prong of certification).

306. TEX. R. CIV. P. 1 (noting that the "rules shall be given a liberal construction").

307. TEX. R. CIV. P. 42(a)(2) (setting forth the commonality requirement that must be present for certification to be attained).

complement to Triad rationale and the development of class action reform.

The restrictive effect of a limited strike option on judicial discretion would not come without strife. Such a modification, however, would allow courts to strike a desired balance between justice and judicial economy.[308] Currently, if a putative class shows complications, Rule 42(d) allows trial courts to try only particular issues as a class action or break up a putative class into certified subclasses.[309] However, the rule only provides limited guidance for continuing an action upon modification due to weak putative class members. The rule states that "[w]hen appropriate (1) an action may be brought or maintained as a class action with respect to particular issues, or (2) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."[310] The current option permits tremendous trial court flexibility to disfigure classes until acquiring a judge's subjective satisfaction. Before the supreme court handed down the strong-fisted Triad, courts liberally interpreted the rule similar to Rule 42(a) and 42(b).

To wholly establish the new certification approach, the supreme court should apply the limited strike option to balance the Triad's rationale. In fairness, otherwise qualified members of questionable classes should maintain some hope to muster certification after a rigorous analysis. Implementation of the limited strike option would allow trial courts to strike members without merit from the putative class. The strike option, if activated by the trial judge, would require strict adherence to established guidelines, eliminating opportunities for indiscretion. Furthermore, a key element to this approach would require wording the strike language so that the rule provides trial judges a narrow, well-defined path, greatly limiting opportunities for abuse of discretion. Establishing a list of unambiguous guidelines that a trial judge must meet in order to strike putative class members and certify a modified class best protects the court's ruling and the class' certification.

One possible option would allow a court to strike a putative class member only if (1) the class would not survive without elimination of the unqualified member, (2) the remaining class represents a sound copy of what is required in Rule 42(a) and (b) and, (3) the eliminated class member maintains an avenue for redress, provided the ousted member pos-

308. *See id.* (establishing that liberal construction should not compromise the objective of fairness to all parties involved and "expedition and dispatch").

309. *See* TEX. R. CIV. P. 42(d) (setting forth the guidelines when classes can be divided or tried only regarding specific issues).

310. *Id.*

sesses a valid claim in a separate individual suit. Furthermore, class actions would still maintain a binding effect, but only to qualified, remaining class members.

The positive effect on judicial economy further validates a strike method.[311] Previously, a class that failed certification potentially became multiple, individual lawsuits congesting the court system and absorbing judicial time and resources. Alternatively, implementation of the limited strike option allows qualified putative class members to advance as a class and satisfy one of the true intentions of class actions—fostering judicial economy through aggregation of common claims.

Of course, a limited strike option comes with some potentially negative effects. For instance, a damaging byproduct of the limited strike option could develop from clever plaintiff's attorneys. These attorneys could form a class and simply aggregate as many putative members as possible, regardless of validity. The attorney could let the trial judge strike controversial members, hoping that a liberal judge will allow some questionable class members to remain. Consequently, every class member that survives certification translates to another billable client for the plaintiff's attorney. The Texas Supreme Court must thoughtfully consider this potential danger when contemplating a limited strike option.

Although the proposed method has flaws, the modification represents a move in the right direction to hopefully appease both sides regarding the recent revolutionary changes to certification. For liberals, a limited strike option allows more classes to survive certification and proceed to trial. For conservatives, such an option limits massive class certification and provides another route to justice for both sides of litigation. Although neither side will find complete satisfaction with the proposed modifications, justice must be administered blindly. Implementing the strike method brings justice closer at hand for classes in the new conservative class action era.

V. CONCLUSION

In only one year, some commentators might suggest that Texas has completed a major shift from being described "tort heaven" to a state where classes have no refuge. Although both of these assumptions are misleading, one cannot ignore some massive changes. Until recently, trial courts could certify putative classes with relatively little proof because the courts enjoyed a safety net allowing decertification. In fact, if judges

311. *See* TEX. R. CIV. P. 1 (mandating the importance placed on judicial economy stating the "objective may be attained with as great expedition and dispatch and at the least expense . . . to the state as may be practicable").

were unsure whether to grant certification, they simply certified the class and left the appellate court to reverse their decisions later. The Texas Supreme Court recognized the negative implications of this approach.

Upon certification, the stakes for both sides of the lawsuit increase dramatically, and in many regards, the advantage shifts to the certified class, even without a strong claim. Consequently, many defendants settle suits in order to avoid the possibility of losing a massive judgment. The current conservative trend of the Texas Supreme Court, although not without controversy, provides parties a better opportunity to attain justice. Avoidance of the predominance requirement rhetoric and implementation of the limited strike option will calm the well-intentioned exuberance of the Texas Supreme Court, while not diminishing the progress gained from the Triad.