

SUBCOMMITTEE RECOMMENDATION FOR REVISION OF CLASS ACTION RULE

August 18, 2003

Rule 42. Class Actions

(a) Prerequisites to a Class Action.

[NOTE: This subdivision (a) is the current subdivision (a) of the Texas rule, except as noted. *See infra*, p.16.]

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law, or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

[NOTE: This is the current first paragraph of subdivision (a) of the Texas rule unchanged. *See infra*, p.16.]

~~**Derivative Suit.** In a derivative suit brought pursuant to Article 5.14 of the Texas Business Corporation Act, the petition shall contain the allegations (1) that the plaintiff was a record or beneficial owner of shares, or of an interest in a voting trust for shares at the time of the transaction of which he complains, or his shares or interest thereafter devolved upon him by operation of law from a person who was the owner at that time, and (2) with particularity, the efforts of the plaintiff to have suit brought for the corporation by the board of directors, or the reasons for not making any such efforts. The derivative suit may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders~~

~~similarly situated in enforcing the right of the corporation. The suit shall not be dismissed or compromised without the approval of the court, and notice in the manner directed by the court of the proposed dismissal or compromise shall be given to shareholders.~~

[NOTE: The second paragraph, concerning derivative suits, has been revised and moved to a new Rule 42a. *See infra*, p.14.]

(b) Class Actions Maintainable.

[NOTE: This subdivision (b) is current subdivision (b) of the Texas rule, except as noted. *See infra*, p.16.]

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

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

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

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

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

~~(3) where the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or~~

[NOTE: Paragraph (3) is deleted as unnecessary.]

~~(4)~~ (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) the difficulties likely to be encountered in the management of a class action.

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

[NOTE: The language of this subdivision (c) comes verbatim from the pending revision of subdivision (c) of federal rule 23, except as noted.]

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

[NOTE: The requirement that certification be decided “at an early practicable time” is a change from current Texas rule 42 (c)(1) and federal rule 23 (c)(1), both of which require the trial court

to decide the certification issue “as soon as practicable after the commencement of [the suit].” *See infra*, p.17.]

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under ~~Rule 23(g)~~ Rule 42 (g).

(C) An order under ~~Rule 23(e)(1)~~ Rule 42 (c)(1) may be altered or amended before final judgment.

(D) For any class certified under Rule 42(b)(3), the certification order must identify the substantive issues that will control the outcome of the litigation, determine if the predominating issues are common to the class, and state how the individual issues can be considered in a manageable, time efficient and fair manner.

[NOTE: This codifies the requirements of *Southwestern Refining Co. v. Bernal*, 22 S.W.2d 425, 434 (Tex.2000), and *Henry Schein, Inc. v. Stromboe*, 102 S.W.2d 675, 689 (Tex.2002).]

(2) (A) For any class certified under ~~Rule 23(b)(1) or (2)~~ Rule 42 (b)(1) or (2), the court may direct appropriate notice to the class.

[NOTE: Currently Texas rule 42 (c)(2) and federal rule 23 (c)(2) both require all classes certified to be given “the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable efforts.” *See infra*, p.17. But under this change, classes certified under 42 (b) (1) or (2) will now receive only “appropriate notice.” The individual notice requirement will apply only to classes certified under 42 (b)(3).]

(B) For any class certified under ~~Rule 23(b)(3)~~ Rule 42 (b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,
- that the court will exclude from [include in] the class any member who requests exclusion [inclusion], stating when and how members may elect to be excluded [included], and
- the binding effect of a class judgment on class members under ~~rule 23(e)(3)~~ Rule 42 (c)(3).

[NOTE: The bracketed substitutions of “include” in place of “exclude” are based on paragraphs (2) and (3) of the Jamail Committee proposal. *See infra*, p.19. Under subdivision (c), paragraphs (2) & (3), of the current Texas and federal rules, the notice must advise each potential class member that “the court will exclude him from the class if he so requests.” *See infra*, p.17. Thus, he will become a member of the class unless he affirmatively “opts out” by requesting to be excluded from the class. The language of paragraph (2) (B) of the pending federal rule set forth above, continues this approach. But under paragraphs (2) and (3) of the Jamail Committee proposal, a potential class member would not become a member of the class unless he “opts in” by affirmatively requesting to be included in the class. *See infra*, p.19. This is a far reaching proposal, and the subcommittee believes that the “opt in” approach should not be adopted without further study.]

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

and whom the court finds to be members of the class.

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

[NOTE: This language has been deleted because it is currently appears in subdivision (d) of the Texas rule. *See infra*, p.17.]

(4) (A) In a class action for personal injuries, death, products liability or property damage involving mass tort or disaster litigation, claimants whose injuries or claims are wholly inchoate may not be certified as a class or subclass or included within another certified class or subclass. Injuries or claims are considered "wholly inchoate" where there has been no discernable or detectable manifestation of injury or damage using admissible expert evidence.

(B) In certifying classes, the court is shall, after a hearing and upon proper evidence presented, determine whether any claimants assert wholly inchoate claims. Inchoate claims excluded from class certification shall, by court order, be protected against the running of any applicable statute of limitations by a specific finding that the claims have not manifested, ripen[ed] accrued or been discoverable as of the date of the written order. Entry of an order containing such findings shall not trigger any applicable statute of limitations.

[NOTE: The language of this paragraph (4) comes verbatim from paragraphs (1) (A) and (B) of the Jamail Committee proposal. *See infra*, p.19. Here again, the subcommittee believes that the problem of “inchoate claims” deserves further study and that the Jamail Committee proposal

should not be adopted at this time.]

(d) Actions Conducted Partially as Class Actions; Multiple Classes and

Subclasses. When 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.

[NOTE: This is current subdivision (b) of the Texas rule unchanged. It is identical to subdivision (c), paragraph (4), of the current and pending federal rules. *See supra*, p.6.]

(e) Settlement, Voluntary Dismissal, or Compromise.

[NOTE: The language of this subdivision (e) comes verbatim from the pending revision of subdivision (e) of federal rule 23, except as noted.]

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

~~**(B)** The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise. Notice of the [material terms of the] proposed dismissal or compromise [together with an explanation of when and how the members may elect to be excluded from the class] shall be given to all members in such manner as the court directs.~~

[NOTE: The subcommittee recommends rejecting the language of paragraph (1) (B) of the pending federal rule (which has been stricken through above). Instead the subcommittee recommends retention of the last clause of current subdivision (e) of the current Texas and federal rules (“ . . . notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.”) with the additional languageshown in brackets.]

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and

on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

[NOTE: For an explanation of “fair, reasonable, and adequate,” *see General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 955-957 (Tex. 1996).]

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under ~~Rule 23(e)(1)~~ Rule 42 (e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under ~~Rule 23(b)(3)~~ Rule 42 (b)(3), the court may ~~refuse to~~ not approve a settlement unless it affords a new opportunity to request exclusion [inclusion] to individual class members who had an earlier opportunity to request exclusion [inclusion] but did not do so.

[NOTE 1: The subcommittee recommends that the language of the pending federal revision of paragraph (3) be changed to require notice to all class members. Accordingly the phrase “may refuse to” has been replaced with the phrase “may not.” This notice can be sent out as part of the notice of settlement.]

[NOTE 2: The bracketed substitutions of “inclusion” in place of “exclusion” is again based on the Jamail Committee proposal. As before, the subcommittee believes that the “opt in” approach should not be adopted without further study. *See supra*, p.5.]

(4) (A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under ~~Rule 23(e)(1)(A)~~ Rule 42 (e)(1)(A).

(B) An objection made under ~~Rule 23(e)(4)(A)~~ Rule 42 (e)(4)(A) may be withdrawn only with the court’s approval.

(g) Class Counsel.

[NOTE: The language of this subdivision (g) comes verbatim from the pending revision of subdivision (g) of the federal rule, except as noted. The Jamail Committee proposal differs in some respects. *See infra*, p.20.]

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

- the work counsel has done in identifying or
- investigating potential claims in the action
- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
- counsel's knowledge of the applicable law, and
- the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and

to propose terms for attorney fees and nontaxable costs;
and

(iv) may make further orders in connection with the
appointment.

(2) Appointment Procedure.

(A) The court may designate interim counsel to act on behalf of the
putative class before determining whether to certify the action as a
class action.

[NOTE: Compare with the pending amendment to subdivision (c), paragraph (1) (A), *supra*, p.3,
which allows for some delay in appointing class counsel.]

(B) When there is one applicant for appointment as class counsel,
the court may appoint that applicant only if the applicant is
adequate under ~~Rule 23 42 (g)(1)(B) and (C)~~ Rule 42 (g)(1)(B) and

(C). If more than one adequate applicant seeks appointment as
class counsel, the court must appoint the applicant or applicants
best able to represent the interests of the class.

[NOTE: The phrase “or applicants” is added to make it clear that more than one
class counsel can be appointed.]

(C) The order appointing class counsel may include provisions
about the award of attorney fees or nontaxable costs under ~~Rule~~
~~23(h)~~ Rule 42(h).

(h) Procedure for determining Attorney Fees Award.

[NOTE: The language of this subdivision (h) comes verbatim from the pending
revision of subdivision (h) of the federal rules, except as noted. It is also
identical to subdivision (h) of the Jamail Committee proposal. *See infra*, p.20.]

In an action certified as a class action, the court may award ~~reasonable~~ attorney fees in accordance with subdivision (i) and nontaxable costs authorized by law or by agreement of the parties as follows:

[NOTE: The first sentence of subdivision (h) of the pending federal revision allows award of “reasonable” attorney’s fees, but this could conflict with the specific provisions of subdivision (i) of this draft revision.]

(1) Motion for Award of Attorney Fees. A claim for an award of attorney fees and nontaxable costs must be made by motion ~~under~~ ~~Rule 54(d)(2)~~, subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

[NOTE: The reference to federal rule 54(d)(2) is deleted because there is no corresponding provision in the Texas rules.]

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

(3) Hearing and Findings. The court ~~may~~ must hold a hearing and must find the facts and state its conclusions of law on the motion ~~under~~ ~~Rule 52(a)~~. The court must state its findings and conclusions in writing or orally on the record.

[NOTE: The reference to federal rule 52(a) is deleted and the last sentence is added because Texas has no clear procedure for making findings and conclusions outside of Rule 297, Tex.R. Civ.P., which is inapplicable here.]

~~**(4) Reference to Special Master or Magistrate Judge.**~~ The court ~~may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).~~

[NOTE: This subparagraph was rejected because there are no provisions in the Texas rules corresponding to federal rules 52 (a) and 54 (d).]

(i) Attorney's fees award

[NOTE: The language of this subdivision (i) comes from TEX.CIV.PRAC.& REM.CODE § 26.003 (a) & (b), which was added by the 78th Legislature in House Bill 4 § 1.01. *See infra*, p.15.]

(1) In awarding attorney's fees, the court shall first determine a Lodestar figure by multiplying the number of hours reasonably worked times a reasonable hourly rate. The court may increase or decrease the Lodestar figure, but the attorney's fees award must not exceed four times the Lodestar figure and it must not be less than 25% of the Lodestar figure. In making these determinations, the court shall consider the factors set forth in TEX.DISCIPLINARY.R.PROF.CONDUCT § 1.04 and other applicable law.

[NOTE: Compare TEX.CIV.PRAC.& REM.CODE § 26.003 (a). *See infra*, p.15.]

COMMENTS:

a. Attorney's fees in a class action may be awarded from the "common fund" recovered for all class members. *City of Dallas v. Arnett*, 762 S.W.2d 942, 953-955 (Tex.App.—Dallas 1988 writ denied); *Crouch v. Tenneco, Inc.*, 853 S.W.2d 643, 647 (Tex.App.—Waco 1993 no writ). *See generally, General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 957-958 (Tex.1996). Currently there are two methods for calculating attorney's fees to be awarded from a common fund: the percentage method and the Lodestar method. *Bloyed*, 916 S.W.2d at 960.

b. Under the Lodestar method, the number of hours worked times an hourly rate is viewed as "the Lodestar of the court's fee determination." *Lindy Brothers Builders Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir.1973). This figure is called the "Lodestar figure." The court may then apply a "multiplier" to raise or lower the Lodestar figure. *See Borg-Warner Protective Services Corp. v. Flores*, 955 S.W.2d 861, 870 (Tex.App.—Corpus Christi 1997, no pet.); *Guitry v. C.C.I. Enterprise, Co.*, 54 S.W.2d 526, 528-529 (Tex.App.—Houston [1st Dist.] 2001 no pet.); *Dillard Department Stores, Inc. v. Gonzales*, 72 S.W.3d 398, 412 (Tex.App.—El Paso 2002 pet. denied); *Haggar Apparel Co. v. Leal*, 2002 W.L. 314 781 72, at *8 (Tex.App.—Corpus Christi 2002, no pet h.).

c. In determining the hourly rate and in calculating the multiplier, under current law, the court may consider the factors set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-719 (5th Cir.1974). Ten of these factors are codified in TEX.DISCIPLINARY.R.PROF.CONDUCT 1.04 (quoted in *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d

812, 818 (Tex.1997)). Compare House Bill 730 § 2.04, p.58 (effective September 1, 2003) (amending TEX. PROP. CODE § 27.004 (e) (2)). But under TEX.CIV.PRAC.& REM.CODE § 26.003 (a), the Lodestar figure can be “increased or decrease[d] . . . by no more than four times based on specified factors.”

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

[NOTE: Compare TEX. CIV. PRAC. & REM. CODE § 26.003 (b). *See infra*, p.15.]

(j) Effective date

This rule shall be effective only with respect to actions commenced on or after September 1, ~~1987~~ 2003.

[NOTE: This is the current subdivision (g). For illustrative purposes, the effective date has been changed to September 1, 2003, which is the effective date of House Bill 4. However, the subcommittee did not agree on a way to deal with the effective date problem. The provision concerning attorney’s fees in subdivision (i) above are mandated by House Bill 4, which “applies only to an action filed on or after [September 1, 2003].” HB4 § 23.02, p.130. Moreover, the legislature is directed to pass a rule concerning attorney’s fees “on or before December 31, 2003.” *Id.* § 1.01, p.1 (adding TEX.CIV.PRAC.& REM.CODE § 26.001 (b)). The other changes in Rule 42 are not mandated by the legislature, however. The subcommittee discussed three approaches, as follows:

First, do not insert an effective date and leave it for the courts to decide.

Second, make the rule effective as to all cases filed after the date that the rule goes into effect.

Third, make the rule effective immediately, except as to events that have already occurred in a case. For example, the certification provisions of the new rule would not apply to a case where the certification decision had already been made. Similarly the notice provisions of the new rule would not apply where notice had already been given. Finally, the attorneys fees provision would not apply if that issue had already been decided.]

Rule 42. Derivative Proceedings

In a derivative ~~suit brought pursuant to~~ proceeding governed by Article 5.14 of the Texas Business Corporation Act, the complaint must ~~petition shall~~ contain the allegations (1) that the plaintiff was a record or beneficial owner of shares, ~~or of an interest – including a~~ beneficial owner whose shares are held in a voting trust ~~for shares or by a nominee –~~ at the time of the ~~transaction of which he complains~~ act or omission complained of, or his ~~shares or interest thereafter devolved upon him~~ became a shareholder by operation of law from a person ~~who was the owner~~ that was a shareholder at that time, and (2) that a written demand was filed with the corporation setting forth with particularity, the efforts of the plaintiff to have suit brought for the corporation by the board of directors or its reasons for not making any such effort the act, omission, or other matter that is the subject of the claim or challenge and requesting that the corporation take suitable action.

The derivative ~~suit~~ proceeding may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders similarly situated in enforcing the right of the corporation. The ~~suit shall~~ proceeding must not be dismissed or compromised without the approval of the court, and notice in the manner directed by the court of the proposed dismissal or compromise must be given to shareholders.

[NOTE: This new rule is a revision of the derivative suit provision formerly found in the second paragraph of subdivision (a) of Rule 42. *See supra*, p.1. It has been rewritten in light of the 1998 revisions to Article 5.14 of the Business Corporation Act, which sets forth detailed procedures for derivative suits. *See Christian v. IGC Telecom Canada, Inc.*, 996 S.W.2d 270, 274-275 (Tex.App.—Houston [1st Dist.] 1999, no pet.). This language comes from the recodification draft, and it has not been reviewed by the subcommittee.]

HOUSE BILL 4

ARTICLE 1. CLASS ACTIONS

SECTION 1.01. Subtitle B, Title 2, Civil Practice and Remedies Code, is amended by adding Chapter 26 to read as follows:

CHAPTER 26. CLASS ACTIONS

SUBCHAPTER A. SUPREME COURT RULES

Sec. 26.001. ADOPTION OF RULES BY SUPREME COURT.

(a) The supreme court shall adopt rules to provide for the fair and efficient resolution of class actions.

(b) The supreme court shall adopt rules under this chapter on or before December 31, 2003. [emphasis added]

[NOTE: “This chapter” includes both subchapter A (“Supreme Court Rules”) and subchapter B (“Class Actions Involving Jurisdiction of State Agency”). Subchapter B, however, deals primarily with interlocutory appeals. If rules are needed “to provide for the fair and efficient resolution” of those issues, they should probably originate with the subcommittee on appellate rules.]

Sec. 26.002. **MANDATORY GUIDELINES.** Rules adopted under Section 26.001 must comply with the mandatory guidelines established by this chapter.

Sec. 26.003. ATTORNEY'S FEES.

(a) If an award of attorney's fees is available under applicable substantive law, the rules adopted under this chapter must provide that the trial court shall use the Lodestar method to calculate the amount of attorney's fees to be awarded class counsel. The rules may give the trial court discretion to increase or decrease the fee award calculated by using the Lodestar method by no more than four times based on specified factors.

(b) Rules adopted under this chapter must provide that in a class action, if any portion of the benefits recovered for the class are in the form of coupons or other noncash common benefits, the attorney's fees awarded in the action must be in cash and noncash amounts in the same proportion as the recovery for the class.

[NOTE: See subdivision (i) of revision draft]

CURRENT RULE 42, TEX.R.CIV.P.

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law, or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Derivative Suit. In a derivative suit brought pursuant to > Article 5.14 of the Texas Business Corporation Act, the petition shall contain the allegations (1) that the plaintiff was a record or beneficial owner of shares, or of an interest in a voting trust for shares at the time of the transaction of which he complains, or his shares or interest thereafter devolved upon him by operation of law from a person who was the owner at that time, and (2) with particularity, the efforts of the plaintiff to have suit brought for the corporation by the board of directors, or the reasons for not making any such efforts. The derivative suit may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders similarly situated in enforcing the right of the corporation. The suit shall not be dismissed or compromised without the approval of the court, and notice in the manner directed by the court of the proposed dismissal or compromise shall be given to shareholders.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

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

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

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

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

(3) where the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(4) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall, after hearing, determine by order whether it is to be so maintained. This determination may be altered, amended, or withdrawn at any time before final judgment. The court may order the naming of additional parties in order to insure the adequacy of representation.

(2) After the court has determined that a class action may be maintained it shall order the party claiming the class action to direct to the members of the class the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort. In all class actions maintained under subdivisions (b) (1), (b)(2), and (b)(3), this notice shall advise the members of the class (A) the nature of the suit, (B) the binding effect of the judgment, whether favorable or not, and (C) the right of any member to appear before the court and challenge the court's determinations as to the class and its representatives. In all class actions maintained under subdivision (b) (4) this notice shall advise each member of the class (A) the nature of the suit; (B) that the court will exclude him from the class if he so requests by a specified date; (C) that the judgment, whether favorable or not, will include and bind all members who do not request exclusion by the specified date; and (D) that any member who does not request exclusion may if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivisions (b)(1), (b)(2), and (b)(3), whether or not favorable to the class, shall include, describe, and be binding upon all those whom the court finds to be members of the class and who received notice as provided in subdivision (c)(2). The judgment in an action maintained as a class action under subdivision (b) (4), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(d) Actions Conducted Partially as Class Actions. When 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.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Discovery. Unnamed members of a class action are not to be considered as parties for purposes of discovery.

(g) Effective Date. This rule shall be effective only with respect to actions commenced on or after September 1, 1977.

JAMAIL COMMITTEE PROPOSAL FOR CLASS ACTIONS

Rule 42. Class Actions

(1) Certain Inchoate Claims.

(A) In a class action for personal injuries, death, products liability or property damage involving mass tort or disaster litigation, claimants whose injuries or claims are wholly inchoate may not be certified as a class or subclass or included within another certified class or subclass. Injuries or claims are considered "wholly inchoate" where there has been no discernable or detectable manifestation of injury or damage using admissible expert evidence.

(B) In certifying classes, the court is shall, after a hearing and upon proper evidence presented, determine whether any claimants assert wholly inchoate claims. Inchoate claims excluded from class certification shall, by court order, be protected against the running of any applicable statute of limitations by a specific finding that the claims have not manifested, ripen[ed] accrued or been discoverable as of the date of the written order. Entry of an order containing such findings shall not trigger any applicable statute of limitations.

[NOTE: The underlined material does not appear in the Jamail Committee proposal.]

(2) After the court has determined that a class action may be maintained it shall order the party claiming the class action to direct to the members of the class the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort. In all class actions maintained under subdivisions (b)(1), (b)(2), and (b)(3), this notice shall advise the members of the class (A) the nature of the suit, (B) the binding effect of the judgment, whether favorable or not, and (C) the right of any member to appear before the court and challenge the court's determinations as to the class and its representatives. In all class actions maintained under subdivision (b)(4) this notice shall advise each member of the class (A) the nature of the suit; (B) that the court will include him in the class only if he so requests by a specified date; (C) that the judgment, whether favorable or not, will include and bind all members who do request inclusion by the specified date; and (D) that any member who does not request inclusion may if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivisions (b)(1), (b)(2), and (b)(3), whether or not favorable to the class, shall include, describe, and be binding upon all those whom the court finds to be members of the class and who received notice as provided in subdivision (c)(2). The judgment in an action maintained as a class action under subdivision (b)(4), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have requested inclusion and whom the court finds to be members of the class.

(g) Class Counsel.

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(2) Appointment Procedure.

(A) The court may allow a reasonable period after the commencement of the action for attorneys seeking appointment as class counsel to apply.

(B) In appointing an attorney class counsel, the court must consider (i) counsel's experience in handling class actions and other complex litigation, (ii) the work counsel has done in identifying or investigating potential claims in this case, and (iii) the resources counsel will commit to representing the class, and may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class. The court may direct potential class counsel to provide information on any such subject and to propose terms for attorney fees and nontaxable costs. The court may also make further orders in connection with selection of class counsel.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs.

(3) Rule 8 Applicable. The provisions of Rule 8 also apply to this rule.

(h) Attorney Fees Award. In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

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

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

(3) Hearing and Findings. The court may hold a hearing and must find the facts and state its conclusions of law on the motion.

RECODIFICATION DRAFT

Rule 37. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if **(1)** the class is so numerous that joinder of all members is impracticable, **(2)** there are questions of law or fact common to the class, **(3)** the claims or defenses of the representative parties are typical of the claims and defenses of the class, and **(4)** the representative parties will fairly and adequately protect the interests of the class.

(b) Class Action Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of **(A)** inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for the party opposing the class, or **(B)** adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole; or

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

(c) Determination by Order Whether Class Action to be Maintained: Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court must, after hearing, determine by order whether it is to be so maintained. This determination may be altered, amended, or withdrawn at any time before final judgment. The court may order the naming of additional parties in order to insure the adequacy of representation.

(2) After the court has determined that a class action may be maintained it must order the party claiming the class action to direct to the members of the class the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort. In all class actions maintained under subdivision (b)(1), and (b)(2), this notice must advise the members of the class (A) the nature of the suit, (B) the binding effect of the judgment, whether favorable or not, and (C) the right of any member to appear before the court and challenge the court's determinations as to the class and its representatives. In all class actions maintained under subdivision (b)(3) this notice must advise each member of the class (A) the nature of the suit; (B) that the court will exclude the member from the class if the member so requests by a specified date; (C) that the judgment, whether favorable or not, will include and bind all members who do not request exclusion by the specified date; and (D) that any member who does not request exclusion may if the member desires, enter an appearance through the member's counsel.

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

(d) Actions Conducted Partially as Class Actions. When appropriate (1) an action may be brought or maintained as a class action with respect to particular issues, or (2) a class be divided into subclasses and each subclass treated as a class, and the provisions of this rule must be construed and applied accordingly.

(e) Dismissal or Compromise. A class action must not be dismissed or compromised without the approval of the court, and notice must be given to all members of the class in such manner as the court directs.

(f) Discovery. Unnamed members of a class action are not to be considered as parties for purposes of discovery.

Official Comments:

Change by amendment effective September 1, 1977. Rule 42 is completely rewritten. Subdivision (a) is copied from revised Federal Rule 23(a). Subdivision (b)(1) is copied from revised Federal Rule 23(b)(2). Subdivision (b)(2) is copied from revised Federal Rule 23(b)(2). Subdivision (b)(3) is taken from present Texas Rule 42(a)(3), omitting the reference to the character of the right as "several." Subdivision (b)(4) is adopted from

revised Federal Rule 23(b)(3). Subdivision (c)(1) is adopted from revised Federal Rule (c)(1) with little change except in the choice of words. The second sentence in proposed (c)(1) is not found in the Federal Rule although the idea is implied therein. Subdivision (d) is copied from revised Federal Rule 23(c)(4). Subdivision (e) is copied from revised Federal Rule 23(e).

Change by amendment effective April 1, 1984. The paragraph concerning a derivative suit is added to subdivision (a).

Rule 38. Derivative Proceedings

In a derivative proceeding governed by Article 5.14 of the Texas Business Corporation Act, the complaint must contain the allegations (1) that the plaintiff was a record or beneficial owner of shares – including a beneficial owner whose shares are held in a voting trust or by a nominee – at the time of the act or omission complained of, or became a shareholder by operation of law from a person that was a shareholder at that time, and (2) that a written demand was filed with the corporation setting forth with particularity the act, omission, or other matter that is the subject of the claim or challenge and requesting that the corporation take suitable action. The derivative proceeding may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders similarly situated in enforcing the right of the corporation. The proceeding must not be dismissed or compromised without the approval of the court, and notice in the manner directed by the court of the proposed dismissal or compromise must be given to shareholders.

[Comment: In 1997 the Texas Legislature passed a new statute governing derivative actions. This Rule was changed to conform to the new statute.]