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Jim T. Priest

Michael R. Pacewicz

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RECENT DEVELOPMENTS IN OKLAHOMA CLASS ACTION LAW

JIM T. PRIEST* & MICHAEL R. PACEWICZ**

I. Introduction

Although the political rhetoric flowing from certain quarters might suggest that Oklahoma is a hotbed for class action litigation, the number of recently reported cases involving class actions from both federal and state courts in Oklahoma is relatively small. Many of these cases focus on whether class certification is appropriate under Oklahoma's class action statute[1] or its federal equivalent.[2] The common thread running through all of these cases is that Oklahoma courts are quite meticulous when analyzing class certification and when applying the relevant statutes.[3]

Part II of this Article begins with a short overview of the requirements for class certification under both state and federal law. Part III discusses three recent state court decisions on certification, including two that are arguably inconsistent. Next, Part IV examines recent federal court decisions concerning class actions in Oklahoma. Finally, Part V addresses new legislation regarding class actions and concludes with thoughts about the future of class action litigation in Oklahoma.

II. Prerequisites for a Class Action

A. Oklahoma's Class Action Statute

Section 2023 of title 12 of the Oklahoma Statutes sets forth the

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* Partner, Whitten, Nelson, McGuire, Terry & Roselius, P.L.L.C., Oklahoma City, Oklahoma. B.A., Houghton College (New York), 1977; J.D., Syracuse University, 1980.

** Associate, Crowe & Dunlevy, a Professional Corporation, Tulsa, Oklahoma. B.A., Northeastern State University, 1995; J.D., University of Tulsa, 2000.

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1. 12 OKLA. STAT. § 2023 (2001).

2. FED. R. CIV. P. 23.

3. *See, e.g.*, Melot v. Okla. Farm Bureau Mut. Ins. Co., 2004 OK CIV APP 25, 87 P.3d 644, *cert. denied* (Okla. Mar. 1, 2004); Roberson v. Painewebber, Inc., 2003 OK CIV APP 100, 81 P.3d 688, *reh'g denied* (Okla. Civ. App. Aug. 11, 2003); Gipson v. Sprint Communications, Co., 2003 OK CIV APP 89, 81 P.3d 65, *cert. denied* (Okla. Oct. 13, 2003); KMC Leasing Inc. v. Rockwell-Standard Corp., 2000 OK 51, 9 P.3d 683.

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prerequisites for class certification in state court.[4] Section 2023(A) mandates that the proposed class meet the requirements of numerosity, commonality, typicality, and adequacy of representation before a court will consider certifying the class.[5] After meeting the requirements of section 2023(A), the action must fit one or more of the categories listed under section 2023(B) for the class action to continue.[6] The category most frequently relied upon by class action plaintiffs is found in section 2023(B)(3), which requires a finding by the court that a predominant question of fact or law is common to the class as a whole and that class action is the superior method for resolving the issue.[7]

Several general rules have emerged as Oklahoma courts have applied section 2023. First, the party seeking certification bears the burden of showing that the class meets the prerequisites.[8] Second, when the question is close, courts generally certify the class because the order certifying is subject to modification up until the time of judgment on the merits.[9] Third, the relative merits of the case are irrelevant in determining certification.[10] Finally, if the record on review does not show that each of the prerequisites under section 2023(A) have been met, then the trial court abused its discretion in granting certification.[11]

The order of a trial court granting class certification, however, receives great deference,[12] and will not be reversed absent an abuse of discretion.[13] "An abused judicial discretion is manifested when discretion is exercised to an end or purpose not justified by, and clearly against, reason and evidence."[14] Where the record does not support the presence of the statutory requirements for class certification, the trial court's action amounts to an abuse of discretion.[15]

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4. 12 OKLA. STAT. § 2023.

5. *Id.* § 2023(A); *see, e.g.,* Ysbrand v. DaimlerChrysler Corp., 2003 OK 17, ¶ 6, 81 P.3d 618, 624.

6. *See, e.g., Gipson* ¶ 16, 81 P.3d at 69; *KMC Leasing* ¶ 11, 9 P.3d at 688.

7. 12 OKLA. STAT. § 2023(B)(3).

8. *See* First Life Assurance Co. v. Mountain, 1993 OK CIV APP 20, ¶ 4, 848 P.2d 1177, 1178-79.

9. *See, e.g., Ysbrand* ¶ 5, 81 P.3d at 623.

10. *See, e.g., KMC Leasing* ¶ 26, 9 P.3d at 691.

11. *See, e.g., Ysbrand* ¶ 5, 81 P.3d at 623.

12. *See* Greghol L.P. v. Oryx Energy Co., 1998 OK CIV 111, ¶ 6, 959 P.2d 596, 598.

13. *See* Scoufos v. State Farm Fire & Cas. Co., 2001 OK 113, ¶ 1, 41 P.3d 366, 367.

14. Patel v. OMH Med. Ctr. Inc., 1999 OK 33, ¶ 20, 987 P.2d 1185, 1194.

15. *See Greghol* ¶ 6, 959 P.2d at 598.

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B. Class Actions in Federal Court

Federal Rule of Civil Procedure 23 is the federal counterpart to Oklahoma's section 2023.[16] Indeed, since the legislature amended the Oklahoma provision in 1984, the requirements for class certification contained in the two statutes have been the same.[17] Thus, Oklahoma state courts frequently draw upon federal court decisions in resolving class action issues.[18]

Like state courts, federal courts are granted broad discretion in determining class certification.[19] Thus, to overturn a lower federal court's decision to certify a class, the federal appellate court would have to find that the lower court had abused its discretion. Even where all of the requirements of Rule 23 are satisfied, the trial court retains discretion to either grant or deny class certification.[20] Nevertheless, a federal trial court "may certify a class only if, after rigorous analysis, it determines that the proposed class satisfies the prerequisites . . . ."[21] A federal appellate court will find no abuse of discretion where the district court has applied the correct criteria to the facts of the case.[22]

III. Recent Oklahoma State Cases

The Oklahoma Court of Civil Appeals recently released three notable class action decisions for publication.[23] Two of these cases resulted in denials of class certification,[24] while the third affirmed the trial court's decision certifying a class of homeowners in an action against an insurer.[25] Notably, two panels of the court of civil appeals reached different results when reviewing the impact on class certification of allegations concerning misrepresentation and fraud.

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16. *Compare* FED. R. CIV. P. 23, *with* 12 OKLA. STAT. § 2023 (2001).

17. *See* First Life Assurance Co. v. Mountain, 1993 OK CIV APP 20, ¶ 3, 848 P.2d 1177, 1178.

18. *See, e.g.*, Dewey v. State *ex rel.* Okla. Firefighters Pension & Ret. Sys., 2001 OK 40, ¶ 18, 28 P.3d 539, 547.

19. *See* J.B. *ex rel.* Hart v. Valdez, 186 F.3d 1280, 1287 (10th Cir. 1999).

20. *See* Cherokee Nation of Okla. v. United States, 199 F.R.D. 357, 360 (E.D. Okla. 2001).

21. *Valdez*, 186 F.3d at 1287.

22. *See id.*

23. *See* Melot v. Okla. Farm Bureau Mut. Ins. Co., 2004 OK CIV APP 25, 87 P.3d 644, *cert. denied* (Okla. Mar. 1, 2004); Roberson v. Painewebber, Inc., 2003 OK CIV APP 100, 81 P.3d 688, *reh'g denied* (Okla. Civ. App. Aug. 11, 2003); Gipson v. Sprint Communications Co., 2003 OK CIV APP 89, 81 P.3d 65, *cert. denied* (Okla. Oct. 13, 2003).

24. *Roberson* ¶ 9, 81 P.3d at 691; *Gipson* ¶ 33, 81 P.3d at 74.

25. *Melot* ¶ 28, 81 P.3d at 649.

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A. Roberson v. Painewebber, Inc.

The plaintiffs in *Roberson v. Painewebber, Inc.*[26] were investors in zero coupon corporate bonds supported largely by mortgages on a Tulsa office building and by the tenancy of one of the building's largest tenants.[27] The plaintiffs' petition alleged that the building appraisal was grossly inflated, that they were not informed of this fact, and that the defendant's brokers induced them into buying the bonds using uniform sales materials.[28] Bringing claims of fraud and breach of fiduciary duty, the plaintiffs sought to certify a nationwide class.[29] The trial court denied class certification, and the plaintiffs appealed only that part of the ruling pertaining to their fraud claim.[30]

The plaintiffs argued on appeal that: (1) the trial court had ignored substantial evidence showing commonality regarding standardized fraudulent sales methods or omissions of material fact; (2) the trial court had improperly found that fraud claims based in part on oral misrepresentations were not suitable for class certification; (3) the trial court had improperly found that individual reliance issues would overwhelm common issues; and (4) the trial court had ignored the rule that close questions of class certification should be resolved in favor of certifying the class.[31] The Oklahoma Court of Civil Appeals affirmed, finding that the trial court did not abuse its discretion in denying class certification.[32]

The court of civil appeals noted that plaintiffs' fraud claims included at least 375 investors who had purchased bonds pursuant to a prospectus and dealings with numerous brokers scattered across twenty states.[33] Not all of the bondholders received the prospectus, however, and the brokers used an assortment of internal documents when speaking with potential investors.[34] The internal documents were not shown to potential investors and did not include all of the information in the prospectus.[35]

In general, fraud claims based upon oral misrepresentations are not appropriate for class certification because each plaintiff must prove that he

26. 2003 OK CIV APP 100, 81 P.3d 688, *reh'g denied* (Okla. Civ. App. Aug. 11, 2003).
27. *Id.* ¶ 3, 81 P.3d at 690.
28. *Id.*
29. *Id.* ¶¶ 3-4 & n.4, 81 P.3d at 690 & n.4.
30. *Id.* ¶ 4, 81 P.3d at 690.
31. *Id.*
32. *Id.* ¶ 9, 82 P.3d at 691.
33. *Id.* ¶ 5, 81 P.3d at 690.
34. *Id.* ¶ 6, 81 P.3d at 690.
35. *Id.*

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relied upon the alleged misrepresentation.[36] The plaintiffs in *Roberson* attempted to avoid this pitfall by arguing that the internal documents used by the brokers when speaking with potential investors constituted a "script."[37] Both the trial court and the court of civil appeals rejected this argument, finding that the alleged oral misrepresentations and omissions formed the bases of the fraud claims and that individual issues of reliance predominated over common issues.[38] Finally, the court of civil appeals found that the record did not support the plaintiffs' argument that class certification was a close question, and thus affirmed the trial court's order denying certification.[39]

B. Melot v. Oklahoma Farm Bureau Mutual Insurance Co.

In *Melot v. Oklahoma Farm Bureau Mutual Insurance Co.*,[40] the plaintiffs filed an insurance claim with the defendant after a storm had damaged their home.[41] The parties subsequently agreed on an amount, and the insurer paid the claim.[42] The homeowners then sued, alleging that the defendant had a practice of underpaying property damage claims by failing to include a 20% allowance for overhead and profit that general contractors routinely charge on home repair jobs involving three or more trades.[43]

In their petition, the plaintiffs brought claims for breach of contract, bad faith, and fraud.[44] The petition was filed individually on behalf of the plaintiffs and on behalf of others who were insured by the defendant and "whose claims for covered damage to their dwellings were intentionally under-adjusted in that [the defendant] failed to include adequate and timely payments for contractor's profit and overhead."[45] The trial court granted class certification and defined the class as:

> All Oklahoma citizens who were or are Oklahoma Farm Bureau Mutual Insurance Company homeowner policyholders:
>
> who suffered a covered loss to their home on or after June 8, 1999;

36. *See* Bunch v. Kmart Corp., 1995 OK CIV APP 41, ¶ 6, 898 P.2d 170, 172.
37. *See Roberson* ¶ 6, 898 P.2d at 690.
38. *Id.* ¶ 6, 898 P.2d at 690-91.
39. *Id.* ¶ 8, 898 P.2d at 691.
40. 2004 OK CIV APP 25, 87 P.3d 644, *cert. denied* (Okla. Mar. 1, 2004).
41. *Id.* ¶ 2, 87 P.3d at 645.
42. *Id.* ¶ 2, 87 P.3d at 644-45.
43. *Id.* ¶¶ 2-3, 87 P.3d at 645.
44. *Id.* ¶ 3, 87 P.3d at 645.
45. *Id.*

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whose losses were adjusted on an actual cash value (ACV) or replacement cost (RC) basis;

whose Oklahoma Farm Bureau worksheets/estimates indicate involvement of three trades or more; and

whose damage adjustments did not include adequately calculated and timely tendered compensation for general contractor's overhead and profit.[46]

On appeal, after summarily dispensing with the defendant's arguments concerning whether the class was sufficiently identifiable and whether it was overly broad because of statute of limitations considerations, the court of civil appeals analyzed the statutory requirements. The court determined that the plaintiffs met the typicality requirement of section 2023(A)(3) because the "[p]laintiffs' legal theories of recovery arise from allegations of a common course of deceptive conduct equally affecting themselves and the putative class members."[47] The appeals court further found that the record was devoid of any indication that the plaintiffs lacked personal knowledge of the circumstances of the case or that they lacked understanding of the issues involved.[48] Thus, the court concluded, the plaintiffs could adequately represent the class.[49]

The appellate court also concluded that the plaintiffs met the predominance requirement of section 2023(B)(3).[50] This analysis required the court to determine whether individual questions predominated the common questions of law or fact.[51] The court found that the trial court's definition of the class as those insureds who suffered covered losses to their homes did not require individual inquiry because the record reflected that the defendant had already determined whether each loss was covered.[52] The court then addressed the defendant's argument that determining whether damage adjustments were adequately calculated depended on individualized questions of whether any particular insured was entitled to payment for overhead and profit.[53] The court noted that while the plaintiffs alleged that the defendant had an "across the board pattern" of failing to pay the charge when the job involved three or

46. *Id.* ¶ 4, 87 P.3d at 646.
47. *Id.* ¶ 16, 87 P.3d at 647.
48. *Id.* ¶ 17, 87 P.3d at 647.
49. *See id.*
50. *Id.* ¶ 26, 87 P.3d at 649.
51. *See id.* ¶ 19, 87 P.3d at 648 (citing Mattoon v. City of Norman, 1981 OK 92, ¶ 20, 633 P.2d 735, 739).
52. *Id.* ¶ 21, 87 P.3d at 648.
53. *Id.* ¶ 23, 87 P.3d at 648-49.

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more trades, the defendant never asserted that it individually assessed claims before determining if insureds were entitled to the 20% charge for overhead and profit.[54] The court concluded that the question of the plaintiffs' entitlement to the 20% charge went to the merits of the case, and was therefore inappropriate for determining class certification.[55]

The defendant further argued that the commonality requirement was not met because individualized inquiries would be necessary to determine what constituted a "trade" and to address the issue of reliance implicated by the plaintiffs' tort claims.[56] The court of civil appeals rejected the first argument, finding that the trial court's definition limited the class to those individual homes where the defendant's own worksheets indicated the need for three or more trades.[57] Thus, the court concluded that the defendant had already determined what constituted a "trade."[58]

The appellate court also rejected the defendant's second argument. After acknowledging the holding in *Bunch v. Kmart Corp.*[59] — that individualized issues of reliance based on oral misrepresentations render a class action inappropriate — the court applied the reasoning of a subsequent Oklahoma Supreme Court case, *Black Hawk Oil Co. v. Exxon Corp.*[60] In doing so, the court of civil appeals stated, "In the instant case, *while the alleged omissions of information may not have been written*, they were standardized in that Plaintiffs have asserted that Insurer made the same omissions to all members of the class. Under this analysis, the commonality requirement has been met."[61]

As indicated, the Oklahoma Court of Civil Appeals relied on *Black Hawk Oil* to uphold certification of the plaintiffs' fraud claims in *Melot*. The plaintiffs in *Black Hawk Oil*, who were natural gas producers, sued a gas plant owner alleging that the owner failed to account for slop oil produced during gas processing.[62] The defendant, relying on *Bunch v. Kmart*, argued that class certification was inappropriate.[63] The Oklahoma Supreme Court noted that while *Bunch* involved oral misrepresentations concerning the need for automotive repairs, the plaintiffs in *Black Hawk Oil* "claim[ed] that

54. *Id.* ¶ 24, 87 P.3d at 649.
55. *Id.* ¶ 25, 87 P.3d at 649.
56. *Id.* ¶¶ 12-13, 87 P.3d at 647.
57. *Id.* ¶ 12, 87 P.3d at 647.
58. *Id.*
59. 1995 OK CIV APP 41, ¶ 8, 898 P.2d 170, 172.
60. 1998 OK 70, 969 P.2d 337.
61. *Melot* ¶ 15, 87 P.3d at 647 (emphasis added).
62. *Black Hawk Oil* ¶ 4, 969 P.2d at 340.
63. *Id.* ¶ 30, 969 P.2d at 345.

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defendants failed to account for slop oil in monthly accountings that defendants rendered to plaintiffs and other members of the class, although defendants admittedly collected and sold the slop oil."[64] The court then stated that "'[t]he need to show individual reliance has not precluded class treatment in cases where *standardized written misrepresentations* have been made to class members.'"[65]

Some might argue that the conclusion reached by the court of civil appeals in *Melot* runs counter to that reached by its sister panel in *Roberson*, where the court found unavailing the plaintiffs' allegation that the oral misrepresentations and omissions of the defendant's brokers were essentially scripted.[66] In *Roberson*, some of the plaintiffs received copies of the prospectus, and the brokers used written internal memoranda when speaking with potential investors.[67] The use of written memoranda in the solicitation of investors, however, suggests that the omissions and misrepresentations in *Roberson* were similar to those in *Melot*.[68]

Trial courts' broad discretion in ruling on class certification may provide some explanation for the differing decisions in *Roberson* and *Melot*. Also, the focus in *Melot* was on the defendant's omissions rather than its representations,[69] and *Black Hawk Oil* similarly involved omissions.[70] Thus, *Melot* serves to further distinguish the differences between omissions and misrepresentations as addressed in *Black Hawk Oil*.

C. Gipson v. Sprint Communications Co.

1. Trial Court Proceedings

The trial court's discretion to determine class certification in the first instance is not without limits. Occasionally one of Oklahoma's appellate

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64. *Id.*

65. *Id.* (quoting NEWBERG ON CLASS ACTIONS § 22.49 (3d ed. 1992)) (emphasis added).

66. *See* Roberson v. Painewebber, Inc., 2003 OK CIV APP 100, ¶ 6, 81 P.3d 688, 690-91, *reh'g denied* (Okla. Civ. App. Aug. 11, 2003). On May 16, 2005, the Oklahoma Supreme Court granted certiorari to review the court of civil appeals decision in *Bill Burgess v. Farmers Insurance Co.*, Case No. 99,739 (Okla. May 16, 2005), in which the court of appeals reversed a trial court's certification of a class. Thus, the Oklahoma Supreme Court appears poised to issue a definitive opinion on class certification that may resolve this confusion.

67. *Roberson* ¶ 6, 81 P.3d at 690.

68. *Compare id.*, *with* Melot v. Okla. Farm Bureau Mut. Ins. Co., 2004 OK CIV APP 25, ¶ 15, 87 P.3d 644, 647, *cert. denied* (Okla. Mar. 1, 2004).

69. *Melot* ¶ 15, 87 P.3d at 647.

70. *See* Black Hawk Oil v. Exxon Corp., 1998 OK 70, ¶ 30, 969 P.2d 337, 345.

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courts concludes that a trial court has crossed the line, which was the case in *Gipson v. Sprint Communications Co.*[71]

In *Gipson*, the plaintiff alleged that Sprint had paid railroads for permission to install fiber optic cable in underground conduits along railroad easements.[72] The plaintiff claimed that the easements did not permit any use beyond operation of a railroad, and that Sprint's installation of the cable without first obtaining landowners' permission or providing compensation constituted trespass.[73] The plaintiff sought damages for trespass, unjust enrichment, ejectment, and removal of the fiber optic cable.[74]

The plaintiff sought to certify a class consisting of all persons owning an interest in land in the United States across which Sprint had installed cable without permission, without the use of legal process, and without paying compensation.[75] Regarding the requirements of section 2023(A), the plaintiff asserted that the large number of affected landowners made joinder impractical and that the class members' damages were too small to justify separate lawsuits.[76]

The plaintiff further asserted that his claims were representative of the claims of the other class members,[77] and that he would fairly and adequately protect the interests of the class.[78] The plaintiff asserted that the proposed class members shared three common questions of law and fact: (1) whether the actions of Sprint amounted to trespass; (2) whether Sprint had been unjustly enriched; and (3) whether the class members were entitled to exclusive possession of their property, free of the cables and related hardware.[79] Lastly, the plaintiff alleged that all of the grounds contained in section 2023(B) were present in the case.[80]

The trial court certified the class, limiting it geographically to the State of Oklahoma.[81] In doing so, the trial court determined that the class included

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71. 2003 OK CIV APP 89, 81 P.3d 65, *cert. denied* (Okla. Oct. 13, 2003).
72. *Id.* ¶ 2, 81 P.3d at 66.
73. *Id.*
74. *Id.*
75. *Id.* ¶ 3, 81 P.3d at 66.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *See id.* ¶ 7, 81 P.3d at 67. The court defined the class as:

> [A]ll persons owning a fee simple interest in land in the State of Oklahoma across which any railroad has a right-of-way, and excluding land owned by the railroad in fee simple where Sprint installed fiber optic cable or other telecommunications cable without permission, without the use of legal process and

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hundreds, if not thousands of Oklahomans, and that eight questions of law or fact were common to the class.[82] The trial court further found the plaintiff's claims typical of the claims of the class members because both were based on theories of trespass and unjust enrichment.[83] Additionally, the trial court noted that the easement on the plaintiff's property was part of a much larger railroad right-of-way created by an 1886 federal act.[84] Thus, the trial court reasoned, all of the landowners along that right-of-way would be affected by a decision concerning the effect of that conveyance.[85] The trial court found that because the plaintiff had retained counsel experienced in class actions and held no interests adverse to the other class members, the plaintiff had satisfied the adequacy of representation test of section 2023(A)(4).[86]

Turning to section 2023(B)(1), the trial court determined that a common adjudication of the issues was necessary to prevent inconsistent results and to prevent Sprint from maintaining the cable in its location if the company was found to be at fault.[87] The court also found that individual adjudications would be impractical because Sprint would not be able to operate its network of cable if some landowners prevailed on ejectment claims while others did not.[88]

The trial court also found certification appropriate under section 2023(B)(3). Section 2023(B)(3) requires 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."[89] The court rejected Sprint's arguments that individual issues of ownership over the rights-of-way predominated over common issues and that each class member would require a minitrial to determine damages.[90] In determining that a class action would be superior to other methods for adjudicating the controversy,

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> without paying compensation. Excluded from the Class are all parents, subsidiaries, and affiliates of the Defendant as well as all officers and directors of the Defendant. Property currently owned by State or Federal governments are also excluded from the Class.

Id.

82. *Id.*
83. *Id.* ¶ 8, 81 P.3d at 68.
84. *Id.*
85. *Id.*
86. *Id.* ¶ 10, 81 P.3d at 68.
87. *Id.* ¶ 11, 81 P.3d at 68.
88. *Id.*
89. 12 OKLA. STAT. § 2023(B)(3) (2001).
90. *Gipson* ¶¶ 12-13, 81 P.3d at 69.

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the trial court noted that Sprint had argued for class certification when attempting to settle similar cases in Illinois and Louisiana.[91] The court held that Sprint could not argue that the plaintiff failed to meet the requirements for class certification in the present case after taking the opposite position before the Illinois and Louisiana courts.[92]

2. The Case on Appeal

The Oklahoma Court of Civil Appeals reversed, finding that the trial court had abused its discretion.[93] Focusing on the requirements of section 2023(B)(3), the appellate court determined that common issues did not predominate over individual issues.[94] The court found that no fewer than six merit-based decisions would be required before class membership could be established:

> 1) fee simple ownership of land in Oklahoma, 2) across which any railroad has a right-of-way, 3) but excluding land owned by the railroad in fee simple (where Sprint installed fiber optic cable or other telecommunications cable), 4) without permission, 5) without the use of legal process and 6) without paying compensation.[95]

The court then found that the predominance of individual issues precluded a finding that a class action was the superior method for a fair and efficient adjudication of the controversy.[96] Thus, the plaintiff had failed to establish

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91. *Id.* ¶ 14, 81 P.3d at 69.

92. *Id.*

93. *Id.* ¶ 1, 81 P.3d at 66.

94. *Id.* ¶ 23, 81 P.3d at 71.

95. *Id.*

96. *Id.* ¶ 25, 81 P.3d at 72. In noting that the individual issues, which predominated the case, precluded a finding that the plaintiff's claims were typical of the class as required by section 2023(A)(3), the court stated:

> The individual conveyances involved necessitate that potential class members will have myriad types of easements or full ownership in the railroad rights-of-way. For example, the land grant allegedly at issue here provides that the railroad right-of-way may be used for the purpose of installing telephone lines. So, it is entirely possible that certain landowners will have no claim for trespass at all, while other landowners may have acquired their lands subject to the right-of-way through a different conveyance which may not include telephone lines as a permitted use of the easement. Accordingly, there will not be a typical claim . . . in this case.

Id. ¶ 26, 81 P.3d at 72 (citing Nudell v. Burlington, N. & Santa Fe Ry. Co., No. A3-01-41, 2002 WL 1543725 (D.N.D. July 11, 2002); Chambers v. MCI WorldCom, No. 00-C-0348, 2000 WL 34229953 (W.D. Wisc. Oct. 10, 2000); Hallaba v. WorldCom Network Servs., Inc., 196 F.R.D. 630 (N.D. Okla. 2000); Swisher v. United States, 189 F.R.D. 638 (D. Kan. 1999)).

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either prong of the test outlined in section 2023(B)(3), which effectively doomed the proposed class action in *Gipson*.

Finally, the court of civil appeals found that Sprint had not acknowledged that class certification was appropriate in *Gipson* simply because it had argued in favor of certification before courts in Illinois and Louisiana.[97] The court recognized that Sprint had argued for class certification in Louisiana solely for purposes of settlement.[98] Additionally, the court noted that while settlement may be relevant in determining class certification, it is "not de facto support for certification of a class for trial."[99] The court concluded that while consideration of Sprint's actions in other courts was appropriate, the company's efforts to certify certain classes for settlement purposes did not override the predominating individual issues present in *Gipson*.[100]

Absent a superseding decision by the Oklahoma Supreme Court, it would appear that Oklahoma has joined with the majority view that landowner suits involving fiber optic cable installed in railroad rights-of-way are not appropriate for class action litigation. As the court of civil appeals acknowledged, however, plaintiffs continue to press the issue with occasional success.[101]

IV. Recent Federal Court Decisions

Four recent federal trial court decisions in Oklahoma contribute to the continuing conversation on class actions; they are discussed in chronological order.

A. Millsap v. McDonnell Douglas Corp.

Millsap v. McDonnell Douglas Corp.,[102] an unreported decision, dealt with recovery of attorney fees in a successful class action brought by former employees of the McDonnell Douglas Corporation (MDC).[103] MDC closed

97. *Id.* ¶¶ 31-32, 81 P.3d at 73-74.

98. *Id.* ¶ 31, 81 P.3d at 73-74.

99. *Id.* ¶ 32, 81 P.3d at 74 (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997)). In *Amchem*, the U.S. Supreme Court reasoned that a trial court faced with a request for settlement-only certification need not consider whether trial of the case would present severe management problems because no trial is contemplated. *Amchem*, 521 U.S. at 593.

100. *Gipson* ¶ 32, 81 P.3d at 74.

101. *See id.* ¶ 33 n.8, 81 P.3d at 74 n.8 (noting that a state court in Illinois certified a nationwide class action in a case involving Sprint while *Gipson* was on appeal).

102. No. 94-CV-633-H(M), 2003 WL 21277124 (N.D. Okla. May 28, 2003).

103. *Id.* at *1.

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its Tulsa plant and laid off over one thousand employees.[104] The plaintiffs' class, consisting of approximately 1100 former employees, asserted that MDC closed the plant to deny them pension and insurance benefits protected by the Employee Retirement Income Security Act (ERISA).[105] After nine years of litigation and bench trials on liability and damages, the parties ultimately entered into a stipulation of settlement, which was approved by the court.[106]

The district court's decision in *Millsap* provides great insight on the issue of appropriate attorney fees in a class action case. The settlement created a $36 million common fund, which the court allocated among class members, reimbursed costs to the plaintiffs' counsel, and awarded an unspecified attorney fee.[107] The plaintiffs' counsel had sought $8.75 million as their fee, which constituted 25% of the recovery.[108] The trial court granted the fee.[109]

The *Millsap* decision contains several important findings on the issue of class action attorney fees. First, in determining an appropriate attorney fee in a class action where a "common fund of recovery" is to be distributed to the class, courts may use the "percentage of the fund method" in determining reasonable attorney fees in lieu of the lodestar method.[110] The percentage method will most likely result in a higher attorney fee award.

Second, unlike some jurisdictions, the Tenth Circuit provides that a trial court may use *either* the lodestar or the percentage of the fund method or a combination of the two.[111] Recent trends suggest a preference for the percentage of the fund method.[112] Under both approaches, the Tenth Circuit advocates that courts use the twelve factors announced by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*[113] to determine the appropriateness of an attorney fee.[114] Thus, the Tenth Circuit adopts what it calls a "hybrid approach," combining lodestar factors with the percentage method.[115]

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104. *Id.*
105. *Id.*
106. *Id.* at *2.
107. *Id.* at *3.
108. *Id.*
109. *Id.* at *14.
110. *Id.* at *4. The court calculates attorney fees under the lodestar method by multiplying the attorney's rate by the attorney's hours on the case.
111. *Id.* at *5.
112. *Id.*
113. 48 F.2d 714 (5th Cir. 1974).
114. *Millsap*, 2003 WL 21277124 at *5.
115. *Id.*

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Third, in calculating appropriate attorney fees in a class action, the trial court acts as a fiduciary for the plaintiff class members.[116] In *Millsap*, the trial court took this responsibility very seriously and sought input and advice from a three-member panel of special masters, as well as the magistrate judge who had presided over many aspects of the litigation.[117] Ultimately, the trial court in *Millsap* awarded 25%, or $8.75 million, to the plaintiffs' counsel, finding that such an award was "proper, and even a conservative, percentage of the common fund to be awarded in this case."[118]

Millsap provides a historical, tactical outline of the process involved in a successful nine-year class action. Both plaintiff and defense counsel in class actions would be well advised to familiarize themselves with *Millsap*.

B. Flowers v. EZPawn Oklahoma, Inc.

The second recent decision from Oklahoma federal district courts is *Flowers v. EZPawn Oklahoma, Inc.*[119] *Flowers* was a class action filed on behalf of individuals who received "pay day loans" at allegedly usurious rates of interest.[120] Rochell Flowers filed the action in state court on behalf of all Oklahomans who had received such loans. The defendant attempted to remove the case to federal court, alleging both diversity and federal question jurisdiction under banking laws.[121]

The trial judge, who found no evidence that each putative member of the proposed class had suffered damages in excess of the jurisdictionally requisite $75,000, affirmed the magistrate's decision to remand the case.[122] The federal court declined jurisdiction despite the fact that the petition sought compensatory, punitive, and injunctive relief, which the defendant claimed would exceed $75,000.[123] The court held that each class member must have a claim that exceeds the jurisdictional amount to establish diversity jurisdiction.[124]

Thus, to establish federal jurisdiction in a class action suit brought in the Tenth Circuit, each class member must claim damages exceeding $75,000.[125] Although a split of authority exists among the federal circuits on this point,

116. *Id.*
117. *Id.*
118. *Id.* at *7.
119. 307 F. Supp. 2d 1191 (N.D. Okla. 2004).
120. *Id.* at 1196.
121. *Id.* at 1197.
122. *Id.* at 1198-01.
123. *Id.* at 1198-99.
124. *Id.* at 1199.
125. *Id.*

the district court in *Flowers* said that it would follow Tenth Circuit law until such law was overruled by the U.S. Supreme Court.[126]

C. Anderson v. Boeing Co.

A third federal trial court opinion in the class action arena is *Anderson v. Boeing Co.*,[127] a decision concerning a Title VII gender discrimination claim. The female employee plaintiffs sued Boeing under a variety of legal theories, principally over unequal pay and overtime.[128] Judge Claire Eagan analyzed both the statistical underpinnings of the plaintiff's class claim, as well as the plaintiff's ability to meet the four prerequisites outlined in Federal Rule 23(a).[129]

The plaintiffs in *Anderson* secured the services of a nationally renowned statistician to (1) analyze Boeing's pay records, and (2) determine whether gender disparity existed in compensation and overtime.[130] The plaintiff's statistical expert, Bernard R. Siskin, Ph.D., concluded that such a disparity existed.[131] The plaintiffs argued that Siskin's opinion was a sufficient basis to conclude that a "common practice" existed through Boeing's Oklahoma facilities, thus justifying class certification.[132]

The defendant attacked Siskin's opinion as flawed and foundationless, but ultimately failed to undermine Siskin's credibility and defeat certification.[133] The court contrasted the fairly low-level standard applied to experts at the class certification stage with the more exacting standard used to screen experts under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[134] In her opinion, Judge Eagan declared that "the Court must determine only that Siskin's testimony is not so fatally flawed as to be inadmissible as a matter of law."[135] Using this standard, the court found Siskin's testimony admissible and considered it as part of the basis for class certification.[136]

After preliminarily accepting Siskin's statistics, the court then turned to "[t]he four prerequisites to a class action . . . commonly referred to as

126. *Id.* at 1194.
127. 222 F.R.D. 521 (N.D. Okla. 2004).
128. *Id.* at 526-27.
129. *See generally id.*
130. *Id.* at 527-29.
131. *Id.* at 528.
132. *Id.* at 529.
133. *Id.* at 525-29.
134. *Id.* at 525-29; *see* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).
135. *Anderson*, 222 F.R.D. at 528.
136. *Id.* at 530.

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numerosity, commonality, typicality and adequacy of representation."[137] The opinion examined in detail the countervailing arguments on these points and found each was satisfied, militating in favor of certification. Accordingly, Judge Eagan gave great weight to the Tenth Circuit standard in favor of class certification.[138]

With the *Anderson* case still ongoing, it remains to be seen whether the case will ultimately make it to trial as a class action or whether later developments will suggest that a modification to class certification is appropriate. *Anderson* illustrates that courts will apply a lighter standard to expert testimony at the class certification stage than at the *Daubert* stage, which favors those seeking certification of a class.

D. Grabow v. PricewaterhouseCoopers LLP

The final federal trial court opinion worth noting is *Grabow v. PricewaterhouseCoopers LLP*.[139] *Grabow* is less substantive in its discussion of class certification than the *Anderson* opinion because it principally deals with an interpretation of federal securities law.[140]

The plaintiff brought an action in state court on behalf of a class of investors who allegedly held certain shares in reliance on representations made by PricewaterhouseCoopers (PWC).[141] PWC attempted to remove the case based on federal securities law that governed the sale or purchase of securities.[142] The plaintiffs moved for remand to state court, arguing that the lawsuit alleged that the plaintiffs had held shares because of PWC's misrepresentations — not that the plaintiffs had bought or sold shares.[143] After examining the language of the federal statute, the *Grabow* court remanded the case, concluding that federal securities law did not apply to the plaintiffs' class because the petition made no allegation of buying or selling shares.[144]

Although the *Grabow* decision does not speak directly about class actions, it offers constructive advice between the lines. First, plaintiffs' class counsel

137. *Id.*

138. *Id.* at 531 ("The Tenth Circuit has stated that 'if there is to be an error made, let it be in favor and not against the maintenance of the class action, for it is always subject to modification should later developments during the course of the trial so require.'") (quoting Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968)).

139. 313 F. Supp. 2d 1152 (N.D. Okla. 2004).

140. *See generally id.*

141. *Id.* at 1153.

142. *Id.*

143. *Id.* at 1153-55.

144. *Id.* at 1155, 1157.

should carefully evaluate the nature and scope of their allegations before filing and drafting petitions. Plaintiffs' counsel must anticipate removal and, if they wish to avoid it, carefully draft their petitions. In *Grabow,* the plaintiffs' lawyer attempted to amend the petition after removal in an effort to defeat federal jurisdiction, but Judge Eagan correctly determined that such an amendment came too late.[145]

Second, defense counsel should draft removal petitions in a way that maximizes the likelihood of defeating attempts to remand. Like the result for the plaintiffs in *Grabow*, however, courts judge the propriety of removal at the time of removal, not by subsequent amendments or affidavits submitted by either side.[146]

These recent federal district court opinions appear uniform in this respect: these courts will carefully analyze each aspect of a class action case to determine whether an adequate basis for federal jurisdiction exists. Once the jurisdictional threshold is cleared, federal courts will apply an equally exacting scrutiny to the appropriateness of class certification.[147] If a strong basis for jurisdiction coexists with a plausible basis for certification, the federal courthouse doors will be open for those classes wishing to enter.

V. Changes to Procedures Regarding Attorney Fees for Class Actions

Oklahoma House Bill 2661 created a new law regarding the awarding of attorney fees in class action lawsuits.[148] This statute requires courts to conduct evidentiary hearings to determine fee awards for class counsel, and specifically establishes the judge as a fiduciary to the class members.[149] Currently, the trial judge grants and determines fees based on motions by the parties.[150] The enactment of House Bill 2661 will have little practical effect on the awarding of attorney fees in class actions except that state court judges will be required to hold evidentiary hearings to determine the amount of awards.[151]

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145. *Id.* at 1155 n.1.

146. *Id.* at 1154.

147. *See id.*; Flowers v. EZPawn Okla., Inc., 307 F. Supp. 2d 1191, 1197 (N.D. Okla. 2004).

148. H.B. 2661, c. 368, § 1, effective Nov. 1, 2004 (codified at 5 OKLA. STAT. § 7.1 (Supp. 2005)).

149. 5 OKLA. STAT. § 7.1.

150. *See, e.g.,* Marlin Oil Co. v. Barby Energy Corp., 2002 OK CIV APP 92, ¶ 6, 55 P.3d 446, 448.

151. 5 OKLA. STAT. § 7.1.

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VI. Conclusion

The cases and statutes surveyed show that class action law continues to evolve in both Oklahoma and federal courts. Future cases will show whether the expansion of *Black Hawk Oil* by *Melot* is a sound policy decision, and whether the Tenth Circuit's method of determining the jurisdictional amount for class actions in diversity cases will prevail. Despite these unresolved issues, these cases reveal that the main issue for lawyers on both sides is class certification, which both state and federal courts take very seriously in applying class certification statutes.

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