Reversed and Remanded and Opinion filed October 18, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-01184-CV

PHILLIPS PETROLEUM COMPANY, GPM GAS CORPORATION, PHILLIPS GAS MARKETING COMPANY, PHILLIPS GAS COMPANY, AND GPM GAS TRADING COMPANY, Appellants

V.

KATHRYN AYLOR BOWDEN, BEULAH POORMAN VICK, OMER F. POORMAN, AND MONTE CLUCK, Appellees

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On Appeal from the 268th District Court
Fort Bend County, Texas
Trial Court Cause No. 107,968

O P I N I O N

This is an interlocutory appeal from the certification of a class action in an oil and gas case. Appellees Kathryn Aylor Bowden, Beulah Poorman Vick, Omer F. Poorman, and Monte Cluck (collectively "Class Representatives") represent three subclasses of certain royalty-interest owners in oil and gas leases in Texas in which Phillips Petroleum Company ("Phillips Petroleum") is the lessee. Appellants Phillips Petroleum, GPM Gas Corporation, Phillips Gas Marketing Company, Phillips Gas Company, and GPM Gas Trading Company

(collectively "Phillips") contend that the trial court abused its discretion in certifying all three subclasses. Applying recent precedent from the Texas Supreme Court, we hold that the trial court abused its discretion by finding that the Class Representatives satisfied all of the procedural prerequisites for class certification. We reverse the trial court's two class-certification orders and remand for further proceedings consistent with this opinion and without prejudice to further consideration of class certification.

Factual Background

The Class Representatives filed this suit against Phillips alleging breach of an implied covenant to market and obtain the best price reasonably obtainable for the production under their leases. As to one of the subclasses, the Class Representatives also alleged that Phillips Petroleum breached the express terms of certain gas royalty agreements or "GRAs."[1] The Class Representatives alleged that, by selling the gas to its affiliates at favorable prices and using the proceeds to pay the royalties, Phillips Petroleum failed to obtain the best price reasonably obtainable for the gas.

The Class Representatives sought class-action status on behalf of three different subclasses of royalty-interest owners under Texas leases where Phillips Petroleum is the lessee. After a hearing on the matter, the trial court certified all three subclasses. After Phillips filed this interlocutory appeal from the class-certification order, the trial court issued a Supplemental Class Certification Order ("Supplemental Order"). This Supplemental Order clarified the definitions of the three subclasses and included a trial plan in light of the decision in *Southwestern Ref. Co., Inc. v. Bernal,* 22 S.W.3d 425 (Tex. 2000). We granted Phillips' motion to review the Supplemental Order in this appeal. *See* TEX. R. APP. P. 29.6.

In the Supplemental Order, the trial court certified the following subclasses:

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[1] We use the terms "GRA" or "GRAs" in this opinion to refer to gas royalty agreements in general, without specifying any provisions or characteristics of the agreements.

Subclass 1—

Royalty owners who own or owned royalty interest [sic] under leases located in the State of Texas; where Phillips Petroleum Company is the lessee; the leases provide for payment of royalties on natural gas production on an amount realized/proceeds basis or market value/market price basis; from which Phillips Petroleum produced natural gas (including natural gas liquids) that was directly or indirectly sold or transferred to Phillips Gas Marketing for marketing or resale; and during the period February 1995 through the present.

Subclass 2—

Royalty owners who own or owned royalty interest [sic] under leases located in the State of Texas; where Phillips Petroleum Company is the lessee; the royalty is paid pursuant to a Gas Royalty Agreement containing language substantially identical to the language bracketed in the Gas Royalty Agreement attached as Exhibit 1 and incorporated herein by reference; the Gas Royalty Agreement has no additional language relating to processing gas or the payment of royalty on natural gas liquids; and during the period February 1995 through the present.

Subclass 3—

Royalty owners who own or owned royalty interest [sic] under leases located in the State of Texas; where Phillips Petroleum Company is the lessee; the leases provide for payment of royalties on natural gas production on an amount realized/proceeds basis or market value/market price basis; from which Phillips Petroleum produced natural gas (including natural gas liquids) that was directly or indirectly sold or transferred to GPM (or any successor entity) for marketing or resale; Phillips Petroleum Company was paid on the basis of a gas purchase contract between Phillips and GPM (or any successor entity); and during the period February 1995 through the present.

The trial court did not attach any Exhibit 1 to the Supplemental Order, even though the trial court referred to this exhibit in its definition of Subclass 2. The trial court excluded the following parties from the above definitions: the defendants, their affiliates, and any successor entities.

Although the Class Representatives' petition and the trial court's two certification orders do not state which plaintiff was representing which subclass, plaintiffs' counsel stated at the certification hearing that Bowden, Vick, and Poorman were being offered as class representatives for Subclass 1 and that Cluck was being offered as the sole representative

for Subclasses 2 and 3. The trial court certified Subclasses 1 and 3 as to the implied-covenant-to-market claim only. The trial court certified Subclass 2 as to this implied-covenant claim and also as to a breach-of-contract claim regarding the royalty provisions of the Phillips GRAs. In its original certification order, the trial court appeared to certify class-action treatment for the Class Representatives' attempts to pierce the corporate veils of the defendants. However, in the Supplemental Order, the trial court stated that it certified only the claims described in the Supplemental Order, and the Supplemental Order did not describe the Class Representatives' claims regarding their various theories for piercing the corporate veil.

Issues Presented

On appeal, Phillips contends that the trial court abused its discretion by certifying the three subclasses. Phillips presents the following issues for review: (1) did the trial court abuse its discretion by certifying Subclasses 1, 2, and 3? (2) did the trial court abuse its discretion by not including with its certification order a trial plan as required by *Southwestern Ref. Co., Inc. v. Bernal*, 22 S.W.3d 425, 435 (Tex. 2000)? (3) did the trial court's definitions of Subclasses 1, 2, and 3 violate *Intratex Gas Co. v. Beeson,* 22 S.W.3d 398 (Tex. 2000)? and (4) did the trial court abuse its discretion by certifying the three subclasses against defendants GPM Gas Corporation, Phillips Gas Marketing Company, Phillips Gas Company, and GPM Gas Trading Company when there was no evidence that any of these companies has an oil and gas lease, GRA, or other contract with any member of the three subclasses or that they have any duty to any member of the three subclasses?

Standard of Review

We review a trial court's ruling on class certification for abuse of discretion. *Southwestern Ref. Co., Inc. v. Bernal*, 22 S.W.3d 425, 439 (Tex. 2000). A clear failure by the trial court to analyze or apply the law correctly is an abuse of discretion. *McDaniel v. Yarbrough*, 898 S.W.2d 251, 253 (Tex. 1995). Rule 42 of the Texas Rules of Civil

Procedure governs class certification. *Bernal*, 22 S.W.3d at 433. This rule is patterned after Federal Rule of Civil Procedure 23; consequently, federal decisions and authorities interpreting current federal class action requirements are persuasive authority. *Id.*

Each subclass certified by the trial court must satisfy four threshold requirements: (1) the subclass is so numerous that joinder of all members is impracticable ("numerosity requirement"); (2) there are questions of law or fact common to the subclass ("commonality requirement"); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the subclass ("typicality requirement"); and (4) the representative parties will fairly and adequately protect the interests of the subclass ("adequacy-of-representation requirement"). *See* TEX. R. CIV. P. 42(a). The Class Representatives must also meet at least one of the criteria enumerated under Rule 42(b). *Bernal,* 22 S.W.3d at 433. Here, the trial court found that the requirements of Rule 42(a) were met and certified the three subclasses under Rule 42(b)(4). Rule 42(b)(4) requires the following findings: (1) that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and (2) that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. TEX. R. CIV. P. 42(b)(4).

Did the Trial Court Abuse Its Discretion By Including Both Market Value Owners and Proceeds Owners in Subclasses 1 and 3?

In its first and third issues, Phillips asserts, among other things, that the trial court erred in certifying Subclasses 1 and 3 because the Class Representatives failed to prove that they satisfy the typicality requirement. We agree and hold that the trial court abused its discretion by finding that Subclasses 1 and 3 satisfied the typicality requirement. A class representative must be part of the class and must possess the same interest and suffer the same injury as the class members. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156, 102 S. Ct. 2364, 2370, 72 L.Ed.2d 740 (1982). Although the named representatives need not suffer precisely the same injury as the other class members, there

must be a nexus between the injury suffered by the representatives and the injury suffered by the other members of the class. *Spera v. Fleming, Hovenkamp & Grayson, P.C.*, 4 S.W.3d 805, 812 (Tex. App.—Houston [14th Dist.] 1999, no pet.). To be typical, the Class Representatives' claims must arise from the same event or course of conduct giving rise to the claims of the other class members. *Id.* These claims must also be based on the same legal theory. *Id.* Ordinarily, the presence of even an arguable defense peculiar to the named plaintiff or a small subset of the proposed class destroys the typicality of the class. *Id.*; *J.H. Cohn & Co. v. Am. Appraisal Associates, Inc.*, 628 F.2d 994, 999 (7th Cir. 1980).

Courts do not certify class-actions based upon the probability of success on the merits, and in determining the certification issue, courts should not rule on the merits of the class members' claims. *See Intratex Gas Co. v. Beeson,* 22 S.W.3d 398, 404 (Tex. 2000). Nonetheless, to properly analyze certification issues, courts must go beyond the pleadings and must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues. *Bernal*, 22 S.W.3d at 435. Further, without Phillips' consent, class certification must not unduly restrict Phillips' ability to adequately and vigorously present material claims and defenses. *Id.* at 435-37. Courts should not certify a proposed class action unless they determine, based on a "rigorous analysis" of the proposed class action, that individual issues can be considered in a manageable, time-efficient, and fair manner. *Id.* at 435-36.

Going beyond the pleadings in order to understand the claims, defenses, relevant facts, and applicable substantive law, we confront several realities that impact the class-certification decision in this case. Subclasses 1 and 3 include royalty owners who are being paid under an amount-realized/proceeds provision ("Proceeds Owners") as well as those who are being paid under a market-value/market-price provision ("Market Value Owners"). The evidence at the class-certification hearing showed that all of the class representatives for Subclass 1 are Proceeds Owners. The evidence at the certification hearing indicated that

Subclass 3 contains both Market Value Owners and Proceeds Owners.[2] Subclasses 1 and 3 assert a single claim for breach of an implied covenant to market, claiming that Phillips breached this implied covenant by not paying them a higher royalty. As a matter of law, there is no implied covenant regarding the amount of royalty paid as to royalty owners who are paid under market-value or market-price royalty provisions. *Yzaguirre v. KCS Resources, Inc.*, No. 00-0829, 2001 Tex. LEXIS 63, at *14-15 (Tex. Aug. 30, 2001) (opinion on denial of motion for rehearing). The implied covenant to market protects a lessor from the lessee's self-dealing. *Id.* If Phillips Petroleum acted in bad faith and sold gas at a rate substantially below market value, then it may be liable to Proceeds Owners—but not to Market Value Owners—for breach of the implied covenant to market. *Yzaguirre*, 2001 Tex. LEXIS 63, at *13-15. The Market Value Owners may still have a claim against Phillips under the express terms of their leases; however, the class-certification hearing in this case occurred before the Texas Supreme Court's opinion in *Yzaguirre*, and the Class Representatives for Subclasses 1 and 3 did not seek class certification as to any claims for breach of express contract. Because of this procedural posture, we make no holding today regarding the suitability for class-action treatment of any claims that may be made by the Market Value Owners that Phillips Petroleum engaged in self-dealing with its affiliates and paid royalties to the Market Value Owners that were less than market value.

Phillips has asserted that there is no implied covenant to market as to Market Value Owners and as to royalty owners paid under a GRA. Phillips has the right to file a motion for summary judgment asserting its argument that there is no implied covenant as to Market Value Owners. The trial court must grant a motion for summary judgment as to a claim for breach of an implied covenant if there is no genuine issue of material fact as to whether the implied covenant exists as to the leases in question.[3] *See* TEX. R. CIV. P. 166a (c) & (i).

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[2] As the only class representative for Subclass 3, Cluck did not provide a copy of any of his leases, and there was no evidence as to whether Cluck is a Market Value Owner or a Proceeds Owner.

[3] Early in the certification hearing, the trial court indicated that it was inclined to certify and let all the claims go to the jury. The trial court stated that it believed that there was an identifiable class and that

Before class certification, Phillips could not have asserted this argument by filing a motion for summary judgment because there is no evidence that any of the Class Representatives are Market Value Owners. Further, as certified by the trial court, Phillips will not be able to assert this motion against the Market Value Owners in the future. This is because, after certification, Phillips will only be able to obtain summary judgment against an entire subclass; however, Phillips' defenses and summary-judgment arguments are significantly different as between the Market Value Owners and the Proceeds Owners, both of whom are contained in Subclasses 1 and 3. *See Markham v. White*, 172 F.3d 486, 490-91 (7th Cir. 1999) (as long as class is certified, defendant may only move for summary judgment as to the entire class). The only other alternative for Phillips would be to move to decertify the subclasses or to create additional subclasses. However, it is arbitrary and unreasonable to certify subclasses knowing that, shortly after certification, the court will have to undo or revise the structure of the subclasses that were certified so that the defendants may assert a defense that they were asserting at the time of the original certification. Such an approach would conflict with the "cautious approach to class certification" and the "rigorous analysis" required by the Texas Supreme Court. *Bernal*, 22 S.W.3d at 435. Where there is a typicality problem like the one in this case, the trial court should address it at the certification stage rather than relying on its ability to decertify or restructure the subclasses later.[4] *See id.* at 435-37.

Therefore, we conclude that the trial court abused its discretion by finding that Subclasses 1 and 3 satisfied the typicality requirement. A breach-of-implied-covenant claim

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the issue of whether Phillips marketed its gas in an appropriate manner—in other words, whether Phillips breached an implied covenant to reasonably market the gas—was a question for the jury to decide. The trial court did not have a motion for summary judgment before it, and we presume that the trial court meant that this question was for the jury unless Phillips presents the court with an appropriate motion showing that Phillips is entitled to judgment as a matter of law.

[4] The trial court may have been swayed by the Class Representatives' legal arguments and their expert's testimony that the implied covenant to market does apply to Market Value Owners. However, these arguments were incorrect. *See Yzaguirre*, 2001 Tex. LEXIS 63, at *14-15.

against a Market Value Owner is a different legal theory than a breach-of-implied-covenant claim against a Proceeds Owner. Furthermore, Phillips has a compelling and distinct defense[5] against the subset of Market Value Owners in Subclasses 1 and 3—Texas law does not recognize an implied covenant to market as to these owners. This distinct defense destroys the typicality among the members of Subclasses 1 and 3.[6] *Spera*, 4 S.W.3d at 812.

Because of this lack of typicality, the trial court abused its discretion by certifying Subclasses 1 and 3 using the subclass definitions in the Supplemental Order. The trial court's certification of these classes would unduly and unfairly restrict Phillips from adequately and vigorously present material defenses.[7] *Bernal*, 22 S.W.3d at 435. We sustain Phillips' first and third issues in this regard, and we need not address Phillips' other arguments under these issues. *See Bernal*, 22 S.W.3d at 439.

Did the Trial Court Abuse Its Discretion by Finding That Cluck Satisfied the Typicality and Adequacy-of-Representation Requirements for Subclass 2?

Under its second issue, Phillips argues, among other things, that the trial court abused its discretion when it found that Cluck satisfied the typicality and adequacy-of-representation requirements for Subclass 2. Cluck testified that he owns a royalty interest in the Whittum well "in Section 25." Cluck further testified that he has seen GRAs that reference Section

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[5] We do not rule on the merits of this defense today. We only analyze the claims, defenses, the facts, and the law to determine if the Class Representatives satisfied the requirements for class certification. *See Bernal* at 435-36.

[6] A recent case affirmed the certification of a class of royalty owners asserting implied-covenant-to market claims against Union Pacific Resources Group, Inc. and others. *See Union Pac. Res. Group, Inc. v. Hankins*, 51 S.W.3d 741 (Tex. App.—El Paso 2001, n.p.h.). However, the court in that case did not indicate whether the class that was certified contained both Market Value Owners and Proceeds Owners. We have also considered a recent case from the First Court of Appeals, but we do not find it to be persuasive as to the issues before us in this case. *See Union Pac. Res. Group, Inc. v. Neinast*, No. 01-00-00006-CV, 2001 WL 1098140 (Tex. App.—Houston [1st Dist.] Sept. 20, 2001, n.p.h.).

[7] We do not rule on the merits of the Class Representatives' claims. The types of affiliate transactions and self-dealing alleged by the Class Representatives may be the proper subject of litigation. In this appeal, we only hold that, under applicable precedent, the trial court abused its discretion by finding that the Class Representatives satisfied all the procedural prerequisites for class certification.

25.[8] Cluck testified that at the time of his deposition—which was taken on May 18, 2000—Cluck had not even heard of a GRA. Cluck also testified that, at the time of his deposition, to the best of his knowledge, he did not know anybody who had a GRA. Cluck testified that, between his deposition and the certification hearing, he looked over several GRAs. Cluck agreed that he has "a GRA personally." Cluck never stated that he owned a royalty interest that is subject to a GRA. The Class Representatives, including Cluck, did not proffer any lease or any other instrument by means of which Cluck owns any oil or gas interest. The Class Representatives, including Cluck, did not proffer any GRA that allegedly applies to Cluck, nor did they proffer any document indicating that Cluck owns an interest that is subject to a GRA.[9] Cluck provided various GRAs relating to properties in which Cluck has no apparent interest. Cluck also introduced a document indicating that there were five leases for the Whittum well and that the original lessors on one of these leases were "J.D. Cluck, et ux." Cluck also introduced into evidence two GRAs that were executed by two of the lessors on the Whittum well other than the Clucks. Both of these GRAs refer to Section 25. These two GRAs may be the ones that Cluck was referring to when he said that he had seen GRAs that reference Section 25; however, there was no evidence that these GRAs are binding on any royalty owned by Cluck.

On this record, we find that the trial court abused its discretion and did not conduct a rigorous analysis to determine that Cluck satisfied the typicality and adequacy-of-representation requirements. The only evidence that we see in the record that indicates that

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[8] Cluck also testified that he had looked at the various documents contained in Plaintiff's Exhibit Number 22 and that this exhibit contained leases and GRAs on Sections 9, 10, and possibly 11—which is an area where the estate of Cluck's father has interests in numerous wells. Although Cluck testified that he was an executor of his father's estate, Cluck filed this suit and was designated as a class representative only in his individual capacity, so the interests of Cluck's family or his father's estate are not relevant to the class-certification issues in this case.

[9] The Class Representatives did provide several Mineral Payment Supporting Calculations and related documents from GPM Gas Corporation that indicate that Cluck owns a royalty interest in the Lawyer, Lawyer #3, Denz, and Whittum #1 wells, but these documents do not indicate whether these interests are subject to any GRA.

Cluck may be subject to a GRA is his testimony that he has "a GRA personally." Even construing this evidence favorably to the trial court's findings and presuming that Cluck has an interest that is subject to a GRA, there was still no evidence as to the terms of any GRA governing Cluck's interests. The evidence at the hearing indicated that many of the Phillips GRAs are very similar; however, there was also evidence that some of these GRAs are significantly different. Without evidence of the nature of Cluck's interests and any GRA that might govern those interests, Cluck did not sustain his burden of proving that he is a member of Subclass 2 and that he possesses the same interest and has suffered the same injury as the members of that subclass.

At the class-certification hearing, counsel for the Class Representatives stressed repeatedly that only parties whose GRAs are identical to Cluck's GRA would be members of Subclass 2. However, there was no evidence before the trial court regarding the form of GRA, if any, to which Cluck's royalty interests are subject. The trial court's Order Certifying Class includes in Subclass 2 all royalty owners who have been paid under a "gas royalty agreement," without specifying the form of GRA. The Supplemental Order limits Subclass 2 to Texas royalty interests paid by Phillips Petroleum that are subject to GRAs whose language is substantially identical to the bracketed language in the GRA attached to the Supplemental Order as Exhibit 1. However, the trial court did not attach an Exhibit 1 to the Supplemental Order; so again, the trial court failed to specify the GRA language necessary for a party to be a member of Subclass 2.[10] Therefore, the trial court abused its discretion regarding the typicality and adequacy-of-representation[11] requirements for Cluck

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[10] This failure of the trial court to specify the GRA language necessary for a party to be a member of Subclass 2 is another basis for reversing the certification as to Subclass 2. Under the trial court's definition of Subclass 2, the class members are not clearly ascertainable by reference to objective criteria. Therefore, the trial court erred in certifying a GRA subclass without knowing the GRA language to which Cluck is subject and without specifying the GRA language necessary for membership in Subclass 2. *See Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 453-54 (Tex. 2000).

[11] To satisfy the adequacy-of-representation requirement, Cluck had to show that he will fairly and adequately protect the interests of the class. In the test for adequate representation, a court examines, among other things, whether the representative has a sufficient interest in, and nexus with, the class to insure

as to Subclass 2.[12] We sustain Phillips' second issue in this regard, and we need not address Phillips' other arguments under this issue. *See Bernal*, 22 S.W.3d at 439.

Did the Trial Court Abuse Its Discretion By Not Including a Trial Plan in Its Certification Order as Required By *Bernal*?

In its fourth issue, Phillips asserts that the trial court erred by not filing its trial plan under *Bernal* until after it had already certified the three subclasses. Phillips is correct that, under *Bernal*, the trial court's certification order should have indicated how the class action claims would likely be tried. *Bernal*, 22 S.W.3d at 435. However, the trial court did include a trial plan in its Supplemental Order, which has been made a part of this appeal. Further, based on this record, we have been able to evaluate the trial court's certification rulings for compliance with applicable law, including *Bernal*. Although the trial court erred in its certification order by failing to indicate how the class action claims would likely be tried, this error was harmless. Therefore, we overrule Phillips' fourth issue.[13]

Did the Trial Court Err by Certifying As to the Defendants Other than Phillips Petroleum?

In its sixth issue, Phillips asserts that the trial court erred in certifying the three subclasses as to the defendants other than Phillips, who have apparently been joined as defendants based on the Class Representatives' claims that the trial court should pierce the

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vigorous prosecution of the action. *Durrett v. John Deere Co.*, 150 F.R.D. 555, 558 (N.D. Tex. 1993). Cluck did not show that he had such an interest and nexus.

[12] The proof regarding Cluck's interest as to Subclass 3 was also lacking. Cluck testified that he owns a royalty interest in the Lawyer 1 and 2 wells and the Denz well in "Sections 30 and 31" in Sherman County, Texas. Cluck further testified that there are no "GRAs" on the two leases that cover these wells. However, Cluck never introduced any documentary proof of the existence of these leases or their terms.

[13] We also overrule Phillips' fifth issue alleging that the trial court violated *Intratex* by certifying three fail-safe subclasses. *See Intratex*, 22 S.W.3d 403-5. Although, as noted in footnote 10 above, we conclude that there was a problem with the trial court's definition of Subclass 2, we do not believe that the subclasses certified by the trial court were fail-safe classes under *Intratex*. For this reason, we overrule Phillips' fifth issue.

corporate veils between Phillips Petroleum and the other defendants.[14] In its original certification order, the trial court appeared to certify class-action treatment for the Class Representatives' attempts to pierce the corporate veils of the defendants. However, in its Supplemental Order, the trial court stated that it certified only the claims described in the Supplemental Order, and the Supplemental Order did not describe the Class Representatives' claims that the trial court should pierce the corporate veil. We conclude that the trial court has not certified any of these claims. Therefore, the error complained of by Phillips in its sixth issue did not occur. In any event, we are reversing the trial court's certification of the three subclasses. On remand, if the Class Representative seek to certify these piercing-the-corporate-veil claims for class-action treatment, they will have to specify class representatives and prove that they have satisfied the requirements for class-action certification as to these claims. Therefore, we overrule Phillips' sixth issue.

Conclusion

The trial court abused its discretion by certifying Subclasses 1 and 3 because of a typicality problem caused by the inclusion in both subclasses of Market Value Owners as well as Proceeds Owners. The trial court abused its discretion by certifying Subclass 2 because of a typicality and adequacy-of-representation problem caused by the lack of proof regarding Cluck's interests and his adequacy as a class representative. Although the trial court erred in its certification order by failing to indicate how the class action claims would likely be tried, this error was harmless. The trial court did not certify fail-safe classes in violation of the *Intratex* case. The trial court has not certified the Class Representatives' piercing-the-corporate-veil claims for class-action treatment. Therefore, we sustain Phillips' first three issues to the extent stated in this opinion, and we overrule Phillips' fourth, fifth, and sixth issues. Accordingly, we reverse the trial court's Order Certifying Class and Supplemental Order, and we remand this case to the trial court for further proceedings

[14] The Class Representatives assert that Phillips has waived its sixth issue; however, we find that Phillips preserved error in the trial court and adequately presented this argument on appeal.

consistent with this opinion and without prejudice to further consideration of class certification.

/s/ Joe L. Draughn
Senior Justice

Judgment rendered and Opinion filed October 18, 2001.
Panel consists of Justices Fowler, Wittig[15], and Draughn.[16]
Do Not Publish — TEX. R. APP. P. 47.3(b).

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[15] Senior Justice Don Wittig sitting by assignment.

[16] Senior Justice Joe L. Draughn sitting by assignment.