IN THE SUPREME COURT OF TEXAS

NO. 05-0748

SOUTHWESTERN BELL TELEPHONE COMPANY,
PETITIONER,

v.

MARKETING ON HOLD INC., D/B/A SOUTHWEST TARIFF ANALYST,
RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued March 22, 2007

JUSTICE O'NEILL, joined by CHIEF JUSTICE JEFFERSON and JUSTICE MEDINA, dissenting.

The Court concludes that Marketing on Hold, doing business as Southwest Tariff Analyst (STA), holds valid assignments of claims typical of the class, has standing to assert its claims as a class member, is neither a stranger to the litigation nor a class-action entrepreneur, and will not disrupt the class-suit vehicle or distort the judicial process. Yet the Court decides STA is not an adequate class representative based on the potential for hypothetical conflicts that have no basis in the record. The Court states that it is not deciding whether an assignee can ever be an adequate class representative, but if STA doesn't qualify it is hard to imagine who would. The assignors were established STA business customers who relied on STA's superior knowledge about Southwestern Bell's billing procedures, information retrieval systems, and the tariffs that govern this highly

regulated industry, and no antagonism or conflict exists that would affect STA's adequacy to represent the class. In my view, STA's unique expertise gives it an ability superior to that of any other class member to pursue this litigation as class representative and supervise the activities of class counsel, as the trial court found. Because the Court concludes otherwise, I respectfully dissent.

Southwestern Bell is assessed fees under various municipal ordinances in order to compensate the cities enacting them for administering public rights-of-way. The company is allowed to pass the fees through to its telephone subscribers, but it is prohibited from making a profit from the charge. *See, e.g.*, Brownsville, Tex., Ordinance 95-1296, § 12 (July 18, 1995). STA provides auditing services of business telephone bills and assists its customers in seeking refunds from telephone companies for improper billing practices, in exchange for a percentage of the amount its customers recover. In the course of auditing Southwestern Bell bills for its customers, STA discovered that the company had improperly passed through municipal charges for certain services relating to SmartTrunk, Digital Loop and Hotel/Motel services. Each of these trademarks describe a service provided by Southwestern Bell to its business customers.[1]

STA had a number of customers who subscribed to some of these Southwestern Bell services.[2] STA and those customers were class members in another class action, *Mireles v. Southwestern Bell Telephone Company*, in the 357th District Court of Cameron County, which

[1] The Hotel/Motel service allows the hotel or motel to incur charges on a per-call basis, thus allowing guests to receive and make local telephone calls charged to the room. Digital Loop and Smart Trunk describe an interface that makes a single connection with the telephone company that then provides the customer with twenty-three channels for telephone communication.

[2] The customers are United Services Automobile Association (USAA), S & B Engineers, Inc./S & B Engineers and Constructors, Ltd., Petrocon Engineering, Inc., Riverway Bank, and Russell & Smith Ford, Inc.

included most of Southwestern Bell's residential and business customers in Texas. When a pending *cy pres* settlement in *Mireles* threatened to release the claims of its business customers and others similarly situated with no compensation, STA informed its customers, who decided to assign their claims to STA. STA then carved those claims out of the class settlement, preserving Southwestern Bell's business customers' claims relating to SmartTrunk, Digital Loop and Hotel-Motel municipal charges, which are the subject of this class-action suit.

After a four-day certification hearing the trial court determined that the class satisfied the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 42(a) of the Texas Rules of Civil Procedure, and that questions of law and fact common to the class predominated over individual questions under Rule 42(b)(4). TEX. R. CIV. P. 42(b)(4) (now Rule 42(b)(3)). The trial court also held that STA had standing to proceed on behalf of the class and is a proper class representative as the owner of its customers' assigned claims. According to the trial court's findings, there was nothing improper about the methods by which STA acquired the assignments, STA has been in the business of auditing Southwestern Bell's and other utilities' bills for years, STA has knowledge and expertise about Southwestern Bell's billing procedures and information retrieval systems which are not common knowledge or widely known to putative class members, and STA's knowledge and expertise give it a superior ability to pursue this litigation and supervise the activities of class counsel. The trial court also found that STA's interests are aligned with, and not antagonistic to, the putative class members. The court of appeals affirmed the trial court's certification order. 170 S.W.3d 814, 825. It rejected Southwestern Bell's portent of the order opening the floodgates to entrepreneurial abuse in light of the trial court's findings that STA's

assignments came from pre-existing customers, those customers had been members of the *Mireles* class action from which this suit derived, and STA did not improperly solicit the assignments. *Id.* at 825. The court of appeals, too, rejected Southwestern Bell's claims that STA's interests conflict with or are antagonistic to other class members. *Id.* at 826-27. The Court today, however, concludes that STA's interests conflict with those of the putative class such that it cannot be an adequate class representative. The potential conflicts the Court hypothesizes, however, are more imagined than real, and in any event are insufficiently compelling to disqualify STA from representing the class.

According to the Court, STA must have a lesser interest in making itself and the class whole because it was "never personally aggrieved by Southwestern Bell's alleged overcharging and its maximum recovery is less than half the value of any individual claim for damages."[3] But neither of these circumstances creates a conflict. By the assignments, which the Court acknowledges are entirely valid, STA stands in the shoes of its customers, whose claims arise from the same overbillings that give rise to the other class members' claims. Nor does STA's smaller financial interest in the litigation affect its ability to adequately represent the class. As other courts have noted, the amount of a plaintiff's financial interest in the suit is not determinative of its ability to represent the class adequately. *See*, *e.g.*, *In re Cardizem*, 200 F.R.D. 297, 306 (E.D. Mich. 2001); *In re S. Cent. States Bakery Prods.*, 86 F.R.D. 407, 418 (M.D. La. 1980). The Court theorizes that since STA never paid the overcharges itself, it might have a greater incentive to settle more quickly than other class members who paid the charges and might want more. However, any incentive STA

[3] The customers assigned 100% of their claims to STA, but as part of the consideration for the assignment STA agreed to pay the assignors 70% of any net proceeds recovered and retain 30% for itself.

might have to minimize litigation expenses by settling early appears to be no different from that any other class member would have, and STA's incentive to maximize recovery appears to be no different either. Though the Court posits that STA might ultimately pursue theories of relief more efficient for itself at the expense of absentee class members, it does not speculate what those theories might be and none have been asserted. Such speculative conflicts are far too tenuous to render STA inadequate. The Court apparently believes the fact that STA was not directly injured by Southwestern Bell's conduct and merely holds an economic interest in any recovery means that STA has a different set of priorities than other class members. But in most, if not all, commercial class actions like this one the members of the class are motivated by economic considerations. Here, STA represents five class members, and thus, if anything, is more cognizant of a greater number of economic interests than the typical class representative would be. The evidence demonstrates that the claims assigned to STA range from small to large, and supports the trial court's finding that STA has an interest in asserting the rights of all putative class members.

Southwestern Bell contends STA's thirty-percent interest in recovered funds will make it more likely to disregard a settlement paid for in coupons or credits. In support, Southwestern Bell points to an STA employee's testimony at the certification hearing that he was uncertain as to whether a coupon settlement would be proper in this case.[4] Coupon settlements, however, have not always been favored in our class-action jurisprudence. *See*, *e.g., General Motors Corp. v. Bloyed*,

[4] That employee testified as follows:

Q: "And a coupon settlement would be proper in this case, as to what STA should receive for 30 percent interest?"
A: "I'm not certain."

916 S.W.2d 949, 956 (Tex. 1996). A general expression of uncertainty on the hypothetical propriety of a future coupon settlement does not diminish STA's adequacy to represent the class, especially when non-cash remedies were contemplated in the assignments. STA's assignments allow it to collect its percentage from all recovered overcharges, whether recovered through refunds or credits. Clearly non-cash remedies have not been ruled out, and the testimony of STA's employee does not indicate otherwise.

Southwestern Bell points to the fact that STA does not hold an assignment from a customer who subscribed to Hotel/Motel services and thus has no incentive to pursue such claims. However, it is highly unlikely that any potential class representative would have a claim based on all three types of subscription packages. The salient point is that the Hotel/Motel claims arise from the same unauthorized course of conduct as the other class claims, and are brought under the same statutory scheme with the same legal theories. Southwestern Bell has not articulated how the interests or claims of Smart Trunk and Digital Loop customers differ from or conflict with those of Hotel/Motel customers. *See Cardizem*, 200 F.R.D. at 306. As the trial court found, and the court of appeals agreed, 170 S.W.3d 814, 827, there is no evidence of any conflict between the Hotel/Motel customers and other members of the class. Southwestern Bell also contends its right to reallocate charges creates additional potential for conflict. Southwestern Bell argues that while it will make a refund to customers it overcharged, it has the right to reapportion the fee to customers who it essentially undercharged. According to Southwestern Bell, STA will have to make strategic

decisions knowing some class members are affected differently by reallocation.[5] Of course, this complaint is not unique to STA and would apply equally to any other purported class representative. In response, STA challenges whether this hypothetical reallocation could occur at all since Southwestern Bell may only "backbill" a customer for the six months prior to when the underbilling is discovered, and that period has passed. *See* 16 TEX. ADMIN. CODE § 26.27(a)(3)(C)(i). But even assuming some reallocation would occur, STA presented expert testimony that any reallocation would at most cause a minor reduction in the total amount due to a class member, and that it is highly unlikely any class member would actually have an increase in fees.[6] The expert also pointed to evidence that Southwestern Bell collected substantially more from its customers than it paid to the municipalities, making it unlikely an increase of fees would result from reapportionment, particularly if Southwestern Bell's overcollection exceeds the amount sought by the class. A potential for conflict might exist if it were shown that reallocation would result in a significantly reduced damages award for some customers and not others. But Southwestern Bell has at most shown that in the case of a hypothetical reallocation some customers might have their damages reduced by a negligible amount compared to other customers, which is not enough to disqualify STA as an adequate class representative.

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[5] Southwestern Bell's expert offered the following hypothetical example: if the municipal fee is $9 million and Southwestern Bell had $100 million in revenues, then Southwestern Bell would charge its customers a 9% municipal charge to recoup the $9 million fee. A customer with a $100,000 bill would have had a $9,000 municipal charge without reallocation. If, however, only $90 million in revenue was appropriately subject to these charges, Southwestern Bell would then have to charge its customers a 10% municipal charge to recoup the $9 million fee. Under reallocation, if only $99,000 was taxable, then that customer would have to pay a $9,900 municipal charge.

[6] For example, for USAA, a large customer-assignor, damages with reallocation would be $2,560.67 and damages without reallocation would be $2,563.74. For Ridgeway Bank, a small customer-assignor, damages with reallocation would be $99.66 and damages without reallocation would be $102.59.

Southwestern Bell also challenges whether STA and its representatives have the qualifications, background, and interest to represent the class and supervise class counsel, pointing to the testimony of an STA employee, Mike Shelton, that "we're here at the disposal of the lawyers." TEX. R. CIV. P. 42(a)(4). However, quoted in full, Shelton's statement demonstrates that he is aware of his duty "[t]o vigorously represent the class, to put their needs above ours, to – as we're doing today, we're here at the disposal of the lawyers, at the disposal of the Court to vigorously pursue this case and protect the class rights." Southwestern Bell claims another employee, Mark Wilder, lacks familiarity with the surrounding facts and legal theories. However, Wilder possesses knowledge and expertise regarding the billing procedures at issue in this case, which are not common knowledge nor widely known to members of the putative class. The evidence supports the trial court's determination that STA is an appropriate class representative, and the testimony of its employees does as well.

In sum, the speculative conflicts the Court and Southwestern Bell hypothesize between STA and the other class members are too tenuous to render it an inadequate class representative. Considering the absence of any realistic potential for conflict or antagonism between STA and the class, together with STA's demonstrated superior expertise in the subject matter of the litigation, I would hold that STA has satisfied the adequacy requirement and affirm certification of the class. Because the Court concludes otherwise, I respectfully dissent.

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Harriet O'Neill
Justice

OPINION DELIVERED: February 19, 2010