IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2353
cons. w/ No. 92-2381

RICHARD DODSON, ET AL.,

Plaintiffs-Appellants,

versus

HILLCREST SECURITIES CORP., ET AL.,

Defendants,

ALEXANDER GRANT & CO., ETC.,
PANNELL, KERR & FORSTER, BRANCH
ORCUTT, KIRKPATRICK & CRISWELL,

Defendants-Appellees.

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WILLIAM M. and LUCILE C. LACY, ET AL.,

Plaintiffs-Appellants,

versus

HILLCREST SECURITIES CORPORATION,
INC., ET AL.,

Defendants,

ALEXANDER GRANT & CO., and
PANNELL, KERR & FORSTER,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Texas
(CA H 1639 & CA H 90 1864)

July 24, 1996

Before GARWOOD, SMITH and DENNIS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Facts and Proceedings Below

Two suits were brought in the name of investors in a government securities tax shelter involving the trade of government securities set up by securities broker/dealers and investment advisors Hillcrest Securities Corp. and Hillcrest Equities Inc. (collectively Hillcrest). The suits alleged federal (RICO and securities fraud) and Texas state law (common law fraud, negligence, breach of fiduciary duty, and Deceptive Trade Practices Act) claims against Hillcrest, three accounting firms—Alexander Grant & Company, now known as Grant Thorton LLP (Grant), Pannell, Kerr & Foster (PKF), and Branch, Orcutt, Kirkpatrick & Criswell (BOKC)[1]—, and others after the Internal Revenue Service (IRS) determined that the reported trades in government securities were never made.[2]

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[*] Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

[1] BOKC was only named in the first of the two suits.

[2] The investors allege that they invested in Hillcrest investments in reliance on representations that the accountants would audit and verify the transactions in government securities by visiting primary and secondary dealers to verify the authenticity of the trades. Ed Markowitz (Markowitz), not a party here or below, a securities trader, allegedly ran a fraudulent scheme involving the Hillcrest trading program in which very few legitimate trades were actually made. Plaintiffs allege that Hillcrest prepared paperwork showing the existence of transactions that never occurred and that the accountants were aware of the fraudulent scheme but continued to make fraudulent representations to the investors regarding the Hillcrest investments from 1981 to

One suit was filed against Hillcrest, Grant, PKF, and others not party to this appeal, on May 11, 1988 (the *Dodson* suit). The *Dodson* suit was filed by Sidney Ravkind as attorney for Richard Dodson, David L. Standlee, the Hillcrest Investigation Trust (the Trust)—later known as Hillcrest Investigative Participants (HIP)—,and a class comprised of investors in the Hillcrest tax shelter program. After the district court denied plaintiffs' motion for class certification, more than a thousand additional plaintiffs were added by means of a multitude of amended, supplemental, and supplemental amended complaints. On February 13, 1990, an interlocutory judgment was entered against Hillcrest, holding that it was liable to the *Dodson* plaintiffs for their actual damages. Actual damages were to be determined by jury trial at a later date.

Discovery commenced in the *Dodson* suit in February 1990. In October 1990, the magistrate ordered 600 to 800 plaintiffs who had failed to file any interrogatory responses dismissed with prejudice. In January 1991, after repeated discovery abuses by plaintiffs, the magistrate found that none of the interrogatory answers of the remaining hundreds of plaintiffs were adequate and recommended dismissing all *Dodson* plaintiffs except those who had been deposed. BOKC was first named as a defendant in the *Dodson* suit in Plaintiffs' Fourth Amended Complaint, which the magistrate granted leave to file on April 8, 1991. On April 1, 1992, the district court adopted the magistrate's recommendation and

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1984.

dismissed all *Dodson* plaintiffs who had not been deposed for their repeated failure to obey discovery orders. In the same order, the district court dismissed the remaining *Dodson* plaintiffs by granting summary judgment motions filed by Grant and PKF on statute of limitations grounds. Two days later, the district court granted BOKC's motion for summary judgment on statute of limitations grounds. A timely notice of appeal was filed in the *Dodson* suit.

On June 11, 1990, after the court-imposed cutoff date for intervention in *Dodson*, Ravkind filed a second suit, this one on behalf of twenty-four named plaintiffs, against Hillcrest, PKF, and Grant (the *Lacy* suit). In an order dated April 23, 1992, the district court dismissed the *Lacy* suit.[3] A notice of appeal was timely filed in the *Lacy* case.

Discussion

I. Notices of Appeal

As a threshold matter, we must determine whether we have jurisdiction of the *Dodson* and *Lacy* appeals and, if we do, over which parties. *McLemore v. Landry*, 898 F.2d 996, 999 (5th Cir.), *cert. denied*, 111 S.Ct. 428 (1990). Failure to adequately comply with Federal Rule of Appellate Procedure Rule 3(c) deprives this court of jurisdiction over an attempted appeal. *Torres v. Oakland Scavenger Co.*, 108 S.Ct. 2405, 2409 (1988). Rule 3(c) requires notices of appeal to "specify the party or parties taking the appeal . . . ." Fed. R. App. P. 3(c). The notices of appeal in

[3] The court also dismissed the suit against Hillcrest for failure to prosecute the *Lacy* suit under Rule 41(b).

Dodson and *Lacy* are captioned, respectively, "Richard Dodson, et al." and "William M. and Lucile C. Lacy, et al." No other plaintiffs are identified by name, but the text of the notices of appeal state that "all Plaintiffs" appeal. We must determine whether the designation of "all plaintiffs" in the *Dodson* and *Lacy* notices of appeal satisfies the Rule 3(c) requirement to specify the parties as the rule existed at the time these appeals were brought.[4]

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[4] Rule 3(c) was amended while this appeal was pending. Appellants argue that the amended Rule should be applied in their cases. Under amended Rule 3(c), effective September 1, 1993, the *Dodson* and *Lacy* notices of appeal would be sufficient. *See* Fed. R. App. P. 3(c)("An attorney representing more than one party may fulfill [the naming of the parties] requirement by describing those parties with such terms as 'all plaintiffs,' 'the defendants,' 'the plaintiffs A, B, et al.,' or 'all defendants except X.'"). The Supreme Court order adopting the relevant amendment states that the amendment shall govern "insofar as just and practicable, all proceedings in appellate cases then pending." *Garcia v. Wash*, 20 F.3d 608, 609 (5th Cir. 1994)(quoting the Supreme Court's April 1993 order). Because we hold *infra* that the notice of appeal in *Lacy* is sufficient under the pre-amendment rule, we need not determine whether it would be just and practicable to apply the amended rule to *Lacy* retroactively. We must, however, address this argument as to *Dodson*.

The *Dodson* notice of appeal was filed in mid-August 1992 and the appellees' motion to dismiss the appeal for lack of jurisdiction were filed in mid-October of 1992. In November 1992, this Court ordered that the motion to dismiss be carried with the appeal on the merits. On January 4, 1993, the appeal was automatically stayed upon PKF's filing for bankruptcy. The amendment to Rule 3(c) did not become effective until almost eleven months later, on December 1, 1993 (the Supreme Court did not promulgate amended Rule 3(c) until April 22, 1993). The pre-amendment Rule 3(c) unquestionably would have applied to the *Dodson* appeal if either (1) this Court had ruled on the motion to dismiss when it was made; or (2) PKF had not filed for bankruptcy. Because it is merely fortuitous that the *Dodson* appeal has taken such a long time to be considered by this Court, we hold that it would not be "just and practicable" to apply amended Rule 3(c) retroactively to it. We also note that the continual alteration of plaintiffs in *Dodson* and the uncertainty even at oral argument about who was appealing adds support to this conclusion. Because we hold that

"The purpose of the specificity requirement of Rule 3(c) is to provide notice both to the opposition and to the court of the identity of the appellant or appellants." *Torres*, 108 S.Ct. at 2409. Permitting vague designations of parties "would leave the appellee and the court unable to determine with certitude whether a losing party not named in the notice of appeal should be bound by an adverse judgment or held liable for costs or sanctions." *Id.* When a notice of appeal lists only the named plaintiff and "et al." in a class action, the notice is sufficient for the class members. *Morales v. Pan American Life Ins. Co.*, 914 F.2d 83, 85 (5th Cir. 1990)(citing *Rendon v. AT&T Technologies*, 883 F.2d 388, 398 n.8 (5th Cir. 1989)). Because we hold *infra* that the district court did not abuse its discretion in denying class certification, we must consider whether the plaintiffs *individually* joined in *Dodson* and *Lacy* were sufficiently named in the notices of appeal. The question facing this Court is whether designating "all plaintiffs" as parties to the *Dodson* and *Lacy* appeals met the specificity requirement of Rule 3(c) as it existed prior to the 1993 amendment.

Defendants argue that, under the version of Rule 3(c) in effect at the time the notices of appeal were filed, "all plaintiffs" is too ambiguous to meet the specificity requirement, and thus, that we have jurisdiction over only the plaintiffs named specifically in the notices of appeal: Richard Dodson, William M.

Rule 3(c) should not be applied retroactively in this instance, we do not reach appellees' argument that retroactive application is unconstitutional under *Plaut v. Spendthrift Farm*, 115 S.Ct. 1447 (1995).

Lacy, and Lucile C. Lacy. The Circuits are split regarding whether "all plaintiffs" or similar language satisfies the specificity requirement of pre-1993 Rule 3(c). *See e.g.*, *Adkins v. United Mine Workers of America*, 941 F.2d 392, 397 (6th Cir. 1991), *cert. denied*, 112 S.Ct. 1180 (1992)(holding "all of the plaintiffs" sufficient); *Santos-Martinez v. Soto-Santiago*, 863 F.2d 174, 175-76 (1st Cir. 1988)(holding "all plaintiffs" insufficient when five of the eight plaintiffs did not actually wish to appeal).

Under pre-1993 Rule 3(c), individuals are not adequately specified by either the phrase "et al." in the caption or the phrase "plaintiffs" in the text of the notice. *See e.g.*, *Torres*, 108 S.Ct. at 2409; *Colle v. Brazos County, Texas*, 981 F.2d 237, 240-41 (5th Cir. 1993); *Samaad v. City of Dallas*, 922 F.2d 216, 219 (5th Cir. 1991). Similarly, this Court has rejected the designation "the defendants in this action" as insufficient under Rule 3(c) because it failed to provide certainty regarding which of the six defendants joined in the appeal. *Resolution Trust Corp. v. Sonny's Old Land Corp.*, 937 F.2d 128, 129 (5th Cir. 1991). In *McLemore*, this Court held an even more specific designation to be insufficient under Rule 3(c). *McLemore*, 898 F.2d at 999-1000 (holding that a notice of appeal designating "River Villa, A Partnership, and the respective individual partners therein" was insufficient to confer jurisdiction over an appeal by anyone other than the named partnership). In so holding, however, we suggested that the notice of appeal was insufficient because one of the fifteen partners of the named partnership may not have been

appealing jointly with the partnership. *See id.* at 1000 n.6 (noting that one partner was named as a third-party defendant by the partnership and had interests inconsistent with the other partners).

The decision in *Britt v. Grocers Supply Co.*, 978 F.2d 1441 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 2929 (1993), helps to clarify our previous decisions involving generic phrases such as "plaintiffs" and "defendants." The plaintiffs in the *Britt* case consisted of two originally named plaintiffs and another 126 opt-in plaintiffs under 29 U.S.C. § 216(b). *Id.* at 1444. The caption of the *Britt* notice of appeal used "et al.," but the text of the notice identified the remaining appellants as "all other 129 consenting Plaintiffs who have previously filed their written consent pursuant to 29 U.S.C. Section 216(b)." *Id.* We held that the notice complied with Rule 3(c)—even though there were actually 126 opt-in plaintiffs, not 129—"[b]ecause the notice in this case states that *all* of a particular defined group are taking an appeal, *and* the individual entities are *readily ascertainable in the record* . . . ." *Id.* (emphasis added). We went on to specifically hold that "it is not necessary to list the names of each appealing party, *as long as there can be no mistake about which parties are intending to appeal*." *Id.* at 1444-45 (emphasis added); *see also Pope v. Mississippi Real Estate Comm'n*, 872 F.2d 127, 129 (5th Cir. 1989)(holding designation of "plaintiffs" in text of notice sufficient when there were only two plaintiffs, one of whom was named in the caption, because "et al." could logically apply only

to the one unnamed plaintiff). Accordingly, the phrase "all plaintiffs" may suffice to meet the specificity requirement of Rule 3(c) *if* it leaves no room for doubt about which parties were intending to appeal. On the other hand, if, for some reason specific to the individual appeal, the phrase "all plaintiffs" leaves room for the court and the parties to doubt who intends to appeal, then the notice fails to comply Rule 3(c). *See McLemore*, 898 F.2d at 1000 n.6.

A. The *Dodson* Notice of Appeal

Though the *Dodson* notice of appeal states that "all plaintiffs" are appealing, it is almost impossible to tell to whom that phrase applies. The named plaintiffs were in continual flux in the district court, and one must make a close examination of the record to determine who were *Dodson* plaintiffs at any particular time. More than a thousand plaintiffs were added to the *Dodson* suit by numerous amended, supplemental, and supplemental amended complaints.[5] In addition to the adding and subtracting of

[5] The original complaint named three specific plaintiffs and a purported class. More than a year later, Plaintiffs' Second Amended Complaint and RICO Case Statement deleted one original plaintiff and added two new plaintiffs. Throughout the *Dodson* litigation, plaintiffs attempted to file at least six supplemental complaints. Most of these attempts were successful, though it appears that no court ever ruled on Plaintiffs' motion for leave to file their Fifth Amended Supplemental Complaint. While adding named plaintiffs through supplemental complaints, plaintiffs also filed a motion for leave to file Plaintiffs' Third Amended Complaint on December 18, 1990. Leave to file the Third Amended Complaint was granted prior to March 5, 1990. More than nine months later, plaintiffs filed a motion for leave to file Plaintiffs' Fourth Amended Complaint and Rico Case Statement. The motion was granted on April 8, 1991, and they filed such pleading on the same date. The April 8, 1991 pleading listed many fewer plaintiffs than the previous pleading, though it still named more

plaintiffs through pleadings, hundreds of plaintiffs were dismissed for discovery sanctions. At least one plaintiff who was dismissed with prejudice was again added as a plaintiff in a later pleading. Throughout the litigation, plaintiffs also filed motions to substitute new parties for named deceased plaintiffs. The court granted the motions to allow substitution in part.

Because of the complexity of the *Dodson* litigation, many motions often were outstanding at once. For example, on January 18, 1990, plaintiffs filed a status report listing over 1200 plaintiffs who had been named in at least one pleading and recognizing that the court had yet to rule on several of those pleadings. No attempt was made to separate those named who were properly plaintiffs and those who were merely potential plaintiffs. It is impossible to tell who "all plaintiffs" in *Dodson* actually were at any particular time without extensive review of the record, and even then there is confusion and ambiguity.

Even if the record were not so confusing regarding who were *Dodson* plaintiffs at any particular time, the notice of appeal in *Dodson* would still be insufficient because on briefing and argument it has been made clear that "all plaintiffs"——if that is taken to mean every plaintiff ever named in *Dodson* (and from the face of the notice of appeal and the record below one could not confidently conclude that such was not intended)—are not actually appealing. When asked at oral argument who "all plaintiffs" are, counsel for appellants responded "all plaintiffs listed in the briefs and all

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than 600 plaintiffs.

plaintiffs in the case below." Yet, not every person who was ever listed as a plaintiff below is listed in appellants' briefs, and it now appears that at least the six hundred to eight hundred plaintiffs who were dismissed for failing to answer any interrogatories are not appealing. In other words, "all" does not really mean all in the *Dodson* notice of appeal. *See McLemore*, 898 F.2d at 1000 n.6; *Santos-Martinez*, 863 F.2d at 175-76. There is certainly doubt about which *Dodson* plaintiffs——other than Dodson himself—could be held liable for costs or sanctions. *See Torres*, 108 S.Ct. at 2409. For these reasons, we hold that the notice of appeal in *Dodson* is insufficient to confer jurisdiction over an appeal by any party other than Richard Dodson.

B. The *Lacy* Notice of Appeal

Although the wording of the notice of appeal in *Lacy* is identical to the wording of the *Dodson* notice, the result is different. The phrase "all plaintiffs" in the *Lacy* notice of appeal leaves no room for doubt about who is appealing because, while the plaintiffs in *Lacy* did add to their ranks through a supplemental complaint and two amended complaints, no plaintiffs were ever dismissed, dropped, or substituted. Not only does this make rooting through the record to determine who are "all plaintiffs" unnecessary, it distinguishes the *Lacy* appellants by the fact that they appealed every order which dismissed any plaintiff from the suit. "All" clearly means all in the *Lacy* notice of appeal. As in *Britt*, we hold that there can be no mistake about which parties are intending to appeal in *Lacy*'s

notice of appeal. *See Britt*, 978 F.2d at 1444-45. Thus, we have jurisdiction over all plaintiffs in *Lacy.*

II. Denial of Class Certification

Dodson appeals the district court's denial of the motion for class certification in *Dodson.* We will not overturn a decision to deny class certification unless the district court has abused its wide discretion. *See McGrew v. Texas Bd. of Pardons & Paroles*, 47 F.3d 158, 162 (5th Cir. 1995).

The *Dodson* plaintiffs filed a motion for class certification on March 1, 1989, requesting that the court certify named plaintiffs Richard Dodson and David L. Standlee as class representatives. The class was to be composed of all investors in the Hillcrest Securities trading program. In the closing paragraph of the motion, plaintiffs requested that the court set the motion for hearing. Prior to the filing of the motion, the district court on January 26, 1989 had scheduled a hearing on class certification for July 5, 1989. PKF and Grant in early May, 1989 filed memoranda in opposition to plaintiffs' motion for class certification. In these memoranda, PKF and Grant argued that the motion should be denied because, *inter alia*, Dodson and Standlee did not adequately represent the class. Plaintiffs never filed a reply to these memoranda.

On June 29, 1989, the hearing on class certification set for July 1989, was canceled, and no hearing was ever held on the issue. The district court denied plaintiffs' motion for class certification without opinion in an order dated October 19, 1989.

Plaintiffs never filed a motion for reconsideration or, as far as we can tell, ever complained to the district court about ruling on the class certification issue without hearing or benefit of a plaintiffs' reply brief. Dodson argues on appeal that the district court committed procedural error in denying class certification without opinion or a hearing and without setting a new date for the reply to the defendants' memoranda. Plaintiffs have waived these procedural complaints by failing to raise them below.[6] *See e.g.*, *McGill v. Goff*, 17 F.3d 729, 732 (5th Cir. 1994)(appellants' failure to raise alleged procedural error——that hasty adoption of magistrate's report and recommendation before they had opportunity to file objections——by motion to reconsider or otherwise before district court resulted in waiver of the alleged procedural irregularity); *Atlantic Mut. Ins. Co. v. Truck Ins. Exchange*, 797 F.2d 1288, 1293-94 (5th Cir. 1986)(holding that failure to raise

[6] Dodson argues that the plaintiffs did not waive these arguments because they were prevented from filing a reply brief by the court's stay order of May 4, 1989. This argument is without merit. The court's order stayed all discovery in *Dodson* until the related criminal suit came to a final resolution and suspended all docket control dates until further notice by the court. It did not prevent the parties from filing motions or responses. In fact, plaintiffs and defendants continued to file motions and other documents with the court. For example, plaintiffs filed (1) several notices of intent to take depositions, (2) a second amended complaint, (3) a motion for default judgment on July 21, 1989, and (4) responses to defendants' motions to strike, for extension of time, and to quash or postpone depositions. Yet plaintiffs never filed a response to the defendants' memoranda on denying class certification. More importantly, plaintiffs never filed a motion for reconsideration of the denial of class certification: they never gave the district court the chance to correct its own alleged procedural errors. *See Merrill v. Southern Methodist University*, 806 F.2d 600, 609 (5th Cir. 1986)("We take a very dim view of parties who silently permit the trial court to slip into claimed error only to complain for the first time on appeal.").

issue before district court results in waiver); *Long v. McCotter*, 792 F.2d 1338, 1345 (5th Cir. 1986)("we ordinarily do not consider issues that have not been presented to the court of first instance")(citations omitted). Even if plaintiffs had not waived these procedural complaints, we would still affirm the district court's denial of the class certification because appellant cannot show any prejudice from the alleged procedural errors. *See Merrill*, 806 F.2d at 608-09 (affirming denial of class certification because any error was harmless).

> "An action may be maintained as a class action if it meets the criteria of 'numerosity, commonality, typicality, and adequacy of representation,' the questions of law or fact involved 'predominate' over any issues affecting individual members of the class, and a class action is the 'superior' method of handling the action." *McGrew*, 47 F.3d at 162 (citations omitted).

Because absent class members will be bound by the judgment in a class action law suit, strict review of the adequacy of representation is required. *See Susman v. Lincoln American Corp.*, 561 F.2d 86, 90 (7th Cir. 1977)(citations omitted). This Court looks to two criteria to determine adequate representation: "(1) the [proposed] representative must have common interests with the unnamed members of the class; and (2) it must appear that the [proposed] representative will vigorously prosecute the interests of the class through qualified counsel." *Gonzales v. Cassidy*, 474 F.2d 67, 72 (5th Cir. 1973). We affirm the district court's denial of class certification because it would have been an abuse of discretion to hold that it appeared that either Standlee or Dodson——the only two proposed class representatives——would

vigorously prosecute the suit through qualified class counsel.

Dodson makes no argument on appeal that Standlee was an adequate representative. Clearly Standlee could not have vigorously prosecuted the suit because, when the court denied class certification, he had been dismissed from the suit with prejudice for willful refusal to appear at his deposition. Thus, he was inadequate as a class representative.

The argument for Dodson's adequacy is not much stronger. Though he remained as a named plaintiff, he admitted that he "did not want to be heavily involved" in the case. Dodson did not authorize the suit before it was filed, though he did later ratify it. Dodson admitted that he had no understanding of what it means to be a class representative. He also admitted that he did not know who Grant is or what role either Grant or PKF played in the Hillcrest securities program. Finally, proposed class counsel Ravkind had serious conflicts of interest with the proposed class: he was simultaneously representing Mack Hickman, a criminal defendant charged with defrauding the very investors belonging to the proposed class. It certainly does not appear that Dodson would vigorously prosecute the interests of the class either on his own or through "qualified counsel." *See Gonzales*, 474 F.2d at 72 (quoting with approval *Eisen v. Carlisle and Jacquelin*, 391 F.2d. 555, 562 (2d Cir. 1968)("[A]n essential concomitant of adequate representation is that the party's attorney be qualified, experienced and generally able to conduct the proposed litigation.")(brackets in original)). For these reasons, we affirm

the district court's denial of class certification.[7]

II. Statute of Limitations[8]

A four-year limitations period, coupled with a discovery rule, applies to plaintiffs' RICO, federal securities law, and Texas common law fraud actions. *See e.g.*, *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 107 S.Ct. 2759 (1987)(RICO); *Sioux, Ltd., Sec. Litig. v. Coopers & Lybrand*, 914 F.2d 61, 63 (5th Cir. 1990)(federal securities fraud and Texas common law fraud); 15 U.S.C. § 78aa-1(a)(pending claims of federal securities fraud governed by law as it existed on June 19, 1991).[9] Claims under Texas law for breach of fiduciary duty, negligence, and Deceptive Trade Practices Act (DTPA) violations are subject to a two-year statute of limitations. *See Russell v. Campbell*, 725 S.W.2d 739,

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[7] Furthermore——though the causes of action against Grant, PKF, and BOKC are based on allegations that they solicited and/or attracted the plaintiff-investors to invest in Hillcrest securities offerings and represented to the investors that they would be responsible for all of the trades to be made——Dodson relied solely upon information he received from his personal accountant and a broker-friend when he invested in Hillcrest securities. Dodson attended no group meetings describing the Hillcrest securities trading program, and he made it abundantly clear that he did not read any materials at all regarding the Hillcrest investments. Thus, Dodson's claims, if they withstand failure-to-state-a-claim scrutiny, are not typical of those who actually did rely on representations by the defendants. *See* Fed. R. Civ. P. 23(a).

[8] While plaintiffs in both *Dodson* and *Lacy* also alleged violations of the Texas Securities Act, the appellants waived any argument that the district court improperly dismissed these claims on statute of limitations grounds by failing to address the issue in their briefs. *See Carmon v. Lubrizon Corp.*, 17 F.3d 791, 794 (5th Cir. 1994)

[9] While the Supreme Court has held § 78aa-1(b) unconstitutional, the reasoning does not extend to render § 78aa-1(a) unconstitutional. *See Plaut*, 115 S.Ct. at 1447.

744, 748 (Tex. App.--Houston [14th Dist.] 1987, *writ ref'd n.r.e.*)(breach of fiduciary duty, professional negligence, and DTPA); *Sioux Ltd., Sec. Litig.*, 914 F.2d at 64 (negligent misrepresentation). The state law DTPA and breach of fiduciary duty claims are subject to a discovery rule; the negligent misrepresentation claim is not. *See* Tex. Bus. & Com. Code § 17.565 (DTPA); *Kansa Reinsurance Co., Ltd. v. Congressional Mortgage Corp. of Texas*, 20 F.3d 1362, 1373 (5th Cir. 1994)(negligent misrepresentation); *Woodbine Elec. Serv., Inc. v. McReynolds*, 837 S.W.2d 258, 262 (Tex. App.--Eastland 1992, no writ)(accounting malpractice).[10]

A. The *Dodson* Suit

On this appeal from summary judgment granted on statute of limitations grounds, this Court views the facts in the light most favorable to Dodson. *See Corwin v. Marney, Orton Investments*, 843 F.2d 194, 195 (5th Cir. 1985), *cert. denied*, 109 S.Ct. 305 (1988).

1. Accrual

Federal law determines when the limitations period begins to run on the federal claims, and state law dictates the result for state law claims. *See F.D.I.C. v. Shrader & York*, 991 F.2d 216,

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[10] One Texas appellate court has held that the discovery rule applies to accounting malpractice and negligence claims only when the plaintiff was a client of the accountant. *See Brown v. KPMG Peat Marwick*, 856 S.W.2d 742, 747-49 (Tex.App.--El Paso 1993, *writ denied*). While the court specifically held that the auditor/non-client relationship in *Brown* did not permit the application of the discovery rule, the reasoning in *Brown* suggests that the discovery rule is appropriate in claims based on fiduciary duty. *See id.* Accordingly, we hold that the discovery rule is applicable to the breach of fiduciary duty claims.

220 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 2704 (1994). Under federal law, Dodson's causes of action accrued when the illegal acts allegedly occurred. *See e.g.*, *La Porte Construction Co. v. Bayshore Nat'l Bank of La Porte, Texas*, 805 F.2d 1254, 1256 (5th Cir. 1986). His federal claims all accrued prior to May 11, 1984, because all of defendants' alleged misdeeds were alleged to have been performed prior to that date.

State law is less clear. Under Texas law, tort-based causes of action generally accrue when the tort is committed. *Randolph v. Resolution Trust Corp.*, 995 F.2d 611, 617 (5th Cir. 1993)(citing *Atkins v. Crosland*, 417 S.W.2d 150, 153 (Tex. 1967)), *cert. denied*, 114 S.Ct. 1294 (1994). This is true even if the damages are not ascertainable until a later date. *Id.* But a cause of action does not accrue until a legal injury has been sustained. *Id.* Dodson relies on *Atkins* and our holding in *Bauman v. Centex Corp.*, 611 F.2d 1115 (5th Cir. 1980) for the proposition that he suffered no legal injuries until the IRS sent notice of tax deficiencies.

In *Atkins*, the Texas Supreme Court held that the defendant accountant's use of the cash method, as opposed to the accrual method, "was not in itself the type of unlawful act which, upon its commission, would set the statute in motion." *Atkins*, 417 S.W.2d at 153. Following *Atkins*, we noted that under Texas law a fraudulent misrepresentation tort "is not complete until the [plaintiff] acts [on the misrepresentation] to his detriment." *Bauman*, 611 F.2d at 1119. We have recently noted that *Bauman* holds that "misrepresentation *by itself* is not enough to establish harm

because it is still possible for the plaintiff to earn a profit after the misrepresentation." *Oliver Resources PLC v. International Fin. Corp.*, 62 F.3d 128, 131 n.3 (5th Cir. 1995)(emphasis added). Thus, we have held that legal injury did not occur to one of the plaintiffs until he "went further into debt and purchased stock in an attempt to rectify a problem allegedly caused by" the defendant's misconduct. *Randolph*, 995 F.2d at 618.

Unlike the potential harm in *Bauman* and *Oliver Resources PLC*——which was not inevitable because of the inherent unpredictability of the marketplace——incurred tax liability is analogous to the debt incurred in *Randolph*. It is itself enough to constitute a legal injury. *See Randolph*, 995 F.2d at 618; *see also Bankruptcy Estate of Rochester v. Campbell*, 910 S.W.2d 647, 650 (Tex.App.--Austin, 1995, *writ granted* Apr. 12, 1996)(interpreting *Atkins* and holding that "the 'legal injury rule' provides that a party has been damaged [by accounting malpractice], for purposes of limitations, when the party discovers a concrete and specific risk to an economic interest"); *Ponder v. Brice & Mankoff*, 889 S.W.2d 637, 642 (Tex.App.--Houston [14th Dist.] 1994, *writ denied*)(holding that claims arising from bad tax advice accrue "on a fact specific basis when [the taxpayer] discovers a *risk* of harm to his economic interest, whether that be at the time of assessment or otherwise.")(quoting *Hoover v. Gregory*, 835 S.W.2d 668, 673)(Tex.App.--Dallas 1992, *writ denied*)(emphasis added). Consequently, Dodson suffered legal injury when Markowitz failed to make the trades in government securities and the accountants failed

to perform the proper audits because it was at this point that the plaintiffs became legally liable for the taxes for which they later unwittingly claimed wrongful deductions. It is undisputed that the allegedly wrongful actions took place prior to May 11, 1984. Accordingly, Dodson's state law claims (like his federal claims) had accrued prior to May 11, 1984. Because negligent misrepresentation is not subject to the discovery rule, *Kansa Reinsurance Co. Ltd.,*[11] Dodson's claim on this ground had expired prior to when he filed suit. In any event, as demonstrated *infra,* Hillcrest's May 11, 1984 letter put plaintiffs on notice well before May 1, 1986 and hence claims with two years limitations, such as negligent misrepresentation, were clearly barred when the *Dodson* suit was filed May 11, 1988. We affirm the district court's grant of summary judgment on Dodson's state law negligent misrepresentation claim.

2. The Discovery Rule

Both federal and state law allow, under certain circumstances, for tolling of the statute of limitations after the causes of action have accrued. Under federal law, the limitations period is extended by the discovery rule until a party has notice of "'storm warnings' which would alert a reasonable investor to the possibility of fraudulent statements or omissions . . . ." *Jensen*

[11] Dodson also argues that his causes of action were tolled while he was defending the paper trades to the IRS. He cites no federal authority for this proposition, and the Texas courts have strictly limited the *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154 (Tex. 1991) litigation exception to toll only legal malpractice claims while the litigation in which the alleged legal malpractice occurred is pending. *See Hoover*, 835 S.W.2d at 675-76.

v. Snellings, 841 F.2d 600, 607 (5th Cir. 1988). A person with notice of such storm warnings must proceed with a reasonable and diligent investigation, and is charged with the knowledge of all facts such an investigation would have disclosed. *Id.* We refer to the chargeable knowledge as inquiry notice. The Texas discovery rule is similar. Texas limitations periods run from the date the plaintiff (1) discovers or, in the exercise of reasonable care and diligence, should have discovered the injury, or (2) was on notice of such facts as would cause a reasonably prudent person to make an inquiry that would lead to the discovery of the cause of action. *Hoover*, 835 S.W.2d at 671. Generally, the reasonableness of plaintiffs' actions, including the reasonableness of inquiring or failing to inquire, is a fact question for the jury. *Corwin*, 843 F.2d at 198.

The district court held that *Dodson* was filed one day late because the statutes of limitations began running on May 10, 1984, the day that a particular *Wall Street Journal* article was published. The May 10, 1984 *Wall Street Journal* contained an article reporting that Markowitz agreed to plead guilty to fraud and was suspected of providing customers with millions of dollars of paper losses in trades on government securities while actually making very few legitimate trades. The article noted that Hillcrest had traded with Markowitz in securities valued at more than $1 billion. The district court purported to rest its grant of summary judgment on four grounds: (1) the *Wall Street Journal* article gave plaintiffs actual or constructive notice of the

violations; (2) Hillcrest mailed plaintiffs copies of the article on May 11, 1984, (3) plaintiffs, through Hickman, made a binding admission that the limitations period ran on May 10, 1988, and (4) some of the plaintiffs admitted to reading the article on the day it was published. The appellees rely on the district court's rationales for dismissing Dodson on limitations grounds, and we address the first three grounds,[12] along with a proposed alternative ground applicable only to BOKC, below.

a. The *Wall Street Journal* Article

Appellees point to no evidence that Dodson received actual notice of the contents of the *Wall Street Journal* article on the day of its publication.[13] Instead, they argue that the *Wall Street*

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[12] As a preliminary matter, we note that the last of the district court's above-mentioned rationales for dismissing the *Dodson* suit, though perhaps relevant to class members, is irrelevant as to any notice Dodson himself received.

[13] The only evidence that might be considered to show that Dodson read the article on the day of its publication is an inference which could arguably be drawn from the following interrogatory and Dodson's answer:

> "Q: On what date and how did you first learn of any facts concerning the allegations in your complaint and the identity of the Persons or Documents that were the source of any such knowledge?
>
> A: In general, the first indication of possible wrongdoing is in a *Wall Street Journal* article published on May 10, 1984 involving Markowitz."

Because all reasonable inferences must be drawn in favor of the nonmovant on a motion for summary judgment, this interrogatory answer is, of itself, insufficient to find as a matter of law that Dodson had actual notice on May 10, 1984. Furthermore, defendants complained to the district court that this answer was vague and *did not* tell them when Dodson actually read the article. It does not appear that defendants ever argued below that Dodson had actual notice of the article on the day of its publication. In fact, in a hearing before the district court on March 15, 1991, defendants' counsel suggested that if the district court granted their statute of limitations motion, Dodson would remain as the only plaintiff.

Journal article constituted constructive inquiry notice to all of the investors, including Dodson, on the day of its publication. A plaintiff can be charged with constructive inquiry notice only if a reasonably diligent person in his situation would have become aware of the facts comprising inquiry notice. *See Corwin*, 843 F.2d at 198. Accordingly, plaintiffs have been charged with constructive notice of events that receive "widespread publicity" or that are "widely publicized." *See e.g.*, *State of Texas v. Allan Constr. Co.*, 851 F.2d 1526, 1527, 1534 (5th Cir. 1988)(state deemed to be aware of "widely publicized" federal grand jury proceedings); *United Klans of America v. McGovern*, 621 F.2d 152, 154 (5th Cir. 1980)(corporate plaintiff put on notice by "widespread publicity" resulting from attorney general's press conference attended by virtually all national media; in addition, Senate report and letter received by president of corporate plaintiff gave notice); *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1170 (5th Cir. 1979)(plaintiffs on constructive notice because reasonably diligent plaintiffs would have been aware of "widely publicized" reports of charges of collusion in industry and of lawsuit similar to plaintiffs' suit), *cert. denied*, 101 S.Ct. 280 (1980). Appellees point to no case, however, in which a single newspaper article was considered significantly widespread to constitute constructive notice, and we find none. We will not hold as a matter of law that a reasonably diligent investor would have certainly read a single newspaper article on the day of its publication, even if published in a national newspaper such as the *Wall Street Journal*. The *Wall*

Street Journal article, without more, does not establish May 10, 1984 as the date on which Dodson received constructive inquiry notice as a matter of law.

b. Hillcrest's Letter to Investors

Hillcrest prepared a letter, dated May 11, 1984, advising all of its investors of the *Wall Street Journal* article and that Hillcrest had made a number of trades through Markowitz-controlled entities in 1982, 1983, and 1984. This letter——stating that Hillcrest (1) was unable to advise them whether the IRS was investigating any Hillcrest transactions, and (2) did not have documentation for at least some of the trades purportedly made by Markowitz——gave "storm warnings" that would lead reasonable investors who received the letter to suspect the possibility of wrongdoing and to conduct further inquiry. *Jensen*, 841 F.2d at 607; *see also Bell v. Showa Denko K.K.*, 899 S.W.2d 749, 754 (Tex. App.--Amarillo 1995*, writ denied*)(limitations start running when plaintiff acquires knowledge of facts which would cause reasonable person to diligently make inquiry to determine his or her legal rights).

There is undisputed record evidence in *Dodson* that the letter was sent to all investors on May 11, 1984. We hold that this undisputed record fact is some evidence that Dodson received the letter at some reasonable amount of time after May 11, 1984. Because the letter could not have provided Dodson with notice prior to May 11, 1984——and because Dodson filed suit on May 11, 1988——, the letter is not grounds for affirming the district court's order

dismissing Dodson's federal claims or his Texas common law fraud claims on statute of limitations grounds. It is grounds, however, for dismissing those claims which have two-year statutes of limitations. Consequently, we affirm the district court's grant of summary judgment on all of Dodson's state law claims other than his claim of Texas common law fraud.[14]

c. Hickman's Letter to Investors

At some time prior to May 10, 1988, Mack Hickman circulated a letter to other Hillcrest investors, attempting to garner interest in suing Hillcrest and others. This letter informed the investors that the Trust had been formed and would obtain Mandell & Wright as legal counsel to file a class action law suit. The letter also stated that the Trust had been advised that if the investors did not file suit by May 10, 1988, their claims would expire. Appellees argue that this letter supports the district court's summary judgment dismissal of the suit on statute of limitations grounds for two reasons. First, they argue that the appellants waived any argument that they were not bound by this statement. Second, appellees argue that the letter was an admission of fact which binds all of the appellants. Each of these arguments is without merit as to Dodson.

Appellees argued in the district court that the plaintiffs who

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[14] We reject Dodson's argument that fraudulent concealment tolled the statute of limitations beyond the discovery rule. Once one is under a duty to inquire, "fraudulent concealment does not trump the discovery rule . . . ." *Colonial Penn Ins. Co. v. Market Planners Ins. Agency, Inc.*, 1 F.3d 374, 377 (5th Cir. 1993)(describing Texas law).

claimed to be members of the Trust or HIP were bound by "admissions" it had made through Hickman. They did not argue that Dodson, who never claimed to be a member of the Trust, was bound by any such "admissions." Accordingly, Dodson could not have waived any argument to the contrary. Even if Hickman's letter were binding on Dodson, which is unlikely, the letter is not a judicial admission. *Compare to Davis v. A.G. Edwards and Sons, Inc.*, 823 F.2d 105, 107-08 (5th Cir. 1987). Neither does the letter admit facts which would be conclusive on the issue of statute of limitations; it merely states what Hickman was *advised* regarding the statute of limitations. *Compare id.* The advice Hickman mentions could very well have been in error. The Hickman letter does not establish that Dodson's claims were barred by the statute of limitations.

3. Allegedly Improper Relation Back for BOKC

BOKC argues that the statute of limitations bars Dodson's remaining claims against it, even if it does not bar these claims against the other defendants, because it was not sued until April 8, 1991, almost three years after the original complaint was filed. As noted above, the statute of limitations had began running on Dodson's claims long prior to January 1987. Thus, absent some other tolling provision, Dodson's federal law claims had expired long before April 8, 1991. Federal Rule of Civil Procedure 15(c) operates to toll statutes of limitations for claims which relate back to a timely claim under its provisions. *Kansa Reinsurance Co., Ltd.*, 20 F.3d at 1366-67 & n.4. This relation back doctrine

is considered purely procedural and governs all claims brought in federal court. *Id.* at n. 4. Dodson argues that the amended complaint adding BOKC related back to the original suit under Rule 15(c).

> "Federal Rule of Civil Procedure 15(c) is a procedural provision to allow a party to amend an operative pleading despite an applicable statute of limitations in situations where the parties to litigation have been sufficiently put on notice of facts and claims which may give rise to future, related claims. The rationale of the rule is that, once litigation involving a particular transaction has been instituted, the parties should not be protected by a statute of limitations from later asserted claims that arose out of the same conduct set forth in the original pleadings." *Id*. at 1366-67 (footnote and citations omitted).

An amended pleading under Rule 15(c)[15] relates back to the date of the original pleading when the amendment changes the party or the naming of the party against whom a claim is asserted, *if,* but only if,(1) the claim asserted in the amended pleading arose out of the transaction set forth in the original pleading, (2) the party to be brought in by amendment received sufficient actual notice of the action within 120 days (with some presently irrelevant exceptions) of its institution and will not be prejudiced in maintaining a defense on the merits because of the relation back, and (3) the party to be brought in by amendment knew or should have known that

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[15] Rule 15(c) was amended, effective December 1, 1991. This amendment made it easier to name additional parties under Rule 15(c). *See* Fed. R. Civ. P. 15 advisory committee note. The parties make no argument that the pre-1991 amendment version of Rule 15(c) should be applied in the instant case. We assume that the post-1991 amendment version of the rule applies. If the claim against BOKC does not relate back under the later, more permissive version of the rule, then it also would not relate back under the older version of the rule.

but for a mistake concerning the identity of the proper party, the action would have been brought against the party. *See* Fed. R. Civ. P. 15. While BOKC had the burden on summary judgment of presenting evidence sufficient to prove its statute of limitations defense, Dodson had the burden of proof to rebut the statute of limitations grounds by relation back under Rule 15(c). *See Crescent Towing & Salvage Co., Inc. v. M/V Anax*, 40 F.3d 741, 744 (5th Cir. 1994)(party who has burden of proof on affirmative defense at trial has burden of proof on summary judgment); *cf. McGregor v. Louisiana State University Bd. of Supervisors*, 3 F.3d 850, 865 (5th Cir. 1993)(plaintiff had burden of proof on summary judgment to present facts supporting equitable estoppel of defendants' statute of limitations defense), *cert. denied*, 114 S.Ct. 1103 (1994).

There is no dispute that the first Rule 15(c) requirement set forth above has been met. BOKC argues that plaintiffs failed to present any evidence that BOKC received notice of the suit within 120 days of the original complaint, or knew or should have known that it would have been named as a party but for a mistake. BOKC also argues that it will be prejudiced by its late addition to the suit because of the vast amount of discovery that has already been taken without any participation by it. Dodson responds that BOKC merged with PKF and that notice to PKF provided notice to BOKC. Dodson relies on two unauthenticated deposition excerpts as evidence of the merger. *Id.* These are not proper summary judgment evidence. *Cf.* Fed. R. Civ. P. 56; *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 191 (5th Cir. 1991)(unsworn letter giving no

indication that affiant is qualified to render an opinion is not summary judgment evidence).

Because Dodson fails to point to any proper evidence that BOKC merged with PKF, he has not met his burden of presenting some evidence that BOKC received notice within the necessary period or that BOKC knew or should have known that it would have been named as a party but for a mistake. Consequently, the statute of limitations continued running on Dodson's claims against BOKC after the initial *Dodson* suit was filed, and his claims against BOKC had expired long before April 8, 1991. For these reasons, we affirm the district court's grant of summary judgment against Dodson on all of his claims against BOKC.

B. The *Lacy* Suit

The district court issued an order purporting to grant defendants' motions to dismiss the *Lacy* complaint under Rule 12(b)(6) on statute of limitations grounds. The appellants and the appellees assume that the district court granted summary judgment, not motions to dismiss. Rule 12(c) permits the district court to treat motions to dismiss as motions for summary judgment if matters outside the pleadings are presented to and not excluded by the court. Fed. R. Civ. P. 12(c); *Darlak v. Bobear*, 814 F.2d 1055, 1064 (5th Cir. 1987). "Only if it appears that the district court *did* rely on matters outside the pleadings should an appellate court treat the dismissal as a summary judgment." *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 283 (5th Cir. 1993)(emphasis in original). In *Lacy*, the district court explicitly relied on its

order dismissing *Dodson*, which is a matter outside the pleadings. And the reasoning in the *Dodson* order was based on matters also outside of the pleadings in *Lacy*: the *Wall Street Journal* article, the Hickman letter, the Hillcrest letter, and the fact that some *Dodson* plaintiffs admitted to reading the *Wall Street Journal* article on the day it was published. Thus, we will review the order dismissing *Lacy* as a summary judgment order. *See also* Charles A. Wright & Arthur R. Miller, 5 Federal Practice & Procedure § 1277 (1990)("[I]n practice, courts that allow the adjudication of affirmative defenses on a motion to dismiss or for judgment on the pleadings are converting these motions into summary judgment motions and normally will give all parties the opportunity provided by Rule 56 to present pertinent evidentiary material to the court.")

While the district court in *Lacy* does appear to have relied on matters outside of the pleadings to grant summary judgment, the court actually raised the statute of limitations defense *sua sponte.* PKF never raised the defense, and Grant raised it by its motions to dismiss[16] only as to plaintiffs' Texas securities law claims. Thus, the district court raised the statute of limitations

[16] Grant did raise the statute of limitations as to all of plaintiffs' claims in its response in opposition to plaintiffs' motions for leave to file three complaints. Because the magistrate granted plaintiffs' leave to file the complaints, however, plaintiffs had no reason to respond to these arguments. Grant next raised these arguments in its response in opposition to plaintiffs' motion for reconsideration of the district court's dismissal order.

defense as to all of the claims on appeal[17] *sua sponte.* "While this Court generally will not consider an affirmative defense not raised below, we are not prevented from considering the defense where it is raised *sua sponte* by the district court." *Burrell v. Newsome*, 883 F.2d 416, 418 (5th Cir. 1989). When a summary judgment is raised *sua sponte* by the district court, as when a motion to dismiss is converted into a summary judgment motion, the notice and hearing requirements of Rule 56(c) must be met. *Nowlin v. Resolution Trust Corp.*, 33 F.3d 498, 504 (5th Cir. 1994); *Estate of Smith v. Tarrant County Hosp. Dist.*, 691 F.2d 207, 208 (5th Cir. 1982). In the instant case, the district court failed to give ten days notice of its *sua sponte* motion to grant summary judgment on statute of limitations grounds as required by Rule 56(c). *Nowlin*, 33 F.3d at 504; *see* Fed. R. Civ. P. 56(c).

While this Court strictly enforces the notice requirement, we have held that the harmless error doctrine applies to a failure to provide notice under Rule 56(c). *Nowlin*, 33 F.3d at 504 (citation omitted). Thus, if it is established that the additional evidence which the appellants would have provided given proper notice presents no genuine issue of material fact, then the failure to give notice was harmless error. *See id.* The *Lacy* plaintiffs' pleaded in their complaint that they first had knowledge of the facts complained of in the Summer of 1986 and that they exercised due diligence to determine the facts. The *Lacy* suit was filed on

[17] Appellants do not contest the dismissal of their Texas securities law claims.

June 11, 1990. Summer ends in late September. We cannot say that the *Lacy* record before us adequately establishes the *Nowlin* harmless error exception regarding those claims which have four-year statutes of limitations coupled with the discovery rule. We reverse the district court's order dismissing the *Lacy* plaintiffs' RICO, federal securities law, and Texas common law fraud claims.

The *Lacy* appellants' remaining state law claims, all of which have two-year statutes of limitations, present a more complicated issue. The appellants argue on appeal that the statute of limitations was tolled by the filing of the motion for class certification in *Dodson*. Under Texas law, the filing of a motion for class certification tolls the statute of limitations. *National Ass'n of Government Employees v. City Public Serv. Bd. of San Antonio, Texas*, 40 F.3d 698, 715 n.25 (5th Cir. 1994)(Texas law same as federal); *see Grant v. Austin Bridge Constr. Co.*, 725 S.W.2d 366, 370 (Tex. App.--Houston [14th] 1987, no writ). Once a class is decertified or the motion for certification is denied, the statute begins running again. *See Grant*, 725 S.W.2d at 370; *Calderon v. Presidio Valley Farmers Ass'n*, 863 F.2d 384, 390 (5th Cir.)(federal law), *cert. denied*, 110 S.Ct. 79 (1989). Accordingly, the longest possible time that the statute of limitations was tolled on the *Lacy* plaintiffs' claims was from May 11, 1988 (the time the *Dodson* suit was filed on behalf of a putative class) until October 19, 1989 (the time the motion for class certification was denied).

As noted above, the *Lacy* plaintiffs claim to have discovered

facts sufficient to trigger the statute of limitations running in the Summer of 1986, and Summer ends in late September. For purposes of this analysis, we use October 1, 1986 as the date on which the statutes of limitations commenced to run on the *Lacy* appellants' state claims other than common law fraud. The statutes ran one year, seven months, and ten days, until they were tolled by the *Dodson* suit on May 11, 1988. The statutes began running again on October 19, 1989. The claims expired, at the latest, four months and twenty-one days later on March 12, 1990——almost three months before the *Lacy* suit was filed. For this reason, we hold that the district court's error in failing to notify the *Lacy* plaintiffs of its intent to raise the statute of limitations as to their state law claims of breach of fiduciary duty, DTPA, and negligence,[18] to all of which the two year statute applies, was harmless error. We affirm the dismissal of the *Lacy* plaintiffs' state law claims, other than that for Texas common law fraud.

IV. PKF's Proffered Alternative Grounds for Dismissal

PKF argues that this Court should affirm the district court's orders of dismissal on several alternative grounds: that plaintiffs in *Lacy* and *Dodson* failed to allege fraud with particularity and that the complaints failed to state a claim on which relief could be granted under various theories not addressed

[18] We further note that, the class certification argument is inapplicable to the appellants' negligence cause of action. The last date on which the *Lacy* complaint alleges any wrongful act was committed is in 1984. Thus, the negligence cause of action accrued prior to January 1, 1985, and, because the discovery rule does not apply to the negligence-based claim, it expired prior to January 1, 1987. *See Kansa Reinsurance Co., Ltd.*, 20 F.3d at 1363.

by the district court. In a similar case in which we reversed a dismissal on limitations grounds, we twice declined to affirm on the alternative basis that the defendants were entitled to summary judgment on the merits. *See Corwin*, 843 F.2d at 199 n.1; *Corwin v. Marney, Orton Investments*, 788 F.2d 1063, 1069 n.5 (5th Cir. 1986). The contention that the plaintiffs' securities claims failed as a matter of law had been raised below, but this Court held that the issue should be considered by the district court in the first instance. *Corwin*, 843 F.2d at 199 n.1; *Corwin*, 788 F.2d at 1069 n.5. Remand to the district court to consider issues it did not consider previously is especially appropriate when, even if the court finds plaintiffs' claims to be faulty, it is within the district court's discretion to allow the plaintiffs to amend their pleadings. *See* Fed. R. Civ. P. 15(a); *Griggs v. Hinds Junior College*, 563 F.2d 179, 180 (5th Cir. 1977)("Granting leave to amend is especially appropriate, in cases such as this, when the trial court has dismissed the complaint for failure to state a claim."); *cf. Bueno v. City of Donna*, 714 F.2d 484, 493-94 (5th Cir. 1983)("It is well-established that there can be no appellate review of allegedly excessive or inadequate damages if the trial court was not given the opportunity to exercise its discretion on a motion for new trial."). Accordingly, we decline PKF's invitation to affirm on alternative grounds of failure to state a claim.

Conclusion

We summarize our disposition as follows:

In *Dodson*: we dismiss the appeal of all appellants except

Dodson himself; we affirm the district court's denial of class certification; we affirm the limitations dismissal of all of Dodson's claims against BOKC and of Dodson's state law claims for breach of fiduciary duty, DPTA and negligence against Grant and PKF; and, we reverse the dismissal of Dodson's RICO, federal securities fraud and Texas common law fraud claims against Grant and PKF and remand such claims for further proceedings not inconsistent herewith.

In *Lacy*: we affirm the district court's dismissal of the *Lacy* plaintiffs' state law claims for breach of fiduciary duty, DPTA and negligence; and we reverse the dismissal of the *Lacy* plaintiffs' RICO, federal securities fraud and Texas common law fraud claims and remand such claims for further proceedings not inconsistent herewith.

DODSON: DISMISSED in part; AFFIRMED in part; REVERSED and REMANDED in part.

LACY: AFFIRMED in part; REVERSED and REMANDED in part.