ORAL ARGUMENT – 2/6/02
00-1162
SCHEIN ET AL. V. STROMBOE

HATCHELL: This is a class action certification case, and there are two broad issues before the court: 1) does the court have jurisdiction of the case? 2) is the TC's certification order void because common issues do not predominate?

BAKER: Did you say, is it void?

HATCHELL: It was an abuse of discretion.

BAKER: There is a difference.

HATCHELL: Big difference.

BAKER: The response to your motion for rehearing by the plaintiffs says on page 2, quoting your original petition, "this case presents four largely undecided questions support and to class action litigation". And their statement is there can't be any conflicts if these questions are undecided to date. What's your response to that?

HATCHELL: I think the interpretation of that, by the way, which was changed in the brief on the merits, and therefore it's not a judicial admission...

BAKER: But it's kind of hanging out there for you to talk about.

HATCHELL: I think clearly what that means is, and we said largely undecided, I think what we mean is largely undecided in the way it does not conflict with decisions of this court or other courts. It's not intended to say that there are no conflicts at all. And we have briefed at least 7 conflicts extensively within the...

BAKER: Well that gets me to my next thing. You've given us an oral argument exhibit with three double boxes. Do I understand by this exhibit that these are the three issues that you assert where the conflicts are, and we don't have to look any further?

HATCHELL: I do not contend that. But I am well aware that there has been within the court's debates as to exactly how the court's conflict jurisdiction should be applied. We think that these three satisfy any construction of the court's conflict jurisdiction in the sense that they appear on the face of the opinion...

BAKER: Well that's what I get for your motion for rehearing that we are only looking

at facial conflicts or asserted facial conflicts. We don't have to be anymore subtle than that to answer those three questions. Is that correct?

HATCHELL: Correct. We are not abandoning the other. But we do believe upon analysis that these three conflicts should satisfy all the court's various interpretations and the emphases they've given to the court's conflict jurisdiction.

We think particularly that the statement of the standard of review is of extreme importance to the jurisprudence of Texas, because what Bernal brought to Texas jurisprudence was the rigorous analysis...

O'NEILL: Well doesn't the CA in this case actually apply a rigorous analysis?

HATCHELL: It did not apply a rigorous analysis at all. As a matter of fact it utilized the standard that this court rejected in...

O'NEILL: This language appears in the case, but I think the CA specifically said that it was conducting a rigorous analysis. And in fact, it appeared to really and truly hit on every single requirement we've talked about for certification.

HATCHELL: With respect, I must disagree with that. I will agree that the court facially states that - actually it says that the TC applied a rigorous analysis...

O'NEILL: If it facially states that, how can there be a facial conflict?

HATCHELL: Because the rigorous analysis that we're talking about to this court is this court's appellate review standard, not the TC's rigorous analysis. We are talking about the analytical structure that the appellate courts used to test whether or not the TC did conduct a rigorous analysis and thereby abused its discretion. And if the court will note every time the CA comes to a critical juncture in this case where a rigorous analysis would require it to have identified the elements of a cause of action, list the common and individual issues and then make a qualitative determination of where the litigation effort was, it retreats to the repudiated standard of presumptions and viewing the evidence most favorably.

Most particularly it concedes...

O'NEILL: Well you would agree that an abuse of discretion standard applies?

HATCHELL: There's no question that an abuse of discretion standard applies, but ...

O'NEILL: How would you apply the abuse of discretion standard in determining whether the TC did a rigorous analysis and the CA review of that? How would you then apply the abuse of discretion standard if you don't indulge some presumption from the TC's rigorous analysis favor?

HATCHELL: I think it is very tempting to confuse the question of abuse of discretion with the tools by which you determine that there is an abuse of discretion. Just last week I think the 5th circuit has probably answered your question about as good as can be answered. It said, "We review the decision of a DC to certify a class for abuse of discretion; however, this discretion must be exercised with in the framework of Rule 23. A DC must conduct a rigorous analysis of the rule 23 prerequisites before certifying class. Whether the DC applied the correct legal standard in reaching its decision on class certification is a legal question we review de novo."

BAKER: Under Texas law doesn't that mean that, and I'm quoting from Walker v. Packer, that in the second element where it's a question of the legal whether the TC properly applied the law to the facts? We say we give less deference to a TC's application of the law to the facts because there is an abuse of discretion right away if the TC doesn't properly apply that. And so we are applying a rule. We're not just looking at it for our own purposes. And there are more parameters than the 5th circuit indicated in that second analysis I think.

HATCHELL: I think that again in applying the rigorous analysis standard, or at least as the appellate court walks in the footsteps of the TC, the rigorous analysis standard has essentially narrowed the field within which a TC has the discretion to operate. And particularly it eliminates matters of presumptions and viewing evidence in the light most favorable.

BAKER: But didn't we say that in the context of what's been stated over a number of years by CA, well certify now and worry later. And that therefore we'll just let this thing go back as it is whether it was really alright or not. And that Bernal was saying that's not the way CA's and this court ought to look at what a TC's done and therefore it's a rigorous analysis that a TC is supposed to make. And isn't the appellate court's function to determine whether that actually happened in the TC?

HATCHELL: Well that may be one of the...

BAKER: Did I understand you to say that you think that the rigorous analysis is also part of the appellate review?

HATCHELL: No. I am saying that when this court walks in the shoes of the TC to determine whether or not the rigorous analysis properly encompassed all of the Rule 42 requirements that that's an issue that is done de novo. And this is quite consistent with the origins of the term "rigorous analysis", the other case that's cited by the court the racial discrimination case. Where there was an across the board presumption that an allegation of racial discrimination made the particular plaintiff an adequate representative. And this is where the rigorous analysis standard arises from. It is a rejection of that particular appellate review standard. And in this particular case, this misapplication of the standard of review and the application of a standard of review rejected by this court is quite material to the outcome. Because the court concedes that there are individual damage questions...

O'NEILL: It's my understanding that the plaintiffs have said that they are not seeking consequential damages. Is that correct?

HATCHELL: That is not correct at all. They have attempted when they have determined on appeal that they cannot defend this case, because of the broader ray of damages that they have alleged, to do what they are calling "judicial admissions."

O'NEILL: If they stand up here today and say we are not seeking consequential damages, does that change your analysis?

HATCHELL: It might change my analysis to a limited extent. I'm not sure as to perhaps some of the causes of action, but it does not eliminate the problems of this class.

O'NEILL: But that's the primary reason you're claiming separate trials are going to predominate. Is that right?

HATCHELL: I think not. Well it is one of the reasons.

O'NEILL: What's your primary reason? I thought that was the primary reason.

HATCHELL: Well there are actually three primary reasons: 1) the influence of reliance; 2) the nature of the damages...

O'NEILL: Isn't there an admission by someone with the company that says they all relied on the same written statements?

HATCHELL: No. There is no such admission. There was a statement by someone from the company that they wished that people would rely upon their ads, but the ads alone are not the source of the misrepresentations. Reliance covers 5 causes of action in this case, and the...

O'NEILL: What if the advertisements were the sole source of the misrepresentation, would that change your analysis?

HATCHELL: Then you would have to move to the determination of 1) whether or not the particular dentist who is claiming reliance upon that ad actually did rely on that ad; 2) was the ad false? 3) was it reasonable that they relied upon that? 4) what were the damages? But the fact of the matter is that this record shows very clearly that at least among the class representatives some never saw an ad. Some relied upon testimonials from colleagues. Some talked to salesmen over the phone. Some attended trade shows.

BAKER: Do you think there is a difference between an oral misrepresentation and a written misrepresentation and something said at a trade show?

HATCHELL: If they are different yes.

BAKER: But I mean if they are all the same thing. And the one that comes to mind is the one that there is a finding of fact on and, that is, did they state that technical assistance etc would be furnished free and they charged for them, which the plaintiffs say was a misrepresentation.

HATCHELL: I would agree if they are absolutely identical. The problem here is they have failed to prove...

ENOCH: Let's suppose they are not absolutely identical. Let's assume for purposes of the rigorous analysis that they are not absolutely identical. But the evidence tends to show they are similar. Does the CA err in saying in an abuse of discretion standard that the TC didn't abuse its discretion in determining that that is eligible to be tried in the class action cases?

HATCHELL: Yes. And I think it depends here on the degree of dissimilarity because that touches upon the reasonableness of reliance. And it also does not touch upon the question of where you have conversations, admitted conversations, in which you do not know what the representations are, such as at trade shows and in telephone calls.

ENOCH: But if we're arguing about the predominance on the class action and that's what the evidence that a plaintiff proffers, these are similar, can argument of the defendant "well no they are not because we really don't know what the representations are" produce an abuse of discretion on the part of the trial judge who permits the class to go forward?

HATCHELL: Yes. I think it is the burden of the plaintiffs initially to lift themselves above those cases that when the presence of individual reliance is almost always fatal to class certification...

ENOCH: But the argument is that they are all relying on a similar representations and that's the proof of the plaintiff. Can the defendant just simply say well we don't know what all those representations are, then justify a conclusion of an abuse of discretion on the part of the trial judge who finds from the evidence?

HATCHELL: I think you can do that. And also let me point out when we're talking about the representations, just about free technical support, we're talking about a small slice of this particular certification order. Because you have got a whole set of Windows class folks in which you don't know what the representations are. They are just claiming a defective product.

O'NEILL: I want to see what points of agreement we can have. Let's look at that slice. Let's say there was a class that was made up of only those who relied upon written representations, and who were not seeking consequential damages.

HATCHELL: And they are seeking what type of damages?

O'NEILL: Their money back.

HATCHELL: If you could demonstrate that 1) there was sufficient certainty that a good number of the class, an acceptable number of the class actually relied upon those; 2) that reliance was reasonable; and 3) that reliance caused damages. I would agree that there would be the possibility to certify a class on that. But again we're getting back into where we ended in Intratex v. Beeson, and that is sitting in an appellate court attempting to find somewhere within a class certification order that has eight causes of action...

O'NEILL: No. I understand. You seem to have drawn such a broad line here that there could never be a DTPA class action period by definition as you've drawn it. If reliance is an element of any cause of action ipso facto it cannot be a class action.

HATCHELL: That is where pretty much the 5th circuit is. But I will...

BAKER: Well do we have to follow them?

HATCHELL: I think that it's influential. Of course you don't have to follow them. But I do think that 5th circuit decisions have been influential upon this court. I want to be very candid to concede to you. I can construct a situation in which a class could be certified if you had for example a class of all folks who are in this room. And let's say someone is selling a weight loss program. An absolute falsehood is stated. And everyone in the room ponies up money and buys that program, and all they want is their money back. That is a possibility. But that is the exception rather than the rule.

O'NEILL: A weight loss program?

HATCHELL: It's an exception that you would be able to find the class where individual reliance did not defeat the predominance.

BAKER: The Checker Bag suit is the one that you rely on for the conflict vis a vis reliance/no reliance?

HATCHELL: Correct.

BAKER: So assuming that Checker Bag is correct and it is required and this CA said it is not required, so you've got a conflict of the legal theory, how do you submit it?

HATCHELL: Yes.

BAKER: Does that necessarily mean there's a conflict vis a vis the TC's certification order? What's the connection there?

HATCHELL: I don't know that there is any more connection there than there was between the holding that the intermediate court opinion in Bernal conflicted with Moriel, which was ultimately not even the basis for this court's reversal. So what we're looking here right now is not the integrity of the certification order, but we're looking at this court's jurisdiction.

BAKER: I understand that and that's why I asked the question. How is the fact that they made statements contrary to what a factor of a DTPA claim is, how does it implicate that there's a conflict when Checker Bag is a totally different case, not a class action and Schein is?

HATCHELL: Because the absence of reliance is the key ingredient by which the CA in this case avoided the analysis of most of the causes of action, and most of the damages in this case. What it was faced with was five causes of action that had reliance as an element and a body of authority that says individual reliance is almost always fatal to class certification. So how does it avoid that? It avoids that by eliminating reliance as an element...

BAKER: But there's a finding of fact as I read it that says the misrepresentation, which you might be able to imply reliance is the free help when it wasn't. And it seems to me that the TC said that is a commonality of claims.

HATCHELL: But the TC also found that reliance was a "common question" as to both classes.

BAKER: If that's the question that they said it was free and it wasn't, and everybody bought it or you could infer from that that they bought it for that reason, isn't that reliance and can't you submit that that way?

HATCHELL: You can do that. Yes.

BAKER: Did they advertise that they would furnish these things free and they didn't? Answer yes or no. And the second question is: if you said yes, do you find that when they bought it they relied on that? And I think a jury might be able. But that's a merit's question, not a class question isn't it?

HATCHELL: Well it's a class question to this extent. Because the DOS class has 10 versions of the software. In my review of the record, I can only find one version as to which quote "free, unlimited technical support" was advertised. That's version 7. It is very clear that by versions 9 and 10, which are within the class, there are statements that you must either sign up for technical support, or, otherwise, technical support is going to be charged. So here again is I think a demonstration of how the element as applied to the particular facts of this case create such a diversity that you have to look at it version by version, purchase by purchase, and office by office.

BAKER: That then gets me to the trial plan issue. Is it your view that there should be a separate statement, order or whatever it might be where the TC delineates exactly how this whole

thing is going to be tried, or can it be within the framework of the certification order itself as a separate section, or can it be inferred from findings of fact or conclusions of law that the TC makes?

HATCHELL: I don't think I have any problems with it being in the certification order itself. The inference however troubles me because what I see the trial plan doing is setting a framework for which the appellate courts review on a de novo basis.

BAKER: Well they argue that you can see a framework based on the findings of fact and conclusions of law. It had to do with proofs a claim can be filed. We can look at those kind of things and so forth.

HATCHELL: That's a far cry from what a trial plan is under Bernal. A trial plan is an understanding of all of the claims, an understanding of all of the elements of the claims, a listing of the common and individual issues involved in those claims, and then a qualitative analysis by the TC of where the litigation effort in resolving the individual verses the common claims fall. That is not done in this case.

O'NEILL: Well defendants didn't request it either in all fairness.

HATCHELL: In all fairness, I think we did. You must understand, and I'm sure you do, that at the time we were litigating this case the concept of a "trial plan by name" did not exist because Bernal had not come out. But what did we do? We contested predominance throughout. We introduced into evidence all the laws on the unsolicited good statutes of all 50 states. We introduced in evidence all of the DTPA statutes of all 50 states. We implored the TC at every opportunity that we could to identify individual questions. We requested findings...

O'NEILL: To make the predominance assessment, you didn't ask that a trial plan be drawn up to see how the cases would be tried?

HATCHELL: Not by that name. No. But we did request and there is in the record a request by us for findings of fact and conclusions of law. And the last 4 to 5 paragraphs of that request, I do request the court to make a listing of individual questions. Which would at least have gone a long way in accomplishing what a trial plan is supposed to do, because it is the influence of the individual questions applying in a D4 class that is important. So I say yes we did.

O'NEILL: It seems to me though really what you're challenging is the TC's assessment of predominance and commonality rather than their technical failure to draw up a trial plan?

HATCHELL: On the merits that is true. But it's the absence of a trial plan that we say is a conflict to give this court jurisdiction.

O'NEILL: And that's what I have a hard time with. If it's never requested and never dealt with by the TC or discussed by the CA how it can be a conflict?

HATCHELL: I would call your attention to a case that hasn't received much play in conflict jurisdiction. It's City of Houston v. Houston ISD, 443 S.W.2d 489. And it's probably the shortest conflicts opinion on record in which this court found that a conflict existed with one of its prior opinions in the words "reversed and rendered." That was a temporary injunction appeal in which the CA found that the temporary injunction had to be dissolved, and it rendered judgment on the entire case. This court found a conflict with its prior decisions holding that the proper remedy is not to reverse and render, but to simply dissolve the temporary injunction. So I say that under a case such as that, and other cases that this court has written such as the Miller case and Bland case, that it is the application of rules of law that can additionally create a conflict. And here what we have is we have a CA's applying a predominance analysis without a trial plan, which I would view as a categorical imperative of Bernal. And I think that is a conflict clearly under the City of Houston case, clearly under the Miller case, clearly under the Bland case.

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RESPONDENT

DUNHAM: If I could start off with the petitioner's oral argument example and go through these 3 boxes. The first box on the left is a quote from Bernal that omits some critical language from the sentence they are quoting from. And what they leave out are the words "and erred in favor of certification." That is crucial.

The criticism of this court of the certify now, worry later approach is also reflected in a CA erring in favor of certification. This CA did not err in favor of certification. In fact the CA applied the abuse of discretion standard which this court in Bernal expressly retained. The very holding in Bernal contains the words "abuse of discretion." And in viewing the evidence in the light most favorable to the evidence and indulging presumptions in favor of the TC's order, they did nothing more than set forth classic abuse of discretion language that you see in all kinds of CA cases where the review is under an abuse of discretion standard.

If you're reviewing an injunction, a divorce order, a certification order, you see this language time and again. It's nothing more than...

HECHT: You agree, I guess, that it's not just that the language appears somewhere in the opinion, but that they actually do that? It's not just enough to say this is what we're going to do, then you have to actually do that. Do you agree with the petitioner about that?

DUNHAM: That the CA has to be true to its words?

HECHT: Yes.

DUNHAM: Yes.

HECHT: If it says we're going to apply an abuse of discretion standard and then they

don't, that would be a conflict if they were required to do so. Just saying so does not get you out of a conflict _____?

DUNHAM: I would agree with that. It takes more than lip service. And in this opinion there is every indication they went through every claim(?), as one of the questions indicated all claims _____ here. They are analyzed.

Now under the abuse of discretion standard, I think this is clear from Bernal and it's clear from the US SC Falcolm(?) case that Bernal quotes. The rigorous analysis requirement is on the TC. The appellate court reviews under abuse of discretion whether or not this rigorous analysis by the TC takes place. This CA, I think, went further than it had to. They looked at the trial certification order through a prism of rigorous analysis. And in doing so they reviewed under the abuse of discretion standard whether a rigorous analysis had taken place. And concluded well justified that it had. This TC heard 5 days of evidence. It received testimony from more than 20 witnesses. There were more than 180 exhibits. There is testimony from the person who created the software, the person who serviced the software, the person who reviewed all the marketing on the software. There were documents out of their files which indicated that the software sold to the class I represent had been released too soon without proper testing. All this came in to the TC's consideration, and she received that evidence and only after we demonstrated that these claims should be certified, then she certified the class.

The second box deals with the CA's footnote comment on DTPA and reliance. There's another footnote I would ask you to look at. It's a footnote in their briefing and it contains an admission which contradicts this being a basis for jurisdiction. In their petition for review footnote 4, the petitioners characterizes the DTPA reliance footnote comment by the CA as a mistake in reasoning. Now as this court has held in the Coltress(?) case as well as in Ford v. Sheldon, the conflict must be more than a conflict among the reasoning in two different courts. It must be in the actual holding. Yet as they admit, this is nothing more than reason. And by looking at the CA's opinion, that's clear what it is. The court is analyzing whether or not certification can be affirmed if reliance is going to be a significant issue, or if it is not. That is simply reasoning and it can't suffice for a conflict.

Now last, the last box in the Schein CA's opinion. The court notes from the TC's findings her discussion of how trial is likely to proceed. At the very end of her findings of fact, the TC sets forth an area where she foresees the possibility of individual issues. The area of damages. And when she discusses how damage issues may be determined, without a doubt she is talking about how trial is likely to proceed. The trial plan is not used in Bernal. Those words do not appear. What does appear in Bernal is the statement that the TC should indicate how trial is likely to proceed. This TC did so in its order. They may not like what she says. May not like the format in which she says it. But when they make a point of error that there is an absence of a discussion of how trial is likely to proceed that's simply incorrect. It's in there. And at no time did they ever express the complaint they've expressed to the TC about how there is error somehow in the absence of a trial plan or regarding this discussion how trial will proceed, how that might be somehow

insufficient.

And then when they filed their brief before the CA they did not list this trial plan argument in any of their issues for review.

O'NEILL: In the CA's opinion they say that the TC noted in its findings and conclusions that the damages can be efficiently determined through proof of claim forms individual damage hearing or other manageable means. If this is a large class how do you manage the individual damage hearings without violating our jurisprudence that one jury has to hear the whole thing?

DUNHAM: Well I don't think this statement is in conflict with the fact that only one jury would be hearing it. I think the jury would stay empaneled and would hear all issues including any individual damage hearings that would be necessary. The first thing the TC says as it addresses how damage issues will be determined is that it may be possible to determine damages from the defendant's own records. And this occurs after a 5 day hearing when there was much discussion about the defendant's records. At the TC they told the TC they could look at their own records and could tell you who was using the software in a network environment and who's using it for some other environment. If they can do that they can certainly tell you how much each person paid.

ENOCH: As I understand your position it is that this really is more in the essence of a contract breach. They bought a product that was represented to come with certain support, and it didn't, and so the CA seemed to look at it that way. But how do you respond to the question that was asked of Mr. Hatchell, but if your cause of action is really predicated on representation being the reason you bought it, wouldn't every member of the class necessarily have to be available to be cross examined by the defense counsel as to whether this particular member relied on the representation in buying the product? How do you respond to that?

DUNHAM: In two ways. When the misrepresentations are uniform, and I'm going to address it as to the Window's class, they received uniformly defective software. We know that from the testimony of their employee who developed the software. Every piece of software that went to the people in the Windows class was 100% the same. Software is one of the rare products that would be that it is simply code. Written into that code is a data base. The data base was deficient. We know that from the testimony of their employee who developed the software.

ENOCH: Where my concern is. It seems to me for a product's liability claim, a defect in the product, it seems to me that is probably exactly what a class action ought to be for. But Texas permits this kind of DTPA kind of action that exist out there. What historically would have been sort of a product's claim or a breach of contract now puts it in the level of being some sort of misrepresentation. Is it possible that a class action is not available for DTPA claims for the very sense that the thing that makes it different than simply a claim for a defective product is that representation, the notion that they made a representation that the person who bought it saw or relied on to their detriment, which then makes the critical issue the representation and reliance as opposed to the defect in the product?

DUNHAM: Let me link the defect to the uniform misrepresentation. Once again I am going to Mr. Well's testimony since he's the man who made the software. His testimony is without a data base that can serve as an engine to drive this software, it can't be practiced management software. We're talking about products that don't conform to their very descriptions. The description conveys a representation. What they did in essence was sell a toaster that couldn't toast, an eraser that couldn't erase, or in the words of Mr. Wells, a car without an engine. You can't sell a car as a car without an engine because the engine was that fundamental to the car. So that's one way. When the product doesn't conform to its very description, everybody is going to be in the same place as a class representative. They are going to be relying on this product to be what it is called. Without a data base to drive this software it cannot manage any practices. It's the data base that allows the dentist to do the calendaring, to organize the patient history notes according to patients...

JEFFERSON: And the damages all the same as well?

DUNHAM: The damages will vary depending on what they paid for. There will be mathematical determinations as to how much...

There was testimony from the expert Dr. Bashear(?) that this software never should have been released on the market, because of all the bugs and defects. In other words, it had no market value.

HECHT: No consequential damages?

DUNHAM: No consequential damages. That's correct.

HECHT: Can you give up consequential damages on behalf of a mandatory class? I take it they would be barred from - each individual member would be barred from ever claiming consequential damages.

DUNHAM: To answer your question, you can. I think as part of the appellate process there is unenviably going to be some narrowing of issues.

HECHT: But I mean they will be barred from making those claims. The whole class is giving up the claim forever.

DUNHAM: That's correct. And consequential damages are not compatible with class actions; therefore, we've been very clear in saying we're not pursuing that.

PHILLIPS: Why has the class met the superior in this type of case?

DUNHAM: It is superior for this reason. We're talking about 5,000 dentist in this Windows class. They paid no more than $10,000; and more like $5-8,000 for each software product that was sold to them. And what professional is going to spend $5,000 of their time trying to recover

a $5,000 investment in defect software. In Bernal this court reaffirmed the value of class actions. When you're talking about numerous class members who have paid small amounts, and they really have no leverage for relief unless the claims are abrogated.

It's also superior because we're talking about dentist who received exactly the same product. This is one of those rare instances where if you were in San Antonio, if you're in Amarillo you received 100% of the same product. Defective for the same reason. Such that a judgment as to this class representative would be binding on everybody in the class.

ENOCH: Again, it seems to me you've described product defect in warranty. Mr. Hatchell keeps hammering on the reliance element of the misrepresentation of claims. When you've got a claim for a warranty, where you've got a claim for a product defect that's one factor. But when you kick in the misrepresentation as being the basis of the claim, do you necessarily kick yourself out of the class action because as the question was if you're talking about reliance then necessarily I talked to everybody in the class on whether they relied on it.

DUNHAM: I don't believe you do. And there is a line of cases that focus on uniform misrepresentations: the Dresser Industries Case, the Texas Commerce v. Wood case, Grabel Movers, Adams v. Reagan, and where the fraud claims arrive out of uniform misrepresentations. And I've described one to you where the product doesn't even conform to its description. The second way we prove the uniform misrepresentations is through the national advertisements. The testimony at the hearing from Mr. Azerelli(?) their director of sales, that the company wants all the customers to rely on these advertisements, expects everybody to rely on these advertisements. And at one time he acknowledges during his testimony that the ads we were looking at is that there is nationwide reliance on those ads. But the evidence goes even further. Mr. McGee, the technician who serviced this software and over the years had to deal with all the Windows customers who had bought it testified that during his conversations with these Windows customers everyone expressed the common complaint that the software had not lived up to the representations in the advertisements. You have a common core of documents here, the advertisements proven by their employees. And when you have that you don't need to talk to every individual in the class to be satisfied about reliance. When you have that rare situation, reliance as to the class representative is essentially reliance as to all. And the CA got it right on that point when they said not every fraud claim will be appropriate for class action treatment. But this is not every fraud claim. Not when you have the employee who developed the product come forward and say, he knew it was defective, never should have been released, asked the company not to release it and they released it anyway. The head technician agrees with that. Their representative in North Carolina, Ms. Hathaway...

OWEN: That proves it's defective, but that doesn't prove that a representation was communicated to the purchaser on which he or she relied.

DUNHAM: With respect, I would disagree if the representation goes to the very description of the product, which I think it does here. If you look at Mr. Wells' testimony, he talks about the uniform defect as the thing which makes this software what it is described to do. And

secondly, when you have documents, common 4 documents that their representatives say they want, expect everybody to rely upon, and the evidence goes further to put in that actually there was class wide reliance on these documents. When that evidence comes in, I don't know how a court who is charged with a rigorous analysis under Bernal can ignore that evidence. To ignore it would be doing the opposite of a rigorous analysis. And this TC included those claims.

* * *

LONGLEY: I'm here on behalf of the 15,000 dentists in the DOS class, and the DOS class did not involve defective software. The DOS class was solely a representation, identical representation made concerning the noncharging for free technical support. And the invoice fraud(?) that we claim with regard to the unsolicited goods act, where identical invoices, plaintiffs ex. 131-135, which represented in each invoice that money was owed for software. These invoices it's undisputed in the record were sent unsolicited and, therefore, our allegations are that that money should be disgorged with regard to the fact that the people who paid that that we have shown without any controverting evidence that they relied upon those invoices by their payment.

O'NEILL: Is your class seeking consequential damages?

LONGLEY: No, we're not.

O'NEILL: This is an opt out class right?

LONGLEY: It's an opt class and anyone who has consequential damages has the opportunity to opt out.

O'NEILL: But then doesn't that have to be in the class definition, the disclaimer of consequential damages? How can anyone know when they get class notice that if they remain in the class they are giving up consequences damages?

LONGLEY: Well it's stated in the class notice. That will be fully disclosed in the class notice that by staying in the class certain things happen or may not happen, and certain things may happen, or you may have ____ rights if you opt out.

O'NEILL: Mr. Hatchell stated that there may be some doubt about whether you are or are not seeking consequential damages.

LONGLEY: With regard to the DOS class, we're not seeking consequential damages, and to my knowledge never have. We are seeking disgorgement of the monies that the people paid and reliance upon the invoice fraud(?).

O'NEILL: Is the proposed class definition in the record?

LONGLEY: It is in the record. You will find it on the very front page of the findings of fact and conclusions of law.

O'NEILL: And it does disclaim consequential damages?

LONGLEY: It does not disclaim consequential damages. The DOS class is everyone who is in the DOS class versions 1 through and including 10.

O'NEILL: Again, that gets me back to my original question. How is somebody going to know whether to opt in or out if they don't know that by staying in the class they are not going to be seeking consequential damages?

LONGLEY: That will be handled through the class notice that will go to those people in the DOS class speaking only for it. The people who have the DOS class versions 1 through 10 will receive a class notice, which the disclosures will be made in that class notice with regard to what happens if they stay in, what happens if they choose to opt out. And consequential damages will be addressed in that.

I would just like to reaffirm the fact that we have identical representations, identical reliance. It's all identical with regard to the DOS class and that is the Greater Moving case basically which this court woj recently. And with regard to the conflicts, we again rely upon the recent case of Collins v. The Isom Newsom. There is not conflict with regard to the DOS class in the Schein case with any other case under the definitions adopted by this court.

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REBUTTAL

HATCHELL: There are three very serious fundamental problems with the argument by Mr. Dunham. His entire argument is premised upon the fact that there was common misrepresentation as to the Windows class, that there is one measure of damages, and that there is a single simple defect. All of those are false. But the thing that's most distressing to me today is the representation that this certification order does not certify actual, special and consequential damages. Both pleadings by both parties use those terms. And in Bernal the court says, first of all in certifying a class the court must be aware of what the pleadings _____.

In the court's findings the court certifies whether or not members of both classes "suffered damages." In the DOS class one of the dentist who is purporting to be a class representative claims "coercion in being made to buy technical support", and claims mental anguish damages in the pleadings. And that is the problem. What you have heard today are two folks who have come to the notion that they cannot defend the class they got. And we're back right where we were in Intratex v. Beeson. When the plaintiffs could not sustain the class definition on what they got, so they wanted a Dow(?) waiver _____. In this particular case they now want to reduce 8 claims, 5 of which include reliance, only one of which includes a known representation. The

Windows class doesn't even have an identifiable representation that we can find in any ad. And the notion that there is a single defect in the software is like certifying a class of Ford automobiles that have defects everywhere from bad wiper blades to exploding gas tanks.

I guess the notion of the single defect raises the age old question - if a tree falls in the woods and there is nobody to hear it, is there sound? Their testimony is that all software has bugs. And if I use it in my particular environment and it doesn't cause a problem, is it defective? And in both classes we have people who are using this software today. But the problem is, and the problem that they face is, they claim these consequential damages, which include both mental anguish and lost profit. But the effects of this so called "common defect" range all the way from "oh it was really hard to boot up" all the way down to "it corrupts data."

Well it was really hard to boot up doesn't sound to me like a $74,000 claim.

O'NEILL: What do you think our judgment should look like here?

DUNHAM: I think your judgment should be that 1) you have a conflict on the basis of any of the conflicts that we have; and 2) that plaintiffs failed to sustain their burden of proving that the common issues predominate.

O'NEILL: And therefore.

DUNHAM: And therefore the class is ordered decertified and remanded to the TC or proceedings not inconsistent with the opinion.

O'NEILL: And at that point they could then seek to certify a more narrow class.

DUNHAM: They could indeed. So I think where we are today on the basis of the arguments that you have heard is essentially a concession that this class cannot stand.

HANKINSON: But this is not really a question of narrowing the class definitions. It would be a question of going back and changing the pleadings with respect to the claims being made and the damages sought. It's not a question of changing - you're not complaining about the class definition?

DUNHAM: No.

HANKINSON: You're claiming that the pleadings that will now form the basis of the class claims against the defendants make the class inappropriate, therefore, the pleadings will need to be amended, and then the court could recertify the same class? I know you're not ready to concede and I'm not asking you for that. But that would be the way it would work.

DUNHAM: I suppose so. Yes. Could do that. I'm not sure whether that would be

consistent with the mandate of the court. I think that what we have here is a class that must fall under the predominant standard on anyone of _____.