ORAL ARGUMENT – 10/15/03
02-0705
COMPAQ V. HAL LAPRAY, ET AL.

BECK: The TC in our case certified a nationwide B2 class and a nationwide B4 class. The Beaumont CA affirmed that order in its entirety.

We urge this court to prevent the respondents of plaintiffs below from circumventing what we believe is the teachings of this court, both in Bernal and in the Shin case.

O'NEILL: Have we ever spoken as to whether predominance and superiority are required by B2?

BECK: You have not. But our position is, and we think the federal cases support it, that because of the very nature of a B2 class, it assumes a cohesive group. It assumes a homogeny of interest. And it assumes a harm which would be suffered by the class as a whole. So basically we say that that's implicit in the whole B2 class.

O'NEILL: So this will be a matter of first impression?

BECK: Yes.

O'NEILL: Then how can we have a conflict for jurisdictional purposes?

BECK: Because we think that if you look at what the court did, it certified two different classes, and you look at what the court...

O'NEILL: Is that finding necessary for your conflict's argument that there were two - that there was certification under B2 and B4?

BECK: We think that if you look at what this court said in Bernal, that the child judge for example must perform a rigorous analysis. We don't think that's limited to B4.

O'NEILL: If we were to find that the certification was solely under B2, and whether predominant superiority as required is a matter of first impression, how would we get conflicts jurisdiction?

BECK: If the court looks at what you said in Bernal and what you said in Shine - for example. What you in Shine you talk about the choice of law, how important that is to a B4 analysis. The same analysis is applicable to B2. Because when you start trying to decide such issues as to whether there's a breach of warranties, whether the warranty is covered...

O'NEILL: Okay. So you would say conflict of law would be over choice of law. I mean the conflict.

BECK: That's one of them. And there are other decisions we've cited in our brief where we say that there is a direct conflict with what the courts of this state are saying. A more recent example is the Houston CA in a case that we sent to the court yesterday. It talked about this whole issue of claims splitting. It talked about this whole issue of res judicata. But which is fundamentally inconsistent with what the Beaumont CA did.

O'NEILL: But it would not be a conflict based on predominance and superiority presuming the predicate to my prior question?

BECK: It would not be a conflict based solely on predominance and superiority if you are of the view that that's not implicit in the B2 analysis to begin with. Our position is it is implicit in that analysis by the very nature of a B2 class. And the cases we've cited from the federal courts say _____.

O'NEILL: As far as the conflict of laws piece if the TC thoroughly analyses the law and found, correctly or incorrectly for conflicts purposes, that the law was fairly uniform throughout the nation. Then there would not be a conflict there as long as it was thoroughly analyzed.

BECK: I disagree. First of all, there's no evidence by what the court actually did. The court said it did an analysis. We don't know what the analysis was. We don't know how the court did an analysis. The court said it did an analysis. It came to the conclusion that there was really no conflict.

If the court looks at the cases that we submitted, the court will see that - let me mention two instances. This whole concept of an unmanifested defect, which is the heart of this lawsuit or one of the issues, you've got cases from other states that say that there is no cause of action for breach of warranty for an unmanifested defect. Well the Beaumont CA dealt with our pointing out the differences in the conflicts in various state laws by simply saying that 1) we didn't point out the conflict, which is incorrect; and then 2) that all the cases we cited were federal cases. That is patently incorrect. We cited case after case after case, true some of the cases were federal cases, but they applied state law. The Bridgestone case, J. Esterbrooks excellent opinion he talked about Indiana law and Tennessee law. So the Beaumont CA was clearly wrong when it said that somehow we didn't point out the conflicts. Notice is another one.

Under the UCC there's a Houston CA case, which we've cited, which specifically talks about how the filing of the lawsuit is not notice under the UCC.

JEFFERSON: Why wouldn't LaPray's letter in 1999 to Compaq on behalf of the uncertified class...

BECK: LaPray's letter was after the lawsuit was filed. In otherwise, he's already filed a lawsuit, and what we have is you have 3 plaintiffs posing as class representatives when they have different situations. We had one plaintiff for example who gave notice outside the 1-year warranty period. That was Mr. Wilson. We had another of the class reps , Owens, sent a notice to Compaq. And when Compaq tried to respond to the notice, I would not respond to the call. You had Mr. LaPray which gave his notice, but after the lawsuit was filed, and then you had another one that downloaded the software patch which we say cured the problem. They dispute that. And that's an issue between us. So you have different class representatives with different situations which we say create fact issues.

On the issue of notice, you've got Alaska for example that says the filing of a lawsuit is notice. You've got other states that say, No. We need to take the notice issue on a case by case basis.

If the TC, we respectfully submit, had done what we believe this court instructed in Bernal and also endorsed in Shine, the court would have done a more thorough analysis. We think the type of analysis the court should have done is the type of analysis that was actually done by the Houston 14th CA in Tracker Marine.

And if the court will look at what the 14th CA did in Tracker Marine, a very recent decision, which a petition has already been filed with this court, the CA did an exhausted analysis of the state laws, and pointed out the conflicts on each of the various issues. That's what the TC we say in our case should have done.

JEFFERSON: We have several amicus briefs that argue that the respondents don't have standing to litigate breach of warranty if there's no harm shown. Are you making that same argument here?

BECK: We did not specifically use the term "standing". What we questioned was the typicality of these plaintiffs. And the position we've taken is if they really haven't suffered any harm, then really there should be no declaratory judgment action and there certainly should be no B2 or B4 class. Because the warranty in this case is a limited warranty. What it does, it says that Compaq will provide a computer free from defects under normal use. So you get to the whole issue of what is normal use.

JEFFERSON: Can we render an opinion based on standing or not by virtue of the arguments you've presented?

BECK: I think you can under the rubric of typicality. I think that if this court concludes for example that they have no defect in the case or assume there's an unmainifested defect, then you get to the issue of, Well, why are we even here? How can these people be typical of a class when there's no injury or no manifested injury at this point?

And the reason that becomes important is let's assume we try this case. And let's assume the jury and wether it's a B2 or B4, we try the case and the jury finds no defect. And then you've got some unnamed class member on down the road who thinks that they've got a cause of action. Well they are bound by this decision. Certainly under the B2 class. Because under our rules and it's slightly different from the federal rules, under the state rules we say that when the notice goes out and you tell the B2 class members that the decision and the judgment of the court is binding. They don't have that same provision in Rule 23. So there's a little bit of difference between our Rule 42 and the federal rule 23.

O'NEILL: Let's take an example. If you had a computer that was shipped nationwide without a floppy disk control. It just got left out of the package. It was supposed to have one but it just didn't get shipped. And it was warranted to have one. Then would that be appropriate for a class action?

BECK: That would be a much closer question. I would probably be similar to the Cauvlin(?) case, which I think both parties have talked about. That was the case where the defendant said, We're going to sell you an all-fiberglass hull and it wasn't an all fiberglass hull. In other words it was an either or situation. We don't have that in our case.

O'NEILL: You think that would be an appropriate B2 class then if it was shipped without the floppy disk controller?

BECK: No. I do not, because there are a lot of other issues involved. Remember a B2 class doesn't use the term "_____" at all.

O'NEILL: Another issue. If all I sought was to have them ship the floppy disk controller to me, that's it, why would that not be an appropriate class?

BECK: You're just simply asking for a declaratory judgment for example that somehow you didn't you get what you asked for?

O'NEILL: That Compaq is to ship out the floppy disk controllers to its customers.

BECK: I would respectfully say that that still is not enough to justify a B2 class, because it doesn't end the dispute between the parties. Suppose you get a declaratory judgment. The dispute is not over.

O'NEILL: But why not? That's all I'm asking for.

BECK: But it's all you're asking for. But it doesn't resolve the fundamental dispute between the parties.

O'NEILL: Why not?

BECK: Because you didn't get what you thought you were supposed to get. What happens after that? Is there a warranty involved? What does the warranty say?

O'NEILL: My example is very simple. We warrant that in this box is a floppy disk controller. And I open it and there's not. And no one else was sent a floppy disk controller. And I say, I want a declaratory judgment that Compaq will send me a floppy disk controller as they promised was in the box. Why is that not a proper class action?

BECK: I would say it's still not a proper class, although there may be one common issue involved.

O'NEILL: Why is it not proper?

BECK: It's not proper because if you are asking for a declaratory judgment that says you didn't get something, let's assume it's undisputed you didn't get it, what's the remedy?

O'NEILL: A declaration and an order that Compaq will ship it.

BECK: Alright. You get the declaration but there's still another step here. Does that mean you get a new computer? Does that mean they somehow take the computer back, install the floppy disk controller?

O'NEILL: Is there any class action you think could ever be appropriate?

BECK: Under B2?

O'NEILL: Yes.

BECK: I can. I think the more difficult question is, can you ever have under rule 42 a B2 class for damages or the functional equivalent of damages?

O'NEILL: I'm taking out damages. I didn't mention damages in my example.

BECK: I think you could if you had for example similar to what's in the federal cases, where you have - say a discrimination situation, where you have discrimination to a cohesive group. You've got a ____ of interest, and the harm is the same.

O'NEILL: Why is my example not that case? They didn't get a part. It's undisputed. They want a declaration that the company has to send me the part they promised to send me. They are the same. I don't want damages.

BECK: I think you need to take it one step further. I don't think it's enough to simply say - because basically what you're saying is, that you didn't get the benefit of your bargain. That's

really what you're saying. So that when you look at a claim for not getting the benefit of the bargain, you've got to ask yourself for example what all the components for that are. Clearly you focused on a major component of the hypothetical that you gave us. But there are other elements of that, the elements being what is your remedy? And it's not just the declaratory judgment.

O'NEILL: I'm just trying to get my hypothetical. I still don't understand why that would not be certifiable as a claim.

BECK: Basically it's because that it doesn't resolve the entire dispute between the parties.

O'NEILL: Why not? If all I'm want is a declaration and an order from the court - send the floppy disk controller - why doesn't that resolve it?

BECK: It doesn't because you still have the issue of what the remedy is. Now if you're saying that you want a declaratory judgment, because you didn't get the benefit of the bargain and somehow - and I hesitate to introduce this. But when you're talking about the benefit of the bargain, you're talking about the whole bargain. You're just not talking about one little component.

O'NEILL: I'm just talking about this box contains 1, 2 and 3. Three is not in the box. I want 3. Give me an order saying you will send me 3.

BECK: I can only say that that doesn't resole the entire controversy we respectfully submit.

SMITH: There's been a lot of back and forth about the state of the record here. Can you tell us whether we have everything we need to review?

BECK: We think you do. We think you have everything in the record that you need at this point.

HECHT: On your adequacy argument what claims do you think may be given up by class members that are not precluded by the express warranty?

BECK: We know that they initially claimed breach of implied warranty. We know they initially claimed and dropped revocation of exceptions. We know they initially sought and dropped request for injunction. We also know, and this is in the record, that they also filed, the same class counsel filed a breach of implied warranty in another courtroom on behalf of these same class members. So the issue is, that if you drop the implied warranty claim in our case and reassert it in another case, either it had value or it didn't have value.

HECHT: I assume you think it doesn't.

BECK: Well they think it does more importantly. Their position is as I understand it that somehow that entitles the warranty period to be extended. And it has other values. So the question is, well if they truly believe it has value, then why was it dropped in this case? And that's why we say and we urge this court to adopt a rule which makes clear that whenever you have claim splitting or claim dropping, that this court adopt a bright line test to assist our TC's in making that determination. Now whether that means a rigorous analysis to make sure that when there is claim dropping that you expressly - the TC must analyze what that claim is, the value of the claim, why it was dropped and so on, because it has res judicata consequences. Particularly in a B2 class where you can't talk about it.

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RESPONDENT

REGER: When Compaq gave this formal product warranty it deliberately elected to take advantage of a safe harbor under §2719 of the Uniform Commercial Code. That safe harbor allows Compaq to protect itself against the unknown risk of open ended damages. But to obtain that safe harbor, Compaq had to agree in writing to repair and replace defective parts.

HECHT: Is it true though that the harbor has different contours and depths in different jurisdictions?

REGER: That safe harbor does not as applied to our case because of another provision that Compaq took advantage of. If all they did was stop at repair or replace the part there might be a question of whether that safe harbor failed of its essential purpose.

Compaq twisted the screw one notch more and gave what the commentators call a "backup remedy" of refund and the law is universal that if the repair and replacement warranty has a backup remedy of refund or use replacement that it cannot fail of its essential purpose.

HECHT: Do you think that there are not individual differences in substantive law that would apply if you applied the law of the jurisdiction in which the class member resided?

REGER: Yes. I believe that's correct. Compaq actually, and the record supports this, included an extra cost in the price of the computer with this warranty. So we see the question as whether B2 can be used for the simple and limited purpose of enforcing those limited rights and remedies that every class member paid for when the warranty is the same, the defect is the same, the remedies are the same...

HECHT: You're not clear in the brief whether you think there should be opt outs.

REGER: That is actually premature, but I will address it. Because the TC did not say they would or wouldn't be opt out. I believe the 5th circuit in the recent Monumental Life opinion addressed that question appropriately. That is something the TC should evaluate after certification.

And that certainly the TC would have the authority to issue opt out.

Texas actually has a super opt out that applies to B2.

HECHT: Well if you've got opt outs it's starting to look a lot like B4 class.

REGER: It is starting to look a lot like a B4 class.

HECHT: What's the difference?

REGER: Well far from running from B4, we asked for certification under B4 and got it, and the only reason we think it wasn't affirmed by the CA is they didn't think they had to do it twice. They affirmed under B2. We don't know whether opt out at this point should or shouldn't be appropriate. That's for the TC to decide.

HECHT: If it is, how then does - what's the difference between the B2 and the B4 class in your case?

REGER: If the class had opt out rights, the difference under Texas law would be different than in the federal. Because the federal law would make the judgment binding on every B2 class member.

HECHT: Their rule C doesn't require notice. Our rule C does require notice. But you might or might not have an opt out under either rule. Right?

REGER: That's right.

HECHT: And if you do then how is that any different from a B4 class?

REGER: Two ways under the Texas rule. The Texas rule says that a B2 judgment is not binding unless the class member actually received the notice. So those who didn't receive notice would not be bound by the Texas rule.

Secondly, B2 unlike the federal rule gives every B2 class member...

HECHT: Would that be the case if you could opt out?

REGER: What it does is it protects B2 class members who never know they need to opt out. The second difference with the Texas rule, it's also 42C, is that after the certification, after the notice the Texas rule allows B2 class members, not B4, to appear and challenge adequacy and challenge class, which allows them a more direct role in challenging adequacy in the class. And with the flexibility given the TC they could even convince the TC to carve out subclasses that are not a part of the class.

So that's the two basic ways that B2 and B4 are different in Texas.

HECHT: You did not take a position at the TC about whether it should be opted out or not?

REGER: No. I had not.

HECHT: Do you have a position yet?

REGER: No.

WAINWRIGHT: How many people are in your class?

REGER: About 1.8 million in the class.

WAINWRIGHT: Does that assume opt out or not?

REGER: That's all of the ___ in the class, whether they opt or not.

WAINWRIGHT: So that assumes for purposes of calculating the number that none opt out?

REGER: That's right.

WAINWRIGHT: There is a provision that excludes judges from being in the class. What does that about?

REGER: That's about making sure that as the class is litigated that you do not end up where you cannot have any judges either binding a case or presiding over the case. For instance when Compaq first filed their three motions in federal court, they filed a motion to disqualify every judge in the Eastern district on the basis that the district clerk owned a Compaq computer. And so that's becoming sort of a standard clause in class certifications to make sure that you end up with a judiciary that can decide the issue.

WAINWRIGHT: Doesn't that create a due process problem for judges who might want to make that call themselves? And the judges already have an independent obligation to consider recusal issues on their own.

REGER: Then you have a writing on the Texas rule to appear and challenge adequacy or the class on that basis. And if an opt out was given you would have the right to opt out.

JEFFERSON: In the ____ title case the US SC noted the existence of at least a substantial possibility that actions seeking money damages are certifiable under the federal rule 23(b)(2) which is now (b)(4). Why should we certify classes under B2 in light of that?

REGER: If there is damages in the class?

JEFFERSON: Yes.

REGER: Which we say there is not. Obviously the SC had not made a decision on that proposition and subsequent to Tycor, all the federal jurisdictions including the 5th circuit as recently as this summer have permitted based on the official comments to the 1966 advisory committee that damages are allowed in B2 class as long as they do not predominate.

JEFFERSON: You say you get the B2 class on the basis of Compaq's breaching an express warranty. And wouldn't any breach of contract action be certifiable under that point of view even if damages were sought in the B2 class?

REGER: No. Although the term "breaches" thrown out maybe by both sides a little loosely, actually what this class seeks to do is to enforce the warranty. And in the bench book we provided the court, I believe it's Tab 5, we show that it's the terms of the warranty and Compaq's position that makes this case different.

Compaq says that and admits and pled to the TC that what we have here is a dispute over the interpretation of the warranty. And we cannot be called to the dock for failing to repair or replace until that dispute is resolved. And at the same time a stand on their exclusion of remedies and their warranty. The terms of their warranty have forced Compaq and have forced the plaintiffs to the point where this case is limited to and there will be a declaration that will allow the class to get what was warranted, which was a computer free of defects of material.

HECHT: Do you think that the requirements of the B4 class of predominance and superiority are essentially incorporated in the B2 ideas of cohesiveness and homogeny/

REGER: I would put it differently because obviously the drafters must have intended some difference. I would say that every B2 class, I know our B2 class that can satisfy the requirements of B2 would also satisfy the requirements of B4.

In fact I believe the 9th court imposed stricter requirements on this class, stricter cohesiveness and it would have if it had reached the B4 criteria.

HECHT: Why is it important to you that it be one or the other?

REGER: It's important to me because I'm up here supporting a B2 class. To the actual class members it makes no difference whether it's certified under B2 or B4. B2 is the more restrictive way to affirm this class than B4. And if the court is looking for a way to affirm this class on the narrowest ground a B2 is the narrowest ground. Because as the 5th circuit pointed out, the limited belief available in the B2 class self contains how far B2 can go.

Because there is not going to be that many class members who are satisfied simply with the type of limited damages and relief available under the B2 class.

HECHT: If this weren't a class could you bring a declaratory judgment action?

REGER: Yes you could.

HECHT: Why wouldn't you be required to bring an action for breach of the warranty, damages and some sort of enforcement, not just a statement yes indeed there is this warranty?

REGER: Because the warranty excludes not only the remedy of damages, but if you read it you will see it excludes all causes of action. And we cite in Tab 5 to the record their pleading before the TC where they say they sued for refund that's barred. They sued for repair and replacement. That's barred. Everything we sued for they said it's barred in the form of a breach of warranty cause of action.

The only thing we have left due to the skillful Compaq ___ who drew this warranty many years ago is this declaratory judgment.

O'NEILL: Can you address our jurisdiction to decide these questions? Specifically there is the rigorous analysis of predominance and superiority which we don't know whether that applies to B2 or not at this point, because it's a matter of first impression. But in terms of conducting a rigorous analysis of conflict of laws, the TC's order says that the plaintiffs have provided a thorough and comprehensive survey, there were experts, there graphs, there were charts. Do we have that in our record?

REGER: Yes you do. The choice of law record is over 3,700 pages long, but it includes many shorter summaries by noted experts, their's and ours, as well as analysis by counsel.

We got back to the fact that Compaq gave a formal product warranty. Under 719, the whole purpose of 719, which is uniform among all the states, is to facilitate commerce. It allows a seller the privilege of packaging his liability and his remedies within the four corners of the warranty, and hoisting himself above the _____ of the different states, so he can conduct business on a nationwide basis and know that in Alaska he warranted the same thing he warranted in Florida.

And when you analyze the cases, when you're talking about enforcing a 2719 warranty, there is complete uniformity.

JEFFERSON: Is there complete uniformity on the question of whether potential harm is actionable when the FTC didn't do any damage whatsoever do all states agree that you can sue and bring class action to that?

REGER: I disagree it didn't cause any damage at all. But there is complete uniformity

that what is warranted will be enforced. It depends on what's in Warranty. For instance in Firestone, the warranty that Firestone gave is not a warranty free from defects. Firestone warranties the tire will remain useable for so many miles. And I think that's brief is in the record that shows that.

Our warranty warrants against defective parts. So all you have to do is prove the defective part. It would be like they warranted to you that your car is going to be red. You wouldn't have to prove personal injury. It depends on what's warranted. So what we have to prove is their expert Prof. Anderson _____. When you have a formal warranty and it's against defects you prove the defect by proving the defect. That's what we have t prove in this case. And that's the manifestation under the formal warranty.

Not a single case, as long as the list as they can make it, and as much paper as they can fill, they have not identified a single case that disqualifies a claim to enforce a formal warranty requiring personal injury or other manifestation of the like.

O'NEILL: If a repair could fix it is that an individualized determination? In other words, I understand y'all are disputing whether the patch is a universal fix. Would that dissolve into individual claims as to whether the patch could fix a particular computer or not, or is that more of a global determination?

REGER: That's another way this court could restrict its decision, because I could perceive of a case where it would be an individual issue. In our case we actually have depositions of their corporate representatives and they were asked what the method of repair and replacement are. This is a _____ chip. If there's a missing part in it, you can't get in with tools and put the part back in. So their own corporate representative said that if pushed to a hardware repair they would repair it by inserting a $5 board. And so we have complete uniformity in the method of repair in this particular instance.

Now if you have cases involving a house maybe there is six ways to fix a roof. But there's not six ways to fix this chip.

WAINWRIGHT: What are the claims that your clients have disclaims. Consequential damages I understand.

REGER: We never sued for consequential damages. We dropped a claim for implied warranty.

WAINWRIGHT: You say you've never sued for consequential damages?

REGER: It was not dropped. It wasn't just _____. It was never a prayer for consequential damages.

WAINWRIGHT: So you believe members of the class can later sue for consequential damages?

REGER: I do. As a matter of fact, beyond the res judicata issue the TC analyzed the reasons for not pursuing consequential damages and found we were justified in not doing so. But under normal rules of res judicata and in the US SC decision in Cooper v. Federal Reserve, we do not believe that there were any consequential damages that they would be barred. We also had the representation of Compaq that there are no pending claims for consequential damages to be cut off. And the case has been pending since 1999.

WAINWRIGHT: If members of the class obtain their relief under the declaratory judgment claim, then later sues for consequential damages, let's assume those who were sued for consequential damages are the ones who opted out, would any fact findings be in res judicata as to them? And then analyze that with regards to the one who didn't opt out.

REGER: No. It's very similar to - it's because there is a special difference between a claim for consequential damages and our claims. Just like in Cooper the US SC said that a pattern and practice discrimination class did not bar subsequent claim for individual discrimination by _____. The same reasoning applies here. We've got to prove this FTC is defective in the box in normal use. That is generally that has nothing to do whether we win or lose that. Will have nothing to do with whether a particular individual can claim that in a particular instance that floppy disk control failed and caused particular consequential damages.

If they find that it's not defective from normal use and they win, a class member who can prove well maybe it's not defective in normal use, but it was defective in my use, he would not be barred.

HECHT: Why isn't it?

REGER: Under the analysis of Cooper two reasons. One, is that the operative fact that are determined in a pattern and practice situation or in a normal use situation just doesn't determine one way or the other whether a particular instance was caused by a defect.

And in this court's analysis also there's another element that's important in res judicata. The typical transactional test from the very beginning this court has held that even claims arising out of the same transaction will not be barred if there is some procedural reason preventing full adjudication. In the Van Dyke case, the court said a necessary corollary to the transaction rule is if the claim is severed it cannot be barred because it couldn't be tried. In Getty Oil this court held that a claim that rose out of the same transaction was not barred because Getty Oil was prevented from bringing it because of a no action provision in its contract and Rule 38 _____.

In Rapid American this court held that a disease arising out of the same exposure couldn't be fully litigated. Here absent class members are by definition can't join the ___. Under our rules they have no standing to conduct discovery as parties. And as Cooper pointed out, when the TC says he's not going to try something in the class, it can't be tried. It's equivalent of

severance.

So under normal res judicata rules even if there was an instance of res judicata it would not be barred.

WAINWRIGHT: So is it fair to say that you fully expect even if a class is certified with a declaratory judgment that some perhaps much litigation would continue over these same controllers?

REGER: No. I do not. Because as I said Compaq has represented and it's in evidence what other _____ controller disputes there are. And they have represented there is not a single claim where anyone is making a claim for consequential damages for _____ controllers.

WAINWRIGHT: And you think that precludes plaintiffs bringing suits later?

REGER: I don't think it precludes them in the sense of a legal preclusion. But if they haven't brought them already they are probably barred by limitations.

JEFFERSON: So if there is no consequential damage from this, you mentioned before that there is harm done even in instances where no harm is shown, what is the harm?

REGER: The harm is hard to visualize something that's microscopic, as missing a hardware part. This chip is missing. If you could blow it up, you could identify what is missing. It's missing a part that's universal industry standards require. And as the memo from Compaq, which is in the record said when they decided to ship this anyway, when it happens by its nature it's silent. You don't know it happens. And in the words of the Compaq corporate representative explaining that memo, the user won't blame us. It will blame a bad floppy diskette.

The problem is that is so microscopic and silent that it would be difficult if not impossible because it leaves no traceable signature to ever say with confidence that a particular instance of data corruption was caused by this particular floppy disk controller, that it can be proven statistically and Compaq's own documents show that.

SMITH: Is this essentially the same suit pending in Oklahoma state court?

REGER: It's not the same suit. It's the same theories, different plaintiffs.

SMITH: Other than the plaintiffs it's essentially the same?

REGER: The same allegation.

O'NEILL: Do you think this case meets the conflicts jurisdiction standard set out in Shine?

REGER: I do not for the reasons your honor state. Either this is a B2 certification in which case there's first impressions. Or it's not and they say it is.

We still believe that there is a lack of conflicts jurisdiction.

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REBUTTAL

BECK: I make five points. First with respect to Monumental Life which is a recent 2/1 decision by the 5th circuit CA. In that case, which was a discrimination case, the 5th circuit allowed damages. I think it's also important to look at the rationale that the 5th circuit employed. The 5th circuit employed the rationale that what was happening in their case was closely akin to a Title 7 civil rights case. Title 7 allows back pay as a statutory remedy. And the 5th circuit was already on record as other federal courts have been of saying that in a Title 7 discrimination type case where you have a statute that allows back pay that Monumental Life is closely akin to that.

O'NEILL: How is that different from a warranty that specifies three types of remedy?

BECK: We don't have to guess because the 5th circuit in the McManus case tells us that. In the McManus case, which was decided in the last few months as well, the 5th circuit specifically said that you cannot have that type of a class in an express warranty situation. And the reason the court used was is because when you're talking about an express warranty, which is the only allegation we have left against us, that you're talking about reliance. They say you cannot presume reliance class wide. And in this particular case, one of the things they are saying we did wrong was that we didn't meet the plans and specifications. There's no evidence in this case that any of these class representatives saw the plans and specifications. They didn't even read the warranty in this particular case. So the 5th circuit in McManus has clearly said that you cannot have a class certification in a breach of express warranty because the individual issue overwhelm the common issues that may exist

The second point is, they talk about how the TC hasn't made any decision about opt out. We think this flies in the face of what you said in Bernal. Well let's certify it and worry about some of these issues on down the road is not appropriate under Texas law. If you look at the trial plan that the TC adopted, I went back, he uses - it was a 46 page opinion. The judge didn't change one word from the order that was submitted and drafted by counsel here. He changed the month. And if you look at what the court said, he used the word "alternately" or its equivalent 22 times.

SIDE 1 RUNS OUT

SIDE 2

...he used the word "likely" fourteen times. Used the word "if" 34 times. He

told us on page 7 of his trial plan that all of the material issues, both B2 and B4 were going to be tried together in one trial at the same time.

On page 43 he says, Well, no, I may try the B2 class first and then I may try the other either before the same jury or a different jury. I'm not sure which.

We respectfully submit with all deference to the TC is that the trial plan is not only fundamentally inconsistent, but it is vague and it's confusing.

O'NEILL: Are you saying the B2 class would be different from the B4 class?

BECK: Yes. I think they are different. Every issue that we would try in a breach of warranty damage case subsumes every issue in the declaratory judgment case. And that's one of the reasons why you cannot have a declaratory judgment.

HECHT: Why can't you have one in a case where as is argued in this case you've agreed that if the declaratory judgment goes against you you are going to honor the warranty?

BECK: That's not correct. If they find a breach of warranty and somehow it's covered, to somehow we are just going to go in and do what they want us to do. But you've got to look at what is meant by breach of warranty? We're talking about notice, the opportunity to cure the problem, the reliance issue. So that you're looking at all of these issues. The bottom line is and the corporate representative's testimony they rely upon basically said, Look. If our warranty covers it, the notice has been one year, the damage was incurred within one year, if all of the conditions precedent to the warranty are satisfied, you bet we'll stand behind it. But you can't just simply ask the question whether there's a warranty in this case and be entitled to a judgment. There are other issues.

If we try the damage case, assuming this court affirms the B4 class, it subsumes every issue in the declaratory judgment action.