ORAL ARGUMENT – 10/21/04
03-0505
CITIZENS INS. CO V. DACCACH

DAVIS: The common thread that has run throughout this case is to change, change anything, shuck off anything in order to get something certified. As a result, we have a class that even has a post-trial election to opt out of the remedy by virtue of the change in class definition that the 3rd court made.

O'NEILL: Not really out of it is it? Aren't they bound by the remedy? They can either avail themselves of the restitution damages or they can just take the benefits of the policy.

DAVIS: The CA says that they are bound by the judgment but they can opt out of the remedy by not surrendering their life insurance policy that they might consider valuable to them. But the problem that poses is that how in the world is a litigant supposed to know in a situation like this, a litigant like Citizens, how many people out there are going to avail themselves of the remedy so that you can make informed decisions at the outset of the litigation.

O'NEILL: Isn't that kind of true in any class action? You don't know how many will actually submit a claim.

DAVIS: I think it's less true here. And recognizing this litigation as the court wells knows is expensive to go through all of these various steps. And there may be a desire to either settle on the front-end or resolve it if you can better assess the outcome of the case. But here we don't know until we go through the entire process and see who comes forward with their policy, how many people this lawsuit is truly going to affect.

O'NEILL: I just don't see how that's different from any other class action. If you have a computer problem that you're getting a class action on, you don't know how many people are actually going to choose to keep their computer or file for the claims.

DAVIS: Maybe it just makes the trial decision in other class actions that don't have this post-judgment remedy, maybe it makes the litigation decisions capable of being decided earlier in the process than we are here. But we have here a serious choice of law issue with this case. The choice of law analysis by the TC is three sentences. The first sentence merely states what the class plaintiff is asking for. The second sentence says that they presented some evidence about where various things occurred. The third sentence, I would really invite the court's attention to because it is most curious to me. The third sentence in the court's order says accordingly the court concludes that for purpose of class certification Texas law applies. Now that phrase "for purposes of class certification," what does that mean? It sounds to me like it means we're going back to the certified now and worry later. Is the court going to make some other determination at a later date about which law applies?

We have as a result of the Compaq v. LaPray decision by this court, and the Schein decision, we have a requirement now that there be a rigorous analysis.

HECHT: Was there any presentation in the TC about whether any of these 50 countries have blue sky laws?

DAVIS: We presented defensively the evidence that 49 of these 50 countries have securities exchanges. The logical presumption is with that sophisticated of an exchange they are bound to have some securities law. It was not our burden as the court has recognized in Bernal and other cases to come forward with that evidence. But one of the experts in the case, Prof. Jeffrey Hazzard who was a former executive director of American Law Institute, was one of our experts and he had an exchange with the court that frankly we have attached to our brief about these various 50 countries. Many of them are civil law countries. Some of them are common law countries. No way to understand the class action. It's foreign to their system, which creates problems with adequacy of ____.

O'NEILL: What if the policies here had had a choice of law provision that said Texas law will apply. How much of rigorous analysis should the TC then engage in?

DAVIS: We do have policies that say - some of the policies within this class says Louisiana law applies.

O'NEILL: Hypothetically if everyone of these policies had a Texas choice of law provision - just presume they did whether they do or not. How much of a rigorous analysis would the TC have to do?

DAVIS: I think the TC still has to go through the rigorous analysis of - if the parties had contractually agreed and that's really what we have here: a life insurance policy.

O'NEILL: Again my question is if the choice of law provision in the contract controlled, can't the TC just say Texas law applies?

DAVIS: In that instance they probably...

O'NEILL: How is this different when the statute directs that Texas law apply?

DAVIS: I'm being corrected by J. Brister over here that according to the restatement...

BRISTER: According to the restatement, the parties can agree to choice of law but not if it violates a fundamental policy of one of the states where it would otherwise apply. So you would still have to do it. That's what Tracker Marine says. Right?

DAVIS: That's your Tracker Marine decision. Correct. We just don't have here in this

case a rigorous analysis. Now the respondents would tell you and the 3rd court ___ to the fact their argument that the provisions of the Texas Security Act §33 is a directive statute; therefore, you don't need a _____ analysis. I would simply invite where is that set forth in §33? And in addition there is a case just decided two weeks ago out of the 14th court in Houston, Greenberg v. _____. It's significant to the court's consideration today because it is a Texas Securities Act case. It's a §33 case. And there, like here, the TC held Texas law applies. But the 14th court held just Sept. 30 on appeal that Texas has adopted the most significant relationship test that should have been done, and it wasn't. This ruling cannot stand up and said if they had done such a test, the laws of New York would have indeed applied in that instance. So we have this most serious problem with choice of law.

BRISTER: We've got to assume they are correct, that your client was making sales from Texas.

DAVIS: You have to assume that. And in order to assume that, you have to ignore one of the sections out of 139.7 of the administrative code that talks about things done in the clerical area. Even receipt of premiums in Texas does not make it a sale from Texas.

BRISTER: What do you say your client was doing in Texas?

DAVIS: We would say we were perfectly within that statute, that we were accepting premium in Texas and underwriting in Texas, that the policy was being sold in the foreign country.

BRISTER: You had agents or different corporation or what?

DAVIS: Different agents in the South American countries primarily. And they were presenting the product. And one of the things about the life insurance that is most significant here is that the sale is not complete until you get the policy. You sign a receipt acknowledging that your health status has not changed in any way. The sale in this situation was consummated in the foreign country. Certainly the laws of those countries have an interest in regulating that kind of activity. Now yes we take the position, they will quickly point out in the 10-K filed by the company, that we're not subject to regulation in those foreign countries. That's been our position. We have never been asked to be regulated in those foreign countries. But that issue has certainly not been decided.

WAINWRIGHT: For purposes of securities regulation, does the Texas Securities Commission take the position that if a sale is out of this state it has authority to regulate it under its securities laws and regs irrespective of what else may have happened in any other place?

DAVIS: I'm not sure what the position of the commission is on that. We have not gone to the merits on that kind of an analysis yet. But I do know that the definition of securities that we're under excludes insurance. And it excludes insurance that is sold by a company that's subject to the regulation of the Texas Board of Insurance. And then goes on and provides...

O'NEILL: And that submits a form for approval, which the company did not do here.

DAVIS: The company did not submit the form for approval. Because we wouldn't submit a form for approval if we were going to sell the policies strictly say in Idaho, because we recognize Idaho as a good state for a particular kind of policy. We don't go over to the Texas State Board of Insurance and file that policy for approval because it's not going to be issued in Texas. And that's what that proviso in the securities law means: accept as now or hereafter required to be filed with the department.

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RESPONDENT

ROACH: The court is at a disadvantage because you heard only a few minutes - 5 minutes of argument and everything else has been reserved. That occurred in the CA, and we are met with a bunch of new arguments that I obviously did not have a chance to respond to as respondent. It's a problem.

Let me make three points in overview. The first is, that I am prepared to demonstrate to this court that this may be without overstatement the most perfectly certifiable class this court has ever seen. I am prepared to demonstrate to you 2)...

WAINWRIGHT: Perfectly. That's an unusual word to be used in the law isn't it?

ROACH: That is the testimony of Jack R____, Prof. at UT, who was testifying for the defense against certification in the three pre-Schein cases from this court: In Bernal; Beeson; and Shelton, he testified for the defense against certification. He is no friend of class certifications. And it's his testimony that I refer to. He said it may be the perfect case.

HECHT: In that connection do you know of a world wide class that didn't have an American plaintiff?

ROACH: I do not.

HECHT: There have only been 10-12 of them in history, world wide classes and I was just wondering if they were like heart valves and stuff like that.

ROACH: This probably strikes the court as being questionable because it's only world wide. But that is the nature of this scheme and it's part of the reason why this is such a perfect case for class action. This insurance policy was sold exclusively to foreign citizens, non-US residents.

HECHT: The problem here is I would be more convinced by your argument if it involved a sale of stock. Because usually after the stock is sold, the problem is becoming worthless and everybody is happy to give it back and get anything they can for it. So there's not any reluctance

about the remedy - you know give me damages, give me recision, give me whatever you can get. I'm going to get something. But here there seems to be some acknowledged reluctance even by the lower courts and by the class that some people might want to hold on to these policies.

ROACH: Three different points I think that question raises. One, is a sale of stock. I want to demonstrate that. Two, there is no reason to believe that - there is no evidence in this record that anybody wouldn't want to give back their stock and get their premiums back. There was nobody who came and objected...

HECHT: I thought we had people suing though on the policy. You can't give it back and sue them for the benefits.

ROACH: You have people who are death benefit beneficiaries. But nobody has come and said I'm not going to give back my stock in exchange for this. That was purely a concern expressed by this trial judge trying to do her job in looking out for absent class members. And in fact in normal securities cases you always have the option not to take - if it's a recision remedy like this is, you have the option not to give back your stock.

HECHT: But usually at that point almost invariably it's worthless at that point.

ROACH: It depends on the stock.

WAINWRIGHT: You were going to make two other points.

ROACH: And that is what I believe to be the real issues in this case, which are choice of law and claim splitting res judicata. And we've heard nothing about claims splitting, res judicata. Would require this court to either make an exception for class actions in the application of that law, or to repudiate this court's general reliance on two specific restatement provisions that...

O'NEILL: You're not conceding that we should apply a general res judicata law to these claims are you?

ROACH: Yes. I am saying that there are general res judicata principles, specifically §26 includes an exception.

O'NEILL: So you're saying that there should be an exception?

ROACH: Yes. But not just for class actions. It is the general exception that applies to any case that for whatever procedural reason cannot be tried in the first case.

HECHT: But that would resolve the war that is now going on about the preclusion of the fact of class action judgment if there ever was one, which there hardly ever is. But if there were a class action judgment, and there's a great debate going on about whether it's going to cutoff claims

that could have been made by an individual in an ordinary case as opposed to claims that could be certified.

ROACH: I am not familiar with that great debate. My review of the federal cases certainly is that those courts that have addressed this issue have not said a claim that could not be certified is lost or res judicata. I am aware of no federal case. Our review of state SC cases would allow me to say that I am not aware of any state SC...

HECHT: Doesn't that strike you as a little facile to say that a trial judge is going to say I will certify this and nothing else and, thereby, exempt all those claims from res judicata just by saying it. Just by saying I will certify it and I won't certify anything else.

ROACH: Good point. Our analysis is different from that. Our analysis is if it could have been certified...

HECHT: Well it can't be ____ certified.

ROACH: I'm saying if the TC makes a mistake and says claims 9, 10 and 11, that Citizens brought, or that any other class plaintiff brought, even though they didn't seek certification for it could have been certified, then there is res judicata effect for those claims. That's the case in any other normal litigation.

O'NEILL: Walk me through how this works because this is confusing. You've got a fraud claim. I know you don't any more. Let's say you still did. Presumably many of these people do have a fraud claim.

ROACH: Not on securities.

O'NEILL: They've got a securities fraud claim. They've got a common law fraud claim.

ROACH: My point was only on insurance. The only fraud misrepresentation claims are the insurance component. The only securities claim is this unregistered securities claim.

O'NEILL: It's insurance fraud component. So let's say this case is certified, the class seeks - there's a group of class members presumably go for the vast majority who seek a recision remedy. What's left of their insurance fraud claim?

ROACH: They were never certified, so they have not been res judicata.

O'NEILL: Those are going to proceed on a different front and what's the measure of damages going to be?

ROACH: We believe like the TC concluded that those cases are not likely to be brought.

O'NEILL: If this were just the individual who were filing, just the individual suit, they would have to bring that claim in one case and get it all done because it arises out of the same transaction. It would be precluded if it were an individual suit. You couldn't split them.

HECHT: You've got an argument that you could.

ROACH: I had an argument that you could.

HECHT: But not the same transaction or occurrence.

ROACH: Absolutely.

WAINWRIGHT: The same product though whether you call it an insurance product or a securities product isn't it?

ROACH: It's the same package, but the cause of action and the controversy are completely distinct. Our controversy says this security has not been regulated either in the US or in any foreign country. And that's a big problem. That shouldn't happen. All other claims are - the purchase of the insurance product in these foreign countries are problematic.

O'NEILL: Here's where I get confused is the application of that. Let's say you take your recision remedy. What happens in the fraud case? I mean how do you apply the fact that - do you deduct that from whatever damages might be awarded on the fraud claim?

ROACH: Your hypothetical is if there are individual claims that are brought, and we've won, and somebody has - first of all they would have to turn in their insurance policy, and their trust assignment agreements, they are no longer holders. If your question is what is the measure of your damages? My assumption is there would be some credit for whatever monies were paid in terms of these return of premiums.

O'NEILL: It seems to me the way we address that question is by applying the common law of res judicata to the claims that could be brought in this suit. And if they can be split, then it is perfect for class certification to carve them out. If they can't be split under common law, then we've got a problem.

ROACH: I think the difference is there is - in the class context, there is a new procedural problem. It is unique to class actions, but not unique in the general rule of exceptions. If it is not certifiable, and in this case every expert agreed and it's in the certification order, that these other claims are not certifiable. Then there is a procedural bar from those causes being tried here. So it might as well be subject matter jurisdiction problem, or a ripeness problem, or any other problem. It is a unique procedural barrier if you...

HECHT: And it's that problem that I think there is some discussion on in the country.

The concern is, should it be that way or not?

ROACH: And I would address that by saying this court as many others have said we shouldn't be creating new doctrines for class action. And in this concept yes. The exception shouldn't apply strictly because it's a class action. The exception that you have in res judicata claims splitting rules, ought to apply to class actions...

BRISTER: But couldn't be brought in that context is something that's out of control of the plaintiff's hands. It's not that it couldn't be brought because the plaintiff chose not to bring it. And you're saying because we chose to do this class action, well we can't choose to do all of it, but if you didn't chose to do a class action, you could sure do all of them. So it's because of the procedural vehicle you are representatives have chosen, that's what's tied their hands.

ROACH: No. It's not our choice. The law will not permit us to get certified an uncertifiable claim.

BRISTER: But your representative could have brought everyone of the claims just as long as it didn't bring it as a class action.

ROACH: That's right.

BRISTER: So because of the procedural vehicle they chose, that's why their hands are tied. That is unlike every other exception where we say res judicata flies if you could have brought the action.

ROACH: That's right. The reason that this issue comes up, why we chose class action, is because there is no other vehicle for these folks to get their _____. And that's why we have class actions. Because in this case no claim like this was ever brought. As long as these policies have been purchased, and no other claims other than the ones we've brought have been brought subsequently. So it is precisely why this is a perfect claim for certification because these claims otherwise cannot be brought: the geographic distance, the cost of experts, all these things.

WAINWRIGHT: What did the trial judge mean that for purposes of class certification Texas law applies? That indicates that for some other purpose in this litigation Texas law will not apply doesn't it?

ROACH: There is no indication in this order, there is no indication in this record that they could possibly point to that says she was making an exception and saying only for purposes of this class action is that a _____. That's preposterous.

WAINWRIGHT: So you think the wording is just awkward?

ROACH: I think for purposes of this order.

WAINWRIGHT: Why didn't she say for purposes of this case then for instance?

ROACH: I am admittedly speculating. But my speculation is that nobody can make a final determination of choice of law. You make as good a determination in a class certification context as you can, knowing that this court is going to review it. But it is subject to final review. All the legal decisions are going to be subject to appellate review after judgment.

HECHT: If you have a Texas seller and a Oklahoma buyer and both have blue sky laws, and an Oklahoma citizens sues in Oklahoma court what law governs? Can he sue under Texas law? Oklahoma law? what? He can certainly sue under federal law.

ROACH: To get to the heart of it it depends on the cause of action. If the cause of action is the one that we've brought...

HECHT: Registration.

ROACH: Yes. And a specific Texas Securities Act provision that says that Texas law requires that either the security or the dealer be registered if you are selling in Texas to a foreign purchaser.

HECHT: But the Oklahoma law almost certainly says that if you're selling in this state you have to be registered.

ROACH: That's fine.

HECHT: So you can sue under the Oklahoma law too, but then do you sue under both, or do you have to pick? Does somebody have to decide?

ROACH: No. It's not an either or situation if you are in a restatement 6(1) situation, which we are.

HECHT: As I understand it, if you want to sell - if I'm a Texas resident and I want to sell stock throughout the country, a security through the country, I have to register in every jurisdiction that has a registration law in which I want to sell. I can't just do it in Texas.

ROACH: These folks say you don't have to register anywhere else.

HECHT: I thought they said the insurance policy wasn't a security.

ROACH: Yes. And the TC rejected that motion for summary judgment.

HECHT: I understand. But if I just have common stock and I just want to sell it any place in the country, I thought you had to register that stock with the prospectus or whatever, the

state government requires in order to do that.

ROACH: Right.

HECHT: And so then given that there are registration requirements throughout the country, that's why it's so hard to make a stock offering because you've got to get somebody to qualify you in every state. But once you have a claim can the buyer sue under his law, his state's law or the seller's states law, or is there a choice of law analysis that decides?

ROACH: If you didn't have a 6(1) situation, if you didn't have the cause of action we have here, clearly it would be a choice of law question. No question about that. We're saying that the only reason it's not a choice of law question where you have all the requirements normally is because restatement 6(1) says if you have a statutory directive to use that state's law, then you...

BRISTER: The comment to 6(1) says statutes expressly directed to choice of law. Not saying what Texas law is, but when it's expressly directed to choice of law, that is to say statutes which provide for the application of the local law of one state rather than the local law of another state are comparatively few in numbers. So which part of this statute says the law of Texas is to be applied to particular kinds of transactions?

ROACH: It says if you are going to sell to a foreign citizen you have to register it. That is the legal requirement of Texas.

BRISTER: The comment specifically cites for instance to 401.02 of the UCC which says the liability of a bank for an item is governed by the law of the place where the bank is located. That's a lot more specific and express direction about what law applies than this statute. Right?

ROACH: I honestly think that that's cutting with a fine knife, because...

BRISTER: Well not too fine because the DTPA says you can't do anything deceptive either in Texas. Right? And so now the DTPA is going to apply to everything in the world because that's a direct choice of law. And we know in a Texas court, Texas will never apply anything but the Texas DTPA to any transaction that touches Texas.

ROACH: There is no component of the DTPA that is like the Texas Securities Act. 139.7 in the Administrative Code that says you must file in Texas...

BRISTER: There are 20 of them in the laundry list. You can't have false going out of business sales, you can't this, that and the other.

ROACH: It doesn't say Texas law applies. It doesn't say you are obligated by Texas to do this.

BRISTER: And where does this statute say Texas law applies?

ROACH: You must file. It is the very essence of this statute that says this statute requires you to file. The statute is Texas law. And that's what the phrase statutory directive. It directs its own application when it says you must do this under Texas law. And if you violate Texas law, this applies recision. That is unlike any common law situation.

I think if you look also both the comment A and comment B, you are not far off to say that this statute does not literally say and Texas law and only Texas law applies. It doesn't say that. But the comments make clear the phrase that's even in their brief. It says rarely will you find a statute that says that. But if you look at the legislative intent that's what 6(1) requires.

HECHT: But every state in the union has one of those statutes that says you can't sell stock in this jurisdiction without registering.

ROACH: I don't know if it does or not, but let's assume he does.

HECHT: Blue sky laws. There is a whole reporter series on that. People have to do that. And so what I am saying is if I'm an Oklahoma citizen and my blue sky law said and if you don't register you have to forfeit the company. And Texas has a blue sky law that says if you don't register then you get a black mark by your name. If I'm in Oklahoma I want to sue under Oklahoma law, not under Texas law.

ROACH: And I think you could. There is no question in my mind that any 6(1) statute allows you to sue in your particular state, and does not create a conflict anywhere else.

BRISTER: If an Oklahoma resident comes to Texas, sues in Texas under the Oklahoma statute, if it was sold out of Texas the Texas legislature you say told us we have to apply Texas law. We've got an irreconcilable conflict. We've got two states telling us under that theory.

ROACH: That's a great example. I would say that if you brought both claims, the Texas unregistered securities claim and the Oklahoma ____ secured claim, and if they were both valid, and I doubt they could both be valid at the same time, you would apply both states' law. The trouble is, it sailed from Texas. It's either one or the other. There was a sale from Texas here because contrary to what you just heard, the decision to issue, the underwriting, the marketing, the mailing of the applications, the mailing of the policy, the mailing of the notices, all came from Texas.

BRISTER: If the evidence at trial is otherwise. If the evidence at trial is for some of these policies the representations were made, the policies were handed over, the people signed and accepted them in Nicaragua, then the choice of law is going to be different on that case.

ROACH: No. Because all we are talking about is the one unregistered securities claim. We are not talking about the other claims that could be brought somewhere else. The unregistered

security claim is established without respect to purchase. All there has to be under the Texas Securities Act is some effort to sell, some offer to sell whether or not it works or not. That was completed and they will not be able to deny you that in Texas they did things that were part of the process offering to sell that qualifies under this statute. It was a completed cause of action at that point. You're right. There are other causes of action that could be brought in other places in connection with you know what was the misrepresentation, what was the reliance. That's not part of our cause of action.

WAINWRIGHT: Let's go back to the example about a transaction that may touch different states. Most blue sky laws also regulate based on the offers in the state, not just sales in the state. So let's say there's the statute in Texas - you've got to be registered. And let's assume there was no registration of the company. Let's assume there's a statute in Oklahoma that says any security that's offered in this state and most of them at least as of 15 years ago, most states regulate offers in their states as well. Let's assume Oklahoma says to make an offer in this state, the company offering the security has to be registered here. Then do you have a conflict issue?

ROACH: I don't believe there is a conflict. I believe you can sue under both. I think you are entitled to recovery under both.

WAINWRIGHT: Now how do you do that in one lawsuit?

ROACH: Only if these qualify under 6(1). If they are self direction statutes.

WAINWRIGHT: Assume both are.

ROACH: Then that is what the restatement contemplates. It is only to get to 6(2), the most significant relationships that you have an either or situation we have to pick. That's what 6(2) is all about. 6(2) says it only applies when 6(1) does not. So 6(1) says no picking. You get both.

O'NEILL: Are there any appellate court cases that have interpreted 6(1) under the restatement?

ROACH: We have cited Busey, which is a Texas decision.

O'NEILL: In this context?

ROACH: Yes. Very similar.

O'NEILL: And do we have a conflict among our CA's on this issue?

ROACH: I don't believe so. Every single CA decision I am familiar with takes this position. I'm not aware of a conflict in Texas on this. Top side or bottom.

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REBUTTAL

KEENE: The choice of law question has occupied much of this court's attention and I would like to address that. In J. Hecht's example where Oklahoma and apparently Texas law apply at the same time, that reminds me of the Spence v. _____ case. In that case the TC determined that Georgia law would apply because the defendant was headquartered there. That Georgia law might be amongst the laws in competition to be the single law that applies doesn't relieve the TC from analyzing the interest of the other jurisdictions. Precisely Oklahoma law may apply and that's what the restatement asks that a choice be made between those based on the relevant policies of the form: if it's a contract claim, where the contract was negotiated, executed, ____ performance.

HECHT: It's a little difference because when a tort occurs and somebody sues, we don't really say multiple torts occurred because they could have occurred in multiple jurisdictions. We say one tort occurred and whose law is going to govern. But here you actually do have a violation of the Texas blue sky law in my example, and a violation of the Oklahoma blue sky. So there's actually two separate violations. And yet you think well we can't try it on multiple laws. We are going to have to pick one. Was any of this developed in the TC, that there might be conflicting registration laws in these other countries?

KEENE: The most that can be said of that is that no extensive analysis of the potential variances between the laws of these 50 jurisdictions was performed in the TC

O'NEILL: Well we don't have any requirement under Bernal that the TC necessarily get it right. They have to thoroughly consider it. And if the TC considered that it was directed by the restatement, even if that's ultimately proven to be wrong, the TC made a legal determination that this is the law that applies. How can we say there was no rigorous analysis?

KEENE: The TC actually abused its discretion when it makes a determination that is not in keeping with the applicable law. Schein and LaPray, require that an extensive choice of law analysis be performed whenever the controversy touches multiple jurisdiction. That's what we have here. The TC didn't engage that analysis. And in our judgment when a TC fails to properly apply the law to the facts of the case, an abuse of discretion issue, and when the TC fails to engage the most significant relationship test, when Texas law requires that, that's a failure to rigorously analyze the predominance manageability and superiority elements of their claim. As the 5th circuit stated in Costano, and this court repeated in Schein, and again in Compaq v. LaPray, it's impossible to determine if common issues predominate if the TC isn't even aware of which law will govern. That's the situation. But I believe that that conflicts with this court's jurisprudence establishes not only conflicts jurisdiction but an abuse of discretion.

O'NEILL: What other law could govern the Texas securities registration requirement?

KEENE: Most assuredly the law of the home jurisdictions where the instrument alleged

to be a security was sold.

O'NEILL: They would determine whether the Texas Securities Act applies?

KEENE: No. They would determine much as this Texas court should have determined, which assuming that they have conflicts of laws analysis much like ours, which law has the most significant relationship. Time and time again in the authorities we presented to this court there is a principle that §145, 148, and 188 of the restatement show that it is the location where the injury occurred. It is those jurisdictions that have a dominant interest in protecting their citizens. That's why the place where the contract was negotiated and executed is important. That's why the place of injury in a tort is important. That's why the place where fraud and misrepresentation were relied on by a plaintiff are important under 148. And in this case virtually all the activity vis a vis the buyers of these policies occurred in these foreign jurisdictions.

Under those circumstances an adequate choice of law analysis was required analyzing the various differences between the states. It wasn't done in this case and we suggest that that constitutes an abuse of discretion.

But there are other reasons. For instance J. Brister noted in the Tracker Marine decision. I think it's appropriate to discuss here whey this case is not _____ certified. Predominance. One of the most stringent requirements of rule 42 requires that after common issues are resolved individual issues predominate. After every common issue was resolved in this case, the individual issues attended to the attorney fee claim under the Texas Securities Act are going to swamp any common issues and overwhelm any fact finder in that regard.

The statute expressly states in the statutory language that the attorney fee award shall be provided if the TC should determine that it's equitable under the circumstances. The commentary describes what circumstances would be relevant; the conduct of each party to the transaction. Neither the TC nor the CA identified how the circumstances underlying 25,000 insurance transactions, occurring in 50 countries, on every continent in the globe can be effectively managed in one proceeding.

HECHT: Are the other claims other than for attorney fees that you think involve issues of fact or law that do not predominate?

KEENE: That has been narrowed because all of the claims that did have individualized issues were shucked aside in the hopes that this lowest common denominator was hopefully homogeneous and uniform across the class.

HECHT: So the answer is no?

KEENE: The answer is no.

JEFFERSON: What other way besides a class action could you enforce the Texas Securities Act? Individual claims?

KEENE: Of course. Precisely the way this case started.

JEFFERSON: And is that likely to really happen?

KEENE: I believe so. These claims even on the recision claim has been admitted by R. Hakim to be worth at least $70,000. Tack on the DTPA treble damages, the fraud claims for punitive damages, the attorney fee recovery provisions under the DTPA and breach of contract claims under the Civ. Pract. & Rem. Code, this court has found in comparatively less valuable claims that those claims were not of a negative value due to fee shifting and the availability of multiple damages. Those damages are available in this case. And every named plaintiff other than the class plaintiff have decided to pursue those claims individually. So the record demonstrates not only litigation already commenced on these issues, or simultaneously commenced, but it shows the reality and the possibility of that litigation because it's already going on.

WAINWRIGHT: What if the plaintiffs had never brought any claims except their securities act claims?

KEENE: A more difficult question. Prof. Hazard alluded to this in his testimony, though that excerpt may not be attached as appendix no. 9. He said it might be a different case if the plaintiff comes forward with one claim, and you're trying to compel them to allege different claims. And as I recall the Compaq v. LaPray case, some of that case fits within that procedural format.

But in this case we don't have that question. What we have are 11 claims by the plaintiff's live pleadings alleged to arise out of the same transaction or occurrence, and 10 of them be shucked aside, not because the class plaintiff thought it was a good idea. He didn't even know it was happening. Not because it benefits the class. Nobody has articulated a reason in support of the shucking. The reason those claims were abandoned is because it doesn't meet class counsel's goal of certifying something. But the class deserves more than class counsel being allowed to in an unfettered manner pursue the attorney fee jackpot of attorney's fees after something is certified. The class deserves an adequate representative to stand in the way of that self interest. And this record is shocking. Dr. Hakim wasn't informed of any changes in the lawsuit until after it occurred. Significantly when you read his testimony, he thinks the reformation claim is still pending. And he says that twice in his testimony. That claim was one of the last to be discarded.

Dr. Hakim can't tell you what a blue sky law is. His answer, "I don't know what it is." Dr. Hakim promised to do better in the future and referred picky questions to his lawyers. In a world-wide class action where the object of the litigation...

O'NEILL: Why does it matter though what claims legally can be brought if all he's seeking is the restitution of remedy?

KEENE: Because those claims are subject, and indeed there is a controversy on this, or at least discussion in different minds on it. Those claims that are shucked off are going to be subject to res judicata. Those claims arise out of the same transaction or occurrence. This court has said time and time again, in fact using the exact words of res judicata in the same sentence, that rule 42 is not an exception to the principles of res judicata.

JEFFERSON: We haven't decided this question, this sticky question on the scope of res judicata.

KEENE: Exactly. What I'm trying to point out is that this court's prior pronouncements as to the procedural rule shall not diminish the substantive rights of the litigants, that rule 42 is not an exception to established principles of res judicata guide this court's decision on this particular issue. And this particular issue...

BRISTER: Well there are some special rules. The statute of limitations gets tolled during a class action. So people do have some separate rules once a class action starts. But why would res judicata not be with limitations as one we're going to hold in abeyance to see what happens on the class action.

KEENE: I can articulate the transactional approach. But what is more important is to articulate the room for flexibility that exists in applying the res judicata doctrine, room that exist under rule 42 and the rule that exist under the judicially created doctrine or fairness. And in this case what you have is a case of overt claim shucking, claim splitting and attempting to proceed on alternative theories, and excluding those from the class. That is the hallmark of the principles of res judicata, to prevent vexatious litigation, to prevent piecemeal litigation. And so I think that the application of the res judicata doctrine in some instances depends on the purposes of that doctrine. I, however, think this is a very clear case; otherwise, litigants are going to be permitted to simply split their claim as many times as they want on differing legal theories, go and try the class action case. If those split legal theories are not barred, then win or lose they can proceed on the more valuable individual theories. That sounds like a risk free method of litigation to me. And that's been prohibited by this court's jurisprudence in class action litigation.

Your honors have inquired quite a bit about res judicata. And as I indicated, the transactional approach is the way this court has resolved those questions since 1992 and the adoption of that test by this court in Duncan v. Cessna Aircraft.

HECHT: If this were a stock, not a securities, which includes stocks, but includes other things, but if this were a stock and it was just worthless and everyone conceded an effort by entrepreneurs to take advantage of unthinking people across the world, and it wasn't registered there is no question that people were going to take recision if they could get it. Would that be closer to certifiable or what? What's your view of that?

SIDE A RUNS OUT

KEENE: ...analysis. And the reason for that depends on the 6(1) verses 6(2) analysis that's been provided by the respondent. If the statute contains a statutory directive, then the court should follow that statutory directive. The problem here is the Texas Securities Act does not have the statutory directive.

HECHT: It's just more complicated than that it seems to me. Because even though it doesn't it does say you violate the law if you don't comply with it. So it's not really a question of the applicable law if you're a citizen of France and you come over here and do this and you don't do what the law says then you violate it. It just seems to me more complicated.

KEENE: I believe that you can analyze that issue, for instance in the context of the Shuts(?) case from the US SC. There is a minimum due process level that the state must have a significant abrogation of contacts to meet due process. Now if the defendant never objects and the contacts in the foreign state are sufficient, that passes constitutional muster. But it doesn't answer the question when the defendant objects.