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Supreme Court of Texas.
SOUTHWESTERN BELL TELEPHONE COMPANY,
v.
MARKETING ON HOLD, INC. D/B/A SOUTHWEST TARIFF ANALYST.
No. 05-0748.

March 22, 2007

Appearances:
MIKE A. HATCHELL, Locke Liddell & Sapp LLP, Austin, Texas.
HONORABLE RUSSELL T. LLOYD, The O'Quinn Law Firm, Houston, TX.

Before:

Chief Justice Wallace B. Jefferson, Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, Don R. Willett, Supreme Court Justices.

CONTENTS

CHIEF JUSTICE JEFFERSON: Please be seated. The Court is ready to hear argument in 05-0748 Southwestern Bell Telephone Company v. Marketing On Hold, Inc., doing business as Southwest Tariff Analyst.

SPEAKER: [inaudible] Mr. Hatchel will present argument for petitioner. [inaudible]

ORAL ARGUMENT OF MIKE A. HATCHELL ON BEHALF OF THE PETITIONER

MR. HATCHELL: May it please the Court. This is a transaction to cover charges on Southwestern Telephone Company Bell's customers 'bills --

JUSTICE MEDINA: Mr. Hatchel let's talk about this assignment whether or not that's a good assignment or not to sustain this class action.

MR. HATCHELL: I think it is not a good assignment your Honor and there are three ways that you could say that it's not a good assignment. You could simply say and probably the simplest route for you to take is to say that the assignment -- the assignee does not meet the requirements of Rule 42. In other words, if stepping in the shoes, it doesn't get it done in this case. The Amalgamated Union case, which we provided the Court on Tuesday, was decided three weeks ago. It probably has the most lucid discussion and which was very simple. Assignments, transfer of property, the right to be a class action representative is not proper. And therefore, it doesn't transfer with the assignment itself. As a result, an assignee must independently meet

the requirements of Rule 42. In this case, STA cannot do that. It was never a member of the class. It did not suffer the class injury, therefore, its claims are not typical and therefore it's inadequate. That's a very-

JUSTICE MEDINA: Under that theory, it's just called it's a class action. If they just brought it as assignee for 7,000 claims, that'd be okay.

MR. HATCHELL: I would say, as a generic proposition your honor, an assignee can be, number one, could have a good claim, can probably could serve its class representative. I would say, however, that I think this particular assignment is void as a matter of public policy because when you look at the records, I think you will find it quite clear that the assignment was taken for no reason other than to confer class representative status on someone who is not a member of the class. There has been some very dramatic testimony recently -- not testimony -- we have news reporting about people paying people, others to be class representatives. If you look at the entirety of this assignment, what it is is a conveyance to the claim and then a re-conveyance by STA of 70% of the claim back to the actual owner. So what is that other than simply a payment, STA to serve as a class representative, which number has the bias, number one, a proliferating litigation; two, but it hides the real parties' interest in the case. So, to answer your question, I would say I guess an assignee can pursue these claims and could even be a class member, but I do think that this particular assignment is void as a matter of public policy.

JUSTICE MEDINA: Why is that such against public policy if, as you said, the ultimate consumer are going to get 70% of whatever is recovered in the payment other than coupons, as I understand it, that seems to be --

MR. HATCHELL: I don't have any problem with the concept of assignments. What I have is a problem with using assignments to create standing to represent a class. I will list ten vices as a result of that assignment. I'll just get it started with --

JUSTICE MEDINA: -- send it in the letter.

MR. HATCHELL: And this comes by and large from Justice Brister and Justice Hecht in PPG and Gandhi. They resulted in a commercial trading of claims which proliferates litigation. It distorts the litigation through role reversal. STA should not be in here contending that our folks were improperly charged. STA pays municipal charges. It ought to be contending that everybody ... in other words, there should be as broad as a pool if possible. Number three, it essentially pays a stranger to be a class representative, I have said. This disrupts the usual market forces as Mr. Justice Brister held in the Tracker Marine. The fish just weren't biting in this case that is why the assignments had to be solicited. It introduces a new area of concern, and that is, the negotiations between the assignor and the assignee. As the Court well knows and has written, the class representative has tremendous fiduciary duties that it owes both to the class and to the Court. In the negotiations between assignor and assignee, to be a class representative, you now introduce a whole level of inquiry, an additional inquiry that I don't think needs to be burdened on top of those that aren't any there and I think that was the concern that Mr. Justice Brister had also in the PPG case. It shields the attributes and characteristics of the real representative from scrutiny and control of the court. It extends litigation because a stranger assignee is disinclined to consider anything but in cash settlement. Why in the world would STA be interested in any sort of creative settlement that

would enhance the services of the class members because he gets nothing unless cash is paid. Number eight, a third party stranger increases the odds of conflicts and unique defenses. This case is a push-through channel, how's that. Number nine, it fosters a bias because the assignee, unlike a regular class member, can pick and choose which claims he wants to pursue and it also can aggregate claims which a normal class member cannot do. Number ten, it defeats the central purpose of class action which is an individual claims are simply too small to litigate. So, that's a long answer to your question your Honor but that's why I think the assignment in this case --

JUSTICE WAINWRIGHT: Mr. Hatchell, isn't in large class suits, the class representative a stranger in a lot of ways? Not unusual for us to see cases where the class representative doesn't know the central gist to the claim? He's not familiar with what is really going on with the litigation so this is so unusual from lots of other large classes.

MR. HATCHELL: But, it may not be unusual and that's one of my problems with class actions generally but I think the rule itself has spoken to that. There is a reason why the rule starts off with requiring an adequate representative with a claim that is typical of the class because there needs to be that identity. In reality, you and I both know, it's not always true. I don't know any other way to argue this case, or talk about class actions in general unless we hone to the ideals of the rule itself.

JUSTICE: You also ... go ahead.

JUSTICE WAINWRIGHT: You also said that this allows, just in one of your points, the ability to pick and choose among the claims or the aggregate claims. Didn't we recently say that the right or the ability to pick and choose claims is not per se and appropriate so long as in doing so, the class rep does not prove itself inadequate or pick claims that are atypical of the rest of the class and there are some other requirements too.

MR. HATCHELL: I think per se that's true. In this particular case the problem that you have, you can have such a wide range of claims. We have one claim that theoretically, is supposed to be $240,000. Most of the other claims were very, very small and then there is a full range of them. So the problem with the ability to pick and choose the large claims is that the assignee then is disinclined to favor or to consider options that might be available to the small claimants.

JUSTICE O'NEILL: But [inaudible] ...

MR. HATCHELL: It's a point, it's just one to me of a waterfall of problems that come with this assignment.

JUSTICE O'NEILL: What about the elements of the claim itself? Is it different because of the assignment?

MR. HATCHELL: The elements on the claim itself would not be different except to this extent: The ordinances do have an antiassignment clause in them and so when someone proceeds with one of these claims through an assignment, then you bring to their whether or not the antiassignment clause voids that. So that adds a different element. And that by the way is the third reason I think that the Court should declare these assignments void.

JUSTICE HECHT: If -- apart from that clause, if this weren't a class and STA was just proceeding on its own as assignee of these claims, your position would be the assignment was invalid, shouldn't it be against public policy?

MR. HATCHELL: In other words, are you saying are they proceeding just to bring the claims?

JUSTICE HECHT: Yes.

MR. HATCHELL: Again, I'll answer in the abstract. I don't think that there is any problem with pursuing one of these claims as an assignee, but I think when you look at this particular assignment, you will see that it really is not an assignment of the claim. It is a purported attempt to assign the right to be a class representative and that's very clear from the negotiations about which the assignments were entered into but the answer to your question is yes. I am not contending that as a general rule assignments of these kinds of claims per se are void as a matter of law.

JUSTICE MEDINA: I presume you have the case that is submitted to us this morning by Mr. Lloyd. Now, if you had a chance to look at this --

MR. HATCHELL: -- I have.

JUSTICE MEDINA: -- Have you seen antitrust litigation which Mr. Lloyd contends on point with the issue that we have here is an assignment issue? Can you respond to that?

MR. HATCHELL: Both of those -- actually, one of those cases is actually in our favor. It finds -- it wasn't a class action, and it finds that there was no standing and frankly, the other, both cases were simply indeposite, I think I'd probably do better in writing the Court a letter about those. I only got to read them yet, I actually got to read them last night but there are -- the cases, I think, actually show how far the respondents are having to dig into this case to find any legitimacy for it. The one case talks about -- actually finds there was no standing because there was no right to proceed and then it just, in passing, talks about the false claims act and which is a statutorily conferred right to bring a representative action. There is no statutorily conferred right to bring a claim as an assignee -- I mean no statutorily conferred right to be a class representative in this case. I think there is another very important issue that the Court should consider and that is the question of conflict of interest and its impact upon the class representative in this case. The Court well knows the standards for adequacy and that one of those, most importantly the absence of antagonism which is the plaintiff's burden. STA has three serious conflicts in this case. Its victory for some of its class members means that some of its rep -- some of the absent class members will have to pay more. As I've already mentioned, by reason of the nature of its assignment, it is only interested in a cash settlement because it's the only way it profits. It cannot do coupons. It cannot do any kind of creative service enhancements or anything of that nature, which, by the way, Southwestern Bell has done in the past. And third, it has no assignment from a hotel/motel groups so it is disinclined to represent their interests vigorously at all. These conflicts are not disputed. What seems to be the issue is to whether or not they are quote speculative and then whether or not they are quote potential. And I think there is a difference between speculative and potential. These conflicts are real. But the Court of Appeals said that "Oh, well they are just potential and the Court can take care of all of these during the mist of trial." I think the higher standard and the higher road that this Court should take is one that says that, the presence of even a potential conflict of interest is a disabling conflict that should prevent the class representatives from serving. That's it your Honor and I I can entertain yet other questions.

CHIEF JUSTICE JEFFERSON: Any other questions?

MR. HATCHELL: Thank you.

CHIEF JUSTICE JEFFERSON: Thank you, counsel. The Court is ready to hear arguments from the respondent.

SPEAKER: May it please the Court. Mr. Lloyd will present [inaudible].

ORAL ARGUMENT OF RUSSELL T. LLOYD ON BEHALF OF THE RESPONDENT

MR. LLOYD: May it please the Court. I bring before you a class action that is more suitable for class action status and leading class action I have seen. We have --. the defendant is one company. The class consists of the costumers of one company. The liability and damages can be determined by examining the records of one company and in the relationships, the legal relationships, between the members of the class and the defendant determined by the laws of one state, to wit, Texas. In point of fact --

JUSTICE O'NEILL: But all that could happen. All that could happen if the company itself was not the class representative. I mean the client of the company could be the class representative and still get the same benefits of having the same company present all the evidence.

MR. LLOYD: Sure. The law applies equally to all parties. Yes, your Honor.

JUSTICE O'NEILL: So, I guess what I'm saying is the economy that your argument puts forth wouldn't be precluded by an individual -- by the client of the company bringing that being the class representative.

MR. LLOYD: Certainly not. We have brought before a class representative that is uniquely qualified. This in fact -- this is a uniquely qualified class rep -- class action because it's in a regulated industry. There are basically no individual issues in this case. Every -- all the terms are defined and all the relationships and legal responsibilities rising from purely from the parties are defined by law. There is no individual issues or contract formation as it was in adhoc, there's no questions that has begun. They were referred to to repair individual issues. These issues are determined as a matter of law by examination of the law by the courts, determined as a matter of law and can be applied to all parties, all members of the class, as well as the defendants.

JUSTICE MEDINA: Mr. Hatchell made an argument that this should be against public policy. What's your response to that?

MR. LLOYD: Yes --

JUSTICE MEDINA: This type of assignment.

MR. LLOYD: All right. This case was started from the get-go on the basis that an assignee cannot be a class rep. That's the way it was litigated by the Southwestern Bell until their most recent reply brief when they said in page 6 that Southwestern Bell does not maintain that a class rep can never be an assignee. This is news to me. It was news to me when I read that. So we've taken one issue out of the case. We've taken the issue out of the case that because of the status of assignee ... because of the status of a class rep, is a, is a class rep by assignment, that's by itself does not disqualify a party from being a class rep. Because you have-- you are in the class, because you are an assignee, that does not disqualify you from being the class rep. That issue's gone. So what are we left with? We are left with -- in analyzing that this typicality and suitability of the class rep with the rigorous analysis that the same analysis that every class rep must undergo. Now, Mr. Hatchell has raised the issue that there's something wrong with this assignment. He is trying to create a new class of

assignee. A stranger assignee, entrepreneurial assignee. These are words never heard before in the jurisprudence of the United States of America, which, except for a brief period in the1860s, it always included Texas. Now, the reason why -- first, the facts of the case don't support the argument. As a matter of law -- as a matter of fact, and we know that the suitability of the class rep is determined on a case by case basis but it's a fact question as determined on a case by case analysis of the facts of the case. In this instance, far from being a stranger to this litigation, STA was immediately involved in these litigations from the beginning. One, they are well known to Southwestern Bell because their job is to audit the bills of the Southwestern Bell and mostly for business customers in the state of Texas. Two, they were a member of the Morales class action along with all of the other users of Southwestern Bell services in the state of Texas. In point of fact, this class action was created as a result of a Rule 11 agreement entered into between STA and Southwestern Bell wherein the claims of the business customers were carved out of the Morales cause of action during the fairness hearing.

JUSTICE HECHT: If the STA were more of a stranger, would you say that that might impact on the class certification or not? If it was like act me class actions and we hire out to take assignments and bring class actions. Would that be problematic in your view?

MR. LLOYD: It certainly would, Judge, which is certainly not supportive of the facts of this case. Now --

JUSTICE HECHT: And then the petitioner argues that this is not unlike paying somebody to be a class representative all other problemwise problems. What should be that?

MR. LLOYD: Once we get passed the concept that a class rep ... that an assignee can be a class rep ... once we get past that concept, which we have gotten past that concept actually, based on their concessions, and of course, all other cases that I brought which I think maybe has something to do with their concessions in this case, but once we get past that concept, and an assignee can be a class rep, then we repair to this rigorous analysis of the suitability and typicality to be a class rep, which is the standard in every case. I brought to you cases where assignees had been disqualified as class reps by virtue of an examination of their motives, how they acquired the assignments. Smith v. Ayres case from the Fifth Circuit, the class rep was denied class representative status. He had an assignment, but one share of stock. He brought out a shareholder derivative lawsuit. And this Court said, you cannot do that because this is merely a strike shoot in the sky. You cannot have ulterior motives behind bringing this lawsuit. In [inaudible] Medical Systems --

JUSTICE MEDINA: But aren't derivative lawsuits, a little different analysis, or are they the same analysis as --

MR. LLOYD: I'm sorry?

JUSTICE MEDINA: -- class actions? Derivative lawsuits. Aren't derivative lawsuits against say, corporations, aren't they a little different?

MR. LLOYD: This is under Rule 23. It was an analysis of Rule 23 and as we know, the Rule 42 -- Rule 42 is a copy of Rule 23 in federal cases are instructed to [inaudible]. It stands from the proposition that the exemp -- that the motives -- the purposes at least it required, assignment required can be examined and would meet these issues. In other words, since we got past the idea that class reps can be assignees, we then, we just have to rigorously analyze their adequacy

CHIEF JUSTICE JEFFERSON: Okay, so under adequacy, STA's objectives differ from the absent class members because the assignments favor ... ah disfavor noncash remedies. Is it not correct here? Most of the members would derive value from a settlement paid in coupons or credits but there is a Mr. Wilder, an STA employee, said coupon credit option was not even under consideration.

MR. LLOYD: In point of fact, Judge, there is nothing in the records to support any of those statements and a point of fact, Mr. Wilder did say he did not think a coupon would be applicable in this case and so did the Supreme Court in Bloyer[inaudible] Bloyer.

CHIEF JUSTICE JEFFERSON: You said nothing supports any of those statements, so is it not correct that STA would disfavor noncash remedies?

MR. LLOYD: That is true, Judge. There is nothing in the record to support that statement. In point of fact, they have added to Mr. --

CHIEF JUSTICE JEFFERSON: Did Mr. Wilder says that a coupon credit option was not under consideration?

MR. LLOYD: He said it might not be suitable in this case, Judge. Now, the point of fact is that they have expanded that in their briefing to say, he said that coupon settlements, refunds, other services might be considered. The point in fact is, refunds on future bills, cash, additional services, those are all cash remedies because the value is attached to these services and that is, monetary relief. So, if there is some skepticism on the part of STA on the virtue of -- by virtue of skepticism with regard the coupon settlements, it is that the STA is merely reflecting the skepticism that this Court expressed by coupon settlements wherein the class gets coupons and in returns gets millions of dollars, that was expressed by this Court in Bloyer . In point of fact, that's what happened to Morales that is why the Southwestern ... STA went down there. The Morales cause of action was this same course of action brought in behalf of all of the customers in the state of Texas. It was settled on a side way settlement where the class received nothing, zero. And the attorneys got millions of dollars. The only reason that these business customers are here and have their cause of action still alive is because Southwest -- STA went down there and objected and got a Rule 11 agreement carving out these causes of action to bring them on behalf of the business customers of Southwestern Bell.

JUSTICE WAINWRIGHT: Also with regard to adequacy of the class rep, the argument has been made that there may be a conflict of interest or at least lack of representation of hotel/motel customers because there has been no assignment of that class of potential plaintiffs.

MR. LLOYD: Yes, Justice Wainwright. Thank you for bringing that up. We know that the inquiry -- it's even said in these cases that class representatives don't have to be clones of every member of the class. That is to say, a class representative doesn't necessary have to have all the claims that every class member has. There merely has to be a common nexus of law, in fact, between the record of claims brought on behalf of the class and the claims brought on behalf by the class representatives, owned by the class representative. In this case, hotel/motel arises from the same statutory scheme, it applies to the same used socks and then the billing is the theories -- the legal theories behind why the billing bills cannot be collected, why it's an improper collection of the same legal theories that are applied for the digital trunk in the Smart trunk and the Digital Loop services. These are all phone services for businesses. These are large customers that have a lot of switching, a lot of telephones, a lot of lines. So they

have these facts in common with the claims that Southwest Tariff Analyst has assigned to it and they have the law in question. So there is a nexus of law, in fact, between hotel/motel services in the Smart trunk and Digital Loop. There has been no showing, only speculation, of any conflict in this case. Mr. Hatchell has raised all these horrible possibilities. They are nothing but speculation. Each of these issues, each of these potential conflicts wasn't dealt with by the Court below and there is record -- evidence in the records which may [inaudible] each of these differences. He raised the issue of ah.

JUSTICE HECHT: Mr. Lloyd --

MR. LLOYD: Yes, Justice Nathan.

JUSTICE HECHT: Why is the Amalgamated Transit case wrong?

MR. LLOYD: Well, I have two things to say about the Amalgamated Transit case. One, it's a narrow interpretation of the California Statutory Law, of a right given under the California Labor Code Private Attorneys General Act to pursue courses of action on behalf of other members who are beneficiaries of the Labor Code. It's a narrow interpretation of California Law. Two, it's wrong. It already been dissent. Dissented by the presiding judge has got-- He says -- 'I am unable to locate any authority which compels these conclusions urged by the majority nor does there seem to be a compelling policy or other reasons to reach its result' it's wrong. I don't think its California Law. It flies in the face of jurisprudence -- all across the country and in California as the presiding judge points out, so, it's just wrong, Judge. I'm sorry, it's just wrong, and it's -- but if you want to say it's right, let's based on the narrow interpretation of California Statutory Law. So, that's why [inaudible].

JUSTICE WAINWRIGHT: The STA would keep 30% of any recovery. Is that correct?

MR. LLOYD: That's correct, Judge.

JUSCTICE WAINWRIGHT: What about attorney's fees?

MR. LLOYD: Attorney's fees we hope to get attorney's fees from the aggregate settlement, the same as in every other class actions. There's nothing to --

JUSTICE WAINWRIGHT: So the class would get 70% of any recovery?

MR. LLOYD: No, no, no. No, no, no. No, no, no, Judge. The STA will keep 30% of the ... as I understand it, of the proceeds from their five assignees. The class will keep a 100% of and by its assignment, will keep a 100%.

JUSTICE WAINWRIGHT: 100% of what?

MR. LLOYD: Of the recovery.

JUSTICE WAINWRIGHT: But STA is getting 30%, right?

MR. LLOYD: Of the five assignors that have assigned them causes of action.

JUSTICE WAINWRIGHT: I see. And the rest of the class gets 100%.

MR. LLOYD: That's my understanding --

JUSTICE WAINWRIGHT: [inaudible]

MR. LLOYD: -- of the situation Judge. We're not claiming the STA gets 30% of the aggregate settlement, if there is one. Reallocation, they raised the issue of reallocation. These facts were all introduced through our expert, Mr. Clapseld, and that's his real name, Mr. Clapseld was our expert, his former employer was Southwestern Bell, who has been in this business for 30 years and he has been -- as a, as a, well never have been [inaudible] dollar challenge. I don't know for fact to go -- if he'd gone further than that. He is an expert in computers and the billing practices of telecommunications industry and he has been -- in fact he's an expert all across the country, and he

has been in Southwestern Bell litigation suit as well as the [inaudible] case in 1988. He knows more about thier records and their billing practices and their computer system than they do. It's apparent if you read the transcript, that that's the fact. And they had to bring forward some issues that they raised, through Mr.Clapseld, because their own guy didn't know it. So, what they said is that Mr. Clapseld there is gonna be a reallocation because the idea that some memebers that they have a right to recoup this -- Southwestern Bell has the right to recoup some of the franchise fees from their customer base by the cost of a tariff and that may mean reallocation may jigger around. Well that's from them. We don't think there's gonna be reallocation as a matter of law. We said that Southwestern Bell is bound by the tariff which says, they have a six-month period in which they can recover any under billing. So we think their six-month period is long past. So we, as STA believes, and takes the position that there will be no reallocation, but Mr. Clapseld appeared to deal with reallocation. Why? Because we know to have a good class -- to have a good trial plan, we have to be prepared to deal with any contingencies that may arise, and he was ready to deal with it. The reallocations, if there is any, which we don't think there will be, [inaudible] not the interest of the class but just really the cash recoveries. This scheme of recovering franchise fees from the customer base extends to every Southwestern Bell customer in the state of Texas, five million of them. Any reallocation will be spread with five million and will have, as Mr. Clapseld says it, a very small impact, if any, upon the interest of any of this business's customers which amount to about 6,900. By the way, the class has been identified. The Southwestern Bell submitted to the Court a list of the potential class members, punitive class members, and submitted to the Court. It's about 6,900 of them. So we have a class which had already been identified.

JUSTICE BRISTER: Are there any other suits like this pending in Texas?

MR. LLOYD: No, sir. Previous litigations has basically been under franchise litigations based on the cities claiming that they, you know, reallocation is not proper.

JUSTICE BRISTER: Some of those cases are still around. Is that right or not?

MR. LLOYD: I don't think so, Judge. I think they are all resolved. The [inaudible], specified annual payment or this is whenever it existed in March 2000. There was a brief interregnum for these for the use of fee per line to recover and now a standby statute because the statute does these things. The [inaudible] is [inaudiable] This is about just basically compared to the 90s. Okay, the reallocation is to minimize -- we don't think it'll happen -- and in point of fact, they acted as if this is some kind of antagonism or some kind of conflict on the part of STA. Well, it's not. STA has no control over whether or not the Court decides that the six-month period doesn't apply and if there can be reallocation. It is a question of law for the Court. STA doesn't control making this kind of decision about that or about whether or not they are gonna reallocate or not. This is gonna be a -- they are gonna urge it and we're gonna say, "It doesn't apply." And if the Court decides to apply, it is about operation of law. It is not a conflict on antagonism because it's something that is strictly inherent in the law as it applies to the situation in this litigation. And that is why this is such a Denny looks like action because everything is determined by the application of their statute and ordinance. I want to talk about that antiability clause. Mr. Hatchell, in his briefing today, doesn't

seem to understand exactly how this thing work. There is a somewhat complex interaction here of ordinance, tariff, and statute that provides the literally, the legal matrix that would set -- that regulates the relationship between the great monopoly Southwestern Bell and its customers. It's a regulated industry for our purpose. Ordinances are in effect the contract between the city and the utility, the Southwestern Bell. Southwestern Bell, the utilities of Southwestern Bell, you can come in and use our rights of way, but you have to pay us a fee for it and it has been called a rent. It's not a tax; it's a rent. And this ordinance says, "You may recover from our customer base who are citizens, your customer base who are citizens, recoupment under certain conditions of this. According to tariff, take a look. Every one of these ordinances has in that recoupment paragraph, quote then comma according to share comma. That is because the PURA, the Public Utility Regulatory Act, Section 53.002 says that "No utility, no telephone company can recover anything from its customers unless it's by tariff, unless it's in a tariff. Now the tariff, section 23 paragraph 11 specifically says, "Southwestern Bell you may recover franchise fees, taxes thereof, levy by means of [inaudible], gross receipts about lot of item in the bills. That is what gives them the authority. That is what gives them, the Southwestern Bell, the authority to take money from their customers. So, the ordinances which control relationships between the city and the utility is looked to to determine the standards, what can they ... whether they got permission to take from their customers as where we can get compensation for, for franchise fees. We look to the tariff for the authority. Without the tariff, Southwestern Bell would have no authority to take this money from their customers; and it is very clear. Well, what I've got here is a class in a regulated industry where everybody's rights and privileges are determined by law or uniformly across the board. I've got a class representative that can rigorously analyze that every nook, cranny and crevice of this assignment we have looked at, All, Mr.... the president of STA is here. He was deposed. Mr. Barr was deposed. All of the assignors were deposed. Every aspect of this litigation has been looked at very carefully. A rigorous analysis of the suitability to be a class rep has been carried out. The Court of Appeals applied the proper standards in reviewing that rigorous analysis and applied their own rigorous analysis. Under current laws that exist in the state of Texas, this is a good class action. This is a good class rep. Any other questions, your Honor?

CHIEF JUSTICE JEFFERSON: Thank you Mr. Lloyd.

MR. LLOYD: Thank you.

MR. HATCHELL: May it please the court. Justice Medina, the very thing case which was cited of the situation where the assignee had this actually the same claim. What happened was, in the midst of the litigation, it didn't resolve and so the claim passed on the party involved [inaudible] by assignment but it was brought by the person who itself was a member of the class and who has suffered the injury. The Glanton case was a case where actually the Court held that a party could not sue a risk of fidiciary unless he had suffered any injury in that particular case It held that he had not suffered any injury and the only reason that this case is cited is because of a bare reference to the false claims act which is statutorily assigned. This case has absolutely nothing to do with this case. I think what the Court has heard this morning is a very simple concept of this case. Assignee steps into the shoes of the assignor and by stepping into the shoes, you automatically become, entitles to class to be a class

representative. There are two problems with that. First of all, it commercializes the right to be a class representative. Under their theory, they could take their assignments and put the right to be class representative on eBay and anybody could bid on that if they wanted to. The second problem is that it asks the Court to just simply disregard the nature of the assignment itself and what violence that does to particular elements of Rule 42. Justice Hecht, I recall in, I believe it was in Gandhi, you made a very interesting point about Turineo v. Turka , the infamous [inaudible] and the point there was, yes, assignments of rights to unstay are freely assignable and this Court does not want to do any violence to that but when you look at this particular assignment, what you are trying to do is to wire around the fact that you accept the benefits under the 1960 will and yet you're taking assignments in order to defeat the estoppel which the law imposes against you. And I simply say that this Court should look very closely at the assignments in this case and when you do, I think you will find that they are terribly destructive of the class process. In so far as the conflict of interest is concerned, an area where I think this Court should write, the only argument I heard was well, we don't think it will happen. Let's "certify now, worry later." It's there and it needs to be deal with and we think it's disabling.

JUSTICE MEDINA: But you also said that if it did happen, it would be because of operation of law, not, not for any other reason. Because there's a Judge has to make a decision based on what that law is as it applies to this class.

MR. HATCHELL: Well, I think that the problem with conflict is, how ... it is not whether or not it's going to be resolved because I think he is talking about reallocation would be determined as a matter of law. I don't know whether I agree or disagree with that. The problem is not how reallocation occurs. It is whether or not this particular class representative, by not having a claim for the hotel/motel group, is disinclined to represent it. And two, because it is only interested in a cash outlay whether or not it is going to pursue options. What -- how the law handles the ultimate disposition of the damages is really not the issue, it is the disabling on the class representative himself and how that impacts, how the class representative will handle them. And we think the conflicts are clearly there. They are admitted in the records. Their experts admitted they were there and they say said, "We can fix it. We can fix it."

JUSTICE MEDINA: Does it matter if the cash outlays, as you say, or some type of other recovery, because as I understood Mr. Lloyd's argument that the testimony that coupons weren't appropriate for this type of -- or this particular litigation not that coupons have been ruled out?

MR. LLOYD: Well --.

JUSTICE MEDINA: Of course we'll look at the record.

MR. LLOYD: -- they said, well -- in the letter that I gave you on the cases I actually attached to the testimony. He said two things as I recall, they are not under consideration and two, he thought a coupon settlement was illegal. So that speaks to me volumes about the adequacy itself of these class representatives. Questions?

CHIEF JUSTICE JEFFERSON: Thank you, Mr. Hatchell. The cause is submitted and the Court will take a brief recess.

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