ORAL ARGUMENT – 02/19/03
01-0836
UNION PACIFIC RESOURCES V. HANKINS

GUNN: If I were going to argue this case in only 60 seconds, I would summarize my argument as follows. I would tell you go read the Nineask() decision, the identical twin appeal that went to the Houston CA. And you will find in that decision and the set of opinions contained there everything you need to know about this case. If you wish to dispose of this case on a narrow ground, you may do so as the Nineask(?) majority did, and hold that predominance is lacking in this case, and the class cannot be certified. Both at the duty and the breach levels.

If you page further beyond the majority of _____ and read J. Cohen's dissent, you will see raised there a broader jury's prudential question, which is this doctrine of what do we do about avoiding the merits in certification? That is a big deal. It is not necessary to reach in this case, although, I'm going to ask that you do so.

PHILLIPS: Do we follow J. Posner word for word?

GUNN: I would at least read J. Posner. Word for word is not something I would do of J. Posner. I would, however, take a great deal of instruction from the point that he has made, and I find J. Easterbrook's opinions a little bit closer to my views.

If you take one step back again from the panel in Nineasked(?) and look at the en banc split, you will see honest, and conscientious CA's judges unable to agree on how class action appellate review should work. That makes this a SC issue. You have an opportunity to give a great deal of guidance about how all the elements of the rule should be reviewed, about how class action abuse of discretion review works, and you can solve not just the problems in today's case, but in the Nineasked(?) case, which is essentially waiting on the shelf on remand to see what happens here.

In Phillips Petroleum v. Bowden, which was argued a couple of weeks ago in the 14th CA, and a host of class action cases, without your guidance I'm afraid we may again see a repetition of what we saw in the CA's opinion here. We just have a CA say, I have to turn away from that 7-day old SC decision in Yzaguirre v. KCS. I can't even consider it. And that leaves us as advocates with a real problem. And I think it leaves the CA judges with a real problem.

O'NEILL: Did I just hear you say that we should find no predominance here?

GUNN: Yes.

O'NEILL: Wouldn't we have to remand that to the TC to make that determination in light of Yzaguirre? How could we make that finding here?

GUNN: I think you can make that finding on the breach level, for example. But I think you could make it on the duty level. If I fan out a pack of 52 playing cards, that is more or less what we have with all these leases.

O'NEILL: But we would have to look at the leases to make that determination wouldn't we? Isn't that an evidentiary sort of review?

GUNN: I take your point. I am agnostic rather than atheistic on the presence of the covenant in those leases. I think you and I are in somewhat of in agreement. I do not deny and I do not ask you to hold the implied covenant is affirmatively lacking in every single lease. So you are right. That is for the trial judge, and that's for the trial lawyers to go squabble about in the TC. And I don't want you to go that far. I think the market value leases are going to have a problem. But I'm not asking for a judgment on that. I simply say they can't unite them all with a bad legal rule and announce predominance and uphold that finding on appeal.

OWEN: But they could unite market value leases that had some more provisions couldn't they? And those could proceed as a class?

GUNN: If they can put together similar leases into a class, then I will let them go that far.

OWEN: Their argument is you've used an index that does not represent market value, or that you have charged a fee that does not add any value to the gas and that that's not deducted essentially from market value. Those are legitimate claims it seems to me. Why couldn't those proceed as a class action?

GUNN: If they want to go forward on that, I would like to let them carry the burden and prove it up in the TC. I don't quarrel ab initio with the idea of letting them do it. I think they are going to run into trouble at the breach stage. But if the leases are identical, if you have one lease with a lot of royalty owners, then I'm going to be a lot less critical of class certification treatment. Although if we go to breach, and not just the duty level of whether there's a covenant or not, if we look at breach, I worry that that's going to break down because if we are looking for comparable sales well by well and location by location, remember the standard here is not of implied warranty. It's a reasonableness standard under the same or similar circumstances. And what a reasonable operator would do in July when it's hot and the demand for gas is low may be very different from what he would do in January. And depending on where the well is located, the quality of the gas at each well, the gas over here may be richer, the gas over there may have more water in it, it seems to me that is likely to break down. I'm willing to let the plaintiffs do it. Whichever way you rule today, the plaintiffs will still have their claims when we walk out. Whatever your judgment is every plaintiff will still have their claims. There is no danger of rendition against them. And if we have underpaid some of them, we want to make it right. They are entitled to pursue us. They have a statutory remedy under Ch. 91 of the Natural Resources Code with a guaranteed award of attorney's fees, and a minimum $200 actual damage award no matter even if we only underpaid them 1 cent.

So they don't need a class action. But if they want to try it that's fine. I just think you should do more than decide this case. Because J. Owen, in answer to your question, that's what so often happens in these class action cases. You get the appellate ping pong. It goes back and there's a recertification. Phillips v. Bowden is a perfect example. It's been certified again. We will see what happens. But let's not have it continuously loop back to the TC for another hearing without some guidance.

ENOCH: Is it your position that if there is one lease, then you can have a class action as to the royalty owners under that lease, but if you have two leases irrespective of what the leases say, you couldn't have a class action combining the two leases, or are you saying you could?

GUNN: It would depend on what kind of leases they are. I am skeptical because of...

ENOCH: They are identical leases. The language is identical. You're saying you could have a class action there?

GUNN: I'm not certain. I don't think I'm going to quarrel with that today, because that may not be superior. I'm not sure we need a class action there.

ENOCH: Let's suppose you have two leases and they are not identical except the one term that's argued. Do you pay market value or do you pay index price? Are you saying that that can't be a class action, not because the leases are identical under the _____, but because the damages would be different?

GUNN: It's more the latter.

ENOCH: And so on a class action notion your view is that you could not - for you to win, the court has to conclude that a class action cannot be used for deciding the key issue - index price - and leave for separate trials the damages for each one under that? And if that's the case then every individual royalty owner has to come in and relitigate the index price question before they can try damages. How do we deal with that problem?

GUNN: I think I understand. If there is a common fight about can you use an index price or not, and the class certification is limited by the trial judge in his or her discretion, that one issue, that may not be improper. That may not have the problems that I've raised here today. I do think it's obviously going to break down when we get to the breach stage. How does it lead to causation and damages? Was this a breach of that duty? I do think the duty question might be amenable to a single resolution early on. But I'm not sure how that advances the ball.

I'm not asking you to outlaw that today. It seems to me we're not here to reform the class on appeal. That would be something the trial judge could decide. And at that point superiority is going to popup. The trial judge is going to say do I need to do everybody at once? Let's have a bellwether trial. I'm going to decide this once. If it's affirmed on appeal, that's going

to be stare decisis in this district. And if you deny the petition, that's the law of the state. Everybody will have a construction of that contract. There's nothing wrong with proceeding that way.

I don't see why a class is necessary. I'm asking you simply to overturn this class certification because there is no way predominance can be achieved on this record.

PHILLIPS: Respondent alleged that your company calculated every royalty the same. Didn't go back to bother to read any of the leases. Does that weaken your argument that we have to look at the leases and try to divvy up the class _____ performance agreement that it superseded whatever was written years ago?

GUNN: Right. It seems to me that's the only argument that I've really encountered from the other side's position. That is the one argument they say is, we have this common fact, not really so much an element of the claim, but this one common fact.

I would say first of all, I find that a bit of an exaggeration of the facts. Now when we talk about facts in this interlocutory appeal there really aren't facts. There are quarreling experts and depositions in the record. We don't have fact findings. As an appellate lawyer, I feel sort of disembodied looking for evidence that hasn't really been litigated yet, and facts that haven't been found. I don't accept their factual assertion that we paid them all the same except only at the most abstract level. We use algebra and a computer system to do it. But I think the factual record is extremely thin and in this pre-trial posture, I think it's a little bit dangerous to even talk about what the facts are.

What they want is a pleading standard that says, if we allege it it more or less has to be taken as true.

O'NEILL: But what if that in fact were the case how would you respond?

GUNN: I would say if you read the O'Sullivan decision from the 5th circuit just a few days ago, they had the same problem. Countywide mortgage was doing this class-wide conduct of the way they assess lawyer's fees on a title statement. And the 5th circuit said, we've got to go transaction by transaction. It's a question of reasonableness under the circumstances of each one. You can't get predominance. They can't get predominance from that one common fact. They may have a common fact, but that doesn't mean it changes this litigation and that becomes something predominant. It may be one common fact.

O'NEILL: But if you interpret the leases the same way, these clauses the same way, which is what I believe they allege, I don't see how the class could then fall apart depending upon the individual leases.

GUNN: The way it would fall apart would be the difference between a summer sale of rich gas, and a winter sale of lien gas at a different well. Because we're talking not just about one

sale for each royalty owner. We're talking about many, many sales every month from wells for several years. There are just too many differences.

O'NEILL: But that's on the damages end and not the liability end.

GUNN: No, I think not. I think that is actually built into the reasonableness standard of what a reasonable prudent operator would do. We're going to fight that determination, we're going to have an expert who says that's a reasonable way to sell it. The way we did on this well in that month for this landowner, that's a reasonable way to do it. And we want our jury trial right to litigate that. I don't think that can be collapsed out of the case.

But if they argue that we should move for summary judgment if we want to resolve these things, again, I don't know what the summary judgment looks like. I don't know how it avoids a breakdown unless we are just going to turn away and not look at all these individualized transactions. The O'Sullivan case, it seems to me, is dead on point on that. If you're dealing with a reasonableness standard and it's a negligence problem it's going to breakdown. Bernal broke down. In Bernal you had one common course of conduct. And this court said, 900 plaintiffs is a lot, but you can't lump them all into one class. This is Bernal squared. We have more than one act. We had it spread over a period of time and over geography, over a large range of places.

I want to caution the court about that phrase marketing fee in the briefing though, because when I read their brief I go the impression they envisioned the marketing fee as something separate. There's no evidence of a separate marketing fee. That's just shorthand for the same basic theory that there shouldn't be any markup at all.

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RESPONDENT

REED: I would like to go straight to Yzaguirre and discuss it on two levels. Because it is the basis for petitioner's claim that this court has jurisdiction. But in discussing Yzaguirre, I would also like to move in to issues beyond jurisdiction related to rule 42. Particularly petitioners say that the TC and the CA found that there was an implied covenant in all of the leases. It did not. That decision has not been made. Nobody has asked the TC to do it.

HECHT: As I understood the argument it was that by the plaintiffs that because Cabot is the law this case is easily certifiable. And if Cabot is not the law, then where does that leave you?

REED: It's not essentially respondent's argument. Start from the standpoint that there is no dispute that the implied covenant is present in proceeds leases. Petitioners don't argue to the contrary. Yzaguirre doesn't argue to the contrary. This record has the statement that the majority of these leases are proceeds leases. And excluded from the class are any lease which has reference to a specific index, or that approves affiliate pricing.

PHILLIPS: Are you saying if it's a market lease it's not in this class?

REED: No. I've gone proceeds and I've excluded the ones that are excluded. Then you have the issue...

PHILLIPS: Are they excluded if they have an index? They are in if they have proceeds, excluded if they have an index?

REED: Index, or the lease says that it approves or allows affiliate transactions, such as this self dealing scam that's going on.

Now we've got market value. Let me go straight to the issue of what Yzaguirre did and what it didn't do. First of all, J. Phillips said in footnote 3, in Yzaguirre we are not talking about a situation in Yzaguirre where there was an allegation that the implied covenant had been breached for marketing the gas away from the lease to reduce royalties.

J. Phillips also said that the implied covenant is there to protect against self dealing.

OWEN: But isn't your proof going to be very different between the market value leases and the proceeds leases. The market value leases you're going to have to prove that whatever the affiliates did that the price you got was not market value. And in the proceeds cases you are going to have to prove that there was some sort of scam basically.

REED: They would be if you were doing an implied covenant case and an express market value claim. That is not the way the case is presently structured. I would like to go back to the fact that I don't believe your Yzaguirre opinion stands for the proposition that in the face of self dealing when you're not talking about the royalty owner trying to get a price of gas well in excess of the current market that it excludes the implied covenant in a market value lease.

OWEN: What if we disagree with you and say Yzaguirre says as long as you've got market value, then demonstrably you receive market value then there can be no self dealing.

REED: Then you have a situation where it can be decided as a matter of law market value you lose on implied covenant. You have none. You've disposed of that issue. And you still have the majority of leases being proceeds and nobody argues that's not...

OWEN: Why is it proper then to fold in to that class the market value leases?

REED: Because you have just disposed of the implied covenant in a market value case.

PHILLIPS: You're saying we should do that?

REED: No.

OWEN: But doesn't that go to predominance? That's my point. If the TC has - why shouldn't the TC be looking at proceeds leases as a class and market value leases as a class to satisfy predominance?

REED: I believe a TC could do that, but I believe you can still keep this class and not have to wait another 3 or 4 years to have them separated out and bring it back up. And see whether having a subclass of market value and proceeds, I think it's unnecessary because it is decided as a matter of law.

OWEN: I have had a hard time seeing what issue predominates when you fold the two together.

REED: The issue that predominates is, you have - in the proceeds lease there is no question but that the implied covenant is present. And what you had happen, what UPRC did was they had a master "contract" between the producing affiliate and the marketing affiliate. After the gas was aggregated they paid royalty on some index related price that was lower than the price the marketing affiliate was getting in the real market. You're talking about aggregated BTU's of gas. You're not talking about something that predominance and commonality is _____. They paid all royalty owners exactly the same. And so that class would still be there. Then you have the market value issue. The judge decides if you're saying Yzaguirre says there is no implied covenant, you just handled all of the market value claims just as they were in Yzaguirre.

Before I leave the Yzaguirre issue. Two weeks ago this court issued an opinion in Anadarko v. Thompson. And that was a cessation of production case. And the court said, the lease didn't terminate because there was capability of the well producing. The plaintiff said, well you could hold the lease indefinitely. The court said, no you can't, because the implied covenant is present to market the gas, and that's the protection that the plaintiff has. That logic that came out two weeks ago in your clarification in Anadarko v. Thompson applies equally to market value leases.

OWEN: There can be implied covenant, but even so how can you show breach if the market value was actually received? You would have to prove it seems to me under the market value leases that notwithstanding this affiliate arrangement here your royalty owners were not paid market value. Because it seems to me if you were paid market value that's the end of it. And that's a very different inquiry than you would have under the proceeds leases.

REED: Where I disagree with you is you can have an implied covenant in a market value lease, which is what I thought you said, which is how I read your recent opinion in Anadarko v. Thompson.

OWEN: There are different components of a marketing obligation. One is to go physically connected up and get it _____. One is to look for the best price. And I thought we said

in Yzaguirre if you get market value, then that's the end of the inquiry. Can that particular piece of the market obligation, not necessarily the other components of them.

REED: What I thought you said in Yzaguirre - you did say that, but you said under the facts of this case where the royalty owner was coming in trying to get a price well in excess of what the then current market value of the gas was. Those are not the facts in this case. We are trying to get what the real value of the gas is in the real arms-length market. And we have much to say about the referencing of indexes and the reliability of indexes, and we believe that the implied covenant can be present, and should be present in that market value lease. Because what you are dealing with and what this case is entirely about is self-dealing. And what we suggest to the court is, that the implied covenant can be present in the market value lease just as in the proceeds lease, and the entire class can be prosecuted on that basis.

ENOCH: In the proceeds lease you would claim we're entitled to whatever proceeds they realized in the sale, and it doesn't matter what the market value was. You want the royalty based on the proceeds received by your lessor. Right?

REED: Under the express proceeds term yes.

ENOCH: Express proceeds that's what you want. Under the market value leases you're not basing your recovery on the implied covenant. You're basing your recovery on that they paid you royalties on an amount that was less than the market value. Right?

REED: No, that's not correct. In both cases...

ENOCH: I thought your argument was that what the affiliates sold the gas for was in fact the market value they sold it for.

REED: And the record speaks a lot to your question. In a current market situation as opposed to an Yzaguirre situation proceeds and market, in the arms length market will be the same.

ENOCH: Aren't you arguing that your claim in this class action is exactly that?

REED: Under the implied covenant to reasonably market the gas, which is different than an express claim. This court in Yzaguirre...

ENOCH: But isn't your sham...

REED: Yes. We didn't get the arms-length price...

ENOCH: Because that was the market value.

REED: It is the market value, and it's also constitutes a breach of the implied covenant.

ENOCH: For you to be successful in this case your claim against UPRG resources is not that they didn't get the market value for the price when they sold it. Your claim is that they breached an implied covenant to get it. Your claim is that they actually didn't get it isn't it? That you can prove by their affiliate that they were shortchanging you because the market value was really this amount, which they were obligated to give you, and not this amount. And you're not arguing that when they sold to a third party they got less than the market value from the third party.

REED: When it was eventually sold by the production company, we are saying that that is the basis that they should have paid royalty owners.

ENOCH: And that's not because there is an implied covenant. That's because they actually didn't pay you what the market value was.

REED: It is based upon an implied covenant claim. Let me try to answer the question this way. This court in Yzaguirre commented on the fact that they didn't want to undo Nela. Nela was a situation where the royalty owner sued on the implied covenant claim, and the market value claim, both in the same lawsuit seeking what could, if the jury found that way, get the same money. The plaintiff royalty owner lost on the implied covenant claim. And as we know went forward under the market value express claim and won.

What I'm suggesting to you is you go back as long as you want to go back. There are two separate claims. And the implied covenant was present in Bala(?). It was tried to a jury. They lost. They still recovered under the market value claim.

PHILLIPS: Do you have a common issue of fact other than the implied covenant that goes through all of these cases?

REED: The marketing fee goes to all of them.

PHILLIPS: So you say it applies to all the proceeds lease as well?

REED: Absolutely. And the petitioner does not dispute that the implied covenant is not present in a proceeds lease. And we take out the ones that specifically allow index pricing. The dispute again is on whether an implied covenant is present in a market value case? And at a minimum this case is completely different on material points than the Yzaguirre case. And Yzaguirre is the basis for their jurisdictional _____. We are prosecuting the case that is precisely within footnote 3. We are making the claim that you said you are not addressing in Yzaguirre. We believe that the gas was marketed in such a way, off the lease to exactly pay less royalties and less severance tax. That's the reason they moved the money from the producing company to the marketing company is exactly for that reason. And for that reason Yzaguirre cannot control what's

going on in this case.

We respectfully submit that the court doesn't have jurisdiction. But beyond that, your recent confirmation of Vela, in Yzaguirre, your recent statements in Anadarko v. Thompson all support the fact that the implied covenant can be when there is self dealing.

HECHT: Given the briefing about the Eisen(?) issue, it's remarkable that we've spent this much energy this morning arguing about the substantive law. Because it seems to me that in all of that debate and whether the jurisprudence should move as far as the _____ case, you have to look at the certification issues through the prism of the substantive law to tell what you're going to have to prove, how you're going to go about that, mechanically how you're going to get to a judgment. Isn't that much true?

REED: If the question is, should the court be looking at what deciding verses evaluating the merits means? Yes. I think you should and I think it's fair game. In Mr. Gunn's brief about your question saying in an NIED case, and when we know there's not going to be a claim should we certify a class. I don't think that makes any sense. And you shouldn't.

HECHT: And we can't look at this as if Cabot were the law. Now it may not make any difference, but we can't and the trial judge shouldn't.

REED: Right. But I do think you're being asked to go one step further than just saying is Cabot the law? You're being asked to do what you said you couldn't do in InterTex v. Beeson. In InterTex v. Beeson you said deciding the merits of the suit in order to determine the scope of the class is improper. Petitioners are asking you to do exactly that. With regard to the proceeds, royalty owners, which are the majority of the royalty owner there is no dispute that the implied covenant is there. They are asking you to decide, even though it hasn't been briefed properly, that the implied covenant cannot be any circumstances in a market value lease.

OWEN: We don't have to go that far. It seems to me that we can recognize there's an implied covenant under a market value lease. But recognize that the proof in proving up a breach of that covenant in a market value lease is different from the proof in a proceeds lease.

REED: The first step you would have to do is find that you have jurisdiction, and if you did, what you just said respectfully you don't have jurisdiction. Because it takes _____ conflict with Yzaguirre which is what they argue. But going beyond that, I don't know any other way to say it but to repeat what I said with regard to Vela(?). They tried in a...

OWEN: I understand your Vela argument. Basically it seems that what you're arguing is that under Yzaguirre you could still, even though you were paid market value each and every day for your gas, you could mount a claim well you should have signed a long term lease that bound you to a higher price, and you didn't. So I get the higher price. And I don't think that's what Yzaguirre stands for. I respectfully disagree with you on that.

That point aside. Let me make it clear for the record. Your index claim is different from your marketing fee claim. They are different facts.

REED: They do both. You're saying, Mr. Reed, you're wrong. You're saying even though the implied covenant can be in a market value lease...

OWEN: I thought we decided in Yzaguirre that we don't have a reverse Vela claim.

REED: And this isn't a reverse Vela situation.

OWEN: I thought what you are arguing is, is that it can be.

REED: No.

OWEN: I know the facts aren't here. But you seem to say that you can have an implied covenant claim even though you were paid market value. And I thought Yzaguirre squarely said no.

REED. Yzaguirre said that under those facts where self-dealing wasn't the issue, and where the royalty owner was seeking a price well in excess of the "current market value for the gas" we're not going to allow that to happen.

OWEN: Are you making the distinction between a couple of cents in excess as opposed to well in excess?

REED: No. What I'm saying is that I don't read Yzaguirre, particularly in light of your Anadarko v. Thompson case as saying that the implied covenant can't be present in a market value lease when the facts present a self dealing situation. When it's present and where you and I disagree when the implied covenant is present, which I thought you said it could be, you can make an implied covenant claim, which is different and requires different proof and a different jury finding than an express market value claim, which is precisely what happened in Vela. They tried and lost the implied covenant claim, and won a market value claim, which is different proof.

O'NEILL: How do you respond to the argument that determining what a reasonably prudent operator would do under the same or similar circumstances is going to be an individual determination...

REED: Because we're talking about a commodity. We're talking about a BTU of gas. The record supports - what we're talking about is, gas comes from different wells; it's processed or treated and then the producing company transfers it at a lower price to...

O'NEILL: I understand the claims.

REED: ...but when it transfers it it's transferring BTU's of gas. A commodity. You

can't tell one molecule of gas from another. It doesn't know which well it came from.

O'NEILL: The way I understood the argument was the price that you receive based at different wells and different places under different circumstances...

REED: All you do on liability, and all you do on the duty and to calculate damages is substitute a higher price into what they've already done, what's already in their data base, you just put the price that they got in the arms-length market. Everything flows back. It's mathematical. It is entirely different than the 5th circuit O'Sullivan case that they cited, because there to determine what was reasonable you had to look at the services that the lawyers performed in all these different files and they were different services. Here you're talking about the damages and the liability being based upon a commodity.

OWEN: I think what J. Enoch was asking you if a reasonably prudent operator would have performed the same transaction with a nonaffiliated company.

REED: The question will be when a reasonably prudent operator take this aggregated gas - it all goes under one...

OWEN: What if the operator decides not to aggregate? They want to sell at the well head or somewhere not very far off the lease. They say we don't want to get into this business, so we're going to sell to a company that is a gather basically. And a reasonably prudent, that's not affiliated and a reasonably prudent operator would have signed the same kind of deal.

REED: A reasonably prudent operator in Anadarko's position or any major producer is never going to do it. They aggregate the gas and they sell it. And that's how they sold. When UPRG was sold to Anadarko, that's how they sold the company. They bragged about these aggregation and marketing points and the fact that they were making more money off their marketing affiliate, and that's how they derived the price. A reasonably prudent major producer is never going to do that. They aggregate gas.

OWEN: Not every producer aggregates gas.

REED: Every producer every time they have a chance does, because that's the way they make money. They take it to aggregate, strategic, marketing locations. That's how they sold their company. Bragging about. They're strategically located marketing outlets where they sell the gas.

PHILLIPS: How come the TC didn't err in certifying this class both under rules for mandatory classes and rules for _____?

REED: Well I don't think they did because you can do both.

HECHT: What kind of notice are you going to give them? Are you going to send them a you don't have any choice notice, or opt out notice?

REED: No. We are not arguing that it's not an opt out class. The order said that there will be notice and it would give them the right to opt out. We do not intend it to be a mandatory class.

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REBUTTAL

GUNN: J. Hecht, I would point out to you that in the Castano opinion from the 5th circuit, oddly enough the trial judge was looking at allegations of negligent infliction of emotional distress and fraud without reliance. The trial judge in that case certified the fraud class and said, I can't think about the individual _____ reliance because Eisen(?) blocks me from doing that. The 5th circuit said that it is not correct. You can get the same result from Walker v. Packer. You can say, if a discretionary ruling is premised on an error of substantive law, that's an abuse of discretion. We are going to essentially vacate it, send it back, do it over. And if they can certify it up without an error of law that's fine. That will take care of the Eisen(?) problem.

Eisen's(?) policy is probably more geared for its protecting jurors and the role of fact finders, to let both sides fight it out and not just have a little summary jury trial or a min trial to the bench about what the facts will be weighing the witnesses. Eisen doesn't really say - what Eisen does say at the end, if you read on there is a quote from a 5th circuit case that says, the focus ought to be on the elements of the class action rule, and are those elements satisfied.

HECHT: But there's no way to know without some knowledge of the substantive law.

GUNN: That is absolutely right. And where there is overlap with the substantive law it's okay to look at the substantive law. Any other system is a retreat from the idea of going beyond on the pleadings. Any other system is a 12(b)(6) kind of pleading standard, which says we've got to take the plaintiff's claim, just take it at face value. And that seems to me it's not coherent.

ENOCH: As I understand Mr. Reed's argument, he responds to your point that because it's what a reasonable operator could do that necessarily is fact specific to each arrangement, therefore, we don't have predominance of issue. Mr. Reed responds that, wait a minute. The point of the reasonableness is decided at the point of sale from the aggregating pool of gas to the marketing affiliate. And so there is no individual reasonableness determination that goes below that. So we're not talking about was it reasonable from the well head to the aggregation. We're only talking about reasonableness that's exercised after the aggregation in selling to the affiliate. Is that true?

GUNN: I don't think so. The facts are fuzzy at this point.

ENOCH: If that's the only claim these plaintiffs are making, then why isn't that a

predominant claim to all of the people whose gas _____ that aggregation?

GUNN: I don't think that's with this class. I think this class goes way beyond that. As I recall, there are royalty clauses with the typical two prong feature of proceeds on the lease and market value off the lease. Some allowed deductions for this and that and some don't. There are notice of cure provisions. This class is just too _____ genius to be put together. I'm not opposed to his right to put together a proper class. But I don't think it will happen.

ENOCH: So it's not the reasonableness of the conduct. You're saying what's aggregated - they can attempt to say the only issue here is whether the index price was not the proceeds price. You're saying they are trying to say that's the only issue. But in truth once you get into the case the leases provide for certain charges against the royalty in some and others that Union Pacific took that they would be entitled to claim as part of their defenses in the class action that then destroy this _____?

GUNN: That is absolutely correct. I still doubt that the plaintiffs will ever be able to overcome the reasonableness problem. If you look at O'Sullivan, you have a federal statute with a reasonableness standard and you have Mortgage Title Co. doing the same thing every time. The 5th circuit said that's not good. If that case is correctly reasoned there is no way the plaintiffs can put together their class here.

HECHT: Do have enough familiarity with the post-remand certification in Sturman to speak to that?

GUNN: I do not. I notice Texas has been carved out of that class, and I will wager whatever my opponent wants to wager that that will not survive 5th circuit review.