ORAL ARGUMENT – 01/08/03
02-0038
CITY OF SAN BENITO V. RIO GRANDE VALLEY GAS CO., ET AL.

PONCIO: As this court indicated in Bernal, federal decisions and authorities interpreting current federal class action requirements are persuasive authority in Texas. The question in this case being whether the petitioners in this case can bring by appeal questions regarding the settlement and class action where they have not intervened in the underlying lawsuit?

In this particular case, we have a recent US SC case interpreting federal class action rules, which has held that nonnamed class numbers, like petitioners in this case, who have objected in a timely manner to approval of a settlement...

O'NEILL: In Devlin the party appeared at the fairness hearing and did object and we had a record of the substance of those objections. It seems that the objection that the city has filed here was solely as to the opt out, and had nothing to do with the merits or the substance of the proposed settlement. Is that correct?

PONCIO: No. The actual objection to the settlement in this case went to the merits of the settlement as well.

O'NEILL: Can you point to me what it said about the substance. I haven't looked at the documents. What objection was made to the terms of the settlement before the hearing?

PONCIO: Looking at the objections to the settlement, the cities object that the amount is inadequate to compensate the cities for the damages. They also object that the attorneys's fees sought was excessive in light of the settlement.

O'NEILL: But they did not appear at the hearing and express why it was inadequate, or put on any evidence, or quantify it in other way.

PONICO: The federal interpretations of the objections requirement particular under Newburg and the cases cited therein are that all that is required is that the objections be on file. There is no necessity to appear at the fairness hearing.

O'NEILL: I guess what I'm saying. The TC never had an opportunity to really address the substance of your objections since you didn't appear at the hearing. Correct?

PONCIO: The requirements are that we filed the objections. I believe that the objections were specifically set out enough that the TC could have addressed these objections.

O'NEILL: Perhaps for preservation purposes. But for purposes of determining whether

if we reach the merits the TC abused its discretion, we don't really have a record to flush that out do we?

PONCIO: Not with regard to the actual objections to the settlement. But the question that comes before this court with regard to petitioners is, if you haven't intervened can you raise it on appeal and, therefore, could it have been addressed?

PHILLIPS: So you're not asking us to reach the merits today? You want us to say the CA was wrong in saying that you were not properly _____ and send it back to the _____?

PONCIO: Yes. What we are asking the court to do is 1) to hold that we could appeal the class action thereby allowing us to appeal the court's rejection of our opt outs.

PHILLIPS: You really want to go all the way back to the TC.

PONCIO: No. Not necessarily.

PHILLIPS: What do you think this record entitles you to get by _____?

PONCIO: We think that this record allows us to be held that 1) we can appeal; and 2) that we properly opted out and should not even have been considered as part of the class action. Therefore, the merits of the class action themselves would not actually be reached. Because we weren't a part of the settlement. We weren't a part of the class action. We never should have been because we properly opted out of the class action. That's what we're asking this court to decide here today.

JEFFERSON: The only decision that the CA made in the appeal has to do with standing. As I read your petition of review you didn't at least at that point challenge the CA's holding in that regard. Why can you now argue standing before this court?

PONCIO: Well we feel that all of our points of error go to the issue of standing in that could they even be addressed first with us being here before this court? Could this court address any of those issues without there being standing. We feel, therefore, that they could be considered included in each of those points that we raised.

JEFFERSON: Obviously there are two things going on. The appeal and the mandamus. But the sole issue reached in review was standing. That was all that they talked about. And so I would have expected the petition would have addressed that first, and then you get to the other arguments that you make. At least make that the central crust of your petition before this court.

PONCIO: We felt that all of these points necessarily included the question of standing, because the court would never address any of those issues without the issue of standing being

addressed first. Moreover, at that time the case law was that in order to appeal any of those issues there had to be an intervention. Now we have the US SC case saying that under Devlin we did not need to intervene. Our problem was, we were in a catch 22 situation. The catch 22 situation was, if we intervened is there any waiver of our contention that we had properly opted out? If we appeared at the fairness hearing was there any waiver of our contention that we had properly opted out and should not be even considered a part of the settlement?

While we failed to artfully address it, we believe that it is an issue that is necessarily included in each of these points addressed in our petition. And more specifically addressed in our brief on the merits.

PHILLIPS: Let's talk about the Devlin case a minute. That was a settlement class. And really the parties had no opportunity to get into the case until it was over. In this case you had at least a year between early 2000 and early 2001, between the time that the TC rule your opt outs were not timely and _____ final judgment _____. Could we look at some type of latches or waiver which should be imposed upon you because you did not give the TC an opportunity to rethink its ruling?

PONCIO: No. I believe that from all intensive purposes looking at the court's disregard of all the opt outs followed by the parties, including by city attorneys, by Mr. Ramon Garcia on behalf of TMTCI, that it was obvious that the court's intent was to allow this settlement to go forward, allow this case to go forward. Subsequently, as part of our objection at the settlement we asked for reconsideration. The court still overruled that. It was clear that it had considered that as part of its final judgment. Latches was never raised by the respondents in this particular case. I don't believe that we necessarily had to seek any other relief. Once the judgement was final we could go forward with our appeal saying, Your Honor, we had opted out in the first place. We should never have been considered a part of this. We're now asking the CA for relief. And then subsequently this honorable court.

The TMTCI contract was very specific. The TMTCI contract provided that TMTCI after having consulted with city shall have the power and right to employ legal counsel of its choice to represent city in enforcing any claim through necessary litigation.

PHILLIPS: Would that mean in any type of class action if somebody already had an attorney that was looking into the matter, the class action was related to _____ that they could not properly be considered a part of the class action to opt in?

PONCIO: I think that attorney should have the right to decide whether to opt in or opt out. In this particular case, the attorneys after consulting with the city made the determination that they should opt out because the settlement was way below the actual value of the case. For example in this particular case, the City of San Benito would have received approximately $18,000 under the settlement. We believe that the value of the judgment or the value of the case was in excess of $1 million. The only people making money in this case were the attorneys, which is improper under

any standard looking at the Lloyd opinion and the other opinions...

PHILLIPS: Which is not something you want us to look at?

PONCIO: I think that the first issues to look at are whether we opted out. If the court holds that we properly opted out, then I don't believe we have standing to address the actual merits of the settlement. If they believe that we should be considered part of the class, then I think that the merits of the settlement should be looked at, or at least remanded back to the 13th CA for them to make the consideration of whether it was a fair and adequate settlement, which we believe it was not on behalf of any cites.

PHILLIPS: Are you as petitioners representing Dona, San Juan, Penita, Santa Rosa, La Joya, and Pharr today, or do you concede that they accepted the settlement and are not in the _____?

PONCIO: I concede that they accepted the settlement, but what happened in this particular case is knowing that we represented these cities they were approached by class counsel, asked to sign these documents in violation of the attorney/client relationship. But we believe that that's a matter for another day.

PHILLIPS: COULDN'T HEAR.

PONCIO: I don't believe it would. I believe that's a separate matter.

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RESPONDENT

HAWKINS: I'm representing the respondents, the cities of Mercedes and Weslaco, who in the underlying lawsuit were the class representatives. Subject to obviously what's on the court's agenda and the questions that they are asking, I would like to address the following four points. Mrs. Timms will be addressing the fairness of the settlement as well as the procedural aspect of the case for the court.

What I've heard the court ask, and I would like to address the issue with regards to the authority of Mr. Ramon Garcia to doubt, which is one of the areas that I will be talking about, which is the opt out effect by an attorney who we believe did not have authority to properly opt out. In addition I would like to talk to the court about the delegation of authority, the retrospect effect of the ratifications that the petitioners have brought up. And then finally, I believe the distinctions of the Devlin case.

First, with regards to the delegation of authority that the petitioners have brought to this court. We believe that the petitioners misframed for this court the issue of inaction

by a municipality in being involved in a class action. In fact from the state of Texas there have been many public entities that have been involved in class actions. But more particularly what we believe this court needs to look at is what...

PHILLIPS: There's no challenge at this stage to the idea that this case could properly be set up as a class?

HAWKINS: We did not challenge it. But there has been briefing with respect to the inaction of a municipality.

PHILLIPS: I'm talking about the whole challenge that nobody should be in the class. That these are individual contracts and they should be litigated individually. That's been in the CA. We didn't have jurisdiction on it, or at least nobody tried to weed their way through jurisdiction and have not any longer preserved for us to consider _____. Is that right?

HAWKINS: Yes. Then let me address the opt out with respect to the notice that have been provided. I would like to address with the court that the fact that the petitioners made mention that the notice may not have been adequate, and, or, ample time to provide notice to these cities to opt out. Obviously this was never an argument made by the respective petitioner cities up to Jan. 31, 1999.

HECHT: Why should they have to make a bunch of arguments. Why shouldn't they just be able to easily get out of the class? Typically in class actions, class members don't have lawyers, they're not sophisticated and they just get a notice in the mail. Why shouldn't it be as easy as pie to get out of the class?

HAWKINS: The rule 42 sets up a procedural mechanism thereby once the court determines that through the elements of rule 42, the due process of the class members, that group has been set. Then the court comes in and determines what is the method whereby you can opt out. Again, it is to create a cohesive, organized...

HECHT: Cram them all in against their will. Shouldn't they have a reasonable time and an easy way to get out of the class? Isn't that the whole point of opt out? We want to make it easy for people to opt out if they don't want to be part of a class, or not?

HAWKINS: We do argue that they did have ample time...

HECHT: Thirty-eight days.

PHILLIPS: During the summer. And you also say that the attorney can't make the decision. This has to go before the city governing body in full compliance with open meetings to make this type of legal decision?

HAWKINS: What the open meetings act deals with, if a city is going to make a decision, is going to decide to opt out, that it has to do...

PHILLIPS: Why can't the lawyer do that?

HAWKINS: Ramon Garcia is not a city attorney who would have had a general authority possibly under a charter. Mr. Garcia wasn't even named in the general franchise contract that petitioners bring forth to this court. In fact, these six or seven contracts that would be in front of this court because there are six or seven petitioners in front of this court, these contracts were all entered into prior to this piece of litigation being certified.

HECHT: He was their lawyer or not?

HAWKINS: No. We make the argument, and I believe he was not their lawyer at the time this piece of litigation was certified and required the cities to have a formal meeting to opt out.

HECHT: Was there a motion to show authority that was filed in the case?

HAWKINS: There was a motion to show authority approximately in Nov. 1999. A hearing was held in the TC in relationship to the opt outs. And at that time it was brought forth to the TC that these agreements were entered into, at least the ones that are currently in front of this court, prior to June 24, 1996. And in fact, at that hearing the petitioners' counsel admit that these agreements were not intended to actually specifically opt out of this piece of litigation or any other class action. In fact, that was a general franchise fee collection contract that would have been entered into prior to the June 24 certification, and it was designed so that an audit could be done of the franchise fee agreements. Then yes, it did provide an option that if they could not negotiate or could not collect on the franchise agreements, then they would be authorized to hire a lawyer to help them. But never at a point in time was that agreement set up or notice given to the public, or a hearing held on hiring Ramon Garcia to opt out for those particular petition ____.

And so we here had a situation where a lawyer, on his own, opted out, then almost 3-1/2 years later when there was a hearing in Nov. 1999 by the TC to determine the viable members of the class ratification ordinances were done. We argued, we submit to the court, that you can't ratify a prior illegal act. Mr. Garcia was never given authority to opt out for these cities.

HECHT: So the city wants out and a lawyer who claims to represent the city opts them out, and then the city later says that's right, that's what we wanted to do, and we wanted him to be our lawyer to do that, and you say that can't be done?

HAWKINS: The ratification would be effective after, which in 1999 was when these cities ratified, the court determined under its abuse of discretion that that wasn't a timely opt out. That in fact, because these entities are required to as a governing body, to take action, if they take action they need to do it in a open meeting.

OWEN: Do you have to have an open meeting every time you authorize counsel to take action in a case to file a motion for summary judgment for example?

HAWKINS: With respect to any action that the governing body would take to further its business, then that would be.

OWEN: As a case moves on down the road, a city sitting there, what do they have to authorize their counsel to do ahead of time in an open meetings act once they retain counsel?

HAWKINS: The open meetings act does have a definition of deliberation and the purpose of the open meeting. What the open meetings act does is if you are going to further the business of the city, and I would argue that unless the charter because of a home rule city would be ruled by its charter as well as state law, its charter and there are cities, and the city of Houston for example it has allowed its city attorney, not another attorney, the right and the...

OWEN: I asked you a specific question about you hire a counsel to represent the city, and in the piece(?) of litigation how does the city determine would it have to have an open meeting and specifically authorize its attorney to take specific actions in a lawsuit?

HAWKINS: At the point in time that the city would hire that particular lawyer it would be assumed, depending on how the open meetings provision was set up and how the contract was set up to hire that lawyer, it would determine whether he takes other actions or whether he comes back. The contracts we're looking at never even hired a lawyer. They hired a consultant firm to look at franchise litigation. While there would have been the ability for a lawyer to look at and help the consultants with negotiating franchise...

OWEN: So your saying a city is served with a lawsuit, they've got 38 days to do something, they can't even hire a defense counsel without an open meeting to file an answer on it?

HAWKINS: I would submit to this court that the city would first look at its charter to determine whether it had the authority by the city attorney to do that, because there are charter provisions that would. If not, I do think that most cities do meet at least once a week...

OWEN: What under the law requires them to have an open meeting to hire a lawyer to respond to a lawsuit?

HAWKINS: Chapter 551 of the Gov't Code requires that anytime a city transacts business it has to have an open meeting. It could have had a contract with Ramon Garcia at that period of time to opt out and take all action necessary to handle this piece of litigation. None of these cities did that.

HECHT: I know you say Ms. Timms is going to deal with the fairness, but let me ask you about the settlement to be sure I understand it. The agreement says it's for a total of $4 million,

approximately $2.1 million is to go to class counsel. Is that correct? $1.7 million, plus $333,000 in expenses.

HAWKINS: That's correct.

HECHT: And it says that's going to be paid whether there are any participants in the participating cities or not. Is that right? Irrespective of the number of non-participating cities.

HAWKINS: That was the terms.

HECHT: If everybody wants out they are still going to get $2.1 million?

HAWKINS: The terms of the settlement agreement was that the lawyers who had been working 4-1/2 years on this piece of contentious litigation would receive that amount of money.

HECHT: And who's going to pay that?

HAWKINS: Southern Union obviously paid that, and whatever cities agreed to the settlement would pass that through. Those were normal, the actual franchise fee collection amount as well as the attorney fees involved would have been passed through as well.

HECHT: In other words the consumers are going to pay for this? The people that are buying the gas.

HAWKINS: Each city had an ability to determine whether they wanted to accept the settlement and pass it through.

HECHT: Is the consumer going to pay the money that's going to go to the lawyer for the attorney fees in this case?

HAWKINS: Yes.

HECHT: Then what's he get for that?

HAWKINS: The local natural gas distribution company would be paying the city the appropriate franchise fee.

HECHT: But they're just getting it from the consumer.

HAWKINS: These entities, and I will have to defer to Ms Timms on some of this, but the franchise fees as the ____ have been able to do it through their tariffs have always been passed through to the consumers.

HECHT: I understand that. But what are they getting for it? Now their franchise fees are being raised and $2 million of it is going to a lawyer, and what have they got for it? Any better gas or any better service or anything?

HAWKINS: I'm not able to answer your question.

HECHT: Well you're class counsel. Why can't you answer it?

HAWKINS: I wasn't involved in all the terms of the actual settlement. But yet I do believe that the consumer received the benefits of actually having the natural gas distribution company pay under the terms of its franchise agreement would be to individual cities that accepted the settlement.

HECHT: It looks to me like if I were Mr. Jones, and I were buying gas in one of these cities, the city of San Bernito, I wouldn't want a higher street charge or franchise fee because it's just coming out of my pocket. It doesn't do me any good. I might as well be paying taxes. Is that wrong?

HAWKINS: No. But I believe that each individual governing body of each city made the determination of whether they would accept. And that one of the terms of the settlement agreement was that each individual city could decide whether it would accept the terms of the settlement, and then pass it on to the residents of that particular city.

HECHT: It strikes me that the gas company, and the city, and had a lawyer have all gotten together and said we ought to take some of these folks' money away from them and split it up among ourselves. They don't have a lawyer. They're not represented in the class. They don't have any say in this and it's their money. Is that a wrong view of this settlement?

HAWKINS: I don't believe that that is a complete view of the picture. The view of the picture is is that from the beginning of 1995 when this lawsuit was filed till the time it was settled in 2001, there was 5 years of contentious litigation with regards to the particular issues. The defendants fighting feverishly that they believe they did not owe that money. That clearly under the terms of the franchise agreements they did owe. Now I don't believe that at any point in time, at least for the history of my participation in this, that we all sat down and that well let's just all get together and settle this agreement, and then pass it on to the consumer. In fact class counsel objected at the fairness hearing about the pass throughs.

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TIMMS: My major problem on the procedural issues is I just do not see how the court reaches the major issues in this case. Because they were required to complain in their petition for review about the dismissal, that's the entryway, the doorway through which they get in to the rest of the issues. They never complained about the dismissal in their petition for review and the issues.

HECHT: And you don't think it's whatever the rule says a fairly

TIMMS: I really don't. What they're argument truly is it's a logical argument that doesn't hold together. It's because we were required to complain about it, therefore, we did. And practical experience teaches you that doesn't hold together. If you read the petition for review, everything, the issues, all of the discussion, everything, you would not even begin to guess that there was a dismissal, that there was a problem with the dismissal, that there were standing issues. Any of those things were out there. If you just gave it to a reasonable reader they would not see any of those issues _____.

TAPE IS GETTING BAD.

HECHT: Devlin says this really isn't really about the standard. This is just really about _____. Do you agree with that? It's not about standing. It's about who can appeal.

TIMMS: I believe that that's true. But I will say this, that issue it's just not in their petition for review anywhere. It's just not there. They tacked it into their brief. This court's rules clearly say that you can't add new issues to your brief. And that's what they tried to do. I told them in April that that issue needed to be in their petition. They did not think. I told them again in July. That is the overriding issue.

J. O'Neill, I just wanted to note that even if you give them sort of everything that's in the CA's opinion, and say we'll count that as sort of in the record, you know that they filed objections. You know the date they filed objections. You have no idea what the objections were. The objections are not in the record before this court. They just attached it to their brief. But it's not in the record.

HECHT: Can the record be supplemented?

TIMMS: The problem is the record _____ at the CA. They did not make sure that those things were in the record going up to the CA.

HECHT: The rules still allow supplementation