ORAL ARGUMENT — 9/8/98
97-1171
ALFORD CHEVROLET-GEO V. PARISH

PERLMUTTER: This is potentially a class action of immense proportions involving the purchase of over 4 million vehicles since January, 1994. The issues that we ask the court to consider today, is whether the punitive class representatives have met the DTPA notice requirements, and whether the defendants may be subjected to merits discovery before a class is certified.

To the DTPA issues, there is no agreement. Our position is still that the DTPA requires notice for the individual plaintiffs before a class action can proceed. The plaintiffs in the case don't agree with that position, so there's a clear disparity under Judge Hecht's opinion in *Hines v. Hash* mandamus, we submit is still appropriate for that.

On the discovery issues, we had offered a counter-stipulation. And our counter-stipulation was that any discovery recently calculated to lead to the admissible evidence related to class certification would be permissible. But that that would not include evidence that was primarily related to establishment of proof of liability and damages. And we couldn't agree on that wording, so that's where the discussion ended.

ENOCH: You're arguing that if the request is any documents that any of the dealers have where they charged this tax, you agree that would be trying to identify the class members?

PERLMUTTER: It would be.

ENOCH: So that's not part of the documents that you're in disagreement over?

PERLMUTTER: Actually it is. We would stipulate to the numerosity requirement, and it's not necessary to identify every class member prior to certification, because that's an extraordinarily expensive process. Once certification occurred, if it did, then it would be appropriate to do that.

ENOCH: So you're willing to stipulate that it's a large class that has similar factual factors?

PERLMUTTER: No, that part we don't agree with necessarily. We are certainly willing to stipulate to the numerosity with regard to the _____ and commonality issues. There are certainly some issues that need to be decided. But the discovery necessary to deal with those issues is quite minimal.

HECHT: It sounds to me as if you're arguing that you have to give notice relating to the class reps, or the individual plaintiffs. The defendants can always then try to settle with them, and maybe you would always thwart class certification completely.

PERLMUTTER: I don't think always that would occur. I think that certainly that can occur if the defendants choose to make the tender requirement under the DTPA. And that's certainly an eventuality that could occur. That's precisely the eventuality that is mandated by the clear wording of the statute. There is no room in the statute to provide notice for an uncertified class on behalf of all these class representatives. As we point out in the brief, notice is required from the consumer advising the defendant of the nature of the consumer specific to the plaintiff.

HANKINSON: There are no more consumer class actions?

PERLMUTTER: No, I don't think that...

HANKINSON: How would you ever have a consumer class action and how would you ever comply with the notice requirement since this is all supposed to occur pre-certification?

PERLMUTTER: There is actually one consumer class that's gone up on appeal in Houston. There is a case again H&R Block, where apparently they dealt with the notice issues and it's been certified.

HANKINSON: How are you telling us it would work?

PERLMUTTER: It would work if somebody made demand under the DTPA, and the defendant failed to make the required tender. And that happens from time to time. I handle more cases like these as planned. I can tell this court that it's a rare occasion when an individual demand like that is actually answered and a full tender is made. It's a rare case where that happens.

ABBOTT: But on a related topic, essentially you would have to identify in the notice letter the names of all the plaintiffs to the putative class, and that would be probably an impossibility?

PERLMUTTER: Under the DTPA the way we read the statute, and I think the statute is clear on this, prior to filing suit, you know all the plaintiffs that you represent. In this case, there are 5 of them involving 4 transactions. They can clearly make demand on behalf of those 5 plaintiffs prior to filing suit. Once certification occurs at that point you can discover and...

ABBOTT: But I'm talking precertification in a consumer class action brought under the DTPA. Because virtually always you will not know the names of all the putative class members. You cannot make a demand on behalf of all the putative class members?

PERLMUTTER: That's correct, you really couldn't. First of all, because you wouldn't have authority to represent them; secondly, because you wouldn't know who they were.

ABBOTT: But this authority issue wouldn't that be true in all class actions - consumer

and nonconsumer?

PERLMUTTER: It's a little different, because in other class actions even though you don't have authority to represent the "class," settlement to discussions informally can take place. But before any settlement is approved or any offer are officially made or accepted, the class has to be certified.

ABBOTT: Why can't those negotiations not be done in the consumer class action context?

PERLMUTTER: They could be, but that doesn't deny that if proper notice is not made on behalf of the 4 identified plaintiffs, and that notice is not done properly, then the defendants are entitled to abatement. You can still have informal discussions about that anytime you want presumably. But that doesn't preclude the defendant's right to abate the case if proper notice is not made.

ABBOTT: Just because it's a consumer class action, there is no difference between the representation by the lawyer of unnamed plaintiffs verses the nonconsumer class action?

PERLMUTTER: In terms of making demand and receiving a response, I submit there certainly is a difference, because the specific provisions in the DTPA require a notice on behalf of an individual plaintiff to an individual defendant. Section 17.506, is a clear expression and intent by the legislature to give a defendant an opportunity to tender the full amount of the plaintiff's claim to terminate the litigation at that point. And there is not any way that I can see other than a legislative amendment to change that. Section 17.506 says that in an action brought under 17.50 it is a defense cause of action if the defendant proves he received notice from the consumer advising the defendant of the consumer's specific complaint, etc., and attorneys' fees reasonably incurred by the consumer in asserting the claim against the defendant, and within 30 days after the day on which the defendant receives the notice, the defendant tendered to the consumer the amount of economic damages and damages for mental anguish claim and the expenses including attorneys' fees if any reasonably incurred by the consumer in asserting the claim.

ABBOTT: In this case, why could the defendant companies not tender the amount of this identified tax? Why couldn't all the car dealers tender that back to everyone they charged that from, and the $110,000 attorneys' fees, and therefore, you would have set up your statutory defense?

PERLMUTTER: First of all, I don't think there is anything that requires the defendants to take that action until the class is certified. The reason why we haven't tendered is because one of the prerequisites of our power to end the litigation by tendering is our proving, that is the defendant has to prove we received a notice from the consumer advising us of the complaint, the amount of economic damages and expenses, including attorneys' fees reasonably incurred by the consumer in asserting the claim. So we've got to prove that they made a demand for reasonable attorney fees and expenses, and that we satisfied at 100%, on behalf of the individual plaintiffs they haven't given us an opportunity to do that. What they did instead in their first letter is they asked for $50 million on

behalf of the entire class, and $75,000 in attorneys fees. In the second letter they asked for $110,000 and $47,000 in case expenses. Now remember that if the court will, that this is anticipated to be a pre-suit notice, and if you're including $47,000 of case expenses and service fees and so forth, that's not a pre-suit notice. So the key to this is, that they've got to trigger our ability to tender by a proper notice letter. And that's what they haven't done in this case. And we've been waiting now 3 years, over multiple suits, multiple counties with multiple dollars to get a proper notice letter so that we can make that tender if we so choose, we haven't had that opportunity.

ENOCH: You could have. You could have taken the letter the way it was written and under your view, you could have paid $150 to the plaintiffs, and you could have paid $75,000 to the lawyer and let them come forward and claim that that wasn't sufficient tender. And then we would be in the process of arguing whether or not the tender satisfied the DTPA. Your argument being, "that's all their letter could possibly require us because it wasn't a certified class," or they would say, "our letter was sufficient." And you would argue, "no it wasn't sufficient." So if we didn't tender, it wasn't sufficient, so we would be down the road apiece.

PERLMUTTER: I certainly appreciate the logic of that argument. I would submit to the court though, that the statute doesn't require us to guess that much. What would happen to every defendant, we would have to absolutely guess how much money really did relate to their attorney's fees in order to get this tendered defense.

If they were required by this court to tender, to make a demand for attorneys' fees reasonably incurred by the consumer in asserting the claim against the defendants, which is obviously not what they have done, they have narrowed the range that we've got to guess.

ENOCH: But that goes to the argument whether or not you've made an adequate tender. That doesn't go to the argument whether or not their letter is sufficient, right?

PERLMUTTER: I submit that it goes to the argument about whether the letter is sufficient. Here is why. Their letter is required to include attorneys' fees reasonably incurred by the consumer in asserting the claim against the defendant. Now does that mean they can wait 2-years after they file a suit, incur $100,000 worth of fees, $50,000 worth of expenses, and say, "okay, those were the fees that were reasonably incurred by the consumer in asserting the claim against the defendant."

ENOCH: But that doesn't go to the adequacy of the letter. That goes to the reasonableness of the fee. Surely under the DTPA, the defendant could not take the position that I didn't have to tender because I didn't like the amount of the attorneys' fees they put in the letter. It seems to me that's the argument you get into as to whether or not your tender was sufficient.

PERLMUTTER: There are two different statutes that we're talking about here. One of them is §17.506, and that's a total defense to any liability determination litigation. The one that I think the court's argument really relates to is the one that allows you to cap the damages. Where they can ask

for a gazillion dollars and you say: Well I really think their damages are $30.00 here, and their attorneys' fees are $250.00, and if I end up being right they don't get any more attorneys' fees for damages when the case is over. The problem is that while all of that's - and we could have done that in this case, but that doesn't serve us, because while the case is going on, we're spending a fortune defending this case, and dealing with 4 million car sales, in this class certification and all this stuff over a class by the way that I don't think will ever be certified. But we're spending all that money doing that, because that defense doesn't do us any good. The one that does us some good is §17.506. And that's why I submit that this court ought to say that in making a request or making a demand under 17.506, we're talking about fees reasonably incurred in making a pre-suit demand on behalf of each individual plaintiff against each defendant from whoever that plaintiff seeks to recover.

ENOCH: Your position here is that they have not given you a proper DTPA demand?

PERLMUTTER: That's right.

ENOCH: But all your arguing is, is the reasonableness, at least at this point, of the fee (we're talking about the attorneys' fees now)...

PERLMUTTER: No, it's what the fees are related to. I'm not saying that $110,000 and $50,000 in expenses is unreasonable for pursuing class action at this point. What I am saying is, that's the demand that they made, but the fees that they are asking for don't relate to the individual claims by these individual claimants.

OWEN: How do you know that?

PERLMUTTER: I think it's perfectly obviously from these amounts. We know that there is no any way that they could have spent $47,000 in pursuing claims on behalf of these individual plaintiffs, because they spent about that serving the 600 defendants in this case that don't have any transactional relationships specifically with any of these plaintiffs in the case. They spent $110,000 - there's no way as a plaintiff's lawyer who testifies as an expert on attorneys' fees, I will submit to this court, that there is not any way that I have ever or anybody else could ever make any kind of a _____ that $110,000 is necessary to assert a pre-suit claim on behalf of a consumer under these circumstances.

ENOCH: Before the plaintiff is permitted to proceed on a DTPA action, the TC is going to have a hearing to determine the reasonableness of the attorneys' fees under a demand of the DTPA. If the TC determines that that was a reasonable fee that they made under the DTPA, then you don't get the abatement? What do we have to do in order to determine the adequacy of the DTPA notice? Is there some sort of fact hearing over reasonableness of these?

PERLMUTTER: The fact hearing would be, is this court would set a standard presumably or to interpret the law as I believe it's intended and that is to say that what we mean by fees and

expenses reasonably incurred by the consumer in asserting a claim against defendant, what we mean by that is reasonably incurred by the consumer in presenting a pre-suit demand. I don't think they make any pretension that that's what their fees and expenses that they have incurred in this case were incurred for. The court sets that standard and that the TC decides whether the demand letter asks for the fees and expenses reasonably incurred in making a pre-suit demand. And that's their facto inquiry. The TC needs guidance from this court, because no court has ever talked about this. These notice letters, we just operate blindly. As a plaintiff and as a defendant we continue to operate blindly on these things. The jurisprudence of this state needs this court's guidance on what's a proper demand letter.

ABBOTT: Are you requesting abatement for what has been identified as the Class B defendants, those who did not file verified motions for abatement?

PERLMUTTER: Yes. Abatement for everybody. Because notice was not proper as to anybody.

ABBOTT: Clarify the facts surrounding the situation where there was an automatic abatement, letter was given, then supposedly the case was unabated automatically? What is the current status of the position that is argued by the plaintiff?

PERLMUTTER: There were certain defendants that filed verified pleadings and their cases were automatically abated. The plaintiffs in this case just ignored that and kept certain discovery, going forward with the case, and so we filed a plea in abatement to enforce basically the court's jurisdiction to maintain the abatements that we think is automatically provided for.

* * *

KILGARIN: Going first to the question that was addressed to us, the test in mandamus is important jurisdiction in this state. And that's the test on granting a writ of error.

PHILLIPS: Well it's in the footnote of *Walker & Packard* that we can exercise our discretion in that regard in deciding whether or not to grant a mandamus.

KILGARIN: Hopefully exercise your discretion by hearing us up to this point. What is important and what is underlying any mandamus procedure is whether or not the trial judge has abused his or her discretion. On 78 different occasions since the adoption of rule 766b, on April 1, 1984, this court has granted leave to file a writ of mandamus in a discovery case. And 75 of those 78 mandamus proceedings this court has held that the trial judge has abused his or her discretion in the discovery ruling.

This court has ruled on 7 separate occasions on over-broad discovery just as recently as *American Optical*, that over-broad discovery is an abuse of discretion. Case law in this state and federal cases, and I might point out that Justice Baker wrote an opinion while on the Dallas

court that says that federal case law is more than advisory. Federal case law because it interprets the rule from which rule 42 is taken is persuasive on our proceedings. Case law says, that class certification hearings shall be devoted to determining the issues of certification. Just recently in the dissent in *Dawson Austin v. Austin*, Justice Baker joined by Justices Enoch and Abbott said this language as to the special appearances: As a policy matter litigants should not engage in discovery on the merits of other issues until the special appearance is decided.

Class certification is no different than special appearances. Class certification, you first inquire as to should this class be certified? Justice Gonzalez put his finger on it in his concurring opinion in *CSR v. Link*: What you're doing to defendants in these cases when you allow for massive discovery before you get to the issue, is you are permitting the compelling the forcing of settlement; it's cheaper to buy your way out. That's what happened on sanctions when we had death penalty sanctions. Up until *TransAmerica* was decided, a trial judge administered a death penalty sanction and it forced the settlement on the part of the defendants and what they may have had a meritorious case.

ABBOTT: Why is the other side's compromise inadequate?

KILGARIN: That's no compromise at all. It says that it relates just to the smallest degree the certification that it's going to be permissible. Well I can craft any question and argue...

HANKINSON: Why is that any different than the relief you are requesting from this court in this mandamus proceeding?

KILGARIN: Their offer of compromise is no compromise at all if you read their proposed stipulation.

HANKINSON: As I read the mandamus papers in this suit, you're asking us to order the trial judge to bifurcate discovery as to class certification issue and merits discovery?

KILGARIN: That's correct.

HANKINSON: And the request is no more specific than that, correct?

KILGARIN: If you want us to fashion for you a proposed rules change to rule 42, we will do it.

HANKINSON: My question is, why is the compromise any different than what you're requesting with respect to the relief?

KILGARIN: Let's go back to rule 166b. Take the broad language there in 166b, we're not drawing bright lines for trial judges to follow, but we're setting the philosophy. We say it's got to

be relevant and the discovery has to lead to something that's admissible. Let this court set the philosophy for discovery in regards to class certification, and then let the trial judges follow it. Right now, the trial judges have got no guidelines whatsoever as far as allowing discovery in class certification.

ENOCH: You've got Alfred Chevrolet Geo. The only question that it seems to me is what people are arguing about is whether or not Alfred Chevrolet Geo should have to produce the pieces of paper that show the purchasers of an automobile who paid a tax. And the argument it seems to me is Alfred says, "I don't want to produce that because that goes to the merits." And the plaintiffs' say, "No, that document goes to the class certification. We're determining the size of the class." Mr. Perlmutter responds, "Well you don't need to know the name of the class member, you just need to know how many there are and we'll concede that there are lots of them." Now is that what this is all about? The details of this case is whether or not Alfred is going to have to produce the pieces of paper that show what customer bought a car that the tax was taxed on. We're just saying, I don't want to produce those because that's merits and the other side I need them because it works on this class. Is that really kind of what we're talking about?

KILGARIN: No, that's not what we're talking about. I'm not going to enumerate everything in Judge Parish's order. We have been required to identify all purchasers, salesmen, sales managers and finance/insurance employees having knowledge of relevant facts. You're talking about 4 million sales of vehicles. We have to identify every purchaser, every salesman, sales manager, finance/insurance employee having knowledge of relevant facts, and moreover contrary to case law we've got to state what their knowledge of relevant facts is. That can't possibly relate to certification.

ENOCH: That's not the one the TC issued an order on?

KILGARIN: They say in their brief that there is merit to our argument that discovery ought to be bifurcated. They say, however, the trial judge took care of it. Let me tell you how she took care of it. Their original question was: Name all persons having knowledge of relevant fact. And they say because Judge Parish changed that to read: Identify all purchases, salesmen, sales managers, and finance/insurance employees having knowledge of relevant fact, that she has somehow bifurcated discovery. That, I submit, to the court, is absurd.

ABBOTT: Would you agree that the discovery issue is moot if the other side gets up and says that they are willing to limit discovery precertification to only discovery that relates to certification?

KILGARIN: We've given them something even more liberal than that, and they've refused to take it.

ABBOTT: What have you given them more liberal than that?

KILGARIN: We said primarily related. We haven't said, Exclusively related. We've said, We can live with something that says, that it's not primarily related to liability and damages. They won't buy that. I feel confident that they won't sign off on what you've just proposed.

* * * * * * * * * *

RESPONDENT

SMITHEE: We've raised several procedural issues. First of all, we alleged in our original petition, that notice wasn't even required under 17.505(b), because of jeopardy of limitations. Because clearly there were certain members of this putative class whose claims would be lost to limitations if a 60-day notice was given.

BAKER: Can't you kind of get around those problems in class action cases? There seems to be lots of class actions where limitations doesn't even get involved, because it is a class action.

SMITHEE: I think limitations is tolled from the time...

BAKER: Is it true to say, the only reason why there is a big issue about notice is because it's a DTPA claim?

SMITHEE: That is correct.

BAKER: If you just suit under some common law cause of action, we wouldn't be here on that issue?

SMITHEE: That's exactly right.

BAKER: And so you want the benefit of whatever the DTPA provides, and their position is, well you haven't given us the notice that's required?

SMITHEE: But the DTPA specifically provides that if limitations...

BAKER: I understand that part of it too. But if you're trying to do this for purposes of a class or a putative class, and limitations rarely has an impact on who the class people are when it's all said and done, why is that argued today?

SMITHEE: We don't believe we were required to give notice under the DTPA because of the invocation of .505(b)...

BAKER: Well did you tell them how many people might be barred by limitations, and that's why you didn't do this? Have you just raised this now or was that argued in the TC?

SMITHEE: That was argued in the TC in response to their motion. That's not a real big issue as far was we're concerned because we went ahead and gave notice after the automatic abatement. In fact, we've given notice twice, and we will do it again if this court tells us to.

HECHT: That argument is more profound. They are really saying that you have to give notice on behalf of the class representatives first, and if the defendants choose to settle, then that's it?

SMITHEE: That's the issue in this case. And that's why we are here. In our judgment, that would be very bad public policy. It would contradict and contravene what the legislature has intended. And I say that going back to 1977, if you recall there were at one time specific provisions in the DTPA regarding class action. And those were removed in 1977, and there was this big discussion that maybe the legislature intended to do away with DTPA class actions.

HECHT: Which they could have done.

SMITHEE: Should have done very easily. They could have done it anytime since 1977. And the legislature is very seldom oblique in terms of changing something as drastic as this would be. Then, Justice Pope, wrote an article and said, "I was there, and I now what happened, and that is, the legislature deferred to the SC when the SC decided to promulgate rule 42." And it was the opinion of both the SC and the legislature that you shouldn't have both statutes and rules that deal with class actions. And so, as a result of Justice Pope's article in *Baylor Law Review* and in some later cases, *Mahoney v.* _____, it's just been assumed that you have DTPA class actions in Texas, and that's never changed either by case law or by legislative action. So that's where we are.

There was some 1995 amendments to the DTPA regarding notice, and they do provide some logistical problems in maintaining a DTPA class action. But certainly it doesn't show an intent to abolish class action. It just causes a little bit of a problem because of the two sections that one gives a defense, and the other gives a mechanism to make a settlement offer.

If this court were to do what the relators are suggesting, it would create a number of policy problems. First of all, you are going to create an inherent conflict between putative class representatives and members of that class, because you are going to require that conflict to occur. If I am a class representative, I file a suit on behalf of the class, their reason would require me to settle my claim, maybe at a premium just to do away with the class. And opposing counsel said that not every class action will be disposed of that way before it was ever certified. I would suggest that the only ones that would be would be the ones with merit, because a defendant who knew that he had a class action problem, he would settle with those main plaintiffs in a demand letter. Why not settle for a few hundred dollars to avoid a very large class action, because typically DTPA cases involve smaller claims with a large number of potential class members. And so we would virtually eliminate DTPA class actions. There may be a few, but any meritorious class actions would be eliminated.

ABBOTT: Why does your position not require us to in effect legislate from the bench by basically engrafting onto the current wording of the DTPA, or at least the wording of the DTPA as it existed at the time it's relevant to this case language that would allow this type of class action to proceed because of the notice standards that are in the specific language in the statute? In other words, if we are going to strictly construe this statute why is it that you do not lose?

SMITHEE: Well I think if the court strictly construes the statute, we win. I will say this, that first of all the legislature passes laws, and sometimes those laws work the way everyone envisions, and sometimes they don't. The original DTPA notice provisions that were in the DTPA suggested you had to give notice before you filed your suit. And there was this question: What if you don't give notice? What happens? Do you lose your suit? Is it dismissed? And this court through the *Shepps* case and later through *Hines v. Hash* said, We are going to devise a way to make this statute work. And it did. And it wasn't inconsistent with this statute, but it made the statute work the way it was supposed to without involving any unintended consequences.

ABBOTT: How if we strictly construe the notification requirement of the DTPA it would result in a win for your side?

SMITHEE: Right. Section 17.505 says, that before you file suit, you have to give notice of advising the reasonable details of consumers' specific complaints, claim, which we believe we have done, and the amount of economic damages, which we believe we have done. It doesn't require us to say that we will settle for that amount. It just says we have to advise of those specific amounts and those specific complaints. We have done that.

Now the *America Online* case, is probably the only is probably the only reported appellate decision to deal with this, and I think *America Online* dealt with it in a very logical and reasonable way. I don't think it's got any history in this state. It's a very recent case. But in *America Online* what the CA said: That in a DTPA case, you allege what's required in the statute, and then you include a demand that the defendant settle with other similarly situated. And the court said: The defendant is not then entitled to be relieved of liability unless it not only offers to settle with the name plaintiff, but also with other similarly situated.

And that's what the Houston court did, and that makes sense. It doesn't contradict the statute. It doesn't involve law _____. It simply involves a mechanism to make the law work, and it prevents the elimination of class actions by the court system under the DTPA when that's clearly not the legislature's intent. So that's what you do, you just simply write your demand in accordance with 17.505, you tell the defendant if you want to settle this case, you're going to have to settle with not only us, but the other similar situated. And they then are given the benefit of §17.506 on the defense, and they are also given the benefit of §17.505(2)(g) to make a counter offer, to make an offer.

GONZALEZ: You made an offer to settle on behalf of the whole class?

SMITHEE: Yes.

GONZALEZ: How is that possible if the class has not been certified? By what authority are you attempting to settle behind a class that's not been certified?

SMITHEE: This is commonly done, and it's done in the federal system. *Newburg*, the kind of a bible on class actions talks about how many times class actions can and should be settled, not only prior to certification, but even prior to filing with a suit. And *Newburg* said, that what you do is, you enter into settlement negotiations on behalf of the putative class realizing that you have no authority to enter into a binding settlement. But you arrive at a preliminary settlement agreement and then you have to take it to the court for approval by the court.

GONZALEZ: It cost less in the long run to do it that way than to litigate.

SMITHEE: As far as the defendant is concerned?

GONZALEZ: Yes.

SMITHEE: That's a possibility.

GONZALEZ: So this overly-broad request for discovery is a tactic to force a settlement?

SMITHEE: It can be. We don't believe that's the case here. We limited it in the TC. Our position has always been, we don't want a lot of documents. And I don't want to have to go through a lot of documents. Now there is certain information that's essential to us in order to be able to certify the class and also to have these venue hearings that are going to have to take place before class certification.

GONZALEZ: Can you zero in on that particular language of the TC's order that Justice Kilgarin read that wanted the name of the salesmen, and anybody who had anything to do with transaction _____. It seems overly-broad.

SMITHEE: It's broad. We asked just the general interrogatory that's asked in virtually every lawsuit that's filed in this state, and that is: state all people who possess information just along the lines...

BAKER: Who do you say this class is supposed to be?

SMITHEE: The class is defined as individuals who bought new automobiles and paid the dealer...

BAKER: Why do you need any more names than that from any particular dealer?

SMITHEE: That's what we need.

BAKER: Why are you insisting the purchasers, the salesmen, the sales managers, the insurance people, and all that? What do they have to do with your class certification?

SMITHEE: Each plaintiff in the context of this lawsuit is suing each defendant on the basis of a conspiracy and concert of action.

BAKER: When you say that, then that goes counter to the argument you're looking for merits discovery rather than class discovery when you are trying to talk about conspiracies and so forth?

SMITHEE: Not really. Because in this issue in order to get to venue, we have to get through venue. They pled a motion to transfer venue. We've got to make some element of prima facie proof to get past a venue hearing, and that's going to involve showing a concert of action or a conspiracy. Now its' not as full-blown as a trial would be, but we've still got to have some evidence to give the court to show that there was a conspiracy or concerted action involved here. Right now, we don't know who these people are. And we ask the TC, we agreed with the TC to limit to it to what we need to get our venue issues done and our certification issues, because we frankly don't want all that discovery right now. We don't have anything to do with it right now.

HECHT: But it seems like the identities of all these people and documents that would show it is a lot of information.

SMITHEE: It may be. But let me say this, that this is an area of very wide discretion of the TC, and the workable rule that - this is not something that this court has time to do, or needs to be doing is going through specific items of discovery in determining what should be discovered and what shouldn't be.

BAKER: What's supposed to be heard by the TC first, the venue or the class certification?

SMITHEE: I think in this case the venue probably would be the first to do order, and then certification.

BAKER: So are we really arguing about discovery in connection with venue hearings or the discovery in connection with class certification?

SMITHEE: Well in the TC we assumed we were arguing about both. I think everybody kind of assumed that we were arguing about venue, and anything precertification and prior to certification.

BAKER: Is there an impact on how this case gets here if it has to do with venue discovery as opposed to class discovery?

SMITHEE: In many areas those are related, intertwined.

BAKER: Then we get into that situation, is this a mandatory venue and you can take it up by mandamus, or you have to appeal and so forth. Does that make a difference on why you are here, or why can you be here?

SMITHEE: I don't think so. The way it was argued in the court, that argument was never presented in the court.

BAKER: So really, it's just purely discovery?

SMITHEE: Yes.

BAKER: Between the two of you on should this be limited to who the class is going to be, and should any discovery about that be limited to that issue without any merits?

SMITHEE: Yes. And we've agreed, we want everything we need to get the class certified, and to get through venue. Anything beyond that, we don't want.

BAKER: Any to get through venue, that's another little hickie you put on?

SMITHEE: But that's probably our first thing that we have to do, is to get through the venue hearing, and then go to class certification. Now anything beyond that, we don't want right now. We don't need it, and we don't want it. We don't have any place to put it.

SPECTOR: How is your position different from the defendants' statement of what they would agree to as being properly _____?

SMITHEE: It's different in this regard. The US SC and the 5th Circuit addressed and they say: You know it's really hard to know what discovery deals with certification and what deals with merits. How do you decide it, because so much of it they use the word "intermingled," and "intertwined". It's all intermingled or intertwined. This comes up in every class action case.

GONZALEZ: They offer the language "primarily related to."

SMITHEE: And then they presented us with a list of things they would not produce under that agreement. And it was everything we had asked for in our interrogatories - virtually everything. If we were to agree right now to "primarily related to," who decides that? I assume it would be the TC. That's going to place an enormous burden on the TC, not only to decide was it related, but is

it primarily related to merits or to class? And what if it is primarily related to merits, but it's something we need in order to prove our class?

GONZALEZ: Do you concede that the order is overly-broad? They are giving you a lot more information than you need to certify the class?

SMITHEE: No, I don't.

GONZALEZ: I thought you conceded that a moment ago.

HANKINSON: Isn't the only order that's here on mandamus is the order on the motion for protective order?

SMITHEE: Yes.

HANKINSON: And we're not talking about the order ruling on the objections or not. The only think that's being complained about in this mandamus is the denial of the motion for protective order?

SMITHEE: Yes.

HANKINSON: Is that motion for protective order in the record?

SMITHEE: I believe it's in the record.

HANKINSON: And it just asks for bifurcation in general terms?

SMITHEE: Yes.

HANKINSON: And we have this second order that deals with the specific discovery items and ruling on the defendant's objections, granting some, overruling others, modifying discovery requests, but that's not part of what we have here. Do we have any basis in this record to determine that in fact the discovery still remains overly-broad?

SMITHEE: I don't believe so. That order wasn't challenged on mandamus. Now that's how the TC chose to deal with this was through ruling on objections rather than dealing with a motion for protection.

HANKINSON: Do we have any kind of an evidentiary record that supports any kind of decision one way or the other with respect to the TC's ruling on whether something was overly-broad or burdensome or anything?

SMITHEE: No, that's the point. You could get mandamus relief in this court, but you've got to make some kind of record. You've got to narrow it down. And if something is overly-broad what you do is you go to the TC and you say: Judge they've asked for all these contracts. They may need this information but we can get it to them this way. If we provided all the contracts it will cost us $2 million. It would involve 2 million documents. We can give them the same necessary information that they need by giving them a computer list. And if that's the case, then the court probably does abuse its discretion.

HANKINSON: But the TC's already refused to bifurcate.

SMITHEE: In general by denying a motion of protection. What she decided to do was to deal with the objection on a piecemeal basis rather than just do a bifurcation order on the motion for protection. But in a sense, she did bifurcate because she excluded a great deal of discovery both by agreement from our side, and also on her own action that didn't relate to the class certification process. So, we simply don't believe that there has been any predicate laid in the TC to come in and enable this court to be able to make a decision in that regard.

HECHT: You mentioned earlier that you were sensitive to the concerns that sometimes discovery can be used basically to force the defendants to capitulate. And here your letter says there might be as much as, or maybe more than $20 million in damages, which comes out to $33,000 per defendant if it were all divided per capita. That's not a very large sum before, the games not worth the candle anymore.

SMITHEE: Damages or attorneys' fees?

HECHT: I thought it was $20 million. Is that just the attorneys' fees?

SMITHEE: No, that's not attorneys' fees. The original damages were - the average class member is going to have damages somewhere between $20 and $50.

HECHT: You letter said the total amount of the claim to be in excess of $20 million?

SMITHEE: At that time, that's what we estimated it to be.

BAKER: That's $30 million less than your 1996 demand, which was $50 million?

SMITHEE: Yes.

BAKER: So is the class getting smaller?

SMITHEE: No. I am confused now about which letter that is.

BAKER: The 1996 letter said, "We believe the damages are in excess of $50 million?"

HECHT: Just take $20 and then we got to $50. But at $20 million, distributed per capita, it would be $33,000 apiece, but that's a fairly small sum of money to hire a lawyer and look for these documents before you think, "Well, $33,000, I might as well kick it in the pot and go on down the road." Why isn't this case at least on the verge of that? You mentioned earlier you didn't think it was.

SMITHEE: As far as being a nuisance where you settle to avoid the expense of litigation?

HECHT: Yes.

SMITHEE: There are going to be cases like that where a defendant makes the election to settle what he believes is not a meritorious case to avoid the cost of litigation. And that may be one of the expenses that we have to pay as a society to have a free and open court system. We have dealt with that in a number of ways, both in the legislature and in this court through promulgation of rules that would get away from frivolous suit. But we don't want to end up in a situation where we essentially eliminate class actions, because certainly in some cases, and including this one where you have a large number of claimants and relatively small amount of damages per claimant, the class action is the most judicially economical way to resolve the complaint. And the courts, not only in this jurisdiction but every jurisdiction in America have recognized that.

PHILLIPS: What amount of money would you take to go _____?

SMITHEE: In the most recent letter, what we did was we told them that it could be resolved if they would refund all of the taxes they had collected from all class members, and they would pay attorneys' fees of $110,000 and cost to date of $49,000.

PHILLIPS: But you cant' tell them how much that is?

SMITHEE: We don't know. Now, they know, because they are required by statute to keep those records, and to keep them for a period of time. Those records are made confidential by statute. So we don't have them. We can't get them. But they know what it is.

OWEN: If they paid you $150,000 and the $150 to the 5 class representatives and signed letters saying, "we agree to refund," would you go away?

SMITHEE: If they agreed to refund to the entire class?

OWEN: Yes.

SMITHEE: Well we would except we would have to get approval by a trial court and

possibly even higher up to do that. The _____ has been settled a class action without getting board approval of the settlement.

OWEN: What would you ask the court to require to prove this up?

SMITHEE: That's really not my decision. There are other lawyers involved. But personally, I think what we've asked for is that if they would just refund the amounts that they've charged on this dealer inventory tax, and pay a reasonable attorney fee, which is going to be high in this case, because there's been a lot of work and a lot of documents, and a lot of defendants, that we would want to settle on that basis. And we would agree to settle. We would recommend to our clients that they settle on that basis and recommend to the court that that settlement be approved.

* * * * * * * * * *

REBUTTAL

PERLMUTTER: I am going to pick up on a couple of things that was suggested by some of the last questions. And particularly, the abusiveness of the level of discovery that we are talking about here. According to the National Economic Research Associates, the average class action settlement is somewhere around $.04 to $.012 cents on the dollar.

GONZALEZ: But that's not before us.

PERLMUTTER: No. But the point I am suggesting is, if I might, is that the fact that you got such small claims here in such potentially wide ranging and expensive discovery, that just re-emphasizes the point that as a practical matter allowing the precertification discovery deprives us of an opportunity to present our case on the merits because it's so expensive to do.

HANKINSON: How does this record show that the trial judge, not every class action that's pending, you are asking us to order the TC to bifurcate discovery in a very general motion with no evidentiary record and with another order that purports to rule on your objection, limit discovery in some respects, order discovery in other respects. How on this record have you shown that the TC abused her discretion?

PERLMUTTER: I submit that the way the TC abused her discretion is that as a matter of law, when you've got a rule as we have that requires that a TC proceed to certification as soon as practical, and if the TC as a general practice violates that rule by allowing discovery on the merits of the claim...

HANKINSON: But how do we know that the trial judge is allowing discovery on the merits of the claim, and that it's overly-broad based on this record when you have not brought before us a challenge _____ order on your objections and have not briefed for the court how these particular rulings violate that rule?

PERLMUTTER: We specifically challenged - we made a motion for protective order on that. And we specifically got a ruling on that motion for protective order that denied the relief we sought, which was to essentially bifurcate discovery.

HANKINSON: And you had another order in which your objections are ruled on, and in a lot of circumstances your objections were sustained and the discovery was disallowed; correct?

PERLMUTTER: That was correct. But I think if you take a look at the TC's rulings when considered together, what that means is is that the TC was specifically denying our bifurcation motion, and that's what we're asking the court to rule on.

HANKINSON: How do we know that without a record showing us with respect to the objections, that in fact, those objections did not actually result in a bifurcation of discovery in this case?

PERLMUTTER: The way you know it is because we asked for specific relief in this particular motion, and that specific relief was denied. Now I can't tell you that you know necessarily whether those objections that were sustained or objections that were overruled allow too broad a discovery. I can't tell you that that's there.

HANKINSON: And in fact could narrow enough discovery to accommodate what your concerns are in this case? We just don't know one way or the other -

PERLMUTTER: I will tell you that they don't.

HANKINSON: Well I know but on this record, I understand that's your opinion, but on this record how do we know one way or the other?

PERLMUTTER: I would ask the court to permit us to provide a supplemental brief if necessary to answer that question, because I don't know the answer off the top of my head. But I do know, that very clearly the court denied our motion for protective order on bifurcation.

HANKINSON: Do we have any evidentiary record in the TC with respect to the cost of the discovery that's been allowed, or in what manner it is overly broad? Is there any evidentiary record made by the defendants?

PERLMUTTER: I don't recall that that was made.

BAKER: What specific rule or principle do you say the TC didn't follow to bring about an abuse of discretion, and where can we find where that's in the record? To find an abuse of discretion don't we have to find that the TC violated some rule or principle?

PERLMUTTER: That's correct. Certainly with the DTPA this court said in *Hines v. Hash*, that if the court denies an abatement improperly it's not following the law and mandamus will lie. That's an abuse of discretion. Failure to interpret the law properly under the DTPA notice letters. With regard to discovery, the court simply fails under *Walker v. Packer* and the basis for seeking mandamus for overly-broad discovery issues there essentially the TC has allowed - by allowing merits discovery to proceed at this point, the TC has allowed abuse of discovery to occur to the point where we basically lose our right to present our case on the merits because the cost of discovery is so expensive.

BAKER: But you're going to face that anyway if the case is not "dismissed" for some reason?

PERLMUTTER: That's only after certification, and that presents a whole other set of circumstances. And I'm not even sure that at that point that kind of discovery would be appropriate.