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INTRATEX CO V. BEESON, ET AL

HATCHELL: This is a suit for nonratable taking by Intratex among 2,000 plus wells along the Oasis pipeline. After a year, the plaintiffs in the case moved to certify it as a class action. The TC after an evidentiary hearing certified one class and one issue, which the CA affirmed with one justice dissenting.

We have given the court a bench booklet that has the class certified and the class issue. The class was defined as "all persons who are producers of natural gas to the defendant between Jan. 1, 1978 and Dec. 31, 1988, whose natural gas was taken in quantities less than their ratable proportions." And the matching issues certified by the court was whether Intratex took ratably from the class as alleged in this cause.

It's interesting that the TC specifically refused to certify any other causes of action or any other issues. This case, I think, gives the court the opportunity to make four extremely important holdings in the area of class actions. The first is, whether or not a so called fail safe class defined in terms of the ultimate outcome is proper? The second is, whether or not if there are truly predominant common issues whether the answers to those issues must be, such as the *Brister* case has held, that the answer to one class representative is an answer to all? A third important holding would be one which meets an issue in the CA's opinion. And that is, whether or not the harmless error rule can be used to essentially trump admitted errors in class actions for the simple reason that a TC who has committed error may cure that error on remand? And the fourth would be, whether or not this court should adopt the federal principle which was recently discussed in potential amendment to Federal Rule 23, whether probable relief justifies the cost and burdens; more particularly whether or not a class should be certified if it appears on the face of the record that there is very little likelihood that relief can be obtained?

Of the man interesting issues in this case, I will argue two this morning. Is the class definition proper because it is couched in terms of an ultimate liability issues? Two, if there are common questions, do they prenominate in this case?

HANKINSON: If we were to answer the first question in your favor whether this is a fail safe class, would we answer the second question, that is whether common issues predominate?

HATCHELL: A very good question. That is wrapped up I suppose in what this court's power would be upon finding error. If the court were to say insofar as the class definition is concerned, we remand for simply reconsideration of the class definition, I would say that you are virtually commanded to reach the second issue because we would obtain greater relief. The answer to the second question would seem to me almost to be able to say "this class cannot be certified at least on this record."

HANKINSON: But isn't it important to know what the class is, how it is defined in order to consider the second issue, and that is whether the issues as to that class predominate?

HATCHELL: If the definition fails, then it is as you correctly say almost impossible to link the members of the class to either a discrete issue of law or a common scheme.

HANKINSON: So we have to stop after the first issue?

HATCHELL: I personally as I say, again it depends upon your interpretation of the harmless error rule. My interpretation of the harmless error rule is this, that if you find error in the class it is your obligation to simply reverse the certification and remand, but not with instruction. The reason being is that the harmless error rule says that this court upon finding error in a TC order or judgment must render that judgment that the TC should have rendered. But if you find that the TC abused its discretion in certifying a class, there is no judgment that the TC should have rendered. If that's the interpretation of the harmless error rule that the court indulges, which I think is correct, you are correct that the answer to the first question should give us the maximum relief to which we are entitled.

HANKINSON: Can an appellate court redefine a class before remanding?

HATCHELL: There is very little writing on that point. My belief is, for the reasons that I just stated, the enjoinder of the harmless error rule in Texas prevents you from doing that. It seems to me that what would happen in that case is that you would be substituting your discretion for that of the TC. Justice Link in this case has in my judgment demonstrated some considerable reluctance to certify an extremely broad class or any other class other than the one that he did. He specifically rejected certifying the class as to causes of action. So I think that it would be very presumptuous of this court to try to redefine the class and make Judge Link try a case that he has indicated he does not necessarily wish to try.

The court is very familiar with the principles regarding the importance of the definition. The definition determines who gets notice of the class and who gets notice to opt in or opt out. It determines what questions are common, it determines the nature of the relief that can be given, and most importantly it determines who is bound. The particular principles of law that must be applied to the definition are, that the definition must be precise and to be precise it must be defined by objective criteria and those objective criteria must lead to a class that is presently today ascertainable.

There are obvious problems with our definition, which is couched in terms of the ultimate decision on ratability, which includes as I understand it a number of disparate theories to reach that point. Number 1, it is not precise because it is couched in terms of the resolution of liability, which is not an objective fact but a blend of law in fact. Number 2, the class is not presently ascertainable. Today, we do not know who's in the class. That must await the trial on the

merits. And third, the class is not objectively defined. It has been defined in this case only by the opinion of an expert as to the merits based upon a legal standard which is not recognized either by the RR Commission or Texas common law and whose study the CA itself conceded would be an issue at trial. So the legal consequences of such a definition are really quite dire in terms of the very reasons we have class actions.

We must await a trial on the merits to determine who is in the class because it is subject to a methodology that may change, that may be declared admissible or it may be rejected by the ultimate trier of fact. It also creates a fail safe class that ultimately doesn't bind anyone. The difficulty that defendants face on this kind of fail safe class definition is that if they prevail, the ultimate result is not a judgment that binds all the class members. The ultimate result is to say there was never any class to begin with and therefore the plaintiffs essentially get to try to re-tool their lawsuit and try again. And in this particular case where you have three class representatives who are all subject to different criteria in terms of their particular well situation, there are insurmountable problems that are posed if the resolution of this class definition is different as to each one, then who is in the class and who is not.

HANKINSON: For what purpose during the class certification proceeding did the class representatives offer Mr. Rhodes' testimony and how was it presented to the TC?

HATCHELL: Clearly for numerosity. I believe that they offered it - I can see reading the record that they were backed into somewhat of a corner in this case, because they used it first of all to define a group of wells, which according to the particular subjective methodology that was employed that were supposedly undertaken. That then was theoretically to define the common issue. Either a common issue of fact or common issue of the law.

I think also because of the fact that the study led to the fact that 50% of the people in that particular study were either ratably taken or were over-taken. They were then backed into the corner of saying, "well we can't define the class on anything other than the ultimate liability." So for three purposes: numerosity; commonality; and the class definition.

HANKINSON: Then how did the evidence about the Dow waiver agreement fit into the proceedings by a certification?

HATCHELL: The Dow waiver agreement is talked about in the pleadings. It was talked about in the arguments. But it was not a part of Mr. Rhode's study other than to the extent that he recognized it existed. But I think it's extremely important to notice that in Mr. Rhode's study upon which this class must rest, he assumed that the Dow waiver program was not operative. In other words, he assumed that all of the takes were attributable to Intratex.

HANKINSON: In their brief, Respondents talk about the Dow wavier agreement as possibly providing the basis for defining the class. Is it futile to attempt to define a class in this case, or can

the Dow waiver agreement provide the basis for the TC to define a class?

HATCHELL: There are I think three answers to that question. First, that was not in the class certified. So you immediately bring yourself back to the proposition that you and I just talked about, and that is can this court basically reform down a class and force the TC to try a class that was not certified? Two, it's also important to notice that the Dow waiver program did not cover the entire time period that has been certified in this case. It only covers a limited portion. So if you redefine the class down to simply those wells which were excluded from the Dow wavier program, then you're also going to have to carve upon the time period as well. Third, going to the Rhode study brings you simply to a smaller micro cause of the points that we believe make individual issues predominate in this case, which are as follows: as the court knows the class must be united by common principles of law, the answer to one must be the answer to all and it must advance the litigation. We know in this case that if you simply take those wells which were excluded from the Dow waiver program and look at them alone, 50% of them were either taken ratably or overtaken. So then where does that lead you? I believe that *RSR v Hayes*...

BAKER: Are you arguing then that when you take the smallest class that's possible under the way you're going, that you end up with no class because nobody...

HATCHELL: No, that's not what I'm arguing. Actually if you take the Dow wavier class it's a larger class. The class that they have attempted to define is 900 roughly or slightly under 900. A Dow waiver class would be approximately 1,800 of which more than 50% we know would be either ratably taken or overtaken. And in that instance...

BAKER: Meaning they don't qualify for damages?

HATCHELL: Well no they don't qualify for damages but that brings up the policy question of then as raised in *RSR v. Hayes*, when you know going in that more than 50% of your class obviously are not linked to any theory of liability either by a discrete(?) issue of law or by some common theory of conduct, should it be the policy of the court to certify a class in that instance or should you look to some other class to certify. When they look to another class to certify in this case all they could find was a class that says "well it's those people who are ultimately going to win." If you're talking about balancing having to do a fail safe class verses the other type of class, I say, that you always opt not to do a fail safe class.

HANKINSON: Effort(?) from the other requirements of the class certification rule if we agree with you that this is a fail safe class are any further efforts to certify a class in this case futile or can a class be defined?

HATCHELL: I think a class can be defined but I think it leads ultimately to futility. And the reason for that has to do with the nature of a ratable take's claim itself. A ratable take's claim is dependent upon four extremely important components.

HANKINSON: I'm interested at this point just whether or not a class could be defined that does not render the problems that you claim this class definition carries?

HATCHELL: No, I do not believe so. I do not believe there can be such a class.

HANKINSON: Why not?

HATCHELL: Because every time you attempt to define a class - first of all there has been no exposition of a theory by which a significant class can be linked either by a common theory of law or by a common nucleus of facts. And I think any group of these well owners that you identify is going to have that same problem. It's ultimately going to lead to an individual well-by- well, month-by-month examination of the factors which are important to a ratability claim.

HANKINSON: If you have a non-ratable take _____, don't you have to show all this information you talked about as well-by-well, month-by-month, producer-by-producer. If I come in and I have a claim as an individual as a producer and I want to pursue that claim on my own aren't I going to have to show all of that anyway to show that my well was not ratably taken? Isn't that going to be part of a non-ratable case whether or not it's class action or not?

HATCHELL: Yes, absolutely. But the mix and combination of factors that underlie a ratability claim are going to be different as to each well, and then that's going to be extrapolated to differences as to each person.

HANKINSON: Then that ultimately goes to damages and the need to determine damages individually in a case does not preclude a proper class action?

HATCHELL: No, that is not correct. Many of the factors which are relevant to a ratability claim such as what system is it on, what field is it in, what is the allowable go to a determination of the way in which the available volumes are spread first to the fields and then to the individual wells. There is expert testimony in this case that if a well drops out of that mix, in other words if you have problems with force majure(?) behind a plant that is down, a well that is blown out, that well comes out of the mix and those volumes are then spread over the rest of the systems and fields and as a result of that, the issue then is not one of damages but what is the ratable proportion. In addition to that I think the court should understand that there are two components to this class definition. Number 1, what is the ratable proportion, but also did we take? And the did we take portion of the class definition requires then for you to look at the particular specific circumstances of each take.

ABBOTT: What do you consider to be the most judicially and economically efficient way of handling this case short of non-suit?

HATCHELL: Hold that this is a fail safe class, that because the definition is very much like the foundation of a building, the whole class falls, you reverse and remand without instructions, the

TC can then pursue whatever discretion he wishes and the cause as remanded.

ABBOTT: But when you get back to the TC presuming that you prevail here the way that you are suggesting, what would be the most economically and judicially efficient way of proceeding with resolving this case?

HATCHELL: That's a very good question. I'm not altogether certain. I think that if you could identify the common themes or a common legal theory or a common nucleus of facts, our rules particularly rule 166(a) and our joinder rules give the TC ample opportunity or ample ability to group particular plaintiffs and try those accordingly. But that's the only efficient way that I see...

BAKER: Well does that suggest subclasses?

HATCHELL: Subclasses have not been defined in this case and a subclass is lead...

BAKER: But the answer was if it goes back and you fail with no instructions, then...

HATCHELL: Yes there are except bear in mind that you are going to have a minimum of 37 subclasses in this case because a system is a discrete unit for judging ratability. One wonders whether or not - and then within each one of those subclasses you again have a reduced micro causem of the very problems that you have in this case, because ratability is not only within the system as to well-to-well, it's also within the system between field and field. So you get into the same individual well-by-well, month-by-month, producer-by-producer. One wonders whether or not that's a superior method and one wonders whether or not that kind of class is manageable at all.

OWEN: Well you suggest in your briefing that the RR Commission could and should resolve the ratable take claim?

HATCHELL: I think our briefing suggests that there is no private cause of action under 111.086.

PHILLIPS: Do you concede that they have a federal case to the contrary?

HATCHELL: No. A federal case supports our position. The *Sowell*(?) case states that there is no private cause of action under 111.086.

OWEN: But assuming that you do - I thought you said in your briefing that the remedy lies at the RR Commission. If the RR Commission determines there were nonratable takes then the RR Commission can fashion the appropriate remedy?

HATCHELL: Yes.

OWEN: Wouldn't the RR Commission face these same problems as the TC?

HATCHELL: No. The RR Commission has much more leeway and flexibility. It frankly does not have to apply any particular legal standards. It has developed its own set of criteria which it is not necessarily bound to follow. But it goes upon an equitable approach and a fairness doctrine. And it also has many more tools available to it than are available at law, such as the requirements for over and under productions, carry forwards and things of that...

OWEN: They would still have to determine whether there had been historically nonratable takes. They would still have to go into the analysis that you are talking about - well-by-well...

HATCHELL: Absolutely they do. I do want to make clear that I do think that the absence of any private cause of action under 111.086 is what brings this court at least to an opportunity to consider whether or not you actually should look at the merits; whether or not Texas should adopt a rule that says you look at the merits in deciding at least on a limited basis to the point that if it appears on the face of the pleadings and no relief can be granted, or that the possibility of relief so far outweighs the cost and burdens of the class that that is one of the discretionary factors that the court should look at. And we think the court is going to ____ when it looks at this that there is no private cause of action at least insofar as the cause of action that has been certified here.

PHILLIPS: How would you advise a reviewing appellate court to determine that while this might be - while there might be an appropriate class that could be defined, and it might meet all the various requirements of rule 42, that the possibility of relief is in your words so remote that it does not outweigh the benefits. How come that's no inherently a TC determination whose discretion must be _____?

HATCHELL: Personally I believe it is. And it has been so held at the federal level. But the difficulty we have in Texas is this litany of cases, case after case after case that says that you can't look at the merits. I don't think that's true. I think your honor's suggestion is absolutely true. But I think that this court needs to speak and aluminate that for the TC, because the message is simply not getting through.

In cases where on the face of the pleadings there is no stated cause of action, we are required to go through the rigors of class certification and sending notices before we can ever get to that point.

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RESPONDENT

LAWYER: Let me first answer Justice Hankinson's question relating to the Dow waiver takings. The record is absolutely clear in this case that two separate grounds for certification were

urged on the TC: The Dow waiver takings and the Rhode study. And they are mutually exclusive. They are different takings. And let me explain this because I think it goes a long way towards explaining why common issues also predominate this case especially as to the Dow waiver takings.

In the Dow wavier takings we had a situation where Intratex had already set the amount of gas it was going to nominate or take throughout the Oasis pipeline. And thereafter gas was waived by another producer to Intratex. And as a result they went back and made purchases from discrete wells and fields along this system to the exclusion of any other wells or fields. So it wasn't a situation where you had to spread things over the field to determine allowables, determine nominations in those types of things, there was no gas taking with those takings. On its face, if it were a sale, and if it were a purchase of gas, it was a nonratable taking because some was taken from some well and none was taken from another.

Now, the judge was in this unique position. On Dow waiver he could - it was a gut sense for certification of the class, and the class could be better defined perhaps as all the producers along the pipeline during this time period whose gas was not taken pursuant to Dow waiver.

OWEN: How can we tell though from the definition which class was certified? We have to dig back into the record and make certain assumptions don't we?

LAWYER: Yes to some extent. But I think the court is aided in that. There's no doubt that this was urged on the court as a basis for certification. And I want to emphasize it was the first thing urged in the arguments of counsel, is the first reason to certify and at the end when the other side had talked only about Rhode study, and did not mention Dow waiver, at the end we said that's the basis again for certifying the class.

OWEN: So when we go back to send out the notices, and you say all those who were not taken from ratably, how do you know just looking at the class definition what time periods are covered, whether it's based on a Dow waiver, or whether it's based on the Rhode study? How can you tell based on the class definition itself?

LAWYER: I think it is fairly certain that you're going to be able to tell that exactly. Here's why. This is not like the cases that have been cited by the petitioner of the Houston case of everybody who was interested in the peace or active in the peace movement in Houston in the 60's. Or like the case from the Midwest, the federal court case from the 7th circuit of everybody whose child was not timely diagnosed. We know exactly who these people are. We not only know their identity, we know their address.

OWEN: You know those who did not sign a Dow waiver agreement. And you contend that they were not taken from ratably. But Mr. Rhodes has also said there were others in addition to those who were not taken from ratably. So how do we know based on the class definition who's

in the class?

LAWYER: I think we can do it several ways. First off, again, we know - I think the 5th circuit has looked at an issue exactly like this in the *Mullen* case which we have passed out to you this morning, and they've addressed this issue. And by the way, *Mullen* is not in either side's briefing. *Mullen v. Treasure City* was decided 4 days after our last brief was due. Let me tell you as of three weeks ago, rehearing was denied and rehearing en banc was denied in that case.

In *Mullen*, the same argument regarding the definition that is made by the petitioners was made there. They said, one it's a fail safe class; two, you can't tell. What had happened in *Mullen* was it was a class action by employees of a floating casino in New Orleans that were claiming that their lungs had been damaged by second-hand smoke. And this was decided after *Castano*. And the 5th circuit, a different panel taking a look at that, one of the first issues they addressed is, is the definition which was "all employees or crew of the vessel who claimed to have injuries and additionally that were caused by the defective air conditioning system or ventilation system." Obviously defining it with the merits of the case. What the 5th circuit says is "listen, that's not a problem. It's not a problem and hadn't been a problem in this circuit since *Forbish* was decided, which was a Judge Higginbotham case. And Judge Higginbotham said, the issue of a fail safe class and the idea that you don't know who these people are is meritless, you can define in footnote 1 of the opinion says 1) based upon the certified question; and 2) is as long as the people are ascertainable.

Now when you compare *Mullen* on the one hand with the definition of peoples whose injuries were caused by the ventilation system verses the notice system here where we know precisely the name and address of each of these people in the Rhodes study 970 wells and in the Dow waiver wells, it is obvious that the definition here gives much more adequate notice than the definition in *Mullen* would give.

ENOCH: It appears that Mr. Hatchell in the brief defines a fail safe class as one where if judgement is rendered in favor of the plaintiffs it's binding on the defendant. If judgment is rendered for the plaintiffs in this case, that is that their gas was not ratably taken, then it's a judgment that's binding on the defendant that failed to take it ratably. But if the judgment is that the gas was ratably taken it simultaneously destroys the class, and therefore, result in no binding judgment against the plaintiffs. Do you agree that that is an accurate definition of a fail safe class?

LAWYER: Yes, that is how a fail safe class is defined.

ENOCH: In your briefing it was not clear to me that unless you use the Dow waiver, you really do have a fail safe class because the only other way to identify the plaintiffs absent the Dow waiver is a plaintiff whose gas was not taken ratably.

LAWYER: I must concede that point. You are absolutely right. As to the Dow waiver

of takings this is not a fail safe class.

HANKINSON: But doesn't the class definition, isn't it broader as it's stated now than just the Dow waiver takings?

LAWYER: Yes, but it would certainly include the Dow waiver takings.

HANKINSON: But what about those outside, doesn't it put them then in the position of us having to have a determination on the merits from the TC on the ratable take claim in order to determine ultimately who's in the class and whether or not they are bound?

LAWYER: I have to concede that point. That is true.

HANKINSON: Well if that's the case and we have an overly-broad class definition what is the appropriate course for this court to take? Can we redefine the class or must we remand to the TC for further consideration?

LAWYER: I think two things are true. First off let met tell you that I think you first can reform the class. Texas courts have done that. In fact if you will recall in the *Ford* paint case that you heard several months ago, Judge Aboussie did redefine the class to get over precisely the problem - the fail safe problem that was done here.

BAKER: We're still thinking about what Judge Aboussie did.

LAWYER: That's true, but the points in the brief were on other grounds, not that one, which I think is a crucial point.

BAKER: Well what about their comment that "well if appellate courts can look at these cases and say well we don't like that one but we might like this one," that that court using its discretion based on a record as opposed to determining whether the TC did or didn't abuse its own discretion. Would you agree that this is an abuse of discretion review?

LAWYER: I think we have to look at the entire body of our jurisprudence on abuse of discretion to make that determination, not just the one that the petitioners would require. For example, in this case there were no requests for findings of fact and conclusions of law to test on what grounds...

BAKER: With all due respect, you don't have an abuse of discretion standard. They are not determinative of an outcome vis-a-vis special standard of...

LAWYER: I think that's true and I would even go a step further. The TC would not be required to file them. But they weren't requested and this point is an opportunity to find it out.

Candidly as we have indicated in the briefs, we would live with the Dow waiver class. The Dow waiver class as Mr. Hatchell told you is the far larger class here.

BAKER: But then, you've already conceded that the devine(?) class is broader than the Dow waiver.

LAWYER: Yes. I must tell you it is.

BAKER: Then that requires us or somebody else to redefine it to be what you say you now think is a good class that will survive?

LAWYER: Yes.

BAKER: Can we do that?

LAWYER: Yes.

BAKER: Should we do that?

LAWYER: You can certainly do it or you can remand it to the TC with instructions to do that. And that's generally what happens in these types of cases. They are sent back if there's a definitional problem for those kinds of situations. Some courts like the Austin CA and Judge Aboussie went ahead and redefined the class herself to take care of the fail safe issue.

HANKINSON: What authority is there in the federal jurisprudence for an appellate court to redefine a class?

LAWYER: I agree with Mr. Hatchell there is no much at all.

HANKINSON: If we do decide that the class definition is not proper in this case, should we or can we discuss or decide any of the other issues going to the other requirements for class certification?

LAWYER: I disagree with Mr. Hatchell. Not unpredictably that you can. And the reason for that is, and especially I think your question was centered on, the issue of commonality and predominance. In this case, I think that there's no doubt that you can. There is certainly a definable case based on the Dow waiver issue. Remember since we're dealing with abuse of discretion, you need to look at what the TC was faced with here because it's an unusual situation. He had a gut sense, I think, on Dow waiver class. Not very many actually common issues at all.

In the arguments to the court and in to the presentations one thing was absolutely clear, you asked the question Judge Hankinson of why was Rhode study introduced? It

was introduced to demonstrate that it was possible to make ratable taking determinations by number crunching of historic look back data - objective data. In fact, even their expert who was offered to counter Rhodes admitted it was possible to do 1) a study that would demonstrate whether ratable takings were taken, but 2) to also demonstrate what those damages were. In any eventual trial of this case, it is clear the common questions will predominate because the real issue is going to be as we get to the trial it's going to be a number crunch based upon, and the uncontroverted testimony is, that can be done here.

OWEN: Do you agree with Mr. Hatchell that ratability will turn on 37 discrete systems on Intratex?

LAWYER: No. Absolutely not. Here's why I don't think it's going to turn that way. Defendants in every class action case they've tried to interject theories of liability and defense that will create individualized questions. Some of those questions that will determine how the numbers are crunched on damages and liability are going to be legal questions that are common to everybody that will be submitted to the court. For example, one of the theories that they have for you is that you are entitled to net undertakes with subsequent overtakes. For example, if there was an undertake in 1978 of a well that was a nonratable taking, their claim is that you get to go maybe in 1988 and net that take against an overtake. The overtake would also as you know be a nonratable taking.

OWEN: My specific question, what's your position on a legal issue of the 37 systems?

LAWYER: First off, I think it is clear that is one system. This is rule 3.34 of the RR Commission that was passed in 1987. At the very end of this time period. At a time that the Dow waiver takes were already finished. So one doesn't affect Dow waiver. But second, with that regulation that the RR Commission adopted, the RR Commission told everybody, "Listen we're going to - if you have one physical system that is hooked up together, you can't subsequently go back and redesignate it as discrete parts in an effort to get around the nonratable taking laws. So I think on the merits of that case, and I'm not sure it's appropriate to visit the merits of that here, but on the merits of that issue I think we win and it will be the same answer for everybody along the pipeline. And everybody in the class.

Again there are going to be other Justice Owen determinations that are the same. The netting determinations. The judge is going to tell us legally in a common question of law how that is done. And in then the number crunchers would be able to do it. This can be done in one trial. There will be witnesses sponsoring these reports but that's how it's going to rate.

Here's what the trial judge had and it was an upsetting thing for him. He had Dow waiver. He thought it was a gut sense reason to certify a class. And then he had the Rhode study, which indicated based on Rhode's determination that there were 970 wells in other takings that might also have claims. Now Rhodes did make some assumptions as the petitioner says. Those assumptions were, because discovery had not been completed. And in fact, at the trial there was an

admission that the discovery 1) had not been completed and accurate records weren't there, and the petitioner at trial even admitted that complete discovery of that would change the members of the Rhode study class. So the judge is thinking, Ok, I have one I can certify with no problem, the other I've got to look at and make a determination and I don't have everything. And here's what he did and it's Tab 12 to our briefing. He writes a letter and says: I'm going to go ahead and certify it, but the one thing I'm not going to do is let individual issues drive this case. And if I determine that subsequently they do, I'm going to decertify it. And then he sends out some weeks later his determination order.

GONZALEZ: Inaudible.

LAWYER: The federal circuits are virtually identical on this issue. Although they sometimes describe these issues slightly differently. They say that on predominance the common issues have to have significance in the trial. Let me take *Mullen* for example. I know in this court you've heard Ford paint, you've heard *Bernall*(?), and the issue of predominance on those cases where you had radically individualized theories of damages. Where here, it's the same type of damage. It's not pain and suffering. It's not mental anguish. It's not something that's personal to an individualized defendant. We are. We don't have that here. The standard is, that it has to be significant in resolving the case. In fact in *Mullen* they say if liability is resolved they reached the conclusion that that is significant enough to result in predominance. I must admit to you that's somewhat out of the - different than what the 5th circuit in a sister panel said in *Castano*. I don't think it's the same. But I think it is when you compare what the other individual issues are in this case. And remember in *Castano* and the other cases that this court was interested in in both Ford paint and *Bernal*, the big issues were: well proximate cause is different to everybody. Not true here. No proximate cause determination. Second, damages will be personal to each of these people. The act will affect the plaintiffs in different ways. They will have mental anguish damages. They will have pain and suffering; loss of wage earning capacity that are obviously individual determinations. Not true here. They took our gas, nonratably, the contract...

OWEN: You say that. Won't there have to be determinations if you're going to do a well-by-well damage analysis? Won't you have to determine what was available, what was requested, what the reasons were, why the gas wasn't available well-by-well, all of those individualized issues for each well?

LAWYER: In some instances some of that will have to be done, not all. Remember the evidence in this case is that the Bolden memorandum and you as an oil and gas lawyer will know about that, that is Mr. Bolden was the head of proration for the RR Commission for years, and he came up with the methodology to use in doing this kind of analysis. By the way that's plaintiff's ex. 6 in the record. Bolden doesn't go into all these individual issues. Now they do go into some but not nearly the ones that the petitioner claims. But in this case even if you go into them this is a matter of an objective historical look back. Intratex has admitted all of that information is on magnetic tape in their records.

OWEN: You say that. I'm curious. Do they have - actually the request on magnetic tape. Do they have whether the pumper actually went out there and turned on the well in response to the request? I mean those kind of individual issues that would determine whether a particular well whose fault it was for example that was not taking ratably?

LAWYER: Yes. In fact - I don't know precisely what is on each of those magnetic tapes. I have seen the results of some of those produced in discovery and a significant amount of that information was on. So much so, that in the depositions of the class representatives they questioned on those matters. So I think that that information in fact is there. And the judge was very concerned about it not being accurate and up-to-date in what had been produced. And that was again one of the issues in this case.

OWEN: Should we look at the ultimate merits? Should we look at whether you have a ratability cause of action under the common purchaser act at all?

LAWYER: If you make that determination, and I disagree with the petitioners on this, you will be the first court in this Union to do so. And certainly the first SC, or court of last resort to do it. The SC looked at this issue in *Eison* albeit under different circumstances I will admit and made the decision that you should not do it because it would be a determination on the merits.

HECHT: What if it were just patently - it didn't exist? I know they quoted the judge in *Eison* and said, You shouldn't even dismiss it on the pleadings. But what if it were an NIED claim or something that the law was perfectly clear did not exist?

LAWYER: You create the best case possible and it's difficult to argue with some of that logic except to say this: think about the principles we're trying to set here. In fairness to both sides....

(SIDE 2)

HECHT: ...unless it was subject to change. And in a securities fraud case it wasn't perfectly clear. In *NIED* it's closer to being clear.

LAWYER: Yes, and I understand your point. I would say this, I think one thing the TC's do look at in their discretion is basically that kind of issue. And I'm not going to try to tell you that that doesn't happen routinely in cases. And I think that's why our system doesn't get to be this way.

HECHT: But you've got a breach of contract claim in this case don't you?

LAWYER: Yes, we do for incorporating the same ratable takings. We disagree on whether the judge certified on that let me first tell you. We believe that he certainly did. Additionally I will tell you, the other thing in this issue is we strongly believe there is a private cause of action under this court's decision *ACCI(?)* as well. And by the way, they mentioned - someone asked about

Justice Enoch I believe you asked about the federal court case. That was *Sowell*(?). That case is decided against us on other grounds. However, the *HCI* case by this court was not decided by that time and it was decided on a ground different than the ones argued here.

HANKINSON: Judge Link in this case did indicate, "if I determine along the way that the individual issue taking over this case, I can decertify." How far must a trial court go at the certification stage to plan how it is going to handle individual issues?

LAWYER: A pretty good way. And we don't contend otherwise. I think a court at certification has look forward: look forward about what the predominate issues will be and what the common issues are. And I think that that look forward has got to be to some degree a prediction of what will happen. And then candidly, if the court is ambushed by the plaintiff and it turns out that these are individualized issues, I think that there is certainly a remedy. And I think that's it. This court looking at *Bloyed*(?) for example, where the plaintiffs say that there is a no doubt rule put in force, I don't think the court meant to do that at *Bloyed*. And this court has sometimes changed the law, but it's always been very honest when it's done it and said, "look out, here it is, we are changing the law, we think the better rationale is that." In *Bloyed*, I don't think he did it. And remember in *Bloyed* we had a look back. In *Bloyed* the TC was looking back to except the settlement had to say that the class action had to have been maintainable as a class action is a condition to the settlement.

HECHT: Why shouldn't the class be all producers on the Oasis system?

LAWYER: That was the first definition we asked the TC for. I believe that that would be a separate certifiable class. I'm not sure that the notice letter would have to tell those people what the claims the class were making though. But it could be very well be that. And we started the class certification with making that suggestion to the judge.

HECHT: But abandoned it for reasons that the TC indicated he wasn't going to certify it?

LAWYER: No. From the record, that is unclear. It was suggested at one point, and then we were suggested to come up with other definitions. A series of four were submitted over the 3-day hearing.

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REBUTTAL

ENOCH: Would Dow waiver class be _____ certified a class?

HATCHELL: Probably not. The Dow waiver class unquestionably eliminates the problem of defining the class in terms of the ultimate outcome. But what a Dow waiver class does not do is to link all of the punitive class members together with some common theory - become some common

theory of law - or some common nucleus of facts.

ENOCH: I'm talking about the common theory of law. If the only issue Dow waivers whether or not it's a _____ wouldn't that be equally binding on the defendant as well as the _____ class?

HATCHELL: Indeed it would except that it is not the only issue. In a predominance inquiry, the issue of sales has been admitted by the plaintiffs in this case to be a summary judgment issue. How long is that going to take? A couple of hours of argument. Three or four hours of study by the judge. And then under the *Brister* standard where is the laboring effort in this class going to be? If you assume that the Dow waiver program must attribute purchases to Intratex, then you are simply back into the same micro causem that causes there to be no predominance of common issues in this case. Because bear in mind, it's extremely important to notice that Mr. Rhode's study assumed that the takes in this case were takes by Intratex. He assumed that the Dow waiver program was not proper. And I think counsel is just simply mistaken when he says that the takes are exclusive. They are not. At least under the Rhode's study. So if you have a situation where as Mr. Rhodes finally had to concede, that I have done a study assuming Dow waiver was really a take by Intratex, and I have determined that 50% of the wells that were non-Dow waiver wells were ratably taken or were overtaken, should the policy be to certify a class of that nature? And we take the position no, because you know going in that there is something inherent in that class that either makes _____ ratably taken or overtaken. So is there either a common thread of law or a common nucleus of facts that justifies the class? And no.

PHILLIPS: For those persons whose wells were undertaken is it possible they have an individual cause of action? Do you concede that?

HATCHELL: Oh, yes.

PHILLIPS: If they do, why isn't a class the type of remedy superior here even if 50% are going to be excluded? Why are you putting the judicial system to 900 individual _____?

HATCHELL: If you consider a ratable takes claim a coalescence of a number of components there is no single resolution of a ratable takes claim as to each of the 900. You have to look at the combination of factors that effect each well, which is then extrapolated to purchases. The problem with the Rhode's study is, is - first of all it disregards entirely the essential basis for a ratable takes claim, which Justice Owen was speaking about a moment ago. And the reason I say there has to be 37 subclasses, he pretends that there are not 37 systems. A ratable takes claim must be done...

PHILLIPS: I'm trying to get just to the Dow waiver.

HATCHELL: But it must be done within a system. Ratable takes must be done within a system. So even if we should lose the Dow waiver issues, do you then have to drop back to look at

how this operates within each system, then within each field, and then as to each well. In other words, assume we lose the Dow wavier, do you then say that Intratex steps aside and all of the producers just begin to send in a bill.

OWEN: But why couldn't a comprehensive ratable takes study be done that would answer the question as to everybody?

HATCHELL: There is a memorandum in this case by the RR Commission that says, if you look at ratable takes on a system-wide basis as wide as Mr. Rhode has done, a ratable takes study is impossible.

OWEN: But isn't that a legal issue to be decided up front?

HATCHELL: No, I don't think so. Because again I think you drop back because of the combination of factors to a well-by-well, month-by-month study to determine not only what was the ratable portion, which could be affected by any one of a number of categories _____. Let me give you just one example. The well that constitutes 10% of the damages in this case, $39 million was extrapolated by Mr. Rhodes under his study that assumed that the Dow waiver program was not proper and that these were...was a well that was blown in for most of the time period. Now that's not a question of a defense by us. This was a well that could not produce even if we asked for it. And those factors multiply in terms of when wells are behind a common meter point. Why did we not get what we asked for? Was a gas plant for example out of business?

OWEN: But wouldn't that affect the ratability as to other producers even in the same system? Wouldn't you have to determine all of those facts to determine ratable share on a field-by-field and then well-by-well basis?

HATCHELL: Yes. You have to determine all of those factors as to each well each month. There is no common thread at links and theory of liability in this case that can disregard all of those findings.

HECHT: Once you determine liability as to a particular well is there any other issue as to damages?

HATCHELL: Yes. There is because a number of these wells, the owners of the wells would have interest in other wells. And under the Rhode's study, we demonstrated that we may have overtaken as to those. So then you have the other issue of balancing out to determine whether or not...

HECHT: Besides the netting argument is there any other issue?

HATCHELL: Limitations is always an issue. That's a big issue in this case and we're going

to win.

HECHT: And is the reason why there shouldn't be just a class of all producers on the system - on the Oasis pipeline that there's no common issues between all of those folks?

HATCHELL: Not identified as of yet. And that brings us I think to the final policy issue facing this court. Counsel says, Well I admit that that's true. Rhodes was just kind of sort of speculating about what might happen. And so here we are assuming that for example that we have lost the Dow waiver issue, then they say but we don't have enough discovery at this point to determine who is in this class or whether or not there's common issues and whether or not they predominate. That then brings the court I think to the issue. In the federal cases you will find some federal cases that say, oh yes you always certify and then you sort it out later. We believe that the policy in Texas should be, as counsel has admitted, if you do not have enough information you do not go through the rigors of class certification by sending out notices and bringing that entire process which diminishes the rights of individual litigation until you are absolutely certain. So we think that their argument actually leads nowhere. They are asking you to reform the class which we believe you cannot do. But in reforming the class, you simply drop down to the individualized issues which predominate this case and will always predominate this case until someone can give you a legal theory and a common nucleus of facts that links enough people to justify a class.