**ORAL ARGUMENT – 9-6-00**
**99-1002**
**BALLY TOTAL FITNESS CORP. V. JACKSON**

THIS TAPE AT TIMES HARD TO UNDERSTAND THE RESPONSES.

TRIBE: I would like to discuss two things this morning. First, how a proceeding by the method of judgment first noticed the _____ transformed the class in this case even more fundamentally than changing the class from _____ to mandatory, transformed the class into a De Los Santos.

O'NEILL: So you would agree that we have to find a fundamental change in the class?

TRIBE: Yes.

O'NEILL: Presume that we find that there has been an improper one-way intervention. And I understand there is some dispute about that. How has the fundamental nature of the class been affected?

TRIBE: In several ways. It's been transformed because it's been converted from a real class authorized by rule 42(b)(4), the _____ class outlawed by rule 42 ever since 1977. And it's indeed legitimate at birth in the sense that its creation violated rule 42(c) (1), (2) and (3). Beyond that it's been converted from a classical waiting formal notice and an opportunity to choose whether to stay in or opt out.

O'NEILL: But it's still an opt-out class.

TRIBE: It's an opt-out class. But the fundamental difference is that whereas before it was waiting to make that decision unpolluted by some irreversible knowledge. Now it is impossible for it to receive notice untainted by the indelible fact.

O'NEILL: Even though the notice is tainted though, why does that change - it's still an opt-out class. How is the nature of the class affected?

TRIBE: I suppose if the only thing that bore on the nature of the class was where in these several little boxes within rule 42(b), that would be _____ mechanical rule. In fact if something moves out of the box altogether from rule 42 to an outlaw class, a class in which any notice that is received will be retrieved and tainted.

O'NEILL: The notice in this case doesn't say that personal SJ has been granted does it?

TRIBE: The notice itself is in that sense misleading. But we think that it is unrealistic to suppose that people out there after this has been on the TV, and after it's been public can be assumed not to have known about it. This court after all did say, that class actions are not an exception to the normal universe. There is no alternative universe for class actions. There is also no alternative cosmology. Time only moves forward. You can't unwind the clock at 10 if there wasn't a SJ. There's no alternative _____ psychology. It's awfully hard voluntarily to forget something that you know.

HANKINSON: But don't you have to look beyond and look at the specifics of the order that was entered in this case? This is an interlocutory PSJ motion that was granted.

TRIBE: Interlocutory certainly in the sense that we couldn't view it because damages hadn't been awarded.

HANKINSON: An interlocutory in the sense that the trial judge could also withdraw the order at any time and modify it?

TRIBE: Always true.

HANKINSON: And similarly, it did not dispose of the liability issues in any kind of a final way, because didn't Bally have affirmative defenses that were also at issue and had not been disposed of?

TRIBE: With all due respect, no. The only possible affirmative defense was the one it had separately against Jackson _____ the class. Namely that he had already been paid. And it was recognized in the 1996 decision upholding the class certification that the issue upon liability common to the whole class was whether these monthly charges constituted finance charges. If they did, that really ends the case. Indeed it was _____ in that opinion by the 4th CA, that all that would be left is to calculate damages, so that it is interlocutory but it disposes of the fundamental liability issue in the case.

ABBOTT: But here is the issue with regard to her question, and that is, your argument is totally gutted if the TC decides to withdraw its SJ?

TRIBE: No.

ABBOTT: Well your argument is premised upon the fact that this SJ has been granted. The TC obviously has the ability if it so desires to withdraw the SJ. If it does so, what leg does your argument have to stand on?

TRIBE: There are at least 90 cases, state and federal, in which that could have been said because a SJ theoretically can be withdrawn. But if it is withdrawn simply pursuant to the suggestive remedy of the respondents, namely let's keep the class going but reverse the SJ, that doesn't change the fact that everyone knows that this judge has solemnly found as a matter of law that these monthly charges in these circumstances constitute a finance change. And once the fact that this judge has made that determination of law, you can't unring the bell and put the cat back in the bag.

ABBOTT: What would be the difference between that scenario and the scenario where you have John Doe file a lawsuit in this particular court, get a PSJ in his favor, and then Jane Doe and 400,000 of her best friends file a class action in that same court on the same subject matter where they've already known that this same judge has rendered a ruling in their favor on the substance, and now they file this class action, they go about setting out the notice, and then they get their SJ?

TRIBE: I'm assuming that despite non-mutual collateral estoppel, your assumption that is that under Sysco Food Services in this court, that they will not be able to use offensive collateral estoppel and...

ABBOTT: That's off of my point. My point is, you seem to be resting your argument on the fact that well the whole world knows that this has been determined. I just gave you a different fact situation where the whole world of potential class members can know how the judge is going to rule, how the judge is predisposed on the substance of this particular case before the class action is even filed.

TRIBE: I think the important point that I want to make is that I'm referring to the knowledge of the members of the class only in the context of answering Justice O'Neill's question about how this class differs from another class. The fundamental difference between the two situations _____ is that we all have a crystal ball. We all think we know of various things about what other people or judges will do, and we are often surprised. But when you have a class in which one side is bound by the result and the other side because it hasn't been noticed, hasn't received notice is not bound, that fundamental structural asymmetry is _____ fundamental and important. And if it were not, then one would wonder why so much sweat and time and tears and money went into investigating and changing the federal rules in 1966, the Texas rules in 1977. Those are very fundamental changes. One way intervention, as I take the drift of some of these questions, is just no big deal. And I'm afraid that under the law of Texas and the federal system it's quite a big deal.

O'NEILL: But again, presume it's a big deal. And presume big harm to Bally. How does it fundamentally affect the nature of the class?

TRIBE: It makes it a lawless class, an outlaw class. It's as though you're asking me

it's a fundamental change to move someone from embezzlement to larceny, but to move him from jail to the free world, that's no big deal. The fundamental difference is that this takes it outside the entire ambit of rule 42, which was deliberately changed in 1977 to prevent this precise kind of activity. It also changes it from a class that serves the normal for genuine purposes of adjudication to one whose only purpose is what this court condemned in Intratex.

O'NEILL: But it still seems like you're saying, because Bally's harmed the nature of the class has been fundamentally changed?

TRIBE: No. It has vastly more than just harmed Bally. It's because of the law we move from a legal to an illegal class. We've moved from a class that can get untainted notice to one that can't. We've moved from a class that can make an unfettered choice to one that can't. And it's not just harm to Bally. It is a fundamental violation of the due process of rights under the federal and state constitutions of the absent members of the class...

HANKINSON: The issue that we're presented with here is actually interpreting the legislature's enactment to the extent that it has granted an interlocutory appeal from an order certifying or refusing to certify a class. All of the things that you complain about may in fact be appealable and may be grounds for action by an appellate court, but the appellate court must first have jurisdiction. So if we look back at the statute and we look at this particular case, we do have a certification order that was appealed and upheld on appeal. Isn't that the history of the case?

TRIBE: Yes.

HANKINSON: So take us back to the statute. Absent De Los Santos, you wouldn't be here arguing at all?

TRIBE: De Los Santos is here. And under the statute literally read, De Los Santos would have to be overruled. It seems to me that De Los Santos recognized that the legislature's purpose in creating interlocutory review for decisions bearing profoundly upon certification...

GONZALES: But couldn't we limit De Los Santos to its facts?

TRIBE: Facts in what way?

GONZALES: To the facts that we...

TRIBE: Not and be a court, and have reasons that make sense to an audience of Texans.

O'NEILL: That was a totally different case.

TRIBE: It's a weaker case.

O'NEILL: You ended up with a crammed down settlement, a plaintiff class that had opted out would be deprived of their day in court, and it was a fundamental change in the nature of the class.

TRIBE: Here, with all due respect, it's crammed down in the sense that all of these people, all members of this class are denied their day in court in the sense that they are all bound now unless this court decertifies and limits the SJ to the parties, which they have no notice and no hearing.

O'NEILL: But they can still opt out.

TRIBE: But the US SC in *Phillips v.* _____ and other cases has made it pretty clear that the fact that at the tail-end you could opt out is not substitute for the fact that _____ and ____ you have a right to take part in a proceeding that decides your rights.

ENOCH: The class was certified. That was affirmed. All that was left was for notice to go out. The argument has been made by the Jackson folks that Bally itself took all the actions or much of the action to prevent the notice from ever going out through the delay of the number of years that occurred. Finally the TC goes ahead and starts rendering decisions on some of the merits. And now Bally is here arguing "Gee, gosh, wiz, the judge is somehow in great error for having ruled on the merits. The argument is that the failure of the notice to go out was not an effort on the part of any of the parties to get a decision before they decided the class, the class was already decided. It was just a fact that there was always some delay in allowing the notice to go out, and so the judge went ahead and ruled on the merits that had been pending for quite some time.

TRIBE: There are a couple of problems. For one thing, even if notice was delayed, that can't justify jumping the gun and entering a judgment because the fundamental principle of no adjudications without notice, even if you have a chance to opt out, like the principle of no taxation without representation even if you can get a refund, is not a reward for good behavior in the course of litigation. It's an axiom of our system of government. But the fact is that this premise of Bally's tardiness is just made up. Notice related discovery was judicially stayed pending review of the certification decision until Sept. 1997, and pending review of the refusal to decertify, again from Dec. 1998, there's a 14 month window. In the first 3 months of that 14-month window Bally produced an exact _____ requested. Something like 460,000 names, addresses and payment histories by January 1998. They sat on those until 2 days after SJ. Why? They made it very clear and it's in the brief, that's not what they wanted. They wanted to know the subset of those who were overcharged. And indeed in the order of certification they defined the class in terms of those who were charged more than the Texas law allows. This court unanimously in Intratex condemned that as a failsafe class. But in this case, unlike Intratex, you can't solve the problem by decertifying simply to rewrite the definition. Because in this case, there's already been a judgment. It was not

any delay on Bally's part that caused that problem. They from January when they had all the names until September 23, when they finally proposed their notice plan and specifically asked for a electronic version of the names so they could pin it down to those who were overcharged, which they don't have a right to do under the anti-failsafe principle, sat on those names and did absolutely nothing because they didn't yet have their _____ guarantee that they would only be sending out notice to those who were certified winners.

ABBOTT: As you know, under the statute that our hands are tied by, there are only two ways in which the CA has jurisdiction. One, is with regard to a certification of a class. And you agree that what happened here was not a certification of a class?

TRIBE: Correct, nor in De Los Santos.

ABBOTT: And there is not a refusal to certify a class?

TRIBE: Not literally nor in De Los Santos.

ABBOTT: So you agree that applying the strict interpretation of the statute, that the statute is not invoked?

TRIBE: Applying an interpretation stricter than De Los Santos is not invoked. But the whole point of De Los Santos, I think it's still good law unless this court overrules it, is those words were not to be strictly construed. They were to be construed in terms of the sense of the situation. And in terms of the functions of the interlocutory review, this was essentially like certifying the new class, refusing to decertify this completely new creature.

HANKINSON: Your argument is based on the ruling on the SJ motion, correct? Isn't that the order being appealed from or are you appealing as well from the oral and the written motions that were denied on the request to decertify?

TRIBE: Decertification, that's all we're appealing from.

HANKINSON: All three of them?

TRIBE: We're not actually seeking a reversal of the SJ. This court wouldn't have jurisdiction to do that. We are saying that part of the remedy that should ultimately be issues, is to limit SJ to the named parties as part of decertifying the class.

HANKINSON: What is it you're asking the judgment to look like in this case?

TRIBE: That the class be decertified and the class action be dismissed, but that the SJ, which if you read it on its face doesn't refer to the class, was construed as applicable to the class by

the 4th CA, but that that judgment be allowed to remain.

ABBOTT: But more specifically, I'm sure you're not saying that every refusal to decertify vests the CA with jurisdiction?

TRIBE: Right.

ABBOTT: What categories of refusal to decertify vest the CA with jurisdiction?

TRIBE: A refusal to decertify that prevents a class from proceeding in violation of any category of Rule 42, that is it takes the class out of rule 42 altogether and, therefore, is not eligible for certification. A refusal to decertify within the discretionary zone within which judges are balancing things like predominance, and superiority is not sort of order that I'm talking about. I'm talking about a refusal to decertify which can allow what was a lawful class under some category rule 42 to move into the zone of complete illegality under precedence, both federal and state.

PHILLIPS: Do you agree that this court doesn't have jurisdiction to look at the question of the certification? Our jurisdiction at this point is limited to looking at whether or not the CA had jurisdiction.

TRIBE: In a way. Because as I understand the decisions of this court in *Bernal* and other cases saying that when you have jurisdiction under the conflicts section of the statute, the jurisdiction will be the entire case.

PHILLIPS: But are you saying we have jurisdiction under the conflicts section?

TRIBE: Yes, because the decision below conflicted with De Los Santos. Because in a situation which was _____, a change more fundamental than crossing the street from one kind of class to another, one that involves jumping over the _____ from a 42 class to one that is no longer authorized, and in that situation to say that's not a fundamental change is to repudiate the core meaning of De Los Santos and it's interpretation of these rules.

PHILLIPS: My problem is really related to Justice Abbott's question. It seems to me there has to be some areas where it's so clear on the face of the record what's been done that we can assert jurisdiction under De Los Santos. But we cannot get into factual resolutions in order to determine whether or not this class is an outlaw class that would confer jurisdiction on the CA. And there are certainly instances, because they are cited throughout respondent's brief, where a partial or interlocutory SJ had been granted at some point in the proceedings before a class was finally certified and notice delivered. And that's okay for one reason or another. Either it's acquiesced in by a waiver. How far can this court get into examining what happened in this class before we violate the statutory scheme restricting, and I think wisely so, the ability of two levels of appellate courts to micromanage what happens in the course of getting a case ready for trial?

TRIBE: I think the easiest and best way to answer that is to relate it to Justice Enoch's question about who was dragging whose feet through discovery. If in order to establish a facial case for the fact that we sit now the category of _____ outlaw of cases in which judgment preceded notice rather than the other way around, if in order to get there we had to persuade you that our electronic production was just top drawer and that we behaved wonderfully throughout this period, and if that was indispensable part of our affirmative case, I think that there would be very _____ institutional reason for this court to say we can't go there. But all that stuff is here because of the attempts by the respondents to tell a tale because _____. They are in effect saying, if there is jurisdiction over the appeal, why then we ought to win because it was okay in this case to enter SJ before notice for the following reasons.

It seems to me that the way this case is structured they are the ones who are asking you dig into those facts. We are not. We are saying that on the face of it knowing only the structure and sequencing situation, this is the textbook case of one way intervention that was flatly forbidden in 66 federal _____ in 77 Texas. And that's all the face of it. And all of their other arguments, including the argument about waiver it's an amazing argument and it relates to a good bit here. It relates also to what Justice Hankinson asked about the defense that was made by Bally against Jackson. Jackson in an earlier case had been paid by a third-party for the very claim he makes here. Bally, therefore, wanted to say whatever may be true of the class or of Mack or anybody else, we have a separate, unique defense against Jackson. Throughout the country in every case that either side has cited to you, that doesn't amount to a waiver protection against one-way intervention. To treat it as a waiver would be flatly unconstitutional.

O'NEILL: Where would you draw the line on a TC's ability to streamline class action litigation? Let's say you had a negligence claim and the TC ruled that there is a duty as a matter of law and approximate cause remained to be decided, would your argument be different in that situation?

TRIBE: I think not. I think I would say as the advisors as the federal rules have said and as other parts have said, it's a simple enough _____ whether it be a class action to opt out of the class action notifying the class, pinning down who they are, giving them a chance to opt in or opt out before you do anything on the merits of the case is the way to go. And that's a clean brightline. But the brightline that the cases and the commentators have drawn, I think ought to be maintained.

O'NEILL: But how does that affect the TC's ability? Texas has been pretty liberal in terms of allowing TC's to work with the class, to modify it, to do different things. How would your rule affect the TC 's ability to do that? Pretty severely wouldn't it. If discovery drags out, if notification drags out for years and years and years, you're saying the TC can't really do anything to streamline the issues or streamline the...

TRIBE: I don't think so. Once there has been notice to the entire class for the chance to opt out, the trial _____ both on the merits has plenty of flexibility. And the cases refer to some

flexibility on possible class modification. It seems to me the far more sound institutional solution is to allow that flexibility to be exercised within a framework that says you do not give people a peek at one or another piece of the merits before you pin down who they are and give them a chance to say yes or no. You're going to throw a pair of dice if you don't let people see one of the two before they...

O'NEILL: But that's not what class actions are about is it? I mean a throw of the dice. Isn't it so that the members of the class have to take a risk as well. Theoretically what's wrong with letting them see that there is...

TRIBE: Because it's asymmetrical. What this court said in the *Intratex* and *Ford* cases was that it is not a legitimate purpose of Rule 42 to allow people to gerrymander failsafe classes.

O'NEILL: But that related to the definition of the class. This doesn't affect the class definition.

TRIBE: It's worse, because you can rewrite a definition. You can't rewrite history.

PHILLIPS: But this makes it hard. De Los Santos is at least easy in this way. The definition itself was changed, therefore, it's kind of like a certification or a refusal to certify. Here it's another fact, an unrelated point is changed. There's been an order entered below that changes the attractiveness of it. It changes the calculus. But it's not on the face of the certification.

TRIBE: How about changing the legality of it. I understand the appeal of saying that if it is not a change that you can see when you look at the certification order accepting the definition of the class, it's all over. But it seems to me that it would be...

HANKINSON: But then it's not a matter of whether it's attractive or not. It's a matter of whether the legislature has said that an appellate court can intervene at this point in time. Isn't that what the issue finally comes down to?

TRIBE: Yes, but it depends doesn't it on what the legislature said. If you look at those words literally in the statute, they clearly do not cover changing from an opt-out to a mandatory class.

O'NEILL: Are you claiming that's what happened here?

TRIBE: No. What happened here was more extreme and if De Los Santos is not to be overruled, and I don't think it should be...

O'NEILL: But you don't claim that became a mandatory class?

TRIBE: No. My brief I think spoke more loosely on that subject. It was not a mandatory class. Some people might still choose to be real gamblers to opt-out to try to get their 17 times the amount that they get. Though the real point is the fundamental change, isn't that now you have to be certifiably insane to opt-out. No the fundamental change is is that it's moved from one kind of class, namely one where both sides have something at risk and where we're playing by the rules, to a totally different kind of class that is the class action in name. And in that sense Justice Phillips you are right. Nothing on that piece of paper has been changed. But surely the message of De Los Santos is if you turn the paper over and look at what's really going on, not by digging deeply in to ancillary facts, but by looking at facts of record that are intrinsic of proceedings themselves like a SJ on liability...

ABBOTT: What would be your argument if the shoe were on the other foot, and that is that the class had been certified and the defendants moved for a PSJ on one aspect of liability or on an affirmative defense, and you got a ruling in your favor?

TRIBE: I wouldn't have agreed to represent Bally in saying that that was not your _____. I think quite symmetrically that under fundamental principles and the statute that was construed in De Los Santos, there ought to be an opportunity for appellate review of that fundamental change, whether it comes from the defendants side or the plaintiffs side, that is the fundamental nature of the class could hardly be changed more than by how _____ a ruling on a basic issue of liability _____ class before there is notice.

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RESPONDENT

SNELL: Professor Tribe cannot transform an order to claim to decertify the class into an order certifying the class and, thus, made appealable under the civil rights and remedies code.

GONZALES: Mr. Tribe said that because of our ruling in De Los Santos that a court can now look beyond the words of the statute and take into account the circumstances _____case. How do you respond to that?

SNELL: I agree that De Los Santos allows the court to determine if an order is so profound as to create a new class, in effect certify a new class. I think De Los Santos would require some change to the class though, some change to the class definition, some change to the class certification order. That is a fundamental change. De Los Santos of course went from opt-out to mandatory and as to the 505 plaintiffs that weren't in the case who are now suddenly in the case against their will and after the case has been tried certainly should be allowed to right to appeal. De Los Santos is quite correct at least as to those people. A new class was certified in De Los Santos. When De Los Santos went from opt-out to mandatory all of a sudden 505 people who did not wish to be included in the class who were strongly opposed to being in the class were in the class against their will after the case had already been tried to a jury.

O'NEILL: How do you respond to Prof. Tribe's argument that - I had sort of read the briefing to be that this had changed to a mandatory class, and I think Prof. Tribe acknowledged that that is less than convincing than the argument that through the TC's PSJ, the class became illegal some way. Do you see that as a valid distinction?

SNELL: Not at all. There is no absolute prohibition in state or federal law against some determination on the merits prior to certification or notice of classes. This has been done frequently in federal courts as well as the state courts. For example, the term one-way intervention does not even appear anywhere in Texas law before this case.

O'NEILL: Presume with me that this is an illegal one-way intervention. I realize that's hotly contested and a much more complicated issue. But presuming that it is an illegal one-way intervention, would De Los Santos then apply?

SNELL: No. It still has not changed in anyway the class at all. The class definition in the class certification order, not a period of that order has been changed. Not a single person is in that wasn't in. No class member has one bit less right than that class member had before. The class members, if anything at all is not to their liking, will be permitted to opt-out and not be affected in any way by this decision.

ABBOTT: Do they have more rights?

SNELL: They have the right to have the benefit of the PSJ if it holds up. Whether that's a right or not is I think debatable. If it is not, we do not allow collateral estoppel or res judicata to apply to interlocutory SJs. It has to be a final judgment before anyone can have the right of claiming that it's res judicata or collateral estoppel. It certainly makes their decision more informed as to whether to stay in or not. They're benefitting. Whether they got a right they didn't have before, I don't know. They certainly have not won the case.

The elements approved in the case will require six. Each class member will have to show that he has purchased the membership on credit. If it's bought for cash, he's not there. He will have to show that he was charged monthly dues to be able to plead his case. He will also have to prove that the particular dues that he or she was charged would not have been charged had he or she paid cash for the membership. And under the plan Bally had in effect at the time and place that member joined, these dues would not have been paid. This is the issue that has been decided at least on an interlocutory basis. Under those circumstances the dues are time-price differential under Texas law. That's what the PSJ has decided if anything, the class. Still another element of proof though is these dues plus the stated finance charges in the contract exceed the legal maximum.

O'NEILL: It seems to me that 1 through 3 are evidentiary matters. I thought the TC found on No. 5. Didn't the TC say that the time-price differential was illegal under our consumer statutes in the DTPA?

SNELL: It found it to be time-price differential. And I think that would be applicable to pledge. No. 5, the particular dues that Jackson and Mack paid close to finance charges exceed the legal maximum, yes, that was found, but only as to Jackson and Mack not as to any other class member. The amount of dues and finance charges varies member by member.

O'NEILL: So then really 1, 2, 3 and 5 are just evidentiary matters. They are not sort of elements of the cause of action.

SNELL: I think they are elements of the cause of action. I think in this case they present factual disputes, not legal disputes. I think the element that presents a legal dispute is whether under these circumstances it's time-price differential.

HECHT: What are the factual disputes about 1, 2,3 and 5? Either they wrote a check or they didn't. Either they charged it to their credit or they didn't. Either their name is on the roll or it isn't. Can't you figure out 1, 2, 3 and 5 with a calculator and some records?

SNELL: You can.

HECHT: Well how is that in dispute?

SNELL: It remains to be done. Each class member will have to be proven to have done 1 through 5 and will have to show the amount of his or her damages. Bally certainly doesn't concede any of those matters, although, I think perhaps, they should. I think it won't be a great task or a great leap of faith to be able to prove those.

HECHT: Don't you think if you lose on 4, you've lost? Either side?

SNELL: You can't win the case without winning on 4. I will put it that way. You can win 4 and still lose the case. If you don't prove 5, if you don't prove 6...

HECHT: How can you not do it?

SNELL: If you take a particular class member and you take the dues he paid plus his finance charges and they don't add up to more than the approximate 23% per annum the law allows, that member would lose.

HECHT: But there would be others who win?

SNELL: There would be others who won assuming there are others who can get over the threshold of showing that the dues plus what is disclosed as finance charges reaches the level of being illegal.

O'NEILL: And this could all be post-judgment. This is when they come in and just simply show the documentation and then they are given the check.

SNELL: That's not my plan. I plan to prove that at trial through experts and accountants and records and so forth. I plan to prove it for every member at the trial.

HANKINSON: When you filed this PSJ motion, put that motion in the context of the proceedings. Why was that motion filed at the time that it was filed?

SNELL: In a desire to move the proceedings along and eliminate things that we thought were for legal issues and that should not be disputed and would not require numerous depositions for example. If we established that these dues are time-price differential, then we need not go depose more Bally's executives about when and under what circumstances they are charged. Of course SJs are the best way in the world to find out what the real defenses of a party are, because they tend to rise to the surface when SJ is filed. All of those are tactical reasons that went into the decision to file the motion for PSJ.

HANKINSON: Before the notice was given?

SNELL: Yes.

ENOCH: Do you agree that at some point the TC could rule so far on the merits that the failure to have sent notice to the class creates a problem?

SNELL: Yes. It could create a problem. Whether it would be error or reversible error or illegal is another question altogether.

ENOCH: On that point, you're saying that what really is in question here is whether or not even a judgment where a class has been certified, the TC renders judgment on the merits, but notice hasn't been sent, in those circumstances it is unclear that that would create such a fundamental change in an opt-out class that in effect it's a class certification reconsideration?

SNELL: I would say not only is it unclear that it doesn't do it. I would say it clearly does not change a class and allow an interlocutory appeal to that order. The legislature has made a decision as to what will and will not be allowed to have interlocutory appeal.

ENOCH: This court has determined that a failsafe class is not a permissible class. Is it possible for a class to be certified, the TC to render judgment on the merits before notice goes out, that by that act of rendering judgment before notice goes out, the TC has in effect created a failsafe class that wasn't as defined but is as a practical matter because of the ruling on the merits?

SNELL: Perhaps I misunderstand the failsafe class. I understood that term in this

court's opinion to be classes that by definition don't exist if they lose. If you don't win on the merits you're not even in a class at all. That's what I thought a failsafe class was...

ENOCH: But a failsafe class could also be someone who's allowed to opt-out if they determine that they would have lost on the merits in the class. So in other words, the TC rules on the merits, the merits is against the class, and after that, the notice goes out and, therefore, the members opt-out of the class. Doesn't that accomplish the same thing? Whereas, I now know that if I stayed in the class, I would lose on the merits. I, therefore, choose to opt-out. Isn't that tantamount to a failsafe class?

SNELL: Perhaps so. Perhaps that's why the federal cases that have considered this have said that where the defendant moves for SJ on the merits, the defendant accepts the risk that he will have a failsafe class as you define that term. The defendant accepts the risk: If I do this before the class is notified and I win, it may not find the class and the defendant waived the right to have any more than stare decisis, protection against the class.

ENOCH: If the plaintiff moves for SJ before notice goes out to the plaintiff class, does the plaintiff accept the risk that they are creating a failsafe class by the ruling of the court?

SNELL: Yes. Obviously there's that risk or we wouldn't be here if that risk didn't exist. Yes, the plaintiff accepts that risk when the plaintiff does that. But does that make it appealable by interlocutory appeal? I think not. It has not changed the plaintiff's motion for SJ. It has not changed one word of the class definition or in any way at all altered the rights of the members of the class at least here, because the class members are free to opt-out if they disagree with anything at all that was done. The legislature has decided that there are occasions when SJs or the denial of SJs can be appealed. For example, when a member of the press seeks a SJ on grounds of free press or free speech in _____. The legislature said you can appeal that. When a police officer, governmental official loses a SJ based on immunity, that loss of a SJ can be appealed. So the legislature has decided obviously that certain kinds of SJs can be appealed. They've not seen fit to extend that to SJs in class action litigation. Likewise, the legislature has decided that the failure to dissolve certain orders can be appealed. Orders appointing trustees, or receivers, motion to dissolve that that's denied can be appealed. The Civil Practice & Remedy Codes specifically allows that. But the legislature for whatever reason has not seen fit to extend that right of appellate appeal to class actions. There's policy arguments both ways on whether more appellate review of class actions should be allowed. As the court has recognized, those policy arguments are more properly directed to the legislature.

HECHT: But the plaintiff can move for SJ on the essential merits of the case, as you've done in this case. If a plaintiff can do that in a class action before sending notice, why wouldn't he always do that?

SNELL: I think it's a good thing for the plaintiff to do. I think it helps reduce issues

in the case and...

HECHT: Because if he wins, he's got a free ride, and if he loses, he doesn't have to send notice?

SNELL: I don't understand the loss of a SJ to have that effect. It's my understanding that if you lose a SJ it just means that the court has declined at this time to dispose of the case on the merits.

HECHT: What triable issues of fact are there on 4?

SNELL: I don't think there are any in this case, and I think that's why it was granted. Bally certainly thought there were triable issues of fact that were raised in a response 2 feet high. They argued the triable issues of fact...

HECHT: Or they just disagree on the law?

SNELL: No. They specifically and strenuously contended that this was a fact question, not a legal question under the circumstances of the case. My point is, had they won on that, that wouldn't have done any harm to the class. It just means that we didn't get our SJ. It doesn't prove the negative. That would not establish the dues are not time-price differential. It would just be a failure for them to declare that they were.

HECHT: Had they won, the class representatives would have to think long and hard about footing the bill for notice to the class members if they know they are going to lose the case, or they think they are going to lose the case. Why would you do that?

SNELL: All I can say is I was certainly personally prepared to go right ahead and do that. That's the obligation you undertake when you represent the class. You try to get a SJ, and if you fail that wouldn't change the class representatives' obligations under the certification order to issue notice. It wouldn't relieve him of that obligation at all.

HECHT: So you think if the plaintiff moved for SJ on the central legal issue in the case and lost on the question of law, that plaintiffs and their representatives and their class counsel would just go right ahead and spend millions of dollars sending notice to the class members?

SNELL: I think if the plaintiff felt enough about the case at all to bring it, he would not be deterred by the fact that one particular...

HECHT: That he was going to lose?

SNELL: Well if one particular district judge declined to grant a SJ, we all know that

SJs can be hard to come by. Denial of the SJ is never - it can't even be reviewed at all on appeal, whereas the granting of a SJ can and often is appealed and has sometime high fatality rates. So the loss of a SJ is not any sort of a fatal blow to anyone's case in my opinion, at least in most circumstances. It just means that you have to come back another day and win in front of a jury or with better proof or with more than you had the first time you tried it. But that's why I think we allow numerous or repeated MSJ. No, we are not restricted to one MSJ. Many things can happen to this order.

We don't' want to get to the merits of this case because that's not before the court. It's only the jurisdiction of the CA. But I do hope the court will keep in mind that there is not a single federal case anywhere out of thousands of federal cases that has decertified a class because of a PSJ rule for the plaintiff. Only one case has decertified a class for a plaintiff who won who did not seek certification prior to trying the case to a jury. That's *Peritz v. Liberty Loan*. That's the only federal case Bally has found where a plaintiff got a favorable ruling on the merits and had his case decertified as a result. One case out of thousands and thousands, and that was after the plaintiff had a full jury trial on the merits before even asking for certification. And even in that case, the 5th circuit said, We are not holding here that there can never be precertification determinations on the merits. In fact, courts frequently do that. This court did it in *GM v. Brewer* by striking certain plaintiff's claims about SJ prior to certification. It's not an unusual circumstance.

The *Posto*(?) case cited in our brief is a federal case that specifically allowed a federal class action to go ahead where the plaintiff got the SJ prior to notice or certification. At most, federal law is unclear on this. There certainly is no absolute prohibition in federal law and no mention whatsoever in state law of any prohibition against the trial judge making some preliminary ruling prior to notification of the class.

Furthermore, as Professor Newberg points out, the whole purpose behind barring one-way intervention under rule 23 has become academic because of the evolution of collateral estoppel, so that now it's no longer necessary to have mutual parties in the case for there to be collateral estoppel, the very underpinnings of Rule 23 prohibition against one-way intervention that has been called into question by this development. So when we're dealing with a situation where the federal law is unclear, we should respect the discretionary view always afforded to trial judges in making these kinds of decisions on the timing of notice in a class action - management of a class action.

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REBUTTAL

O'NEILL: Could you respond to the last statement that was just made, that the

jurisprudence of collateral estoppel has sort of undermined the underpinnings of one-way intervention?

TRIBE: The claim has been made by one or two commentators, but it was most eloquently and _____ refuted by _____ in the 7th circuit in _____ Electrical in 1987, which he carefully shows that it's not true and that there would be no authority constitutionally for the courts to undermine a rule because the affected statute, rule 42 here, just like rule 23 in the federal system has affected _____ the statute. Non-mutual offensive collateral estoppel would in fact have been a legitimate development if it hadn't been shot through with exceptions. Exceptions from the very beginning in the Park Lane opinion were designed to say, it won't apply if there was an opportunity to take part in the case in the first place. It won't apply unfairly to the defendant.

O'NEILL: My understanding of the statement was that no court had decertified, not that they hadn't said it was improper.

TRIBE: Some times what the courts do is limit the judgment to the parties and order dismissal of the case. They don't use the phrase "decertify." That's how Mr. Snell got to that conclusion. I count 18 or 19 leading cases, some of them lower courts in Texas, where functionally that's exactly _____.

ENOCH: Is this a judgment rendered before certification or a judgment rendered before notice?

TRIBE: Before notice. Some times also before certification, but the courts draw no distinction. That is, even if the class is decertified, as long as the class hasn't been formally notified and given a chance to decide whether to opt-in or out, the theory of all these cases is it's fundamentally improper to resolve on the merits. It's also not true by the way that a SJ denial is just nothing. It depends what it's based on. The basic dispute between us is whether in this special circumstance the $5 a month monthly charge, even though it is not directly correlated to the amount owed, amounts to a finance charge.

O'NEILL: And you claimed that that was a fact intensive inquiry, correct? And by doing so, if the SJ had been denied it wouldn't have been any sort of determination one way or other on the merits. It just would have been a recognition by the TC that it was what you urged it to be, which was a fact inquiry.

TRIBE: It would depend on what the trial judge wrote. If the trial judge said, that the key point that's not being disputed is that the $5 a month memberships are not tied to the amount owed, and that some times they are waived because you pay the entire membership fee up front, and some times they are waived because it's the holiday season and as long as that is the case, and that wasn't in dispute, it can't be within the meaning of the Texas Credit Code a time-price differential.

If that ruling of law had been rendered, then we would be exactly where Justice Hecht posited for Snell, mainly that's a dead loss.

HANKINSON: But that's not what happened in this case. As Justice O'Neill says, the position that Bally took was that this was a factually intensive issue and that fact issues existed which precluded the trial judge from ruling as a matter of law that the dues were a time-price differential. So the denial of that motion left no determination as to the question of law. Is that correct?

TRIBE: It's correct, but I don't know of any case in which one doesn't say, as a matter of law you're wrong, and even if you don't agree with us on that, there is some facts we are assuming that aren't true. That's what happened here.

HANKINSON: Unless you have competing SJ motions in which the court is asked to resolve a legal question one way or the other which is not what happened here.

TRIBE: It is not what happened here, but institutional decisions the court has to reach is not only about this case. It's about whether his practice(?) should be _____, or whether one should say under De Los Santos that this is a fundamental change in the class. In De Los Santos the court didn't say that because moving it to a mandatory class is a new class certification would fit the statute. He said it's a fundamental change.

O'NEILL: You've abandoned that argument. You are no longer saying this is a mandatory class.

TRIBE: My point is that the category of what is a fundamental change ought not to exclude moving it to an illegal class.

O'NEILL: The court said more than that. It basically went into the details of why this was a crammed down settlement, it deprives someone of their day in court, it created conflicts among counsel, it was much more than...

TRIBE: I would say you would have an easy time writing an equally detailed opinion of what a radical transformation this is adding to the rights of some members of the class, subtracting from the rights of defendant a fundamental change.