

**ORAL ARGUMENT – 02/18/04**  
**03-0547**  
**BMG V. PEAKE**

LIBERATO: This is a class action case that if tried will require the TC to put on the witness stand literally every plaintiff in this case to be asked whether or not he/she paid the late fee voluntarily?

O'NEILL: The voluntary payment rule. Tell me whether you agree with this statement of what it is. Money voluntarily paid with the full knowledge of all the facts. And without fraud it seems to me that if they prove they did not have full knowledge, the fraud deception duress piece goes away. But the basic premise of your brief appears to be that even if they show no full knowledge they also have to prove fraud.

LIBERATO: I think you hit at the heart of the issue in the case. No. What our premise is, is that we have shown full knowledge.

O'NEILL: So you would agree that if the knowledge issue is determined against you, then the rest of the individualized fraud piece goes away.

LIBERATO: That's correct.

O'NEILL: So just in terms of full knowledge is it safe to say that your argument is if you know a late fee will be charged and you know the amount that is full knowledge?

LIBERATO: And the circumstances. In other words, as what happened here, if you don't pay within 30 days, then you will be charged a late fee.

O'NEILL: So if you had in the agreements that interest at a certain amount would be charged on all over due amounts, and that was paid for a period of time, and then it was determined after some time that that rate of interest was usurious and the person paying it wouldn't know that it constituted user does he then pay with full knowledge?

LIBERATO: The answer is yes. He pays with full knowledge. I don't know for sure if there wouldn't be some sort of separate statute that relates to usury that would apply. Which you don't have here.

PHILLIPS: Is there a full knowledge defense to the usury?

LIBERATO: I don't know. I don't think so.

BRISTER: Is there voluntary payment defense to liquidated damage? Has any case ever

said, Well if you voluntarily paid the liquidated damages, you can't later claim it's a penalty.

LIBERATO: Yes. I think that is accurate.

BRISTER: Which case says that?

LIBERATO: The Salvaggio case, which is the 14<sup>th</sup> CA case that we rely on says that. And I think generally that is true with the voluntary payment.

BRISTER: I had trouble finding anything by this court regarding voluntary defense outside of taxes and one or two other limited areas. Obviously if you pay these fees that the car dealers always put on there, people always pay those voluntarily. And they always get them back because they are illegal fees.

I'm trying to find out where this voluntary payment defense is that all the time people pay a contract and then sue, and get it back because the contract was breached, etc. Which real cases do voluntary payments constitute a defense to?

LIBERATO: They do when there is full knowledge. And I think that's where the distinction arises here is was this full knowledge or not? And here the plaintiffs don't complain about the method of how we provided knowledge. In other words, they don't complain that we limited the amount the materials that was in here. We had it in our promotional materials. We had it in our invoices. We had it in our membership \_\_\_\_\_. Their sole contention is that we did not provide the basis for the late fee. In other words, how we reached the calculation of that late fee. So I think it limits the issue here in that case, whether that is required for there to be full knowledge.

JEFFERSON: What was the basis for the late fee?

LIBERATO: We don't know. The record doesn't reveal what the basis of the late fee was.

JEFFERSON: If you don't know, how can we assume that they know?

LIBERATO: Well in this sense. What I mean is they don't know. But what they do know are the circumstances: they know the time and they know the amount.

PHILLIPS: But that's true of all the fees J. Brister was talking about.

LIBERATO: But I think that's a different situation because those fees they don't specify what those fees are for.

PHILLIPS: So if they say this fee is for document fee, and it turns out that's an illegal fee you are bound by the voluntary payment rule?

LIBERATO: I think that's right.

PHILLIPS: So full knowledge doesn't mean knowing that it's something you don't have to pay.

LIBERATO: That's correct.

WAINWRIGHT: Salvaggio was a tax case, and Salvaggio cites other precedents from this court on the voluntary payment rule, and they all seem to be tax cases that are cited in Salvaggio. Frankly I never heard of the voluntary payment rule until reading the petition for this case. What is the origin and the rationale for the origin of the voluntary payment rule? Was it specifically to deal with governmental entities and tax payments, or was it for some other reason and it's been expanded?

LIBERATO: I don't know if it was specifically meant to deal with tax cases. But I do know what the origin is, and I do know what the basis is because there are numerous cases that talk about the policy reason behind the voluntary payment rule. And yes you are correct. There are many, many cases where it involves taxes but there are many other cases to where it involves late fees or other types of fees. I'm talking about around the country. But the basis is, that a person who is the demand is made upon and then pays the fee, when they do that they should have the responsibility then to dispute the fee and not in a sense sit on their rights and then later on leave themselves open to the option of being able to litigate. That they should do it up front. And then the payee should be entitled to be able to use that money and to know that he/she can use that money without fear that it is going to have to be returned later on.

WAINWRIGHT: So this rule then is based upon a rationale similar to estoppel?

LIBERATO: I think that's exactly right. And sort of a practical one that if you have a complaint about the fee, then it is your responsibility to say up front here is my complaint. Not pay it and then leave open the option of litigating.

WAINWRIGHT: So then the estoppel requirements about knowledge then might be imported into a view, or an analysis, or an understanding of the voluntary payment rule. And that may explain why there's a full knowledge requirement if it's an estoppel based concept.

LIBERATO: Right. I would say it's analogous to estoppel. Maybe it is estoppel base. I've never seen a case that specifically said it was estoppel base. But surely fundamental to it, and what may distinguish it best from the other type situations is, what constitutes full knowledge and what has to be...

O'NEILL: I think the point of disagreement is a very narrow one. And that would be if for full knowledge you also need to know it's illegal, then you lose. You've said that the threshold question about the extent and nature of each class member's knowledge of the late fees is susceptible to class wide resolution. And all that we have to decide is what are the components of that

knowledge? You say whether the payment is determined to be legal or illegal doesn't matter. They just have to know what the amount is. But if we say it does matter they have to know that it's illegal, then you lose.

LIBERATO: I think that's right.

O'NEILL: And the court in this case, that issue has not been determined. Under the certification order the court will make that determination itself as a matter of law. That will not be a jury question. So this class will rise or fall on the TC's determination as a matter of law of whether this payment is legal.

LIBERATO: The TC's determination as reviewed by the appellate courts. And I think as reviewed by the appellate courts now, and the reason that I say this...

O'NEILL: But what I'm saying is I'm getting away from the - we don't get to the individualized on whether it's legal or illegal payment. And if the TC decides that it is legal they have no case. If the TC decides that it's not legal then there's a class. So the class will rise or fall on this one determination.

LIBERATO: It may rise, but it may not fall. And by that I mean that if there is a determination that there was full disclosure, then the class fails because then the second prong of the voluntary payment rule has to kick in.

O'NEILL: But you agree they didn't disclose it was illegal?

LIBERATO: Because we don't think it was illegal. But that issue is the basic issue and the merits of the case.

BRISTER: And we can presume that everybody knew the law, which was that if it's a penalty it's a illegal, but if it's a rough estimation it's okay.

LIBERATO: That's right. Either a rough estimation or if it is proper liquidated damages and if it's not a penalty.

PHILLIPS: How can you know if it's a rough estimate if you don't know or the company doesn't know the basis of which they calculated?

LIBERATO: How can the person who's paying know that?

PHILLIPS: How can I know that? Maybe because of bookkeeping and all it cost them \$20 to figure out a particular fact or maybe it only cost .50 cents because they have a good computer system.

LIBERATO: I think that they don't know if it is or isn't. But I don't think that it's required that they know that. In fact there are cases that say if it is illegal, even if the fee is illegal, that the voluntary payment doctrine applies.

PHILLIPS: I thought that they have to have full knowledge. And full knowledge included - they are informed of the law. They know exactly what the standard is even before we figure it out. And so if they know that if it's a reasonable amount they need to pay it. But if it's not a reasonable estimate of what the cost of processing the late payment is going to be, they don't have to pay it. Even assuming this perfect knowledge of the law, if they don't know the basis for how to calculate it, I don't know how can they know I should pay this because it's going to be reasonable, or I shouldn't pay it because it's illegal and these turkeys shouldn't be doing that.

JEFFERSON: The fee is assessed and what do they do? They send a letter complaining this fee is an illegal fee. It doesn't represent a rough estimate of how much it will cost. And what basis would they have to even make that complaint?

LIBERATO: They can pay under protest.

JEFFERSON: Why would they protest if there's no basis for a protest?

LIBERATO: And there may not be. By your questions, you're assuming that this is an illegal fee, which we don't believe it's an illegal fee. To take it a step further. It would almost require anyone who charges a fee to tell the full basis for the fee and why they think the fee is illegal. It really gets to the substance of the case to answer some of the questions, which are good questions, but to get to the substance of what you're asking. It presumes that the fee is illegal. And there shouldn't be any presumption that this fee is illegal. That's what would ultimately be decided in the TC. And so if the \_\_\_\_ says, Well we need to let them know the basis for whether it's illegal, then I think as a practical matter that just makes it so difficult in any situation for someone who assesses any kind of a fee to know how much information has to be put on there. I think there needs to be enough to put the payor on notice of the circumstances, the time, the amount, what we did here, and that that should be enough to put them on notice to at least inquire to pay under protest, to investigate, and ultimately to file suit if they think it's appropriate to file suit.

But the key problem in going back to your question J. O'Neill and how this kind of fits in to this whole class action concept. I think it's really a two step process. Number 1, the court has to determine whether there is full knowledge. And that's what we've been talking about. If the court determines there was not full knowledge, then this class is certifiable.

O'NEILL: Let's say the class definition was all those who paid this fee under protest. The voluntary payment rule would not apply.

LIBERATO: I think that's correct.

O'NEILL: Appropriate for class certification.

LIBERATO: I think that's correct. As your question indicates, that's not what happened here. So what does have to happen, and I think from the difficult question involved in this case is that there has to be a determination then made and how does that fit in to the overall concept of determining when a class action is appropriate to be certified and when it's not? Because there does have to be a legal determination made. Was this full disclosure before you even get to step 2. And of course generally you don't make in the class action decision whether to certify the class is substantive legal determination.

But here that has to be done. Not the substantive legal determination \_\_\_\_\_ whether there's liability or not. But the substantive legal determination of whether there is full disclosure. Because that is so inherent in the decision of whether the predominance requirement is met. And you have what is truly, I believe, a bogus argument about whether this is full disclosure or not. There's not been any case in the country, and we cited in both footnote 4 of both our opening brief and our response, case after case that says that this argument on full disclosure requires stating the basis that that does not defeat full disclosure.

O'NEILL: But disclosure doesn't matter if it's determined that it's illegal.

LIBERATO: No. I disagree with that. Because the voluntary payment doctrine applies even if the demand is illegal.

O'NEILL: And the question we have to decide is, does the payor have to know it's illegal or not? You say it doesn't. They say it does. If we say the payor does have to know it's illegal, you lose.

LIBERATO: But the thing that's so troubling about the question as you phrase it is that presumes it's illegal. And in fact if you presume it's illegal, then and in fact what the court is doing is substantively deciding an issue in the case that it's illegal.

O'NEILL: But we're doing the same thing - mere image if we decide that it is legal and bust the class. In other words, the whole class will rise or fall on this determination both naturally and legally.

LIBERATO: Whether there should be a class or not? That's correct. But there won't be a class either way. And in one situation there will be a class, and that is if there's not full disclosure. If there is full disclosure then there cannot be a class.

O'NEILL: But whether it's legal or illegal is a common issue.

LIBERATO: That's true.

O'NEILL: And we have to decide just as a matter of law as to whether the payor has to know that fact for the voluntary payment rule to apply.

LIBERATO: That's correct. And I think what you will find is there are many, many cases throughout the country that has said, and no cases to the contrary, that say that that's not a requirement.

\* \* \* \* \*

RESPONDENT

KEMP: I think the court has zeroed in on exactly what the issue is in this case. There is no contest as to the certifiability of these claims except as it relates to this voluntary payment defense.

WAINWRIGHT: Would you agree that in order to determine whether predominance exists, we have to know what the law is that's going to apply to the case?

KEMP: I do. I think in the Hankin's case...

WAINWRIGHT: The TC said the voluntary payment rule doesn't apply here. The underlying rationale doesn't fit this case. It's unlikely it's going to apply. The CA said it is "far from clear" that the voluntary payment rule applies. Neither court determined that the voluntary payment rule applies. Are the parties knowledgeable about something that's not in the CA's opinion or the TC order? Is the voluntary payment rule going to apply to this case? Isn't that our first question?

KEMP: Actually I believe that that is a merit's determination that needs to be made once the certification issue is resolved.

WAINWRIGHT: You just agreed with me that we have to know what the law is to determine whether certification was proper or not. Now you said, we should confirm the certification and send it back to the TC to determine what the law is.

KEMP: I believe as this court determined in the Hankins case, you have to make some merits analysis of the issues to see how it applies to the facts of the case to the claims being made. We're not disputing that at all. But as the court also said, the merits analysis at certification is far less searching than in trial on the merits. And it certainly isn't a determination on the issue of the merit. What both the TC and the Beaumont CA says is, the allegation is being made by the class that the voluntary payment defense does not apply in this case. That well may be the case. It may be that it does apply. But it's application or non-application based on the law as it is is a determination that will have to be made on the merit. They recognize the issue. They analyzed the facts surrounding it, but simply did not make that determination because it was not the appropriate stage to make the determination.

WAINWRIGHT: We may be talking about two different things. Whether the law of voluntary payment rule applies to this case is a different issue from whether the facts establish a violation of that rule. I'm just curious as to why neither court would say that it applies. Or would say clearly that it doesn't apply.

KEMP: From the classes perspective there are three separate distinct arguments from why it would not apply. First, under the McClung case, that's the Dallas CA case from 1972 dealing with the voluntary payment. The court there said that the voluntary payment doctrine is not rigidly applied where the reasons underlying the rule are not present. And the only reason underlying the rule that's stated was that by delaying bringing a claim a payee may be put at a disadvantage because of the unavailability of records or witnesses. And the McClung court there determined that there wasn't any such hardship and they didn't apply the voluntary payment rule.

The second reason is, also from the McClung court, where the court says what we have to do in this case, because this was a case involving a large bale of cotton left in a gin, it wasn't re-weighed at the appropriate time, there was a dispute over the lost market value and also a separate claim related to storage costs that had been paid. And the court in McClung said, we have a dichotomy here between this voluntary payment rule and the rule that says a party who suffers a breach of contract is entitled to full damages as compensation. And where those two rules conflict we're going to decide that the rule in favor of full compensation for breach of contract prevails over the voluntary payment. So that's a second reason why the voluntary payment rule doesn't apply.

And the third reason gets back to what you're discussing with the underlying rationale for the rule itself. Frankly, I think rather than estoppel a closer analogy to the voluntary payment defense is laches. It's one where someone is put at a disadvantage because of delay. The only rationale presented for the defense being applicable by BMG in this case was fairness and finality. Here we had a situation where they have admitted they have lost no records, there is no indication that any of the evidence they would need to defend this case is missing, misplaced, unavailable to them. So the rationale for the rule is not applicable.

WAINWRIGHT: In *Southwest Industries v. Varnio*(?), Houston CA says that it's essentially an estoppel base concept. So there's a number of different theories out there.

KEMP: There was some discussion about the tax cases. It's almost like there are two separate animals out there. There is a voluntary payment defense as it relates to taxing authorities, which is based on sort of a sovereign immunity type issue, more of an efficient method of revenue collection for taxing authorities. And then there is the private sector of voluntary payment rule which is very seldom applied. And in the Texas cases that they cited, the McClung case that we've talked about, it was not applied at all. In the Salvaggio case, it was a tax case, and it was tried as it related to the duress element to get around the defense. The same with the Spring Branch bank case. It was a duress case. *Runcy v. Runcy*, the court specifically found that the plaintiff was familiar with all the facts, which was the same thing in the Boyd case. The evidence shows the plaintiff was familiar with all the facts. And in *Southwestern Industrial* that the court just mentioned, the plaintiff did not



allege he was ignorant of any facts. So those cases that have applied that in Texas are separate and distinct from the case we're presented with here, which gets back to the nature of the claims, which goes back to the purpose that they had in charging the late fee where their representative admitted that this primary purpose for the late fees was to \_\_\_\_\_ our members to pay. In other words, it was a penalty clause to produce performance of a contract. As we know you can't get punitive damages for breach of contract. And what this court has said in the Phillips v. Phillips case is that enforcement of a penalty like enforcement of an illegal contract violates public policy.

O'NEILL: If we were to determine that - let's presume this is an illegal penalty - the late fee. If we were to hold that Mr. Peake did not need to know that when he paid for the voluntary payment rule to apply. Would you agree that determination of the fraud, deception, coercion, duress piece would devolve into a particularized inquiry? It would defeat commonality.

KEMP: No. First of all you're right in that the knowledge is the key that the class is relying upon here to defeat - if the defense is applicable the knowledge element is the one that the class is relying upon to defeat the defense. I don't think it has to go so far as to say that they send you a letter saying, We're charging you an illegal fee. I think what it requires is full knowledge of the facts. And the facts underlying...

HECHT: What does that mean?

KEMP: In order to determine if it meets the Phillips test of a proper liquidated damages provision versus a penalty, you have to know 1) were the actual damages difficult or impossible to estimate prior to breach. There's no evidence here that they were.

HECHT: How are you going to put all that in this invoice?

KEMP: It's actually quite simple. Because in a number of the cases from around the country that they cited that's exactly what happened. For instance in the Dillon case out of New York. The defendant had made a pre-charge calculation and notified everybody about it. And that's why the voluntary payment...

HECHT: What do they say? Do you attach a financial statement?

KEMP: I don't think it's that necessary. I think something that says you know we're charging this fee based upon our calculation, estimate of the damages to be suffered.

HECHT: Now if that statement is true, then you can't recover no matter what.

KEMP: That's right. If they have made a reasonable estimation...

HECHT: And if that statement is false, then the voluntary payment rule doesn't apply because there is no full disclosure. So it seems to me that if that's the rule there is no voluntary

payment, because it's going to come out the same way either way.

KEMP: No. If they honestly disclose all of the facts to their members.

HECHT: They are not going to say we're charging you an illegal fee. They are going to say we're charging you a fee based on what it really cost us. If that statement is true, then you have no case.

KEMP: That's true.

HECHT: And if the statement is false the voluntary payment rule doesn't apply.

KEMP: That's true.

HECHT: So either way if that's the requirement of the voluntary payment rule, there is no voluntary payment rule. It doesn't affect the outcome.

KEMP: The reason that the first outcome is the way it is is because on the merits of the claim we lose. Because then they have a proper liquidated damage clause under Phillips v. Phillips.

HECHT: It seems to me that the purpose of the voluntary payment rule is to say you're not going to recover when otherwise you might on the merits. Isn't that the purpose of it? Otherwise it doesn't have a purpose.

KEMP: Well that's what I keep coming back to. It's really unclear as it relates to the private sector what the underlying purpose of the voluntary payment defense is other than...

HECHT: Whether it's laches or estoppel or whatever it is, the effect of the rule is to keep somebody who has a good claim from recovery.

KEMP: That's the way it's attempted to be applied.

HECHT: And it seems to me if the disclosure has to be what you say it does, then it would never apply and there's no point in having it.

KEMP: If the court wants to abrogate the voluntary payment defense rule, I would sign on to that.

BRISTER: How many people are in your class?

KEMP: Based on the discovery or responses that we've done prior to this certification hearing it's unclear. There were approximately a little over 200,000 late fees collected each of the

four years prior. So there's probably some overlap in there. So it's safe to say there are several hundred thousand.

BRISTER: Let's say 500,000. Probably a law professor in there somewhere. Right?

KEMP: Right.

BRISTER: Perhaps even a member of your firm in there somewhere.

KEMP: I don't think so.

BRISTER: Perhaps there's a member of a firm who has filed a claim just like this against Blockbuster. They would know that there's a good real chance that this \$1.50 flat fee is a penalty. Right?

KEMP: It depends.

BRISTER: Just purely hypothetical. If they filed a claim just like yours, then when they got this \$1.50 fee they would know there's a good chance it's probably a penalty. And of course if there's one in the class, then how are we going to find them if it's a class?

KEMP: You're asking about then the duress, the coercion and the fraud?

BRISTER: No. Let's assume out of this 500,000 there are ten people who really would be subject. They don't need any disclosure at all. They know exactly when they get this \$1.50 flat rate that there is no way that that could be based on what the carrying cost was. How do we find those people in a class action, and doesn't the defendant have a right to cross-examine all 500,000 if they want to to find those ten people so they can kick them out?

KEMP: I don't think so because you're basically asking to find 10 people who have some knowledge that the defendant itself didn't have. Because they didn't make the calculation.

BRISTER: They say the didn't calculate. They can't say exactly how much it cost for everybody that's late. But that doesn't mean necessarily that it either is or is not. As we said in the Phillips case, if it said 3 times what your actual damages are, you don't have to know what the actual damages are to know that's a penalty. If it said \$1.50 whether you're one day late or 100 days late, we don't have to know what the calculation is because it's not based on how long you waited.

KEMP: That's not what their fee was. Their fee was \$1.50.

BRISTER: You're quibbling with me over the details of my hypothetical.

KEMP: I just don't understand how those people have that knowledge. They may

have an assumption. They may have a belief. But they are not going to have that knowledge because it's possible that \$1.50 fee would be a reasonable estimate.

BRISTER: For all 5 million people no matter whether they pay the day after they get the notice, or 29 days later, no matter how many times they've been contacted, no matter whether they live in Thailand or Temple, \$1.50 is always going to be a good estimate?

KEMP: I don't know how to answer that question other than to say I don't know how they would have that knowledge.

OWEN: I guess the definition is problematic to me. You all seem to agree that the cases in Texas agree on a definition of what it is. And it seems to me that within the definition is the concept that you have to know all the facts, but you don't have to know that it's a void(?) or an illegal demand or upon a claim which had no foundation in fact. In other words you pay it and you can't get it back if you pay it even if the claim had no foundation in fact or is illegal. I mean that's what the definition seems to say.

KEMP: That is what the definition seems to say. Like the McClung case dealt with the conflicting rules because in Phillips v. Phillips we said (referring to collection of a penalty) it should not be done even if the parties do not object. So you've got conflicting rules of law here it seems. And in the application where there isn't full disclosure of the facts obviously the phrase in the definition that you're reading "with knowledge" of all the facts must mean something. So there must be a determination made as to whether or not the facts were known.

HECHT: In the reply brief at pages 5 and 6, the petitioner says every case BMG Direct was able to locate addressing an issue, whether the person making the charge must disclose the late fee holds that there is no obligation to make such a disclosure in order to obtain the benefits of the voluntary payment rule. And those cases were also cited in the initial brief. You didn't respond to those in the response.

KEMP: The cases from out of state?

HECHT: It's cited at footnote 4.

KEMP: Those are the cases from out of state. Basically what we have there is a situation where, for instance there were two cases from Mississippi - the Hill and the Horne case. If you read the definition that those courts cite for the Mississippi voluntary payment rule, there isn't a clause that says it has to be based on knowledge of all the facts. So there isn't that requirement. The Horne case was a duress claim. So that's what that was ruling at. In the Hill case in Mississippi, the court had actually certified the case and then later on ruled on the merits as to the voluntary payment defense. They didn't find it to be a \_\_\_\_ certification. The same way with the Oklahoma case, McWelly. The plaintiff there pled the class had full knowledge of all the facts. The Hall case, dealt with a very specific statute on voluntary payment relating to these hospital payments that were

being made.

HECHT: You say they are distinguishable?

KEMP: Yes.

HECHT: You cite some case that you say were tried. In your brief at footnote 2, you cite some cases that were tried in sort of this context. And the response brief says they don't mention the voluntary payment doctrine.

KEMP: The ones that I mentioned as being tried did not. Which were simply mentioned for one reason and one reason alone. They say that every place else in the country that has ever dealt with this late fee litigation bounces it because of the voluntary payment defense. Clearly that's not the case in those states where it's actually been tried.

The other out of state cases that we cited, the Muncy case from Louisiana, the Hanson case from Minnesota, the Pratt case from Tennessee and the Folsom case from Georgia, all dealt with the voluntary payment defense and rejected it.

O'NEILL: I'm not sure I understand the disclosure argument. Tell me if I've got this right. That seems to me to be a side issue. The fee is either legal or it's illegal. And my understanding about where the disclosure piece comes in on the voluntary payment defense is if it's illegal the only way the voluntary payment defense would apply would be if in the agreement itself you revealed that it was illegal, or at least enough information from which the payor could determine that it was illegal. Would it be accurate to say that that's the only context in which this disclosure failure to disclose argument has any meaning?

KEMP: Actually in one other area. Because they have now acknowledged that that knowledge component of the voluntary payment defense can be tried on a classified basis as a common issue. But then they step back and say, However, we're going to win that argument and therefore that leaves you with duress, fraud, and coercion and those are all individualized. That's really a strawman argument that's easy to knock down because here you're dealing with a situation where they admit they had uniform contacts with each and everyone of the class members through their promotional material.

O'NEILL: My question is more - when I first started reading the briefing, I became confused on the nature of the class claims. It seemed to me that the class question was, whether they disclosed or didn't disclose financial information. And that was a more difficult concept for me than just the simple legal determination of whether this is a legal or an illegal fee. Is it accurate to say that the claim in this case is that an illegal fee was charged, and the only way the voluntary payment defense could be gotten around in this agreement would be if they had made full disclosure of how the fee was calculated that showed it was illegal on its face, then if Peake had paid it anyway, the voluntary payment rule would apply?

KEMP: That's accurate with the addition of the three reasons for completely avoiding the defense that I talked about with J. Wainwright. But if the defense applies, that's the only way for the class to be...

O'NEILL: So disclosure is not really the issue so much as legal or illegal fee.

KEMP: I think the way the defense is worded is that the class members have to have knowledge of all of the facts. And as we've talked about the facts that they have to have knowledge of would lead one to the conclusion, and one would give a basis for determining whether it was legal or illegal fee.

\* \* \* \* \*

#### REBUTTAL

LIBERATO: J. O'Neill let me begin by addressing your question. And as I understand it, the issue that you raise is how important or isn't it fundamental to determine whether this fee was legal or illegal? And the answer to that is that it is not. And the reason for that is that the voluntary payment rule almost presumes that it's illegal. Now that's not to say it's illegal in our case, but it presumes it's illegal because there's no need for it unless the demand is illegal. Because if you pay something that's your supposed to pay, that's legally paid, then there's no point of having the defense at all.

O'NEILL: It seems to me based on the estoppel argument, the purpose of the voluntary payment rule is, if you pay something knowing it's illegal, if you pay something knowing you shouldn't be charged but you pay it anyway, then you really sort of waive the right to complain?

LIBERATO: You do not now have to know it's illegal. I think that's the next step in the analysis, that there is no requirement. You need to know the facts but you don't need to know that they are illegal. And there are many cases that say that. The Putnam case, in footnote 4, relies on some of the other cases that we cited. And it's a case out of Wisconsin SC. It says that the customer's failure to know the precise factors underlying Time Warner's decision to charge a \$5.00 late fee is not a mistake at fact as to the basis for the payment made nor is it the product of fraud by omission.

And here's the point. To conclude otherwise would \_\_\_ suggest that all demands for payment and business transactions would need to be accompanied by an itemized list explaining the basis for each charge so that the payor had voluntary knowledge. It's just not required.

O'NEILL: It seems superficially without the voluntary payment rule that this would be the perfect case that class actions are designed to address. And that is, no individual plaintiff would ever file suit for \$1.50. If in fact it were illegal no one would ever challenge it unless it was done on a class wide basis. But for this voluntary payment defense, you would agree that it is just - and

it's subject matter 1) that is typically used a \_\_\_\_ for a class action suit.

LIBERATO: Yes. But the voluntary payment rule is an awfully big obstacle and we have the right to have a rigorous analysis of predominance judged on our defenses, which this court has said repeatedly on our defenses, not just on a claim. And so this is, in fact, I think a case that will show why that rigorous analysis is so important. One of the basis for the application of the predominance requirement to defenses too is that in fact what may well happen. And I think what would happen in this case is whenever you put all these individuals on the stand and you asked them: Did you pay this because you were forced to basically, or you were defrauded, or you were deceived? The answer is going to be no. And so we're going to, I predict, win. If we had ever gotten to that point we would win our case. And I'm not trying to go outside the record just as much to say how this might play out.

PHILLIPS: We never adopted this rule in this court for the state. Why is it a good idea to have a voluntary payment rule if as you say the whole purpose behind it is a fee that has been charged as illegal and a claim involving again some applicable statute of limitations period? Why is this good public policy for the state?

LIBERATO: It's good public policy for the voluntary payment rule to apply because the money enters into the stream of commerce if you will. People obtain the money and they should be able to go on and spend that money. Because if they are in fact doing something illegal or wrong, it gives them the opportunity to cure that, and it should be incumbent on the person who has a complaint to say here's my complaint; here's the problem; here's the demand. Change it which the payee may do. And if not, then someone should complain first and litigate second. And so those I think are the public policy reasons behind having this. They are good public reasons that are recognized universally around the country and should be recognized here.

O'NEILL: And so when the customer gets that bill for \$2.50, or whatever it is, they can not pay it and say give me all your financial data that backs me up so I can determine whether it's financially reasonable. And then the company is going - this is going to cause them to go reassess their policy and determine whether it's legal or not.

LIBERATO: They can call and ask why - or they could say I'm not going to participate anymore unless you do something about this fee. And then if enough people are upset about the fee for business reasons they may change it. If for no other reason even if it's a legal fee. So yes, I think it could make a difference. These companies get thousands and thousands, millions literally of calls from people about these and some of those calls may well and probably are complaining about the fee and trying to seek information about the fee, and they may end up satisfied that it's a legitimate fee under the circumstances.

WAINWRIGHT: The TC's certification order says that after it determines that it's unlikely the voluntary payment doctrine would apply, says even if it does apply it appears from the evidence presented by plaintiff that the issue is not individual and may be determined as another common

issue on a class-wide basis. I understand there was no live testimony taken at the certification hearing. Is that correct.

LIBERATO: Yes.

WAINWRIGHT: Generally what was the evidence that the TC relied on to make that determination?

LIBERATO: I don't really know. I think the TC reached the wrong conclusion. My presumption in reading that is that the TC made the decision that there wasn't full disclosure. And was really making a legal decision that they didn't count this as full disclosure. I can't say because I'm just reading the opinion and looking at the evidence in the same way that the court is.

The TC determined that it was foreclosed because there was not full disclosure.

WAINWRIGHT: Are there many cases that so hold? You've cited in the briefing a number of cases in other states, not Texas, that hold in your favor. Are there any cases that go the other way?

LIBERATO: No. There are no other cases that hold that the basis for the payment has to be disclosed or the legality of the payment has to be disclosed. There is not a single other case and the cases that are in support of that position we cite in footnote 4.