ORAL ARGUMENT - 10/3/96
96-0362

LILIENSTERN: May it please the court, counsel. This case is an attempted class action, an abuse of class action attempting to superimpose the Texas Securities Act over residents of 22 states, countries of Bermuda and Canada. They are trying to expand this case which is essentially a $200,000 case that was filed by the two individuals who are the class representatives into a class in which they seek $47 million by their own pleadings and damages.

They are in essence trying to make the Texas Securities Act the law of the land by this case. There is no question, there's no dispute in the record that no other lawsuits have been filed by these purported class members. There was nothing at the hearing on class certification to indicate that there is a single other person in the entire universe who wants to be part of this litigation. Yet under the CA's decision, not only these two class representatives, but these other 200 people who are the purported class members, if the CA's decision is maintained will be able to maintain their actions against Deloitte & Touche and Ronald Begnaud without ever having to show that they even read the prospectus that they are complaining of without ever having to show that they read the audit opinion that they are complaining of.

GONZALEZ: Assuming all that is true, how in God's green earth do we have jurisdiction to hear this case?

LILIENSTERN: You have jurisdiction because as the court is aware we filed an application for writ of error from the CA's decision. It was dismissed for w.o.j. The court has two types of jurisdiction as it is aware. It has jurisdiction on the law side, the appellate jurisdiction; it has its mandamus jurisdiction. The constitution of the State and indeed the legislature has ceded to you in Art. 22.022, your mandamus jurisdiction.

GONZALEZ: With regards to class actions how do we have jurisdiction over interlocutory appeals?

LILIENSTERN: Your have jurisdiction your honor to hear mandamus over any matter that you believe is relevant to the principles of law as determined by this court. The mere fact that the legislature has said that there is very limited right to appeal, conflict jurisdiction or dissent jurisdiction, does not implicate in any way your mandamus jurisdiction. That's on the law side. This is on the _____ side.

ABBOTT: Would we not be doing by mandamus what we could not do by writ of error?

LILIENSTERN: The case books are replete with examples where you have done that very thing. The amicus brief filed by the Texas Assoc. of Defense Counsel chronicles many areas in which mandamus jurisdiction has been maintained really going back to the late 1800s in situations

where you did not have appellate jurisdiction. The principals are separate. We qualify we believe under the normal principles for mandamus and that the appellate court abused the standard of review in reviewing the denial of class certification, and because we have no adequate remedy of appeal.

We are in a much different situation I would suggest that and for example those who come before you with special appearance mandamus actions. We have been to the CA. That's when we first aggrieved. We were not aggrieved in the TC. It's the CA's action that we are complaining of here.

GONZALEZ: And the CA made a very clear declaration that there is no basis in law, or in fact for Judge Smith's order.

LILIENSTERN: That's true your honor. It abused its discretion in so doing because it misapplied the standard of review. It was required to apply a discretionary standard of review if there's any basis on which Judge Smith's order could have been maintained, it should have been upheld. That's what we're complaining about. They misapplied the standard of review. They had no discretion to misapply the law. That's the basis of our mandamus.

BAKER: Is that an error of law then?

LILIENSTERN: It is an error of law on their part.

BAKER: On the CA?

LILIENSTERN: Yes.

BAKER: What about the statute that says the CA is final on both questions of law and fact in an interlocutory appeal in a class action situation?

LILIENSTERN: Indeed the statute says that. But again this court on many occasions has assumed mandamus jurisdiction where it does not have appellate jurisdiction. It is your right to do so and you have done so on many prior occasions. That statute does not take away from you your mandamus jurisdiction. It simply limits the appellate jurisdiction which can come to you.

BAKER: What is the best case that you have that supports your premise that you're arguing right now? Cite it to us please.

LILIENSTERN: One case your honor is _____ v. Bill Mobring Motors, 647 S.W.2d 253, which says: Absent a special statute granting jurisdiction, Art. 22.25b makes final in the CA's decision for reviewing interlocutory orders made appealable to the CA.

GONZALEZ: But that was not a class action suit.

LILIENSTERN: No it was not. I would suggest there's no difference in a class action suit. It is an interlocutory appeal. It's a situation in which your appellate jurisdiction is limited by statute. But just because it's a class action suit it should not be treated in any different way as far as reviewing it by this court's standards of mandamus.

PHILLIPS: Do you have any situation where...can you point to a case where the court was limited by the statute from having appellate jurisdiction review over a case, and the court granted a mandamus for purposes other than to protect its own ultimate jurisdiction? For instance the courts of appeal refusing to certify a question meant that this court didn't get to review something that the legislature wanted us to review. The CA refusing to rule on a motion for rehearing, or refusing to file a late statement of fact, those types of cases prevent the case from being processed through the appellate mechanism so that it could ultimately come to our court. But here the legislature has made a determination that this kind of ruling should not be made by this court. And I can't find a case where we've granted a writ of mandamus in the face of that type of _____ statute?

LILIENSTERN: There's none dealing with this statute. But there are cases in which you have mandamused courts other than an aid of your jurisdiction. One example is the series of cases again cited in the Texas Assoc. of Defense Counsel brief dealing with contempt judgments not involving confinement. Contempt not involving confinement is not reviewable by appeal. But this court has stepped in and has exercised its mandamus jurisdiction.

PHILLIPS: There are those kind of cases where there is no appeal, there has been no appeal like the CA's mandamus ruling - original proceeding - where the court has stepped in. But where the legislature has provided an appellate remedy, but provided that that appellate remedy is going to be in some court other than the supreme court, and the ruling is over the whole case it's not like there is a discovery ruling for instance in the TC in a slander case prior to 1993...

LILIENSTERN: Well it's over the class certification issue. It's not over the merits of the case.

PHILLIPS: But that's over the whole issue that has been set aside by the legislature for an appeal. Can you point to a single case where they have a ruling over the whole issue that has been set aside by the legislature, has been designated as appropriate to an appeal, the appeal is not for this court and yet this court has exercised extraordinary relief?

LILIENSTERN: I cannot point to a case dealing with the interlocutory appeal statute. But I would say that the principle is the same. You either have appellate jurisdiction or you do not have appellate jurisdiction. In the absence of some indication by the legislature that it intends to deprive you of the other form of jurisdictions given you - mandamus jurisdiction - I would say that it doesn't matter. It's the same situation.

CORNYN: Are you suggesting that the legislature can limit jurisdiction conferred on this court by the constitution?

LILIENSTERN: The constitutional provision dealing with your exercise of a mandamus jurisdiction I think cedes to the legislature in part the right to pass legislation granting you that jurisdiction which it did in 22.022.

CORNYN: So your answer is yes?

LILIENSTERN: Yes.

CORNYN: So the legislature could pass a statute saying the Supreme Court of Texas notwithstanding any constitutional grant of jurisdiction can not hear certain types of cases?

LILIENSTERN: Perhaps it could. The importance here is it has not done so with respect to this type of case. It says you cannot hear these as an appellate matter on the law side. It has not sought to restrict your mandamus jurisdiction on this type of case.

CORNYN: That strikes me as little strange. I thought the basic charter preempted any legislative incursion?

LILIENSTERN: The constitution in preparing for this I learned a lot about it, but the constitution indeed does have a section which authorizes the legislature to pass legislation authorizing the court to exercise its original mandamus jurisdiction. It then did so in 22.022.

ABBOTT: Let's say your argument prevails and we write an opinion in your favor. Why would that not establish precedence that in every class action law suit where an argument can be made that the CA did not appropriately apply the law there would be appeal to the SC by mandamus?

LILIENSTERN: Well there are a couple of reasons. One, this court has the ultimate and absolute authority to control what you do with those mandamus applications. And we've seen many instances where you don't grant the motions for leave. That's one answer. The other is we're quite differently situated here in that our complaint is not about the TC's action, which is normally what you see here. Our case is the only reported case we've been able to find in the State of Texas where the appellate court overruled a denial of class certification. All the other cases go the other direction where class certification has been granted, the appellate court considers that in almost all cases affirms that because they are applying the discretionary standard to what the court did, the TC did, who has pretty much absolute discretion within certain broad parameters to certify or not certify depending upon the evidence that's presented to it.

So our case is different in that respect. This is our first chance to complain about the action of the CA. Our appellate right in which we filed our application for writ of error was truly a losery because of the statute. We tried to assert conflict jurisdiction. We did our best. The court dismissed for WOJ. So that was the first point at which we were aggrieved and this was our first opportunity to cure that.

You might say why not send it back to the TC and let us bring it back up through the same process again? The answer to that is two-fold. One ordinarily the TC would have the ability to reconsider class certification decisions. In this case with two very limited exceptions the CA has put handcuffs on him. He's going to be mad if he tries to reconsider that with claims by the plaintiffs a law of the case in res judicata. So he will be unable to do anything about that. If we wait until after the case is tried on the merits and we try the appeal then we are coming right back through the appellate court which itself is presumably, at least we cannot presume that it will reconsider these issues, that it's already passed on. That's why we think our situation is unique. That's why we think this court can and should exercise its mandamus jurisdiction because of the harm, because of the position we've been put in.

GONZALEZ: Let me see if I understand your argument. Do I understand your argument to be that a trial court, a district judge, when faced with the application to certify clients and the proponents of the certification meet every requirement of rule 42, despite the fact that all the requirements have been met the TC has the power to say I'm not going to certify?

LILIENSTERN: Bensen v. Texas Commerce Bank, Dallas CA case held just that. We say that's not the case here. We say they wholly failed to satisfy the 6 requirements of Rule 42. But there is law that says just that. Even though you need all 6 of those requirements, the court still has discretion to refuse to certify.

GONZALEZ: On what basis?

LILIENSTERN: Just the court's discretion your honor. I admit it's to the outer edge of the envelope. We cite that case only to show that the discretion as it has been determined by the appellate courts of this state is very broad. But again we don't believe that's the case here. In fact in order for there to have been an abuse of discretion by the TC here, it would be necessary for the appellate court to determine that all 6 of those prongs were not met, that he abused his discretion on every single one of those prongs that are required by Rule 42a and b4.

The standard of review for abuse of discretion it's stated in lots of different ways, that the appellate court must review the evidence in the light most favorable to the TC's order, it must presume all findings in favor of the TC's order...

HECHT: In fact the CAs in this case cited Vinson, and relied on that same rule of trial court discretion?

LILIENSTERN: The appellate court in this case your honor said all the right things, then did the wrong thing. It cited all the law for the standard of review, and then it proceeded to do a de novo review. If you go through the opinion of the case, the court chronicled its own findings on all of these things. It didn't defer in any respect on any of the 6 elements of rule 42 to the TC's determination. And it is a discretionary standard of review that the appellate court failed to properly

apply here.

HECHT: Although this court itself said it had to do?

LILIENSTERN: This court itself said it had to do so, and then it failed to do so. Again it said the right things, they quoted the right language, it apply set out, it even said if there's conflicting facts you must adopt the position that is consistent with the TC and then it right on and rejected the facts that were conflicting here.

PHILLIPS: Can you grant a mandamus even if we have the power to grant a mandamus on the grounds that the law is misstated? I mean Walker v. Packer sets out several grounds on which mandamus can be granted and they are not all available in this case in light of Justice Hecht's question?

LILIENSTERN: Walker v. Packer I believe it would certainly permit you to vacate that the appellate court's order on the basis that it abused its discretion and it has no discretion to misapply the law. It can say what the law is, but when it misapplies it that I believe is where I believe it abuses its discretion. It also reversed the entire burden. The burden is on the movants under rule 42. It reversed that burden and as it went through the opinion it chronicled all of the factors that it believed supported overturning the lower court's opinion rather than looking for the factors that are in support of it as it's bound to do under the standard of review for discretionary actions by the TC.

There's no right to bring a class action here. The plaintiffs had to convince the TC that he should exercise his discretion ad certify the class. The rule itself says: May. It uses the word may. The burden in on those proponents of the issue to convince the TC in his discretion that they are entitled to a class certification.

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RESPONDENT

WRIGHT: May it please the court, and counsel. My name is Tom Wright. As has already been demonstrated in the questioning of my opponent, this case involves serious questions of stare decisis and judicial restraint. Deloitte is here asking this court to do something completely unprecedented. This court has never issued a writ of mandamus to a CA to require it to change its opinion in a case where the CA was exercising appellate jurisdiction. This court has limited its mandamus power to what the legislature has granted, and that is, when the writ is agreeable to the principles of law.

CORNYN: Is this the only reported case where an appellate court has reversed a TC order denying certification and ordering certification?

WRIGHT: It's the only case in the Texas system. There are cases in the federal system and maybe in other state systems where that exact thing has happened.

CORNYN: You have cases that you've cited? I believe they make a rather broad statement that there is no other case. I don't know if they just limit it to Texas or not?

WRIGHT: I believe they did limit it to Texas. But we will be happy to provide those citations of the federal cases. The statute gives a right of appeal. So unless the TC is always correct, there is eventually going to be a case where the TC is reversed for denying certification. Contrary to what Mr. Lilienstern said, the TC does not have any sort of absolute discretion on this issue. The only situation that I know of that a TC has absolute discretion is in granting a new trial as long as they don't state the wrong reason.

If it were true that the TC had absolute discretion to deny or grant class certification, there would be no need for an interlocutory appeal statute. Furthermore, this court would have its own hands tied. This court said in the Bloyed(?) case that the TC is supposed to be the guardian for the class, and how is this court supposed to make sure that that happens if the TC has absolute discretion in certifying classes, approving settlements, and that sort of thing.

CORNYN: Well as far as some of the statements made in the CA's opinion for example on page 10 of the Slip opinion, it says it is improper at the certification stage for the court to determine which law applies. How can that possibly be the case when you have a class action involving people who purchase securities outside of the State of Texas and how can the court determine adequate representation and the other issues it's required to decide under rule 42 without determining what the substantive law is?

WRIGHT: Your honor makes a very good point. And I believe that in some cases if there is a serious question about what law should apply, the TC should take that up. It will be a preliminary decision of course as is the class certification decision.

CORNYN: But the CA has ordered the certification of this class without a determination of what law applies to the class?

WRIGHT: Your honor there's no issue in this case about what law should apply. As much as Mr. Lilienstern tries to make an issue out of it, all of the defendants were from Texas, all of the conduct occurred here. This has got to be the first case in which Texas residents stand here and say to you that they are not subject to the Texas Securities Act. The fact that some of the plaintiffs may have lived in other states is just one of the many restatement factors. All of these factors would urge this court as the CA noted in a footnote to apply Texas law. The second problem is Deloitte tries to flip the burden. The burden in Texas on proving foreign law has always been on the person who wants foreign law to apply. To put that burden on the party who is arguing for Texas law to apply makes no sense at all. Even in the class certification context.

GONZALEZ: Would you address the res judicata argument and the law of the case problems?

WRIGHT: That is absolutely inappropriate for Mr. Lilienstern to suggest that we would argue that. Class certification can be altered at any time. And the rule says that. We would be fools...

CORNYN: How would that work if the TC decided that a week from now that if we were to deny the mandamus, a week from now the TC could say the CA has ordered the certification but based on circumstances intervening during this last week I now order decertification? Then there would be another appeal to the CA. Would it be sort of a ping-pong match between the TC and the CA?

WRIGHT: If the TC held an evidentiary hearing, and had some determination about that this court already has before it another case raising the question of which cases fall in that interlocutory appeal statute, orders it to shrink the class or expand it, and this and that. But if it were to happen that this court would deny mandamus and the TC would enter the same order, then I suppose we would be obliged to file another appeal. I don't believe that's going to happen. The TC will...

HECHT: But if you did file another appeal, you would not argue law of the case?

WRIGHT: I suppose that we could say that absent some change in circumstance that somebody can articulate I guess it would be law of the case. But that's not what the rule anticipates.

HECHT: So if they can articulate some change in circumstance you would not argue law of the case?

WRIGHT: We would not argue law of the case if they could articulate and had presented evidence to the TC of some change in circumstance. We would be arguing about that change in circumstance and what difference that made.

CORNYN: May I ask you about another statement in the CA's opinion on page 14 of the Slip opinion, the court said: The question in terms of adequate representation of the class representative says the question is whether the class representatives through their attorney will vigorously prosecute the class action. Didn't the CA skew the rule that we articulated or at least repeated in Bloyed(?) that there is an inherent conflict between class counsel and the class and, thus, there must be vigorous oversight by the TC and the class representative to make sure that that conflict doesn't become intolerable?

WRIGHT: The conflict that arose in Bloyed(?) was because of the settlement where the clients got the coupons and the lawyers got the money. That is not the issue here. The issue at the initial certification stage where there is no settlement pending, is will the class representatives and of course by using lawyers they have to use lawyers to prosecute the class case, these class representatives know everything that the law requires them to know about their case. Of course they don't know, didn't know about the fraud when it happened. They wouldn't have purchased the stock. But they know about stocks, and they have demonstrated that they have the knowledge and the involvement necessary to see this class case through. The true irony is of course defendants in Deloitte's position

would prefer that there be no representation at all. And if you read the cases from around the country even Deloitte and other defendants will take inconsistent positions about class representatives. They know too much; they know too little; they are too sophisticated; they've never done this before. And on any basis they will make those kind of arguments. The federal courts have seen through that and noted that all that is really required is that they have the same injury and that they be involved, and that they have some minimal knowledge of their own claim. Because that's all they can be called upon to testify about at the trial.

CORNYN: How can they police the activities of class counsel if they are figure heads?

WRIGHT: Well in this case they are not figure heads. But they police class counsel just like any other client does. I have many clients. If they are lawyers sometimes they try to stick their nose into the case a little further than others. But lay people tell me routinely we are going to take your advice. In this case we expect the class representatives to work with us at every point. And really the main point they have to work with us is if there's a settlement. Because if there is a trial, we are the trial lawyers, we know how to try a case. So it really comes up in the settlement context which goes back to the Bloyed(?) statement that not only us and the class representatives, but the trial court need to be involved to make sure that the interests are protected.

GONZALEZ: What significance if any should we place on the fact that these plaintiffs or purported representative members of the class were solicited by counsel and that they cannot possibly be good representatives of the class because they are not class members? They didn't buy any stock.

WRIGHT: Well let me address those two points. First of all solicitation is sort of a dirty word. But there has never been any claim that we did anything unethical in soliciting these clients and writing to them and telling them about their troubles. We got this information from another client who had come to us, who had a case against Deloitte on the same stock issue except he bought in the open market. Now that's how we got this information. If they had that kind of claim and they will never, because nothing un_____ was done, they should make it in a grievance committee. The fact that these class members bought debentures as the CA said, doesn't distinguish them from the stock class in these circumstances. Debenture holders have some superior rights to stockholders in a liquidation context, but that's not where we are. These debentures were convertible into stock, and they have the same interest, the very same financial statements were put in two nearly identical prospectuses for stock and debentures, and there's no significant difference and certainly no conflict of interest.

HECHT: One hundred and ninety-nine class members have been identified?

WRIGHT: Yes your honor and there may be more.

HECHT: Is it true that no other suit has been filed?

WRIGHT: I don't believe any other suit has been filed against Deloitte on the initial stock purchase. There have been other class actions dealing with or maybe some resolution in bankruptcy dealing with the ultimate demise of EMI. I think there was a class action in New York about some people who had bought on the market after this initial public offering between certain dates. So there have been other people who have in general complained about this situation.

HECHT: But no member of this putative class has filed suit to date somewhere else?

WRIGHT: That's right.

HECHT: Is it true as Professor Dorsanno suggests that all those claims are barred by limitations?

WRIGHT: I believe they are.

HECHT: So the effect of this class action is to cause them to survive?

WRIGHT: Right. The tolling rules mean that they still survive till today until somebody says that they can't have a class action.

HECHT: Why is this a superior form of action - none of the class members have expressed any interest in bringing it personally to date and some of their claims at least would be sizeable?

WRIGHT: Well I don't see the connection between other people expressing a personal interest in bringing a claim. I think when the courts look at the superiority of the mechanism they are assuming that people with claims of some size will file. It's a general statement. It's not a particularized thing. If it were particularized, this court could look at it and say: Well it's not superior because if we cut off class action their claims would be barred by limitations. And therefore, the TC would only have to try two suits. That's not the idea behind it.

HECHT: The CA seemed to think it was important. They say this is an element of efficiency because if we don't certify this class, then there will be at least 200 other lawsuits filed. And truth to tell that's not right.

WRIGHT: Well truth to tell unless there's some state that has a longer statute of limitations than the Texas Securities Act, which I don't know, that probably will not happen.

HECHT: Is there nothing the CA could do in an appeal like this that could be correctable on mandamus?

WRIGHT: Yes there are things that the CA could do. Such as: failed to file a dissent, which would interfere with this court's appellate jurisdiction. But in terms of issuing a ruling on the merits

this court has plenty of jurisdiction over the serious problems that might arise in this context because you have conflict and dissent jurisdiction.

HECHT: Suppose they assign this case to 1 judge to write, instead of a panel of 3. Could we correct that on mandamus?

WRIGHT: Yes.

HECHT: Suppose they decided that they didn't like rule 42, and they just weren't going to follow it. Could we correct that on mandamus?

WRIGHT: I believe you would have appellate jurisdiction of that because there would be a conflict with the many other cases.

HECHT: Between the decision and the rule?

WRIGHT: Or the decisions of other cases.

HECHT: Well if there had not been another case, there has to be a first case someday.

WRIGHT: Well there are plenty of cases saying rule 42 has to apply. I guess what I am saying.

CORNYN: Is it true then that really the only time a class action will ever get to the Texas SC is when there's a settlement, or if there's a dissent in the CA, or in the very limited class cases where there is a conflict between the decision of the CA and some other case?

WRIGHT: Well I guess if by settlement you would also include a final judgment, even if it's not a settlement, if they go through trial and have a final judgment...

CORNYN: Well like Bloyed(?) for example?

WRIGHT: Well Bloyed...right was a settlement with a final judgment. But there could be a class action case tried someday and the final judgment entered on the merits that could also come up to this court.

CORNYN: Let me ask you about that. As a practical matter how many class action cases are tried?

WRIGHT: Not many your honor.

CORNYN: And so as a result of that ultimately the cases will either settle or somehow they will go away. But the chances of the Texas SC ever being able to articulate a body of law so to speak

insofar as it affects litigated class action cases is relatively small isn't it?

WRIGHT: Well it is relatively small in the abstract. Of course this court has already taken that opportunity in Bloyed.

CORNYN: Well that was a settlement.

WRIGHT: Right. But still the court said that the same factors have to apply in a settlement class as apply in a class certified for trial. The court said many important things about class action settlement. And there are many important issues out there in class actions: mass court cases; personal injuries; future injuries; people trying to compromise all sorts of claims they don't even know about. Those issues are not involved in this case. This is a textbook case for class certification.

CORNYN: As far as the amount of the claims of the individual class members could you give us sort of a rough idea of the size of the amount in controversy? What is the range?

WRIGHT: Well the range on individual claims I believe is between about $8,000 and $20,000. The Houston Fireman's Pension Fund for example is a bond holder. They bought bonds of $500,000. They later sold them and have $140,000 worth of damages. In fact our expert reports which I believe we have provided to the court show that the actual damages are more in the range of $16 million. The $48 million was the gross amount sold, but some of those people resold them before it hit rock bottom.

ENOCH: In response to the questions about mandamus jurisdiction of this court, if the CA I guess refused to file its dissenting opinion to deprive this court of jurisdiction you would say mandamus would be appropriate. Well assuming under the circumstances that mandamus in your view would be appropriate in this circumstance, what would the result be? What would the SC do?

WRIGHT: I am very glad you asked that question. They would order the CA to file the dissent, and that's it. And once the dissent was filed somebody would have the right to apply for a writ of error, and this court could rule on the merits. But that's what I am saying, this court has never issued a mandamus to the CA that says; You change that decision on the merits of a case where they had appellate jurisdiction.

PHILLIPS: Is there anything in the interlocutory appeal statute that requires an aggrieved party to file the interlocutory appeal in order to preserve question of error on the class certification?

WRIGHT: There's nothing in the statute, but I would be very cautious in not doing so, because of the waiver rules that are applied around the state.

PHILLIPS: So if you were aggrieved by what the TC did that you thought the SC was the only real vehicle for correction, would be too dangerous to wait and try the case _____?

WRIGHT: Yes I believe so. And you know that fits into what counsel was quoting from the TABC. They have promised this court that when the court exercises mandamus jurisdiction in this case, whether to grant or deny, they don't advise you. They say: Please exercise your jurisdiction because we want to come here, and every case where summary judgment's been denied on an immunity question, and where interlocutory appeal has been cutoff at the CA that will really undo the statutory scheme that the legislature had in mind. And it will make Justice Cornyn's prediction come true, that this court's going to be asked pretty soon to issue mandamus in a routine case where summary judgment is denied for any reason.

CORNYN: We haven't done that yet.

WRIGHT: That's true Justice Cornyn but if you look at it Deloitte is saying to you that this special appeal that the legislature has given them is inadequate. And they were involved in that appeal. And they had motions for rehearing, and they had a chance to get into this court if they could meet the criteria. If this limited appeal as they want to call it is inadequate certainly no appeal is inadequate. So every interlocutory order that's entered by the trial judge is now going to be subject to a claim that mandamus is available. And the careful rules that this court has set out in Walker v. Packer and the other recent cases are going to be thrown out the window.

CORNYN: If as I think we agreed earlier that class actions are rarely if ever litigated in state courts in Texas, how will we ever be able to address this court some of these important questions about the application of rule 42 if in fact the CA's decision is going to be filed?

WRIGHT: Well this court has many avenues. We've talked about the appellate jurisdiction and there are going to be clear conflicts. When the legislature says you can look at this when there's a conflict or dissent why else would this court want to be involved unless all of the CAs are going in one direction and this court wanted to go in another. You also have your rule making authority which can address these problems in a forum that will apply broadly.

BAKER: What rule would you suggest that we promulgate?

WRIGHT: Well as a matter of fact as the federal courts have shown, the existing rules are confident to deal with these thorny questions. They have been denying class certifications, in asbestos cases, in medial implant cases, in AIDS cases, in tobacco cases. So I'm not sure that anything other than a strict inherence to the rule as it is is necessary to deal with those problems.

BAKER: In the context of further review of the CA under the circumstances as apply to class action certification are you suggesting that we have rule making power to change that circumstance?

WRIGHT: No your honor that's set out under statute and you don't have rule making authority to change the appellate structure. But you do have rule making authority to overrule 42. And if something needs to be put in there about any of these subjects, I'm sure that that can be done.

BAKER: Is it factually correct that you asked everybody that you could identify as a member of this purported class to join as the plaintiff and only 2 have done so?

WRIGHT: No, I don't believe so. My partner handled that part of it but I don't believe that we wrote to everybody that we could possibly identify. I think we picked out individuals.

BAKER: How many did you write to?

WRIGHT: I'm not sure.

BAKER: More than 2?

WRIGHT: I'm sure we wrote to more than 2.

BAKER: Is it correct as Judge Hecht suggested there's 194 identified possible plaintiffs that fit into the May 16 - April 30 time frame?

WRIGHT: Yes. That is the number of plaintiffs that have been identified. There may be others through other brokerage houses that we haven't identified yet.

BAKER: So are you saying that you didn't write letters or contact 194 people?

WRIGHT: I don't believe we did but I can't swear to that because I wasn't doing it at the time.

BAKER: Does the record show? I don't believe the record does show. I would only say that this idea that somehow we solicited these people and we ought to be punished for that...

BAKER: I'm not suggesting that because if you're looking for class people you have to talk to them don't you?

BAKER: Well we have to give them notice and the rules provide that we give them specific notice as best we can. And when the class is certified we are going to have to make a big effort to do that to give them if we can identify who they are and their address personal notice as well as a generalize notice that's more common.

The recent SC cases, cases from this court that have issued writs of mandamus in special appearance cases and in religious cases I guess would be a category. Those cases involve a situation where the defendant has a constitutional right to not even stand trial. Mr. Tilton with his religious beliefs, these defendants that have no contacts with Texas, they've got a federal constitutional right not to have to answer in Texas for their conduct. Deloitte does not have any kind of constitutional right not to have to stand trial.

CORNYN: Can you distinguish this case, the exercise of mandamus jurisdiction, in Anglin v. Tipps just to pick an example from this case, there there was no statutory right to interlocutory appeal under state procedures of a denial of arbitration under the Federal Arbitration Act, yet this court intervened and granted a writ of mandamus.

WRIGHT: Well that's another case where the defendant has a right guaranteed by federal law that was being interfered with and the very going to trial rather than going to arbitration would deprive him of that right.

CORNYN: But we had no appellate jurisdiction in that case.

WRIGHT: You had no appellate jurisdiction. There was no adequate remedy by appeal because 1) there was no appeal at all at that point, the appeal had to wait until after the trial was over, which would have denied them the right to arbitration. This case is quite different because there has already been an interlocutory appeal and Deloitte will have another one if it needs one when the case is over.

CORNYN: Is an interlocutory appeal always an adequate remedy by appeal even if the CA is wrong? I mean does that make any difference?

WRIGHT: Since the legislature has confined this court to mandamus jurisdiction to situations in which the writ is agreeable to the principles of law and since it is the legislature that has designed this statutory interlocutory scheme, which is not unreasonable, it doesn't really cut it off at the CA unless the issue has not drawn a dissent or a conflict, I would say in those circumstances it cannot be said that that's an inadequate appeal. And I don't know of any circumstance under our interlocutory appeal statute where a person could say that that legislatively provided appeal is inadequate.

BAKER: Going back to Justice Hecht's question about res judicata and law of the case, do I understand your answer to be that you think they have an adequate remedy on a regular appeal when the case is tried and _____ here because you as the plaintiffs' representative would not raise red judicata and law of the case?

WRIGHT: As long as they could put in some other evidence and I'm sure they would, that would change the mix and those principles...

BAKER: But you opened your answer to that question by saying that certification is a moving target and it can be decertified anytime through the process up to the day of trial starting I presume?

WRIGHT: That's right. And presumably that would be done on the basis of something that came to the judge's attention.

BAKER: Well I understand but does that _____ to your answer therefore res judicata and law of the case are not applicable under these set of facts because it's a certification situation; is that your position?

WRIGHT: That's right.

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REBUTTAL

LILIENSTERN: The only two areas for future consideration by the TC is for it reconsidering certification were 2 in the court's opinion: 1) if the representatives became inadequate or their counsel became inadequate; and 2) if everybody opts out, which is rarely known to happen in class action cases when you receive a notice - does everyone opt out. So those are the only two situations in which the appellate court believes the TC can reconsider the matter. Even if it's not raised by the plaintiffs we are still at jeopardy that after a trial on the merits when the case is appealed to the appellate court, the court itself is going to hold that it's not going to reconsider any matters we raised again applying principles of res judicata and law of the case with those two very narrow exceptions which are probably never going to happen.

This is not a $1.98 kind of claim case. The value of the claims that these purported class members have varies Mr. Wright said from $8,000 (I know it ranges up to about $3 million). So these are substantial claims. The two class representatives one has a claim of $25,000, the other $145,000-150,000. So this is not that kind of case where everybody has $1.98 in damages and it really doesn't really warrant bringing an action.

The class representatives are important not just to representing the class, they are important to the judicial process. They serve as governors on the lawyers. They are important to the judges, they are important to the defendants, because in the normal case that's not a solicited class action case where the class representatives had never heard of the lawyers prior to the time they got their letters, you have some relationship and there is some control of the judgment of the lawyer. Whether it's in the context of settlement, whether it's in the context of whom to sue. So I do believe the CA was wrong in suggesting that the control by the class representatives is unimportant so long as they hire good lawyers.

The TC in this case spent about 4 months receiving briefs, holding a hearing. Once the decision was made, the plaintiffs moved for reconsideration, he held another hearing, then he considered the matter and entered his order. This is not a situation where anything was flipantly done. Candidly one of the problems in class action practice is that so many motions to certify classes get rubber-stamped. Somebody files a motion. Their motion in fact was simply a recapitulation of rule 42 with a lot of conclusions. That is the problem with class certification. That's why the lower courts need some guidance. And indeed I believe Justice Cornyn is right: if you don't take a case on mandamus you're never going to get a case where you can deal with how lower courts are

supposed to apply the elements of rule 42. It just won't happen because as the court in Castano v. American Tobacco Co., the 5th circuit case that we appended to our letter brief on May 27, held: these huge class actions put defendants at such jeopardy, at such high risks they spew the trial process that settlements are almost mandated in every case. The risk is simply too great.

In our case we have asserted a due process deprivation because by permitting these residents of other states to come into our State and sue us applying Texas law those individuals are going to get causes of action or rights they would not have were they to sue under their own state laws.

PHILLIPS: Hasn't the US SC already considered that and _____ wrote and said that Texas can be a courthouse to the world if it wants to?

LILIENSTERN: I don't think so your honor. We cited quite a number of cases in which in the class certification context in which a federal securities claim is filed, pendent state law claims are filed, and those courts uniformly refused to certify the state law claims saying that because of the notion of a misrepresentation and a prospectus or something like that, that occurred at the time of purchase, and that occurred in your state of residence. So it is that state's law. A resident of Texas who bought some general motors stock for example would not expect that he is going to have to go to New York and apply New York law or Minnesota law, or any place else. One of the elements of the restatement of conflicts is...

PHILLIPS: And he doesn't have the option of doing that; is that the converse? You're saying if a resident of Texas buys general motors stock you are going to be limited to whatever Texas law. And if the defendant is in Michigan and did its dealings in Michigan and Michigan's law is more favorable that Texas residents are just out of luck?

LILIENSTERN: That's true your honor. I mean the fact that an audit is done in a state or a corporation is located in a state, that's not really relevant to the issue of where the alleged tort occurs. The misrepresentation and the tort occurs at the time of purchase. And that occurs where you purchase. And it is that state and the expectations both of would-be plaintiffs and of defendants is that you have a known body of law.

ENOCH: Shouldn't the plaintiff be arguing. If the defendant is arguing that the choice of law is unfair...at least Mr. Wright's point was that shouldn't you be here standing with a demonstration how other laws should be applying rather than saying that...Mr. Wright's point is your argument is upside down?

LILIENSTERN: No your honor it's not upside down in the context of rule 42, because rule 42 places the entire burden to show commonality of facts for law on the plaintiffs. You can't apply the general rule that you would apply on the merits situation where a proponent of a foreign law has the burden of proving that law. We were not a proponent of anything here. The burden is on them. We don't have to establish some other state's law is applicable. That's their problem because they've

got to show commonality of legal issues.

ENOCH: Mr. Wright makes the point that the essence of your client's argument is that if a statute only has the right of one appeal, then as a matter of law that is an inadequate appeal. It seems to be that his point. For this court to take mandamus in this case this court has to determine that there is an inadequate remedy by appeal. Since you had an appeal to the CA for us to hold that then we hold as a matter of law any statute that cuts off appeal after the first level is inadequate?

LILIENSTERN: No exactly your honor. We didn't appeal to the CA. We were aggrieved by the CA and that's an important difference.

ENOCH: Well when there's only one appeal permitted obviously some person is going to end up with an adverse decision and they may not have been the one who brought...

LILIENSTERN: That's true your honor and that theory would apply if we were complaining about something the TC did, but we're not. We're complaining our aggrievement occurred at the CA level. We were not permitted...our only appeal to use that language in the case was an illusory one. We didn't qualify for the appeal. It's going to be a vain act to send us back and have us try to appeal coming back through the system and through the same court that has already determined all of these issues. Under those circumstances we have no...

BAKER: What if you have the opportunity to come this court under that scenario that was articulated?

LILIENSTERN: On an appeal your honor after the TC? We probably wouldn't get here Justice Castano said that the fact that a heavy burden is placed upon all defendants in a class action context skews the trial process. So few of the cases come back up this way. You've never had one that I'm aware of where you consider the rule 42 factors either on mandamus I concede or by way of appeal. So I think the likelihood of our ever arriving back here again on that issue is very remote your honor.