

ORAL ARGUMENT -- 2/3/98
96-1208
COASTAL CORP. V. GARZA

POWERS: The fatal flaw with this certification is that the plaintiffs are trying to use a procedural device, class actions, to change substantive tort law. It can't possibly meet the requirements of Rule 42(b)(4), a predominance, superiority, manageability without substituting group causation for individual causation.

In *Boyette(?)* you held that the requirements of Rule 42 have to be scrupulously observed in order to protect the rights of absent plaintiffs.

PHILLIPS: Are you arguing on behalf of all of the petitioners?

POWERS: I represent *Coastal, American Chrome, and Citco. Hess* is part of this appeal and they are still part of this appeal. They've asked not to give their argument and to have us make their argument for them.

PHILLIPS: Well at some point, we are going to want to ask questions that go to just some of the petitioners, but not others. You may proceed with an argument as to the whole case.

POWERS: What we have here is the flip side of *Boyette*. The requirements of Rule 42 also have to be observed to protect the substantive rights of the defendants. The plaintiffs here have alleged three torts: trust(?) as to land; nuisance; and negligence. The substantive law of these torts requires the plaintiff to prove a particular kind of harm to his or her property. This isn't just an issue of defenses or damages. It's part of the plaintiffs' case on liability. If an individual plaintiff in this case sues multiple defendants, that plaintiff has to show a causal link to each defendant individually. He can't establish liability against Citco by showing he was exposed to Coastal's emissions. Or he can't show liability against Coastal by showing that Citco's emissions reached his land.

ABBOTT: How is this case different from *RSR*?

POWERS: *RSR* was a single source, and our case is a multiple source, long-term exposure case. But it's similar to *RSR* in the following way: In *RSR* the court clearly held that a class could not be certified because certifying a class would preclude litigation of showing that individual pieces of property were connected to the defendant. That issue is exactly the issue in our case.

ABBOTT: What about the significance the CA put on the personal injury claims in that case?

POWERS: We don't have personal injury claims in our case, and that's a factual

distinction. But individual causation is not an invention of personal injury cases. It's true in all tort cases, and property damage cases as well. And that's exactly what *RSR* held. *RSR* had a property damage claim, and the court held that the plaintiffs were required to show individual causation between their property and the defendant's source even on the property damage claim. So the general principal is individualized causation rather than group causation. And that's as applicable to property damage claims as personal injury claims.

PHILLIPS: Wouldn't we have to overrule some of our prior cases to find a conflict between these two decisions?

POWERS: I don't believe you would. All of the Texas jurisprudence requires individual proof of causation. Consider for example: Market share liability. The court has rejected market share liability involving individualized proof of causation of what we're putting before the court. And I think that's a deeply embedded principle in Texas Tort law that would not have to be overruled.

GONZALEZ: Before you get further in the argument help me to understand the issue of mootness and the rights of the party to dissolve the class. As I understand it, the plaintiffs have moved to decertify the class. That's the relief you are seeking here. Why can't we just allow the TC to proceed with the plaintiff's request to decertify the class - you've won?

POWERS: If the TC decertifies this class that would not end our disputes with the plaintiffs. They would like to make you think it would. But that would not end our disputes with the plaintiffs about class certification. If they decertify the class and deprive this court of the ability to make a ruling, deprive us of our appellate relief that we are seeking from this court, that is that a class certification in this case is inappropriate, if they deprive us of that ruling they can turn around and recertify this class, or move to recertify this class tomorrow.

GONZALEZ: They've been candied about that. They said they would.

POWERS: And they said they would. They still are seeking certification against one of my clients, CITCO, to enforce a settlement against CITCO's objections. So they are still trying to certify a class in this case.

GONZALEZ: That's for the purpose of collecting on the settlement from CITCO?

POWERS: But under terms that are contrary to the terms CITCO agreed to.

OWEN: What about Coastal? What have they said about recertifying as to Coastal?

POWERS: We've moved specifically as a cautionary device in the TC that if the class was dissolved it would be dissolved with prejudice that it would not simply be reasserted and

reestablished shortly after this court loses its jurisdiction. And they said, no. They filed a pleading yesterday in the Corpus Christi DC and said they oppose our motion to make their decertification with prejudice.

OWEN: Did they indicate that they would ask the TC to recertify as to Coastal?

POWERS: Well that's all Coastal asked is in the order that they would not be able to recertify. And they said yesterday in their pleading they opposed that motion. Every indication is they want to certify this class against us and the only reason they are moving to decertify the class or dissolve the certification order in the TC, is to keep this court from making a ruling and deprive us of our appellate relief. They said that in their pleading.

PHILLIPS: Has the trial judge given any indication of how she might view a motion to a recertification?

POWERS: She hasn't. But if we were to lose that, we would have to go through the appellate process again. We've been deprived of our appellate relief. And one of the things that many, many courts have talked about in terms of class certification is that the mere certification of the class drastically alters the settlement posture of a case. And in fact, that's what's happened in this case. We've had a certification hanging over our heads. It drastically alters the settlement posture. We want appellate relief to get out from under that. And if it goes back to the TC, we are going to have to go through that whole process again.

SPECTOR: In this case, I believe the TC certified some subclasses. Do you oppose the certification of any of the subclasses?

POWERS: Yes, we do oppose certification of the subclasses. The three classes run east to west in these three zones, and then they are divided into five year subclasses. Those five year subclasses are totally arbitrary. They have nothing to do with when there was diminution to property value, when there were incidents at any of these plants. For example, their claim is there is a diminution of property values. That diminution of property values did not happen all at once. There is no base line that they give. People who bought early may have had more diminution of property values than people who purchased late in the process.

SPECTOR: Is your position that each of these claims needs to be tried separately?

POWERS: No. Our position is that these claims have to be tried in a way that protects the substantive rights of the defendants to dispute whether there is a causal link between an individual defendant and the particular piece of the plaintiffs' property. That can't be done in a class action. But there are other aggregate methods of adjudicating these claims. And in fact, that's exactly what the manual on complex litigation that's put out by the federal judicial center calls for. That is, there can be other forms of aggregate litigation. There can be consolidations for discovery

or for trial. There can be bell weather cases. We can try many of these cases as bell weather cases, make settlements on that basis, or find out that their theory here, that the mere presence of industry diminishing property values, that mere theory which is not a tort doesn't have anything to do with emissions reaching particular pieces of property. We might find out that there's no liability there, and then the case goes away. But we can litigate with some advantages of aggregation. We can litigate individual issues of causation in bell weather cases, consolidated cases without a class action.

OWEN: Back on the conflict jurisdiction issue. Would we have to overrule any of our prior case law?

POWERS: Absolutely. I thought in addition to *RSR* absolutely. *RSR* stands for the proposition that even on the property damage claim there has to be individualized causation between a particular piece of property and the defendant's source. That's what we're arguing here. Each individual defendant says, "I want proof, I want to litigate individual causation between our emissions and your piece of property." That case would have to be overruled if this class is certified.

OWEN: Not just distinguished?

POWERS: On that principal, that holding in *RSR* would have to be overruled.

PHILLIPS: But we talk about it being so close on the same facts that one could not come up with a distinguishing principle. And that's been our standard right or wrong.

POWERS: There's nothing to distinguish that principle. Every case can be distinguished at some level on the facts. If that's the standard of conflicts' jurisdiction, there will never be any conflict's jurisdiction. The principle that was necessary for the holding in *RSR* was you can't use a class action to substitute for individualized connection between a plaintiff's piece of property and the source. That principle would have to be flatly overruled to survive this class.

ABBOTT: Why would we not also have to overrule *Avalos*?

POWERS: You wouldn't have to overrule *Avalos*.

ABBOTT: You don't think that we would have to reevaluate the standard?

POWERS: What *Avalos* is saying, which is a perfectly appropriate standard, you can't simply create conflicts jurisdiction by finding dictum in a footnote in a case, and say there is something that this court said that's inconsistent with that dictum. We would like the SC to clear it up.

In *RSR*, the particular reason for the holding, even if the case can be distinguished on the facts, the particular reason for the holding, individual causation, not group

causation. That is exactly the principle we're putting forward here. And it's exactly the principle that the CA ignored in our case. It's a direct conflict.

ENOCH: On your argument of individualized causation how is that principle not applicable across the whole spectrum of class actions? If the principle in this case was that for a nuisance you have to have particularized causation, therefore, you could not have a class action. How does that not apply virtually in all class actions where a defendant or multiple defendants would always allege: Listen, you've got to particularize the causation. You can't do class action that way.

POWERS: First of all there are class actions in commercial cases in anti-trust cases where once someone is in the market at all, the causation issues are trivial. In mass tort multi-source tort cases we are urging that it is difficult if not impossible to ever meet the requirements of Rule 42(b), because of this point, and we're not alone on that. That's exactly what the US SC in *Amcam* said. That's exactly what the Fifth Circuit said in an excellent opinion by Judge Higginbotham in *Fiber Orr*. You've got to have individualized causation. It's exactly what the Fifth Circuit said in *Castano*.

ENOCH: Those are all personal injury cases?

POWERS: It's what the court said in *Murphy Oil*, which has property damage cases. But all of those cases do say that it is, and it's not us inventing this principle, and including the manual on complex litigation, says that because of individualized causation class actions are not an appropriate way to handle long-term multi-source mass tort cases whatever they may be in a consumer fraud type of case. So, yes, we are saying that this is not a device especially compared to bell weather trials or consolidations for handling multi-source mass tort cases and we're not alone on that.

PHILLIPS: Can you explain the exact procedural posture of *Citco*'s settlement right now? There was an agreement. The ad litem came back and made certain recommendations, made recommended changes.

POWERS: The ad litem recommended changes on the settlement as being enforced. As the plaintiffs are trying to enforce it is with those changes.

PHILLIPS: And the trial judge has approved the settlement and put those changes in it?

POWERS: Has tentatively approved sending out notice to certify a settlement class. So they are in the process of certifying a settlement class. And that again to the mootness point shows that there still is a dispute about these classes. The settlement is not complete. *CITCO* objects to the settlement, and it would simply be on different terms than *CITCO* agreed to.

BAKER: Is that what the problems is with, that *CITCO* signed an actual agreement but

now the ad litem's changes are material, so that's a counter offer so to speak?

POWERS: I don't know whether they signed or came to other agreement with the plaintiff. But the terms of that settlement have changed in a way that it is not enforcing the original settlement.

ABBOTT: Why would this scenario not work, and that is for us to abate this particular appeal, have it go back to the TC for two determinations. One, is to see if *CITCO* could be held to the settlement agreement that they voluntarily entered into, and if the court approves that class settlement, then *CITCO* would have gotten what it wanted? Then two, see if the TC would dismiss with prejudice the class certification such that Coastal and any other nonsettling defendants would not thereafter be subject to any class certification other than perhaps a settlement class, which could only occur if the parties agree?

POWERS: Two problems with that. One if a settlement class is enforced against *CITCO*, *CITCO* is going to be right back here asking for that to be...that that's not appropriate for class certification under the same arguments we're making here.

ABBOTT: But even if the terms of their settlement agreement hold true, like the 90% aspect and everything else, not the modified settlement agreement but the original settlement agreement that they entered into?

POWERS: That's purely hypothetical. That's not what the plaintiffs are asking to do. So we don't have a proceeding in the TC. It would not be possible for the court to abate the proceeding here and send it back to the TC to proceed on that. That's not the proceeding in the TC right now. There would have to be another motion. The plaintiffs would have to bring some other proceeding in the TC to do that.

The other problem is it's our view that these multi-source long-term mass tort cases are not appropriate for class action. We would like to have that resolved. I think the court does have jurisdiction. It would be far better to get that resolved and then when we go back to the TC, we know the ground rules. And we can start to resolve this case. We can start to agree on bell weather trials. We can maybe try a few of the cases _____ and see how it goes, as has happened in many mass tort cases. We're simply delaying the process if we do that.

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RESPONDENT

GODFREY: These appellants are asking you to overrule your prior decisions to resolve this case on the basis of an alleged conflict between the decision of the court of civil appeals in Corpus Christi in this case, and two cases: *Amoco v. Hardy* out of Corpus, and *RSR*. The sole basis of jurisdiction of this court over this interlocutory order is this alleged conflict that they claim between

this decision below on the interlocutory appeal, and the decisions in *RSR* and *Amoco v. Hardy*.

If there is not a conflict within the meaning of the decisions of this court, including, particularly the *Gonzalez Arrello* case, the *Christie* case cited therein, the old *Vixon v. Southwestern Bell* case, all of which is the law of this court if these appellants don't meet the standard set forth by this court about what it takes to show a conflict for purposes of conferring jurisdiction on this court over the appeal of an interlocutory order they are out of this court. And they are out of this court.

ABBOTT: Tell me what's wrong with this theory for basically a conflict jurisdiction in the class action context. And that is that in *RSR*, under the facts they had in that case some of which are similar to what we have in this case, the court decided not to certify. Then you add on to that facts we have in this case, such as, as opposed to that case we have multiple defendants. As opposed to that case we have multiple different types of what I call chemicals. There it was lead, and here it was various other things. There was only one method of exposure, but here I see at least two methods of exposure counting the groundwater. Considering those things, the things I mentioned I would consider to be even more compelling reasons why class certification should not take place. So the argument would be that since class certification was not allowed in *RSR*, with these other factors would seem to mitigate against class certification, and for the CA to hold that class certification would be valid that would be a true conflict in the extreme against the holding in *RSR*.

LAWYER: Two reactions to that. First, what conflicts jurisdiction is about is indeed: Do you have a case that is so on the same state of facts, that the decision in the one case necessarily involves an overruling of the decision in the other case? You can't get to that. You don't make that analysis on the basis of whether the court applied the correct legal principles or different legal principles, although that was the argument you just heard. You get to it by looking and comparing the facts of the previously decided case with the case at bar. Number 2, there are just as many if we want to start toddling them up. Differences between *RSR* and this case that militate against applying an *RSR* result to this case is there may be factors as the court suggests that would say: well this is an even an easier case than *RSR*, therefore, we ought to say: Notwithstanding that we don't have the same state of facts it is a conflict. As a footnote, that might be an excellent argument to make to the court of civil appeals in all due respect, Justice Abbott. But it is not the issue before this court, and it's not the basis of this court's jurisdiction.

In *RSR*, we had personal injury claims and all the attendant individualized issues that a lot of courts have talked about, including the *Murphy* court in Louisiana that they make a great deal of in their brief that lots of courts have had trouble within the class context, including the *Castano* case, the smoking case in New Orleans, including *Amcamp*, the asbestos case. *RSR* if you read the opinion and if you read the facts, that court was plainly occupied if not preoccupied with the problems attendant to the personal injury claims in that case. Not here in this case. Two, the facts, and it's the facts that we have to look at when we're looking at the issue of conflicts jurisdiction. In that case it was undisputed by the plaintiffs that over 70% of the class area had

received no deposits of lead from the smelter. So the plaintiff was asserting a class overlying a geographical area 70% of which had no damages. Undisputed. That is absolutely not the state of facts in this case.

The record in this case, and let me say something about the record in this case, since someone mentioned *Boyette*. We had a hotly contested adversarial class action hearing before Judge Pate in Corpus in this case. We presented factual testimony from percipient witnesses. We presented expert testimony. All of which to show Judge Pate that in this case we have shown and we will show that emissions by each defendant diminished the property values of each property in this case.

You've heard an argument essentially on the merits here about how you just can't have a class action in a toxic tort case, and certainly you can't have one if there's more than one defendant if because you just can show as a matter of law, and I ask you to look and find any of this in *RSR*, the alleged basis of the conflict, because as a matter of law a class cannot demonstrate class-wide injury tied as a matter of fact to the acts and omissions of each defendant.

OWEN: I take it from your argument that if we were to send this back to the TC to decertify as to some defendants, you would recertify or ask the court to recertify as to *Coastal*?

LAWYER: We might and we might not. I am not prepared to agree to their motion which says: that we will not and that we will dismiss all class allegations against *Coastal* and *American Chrome*. And certainly I will never agree...they also made that motion as I recall on behalf of *CITCO*, which entered into a settlement agreement with us.

OWEN: But focusing on *Coastal*, what are you going to do about *Coastal* if we send this back to the TC?

LAWYER: If we send this case back two things will happen. Hopefully *CITCO* will honor the contract that it entered into and we will be able to send out the notice...

OWEN: What about *Coastal*? What are you going to do about *Coastal*?

LAWYER: That will leave as unsettling parties, *Coastal* and *American Chrome*. *Hess* is in the process of reaching a settlement with us. I expect it to be concluded very shortly. They are not arguing here today. And counsel who stood up and argued and my understanding is not arguing on behalf of *Hess*. I expect that settlement to be concluded shortly. We will have then, a situation where we will have recovered for the class the \$31 or \$32 million in settlements that we have achieved including the *Citco* settlement, and we will have *Coastal* and *American Chrome* left. If indeed we are unable to consummate a settlement with those two companies, we will indeed probably will be obliged in fact to continue to seek recovery on behalf of the class against those two companies. I cannot ethically in my judgment simply say I will dismiss with prejudice the claims

that we've made on behalf of this class against *Coastal* and *American Chrome*.

PHILLIPS: If that's the case, are you then saying this court should decide on the merits either there is conflict or there is not conflict, and if there is a conflict then go to the issue before us?

LAWYER: I am saying that this court should withdraw its granting of the application as being improvidently granted for lack of jurisdiction.

PHILLIPS: But if we find there is jurisdiction, do you say that your dismissal at the trial court level of the *Coastal* class or of the certification against a class against *Coastal* moots this proceeding?

LAWYER: Moots this proceeding. Absolutely.

PHILLIPS: And how many times could you do it. Could you get 50 class certifications and if it were appealed you could dismiss them and there's no appeal?

LAWYER: Hypothetical or wanting to continue with a decent...

PHILLIPS: Well do you get one free bite, or five or what?

LAWYER: It was not an easy decision, but it was the only way that we felt we could protect the settlement that we had reached with *Citco*, would be to move to decertify in the TC this previous certification. And that is what they are claiming as a basis for why they don't have to perform their settlement agreement. So that's the reason why we did it. They agreed to pay in round numbers \$17 million to this class.

OWEN: But you could sever *Citco* and go on theoretically? You wouldn't have to decertify as to *Coastal*.

LAWYER: *Citco* is an appellant here. And they are claiming that they don't have to perform their settlement agreement.

OWEN: I am focusing on *Coastal*? You could theoretically sever and go about your business with the settlement however that's going to shake out and proceed against *Coastal* without decertifying as to *Coastal*? Well we are right back to where we started if you don't reach a settlement and you ask to recertify. They have to start the appeal process all over under your theory of the case.

LAWYER: If the class was decertified as to *Coastal* pursuant to our motion in the TC, and if we are able as I believe we will to hold *Citco* to its settlement agreement and go ahead and get out notice along with the defendants who are not participating in this appeal and want their

settlements to be concluded, if we get that done, we would have a decision to make concerning whether we would seek again to have a certification hearing as to *Coastal*.

OWEN: In CJ Phillips' procedural and jurisdictional issues how many times can you certify and decertify against someone like Coastal and evade appellant review of that certification decision?

LAWYER: Technically I suppose you could do it multiple times. It's a procedural rule. It's a procedural device. It's an interlocutory device in the TC just like a lot of other things that get done and undone in the TC. Obviously it involves the judicial process more than most interlocutory orders do. But I don't believe there is any legal impediment to not one but two or three certifications in the TC. Now as a practical matter what happened is a very different question.

GONZALEZ: You're trying to enforce the agreement that Citco made with your client?

LAWYER: Correct.

GONZALEZ: But in that agreement Citco expressly reserved the right to challenge a certification order?

LAWYER: But did not make the settlement contingent on any action by this court on that appeal.

GONZALEZ: But don't they have a right to continue to contest the certification order because they expressly reserved that right?

LAWYER: So long as they continue to perform their settlement agreement

GONZALEZ: But they seem to be contradictory?

LAWYER: Not necessarily, because one thing that's going on in my judgment is a desire perhaps by some of these defendants to make some law that has nothing to do with whether or not they are going to perform their settlement agreement in this case. Their settlement agreement is not contingent on whether or not this court grants or denies the application or the action this court takes on the application.

GONZALEZ: They can pay the \$17 million and continue to appeal and try to make some law?

LAWYER: Absolutely.

PHILLIPS: Why isn't that a live controversy? Why would we have jurisdiction over that?

LAWYER: That's their position. That's what I would say is the most generous description of their position. I don't believe that in fact a proper construction permits them to decide on the day before preliminary approval of the settlement agreement they signed that they are not going to perform it and that they are going to come up to this court.

PHILLIPS: Well they say that they haven't agreed to this, that the ad litem made recommended material changes in the settlement and that they didn't approve of?

LAWYER: What the ad litem did is require the attorneys to reduce their attorneys' fees and to put more money in for the class. Any additional funds came from the other settling defendants.

PHILLIPS: Don't attorneys think that's material?

LAWYER: It had nothing to do with the amount of money being paid by Citco. There were no changes ordered by the court as a result of the guardian ad litem's advice, and our several conferences with her and the guardian that affected Citco's settlement.

All Citco has done, is instead of performing their settlement agreement they have announced to the public, the day of the preliminary approval hearing of their settlement, they announced to us the day before that they didn't intend to perform it, is that they are going to buy out one of the neighborhoods that's included in this class. They are going to do it without the restrictions in the settlement agreement as to what use that property can be put. And they are going to do it without paying the cash in addition to the buyout that they agreed to pay in the settlement agreement. That is what Citco in fact is doing. They repudiated their settlement agreement with no legal basis to do so, they refused to comply with the restrictions in the settlement agreement on what could be done with this property after it was bought-out and they refused to put the cash into the settlement agreement that they agreed to put in.

PHILLIPS: In essence, you're saying Citco has no standing to challenge these changes the ad litem recommended and the court agreed maybe, going to agree to, because it doesn't change their position?

LAWYER: It doesn't change their obligations at all. What they are doing, is not in compliance with their obligations under the settlement agreement.

ENOCH: Are you aware of any authority out there on class action where the damages that are claimed are purely economic damages, and courts have applied this argument of the defendants here that particularized causation trumps the class action concept in a purely economic damage's case?

LAWYER: No, sir.

ENOCH: Now they relied on *Murphy*, and you made a brief reference to that. Does *Murphy* have anything other than pure economic damages in it?

LAWYER: *Murphy* has personal injuries in it. *Murphy* had a so-called air class and a water class. And interestingly what the *Murphy* court said "water class" was a group of people who lived along this lake front in Louisiana, whose houses were around this lake. The claim was that the defendant company had been dumping toxic chemicals into the lake, and it interfered with their property around the lake. This may be the _____ let case that's cited in *Murphy*. But the *Murphy* court discussed a class where all the people suffered simply economic damages, property damages, and talked about how that class could be certified.

ENOCH: I misunderstood. I thought your argument that *Murphy* was referred to as a case where there was economic damages, not personal injury.

LAWYER: I am aware of no decision in Texas, and frankly nowhere else that says that you cannot have a class action of property owners who are suing for purely economic damages or diminution in property value.

ENOCH: So the problem with the *RSR* in this case is conflict really, is fundamental to the issue that's raised is whether or not the individual causation trumps class action in a case where only pure economic damages are being alleged?

LAWYER: That's one problem with it for sure.

ENOCH: *RSR* had personal injuries which there's been a lot of cases that have indicated that's not an appropriate case for class action?

LAWYER: Correct. *RSR* court talked about children playing in the yard, or people gardening and how this would affect their personal injury claims. I think what *RSR* stands for, is that where you have these kinds of personal injury claims, that the court there decided they could not certify, because a lot of the same reasons other courts have reached the same result.

If this court, as I believe on the authority of *Gonzalez, Dixon, Christy* withdraws its order granting this writ for want of jurisdiction, and this case goes back to the TC, and the TC understands which right now she maybe she doesn't, but would like some help that under Rule 43, she has indeed the jurisdiction notwithstanding the proceedings in this court to dissolve the order appealed from. Going back to your very first question Justice Phillips, which I think she plainly does have the jurisdiction to withdraw the order appealed from, which is the certification on the merits. If she does that, we will be able in my judgment to conclude at that point. I know we have the settlements concluded with Southwest, with Champlin, with Oxy. We will have it done with Hess and we will be able to get the Citco settlement done and I will represent to the court in all probability that we will certainly not be seeking multiple merits of certifications as against Coastal.

We are not prepared to agree to their motion which says, "We should dismiss with prejudice all class claims against Coastal."

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REBUTTAL

POWERS: I would like to make some specific responses to some things the plaintiffs say. But I do want to note that they spent very little of their time defending on the merits of this certification that this case ought to be certified as a class action. There was some talk at the end of that and I would like to address that.

OWEN: Would you refresh my recollection about what happens in the comparative liability statutes if *Coastal* and *American Chrome* were the only remaining defendants?

POWERS: If I could just preface by saying there's a problem with well what if *American Chrome* and *Coastal* are all that's left, that does not turn this case into a single source case.

OWEN: I agree. What findings would you be entitled to from a jury on comparative liability as against settling defendants?

POWERS: We would be entitled to a sliding scale credit or a dollar credit against the defendants.

OWEN: So you wouldn't have to get apportionment findings from _____?

POWERS: We would have to get apportionment findings between us and the plaintiffs. And for every defendant that is left would have to get apportionment findings between us and those defendants. If *American Chrome* was left *American Chrome* and *Coastal* will be at odds with each other in that trial. So we would have to get findings on the comparative negligence issues. Again, this would not be a single source case even if there was a single defendant left.

SPECTOR A minute ago you said there were alternative ways to dispose of these claims. But it seemed to me what you were saying, is we try ten and that will dispose of the two thousand, which seems to me then a reason why it perhaps is a valid class?

POWERS: But in those ten individual suits, and that's exactly what the manual on complex litigation calls for, we can litigate individual causation between individual defendants and that piece of property owned by the plaintiffs, or diminution in property value.

SPECTOR: And then that would apply to the rest of the claims?

POWERS: Some courts have applied estoppel. Many bell weather cases have been

successful in giving the parties a view of how to settle these cases. And that's exactly what the manual on complex litigation calls for. But in those cases individual causation can be litigated.

I would like to address Justice Enoch's point on the difference between personal injury and economic damages. Their model is presence of industry reduced property value. That's what Barton Smith testifies to. That's what that want to say gets away from the individual issues of causation. There is not a tort that says negligence causing pure economic loss is recoverable. That's the economic loss rule.

So, they've got to show economic damages from a trust _____ land. Trust _____ land requires tangible stuff to go from an individual defendant and injure the plaintiff's land.

ENOCH: Suppose it's smell?

POWERS: Smell could be a nuisance between trust _____ land and nuisance is the difference between tangible and intangible invasions like smell. But they've got to show their smell on their land.

ENOCH: If the evidence is such that the prevailing wind comes from the northwest and it blows it to the southeast across this property, couldn't you design a class with subclasses for property that's closer and the property that's farther away based on a model of how the smell dissipates and greater damages closer and less damages farther away. Isn't that appropriate?

POWERS: Some people in the class are over here near Citco. Some people are over here near Havalina. It may be that all of them are affected. We just want to be able to litigate that. We want to be able to say, "You, over here were not affected by Citco's emission." We just want to litigate. That's not the merits of the case. Mr. Godfrey says we're trying to litigate the merits of the case. All we're saying is, we want the case to be litigated in bell weather or individual suits where we can litigate those issues. If it's a class, we can't possibly litigate those issues. And their substitutions were saying, "Well, we all had reduced property values." Reduced property values simply under the substantive law is not a tort. They've got to show an invasion of their property interest. They allege trust _____ of land, nuisance and negligence. Those are not merely economic loss torts.

Let me turn briefly to the mootness question. It's put quite correctly. How many times can they do this? We're complaining about the class being certified. We come up and try and get relief and they say on the eve of our relief, or what we hope to be our relief, they can simply dissolve the class, go back and start over again. If that doesn't interfere with our appellate remedy and this court's jurisdiction, I don't know what does. They say there is a procedural rule, a procedural device that they get to us that says the TC can dissolve the class. The TC can do a lot of things, but they've got to do them consistent with the other parts of the rule. The rest of Rule 43 or 29, whichever is applicable here, the rest of those rules say, they can't enter an order, any kind of

order, an order to resolve the class or any other kind of order that would interfere with this court's jurisdiction, or interfere with our appellate remedy. Now if they coming up and going back, and going back and coming up doesn't do that, I don't know what does.

Finally on the conflict's jurisdiction, Rule 42 and the predominance requirement does not just apply to personal injury cases. And it doesn't require looking at the merits of the case. *Costano, Murphy, Amken* all say you at least have to look at the nature of the case. That's not a personal injury issue, and it's not a property damage issue.

PHILLIPS: How about Citco's settlement, and whether or not Citco has standing even to complain that there are changes in _____.

LAWYER: It is true that part of the new settlement has involved some attorney's fees being put back into the class. But those attorneys' fees, there are different classes here: groundwater class; airborne classes, changes what different people in different classes get, and it will change their leases.

GONZALEZ: But Cisco's liability does not change?

LAWYER: It does change.

GONZALEZ: Are they going to put more money into the settlement?

LAWYER: They are not going to get the same releases as they would have with the money they were putting in before. And so the settlement isn't as valuable to them. It is my understanding of Citco's position is that to get that money to satisfy some of the classes it may not or put at risk the settlements with the other classes; and therefore, the protection that Citco would get would not be the same for the same amount of money.

PHILLIPS: Is that explained in your briefing?

LAWYER: All of this has come up after our brief. We would be happy to further brief that issue if the court wants.

OWEN: But that settlement hadn't been enforced, so that's not in front of us technically.

LAWYER: But we're here because Citco is objecting to a settlement class for litigation purposes or for settlement purposes. It is the plaintiffs who come back and say, "Well Citco's a bad guy because they are just renegeing on their settlement class." We're saying they are not renegeing on their settlement class. It's a different class.

PHILLIPS: Let's suppose Citco had a settlement. It's all been approved. Notices have been sent out and paying out money right now. But as part of the settlement you provided that you could come up to this court and get an opinion as to whether that class is _____ anywhere. Would that be a live controversy that we could decide?

LAWYER: We think there's still a controversy about the class, and we think it would preclude the plaintiff from objecting to us coming forward with this appeal. For them to say part of the settlement is we can go forward with the appeal.

PHILLIPS: It would not preclude the court from wanting to see the documentation in deciding that indeed this was *Fletcher v. Peck*?

LAWYER: I agree that we can't simply by agreement confer jurisdiction on the court. But we are a long way from an agreement. We have a real dispute and Coastal has a dispute aside from all of this.

PHILLIPS: If there were only one settlement and the ad litem had come in and said it was great and it was in the process of being executed, then clearly this court could look at those documents and decide that there was a not a live controversy, correct?

LAWYER: Well the controversy before this court isn't the propriety of the settlement.

PHILLIPS: I mean if it's going to be settled there wouldn't be anything for us to decide that would affect the parties?

LAWYER: If both parties came forward and said this is going to be settled tomorrow but we would like some opinion to give us guidance in the future, I agree, that would be different. I don't think this court would have the jurisdiction to decide whether the settlement was the same or different, that's for the TC. And as long as that's a live dispute, whatever the merits of that dispute, as long as that's a live dispute, and Citco is objecting to it being done as a settlement class, then all we're doing in this court is objecting to the settlement class part of it.

OWEN: But there's a possibility the TC might enforce the settlement agreement as written if she decertifies it?

LAWYER: But then we would be back here on two issues.

OWEN: That's a different appeal though.

LAWYER: Part of it would be a different appeal, the part that objected to enforcing a settlement against us that was not the original settlement, that would be a different appeal.

OWEN: If she goes back to the original settlement and enforces it as written, that's an option for the TC?

LAWYER: But Citco is still going to object to a class.

BAKER: Don't we have just two issues here in this appeal: the conflicts issue, and whether the class was properly certified? And if all of them settle out those two issues are gone, and so the appeal is moot?

LAWYER: Well there is no indication of *Coastal* settling here at all.

BAKER: In my mind there's some confusion about who's doing what, when and where and a lot of the discussion has to do with matters that are purely in the TC now and cannot be before the court on the record we have, would you agree to that?

LAWYER: Yes. We are not coming forward saying the settlement is before this court. When I was sitting here, I heard us getting beaten up by Mr. Godfrey for reneging on this settlement, and I'm just saying that's not true.

BAKER: What either one of you says about that is not before the court?

LAWYER: Correct.

ABBOTT: The scope of the stay entered voluntarily by the TC concerns only staying a ruling on decertification of the class, or is it broader than that?

LAWYER: That's my understanding.

ABBOTT: And is it your understanding that the TC will maintain that voluntary stay until such time as we issue an order or an opinion?

LAWYER: That's what she has indicated in her order that she is waiting a ruling from this court.