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**FORD MOTOR CO V. SHELDON, ET AL.**

LAWYER: ...But more than just paint is at issue in this case. This case is really a study in inconsistencies. It focuses on Texas Rule of Civil Procedure 41, the Texas Class Action rule. That rule is virtually identical to and indeed it was derived from Federal Rule of Civil Procedure 23, the Federal Class Action rule. And there are many Texas CA cases holding that the federal interpretations of the federal rules are persuasive when it comes to interpreting Texas Rule 42. Yet, in this case, we see a Texas court and a federal court apply what is supposed to be basically the same rule to a virtually identical set and facts and come out with diametrically opposite conclusions.

ENOCH: Except didn't the federal case, at least the federal judge that was working on this give a lot of emphasis to the fact that it was 49 different states as opposed to 1 state?

LAWYER: If you look at the issues that we're taking issue with, particularly whether common questions, the federal court looking at that in isolation said, "there is no way they are common questions here." You are correct that when it came to the predominance analysis that the court did factor in the 49 states. But in looking at the defect issue in the case, which is really the court issue here, the court said, "There is no way that this is a common question."

ENOCH: If a 100,000 vehicles didn't get paint primer and the allegation was the lack of the paint primer is what's causing the damage, why isn't that class action?

LAWYER: Because that's not really the issue here. That's looking at the issue as framed from the plaintiff's perspective and only the plaintiff's perspective. What we are talking here is whether the overall paint systems in these vehicles were sufficient, whether they were adequate.

ENOCH: Is it's Ford's position that these cars only some of them didn't have the paint primer, or parts of them didn't have paint primer?

LAWYER: What we're saying here is that it's sort of like I make a pot of chili, and I don't put chili powder in it. Instead, I put in something else, a different kind of spice. Now some people may say, "Well there's no chili powder in there." But when they taste it they say, "Well that's good enough, it's the same thing." And you use a different way of reaching the same result but it's okay. And that's what we are saying here. They are saying that the vehicles are defective because they didn't have spray primer in them. Our position is, Yes, but we put other things in there that made the vehicles adequate, that that thing we put in there the way we dealt with those vehicles varies from vehicle to vehicle within the class. And therefore, the jury may well reach different conclusions among the vehicles in the class as to whether we did or did enough job on that...

ABBOTT; So, under your theory then, if the plaintiff proceeds with a certain cause of

action and a certain theory and that cause of action and theory is common among all the possible class participants, a defendant could undermine that commonality by bringing in a defense that argues, Well things are really different for everyone.

LAWYER: If that's a legitimate defense, which their experts say it was here. I realize the concern that may exist if you just say, well any defense is good enough. But the defense that we're talking about here comes directly from the plaintiff's experts in this case. Let's look at what we're talking about here.

O'NEILL: Can't the TC address the problem you have by creating subclasses when he tries the class?

LAWYER: No subclasses were proposed here. And given the number of variations that we have in the class here it is doubtful to me that you could create subclasses, but the court didn't do that.

O'NEILL: But he could still do that though approaching the trial?

LAWYER: That's really one of the problems that I think exist in the way that class actions are being approached in many of the CA's decisions here. And that's where federal precedent and state precedent really have gone off in totally different directions. The federal courts are now saying, Before you certify a class, you better look at how you are going to try that case, you better figure out whether you can do this before you go out and notify everybody that there's going to be this class proceeding when you get everything moved on towards trial. That's what the federal court did. It went forward and it looked at this and said, You can't, or there's no way to do this.

OWEN: But I take it you disagree with the federal judge's decision in Louisiana since she found that there were common issues?

LAWYER: The judge said, it was conceivable to her that you could find common issues in the case.

OWEN: She really focused on predominance.

LAWYER: But that judge said that the common issues that the judge in this case found were not common. Made that specific finding. The defect issue, the knowledge issue, which are the two key issues here the federal court judge said were not common issues in this case. Diametrically opposed conclusions on that.

ENOCH: Your issue really is there's - you don't really complain - there could be subclasses? There was a plant somewhere in Ford's business that used the same paint scheme for hundreds of cars, you just don't think that they ought to include with those hundred cars, the hundred

cars that were produced at a different plant that used a different formula for paint?

LAWYER: Yes. I mean there are groups of vehicles, you are right if you look at this in small pieces that may have had the same paint systems, but...

ENOCH: And depending on the value of the damage for having failed to use paint primer it might not be economically feasible for an individual plaintiff to mount the kind of technical case against Ford for just the amount of money involved and so this is the type of case that would the parameters of class action to allow a number of some representatives of a larger class that would then make it worthwhile to pursue this claim against Ford Motor Co.?

LAWYER: It seems to me that what you're really talking about here is something quite different. I don't agree with the proposition that individuals can't mount these claims. Individuals have mounted these claims. The reason that plaintiffs were saying this is so complicated is because this huge class that they've tried to bring the claims with respect to it is not clear to me under the Texas DTPA where a plaintiff's counsel is guaranteed reasonable attorney's fees if they bring the case, if these cases aren't mountable individually. The fact they have been brought.

PHILLIPS: Have these cases been brought in Texas?

LAWYER: Yes.

PHILLIPS: And none have been up to the appellate court?

LAWYER: No. The CA we believe and the TC also erred in the predominance finding as we noted earlier. Now plaintiffs try to pretend otherwise here, but both of the courts below have made a firm finding that in this case there would need to be individual trials with respect to the individual named plaintiffs, that the common issues trial is not going to find liability, is not going to resolve the issues really for anybody. Some CAs in this state have said, that ends the analysis. Some say, you've got to have individual trials for all of the class members - it's not a class. There's not predominance. Others have put it in terms of saying, that the common issues must be the object of most of the efforts of the litigants in the court for the predominance requirement to be satisfied. I respectfully submit that if in a case like this there have to be thousands of trials on individual issues before anybody's claims are resolved, the vast majority, the effort is going to be on those individual trials no matter how you cut it, and the predominance requirement therefore is not satisfied.

Now the other lack of predominance in this case I think is revealed if you look at the individual claims. Let's look at the named plaintiff's claims here. The first one, Mr. Shelton. He bought a Ford truck. He said he bought the truck after he saw a TV ad starring Bill Cosby, which counted the paint features of the truck. Now none of the other named plaintiffs say they ever saw that ad. This is unique to Mr. Shelton. A couple of years after he bought the truck, he saw some paint problems, but he waited for 5 years before he went into the dealer and asked the dealer to do

anything about it. The dealer said, Look, I will make you a deal. It costs a lot of money to repaint the truck, but I will repaint your truck for $200. The guy said, Fine, he did that. And the truck was repainted. In deposition he said he didn't have any more problems with it. He said, in fact, it looked a lot better than most other 6-year old trucks that were on the road. He totaled the truck in 1993 after he drove it for 104,000 miles. Now he wants to get paid back the $200 that he paid as the compromise to get the truck repainted.

Now the individual issues here are enormous. This Bill Cosby ad, he's the only named plaintiff who said that he saw that. But somewhere along the line a trial, a jury is going to have to determine what the story is with this ad. Was it a misrepresentation?

OWEN: You wouldn't have to have that to recover would you? If you bought a car that was not painted properly and it peels, you wouldn't have to prove that you saw an ad about the paint to recover would you?

LAWYER: Well you have to remember what this case is. It's an implied warranty case. But in his case, the warranty had run out. So therefore after that it's a DTPA case. And one of the claims he's got here is was there a misrepresentation? So he would have to prove that. His alternative is to prove that whether there was a gross disparity between the price he paid for the truck and the value received. Well that's $200 on a $20,000 truck. That's not a huge disparity. That's a very individualized issue with respect to Mr. Shelton.

HANKINSON: As you discuss predominance obviously a related issue is this question of bifurcation and the need for individual trials on various issues. How do you reconcile the language in 42d that talks about the fact that a class action may be maintained with respect to particular issues with Texas law which disfavors piecemeal trials?

LAWYER: I don' think it can be reconciled. And I think that these are the same issues that this court had in *Iley* and *Otis Elevator* earlier. If you look at the issue in *Otis Elevator* they were looking at rule 174b, where the rule specifically authorizes separate trials on separate issues. And in *Otis Elevator* you are looking at Texas rule of appellate procedure 81(b)(1) that says basically the same thing, you can have a separate trial on separate issues.

I think what you have to look at here is what the full 42(d)(1) says, and it talks about when appropriate. And I think this court should not deviate from its prior position about what that means when they are talking about separate issues is separate claims. I can envision circumstances in a case where a class may have a series of different claims, but it may make more sense to go forward with a class trial on one of those claims first because it may obviate the need to even look at the other claims that for whatever reason are more complicated. And I think that's the proper resolution of _____ here.

HANKINSON: Does that mean that in Texas we can never have a class action in which the

liability determinations which are common and do predominate, if we assume that that is shown in connection with the class certification motion that we can never then have the class follow-up proving the amount of damage or making their particular claim? Are you saying that we could never do that in Texas?

LAWYER: Let me indicate what I think the problem is with the kind of trial at least that is being suggested here. I just talked about Mr. Shelton's individual...

HANKINSON: Can you go back and answer my question in terms of if under your interpretation of 42 to reconcile it with Texas law disfavoring piecemeal trials, let's say we could try the warranty claims if could, but not the fraud claim for example. You could divide it that way. But could we ever have a class action though that allowed common issues to be determined for example with respect to liability but then have separate determinations on damage?

LAWYER: I think that would be difficult, but I guess the real question there is why should the class action be different. If there's a principle in Texas that you don't have piecemeal trials to protect the interests of the parties in the case, I don't know why a class action should be different.

HANKINSON: So that really means in Texas we have much less opportunity for class action litigation than perhaps in the federal system because of this limitation?

LAWYER: First of all, I don't agree with the notion that there be radically less. If you look at the trend of federal law it's been decidedly away from those piecemeal trials because of the way they have turned out and the abuses that I think that have been recognized there. But I think the key here is Texas Gov't Code §22.004(a), which says that rules of procedure that are adopted by this court shouldn't change the substantive rights of the parties. And I think what is being said here is that everybody else if these claims are being brought individually there's got to be one single trial. You can't slice it up.

HANKINSON: What if you had one jury? Let's just say that you really did have 12 good citizens in this state who are willing to see this through and you did have common issues at the liability end, would the fact that one jury decided it take care of that problem?

LAWYER: It seems to me that you may lose some of the problems then that you have with a bifurcated trial approach. And if you had a class then reasonably you could expect a jury to sit through thousands of trials, that may obviate some of the problems. But my understanding of Texas jurisprudence is that it's not the one jury problem. Indeed, I think there is some precedence that say that that's not really the issue. It's the fact that you have bifurcated trials.

HANKINSON: But it's not a gasoline product's problem then?

LAWYER: It seems to me that you can - there are circumstances where there may be a

case that is such that you could have one jury do that and perhaps obviate some of the concerns that are raised by the bifurcated trial point.

PHILLIPS: Do you agree that the appropriate standard of review for an appellate court of a class that has been certified by a TC, how much difference should we give to the TC's ruling as modified?

LAWYER: I think that the question in this case is fundamentally an abuse of discretion standard and I think that is met here. Because the rules that are applied here just don't mesh with the facts. And indeed, the rules by the CA to make this fit have been changed radically from the common question definition, predominance definition that has been used by other courts.

HANKINSON: Under the limitations that you are saying need to be applied in interpreting rule 42, are consumer class actions possible in Texas?

LAWYER: Absolutely. I can think of a number or circumstances in which consumer class actions would be readily available.

HANKINSON: Give us an example, please.

LAWYER: An example is if you have a company that has a form contract that is used with individuals, and it says in the contract we'll have a certain charge, and it turns out the charge is in excess of that. It seems to me that in a lot of circumstances you would be able to have a class action in that circumstance.

HANKINSON: But if you had a product that didn't work the way it was supposed to, you couldn't ever have that as a consumer class action?

LAWYER: I don't think that's true. I think you could have a circumstance where you have just a flat nonfunctioning product. The same thing was sold to everybody. The real problem here is there isn't a product. Multiple products were sold here and people are trying to lump all of these into one proceeding and force a jury to give a yes/no answer.

HANKINSON: What if you have one product that's been sold, we don't have the problem that Ford complains about here, and yet the manufacturer comes back and says, Well, the reason why your product doesn't work is because you, class representative, misused your product, and you class representative did something else that's the real cause of the problem. Then under your theory doesn't that defeat the class action again even though we've got one product and one complaint?

LAWYER: I think it depends on whether there is any basis for the misuse statement that was asserted there, but there's no debate in this case that the differentiations that we're talking about comes from the mouth of the plaintiff's experts and I think that's what distinguishes this case.

ABBOTT: Let's assume that there is no class in this case, and that every person who would otherwise be a member of the class nevertheless goes ahead and brings a lawsuit against Ford. Why would that scenario not be more problematic for Ford?

LAWYER: I don't think frankly it would be much a difference there. Because I think with the individual issues that exist in this case, those trials will be fairly complicated as it is, because you are going to have to reintroduce a lot of the evidence in those individual trials that would be in the common issues trial to start with. When we start talking about product variations there, and have to explain why the product is okay because we used a different spice instead of chili powder in there, it's the same old story you are going to have to use in that second trial. So in terms of burden on the Ford...

ENOCH: Not unless you use it in the first trial and then you would be estopped from trying to relitigate as to the same formula, as to the other series of cars.

LAWYER: But that's exactly the point. Then what you've done is you have basically by granting this class certification ruling the court has granted summary judgment on this issue without Ford ever having a chance to get to the jury with it. Because that jury is going to have to say they are all defective or they are all not defective. One or the other. And if the jury in its own head is saying, Well some of them are and some of them aren't. If they say, well they are all fine, they are okay, then there are a lot of class members whose rights have been injured here. And if the opposite is true and they say, Well they are all defective, then Ford's due process rights have been denied. But the point is, right then and there the court by granting the class certification motion has in essence granted summary judgment to one side or the other. We don't know which yet. Because you are never going to get to the jury and have a fully effective presentation of those highly individualized issues...

PHILLIPS: You do admit that there is evidence that a jury could conclude as to however many classes you choose to draw out on however many different products there were, that they were all defective because of this decision. There is some evidence of that.

LAWYER: No, there isn't evidence.

PHILLIPS: The plaintiff, I have not read the record yet, but the respondent has quoted some memos in their brief that will make it appear that at least some people at Ford saw this as a unitary problem throughout all of _____ classes of products?

LAWYER: Two points. If you look at those memos in detail, you see that they deal with certain vehicles within the class. They are not across the board. And the second point is, that plaintiff's expert at least with respect to some vehicles in the class said, that it is not possible for those vehicles to be at risk under plaintiff's defect theory.

PHILLIPS: So you're saying that on the evidence most favorable to the plaintiff there is at least some of these vehicles?

LAWYER: Absolutely, because concessions have come from the mouth of their own expert in that regard.

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RESPONDENT

LAWYER: The first thing that we need to get straight is, there is no evidence in this record that one of these cases has ever been filed in the State of Texas for an individual consumer. And I think that the answer of why they have not been filed in the State of Texas was what Judge Abbott was asking the counsel for the respondent. These are too expensive for an individual consumer to bring on their own. They are too time consuming and the cost is too high.

The courts have said negative value lawsuits where the cost is greater than the recovery are the perfect suits for certification.

GONZALES: But they will still have to bring individual suits?

LAWYER: No. I do not believe there will be. When we look at whether or not there are common questions here, we don't need to go any further than the evidence of how Ford themselves treated this class. Ford, and this is the evidence in this case, and their own record said, All the vehicles in the class, in our class are ones that had the paint primer taken out. Their own record show that. Ford's own records state, that the peeling was caused by the removal of the primer from the paint process. Ford's own records show, to stop the peeling Ford put the primer back into the paint process. When the peeling started and the public saw it, Ford adopted a program called The Owner Dialog Program. That program only applied to vehicles where the primer had been taken out of the paint process. And Ford then would repaint those vehicles. And it didn't matter which plant the vehicle had been manufactured in. It didn't matter what the color of the vehicle was. It didn't matter what the metal on the vehicle was. All of these elements that they say are individual fact issues, and we admit they can be, but when Ford treated this, the evidence is in the record they treated the people we have brought this class action for as a class. That's how Ford treated the program.

OWEN: On page 5 of your brief you give us some statistics. You say that in 1985, for example, 44.9% of the models surveyed peeled. And my first question is, did all of those cars not have primer or is the 44.9, I don't understand what that's a percentage of?

LAWYER: Everyone that Ford was looking at in that survey they specifically pinpointed the cars that did not have primer.

OWEN: So not every car that didn't have the primer peeled?

LAWYER: That is correct.

OWEN: Less than half peeled?

LAWYER: Well at that point in time. And then in Texas where - and that survey is broken down between Dallas, Los Angeles, and I forgot the other city, but Texas had by far the highest peeling rate.

OWEN: Assuming the facts are such that we can't say well but if it doesn't have primer it's going to peel?

LAWYER: No, we are not saying that. We are saying that the likelihood and which is the likelihood Ford found that it was very likely that it was going to peel. And their own record show that when they discovered that and they knew that, they did not tell the public. Their own memo, which is also part of the record is, we don't want the public to know this because if they know it there are going to be more claims.

O'NEILL: But does that create an additional causation problem on these individual damage trials? In other words, at what point do they raise that the use of the vehicle contributed to the paint peeling? Is that another element of causation that's going to be layered on to damages?

LAWYER: I do not believe so because that is real important to how we have pled this case We have pled this case under the DTPA, which is producing cause. We don't have approximate cause here. It doesn't have to be the sole cause. It only has to be a cause. And the claims process is going to knock out any car whose paint did not peel. We propose that in the claims process, which will be merely ministerial, first the jury, and I believe one jury can do this is answer all of the general issues that deal with the common questions. And then after that, we are going to be left with a claims process and we will ask the jury: Do you think the way Ford did this when they made the determination? Ford would roll these vehicles in, they would take out masking tape, they would put it on the hood of the car and then they would peel it away, and if the paint came up with it, Ford said that the reason that the paint came up was because the primer had been left out of the process. We asked the Ford man, "How accurate is that to test that the lack of primer caused the peeling paint?: His response, "Bullet proof." Ask the jury if that is a good way to determine if the peeling paint was caused by the lack of the primer. If the jury says yes, how long does that take in the ministerial process to determine on the peeling car if the lack of paint caused it? Under Ford's own records, two minutes.

So this idea that there is going to be hundreds of thousands of trials is simply a strawman. That's not going to happen.

PHILLIPS: How come Texas as in the GM Sidesaddle case is not in the national class?

LAWYER: Because we don't think that a national class is going to be able to be certified because we think that the law between the 50 states is too diverse and that is exactly what the Louisiana DC found. And we said, We think that if this happens to those counsel, and this is outside the record, you're not going to keep it because fraudulent concealment the way you are pleading it requires the law of all 50 states to be compressed into one jury issue and that is impossible. And that is exactly what the judge in Louisiana said.

PHILLIPS: And why are you suing Leif Johnson and a dealer? Why do all 150,000 purchasers get to sue this one?

LAWYER: Because that was part of the process. In the Owner Dialog Program they would not tell the people what was causing it. In fact, the other evidence is they tell the dealers when you would bring the cars in before the Owner Dialog Program started, and after the Owner Dialog Program started, Dealers you are not to tell them that this is any type of defect and you are first, and we have an affidavit from a Ford employee saying that this was the process, you are to say, You've got to pay for this because it's outside of warranty. Then if they complain loudly enough tell them that we will pay part of it. And if they complain very loudly, then we will pay for all of it. And that is an affidavit from a Ford employee and that went to all the dealers like Leif Johnson and that is exactly what our...

PHILLIPS: Leif Johnson gets sued from people who buy from a Ford dealer in Dallas?

LAWYER: For the class representatives that we have, they bought from Leif Johnson. Two of them bought from Leif Johnson and that was the process that was done there at Leif Johnson.

PHILLIPS: I thought the class defendants were supposed to be somebody that had potential liability to everybody in the class?

LAWYER: These issues will be asked of class reps, but they will bind all the class. And I don't think that Leif Johnson will be responsible to everyone in the class. I think Ford will be.

OWEN: I'm having trouble envisioning why there won't still have to be separate trials. Even your class representatives some of these people don't even have the cars any longer so we can't go do the tape test. And then some of them will have differing measures of damages depending on what kind of condition the car was in and that sort of thing. Won't we still have to have mini trials or short trials, but trials nonetheless on the loss of value?

LAWYER: No, because what we did at the trial court, and this is in the record, is we presented a grid. And we said, If you sold the car and if it had the problem at this point in time on this particular grid with this problem, how much did it reduce the value of the car.

OWEN: But we don't know that in theory. But the person that actually sold the vehicle may not have followed the grid. They may have gotten more or less than the grid.

LAWYER: We're going to look at the pure Blue Book prices because cars are ____ and they do have set prices under the grid.

OWEN: But my point is, some of them have sold their vehicle for more or less than the grid price, so their actual damages will differ from the so-called grid.

LAWYER: But if they did sell it for more than less, then we're not looking at what they sold it for, but what the bad paint reduced the value. And if they sold it for a certain amount...

OWEN: But your grid assumes to say, well your car with a bad paint job is only worth $5200.

LAWYER: The grid says how much off the value of the car the bad paint reduced the sale price for particular vehicles in particular years. So if they sold it for more than they should have, then that will come off of what they sold it. If they sold it for less than they should have, that will be added. But it's not for a particular price.

OWEN: So you're saying they get the damage no matter what they sold their car for?

LAWYER: If they had a bad paint and it was a bad paint because of the peeling paint and they can show that through the claims process, that is correct.

OWEN: Well what about the cars that have been sold and we don't know where they are, we can't do the tape test on?

LAWYER: They are going to fall through the claims process. Many of these people will not survive the claims process. We know that. And they will not be able to get a claim. But this is the only way that they are going to get any recovery at all.

ABBOTT: So under the grid, you've come up with a method of achieving some kind of let's say mathematical certainty as to what the damages are going to be for the class members?

LAWYER: Yes, but the jury has to answer that. The jury has to find that that is a correct way and that that does achieve the damages.

ABBOTT: Assuming that though, actually going to a step before that if the class goes forward, are the potential class members going to see the grid and after seeing that they will choose whether or not they opt in or opt out of the class?

LAWYER: That information will be provided to them when they have a chance to opt in or opt out.

ABBOTT: And for those who opt in they are going to be subject to the grid. If the jury approves the grid, then you just apply the math and everyone knows how much they get?

LAWYER: Yes. And that way you don't have the spectrum of problems. And this is basically the way class consumer actions have been handled in other jurisdictions.

ABBOTT: So the only thing that would cause a deviation from that then would be the extent to which Ford or the other defendants were able to prove that, Well really the problem with so and so's car is that they didn't take care of it.

LAWYER: Then you go back and you look at our particular case. We've got a DTPA case. This isn't a contributory negligence case. All it has to be is a producing cause. And if the person did not take care of it and that resulted in its value being knocked down, that will be already in the price.

OWEN: What do you do with Mr. Shelton for example, he's only out $200, yet your grid may compensate him differently than his $200?

LAWYER: No, he paid the $200 for the paint. And for those people that paid the paint, then you get into subclasses, that will be their damage.

HECHT: _____ certification is tantamount to settlement because trial is not a viable alternative either for the plaintiffs or the defendants, do you agree that if it's not a settlement class at least setting those classes aside, that the viability of trial is an important consideration in class certification or not?

LAWYER: First of all, I think that's pretty antidotal to be honest. I don't know of any hard evidence on that and I've read a lot of this and I've studied it, and I think that people raised that spectrum. But we now know in Texas that class actions are being tried. We've seen them tried. They haven't worked their way up but that is an antidotal. We've had one tried in Corpus and others tried other places.

Now I don't think to be honest that this trial is going to force anybody to do anything except file some certification to file summary judgments and special exceptions, because if some of these people as they say the evidence clearly shows they don't belong in the class, well that's what motions for summary judgment and special exceptions are for. And if the court agrees with that, the court has already granted motions for summary judgment that Ford has filed in certain causes of action. That will take care of many of these problems.

HECHT: I'm not trying to be argumentative. I'm asking in the certification process,

when the trial judge sits down to decide should this be certified or not, should he or she take in to account the viability of an adjudication on the merits? Whether it's by motion or by trial to a jury or however, is that a factor to consider in certification?

LAWYER: I think it is a factor and I'm trying to answer the question.

HECHT: Well you're saying it may not be so hard in many cases, and it may not be, but is that irrelevant to the certification process?

LAWYER: No, I don't think it is. And I think that there was evidence here very clearly in front of the court of how this could be tried as a class. Now it has never been said that at the time of certification that the court has to have a complete trial plan ready. And I think under what we have and what this court has said in *Moriel*, let's be honest as the was in *Moriel*, our trial courts only have so many resources. I think there were 70% of them that y'all stated don't even have secretaries. Less than that have clerks. And to require a TC at that point in time to come up with a complete trial plan, I think starts interfering with the discretion of a TC and it's putting a burden on them that a lot of TC's probably cannot handle. But I think that that is a consideration that should be there. And I think that also asking a TC to do this at that stage ignores how class actions really works, because the class action rule itself states that certification and how a class is certified can be redone, redefined anytime up until the judgment. And there are several factors to consider in the predominance question not just how it's going to be handled. And that also is stated within our rule and the federal rule.

ABBOTT: Let's assume that this class certification is affirmed. Why would that not serve as precedent for the following example, and that would be a situation such as a seatbelt defect case or a crashworthiness case involving a particular make and model of car. Why couldn't we have a class certification for every one of those plaintiffs or potential plaintiffs who were in a crash in one of those kinds of cars certify them for the liability aspect and then ship them back out for the damages phase?

LAWYER: A crashworthiness case involve personal injuries. And that's where the federal courts have said, in fact Texas was ahead of the federal courts on this in the *RSR* case, that personal injuries are so serious and that they are so important to the individual that we're going to hesitate to certify classes involving personal injuries because they are too individualized. Now that is exactly what the federal courts and the cases they cite to you are. Those are all personal injury cases. As Judge Posner said in the _____ case, when you're dealing with a personal injury, you're dealing with something that is totally individualized and is generally a person's health is the most important thing to them in the world and those are not suited for class certification like a property damage case is. And I think that's the difference.

ENOCH: If I understand the posture of this case, the parties are really arguing over the significance of the defective paint. Is that really the significant issue in this or is it not? And Ford of course wants to argue, well they've got different formulas, some were defective because no primer

and others weren't defective and there was no primer. It seems to me that's the argument they are making at least using your expert trying to show that well different formulas operate differently and, therefore, the primer isn't the key issue. Well your point is, the primer is the key issue. Once we get to trying whether or not the primer made the paint defective, once that's over with, is that really all there is to this case other than each individual plaintiff _____ saying, I had a car that didn't have the primer, therefore give me those damages, or is your claim really more like a misrepresentation type claim that says it's not the primer is the key issue here. What is the key issue is, the coverup. And Ford alludes to the fact that well what's really going on here is it may be primer is one of the issues. But what really is going on here is they are arguing we misled the public, we misrepresented the state of the facts, or maybe we had a duty to disclose and failed to disclose and because that requires each plaintiff to demonstrate some representations to them or some duty to tell them, that's how come this can't be a class. It seems to me what you say is a DTPA, but it really isn't the difference in the value of the car they got and what was represented. It really has to do what was the conduct of the seller in selling this car to the consumer and that's where the damages come from and they are saying that's the real issue and it really is individualized.

LAWYER: I think that the lack of the primer as the common defect is a nexus that this whole case revolves around. As their own expert when I took his deposition, Professor Ratliff, I asked him this very question that you just brought up. Assuming that we can prove that Ford knew by a specific date that the absence of spray primer on vehicles caused unusual paint peeling, does that jury question under 17.46(b)(23) would it be the same for every member in the class? Yes. That doesn't change with individuals. That is the same for everyone.

HECHT: There are four parameters on your class definition: model; year; no primer; and who suffered damage. And that's like the MDL class and then the CA added a fifth one: who allege. If the class were to be certified, why shouldn't it be everybody who bought a car or a truck with those models and years without primer, whether they experienced flaking or not, why shouldn't it bind all of those purchasers?

LAWYER: It could and they can request that. And if it does, then all those people that don't have a car with primer and haven't had the peeling are going to fall out. And they will fall out in the claims process.

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REBUTTAL

LAWYER: I have to confess to be a little flabbergasted at the suggestion that all of this can be resolved in one trial, because none of the courts below believe that. If you look at the record in the TC proceeding, the TC said, Once we get beyond the common issues trial, as I as a trial judge see it, the real herculean task, and that was the TC's note, was everything that will come thereafter. And the CA said, that the TC's finding of common issues only through part of the causation element indicates its recognition that there will need to be individual findings on causation and damages.

None of the courts below believe what you are hearing here this morning, and that is, that this whole thing can be decided in one felt swoop.

If you look at pages 2-5 of our opening brief here and really look at the individual claims that are presented here, there is no way that they can be resolved by a single jury in a single proceeding.

ENOCH: Do you agree that if there is a defective paint job on the automobile that it reduces the value of that automobile on the market?

LAWYER: Not necessarily. It depends on whether the market has made the judgment as to whether there is a defective paint job. We've presented evidence in the court below that the blue book value of these vehicles was not diminished. And I suspect that's the reason why Mr. McConnico was saying, Okay we are going to limit this to just vehicles that have peeling. But the key problem with that is and I think the false assumption that's being asserted here and again look at their expert's testimony on it, there's an assumption that if a vehicle peels it's because of this defect theory that plaintiffs are talking about. Their expert said there are a lot of reasons. If you park a vehicle outside of a chemical plant and you don't wash it very frequently, it's going to peel for reasons totally independent of anything without the spray primer.

O'NEILL: Will it respond to the tape test the same way? My understanding is the way they take care of that is the tape test.

LAWYER: Let me explain the tape test here, because this is a redherring in all this. The program Mr. McConnico is referring to, is a program that Ford had started basically to deal with a wide range of issues on these vehicles, on trucks, and those are the vehicles it was used on. Ford had an Owner Dialog Program. They wanted people to bring vehicles in with a whole range of problems.

O'NEILL: Without getting into all of that, if someone drives their car around a chemical plant, I think is one of the examples you used and that affects the paint, will it peel off on the tape?

LAWYER: Yes. What I am saying is that tape test wasn't intended to address this issue. It was a test that they were using if people brought their vehicle in we offered to make repairs to the vehicles. So it could be a whole host of reasons why paint would come off. One of the named main plaintiffs here, our expert looked at the vehicle and concluded that yes he had a paint problem with that vehicle, but it was a result of his parking the vehicle in the hot sun on a summer day and throwing cold water on it which you are told not to do. If you do that frequently enough, you will cause these sorts of problems. That's the myth in all of this, that there are many causes. It's not disputed in the record. Their expert says that. And that's why the courts below were saying you've got to have a separate proceeding to deal with causation issues. That's why they never got to the point that Mr. McConnico is talking about here.

ENOCH: Going back to the central issue. What you're saying is that without primer doesn't make the paint defective?

LAWYER: I am saying that and I am saying that you're going to have different judgments by the jury on that score with respect to different vehicles in the class.

ENOCH: And it's central to this case and as a result because you could get inconsistent decisions by the jury it perhaps is best to try this in one case?

LAWYER: Indeed, I am saying it's a denial of due process to try to try it in one case, because the jury may conclude...

ENOCH: I don't understand. How can - it seems to me it's just a matter of timing. It's not a matter of either the paint formula does something different because there is primer or isn't primer, or it doesn't. And it seems to me your argument about being around a chemical plant, being out in the hot sun, water either primer contributes to it or doesn't contribute to it.

LAWYER: Absolutely. And I think what I am saying in those cases is those instances would have occurred whether it was primer on the vehicle or not. If that's your point, that's it. Paint peels on vehicles that have spray primer.

ENOCH: Exactly. And so the question is, in each of these cases, whether or not the lack of a primer leads to a defective paint job?

LAWYER: And what I am saying is that's a determination that needs to be made individually, because in a case where the conclusion of the jury is this vehicle would have peeled whether it was spray primer or not...

ENOCH: That seems like that's a causation issue. That's not a product defect issue.

LAWYER: And it's got to be determined individually.