ORAL ARGUMENT – 03/21/01
00-0710
MCALLEN MEDICAL CTR V. CORTEZ

HUGHES: This case arises out of a situation in which the hospital was caught in a crossfire between competing and rival groups to gain control over what they thought was a wealth of personal injury cases, and the key to that wealth was the list of our patients, which is confidential.

O'NEILL: Can't hear question very good.

HUGHES: Well two things. First, I think under the authorities whether the certification and standing has to be ____ by the record at the time the TC ruled. But going one step further, we lost on that question. The claims against Dr. Bracamontes form a subset of the claims the other plaintiffs are asserting against the hospital.

And so literally - I mean if you take it one step further and if the trial judge were to say now, Well settlement class based on the evidence before me, I certified a settlement class and forced you to settle with Dr. Bracamontes for nothing. And now when I get around and I hold another class hearing put forward by the new claimants who are asserting many of the same things that you are asserting (because it's the same class - it's the class of all cardiac patients during that period), ghee, it turns out on the same sort of allegations, particularly the ones Dr. Bracamontes you're not no certifiable. In some sense that causes the whole thing to unravel.

O'NEILL: What gives you standing? It appears to me based on the first two petitions in the case was that the allegations were the same as to you and Dr. Bracamontes and that therefore the same considerations would go into the class certification question, therefore, you had a _____. Those claims seem very, very different now, and how do we deal with that? Sure we could rule your way and say that the court erred in not considering all of the certifications _____. Where does that leave us with a 4th(?) amended petition?

HUGHES: The first thing is, is that was one our grounds for certification that the conclusion of law that this wouldn't carryover was incorrect especially after Amchen. And I think after Amchen there has to be some carryover effect. But it went further than that. It was how the certification process was about to be used.

O'NEILL: But even if everything you say is true, what can we do about it?

HUGHES: For one thing, to decertify which would have the effect of putting an end to all of this. I mean, the TC has continuing power to regulate all these - based on its earlier _____ issue more notices of the same kind. They could correct. I mean that was part of the thing they said - Well what can we do about the notice? Well we can correct the notices. Order corrections to be postponed. Put out to the class members. And the second thing is is that this agreement is approved under the terms of Dr. Bracamontes' agreement his obligations to cooperate go on forever. They survive the judgment. And in effect, - I mean if I recall the terms of the settlement agreement even once it's severed out and put into a new cause number, the TC retains jurisdiction to enforce the settlement. And so he can be called upon to cooperate and provide the information we're talking about even after there is what went up here to be an otherwise final judgment. And at that point, they may call upon and say well now we would like that list.

O'NEILL: I understand that _____ is strategy. I'm not sure strategy is what gives you standing. I'm having a hard time determining based on the posture of the

pleadings right now how you have standing to say that you are injured in a way to give you standing _____.

HUGHES: The standing first arose that this agreement that he has has a tendency to put financial pressure on him to disregard his duty to protect confidential information.

O'NEILL: But the agreement reached with Dr. Bracamontes said that he will only give information _____.

HUGHES: That's paragraph 15. And paragraph 16 is the one that states that he is to cooperate by providing names of all witnesses who have knowledge. And that contains no such limitation. Second, the problem here is not just the agreement. It's so to speak how it's to be implemented. As we've already seen, the other agreement was implemented in a way in which the information was turned over despite the privilege. There are all sorts of ways and we seem to get around to these problems. His duty to cooperate is to do so informally when called upon. Both paragraphs are quite clear. They don't have to send him request for interrogatories. They don't have to send him request for production. They only have to call him up on the phone or send a letter. And it's at that point, the doctor has to make a decision.

Now what if that decision comes at the point when the judgments gone by or it comes next week or in two months and Dr. Bracamontes says - or let's say after the settlement has been approved, he doesn't have counsel anymore. He decides he didn't even want to talk to his counsel. He just gets a phone call now that he's unrepresented and says, you've got to cooperate. I want the list.

Well how do we at that point protect? I mean he's still obligated by the agreement. The agreement puts the pressure on him

ENOCH: Let's assume the hospital was never sued. Bracamontes is being sued for having misrepresented that he is board certified, and the people want to certify a class: anybody he has served on and they want him to produce a list of all patients that I guess he served. Now can the hospital come running into the court and say I have standing to appeal the TC's direction to the doctor to do this, because we don't want the doctor to violate the law? I mean is that what this whole argument is about?

HUGHES: That's the inception of the argument. If the agreement is that he is going to turn over confidential information...

ENOCH: So the hospital is not subject to any sort of order to provide any information - I mean they haven't been ordered by the TC to provide any information or do anything at all?

HUGHES: Well we were ordered in one sense, because we were ordered to send out the notice, which made us use the list. We have to basically stuff the envelopes and address them ourselves. But we had to use the list which we think was a violation of the privilege.

But the answer is - I mean to take your hypothetical and if it were a separate lawsuit, I think if the hospital would have standing on behalf of the patients, then I think it does to say this agreement is improper because it violates the doctor's obligations to his patients and if as they say the hospital were able or under the circumstances the court were to conclude that the doctor is legally liable for the doctor's behavior and has some responsibility if the turnover were

improper, I think in that case they would have standing to contest the agreement's fairness.

ENOCH: So your only argument to us really is that you're here with standing because the hospital has the authority to protect individual patients from having their names disclosed by that doctor over there who is the real defendant?

HUGHES: That's the first key to the standing. Yes. And that if the statutes give us both the ability to stand in for the patients and say you can't - these are our patients too and you can't violate their privacy, or for some reason we could be held responsible legally, then that as well. But also there is one step further. If the ultimate goal of this...

ENOCH: You're not arguing that the TC has ordered you to do something that your legally responsible - that they you can be legally liable or because - you're not arguing the judge has ordered you to produce any of this information. You're just arguing that if that doctor over there violates the law, then you have standing to argue on behalf of the patients that he should not be allowed to do so?

HUGHES: Yes. And the other sense in some cases, maybe not in our case, but in some case the hospital may be responsible. But the second thing of it is...

ENOCH: But you're not arguing that you're responsible here?

HUGHES: Well the hospital is not his employer. One of the new defendants does have an employment relationship with him. The McAllen Medical Center physician group is a non-profit and there is an employment contract between the nonprofit and Dr. Bracamontes.

ENOCH: But you're not arguing that the hospital here has some sort of ultimate responsibility if that doctor honors the TC order?

HUGHES: No. I mean they have alleged that we are - that the hospital, McAllen Medical Center is the employer. We disagree. And that remains to be proven. But at this point, no, we don't agree that we're the employer. But the second thing is, is not just that if the whole process is to stir up cases against us, and they have - I mean at this point they really have sued us. I think that's a positive injury. I mean that's what was talked about in Bernal is about the danger of using the class certification process and cutting corners to allow the unfair aggregation of claims to injured defendants who may have little or no responsibility that the people whose claims are being aggregated against them.

ABBOTT: A class of plaintiffs who are going to pick on two defendants, and with regard to defendant one the goal is to have a class action lawsuit. With regard to defendant two, for whatever reason, they are going to cut that person out of the class action lawsuit, but nevertheless, attempt to maintain legal action against them on a nonclass basis. When it comes to the class certification with regard to the plaintiffs and their relationship with defendant one, and defendant one objects to that class certification, does defendant two who is not going to be a part of that class action have any ability under your theory to intervene with regard to the class certification, or to object to it?

HUGHES: If they don't intend to certify a class against defendant two, and have no intent to, I would ordinarily say no unless they were going to use the process of certification and some way injure that party.

ABBOTT: Let's assume that they are obviously going to gain benefits to the class certification process, gaining access to an abundance of more plaintiffs or potential plaintiffs. Even if that's true how is it that defendant two has standing to participate in objecting to the class certification, and then if it is certified have standing to appeal the certification?

HUGHES: If the intent of the first certification is to go out and solicit claims against the second defendant, and you could do that by using the class notice, the official class notice, then I think that defendant does, because the plaintiffs are asking the court to take an action and basically to put the court's _____ on using the notice..

ABBOTT: What's the legal basis for your conclusion?

HUGHES: Frankly at this point, this is a first impression on that point except that there are numerous cases which talk - I mean in the federal system they are mostly DC cases. They talk about it is totally improper to allow the class notice procedure or the class certification procedure to be used as an opportunity to drum up either participation in the case or to solicit individual cases. They were cited in the latter part of the brief, such as the _____ case, the Shell Oil case, and a few of the other ones. That is _____ of certification.

PHILLIPS: Who gets to complain about that?

HUGHES: Well I imagine the defendant who is being drummed up against. In each of those cases that I cite in the brief, they were contested hearings. And they were usually instigated by the defendant.

PHILLIPS: Who was the class certification party?

HUGHES: In most of these cases the class had already been certified or it was about to be certified. In the Shell Oil case out of Louisiana, and they were allowed to complain that that's how it's being used. Now in that case, the court took other measures having to do with well this is then how we are going to certify, or this is the kind of notice or that counsel doesn't get to be class counsel. But they did get to complain. And that I guess is the injury.

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RESPONDENT

BRIN: I'm going to restrict my comments with the court's permission to the issue of standing in this case. And more particularly, to the subissue of the alleged collusiveness of this settlement, which appears to be at least to some extent part and parcel of the petitioner's claim for standing to attack it.

The tone of petitioner's argument appears to be that notwithstanding its terms, which the court has pointed out obligate Dr. Bracamontes to furnish only that information to which the plaintiffs are entitled under the law, that notwithstanding those terms it must be collusive, because it does not provide for the payment of money on behalf of Dr. Bracamontes in exchange for his release from this class action.

There is absolutely no evidence in this record of any collusion that Dr. Bracamontes has acted or intends to act in anyway contrary to the terms of this settlement agreement.

O'NEILL: But that's not for us to determine is it? I mean we're not going to

decide in anyway in this decision whether the settlement was collusive or not. That's a _____.

BRIN: I believe that the petitioners are grounding their standing, their claim of standing at least in some portions of their brief on the fact that this is a collusive settlement and by virtue of its collusive nature, they have standing...

PHILLIPS: But you're not contending this settlement is an _____ of itself, that the plaintiffs all got together and they worked up a class and they sent somebody for no money damages and now they are going to go home. I mean it's a building block to something else isn't it?

BRIN: I don't believe it is. Certainly I have not seen evidence of that. I believe what happened here is that Dr. Francisco Bracamontes was pulled into a fight with this class action that was never his. And that this realization came to the plaintiffs...

BAKER: Well who pulled him in, the plaintiff?

BRIN: Yes.

ENOCH: But they don't need to certify a class to get him out would they?

BRIN: My understanding is that in order for there to be a settlement there has to be approval of that settlement by the court in a fairness hearing.

ENOCH: You mean if the class is certified?

BRIN: If the class is certified. And I think...

HANKINSON: If there's not really a claim against him and there's not any money changing hands, why can't he just be nonsuited? Can't the putative class representatives nonsuit him?

BRIN: That would be my preference in the matter. But what we have at this point is this settlement that requires his cooperation, which I suppose could be said to be some quid pro quo. My point that I'm making to the court is there is nothing elicit about the cooperation at least that I contemplated...

BAKER: Let's say we agree with that and the other issue that I thought they were raising is is because they were originally sued along with the doctor on the basis that there were misrepresentations about certification qualifications, and that they did it together and that whoever this unknown class was suffered injuries. So their argument is at the time this case started we were there as a defendant facing possible damages along with the doctor. And so we have standing to talk about and to contest the nature of the certification order because they are going ahead over on this path without us but we can suffer injuries. And you're saying no standing, so you can't complain.

BRIN: That's correct.

BAKER: What's wrong with that argument?

BRIN: In my mind, many times plaintiffs sue defendants asserting liability

on the same grounds. And many times one or more of those defendants settles the case with the plaintiff for reasons that...

BAKER: Yeah, but that's a little easier said than done than when you're doing class actions.

BRIN: I understand. But at the root of the contention however here is that this settlement should not be certified.

BAKER: No, the settlement hadn't even been reached yet if I understand the record. There has been no hearing that this is a fair settlement and the TC's going to approve it so they can go to a judgment. All that's been certified is yes we're going to have a class. That it just includes the doctor's patients, and we're going to go that way, and there is a settlement in the works and it will be approved later on. Isn't that correct what the record shows?

BRIN: I think that's a correct statement, but I also believe that at the heart of petitioner's petition in this case is their right to contest certification of this class for purposes of settling. And we believe that - this is not our fight. It became obvious very early on that Dr. Bracamontes made none of these misrepresentations that they are contending as the basis of their class action. The other basis for their class action is that the hospital overcharged for services. That's not Dr. Bracamontes's fight. And finally, and I think of some importance to our position here, the contention that the hospital should have purchased a _____vintricular assist device...

BAKER: If it's as you say that the doctor made no representation and injured nobody it seems to me he should have been the one that would be nonsuited and you go for a class against the hospital. But you're going the other way. It doesn't make any sense. Why shouldn't they have the right to say there is something that's amiss vis-a-vis certifying a class under the rule when you can't show damages?

BRIN: All I can say is that there is nothing in this record to suggest that this settlement is any different from any other settlement where a settling defendant pays cash to settle a case. There is no evidence, no suggestion that Dr. Bracamontes has done anything that is illicit or collusive or that he has any intention to.

BAKER: What is the definition of class that you're asking the court to uphold as certified as against Dr. Bracamontes?

BRIN: Those members of the class that asserted causes of action against him and wish now to abandon.

* * *

CADDELL: I think there's several interesting questions presented to the court, and I know the court has a continuing interest in class action procedure. One question that I hear this morning that frankly I had not anticipated or have really not thought about is the issue of when you have multiple defendants and a settlement is reached with one of those defendants, and that would necessitate class certification in order for that settlement to achieve the global piece that the defendant would want, does that certification process create standing for another similarly situated defendant.

Now I'm not sure given the current state of the pleadings that this is

the case in which that decision should be made or that determination should be made. I think it's an interesting question. And it may very well be that the cause of AMCHEM, Bloyed, Bernal and other cases of this court and others, other decisions, that as we I think raise the bar on class certification, that if you do have an identical case if the claims are identical against multiple defendants, there may be an argument in fact that if you have a class certification proceeding against one defendant even in the settlement context that another defendant who would be similarly situated might have standing to appear and participate in that class certification proceeding because of the potential prejudice that class certification might create for that similarly situated defendant.

ENOCH: You're certifying a class in order to have a settlement against the doctor. The putative class representatives now admit they have no cause of action against. Now if that were really the case wouldn't the global class you're talking about _____ include everybody in the world? I mean they claim he made no representations. He made no misrepresentations. He didn't do anything that we claim that he did. How would you ever define a class? A class that was his patient or a class that he did business with, or a class - it's hard for me to certify a class to settle it when the putative plaintiffs are arguing he didn't breach any duty to them that they claim that he owed to them.

CADDELL: I would refer you to the settlement agreement itself. I think there's been a slight misunderstanding created by Mr. Brin. We do not concede that Dr. Bracamontes has no liability for the misrepresentations made to the class. Nor do we concede that he has no liability for overcharges that might have been connected with those misrepresentations. And in fact, the settlement agreement in the preamble recites that the class is not giving that up and does assert those claims just as it recites that Dr. Bracamontes contests those claims, and by entering into the settlement is not conceding liability. So it's pretty much like a plain vanilla settlement that you would see in many cases. And we reserve our rights and the settling defendant reserves its right, but we agree to compromise those claims in the settlement.

HECHT: But if there were significant claims, they wouldn't be approved at the fairness hearing.

CADDELL: I disagree.

HECHT: You couldn't give up significant claims for nothing and have the TC approve that on behalf of the class.

CADDELL: I respectfully disagree, and in fact, I do it all the time. When we have a defendant who has no money, who has no insurance and who has no prospect of getting money or insurance then in fact we often settle with those defendants for things that are other than money. Now in the case of Dr. Bracamontes we investigated his assets. Had we ever reached a fairness hearing, in fact it will be incumbent on us to demonstrate to the court and to the class that we've done our due diligence in investigating his assets, in investigating his insurance and responsiveness of his insurance to these claims. And also to demonstrate to the class and the court the quid pro quo that we received in exchange for the settlement. His cooperation is important.

One thing that Mr. Brin did not mention, Dr. Bracamontes is a Mexican National. He freely comes and goes, and in fact, he has some family in Mexico. Now we have a concern in a case like that that someone in fact like Dr. Bracamontes might go back to Mexico and not return to the State of Texas. We have no control over him. We have no process that would force him to appear at trial absent the settlement agreement which requires his cooperation.

I think the court should dismiss the appeal as being without jurisdiction. I don't think there is conflicts jurisdiction in the true sense of the word as I read the court's opinions.

O'NEILL: We do have the _____ to determine whether the CA properly exercised its jurisdiction, and the CA determined it was _____ because certification issues would be decided _____. So we can reach the question in evaluating whether the CA properly evaluated _____.

CADDELL: I think your question raises three important issues. The first issue is, was there in fact a class certification proceeding in the TC below; and was that subject to revisiting a fairness hearing in accordance with Bloyed. And I think if the court looks at both the record, and I might cite the court to pages 8, 17, 29 of the June 8 transcript on class certification where it states: the class should be certified temporarily for purposes of evaluating the settlement. All we are asking for today is preliminary approval, not final approval. The court is not bound in anyway to give final approval to a class certification order.

I think the standard under which you evaluate that class certification will be different. Unless this court wants to overrule its opinion in Bloyed, the procedure that's been set up and been followed and was approved explicitly in Bloyed...

HECHT: That was before Amchen and Ortiz.

CADDELL: Amchen and Ortiz, and I don't think that this point is at all at odds with what happened in Amchen. The issue is not, in the settlement class context, whether a settlement class must meet the standards of either rule 42 or rule 23 under the federal procedure, but when does that occur. And in the context of a settlement class what this court said in Bloyed, and what I believe is correct procedure in the federal courts today is that the preliminary class certification is done and it must meet similar to preliminary approval of a class settlement. It must be within a range. It must appear to the court based on in this case the court had affidavits of the class representative, affidavits of class counsel. It also had the petition. It had a settlement agreement. I think the first issue is does it meet the smell test?

HANKINSON: Under those circumstances if you're talking about affidavit proof to support a preliminary certification decision as opposed to the full blown evidentiary record that may be required to _____ the actual certification or later certification, on what basis would a court review that decision for the proper exercise of discretion? Does this mean that there would be no review of such decisions by appellate courts that it is essentially it is unreviewable because as long as you put something before the TC you get your class preliminary certified and we can wait later and actually have certification proceedings in connection with the fairness hearing?

CADDELL: You answer your own question, I think, when you say as long as something is put in front of the TC. I mean, I think something has to be put in front of the TC. You have to meet as I said a minimum standard. You have to have affidavits. The case law in Texas is, you can certify on the petition.

HANKINSON: And my question to is, what is it that must be put before the TC and how does an appellate court review that?

CADDELL: I think that's an important issue. In my opinion, it is important that the TC see not more than just the petition. In this case, the court did see affidavits of not only the

class representative, but also affidavits of class counsel. There was the petition before the court. There was the settlement agreement before the court. There was in fact a hearing conducted on the 8th and there were 3 days given for MMC to file objections, and the court did have an opportunity to consider those objections before issuing its order on the 11th.

Now, the order itself is preliminary however.

BAKER: What do you think is the criteria that establishes the right of the TC to grant a preliminary order? What does the party or a group have to show?

CADDELL: I think that the court has to based on a review of the affidavits and the evidence submitted...

BAKER: What about applying the criteria of rule 42 to this request to preliminarily certify a class. Shouldn't that order meet all those requirements even if it's supposed to be a settlement class?

CADDELL: If the court wants to overrule Bloyed, the court can decide to do that.

BAKER: Well tell me why you think Bloyed can get where it got without having that rule 42?

CADDELL: Let me read to you Bloyed, and the opinion from the court. First, the court cited with approval Newburg(?). The actual class ruling is deferred in settlement class actions until after hearing on the settlement approval following notice to the class.

O'NEILL: But that's not what happened here. They certified the _____ and Bloyed says the TC must assume its role as guardian of the class, not only in a _____ class settlement, but also in deciding whether to certify a class in the first place.

CADDELL: In fact, what was done was a temporary class or a preliminary class was certified solely to give notice to the class.

O'NEILL: I'm having a hard time following that reasoning, because there is no such thing as preliminary. It was certified, notice went out, and it is appealable.

CADDELL: Then I guess my question to you Justice O'Neill is how do you give notice to a class unless a class has been certified? Now what Newburg says and what Bloyed says, and again, let me read. This court said in citing Newburg with approval, the actual class ruling is deferred in settlement class actions until after hearing on the settlement approval following notice to the class.

Now how do you give notice to the class without certifying the class?

O'NEILL: How do you preliminarily certify them without stringently meeting the requirement of rule 43?

CADDELL: How do you preliminarily approve a settlement agreement? I think the point is this. In the settlement context, and again what the court said in Bloyed is, we think that a preliminary hearing with the opportunity for questioning by the court and vigorous cross-examination by counsel representing objecting class members should be the general rule. In

conducting a preliminary hearing on a proposed class action settlement, the TC must resolve two primary issues. One, whether to certify the class under rule 42 meeting the requirements of rule 42; and 2, whether the settlement is fair, adequate and reasonable applying for considering the six _____ factors.

HANKINSON: If we look at the record that was before the TC at the point in time it issued its preliminary certification order, is it your position that we could determine applying the requirements of rule 42 that the TC did not abuse its discretion in certifying a class based on the record before it? If we apply the ususal rule 42 standards under the law that exist, did the TC abuse its discretion certifying that class?

CADDELL: I think it did not in the context of a settlement class in Bloyed.

HANKINSON: I just want to talk generally. I'm not talking about in the context of a settlement class. Under rule 42 did the TC abuse its discretion in certifying the class based on the record before it?

CADDELL: I don't believe so.

HANKINSON: Why not?

CADDELL: I believe that it had the requisite evidence in front of it to determine that the class met the numerosity, commonality and typicality requirements and the adequacy requirements of rule 42. But, the point is do you want to have - and again, the court can do this - you can make new law. If you want to you can say we're going to require a full blown class certification hearing at the preliminary approval stage before notice goes out to the class. Now what you sacrifice by that is, you elevate the position of someone like MMC who has no standing, I believe, is not a class member, is not a settling defendant, you elevate them into a position that is superior to that of class members.

HANKINSON: All I'm trying to determine is you're asking us to follow Bloyed in a way that says this kind of procedure in this case is acceptable. And I'm asking you what is a class lawyer supposed to give to a trial judge and what standard is a trial judge to review in order to determine that yes it's okay to preliminary certify a class when all we have is rule 42, and we do have law applying rule 42 to determine whether or not there's sufficiency. What does - I mean you're saying yes you should be able to do this and hear all these good reasons, but I'm asking you what it looks like and what standard is to be followed by a TC's making this determination and what standards are appellate courts supposed to use in reviewing it?

CADDELL: And I think the standards are the standards that the court has set in the past for those type of proceedings. This court - Judge App_____ did not do this in Hidalgo county. This court has set up a two track process for class certification and that process is dependent on whether or not there is a settlement. Now again, the court doesn't have to do that if it doesn't want to. Newburg suggests that that is the appropriate way to go forward. I would suggest that also is the appropriate way to go forward. The reason for that is this...

ENOCH: It may be the appropriate way to go forward, but because the TC can at anytime decertify a class after it's certified a class, I'm not sure I see any difference between whether there's a certification for the purposes of notice for settlement and certification for the purposes of a full blown class action lawsuit. In terms of - the effect is that even though there is an interim appeal on the certification, and the CA says that that's fine, the TC because of subsequent

evidence could always determine not to - it would not inconsistent for Bloyed to say well make the preliminary determination by class, send out the notice, but the TC still must in the fairness hearing take into consideration the _____ of the class.

CADDELL: And I don't disagree with that as a general statement. But this court in other opinions has noted that once you go through a class certification process there is a presumption created. And so the issue I think for the court is, in the interest of achieving the best decision on class certification at what point in that process do you want to have a full blown class certification hearing. Do you want to have it at the preliminary stage when you've got a settlement, and before you give a notice to the class so that no class member has an opportunity to appear and participate because they won't know about it except for the class representative who presumably is in favor of the settlement. Or in a settlement context, do you want to have a preliminary class certification for purposes of giving notice so that then you can have a full blown class certification hearing where these issues can be joined by both proponents and opponents of the settlement. And that, I think, gives rise to the best decision making on class certification.

This is the way it works, and this is the way Bloyed set it out for this to work and this is what happened in Hidalgo county. And if you read the record at the transcript that I have identified, the court made it very clear this was preliminary approval for notice only. And there was going to be a full blown class certification hearing at which point all of these issues would have to be addressed. And that would be in accordance with Bloyed. And that would be after notice of the class. Again, the question is shouldn't we give class members the opportunity to appear.

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REBUTTAL

HUGHES: I wanted to address two points. The first one is about the fairness hearing that is yet to come. First, unless somebody says we have standing, we won't get to participate. Because the way the order is written only people who make objections can participate, and it defines those people as class members, the people who file the objections. But there will also be a spill over. Before any claimants who are only suing the hospital allege about 3-4 basic claims. But one of the claims those four people are alleging is that Dr. Bracamontes was not board certified. They and their class they want to represent should have been told, and they weren't told. That's one of the class. Yea, there's the thing about the equipment. Yes there is the corporate practice of medicine, but at least 25 or 30% of their allegations focus on Dr. Bracamontes' lack of certification and whether that should have been told.

Now that's exactly what the court will review at the fairness hearing. And if the court at that hearing concludes that those claims are cohesive enough to warrant certification under B(3), that's got to carryover to the next hearing, because how can you tell the settlement class those allegations will form the basis of a certifiable class and then turn around and tell essentially the same group but over in this class with these people who are raising the same allegations among others, you aren't. That just won't fly.

ENOCH: If I understand Mr. Caddell's argument on one aspect for a settlement class this is going to settle the case, and this is going to be the end of it as opposed to trying the lawsuit and the jury making findings of facts and the TC providing the judgment on that at the other end. A settlement has sort of an implication of ad litems looking out for the interest of the settling parties. Mr. Caddell raised this spector that maybe there's a reason for having a preliminary certification class without a full blown hearing that generates this class for the purposes of a notice with the idea that the class certification actually occur after the notice, and therefore, you have this

aspect of perspective class members actually having an opportunity to participate in the class action certification hearing. Is that a reason why this might be a premature appeal because you really haven't had the class action certification hearing yet?

HUGHES: No. And I think the answer to it is sort of historical - what you get if you do read _____. The first one was, that before the 1990's courts didn't even think you could have tentative settlement classes. And so they sent the notices out before they certified and the certification would take place at the hearing. The idea of a tentative preliminary certification came after some people saying well we think you can actually have these _____. And so there was originally a time when courts would just send out the notice: we're going to have a certification hearing class members to conclude this settlement, and we're going to take both issues up.

So in other words, there is no logical legal. It's the reason why you certify the class when you send out the notice about the fairness hearing where we're going to take the whole thing up. It's largely historical. But it has acquired a significance which I would like to point out here. And that is the power that certification is to the TC and the class representative. The reason why I think tentative class certifications have become popular, and I use that word guardedly, is that it gives the court and the class rep tremendous powers to shut down rival litigation. The court _____ the power to regulate the defendant's communications with the class. He no longer can put notices in the paper or talk to them willy nilly. It requires the same powers to shut down rivals from doing that. As we saw in the St. Louis Railway case, they can even issue injunctions as part of preliminary certifications to order class members to stop their litigation in their tracks.

While that wasn't done in this case, I think what that counsels is is that if you're going to do preliminary certification to give the court, to give the class rep these powers and assume control over the class, then the same standards to guard the class against abuse at later steps or addition apply at that point as well.