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In the
Supreme Court of Texas

ALFORD-CHEVROLET-GEO ET AL,

Petitioners,

v.

JETT JONES AND ENVO-TECH, INC.,

Respondents.

On Petition for Review from the
Sixth Court of Appeals, Texarkana, Texas

BRIEF OF *AMICUS CURIAE* TEXANS FOR LAWSUIT REFORM

IN SUPPORT OF PETITIONERS' MOTION FOR REHEARING

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TEXANS FOR LAWSUIT REFORM

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DISCLOSURE REGARDING *AMICUS CURIAE*

This brief is filed in support of the petitioners by Texans for Lawsuit Reform, which paid all fees and expenses for preparation of this brief. TLR is a bipartisan coalition of companies and individuals dedicated to the reform of the civil justice system in Texas.

TO THE HONORABLE SUPREME COURT OF TEXAS:

This brief is tendered by Texans for Lawsuit Reform ("TLR") in support of Petitioners' motions for rehearing in *Alford Chevrolet-Geo v. Murphy*, Case No. 03-0043, and *Alford Chevrolet-Geo v. Jones,* Case No. 03-0044, and urging that this Court accept the petitions for review and reverse the court of appeals' decisions in those two cases. *See Alford Chevrolet-Geo v. Jones*, 91 S.W.3d 396 (Tex. App.—Texarkana 2002); *Alford Chevrolet-Geo v. Murphy,* 2002 WL 31398487 (Tex. App.—Texarkana Oct. 25, 2002).

INTRODUCTION

In the past few years, this Court's well-reasoned opinions have corrected many inequities in class action litigation in Texas. By recently granting this Court jurisdiction of appeals from trial court certification orders, the Texas Legislature expressed its desire that this Court exercise jurisdiction to review class certification orders and correct the well-known abuses of that process. This Court should heed that mandate by exercising its jurisdiction whenever presented with a class certification as clearly erroneous as the one in this case. Indeed, failing to grant review in this case promises to undermine *Southwestern Refining Co. v. Bernal*, 22

S.W.3d 425 (Tex. 2000) and could give rise to a new round of giveaway certification of abusive class actions. The basis for this statement is extensively and well argued in the numerous briefs already on file by Petitioner and other amici curiae. Rather than take this Court's time by retracing ground already capably briefed by others, TLR is limiting this brief to the most egregious error in this certification appeal: the issue of reliance.

A. Auto Sales Practices Defy Conventional Pricing Assumptions

We may not like it much, but automobile sales have traditionally been conducted in an atmosphere more akin to third-world bazaar haggling than to normal business. "Owner has brain damage", for example, was the proud claim of one Houston car dealer for many years. The market seems to be in a constant tumult of "unbelievable discounts", "clearances", "overstocked models", and "everything must go!" attractions. Dealerships hire blimp-sized inflatable King Kong balloons to symbolize the "giant price cuts" available to buyers lucky enough to be in the market for a car. All dealers do not engage in bizarre sales tactics, of course, but the obscurity of automobile pricing is common knowledge.

Against the background of a market dominated by opaque, ad hoc pricing, the district court of Marion County and the Texarkana Court of Appeals implausibly claim to have discovered one uniform, objective and universal "thread of deception" foisted by all sellers on all buyers. This discovery supposedly is so clear that the defendants are not going to have a shot at disproving the claim on a case-by-case basis. The story goes like this: (a) every single automobile sales transaction since 1994 must have been constructed by the dealer first establishing a "top line" price which it then, in every case, bloated by the addition of a vehicle inventory tax; (b) every one of these millions of consumers must have been gulled into believing that the inventory tax was, like a sales tax, something he or she had no choice about paying; and (c) it is reasonable to conclude that each of these millions of consumers relied on the dealers' deception in deciding to buy their cars. While all three of these premises are dubious on their face, the third is demonstrably false.

B. The Impossibility of Showing Reliance on a Class Basis

As a matter of law and logic, the following kinds of buyers cannot be treated as acting in reliance on anything done by Texas car dealers in connection with vehicle inventory tax.

1. *Buyers Who Negotiate For a Flat Amount Down and Fixed Monthly Payments.* We may fairly doubt whether this type of buyer is negotiating effectively for the lowest price, but this choice is nevertheless made by many of the millions of car buyers in the purported consumer class. This buyer fixes two variables in the price equation and all other numbers vary to meet those fixed values. Given the down payment and monthly installment amounts, the dealer than cranks in the interest rate, the number of payments and, through a process of accounting iteration, arrives at a final all-in price to the consumer which includes any cash rebates and incentive allowances as well as sales tax, title, license, vehicle inventory tax, dealer preparation, documentation charge and every other kitchen sink add-on it cares to—none of which make the slightest difference to the buyer whose negotiation objectives were limited to a fixed amount down and set monthly payments.

2. *The "Drive-Out Price" Buyer*. This buyer may intend to finance with a bank rather than the dealer, or may simply be paying cash. Rather than bothering with hype and loopy sales dynamics, this buyer shops for a total price and lets the dealer add it up round or flat. This buyer, like the installment buyer, wants to know what the total dollar amount will be in

order to drive the car out fully paid for. Like the installment buyer, there is no reason to assume that this buyer cares how the dealer allocates the components of the drive-out price. Drive-out price buyers may also be comparison shopping—which demands a clearly defined price for comparison purposes, as may also be true for the down-payment-plus-fixed-installments buyer.

3. *The Research-Oriented Car Buyer*. This consumer is probably put off by auto sales showmanship and knows how to avoid it: research the subject and find out what the dealer's real bottom line cost is, then negotiate from there. Some version of this approach is easily available to anyone with access to a bookstore or computer.

On the internet, for example, a member of Consumers Union would simply log on to Consumer Reports online,[1] click "Autos" and read the comprehensive information presented. One segment, for example, is entitled "Buying a new car: 5 steps to getting the best price." This includes precise information as to how to determine the dealer's wholesale price, including the dollar effect of such arcane pricing layers as rebates, unadvertised dealer incentives, and holdbacks. Part of the service offered by this leading consumer publication includes a custom

[1] http://www.consumerreports.org

pricing report for whatever car the consumer specifies, including its specific options down to the last floor mat, pinstripe and transportation charge.[2] For pricing assistance, Consumer's Union also recommends the online pricing services Kelley Blue Book,[3] and Edmunds.[4] Amazon.com lists a half dozen consumer guides with titles like *What Car Dealers Don't Want You To Know*. For non-computer consumers, Edmunds has also for many years published printed pricing guidebooks available at bookstores, currently called the *Edmunds.Com 2004 New Cars & Trucks Buyer's Guide.*

The object of the research-oriented buyer is to identify the dealer's cost, add a negotiated margin, and buy the car. The Texarkana court's reasoning makes no sense when applied to a research-oriented buyer: why would anyone think such a buyer would bother to identify all of the dealer's costs only to allow insertion of an unexplained tax to the final tally? Indeed, because the inventory tax is an actual per-unit cost of doing

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[2] For example, Consumer Reports summarizes its lengthy analysis as follows:
"Every New Car Price Report includes the CR Wholesale Price for that model, which helps you set a target price for your negotiations. The CR Wholesale Price combines the dealer-invoice price and any national consumer rebates or dealer incentives available. If a regional rebate or dealer incentive is being offered, but no national incentive, you simply subtract the incentive from the CR Wholesale Price. From there, we suggest that you start your negotiation at 4 to 8 percent above the CR Wholesale Price for the vehicle you're interested in purchasing. To help you crunch the numbers, Consumer Reports provides a free auto finance calculator."

[3] http://www.kbb.com

business that would not be included in national pricing figures, the research buyer might well regard the add-on as legitimate. Or this buyer could take the position that the dealer should absorb the tax. The one alternative we *can* logically exclude is the alternative the courts below claim is only proper assumption: that all buyers were tricked, and that all buyers relied on the trick to their detriment.

C. Allowing This Class to be Certified Will Undermine the Court's and the Legislature's Efforts to Reform Class Action Litigation

In light of this Court's strong position in *Bernal,* TLR and other reform groups saw the expansion of this Court's jurisdiction to review trial court certification decisions as the final link in the chain needed to control abusive class action practice. The Legislature agreed and in 2003 expressly authorized the Court to review certification decisions. This grant of jurisdiction expressed the Legislature's intent that the Court enforce statewide class action standards pursuant to the principles set out in *Bernal* and other leading cases.[5] *See, e.g., Henry Schein, Inc. v. Stromboe,* 102 S.W.3d 675, 687-91 (Tex. 2002); *Southwestern Refining Co. v. Bernal,* 22 S.W.3d 425, 430-32 (Tex. 2000). As Justice Hecht put

[5] The case at hand technically does not require the Court to apply H.B.4's jurisdictional grant because jurisdiction is established under another statute. Because the appellate standard is the same, however, the separate jurisdictional statute should make no difference.

it in *Wagner & Brown, Ltd. v. Horwood*: "In giving this Court the power to act as arbiter, the Legislature no doubt expected the Court to use it." 53 S.W.3d 347, 350 (Tex. 2001) (J. Hecht dissenting from denial of petition for review).

Amicus offers no brief defending automobile marketing practices. However tempting it may be to simply let the dealers defend themselves, the Court should again recall that hard cases make bad law: in this instance, the bad law of permitting the certification of a manifestly defective and abusive class action. The court of appeals' opinions in *Jones* and *Murphy* simply defy the rules laid down in Bernal and underline the importance of this Court's power to review and control class action cases at the certification stage. If left unreviewed, *Jones* and *Murphy* will breathe new life into the prior loose practices that so long marked court of appeals' certification case law, potentially triggering a new spiral of class action abuse.[6]

In recent years, this Court made great progress in addressing and correcting the inequities in class action litigation in Texas. Due to this

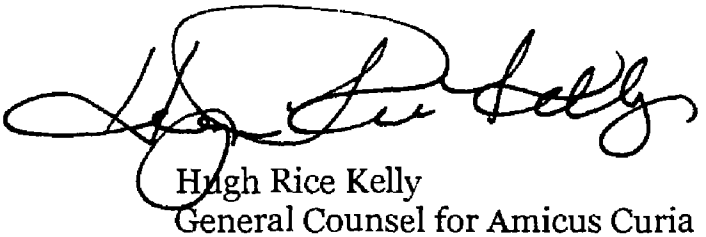
[6] In fact, as petitioners noted, at least one commentator has already cited *Jones* with approval as a way to achieve certification of a class despite apparent problems with proving reliance by individual class members. *See* 27 STEPHEN COCHRAN, TEXAS PRACTICE SERIES §§ 1.2, 1.7 (Supp. 2003); 28 STEPHEN COCHRAN, TEXAS PRACTICE SERIES §11 (Supp. 2003).

Court's work, class certification is close to being identified as the exception rather than the rule in Texas—as it should be. But the effectiveness of this Court's prior decisions will dissipate if the Court allows this case, or others like it, to proceed without review. This Court should exercise its jurisdiction in any class action in which the certification decision is clearly contrary to this Court's prior opinions, as it is here.

CONCLUSION

This Court has worked effectively, despite previous jurisdictional handicaps, to correct inequities in class action litigation in Texas. However, this Court's rulings actually effect change only when lower courts uniformly follow them. Until that happens, this Court should review and reverse every class certification that fails the certification requirements of *Bernal*. Granting review in *Jones* and *Murphy* will affirm the Legislature's confidence that the Court would exercise its power to complete the reform of class action law in Texas. Texans for Lawsuit Reform urges this Court to grant the petitioners' motions for rehearing and their petitions for review, and that it reaffirm the controlling effect of *Southwestern Refining Co. v. Bernal* by decertifying the alleged class.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on this the 17th day of June, 2004, a copy of this Brief was served on the following by first class United States mail.

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