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GMC V. BLOYED, ET AL

YORK: Chief Justice, may it please the court; Larry York and Judge Joe Greenhill from the appellant class in this case. This case involved a settlement involving 650,000 or there abouts Texas GM Chevrolet truck owners. In addition to the class those appearing, or those in support of this settlement are: the Texas Association of Defense Counsel, the State of Texas, Texas Trial Lawyers Association in a rare joint appearance with the Texas Association of Defense Counsel, and General Motors of course. Those appearing to oppose are two: one former owner of a truck that was affected by the class; and one person who I believe still owns one of those trucks. Ralph Nader is opposed, and the lawyers on the other side of the table are opposed. They have a competing class that they have filed in Federal court in Dallas to take over this class if we lose, and the charge for contingent fees if we lose.

About .1% of the persons in this 650,000 member class objected to the class settlement. About 2.2% (1,100 or so) opted out. Before the court today is .0005% of the class here objecting. This is not may it please the court the tail wagging the dog. It is the last hair on the tail of the dog attempting to wag the dog.

HIGHTOWER: Mr. York let me be sure I understand the nature of this class. There were 650,000 individuals?

YORK: Six hundred and fifty thousand trucks.

HIGHTOWER: Six hundred and fifty thousand trucks. So as far as individual members of the class it doesn't reach that number. Now does that include fleet?

YORK: Yes. The State of Texas is the largest fleet owner in the State I believe. And they have something over 3,000 trucks and they've joined in supporting this.

HIGHTOWER: So when you think about people, how many people are we talking about in that 650,000?

YORK: Well I have seen some numbers that you know on an average household maybe there is 1.8 people or 2 people or something, but it is a larger group obviously than 650,000.

HIGHTOWER: Oh you are saying the truck owners' family is represented. I am talking about individual owners.

YORK: Six hundred and fifty thousand. Well I am sorry we are talking about different things. I can't tell you exactly how many of those are fleets. There is nobody in this objecting who is a fleet owner. But there are some part of that group that is owned by fleets.

PHILLIPS: And how many trucks are in the corresponding litigation in the federal district court Class action?

YORK: In Pennsylvania there are about roughly 5 million I believe - 6 million roughly. Judge Cook and I will divide our time by 10 minutes, and I am going to talk a lot more about attorney's fees. He will talk more about the settlement. But I need to talk a little bit about the settlement because the CA's view of the case was that the attorneys' fees had no value because the settlement had no value. And

that's what I need to address the settlement a bit in order to make that point.

ENOCH: As I understand it is undisputed that any personal injuries, bodily injuries are not a part of this litigation?

YORK: Yes, sir.

ENOCH: This is strictly litigation involving people who bought the cars, and claim the cars were not the value that they were represented to be?

YORK: Yes, sir. There is a handout that we have handed. It's the one with the beige or sort of cover on it that outlines the settlement agreement. And there is also a handout in there about what the CA did. And that agreement Judge makes clear that personal injury and death were excluded whether past or future, and any action by the national authorities NITZA as it is called for short are excluded.

The abuse standard that this court had to judge, the CA had to judge the TC's action on is an abuse of discretion standard. There are numerous cases, and I won't bother talking about the standards where they talk about you have to decide the court acted without reference to any guiding principle. The cases say an abuse of discretion doesn't exist where the TC bases its decision on conflicting evidence as this one did. This court went over the ball factors at the trial level. Findings of fact and conclusions indicate they made exactly the analysis that is required and compelled by the appellate courts. And came out approving the settlement.

Now if you read the handout that we gave, that sets out the factors as they were considered, the 6 factors considered by the appellate court, if you read those as we did I was confused when I first read the CA's opinion because it appeared to me that they were about to affirm what the TC had done. If you read those 6 factors everything they say about those 6 factors is in favor of finding for the settlement. It appears that it was almost like written by committee, that one group said somebody wrote it and said we are going to affirm and you get to a certain point, and then it says but we are going to submit our judgements to suggest to replace the TC's judgment. When you read what they actually say it is clear that they replaced the TC's judgment with theirs. They say it is questionable that the $6,000 certificates have any value. They say it is questionable whether the $500 certificates have any value. They say a settlement requiring GM to pay for all class members repairs would be more comfort. And they are talking about the TC having made an error in judgment when they talk that way. And that is what the appellate court cannot do. It cannot be a trial de novo if we are to continue to have our rules as we have had them forever in this state.

On the subject of attorneys' fees. First of all percentage fees are standard in these kinds of cases in Texas. There was absolutely no evidence, no one suggest top side or bottom, the appellate court found, and there is no evidence of any collusion or fraud between the defendant and the class.

CORNYN: What is the value of the settlement against which that percentage might be applied?

YORK: The trial judge found that the $9 million attorney fee represented less than 10% of the settlement.

CORNYN: Can you suggest to us how that can be calculated?

YORK: The way it is calculated is you look at the evidence before the court. If you remember the evidence before the trial court was in the form of affidavits. An affidavit from a man named

Nichols, and an affidavit from a man named Simonsen. And those affidavits they had actually polled the class. Simonsen polled the class nationally and Nichols polled the class in Texas, and concluded that some 45 to 50% of those in the class would utilize the certificates.

HECHT: Is it true that Nichols' poll is based on survey of 109 class members?

YORK: Yes.

HECHT: And that's the only evidence of the 46%?

YORK: No. Simonson reaches the same conclusion in a national poll that had validity for Texas. And so if you look at those numbers 645,000 if the whole group used a $1,000 certificate you would come up with a $650 million value. If 45% you would get $300 million. If it were less than that it is $200 million. The trial judge concluded that when she said less than 10%, that would calculate to being that the value had to be more than 90% - more than $90 million. In fact if you will come down as far as $30 million in value and compare a $9 million fee to that, you would find that it was 30%. And 30% is at the top of the 20-30% range that has been approved repeatedly by courts in this state.

HECHT: Why isn't it troublesome that in the national MDL litigation only slightly more attorneys' fees were requested and rewarded by substantially more lawyers in a substantially bigger case?

YORK: I don't think it is troublesome because they have a different standard in the 3rd circuit. They have used what is the called the Load Star standard in the 3rd circuit, that is mandated by law in the 3rd circuit. It is not one which we have in this state. It is simply a different standard. Their's is more close to an hourly rate, and that is one that I believe is being retreated from by other circuits and by states. But it is not one we have in this state.

HECHT: There are assertion in the briefs that this attorney fee request comes out to about $1,500 an hour; do you dispute that?

YORK: No. But in Crouch v. Tenneco one of the leading cases in this area it came out to $3,000 an hour. I mean they come out to multiples over reasonably hourly rate every time in a contingent fee case, because for those kinds of cases and those lawyers it is as they put it it's chicken one day and feathers the next.

HECHT: There is an assertion in the amicus brief of the Public Citizen and Consumer Federation that the only reason to bring this action separately in Texas and not to join the MBL litigation was so that the attorneys' fees would be bigger in this case. What is the response to that?

YORK: Well the response to that is that we started this case before we knew what was going on, class counsel did. They started the case in state court which is where they wanted to be. They had doubts about the Moss Magnison jurisdiction in federal court. They had doubts about _____ jurisdiction. They had a bunch of cases that were smaller than $50,000 each, and they had a concern about jurisdiction in federal court for that reason. And they did not want to be burdened. This case moved faster than the federal court case. This case in fact drove the federal court case. They did not want to be impeded by and be part of a nightmarish MDL proceeding in Philadelphia, PA. And I think to the interest of the class they won't.

PHILLIPS: In calculating a percentage fee if that is an acceptable method of awarding a fee in this case, should the finder of fact take into account the lack of any other available discounts that a purchaser could use in order to decide if this $1,000 was really a $1,000 or if it was less than that?

YORK: I think the TC took that into account. If $1,000 per truck was used, it's $650 million. Surely nobody could argue with that. The evidence was that it was worth less than that.

PHILLIPS: But do you have to look at what other discounts were ordinarily and normally available to various dealers and manufacturer incentives?

YORK: No, not at all. The $1,000 is on top of all those. You walk in with one of those $1,000 deals and you get that on top of every other single discount or program, whatever the dealer's got, that $1,000 goes on top of all of that.

PHILLIPS: Was there any study about how many additional trucks GM could anticipate to sell because of this incentive, that they would not have otherwise sold, and what type of profit there would be in those sales even with a $1,000 discount?

YORK: Well the evidence was that 77% of GM truck owners are going to buy another GM truck. So GM is not expecting a sales bonanza as a result of this promotion.

PHILLIPS: But not within any 15 month period?

YORK: Right.

PHILLIPS; I mean there might be an acceleration even if that statistic proves?

YORK: Well there could be an acceleration. But I think their idea is that they don't plan to sell more trucks as a result of this. And in any event let me just make this point, that no case anywhere has ever suggested that we've seen except this case, that harm or pain to the defendant is a necessary ingredient to approving the settlement. By the plaintiff's definition if they use every one of the 645,000 certificates GM would make a huge bonanza, but it would be worth $645 million to the class. A huge bonanza to the class. And a tiny fee in comparison to that.

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COOK: May it please this honorable court. With me at counsel table is Mr. Lee _____ an attorney with General Motors. I would like to give you a few brief sentences on a recent announcement from the US Dept. of Transportation, Office of the Secretary, Frederico Pena.

> "As Secretary of Transportation I have no greater responsibility than to protect and improve the safety of the traveling public. This settlement will save far more lives than could have ever been saved by the proceeding with the other options I had before me. The alternatives were to proceed with the recall, that would have involved years of litigation and uncertain outcome, and prevented few if any deaths. This settlement I am announcing today is a common sense outcome and a victory for safety and saving lives. There will be no national recall of Chevrolet and General Motors trucks."

I would like to now take time with the court to tell you why this is a good settlement for the plaintiffs. First of all, the plaintiffs have suffered no economic harm. Despite all the bad publicity from certain elements of the media, the value of these used trucks never went down. It kept up with Ford and with Chrysler. There is no economic loss whatsoever. Second, we have already talked about if you have a personal injury or a death action you are not excluded by being part of this action. Two important reasons. Third, another reason why this is a good settlement nearly all of the plaintiffs would have been time barred by limitations.

Remember these trucks go back to 1973 and come forward to 1991. Starting in 1973 GM advertised in its advertising that these trucks had gas tanks mounted outside the frames. The truth is there are no defects in these trucks.

There has been a lot of publicity about this, but the fact is there is 3 million trucks on the highway - medium and heavy duty trucks. These are light duty trucks that have gas tanks in the same position. GM would fight any formal certification of a class. And GM would have a good chance of prevailing.

What we have here is a product that has no defects where the owner of the product is not having any problems with that product.

CORNYN: Mr. Cook why did GM agree to settle a case worth $300 million?

COOK: GM used the same six factors that the TC did, and looked at the 6 factors from Ball, and this is a compromised settlement of a disputed claim by which GM is hopefully forever buying its peace. And the TC looked at these factors and came to the conclusion this was a good settlement, and a reasonable settlement. The CA we believe is wrong.

Let me take just a few second to address the question of attorney's fees. This is a large case. It is a large class. It is a significant settlement in terms of value. It is the largest rebate settlement in the history of GM ever. Counsel for the plaintiffs are excellent. Franklin Jones is known to this court as a very able plaintiff's lawyer, the former president of the State Bar. Considering all the factors, all 6 factors in this case, GM made the conscious decision that it did not warrant objection to the attorney's fees.

PHILLIPS: Why shouldn't the members of the class have been advised of the amount of the attorney's fees during the period of time when they were allowed to lodge objections?

COOK: That's a valid question. When the case was settled, the attorneys fees were not. The case law is real clear in Texas. For instance the Shubee(?) case, that since when they settle the case attorneys fees had not been resolved. You could not send out notice to the class of what the attorneys' fees were going to be.

HECHT: Was there any reason why they couldn't be resolved?

COOK: They simply had not been resolved. And GM's point of view, GM does not get involved with the plaintiffs to determine what a reasonable fee should be.

OWEN: Where did the $9 million figure come from?

COOK: The $9 million figure was the number that was arrived at by the plaintiffs. They submitted it to the court. Then there were 20 days notice in which anyone could object. And the objectors did object during that 20 day period. But when the case was settled there was no agreement on attorney's fees. If GM would have reached an agreement on attorney's fees and become involved in that, they then would have been accused of being in a conspiracy.

CORNYN: Well how can a class know whether to object to the settlement without knowing the amount of the attorney's fees because the argument is that if there hadn't been such a high amount of attorney's fees awarded under the settlement, that the benefits to the class members could have been enhanced perhaps by making these vouchers negotiable, or some other way to increase the value to the

class members?

COOK: You can make that argument.

CORNYN: Why isn't that right?

COOK: Why isn't it right? The attorney's fees did not come out of the settlement amount. That was reached independently by the parties, the exact details of the settlement. The plaintiffs then said we will apply for attorney's fees. General Motors reserved several rights one of which was to veto the entire settlement, the other was to object, and the third was to appeal to these attorneys' fees. The procedure that is being used here is widely used. If you look at the manual of complex litigation it sets out several different types of forms. One of the forms follows the procedure that was used here. If you look at Newberg's on class actions it has several forms. One of the forms is the one that is very similar to what was used here.

HECHT: It just looks like a party would feel a little nervous knowing that his attorney is being paid by his opponent to settle a case. Why doesn't that raise problems for some people?

COOK: It does raise problems with certain people. But this is a procedure that has been adopted and used very widely in this country. It is a procedure. You need to look at all 6 factors to determine are the attorney's fees reasonable.

HIGHTOWER: How long after the settlement of the main case was announced did they resolve the issue of attorney's fees?

COOK: The case was settled on July 19. The attorney's fees application was filed about the beginning of October.

HIGHTOWER: And then it was filed, and then when was it resolved?

COOK: It was resolved at a fairness hearing at which time the court went over everything in the case.

HIGHTOWER: In October?

COOK: Yes.

PHILLIPS: Isn't it a little troubling that even the parties advocating this settlement experts estimated that over half of the class would not take advantage of this settlement?

COOK: First of all nothing permits anyone from taking advantage of the settlement. This is they are saying we estimate this percentage will take advantage of it. If you go to Newburg on class actions you will find there are numerous class actions which have been approved where the percentage of acceptance was much, much lower than those in this particular case.

PHILLIPS: Mr. York mentioned earlier in answer to one of my questions that the $1,000 certificate could be used on top of any other discount. There was a sale provision you could negotiate one of these certificates outside a member of your immediate family, but it was only worth $500; and those certificates could not be used in conjunction with any other manufacturers promotional opportunity; isn't that correct?

COOK: Yes.

PHILLIPS: I didn't see any specific findings on that. But it would be very unlikely that that type of certificate would have much market value; is that correct?

COOK: No. It is estimated from some of the people who are experts, that there will be a secondary class market for these certificates, and that they will be sold and there will be a market for them.

CORNYN: Wouldn't you agree that the $9 million in attorney's fees awarded verses the amount of the vouchers awarded to the class members under the settlement at least raises the potential for a conflict of interest between the attorneys and the class members?

COOK: Whenever you have an attorney getting attorneys fees in a class action lawsuit you always have the potential for a conflict of interest.

CORNYN: If that's true then why wouldn't the Load Star method be a more appropriate means for resolving the issue of attorney's fees here where there is some factoring taking into account the number of hours spent, and then some perhaps bonus paid above a normal hourly rate for the difficulty of the case, and the other factors that ordinarily go into...

COOK: Well the Load Star method is used by certain jurisdictions. In other jurisdictions, the percentage method is widely favored. In this particular case the attorneys have the case on a contingent fee method. But there is a tremendous amount of literature which gives you the range of fees based upon the amount in controversy. There is a class action report where I studied over 400 class actions that were settled. It gave you the range of fees that were allowed based upon the amount in controversy. The amount of literature there is a lot of it out there. That's why you have...there's a case called Ace Heating, and it says: the trial judge is on the firing line. And he really is. And he's the one out there who determines whether it should be approved. And quoting this court in Walker v. Packer with respect to the resolution of factual issues or matters committed to the trial court's discretion, the reviewing court may not substitute its judgment for that of the trial court. And what you have here this is where they went wrong. A more fair and reasonable settlement would be this is where the CA put on the mantle of the trial judge and instead of the abuse of discretion standard went back and used a de novo standard for determining what they would like.

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RESPONDENT

GARDNER: May it please the court. I represent Ron and Regina Godby, two GM truck owners who objected to the class settlement. Today I will discuss the reasons why the CA correctly found that the trial court had abused its discretion when it approved the settlement. With me today is Roger Mandel, who will discuss the attorney's fees issues before this court.

On the merits of the settlement the objected position is simple: the trial court abused its discretion because it failed in its duty to make an independent determination that the settlement was fair, adequate and reasonable to the class as a whole. In support of this position I want to make two points to the court today. First, although class actions are a good and efficient means of resolving disputes this settlement is an abuse of the class action process. And secondly, the trial court so fundamentally failed in its responsibilities to the absent class members that its approval of the settlement was in fact an abuse of discretion.

If the court will permit me a few moments to puts this settlement into the context

of what this lawsuit was about when it was filed. This lawsuit when filed was based on the worst vehicle fire safety hazard in history. Exploding side saddle gas tanks in GM trucks that killed more than 400 people, and badly injured over 2,000 more. The trucks are flawed by a dangerous and latent design defect, the placement of the gas tanks outside the frame rails.

ENOCH: Do you agree though that the only issue involved in this one...the only tangible damages involved in this litigation is economic damage?

GARDNER: Yes, your honor, very much so.

ENOCH: So in terms of evaluating the settlement issue is it relevant that there are firey crashes with the truck?

GARDNER: Yes, your honor to a degree it is. Judge Cook referred to GM's desire to buy its peace. In fact by merely passing on these trucks to a new generation of truck owners GM is not buying its peace at all. It is merely settling this lawsuit.

ENOCH: In terms of the evaluation of the settlement the only issue here is the economic damages suffered by the class. I believe Mr. Cook has said that there is no evidence of any economic damages to the class.

GARDNER: I would have to differ with Judge Cook on that. There is evidence of economic damage not from diminution of value, which the plaintiffs and GM have latched onto because apparently the Blue Book value has not been diminished. There is either evidence or could easily be developed evidence for the second standard that this court has determined is available at the option of the plaintiffs in a DTPA case, which is the cost of repair for the trucks. There is evidence before the court on the cost of repair. That well serves as the indication of the economic damage of the class members.

ENOCH: Could it be that a reasonable analysis of this would be if a party felt that the cost to them of repairing the truck because they want it, or the diminution in value of the truck or resale is I guess less than $1,000 on a trade-in that economically it would be in their benefit to trade the truck in as opposed to trying to resale it?

GARDNER: Yes. And certainly some class members may opt to do that. We know from the evidence that the plaintiffs and GM presented the Simonson and the Nichols' affidavits that under the best more optimistic and we believe fundamentally flawed estimates less than 1/2 of the class will be able to take advantage of that opportunity. They may not want to go back to GM. They may feel that GM sold them a dangerous truck and they may because this is America not choose to do business again with the people who sold them a dangerous product. They may simply not be able to afford it. Most of these trucks were used trucks and were bought used by people who I don't believe opted to buy used trucks but rather would have preferred to buy a new truck had they been financially able to.

About 90% plus of these trucks right now are over 8 years old. These are old trucks. They are diminishing in value. And people who bought them did not have _____ to buy a new truck. The only thing this settlement gives the minority of the class members who according to the plaintiffs and GM would use the coupon is the opportunity to buy a new truck, to provide I believe there is evidence before the court approximately $2,000 per truck and profit to GM and do so within a 15 month period.

PHILLIPS: Do I understand your argument correctly, that if the plaintiffs had represented this class pro bono, and had taken no dollars in fees you would still be challenging this settlement as

unreasonable and saying that the CA was correct in disturbing the judgment of the TC, that this was fair and adequate?

GARDNER: Absolutely your honor. The excessiveness of the attorney's fees as Mr. Mandel will discuss is not pudding - it may be the proof of the pudding, but it is not the only evidence of problems. The true problem here is...

PHILLIPS: You make a very good case for the strength of your argument. But can't GM also make a very good case that had this litigation drawn to a verdict and judgment, that the plaintiffs would have taken nothing; and isn't that the kind of factual disparity that parties are allowed to dissolve through settlement?

GARDNER: To a degree parties are...any case is best often resolved by settlement. Most cases do resolve by settlement, most class actions do resolve by settlement. But when you have parties in the courtroom, the plaintiff's lawyers, GM's lawyers coming before the trial court saying we like this settlement, it's an out of the average settlement, it is something that Rule 42 as far as I can tell places a unique duty onto the trial court to examine the settlement. This is not just a resolution of dispute between private parties. This is a resolution of a dispute that in this case affects hundreds and hundreds of thousands of people. And their interest must also be taken into account.

PHILLIPS: How would you articulate the standard that the trial court is to use and then more important that an appellate court uses in reviewing that TC decision?

GARDNER: In this particular case I think that certificate settlements are on the rise. I believe that they are evidence of an abuse over all of the class action settlement process. They generally give more in reward to the class lawyers than to the class members. We have suggested in our brief that this court could set a very clear standard that no class action may be settled by certificates that does not also contain a significant cash component. That might be as some of the coupon settlements in other cases have done by giving class members the alternative of cashing in for a reduced amount, whereby they could get instead of the $1,000 coupon they could elect $500. I believe that is the value that GM put on this element today works out at $300,000 million to approximately $500 per individual. If in fact it is worth that much then that dollar amount should be there so that we are playing with real dollars and not the funny money coupons.

HECHT: If there were no realistic chance of plaintiffs prevailing in the case wouldn't certificates or some settlement like this be appropriate?

GARDNER: No, your honor it wouldn't. Because if the plaintiffs are going to lose the system should be allowed to work and they ought to lose. We think the plaintiffs will win. We think they have a very good case.

HECHT: But plaintiffs can settle even if they think they are going to lose, and defendants can choose to give them whatever if it is nothing more than saving face is appropriate to get them to go away, why can't they do that here?

GARDNER: Because it does not give relief to the members of the class - over half the class.

HECHT: But that assumes that they are entitled any, and they may not be entitled to any.

GARDNER: Will all respect your honor I don't think it requires that assumption. In the settlement it is the fundamental test that the settlement must be fair, adequate and reasonable to the

members of the class as a whole, not to some subset and not presuming that they are going to lose.

HECHT: But assume the case is tried and they do lose, they would have been better off with the settlement?

GARDNER: Some will have, some will not have.

HECHT: But overall something is better than nothing?

GARDNER: Your honor I would differ with that. I think that if this is a loser, the process should work out, and there should not be a windfall to anyone.

HECHT: That's a hard rule to apply in other cases because there is a lot of cases where it looks as if one side or the other is going to lose, and that's all the more reason to settle if you can.

GARDNER: Those cases by in large your honor are individual cases. They do not have the special guardianship of the absent class members that Rule 42 puts onto the trial court. It does not have the dozens or hundreds or in this case hundreds of thousands of people who are unrepresented and not before the court.

PHILLIPS: Why do we even say that an individual who chooses to sue GM on a thin liability case should be able to make a nuisance settlement but a large class should not, that they should either have to substantially prevail or lose everything?

GARDNER: Neither one should have to your honor. The fact is that there are nuisance settlement, but the fact also is that there are nuisance class actions. I have seen them. I have seen other actions that have been brought after the resolution was _____ complete where nothing was sought but attorneys' fees. This is a growing phenomenon. It is an abuse of the class action process. In this instance the class action process the system worked. The CA fulfilling its mandate to review the TC's actions by an abuse of discretion standards said a fairly bright line standard that when less than one half of a class get any relief and that relief is itself speculative, but get any relief whatsoever as a matter of law that settlement must fail. What we would propose to this court as a standard for settlements is that in order to be fair, adequate and reasonable to the class as a whole, not to the parties in the court, not to the class counsel, not to the defendant, the settlement relief must be available to all or virtually all of the members of the class.

PHILLIPS: Has any court ever announced such a standard in the class action review?

GARDNER: The only court that has announced anything similar to that was the district court in Minnesota in Buchet v. ITT case, that I believe all parties have cited in their briefs, that court holding that almost presaged what the court of appeals did here said that a settlement that provided relief to less than 1/2 of the class was not acceptable. That court also said that the fact that the defendant there was unwilling to provide any cash component to the settlement be tokened that defendant's determination that the settlement was not really worth what it was representing it to the court to be. The CA agreed with the Bushee logic in general, and in specific and said that it doubted that GM really placed the value of the $500 we've heard to today, I figured it to be $321 based on some other numbers that were presented in the briefs. Those are not real numbers. Those are numbers that are manufactured to justify the settlement, but they cannot do so. Because to over half the class they don't get $500, they don't get $1,000, they don't get one cent. They get zero. They get absolutely no relief whatsoever.

HIGHTOWER: Why?

GARDNER: Because for a variety of reasons. As I had said earlier because they choose not to, or they cannot...

HIGHTOWER: Because they choose not to. Now don't they have the right? If I walk up and hand somebody a $10 bill and they say I don't want your $10 bill? That's fine. They have the right to say that they don't want it.

GARDNER: They have the right to refuse to return to GM. It is anomalous within our system to say in order to receive any recompense for what this alleged wrongdoer did to you you must go give them new business and new profit. They have that right to do that. But more importantly most of the people it's not a matter of right, it's a matter of choice. They don't choose to be poor, they don't choose to be middle class, they do not simply have the opportunity to buy a brand new truck, average purchase price of $20,000 within the brief 15 month window that this settlement provides. It is not a matter of choice at all.

PHILLIPS: Is Buchet different because they are the people...a majority of the class, in fact _____ majority were absolutely ineligible to participate in the settlement rather than here where it's just an estimate that they won't be able to participate? I mean theoretically everybody could participate in this settlement if they all won the lottery or all mortgaged their house or whatever?

GARDNER: It's one of those ifs and buts were candy and nuts we would all have a merry holiday.

PHILLIPS: But isn't that a distinction? I mean wouldn't be the first court to say just based on estimates?

GARDNER: Well that's part of the problem is really not the objective problem. The estimates your honor are the only evidence the TC had, the CA had, or this court had that this settlement has any value whatsoever to anyone. We are spotting the plaintiff's and GM the 46% estimate. There are other reports. One of the GM lawyers publicly stated that it could possibly go down to single digit redemption. We've presented evidence that speculated redemption around 10%. We are spotting them this bare minority, bare majority of the class who gets nothing. But assuming even the best case analysis, and we can do nothing more than project in this matter, assuming all of that they get absolutely nothing.

CORNYN: I believe it was Mr. York who said that in no other case other than the CA's decision here has the court taken into account the benefit here to GM from the purchase of new vehicles. In other words the CA is concerned that built into this was a $2,000 profit on all of the new vehicles that GM would potentially sell under this settlement. Are you disputing that characterization?

GARDNER: I do not your honor. I have not looked for that. I am aware of none where in the language of the opinion the court made that discussion. I do agree that it is a valid point to look at in terms of trying to arrive at what the economic value of this settlement, the true economic value to the defendant is.

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MANDEL: Mr. Chief Justice. May it please the court. My name is Roger Mandell, along with my co-counsel Mark Stanley, I represent Respondent Clyde Bloyed. As Mr. Gardner indicated I will be addressing the attorney's fees issue today. And more specifically I will make two arguments. First, we will argue the CA correctly held that the approval of the settlement was an abuse of discretion because the class notice failed to disclose either the exact amount or a maximum amount of attorney's fees and expenses

sought by class counsel. Second, we will argue that the CA correctly held that there was insufficient evidence to support an attorney's fees award of $9.5 million, such as the approval of the settlement by the TC was an abuse of discretion.

HECHT: Before you begin. Let me ask you if any of those issues are involved in the appeal of the MDL action?

MANDEL: Your honor it is my understanding that the attorney's fees issue was somehow handled separately in the MDL litigation. And some of the people on appeal are trying to bring up on appeal bring up the attorneys fees issue for the first time on appeal. So there may be an argument in that case, that the attorney's fees issue was not preserved for appeal unlike the present case.

HECHT: And secondly, counsel alluded earlier to another suit that has been filed in the US District Court for the Northern District of Texas; what case is that?

MANDEL: Your honor there is a case called Crowder v. GM, that was brought by the same attorneys that are here before you today. The perks of that suit was to take care of the many people who are buying trucks after the July 19th deadline. This settlement said that, "if you owned a truck on July 19 you are in the class; and if you buy one of these dangerous trucks after that, you are not on the settlement." There was evidence presented that as many as 10,000 of these trucks are sold a month. So in essence we have another group of hundreds of thousands of people who own these potentially fatal trucks who are not taking care of by this settlement. And the goal of filing the other suit was to take care of these other people who are exposed to the trucks. And people who may be involved in crashes with these trucks.

What the court has to keep in mind is that the animated principle of this lawsuit originally is brought by plaintiffs' attorneys quite properly was to try to remedy these defects to get this truck fixed. Once the carat of $9 million in attorneys fees was dangled however, they amended their petition to drop that kind of relief and to only ask for coupons or monetary damages.

What's crucial to remember in this case is that class counsel owed a fiduciary duty to all the members of the class. This has been consistently held by the federal courts: Greenfield v. Villager Industries, a 3d circuit opinion at 73 is a good example. It has been black letter Texas law for decades that the attorney/client relationship is a fiduciary relationship.

ENOCH: The notice to the claimants about their objections indicated that the size of the settlement would not be affected by the attorney's fees. So no matter what was awarded as attorneys fees, the amount paid in settlement wasn't going to change?

MANDEL: Well your honor I think as an economic matter, that is simply a fiction. The amount of the settlement is the entire amount payable by the defendant - GM in this case. And what the class members have a right to know is how is the entire amount payable by GM going to be split up between class counsel and the members of the class so that the class members can make an intelligent judgment as to whether they want to opt out of the settlement, or whether they want to object to the settlement.

ENOCH: Let's go back to that. If the amount of the settlement that is available is not going to be affected by the amount of the attorney's fees, then your argument is well they've got to know whether or not these plaintiffs sold me out. That's what you're saying. You are entitled to know whether or not they sold us out.

MANDEL: I think certainly they are entitled to know whether they were sold out. But it goes beyond that. GM was willing to do whatever the certificates will cost them and to pay $9.5 million in fees,

and $9.5 million cash. The question is: should it have been certificates and $10-15 cash per person and much less in attorney's fees? In other words should part or all of that $9.5 million more properly have been paid by GM, which was willing to pay it to the members of the class. And the class members have the right to know what the distribution of the total amount payable by GM is so that they can make an intelligent judgment as to how they would proceed from there.

ENOCH: So the statement is incorrect, the statement to the members that the amount of the settlement is not going to be affected by what gets paid in attorneys fees is an incorrect statement?

MANDEL: Absolutely your honor. That is a economic fiction that they tried to perpetuate upon the class and they have consistently done in the CA and here as a matter of economics it simply is an untruth. And the CA saw through this argument and said very clearly in its opinion that what you have to look at is the total amount of the settlement, and the distribution needs to be disclosed. And that necessarily arrives out of the fiduciary duty. In fact it was promulgated on these counsel by the Texas Disciplinary Rules of Professional Conduct, 1.02 and 1.03 as the CA's stated.

HIGHTOWER: Are you saying Mr. Mandel that the actual $9 million was negotiated prior to the settlement?

MANDEL: Your honor there was...we were not allowed to do discovery, and we very much wanted to do discovery into this issue. So we weren't able to develop that evidence. But I don't think that that is ultimately the point.

HIGHTOWER: But you are implying though that they knew how much it was going to cost altogether when they agreed? When GM agreed that they knew about how much it was going to cost to settle including attorney's fees.

MANDEL: Your honor I think it is important to look at it from the perspective of the plaintiff's counsel, the issue is could they and should they at the time they gave the notice have disclosed either the exact amount or maximum amount of fees? Now you look at the timing here and it is incredibly suspicious. They sent out the class notice in August 1993. The class notice sets as the deadline for either opting out or objecting to the settlement October 5, 1993. Two days later, two days after the information could have been useful to the members of the class they file their fee application on October 7, 1993, only 2-1/2 weeks before the October 27 fairness hearing. The timing on its face was done so as to prevent the class from finding out how much they were going to ask knowing that of course people were going to say I get a certificate which is virtually worthless to me, and on the other hand they get $9.5 million in cash.

OWEN: Mr. Mandel is your objection to the amount, the $9 million amount that that should have been paid to the plaintiffs in this case, or is your true objection the conflict of interest it creates between plaintiff's counsel and the plaintiffs themselves?

MANDEL: Our primary objection is indeed this conflict of interest, that anytime you have the potential for a conflict of interest anytime there is going to be a split of the total amount payable by the defendant between attorneys fees and the class. That is why disclosure is absolutely crucial. If it is fully put out there for the class members giving them the opportunity to either opt out or object to the settlement because they know what the class is going to get, then you have an acceptable situation.

PHILLIPS: But you do not object to the concept of a contingency fee settlement in a class action suit?

MANDEL: Your honor we do not say that per se a percentage of recovery method is

objectionable. But we do say that 1) it has to be fully disclosed; and 2) we believe suggested in the amicus brief that there needs to be check on that by using some Load Star analysis. In other words we say we can start with a premise of a percentage of recovery, but then we need to go further and we need to look at the actual relief obtained in the amount of fees on an hourly basis and say, "is this justifiable?"

PHILLIPS: Isn't it impossible in fact to have any idea what the percentage is going to be until you see how the class responds? If 49% of the members of this class exercise their coupon rights, this settlement could be a very low percentage. On the other hand if it was single digit response it could be a much higher percentage.

MANDEL: Well your honor that's why an inflexible rule on attorney's fees is not good. And this may very well be a case that by its nature is not susceptible to percentage of recovery method, but could only have attorney's fees awarded on a load star method. And in essence that's what the CA was getting at. It says that because of the problem with redemption rates even using their estimates solely applying our legal discretion as to their estimates not looking at the contrary evidence there was not sufficient evidence to give a estimate of the value from which a percentage of recovery could be calculated. Now the problem that these counsel have was that without percentage of recovery they had no legally sufficient evidence to support any award of fees. They didn't have enough evidence to support a load star award. Because all they did was put in some affidavits which stated the bare conclusion of 6,000 hours, yet they gave no supporting time records, they admitted they kept no contemporaneous time records. They also had $500,000 in expenses that were just summarized in 12 vague categories with no supporting invoices. The applications in this state and elsewhere have always had to be far more detailed than that and supported by time records and actual invoices. So their dilemma was they had no way to go for a load star. And so they suggested the percentage of recovery method, which is completely inappropriate in a case where the amount of the recovery is so speculative.

And of course the CA was correctly exercising the abuse of discretion standard in disregarding the evidence in favor of objectors only looking at the evidence that they gave, the 46% estimate or the Simonsen affidavit and saying that evidence was legally insufficient as to the value of the settlement in order to calculate attorney's fees on a percentage of recovery method.

CORNYN: Did class counsel have a written fee agreement with the class representatives?

MANDEL: Your honor my understanding at the fairness hearing and in their briefs they made a statement that they had the with the original individual plaintiffs they had it on a contingent fee basis. I don't believe that they put in their contingency fee contracts into the record, but I am not positive on that.

CORNYN: So we don't know whether it was 10% contingency fee, or 30%, or whatever?

MANDEL: I think they claim 33%, but I am not sure that that is supported in the record. But whatever they arrived out with the individual plaintiffs in no way would be or should be binding on the trial court because its interest is to protect the 100s of thousands of unnamed and absent class members, and to make sure that the distribution of the settlement is going to be fair to all those unnamed members.

CORNYN: Would you still be complaining about the conflict as you say a conflict of interest between the class members and class counsel on this failure to give notice, the amount of attorney's fees if the TC had awarded $75 an hour?

MANDEL: Yes, your honor we would, because quite frankly...

CORNYN: In other words regardless of the amount awarded by the TC you still think there

is a conflict?

MANDEL: In certain settlements $9.5 million could be reasonable attorney's fees as well as $75. I think you can't take the attorney's fees strictly in a vacuum. You also have to look at it in the context of the overall settlement. And it's an integral part of that overall settlement necessarily as an economic matter.

I think what the bottom line in this case is about is that this court should hold as a matter of law that a settlement which is not projected to and cannot provide relief to over half the class is simply unacceptable as a matter of law. Justice Hecht was asking the question: well what if this is a low probability of success lawsuit? We think it is a good lawsuit. But granting that point, the issue is should all of the members of the class get a small amount of relief, or can you approve a settlement that gives for a few lucky people who can afford a new truck a high amount of relief and leave over 1/2 of them out in the cold. The bottom line is that you have to have a pro rata settlement. Whatever amount of total settlement is justified it has to be evenly distributed throughout the class. And that a settlement which causes over 300,000 people to give up all of their legal rights unless they happen to be burnt to death, but gives them nothing in return is simply unacceptable as a matter of law.

HECHT: Does your position differ from that taken by the amici curiae public citizens _____?

MANDEL: I believe it were in accord with Public Citizen on that point your honor.

GAMMAGE: Let me make sure I am clear on this. The settlement provides for $1,000 vouchers to each plaintiff truck owner in the class, that they are good only if they buy a new GM or Chevrolet truck within 15 months of the time they receive the voucher?

MANDEL: Correct your honor.

GAMMAGE: And the evidence shows that more than 90% of the plaintiff class own the used trucks?

MANDEL: I believe that more than 90% of the class own trucks which are more than 8 years old. And I think the point that Mr. Gardner was trying to make is most people are not driving a 9, 10, 12 year old pickup truck that's worthy maybe $300-400 or $1,000 out of choice. They would rather be buying new pickup trucks but they can't afford to buy them. And there was no evidence that uniquely $1,000 off would somehow enable all these thousands of people who obviously can't afford to buy a new truck to suddenly do so. In the affidavit of Mr. Simonsen which is the gentlemen who did the other 49 states, he really didn't do Texas, he didn't bother to specify the reasons why the people who were not going to use the certificates were not going to use them by percentage. But he did admit in that affidavit that many of them would be because they are financially unable. And that's no different than the people who wouldn't qualify for a loan in Bushee(?). There are some people who as a matter of finance or credit are not going to be able to use them. And our position is that you can't leave these people out in the cold because the settlement has to be fair, adequate, and reasonable to the majority of the class, and to all the identifiable subsections of the class, including people who simply can't afford to buy a $20,000 truck regardless of whether it's now 19 or it remains at 20.

ENOCH: Mr. Mandel you've made this argument and I know Mr. Gardner made the argument that there ought to be a rule that more than half of the class has to get some sort of recovery. I question though if recovery is a problem and apparently all parties concede that economic damages is what's here, and the argument made there has been no diminution in value of the truck, but under the DTPA we can claim the cost of repair. So we don't have to worry about value. The question is: if a significant

number of the members of this class have an opportunity to have some recovery, then don't the lawyers representing the class have an obligation to then to get what they can even if it's not for a majority? Wouldn't we be here arguing this case if they refused that settlement, that benefitted a significant number of the class and they got a zero verdict? Haven't they breached some sort of obligation to those members?

MANDEL: Well your honor your question points out one of the key problems with this particular settlement, which is that this settlement was approved prior to there ever being a certification of the class. So as we sit here on this settlement today we don't even know if the class as defined should have been a class, or whether it should have been divided up into subclasses, or certain people should have been left out, and certain people should have been left in. And the problem is that they are willing to sacrifice the rights of over half the class without knowing whether these people properly should have been part of the class in the first place, or whether this class should have been divided up into subclasses. And once we have done the proper certification then the argument might have some validity. But when we don't know whether these people had a good case or bad case where they should have been in the class or out of the class, then a settlement that simply abandons the majority of them should not be tenable, and it points out the danger and the need for additional heightened scrutiny by the trial court on pre-certification settlements.

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REBUTTAL

COOK: Counsel talked about the Buchet case. Let me cover it very quickly. Number 1, Buchet was a district court judge doing what a district court is supposed to do. It was not a court of appeals decision. There is not a single court of appeals decision out there except for the one in this case where a court of appeals has gone back under the abuse of discretion standard and set it aside. There aren't any. Buchet was a district court judge doing what he was supposed to do.

Let me look at Buchet a little bit more. Number 1, over 50% of the class it was impossible for them to ever receive anything. There is no way they could qualify. IT&T was out of business. It was simply impossible for them to ever get a penny. Number 2 in Buchet, the response rate it appeared there was going to be a response rate of between 1 and 3%. Buchet is totally distinguishable. Most of all it is because it was a district court judge. It was not an appellate judge.

OWEN: Judge Cook I want to ask you about the attorney's fees issue. Can you articulate for us on public policy grounds any compelling reasons for allowing this kind of settlement to occur in the order that it did to allow attorney's fees to be determined after the notice went out are there any compelling public policy reasons why that should be the order of determination?

COOK: It is accepted as public policy in many states to do it this way.

OWEN: What is the rational behind that?

COOK: Is that the amount of settlement is separate from the attorney's fees. It is totally separate. And the settlement agreement in this case says it is separate. That's why I pointed out that GM retained 3 options: we could veto the entire settlement; we could object; or we could appeal.

OWEN: But you recognize that there is a conflict of interest created when $9 million dollars is awarded to a handful of plaintiff's attorneys as opposed to the class. Would you concede that there is a conflict of interest?

COOK: The potential for conflict of interest always exists in such situations.

OWEN: Why should this court not adopt a policy that would say that in a class settlement such as this, that the attorney's fees or at least the ceiling on attorney's fees has to be a part of the notice to the class, or has to be a part of the settlement itself that's sent out to the class for approval rather than determined separately?

COOK: Judge you would have to address the Shubee(?), which is a Texas case, which approves the exact procedure that was followed here. If the attorney's fees have not been agreed to, the amount, then you send out the notice without the attorney's fees amount being in there. That's the Shubee case. I've cited it. And it's the exact procedure that was used here.

OWEN: I am looking for policy reasons. Why shouldn't this court adopt a policy along those lines to flush out any conflict of interest that might arise so that plaintiffs can make an intelligent election?

COOK: That is one course of action that this court could take. There is a good deal of law out there on this particular subject matter. I think it would be very helpful to the court if it desires to follow that procedure.

OWEN: Again, I am just searching for the rational behind this. Can you give us arguments on the other side?

COOK: The reason we stay away from this, and the reason we back away and we don't even know about what the amount is going to be, is because if we do then we are brought in as co-conspirators - GM. And we are not conspiring with anybody. We retained 3 specific options. And so when they file their amount of attorney's fees we have all 3 of those options.

PHILLIPS: How many courts have joined the 3rd Circuit in requiring a load star method of attorney's fee calculations for class actions?

COOK: I don't have that exact number, but there is tremendous amount of material out there on these subject _____.

PHILLIPS: Why would that be bad pubic policy for the state of Texas to impose such a requirement?

COOK: I think you have to look at it almost on a case-by-case basis to determine the risk involved, whether or not a contingency. You have to look at the variations in the multiple. You know you take hours times rate and then you add your multiplier. Different courts have gone different ways. I almost think though you need to do it on a case-by-case basis.

PHILLIPS: In our opinion here we should do nothing to clarify to the trial and appellate courts of this state what standards if any there are in reviewing the fairness of a class action settlement?

COOK: No, sir that is not what I am saying. I am saying I think this is a good case to clarify it.

PHILLIPS: What clarifications would you suggest then?

COOK: Well one of them that I just mentioned was the fact that you are going to need to look at your Shubee because it would conflict.

PHILLIPS: Well that was an intermediate appellate court decision that was not appealed to our court. And we are certainly not bound by it.

COOK: No, not at all. It could be clarified. You would need to decide what all the other jurisdictions do, and what would be the course of action most favorable to the state of Texas.

PHILLIPS: But certainly when we have the advantage of companion litigation here that involved 10 times as many _____ and ten times as many law firms, and the attorney's fees were virtually identical, that gives us an opportunity to look at what's fair to the members of the class.

COOK: It does your honor.

HECHT: Isn't part of the concern that if you tell the members of the class how much the attorney's fees are going to be, that more people will object. Is that part of the concern?

COOK: I think that would be part of the concern. But you know the percent of objectors here was either .1% or .2%. That is 1 or .2 of 1%. The honest truth is in these class action cases most people don't object. A lot of times when you even offer money they don't send in to get the certificates. Even when they are notified. I can't tell you why. It's just that they don't d it.

Class actions, there is public policy in favor of class actions. The trial judge did what he was supposed to do in this case. The problem is that the CA tried to become super trial court judges and used the de nova review. As I said there is not a single reported case out there in the country where an appellate court has come in and done and did what our appellate court did here.

PHILLIPS: Is there any estimate how long this case would have taken to try if the trial judge had refused the settlement?

COOK: Judge it would have taken years on the certification issues because there would not have been an agreement that this was a certifiable class. The only certification here was for settlement purposes. And this whole matter was fraud; certification problems. For instance: there were different fuel systems from 1973 to 1991. On just fuel systems alone there was very valid objection. There are a whole series of objections. This may never have become a class. It could have taken years.

PHILLIPS: Doesn't the trial judge have tremendous incentives to approve whatever settlement the parties before the court agree to?

COOK: He has a _____ duty on class actions to look at the six factors from the Ball case, and then when he has weighed all 6 factors since he's on the firing line to determine does this merit my approval?

PHILLIPS: But the consequences to a trial judge who refuses a settlement will be rather profound both in terms of the amount of time and energy the trial judge has to invest and the pressures on an already crowded docket, that that trial judge may have in other cases?

COOK: Could very likely be true.

GAMMAGE: And you are arguing here today that these surrounding circumstances that make these attorney fee's reasonable that there wasn't going to be any government order of recall, there wasn't going to be any voluntary recall on the part of GM. It does provide some relief t some folks who choose to avail themselves of it. And that those who might suffer injury as a result of design defects still retain any

causes of action for those injuries; is that right, that under these circumstances based on the possibility of losing, no class being certified except for settlement purposes, no one recovering anything down the road unless they were injured, then they still retain that right, that this is a reasonable settlement and attorney's fees?

COOK: All of my comments were directed towards that this is a reasonable settlement - fair, adequate and reasonable - that's how I listed all of those factors. When you add the attorney's fees in this was a matter that GM decided did not warrant a objection.

ENOCH: As Mr. York suggested that courts may be abandoning the load star approach, can you elaborate a little bit?

COOK: I don't know that it's being abandoned. It depends where you go, what is popular. I've seen the statement made. It's decided on a case-by-case basis. What some jurisdictions require that if you want a percentage recovery, that you are also required to keep your hours. In other words normally a plaintiff's attorney does not keep hours. Some jurisdictions are saying if you have a percentage method you must also keep hours so that we will then have an idea of what the load star would be.

HECHT: I realize the amici brief by a Public Citizen and Consumer Federation was filed less than 1 week ago. But as one member of the court it would be helpful to me if petitioners chose to respond to it.

COOK: We will respond.