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News

Litigator of the Week: Dallas Attorney Convinces Houston Federal Judge Not to Grant Class Cert Against AT&T

And to win that ruling, Thad Behrens had to best Tony Buzbee, one of Texas' most successful trial attorneys, who represents the plaintiffs in the case.

BY JOHN COUNCIL

Had defense attorney Thad Behrens lost a recent ruling before a Houston federal judge, his client AT&T might have been forced to dig up 200 miles of underground cable and potentially pay over $35 million in damages to a proposed class involving hundreds of property owners.

Yet Behrens recently convinced U.S. District Judge Al Bennett that there weren't enough common issues in the case to justify granting class action certification against the telecommunications giant.

And to win that ruling, he had to best Tony Buzbee, one of Texas' most successful trial attorneys, who represents the plaintiffs in the case.

Thad Behrens/courtesy photo

The case, *Cook v. AT&T*, centers around communication cables that were buried under land owners' property pursuant to easements granted in the 1950s on various properties spanning the 200 miles between Houston and Dallas/Fort Worth.

Seven plaintiffs filed the case alleging that deteriorating cable was leaking lead and copper onto their property. The

plaintiffs proposed a class made up of hundreds of property owners whose land has been encumbered by an AT&T easement.

They also sought declaratory relief, arguing that because AT&T had abandoned its rights to the easements, it had the duty to remove the cable from under their properties.

In his decision, Bennett concluded the case was not appropriate for class certification because of the dissimilarities between the hundreds of properties at issue.

"If plaintiffs could show that one easement had been abandoned by some definite act other than retirement (nonuse) of an underground cable, this answer would not necessarily determine that all hundred plus easements pertinent to the class have also been abandoned," Bennett wrote in his decision. "Accordingly, the difference in the properties and the easements attached to them dissuade the court of its ability to generate common answers to the contentions of the class. Therefore, certification of the class fails on commonality."

Bennett also ruled that the plaintiffs would be required to put on individual proof that the cable had leaked contaminates on their property to prove their claims.

"Highly individualized issues of both causation and damages that predominate over common issues make class certification inappropriate," he wrote.

Behrens was pleased with Bennett's ruling.

"We appreciate Judge Bennett's thoughtful opinion denying class certification, which we believe is entirely correct," Behrens said. "In addition, we believe the claims of the individual plaintiffs are without merit. We sampled soil on the individual plaintiffs' properties and found no evidence that lead or any other metal have leached from AT&T's cable."

Behrens, a partner in Dallas' Haynes and Boone, leads a litigation team in the case which includes partner Mark Trachtenberg, associates Michelle Jacobs and Billy Marsh and AT&T in-house lawyers Paul Drummond and Len Briley. He said they all have very high regard for Buzbee and his firm.

"We're used to being against the very best in our kind of cases and have a great deal of respect for him and his firm," Behrens said.

Buzbee doubts his clients will appeal the ruling.

"Class action practice in Texas and the Fifth Circuit is essentially dead and has been for years. Until there is a wholesale change in the appellate courts I don't see that changing," Buzbee said. "I don't think it's a stretch to say the case was a long shot in this jurisdiction. We did our best."

"I thought that if a case can still be certified in Texas, it would be this one. The judge, who is a fair and thoughtful person, disagreed," Buzbee said. "As my law professor used to say, 'reasonable minds sometimes differ.'"

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