ORAL ARGUMENT – 11/20/02
01-1167
N.P. V. TURBOFF

LEVY: This case asks the question, how stable and secure are real property rights in the State of Texas? Specifically it turns on the enforceability or not of two instruments: a 1984 municipal utility district contract that failed for lack of performance; and a so-called stipulation of interest that was void ab initio because it violated federal banking law.

Respondents insist that one or both of these agreements gave them rights affecting real property owned in fee simple by N.P. Inc. Even though neither agreement was viable respondents argued and the CA agreed that N.P.'s knowledge of their claim made the claim enforceable against N.P. That is not and cannot be the law.

The saga that brings us here today began in 1983 when Jerald Turboff borrowed $26 million from First Texas Savings to purchase and develop a tract of real property in North Houston. Turboff entered into a contract with the MUD saying that he would construct the facilities and perform other parts of the contract. Ultimately convey the facilities to the utility district and the utility district would reimburse him. Turboff did construct the facilities, but before he could go further in his performance of the contract, First Texas declared him in default and foreclosed on the property.

At foreclosure as is the case, First Texas bid in the value of the property at that point in time including the construed facilities and that amount of the bid was credited against Turboff's indebtedness.

Turboff and First Texas sued each other. Turboff is represented in that suit by Julius Glickman. At the settlement of that suit, First Texas agreed to several of these. The relevant provisions here are that First Texas forgave Turboff's indebtedness, his deficiency on the loan, paid him several hundred thousand dollars, and gave to Turboff and Glickman a document that they called a stipulation of interest, which purported to convey to Turboff and to promise Turboff that he would be the owner of any payment by the MUD for the utility facilities. Had the stipulation been valid, Turboff would have then walked away with approximately a $2 million bonus.

PHILLIPS: This could have been structured just very little differently and it would be valid as long as it was just a deal between them. Is that your position?

LEVY: If it was a deal only between First Texas and Turboff absolutely.

PHILLIPS: Once the MUD paid First Texas, then Turboff had a claim against First Texas, you wouldn't have any problem?

LEVY: That's absolutely correct. A contract, a personal covenant of the type represented by the stipulation is enforceable between the parties that agreed to it. But the question in this case is whether that same personal contract, which is not recorded or required to be recorded for that matter, is enforceable against a third party as...

PHILLIPS: The third party owes this money to somebody. Is that right?

LEVY: When Turboff lost the property and First Texas acquired the property, First Texas could have conceivably developed the property - agreed to develop the property, and entered into its own contract with the MUD. There is no provision in the MUD contract that it would automatically bind a subsequent owner of the property. But as the owner of the property and the owner of the utilities that were built on the property, First Texas could have conceivably gone to the MUD and said we're going to hold this property and develop it. But of course that did not happen because about 30 minutes after the stipulation of interest was signed, the FDIC shut down First Texas.

The stipulation, which was not approved by the Board of Directors or by First Texas loan committee, was therefore void under the D'Oench Duhme doctrine violating the federal banking law represented in the D'Oench Duhme doctrine and now in the statute.

So at this point in time in 1986, Turboff has gotten the loan, constructed the facilities, defaulted on the loan, lost the property, been compensated for the property, been given an additional bonus of several hundred thousand dollars, and promised another bonus in the form of these reimbursements.

PHILLIPS: But are the reimbursements ever going to be paid to anybody _____?

LEVY: The reimbursements would be paid to whomever conveys the facilities to the MUD.

ENOCH: The bank says we're going to take some property here but we agree not to take your reimbursable. I thought the D'Oench Duhme said that a bank's release of liability under a loan was not binding unless executed by the board of directors. Does D'Oench Duhme also say that an agreement not to take certain property that they might otherwise negotiate to take has to be also signed by the board of directors?

LEVY: D'Oench Duhme provides that the bank in anticipation of failure cannot give away assets of the lending institution unless those contracts are approved by the board of directors or the loan committee of the bank. And here, First Texas acquired this property in 1984 when Turboff defaulted. For all practical purposes this property was First Texas property from 1984 to 1986.

ENOCH: So your D'Oench Duhme argument really depends on the court following almost?

LEVY: That's correct.

ENOCH: It's not clear to me under the almost decision that simply because the person that has the reimbursement agreement with the MUD loses title, that necessarily means that the MUD wouldn't under some circumstances still owe them the reimbursable. By that I mean almost says well the reason that you lose the reimbursable is because you will breaching the agreement because you can't pass title. I'm not sure there's a connection there. Is there some case law out there that said the agreement on the reimbursement is an agreement that depends on the party that's going to receive the reimbursement to be the one that transfers legal title?

LEVY: That's correct.

ENOCH: What authority says that?

LEVY: I don't know if there's authority that says that, because authority on this particular situation is pretty slim.

ENOCH: Almost doesn't say the reimbursable follows title. Almost says that really - it's a breach of contract. So Turboff could not force the MUD to give them the reimbursable because Turboff can't give them title. But I'm having difficulty tying the obligation to reimburse is a function of only going to the person who owns the title.

LEVY: The obligation to reimburse was the function of the contract between the MUD and Turboff. It was a contractual agreement. So the obligation for the MUD to reimburse Turboff arose under that contract. And when Turboff lost the title to the entire property, he could no longer perform the contract. Because the contract said, MUD we will not pay you, Turboff, until you convey the facilities to us.

ENOCH: If the facilities get conveyed to the MUD, then would the MUD have an obligation to pay Turboff?

LEVY: The MUD will have the obligation to pay the party under the contract who conveys the facilities under the current contract.

OWEN: I think that's where we're confused. Where does the current obligation of the MUD to reimburse anybody come from? It seems to me that the Turboff contracts are dead and gone and the MUD doesn't have to reimburse anybody unless it agrees to.

LEVY: The MUD has a new contract with N.P. Inc, which it entered into shortly after N.P. purchased the property.

OWEN: And what right of reimbursement is under the contract?

LEVY: The right of reimbursement under that contract involves conveyance of the property, conveyance of the facilities - well completion. Let me back up. When N.P. took the property 9 years after Turboff lost it, it had been sitting for 9 years, the facilities were in great disrepair. N.P.'s contract with the MUD required it to come in, fix the facilities that had deteriorated, add additional facilities that were necessary, and then do a host of other things: obtain approval from the MUD; warrant to the MUD that the facilities were constructed according to valid engineering and construction principles; warrant that they were constructed in a good and workmanlike manner; promise that after conveyance, N.P. will make continuing corrections and will assume a duty to cure if anything goes wrong with the facilities. All of these requirements were also part of Turboff's contract. Turboff cannot perform any of those requirements.

OWEN: My point is this is a separate contract and whatever they agreed to compensate is not the right of reimbursement that Turboff had. Is that correct? I mean there isn't a free floating right of reimbursement that's created out there.

LEVY: No. There is no free floating right of reimbursement out there for someone to jump in and claim. When Turboff's contract died, the MUD made a contract with N.P. And it is in the MUD's best interest to do this. Because the MUD cannot sell the bonds to fund the utilities until it has a seller of the utilities who is going to agree to accept all of these responsibilities under this contract.

So the MUD made the contract with Turboff and in fact Turboff at that point, I believe, contacted the MUD again and said these are my reimbursables. And that was the reason in the MUD's contract for an acknowledgment that Turboff has acclaimed that he is asserting and the MUD will pay the reimbursement only when the right to the money is finally determined.

JEFFERSON: Is there a purchase agreement between N.P. and First Nationwide Bank?

LEVY: Yes.

SMITH: Doesn't that expressly exclude reimbursement?

LEVY: The earnest money contract between First Nationwide and N.P. contains language excluding the right to the reimbursement based on the 1984 contracts. Specifically it says, excluding seller's right to reimbursement under any and all agreements by and between seller or any of seller's predecessors in interest and the MUD. And it defined MUD 36. But the contract was dead at that point.

HECHT: So your argument doesn't turn on the validity of the stipulation or on that exclusion. Your argument is quite simply that the contract can't be performed and therefore there's no right to reimbursement any longer.

LEVY: That's correct. And the only reason that we addressed the stipulation is because Turboff has argued all along that the stipulation standing alone was sufficient to give him that right.

HECHT: But even if it does your position is it only gives him the right under the contract that he had, which you claim he can't perform under.

LEVY: Right. Our position is it doesn't give him the right. That because the contract terminated...

HECHT: It gives him the right as between him and the bank or not?

LEVY: That's correct.

HECHT: So the bank couldn't convey to N.P. or anybody else for that matter any interest it might have gotten at some point under this contract to reimbursement. But that doesn't matter to you because you say well, so what.

LEVY: Right. There is no interest. So if you exclude the interest...

ENOCH: But if the bank takes the property subject to the agreement with the MUD, if the bank had not had any independent contract with the MUD, but the bank had developed the facilities and the property, would the bank not have been under an obligation to transfer the facilities to the MUD under its acquiring of the property from Turboff?

LEVY: The bank was not under any obligation. But had it chosen to keep the property and develop it and enter into a contract with the MUD for the proceeds, then I believe under the stipulation the bank would have had to have given Turboff the money.

PHILLIPS: Assuming the bank had stayed in business.

LEVY: Assuming that the bank had stayed in business, so the stipulation had survived. Because the D'Oench Duhme doctrine wouldn't apply, then the ultimate result would have been that the stipulation giving a right that didn't exist would have conveyed nothing. It was conveying a right under a contract that had expired 2 years earlier.

ENOCH: A developer doesn't have to choose to develop the facilities. The agreement is if the facilities are developed, the MUD agrees to buy the facilities from the developer. The bank takes over this property. If the bank had decided to proceed with developing the facilities, you're saying the MUD would not have had any obligation to buy it?

LEVY: The MUD could have assumed the obligation and might have done so. It would not have been automatic.

ENOCH: Just because the bank became the owner of the property _____ the property and it built out the water's facilities and done all that, there's nothing under this transfer of ownership by the developer to the bank that would have assigned the obligations and the rights under this contract with the MUD. The MUD is clear, they don't have to buy this facility from them and reimburse them.

LEVY: That's correct. There were not any automatic obligation there. The more important question, and this is outside of your hypothetical J. Phillips, the bank was obligated to Turboff under the stipulation. So if the bank had continued in business and if J. Enoch's hypothetical had occurred and it had developed the property, it would have had an obligation to pay Turboff, but that obligation cannot bind a third party. And that is the crux of our argument. It cannot bind N.P. Inc because it does not _____, because it is a purely personal covenant and because if people can just go around making little deals among themselves that do not have to be recorded, that the actual document doesn't have to be shown to the buyer...

O'NEILL: N.P. knew about this arrangement. You're not claiming that they didn't?

LEVY: No. N.P. knew about the claim that Turboff was asserting. N.P. never knew about the stipulation. N.P. did know about the contract, but was informed by the MUD, he did do due diligence on the contract, went to the MUD and said, I understand this contract was there. The MUD said yes. It expired 11 years ago. Turboff cannot perform the contract because he does not own the property. So N.P. knew that there was claim out there, but then he also knew that the claim was based on an invalid expired contract.

On the other hand, N.P. never knew about the stipulation and interest. The earnest money contract doesn't reference that. The warranty deed did not reference that. Everything was tied to the MUD contract.

O'NEILL: I guess what I'm having trouble with. I felt like you were making some sort of equitable argument that there was no notice. Someone can't buy something subject to something they don't know about. But there's really nothing here they didn't know about or couldn't have found out about it except for the legal position they took with regard to it?

LEVY: That's correct. Our argument on notice is that notice of an invalid claim has no effect.

* * * * * * * * * *

RESPONDENT

MCCONNELL: I want to start off by talking about why you have these reimbursement agreements in the first place. I've gotten the impression from hearing the petitioner's argument that some of these reimbursements that have been presented is kind of a burden on the property, an agreement to convey something to somebody. These reimbursement agreements and the whole

existence of MUDs are a boon to developers. The developer is going to have to put in the utilities at his expense in order to do his development. What the creation and the existence of a MUD does is it allows under the state statute the developer to be reimbursed for up to 70% of the cost that otherwise would come out of his pocket, and that he would never be reimbursed for other than by sales of his properties. Not only does he get to sell the property that he has improved, but he also gets reimbursed 70% of what he has spent on utilities to develop that property and get it into a salable condition.

The lenders obviously are aware of the fact that that is a cash stream that is out there that is a back-end cash stream. In other words, the lender who owns the money for a development project, they know that at the end of the project when the bonds are sold that the developer is going to get that 70%. So the lenders look at that as a portion of their security. You know, we are in effect going to have a claim against that money that we have advanced to the developer to put in those utilities.

So in this particular case, when the settlement was made with First Texas, Turboff knew that there was $1.5 million, 70% of the little over $2 million that Turboff had spent on putting in the utilities. And by the way, this is money. It's undisputed in this record that Turboff is the one who put in and paid for all of those utilities. It's defined in the N.P. MUD 36 contract. What Turboff did is defined as the existing facilities. That contract specifically provides that those existing facilities were installed and paid for by Turboff. So we're not talking about anything that N.P. did later. We're talking about what Turboff did way back when.

As part of the settlement between Turboff and First Texas, First Texas paid Turboff $400,000 and agreed that Turboff could have this additional $1.5 million when the time came for the MUD to reimburse for those costs.

HECHT: The bank never got it in the first place did they? It just foreclosed on the property.

MCCONNELL: In the record, I think it's at 300 where the deed of trust and security agreement is. Typically what the bank does in there they take a security agreement in those contract rights that are related to that, because they know that this is money that's coming in on the back-end.

HECHT: So your position is, the bank in foreclosure got whatever rights there were to the reimbursement under the Turboff contract?

MCCONNELL: Yes. And not only that but it doesn't make any difference. Because if they didn't get it, we have then. If they did get them, they gave them to us as part of our settlement of the lawsuit.

OWEN: Let's suppose you own some property and I say if you will develop a shopping center out there and do a turnkey job, I will buy the property from you. You get 80% if the bank

forecloses on you. Then the bank sells the property to your co-counsel, and then a third party comes and buys it from your co-counsel and sells it to me. Now do I now have to pay you for the improvements that you made to that property?

MCCONNELL: No. And the reason that that is different here is because in the agreement where you resold the property, the people to whom resold said that there's a dispute between you and Turboff, and I'm going to pay the money for this property to whoever is determined to be entitled to that money.

OWEN: Where does your right to entitlement come from?

MCCONNELL: It comes from the whole scheme of the reimbursement. The idea behind the MUD's creation and the statutory scheme for the MUD is that the developer who installs those improvements, those utilities is going to be reimbursed for the costs of those utilities.

OWEN: Does the statute say that, that regardless of whether they complete the transaction and sell the property to the MUD, that once you put those utilities in the ground you are forever entitled to reimbursement if another takes possession?

MCCONNELL: As Ms. Levy said, there is precious little law on that. The statute is not specific on that. The agreement provides for a reimbursement to Turboff. The argument that N.P. is making says, well Turboff can't perform because Turboff can't deed this property.

OWEN: Well I agreed to pay you for the shopping center, but once you can't perform, I'm off the hook aren't I?

MCCONNELL: You are...

OWEN: Then I later acquire the property.

MCCONNELL: That's right. And the difference there is is that you have a buyer. You have an entity that is created and charged with supplying utility service to the tract of land. In other words, you don't have any obligation to buy the property if our contract falls through under your example. However, if our contract falls through the MUD is charged by statute with the obligation to supply utilities to that tract of land within its boundaries. So that I think is the distinction between the two of them.

ENOCH: The bank acquired the development. Did the bank take it and was the MUD then obligated to buy the facilities if as and when developed by the bank, was the MUD obligated to buy it from the bank?

MCCONNELL: Yes.

ENOCH: Without a new agreement?

MCCONNELL: Without any new agreement. The district is charged under law with providing those services to the property within the district. In order to do that, in order to fulfill its duty as charged by law, the district must either install the facilities itself, which districts sometimes do,.

ENOCH: When the bank became the owner, the MUD has the obligation. That doesn't mean the MUD is obligated to the bank because of its agreement with Turboff. It just means that since Turboff no longer owns the land the MUD has to now look for another developer to come develop this, and the MUD would enter into a contract with the bank.

MCCONNELL: That's right. The MUD's duty is to acquire those facilities for the benefit of the property located within the MUD.

ENOCH: In this case, the MUD did not enter into an agreement with the bank to do this, and the bank then would agree to give the reimbursement to Turboff. The MUD actually entered into an agreement with N.P. If N.P. develops it, then the MUD would owe them a reimbursable. But now where does the reimbursable come to?

MCCONNELL: We refer to this as a reimbursement. That implies to me when we're reimbursing someone that we are reimbursing the person who spent the money. We're not reimbursing. You don't reimburse someone who hasn't spent.

HECHT: Well but you can write this contract to provide that. You can write this contract it looks to me unless there's some legal restriction on it anyway you wanted to. And it could have said the MUD will be obligated to pay Turboff some portion of his expenses if the MUD ever acquires these facilities by whatever means. It could have made that agreement or it could have made another agreement, which is we're only going to pay you for these facilities if we acquire them from you. And whichever way you made the deal, then people would just have to protect themselves later on when they are in foreclosure or selling things to realize that this either is or is not an obligation to continuing along.

MCCONNELL: And when the MUD made its contract with N.P. it did recognize that. And it said we recognize that we have an obligation to pay for these facilities. We have an obligation to pay for the existing facilities just as we have an obligation to pay for any additional facilities that N.P. builds. We are going to pay that money for those existing facilities. We're either going to pay Turboff or we are going to pay N.P. depending upon who is ultimately determined to be entitled to that.

OWEN: I don't understand why this just doesn't all fold into the chain of transactions here. The bank paid value for these facilities in the sense that it loaned money and was not repaid. And when it foreclosed it had ____ dollars there. It then owned the facilities. And it could turn around and sell them to a third party for value, and then that third party could convey to the MUD,

the MUD would pay for those facilities. So what does it have to do with the land itself if the bank decides for whatever reason that if I ever get money from the MUD, I will give it to your Mr. Turboff. How does that bind a third party to whom the bank sells the facilities down the line?

MCCONNELL: Just as if you and I entered into a contract. I was going to buy a piece of property from you. You then turn around and sold the piece of property. We didn't have anything in writing, we didn't have anything of record. You turn around and sell it to J. Hecht. Now if J. Hecht knows about it, my deal, if he has either actual or constructive notice, J. Hecht has to honor the contract with me. He didn't make it. But he has to honor it because when he acquired the property that was the subject of that contract, he had knowledge.

HECHT: But petitioners says the contract says we will pay you if you convey it. And so if you can't convey it, we don't owe you anything. They could have made another contract, which is we will pay you if we ever get it, but they didn't make that contract. That's petitioners.

MCCONNELL: I understand that. But to me what that does is the petitioner says oh, I knew about that, but I decided that that wasn't a valid and enforceable contract and therefore its not notice to me. It is notice.

OWEN: The bank foreclosed, and they may have had a separate deal with Turboff that was enforceable as between the two of them. But the bank had title to the facilities - conveyable title, unencumbered by any claim of Turboff. They had title.

MCCONNELL: If one ignores the fact that there was a lawsuit pending with a notice of lis pendens on file, then you're right. There was a lawsuit pending at the time the bank foreclosed on the property.

OWEN: But there was no lien?

MCCONNELL: There was a notice of lis pendens which puts the world on notice of the pendency _____.

OWEN: But that was a personal claim. The bank agreed to pay me money under certain circumstances.

MCCONNELL: What the banks said is, I'm going to take this bundle of rights that is attributable to my ownership of the property, and just like giving a royalty interest, I continue to own the minerals but I say that when I lease the minerals J. Owen is going to get X number of dollars. You are going to get certain percentage of the things attributable to my leasing the minerals. So to what First Texas did is they said, okay I own the land, but I'm agreeing that when it's time for reimbursement it's not coming to me. It's coming to Turboff.

OWEN: But that's a personal obligation to pay money. They own the facilities

outright. They had title to the facilities. They may have had a contractual obligation to pay Turboff. They go under. There rights are transferred to the gov't. The gov't sells to someone else, the facilities for full value presumably.

MCCONNELL: But they sell them subject to Turboff's right to reimbursement.

OWEN: Subject to his contractual claim with the bank.

MCCONNELL: No. If you read the language of the earnest money contract and the deed, they don't say subject to whatever legitimate rights Turboff may have under the 1984 agreement. They say subject to the rights of grantor or its predecessors in title, ie Turboff...

SCHNEIDER: What would be the difference or would there be any difference if the bank would just merely quick claim their right to the facilities?

MCCONNELL: Quick claim, you can't have a BFT with a quick claim deed. The difference between this case and almost is the BFT issue. The question of here we have a buyer who bargained for and knew that it wasn't getting the right to reimbursement. He knew that there were facilities that were in place, the existing facilities, for which the right to reimbursement belonged to a third person that was specifically excluded from his earnest money contract, specifically excluded from his deed, and if you look at page 348 of the record, he was specifically told who had those rights and what they were.

ENOCH: The court seemed to say that when the ability to transfer title to the facilities disappears that necessarily ends the contract. They talk about being a breach of contract. But it turns out it's not an enforceable agreement. So after foreclosure there was not an enforceable agreement here and as a result the reimbursable issue dies. That seems to be almost. How do we now say that after the foreclosure, but if the bank wants to give you the reimbursable that that somehow is an enforceable obligation even though you don't possess the title to be transferred?

MCCONNELL: Suppose that the bank had after the foreclosure deeded Mr. Turboff an easement across the property. I think we would all agree that the bank could do that and that that was going to be binding on subsequent owners of the property.

ENOCH: But that travels with the title.

MCCONNELL: That's right. But I think that so too does the right to reimbursement travel with the title because it is in the very document that vested title in N.P., Inc, ie the deed from First Nationwide. It is referred to and accepted from that. It travels with the title because the parties made it travel with the title. And it's well established under Texas law that even if there is an unrecorded right out there, that if you know about it, and if it's a right that affects that property, if you know about it you take title subject to what you know about it. Dr. _____ testified he saw the fire hydrants out there, he saw the storm sewers out there, he knew about the existence of those facilities

before he bought the property. His seller told him that he wasn't getting the right to reimbursement that goes with those facilities. He then enters into a contract with MUD 36, where MUD 36 says hey man we're going to pay this money - you're going to deed all of the facilities to us. And I don't think under Stine v. Stewart that there is any longer a question before this court as to whether we're a third party beneficiary to that contract. We are all over that contract. But he enters into a deal that says, I'm going to deed them to you regardless of whether I get the money, or whether Turboff gets the money. And that's what we're asking the court to enforce on our petition. Because otherwise you know he just says I don't have to sign a deed to you guys; come tell me how much money you will give me to sign the deed. That's where the TC messed up on that.

This is a real estate issue. To hold as the petitioner ask you to hold, you're going to do violence to the entire BFP notice doctrine that we've built up over 170 years in this state.

HECHT: I don't understand that argument, because it seems to me just a simple matter of construing the original contract. If the MUD said we'll pay Turboff no matter what if we ever get these utilities, then they owe the money to Turboff. And if they said we're only going to pay Turboff if he conveys them to us, then they don't owe the money to Turboff. I don't understand how land titles are affected one way or the other.

MCCONNELL: I think what happens is, you have to construe then the contract between N.P. and the MUD. The MUD is going to end up with title to the property. The MUD's going to get what it bargained for in both contracts. The MUD is going to end up with title. That's what it wanted. Title to the property, because they have a statutory obligation to furnish utilities to the people within the district. They are going to end up with title. The only question is, who's going to get the money?

OWEN: All it excluded was seller's rights under any contract. And if it no longer had rights under any contract there was nothing to exclude. Doesn't it come back to that?

MCCONNELL: Except that again, you not only have that language but you also have at page 348 of the record, you have Dr. P_____'s testimony that he was made aware of Turboff's rights to reimbursement.

* * * * * * * * * *

REBUTTAL

O'NEILL: If we were to rule your way why wouldn't this be a windfall to N.P.?

LEVY: Let me explain that. That's a very welcomed question. This contract from the MUD required numerous actions by the developer. The contract never refers...

O'NEILL: By developer do you mean by N.P.?

LEVY: By developer, N.P. under the current contract from the MUD and by Turboff

under...

O'NEILL: My understanding is that N.P. just added value. There was value there in the improvements and then N.P. just added some to update it. If you get the benefit of the entire reimbursement why is that not a windfall?

LEVY: For two reasons. First of all, because although they add value and they are now improving that value, N.P. is signing on basically for life for these facilities. N.P. warrants the facilities. N.P. holds the MUD harmless...

O'NEILL: But it does that regardless. Right? I mean it's going to do that even if it had been transferred to N.P. after the money was paid.

LEVY: I think part of the problem in talking about the money is that Turboff calls this, the reimbursement. The contract does not use that term. The MUD contract calls this the contract price. Turboff says it is purely for the construction. But the contract involves all of these other warranties and continuing corrections that the other party to the contract, in this case N.P., must agree to provide. And the contract never limits the contract price purely to the reimbursement. Presumably the reimbursement is certainly part of the contract but all of these continuing things...

O'NEILL: I still don't understand why that's not a windfall. If the reimbursement had been made to Turboff _____ and you had bought it after the reimbursement had been made, you would still be doing that same warranty.

LEVY: We would be doing the same work. Yes. And we would be compensated for that work. But we are taking over Turboff's initial facilities: improving them; maintaining them; paying to continually upkeep them; correct any problems; hold the MUD harmless if something happens to those facilities.

PHILLIPS: Would Turboff have any quantum meruit claim against your client?

LEVY: I don't know. He's never asserted that claim. And I suppose if he did assert some claim like that it would be decided in terms of what was the state of the facilities after sitting idle for 10 years, and how much do we have to spend to continually maintain them. I don't know.

ENOCH: It is not clear to me about the contract. The contingent issue of transfer of the deed is person specific. It is not clear to me that of essence in the contract is that it be Turboff that transfer title to the property of the MUD only that title be given to the MUD as a precondition to the MUD paying for the facilities. Can you make it clear that if I don't have the title to transfer that that necessarily means that the MUD is released from the obligation of paying me for the facilities if they ever do get title to the facilities?

LEVY: The contract is between the MUD and Turboff. The MUD agrees to pay

Turboff. Turboff agrees to pass title. That was the issue in almost as well.

ENOCH: There's a trustee who actually holds this title, it may be in escrow, to make sure that certain things get done, Turboff gives instruction to the trustee to transfer title to the MUD. You're saying that the MUD could refuse to pay Turboff because under the contract they are only obligated to pay Turboff if Turboff gives them the deed?

LEVY: If Turboff owned the property, then Turboff could order the trustee or whomever to convey the property. But Turboff doesn't own the property. He could not go in as a nonowner and require someone else to part with their title. Which essentially is what he is trying to do here. N.P. took fee simple title, which means N.P. got that entire bundle of rights. Turboff keeps saying he took some rights out of that bundle of rights that goes with property ownership. That's impossible. First Nationwide gave N.P. a deed warranting that N.P. has fee simple title for the land. And that includes all of the rights. So if something is missing, First Nationwide then breached its warranty under the deed.

But the bottom line and the one thing that I would ask the court to remember is this. First Texas and Turboff could agree to anything they wanted to agree to. Between the two of them they could make a contract. We have no problem with that. And that contract would be enforceable by each of them against the other. But the issue here is can that sweetheart deal, 30 minutes before the Savings & Loan was shut down, now bind someone who paid for the property, who got fee simply title, can this somehow cast a cloud on N.P.'s title? And Turboff says it does. Turboff says your title is worthless.