ORAL ARGUMENT - 4/5/95
95-0085
MORGAN STANLEY V. TEXAS OIL COMPANY

REYNOLDS: I represent Morgan Stanley in this case who I submit finds himself in quite an unenviable position. Tenneco hired Morgan Stanley in 1988 to assist it as a financial advisor in selling certain oil and gas properties. In fact a rather substantial amount of them.

When I read the briefing in the case though I am attempted to believe that our client was not Tenneco, but instead the Texas Oil Company. Because Texas Oil is seeking to impose so many duties on Morgan Stanley that runs so contrary to what Morgan Stanley's duty at Tenneco was.

What was Morgan Stanley's duty to Tenneco to assist them in selling these assets? When you assist someone in selling assets you create a class of entities. One entity is going to be the successful purchaser, the balance of the entities are going to be unsuccessful. Their hopes to buy the company are going to be dashed. They are not going to be successful and, therefore, if Morgan Stanley is successful in performing its duties to Tenneco it will create a whole class of disgruntled folks who did not succeed in purchasing the assets.

Why does Tenneco hire someone like Morgan Stanley to be its agent and its financial advisor? Advice from Morgan Stanley is judgment. Tenneco secures Morgan Stanley's judgment to help it evaluate competing proposals, to help it screen and filter information as it comes to the floor, to help decide what's critical, what's important, what's not important, what should be considered, what shouldn't be considered as Tenneco goes along the road to selling what is a very complicated asset. There is no dispute about that in this case. Houston Oil & Minerals in its capacity as the Trustee of the Houston Oil Royalty Trust with its fiduciary duties to the trust holders was a very complex asset to sell.

Morgan Stanley's position is not enviable because it's judgment as I say is being second-guessed not by Tenneco, who had many opportunities to pick up and pursue negotiations with The Texas Oil Company if it so desires.

SPECTOR: Now Tenneco was originally sued in this suit?

REYNOLDS: Tenneco was originally sued in this suit. It was the first defendant. It was sued before in fact your honor it ever sold the asset to Seagull, and was told in the petition that Texas Oil was willing to pay more than Seagull and nonetheless went forward and sold the asset to Seagull. In fact closed the sale the morning of the hearing on the temporary injunction.

HECHT: Has Tenneco ever sued Morgan Stanley?

REYNOLDS: No sir your honor.

HECHT: Has it ever threatened to?

REYNOLDS: No.

HECHT: Has limitations run?

REYNOLDS: Surely. By this point in time this is...in fact I was just starting to date my wife in November, 1988, when I got the call on this case. So we've got 7 years now. So I think limitations has well and truly run on any potential claim that Tenneco might have.

HECHT: On both of them then?

REYNOLDS: Yes your honor. So who is questioning our judgment? Every single decision Morgan Stanley made in the course of disposing of Houston Oil & Minerals on behalf of Tenneco is being second guessed now by the plaintiffs and by the experts that they have hired to scrutinize and say: Well here Morgan Stanley should have done this, and therefore, they must have been preferring one over the other. That is not their burden we suggest to place on someone who is a fiduciary to Tenneco and who has obligations to Tenneco.

CORNYN: So Morgan Stanley doesn't have any duty to Texas Oil?

REYNOLDS: I think that once you start to impose any duty on Morgan Stanley to a third party you have to be very careful. We as attorneys for example cannot assist our client in defrauding a third party. We owe duty to our client but there are limits on that duty under for example The Flowers case.

CORNYN: What I am trying to understand is whether your contention is here today that Morgan Stanley owed no duty to Texas Oil because Tenneco didn't complain?

REYNOLDS: In the context of the facts alleged in this case there are no facts alleged that breached an duty to Texas Oil Co.

CORNYN: My question is more global than that, and that is, in this case context are you saying that an agent for Tenneco could never breach any duty to a bidding third party?

REYNOLDS: I think it could. I think it could assist Tenneco with _____.

CORNYN: Not tortious interference?

REYNOLDS: I don't think they could tortiously interfere with the perspective relationship on these facts.

CORNYN: Well under any set of circumstances?

REYNOLDS: Right. In fact the only duty I think they could breach is if they assisted Tenneco in affirmatively defrauding them. And if Tenneco said: we want to lie about the productive capability of the properties; will you help sell this information to the Texas Oil Company? Yes, that would breach a duty and would expose them to liability with the Texas Oil Company. But those are not the facts in this particular case.

ENOCH: You're familiar with the Maxey case. The language in the Maxey case talks about basically corporate agents not being liable for tortious interference assuming they've exercised their authority in good faith. How do you get to...I mean what does that mean? You've identified you can't participate in a fraud with respect to the third party, but what does good faith mean?

REYNOLDS: What good faith means from my perspective when you're the corporate agent for someone like Tenneco and you're a party hired by Tenneco is if you and Tenneco are going along and you're happy about the way things are going and Tenneco obviously is happy about the way things are going, Tenneco after being fully informed of this suit proceeded to sell the asset to Seagull, etc., you must by definition be acting in good faith and someone should not be able to question it. But the whole notion of requiring someone like Morgan Stanley to prove that it acted in good faith is very difficult because you can only second-guess every single decision they made along the way. And anytime you can find an expert to come in and say: Well it would have been better for Morgan Stanley to pursue negotiations with the Texas Oil Company because they may have gotten this particular term of the contract more favorable to Tenneco than ultimately they secured.

But I think good faith in the context of this relationship is if there's a unity of interest as obviously is disclosed here between Tenneco and Morgan Stanley then there cannot be any breach of it.

CORNYN: The allegation here though is that Morgan Stanley hoped to have some future beneficial relationship with Seagull, right?

REYNOLDS: Yes. I think that...

CORNYN: And why isn't that a sufficient personal interest that diverges from that of the principal that might under some set of facts give rise to a tortious interference claim?

REYNOLDS: Well I think that you have identified the thread from which their whole case hangs, which is the stating in their brief here that Morgan Stanley stood a chance to gain a valuable client in Seagull. In this particular case the evidence is undisputed that we did not gain a valuable client in Seagull, that there was no personal benefit to Morgan Stanley, and that Seagull had never been a client of Morgan Stanley since the time of this event.

CORNYN: Does it have to be a fait accompli by the time the lawsuit is filed or can it based on an allegation that you hope to secure some future benefit?

REYNOLDS: Well under the opinion in Hallway v. Skinner it says that there are at least two things that

have to happen: a) there has to be a personal benefit to the alleged actor; and in this case there is no allegation that there was a personal benefit to Morgan Stanley; and then (b) you have to show that the actions of the agent were so manifestly unreasonable that they could have only been motivated by a desire to further its own personal interest.

CORNYN: So the personal benefit that you say Holloway requires has to be money in your pocket right now, not some hope of future, favorable treatment or relationship in the future?

REYNOLDS: As I will tell you it is my most earnest desire in every case I handle for a client that ultimately the outfit that was my adversary will be so impressed by my skill and talent that they will want to hire me to handle future litigation on their behalf. I mean that is my desire every time I represent a client, and I assume it's a desire that's common to virtually every agent in every transaction particularly outside agents in a case such as this.

But that desire alone puts you on a slope that inevitably means that you are going to have go try and defend these cases and ultimately be exposed to more dollars of damages actuals and exemplaries than Tenneco would have been had it actually agreed to a contract with the Texas Oil Company and said we are going to sell it to you and then reneged and said: We've decided we hate you Texas Oil; we want to sell it to Seagull Energy Corp. In that case the most Texas Oil could hope to get from Tenneco was the difference between the value of the assets it was going to buy, and the purchase price it agreed to pay. But by virtue of claiming that Morgan Stanley found Seagull interesting as a particular client, they now say they are entitled not only to go after their actual damages, but also exemplary damages. It's a very odd result and it's precisely because the court found there was no agreement with them.

But in any event as I understand the case when you're talking about anything that's going to impact on the ability of Morgan Stanley fairly and fully to exercise its judgment on behalf of its own client, and that is starting to create some duty to third parties, which is going tend to inherit, you have to be very careful. And so I think it's appropriate that the court look for and demand evidence of a personal benefit before it can conclude that there is a right to go to trial in such a case, that it does exactly as the case says: there must be evidence in Holloway _____ _____ benefitted from the decisions. It's even more important in this case because in Holloway they had a contract. In Holloway Mr. Skinner had an ascertainable loss. He had a promissory note that had not been paid. Here we have a case in which the CA has found and no one has challenged in this court from the other side, the CA has found that there is 6 items of nonagreement between the parties of essential terms. For example: whether Texas Oil agreed to the terms of the stock purchase agreement that Tenneco had proposed. Would Texas Oil agree to structure the transaction as an asset sale as opposed to a stock sale in order to avail itself a certain tax benefits? Was the Ensearch(?) litigation included among the assets of Houston Oil & Minerals to be sold? Would or could Texas Oil indemnify Tenneco? What was the source of funds for the acquisition, and would furniture, computers, etc., be included in the sale? Here we have no way of knowing what was the total consideration with which Texas Oil was supposedly going to part and what was the total consideration that Tenneco was to receive from this deal? So we don't even have here a firm offer. It's not like the parties were about to sign the agreement and Morgan Stanley came along and bludgeoned Tenneco away from the table. Here we didn't even rise to the level that we knew the terms of the Texas Oil Co's offer.

And that critically important in this case because when you get to the second element of what we understand to be the test represented in Holloway v. Skinner you have to show that Morgan Stanley acted against the best interest of its principal, Tenneco.

CORNYN: Is there no distinction in your mind between the circumstance of Holloway v. Skinner where you have a small closely held corporation where the only individual that could act for the corporation was indeed the principal, the officer of the corporation, and a situation like this where obviously Tenneco could act through a variety of agents, but in this instance chose Morgan Stanley to...

REYNOLDS: I think there's a huge distinction your honor. And it's a very important distinction. In the case of Holloway if Mr. Holloway takes an action that is against the best theoretical interest of his corporation, who's going to complain? Is there going to be any stick to deter that sort of conduct on behalf of someone like Mr. Holloway? No, because he is the corporation for all intent and purposes, owning 40% of it and being an officer, he's one in the same as the guy that made the decision. Plus, even if the corporation did complain he would be able to avail himself of the benefits of the business judgment rule under cases like Earhardt v. Smith Industries out of the 5th circuit interpreting Texas law, and telling directors that they have certain protection and telling officers that they have certain protection when exercising their business judgment.

Morgan Stanley on the other hand has a huge deterrent in a conduct like this because it exposes itself if it really thought for a minute that it could get away with they claim they were doing in the brief. It exposes itself to a claim brought by Tenneco for breach of fiduciary duty for millions of dollars plus exemplary damages in a multiple of that amount. So there is a huge deterrent to outside agents like attorneys, and advisors and the like doing this sort of thing. So I think that is an important distinction and says we need if anything a rule that is more tough for plaintiffs to meet in the case of someone like a Morgan Stanley.

CORNYN: In this case there should be an additional element and that is the principal must first complain before the third party can suit for tortious interference. Whereas that should not or is not an element in the closely held corporation?

REYNOLDS: I think at a minimum that is something that should be required in this particular case given the differences in the already existing laws, the potential of deterring and preventing this sort of conduct from occurring. In addition of course to having the benefit. And it's really strange because this statement in their brief is something from which they hope to draw certain inferences and this of course is an inference, that the inference they want to draw is that Morgan Stanley believed that Seagull would be so impressed with its decision to breach its fiduciary duty to Tenneco and deprive Tenneco of millions of dollars, that Seagull would want thereafter to have Morgan Stanley to be its investment banker and financial advisor. That I submit is not a reasonable inference to be drawn from this evidence in any way shape or form.

And also that Stanley may chance as they say in their brief to gain a valuable client was worth exposing itself to this huge risk.

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RESPONDENT

ENOCH: Mr. Matthews am I correct that as I was reading the briefs it looked to me that your complaint is in essence Morgan Stanley did not permit you the opportunity to negotiate for the purchase of HO&M?

MATTHEWS: Absolutely. At least in any sense of a fair negotiation. It's not the comparison of the bids that were actually made so much as the perversion of the process. An item that was just mentioned by counsel could we reasonably believe that Seagull would be impressed by Morgan Stanley's fraud and therefore use it in future business opportunities?

GONZALEZ: What fraud?

MATTHEWS: Well the fraud I mean by that your honor is misrepresenting to Texas Oil that a) this was a bid: b) that their bid was high; c) that if any other bid came in they would be given a chance to increase their bid. That's misrepresentation. I call it fraud. It's conduct that violates every standard in common business practice. And our point is Seagull didn't know that. If you see in the record Barry Gault with Seagull, Seagull says: Well we were called and told we had to increase our price. And he said they weren't told that Morgan Stanley had told Texas Oil: You're high and you're going to get it if no one else comes in. But they go to Seagull, and they tell Barry Gault: You've got to come up a little bit. And of course Barry denies knowing the amount but as the CA recognized in the evidence that it's funny that in his handwriting there is our bid. And it's not important that he know the identity of the high bidder was important as he was given a chance to edge up and outbid all in secret. What it is is a perversion of the process that was set up by Tenneco.

SPECTOR: Counsel stated however that Tenneco knew of the claim that your client is making before they closed on the deal that was at issue. Wouldn't that be important not whether Seagull knew, but whether Tenneco knew?

MATTHEWS: Well your honor it is an interesting point and a question of what they knew. In the first place, it's clear in the record that although Morgan Stanley was hired to be the gatekeeper, hired to be the person who brought the evidence of the different bids together and gave it to Tenneco to make a decision. Tenneco Inc., nobody at Tenneco, Inc. was ever told that Morgan Stanley had even received a bill for an entity called Texas Oil. Now that's incredible.

GONZALEZ: I think they were aware of it before the limitations had run, or expired, and they chose not to complain or to sue.

MATTHEWS: What they were aware of at the time they first heard about the bid they had already been locked up by Morgan Stanley in an exclusive negotiated the contract with Seagull. Now what did they know just before they closed? Well someone knew that somebody out there was complaining. But what they didn't know is when you file a lawsuit you don't have the evidence, you don't know what happened.

In fact the development of the evidence in this case through the depositions frankly Texas Oil believed that somebody at Tenneco had tried to give their brother-in-law a good deal. It wasn't until long after the closing that depositions were taken and it became evident that it wasn't Tenneco. Tenneco didn't even know about our bid. Tenneco, Inc. had never heard of our bid.

GONZALEZ: But they're not complaining about Morgan Stanley's services?

MATTHEWS: Morgan Stanley, the evidence shows, Morgan Stanley was able to use his position of trust with Tenneco to manipulate the various Tenneco entities involved...

GONZALEZ: To the detriment of Tenneco.

MATTHEWS: To the detriment of Tenneco.

GONZALEZ: So if they had a beef they had a right to complain and they're not complaining.

MATTHEWS: That's right your honor. It's our view that Tenneco is a large diversified company worth billions of dollars with wide spread interests. We do not believe the law should be that if the proof is that Morgan Stanley had an assignment and they went far beyond the bounds of that assignment, they went outside the scope of their assignment. They made the decision in secret and not in good faith.

We believe that if the evidence shows that by doing that and by not playing by the rules that they had set up, and by lying and misrepresenting to the other bidders, that they should be held liable to those other bidders. Not because they were not successful, but because of the perversion of the process that they were not able to even get their bids before the decision-maker Tenneco.

ENOCH: You're talking about this duty that exists here. Let's forget about the agency circumstance. You sued Tenneco or did you not?

MATTHEWS: Originally they sued Tenneco because I thought they had a contract with Tenneco.

ENOCH: Now generally speaking are principals liable for the actions of their agent. Assuming everything you've said what cause of action does that create for reliability of the principal for having failed to negotiate with you for the sale of the HO&M? Their failure to negotiate with Texas Oil for the HO&M, what cause of action do you have against Tenneco?

MATTHEWS: We don't believe that we have a cause of action against Tenneco on that basis. We believe that Tenneco was the victim. And in response to Justice Gonzalez we believe that Tenneco simply has chosen to take its lumps in this case, which to Tenneco are not all that large and consideration that they use Morgan Stanley as one of their primary merchant bankers gathering and rasing public money for Tenneco that this is not worthwhile. They are rupturing that relationship although it caused severe damage and harm to the other party involved. Tenneco is by the way just to emphasize that has gotten out of the oil and gas business. That's the reason they've just moved their corporate headquarters up there next to

Morgan Stanley in New Jersey.

GONZALEZ: What is so unusual about an agent for an owner to want to jack up the price by telling people you know your bid is not high enough, or we have a competing bid, possibly if you come up on your bid we have a deal. That's done every day is it not?.

MATTHEWS: I agree with you. And if we know that it's a bid situation or whatever reason is Morgan Stanley goes out and helps market this property and they tell and if they publish and they send people draft contracts they have to agree to and they send out the rules.

GONZALEZ: And people use other people to jack up the price. I mean that's done every day.

MATTHEWS: Right. What we're complaining about here is that Morgan Stanley according to the summary judgment record affirmatively did not get and did not try for in effect actually prevented Texas Oil from giving their best bid.

OWEN: Would you detail the evidence for us that shows but for Morgan Stanley's interference that Texas Oil would have closed the deal with Tenneco?

MATTHEWS: Well I think there's a lot of evidence that we would...for example: we had purchased other properties from Tenneco. We had funds to purchase this. We're talking about $15-16 million bid. There was $15 million in cash in this company. Not to mention the oil and gas properties. So we're talking about whether we would have entered into a contract. Financing - no problem. We had purchased other properties from Tenneco. No problem. We were prequalified by Morgan Stanley to go into the bid room. They had prequalified bidders to see the confidential information - no problem. We were the high bid. No problem. We agreed to their terms - no problem. Now this is a very interesting part of this because it illustrates so much how Tenneco was taking advantage of by Morgan Stanley, how Tenneco found its agents stepping outside the bounds of its assignment and stepping outside the bounds of its agents.

ENOCH: You had no...your complaint is that Tenneco had no idea that you were doing these things, right?

MATTHEWS: Right.

ENOCH: So this is not...the facts of this case are not where you're having a dealing with Tenneco and the agent outside your dealing with Tenneco goes to Tenneco and says this isn't a good deal. This is a situation where Morgan Stanley is doing all of the negotiating on behalf of Tenneco and you're dealing all of your time with Morgan Stanley, right?

MATTHEWS: Morgan Stanley says that Tenneco is going to make the decision. That's in all the publications, all the rules, and that's in their briefs. Tenneco is going to make the decision.

ENOCH: Whether Tenneco makes the decision or not, you're not dealing with Tenneco, you're

dealing with Morgan Stanley?

MATTHEWS: Right. The only Tenneco person that ever knew we were involved in this was Mr. Schultz, and he was with Tenneco Oil. He knew about the oil and gas properties, and he attended a meeting. Mr. Schultz has testified he was not involved at all in the sales process. He was merely there in a technical capacity to answer questions.

ENOCH: If Tenneco had assigned HO&M to Morgan Stanley to sell, so that Morgan Stanley was actually going to be the seller of this deal, we wouldn't be here today; that would be your point? You have no cause of action against Morgan Stanley as the seller of this item?

MATTHEWS: We think that if they have engaged to sell and make the decision, that they still had duties to do that in a commercially reasonable fashion, the duty is to Tenneco. And what I was about to tell Justice Owens in which I think illustrates this point about them breaching that duty to our harm and also to Tenneco by millions of dollars was this question of the 338 election. It's an incredible story. It's in the summary judgment evidence. What happened was Morgan Stanley knew that it was required that anybody that bought these properties had to agree to a 338 election - it's a tax matter. It meant big bucks: millions and millions of dollars. Tenneco couldn't go forward without them electing 338 coverage and both the purchaser and the seller have to make that election.

HECHT: Just to put a little finer point on it. It was like $3-4 million?

MATTHEWS: No, I think it was really for Tenneco it was a problem that was much larger than that if they didn't get it. It only cost them in the end to get Seagull to agree to it some $4.5 million. But they had to have it because their downside was tremendous. Now what happened? When it comes up Seagull says: well we don't want to agree to that; we've not agreed to that. And yet Morgan Stanley knows and its in the summary judgment evidence that they have given Seagull a draft purchase agreement which requires it that they attended a meeting at which Mr. Perrera testifies he was there and Seagull actually discussed it prior to making their bid, that Seagull said: I'm not sure this is available, but we see that it's required and we agree to go along with it - happy to go along with it - we just don't if it's available. Only later when they get into the discussions and they are bidding under this lockup agreement with Seagull, exclusive agreement with Seagull, Seagull says: No, I don't think this is really in the cards. Morgan Stanley at that point instead of saying: You're right it's in the cards; you saw it, it's in the purchase agreement we drew up, we got together in a meeting you agreed to do it, and now you're telling us with an exclusive agreement to negotiate only with you that you're not going to do it. Morgan Stanley at that point knowing the facts went to Tenneco and said: You guys have made a mistake. We've got to agree with Seagull. We've got to give Seagull what they are asking for here, or this thing is going down the tubes. And Seagull gets an additional $4-5 million dollars out of it.

It's an incredible breach of their duty to Tenneco. It's stepping out of all bounds not only of their duties to Tenneco but a reasonable commercial practice. They're not Tenneco's agent at that point.

CORNYN: In trying to understand why your opposing counsel says that you shouldn't have any beef

if Tenneco doesn't have any beef with their very own agent. Is your point, and I'm trying to just clarify this in my own mind, is your point that the harm to Texas Oil wouldn't necessarily be equivalent to or is significant or would be more significant than the harm that Tenneco might suffer from some exceeding of authority?

MATTHEWS: That's clearly the point I made that they need Morgan Stanley for a lot of purposes. There's a lot of reasons why someone might not sue their professional advisors. Whether it be their lawyers, hopefully, or their merchant bankers, it's a complicated relationship. They deal with them in all facets of their business. Extremely important _____. So they may not bring that suit. Even though they may have been materially in the sense of millions of dollars harmed by it.

This whole question only assumes that there is one set of interests to be protected. But frankly we think in a commercial business environment that there are more than one set of interests to be protected in a legitimate fashion. And that this is like saying only the buyer can assert a breach of contract.

PHILLIPS: To affirm the CA under the logic you're expounding is there any way that we could retain the doctrine of attorneys owing no duty to anyone other than their client? You keep mentioning attorneys every time you mention merchant bankers.

MATTHEWS: Right. Well I think it's best summed up I guess in the pitch that we heard from Morgan Stanley that we have a duty, that we Morgan Stanley have a duty to Texas Oil, and he said: if we assisted Tenneco in a fraud, if Tenneco came to us and said "We want to lie about this" and if we assisted them in defrauding Texas Oil somehow in this purchase of assets, then yes we would be liable. That was his reply. My pitch is that hey look you didn't only assist Tenneco in a fraud, Tenneco wasn't involved. You created the fraud. Now if you think you're liable if you assist Tenneco in a fraud, what is the rationale for someone who's willing to do what the summary judgment evidence shows was done here, what is the rationale for walking free if they originated the fraud and carried it out? And what it did was secretly pervert the entire competitive process to their client's harm and not to their client's favor.

PHILLIPS: I think the answer is yes. I mean if the lawyer is serving the client and harms the client in a way that also harms some other party the client is negotiating with, that that lawyer should have liability even if you can't show money is coming into the lawyer's pocket as a result of it.

MATTHEWS: Right. If the lawyer carries out practices which are essentially unlawful, misrepresentations, lying, cheating and stealing.

PHILLIPS: Nothing was done here that was criminal?

MATTHEWS: I didn't mean by lawful criminal. I mean to include telling someone something that you know the facts are not there; convincing them to enter this bid when you knew they were willing to bid $300,000-400,000 higher because you knew that your other interests, Seagull, was not going to bid more than $16.4. The pattern of the bidding was very interesting. We had an earlier conversation with Morgan Stanley in which we said before we came to talk to him we're thinking of bidding in the $15 maybe up to

$16 million range. And so what happened is that Seagull comes with a blank in their bid, a blank in their draft agreement. They sit down with Morgan Stanley and they come out with a $16.162, or something like that. It's incredible. Just amazing that they did that. And then we come in for the first meeting with Morgan Stanley and we say: we've decided to bid $16.2, there's a panic - but y'all want us to bid that much. We say we're willing to go to $16.7. Don't do it.

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REBUTTAL

CORNYN: Counsel is it your contention that there should be no cause of action for tortious interference even if the agent exceeds the scope of their authority?

REYNOLDS: For tortious interference and this is a case of perspective contract as opposed to contract like Holloway v. Skinner was. So the interests is much more tenuous here. Yes, I mean I don't think there should be a cause of action here that would create a duty running in the opposite direction from Morgan Stanley.

CORNYN: So even under the standard that Justice Hecht articulated in his concurring opinion in Holloway v. Skinner, that there must be a demonstration if they exceeded their authority to the principal you don't think there should be any duty under those circumstances?

REYNOLDS: No. Personally I feel that creating those sorts of duties compromises the ability of one's agent to act in the best interest of this principal. So yes that's how I think it should be.

I wanted to respond to a few points he made that seemed to imply that this deal was conducted in secret from Tenneco. At the first meeting with the principals of Morgan Stanley, or at the meeting where Texas Oil allegedly conveyed its expression of interest in the companies and expressed its willingness to pay a certain price, Charles Schultz was there, an officer of Tenneco Oil, the outfit that owned Houston Oil & Minerals, an outfit that was going to have to sell the stock. So Morgan Stanley would have to presume I take it and we have to infer that Morgan Stanley believed that an officer of the company that owned the stock would withhold relevant information from his company about Texas Oil. Did he participate in this meeting? They've implied that he didn't participate at all. If you go to pages 116-119 of Mr. Pedigreus oil deposition in this case, the principal of Texas Oil, he said: Mr. Schultz had a keen interest in a certain topic at that meeting; his keen interest was not on how much you're willing to pay, but to what extent are you willing and able to indemnify Tenneco against its prior actions. That is we want handle this business less important to us is the purchase price, than is the ability for us to have tail coverage so to speak and to put this thing behind us. And so Mr. Schultz was not only there, he was an active participant. The second thing as he tries to portray Tenneco's being ignorant through this whole process and claim that his client dealt only with Morgan Stanley is when on October 12, 1988, they wrote directly to Mr. Kettleson the chairman of Tenneco, Inc. and said: here are the facts, here's what Morgan Stanley told us, we're willing to pay $17.25 million for the company and we're willing to sign that contract today. So Tenneco is fully apprised of that. The record evidence here shows...

OWEN: That was after the lock-up agreement was signed with Seagull; is that correct?

REYNOLDS: That's what they call the lock-up agreement, but importantly they had a right to walk away from Seagull as of Oct. 21, 1988, they had a complete right to walk away. So they were fully informed and aware of what Texas Oil claimed it was aware vis-a-vis Morgan Stanley and what Morgan Stanley allegedly told it before they ever decided not to walk away from their further negotiations with Seagull, notwithstanding all the machinations ongoing about the 338 H10 election. And importantly is the fact that Mr. Kettleson not only saw this letter, he shared it with the corporate general counsel and with the assistant general counsel of Tenneco to make sure everyone was fully apprised of what Texas Oil was claiming in this particular letter. And then as I said this lawsuit gets served before this deal is done. And in the lawsuit they say: Morgan Stanley promised this X, Y, & Z, and if Texas Oil's evidence is to be believed in this case, which I think we have to do in the context of the summary judgment, Tenneco is already aware of the machinations ongoing with the 338 H10 election. So it's served with the lawsuit saying that Morgan Stanley made all these representations to us as follows:

> Knowing what happened vis-a-vis the 338 H10 election, how does Tenneco respond? Tenneco responds by immediately closing the deal, moving to closing more quickly than otherwise on the day of the hearing on the temporary injunction.

CORNYN: Opposing counsel says that your argument that the agent should owe no duty to anyone accept the principal assumes that there is only one set of interests to be protected in a transaction like this and those are Tenneco. Would you respond briefly to that. I mean do you agree with that statement?

REYNOLDS: I think from Morgan Stanley's perspective and from the Maxey motion of good faith it's the duty of good faith is owed to Tenneco and Tenneco is the party best able to judge that, and has the clubs ability to enforce any deviance from that standard by Morgan Stanley.

CORNYN: So you don't disagree with his contention that your standard would protect only one set of interests and those would be Tenneco's?

REYNOLDS: Obviously we cannot participate in a fraud as I understand the law to be.

PHILLIPS: They claim their summary judgment proof raises a fact issue that you made statements that_____ about the status of the bid being open, and that they would have another chance for a bid, and the deal was going to be there's. Why don't some of those allegations arise from a factual from _____ fraud?

REYNOLDS: Well the CA threw out their fraud claim and they have not appealed that. They had a fraud claim and the CA affirmed the judgment of the TC that threw out their fraud claim in this case. And one reason they don't rise to the level of a fraud claim is because one of the elements of fraud under Sterner v. Lawyers Title or anything else is that in reliance on the false representation you have suffered some injury. And Texas Oil as the CA found was unable to show that it suffered any injury from reliance on anything that was alleged to be a misrepresentation. So they said there is no fraud claim as a matter of law

notwithstanding the disputes about what was said and whether what was said was true, etc.