ORAL ARGUMENT — 4/8/99
98-0645
STATE OF TEXAS V. VITAPRO FOODS, INC.

LAWYER: At issue today is a brash and thinly veiled attempt to avoid the state's statutorily required competitive bidding process. Purchases of food for inmate consumption must be and usually accomplished through competitive bidding.

To explain, a state agency can only purchase for resale what it can later sell. For instance, if you have a statute that says: Agency X can sell desks and chairs, and then you have a separate statute that says: Agency X can buy or purchase for resale. That doesn't mean that agency X can go out and buy anything it wants unrelated to desks and chairs. It can only buy items related to what it can sell, that is its statutory authorization. In this case, there are severe limitations on what TDCJ and the institutional division could actually sell. Those limitations are found in part in the old section 9007 of the Texas Revised Civil Statutes and in the Prison Made Goods Act, which is subchapter B of Ch. 497 of the Government Code.

Section 9007 said that TDCJ could contract "for the manufacturing and selling of items produced by prison industries." Moreover, in the Prison Made Goods Act, (B), nearly every section talks about articles and products produced. That's a quote from the language. What that means is that it could only sell items that it manufactured or produced. It didn't manufacture or produce VitaPro. Manufacture means the making of goods or articles by hand or with machinery. Produced in the dictionary refers back to make or manufacture. There is no fact question in this case about VitaPro. TDCJ and its prison industry offices did not manufacture or produce it as a matter of law. It arrived in Texas pre-made and pre-packaged.

HECHT: If TCI and TDCJ had succeeded in distributing this around the country it would have been outside of their statutory powers?

LAWYER: I believe so. This national distributorship idea was not a statutorily authorized contractual arrangement. There were things that you could sell but the statutes required them to manufacture or produce. And we believe that a distributorship agreement in fact would have been void as unauthorized.

ENOCH: If a prison grows the tomato and celery and _____, etc, and whatever you do, and they put in a big masher and create salsa with that, then the prison under the statute is authorized to sell that to the public?

LAWYER: Not to the public.

ENOCH: Wherever you sell it if they buy the tomatoes and the ingredients and put it through the masher, they couldn't sell the salsa or could they?

LAWYER: I think at that point if they had purchased the tomatoes and that was statutorily authorized and they made those things in to a salsa, then that would satisfy the statutory requirements that they manufacture or produce that salsa. That is a far different thing than what happened with this VitaPro.

ENOCH: In VitaPro, your argument though is all they are doing is taking 55 gallon drums of something and putting it in a little 1 lb. packages, and that's not manufacturing?

LAWYER: That is exactly our argument. That repackaging, particularly repackaging here under the undisputed fact simply is not manufacturing or producing VitaPro. And it's exactly better than that because this whole idea of repackaging was a complete sham. If you look at the purchase orders they say in §4.6 of those purchase orders, that the VitaPro would be delivered to TDCJ in 33 lb. pales. And for a time it was sent in 33 lb. pales. It was only later that TCI requested that they send it in bulk with buckets so that they could then claim that they had done something to it. But originally it was coming from Canada in the 33 lb. pales.

Now our argument is that that transferred to the limited extent that it happened was not manufacturing or producing that product as a matter of law and the DC properly granted our summary judgment.

The CA said that preparatory language - agricultural or industrial - went only to production and did not follow it into the other purposes that were permitted under the statute. And to do that it said, We rely on the doctrine of the last antecedent. The doctrine of the last antecedent doesn't apply. The last antecedent means a descriptive term that follows a list may be deemed to apply only to the last item on that list. An example might be cars, trains and planes that are red. Using the doctrine you would say that red describes only planes but not cars or trains. And there's a lot of case law that I've looked up to support that. It is where the descriptor follows the list. In this case the descriptors were in front: Agricultural or industrial production, breeding, consumption or resale.

The CA was wrong in saying that agricultural or industrial did not describe consumption. And VitaPro has to rely on the CA's decision because its briefs don't argue that this was agricultural or industrial consumption. The only consumption that they can point to is in their _____.

The statute is set up with a dual _____. It says, you can buy certain types of items for certain purposes. And the statute contains lists. We again agree that the statute itself does not create the authority. It had to be the board policy, which we think further limited what the institutional division can do. But even if you said that there was a valid purpose for them to have direct purchasing authority under that statute and the board policy it would also have to show that VitaPro was an item described in that statute. And what they've argued is that it's an agricultural commodity: supplies for raw materials.

We don't believe that any other statute that they've cited gives them direct purchasing authority.

ABBOTT: And what you're saying is that if we were to conclude that VitaPro was not an agricultural commodity supply or raw material, then...

LAWYER: End of the ase.

HANKINSON: What test should we use to determine whether or not VitaPro is an agricultural commodity and why?

LAWYER: I think both the parties agree that the substantial identity text set out in the *East Texas Motor Freight Lines* is an appropriate test. The issue and why is there has been this idea there is a spectrum of continuum. If you go pluck something off the row in a farm certain things happen to it, and ultimately it may end up on the grocery shelf. And there has got to be some point at which you cut that off. And what *East Texas Motor Freight Line* said was that we understand that certain processing has to take place before it gets to market. And that's okay. We're not going to say that that's no longer an agricultural commodity simply because you've done certain things to it. But if you go too far and it doesn't retain continuing substantial identity, then we will say that it is a manufactured good. And the cases I think have been fairly clear and have a consistent analysis here. They've said that agricultural commodities include cut up vegetables; raw shelled nuts; killed and picked poultry; pasturized milk, even buttermilk. The DC's opinion coming back from *East Texas Motor Freight Line v. Frozen Food Express*, had a pretty long list and footnote that I thought is pretty illustrative.

The things that have been held to be manufactured are: cottage cheese; canned fruits and vegetables; canned beer; condensed milk. These are things which something more has happened to it.

ABBOTT: