ORAL ARGUMENT – 2/9/00
99-0490
FORTUNE PROD. CO, ET AL. V. CONOCO INC.

O'NEILL: The pertinent facts of this case both parties agree in their briefs is adequately represented in the CA's opinion on this case.

HANKINSON: Would you go to your fraud theory and please explain to us what theory was presented to the jury to support your fraud claim?

O'NEILL: There were two theories presented to the jury to support the fraud claim. Two types of fraud were actually submitted as shown in question no. 1, which is included in all of the briefing in front of the court. Two forms of fraud were submitted: fraudulent inducement of contract; and also fraud - factual misrepresentation. There was no objection to the submission, so the affirmative answer to both of those gives rise to a presumption on appeal that the jury found either or both forms of fraud in this case.

HANKINSON: What evidence was presented and what factual theory was the basis for those two claims?

O'NEILL: The factual theory for both of those claims was that Conoco misrepresented to all of the producers in this case the amount at which their gas would ultimately be sold.

HANKINSON: Precontract?

O'NEILL: Precontract. And what happened was the producers in this case entered into a completely new form of contract with Conoco after it purchased this gas producing system of which the producers were a part. They were already hooked up to this system when Conoco purchased it, and their gas was dedicated to the most lucrative aspect of that system, the Lone Star contract.

When Conoco came in it changed the manner in which the contracts were written and adopted what's called a percent of proceeds form of contract. Which by its very terms makes the payment to the gas producers dependent upon the proceeds received from the gas processor Conoco from the ultimate consumer of that gas. But during those negotiations and in the process of obtaining those contracts, it was the producer's contention that Conoco had lied or misrepresented to them the price at which that gas would be sold ultimately. That they were told it would not be sold as it had been historically to Lone Star at a very high contract price, but instead that they could no longer get that price, they were not dedicated gas under the contract any longer, and it would have to be sold at a much lower amount on the spot market. That was then the price inserted into these contracts and it was the price at which they were paid.

HANKINSON: And ultimately the gas though was sold to Lone Star under the earlier dedicated contract?

O'NEILL: That's absolutely correct.

O'NEILL: There appears to be an attempt to make a causation argument here that because the producers couldn't have gotten any other contracts other than a spot market contract, there couldn't have been a proximate cause of damages. Was that developed in the TC or is that something that's been brought all the way up through the appeals process?

O'NEILL: There was an attempt. There was evidence back and forth about what the producers could or couldn't have gotten outside in a different market with others.

O'NEILL: Did they raise a factual or legally insufficiency point on causation in the CA?

O'NEILL: I do not believe that they raised it prior to submission of the charge. It may be that they have raised that issue. They certainly attacked the issue of causation of harm or materiality in post-verdict motions in front of the TC and on appeal.

O'NEILL: On appeal they did?

O'NEILL: On appeal they have in the form of asserting as a matter of law, but there was no harm or no materiality of these misrepresentations to the producer's transactions.

O'NEILL: So is it a no evidence issue? Did they raise factual and sufficiency?

O'NEILL: Factual and sufficiency has been virtually no part of this appeal.

HANKINSON: So what is your response to their argument that there is no evidence of causation to support a judgment for fraud?

O'NEILL: The response to that is that Conoco's entire argument in that respect focuses on what the producers might have been able to do outside of the market between Conoco and the producers. And frankly, that's not the relevant inquiry.

HANKINSON: What is the relevant inquiry?

O'NEILL: The relevant inquiry because of the special circumstances that's present here, is what harm resulted to these producers in the relationship and in the bargaining positions of these parties with this gas processor who had a lucrative long-term contract that was dependent on a specific kind of gas of which producers possessed. What was the harm that resulted to them in that relationship, and that harm was substantial.

HECHT: The answer has to be that they could have gotten more money, right, or there are no damages?

O'NEILL: The answer to the question is what did these parties agree to? What these parties negotiated on was a percentage of what Conoco would ultimately receive. Now they managed to get a price from these producers that was quite low because they misrepresented the price that they were going to get. Just like in the Gulf Tide case decided by the First CA that's discussed in the brief.

HECHT: But they argue that doesn't matter because they wouldn't have paid them that no matter what, whether they lied or hadn't lied.

O'NEILL: That's correct. But what that asked this court do is precisely what this court would not do on behalf of the plaintiffs in *Formosa Plastics*. If the court will recall in *Formosa Plastics*, this court evaluated whether there was evidence to support a benefit of the bargain damage analysis by the plaintiff in that case. In that case as the court is aware, the plaintiff had bid on a job on representations that the costs would be $300,000 by the defendant when the defendant knew it would be closer to $800,000. So that instead of getting a $200,000 profit ultimately on the job, the plaintiff went in the hole $200,000. And this court held it is sufficient on those facts to support an award of benefit of the bargain damages of $400,000.

O'NEILL: My understanding is that the evidence in this case was that there was no longer a bargain. These contracts had expired. It required the money that Lone Star was going to pay to be dedicated to these producers so to speak. So my understanding was that relationship had gone away and the producers were relegated to the pre-market. So as a matter of fact I suppose _____ there was no benefit of the bargain - that bargain is still out there.

O'NEILL: What the court disallowed in *Formosa* was the plaintiffs saying this: well you know if I had known it was going to be $800,000, if the fraud had not occurred, then indulge with me my speculation about the much higher bid I would have submitted to the plaintiff that I would have benefitted from. We're experiencing the flip of that in this case because what Conoco wants to come in and suggest to this court is, if we had not defrauded the plaintiff, if we had had to tell them the truth about what their gas would be sold at, we never would have agreed to give them 80% of that.

OWEN: Let's get specific. Conoco says in their brief that Lone Star was only obligated to buy 55 million MCF per day and that they already had dedicated to the Lone Star contract separate and apart from your plaintiff's gas 70 million MCF per day. Are those facts correct?

O'NEILL: The problem is that was a hotly contested issue at trial. That was a fact question. But they are taking that position as a matter of law in this case.

OWEN: What were the facts?

O'NEILL: The facts were, there was evidence in the TC that at the very time these contracts were negotiated, Mr.Luger with Conoco, who is the one who procured the contracts from the producers who actually signed written contracts, was worried about the gas supply with this contract. We have to keep in mind the environment...

OWEN: When were these other contracts, the 70 million mcf per day, first entered into by Conoco? Do they predate the termination of the 1990 contract?

O'NEILL: Are we talking about the Lone Star contract?

OWEN: The 70 million that Conoco says was dedicated to the Lone Star contract, when were those contracts entered into?

O'NEILL: The testimony concerning the amount of gas dedicated to this contract varies in time. So there's not a given time - a certain amount of gas.

OWEN: Did you put on any evidence that there was leeway at any point in time where Conoco still needed gas?

O'NEILL: Yes.

OWEN: And what was that testimony.

O'NEILL: There was testimony from their own documents and internal memorandum that they were worried about being, and they believed themselves to be under the 55,000 MCF that they could supply and benefit from to Lone Star at the very time that they were negotiating these contracts with producers. And the lead gas buyer for Conoco testified to that. In deposition it was his memos that were reviewed and it was not until he took the stand in front of the jury that he stated that, No that wasn't his concern. He wasn't worried about that. They really did always have enough gas.

OWEN: Is his deposition in evidence?

O'NEILL: It was read and he was impeached with it during the trial of the case. And the very memo from which his concerns about the gas supply is in evidence.

OWEN: How much does Lone Star need? How much was Conoco short for the Lone Star Contract?

O'NEILL: I can't remember the precise figures, but it was under - what's key is that he

believed himself to be under the 55,000 mcf.

OWEN: How much?

O'NEILL: I don't recall the exact shrinkage amount.

OWEN: What's the total volume that your plaintiffs' wells have available?

O'NEILL: I believe the total volume on this is about 6,000.

OWEN: Six thousand mcf per day?

O'NEILL: It's actually per month. And so there was evidence - hotly contested evidence - going back and forth between these parties over what the real circumstances were at the time that this was going on. Conoco wanted to take the position they didn't really need the gas. They could go anywhere and get this gas, and buy it from anybody. But there was significant evidence as detailed in the briefs that that was not the _____.

OWEN: What about the two plaintiffs who didn't have contracts at all, how can they make a fraud claim?

O'NEILL: We started out and answer the first question from the court, fraud and the inducement was not the only thing submitted in this case. The alternative of just flat fraud on factual misrepresentations was also submitted.

OWEN: Where is the fraud? They didn't have a contract, they were just taking whatever they were paid...

O'NEILL: They gave Conoco their gas at a spot market price based on fraud.

OWEN: How could they have required and what's their argument that they could have gotten a higher price from Conoco?

O'NEILL: The argument is the same. The argument is, we are prohibited by the fact that the fraud occurred from bringing you that evidence. Just like the plaintiff in *Formosa* could not come in here and say, Sure I would have demanded more had I not been defrauded. Are the defendants permitted to come in here under *Formosa* and say, We wouldn't have agreed to that had we been required to tell the truth. We are literally facing the flip of *Formosa* in the presentation of the argument that they make to this court.

HANKINSON: Were the Interfon(?) contracts such that they were receiving from Conoco their proceeds based on the Lone Star?

O'NEILL: Yes, and they were executed in the months before Conoco purchased the systems.

HANKINSON: Was there evidence then that Interfon(?) had been provided the information that the gas was going to be sold under the dedicated Lone Star agreements?

O'NEILL: No, your honor has that flipped. Inferon was Conoco's predecessor. They were buying producer's gas. And months before Conoco took over the system Interfon correctly disclosing where the gas would be sold to Tucker signed contracts entitling Tucker to the Lone Star contract class, not spot. And Conoco wouldn't pay them either. Just on the eve of trial finally conceded breach on those contracts and let the amount of the damages go to the jury.

OWEN: What was the evidence about once the field liquids were taken out of the pipeline where did they go? Were they taken to the plant and processed? What physically happened to them?

O'NEILL: Once the field liquids were processed or dropped out in the field, then they were trucked to the plant, reinserted in tanks at the plant, and sold at the tailgate of the plant with the liquids that were sold.

OWEN: But they weren't processed there?

O'NEILL: No they were not processed at the plant. They drop out in the field. They are heavier liquids. And more of them dropped out as a result to changes in the system after the contracts were executed.

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RESPONDENT

O'NEILL: Mr. Wilson, it seems as though you would agree that the jury found against you on waiver?

WILSON: The jury had an implied finding of waiver, yes. By answering yes to question 1, there was an implied finding against us on waiver.

HANKINSON: And you're not taking the position that that finding there was waiver as a matter of law?

WILSON: We are taking the position that the jury found ratification. We are not arguing a waiver as a matter of law. They are two different theories.

HANKINSON: But you're not arguing waiver as a matter of law?

WILSON: That's correct.

O'NEILL: But your argument doesn't it presuppose that those concepts are one in the same?

WILSON: No. The argument presupposes that the concepts are different, that they are different elements. The yes finding on question 1 is therefore not in conflict with the ratification finding on question 3.

HANKINSON: Your theory and the question that the jury was asked was whether or not the plaintiffs had ratified the contracts. It was specifically directed towards the contracts. How do you square the viability of that defense with this court's decision in *Dallas Farm*?

WILSON: *Dallas Farm* dealt with a situation where the court was dealing with an election of remedies in that case. The court said there can be an election of remedies, a recission verses damages. But where you have more than mere acceptance of the benefit, but you also have an intent to ratify, the plus factors of an intending to ratify the contract, which takes it beyond *Dallas Farm Machinery*, then that constitutes ratification.

HANKINSON: Why shouldn't the person who claims that they are the victim of fraud be allowed to ratify a contract and continue the performance under the contract and then sue for fraud to recover their damage? Doesn't that further the law's policy that mitigation of damages should be encouraged?

WILSON: I don't quarrel with that. I do not quarrel with the proposition that mere retention of the benefits alone does not bar a fraud claim. That's well established precedent for which I do not quarrel. But it is also well established that retention of the benefits plus an intent to ratify, that intent factor that the jury is allowed to find, that then is what constitutes ratification.

HANKINSON: What does the plaintiff do to avoid ratifying a contract if what it chooses to do is accept the benefits of a contract in order to mitigate its damages but wants to preserve its right to sue for fraud?

WILSON: In this case, the CA found there was sufficient evidence of ratification by virtue of the fact that the plaintiffs could well have known about the fraud at the time they entered into the contract. That was the evidence that the CA relied upon.

ABBOTT: It appears though that the CA may have misapplied its own test. Let me read to you the test established by the CA, which includes a quote from this court's opinion in *Rosenbaum v. Texas Billing Mortgage Co.*, and I'm going to get you to respond to it. It says, in order to constitute (page 20 of its opinion) ratification of the fraud appellees would have to do so not only with full knowledge of the fraud and all material facts, but with the intention clearly manifested over

abiding by the contract and waiving all right to recover for deception.

It seems to me that the CA's application of this test leaves out those last 7 or 8 words and waiving all right to recover for deception.

WILSON: Not necessarily because the court found there was sufficient evidence for ratification by virtue of the conduct of the plaintiffs at the time of the entering into the contract.

ABBOTT: The CA, however, did not get into the waiver issue and did not recognize the fact that in jury finding to the question number 1, the waiver issue was found against you.

WILSON: The jury found that there was no waiver but there were also other elements involved in ratification. And there has to be an absolute head of conflict on every single element which they don't have.

ABBOTT: There are other elements to ratification, which have been satisfied here. But do you concede that one element of ratification are these words quoted from *Rosembaum* in waiving all right to recover for deception?

WILSON: That appears to be what this court has so held. Yes.

ABBOTT: So you agree that's an element of ratification?

WILSON: It would appear to be.

ABBOTT: And you agree that the jury found against you with regard to that element?

WILSON: They found there was fraud included within that definition of wavier. I think there were different definitions of waiver in question 1 than there was in the ratification in question 3.

OWEN: Did the plaintiffs object to the ratification issue and say that that misstated the law of ratification?

WILSON: Yes.

ABBOTT: Just to clarify your last comment. There was actually nothing said in question 3 about waiver and nothing said in question 2 about waiver?

WILSON: Question 3 did not contain the word waiver, that's correct.

ENOCH: These parties have entered into a contract. They are now selling their gas and

they are receiving money for it. What other evidence in this case that they did something other than that that constitutes ratification?

WILSON: The CA pointed to the fact that at the time the contracts were entered into they could well have known exactly what was happening to the gas and could well have known the exact state of the facts.

ENOCH: It would seem to me there would be no fraud because they didn't enter into it with a misunderstanding of what the facts were. They knew the facts. That wouldn't be ratification. That would simply be no fraud.

WILSON: It could constitute both. They found fraud. They also found ratification.

HANKINSON: Then wouldn't you have to take the position that as a matter of law there was no fraud in this case in order to avoid the jury's answers to question 1 for your theory to prevail?

WILSON: Based on that evidence it would indicate there was no fraud. I agree that the jury found there was fraud. But there was also sufficient evidence for ratification.

HANKINSON: But then don't we have a conflict in the jury's answers? As I understand you've said your ratification theory is that the plaintiffs knew of the facts that are allegedly the basis for the misrepresentation at the time they entered the contract. It's not that they learned about it later and then continued to accept the benefits under the contract.

WILSON: Those are the facts the CA pointed to.

HANKINSON: And as Justice Enoch has said doesn't that seem to go to the fact that there would be no fraud as fraud is defined under Texas law because if the plaintiff knew the facts they couldn't have been the target of the misrepresentation?

WILSON: I don't quarrel with that.

HANKINSON: Well if that's the case, then we have conflicting jury answers under your interpretation because we have a finding of fraud and you've now defined ratification on these facts as being at the inception of the contract. So I'm a little bit confused about how we look at this jury charge then.

WILSON: This court is to reconcile jury findings if there is anyway to reconcile them. And the mere fact that there is a finding on one that is inconsistent with the finding on the other, that mere fact alone does not make the jury findings irreconcilable. It does not make them in conflict.

ENOCH: It's your position then, that the evidence that supports the jury finding that this

contract was ratified is the evidence that the plaintiffs knew of the true facts before they entered into the contract?

WILSON: Yes.

ENOCH: If the court decides that is not evidence that goes to the question of ratification, then do you agree as a matter of law there is no ratification in this case?

WILSON: I would agree there is no other evidence of ratification other than acceptance of the benefit, which I agree is not sufficient.

HANKINSON: I don't understand how your theory fits under the instruction that the jury had on ratification in this case. The instruction on ratification was that a defrauded party must continue to accept benefits under the contract after they become aware of the fraud or recognize the contract is binding, which seems to contemplate something that occurs after the formation of the contract.

WILSON: Yes, with full knowledge of the fraudulent act or breach at the time of the ratification and intend to ratify.

HANKINSON: I'm looking at instruction no. 1 under the definition. I'm having a hard time reconciling that with your theory.

WILSON: The jury is going to be the trier of fact, and the jury is going to be able to determine the intent. They can determine intent from a variety of different factors. They can determine intent from a little more than facial expressions. I mean from the tone of the witnesses. Intent is a question of fact for the jury.

HANKINSON: But part no. 1 says, continue to accept benefits under the contract, which makes it sound like there would have been a contract and that the act of ratification would have occurred sometime after the contract was entered into, and the parties then treated it as continuing to be binding.

WILSON: Yes. That's how the unobjected instruction reads.

HANKINSON: Isn't that inconsistent with the theory that you're telling us you tried to the jury, that the ratification occurred before or at the time the contract was made?

WILSON: No. I was simply responding to what evidence is there of ratification. And I pointed the evidence that the CA pointed to, that is ratification at the time of the inception of the contract. Now if the jury as well wanted to find that the parties had the intent of accepting the benefits after the contract was entered into, they can find the intent of the parties based upon the intangibles that the jury is entitled to do so.

HANKINSON: Is the evidence disputed about whether or not the plaintiffs knew or should have known about the truth of the representations that were made at the time the contract was made?

WILSON: Yes. That evidence was disputed.

OWEN: Did you rely on the merger clause in the TC?

WILSON: Yes.

OWEN: Could you tell me where in the record?

WILSON: I cannot cite it.

OWEN: They argue of course that you didn't. And I didn't see in your papers where you say, Yes, we did.

WILSON: It was relied upon. The problems with the fraud case are fourfold. One is the ratification we talked about. Second is the problem of lack of materiality/reliance. Repeatedly I asked these witnesses: What would you have done differently had you known? Supposed we had come to you and said, Mr. Producer I'm going to buy your gas and I'm going to resell your gas at least in part to Lone Star. I, however, because your contracts with me have expired, I am only going to pay you a percentage of spot. That's what I'm going to do.

O'NEILL: Well wasn't there evidence in the record to support your theory of causation, that in fact, the producers would have been in a better bargaining position, could have struck a better deal. I mean you might not agree with that evidence, but there was some evidence in the record.

WILSON: The evidence was simply, yes, I think I could have been in a better bargaining position. That's the extent of the evidence. When I asked them what would you have done differently, the answers I got back were, I'm not sure, to I darn sure would have done something, to I think I could have struck a better price.

ENOCH: But Conoco misrepresented it to them because they wanted to strike - I mean it seems to me their argument cuts against you. You're saying, well they've got to demonstrate they would have had a better bargaining position out there. But the fact is Conoco must have assumed - assuming Conoco lied about what they were going to sell it for, then doesn't all that inference sort of go against Conoco, that Conoco is agreeing with them, they would have had a stronger bargaining position because there would have been no reason for us to lie otherwise?

WILSON: Obviously Conoco disputed the existence of the fraud. Obviously we said it didn't happen. For purposes of the appeal I have to assume it did. Of course. The mere fact that there may have been a misrepresentation, which I don't consent to, but assume for this appeal,

doesn't necessarily assume they have proven. They've got to do two things. They've got to prove it was material, that's their element; and they've got to prove there was injury, cognizable injury and damages. That's their burden. It's got to be material and they've got to prove injury.

Where is the proof of that? They've got to show what would have had happened.

OWEN: That's where I want to get specific. What was the evidence about Conoco's ability to meet the Lone Star 55,000 MCF per day? Did they already have that under contract at all times material...

WILSON: We put into evidence a chart showing how much was dedicated into the system at all times. At all times it was north of the 55 MCF. To be sure, they put into evidence testimony from Mr. Luger which indicated from time to time he was "concerned." But at no point in time were we under that amount.

OWEN: At any point in time after 1990 did Conoco buy gas and dedicate it to the Lone Star - pay the percent of the Lone Star price to a producer?

WILSON: There's nothing in the record to so indicate.

O'NEILL: But there is evidence in the record isn't there that more than spot was paid under one or more contracts?

WILSON: Under old contracts, sure.

O'NEILL: I'm not talking about under old contracts. Wasn't there some contracts negotiated that went over spot?

WILSON: No. What there was was we would negotiate with people on the basis of spot. Some we would pay 70% of spot, some 75%, some 80%. But there were no contracts in the record of post-Conoco's acquisition of the system and entering into converse with producers that we were paying a percentage of the Lone Star price. To my knowledge there is no evidence of that at all.

Under *Formosa* this court said, You cannot award damages. To be sure you can have damage awards that are benefit of the bargain or out-of-pocket. That's the rule in fraud damages. But the court said, You can't base that upon hypothetical injuries or upon hypothetical damages. And that's exactly what is done here. They hypothetical injury that they are seeking is, I would have gotten more, and, therefore, let's take the contract that we got, we would have gotten 80% of the spot. Let's simply cross out spot and insert into that Lone Star. That is the hypothetical bargain that I think I would have received. At bottom what this case is, is the plaintiffs complain that they were defrauded into entering into a fair contract. At bottom that's what it amounts to. They

received precisely what their gas was worth. When they learned that we were renegotiating the contracts, they went out and tried to find alternative sources of supply. They searched high. They searched low. And to no one's astonishment, what they found was everybody was paying spot.

HANKINSON: As I understand their theory, their theory is that had you told them that Conoco was concerned about whether it would always be able to meet the requirements under the Lone Star contracts. And that given Conoco's uncertainty and concern about wanting to make sure it met those requirements, that had they known that you were going to sell the gas to Lone Star then they would have taken a harder bargaining position in taking advantage of your weak spot and said, Hey you need this gas. Well by gosh you need this gas then you're going to have to pay us more. And that because of Conoco's testimony and admission that it had concerns about meeting those requirements in a negotiating position it would have tried to hit that soft spot to get a better price. As I understand it, that's their theory. Why isn't that sufficient?

WILSON: Several problems. One, exhibit 2 indicates they knew exactly what was happening in the first place anyway. That was the hotly contested issue. They surely suspected it was going to go to Lone Star anyway. Now they say they were talked out of that position, but merely because they say they we could have taken a better bargaining position where is the proof of what the price would have been? Where is the proof of what the benefit of the bargain would have been? Where is the proof of what their damages are? Why are they simply allowed to assume that they would have gotten now 80% of the Lone Star price, ie. $3.50 rather than 80% of the spot market price which at the time was about $1.25 when they went out and looked for alternative supplies and couldn't find any. We bought the gas at what it was worth. They've got exactly what it was worth.

OWEN: I think Justice Hankinson's point is fairly pointed. She says that their argument is they would have been in a better bargaining position and that there was some evidence that Conoco needed additional gas to put to Lone Star. Is there some evidence of that, and if so, why isn't that enough?

WILSON: I apologize if I didn't fully answer it. There is evidence, albeit it highly conflicting. I will concede that we were "concerned." We never actually fell below the mark, but there was evidence of some concern. But that still doesn't get them I contend to their point of showing that they must actually prove they were injured and by what amount.

ABBOTT: Assuming that's true. Assuming that they were defrauded into a fair contract what do you conclude the jury relied upon in awarding the fraud damages that they awarded?

WILSON: There is no question what they did. They simply took the Lone Star price and gave them 80% of it. That was their damage model. They made some arithmetic miscalculations in the damage model and actually had it higher, and we put on the model that said, no, no, we don't think that's the proper measure of damages. But if you are going to do that, let's at least do the math right, and here is what the math could be. And so we showed them what the math was and they then

adopted our numbers in its entirety.

HANKINSON: But then didn't Conoco ask the jury to decide basically, even if we assume that there was fraud here, that the plaintiffs were fraudulently induced to enter the contract, in any event there was no damage?

WILSON: That's correct.

HANKINSON: And that that's what Conoco asked the jury to believe and that the jury chose not to believe it. Instead believed the plaintiff's proof that in fact Conoco was hesitant enough that Conoco would have given in on that and given them the price had that been the negotiation. Why isn't that some evidence to support the damages that plaintiffs claim?

WILSON: Merely the only evidence they can point to is concern on our part and a belief on their part that they therefore would have gotten a better bargaining position. That's it. That is insufficient.

O'NEILL: Which is what prompted my initial factual verses legal insufficiency question. Was that raised in the CA?

WILSON: I certainly believe so, but I will double check.

HANKINSON: Is it Conoco's position that the contract did in fact provide for the payment of proceeds for the field liquids?

WILSON: Conoco's position is on unjust enrichment. We bought the gas - all of it - and the contract provided how they were to be paid for all of it.

O'NEILL: Didn't the evidence show that a trial you yourself segregated out the liquids and took 100% of the profits? You segregated it out into subcategories and didn't treat it as part of the original contract?

WILSON: The contract did not provide for the payment of field liquids because these were not plants. The field liquids were not plant products, and the contract did not so allow.

HANKINSON: So your view is that Conoco never owed them for any percentage of the field liquids?

WILSON: Under the contract, yes.

HANKINSON: That in fact, Conoco could extract the heavier liquids out in the field before the gas went into the plant and came out at the tailgate at what point in time the calculations were

made about proceeds or whatever. The point was that you could extract under the contract, the field liquids and keep the entire proceeds from it?

WILSON: That was our position.

HANKINSON: Does the contract specifically provide that?

WILSON: The contract says that they get a percentage of plant products. And the whole issue at trial was what's a plant? What's a plant product? They argued that the compressors out in the field were plants and therefore they were plant products. This would have been a really good breach of contract suit. It would have been a real interesting issue: are the compressors plant products or not? It would have been a fair fight. Not once but twice waived their breach of contract claim because they wanted to go after conversion and then after unjust enrichment. But their pleadings said that these are plant products. Their pleadings said they are entitled to it under the contract, but then they waived the contract. And that doesn't resurrect the unjust enrichment.

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REBUTTAL

ENOCH: I can understand a party having seen how the contract looks and see what the respective financial impacts is going to be and deciding I'm just going to sue for the difference. I'm going to keep what I've got under the contract, but I'm going to sue for the difference in value. I can see that. But in most cases, the benefit of the bargain the plaintiffs got to go out and prove that but for doing this I could have done that. And that's where the difference is. In this case, for you to keep the contract and sue for the difference, you basically have to say I want the court to not keep the contract. I want the court to reform the contract to in essence put a different agreement together. So even though I agreed to sell it to them for such and such price, they defrauded me into taking a less price than I would have, so I want the court basically to reform the contract to include, in this case, Lone Star price. What authority permits you in effect to do that? I can understand paying the damages because I demonstrated I could have done something different than I did with this. But where can you with all of the evidence that's here get the judge to agree with you, I'm just going to change the price in this contract?

O'NEILL: When a defrauded party under *Dallas Farm Machinery* affirms a contract, it's affirming a contract that didn't give it what it was entitled to get. It's affirming a contract that didn't give it the deal. The deal that was represented to these producers throughout negotiations that they would get a percentage of what this gas was sold for, a percent of proceeds contract, they didn't get that deal, and they were prevented from getting it...

ENOCH: But you didn't show what the gas was sold for. You showed that they had a contract where some gas could have been sold for this, and you would have insisted that yours be paid that amount?

O'NEILL: No. We showed where the gas was sold. They calculated where the gas was sold and they put it in front of the jury.

O'NEILL: But the gas was no longer dedicated?

O'NEILL: It was dedicated. It remained dedicated at all times. It flowed to Lone Star from the day before and the day after.

O'NEILL: The producers were no longer entitled to the dedicated price?

O'NEILL: No. And the reason they weren't is because Conoco walked in and said it's not there anymore. It doesn't go there. It's not dedicated there. An example I think will clarify this for the court. I'm a plaintiff in a personal injury lawsuit and I agree with you, the defendant, that I will settle my case with you for your policy limit. And you agree, yes, I will do that. And I say okay, how much is that? Give me the polices. I want to see what it is. And you give me one of your policies for $500,000. And I say is this it? Is this the limits? And you say, yes. And you know the day that you hand me that policy, that you have $1 million in coverage.

OWEN: And you know you've got a merger clause in your agreement. So if it's material representation why don't you insist that it's put in writing in your agreement?

O'NEILL: This is a garden variety merger clause and it was raised. The court asked whether that was raised in the TC, and the answer is, no. And that's why it was not included in the briefing. But beyond that, let's say for simplicity, do not get tied up in settlement merger clauses, let's say we don't have a merger clause but we have a settlement agreement where you write in the amount of $500,000. I get $500,000 under the settlement. I take the $500,000 under the settlement and only later do I find out that all along you knew you had $1 million. Our deal was for your limits and you hid them from me.

O'NEILL: Well that's what I'm confused about. I thought that the dedicated price contract expired in 1990, and at the time Conoco was negotiating this deal they weren't obligated to give the Lone Star price to anyone. And so even if they had told them this gas is still going to Lone Star, you still would not have been entitled to that dedicated price?

O'NEILL: But the fact question that then arises is the one that we've discussed at length, and that is, were the producers harmed by not knowing the true facts in that situation. Could they have bettered their bargain?

O'NEILL: In the jury's damage model, what was that based upon?

O'NEILL: Was based upon a comparison of the deal: 80% of what the gas was actually sold at, and it was undisputed where it was sold and at how much.

O'NEILL: But that was the old deal that expired in 1990.

O'NEILL: That was the deal represented in a changing to percent of proceeds. The deal discussed throughout was you will get 80% of the proceeds we sell this gas for. And then, factually misrepresented as to what that amount was, and inserted into a contract. The deal was 80% of the proceeds. The reason a different figure got inserted than the one that it actually got sold at, is based on fraud. So the jury took the 80% of what it was actually sold at and they compared that to the amount that was paid, which is the benefit of the bargain analysis right down the line out of *Formosa*. The Conoco's damage calculations that were done for them in their expert's exhibits, there wasn't any speculation or hypothetical involved in any event. It's what happened verses the reality of what occurred verses what they were given. No disputes over it. And the jury took those figures and awarded that amount, which they are absolutely authorized to do under the court's *Formosa* opinion.

HANKINSON: What you're saying is that the representation was you agree to this, the 80% of spot market price, because that's where we're going to sell the gas. That's what Conoco said?

O'NEILL: Correct.

HANKINSON: And the producers said, okay you can put 80% of the proceeds at spot market price in our contract?

O'NEILL: Right.

HANKINSON: And in fact at all times what Conoco intended to do was sell the gas to Lone Star at a higher price?

O'NEILL: Correct.

HANKINSON: So the representations you will get 80% of what we get was not accurate, and that's the basis?

O'NEILL: Correct.

O'NEILL: Isn't that a big _____, that it was no longer dedicated?

O'NEILL: No. It was dedicated.

O'NEILL: They weren't entitled to receive a percentage of Lone Star gas?

O'NEILL: I think the court's confusing two questions there. Whether the gas was dedicated to the Lone Star contract was a function of the Lone Star contract. When the Lone Star

contract was initially written in1970, Lone Star said, fine, we will take 55,000 mcf at this price. But we're not going to take any gas. We're going to take certain gas.

O'NEILL: But before 1990, Conoco or someone in Conoco's position was required to pay these producers a percentage of what Lone Star paid them?

O'NEILL: Actually prior to Conoco taking over, these contracts would be on primary term. Their predecessors could have canceled them and rewritten the contracts.

OWEN: The hypothetical you were giving me awhile ago I want to make sure that we're clear on this. You've said that the deal was 80% of proceeds, but in fact, the deal was 80% of spot market price. So your clients didn't have any expectation of 80% of proceeds. They had the expectation of 80% of spot market?

O'NEILL: The producers' expectations at all times was that they were receiving 80% of what their gas was being sold for.

OWEN: But their contract said spot market.

O'NEILL: Right, because Conoco told them that's where it was being sold.

OWEN: Where is the evidence that had they known the truth, they could have gotten 80% of the Lone Star contract? There's a huge gap there between 80% of spot market and 80% of Lone Star?

O'NEILL: In connection with this, I would like to answer one of the Justices asked the question, was there any evidence in the record that somebody else after this who knew about where the gas was going got more? And the answer to that question is, yes. And Mr. Wilson even argued it in closing argument. That is in there and it's in the briefs. But the answer to that question is what's happening in that analysis. Where is the evidence that Conoco would not have agreed to the deal? Can they come into the Texas Supreme Court and say to you that we cannot demonstrate we were harmed? Because if they had had to tell the truth they wouldn't have done what they told us they were going to do. That's the inquiry that they are asking this court to make. And by doing so, they are asking you to do the flip of *Formosa* - engage in hypothetical. Engage in speculation and assume as a matter of law that they would not have done the deal had they told the truth when it was hotly disputed as to what would or would not happen in the court and the jury had to weigh and assess the evidence and determine that in fact producers were harmed, and that Conoco needed the gas.