**ORAL ARGUMENT - 4/16/96**
**95-0978**
**TENNECO INC. V. ENTERPRISE PRODUCTS COMPANY**

LAWYER: This case is about whether courts should be in the business of second-guessing choices that corporate parties have made as to how to structure their transactions; and about whether parties can have certainty and finality in the transactions that they structure. In this case the CA has reached out to try and create a fact question. And as a result a transaction that was valued at over $600 million that the parties thought closed over 4-1/2 years ago is still open, and is still uncertain, and the parties have not been able to achieve the finality in that transaction that corporate law really demands.

The CA in this case found a fact question because it determined that there was an issue about whether the transaction that was structured as a stock sale, that the parties concede was structured as a stock sale, was really an asset sale disguised as a stock sale. The court apparently reached that conclusion solely because the stock purchase agreement was not part of the summary judgment record. The petitioners would submit that the whole concept of an asset sale or stock sale really being a disguised asset sale is a non_____. It's nonsensical. The law of this state, the corp law of this state and virtually every other state allows the parties to make choices and alternatives in how they structure their transactions. There is a perfectly legitimate way to structure a transaction: sell the assets or all the assets of a company. Another perfectly legitimate way to structure a transaction is for the purchaser to purchase the stock of a company. In this case the parties made a choice between those two alternatives, the stock of Tenneco Natural Gas Liquids Corp. was to sold to an Enron entity, and that's what happened here. There is no way that that kind of transaction can in fact be disguised, cannot as a matter of law, as a matter of logic be really an asset sale. When the stock of a company is sold, the shares of that company, the certificates are transferred, the new owner of the stock is reflected on the corporate books and records.

HECHT: What if it were an admitted subterfuge?

LAWYER: It's difficult to imagine how there could be a subterfuge in this kind of context. Because either the shares of the company are sold, the stock certificates are sold, or the assets are sold.

HECHT: But I mean what if the parties got together and said: look we know we can't do it this way we are going to have to do it this other way because we really do want to do something to get out of our agreement?

LAWYER: If there was a actual fraud in the sense that the parties really were conveying assets, and dummied up a fake stock certificate, that would be one scenario.

HECHT: But short of that no matter what their intent was if that was the form of the transaction it's okay?

LAWYER: Absolutely. The intent of the parties here is irrelevant. And the reason it's irrelevant is because all parties know when they enter into these kind of restrictions on the alienability of assets when they are dealing with a corporate party, that the stock of that corporate party can change. That's a fundamental fact that all parties recognize when they enter into one of these transactions. And it's for that reason the parties sometimes negotiate what's called change and control provisions. Those being provisions that trigger a right of first refusal or some other restriction on transfer when there is a change of ownership or change of control in the company that owns the asset. Those are common restrictions that are sometimes negotiated by the parties.

ENOCH: But a change of control in the owner of the corporation really contemplates that stock ownership in the holding corporation somehow changes. Isn't that what it goes to? It doesn't go that the corporation itself gets sold to some other corporation.

LAWYER: Different provisions can be negotiated differently. Sometimes change and control provisions are negotiated where if there is a change of a certain percentage in ownership of the company that owns the assets, then the right is triggered. Sometimes they are drafted so that if there's 100% change in control where the trigger would occur. In this circumstance, the parties were free to have negotiated any one of those various alternatives. But the record is absolutely clear that they did not. And the right of first refusal that they negotiated is limited solely to the asset.

ENOCH: Your answer would be the same if the sole asset of the corporation was this enterprise? If the sole asset of this corporation is this enterprise, you're answer would be the same, that the owner of the shares of that corporation is freely transferable to anybody at any time regardless of the first right of refusal to buy the asset?

LAWYER: Absent a specific provision negotiated by the parties that would restrict the sale of the stock? I think that's correct. Of course that's not the situation here. This corporation TNGL owned an entire natural gas liquids business and owned many other assets other than the interest in this fractionator. But yes if the parties have not negotiated a restriction on the alienability of stock, then none can be implied. And that's been the law of this state and the policy of this state for a long time. The Earthmans(?) case which we've cited in our briefs makes clear that there's really no such thing as an implied restriction on the alienability of stock. The policy of this state is that stocks should be freely alienable, and that if the parties want to restrict the transfer of that stock, then they need to negotiate it, and if they do negotiate a restriction on the transfer of stock, that restriction needs to be strictly construed. Because it's against the policy of this state.

The same issue really came up, the issue of whether a court can be in the business of recharacterizing the transaction that the parties have done. In the context of the De Facto Merger Doctrine, which a number of years ago some CAs had written that what is really a sale of assets where it's substantially all of the assets of a company can be recharacterized by a court after the fact to impose liability on the purchasing company under the De Facto Merger Doctrine. In other words a court can recharacterized what is really an asset sale as a merger. And in the next legislative session after those CAs' opinions came out, the legislature emphatically said: no, that the courts should not be in the business of recharacterizing the partys' transactions. That if a party wants to restrict certain kinds of transactions they need to negotiate for those restrictions. And in this case that simply did not occur.

The CA struggled here to create a fact question even if you assume for a moment that it's possible in some circumstances for a court after the fact to recharacterize a transaction. The 3 grounds that the CA relied on here simply don't even come close to raising any kind of a fact question on the nature of the transaction.

The CA said first that a press release that was issued that the CA construed as describing this transaction as an asset transaction could somehow change the fundamental nature of the transaction. The problem is that that was a press release that was issued by the ultimate parent of these companies, Tenneco, Inc., and it did describe the sale of assets, the asset being the stock of Tenneco Natural Gas Liquids Co. As to that entity that issued the press release, this was an asset sale, i.e., the stock of the company was sold. But it is undisputed in this record that what Enron bought was the stock of Tenneco Natural Gas Liquids Corp., and there is no restriction on that kind of a transaction anywhere in these agreements.

The other thing that the CAs relied on was the fact that the parties elected under the Internal Revenue Code to treat this transaction for tax purposes as an asset sale. That is totally irrelevant to the issue of state law and the interpretation of the party's agreements here. The Internal Revenue Code has said that the parties can elect a fiction for purposes of income tax treatment, and can have taxed as an asset sale something that is in fact a stock sale. The fact that that option was available to the parties simply proves that this was under state law truly a stock transaction.

The other fact that the CA, which is not disputed relied on to create a fact question on the nature of this transaction is the fact that originally Tenneco Nat. Gas Liq. Corp. contemplated selling its assets as opposed to its stock. That again is totally irrelevant to the ultimate question of how was the transaction finally structured? The fact that they considered one alternative at the beginning and then changed to another alternative proves absolutely nothing when the partys' agreements gave them the right to sell the stock of the company without triggering one of these restrictions.

And that really points up what to me is the ultimate irony of this case. Parties in the CAs have spent a lot of time considering this issue of stock sale verses asset sale but ultimately in this case that's an irrelevant issue totally because there is a specific exception to the right of first refusal in art. 12.6 of the relevant agreement that says...

BAKER: What about their argument that you didn't raise that as a ground in your motion in the TC?

LAWYER: I think we did raise the exception of 12.6 in the summary judgment papers. It was not extensively discussed in the summary judgment papers, but...

BAKER: Can you give me the transcript cite on that?

LAWYER: I will have to get that for you. I believe it was discussed in Enron's motion for summary judgment which was picked up in Tenneco's first motion for summary judgment. That provision of the restated operating agreement says: that in any event even if you are dealing with an asset sale, if it is a sale of all or substantially all of the assets of the company, the right of first refusal is not triggered anyway. Clearly the parties here contemplated that there would be corporate reorganizations, that there might ultimately be a new entity that owned this fractionator interest without triggering a right of first refusal either through a sale of all or substantially all of the assets, or through a stock sale. They could have expressly provided against those kind of transactions, but they simply did not. The issue in this case of the need to put the stock purchase agreement into evidence, which the CA appeared to rely on so heavily, is again a total red herring. First of all there was absolutely no objection to the lack of the stock purchase agreement made at the time the summary judgment was granted in the TC. And more importantly, the very summary judgment evidence offered by respondents in opposition to the summary judgment establishes itself that this was a stock sale.

Respondents put into the summary judgment record deposition testimony, they put in corporate records consisting of the _____ portion of the minutes books with Tenneco Natural Gas Corp., that reflect unequivocally that this was in fact a stock sale.

ABBOTT: Can you address why the first transfer was effective under 12.2 of the contract?

LAWYER: 12.02 provides that a transferee must assume a delivery obligation different than the transferor, but on its face it applies only to transfers that are authorized by §12.1. Section 12.1 is a provision that on its face authorizes transfers either to other owners or to third parties.

ABBOTT: Who drafted this contract?

LAWYER: I'm not sure that it's in the record who drafted it. It was drafted by both parties with extensive negotiation?

ABBOTT: At any rate in 12.6, the drafters of the contract were able to segregate out affiliates. And they weren't segregated out in either 12.2 or 12.1. So one interpretation of this contract would be that they are not to be excluded.

LAWYER: Except that I would respond by saying that 12.2 is the specific provision that supposedly creates this new delivery obligation. On its face it only applies unambiguously to transactions that are authorized by 12.1, and 12.1 is not the authorizing provision for affiliate transfers. If the parties had wanted to restrict or impose this new delivery obligation on an affiliate they would have expressly provided for that. And we submitted substantial summary judgment evidence from the parties, sworn deposition testimony from each of the other owners that that is in fact how they interpreted the agreement. Not just with respect to the TNGL transaction, but other affiliate transactions among the owner group. There was never any attempt to enforce §12.2 as it relates to affiliate transfers. And there were several other examples of affiliate transfers other than the Tenneco transfer.

ABBOTT: Well the use of the language third party is not included in either 12.5 or 12.6 is it?

LAWYER: That's correct not in 12.5 or 12.6.

ABBOTT: Why would third party not include an affiliate?

LAWYER: It could, but if you go back to other provisions of the agreement where the parties specifically spelled out obligations, I think it's §§ 5.1 and 5.2, where they deal with affiliates as one group of entities, owners as another group of entities, and third parties as a separate group of entities. And when they got to §12.2 they selected two of those three groups of entities to deal with, owners and third parties, but made no reference to affiliates. Had they wanted to restrict or impose a greater delivery obligation on affiliates I think under an unambiguous interpretation of the agreement they would have had to have specifically spelled out affiliates in §12.1.

ABBOTT: What about the argument of the other side that there was a fact issue concerning waiver?

LAWYER: In this case there was express waiver. The other side and the CA relied on the fact which I don't think is supported by the record, but the fact that there was supposedly no evidence of reliance or prejudice shown so, therefore, there can be no waiver. There is no requirement under the waiver cases to show prejudice, or reliance when there was an express waiver. In this case there was a document from Enterprise who was authorized on behalf of all the owners to deal with these transfer issues that expressly acknowledged in Enterprise's words the TOC to TNGL transaction. That is an express waiver. Given the express waiver there is no requirement that there be any kind of reliance or prejudice. And having expressly acknowledged a transaction when the only thing the contract gave them the right to do was to deny the effectiveness of the transaction. As a matter of law we think that there is a waiver. When you follow that with the notion that the parties thereafter, and this is all undisputed in the record, amended the restated operating agreement, entered into several other agreements among themselves that expressly reflected that TNGL, the transferee, not Tenneco Oil Co, the transferor, was the owner and was the partner of_____ Associates it's just inconceivable that there can still remain a fact question under an express waiver of analysis. There's also reams of summary judgment evidence of an implied waiver in the sense that all of these parties knew that the transaction had taken place. It's undisputed that they knew

that TNGL was not delivering the 31,000 barrels a day that now say was required, and had not entered into a new fractionation agreement and they allowed that state of affairs to continue for 3 years. In those circumstances we think as a matter of law that waiver was established.

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RESPONDENT

LAWYER: Let's talk about sanctity of contract. The petitioners ask why shouldn't the Tennecos and the Enrons of this world be free to structure their transaction however they wish? And the answer of course is generally they should be. But when one of the parties in this case Tenneco was already a party to a preexisting contract that set restrictions on how that party could enter into future transactions, the first contract is also entitled to be enforced. And is also entitled to its own sanctity. That first contract of course is this 1985 restated operating agreement, the one that set restrictions on transfers of ownership interest in this fractionation plan. Tenneco is one of the parties to that agreement; agreed that it would be abide by the restrictions in the agreement on transfers of ownership interests.

Now I want you to consider why it is that joint owners of an individual asset have rights of first refusal or restrictions in their agreement on transfers, sometimes called preferential rights to purchase, that's what the parties here called it, or preemptive rights. Why do they do that? Because they want to make sure they know who they are doing business with. And they want to give each other the right to acquire additional interest if they want to. That was extremely important to the parties in this case. Because this fractionation plant all it does is take natural gas liquids and separate them. And the owners of the plant in 1985 when they made this agreement were also suppliers to the plant of the Natural Gas Liquids of the raw make. And everybody who was a party to the agreement had an incentive to keep the plant at full capacity, to make it profitable.

ABBOTT: Those arguments aside, isn't it true that the only reason the CA overturned the summary judgment at least with regard to the second transfer, is because the agreement was not attached?

LAWYER: That is indeed correct.

ABBOTT: And isn't it true that you all had a copy of the agreement?

LAWYER: Oh, yes, there's no question about that.

ABBOTT: And it's true that you didn't offer it into summary judgment evidence?

LAWYER: That is also correct. It wasn't my burden as the respondent to the summary judgment motions to make the summary judgment record. But I'm not asking this court and I don't think this court here ought to decide the case on some procedural technicality. I don't think you granted the writ on those issues. I would think that there is some reason to determine the issue that the petitioners have argued about is the 5th circuit correct in their West Texas Transmission case, that the owner of a preemptive right shouldn't have that right taken away by specifically designing a transaction around that right?

CORNYN: Counsel said you could have contracted to prevent this outcome; what's your response to that?

LAWYER: Well my first response and this is something that was not treated by the CA. In fact in the opinion they specifically declined to rule on this point, the very argument that was made in the TC to begin with was that the contract itself, the restated operating agreement, doesn't talk about assets

sales or stock sales. The language of the restated operating agreement is extremely broad. It says: An owner shall have the right to sale, transfer, assign, or otherwise convey all or any portion of its ownership interest either in favor of another owner, or a third party. And my point is that in my view, my reading of this contract it doesn't matter whether it's a stock sale or an asset sale it's a transfer. There wouldn't be two parties sitting at this table if there weren't a transfer. There wouldn't be the argument from the Tenneco defendants we're not involved in the next transaction because it's the same party. Because the realities of the corporate world here is there are different parties that now own this interest than before.

ABBOTT: How is this transferred when there is a stock sale, because the rights to individual property owned by corporations are not transferred when there's a stock sale, there's merely a change in ownership?

LAWYER: Let's go back to what happened in the case here, and what's in the summary judgment record. Because in the Fall of 1991, when Tenneco offered these assets for sale, they offered them as packages of assets, including their interest in this fractionator. And in fact in the offering materials they acknowledge that the other owners of the plant had a right of first refusal. Then in November, 1991, Enron makes its offer to buy those assets. Now under the agreement, this is my reading of the agreement in 12.5: once there has been a bona fide offer made, and there was and there was an even form contract that's part of the summary judgment evidence that Enron marked up and submitted back on the acquisition of this asset, and at that point in time there was a contractual duty on the part of Tenneco to offer to make that same offer that Enron had made to the other owners. Furthermore, there wasn't just a contractual duty because one of the unique aspects of this case is that Tenneco owned its interest in the plant together with Enterprise and a partnership. I submit they had a fiduciary obligation to think about the interest of their partner at a time when they got a firm offer to buy their interest in the plant and they had decided to sell their interest in the plant as an asset.

CORNYN: Could you paraphrase the fact issue that you think the jury ought to decide?

LAWYER: I think the jury ought to decide the very issue that the 5th circuit set out, and that is: did Tenneco and Enron specifically design their transaction so as to circumvent the preemptive right.

HECHT: What difference does that make? What if they all got together and said: now we are not going to do this just to circumvent this right. We are going to do this for all these other reasons, but we're still going to do it. Then you lose?

LAWYER: That's right. If the jury believes that their transaction had other commercially reasonable reasons to restructure the way they did, if the jury believes that they acted in good faith and they can prove that in a trial, not in a summary judgment then, yes, we lose at that point.

HECHT: It looks to me like they are going to always say they had good intentions.

LAWYER: Of course they are.

HECHT: So why are we going to braid this into a jury: Do you believe these lying no good people or not, when the sale is structured the way it was?

LAWYER: With all do respect your honor juries decide those very types of issues all the time. We are not talking about revolutionary principles here. We are talking about good faith, bad faith, commercial reasonableness. We have summary judgment evidence in the record that one of the reasons why they restructured the deal was so as to avoid dealing with the right of first refusal. That's in the record. Now maybe they had other reasons. Maybe it made business sense, maybe it made tax sense, maybe they

thought it was easier. They sure were in a hurry to get it done by the end of the year and it was quicker to do it that way. And if the jury believes those are all good enough reasons so that they can get around this right if indeed that works we lose.

HECHT: But this is not a tricky format that they just thought up for this transaction. People do this all the time. Coming back to the question Judge Cornyn asked: why wasn't this contracted for? You certainly could contract for it.

LAWYER: As I said my first argument is I think they did contract for it. I think that this agreement is broad enough to cover stock sales, asset sales, any kind of transfer. What happened here I don't think the parties really anticipated a situation where as Mr. Farrell said an integrated supplier of natural gas liquids like Tenneco Oil Co. was going to take their interest, put it in a smaller company, and then by the time they offered this for sale in 1991 we are talking about just a company that owned two assets: a pipeline; and the interest in the plant. It didn't own anymore production of natural gas or natural gas liquids; didn't own any other assets. That was it. That was not within the contemplation at the time. So when you talk about this 12.6 for example: sale of all of the company; well is it proper to take your whole company and carve it so that now you've got a little company and you can say: now I'm selling all of the assets of the company. Well it seems to me a jury can determine based on what the motives were, were they just doing all of these corporate transactions in order to avoid what they contracted for back in 1985, which is we're going to give the other owners a chance to buy it on the...that's all it is just a chance to buy it on the same terms as somebody else like Enron. If we ever decide to sell, we are going to give the other parties the same right. The 5th circuit opinion I think it sets out some pretty good standards. The 1st CA in Texas State Optical v. Wiggins case followed that and sent a case back to be tried on the same kinds of issues. And as I said these types of fact intensive issues are the very types that juries deal with all of the time.

CORNYN: I assume your client sees some value in certainty in their commercial relationships?

LAWYER: Absolutely.

CORNYN: And the prospect of a jury trial as some might argue is the antithesis of certainty?

LAWYER: Yes I can understand that argument. Believe me my clients in this case are sophisticated businesses as well that deal with these types of transactions all the time. I think this whole thing could have been avoided. You wouldn't have this dispute or this potential for a jury trial if Tenneco had simply offered the asset to its joint owners back in 1991. There wouldn't be any breach of the agreement. There wouldn't be any dispute. They would still end up with the same amount of money obviously as there were going to end up at the time of the transaction within _____. That's all we are asking for. All they had to do was to comply with what they had agreed to. If they want certainty why isn't it more certain to follow what they agreed to back in 1985 instead of trying to get around what they agreed to? It seems to me that this is the kind of thing again clever lawyers, clever corporate lawyers are going to find ways to try to structure agreements all of the time and clever litigation lawyers are going to try to find ways to attack them.

ENOCH: Under your scenario if I've got a large company and I want to take a number of assets that are related, and spin them off into a separate affiliate would that buy me a lawsuit as to each individual asset that might have a first right of refusal applying to it?

LAWYER: It might if you haven't offered that to the other owners of each of the assets if they have the right of first refusal?

ENOCH: So if I have an asset or two that are similarly related in my enterprise that are subject to that then I would effectively be stopped from doing any sort of reorganization stock wise because I would always be subject to each individual piece of asset being sold off just by my attempt to restructure?

LAWYER: If you had agreed in the first place to restrictions on transfers that were broad enough to cover those kinds of transactions then, yes.

ENOCH: The agreement would be simply an agreement like we have here where it's just if you sell the asset you've got to offer it to your partners first?

LAWYER: I say that that agreement freely made like this one was in 1985 ought to be enforced. The whole purpose here as I said is the joint owners of this particular asset put this right in there for a reason. In fact what happened with the three transfers here from Tenneco Oil to Tenneco Natural Gas Liquids to Enron to whatever the partnership name is now, the very thing that we contracted to prevent has happened, which is now we have an owner of the plant that has not been willing to commit to bring any raw make, doesn't have a supplier of raw make to bring, and we're in the position that we sought not to be in. That's the whole very purpose for it. And that's the reason why we filed a lawsuit in the first place.

ABBOTT: If I understand your argument you keep coming back to a claim that instead of this being a stock transfer which is the way they wanted to characterize it it really was an asset transfer.

LAWYER: We argued that.

ABBOTT: What other type transfer is it?

LAWYER: There's no question that it was a stock transfer. I'm saying that what they did though...originally it was an asset transfer. There's no question about that either. I'm saying that based on the 5th circuit case West Texas Transmission, based on the 1st CA case, that once they decide to transfer their ownership and they get a bona fide offer to do so, that's what triggers the obligation on their part to make that same offer to their joint owners.

ABBOTT: But there are provisions in the contract that you participated in that says that if it is an out and out asset transfer, and if it's substantially all the assets, then that is excluded from the right of first refusal.

LAWYER: That's true too. But again as I said the way they have structured this transaction by the time Tenneco Natural Gas Liquids, the stock of that company was sold, there was only one or two assets left in that company. Was it fair for them to structure the deal that way? That's for the jury to decide. I understand that there are not only restrictions on transfers but exceptions to it and I think the agreement ought to be applied as written.

ABBOTT: Would you address the first transfer and tell me why you think there is evidence showing that there was neither expressed nor implied waiver?

LAWYER: The first transfer in 1989 from Tenneco Oil to Tenneco Natural Gas Liquids clearly was an affiliate transfer. The only section of the contract that deals with transfers at all is 12.1. The only section of the contract that deals with the delivery obligation as to transferees is 12.2. As you noted and as the CA noted in its opinion on this very point, if the parties who knew how to write exceptions for affiliate transfers as they did on the preferential rights section had intended there to be an exception under 12.2 as to affiliates they could have written one in and they did not. That section plainly applies in my view and in the CA's view to all transfers and transfers to affiliates. Now clearly the summary judgment record

shows that the other owners recognized that Tenneco Natural Gas Liquids was a joint owner. As the CA said and I agree with their analysis completely on this point we had a choice at that point. This is not an exclusive remedy under 12.2. We didn't have to say we're not going to recognize the effectiveness of your transfer. We could accept them as an owner and enforce the consequences of their breach of the agreement if they fail to deliver the sufficient quantities of the raw makes of the plant. And that's what we did.

There is no summary judgment evidence that we ever gave up that right. Now we certainly said in our writings and in our statements to them: Yes, we recognize you're an owner of this plant. But we never said to them: We also are waiving our right to call upon you to deliver what you are supposed to. There is no summary judgment evidence as to that.

I simply conclude there are a number of procedural issues that were raised by the Enron petitioners in their brief that were discussed in the CA. I have to confess if I were going to all of this over again in the TC, I probably would have handled some things differently in the way the record was done. But as I said I presumed that the writ was granted in this case to deal with the important issue, one that I think is important about preemptive rights. And in this case we are presented with a summary judgment case. One where there is sufficient evidence in the record to demonstrate that there could be, there would be commercially unreasonable standards here in how these parties structured their transactions.

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REBUTTAL

LAWYER: Justice Baker in answer to your question earlier, the transcript references are page 337, which is the Tenneco Motion for Summary Judgment, and page 41 which is the Enron Motion for Summary Judgment is where the 12.6 issue was raised in support of summary judgment.

GONZALEZ: Would you address the argument of counsel that you're bound by the 1985 contract and you're trying to get around it?

LAWYER: We fully concede we're bound by the 1985 contract. What that contract provides is that if there is a transfer of ownership interest, and it's not in connection with the sale of all or substantially all of the assets, then there is a right of first refusal. Ownership interest is a defined term in the contract. It is defined as the partys' percentage interests in the "facilities." Facilities is defined as the physical assets, the fractionation plant itself and the real estate on which it exists. Clearly the 1985 contract only burdens a transfer of that hassle. We complied fully with that. When it was contemplated originally that there might be a sale of assets we recognized that if there were, and if it was not substantially all of the assets, that right would be triggered. That's not the transaction that was ultimately done. Counsel says that when Enron submitted an offer for all of the assets that somehow at that point the right of first refusal was triggered and we had an obligation to extend it at that point. The problem with that is that art. 12.5, which gives the right of first refusal says that it's only triggered when the parties have executed a contract, the transferor and transferee have executed a contract. At that point that's when if the right is going to be triggered it is triggered. In this case, there was never a contract executed for the sale of assets. The only contract that was ever executed was for the sale of stock and that's simply not covered by §12.5 of the Restated Operating Agreement.

Counsel makes reference to the 5th circuits opinion in West Texas Transmission as imposing some kind of good faith duty in these circumstances. That case is totally in_____. It deals with a situation where the right of first refusal must clearly trigger. Nobody was arguing in the West Texas Transmission case about whether it was an asset sale or a stock sale. All parties conceded that the right of first refusal was triggered. The issue in that case was whether the offer that had been received from a

third party was a "bona fide offer". The contract required that it be a bona fide offer. The argument was whether certain conditions had been imposed in the offer that were not bona fide and therefore were designed to defeat the right of first refusal. That's a totally different issue. It was decided purely as a matter of traditional contract principles and interpretation of the term "bona fide offer." In this case we never get to the point of whether there was a bona fide offer because we don't have a transaction that triggered the right of first refusal under the clear and unambiguous terms of §12.5.

Counsel also suggests that there had been some impropriety going on because in 1991 at the time of the stock sale, Tenneco Natural Gas Liquids was down to 1-2 assets, and was no longer the substantial company that it had originally entered into the agreements in 1985. I submit that the summary judgment evidence is directly contrary to that. Five asset packages were considered for sale in 1991. Asset packages worth some $600 million. It was the entire natural gas liquids business of the Tenneco entities consisted of in addition to this fractionation plant dozens of other assets worth some $600 million. Clearly it was not a case where they had stripped out this fractionator and stuck it in a corporate shell and then sold the stock of the corporate shell.

CORNYN: But even if they had you said it wouldn't make any difference?

LAWYER: I think even if they had it would not because parties when you deal in a corporate context clearly understand that your contracting party might change control, might change ownership. And if you desire to restrict that kind of activity you simply must negotiate for it specifically.

Finally counsel said that the parties here wanted to make sure that they knew who they were doing business with. And that's the reason for the right of first refusal in the first place. I submit in §12.6 they allowed for the very thing that happened to happen here.