ORAL ARGUMENT – 3/21/01
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WAGNER & BROWN V. HORWOOD & GLASS

ESTES: To date this court has recognized two narrow exceptions to the imposition of statutes of limitations. The first being, the discovery rule, which is analyzed by category of case. And the second being, fraudulent concealment or fraud, which is analyzed on the facts specific bases by applying the facts of the specific case to the elements of the doctrine of fraudulent concealment.

The El Paso CA in this case, we believe, has added yet a third exception that blends the elements of each of the prior exceptions without requiring satisfaction of the strict standards of either. The El Paso court began by categorizing the case at bar as underpayment of royalty case. But it went on to hold that such a case the injury must be inherently undiscoverable if the only source of information available to the plaintiff would be the defendant or the operator in this instance.

Furthermore, the El Paso court went on to apply the facts of that specific case, analyzing the facts of that specific case to its discovery rule analysis and held that the discovery rule was applicable to this underpayment of royalty case.

O'NEILL You have claimed that the CA erred by failing to apply the statute categorically. What category would you base your argument on? That seems to be the _____ in determining what - what is the category...

ESTES: It is. You could begin very broadly. And as you go each step more narrowly of course you become more case specific, which seems to be contrary to the _____ of Altai and S.V.. The broadest category of course would be breach of implied covenants or express covenants under oil and gas.

O'NEILL: I understand the different possibilities. But how would you direct us to choose which category?

ESTES: We don't see that there would be any meaningful distinction between applying the category as the breach of express or implied covenants under an oil and gas lease, rather than go through each potential covenant and each potential fact situation that would apply to those covenants. Nevertheless, the El Paso court did select under payment of royalty as a category case, which probably would have worked fairly well had they stayed there and not continued to work the facts of that specific case into that broad category.

HANKINSON: I'm not quite sure what you mean by that in terms of working the facts of the case into the circumstance.

ESTES: We believe paid inordinate attention to a couple of facts and their view of those facts, particularly the statements themselves, the revenue statements that Wagner Brown would send out to the royalty owners which showed a net payment rather than showing what the gatherer was actually being paid by the purchaser.

HANKINSON: Is your category then breach of express or implied warranty that result in underpayment of royalties as opposed to other types of damage that may flow in the context of an oil and gas dispute?

ESTES: I think that the category would be those cases seeking damages - underpayment of royalty in this instance...

HANKINSON: Would it make a difference (and I'm puzzled as Justice O'Neill is about how we define the category), the case that you all rely upon, the HECI decision, didn't involve a similar fact situation, and so that's what causes the question to arise in my mind that in deciding as to that category of cases, we did have to look at the facts to determine whether or not the discovery rule applied. Are these facts sufficiently different even though it is a breach of express or implied warranty case to justify a separate category and for us to have to apply the analysis to determine whether or not the discovery rule should be applied?

ESTES: We do not believe that they are. And we don't believe so for these reasons. There are still a large number of sources for information other than simply the operator. But, the HECI opinion very carefully pointed out that that would be one of the first places that you would go, and that if they fail to tell you the truth, then you would move over to fraudulent concealment. But you would have information available from the operator, from the gatherer in this instance, from the gas purchaser, from audits or other professional help such as Mr. Glass availed himself of. And when you move the analysis over to the type of case rather than this specific case, we don't see any meaningful distinction between this and HECI.. It is clearly factually distinguishable. And we read Altai and those other cases to say try to stay away from factual distinctions and apply these unifying principles or these tests to a category of case to determine whether or not limitations...

HANKINSON: The question is, how broad is the category? And the question is, are you asking us to decide that in all cases involving a breach of express or implied warranty involving the payment of royalties, regardless of what the facts may be or the type of damage that is claimed, which may mean that there are different kinds of claims actually that we should at this point in time pronounce that the discovery rule applies for all time, or your position may be that we already did that in HECI?

ESTES: That certainly, it was our view of reading HECI when we argued this case to the TC. But I would point out the general unifying principles apply to all of those underpayment of royalty cases even though you have different types of underpayment cases. You have the case where you sell a different amount of product than you produce, or as in this case, the unreasonableness or the alleged unreasonableness of post production costs, but the principles remain the same. And the guiding principle is of course that it's a commercial relationship. And the royalty owner has a duty of its own diligence that cannot be ignored in any test to follow through on that and to keep up with that on a specific basis. The danger of going narrower and narrower is you will lose the benefit of consistency and certainty that was gained in the trilogy of cases recently decided if suddenly courts and lawyers being saying well this is factually distinguishable. In that case, the royalty statements said this, and this case has said that and you run a real danger of going back to what I would call the pre-Altai confusion where each case kind of stood on its own whether there was a discovery rule...

OWEN: Wouldn't we characterize this really a dispute over marketing arrangements?

ESTES: That is an accurate characterization.

OWEN: And the royalty is how you measure potential damages. But the actual dispute is over how the gas was actually marketed?

ESTES: I believe that to be the case. The plaintiffs claim because of the way the gas is sold in this instance, and has been being sold and gathered since 1975, really come back around to a deduction from price even though it's not a deduction that the operator makes. And so, the complaint really is a marketing arrangement. But it's interesting that it is a marketing arrangement that's been in place since the mid 70's, and each of these plaintiffs in this instance acknowledged that knew it was in place, they knew who to call for Canyon matters, they knew who to call for Wagner & Brown matters and in fact did so on other issues whenever necessary, that although they are if you will related, they perform separate business functions, and they knew which performed which. And in fact, Mr. Glass said he began investigating that relationship as far back as 1983. And I assume that he meant by that consistent with the court's question whatever that marketing arrangement was.

The second portion other than inherently undiscoverable, where we think this case fails on a discovery rule analysis is the objective verifiability statement. That requires in reading S.V. v. R.V. direct physical evidence that in and of itself establishes the injury.

O'NEILL: I'm a bit confused on this point. If the sole claim is whether that these were defective, and I can see how that would be a subject to expert interpretation, but I understand on some of your claims in terms of a simple misrepresentation on the statement for which there is no expert witness testimony.

ESTES: No, the sole claim is the unreasonableness of post reduction costs. And their response to the petition for review, they act as though a fraud measure of damages would apply. That is, what was as represented verses what _____ was actually receiving. But that's nowhere in the pleadings. The summary judgment was heard prior to the class certification hearing in this case. There were no fraud pleadings _____. Only pleadings of fraudulent concealment. And the only measure of damages sought are whether or not the post production charges were unreasonable.

O'NEILL: So there is no claim for misrepresentation on the...

ESTES: No. The only thing that's in this case is the doctrine of fraudulent concealment. And in fact, you will note in the deposition excerpts that we quoted in there, that's what we were questioning Mr. Glass and Mr. Horwood about: Did you know you intended fraudulent concealment and can you tell us where that fraudulent concealment is?

O'NEILL: Fraudulent concealment. Isn't the flip side of that argument that the statement couldn't accurately reflect what was actually being charged and therefore misrepresentation?

ESTES: First of all, we would argue whether or not they did accurately reflect what was being charged. Because what was being charged against their account was accurately reflected. But whether they argue that or not it doesn't change the fact. The case they brought was for breach of express and implied covenants as a result of unreasonable post production charges. And the measure of damages to that can only be the difference between an unreasonable charge and a reasonable charge. It has nothing to do with the statements. The statements come up only in the context we believe of the fraudulent concealment claim to avoid the bar of limitation. And that is part of what we felt was in error by the El Paso court. They kind of mixed that apple with the orange if you will of the discovery rule. But if you look at the pleadings and you see - you can look at their expert's affidavits. What they are seeking solely is a measure of damages for unreasonable post production charges. And that is in fact as the court pointed out necessarily subjective of the

reasonableness analysis. The amount of the charges themselves are not a matter of dispute. And they are in fact objective. But to get to the injury or the wrong if you will, you have to say that charge that's not in dispute is reasonable or unreasonable, which is a matter of judgment and a matter of expert opinion, which it appears to us leads to precisely the swearing match of experts warned against in S.V. v. R.V.

BAKER: I want to ask you about the fraudulent concealment that you've been discussing. Your opponent say that's not an issue on this appeal because it wasn't raised. I'm confused on the procedural aspect of where the case is since the CA acknowledged there were two grounds that the royalty owners were alleging, but didn't discuss fraudulent concealment and it's not in your petition or your brief on the merits. Exactly where are we and who did what and when and can we talk about it if we write on it?

ESTES: We believe that clearly the court can address it. In the 1998 case...

BAKER: Am I right that in the TC since you were the movant you had the burden to show there were no material facts on a fraudulent concealment defense or is that wrong?

ESTES: No. I believe on fraudulent concealment they had the burden to raise a fact question as to each and every element of fraudulent concealment. We had the burden of proof in the matter of law that there was a bar of limitations...

BAKER: So it's different. It's the exactly the reverse from the discovery?

ESTES: It is.

BAKER: The TC agreed with you and they didn't raise a fact question.

ESTES: The TC agreed with us, the El Paso CA...

BAKER: But then when we get to the CA, they mention it but never discuss it. I don't see any citation to a fraudulent concealment case in their writing whatsoever. So when it comes here who has to do what to draw an issue on that?

ESTES: It's optional with this court to consider that in the first instance.

BAKER: So is it your view then because they raised it in their response that we do have the issue before us?

ESTES: It is. In fact, it's our view that surprisingly in their response that's what they led with is please remand it.

BAKER: They sent us a letter saying they disagree.

ESTES: We disagree with that. We think that there are a couple of fairly recent cases from this court that indicate that you can consider that in the first instance. The record is before you. The fact of the matter is in the El Paso opinion without citation to authority and their briefing in this case without analysis under fraudulent concealment, we discussed all of the facts on which they rely for fraudulent concealment. The record is before the court and this court can make that determination in the first instance as a matter of law. And we believe in the interest of judicial economy should do so. We can understand why the...

BAKER: Well we do have an option to send it back for the CA to write on. Would you agree with that?

ESTES: You do have that option. It would appear to us to be more convenient for all to go ahead and address it here, because we think all of the facts have been thoroughly discussed here. We didn't make the choice that was made in their briefing to try to make this a fact specific argument. We were trying to stay with the type case. But having made that choice, they want to worry you with these facts and then say, but don't worry about that now. If don't like what we're saying send it back to the El Paso CA. We think it should be determined here and can be determined here but it's certainly within this court's discretion to do it either way.

ENOCH: Would it be helpful or not in trying to determine the category which the discovery rule applies or does not in terms of the causal connection to the claim and it's causal connection to the damages asserted? It seems to me in this case is not so much the breach of warranty that's the category that - is it a broad category or a narrow category. It really seems to me the concern is what's the nature of the wrongfully caused damages since the nature of the wrongfully caused damages is underpayment of royalty, and the party that receives the runned checks and sees that, it seems to me the category could be in a case where the claim is underpayment, the claimant obviously has the information or access to information on how their payment was calculated. They just go to the person that gave them the payment and say that. If they claim that it's misrepresented to them in a claim that you say moves from a discovery rule claim to a fraudulent concealment claim, which gives them the opportunity to say I know I have that information, but they lied _____ and they also escape _____. But couldn't the category of cases would be helpful to look at categories in terms of what's claimed to be the wrongfully caused damages to determine whether or not that's what's inherently undiscoverable is those damages they now claiming are discoverable?

ESTES: I think that's correct because the test is actually stated as to whether or not the nature of the injury in cases of that type would be inherently undiscoverable. And here, as in any other under payment case in a commercial context whether it be royalty or commercial leases or anything else, you're talking about a claim for money damages under a commercial contract. And that is in fact the nature of the injury and the inquiry should be as to whether or not the fact of that injury was inherently undiscoverable.

ENOCH: Would it make any difference that if the category was a - the category could be under payments under a commercial contract as opposed to the category being oil and gas cases involving breach of warranty?

ESTES: Absolutely. There's no logical reason that I can define to differentiate between the two, because the leases are at their core commercial contracts between parties.

HANKINSON: Does it matter what the runs look like, or in the other context whatever the documentation looks like that the person paying gives to the payee in determining whether or not the discovery rule should apply?

ESTES: I don't believe that it does, because you still have all of these other sources of information. You can still contact the operator and question them and seek more information from them.

HANKINSON: So what we're saying now is that every 2 or 3 months they are going to have to ask you for an accounting to make sure that you give all the breakdown or they are going to have to sit down and talk with you to say, Now tell me how you calculated this?

ESTES: I don't think that's what they would have to do at all. In fact the record is very clear that they can calculate these. Their own expert said how they can do that and calculate the charges being made against their account. And in fact the evidence in the record is very clear, that had they done so they would have seen the contractually called for escalation of the compression fees. Even from 1985 to 1992, well before 1992, we had fees beyond what their experts now contend are reasonable.

HANKINSON: If we're talking about a broader category of underpayment in any kind of a commercial context, we may have a payment document that would not allow someone to do that and in fact would have to do an outside investigation in order to determine why they were being paid the amount they were being paid.

ESTES: I think that's accurate. I think it becomes an economic decision though. They are in fact commercial contracts. And how much detail or trouble you want to go to to keep up with them are very different as seen by the two plaintiffs in this case.

HANKINSON: But it may also affect how broad the category should be for application of the discovery rule.

ESTES: It may well do that. You know in reviewing the facts of Altai in particular, that certainly no less fairer than the burden that was placed on Computer Associates in that instance, and that doesn't make it right or wrong. It just gives us consistency that we know to follow in the law.

O'NEILL: On the objective of your liability claim, we said in S.V. v. R.V. that it is possible that recognized expert opinion on a particular subject could be _____ consensus. Do you agree with that language?

ESTES: Yes. I think that when the standard is reasonableness there can be no consensus. But we showed that our experts or the people who opined in our instance said that the charges were reasonable. Their experts used a methodology that they said came to the conclusion that it was not reasonable even though the - I think the question is burden, and I may be getting off on methodology. It is our burden and we think we met that burden by showing that two experts could disagree in this instance. And there clearly in determining reasonableness can be no consensus. There may be a consensus as to the methodology, but by its very nature reasonableness is going to require some sort of subjective application: I've done the work; I've done the comparative analysis. Now where in that range does the reasonableness cut off. And we believe that that's well in this record and it presents an excellent opportunity to define that better in a commercial _____.

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RESPONDENT

HOVNATANIAN: I want to begin by addressing Judge Baker's question on fraudulent concealment. Mr. Estes is correct that we led off in our response, our brief on the merits with the issue of fraudulent concealment. But if the court will recall, we led off with that issue by saying it is not an issue. We spent 2-3 pages telling the court our opinions - suggesting to the court that because they did not brief fraudulent concealment, fraudulent concealment cannot be an issue in this case.

HECHT: Why do they have to brief it?

HOVNATANIAN: Because of the unique procedural posture of this case. There was a summary judgment granted, as the court knows in the TC. We raised two affirmative bars to the defense of limitations on which the summary judgment was granted: fraudulent concealment and the discovery rule. The El Paso CA concluded the discovery rule applies and reversed the case and therefore did not address fraudulent concealment. Now on appeal the petitioner's position is the El Paso CA was wrong on the discovery rule to say the discovery rule acted as a bar to limitations. In that event even presuming they are correct, even presuming this court were to agree, we still have a fraudulent concealment bar that has not been adjudicated. And so for that reason...

HECHT: Well why don't we adjudicate it?

HOVNATANIAN: You could, but for the fact that they have not briefed it. They haven't told this court: here are the reasons that fraudulent concealment wouldn't apply, and we should win even if the court agrees with us on the discovery rule.

BAKER: But do you agree with his comment that fraudulent concealment is an affirmative defense and you had the burden in the TC to raise a fact issue on every element as opposed to their burden in the TC to show as a matter of law that the discovery rule didn't apply?

HOVNATANIAN: Not necessarily. No, I don't necessarily agree. I think the cases are fairly well split on that. There are some cases that say regardless of whether you're talking about estoppel or fraudulent concealment or the discovery rule, it's the movant for summary judgement on the basis of limitations that has the duty to negate...

OWEN: I thought our jurisprudence is very clear that there is a dichotomy between the discovery rule of fraudulent concealment, that even in summary judgment the burden is on you to affirmatively establish fraudulent concealment, not on the summary judgment...

HOVNATANIAN: I think that's correct. I think this court has basically cleared it up.

HECHT: I thought you said it was unclear. I'm not following.

HOVNATANIAN: Now it's me that's certainly unclear. I think there was a split in the case law. I think this court in two successive cases that are cited in the letter we sent to the court last week specifically stated: there is a difference in fraudulent concealment and the discovery rule. In fact the court specifically said there are different procedural rules; there are different _____; there are different shiftings that go on. So for that particular purpose, I don't disagree. I do agree with Mr. Estes. I do agree obviously with Justice Owen that the ultimate burden on fraudulent concealment is on us. But the point is, while that may be true in the TC and the TC said that we didn't meet that burden, it's their burden on appeal to raise it as an issue.

HECHT: Justice Baker asked you about the TC and you said it was unclear, but now you say no you agree with him. Do you agree with Judge Baker?

HOVNATANIAN: I do agree with Judge Baker. That's correct. I think ultimately this court cleared it up...

ENOCH: You're saying in the CA, you raised as a point of error the TC's failure to accept your affirmative defense by granting their summary judgment, the CA didn't address your point of error?

HOVNATANIAN: Exactly.

ENOCH: They left it because they disposed of it on a different point.

HOVNATANIAN: Exactly.

ENOCH: And you won in the CA, and your point is when you got to the SC it was the petitioner's obligation to challenge both grounds upon which the CA could have - its judgment could be supported, which were the two you brought on appeal?

HOVNATANIAN: Exactly.

ENOCH: If we decide that you're wrong on the discovery rule, we still have to address the fraudulent concealment question, but you're arguing that question is not before us because the petitioner didn't raise that unaddressed point out of the CA?

HOVNATANIAN: I wish I had just said that. The answer is absolutely correct.

BAKER: Why can't we write on it anyway?

HOVNATANIAN: You can't write on it because the only time they have ever raised it...

BAKER: But what about Cincinnati v. Cates?

HOVNATANIAN: That's true. Cincinnati v. Cates is out there, but this case would go far beyond Cincinnati v. Cates, because one of the elements in Cincinnati v. Cates is did the appellant or the petitioner preserve the error? They haven't preserved the error here because they have not argued it to this court.

BAKER: They've preserved it in the - actually the issue is preserved in the CA because you brought it there, so at least we could send it back to the CA.

HOVNATANIAN: Precisely. That's exactly right. And I think that's the difference in a remand and a render. If they had argued fraudulent concealment and this court could have determined well we disagree with the respondents on the discovery rule, we disagree with the respondents on fraudulent concealment, we're going to reverse the El Paso CA and we render judgment for the petitioners because you can't win respondents on fraudulent concealment or discovery rule or estoppel, then this court could do that. But without briefing on fraudulent concealment the most this court could do would be to remand it to the El Paso CA and say they briefed it in your court, you figure it out.

Now it's true that they briefed it in their reply brief, the petitioners in this court. But...

BAKER: There's the possibility if you hadn't said anything at all in your response, we wouldn't be having this discussion.

HOVNATANIAN: No, I don't think that's a possibility because in their brief they do mention fraudulent concealment in their opening brief. Now they don't mention any of the three elements of fraudulent concealment. They don't cite a single case that would apply here on fraudulent concealment. They don't go through any analysis on fraudulent concealment. But they

do mention it. And that was enough to raise our intent to come in and say, wait a minute. Let's talk about what the issues are in this case, and they don't include fraudulent concealment.

At risk of beating a dead horse, I want to point out that the appellate rules are very clear that when you set out your issues to tell this court what your case as petitioners is about, you've got to do it in your issues presented. Not just to let this court know, but to let the other side know.

OWEN: Would it be fair to say that what you're really complaining about is the way the gas was marketed?

HOVNATANIAN: That would not be fair to say. Marketing is a part of it, but that's not all of it. Our ultimate complaint boils down to the fact that they have shorted us on royalties.

OWEN: But because of the way they market it. Because of the arrangement with their affiliate.

HOVNATANIAN: Not so much because of the arrangement. We don't have a problem with them deducting compression charges, for instance, from the price of gas. Our problem is their compression charges are unreasonable.

OWEN: That's my point. You're saying that they are making money on the side with an affiliate by virtue of the way they are marketing the gas.

HOVNATANIAN: That's correct.

OWEN: The statement, does it accurately show the gross price that the operator says it received for the gas?

HOVNATANIAN: I will refer to Mr. Herring on that.

HERRING: I believe it did show accurately what the gross price for gas was.

OWEN: Then you obviously know what the net price you received was. And so you could determine on a global basis what was deducted. Why would it be difficult for a royalty owner to ask the operator for the agreements under which the gas is being marketed so that they could determine when they read the agreements between the operator and the gatherer and the purchaser what precise arrangements, or why would that be a difficult thing to do?

HOVNATANIAN: It wouldn't be difficult. Bu the problem in this case was Mr. Horwood and Mr. Glass never knew they needed to.

OWEN: But if they had done that would they have been able to figure out who was getting what charges?

HOVNATANIAN: I don't think so, because for one thing it took an expert for us to figure that out. So I certainly don't think Mr. Horwood and Mr. Glass, who are not proficient in this field and certainly not lawyers and certainly not oil and gas...

OWEN: Based on your briefs it seems to me that your arguments as laid out in the briefs is based on the contractual provisions themselves?

HOVNATANIAN: That's correct.

OWEN: And so if you had asked for the agreements and gotten them, you could have laid out the same argument that you lay out in your brief?

HOVNATANIAN: It would have been possible. But the problem...

OWEN: Why should we fashion a rule that says royalty owners shouldn't at least be obligated to ask for the marketing agreements if they have questions?

HOVNATANIAN: Because what we did in this case was better. We went directly to the lessee and said, what are you charging us for compression charges. We did even better than looking at the contracts - we went right to the source.

OWEN: And they told you was true. What they didn't tell you was the arrangement with the affiliate: what you could have learned about had you asked for the agreement.

HOVNATANIAN: What they told us was not true. What they told us was we're charging you .12 cents in compressions charges, and that has come down from .30 cents.

HECHT: But that's a fraud claim. That's not a discovery rule problem. If you go and ask somebody are you cheating me, and they say no, and they are, then you've got a fraud claim. But that doesn't mean that the discovery rule applies.

HOVNATANIAN: I have to disagree. I think fraudulent concealment is in there. But I think that's also a discovery rule problem as well. For the very reason that the two elements of the discovery rule, the first element is is it inherently undiscoverable would apply there.

HECHT: You say in your brief the royalty statements showed the compression charge.

HOVNATANIAN: They didn't state here is your compression charge. They gave the information.

HECHT: I'm just quoting from the brief. And then it say on the same page, _____ reported to Mr. Glass that he was being overcharged.

HOVNATANIAN: Correct.

HECHT: How is that inherently undiscoverable?

HOVNATANIAN: Because at that point, Mr. Glass was faced with the option of running to the courthouse and bringing suit, or going to his lessee with whom he had done business for years and years, and telling them I've got this auditor over here that say's you're doing me wrong. What do you have to say about that? And they reassured him, No, no, it's .12 cents, that's all we're charging you, and it's come down from .30. And at that point he said, Okay, well I believe these people with whom I've done business for years and chose not to file suit.

HECHT: That's your choice. But I don't see how that makes it inherently undiscoverable if there is an expert out there that you employed that was actually discovering it if it was the overcharges you say.

HOVNATANIAN: I see the distinction you're making. I guess I should retreat to the Advent case, because that case speaks to that. The Advent Trust v. Heider(?) says that when you only have one potential source to get that information from, and that source gives you wrong information, that fits under the discovery rules.

OWEN: I thought what we said in HECI was go to the operator first and see if you don't have a discovery rule problem, then if the operator _____ misleads you, you might have a fraudulent concealment problem. That's not a discovery rule problem.

HOVNATANIAN: That's virtually a quote from that case. That's absolutely correct. But the court didn't say you would not have a discovery rule problem. The court just said, of course if they are telling you something that's untrue, then you would be able to rely on the fraudulent concealment.

OWEN: I thought that was implicitly in HECI that these royalty owners in that case could have asked the operator what was going on. They didn't do that.

HOVNATANIAN: What the court said in that case was that the Neals went to HECI, and HECI was entirely forthcoming and told them everything accurately that the Neals asked, which makes our case sort of the anti-HECI.

OWEN: But we said categorically I thought later in the opinion, that in these cases where a source of information and the best source is the operator, that the royalty owner has some obligation to inquire. And that then if they make inquiry and there is false information given, you might have a fraudulent concealment problem but it's not a discovery rule problem.

HOVNATANIAN: You obviously know the case better than I. But I think that's a fair characterization. I completely agree. I think just the difference and the reason that this case is a square peg into the square hole of the discovery rule and HECI was not is because there was no other place for us to go.

But the point that I want to make is that when it comes to the discovery rule if there is only one source we can go to, and they give us wrong information and all we are trying to do in this context is raise a fact issue on the discovery rule, then to avoid summary judgment on limitations then in this case that would be enough. If this were an appeal from a jury verdict, then I think Mr. Estes might have a point. But in this case we are trying to blow up a wisp of smoke. All we're trying to do is raise a fact issue. We've raised a fact issue that 1) at the least we raised a fact issue that the information was wrong; and we've at least raised the fact issue on the fact that we couldn't know that except from the lessee, and we raised at least a fact issue on the fact that when we went to them they gave us wrong information.

ENOCH: Does this destroy the value of Altai then? Altai was predicated on the notion that through reverse engineering you could find these stolen source codes. Your argument is applying to Altai, if Altai's expert gave them the wrong information so that they didn't know that the source code had been used, then the discovery rule would apply. But the predicate of Altai, which is they could by investigation, discovery, is destroyed by the ver notion that if they used that investigation and failed to discovery it, then the discovery rule applies. So how is this not going in your direction? It just destroys the value of Altai's opinion.

HOVNATANIAN: I think I see what you're saying. You're saying we got the cart before the horse and then we've got the cart after the horse as well. How can it work in both directions.

ENOCH: Altai was predicated on the fact that through reverse engineering you could discover this. The argument Mr. Estes says, well you got the bill and through reverse engineering you could discovery the overcharge. You're saying, ah, but the person when we asked them, they gave us the wrong information.

HOVNATANIAN: And more fundamental than that, we got the bill but the bill was wrong. The bill gave the wrong numbers. That's why it would not work in this particular case. There are so many judgment evidence in the record that the figures that were stated on the royalty statements that were used to calculate the compression charges were wrong.

OWEN: But they are only wrong because of the marketing arrangements. They purported to show what they purport to show. They just weren't the whole picture.

HOVNATANIAN: I think they are wrong as a matter of mathematics. I'm not saying they don't add up on the royalty statement. They do. We've done the calculations. What I'm saying is that the contracts, the marketing arrangements call for X compression charge, the royalty statement said well we are charging you Y. And that's where what they were putting on the statement as long as it was not X it was Y.

O'NEILL: Is your claim complying to a battle of the experts on accepting this?

HOVNATANIAN: No it is not.

O'NEILL: Give me your damage model based on simple misrepresentation on the statement.

HOVNATANIAN: It goes further than the simple misrepresentation on the statement.

O'NEILL: You have to have an expert on this evidence to get there right?

HOVNATANIAN: That is correct.

O'NEILL: Then why aren't you bound by a battle of the experts here? It would depend on whose expert the jury believes.

HOVNATANIAN: I will tell you why that doesn't hurt us, because this court in S.V. v. R.V. said, if you have expert testimony in connection with your hard and fast physical evidence...

O'NEILL: You seem to be saying because there's subjective data to back up an expert's opinion, then therefore you get over this hurdle. But there's always subjective data to back up any expert opinion. The question is, whether the ultimate determination is one of opinion.

HOVNATANIAN: I think that's true. What we have in this case, we have financial records that show here's what they told us they were charging us. And by that, I mean the royalty statements. We have other records, like the contracts, that says here's what we were really charging.

O'NEILL: To get to your victory in this case, you have to have an expert give a subjective opinion. There are going to be two different subjective opinions based on the subjective data.

HOVNATANIAN: It would depend on which damage's model we use. If we're going to

get an expert to come in, and we already have, two of them, to say that I've looked at the amount of the fees, the post production in compression charges and that's too high, then that is an objective standard, and we've got the hard and fast data...

O'NEILL: Too high, is that an objective standard?

HOVNATANIAN: I guess what I mean to say is they are unreasonable.

O'NEILL: Again, why aren't you in _____ with the experts?

HOVNATANIAN: I chose the wrong adjective. That's not an objective standard. But that is one way we can show our damages. The other way is to simply look at the two sets of figures. On the one hand you've got what they are charging us and on the other hand you've got what they say they are charging us, and as a matter of math those things don't...

HANKINSON: You obviously take the position that the category of cases that HECI determined did not fall within the discover rule is different than the category of cases that this case would fall in because the discovery rule should apply.

HOVNATANIAN: Yes.

HANKINSON: How do you define the category of cases that HECI determined were excluded from the application of the discovery rule, and how would you define the category of cases that this case would fall in because the discovery rule should apply?

HOVNATANIAN: I think there's a clear definition, and the definition actually without addressing that specific subject, the El Paso CA in their opinion in this case, told us what that is. HECI and all of the cases that are cited in HECI, like Cibers, and Rogers v. Rocain, and Coco and Harrison all were cases involving facts to substantiate a claim, information that were obtainable from two different sources. Either 1) they were in public records, like RR Commission filings; or 2) it was open and obvious from a review of the leased premises. For instance, as the court wrote in HECI it would be possible for the landowners to go out and look over the fence and see the wells and know that they weren't the only ones producing from that common reservoir. This case on the other hand said the El Paso CA doesn't fall into that category because there was no way for us to know the facts given rise to our claim either from public records or from just a review of the leased premises.

OWEN: Why isn't that going to be true in 99% of the commercial contract cases. The only way you would know if the guy that you're dealing with across the table is accounting to you properly is to ask him and do and audit. It's all internal. What if this were a contract rivalry to buy all of the output, and the supplier said I will say you everything I'm putting out. And the only way you can find out if he's living up to that contract is to ask for an audit. Would we apply the discovery rule in all of these commercial cases?

HOVNATANIAN: I would suggest not. I would just suggest only in those cases where really and truly there is no other place to go for the person seeking the information...

OWEN: Well in my example. I say I want all of your widgets, and the supplier says yes you're getting all of my widgets and sending a letter to that effect every month. It turns out he's supplying three other people. And the only way I can find that out was to go ask him. Would the discovery rule apply in that case?

HOVNATANIAN: Then I think it would. Absolutely. Paul Morris, Canyon's own president testified in the record, that after 1984 when the new contracts that apply in this case took _____, there was no way for the respondents to find out what Canyon was charging them from a public source. And if there's no way for us to learn that from a public source...

OWEN: Well in my example how do you learn from a public source that what the widget output is of my supplier?

HOVNATANIAN: I don't know. I would presume not. I would presume that you could not. But that's why I think perhaps that case would be proper for the discovery rule. And I think that's the answer Justice Hankinson to your question. The category is different because we don't have any other source for this information, which was not true in HECI and the cases on which HECI relied.

BAKER: So the bottom line is that if the only source for information is the other side, then the discovery rule is going to apply in every category that involved that fact?

HOVNATANIAN: I wouldn't want to go that far. I wouldn't want to speak that broadly because I don't think I have to in this case.

BAKER: I'm not saying that. But that's what the rule would be if we buy into your viewpoint.

HOVNATANIAN: I don't think it would be. I think if you stick to the HECI category scheme, and this court in HECI defined HECI's category very narrowly. I think if you define our category as breach of expressed terms, or breach of the implied covenant to manage and administer the lease, then you don't have that problem. If you stick to the narrow framework that you set out in HECI, I don't think you would be speaking too broadly to cover cases you don't intend to cover.

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REBUTTAL

ESTES: To begin with, again, we're leading with a request to remand in this case. But I think that the rules are very clear that this is preserved and this court can do what it needs to do with the issue of fraudulent concealment here, both under the Associated Indemnity case and the rule that really applies is Texas Rule of Appellate Procedure 53.4, which allows that to be raised in a reply on a motion for rehearing or at anytime that this court still has jurisdiction to optionally consider that.

To address a few of the questions of Justice O'Neill, particularly the damage model, you are correct that it necessarily requires a testing of an unreasonableness. If you look at the pleadings in this case, which you have to go back to, and in fairness to Mr. Hovnatanian, he wasn't in this case at the time these pleadings were made and ruled upon. But the pleadings aren't about fraud. They are not about these statements verses those statements. The pleadings are about excessive post-production charges.

PHILLIPS: Are you saying it could never be an objectively verifiable claim that satisfies all _____ that can be a battle of experts?

ESTES: I think that there are some, as the court noted. I believe it was in S.V., that there might be an expert opinion so near consensus that it would satisfy that. But we don't have

such an opinion here in determining reasonableness nor would you.

Actually their experts' report is conditioned upon and predicated upon the notion that there are no comparable sales or charges if you will in the field, and, therefore, I have to go to what we would call a rate making analysis. We're not sure that that's true. But even if there were a standard methodology, for example, in a case where you are valuing property by comparative sales, the methodology may be consensus, but that doesn't make the opinion consensus. Because if the opinion still relies on subjective standards, such as reasonableness, you like that consensus that the court was pointing to we believe to get there.

Justice Owen's question was very pertinent. You could have asked for the contracts. You could have calculated these, and it was conceded that you could have. The information was available. We disagree vehemently with the characterization of the facts that they called and said _____ tells you are overcharging us. Read the briefs, read the records, that's not what happened. Eighteen months later, and when you see what that conversation was, you will wonder I believe why we were having this discussion to begin with. But nevertheless, the medical doctor's example was a good reason. All you have to do is go further. Let me see the contract. Let me understand the allowance that you are giving us that makes this accurate, and I will decide whether I agree with that or disagree with it. But there's no question but what that information was available.

Also I would point out that the Advent Trust case, which counsel cited, does not reach a discovery rule analysis.

O'NEILL: Could you tell me what the status of that case is?

ESTES: Petition denied. And in fact, what it does is criticize HECI in a footnote in dicta. And we think that that's one of the reasons unfortunately even having written a trilogy that you need clarification one more time about how we separate the fact specific analysis verses a categorical or a type of case analysis.

In summary, I think Mr. Glass said it best when I was asking him about the _____ report and he summed up the reason we have limitations. Man, I don't remember. That's been 14 years ago.