# ORAL ARGUMENT – 9/9/04
# 03-0209
# GEODYNE ENERGY V. THE NEWTON CORP.

TIMMS: We're here today talking about the Texas Securities Fraud Act. I would like to address two issues. The first issue addresses the question of whether there is an element of transactional causation under the Texas Securities Fraud Act. And the second issue is the question of what it meant in this case to offer a quick claim of an interest in an oil and gas lease.

On the first question it really comes down to the question of what does by means of mean? The Texas Securities Fraud Act (TSFA) requires a misrepresentation or omission. It requires that the misrepresentation or omission be material. And it also requires that the sale be by means of the material, omission or misrepresentation.

The statute could have stopped with the material misrepresentation or omission, but it didn't. It has those other words "by means of." What does that mean? It seems to me that by means of creates some sort of link. It creates a bridge between the material misrepresentation and the sale. And what exactly that would be has been addressed in some of the federal courts that have addressed the issue under the Federal Securities law 12.2. And in particular what those courts have said is that the causation is not proximate cause. I don't think it's the equivalent even of our producing cause. But there must be a link. The material misrepresentation must have been instrumental in effecting the sale. It must have been instrumental in bringing the sale about even if it's not decisive. It must have been a part of that process.

BRISTER: Can you give an example of that. When would something be by means of but not proximate cause?

TIMMS: I think it's something in which it would be - a proximate cause requires foreseeability.

BRISTER: I know what proximate cause is. But I have no idea what "by means of but not proximate cause."

TIMMS: Maybe you've written something in there and you don't realize that this would cause people to do something, but it is not accurate. That would be one thing. It could be that there is a bundle of things.

BRISTER: You just said if there is any inaccuracy in there...

TIMMS: For example. The amicus brief points to it. I disagree that this would always end up in being able to rescind a transaction. A biographical error. He points to that as saying that if you have an error in your biography, in your prospectus, then that can lead to recision in and of

itself. And so an error in a biography in your prospectus may be something that is not foreseeable. Maybe people - the average person doesn't care that you went to the U. of Oklahoma as opposed to Harvard, or that you have some sort of record that should be in your biography that may affect the decision. But this causation does get subjective. Like most causation it does ask the question of what was in your mind when you bid on this transaction or when you bought this interest. But it may be something that's not quite material.

BRISTER: My understanding of the Federal Securities law is, if you put something in a prospectus that misleads the markets so the price is higher but I personally never read the prospectus, nevertheless because the market is higher because other people were misled, I never relied, but it did have an affect on me even though I never saw it.

TIMMS: That's a fraud on the market theory. That's the Sanders v. _____ case.

BRISTER: And so that would certainly be a by means of.

TIMMS: It was a material misrepresentation that affected the entire market. And the problem in Sanders v. Navine(?), and the 7th circuit struggled with that case, because they wanted to satisfy the standard that had been put out by the 2nd circuit, that it was instrumental in bringing about the sale. While still staying, Not everybody in the world has to sit down and read the prospectus. And that's what gave rise to the fraud of the market theory that's recognized in some jurisdictions, but not in others. But the theory is, some people read the prospectus and it drove up the price and the price that was elevated affected the entire market. And so they allowed that to be the causation.

The 2nd circuit has adopted that standard. At least other circuits have looked to that standard and incorporated it in their reasoning. The 8th circuit has, the 3rd circuit has mentioned it. The 10th circuit.

HECHT: The amicus brief says it's only the 2nd circuit. And you disagree with that?

TIMMS: I absolutely disagree with that. The amicus brief tends to overlook authorities that don't agree with the view of the amicus brief. And there's a lot of other authorities out there. In fact, if you read the authorities in the amicus brief pretty carefully, some of those authorities actually are ones that I probably should have cited in my brief. They support our position.

The CA said that it should only be an in connection with test. The amicus brief also argues for that. The reasoning set forth in the amicus brief is very interesting and I think very persuasive for the fact that it should not be an in connection with test. What the amicus brief says is, You should look to 10(b)(5). It uses in connection with. And so you should use that same sort of standard over here. The problem is, 10(b)(5) uses that language. It says, in connection with. While in 12(2), the language is different. It says by means of. So we know Congress knew to use that language. It was capable of using that language and it did use that language elsewhere in the

Securities Act, and yet it chose to use different language in 12(2). So it must mean something and it must mean something other than in connection with. And I don't think there's a better authority out there, or better explanation of what it should mean other than the 2nd circuit Jackson opinion.

O'NEILL: I'm a little bit confused at where this all fits. Apparently the jury found an omission rather than false statement, or they could have found an omission.

TIMMS: They could have found an omission.

O'NEILL: And that would be based on the failure to produce the joint _____ statements?

TIMMS: Yes.

O'NEILL: So why can't you then read the statute to say, by means of the person who offered it or sold it by means of omitting. Why doesn't it just fit the literal wording of the statute? Because it seems to me the argument is if we had had that information we wouldn't have bought. So there is sort of a reliance piece under the literal wording of the statute.

TIMMS: I agree that the literal wording of the statute absolutely supports that there is a causal link.

O'NEILL: So why are we arguing whether one is necessary or not? I hear the argument is, do we have to establish causation or not? But it seems like under the facts of this case and the literal wording of the statute that's not really in dispute here, that the purchase was made by means of an omission is the allegation. So this theoretical inquiry about causation reliance what it might or might not be was not presented so much on the facts of this case.

TIMMS: If the point of that is that this court can decide this case on something other than causation, I agree with that. It seems to me that there are - reading all of the briefs, reading the opinion of the CA, that there are two arguments being made by Newton. One is the omission argument. If you had given me the joint interest billing statements, I would have seen that there were no work overs. And I would have known that with zero production and no work overs, I would not have bought this property. The problem with that, and that one to me you can easily decide it on the materiality decision. Because what they have before them was a chart, and it covered 6 months of time, and it showed production and it showed expenses in about 10-12 different categories. And the production was zero or next to zero. And then all of the expense categories were zero except for miscellaneous expenses. And there is a specific expense category for work overs. And it has a string of zeroes on that category for 6 months. I don't know what you could have seen in the joint billing statements that would have made this well look worse than how it already appeared on that piece of paper. Because they need to come in here and say, Wow, the piece of paper looked okay, but if I had seen the joint billing statements, I would have known not to bid.

O'NEILL: I understand that argument. But where do we get into having to define what causation looks like in this case?

TIMMS: It seems to me that if you get past the misrepresentation or the omission, and you find that the omission may or may not have been material, then you get into causation. And where causation would come into play would be with regard to the actions that were taken with respect to those things, and it would also come into play - and this may be important in the context of oil and gas industry auctions.

O'NEILL: And I understand the argument on that piece. But I'm still confused on...

TIMMS: Where it would come into play would be with regard to how you get into the auction. In that you have to sign all of these forms. You have to say you are sophisticated, that you are having no representations, no warranties, and all of those things that you sign in order to get in.

O'NEILL: It would be the interaction of the as is clause?

TIMMS: As is. But that's one of many. I mean it is a long stream of things in which you, the buyer, generally take _____ to do the due diligence. And the other courts that have dealt with that issue in the federal area have dealt with that issue usually with regard to the reliance requirement, say under 10(b)(5). It would feed into causation here.

BRISTER: Why is it you say this is a quick claim?

TIMMS: Because the instrument is exactly as described in Rogers v. Racain(?), this court's opinion.

BRISTER: Which document am I looking for and where does it say quick claim?

TIMMS: I think it would be in Vol. 8, Plaintiff's Ex. 40. And it is not titled Quick Claim. It is titled Assignment and Bill of Sale. And if you look at the language that comes after that, it's without warranty and it consistently says that we are conveying our right, title and interest. And that is typical quick claim language.

To get back to your point. This state has a little bit of a problem in that - I think I sent a letter here. It was a paper written for the Panhandle Producers Pipeline group. And it says very clearly at the end of the discussion that what this case means is that no matter what you have signed, no matter what you've said, no matter what promises you have made going into these auctions, you do not have to do any due diligence. All you need is a misrepresentation that's material and then you get to back out of the deal. That same discussion, that same author over the summer wrote the update for the SMU Law Journal discussion of oil and gas. That same discussion, that almost identical paragraph now appears in the SMU Law Journal. And so what you have is a problem that's going to be endemic in these auctions of people thinking maybe I don't have to do

due diligence.

I think that what you have to look at is the very nature of what it was that we put up for auction. We were not selling a warranted piece of property. We were quick claiming our interest, whatever it may be. And that is the very essence of what a quick claim is. And it happens all the time that people will quick claim properties not really knowing whether they own anything. And quick claims are very important. They are used to clear title and they have an important function. But in this auction the reason that there was no misrepresentation was that you have to look at what it was that was being conveyed, or what was being sold. And it was strictly our interest in the property whatever that interest may have been.

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RESPONDENT

KING: I would like to answer J. O'Neill's question concerning what the misrepresentation was. It was an omission case, and it was a direct misrepresentation case. In this instance, they represented that there was an oil and gas lease. That representation turned out to be wrong. The oil and gas lease had terminated more than a year prior to the sale in this transaction.

BRISTER: Is there any evidence that they knew that? What's the evidence they knew that?

KING: There is no evidence that they knew that, but under the statute they did not prove that they, after exercising reasonable diligence, were unable to know that.

BRISTER: Your argument is, there is evidence they should have known that.

KING: That's correct.

BRISTER: But when they come in and sell their right to tile and interest to the lease as attached, negligently not knowing that they no longer - I mean people negligently sell whatever right they have when they arguably should have known better all the time. Right?

KING: Yes.

BRISTER: So why in this case is that going to be a material omission?

KING: Because we go into the Texas Securities Act. And the Texas Securities Act requires disclosure on behalf of the seller.

O'NEILL: Misrepresentation is not really at issue. The jury found no misrepresentations. So we really are talking about an omission.

KING: The jury found a violation of the Texas Securities Act. And the instruction to the jury was, that there was a material misrepresentation.

O'NEILL: And untrue statement of material fact. The prior question said on the fraudulent inducement claim that there must be a false representation. They found no. So isn't that kind of inconsistent?

KING: No. Because in the fraudulent inducement case they had to also find intent. And what the jury found was that there was not an intentional misrepresentation. So I don't think you can equate the fraudulent inducement answer with the fact that there was no misrepresentation. They found that there wasn't an intentional misrepresentation.

The Securities Act requires disclosure. It is a seller integrity statute. And it is modeled after §12.2 and it's modeled after the Uniform Securities Act that most of our states have passed. In every one of those instances the purpose behind those statutes was to require disclosure. And it provides defenses for sellers. And those defenses are, well if the defendant actually knew, not constructively knew, but actually knew that the statements were false, then there is no liability. Or secondly, after exercising reasonable care, the seller could not have known. And in this case the evidence is, this really - they say that it was rebutted but I didn't read it. I tried the case myself at the TC. The evidence from the only expert that was there was that all of that information that Geodyne was receiving was that this lease had terminated and it terminated quite some time before.

OWEN: But the chart showed the same thing didn't it?

KING: The chart showed no expenses and no production. But that really goes to the point of materiality.

OWEN: Let's go back to the representation. In the petitioner's brief they say that as part of the bid process your client had to sign a document saying that there are no warranties at all regarding title. And then specifically in the document you got it said, yes, we are conveying our right to title interest without warranty of title either express or implied. Now that doesn't that tell you that you're taking it with the knowledge that you may not have title?

KING: No. It doesn't. And it doesn't absolve this party from violations of the Texas Securities Act. Because they made a misrepresentation that there was a lease. Aside from the fact that they said that you're taking it without title, they represented that there was a lease, they provided us with lease files that said there was a lease, and that showed that they owned a working interest in it.

BRISTER: There was a lease.

KING: Yes. At one time. But it had terminated a year prior to that. And that information could not be learned from the lease file.

BRISTER: Can the state waive that? As I understand it they were shutting it down, hoping the pressure would build back up. If it did and the state said, Fine, keep going, we don't want to rebid this thing. Is there some reason the state couldn't have done that?

KING: From a technical standpoint, no. Under the Jupiter Oil v. Snow case, once a lease is terminated the fee simple determinable interest reverts back to the state. So they would have had to execute a brand new lease in order for that to be valid, or at least a modification or an amendment to it, to show that the lease thought it may have terminated was now a live and well lease for the state of Texas.

OWEN: What if this had been a corporate acquisition and there was a piece of property, a real surface property that the corporation said I'm conveying you these 10 properties with this same language - right title interest, without warranty of title either express of implied. It turns out that 10 years ago somebody got adverse limitations on one of the pieces of property and they did know that. Now is that a securities act violation? I'm talking about surface land.

KING: I don't believe that's a security.

OWEN: Well you're buying the stock of a company and they list their assets, but the instrument says you get our right in title and interest to these properties, but without warranty of title these are expressly implied. Now is that a securities violation?

KING: I would suggest to you that it is a security and that it is possible securities violation depending upon the totality of the circumstances surrounding that transaction, which is what all the federal courts say how you interpret whether a misrepresentation rises to the level of being material.

WAINWRIGHT: What's the policy behind that, the disclosure?

KING: To protect investors. And this court since 1971 said we are to give this statute the widest possible scope for the purpose of protecting investors and for the purpose of having full disclosure.

OWEN: But if the investor signs a lease, and says I know that I may not be getting title, and the document transferring it says I know I might not be getting title, and the documentation that goes with the transfer shows that there was no production for 1 year, and no working expenses done for a year, and you can look at the terms of the lease and see we've got a problem here. How was that a misrepresentation?

KING: That coupled with the fact that there were statements that - I mean if you take that into the abstract, you just can't do that. You have to take that into consideration with all of the facts.

OWEN: What other facts are there?

KING: The facts are that they sent us a brochure that there is a lease and that they are selling...

OWEN: Here's the lease. Here's the terms. And it will terminate if this, this and this happens. And there was also a chart that says this, this and this happened.

KING: I disagree with that. That's a mischaracterization of the evidence. There is a column in a chart without any backup documentation. Who do you know what it means or doesn't mean? The form here is there was backup documentation that should have been supplied that wasn't supplied.

O'NEILL: What would that have shown that was not on the chart?

KING: It would have shown that there was some activity on the well, that activity was simply the dropping of a streamline down in to see if there was blockage. There was some activity that it would have shown exactly when the activity stopped and it would have shown when the lease had terminated.

O'NEILL: Why does that matter if the chart you have just showed no production? If there's no production after 60 days doesn't it lapse?

KING: Under this particular lease, if there was no production or no continuous operations or reworking operations.

O'NEILL: And you concede that based on the length of time under the chart under the chart that there were not?

KING: If the chart is accurate, then that would be true.

OWEN: Are you contending the chart wasn't accurate?

KING: I'm not going to make that contention at all. But the point I am trying to make though is, that would be trying to say as a matter of law there was materiality is rebutted. And the cases under the federal act and the cases under all the uniform act says you can't rebut materiality as a matter of law, you have to...

OWEN: So you're just saying you can't quick claim under the Texas Securities Act. You just can't do it. If you purport to own something, and say I don't know if I own it or not. I quick claim it. You got a securities violation.

KING: If you make an affirmative statement and disclose that this lease may have

terminated, then you probably have a strong defense if there's not materiality.

OWEN: I don't understand the difference between that language and when I sign something that says, I may not have marketable title, the seller is not warranting title either express or implied. I don't understand the difference between the two.

KING: The difference is such disclaimers go to the issue of materiality. And one of the interesting things about this case is I do not see a single citation from my opponent concerning disclaimers and from the various states or the federal courts related to disclaimer such as the one that you are talking about. But, I did find a case and it's also cited in the amicus brief in which the DC in Pennsylvania - In re Farmore(?) dealt with a disclaimer not unlike what your honor is discussing. It says I'm not making any representations to you at all. You're doing your own homework here. And the In re Farmore case said under §12.2 of the 1933 Act, that that goes to the issue of materiality. It does not get you out of liability under the federal act.

And there's a strong policy reason for that and it's actually in the statute. In the statute itself there is an anti-waiver provision. Now I know we've dealt with anti-waiver provisions and naturally the federal courts call it an anticipatory waiver provision. But the Texas Act has virtually identical language to the federal act, which says a condition stipulation provision binding a seller of a security to waive compliance with a provision of this act, or rule, or order, or requirement hereunder is void.

Now the federal courts have interpreted that particular statute in four separate cases. Unfortunately none of these are cited to the court. I direct the court's attention to the case of ADS Corp. v. Dow Chemical, 325 F.3d 174. Also King v. Allied Vision which can be found at 65 F.3d 1051; City Bank v. Itashow(?), 2003 West Law 1797847; and MBI Acquisition, 2001 West Law 1478812. And those cases hold that a clause in a contract that attempts to negate an element of the plaintiff's security cause of action and thus its subsequent rights is in violation of the federal anti waiver statute.

HECHT: The whole point of this auction is to engage in this gambit it seems to me. I can understand that the federal and state securities laws may have some interest in precluding one on one transactions or those kinds of contracts in consumer situations or something like that. But where sophisticated oil and gas men get together to play blackjack it looks to me like we should let them play.

KING: If that's the case, the statute doesn't make that distinction. That's the problem that you are articulating. The statute doesn't make the distinction if it's sold at an auction or an estate sale, or between an arms-length negotiated transaction.

HECHT: And I guess it's true here. There's never been a complaint that he didn't get $300 worth of stuff. The complaint is that he may have a bought a big liability that he wished he didn't have.

KING: That's exactly what spawned this lawsuit.

BRISTER: But your client knew that wells sometimes get shut-in even if they only pay $300. If they had to pay their share of shut-in costs it could be a bunch. You knew that without being told.

KING: In the oil and gas business...

BRISTER: Everybody knows that.

KING: Certainly

BRISTER: If they would have paid $1 for this there would have been no question they weren't thinking they were getting much of a lease. Right?

KING: I would submit to you it doesn't matter whether they paid 1 cent for it if it's a security and there was consideration paid. It wouldn't matter if they pad .25 cents, because the securities act doesn't make those types of distinctions.

OWEN: I still have a problem with your waiver argument. I'm having difficulty seeing how this is a waiver argument. To me it goes to whether there's a misrepresentation or not. You say I don't know if I have title or not. I'm offering this to you for whatever you want to pay for it. I put it in the auction and if it's off $1 that's it. I've agreed to put it in there. But I've said I don't know if I own title or not. I'm not warranting title.

KING: Here's the distinction. The point is it's not whether they've sold us title. We wouldn't even be in there bidding on this property if there hadn't been representation that there was a lease. The point about the quick claim is it's a complete red-herring. The issue is, there was a misrepresentation or omission that there was a lease when the reality was there wasn't.

OWEN: No they said here's the document I signed. I may or may not have an interest. I'm not warranting what my interest is. Here it is. Do your own investigation and decide whether you want to bid on it.

KING: I would submit to you that in the federal system under the identical federal statutes that goes to materiality of whether the representation related to the lease verses whether there's a quick claim goes to the question of materiality. And in fact, I will tell you that was tried. That very issue was tried to the jury in this case. They argued it extensively. They cross examined my client extensively concerning that very issue. And the jury had those facts before it in the totality of the circumstances. What the cases are holding is that you just can't take a set of facts, hold it out in insolation, and say that automatically rebuts a securities cause of action.

OWEN: I think what you're doing is holding out in isolation that there was "a

representation that there was a lease." I mean the representation was, I signed this. Here's all the stuff about it. I may or may not have title. I may or may not have this interest. You make your own...

KING: I'm not holding that out in isolation at all. I'm actually saying that you take all of these factors into consideration and you take into consideration the evidence that was presented to the jury and let the jury decide about materiality. That's also the other point. Materiality is a fact question.

BRISTER: What effect will this holding have on the auction?

KING: I don't believe it will have any affect whatsoever.

BRISTER: There's a lot of things non-operating working interest donors don't know about a well.

KING: That's true.

BRISTER: So a lot of non-operating - apparently 20,000 of them - non-operating working interest owners want to sell their working interest. Right?

KING: I would imagine at some point that's true.

BRISTER: So the deal is they are going to have to do an exhaustive examination to find out just as much as the operator knows before they can get out of them. Even if they are only selling it for $300.

KING: I think the only thing that they have to do is act - the statute gives them two defenses. One, I actually knew that what you said was false; or two, you acted reasonably and prudently and despite your actions of being reasonable and prudent you were unable...

BRISTER: And in hindsight more often than not, a jury is going to say you should have found out what they found out later.

KING: Actually in this particular...

BRISTER: Or, if I can rephrase it slightly. If a jury might find that out you are going to have to go to trial and it's one thing you want to unload for $300, it's going to cost you at least $100,000 in attorney's fees. It is certainly going to have some affect on the auction.

KING: It will have an effect on the standpoint that you are going to have to be careful about what you put up for an auction, and you're going to have to be careful about what you say.

BRISTER: When you say be careful, that means you are going to have to spend money?

KING: You are going to have to spend a little bit more money. But let's not feel too sorry for Geodyne. They did get some money out of this well before it sputtered out. This well wasn't a big producer, but the facts of the case were that there were $500,000 or more of revenue generated by this well.

BRISTER: And then unloaded the liability.

KING: And then unloaded the liability. That's exactly what happened.

OWEN: Your client also signed a document that said, I've got 90 days to figure out if I have title. It's contemplated voiding the sell and returning your $300 if within the 90 days it was determined that you didn't get conveyed to you what you thought you got. Isn't that another indication that this is not a misrepresentation, that you are buying something not knowing whether you are going to get any title or not?

KING: Actually what the document says is that if the interest conveyed are different than what is on the document, you've got 90 days to let us know that the interests are different. In other words, if there was a 10% interest in this instance, as we all know working interest can be very small fractional shares, and if it turns out that that is a different fractional share, then you come back to me and you let me know that. The facts of this case are, that when we thought we purchased this, we immediately sent a division order to the operator. And we didn't hear back from the operator until July when the operator sent us a bill saying pay us $75,000.

OWEN: The document you signed contemplated that you might not get anything, because you were either getting ratchet down pro rata, or if you own nothing the whole thing was going to be called off. Voided is what the language says. And you get your money back. It seems to me there was a contemplation from the get go that you might be buying nothing at all.

KING: One thing I need to point out on that is those are adhesion terms. Those are nonnegotiable terms. That's another point that needs to be made, is before you walk into the auction you get to the door, they give a form contract. This form has boilerplate provisions on it where you have to agree to all of these things before you can even go in and try to participate in the auction. As J. Hecht wrote in Prudential, while that may be okay that shouldn't be a problem if you've got an arms length negotiated deal but...

OWEN: The US SC has come out differently on that even in the Carnival Cruise Lines ticket. It was boilerplate language on their ticket that they had to bring the lawsuit in Florida and the US SC says there is nothing in _____, enforceable or anything wrong with that.

KING: But the point here though is whether you can waive elements of a securities cause of action or...

OWEN: It goes to me whether there's either a misrepresentation from the get go. That's where I'm having the difficulty. It seems like you were being told, your client was from every step of the way, you may be buying a pig and a poke(?), you may be buying nothing. If that happens you've got 90 days to figure it out and get your money back.

KING: I submit to you that the only place that those statements were made is in these _____ contracts. If someone had come in and said, if they had said or put something outside of one of these boilerplate provisions, they put something outside that says you know, we are telling you that this lease may have terminated. I would agree with you that there wasn't a misrepresentation. But that didn't happen. What Geodyne is arguing is I can throw all of this stuff...

O'NEILL: But you could see that the lease may have terminated. Couldn't you see from the lack of production that it may have terminated?

KING: The point though is, is whether I actually knew that it had terminated. That's the issue. It's not a defense that I might have known. And I don't believe in this particular instance that's what the evidence shows. The only defense that they have is that I actually - you can't imply constructive knowledge under the Texas Securities Act or under the federal act.

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REBUTTAL

MOORE: Let's talk for just a minute about oil and gas options. This is not the only place where you can buy oil and gas properties. In fact it's probably one of the worst places that you can buy oil and gas properties. It will definitely have an affect on auctions to do what Newton wants here.

I was looking through the exhibits last night and our ex. 11, which is in vol. 9, has one page of the auction brochure. And it has about 48 properties listed on that single page. I counted 7 as having no production whatsoever. So this is a very common thing.

BRISTER: But isn't the auction also going to be hurt if everybody knows this is the place where you go when the lease lapses and you're about to get a joint interest billing for the close-in costs, and so everybody knows that mostly the stuff that's being sold at the auction is going to be hurt then, too. Right?

MOORE: that has been true up until now and there's been much of a thriving auction industry. I'm not saying all these properties sell. There was one bidder on this property and it was Newton, and no one else even bid. And Newton didn't have to bid $300.

BRISTER: Should we be running an auction that's selling off my statutory liability to plus the well?

MOORE: Hopefully what's happening is that people are coming in after signing these forms and they are only bidding on properties where they have a pretty good clue as to what they are going to do with it. Maybe they know somebody at the GLO. Maybe they know that they can get an extension of a lease, or a renewal of a lease, or that they can package it up and do something with it. Hopefully they are not just wandering in and buying a well that's been dead for 6 months and just hoping against hope that something will happen to revive it. Although, actually, in this situation the operator was trying to do that very thing. And no one knew until about 3 months after the auction that the thing was really dead. Because the operator was even preparing in Sept. of that year, the operator prepared an authorization for expenditure to do a work-over.

HECHT: Do you agree incidentally with the respondent's position that the lessor cannot waive the termination of the lease for nonproduction or not? If the lease terminates for nonproduction can the lessor waive that or not?

MOORE: There are various ways that the lessor can ratify adverse possession that can review the lease. Yes. They absolutely, I think can breathe new life into that lease.

HECHT: There was some indication in this record that they had been in contact with the state and maybe the GLO was okay with this or some sort of loose language.

MOORE: Yes. They could have signed something, and just would not have been an issue. Let me talk about the case that they just cited, the AES Corp. case, 325 F3d, 174, 3rd circuit case. And there are a number of cases out of the 1st, 2nd, and 3rd circuits that deal with promises that you are not relying, promises that there is no representation, no warranty, that type of thing. The courts have dealt with it somewhat differently. No court simply ignores those things. They are not just removed from the formula. The 2nd circuit basically enforced it in a securities setting. The 3rd circuit and the 1st circuits says, We don't just automatically enforce these things. We look at them as one factor as to the person's behavior and what they would have relied upon and whether there was causation and what not. They say that it may establish an absence of reliance and when unrebutted may even provide a basis for summary judgment in the defendant's favor. That's the 3rd circuit.

It's very much that the courts take very much the same approach that this court took in Prudential. It's not always given absolute credence across the board to look at it in the context of what happened, but if everything that happened was okay, then the court will pay attention to it.