ORAL ARGUMENT – 02/04/04
03-0555
SHELL OIL V. HRN

BALDWIN: The question on appeal in this case is the proper interpretation of §2.305 of the Uniform Commercial Code. I have asked the clerk to place before each of you an exhibit which sets forth the pertinent part of that section. Also on the exhibit is the text of comment 3, which we submit is the proper interpretation of §2.305 and the one intended by the drafters.

As the court knows, this is a case in which several hundred Shell franchise dealers claimed that Shell had breached its dealer agreements with them by charging a bad faith DTW price for all of the gasoline that each dealer had purchased from Shell. DTW is an acronym in the trade. It stands for Dealer Tank Wagon. It refers to the price of the gasoline that's delivered in the tank wagon to the station.

The dealers allege that Shell's DTW price was in bad faith because some dealers could not compete effectively or had experienced decreased profitability. The damage model asserted was the difference between the DTW price and a hypothetical good faith price selected by plaintiff's expert multiplied by every gallon of gasoline that every dealer had purchased throughout the limitations period.

HECHT: The brief says the DTW price is set without regard to the rack price. Is that true?

BALDWIN: It is true for Shell. And it is my understanding from my exposure to this industry that there is not a lock step between DTW and rack prices. The trial judge, Scott Brister, granted summary judgment for Shell. His action was based on a long line of cases in other jurisdictions, interpreting §2.305 in the context of gasoline distribution.

PHILLIPS: Why would Shell be hurt if it let its dealers buy from jobbers who bought wholesale from you as long as the dealers had to pay a certain fee for your advertising branding, good will, etc. if they paid a few cents a gallon or whatever it is for that why was it so important to you that your jobbers be able to sell to anybody except your own dealers?

BALDWIN: Shell jobbers operate mostly in the _____ of metropolitan areas - out in the outskirts. They have their own system of support for their stations. Shell has a completely different system of support for its dealer stations in terms of counseling as to marketing, environmental matters, accounting, etc. Shell has a policy that's reflected in its jobber contract that essentially would require the jobbers to pay the DTW price if they resold in competition with Shell's dealers.

HECHT: Why though?

BALDWIN: So that the dealers are not put at a disadvantage.

PHILLIPS: Why would it put them at a disadvantage?

BALDWIN: If they were competing head to head say for their jobber supply of station. The CA reversed the TC's judgment. It chose to follow a recent 5th circuit decision called the Mathis case. It's our position that the 5th circuit opinion ignored the overwhelming body of case law, ignored the legislative...

HECHT: At one point the circuit said, In the absence of comment 3 there is no doubt Exxon would be subject to both the subjective and objective elements of good faith. Do you agree with that part?

BALDWIN: No. I do not. I believe that the Mathis case was the first case that I'm aware of anywhere in the country in which the honesty and factor ___ from the definition section was used to create a cause of action based solely on specific intent. There's no support for that beyond Mathis.

WAINWRIGHT: Does honesty and fact suggest subjective intent?

BALDWIN: I think that's situational. It certainly doesn't in this case. And there's no case law support to take the honesty.

WAINWRIGHT: Are you saying the honesty and fact test could be subjective in some cases, and objective in others?

BALDWIN: With all the myriad fact situations that could arise, I really can't say that it would never be. So I guess I would have to concede on some fact situations.

WAINWRIGHT: It might be a difficult test to apply and for people to arrange their business according to it wouldn't it?

BALDWIN: That is part of the great problem that the refiners are now having in light of this Mathis decision.

HECHT: But honesty and fact is in the UCC.

BALDWIN: It is in the definitional section. But the drafters of §2.305 were the very same people who drafted the definition section. They understood that it was there. And the legislative history makes it clear that they did not intend for that language to be a fulcrum to import this subjective intent test into 2.305. In fact all of the legislative history indicates that the drafters meant just the opposite.

HECHT: Does honesty and fact ordinarily mean subjective intent?

BALDWIN: I think honesty and fact is not further defined in the code. There are not a lot of cases that I have seen on what honesty and fact means. They are very fact specific. It becomes very difficult to parse an objective and a subjective test. If someone lies is that subject or is it objective? But I am certain that no case has ever used the honesty and fact language prior to Mathis to create a subjective intent test for good faith pricing under §2.305.

PHILLIPS: And your objective test is based solely on what's going on in the market among similarly situated competitors?

BALDWIN: It is a test that includes being within the range of the dealer prices offered by your major competitors and not price discriminating within a price zone.

PHILLIPS: If 60% of the industry decided to start charging $5 a gallon to their dealers with the intent that the dealers would all be gone within 2 weeks, and everybody in the industry does it uniformly to all their dealers, then that's it. We can't look at that.

BALDWIN: There may be many things that we would look at that under, but not 2.305. That's what the drafters intended. That is what the overwhelming body of the case law holds. To do otherwise, to accept the Mathis test puts us in to terrible public policy situations.

SCHNEIDER: What courts if any have actually foreclosed the possibility that bad faith be shown by an attempt to run the contracting party out of business?

BALDWIN: In our reply brief, we addressed that directly, and we've been accused of string citing because there are several of them, cases in which that very self same claim has been made, and rejected time and time again as a matter of law. I may miss some because I don't have the reply brief in front of me. But generally the Tomlin(?), most recently in the 6th circuit Ajir I and II from the 9th circuit.

HECHT: The problem here is if commercial reasonableness is the only test, if there were some parallel behavior in the industry so that everybody started moving to a price that was less connected to the rack price, it doesn't seem like it would be appropriate to say that was a good faith, open end price just because the market in which all of the participants didn't have to be doing the same thing dictated that price.

BALDWIN: Obviously if there was a conspiracy of that sort of going on there's all sorts of laws to address that. The drafters of this section were well aware of the definition of good faith. They clearly adopted comment 3 for the specific purpose of ensuring that sellers under open price term contracts were not subjected to this endless question and litigation about the reasonableness or the fairness of the selling points. And the courts have virtually, uniformly followed those decisions.

PHILLIPS: How long are most of these dealer contracts for? What's the term on most

of these dealer contracts?

BALDWIN: I saw some that were 5 years. I think that's coming down. I think the ones that I've seen recently are 3 and 2 years.

PHILLIPS: And are they generally terminable by either party at the end of that time, or are they renewable unless there is good reason not to?

BALDWIN: That's a fairly complicated question.

PHILLIPS: There's nothing standard in the industry, or is that governed by the federal law?

BALDWIN: I think the answer to that is twofold. It differs from refiner to refiner, but more importantly there are very significant rules under Petroleum Marketing Practices Act that deal with non-renewal of a petroleum franchise. There are circumstances under which - the dealer can always walk away. There are circumstances under which the refiner can non-renew a dealer if he complies with federal law.

PHILLIPS: I was just trying to get a sense of what the market situation we're in is. In other words, the nature of the public demand is changing rather radically, and it may be changing just because the nature of automobiles have changed. You don't need to check your oil and check the tires every time you fill up like you did when some of us started driving. But if that nature is changing how long does law and contracts generally set the current structure in place to make it difficult for either party to change if there is a demand for a different type of market and - I'm trying to get that to help inform me of what the UCC is about

BALDWIN: First there are significant changes under going in the market right now. And I would refer the court to the Exxon amicus brief. It's a detailed discussion of what's going on in the market. As far as changes in the dealer agreements, Again that's covered by the PMPA. There the Petroleum Marketing Practices Act allows changes in the dealer agreements, but imposes a very thorough going scheme of control over what those changes are. So that question is one that we could talk back and forth about for a very long period of time. It's not a simple question of look at the term in the agreement.

On the record before this court Shell is entitled to judgment as a matter of law for three separate independent reasons. First, the undisputed evidence conceded by the CA demonstrates that Shell's DTW prices were objectively reasonable under the test adopted by the vast majority of jurisdictions. Second, even if this court were to hold that the Mathis standard is the law in Texas, the TC correctly concluded that the circumstantial evidence of Shell's malicious evil intent was so weak as to amount to no evidence at all. And third, even if we adopt the Mathis standard and find that the circumstantial evidence was sufficient to prove intent, it is undisputed that there was no relationship between that alleged intent and Shell's actual DTW prices. And 2.305 is after all the

pricing statute.

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RESPONDENT

SCHNEIDER: Can you tie the price charged to this scheme to run them out of business?

MANN: There are two things I would like to say about the state of the record with respect to the second and third points that he just made. The second point that he made was a suggestion that the TC found that even under the legal standards that we support there is no evidence in the record. That's not correct. This is not a case where the people at trial filed a no evidence motion for summary judgment and the trial judge said, Whatever the duty might be, even if the duty is as the plaintiffs assert, there is no evidence.

I would refer you specifically to the Dec. 7, 2000 hearing, pages 23-28 where the trial judge talks about this question.

Generally in that hearing the judge said, I'm willing to assume that there is enough evidence for you to make out these claims, but it's not going to matter to me, because under my view of the law what their intent was is not going to matter to me.

So this is a case where the TC said, You don't need to collect any more evidence, you don't need to prove anything more, because the things that you are trying to prove are not going to convince me that you have a cause of action. And that's understandable of course because Mathis has not yet been decided.

That answer is weighted to his third point, which is that it is undisputed according to him that there is no tie between what you might say the plan of Shell to alter the distribution channels and its pricing policy. What is undisputed is that the record does not currently contain a document that proves that there was a tie. It's also undisputed, I think, that there are a variety of documents that might be relevant to that that we do not yet have. For example: at that same hearing, we discussed the fact that there, are based on things we've seen in other cases, 38 marketing plans that Shell has. And we've only gotten three in them in the record and we would like to see the other 35 to see what they say about that.

More broadly it can't be the case for us to approve what the intent of an entity like Shell was that we would have to have a specific document that ties these things together.

HECHT: Let me ask you about the first point. Do you agree that Shell's price and effect was an objectively, commercially reasonable price?

MANN: I do not. I want to start by addressing your question, which might have been the very first question of the argument. He asked, Does the standard of good faith - honesty and fact

- include something that's subjective? And I would like to refer you to this court's decision in Lasara(?) grain case...

HECHT: It says the good faith is actual belief of the party.

MANN: That's what this court has said when they addressed it. 673 S.W.2d 563, which I believe is the last time this court has interpreted the definition of good faith under the UCC. You said quite firmly that it's a subjective standard. The Tomlin(?) case on which she relies on is a decision of the SC of Ohio, which takes a different view of whether it's subjective or objective. I think that's mostly not important for this particular case. I would characterize that as academic, which means it might be interesting to a law professor but it's not really _____.

HECHT: Back to the objective though. Your position is that the price doesn't meet even the objective part of the test.

MANN: Our position is that the standard of good faith requires both honesty and fact, and commercial reasonableness. The objective part of the test would require them to have a commercially reasonable behavior.

HECHT: I'm just saying the price in the abstract.

MANN: We're not challenging price in the abstract. Our contention is not that if we can prove that this price is too high that we win. Our contention is that the ultimate fact here is not is this a high price. The thing that we have to prove is, they set this price for a bad reason.

HECHT: You're not complaining that the price is not commercially reasonable?

MANN: We are not complaining that they set this price at a level that is commercially reasonable. We believe that § - if comment 3 is going to influence your interpretation of the statute, then you should be reluctant to entertain claims where the ultimate fact for which someone should recover is that the price is too high or too low. But that of course is not our claim. Our claim is that this price was set for a motivation that is impermissible. And Shell does not contest the fact that the motivation we talk about is an impermissible motivation. They have not today, they haven't in their briefs stood before you and said, We believe that under the general definition of good faith it is just fine to operate in a way designed to destroy your contracting partner.

I want to talk about your question, which is what I thought was the perfect hypothetical, which is suppose that some group of refiners that has a large market share in a particular jurisdiction sets the price at $5 per gallon. Our position is, well that's a breach of the contract. It may be that the federal gov't has some standard that might fix that for you, but what we're here today is to talk about a commercial law, the governments contracts among businesses in the State of Texas. There are very good commercial reasons why people want to enter into contracts in which the price is not set at the time of the contract. That's why the UCC says that you can do

that. If this provision was not here, you would have one of two results. In an older 19th century era you would have those contracts be held unenforceable. And that's bad for everybody. In the early part of the century the relevant appellant cases from this state, you would have courts that would say, That's okay as long as the price is reasonable. The problem generally for businesses with a rule that prices have to be reasonable is that that means every case is an audit into the pricing structure of the seller. So UCC comes in and says, We're not going to say that prices have to be reasonable. We're going to say something which is much harder for a plaintiff to contest. We're going to say that the prices only have to be fixed in good faith. The price might seem reasonable. It might seem unreasonable. But if you can't prove that it's fixed in bad faith, you can't prevail.

HECHT: The troubling thing with that is, if it's a reasonable price what difference does it make whether the price setter is mean spirited or cruel or vindictive or crazy or perfectly reasonable?

MANN: That of course is the typical tension between a subjective and an objective component of a good faith standard. You have this concern that well why should it matter if something is done in a level that you can't prove is too high, but it's done for a bad reason. That question requires some thinking about the general way that the concept of good faith is developed in the commercial law. What happens in the UCC is there are historically two separate standards for good faith. There's a standard that requires only honesty and fact, which is generally regarded as being the hardest standard to satisfy; and the standard that requires both honesty and fact and commercial reasonableness. That standard is generally regarded as being more onerous because businesses are subject to two different methods of proof that can be used to challenge them. And so that standard applies only to merchants in art. 2. And the original version of the UCC did not really apply in most of the other articles.

The point is that there are two different things that you can prove. If someone can prove that the reason the price is set is for this particular bad motive and can convince the fact finder of that, that strikes me is something that the UCC should not tolerate. It is of course the case and I think here it's easy to think about employment litigation. That if they can come in and say, Look the price we are charging is precisely equal to the other price that we charge for another distribution channel, plus these costs, plus these costs, and here's how we come up with the price. Or we charge this price because this is the way calculated for us to make the highest amount of profit out of this distribution channel. Our goal is to make money. If they come into the TC and say, We're setting the price at the level that gets us the highest possible product and they have an explanation for that, well I think we lose.

HECHT: But it's hard to understand why you should win just because they say, Well we did all of that. All that's true. But in addition we hate these particular lease dealers.

MANN: Those mixed motive cases are always going to be complicated. I referred to employment discrimination. Imagine a case where you have an employer who has some entrance exam for getting a particular position. And you might believe that the reason they had this entrance

exam is because they want to keep minorities from being hired. You can have cases where it's going to be difficult to know what the motivation is. But if you can actually prove that the motivation was, that the purpose was to eliminate minorities, and if that's an illegitimate motivation as a matter of contract law, then even if it turns out that the test was reasonable, if you can't prove that the test was unreasonable then the plaintiff can prevail. What that means in the real world of course is that the test probably is unreasonable. If you adopted a test and it can be proved that you adopted it for the purpose of excluding minorities, it may be that the test is in fact unreasonable. But that's just harder to prove.

WAINWRIGHT: I understand there was some expert testimony that the price in the Exxon case and Mathis, the DTW price was higher than the rack price because it reflected the investment in land, the store, the transportation, costs of managers, etc. Does what you're arguing require under similar circumstances the seller to price its gas lower than its costs?

MANN: Not at all. Our premises, and I think when you read their briefs, there's a lot of confusion between things that we regard as evidence, and things we regard as the ultimate fact. There are many things that are evidence because they would be probative of ultimate fact. But for us the ultimate fact is that we need to prove that Shell set these prices with the intention of driving our clients out of business.

Now if we had evidence that showed how the rack price was calculated, and if we had evidence that showed the components of the price that's charged to our client – suppose that it turns our that the rack price $1.50 a gallon and that the services that are provided to our clients are roughly .27 cents a gallon, and that the price charged to our client is $5.00 a gallon. I think that is evidence that tends to establish the fact that we're trying to prove.

WAINWRIGHT: That example is the converse of my example.

MANN: Right. I think if you had evidence that the price was lower, I think that would be evidence that would tend to rebut the fact that we wish to prove. But there's all sorts of other evidence that would rebut the fact that we wish to prove. Because in the market the price to our clients is going to be higher than the rack price.

WAINWRIGHT: So you think it's a fact question that the jury should decide?

MANN: Absolutely. To clarify, I don't want you to be misled to think that the only way refiners can respond to our case is by charging a cost losing price. Another way they can respond to our case is by explaining to the TC their pricing structure in a way that shows that it's perfectly reasonable.

PHILLIPS: It's your contention that you had enough proof in this record to get to trial?

MANN: I think that's right.

PHILLIPS: And you're not complaining of the trial judge abuse of discretion in not giving you additional discovery. You whine about it but it's not a point that you're asking the court to reverse on.

MANN: What I would say is the way in which the TC handled discovery reflected the TC's understanding of the law and reflected an intention to resolve the case in accordance with the TC's understanding of the law in an expeditious manner. I'm not complaining about the discovery because I don't think that the TC's discovery practices are before you for review, because the CA did not resolve them. What I think is before you is the state of the record as it was decided.

PHILLIPS: You're saying there's enough evidence here, that you raised a fact issue on this point if we agree with your view of what the law is on this section of the UCC?

MANN: Yes. Our position is that the evidence that's in the record right now is enough to get past summary judgment. Second, procedurally because of the way the case was handled in the TC we don't believe that the case is yet right for disposition on summary judgment because the TC's determination as to what evidence we could acquire through the discovery process depended on the TC's understanding of the applicable law.

PHILLIPS: What are you asking us to do about that? Reverse in the interest of justice for more discovery.

MANN: I'm asking you to affirm. What the CA said is, Here's our view of the law. We believe the TC, which did not have the benefit of J. Smith's opinion in Mathis, got the law wrong. We're going to send this back. We assume that when the TC examines the motion for summary judgment, the TC will deal with these discovery issues in a way that's appropriate with the accurate legal standards.

PHILLIPS: If a refiner were charging you $5 a gallon with this bad intent, what various causes of action would you have?

MANN: I think if that's the only facts that we could establish...

PHILLIPS: $5 to drive you out of business.

MANN: Right. If the facts that I have are, a document that demonstrates the relevant level of the selling entity that the entity set the price with the intentions to drive my customer out of business, it's not immediately clear to me that the breach of contract action wouldn't be the best cause of action.

PHILLIPS: Is there anything else in the dealership agreement that you would sue on other than this clause about price setting?

MANN: I don't think so. The traditional understanding of good faith, the way that people try to accommodate the concern that a duty of good faith will be vague is to have the judges and the appellate courts articulate the types of motivations that are impermissible. That's the distinction between the law and the facts. And the law would be, in our view it is not consistent with the duty of good faith to act with the intention to destroy your contracting party.

The facts are that you have to prove that. The test by which we say that violates good faith is, well that's not something that could possibly have been in the reasonable contemplation of the parties. And the reason you can see that is, imagine that if the contracts with dealers said, Section 14 shall be free to set prices in a way designed to cause all of its dealers to file for bankruptcy. The dealers would have objected to that. They certainly would not have thought that that was what the deal was in the contract.

PHILLIPS: But as you stand here now, you don't know of any other thing in the dealer or _____ contract that you would have good faith implied into apart from the price provision?

MANN: We do not rely at all on any implied duty of good faith. This is not a complaint about the price. This is a complaint about the way in which the price was set.

PHILLIPS: The petitioner says that initially you brought a whole lot of causes of action and it's been whittled down. It's down to this. So what other causes of action were at one time in this litigation that aren't anymore?

MANN: A lot. That's true. The PMPA, which is the federal statute, that generally says that they cannot intentionally terminate dealers. That cause of action is very difficult to prove in the 5th circuit because there is no cause of action for a constructive termination.

HECHT: Let me ask you. You get a memo from whoever sets prices at Shell. And it says we're going to charge this DTW price. It may have the effect of driving lessee dealers out of business, unfortunately. Do you win that case with that memo or lose it?

MANN: If you have that memo it would be relevant evidence. I think that it's highly likely that George ____ would stand up for the plaintiffs and try to convince the jury that that was really bad. I think he would say the memo shows that they had the intention to do this. And if you look at this, I would suspect that a lawyer for Shell would argue, the enforcement part shows that we really didn't want to do that. And I think a fact finder would have to decide what the actual intent is.

WAINWRIGHT: Add the fact that Shell's price is the lowest price in the industry to that hypothetical. Summary judgment against you or not?

MANN: Frankly if I was the trial judge, I would be presupposed to grant summary judgment on that. The reason is because it's difficult to decide whether circumstances in which you

want to have evidence weighed in the context of a summary judgment motion.

WAINWRIGHT: So there are circumstances from your standpoint in your approach under which the price alone is sufficient to satisfy 2.305?

MANN: I think that you could introduce evidence..

WAINWRIGHT: Is that correct or incorrect?

MANN: Not technically.

WAINWRIGHT: Well you said yes in answer to my hypothetical.

MANN: I did. But I think your hypothetical is worded slightly differently than your question.

WAINWRIGHT: My hypothetical was one example of when the price alone was sufficient for Shell to win. Even given the equivocal statement in the memo about putting dealers out of business. Correct? That was one example.

MANN: My perspective. Yes.

WAINWRIGHT: So then there are circumstances even from your standpoint where price alone is sufficient for Shell to win under 2.305, because there's at least one counter example?

MANN: I would say yes. Depending on the nature of the proof that the plaintiffs have introduced themselves. And the hypothetical is one in which the plaintiffs had not introduced the evidence that would justify a jury _____ that particular piece of evidence...

WAINWRIGHT: The hypothetical assumes facts.

PHILLIPS: In the interest of knowing how much the drafters of the UCC and the legislature intended for this particular provision to bear in terms of what other legal remedies, theories are out there for really bad behavior by a seller who has the power to set a price.

MANN: I think you start off with the idea that you are going to try and find a statute that regulates the industry. You're going to try and find tort cause of action for contract cause of action. Looking at tort cause of action, I think you would immediately say, I should sue these people for breach of the implied duty of good faith and fair dealing. You would say, Well I live in Texas and we don't have implied duty of good faith and fair dealing because we think that puts too much authority over lawmaking in the hands of the judiciary. And we think that the legislature should decide when people are subject to duty of good faith.

And then I go to contract cause of action and I say, Okay. This one actually looks good because the particular price in this case is set with reference to a particular UCC provision that with plain intent said that a duty of good faith applies. And so I say this one actually looks really good. I would look for major regulatory statutes at the federal level, the Petroleum Marketing Practices Act. My sense is the law is not entirely clear that our cause of action would prevail there for constructive termination. My sense is that is very tough argument in the 5th circuit right now because there's a recent 5th circuit case that says that that cause of action is...

PHILLIPS: An anti trust state or federal requires some proof that Shell has been dealing with somebody else?

MANN: I'm not an anti trust expert. The main things for anti trust you would think about would be monopolization or a conspiracy. I can't imagine that the facts we have here would suffice any sort of claim for a monopolization.

What's objected to here is just a basic contract principle. The only reason that the UCC can make these contracts enforceable is you have to reject this uncommercial idea that what the parties mean when they say the seller can set the price, is that the seller can do absolutely anything the seller wants. There has to be some constraint and the constraint they picked was the narrowest one they could think of, which is good faith.

JEFFERSON: Is the Mathis construction in your view the majority view on 2.305 or a minority or are there enough cases for us to ...

MANN: It's certainly not a minority view, but that's because there are very few cases that have analyzed 2.305 comment 3. What you can say is there are several federal CA that have considered the question whether 2.305 permits a cause of action when the refiner can prove that it's charging the same things as its competitors. And every federal CA that has looked at that has said, Yes, you can make that a cause of action. And that would be the 5th circuit in Mathis, the 9th circuit in ____ Cooley with concurrence by J. Kennedy. The 10th circuit in Wayman where they affirmed for the reasons stated in a DC opinion that says that. And in the 6th circuit in Tom Lynn. If you read the 6th circuit opinion in Tom Lynn what it says is the standard has to be wholly objected. And then he gave this long question, Is it as an objective matter commercially and justifiable to drive people out of business? And they evaluate the record. This is why when you asked me what does it mean to be commercially reasonable if it's an objective standard, if you wanted to take Texas good faith law and say well it's wholly objective as in Ohio it wouldn't change the litigation that much. It would just change whether the proof had to be that Shell actually intended to do this as opposed to whether proof had to be that it was commercially and justifiable as an objective matter for Shell to do this. And that's not that different as a matter of proof. It's important academically, but I don't think it would change the case.

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REBUTTAL

BALDWIN: In the final analysis we are dealing with the UCC. The purpose of the code is to promote commerce through a uniform set of laws. The purpose of §2.305 is to eliminate not create legal disputes. I respectfully submit that what I have just heard is a recipe for perpetual litigation.

I note the portion of Exxon's amicus brief in which they point out that some of the very same dealers who were plaintiffs in the Mathis case have sued them again for all the gasoline that they bought since the judgement in that case.

The Mathis standard undermines contractual certainty. A refiner has absolutely no idea how to set a good faith price because after all it's subjective. A refiner can be sued years after a transaction to renegotiate a price that the parties agreed upon at the outset.

PHILLIPS: These contracts by their very nature are antitheses of a contractual certainty.

BALDWIN: At the outset the dealer agrees because of the volatility of oil prices to leave the pricing in the refiner's hands by subject to...

PHILLIPS: And not look to any other benchmark because there are plenty of benchmarks in this industry.

BALDWIN: Subject to the requirements that the price has to be in a range with the dealer prices of the major competitors, and there cannot be price discrimination among dealers in the same pricing zone. And that is what the drafters intended. In return for that the dealer is entitled to all sorts of support: the refiner buys the land; builds the station; provides advertising; accounting; credit; marketing support. So these parties have an opportunity at the initiation of the contract to balance the rewards and the risks.

Right now if the Mathis case remains the law, Texas is absolutely isolated and the code is no longer uniform in a very important sense.

PHILLIPS: What did Lasara(?) mean? What was Lasara(?) G_____? Just a little lose language.

BALDWIN: I don't think that it was intended to apply to a situation such as this where the drafters of the very section have told us explicitly what the section should mean, and what it must mean if we're going to have commercial transactions under open price terms.

PHILLIPS: So comment 3 was intended from the general definition of good faith?

BALDWIN: I have always looked at comment 3 as a guide to what the drafters' motives were. That to me seems to be the importance of comment 3. It tells us what they were thinking. In addition to producing a flood of litigation if the Mathis case becomes the law, I think that the

excellent amicus briefs, Bridge Petroleum and Exxon Mobile, and I hope our brief on the merits indicates the proliferation of litigation under this Mathis rule.