ORAL ARGUMENT – 12/01/04
03-1129
KELLOGG BROWN & ROOT INC.

CARNEGIE: I think there are a number of reasons why the CA's decision in this case should be reversed even if KBR were subject to the arbitration clause in the MacGregor's _____ contract.

I would like to start with the threshold question of whether KBR can be bound from an arbitration clause in the contract that it's not a party to? In particular, I would like to focus on the estoppel question. I don't want to minimize the importance of the result in this particular case in whether we have to arbitrate with MacGregor. But really the driving force behind KBR filing this petition with this court has more to do with the precedent that we think the CA set and the potential impact of this case on all of KBR's other subcontracting relationships.

I think it's undisputed that anytime there is a motion to compel arbitration, it's a two-step inquiry. And the first issue is whether there is an agreement to arbitrate? The second is whether the claim falls within the scope of the arbitration clause? And these are two very distinct and separate issues and they are subject to different standards. I think part of the problem with the CA's decision is they seem to have collapsed those two distinct inquiries into one. And as a result they applied a diminished standard to the threshold question of whether KBR can be bound to the arbitration clause in this contract that it's not a party to.

The US SC recently said that it goes without saying that a contract cannot bind a non-party. And of course like most Black Letter rules, that's subject to exceptions. But the exceptions are narrow and they are no different in an arbitration context than they are in any other context.

O'NEILL: Is this moot? Has the arbitration proceeded?

CARNEGIE: The arbitration has proceeded. I don't think the case is moot. I think it's moot from this perspective. The relief that MacGregor asked for was very specific and narrow. It said, make KBR join in this arbitration that has been proceeding for the last 5 months. And that arbitration proceeding has not concluded. So the specific relief that they asked is moot.

I think the reason the case is not moot is conceivably they could go back and say, Well we want to compel arbitration under the standard that the CA established and please compel them to go arbitrate separately in Finland.

O'NEILL: How could that happen? The arbitration was over obligations and rights under the primary contract. And if those have been determined and adjudicated, then any argument that it would be on the contract would just be frivolous wouldn't it?

CARNEGIE: I think it was frivolous in the first place. And arguably more frivolous now. But I would certainly be concerned that if this case just said we vacate the CA's opinion because it's moot and send it back, the next thing we would see in the TC is they would say, Look at the standard the CA established, go __ on a merit claim or lien claim. Still somehow relate to this MacGregor contract.

O'NEILL: Is there still a dispute among the parties here?

CARNEGIE: There is a dispute - I mean no ones paid KBR. We still need to get paid.

O'NEILL: But there's no dispute as to who should be paid. Right?

CARNEGIE: I'm not sure that that is true. I think under the results in the arbitration proceeding, if we recover on the bond that MacGregor filed, I think Unidynamics then is suppose to have to compensate MacGregor for that.

O'NEILL: How would that not resolve your claim? If MacGregor is obligated to pay on the bond and you are paid.

CARNEGIE: I think Unidynamics is still going to dispute that they owe us. There may be a question as to whether Unidynamics can pay. The bond is not completely sufficient to secure our liability.

O'NEILL: So Unidynamics owes you more than the bond?

CARNEGIE: Yes.

HECHT: You were a non-signatory, but you sued for declaratory judgment. And that would have resolved who was entitled to the products as between MacGregor and Unidynamics.

CARNEGIE: That's correct.

HECHT: You said you really didn't care. It's sort of in the nature of the interpleading.

CARNEGIE: To the extent that is correct. Not 100%. There was a dispute between MacGregor and Unidynamics. Both of them were demanding the collateral, claiming ownership of the collateral. KBR was very much caught in the middle of that dispute. We were afraid to deliver the collateral to either one. And given the competing ownership claims we could get into trouble with that. And so one of the reasons we filed the declaratory judgment action was to establish who had title to the collateral so we would know the proper party to deliver it to.

HECHT: But that's the very issue that they had agreed to arbitrate. And there is no question they agreed to do that.

CARNEGIE: They are free to arbitrate that.

HECHT: Well they are not if you drag them into a Houston courtroom and make them litigate it there. They are not free to arbitrate it.

CARNEGIE: They did arbitrate it.

HECHT: Only because of the trial judge's ruling. If you had prevailed on your claim for declaratory judgment, MacGregor and Unidynamics would have had to litigate in Houston something that they had - there is no question about it. Unquestionably they agreed to arbitrate that somewhere else. Finland or Paris or somewhere.

CARNEGIE: And they can do that. But the question is, is KBR bound somehow to arbitrate that question.

HECHT: But you are forcing them to litigate.

CARNEGIE: No. I don't think so.

HECHT: How do you not force them to litigate when you sue them for declaratory judgment?

CARNEGIE: I think where this gets to is the US SC decision in Moses Cone(?). A lot of times we have interrelated, intertwined claims like this. And what the SC said is, under the FAA the reason we have a multiplicity of claims is because these two parties over here entered into a private agreement that they wanted to go arbitrate and resolve the dispute between themselves in another forum. And that's fine. We have to enforce that under the FAA. But that's no excuse to then force a non-signatory to come in and say, well that non-signatory now has to come in and as to its rights be pulled into that arbitration.

HECHT: I don't understand the argument. They were arbitrating and nobody had bothered you at all except to make noises about whether your were going to have to give up the collateral. You filed suit. Part of that suit was to insist by forcing the process of the court that they come and litigate the issue they were trying to arbitrate in a Houston court.

CARNEGIE: Not as between themselves.

HECHT: What else does a declaratory judgment mean? Isn't it going to resolve it?

CARNEGIE: I think there is a collateral estoppel, res judicata issue here of whether KBR is bound by the result in the arbitration. And yes, you could conceivably get inconsistent results. But that's just the nature of the beast.

HECHT: No. I'm not talking about that. I'm saying that by suing them for declaratory judgment, you have drawn them into the courtroom when they are trying to arbitrate those issues.

CARNEGIE: We have drawn them into the courtroom to litigate the issues as to KBR. We cannot force them to litigate the issues as between themselves.

HECHT: How will the declaratory judgment not resolve that?

CARNEGIE: I think it could.

HECHT: It could only resolve their respective duties to you and not to themselves?

CARNEGIE: I think that it could end up in the litigation because they are parties to the litigation, resolve those claims as between MacGregor and Unidynamics too. But the converse of the arbitration could not resolve them as to KBR.

OWEN: Why did you care? Why wasn't this in the nature of a true interpleader? Why did you take a position one way or the other?

CARNEGIE: That's the second reason that I was going to get to about the declaratory judgment action. The second reason for the declaratory judgment action is, that we had asserted statutory and constitutional liens on this collateral. And because our contract was with Unidynamics (as I understand the liens, you can only a lien against collateral that is owned by the party you have a contract with) and because our contract was with Unidynamics and not MacGregor, we needed to establish that Unidynamics and not MacGregor owned the collateral at the time our lien attached.

HECHT: And when you established that, all three parties will be parties to the same lawsuit. So it will be binding on everybody. And you will have litigated what those two parties agreed to arbitrate. That seems to me that's the problem.

CARNEGIE: We probably would have.

HECHT: The question is not so much - the argument here is they shouldn't be allowed to drag us in to arbitration. We didn't sign the agreement. But the argument seems to be on the other side: Well you certainly shouldn't be allowed to drag us into litigation when we did agree to arbitrate.

CARNEGIE: I think the answer is they just have to be litigated in piecemeal fashion, and the chips fall where they may. Because the fact that they have an arbitration agreement and agreed between themselves to arbitrate shouldn't prejudice our right to litigate. Now I know you turn it around and say, well gee our right to litigate shouldn't prejudice their right to arbitrate. That's just attention that you have. And their private agreement should not prejudice our right to litigate.

O'NEILL: Why is that not a suit on the contract?

CARNEGIE: In order to be a suit based on the contract, we have to affirmatively assert rights under the MacGregor contract.

OWEN: Who did you say owned the property?

CARNEGIE: I think we ultimately said Unidynamics owned the property.

OWEN: Then why did you join MacGregor?

CARNEGIE: We thought we had potential other claims against MacGregor: 1) in quantum meruit; 2) if the property transferred after our lien attached, the lien would follow the property to MacGregor.

O'NEILL: If your lien cannot attach until ownership is determined, that ownership is determined under the prime contract. Why is your suit not then on the contract because it depends upon the ownership question?

CARNEGIE: I'm not sure that the ownership question is determined by the prime contract. First of all, I think the prime contract may be relevant to that question. For example, now the arbitration has determined the ownership. We don't need to rely on the contract to establish that. And I think the question for whether you can bind a non-party to a contract is, is that party saying Look, there are provisions in this contract, clauses in this contract that run to me, that benefit me, that I am going to enforce directly. I can sue on this contract because I'm like a party to this contract, or I'm a third party beneficiary to this contract. This is my contract. That's what it means to sue based on the contract.

O'NEILL: Does there have to be an all or nothing? It seems to me that if the ownership determination is wrapped up in the prime contract, and the prime parties have agreed to arbitrate that, why can't your proceedings be abated until the ownership question is determined?

CARNEGIE: In fact, MacGregor asked...

HECHT: So why wasn't that agreed to?

CARNEGIE: I can't answer why that wasn't agreed to.

HECHT: It would have solved the problem.

CARNEGIE: It certainly would have solved the problem. And so when we're talking about the CA's opinion and the mandamus here, should we be mandamused to go arbitrate in Paris? I think the answer is no. If the question is, Gee was there this alternative relief? Should the case have

been abated until the arbitration was over? I think they've got a better argument for all the reasons you just said.

OWEN: You're saying you're not bound by the arbitration but, yet, you're saying well we would have abated our claims to wait and then abide by the arbitration outcome.

CARNEGIE: I think that it's not so much that we would have been bound by the arbitration. I think as between MacGregor and Unidynamics, they would have been bound by the arbitration.

OWEN: But what if you didn't like the outcome. Would you say ignore the arbitration. I still think...

CARNEGIE: If we didn't like the outcome, I think you are right. I think there is the potential for us to argue that we're not bound by it. And the result is wrong. And because we don't have to arbitrate, we are entitled to litigate the question. And, yes, you do have the potential for inconsistent results.

OWEN: But you do like the way the arbitration came out. So you are willing to be bound by those?

CARNEGIE: We are.

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RESPONDENT

GALLOWAY: I think J. O'Neill you hit the nail on the head as far as are they not suing on the contract? You offered up a test yesterday in the Weekley case as to whether or not you're suing on a contract, can their claims stand independent on the contract? And their claim cannot stand independent of the contract.

As we've heard this morning. Fundamentally they are arguing...

O'NEILL: Can their Warehouseman's lien stand independent of the contract?

GALLOWAY: Their Warehouseman's lien claim could potentially stand independent of the contract. But that is the tail wagging the dog. The Warehousman's lien is as to whatever small amount of money they are claiming for storage and so forth. Which by the way, they have no privity with us on that either. That was an issue in arbitration as between Unidynamics and MacGregor. But their real claim here, the heart of their claim here is a constitutional lien claim. That claim cannot stand independent of the contract.

OWEN: Let's say I'm a mechanics materialsman guy - I'm a laborer - and I file a lien on your property and you've agreed to arbitrate in Paris. Now do I have to go to Paris to enforce my

lien?

GALLOWAY: Unless you have privity with me you can't file a lien on my property as a materialsman under the constitutional lien. It's not all that clear from all of our briefing...

OWEN: But I could on a statutory lien.

GALLOWAY: Other than the warehouseman's lien, the fundamental lien at issue here is a constitutional lien. That's where all the money is. That's what the dispute is. That's why we are in litigation. They are seeking to be paid for the work that they did on these elevator shafts. They were not paid by Unidynamics. We paid Unidynamics. They want us to pay twice.

You asked J. Owen, why do they care? We asked that same question why do they care? Why did Unidynamics essentially join with them in fighting us in this underlying lawsuit. Aren't they the ones that have the contract with one another. Isn't Unidynamics the one that didn't pay them?

OWEN: What do they have to establish to prevail on their constitutional lien?

GALLOWAY: They have to establish that Unidynamics owned the property at the time that they did the work. So they have to establish title to the property. Now you have to understand that these elevator shafts were built fundamentally with raw materials that were owned by MacGregor at all time. MacGregor bought the materials, supplied them to Unidynamics, in some cases shipped them directly to KBR to put together. Under the fabrication agreement, which is the agreement with the arbitration clause, is also provisions for progressive passage of title with the improvement...

OWEN: So again, I'm a laborer. I want a constitutional lien on your property. And all I have to show is that at the time that my lien attached it was the subcontractors. Do I have to arbitrate in Harris because to establish is my constitutional...

GALLOWAY: It depends on how you are arguing that. They are arguing that based on the contract that contains the arbitration clause. Their argument that title passed after they did all their work is based on one thing. It's based on the title agreement, which is an amendment to the fabrication agreement and which includes the arbitration clause.

OWEN: But they're not claiming under the contract. They are just saying as between you and Unidynamics, Unidynamics own it.

GALLOWAY: They are seeking an adjudication of that contract as to the title passage provisions. That's what they are seeking. They are seeking an adjudication of that contract, a direct benefit of that contract. They have no constitutional claim unless the title agreement is adjudicated such that title passed at a particular point in time.

OWEN: As a materialsman, I've got constitutional rights.

GALLOWAY: But only if it's someone whose property that you have...

OWEN: That's correct. Nobody asked me to waive my other constitutional rights to go into court and enforce my constitutional lien by signing an arbitration clause.

GALLOWAY: That's correct. But you did not necessarily as a materialsman have an expectation that what you were working on belonged to your contractor, to the person that you were in privity with. You have no idea who owns this property. It may or may not be the person that you are in privity with.

O'NEILL: So you're saying absent the lien piece, there would be no problem here?

GALLOWAY: Well and you get to their quantum meruit claim as well, which we didn't hear much about because it essentially doesn't exist.

O'NEILL: Not even that. If KBR were suing Unidynamics just for payment under its own contract without _____ sort of lien, they would not be subject to arbitration.

GALLOWAY: They can do whatever they want to with Unidynamics. And it's something of a red herring point raised in their briefs on that. We have never suggested that their claims against one another are subject to arbitration. Now it's true that the CA - they didn't rearbitrate with one another. They can do whatever they want to in court. If they are both in our arbitration as they would have been had they not resisted, certainly they could have by agreement, and we certainly wouldn't have objected to choose to adjudicate those against one another. But we have never suggested that their claims against one another are subject to arbitration.

HECHT: And even if, I suppose, KBR had sued Unidynamics but not MacGregor, and insisted that its lien was valid because of the title amendment, that still could not be removed to arbitration?

GALLOWAY: No. Because who would have asked for it.

HECHT: Because you're not a party and you're not bound.

GALLOWAY: I'm not a party and not bound. Now I suppose Unidynamics could have in that case saying they are seeking some benefit under a contact that I have with somebody else that contains an arbitration clause.

OWEN: Well you are basically saying anybody that has a constitutional lien is seeking a benefit under a contract is going to be bound by the arbitration clauses in those contracts.

GALLOWAY: But that would be an unusual case. Normally you can tell who owns the property without resorting to some contract that has an arbitration clause. They are seeking - that's why this hasn't come up before. This is a somewhat extraordinary...

OWEN: I thought you just said Unidynamics could require arbitration. There is no arbitration clause in Unidynamics's contract with KBR

GALLOWAY: If KBR affirmatively ran into court and says I've got this title agreement that says that title passed and I want to assert that right, then they are asserting a right under a contract that has an arbitration agreement in it. They are in arbitration because they affirmatively did something. They chose to assert rights that they otherwise would not have had except under the contract.

J. Wainwright asked yesterday. What's the limits of the theory of compelling arbitration? Can you just drag anybody in arbitration? No you can't just drag anybody in. But if somebody is going to come into court and say I want some rights under this contract, then...

OWEN: Let me give you my example. I'm a neighbor. My two neighbors have gotten into a boundary dispute. They've decided to arbitrate any disagreements they have. They build a fence. Well it encroaches on my property. And I say, I don't care whose fence it is. I want you to get it off and I sue both of them. Now do I have to go arbitrate to determine which party I've got the right against?

GALLOWAY: No.

OWEN: And they both say not me, not me.

GALLOWAY: See the resolution of your dispute is not dependent upon any rights that exist. The resolution of your dispute is not dependent upon any issue in that contract. They happened to have chosen to arbitrate whatever disputes...

OWEN: Neighbor A says it's not my land. I'm not the owner of the land. Dismiss me as a party. As a matter of law, I'm not the owner. And Neighbor B says no you are the owner. We agreed to that. And I'm saying, I don't know who to sue. I don't know who to get the injunction against. Do I have to go arbitrate as between those two who to get the injunction against?

GALLOWAY: I think you do if you are effectively forcing them to litigate with one another. Maybe that's the way the hypothetical breaks down. To J. Hecht's point. We are fundamentally being forced to litigate this against each other something that is Unidynamics and us are being effectively forced to litigate. Because we also care for other reasons as between ourselves as to when this title passes. And so if in your hypothetical if they care about this boundary dispute and they cared about being bound by the outcome, and you were suing both of them, which is what they are doing. They are suing both of us on our fact finding hearing. And you were effectively forcing them to resolve

in court something that they had agreed to arbitrate, I think...

OWEN: Let's say this is a defective product and it injured somebody. And you're saying no it's not our. Unidynamics says no. It's MacGregor. And I'm the hurt person. Do I have to go arbitrate in Paris who owned the product that injured me?

GALLOWAY: I guess I have a hard time understanding how that ownership would actually be in dispute against one another. But I believe if the issue - if the only issue in this litigation as it is here, is - their claim is essentially determined - the major issue is when did title pass? If in your hypothetical when title passed was the only critical issue, and the parties cared with one another about who owned this property, they had a live dispute with one another about who owned this property. I think in your hypothetical if you effectively were to drag them into court, maybe the answer is abatement is the better way to deal with this and we could have solved a lot of things a long time ago.

BRISTER: We could have a case where husband and wife owned community property. Husband sues whoever he bought it from and Texas law is that doesn't compromise the wife. The declaratory judgment action between husband and seller, buyer, or whoever doesn't compromise wife. It looks like it would compromise the wife, but we just deem it if it's an indispensable necessary party A & B can work out their suite, B & C work out their suit and neither one is binding on a non present party. And leave it at that.

GALLOWAY: I think that may very well answer the issue. Unfortunately we didn't have that situation here. We had both of them essentially litigating against us...

OWEN: In my hypothetical would I have to go to Paris and arbitrate as between you two who owned the machinery before I could proceed with my personal injury lawsuit?

GALLOWAY: I'm trying to think of a principled distinction on why that would not be the case. But it seems to me that if two parties have agreed to arbitrate an issue as to who owned the property and someone was then in the meantime injured by that product, and so they needed an adjudication of that issue. I think the answer would either be yes they have to go into arbitration, or that those parties would not be bound as against one another...

O'NEILL: Why should we not just apply ordinary contract principles and say that if they are a third party beneficiary, that's true. They shouldn't be able to drag them in. But if they are not a third party beneficiary under ordinary contract principles, why does what somebody else agrees to affect them? If these elevator shafts fell on someone and injured them your same theory would apply here. They would have to go to Paris to adjudicate that claim because ownership is a determination that has to be made. But why should that bind someone who's not by law an intended third party beneficiary?

GALLOWAY: The law is otherwise by the FirstMeruit case it's not limited purely to third

party beneficiary who is also an issue that we haven't fully addressed. We have in a footnote as to what law actually governs this determination of equitable estoppel issue. Is it state law? Is it federal law? The federal circuits, including the 5th circuit addressing that issue have concluded that is a federal law issue. This is one of those issues governed by the federal arbitration act. And so the answer is, that if it indeed federal law, then you've got the equitable estoppel doctrine out there that's well settled that extends this well beyond third party beneficiary.

But I believe Texas law as evidenced by FirstMeruit is consistent with equitable estoppel.

OWEN: I'm just trying to fit all this into common everyday examples. Let's suppose we're on a job site. You've got an owner, contractor, subcontractor, the whole chain. And someone is injured on the work site and the issue is who was controlling the premises. And the agreement between the general and the sub says we agree to litigate all disputes between us. And, I, the injured person sue you the general and say you were in control. And you say no. I wasn't in control. My sub was. But I have agreed to arbitrate with my sub all the disputes. Now do I have to join in that arbitration?

GALLOWAY: I think the answer is in the word equitable that goes with estoppel. Which gives the court some discretion as to apply some common sense. We don't have here an issue of someone injured on the job site that's going to have to troop over to Paris. Which by the way, Paris is something of a red herring here. The arbitration clause does not say that - it's not all that easy to parse it out because the underlying contract has multiple parts. But fundamentally I think the arbitration clause says that it's governed by the ICC rules, which may or may not result in some forum other than Houston for this arbitration. The provision that they rely on is in a part that's superseded by another part of this contract that relates to the ICC rules.

Here, as you will see from both briefs is both this direct benefits issue which is what we've been focusing on here. But there is also this intertwined claims aspect of estoppel. We have both of those fact patterns here.

O'NEILL: Would you agree that the CA did blend the analysis between scope of the clause and binding effect of the clause? They seem to say if facts were intertwined it's arbitrable whether you are a signatory or not. And you would agree that's a little broad?

GALLOWAY: I think their wording is broad. Their result is correct. And I think you can certainly parse their wording. The CA has a pretty seamless transition from scope to whether these parties are bound.

WAINWRIGHT: This Summer we said that to waive constitutional rights requires a voluntary and knowing act. And we said that in the context of a pre-suit contract to waive jury trial. In this case and other similar cases we're talking about whether folks who didn't sign a pre-suit knowing and voluntary contract to waive jury rights can be forced to waive those jury rights. Reconcile your

position with what we said in, In re Prudential.

GALLOWAY: They did engage in a knowing act.

WAINWRIGHT: Which was?

GALLOWAY: They knowingly sued us under a contract that contains an arbitration clause. We're not in privity with these guys.

WAINWRIGHT: So let's assume you are correct. They undertook knowingly and voluntarily an act of suing you under a contract. Is that the same as a knowing, voluntary an intelligent waiver of a constitutional right?

GALLOWAY: If they are going to assert benefits, that's the basis of equitable estoppel. If they are going to assert benefits that they have only by virtue of this contract, they are in for a penny, they are in for a dollar. That contract has an arbitration clause. If they don't want to assert those rights they don't have to.

WAINWRIGHT: I understand that. But if you take an action that's voluntary, it sounds like what you are saying, it results in waiver of a constitutional right that's okay. We didn't mean what we said. Are you saying that, that the waiver has to be knowing, intelligent and voluntary of that constitutional right, not something that may result from a lawsuit, a litigation that gets to the SC later?

GALLOWAY: Do they have to knowingly waive this right to - they have to understand the full consequences of their act before it can constitute a knowing waiver. And I don't think that you have to actually know. And I'm not an expert on Texas constitutional law on what constitutes a waiver. But it makes sense to me that you should be held to the natural consequences of the voluntary choices that you make. This is not some poor homeowner out here who has come and somehow found itself subject to arbitration. This is one of the largest construction companies in the world that is well familiar with contracts that have arbitration clauses in it, and they affirmatively chose to jump the step of the party that they were in privity with. The people who owed them money.

OWEN: Again, we're trying to bring it down to the lien holders across the board. Do we say lien holders that have a net worth of more than $1 million or less than $1 million. We're looking at lien holders here and trying to parse through what the law ought to be. Is a lien holder truly a beneficiary of a contract, that just decides who owns the property, or is that just sort of a...

GALLOWAY: I suppose it would be a closer case if you had a contract that was only that. But that is not all they are suing on. We've focused on it because that's the black and white of what they are suing. But fundamentally they are suing on this entire complex construction arrangement, this giant contract which is subject to an arbitration clause. Fundamentally they are trying to get their

money from us. They want us to...

OWEN: What about quantum meruit?

GALLOWAY: Quantum meruit under the Woodworth case, the SC in 1964 which they cite, they don't have a quantum meruit case. If there is a contract that covers the subject matter, which there is, they've got one with Unidynamics. They don't have a quantum meruit case against anybody including us. That's what the Woodworth case. It's the 1964 case they cite in their brief. If they've got a claim for money from us, which is their count 2, it has to be under our contract. Because that's the only way they can get money from us. And their contract by the way with Unidynamics is one of these one pagers, which all by itself doesn't lead to anything in order to understand what it is that they have agreed to do.

BRISTER: That would be deciding the merits, an arbitration decision. You would have to decide whether it's covered by the contract or not, which is the merits question in deciding whether you are going to refer.

GALLOWAY: That's right. But the only route that you can go through to get there is through that contract. In their summary judgment brief below they didn't characterize themselves when it suited their purposes as an assignee of that contract.

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REBUTTAL

JEFFERSON: Under their theory would you have the right to compel arbitration as a nonsignatory?

CARNEGIE: First of all, the standard for a non-signatory to compel arbitration is different under estoppel than the standard for a signatory to compel arbitration against a non-signatory. And I think if you look at cases like the Bridas case out of the 5th circuit, that's clear. I think the answer is in this case probably not. We have no basis to compel arbitration against MacGregor. We have no contract with MacGregor. We have no rights under the contract between MacGregor and Unidynamics. That's clear. That's why we didn't sue them for breach of contract.

Our constitutional lien claim, Mr. Galloway said unless there is privity we can't file the lien. And that's right. Unless there is privity with Unidynamics and Unidynamics owns the collateral, we have no lien claim. We have no lien claim because we have no contract with MacGregor if MacGregor owns that collateral.

HECHT: If the trial judge had abated what would have happened?

CARNEGIE: I think if the trial judge had abated, we would be exactly where we are now with an arbitration decision that establishes when title passed and we wouldn't be here.

HECHT: Exactly where we are now is in this case in this courtroom. I thought you said at the end we wouldn't be here.

CARNEGIE: I think if the trial judge had abated, we have the arbitration decision. We would walk in and we would say this arbitration decision establishes that Unidynamics had title in our contracts with Unidynamics, therefore, our lien is valid. Therefore, pay us.

HECHT: So we wouldn't have this question?

CARNEGIE: I think that's exactly right.

O'NEILL: Which leads me back to my question. Isn't that what happened? I mean haven't they done that now and why isn't this thing moot if we wouldn't have been here?

CARNEGIE: My view is, that it should be that simple when we go back and we've got a nice clean summary judgment case now. I doubt Mr. Galloway would agree with me. And I think that's going to have to wait remand to see if it turns out as simple as I think it ought to be at this point.

O'NEILL: But our determination of whether that ownership issue - I'm a bit confused on the mootness part.

CARNEGIE: I think that this court just needs to say, the CA is wrong number. One, this multiplicity of suits issue doesn't have any bearing on the threshold question of should this nonparty be bound to this contract? And the standard that applies for estoppel has a lot to do, not with gee is there some contract out there that's relevant to your case so that you may rely on it as evidence? But are you directly asserting rights pursuant to that contract...

OWEN: It's been your position, I assume throughout, that you want Unidynamics to be declared the owner of the property. Why did you sue MacGregor? Why didn't you wait for MacGregor to come in and say no. Because as between you and Unidynamics that's binding and they would have to come in...

CARNEGIE: I think you normally sue everybody that might potentially have liability to you. If we lost against Unidynamics, if that contract wasn't valid for some reason, who knows what, then there would be a potential quantum meruit claim against MacGregor, which in no way derives from MacGregor's contract. Any measure of damages certainly doesn't turn on the amount of MacGregor was going to pay under its contract or anything like that. In fact it would be completely inconsistent to file a quantum meruit claim and at the same time try to say we had some contract with MacGregor. Because we don't . We have absolutely no rights. Our constitutional lien claim derives from the constitution. It turns on how our contract with Unidynamics and not any contract with MacGregor. And it just so happens to our misfortune that the rights between MacGregor and Unidynamics under their contract between each other happened to bear on that issue. But that's a

very different thing from saying that KBR is somehow relying on that contract in trying to derive rights from that contract. I think if anything, we could even say that this is an affirmative defense almost of them to say No, you don't have a constitutional lien because under the contract between MacGregor and Unidynamics title has transferred.