ORAL ARGUMENT - 2/13/96
94-1206
COLUMBIA GAS V. NEW ULM GAS

LEE: If the court please. This is a case in which respondent New Ulm pursues $6 million windfall based on a _____ complicated and self-serving interpretation of the contract by which it sold gas to Columbia. The case turns on the meaning and interpretation of the two principal pricing provisions of that contract, Section 3.1.1 and §3.1.3, to contradictory and philosophically uphold pricing provisions as we will see.

The only pricing provision available during the first pricing period of the contract was §311. It remained the only pricing provision until the invocation of §3.1.3, which marked the beginning of the second pricing period of the contract. The only question or the only interpretation question in this case really is whether or not when §3.1.3 is invoked and takes its place as an active pricing section, whether it supersedes §3.1.1, or whether it merely takes a place beside it as a co-pricing section?

CORNYN: Are these commonly used gas pricing provisions or is this a one shot case? I guess it is not one shot because we have some other provisions in other cases.

LAWYER: Similar provisions appear in many, many contracts.

CORNYN: Whatever we determine this case is going to have broad application?

LEE: Well I don't want to exaggerate that your honor. This case has its own unique feature. But provisions like this menu provision in §3.1.1, and the market out provision was a little unusual type of market out, but there were many market out provisions in the gas industry.

CORNYN: The way we interpret this contract will decide this case. But what I am wondering is will it impact other market out cases generally, or will it be limited to this case?

LEE: I judge somewhere in the middle your honor. It will clearly have some impact on those gas contracts, but I am not sure it will...it won't be like a common clause in a form in a producer's 88 oil and gas _____.

A reasonable place to look for the answer as to which one of these two interpretations is the correct interpretation would be the contract. Let me repeat the question again. The question is whether §3.1.3 supersedes §3.1.1 when 3.1.3 is invoked, or whether it merely becomes a co-pricing provision in spite of the fact that the provisions of the two sections are quite contradictory? Contradictory in the very real sense that §3.1.1 called for prices during the period in controversy in the range of $8 actually from $7.31 to $8.61 as I recall. And the prices under 3.1.3 range from $1.31 to

$1.90 say $1.50. The contract itself simply doesn't say one way or the other.

ENOCH: Why don't you walk...it will be helpful to me if you would walk us through what happens under...you get up to December of 1984, I guess this is the end, and it's 15 days before the end of the quarter. And so New Ulm comes in and says: I want 3.1.1 prices. From that point forward, now I know this isn't quite how it fit, but we are right at that time when January 1, 1985 comes around. What do you say happens under the contract? I am 15 days before the end of December, and I am New Ulm and I say I want 3.1.1 prices as calculated under that provision, then what happens?

LEE: New Ulm at that time your honor had not become a working interest owner. It did not begin producing gas after it became a working interest owner until Sept., 1986, 1-1/2 years later. Mobile was the working interest owner at that time. And what happened was that Mobile had selected a 3.1.1 price back in December, Columbia invokes §3.1.1 on January 1, 1985, as quickly as it could and negotiations were then begun about a market out price, a 3.1.3 price.

ENOCH: And did those negotiations result in a price different than 3.1.1?

LEE: Yes sir that's correct. It took awhile.

ENOCH: Now could from your reading of the contract could New Ulm when it comes into play could it demand a price calculated on 3.1.1.?

LEE: It was not entitled to such a price. It could and did demand it later after it got...

ENOCH: Well why do you say...do you say it's not entitled to 3.1.1. because that was no more than a request to renegotiate prices under 3.1.3.?

LEE: No, during the first 4-1/2 years of the contract anytime until the first invocation of §3.1.3. it is a right they had to get a new price under 3.1.1. They had a quarterly right to do that.

ENOCH: But under 3.1.3. they can demand a renegotiation too can't they?

LEE: They can demand a renegotiation of a market price under 3.1.3. beginning January 1, 1985, and then anytime thereafter.

HECHT: Is it your position that the contract is ambiguous or unambiguous?

LEE: The CA held it ambiguous. Columbia appealed from that ruling, the ruling that New Ulm's interpretation was reasonable in its application for writ of error. New Ulm did not appeal from the CA's ruling that Columbia's interpretation was reasonable.

HECHT: The TC also held that it was ambiguous. But your position is it's unambiguous?

LEE: Yes they did that's correct your honor. Judge Raney as the court will perhaps recall had a parallel case involving the identical contract where he held the contract unambiguous in what we think is a thoughtful opinion. He held that New Ulm's interpretation was unreasonable. The truth is we think that the two contracts are incompatible when they are operating at the same period of time. Under Columbia's interpretation 3.1.1. is the only pricing section that has any sway over the price of gas during the first 4-1/2 years and until the invocation of §3.1.3. Thereafter 3.1.3. exclusively controls the price of gas.

When you adopt New Ulm's interpretation, which allows a return to 3.1.1. pricing, to the high prices of 3.1.1...

ABBOTT: Your position is that once 3.1.3. is invoked you never go back to 3.1.1.?

LEE: Yes, sir.

ABBOTT: And there is no language to that effect in the contract is that correct?

LEE: There is no language to that effect nor is there any that allows them to return the 3.1.1.

ABBOTT: And there is testimony by Mr. Callahan saying that the reason it's not in there is because Columbia wanted it, but couldn't get it.

LEE: That's exactly why Columbia has already lost this case if the contract is ambiguous. Unless we can convince this court that this is an unambiguous contract as we indeed did convince Judge Rainey, then Columbia has lost because there was a factual dispute about that and the jury resolved the issue against Columbia.

ABBOTT: I understand. My concern is that Columbia knew how to make the contract unambiguous, that is by putting clear language in that 3.1.3. once it is invoked then 3.1.1. would no longer apply. They knew that they could do that. They knew that they could put that language in the contract. However what they also knew is they could not negotiate that with New Ulm because New Ulm wouldn't go for it at the time, or whoever the seller was at the time wouldn't go for it, and therefore, they couldn't put it in there. And consequently as the argument goes, the contract reads ambiguously.

LEE: Well the other part of the testimony of Mr. Callahan does not appear in New Ulm's brief are places where he testifies over and over and over again that this was not a negotiation back and forth. This was when they were trying to develop the history of this particular market out provision. And he testified over and over with this provision in this contract that the people that were working on it

including the producers whom they consulted about it knew and fully understood that once 3.1.3. was invoked you could never return to §3.1.1. And he described the statement that appears in New Ulm's brief about: I couldn't get them agree to it; as a situation in which he misspoke.

The vast bulk of his testimony makes it clear that the contrary was the case. But we lost that issue to the jury and it stays lost. Unless we can convince you this contract means what it says we lose the case.

ENOCH: I asked you to kind of walk through how this contract applies under Columbia and we sort of got short circuited. And I won't go back to that. But just a succinct statement do you agree...is it your position that unless this court determines that 3.1.1. is no longer effective because Columbia invoked 3.1.3. back in January, 1985, that Columbia loses? Is that your position, that unless their invocation of 3.1.3. back in January, 1985, was effective to eliminate subsequent use of 3.1.1. Columbia loses?

LEE: Yes sir.

OWEN: Let me follow-up on that. Even if the court were to say you can back to 3.1.1. and the seller were to invoke 3.1.1. couldn't the buyer come right back behind and invoke 3.1.3.?

LEE: That is the pricing theory of this contract according to New Ulm. New Ulm says that §3.1.1. can be invoked after §3.1.3. in the last 15 days of any calendar quarter. It says that before that price becomes effective on the first day of the following calendar quarter, which will be the first of the next month, that Columbia or any buyer can go in and trump. It also says override that 3.1.1. price with a 3.1.3. invocation. There is absolutely no language anywhere in the contract to justify any such mechanism. That is creative, inventive interpretation pure and simple.

PHILLIPS: But you are trying to harmonize provisions too by saying one must logically end when the other starts.

LEE: They harmonize by creating things. The contract is unquestionably inexplicit about whether 3.1.1. is available after a prior pricing under §3.1.3. There is no question about that. As the CA pointed out a contract doesn't say you can go back to 3.1.1. It doesn't say you cannot. So that is simply inexplicit in the contract.

CORNYN: How is an inexplicit contract different from an ambiguous contract?

LEE: This court decided that issue in the similar case of Universal CIT Credit Corp. v. Daniel. In that case there was a contract and 3 interpretations were urged upon the court. The court could not satisfy itself from the language of the contract, from the grammatical construction of the critical paragraphs or from the punctuation or anything of that nature which of those interpretations was reasonable and which was not. And so it turned and examined the consequences of those interpretations. One

interpretation resulted in the deletion in giving no effect to some obviously important language in the paragraph. An alternative interpretation gave the seller an inefficient redundant remedy when the contract provided a better remedy elsewhere in the contract. Those two interpretations were rejected as unreasonable. The third interpretation which was reasonable the court adopted as the unambiguous meaning of the contract although it had described the meaning as of _____, _____ and dubious and such words as that.

CORNYN: So your contention is that even though this contract may be inexplicit it's not ambiguous because yours is the only reasonable construction?

LEE: Absolutely.

PHILLIPS: Counsel is the decision of the Southern District of Texas final or has there been an attempted appeal of Judge Raney's decision?

LEE: There has been no appeal yet.

PHILLIPS: Has time run on it?

LEE: No, that decision was made in a partial summary judgment and steps are underway to make that a final appealable decision in federal court.

ABBOTT: One last question and that is it seems that New Ulm argues that regardless of which way the court may decide the ambiguity issue, that the fraud claims exist independent of the ambiguity issue. What is your position on that? And as a result the fraud findings by the trial court should be upheld regardless of this court's ruling on the ambiguity issue?

LEE: There were two different elements claimed as fraud. One was based on the 3.1.1. price. If Columbia's interpretation is correct as a matter of law, and that's what we urge upon this court, and was the point on which the writ of error was granted, if that's true there cannot be any damages if there was fraud for that because they had no right to a 3.1.1. price under the circumstances. There was another fraud count based with a maximum price of $3. They said that Columbia told them that they were going to get what Columbia was paying Mobile. And they have a theory unsubstantiated in the record that a particular settlement agreement between Mobile and Columbia necessarily results in a $3 price unless that is established to this court's satisfaction as a matter of law from the reading of that settlement agreement New Ulm has not established that $3 price as a real agreement and we do not think they have preserved that point. It was certainly mentioned in the last brief they wrote. But we don't think it's properly before this court. If it is the case should be remanded for trial on the $3 fraud issue, but not the $8 fraud issue.

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RESPONDENT

REAVLEY: May it please the court. I would like to address first the question of whether or not New Ulm's interpretation is a reasonable one. It seems to me that may be a central issue in the case as I read the briefs and arguments of the parties.

BAKER: Do you say that the agreement is unambiguous?

REAVLEY: No we say it's ambiguous. We say the TC and the CA were both correct in holding it's ambiguous.

BAKER: Did you originally hold to that?

REAVLEY: We did argue in summary judgment before the TC and we had an alternate ground in the CA that it was unambiguous in our favor. In this court all we are saying is that it is ambiguous. And we think that interpretation is stronger in our favor than theirs, but obviously we have won on the ambiguity question. I mean if it's ambiguous the jury found in our favor. We are simply saying giving Columbia the best benefit of the doubt is ambiguous, but the intent favored New Ulm.

ABBOTT: It would not be considered ambiguous if Columbia's interpretation was reasonable and your interpretation was not reasonable; isn't that a correct statement?

REAVLEY: Yes, that's my understanding. If the court holds that New Ulm's interpretation is not within the bounds of reason that a reasonable person couldn't have meant that, then they can win and the court can hold this is unambiguous. And that's why I wanted to address that point first. Because I think one of the problems is the test as I understand it from this court's decisions in the past is whether or not considering circumstances surrounding the execution of the contract a reasonable person might have intended this, or the alternative. And yet everything Columbia has said and I believe I submit the district court's decision is based on and analyzing reasonableness as of today or as of the time of breach as opposed to considering what the situation looked like in 1980 when the contract was signed.

There was expert testimony on both sides on this. But the experts I think were pretty much in agreement. In 1980 nobody knew for sure what was going to happen to the future of gas pricing. There were certain regulatory events in 1985 and thereafter that made that very difficult to know. There was testimony there might be a big fly up in prices. There was testimony that there might be alternate fuels competing: coal and oil. And some of Columbia's markets that could have made it hard for them to market this gas in their market. But they were all possibilities.

With the court's permission I have prepared a chart to talk from. This is not an exhibit that we used in trial, but it just explains what I am talking about. This is simply 3 alternative

scenarios in terms of the standing in 1980 when the parties made the contract what the future pricing might look like. The second chart here is what Columbia and I believe the federal courts spent all their time discussing. This is the scenario where prices go up to 1985. There is a decline, fairly precipitous thereafter. And then there's some variation. But the prices stay low: 20 above; 20 below, where the 3.1.1. price would be. And so what Columbia said: Is well how does it make any sense to let New Ulm continue to use 3.1.3., which would have a price up like this, since by their own admission Columbia can come back and invoke 3.1.3. and bring it back down. And then there's this huge gap here that in effect they are saying is sort of a trap door or trick against Columbia if they don't play things right and do it.

What I would like to point out for you is one of a number of possibilities facing the parties when they made this contract. If they had known this would happen perhaps they might have reached a different conclusion. Perhaps they might have made it clear that you can't go back to 3.1.3. once you hit this big drop in prices. Probably they would have done the contract in its entirety differently.

But we know that they contemplated other scenarios. For instance, this first scenario contemplates the price just keeps going up, the market value just keeps going up. 3.1.3. in other words would yield a 3.1.1. price. We know that the parties contemplated that that might happen because they had another provision in the contract, §3.1.2., the one that becomes between the other two, that had one price ceiling that governed this period. It said 3.1.1. can operate but can never exceed a certain percentage of number 2 fuel oil price. And then it said: After 1985, 3.1.1. is subject to a different ceiling. The average is the high street prices in the State of Texas. There was no reason at all to have a ceiling specifically designated for post-1985, that the parties didn't contemplate at least a possibility that 3.1.1. would continue to operate after that time.

So that's another thing. Then we know that they thought that that was something that was within the contemplation of the parties because now they draft a new contract. If this is a possibility, the precipitate has dropped, and this is a possibility the continuous rise. Certainly anything in between that would be a possibility. Perhaps more likely that it would not be a pure scenario either way. And that's the third graph here. And this is just one of...you can have an infinite number of variations on this. But suppose the price goes up to 85, and then there's a drop because there is a lot more deregulated gas coming into the market. Columbia needs the right to bring the price down to reflect that drop in the market. They've got 3.1.3., that's their only tool in the contract to bring the price back down.

But if the price goes back up and it goes back up to near 3.1.1. levels, it certainly would strike me as reasonable, and I submit to the court it is reasonable, that the parties would contemplate the seller to go back to 3.1.1. prices.

ENOCH: Assuming all of what you've said, what is the significance that 3.1.3. permits the seller to seek a redetermination of pricing? 3.1.1. is always there, and 3.1.2. is always there with a cap. What is the significance of the seller being provided in 3.1.3. this authority to redetermine?

REAVLEY: I think your honor that the circumstances again by agreement of the parties is that this was a strong seller's market in 1980. And I submit that what the seller wanted was every right they could get under the contract. They did agree to give Columbia the ability to adjust this downward after a period of time. But if Columbia could do that they wanted to be able to use that mechanism as well as the other mechanisms they had there.

HECHT: And if they had it, then why would they ever go back to 3.1.1., the seller?

REAVLEY: Because the seller wanted...if it was happy with 3.1.3. there is no reason to put 3.1.1. in to begin with. You could start 3.1.3. and say that just the seller could use it till 1985, and then both could use it after that. The advantage of 3.1.1. it is so much simpler and quicker and more objective and easier to apply. You simply look at certain published references, you send your notice, and that price goes into effect during the time that that provision operates.

SPECTOR: If during that time Columbia invokes 3.1.3. I don't understand if that trumps 3.1.1. why that is to Columbia's disadvantage?

REAVLEY: I agree your honor. I don't think it is to their disadvantage. I think it helps them. You know to be perfectly frank, I mean we recognized 3.1.3. has to mean something. You have to interpret this contract so that it means something. So it is an effective provision. They can use it and make it effective. All they have to do however is to use it. I mean if we elect 3.1.1. after 1985, and they come back and they elect 3.1.3., then you know we go into 3.1.3. But again if you knew this was going to happen, I am not sure you would have built a railroad that way. But the parties didn't know that. And if this happens, it's very reasonable that we would be able to do that. We can use 3.1.1. and bring it back up.

ABBOTT: Counsel isn't it true that if you use 3.1.1.(ii), then Columbia could never get to 3.1.3.?

REAVLEY: I don't believe so your honor.

ABBOTT: If you will take a look at it once a seller requests a determination, then it shall remain in effect thereafter until seller, being New Ulm, requests a different alternative price. You never get back to 3.1.3. unless of course we have this trumping provision. But as you will concede there is zero language in the whole contract that talks about 3.1.3. trumping anything. So what you are asking us to do is to write into the contract language which is not there in order to make your interpretation reasonable.

REAVLEY: Your honor I think Mr. Lee was asked the same question. I think we are both in the same boat, the parties are both in the same boat in terms of writing language in. I think Columbia and New Ulm agree the contract does not specifically address how you coordinate these two provisions after 1985.

ABBOTT: Well so would you concede then that your position is unreasonable, that you are requesting us to write language into the contract, and you prevail only if their position is unreasonable?

REAVLEY: No, your honor I do not agree with that. I guess the best way for me to address that is I think that the parties have in effect agreed the contract does not tell you how you coordinate those _____ provisions. And so the position that this court has to adopt if it is going to hold this unambiguous is it's going to have to imply some language either way.

ABBOTT: Well let me ask you this, because if you look at 3.1.3. can't it fairly easily be discerned that once you renegotiate under 3.1.3., that renegotiated price staying into effect until it is renegotiated again under 3.1.3.?

REAVLEY: If 3.1.3. were the only provision in the contract, that would be true.

ABBOTT: But all these provisions exist and by using 3.1.3. it doesn't eliminate 3.1.1. because 3.1.1. had a life until 3.1.3. was invoked.

REAVLEY: It seems to me that assumes the conclusion. If you assume that once 3.1.3. is invoked, 3.1.1. goes away, then yes then that's the end of the life. But my point is that the only way Columbia gets where it wants to get is to have this court imply the language after you first use 3.1.3., then 3.1.1. is no longer available for the rest of the contract. That is not in the contract. You have to imply that.

ABBOTT: But if you look at the mechanics of 3.1.3. there doesn't seem any escape from 3.1.3. once you invoke it, because the renegotiated price stays in effect until as the language of 3.1.3. reads: Until a request for renegotiation is made again. So you are kind of stuck there due to the own language of 3.1.3.

REAVLEY: Maybe I am not understanding. It seems to me though that you could say the same thing about 3.1.1. I thought the Justice referred to that earlier. 3.1.1. seems to say it stays in effect thereafter until it's used again. So both of them say that. And that's where I am saying there is a gap unless you hold it's ambiguous, the only way to reach an unambiguous result is to imply one of the other of these alternatives. You either have to say that 3.1.1. drops out, then you use 3.1.3., or you say that during a period that 3.1.3. is being used to establish a new price, you can't bring in new prices under 3.1.1.

ENOCH: What's the practical difference in these two interpretations? I understand Mr. Lee said well we just lose if 3.1.1. is still applicable. The only practical difference I see in these, and I am subject to being corrected is the burden of proof on the party if 3.1.3. is in place, then New Ulm has to establish that the prices they demand are the market prices. If they don't come to an agreement they can go out and get a third party buyer and then Columbia only has the ability to pay what the third party would pay, or else they've got to give up the gas. Or if 3.1.3. is still applicable, then New Ulm doesn't have to do any of that it can simply demand this higher price, and then it's Columbia's burden to come forward and

object, and then they've got to produce the market value. But the seller still under 3.1.3. has to got to come in with a third party buyer. So as far as I can tell the only practical circumstance here is who had to make the next move. New Ulm says: Well Columbia you had to make the next move because under 3.1.1. we can demand this without a showing of market price, and you therefore have to object. Having failed to object you've breached the contract by not paying. And Columbia simply says: No, New Ulm can request whatever they want to, but they are going to have to meet the market value that's set under 3.1.3. Is that really what's the problem here?

REAVLEY: I think as it turned out historically that's basically the difference. If using 3.1.1. knowing what happened with the prices going way down, it results in a burden shifting device, the seller has an easy way to invoke redetermination, but the buyer can come in invoke 3.1.3. and you still have to go through the 3.1.3. process.

HECHT: That $5 million bucks?

REAVLEY: If the buyer doesn't pay attention to what the buyer is supposed to do. Now as I said before I don't know that you would have written, or the parties would have written the contract the way they did if they had known.

PHILLIPS: How long does it take to make a 3.1.3. determination?

REAVLEY: That could be anywhere from a week to 6 months, a year.

PHILLIPS: And every 3 months under your interpretation you can invoke 3.1.1?

REAVLEY: If there is not a 3.1.3. proceeding ending, that's true.

PHILLIPS: Under your interpretation as long as the 3.1.3. proceeding is pending you wait for that, then once that's over you wait until the next quarter, and then you can go back to your 3.1.1.?

REAVLEY: I am saying once 3.1.3. is invoked you wait until the end of that proceeding whether it last a month or 6 months regardless of whether a quarter comes in in the interim.

ABBOTT: But of course there is no language to that effect in the contract.

REAVLEY: There is no language to that effect. You have to make...either way you've got to imply something.

PHILLIPS: Without asking you to go outside the record would the court be advised to watch the 5th circuit proceedings to see if anything is filed there or not?

REAVLEY: Really this is a state law question. And there was argument in the federal court about collateral estoppel and such, and I think there was a view that since it wasn't a decision of the highest state court, that it wasn't strictly speaking an eeire(?) problem. But I would assume that the proper final authority in this would be this court.

Let me also mention one other distinction between those cases. Besides the fact that Judge Raney like Columbia here has argued...I mean it looked entirely at this scenario of what happened and then decided would the parties have contracted knowing you had this big gap, this $5 million as risk, would you do it that way? Again the court did not look the way I think this court's precedent requires you to look, which is what were the parties looking at at the beginning when they were trying to figure out how these things would work and what might be available and what might not.

PHILLIPS: Well my second question is would you speak to opposing counsel's argument that the two prongs of your fraud argument one goes away if you lose the legal argument, and the second one you haven't preserved error on it to this court. Is that right?

REAVLEY: I think counsel correctly stated my view, which is we don't lose on the fraud claim, but it gets remanded. Because there were two fraud issues one of which would be knocked out if the court held that the contract was unambiguous in Columbia's favor. The other was just a fact issue about misrepresenting what Columbia was paying to another producer. And I think the CA disposition of the case was a remand and the correct result here if the court held against us on the contract interpretation claim would be to affirm the remand as to the fraud issue.

PHILLIPS: And there is no question about preservation of error?

REAVLEY: No your honor. We've prevailed and the CA remanded it and that's where we are. And that would be the status quo.

PHILLIPS: And finally your brief relies rather heavily on the testimony by a negotiator of what was and was not able to get into this contract. Opposing counsel takes the position that it is cheating for us to look at that. I mean we have to first make a determination of is it ambiguous or not without looking to specific testimony of a negotiator, and I didn't see you respond to that. Do you agree with that? I mean shall we not look at that?

REAVLEY: My response to it is two-fold: one is technically it is correct that you first determine whether it's ambiguous, and if it is, then you look at underlying evidence of intent. Where I think it does come in is more illustrative. Because Columbia _____ out the argument today saying this is a windfall, this is a travesty, this is unfair. It seems to me that the way this is supposed to work is the court is supposed to decide certain things. Is it within the realm of reasons? is this interpretation within the realm of reason? is the language explicit? If not then it goes to the jury. The jury considers or the fact finder considers the whole panoply of evidence: the course of conduct, what one side's expectations were as to what the other

believed. Those things all come in. Is it fair? Is it a windfall? Well that may depend on whether or not the fact finder or if this court were the fact finder sitting there listening to Mr. Callahan's testimony, noticing that the jury found that Columbia committed fraud, that it deliberately misrepresented altering the contract to remove 3.1.1. by amendment in a secret sealed settlement agreement. They found that that was intentionally done. Is it fair if those things are true? I would say yes.

To me this whole argument just goes to the wisdom of the underlying law, which is that the test here is our interpretation within the bounds of reason. Not weighing them. Not the court saying which one it likes better. But is ours within the bounds of reason considering the circumstances when the contract was executed.

PHILLIPS: It's your position that a court on a law point can look to a negotiator's particular testimony, not for specific purposes, but to determine in general if a position is...

REAVLEY: No, your honor I believe Mr. Lee is correct that legally this court does not look to Mr. Callahan's testimony to decide whether it's unambiguous. But because he has argued windfall and fairness, and I sense that is an important issue, I mean frankly that would be my concerned. I mean I think he's done a good job of arguing that. That's the way I would have argued it. I am simply saying that as a matter of judicial policy, that that may be short cited because there is a reason why the court has limited its role in contract interpretation just up to this point of is our interpretation within the bounds of reason assuming the contract is not explicit on this?

PHILLIPS: I don't fully understand. But I understand a little better.

BAKER: Is it your argument that after January 1, 1985, that New Ulm made a demand for 3.1.1. price change, that you are not bound by the proof requirements under 3.1.3.?

REAVLEY: Yes your honor. My position is that any time New Ulm is able to make a 3.1.1. after 1985, assuming that there is no 3.1.3. proceeding pending at that time, that's an automatic thing. It sends the notice referencing the prices and that's all it has to do. If Columbia then elects 3.1.3., then they will have the burden of showing it doesn't reflect the market value.

BAKER: Well it just says that anytime after December 31, either the buyer or seller may request renegotiated prices. And so your demand is for a new price under 3.1.1. is that correct?

REAVLEY: Your honor I am not sure if I know which provision the court's reading from.

BAKER: It's 3.1.3.

REAVLEY: Certainly if we make a request under 3.1.3. for redetermination we have the burdens that are stated there.

BAKER: But this says any renegotiation of the price. So it's your position if you make a 3.1.1. demand that fixes its period and nothing else happens unless Columbia comes back and says well we want to renegotiate?

REAVLEY: Your honor I am saying that they are two entirely separate procedures. And if either party makes an election under 3.1.3., then they have to comply with those provisions. But if the seller makes selection under 3.1.1. they only have to comply with the requirements of that section.

OWEN: Prior to March, 1988, how many times had 3.1.3. been invoked? Just once?

REAVLEY: No your honor. There had been several invocations I believe when Mobile owned the property, and there had been, I am trying to remember whether there was just one with New Ulm, or not. I am not sure about that.

OWEN: Is it in the record who invoked it and when?

REAVLEY: I believe so.

OWEN: And that's in the statement of facts?

REAVLEY: I believe so. There is a document that specifically addresses the court's question which was Ex. 277, which I think we handed out to the court, that in late 1987 Mobile made that specific 3.1.1. request after Columbia had previously used the 3.1.3. procedures.

OWEN: How was the price ultimately agreed on? Under what section of contract after that request was the price determinative?

REAVLEY: After this request New Bremman, the company involved in the federal court suit, took over Mobile's position, and ultimately the parties got into a dispute about that. And I think it went both ways. New Bremman kept insisting that 3.1.1. should be responded to. But I think there was also a 3.1.3. determination that eventually went to arbitration.

OWEN: So the price was determined under 3.1.3.?

REAVLEY: In the Bremman case there was a 3.1.3. determination after that. Yes.

OWEN: But they are your predecessor in interest?

REAVLEY: No, they are not. New Bremman and New Ulm are more or less parallel. They both derived their interest from Mobile and others. But they were as to different parts of the property.

OWEN: Did Mobile ever the position that you are taking in this case, that after 3.1.3. is in effect you can go back to 3.1.1.?

REAVLEY: Yes, that's exactly this exhibit is exactly that.

OWEN: But that was not resolved with Mobile?

REAVLEY: That was not resolved between Columbia and Mobile because after that letter was written or around that time when Bremman stepped into Mobile's shoes as to the property, that Mobile was riding(?) on.

ABBOTT: What impact would it have on the gas market in Texas if the court found in favor of Columbia on this matter?

REAVLEY: Your honor I guess my view is different from Mr. Lee's in response to Justice Cornyn's question. I don't think as a practical matter this decision has a lot of effect on anybody as to this particular contract language. Because 1) I think the structure of these provisions is peculiar to Columbia; 2) Columbia has been through a Chapter 11 bankruptcy proceeding, and all of these things except for these two pending lawsuits have been washed out through that is my understanding. My belief is to the effect of this is more on the doctrine of how you interpret contracts. That's where I have concerns in terms of whether the court to respond to the kind of arguments Columbia is raising is going to take a broader view of what the court can do either by looking at circumstances at the time of breach as opposed to making or some other method. I think that has real significance to contract law. I don't see how the court construes this particular contract in terms of the result is going to have any big practical effect on anybody other than these parties and their related federal case.

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REBUTTAL

ENOCH: Mr. Lee following up on Mr. Reavley's comment, is New Ulm's view reasonably within the realm or within the realm of reasonable interpretation of the contract if the only practical difference between Columbia's reading of the contract and New Ulm's reading of the contract is who had the burden to establish the fair market price, that is if they demand under 3.1.1. the burden shifts to Columbia to make the objection, and then prove the market price. If they make a demand under 3.1.3. then they've got the burden. If that's the only significant difference in these two interpretations why is not New Ulm's interpretation that they can demand 3.1.1. you simply have to come over and make the objection and do the burden of proof. Why is that an unreasonable interpretation of the contract?

LEE: Because the contract doesn't tell us that §3.1.3. is trumped. It would have been no trouble under New Ulm's theory for Columbia to have trumped the §3.1.1. selection that New Ulm made. New Ulm wasn't aboard with that interpretation. Because that's not the way it thought. And I

suggest to the court that if it will read this contract it will not find anything that is self evident that will tell the reader that you better trump if they invoke 3.1.1., or you can trump it.

ENOCH: But if 3.1.2. provides for caps that continue beyond January 1, 1985, to take Columbia's view that 3.1.1. no longer exist, what is the purpose of 3.1.2?

LEE: The purpose of 3.1.2. is that 3.1.1. may not be invoked on January 1, 1985. It can be invoked at anytime and from time to time after Dec. 31, 1984. If they don't invoke it until 1986 for some reason, then the parties wanted a cap on the 3.1.1. price.

ENOCH: So 3.1.2. is also set aside by the invocation under 3.1.3, although the contract is silent about that?

LEE: No, it's not set aside. But I think the parties agree that 3.1.2. is applicable only to put a cap on 3.1.1. prices.

ENOCH: Is there any other reason why their interpretation would be unreasonable, that they could demand 3.1.1. and Columbia just has to make its objection and take the burden of proof?

LEE: What's unreasonable about it is that it creates the two conflicts and it creates this trumping function of §3.1.3, that are secret. They are secret to the reader. The reader doesn't know he can go in there and do it. There are other problems with it. If the buyer can get out of the 3.1.1. selection, which they say is valid by trumping, clearly the thing to do is to inhibit the buyer's ability to trump. So instead of making your 3.1.1. selection on March 25, you make it on March 31, at 5:00 or at 11:58 where there is no ability to get together the good faith demonstration of 3.1.3. or even to get a letter to them.

In addition, Mr. Reavley told you that the arbitration process itself can take as long as 1 year. Why would these parties fight for 1 year over the difference in $1.73 and $1.82 to have that whole process wiped out in 1 letter saying we nominated 3.1.1. price. Section 3.1.3. to the extent it grants, it is a bilateral provision granting the seller the right to invoke that provision to raise the price is redundant - more redundant than the provision declared unreasonable by the Daniel case. It's theoretically possible that it's going to use it, but anybody's going to use §3.1.1. because it's the easy way to go. Also you've always got the bond to hold, the perverse incentive that Judge Reavley talked about, there won't be a market out to trump the §3.1.1. election.

Mr. Reavley argued that the seller would want any little thing he could get, and I agree with that no doubt they would. But there is no constructional preference in favor of what the seller wants even a reasonable seller wants. This is not for a higher price according to New Ulm's interpretation. It is simply to trigger, to compel New Ulm to make the 3.1.3. invoke invocation.