

# IN THE SUPREME COURT OF TEXAS

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No. 99-0490  
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FORTUNE PRODUCTION CO., TUCKER DRILLING CO., INC., CURTIS HANKAMER  
CORP., AND JOHN L. COX, PETITIONERS

v.

CONOCO, INC., RESPONDENT

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ON PETITIONS FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS  
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**Argued on February 9, 2000**

JUSTICE ENOCH, concurring and dissenting.

Although I join Parts I, II, III and V of the Court's opinion, I can't join its conclusion that there is some evidence of fraud damages warranting a remand to the trial court, because the Court measures those damages against a bargain that was not, in fact, made. Consequently, I must dissent in part.

The Court goes astray when it looks for evidence that the plaintiff natural gas producers could have forced Conoco, Inc. to pay more had Conoco not misled them about its intent to continue selling their residue gas to Lone Star. To award damages on this basis compensates the producers not for any damages actually sustained, but for lost profits on a bargain they never made. The law doesn't allow such a recovery. Further, the producers eschew reliance on any evidence that might establish appropriate damages. I would affirm the court of appeals' judgment for Conoco on the fraud claim.

In a fraudulent inducement case, as the Court agrees, there are two measures of damages – out-of-pocket and benefit-of-the-bargain.<sup>1</sup> Out-of-pocket damages represent the difference between the value of the thing parted with and the value received in return.<sup>2</sup> This measure of damage compensates a party for actual damages, not lost profits.<sup>3</sup> Benefit-of-the-bargain damages, on the other hand, represent the difference between the value as represented and the value received.<sup>4</sup> Significantly, benefit-of-the-bargain damages could include anticipated profits.<sup>5</sup> And until today, to get those lost profits, one would have had to prove that there was indeed a bargain made.

Conoco correctly argues that the producers have no benefit-of-the-bargain damages because the benefit the producers have sued for is not the benefit of any bargain made. That is, the parties never agreed that the producers would get a percentage of the Lone Star price. The producers insist, however, that they are entitled to benefit-of-the-bargain damages because they were *bargaining* for a percentage of the actual proceeds Conoco received from selling their gas to Lone Star, but were misled into *agreeing* to accept only a percentage of the lower spot-market price. As a result, the jury had sufficient evidence to award damages based on a percentage of the Lone Star price. Interestingly, the Court apparently agrees with Conoco that there was no bargain for the higher price because the Court reverses the jury award.<sup>6</sup> And in fact, the contracts between the parties demonstrate that the bargain reached was for the producers to receive a percentage of the spot market

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<sup>1</sup> *Formosa Plastics Corp. USA v. Presidio Eng'rs and Contractors, Inc.*, 960 S.W.2d 41, 49 (Tex. 1998).

<sup>2</sup> *Id.*

<sup>3</sup> *Morriss-Buick Co. v. Pondrom*, 113 S.W.2d 889, 890 (Tex. 1938).

<sup>4</sup> *Formosa Plastics*, 960 S.W.2d at 49.

<sup>5</sup> *Id.* at 50.

<sup>6</sup> \_\_ S.W.3d at \_\_.

price:

The amount of payment for Residue Gas shall be eighty percent (80%) of the monthly Weighted Average Sales Price (W.A.S.P.) per MMBTU received by Buyer, f.o.b. Buyer's Plant(s), for all Residue Gas sales sold on a "short-term" spot market basis and allocated to gas delivered hereunder. "Short term" sales shall include all Residue Gas contracts with terms of one year or less.

What the producers really argue is that they would have made a different bargain, but for misrepresentations by Conoco. According to the producers, the misrepresentation was two-fold: that Conoco would pay a percentage of the price it received and that the only price it could get was the spot market price. As a result, the producers agreed to accept a percentage of spot market price. But as I've stated, to claim benefit-of-the-bargain damages, the producers must show they got less than what they bargained for. And here, they bargained for spot market price, which is what they got.

The Court first errs by agreeing with the producers that benefit-of-the-bargain damages are applicable. The facts of this case demonstrate that the out-of-pocket measure is the appropriate measure. That is, the producers' damages, if any, result from them being misled into selling their gas to Conoco at a price lower than what they could have received by selling their gas elsewhere.

Second, the Court compounds its error when it says that the producers' benefit-of-the-bargain damages can be shown by evidence that they could have gotten a higher price *from Conoco* for their gas. This conflates the benefit-of-the-bargain and out-of-pocket measures of damages.

Finally, the Court caps its error by accepting as evidence of damages a bargain Conoco struck with someone else – a bargain that not even the producers argue for. This is error because those damages compensate the producers for profits from "a hypothetical bargain never struck" – an

approach we rejected in *Formosa Plastics*.<sup>7</sup>

In *Formosa Plastics*, a contractor bid on a construction job on the basis of misrepresentations made by the project owner. The misrepresentations resulted in the job costing more than the contractor had anticipated, so that instead of making a profit the contractor suffered a loss. The contractor had bid \$600,000 on the job, contemplating costs of \$370,000 and a profit of \$230,000. Instead, the costs totaled \$831,000. The trial court rendered judgment for \$700,000 in damages based on the contractor's testimony that, had he known the truth, he would have bid \$1.3 million for the job. This Court, however, rejected a computation of damages based on what the contractor otherwise would have charged, noting that such evidence established neither the benefit-of-the-bargain actually made, nor the out-of-pocket loss the contractor actually sustained from the higher than expected costs. Rather, the Court observed, such evidence was "based on an entirely hypothetical, speculative bargain that was never struck and would not have been consummated."<sup>8</sup> It is a leap of faith for the Court to say today that the *Formosa Plastics* statement that "this doubling of Presidio's bid is entirely speculative because there is no evidence that Presidio would have been awarded the project if it had made a \$1.3 million bid"<sup>9</sup> means that "if there is evidence of the bargain that would have been struck had the defrauded party known the truth, there can be a recovery for benefit-of-the-bargain damages."<sup>10</sup>

*Formosa Plastics*, as a matter of law, forecloses a damage award based on what the producers

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<sup>7</sup> See *id.* at 49-50.

<sup>8</sup> *Id.* at 50.

<sup>9</sup> *Id.*

<sup>10</sup> \_\_\_ S.W.3d at \_\_\_.

would have charged if they had known Conoco could get the Lone Star price for their gas. Rather, if the producers are entitled to damages, it is for out-of-pocket damages, which are based on the difference between the value of the thing parted with and the value received. In short, the producers were damaged if the gas they sold to Conoco was worth more than what Conoco paid them for it. And in this context, the appropriate measure of the gas's worth is its fair market value, which would be the price the gas would have sold for "when it is offered for sale by one who desires, but is not obliged, to sell, and is bought by one who is under no necessity of buying it"<sup>11</sup> – not the price that the producers might hypothetically have secured had they known their gas was going to Lone Star.

Stated another way, the producers suffered no damages if Conoco paid them fair market value for their gas.<sup>12</sup> Thus, it was up to the producers to show that they could have gotten a better price from another purchaser but for Conoco's misrepresentations. But the producers point to no evidence that they could have sold their gas for anything more than Conoco paid them. Indeed, they expressly disclaim reliance on any such evidence. Consequently, there is no evidence that the producers suffered any damages from Conoco's misrepresentations.

The Court apparently buys the producers' premise that they are "in a unique market with an asset that was particularly valuable to Conoco."<sup>13</sup> Boiled down, their complaint is that because Conoco misled them about its down-stream sales plan, they were unable to hold Conoco up for a higher price than their gas was worth on the open market. Fraud damages aren't intended to

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<sup>11</sup> *State v. Carpenter*, 89 S.W.2d 194, 202 (Tex. 1936); see also RESTATEMENT (SECOND) OF TORTS § 549(1)(a), cmt. c ("The value of the article is normally determined by the price at which it could be resold in an open market . . .").

<sup>12</sup> See, e.g., *Whitfield v. Klein Indep. Sch. Dist.*, 463 S.W.2d 232, 235 (Tex. App.--Houston [14<sup>th</sup> Dist.] 1971, writ ref'd n.r.e.) (no damages when party induced by alleged misrepresentations to sell property for fair market value).

<sup>13</sup> *Fortune Production Co., et al.'s Response to Conoco's Post-Argument Submission*, p. 4.

compensate for a bargain not made.

Because there is no evidence that the producers could have sold their gas for a higher price than they were induced to sell it to Conoco, they suffered no compensable damage as a matter of law.

I dissent from the Court's conclusion otherwise.

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Craig T. Enoch  
Justice

Opinion delivered: November 30, 2000