In the

Supreme Court of the United States

KERN COUNTY LAND COMPANY)
)
Petitioner,)
) No. 71-1059
vs.)
)
OCCIDENTAL PETROLEUM CORPORATION)

Washington, D. C.
December 5, 1972
December 6, 1972

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KERN COUNTY LAND COMPANY, Petitioner, v. OCCIDENTAL PETROLEUM CORPORATION	No. 71-1059

Washington, D.C.

Tuesday, December 5, 1972
Wednesday, December 6, 1972

The above-entitled matter came on for argument at 2:42 o'clock p.m. on December 5, 1972 and continued for argument at 10:0y o'clock a.m. on the following day, December 6, 1972

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

DAVID R. HYDE, ESQ., 80 Pine Street, New York, N.Y. for the Petitioner

WHITNEY NORTH SEYMOUR, ESQ., One Battery Park Plaza, New York, N.Y. for the Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 71-1059, Kern County Land Company against Occidental Petroleum.

Mr. Hyde.

ORAL ARGUMENT OF DAVID R. HYDE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. HYDE: Mr. Chief Justice, and may it please the Court:

Certiorari has been granted here to consider whether either of two securities transactions of the Respondent, Occidental Petroleum Corporation, constitute sales as that term is used in section 16(b)of the Securities Exchange Act of 1934 of Occidental's better than 20 percent interest in common stock of Petitioner's predecessor, the former Kern County Land Company of California.

The District Court, on Petitioner's motion for summary judgment, held that both of these transactions, the first one being Occidental's sale of an option with respect to such securities, the second transaction being the subsequent exchange of these securities for shares of a convertible preference stock of the Petitioner's parent, Tenneco Incorporated, constituted sales within the meaning of section 16(b). Accordingly, there being no dispute that the shares in question had been acquired by Occidental within the six-month statutory period, the district court entered summary judgment against Occidental in a total amount exceeding $23.5 million.

On appeal to the court of appeals for the second circuit, the court held that neither of these transactions was a sale within the contemplation of section 16(b) and, accordingly, the court directed entry of summary judgment dismissing the complaint although such relief had not even been sought by Occidental in the district court, which had asked the district court for a full trial on the merits.

Turning briefly to the facts, if your Honors please, in May of 1967, pursuant to a tender offer which it had announced on May 8th, Occidental purchased for cash at $85 per share, some 886,000 shares of the common stock of Kern, an amount in excess of 20 percent of the total number of shares outstanding.

By reason of such purchase, Occidental became a statutory insider within the contemplation of section 16(b).

Now, Occidental's tender offer met with opposition from Kern that precipitated a contest for control of Kern. On May 18th, Tenneco made an offer to Kern, to its board of directors, to acquire all of Kern's business in assets in exchange for shares of a new class of Tenneco preference stock.

On May 19th, Kern's board accepted the Tenneco offer, subject, of course, to stockholder approval. That very same day, a Friday, May 19th, 1967, Occidental's president, Dr. Armand Hammer, issued a quarterly report to Occidental's shareholders making reference to the Tenneco offer which has just been accepted by Kern's board. Dr. Hammer, in his report to Occidental shareholders, appraised the Tenneco offer as being worth $105 per share of Kern stock and noted that this would bring an anticipated profit of $18 million to Occidental.

Nevertheless, beginning the very following Monday, Occidental embarked on two courses of action. In the first place, it retained counsel, made demands upon Kern for two seats upon Kern's board of directors, made demand upon Kern for inspection of its list of stockholders and for inspection of a broad range of Kern books and records. Lawsuits were instituted in the San Francisco Superior Court on behalf of Occidental. Its legal papers, noting the possibility of a proxy fight with Tenneco, instructing the need for prompt judicial action if it was to prepare proxy soliciting material and to submit it to the Securities and Exchange Commission for approval.

Simultaneously with the foregoing, Occidental attempted to meet with its prospective adversary, Tenneco. Occidental's executive vice-president, a Mr. Walter Davis, telephoned Tenneco's chairman, a Mr. Gardiner Symonds, requesting a private meeting with him. Such a meeting could not be arranged until the Memorial Day holiday, May 30th, when the two gentlemen met at Mr. Gardiner Symonds home in Houston, Texas. At that occasion, according to Mr. Davis' own deposition testimony, he walked in and told Mr. Symonds that he had been authorized by Occidental's president, Dr. Hammer, to discuss with him Tenneco's possible purchase of Occidental's 20 percent position in Kern.

This initial meeting was followed up two days later by further meetings in New York at which both of the parties were represented by counsel. At this time, Occidental's counsel proposed that instead of an outright purchase of Occidental's shares by Tenneco -- which, of course, would have given rise to an open and shut 16(b) claim -- the parties instead enter into an option agreement under which Tenneco would purchase from Occidental an option on its 20 percent Kern holdings exercisable six months plus one day after the closing date of the Occidental tender offer, the exercise price to be $105 per share, the very same price which Dr. Hammer had recently announced to Occidental shareholders as being the one which would bring Occidental an $18 million profit.

In return, Occidental was to receive a so-called "premium" of $10 per share, nearly $9 million in all, payable immediately, cash in hand, which would be credited against the exercise price.

Such terms were agreed to and a written option agreement, which is set forth in the Appendix at page 129A --

Q Is that just part of argument, or is it part of the facts as to why either side was interested in entering into this transaction you just described?

MR. HYDE: Your Honor, I believe that there is no dispute as to Occidental's wanting to get out of its position in Kern. Once it had --

Q On the other hand, why didn't it just wait? It couldn't get rid of its stock for six months, anyway.

MR. HYDE: That is correct, your Honor.

Q Why didn't it just wait?

MR. HYDE: That, you will have to ask Occidental counsel.

Q It is your position that I am interested in.

MR. HYDE: My position is that it wanted its money right away. It wanted a sure and it didn't want to take the chance.

Q It didn't get it. It got only $10 million.

MR. HYDE: Well, it got the remainder six months and one day later. Ultimately, of course --

Q Yes, but it didn't have it meanwhile. So why did it enter into the option agreement at all?

MR. HYDE: Well, I believe that --

Q Did it need $10 million that badly or not?

MR. HYDE: I don't know, your Honor, but $10 million is a lot of money.

Q Well, why would Tenneco do it, then?

MR. HYDE: Well, Tenneco was, of course, anxious in avoiding this proxy fight which was threatened by Occidental. It had no desire to engage in such a contest with Occidental. It was, in effect, buying peace by buying out a possible competent.

Q And even to the extent of paying $10 million now and either having to give that up or paying the market price that it agreed to?

MR. HYDE: That is correct, your Honor. It paid $9 million.

Q That was actually a premium, wasn't it?

MR. HYDE: Well, really, it was to be applied on the purchase price, to be credited ultimately against the $105 per share purchase price.

Q So why do you call it a premium?

MR. HYDE: Well, your Honor, that is a word that is sometimes used in connection with these options in the put and call market. I am afraid I have gotten into the habit from Occidental's papers. When a put or call is sold, the amount which changes hands at the time of the execution of the agreement is commonly called the premium. It could also well be regarded as a downpayment.

Q Well, it turned out to be, didn't it?

MR. HYDE: Yes, it did.

Q In terms of the market price at the time the option was closed.

MR. HYDE: At the time that the option was closed in December, the price of the shares was approximately $95 so that Occidental was making a $20 profit by reason of having entered into the option agreement back in June as opposed to the approximately $10 per share profit it would have made if it had waited the six months' statutory period and sold the shares in December.

Q Down payment isn't entirely accurate here, though, since the seller didn't have the right to demand any balance, did he?

MR. HYDE: No, the seller could not enforce Tenneco to execute the option, although our position is, Mr. Justice Rehnquist, that, for all practical purposes, this was tantamount to a sale. Tenneco would have forfeited some $9 million already paid if it had not gone ahead and executed the option or rather had its assignee execute the option.

Q Do you contend that because it is so extreme that it is like the lease of a place for $10,000 a month for a year and then a dollar for the 13th month you buy it, so that you look at it and you say, it must be? As I recall, there is some argument here that there was a -- this was not that extreme a situation.

MR. HYDE: Our position is, your Honor, that first of all, our position is that any option sold by an insider within the six-month period comes within section 16(b).

Q It's an option without anything more?

MR. HYDE: Right. Option qua option, our position is that that comes within section 16(b) but to answer your question, we urge alternatively that even if the court is not willing to accept that position, as the court of appeals was not, and holds that an option must be, in truth and fact, a sale, in other words, the economic equivalent of a conventional sale, we say that the facts here are such that the Occidental option should be held to fall within that category.

The facts, in a sense, certainly are extreme, I would say. You have the magnitude of the transaction. I daresay that this is the largest option on a block of stock which has ever been entered into in the history of the American securities laws. The $9 million premium is a lot of money to let go down the drain.

Q How much did the $20 difference make in market price? In the total price, how much?

MR. HYDE: $18 million, roughly. I think it is $17 million 700 and 70,000.

Q Are you saying, Mr. Hyde, that really, when you are dealing in sums of this kind, inevitably the complete transaction had to go through? Is that what you are telling us?

MR. HYDE: Yes, your Honor, certainly.

Q They both might have saved money if they hadn't taken it up, because they had to pay a market price that was $10 million more than what they could have gone on the market and bought.

MR. HYDE: No, your Honor, because the $10 million which had been paid in June, call it what we will, a premium or a downpayment, for want of a better term, because that $10 was to be credited against the $105 exercise price, the actual out of pocket exercise price in December was $95 per share, which was, at that time, roughly what the stock was selling for, so that --

Q Yes, but they weren't making much money anyway, were they?

Q Mr. Hyde --

MR. HYDE: Occidental, your Honor?

Q No, Tenneco.

MR. HYDE: No.

Q They didn't -- they could have bought the stock on the market for much less.

MR. HYDE: Well, it would be pretty hard, your Honor --

Q To pick up this kind of stock?

MR. HYDE: -- to pick up this size of a block of stock on the market.

Q Without pushing the market way up.

MR. HYDE: I am sure it would have had an inflationary effect, yes.

Q Mr. Hyde, the option would have had to have some consideration before it would have been enforceable, would it not?

You referred to it as a premium or the downpayment on the option. If the downpayment had been zero, the option would not have been enforceable, would it?

MR. HYDE: Well --

Q What are the considerations?

MR. HYDE: I don't know what the uniform commercial code provides in that respect, your Honor. If there were no money paid in return for the option --

Q No consideration.

MR. HYDE: It would be sort of a unilateral offer to sell at some future time. Now, possibly that would be enforceable under some of these current provisions of the code. I am afraid I don't know the answer.

Q Well, what I am leading up to is whether your point is, when you suggest that this, in effect, was tantamount to a sale, assuming your basic position is not accepted, are you basing that thought on the amount of the downpayment? Suppose it had been $500,000 instead of nearly $9 million?

MR. HYDE: Well, then, I wouldn't have such a good argument, your Honor. I don't base it entirely upon that, of course. We have other factors here besides the magnitude of the transaction, the $9 million payment.

At the time that this option agreement was exercised -- I'm sorry, was executed in June, Occidental delivered a proxy with respect to the shares in question authorizing its entire block of its 886,000 and its 20 percent interest in Kern to be voted in favor of Tenneco's acquisition of Kern. Although, on May 31st, two days before, in the midst of the negotiations, Occidental had filed further papers in its California lawsuits stressing the possibility of a proxy fight verifying those papers, it now, given the option in hand, issued a press release saying that it had decided not to oppose the Tenneco offer.

Its lawsuits were dismissed. Its demands for two seats on Kern's board were dropped. Nothing more was heard of it so that we say, given all of these circumstances, it would appear in our view beyond peradventure of doubt that Occidental itself regarded this option agreement as a disposition of its beneficial interest in Kern stock.

The position we take with respect to this option, as

I have already indicated, is that any sale of an option by an insider within the six months' statutory period, must be deemed to be encompassed within section 16(b) if that statute is to be given its full force and effect.

In the first place, this is not a case in our view where there is any problem of statutory interpretation, any need for any so-called "broad" or "liberal" interpretation.

MR. CHIEF JUSTICE BURGER: We'll resume there in the morning, counsel.

MR. HYDE: Thank you, your Honor.

(Whereupon, at 3:00 p.m., the court was adjourned until the following day, December 6, 1972, at 10:00 o'clock a.m.)

MR. CHIEF JUSTICE BURGER: We will resume arguments in No. 71-1059. Mr. Hyde, I believe you have some time remaining.

MR. HYDE: Thank you. Mr. Chief Justice and may it please the Court:

With the Court's permission, let me attempt to sum up briefly with respect to the option point and then turn to the exchange of securities issue.

As I indicated yesterday and as was more fully set forth in our brief, we maintain that the Occidental option and issue here meets the test of being in truth and in fact a sale which was established by the court of appeals. First and foremost, however, we urge that any sale of an option by an insider within the six months' statutory period should be considered a sale. There is, first of all, in our view, no question as to the statutory language. As the opinion below acknowledged, the definitions set forth in the 1934 Act of Sale in section 3(a), read literally, would encompass the insider's sale of an option. Furthermore, if the test is the pragmatic or subjective one, whether or not the transaction lends itself to the speculative abuse which the statute is designed to prevent, we would submit that there can be no question here that the insider's short swing sale of an option meets that test.

As the court of appeals for the Seventh Circuit in a recent decision in Bershad against McDonough stated, and I quote, "The insider's sale of options in his stock is well adapted to abuse of inside information. The sale of such purchase rights provides an easy vehicle for the use of inside information in extracting profits from the stock itself." That, in our view --

Q The discussion in the Bershad case was at least arguably a spurious option, a so-called "deep in the money" option?

MR. HYDE: Yes, your Honor, the court so filed.

Q And different, therefore, from the option in this case?

MR. HYDE: Well, we maintain that we would meet that test, your Honor, that the option in our case, for all intents and purposes, was virtually identical to the Bershad option. We say that that test is met. However, the language that I just quoted from the Bershad opinion is of a general nature which relates to options per se, not to the specific option that it had before.

Q But the actual decision did involve an option that was really, in fact, a sale because it was a so-called "deep in the money" option, wasn't it?

MR. HYDE: Yes, although I don't believe that phrase was used in the court of appeals' opinion. I think that there were many factors in the Bershad case, the conveyance of the proxy which we also have here, the premium and so on.

Your Honors, in our view, section 16(b) requires the statutory insider either to abstain completely from any securities transaction in his company's stock over a six-month period or else surrender any profits that he may have realized by reason of such transaction.

Here we have Occidental voluntarily, of its own initiative, three weeks after it assumed the status of a statutory insider, seeking out Tenneco and proposing the sale of an option on terms which yielded it, Occidental, an immediate cash in hand payment of nearly $9 million ultimately and $18 million profit.

We submit that such a transaction, in and of itself without any further fringe benefits that may be conveyed, falls within the statutory definition and contemplation.

Turning now briefly to the question of the exchange of securities, on August 30th of 1967, again well within the six months' statutory period, Kern common stock was exchanged for shares of a TEnneco convertible preference stock. Kern was shortly thereafter liquidated and in accordance with California law.

We maintain that, apart from the option agreement, this exchange of securities constitutes a sale by Occidental within the contemplation of section 16(b).

Again, we submit that there is no problem with respect to the statute. The courts have frequently held that an exchange of the securities of one company for those of a completely different company constitute a purchase or sale of such securities under the 1934 Act. This Court itself has so held in a section 10(b) action, the SEC against National Securities case. Indeed, so far as we can determine, this would appear to be the very first case in which any court has ever held under either the 1933 Act or the 1934 Act that an exchange of securities of one company for those of another is anything other than a purchase or sale of such securities.

Q Mr. Hyde?

MR. HYDE: Yes, sir.

Q The exchange was the result, as I recall, of the sale of assets and liquidation. Is that correct?

MR. HYDE: Yes, that is correct.

Q Would you draw any distinction between that type of transaction and a merger? They are sometimes used interchangeably.

MR. HYDE: I think for purposes of the Act, it makes no difference which form the transaction takes. The result is the same in either event. There is an exchange of securities in the sense that the old security is extinguished and the new security and the successor company is received.

In reaching the result which it did here, the court of appeals appears to have been influenced and impressed by the fact that Occidental acquired the shares in question by means of a tender offer and that it was the losing party in a battle for control of Kern.

The court appears to have felt that it would somehow be inequitable under those circumstances to deprive Occidental of its profits and that such a result, to quote the court below, "Might discourage the making of such offers, such tender offers."

Our position, if the court please, is that no special exemption should be carved out for tender offerors. Indeed, this is exactly the relief which Occidental sought from the Securities and Exchange Commission in the summer of 1967 when it went to the Commission and proposed that the Commission adopt a special rule exempting such tender offerors as itself from the operation of section 16(b).

We submit that it simply cannot be taken for granted as the court of appeals seems to assume that a defeated tender offeror enjoys no opportunity for speculative use.

Unless each of these cases is to be tried on its individual facts, there is, I suggest, no way of knowing what influence a defeated tender offeror may have had in arranging the terms of the offer. What actual access to inside information there may be, or what special arrangements the defeated tender offeror may make for himself as did Occidental here in seeking out Tenneco and getting from it an option which yielded an $18 million profit.

The court of appeals test would necessarily mean that an ad hoc determination would have to be made in each of these tender offer cases. That, we maintain, would undermine the mechanical quality of the statute which this court recently noted with approval earlier this year in the Reliance Electric case.

Accordingly, we respectfully submit that, separate and apart from the option, the exchange of securities here must also be regarded as a sale of Occidental's beneficial interests. On either theory, the option or the exchange, we respectfully submit that the decision below should be reversed.

Your Honors, I will save the remaining time for rebuttal if I may.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Hyde.

Mr. Seymour.

ORAL ARGUMENT OF WHITNEY NORTH SEYMOUR, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. SEYMOUR: Mr. Chief Justice, and may it please the Court:

It seems to us that what the Petitioner is asking here is for the court to stretch section 16(b) to cover transactions which are neither within its terms nor its purposes and to give the Petitioner a recovery of some $25 million when the transaction does not bear the slightest resemblance to the kind of transactions that Congress was dealing with in 16(b).

Indeed, it would be unconscionable, I submit, to have such a recovery where the very transactions now alleged to be sales are transactions in which the Petitioner had a grave responsibility and a real part. The option, as I will show you in a few minutes, was prepared by counsel for both parties with the understanding that this option was not within 16(b) and dealt with all 16(b) problems properly and the merger to which counsel has replied or the sale of -- or referred to which the sale of assets was one as to which Occidental was a perfectly involuntary party. It was one forced upon Occidental by the other side and, under well-settled authorities, is not a sale.

Now, the statute was before your Honors so recently in Reliance that I shall not labor the purpose and meaning to which your counsel has made very little reference but it was also before your Honor in Blau against Lehman ten years ago, which I had the privilege of arguing and from those two cases it is perfectly evident that the statute is to be read in accordance with its terms and transactions within its terms are subject to its relief and others are not to be brought within its terms by interpretation despite, in those cases, a very moving argument by the SEC which that you ought to stretch it a little bit to pick up those cases.

The aim of the statute was to deal with, as your Honors will recall, was to deal with short-term, sure-thing profits by corporate insiders baaed upon inside information and there is only a very small, narrow group of transactions involved. Those are, purchases and sales within six months. Now, there are many other provisions of the Securities Act that deal with other kinds of problems, but this deals with a very specific problem.

The court below, in a strong and comprehensive opinion by Chief Judge Friendly, held that there was no evidence of abuse, no use of inside information, that these transactions were not sales and, in respect to the option, he was there following the decision in Silverman against Landa, rendered ten years before in that court and he distinguished the Bershad case, which I'll come back to, as a case depending on the fact that there there was not an option but a sale and the same disposition was made with respect to the exchange offer where the same case relied on by counsel, the Newmark case in the Second Circuit, was clearly distinguished.

Counsel has not said that in argument, but it is all over the brief that this transaction should be regarded just as if, when Occidental got its Kern stock, it sold the Kern stock and bought Tenneco stock. But this is not a "just as if" statute. This requires the purchase and sale of the same security in order to be within the same statute or its equivalent.

Now, I think I must say a word about the facts because counsel has, in the short time available, of course, rather related the nature and the bitterness of the contest that was involved here.

Occidental, having first tried to find out if Kern was at all interested in the merger and finding that it was not, made a tender offer -- made a tender offer -- was your Honor going to ask a question? I'm sorry.

Q No, that's all right.

MR. SEYMOUR: Made a tender offer on May 8th, advertised on May 9th, for 500 shares of Kern stock at $20 over the market. The market was then about 63.5 and this price was $58 including the broker's commission.

By May 10th, an identifiable date which is not relevant here, on that day, 500,000 shares had come in. And so Occidental decided to extend the offer and on May 11th, they tendered for another 500,000 shares and, pursuant to that offer, the total that had come in in the end was somewhere around 885,000 shares.

When Kern learned of the offer, it immediately went into action to use every weapon at its command and its friends to try to block this tender offer and it adopted, on May 8th, the very day of the announcement, a resolution of the directors to oppose. On May 10th it sent a letter to all stockholders suggesting that they should not tender. Immediately after, on May 11th, it sent a telegram to all stockholders urging them not to tender. On May 10th or 11th, although it had had no previous suggestions of merger except from Occidental, it got ahold of Tenneco and suggested that they come in and help provide a merger, a so-called "defensive merger."

Tenneco was then given access to every record of Kern, things that Occidental never got, all the inside information and as a result of all that, by May 19th, Tenneco had decided to make an offer which was to provide a non-convertible preferred stock which would be paid over in exchange for the Kern assets to the Kern stockholders on a share-for-share basis and that offer was announced.

Now, just to sort of show the atmosphere between the parties, Occidental apparently got some wind of the fact that something like this was happening and called them up and said, what is the tender offer and they said, read about it in the newspapers and that was the relationship between these parties and about as far from being an inside relationship as you can imagine.

Lehman Brothers, who was Occidental's financial advisor, when it learned of this offer, thought that the value of the Tenneco stock would be about $105. Now, it is perfectly clear, and the court below said there is not a word in this record to suggest that there was any inside information when these offers were made by Occidental about the situation in Kern or about this proposed merger which was secret and only learned about on May 19th.

Well, that brings us up to May 19th and here is Occidental with a very large investment. Tenneco's offer has quashed its tender offer so that only a few hundred shares came in after that and so that was the end of the tender offer and the hostility which was shown by Kern's management continued. Occidental naturally wanted to try to get a look at the books which it was entitled to do under California law which specifically provides the right of access to the corporate books and demanded a right to look at the books and Kern said, what is your reason? And they responded and then Kern said, we still won't let you look at them. Go to court. And so a couple of mandamus actions had to be brought.

In the end, toward the very end of May, some lawyers and others from Occidental were allowed to look at the books which any stockholder had a right to get and which they had to fight to get. Now the court below says this is not any basis for assuming that they saw anything special that any other stockholder would not have.

By about May 30th, Occidental had decided that it could not successfully oppose this merger. The only way it could have done it was to make a better offer, which it couldn't afford to make and as far as a proxy fight was concerned -- and there is some suggestion in the papers which Kern forced out of Occidental in order to give a justification for looking at these records which it refused to let them see otherwise -- that they were thinking of the possibility of a proxy contest. They decided they could not have a proxy contest. Obviously, you couldn't have a successful proxy contest when the offer that was outstanding, which was to be approved for a merger, was $20 better than the offer that had been made. No stockholder in his right mind would give a proxy to the other side under that basis and so, of course, the idea of a proxy fight disappeared.

Now, counsel said yesterday that this option agreement was a result of threats of a proxy fight and I am sorry he said that because that is directly contrary to the record. The record -- and we deal with those portions of the record on pages 11 and 12 and 15 of our brief -- show that the principals did not consider that there was a threat of a proxy fight, that no such threat had been made and in the pleadings in the case and in the interrogatories there are solemn denials that the option resulted from a threat or from any desire to appease Occidental and I think that is completely out of the case, but if it wasn't, it wouldn't make any difference because whether the option was the result of a threat or something else wouldn't make it a sale if it wasn't otherwise a sale.

Now, what happened was that on May 30th, Occidental's vice president got hold of the president of Tenneco and asked if they were interested in acquiring Occidental stock. They said they were but there was obviously a 16(b) problem in connection with the sale and the Occidental man said, well, of course, we don't want to do anything that is illegal. Let's get the lawyers together and see if anything can be worked out.

So, about June 1st, and the option is dated June 2nd, counsel for both sides got together. My distinguished friends on the other side representing Tenneco and Pillsbury, Madison and Sutro representing Occidental, and they spent the morning in research to make sure they were on sound ground and then they decided that a long-term option under the existing state of the law was an appropriate way to deal with the problem of a stock acquisition without having a sale which would trigger the section 16(b) and so the option was drawn and it was a long-term option, an option which would not be exercisable for more than six months after the last purchase in connection with the tender offer. It provided that it couldn't be acted upon for more than six months and might run as long as 14 months. Meantime, that Occidental would be under the extraordinary burden of having to hold on to the stock which option orders ordinarily are not under a burden to do unless it is expressly provided for and that the option, that if the merger had not gone through by July 31, 1968 the premium --- which I'll mention in a moment --- would be returned. And it is perfectly clear in all those discussions that the premium was not regarded as a down payment. A down payment is something that you make when you are obligated to make further payments. A premium is something which is paid to get the option and you are under no further obligation unless the option is exercised.

Now, as Mr. Justice Brennan pointed out, a premium is an ordinary aspect of an option transaction and you can see it in the New York Times every day, "call options premium so-and-so" and here,in the course of this discussion by the lawyers, a call was made to a leading New York investment firm and they were asked what this premium was on a stock of this kind at this price and the reply was, somewhere between \$9 and \$12 a share and they agreed on \$10 a share at the lower end as the premium and there was not any debate or argument about that. That was accepted as the premium and that is the way the figure got into the agreement and that is the way the premium was arrived at.

Q And that was $10 a share, paid to Occidental --

MR. SEYMOUR: Yes.

Q -- for the right to purchase the shares --

MR. SEYMOUR: At a future date.

Q -- at a future date at what price?

MR. SEYMOUR: At -- the option price was $105 which was the price that Lehman Brothers had fixed as the probable value --

Q Of the Tenneco shares?

MR. SEYMOUR: Yes and the effect of this was that the actual exercise price was $95 because the option -- the premium could be credited to the purchase price if the option was exercised.

Q And what was the then market value?

MR. SEYMOUR: The then market value was $94.75 a share so that the knockdown price was almost exactly on the nose of market value and this is the test of whether or not you have got a deep-in-the-money option as they had in Bershad or whether you have got a normal option. If you have a normal option, the option price is about market. The premium is over market and I'll come back in a little bit to the consequences.

Q What was the market price for the option?

MR. SEYMOUR: About $95 a share.

Q The premium then covers the risk that the -- that is run by the possibility of change in the market during the period of the option?

MR. SEYMOUR: Yes, it was an opportunity to get an option exercisable in more than six months compensating the optionor for his making available that opportunity and he here assumed many other obligations such as holding the stock which he ordinarily wouldn't have to do and an obligation to return the premium if the merger didn't go through.

Q Now, in this context, he probably would hold it, wouldn't he?

MR. SEYMOUR: Well, I think I had better get right into that because you discussed that a little bit yesterday.

Q Well, I am interested in why Occidental entered into the option and was interested in doing it, except to make \$10 million.

MR. SEYMOUR: Well, there are a lot of business reasons which enter into a judgment.

Q Well, that is a pretty good one, isn't it?

MR. SEYMOUR: Well, I really don't think the size of these figures ought to affect the principle involved and counsel yesterday, in a little touch of a jury argument, threw these figures around. I submit they are irrelevant.

Q Well, let me get it straight, was the market price of the stock \$95 when the option was signed and about

$94 when it was exercised?

MR. SEYMOUR: It was about --

Q Is that the way it was? Well, I had been under the impression that the market price went down in the six months.

MR. SEYMOUR: The market price went down and then it went up and after, sometime after the option the market price of the stock went down into the $60's.

Q And what about the two dates when it was signed and when it was exercised?

MR. SEYMOUR: When it was signed, the market price was $94.75. It went down during the period of the option to $88. It went up to $107 and at the time of exercise was somewhere between $94 and $96 so that if you were to take this as -- just as an example because I think if we get away from these large figures it is simpler, if you had a 100-share option at $105 and a $1,000 premium was paid and the option Price was $95 and the market price was $95, there is absolutely no assurance to anybody that that option will be exercised.

If the market price goes down, say, to $80, it would be very foolish, probably, for the optionee to exercise the option. The fact that he has paid his money, that is money gone and it would be absolutely ridiculous to exercise this option instead of going out into the market and buying the stock at $80. So the risk in the market on the optionor of having the sock go down is a very real risk and nobody can foresee and Congress knows that because the six-months' rule was based upon the theory that after six months, the effect of any inside information would be spent and the market would take over.

Q Well, why would Tenneco -- if Tenneco knew that you were, in a way, locked in for six months, why would they pay you $10 million for an option? Was it to head off a proxy fight or what was it? I just don't know what actuated it.

MR. SEYMOUR: Well, the record show s it was not to head off a proxy fight. It flatly shows that the threat of a proxy fight was not an element in this decision. Obviously, with an option, Tenneco had a ceiling on what it would have to pay and if it could tie up a stock, as it did by having an option and having Occidental required to hold it, it kept its options open as to whether it wanted to buy this stock or not and in any event, if the market went up as they thought it would, because the Tenneco people thought the stock was worth $150 a share, they would have a ceiling on what they would have to pay.

Q Right.

MR. SEYMOUR: And from Occidental's point of view, they found themselves partners in an enterprise in which they had no interest. Occidental didn't have any interest in becoming a large stockholder of Tenneco. Tenneco is a conglomerate and they were not very welcome there and it isn't much fun to be a stockholder in a company where they don't want you around and they won't even let you see the books and so, from both points of view there was an interest in entering into this option.

But he point I want to make to your Honors is, and you won't be able to decide any better than I can, I don't suppose, just what the total wisdom of the business transaction was because of a lot of things that entered into it.

The thing that is perfectly clear is that when the lawyers drew a long-term option, they were drawing a document which, under all the decisions and the rulings of the SEC which I'll come to in a moment, was not a sale and, therefore, the sale would not take place until the option was exercised which was more than six months after the purchase of the stock.

Now, I think perhaps right here I will mention the SEC situation which is in our brief and has evoked no response from my friend. The SEC at the time of this transaction had a regulation which did not require the grantor of an option to register and it also -- the regulations also provided that if a transaction did not have to be registered, it did not give rise to 16(b) liability and that remained the situation and, your Honors, the Reliance case gave weight to the SEC regulations. This regulation is entitled to the same weight and this fully supports the judicial decisions like Silverman against Landa.

In 1972, just for completeness, the SEC modified its regulations, announced it was including additional transactions and said that grantors would have to register options when they became exercisable.

Now, that is our point, an option is not a sale. Nothing happens under an option until it is exercised and that is the time a sale takes place and that is the current state of the SEC regulations.

Now, I am going to hurry along and just say further as to the option, Bershad, which Mr. Justice Stewart inquired about and which my friends wrapped themselves around, a decision in the Seventh Circuit is clearly a decision on its particular facts. There the McDonoughs, on a big block of Cutty Sark which Smelting wanted to acquire, it gave what was on its face an option but provided for a premium -- not like this premium of an amount over market -- but an amount of a premium which cut into the market value so that the likelihood of exercise was increased by that fact.

McDonough and two of his colleagues were directors. They resigned. They gave an irrevocable proxy to the proposed purchaser and there is no doubt at all, I submit, that that was not a genuine option and so Judge Friendly below analyzed it and so it has been generally regarded.

Your Honors, in Reliance in a one-sentence footnote, cited it as if it said that an option was a sale but I assume that in footnotes you don't try to analyze all the facts and I take it that that was not intended to change the character of the disposition.

Now, it is true that in the court of appeals' opinion Judge Cummings, in what I regard as dictum, suggests that options might lend themselves to speculative abuse but our examination of the briefs indicate that that was not argued. It was not presented and there is nothing that would indicate that there was anything before Judge Cummings from which he drew those conclusions and in any event, it didn't deal with the facts in that case and I submit that against the decision in Silverman against Landa, that case should not carry any weight.

Now, as to Silverman against Landa in the light of the Blau against Lehman case, the SEC advised Congress in 1962 about Silverman against Landa and Congress made no change in the statute and I submit that that is strong evidence taken along with the SEC interpretation that nbody quarreled with that interpretation.

Now, just to conclude on the merger point, wich in the court below was the counsel's main point and has now taken second place and I don't know that it should be there at all. It is perfectly clear that this transaction was imposed by Tenneco and Kern, that all stockholders were treated alike. Occidental got no special benefit out of its large stockholding. It falls within those cases where there have been conversions and so on without any control and where the courts have held, after looking at the pragmatic facts, that there can't be any abuse and in those circumstances, to let Tenneco lift itself up by its bootstraps and force that transaction and then say, well, that is a sale seems to me to be most unscionable.

Now, there are two little technical points which I don't want to overlook. This option dealt with nonexistent securities. It was an option for Tenneco to buy securities which were not in existence and Occidental didn't have any insider relationship to Tenneco so if one were going to be very technical about the statute instead of dealing with it broadly as I am trying to do, those were sufficient grounds on which the cases might be distinguished anyhow.

Now, counsel says that Occidental, in 1967 approached the SEC for an exemption and that is true. This was during the period of brief good feeling between the companies when Tenneco and Kern indicated they would try to help get an exemption in connection with this merger and the SEC for reasons of its own, after initially indicating they might do it, decided they might do it and I take it, as the court below did, that this is probably due to the fact that the Williams Act was then pending and the SEC was going to deal with tenders on a broader basis, as Congress ultimately did, and in the opinion below, Judge Friendly says that counsel made no point of that and sought to draw no inference from it and the court did not and I submit that neither should you.

I regard that as one of those inspired efforts to get administrative justice done which sometimes fails and then you have to come to the courts and that is where we are.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Seymour.

Mr. Hyde, you have two minutes left.

REBUTTAL ARGUMENT OF DAVID R. HYDE, ESQ.

MR. HYDE: Well, if I may jsut try to make one point then, your Honor. The question has been asked again as to the reason for this option and there I would emphasize what the reasons were not. Typically, an option is entered into for some economic reason. The purchaser does not have the cash necessary to consummate the transaction. He takes out an option to see if he can raise the money. The purchaser may want to see if he can acquire other property of a like nature, so he takes out an option.

This option has absolutely none of those economic criteria that underlie the normal option. This option was entered into for one reason and one reason only, to try to get around section 16(b) in circumstances where Occidental wanted to sell out its position but knew that that would give rise to an open and shut or, as the court below said, "garden variety section 16(b) claim."

Reference has also been made by Mr. Seymour to an understanding --

Q They did get all their money, didn't they?

MR. HYDE: They got $9 million on the spot. They got the rest of the money in December when the option was exercised. Ultimately they got the money they were looking for, the $18 million profit, all of which, we maintain, is subject to recovery under section 16(b).

Q What would have happened if the market had had a different turn?

MR. HYDE: Well, if --

Q Down to $60 per share.

MR. HYDE: -- hypothetically, and we say this as a remote possibility, the stock had plummeted into the sixties, I would assume that Occidental would not have made the $18 million profit. They would have retained only the $9 million that they received back in June. But our point on that, our answer to that, your Honor, is that it makes no difference under section 16(b) if, given some remore, unforeseen turn of events,the deal which the insider made turns out not to be as beneficial for him as he expected it to be. The statute, in our view, requires that any profit realized, as the precise phrase in the statute, any profit realized be recoverable under section 16(b) action and our position is that where, as here, profit is, in fact, realized, the chance that it may not have been realized under some unforeseen hypothetical is irrelevant.

Thank you, your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Hyde.

Thank you, Mr. Seymour.

The case is submitted.

(Whereupon, at 10:49 o'clock a.m., the case was submitted.)