

# PENNZOIL V. TEXACO, TWENTY YEARS AFTER: LESSONS FOR BUSINESS LAWYERS

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## Introduction

On November 19, 1985, a state court jury in Houston, Texas returned a verdict against Texaco, Inc., in the amount of 10.53 billion dollars plus prejudgment interest.<sup>1</sup> This was the largest civil verdict in history,<sup>2</sup> and it arose not out of a mass disaster but from a business deal and the judgment calls lawyers made in the course of that deal. As we approach the twentieth anniversary of the verdict, it is a good time to look back at the case and see what lessons business lawyers can learn from the case and from the deal that gave rise to the case.

The first part of this article is an account of the transaction and the resulting lawsuit, selectively taken from the many published accounts.<sup>3</sup> The second part of the article explains some of the lessons a lawyer can learn from *Pennzoil v. Texaco*—from what the people involved did wrong and, in some cases, from what they did right.

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<sup>1</sup> *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 4 (1987).

<sup>2</sup> KEVIN J. DELANEY, *STRATEGIC BANKRUPTCY: HOW CORPORATIONS AND CREDITORS USE CHAPTER 11 TO THEIR ADVANTAGE* 133 (1992). The lawyer who won the case for Pennzoil says it was ninety times larger than the largest verdict to survive an appeal. JOE JAMAIL, *LAWYER: MY TRIALS AND JUBILATIONS* 138 (2003). Others said it was more than 40 times the largest verdict to withstand appeal. J.S. Bainbridge, Jr., *Texaco's Last Stand*, A.B.A. J., Aug. 1, 1987, 111.

<sup>3</sup> There are three full-length books devoted entirely to the transaction and the subsequent lawsuit: THOMAS PETZINGER, JR., *OIL & HONOR: THE TEXACO-PENNZOIL WARS* (1987); STEVE COLL, *THE TAKING OF GETTY OIL 21* (1987); STEVE COLL, *THE TAKING OF GETTY OIL 21* (1987); JAMES SHANNON, *TEXACO AND THE \$10 BILLION JURY* (1988). In addition to the many newspaper and magazine accounts, the case has received extensive treatment in many other books such as corporate histories and biographies of persons involved in the takeover or the lawsuit.

### I. The Deal and the Lawsuit

Getty Oil was founded by J. Paul Getty, a colorful figure even for the oil business. J. Paul was the son of one of the early wildcatters,<sup>4</sup> and he had taken the measly few million dollars his father had given him<sup>5</sup> and multiplied it hundreds of times, becoming one of the first billionaires.<sup>6</sup> In the late 1950s, Fortune magazine described him as the richest person in America.<sup>7</sup> By all accounts, J. Paul was an unpleasant person with an ego as big as his bank balance.<sup>8</sup> He was famous for saying: “The meek shall inherit the earth, but not its mineral rights.”<sup>9</sup> According to one writer, it was the only joke he ever made.<sup>10</sup>

One of the meek did inherit some serious mineral rights, however. J. Paul had four sons, and three of them self-destructed, largely from the stress of being the sons of J. Paul.<sup>11</sup> This and some other bizarre circumstances left Gordon Getty, the son least like the old man, in charge of the family fortune. One son, Ronald, whom J. Paul had disinherited because his mother had won such a good settlement when she divorced J. Paul, had worked for Getty Oil.<sup>12</sup> But after Ronald made some errors in

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<sup>4</sup> Getty’s father had been the general counsel for an insurance company until, at age 45, he went to Oklahoma to collect a debt for his employer and succumbed to the oil fever. ROBERT LENZNER, *THE GREAT GETTY* 9-10 (1985).

<sup>5</sup> Getty’s father left him \$500,000 in his will, but there had been earlier gifts of stock and money that had been substantial. *See id.* at 34.

<sup>6</sup> *See id.* at 220.

<sup>7</sup> *Id.* at 92, 120.

<sup>8</sup> *See id. passim.* He achieved considerable notoriety when he installed a pay phone in his English estate to keep his guests from running up the estate’s telephone bill. Margot Pitkin, *Oil Billionaire Kept Harem of Beauties: Getty Fueled by Lust, Greed and Stinginess*, DAILY TEL. MIRROR, Dec. 13, 1995.

<sup>9</sup> Euan Ferguson, *Big Money Given With Good Grace*, SCOTLAND ON SUNDAY, Aug. 14, 1994.

<sup>10</sup> *Id.*

<sup>11</sup> *See* LENZNER, *supra* note 4, at 144-149. The former president of one of Getty’s companies, who had had all four of the sons working for him at various times, put it bluntly: “Paul browbeat them to death.” *Id.* at 144.

<sup>12</sup> COLL, *supra* note 3, at 21; PETZINGER, *supra* note 3, at 25, 54. One of J. Paul’s biographers claims that Ronald was not provided for because J. Paul thought he would inherit considerable wealth from his maternal grandfather. LENZNER, *supra* note 4, at 76-77. In any event, Ronald’s exclusion from the

judgment, his oldest brother George convinced the old man to fire him.<sup>13</sup> Another son, Eugene Paul, who later changed his name to J. Paul Getty, Jr., also started out in the family firm, but he too ran into problems and was fired by his father.<sup>14</sup> He joined an international jet set that included Mick Jagger, but he overdid the wild life and became a hopeless drug addict.<sup>15</sup>

George, the oldest son and a very able businessman, worked his way up to the number two spot in the company behind his father.<sup>16</sup> But the stress of dealing with his father's constant badgering became too much for him, and he committed suicide at the age of 43.<sup>17</sup> This left Gordon, who had never shown any aptitude for business. A self-described "absent-minded professor,"<sup>18</sup> Gordon had been forced to leave Getty Oil (again at George's insistence) after a series of unfortunate incidents, some of them involving his failure to remember what he had done with company cars.<sup>19</sup> Thereafter, Gordon devoted himself to composing music in the soundproof music room he had built in his 25-room San Francisco mansion.<sup>20</sup>

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trust resulted in several lawsuits. *Id.* at 77. J. Paul's mother left Ronald \$200,000 in her will as partial compensation for the way J. Paul had treated him. *Id.* at 79, 148.

<sup>13</sup> PETZINGER, *supra* note 3, at 58. After several unsuccessful attempts to start his own business, Ronald began suing his brothers and others who had received portions of the family fortune. Eventually, he was able to obtain a settlement which gave him close to \$10 million. COLL, *supra* note 3, at 23-24.

<sup>14</sup> COLL, *supra* note 3, at 96.

<sup>15</sup> See LENZNER, *supra* note 4, at 159; PETZINGER, *supra* note 3, at 58-59. Eugene Paul's life got off to a bad start. He was born three months before his parents married. LENZNER, *supra* note 4 at 42. When J. Paul finally married Eugene Paul's mother (his fourth wife), he had not yet received a divorce from his third wife. *Id.*

<sup>16</sup> *Id.* at 161. In addition to being executive vice-president of Getty Oil, George was a director of Bank of America, a director of Douglas Aircraft—one of the nation's largest aircraft manufacturers—and a chief fundraiser for the Los Angeles Philharmonic. *Id.*

<sup>17</sup> See *id.* at 161-67.

<sup>18</sup> See PETZINGER, *supra* note 3, at 75.

<sup>19</sup> *Id.* at 33-34.

<sup>20</sup> See COLL, *supra* note 3, at 20.

Gordon's power stemmed from a deal his grandmother had struck. In actuality, J. Paul hadn't been as rich as he claimed to be. Early in his career, he had attempted to take over a large oil company, Tidewater Oil. For this project, he needed the financial support of his mother, who had inherited most of her husband's wealth.<sup>21</sup> J. Paul's mother was afraid her driven son would blow the family fortune in his wheeling and dealing, so she balked at loaning him the money for the venture. She ultimately relented, but only on the condition that J. Paul put most of the family fortune (his as well as hers) into a trust.<sup>22</sup> She set up the trust so that upon its termination all of the trust assets would be distributed to J. Paul's grandchildren or their descendants. In the meantime, only the income from the trust assets would be available to the family members.<sup>23</sup> This meant that most of the billion dollars J. Paul made during his career was beyond his control. He couldn't spend it. All he could do was to spend the income it earned.

Before J. Paul died, he amended the trust so that upon his death the trust would be managed by three trustees: Gordon, whom J. Paul then considered the least-competent of his surviving children; Lansing Hays, J. Paul's longtime lawyer and right-hand man; and Security Pacific National Bank, then the second-largest bank in California.<sup>24</sup> But when J. Paul died, the bank refused to serve, passing up a \$3 million a year fee for fear of the potential liability. The trust was so big that a judgment against the bank for mismanaging it could destroy the bank.<sup>25</sup> This meant that when Hays died, Gordon was left in sole charge of the trust, which owned 40% of the stock of Getty Oil Company.

Twelve percent of the stock of Getty Oil Company, that part of his fortune that J. Paul had been able to keep out of the trust, belonged to the J. Paul Getty Museum

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<sup>21</sup> Most of George Getty's \$10 million dollar estate went to his wife Sarah, J. Paul's mother. LENZNER, *supra* note 4, at 34.

<sup>22</sup> See LENZNER, *supra* note 4, at 49. Among other things, the trust prohibited the trustee (J. Paul) from investing the trust's money in any oil companies in which the trust did not already own an interest. See COLL, *supra* note 3, at 15-16.

<sup>23</sup> See LENZNER, *supra* note 4, at 50-51.

<sup>24</sup> See COLL, *supra* note 3, at 16; PETZINGER, *supra* note 3, at 82. One writer says it was George's death that led J. Paul to amend the trust in this way. COLL, *supra* note 3, at 16.

<sup>25</sup> PETZINGER, *supra* note 3, at 82-83; see also COLL, *supra* note 3, at 17 (describing efforts to persuade Security Pacific to accept appointment).

of Malibu, California. Like many rich people, J. Paul had become an art collector,<sup>26</sup> and in his later life he decided to build a monument to himself at the taxpayers' expense.<sup>27</sup> (The museum qualified as a charitable foundation, making Getty's gift to it exempt from estate tax. If he had not left it to charity, most of his estate would have gone to the feds in estate tax.) J. Paul started the project before he died, commissioning the building of what one writer called "a garish \$17 million monstrosity full of proto-Classical geegaws."<sup>28</sup> Most of J. Paul's estate went to the museum, making it the richest museum in the world. At the time the estate was probated, the museum's inheritance was worth \$1.2 billion.<sup>29</sup> (When the museum's stock was sold to Texaco, Inc. in the transaction described below, the museum became the second-wealthiest charitable organization in the world, behind only the Ford Foundation.)<sup>30</sup>

When Gordon became the sole trustee of his family's trust, he didn't want to be involved in the day-to-day management of Getty Oil.<sup>31</sup> But as he observed the company, and in particular the price of its stock, he came to the conclusion that the people who were running the company weren't doing a very good job.<sup>32</sup> Gordon was not just concerned about the effect of this mismanagement on his own wealth; he also felt a responsibility to the other beneficiaries of the trust. So he started looking for ways to increase the market price of the company's stock, which was

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<sup>26</sup> In his typical fashion, he had begun his collection by finding bargains, buying at depressed prices in the 1930s. Even then, he had chosen to concentrate on the types of works that most collectors overlooked, which enabled him to pick them up at still lower prices. LENZNER, *supra* note 4, at 59-60.

<sup>27</sup> Getty's personal assistant described his motivation: "He wanted to make sure his name would be perpetuated as long as there was civilization." Norris Bramlett, *quoted in* LENZNER, *supra* note 4, at 4.

<sup>28</sup> PETZINGER, *supra* note 3, at 88. It was said that the museum was designed like a Roman palace to indulge J. Paul's belief that he was a reincarnation of Hadrian. Ferguson, *supra* note 9.

<sup>29</sup> PETZINGER, *supra* note 3, at 88. Under federal tax laws, the Getty Museum was required to spend almost \$54 million dollars a year. This was more than nine times the acquisition budget of England's National Gallery, and it had the effect of driving up art prices throughout the world. RUSSELL MILLER, *THE HOUSE OF GETTY* 315 (1985).

<sup>30</sup> PETZINGER, *supra* note 3, at 268.

<sup>31</sup> COLL, *supra* note 3, at 37-38.

<sup>32</sup> BRUCE WASSERSTEIN, *BIG DEAL: THE BATTLE FOR CONTROL OF AMERICA'S LEADING CORPORATIONS* 190 (1998).

then trading at a price far below the value of the company's oil reserves.<sup>33</sup> Although Gordon was a member of the Getty Oil board of directors, other members of management didn't take him seriously, seeing him merely as the Old Man's eccentric son. So Gordon began looking for ways to protect the trust that would not require the cooperation of Getty Oil management.<sup>34</sup>

Gordon consulted Texas oil barons and Wall Street investment bankers, soliciting ideas for increasing the Getty Oil stock price.<sup>35</sup> Pretty soon the word got around that there was internal trouble at Getty Oil.<sup>36</sup> This caught the attention of Hugh Liedtke, the Chairman of Pennzoil Company. Liedtke had always wanted to become a major player in the oil business, but to achieve that goal, he needed much larger oil reserves ("oil in the ground" as they called it in the business).<sup>37</sup> Getty Oil had those reserves.<sup>38</sup> Liedtke calculated that buying Getty Oil was the cheapest way to get the reserves he needed—far better than sending out expensive exploration parties, which might just come up with dry holes. This was ironic in two ways. The idea of buying oil companies to get their reserves (known as "drilling for oil on Wall Street") had been pioneered by J. Paul Getty, and it was his need for his mother's money to do it that had led to the creation of the trust that Gordon now controlled.<sup>39</sup>

Seeing that the stock of Getty Oil was split among the trust, which owned 40%, the museum, which owned 12%, and the public, which owned the remaining 48%, Liedtke (acting on behalf of Pennzoil) made a tender offer to buy 20% of the company's stock at a price of \$100 a share.<sup>40</sup>

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<sup>33</sup> See COLL, *supra* note 3, at 40-56; WASSERSTEIN, *supra* note 32, at 190.

<sup>34</sup> See COLL, *supra* note 3, at 56-66; ARTHUR L. LIMAN, *LAWYER: A LIFE OF COUNSEL AND CONTROVERSY* 240 (1998).

<sup>35</sup> See COLL, *supra* note 3, at 43-49.

<sup>36</sup> See *id.* at 101-18.

<sup>37</sup> PETZINGER, *supra* note 3, at 44.

<sup>38</sup> Getty Oil's reserves were especially attractive because two-thirds of them were located in the United States, rather than in potentially unstable third world countries. COLL, *supra* note 3, at 42.

<sup>39</sup> See *supra* text accompanying notes 21-22.

<sup>40</sup> COLL, *supra* note 3, at 252-57; WASSERSTEIN, *supra* note 32, at 190.

Acquiring 20% of the stock would allow Liedtke to team up with Gordon and throw out the current Getty Oil management.<sup>41</sup> Because the company's stock had been selling for \$80 a share before the tender offer<sup>42</sup> (it had been selling for \$50 a share before Gordon got involved in trying to raise the stock price)<sup>43</sup>, it seemed sure that Liedtke would get his 20%.<sup>44</sup>

Gordon, however, thought he could do better. He and his advisors came up with a plan whereby Pennzoil and the trust would together buy all of the Getty oil shares in the hands of the public and the museum, with the trust ultimately owning four-sevenths of the total shares and Pennzoil owning three-sevenths.<sup>45</sup> Gordon proposed the deal to Liedtke and Liedtke agreed to it. Gordon would be chairman of the company; Liedtke would be chief executive officer and would run the day-to-day operations. They agreed that they would offer the museum and the public shareholders \$110 a share for their stock.<sup>46</sup> Pennzoil's lawyers drafted a five-page Memorandum of Agreement spelling out the terms of the deal.<sup>47</sup> Gordon Getty signed it on behalf of the trust and Hugh Liedtke signed it on behalf of Pennzoil.<sup>48</sup> Harold Williams, chairman of the museum's board of trustees, was asked to sign on behalf of the museum. Williams was being represented in the transaction by Marty Lipton, one of the nation's premier corporate lawyers. Before Williams signed the memorandum, Lipton added language stating that the museum's participation was subject to the approval of the transaction by the Getty Oil board of directors. Lipton's handwritten insert said: "[U]pon condition that if not approved at the Jan. 2 board meeting . . . the museum will not be bound in any way by this plan and will

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<sup>41</sup> See WASSERSTEIN, *supra* note 32, at 190-91.

<sup>42</sup> PETZINGER, *supra* note 3, at 149.

<sup>43</sup> *Id.* at 178.

<sup>44</sup> COLL, *supra* note 3, at 257; PETZINGER, *supra* note 3, at 150.

<sup>45</sup> COLL, *supra* note 3, at 266-67; PETZINGER, *supra* note 3, at 158.

<sup>46</sup> See COLL, *supra* note 3, at 267-82; PETZINGER, *supra* note 3, at 160-61.

<sup>47</sup> PETZINGER, *supra* note 3, at 166-67. The full text of the memorandum is reproduced in Roger M. Baron & Ronald J. Baron, *The Pennzoil-Texaco Dispute: An Independent Analysis*, 38 BAYLOR L. REV. 253, 282-85 (1986).

<sup>48</sup> See *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 785 (Tex. Ct. App. 1987) [hereinafter "Texaco I"].

have no liability or obligation to anyone hereunder.”<sup>49</sup> The memorandum contained a space for a signature on behalf of Getty Oil, indicating that the board of directors had approved the deal. However, no one ever signed for Getty Oil.<sup>50</sup>

To keep Gordon from changing his mind, something he was notorious for doing, a Pennzoil lawyer drafted a letter for Gordon’s signature. In the letter, Gordon agreed that if the Getty Oil board of directors did not consent to the proposed transaction, he would go ahead with it anyway, attempting to get the museum to join with him in using their combined 52% of the stock to oust the board of directors.<sup>51</sup> Gordon signed the letter, but only after adding language stating that he would not take action against the board of directors if doing so would violate his fiduciary obligations.<sup>52</sup>

The Getty Oil board of directors had scheduled a meeting for the evening of January 2. At the meeting, Gordon and his advisors (lawyers and investment bankers) presented their proposal for the tender at \$110 a share. They said that the offer would be good only as long as the board meeting was in session. If the board adjourned without accepting the offer, the offer would terminate.<sup>53</sup> This did not sit well with the board. The board was indignant that it was being asked to consent to a deal involving billions of dollars without the time to think about it and study it in detail. They also thought the price was too low.<sup>54</sup>

In transactions of this sort, it is customary for the board to hire an investment banking firm to render a “fairness opinion,” in which the investment banking firm (supposedly expert in the valuation of companies) tells the board that the company is not being sold for less than it is worth.<sup>55</sup> A major purpose of such opinions is to give the directors some protection against suits by shareholders alleging that the directors

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<sup>49</sup> See PETZINGER, *supra* note 3, at 169 (emphasis in original).

<sup>50</sup> See PETZINGER, *supra* note 3, at 191.

<sup>51</sup> See Baron & Baron, *supra* note 47, at 281 (setting forth the letter in full).

<sup>52</sup> PETZINGER, *supra* note 3, at 170.

<sup>53</sup> PETZINGER, *supra* note 3, at 174.

<sup>54</sup> COLL, *supra* note 3, at 295-96.

<sup>55</sup> See Robert J. Giuffra, Jr., *Investment Bankers’ Fairness Opinions in Corporate Control Transactions*, 96 YALE L.J. 119, 120 (1986).

violated their duty to the shareholders by failing to get the best price for the company.<sup>56</sup> Many people think these fairness opinions are shams and that the investment bankers come up with whatever numbers they need in order to let their clients do the deal.<sup>57</sup> But this time the board's investment banker refused to give a fairness opinion because he said the price really was too low. (Whether Diogenes found his man or whether there were other motives involved, I'll leave for others to decide.)<sup>58</sup> The trustees of the museum, however, were able to get their investment bankers to opine that the museum would be receiving a fair price if it sold its shares for \$110 each. In any event, the Getty Oil board rejected Gordon's proposal by a vote of ten to five.<sup>59</sup>

The meeting dragged on, with various members of the board proposing other alternatives for selling the company and Gordon finding reasons to oppose them all.<sup>60</sup> Shortly after 1:30 a.m., one of the directors, Harold Stuart, began to wonder why Gordon was against all the alternative plans even though many of them would benefit the trust. Stuart asked Gordon point blank if there was a secret deal with Pennzoil. Gordon consulted his lawyer, and the lawyer then read the board the letter containing Gordon's promise to try to replace the board if they didn't go along with the Pennzoil deal.<sup>61</sup> The directors were outraged.<sup>62</sup> But at 2:30 a.m., after some acrimonious discussion, the board voted to make a counteroffer, proposing to accept

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<sup>56</sup> See *id.* at 123.

<sup>57</sup> See, e.g., Giuffra, *supra* note 55, at 123 (discussing shopping for favorable opinions); Robert A. Prentice & John H. Langmore, *Hostile Tender Offers and the "Nancy Reagan Defense": May Target Boards "Just Say No"? Should They Be Allowed To?* 15 DEL. J. CORP. L. 377, 469 (1990).

<sup>58</sup> One writer speculates that the banker's motives may have included, among others, (1) basic integrity, (2) protecting the reputation of his firm, or (3) killing the deal in order to earn a larger fee on a sale of the entire company. COLL, *supra* note 3, at 293.

<sup>59</sup> PETZINGER, *supra* note 3, at 175. As with many other aspects of the transaction, it is not clear what the facts really were. One writer suggests the actual vote may have been 9-6, depending on how an ambiguous vote was counted. COLL, *supra* note 3, at 298.

<sup>60</sup> See COLL, *supra* note 3, at 302-05.

<sup>61</sup> See *id.* at 306.

<sup>62</sup> See *id.* at 306-07.

the deal Gordon and Liedtke had worked out if the price were increased to \$120. They then adjourned to reconvene at three the next afternoon.<sup>63</sup>

When Liedtke's representatives told him of the \$120-a-share counteroffer, he was furious. He had been expecting to make a deal at \$110 a share or at most a bit more.<sup>64</sup> To keep the deal from falling apart, Pennzoil's lawyers and investment bankers drew up a couple of counteroffers of their own to present at the afternoon board meeting. But Lipton, the museum's lawyer, had inserted himself into the deal in a role akin to that of a mediator, and he assured them the proposals wouldn't fly.<sup>65</sup> Instead, Lipton proposed a deal whereby Getty Oil's insurance subsidiary would be sold and any proceeds in excess of \$1 billion dollars would be distributed to the selling shareholders of Getty Oil, who would receive these proceeds in addition to the \$110 in cash. Pennzoil and the trust would guarantee that the selling shareholders would receive at least \$5 per share from the sale of the insurance sub and that the money would be received within 5 years.<sup>66</sup> Arthur Liman, the Pennzoil lawyer with whom Lipton was dealing, knew that Liedtke was angry because he felt he was being asked to bid against himself, so Liman refused to convey the counteroffer to Liedtke until it had been formally approved by the board.<sup>67</sup>

When the board reconvened in the afternoon, Lipton presented his proposal. The board's investment banker still refused to give a fairness opinion, contending

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<sup>63</sup> See PETZINGER, *supra* note 3, at 181. The proposal was actually for \$110 in cash and a \$10 debenture. See *Texaco I*, 729 S.W.2d at 785.

<sup>64</sup> See COLL, *supra* note 3, at 314; PETZINGER, *supra* note 3, at 183. There had been talk of giving the selling shareholders some "optics" in addition to the \$110 in cash. In the parlance of the trade, "optics" meant securities that looked good on their faces but had a real value substantially less than their face value, for instance promissory notes payable in the future that bore no interest or bore interest at a rate substantially less than the market rate. See PETZINGER, *supra* note 3, at 183. Such notes would have a market value less than their face value. See ROBERT W. HAMILTON & RICHARD A. BOOTH, *BUSINESS BASICS FOR LAW STUDENTS* 19-28 (3d ed. 2002) (explaining discounting of future payments).

<sup>65</sup> See COLL, *supra* note 3, at 315; PETZINGER, *supra* note 3, at 186-87.

<sup>66</sup> See COLL, *supra* note 3, at 315; PETZINGER, *supra* note 3, at 187. This proposal had originally been made by Pennzoil with the amount being \$3 per share. Lipton told Pennzoil lawyer Arthur Liman that the proposal would not be acceptable to the Getty Oil board but that he thought it would be acceptable if the guaranteed amount were increased to \$5 per share. See COLL, *supra* note 3, at 315-16; PETZINGER, *supra* note 3, at 187.

<sup>67</sup> See COLL, *supra* note 3, at 316; PETZINGER, *supra* note 3, at 187.

that the consideration to the selling shareholders, which everyone seems to assume was the equivalent of a cash payment of between \$112.50 and \$113.00, was too low.<sup>68</sup> But after three hours of discussion, the board voted to accept Lipton's proposal.<sup>69</sup>

What happened next was hotly contested. Pennzoil lawyer Arthur Liman had been waiting outside the room where the board was meeting so that he could convey the result to Liedtke, who had refused to be in the same building.<sup>70</sup> At the trial, Liman testified that when the meeting adjourned, he came into the room where the board had been meeting, and a number of the participants congratulated him and shook his hand, saying things like "Congratulations, Arthur. You've got yourself a deal!"<sup>71</sup> No one representing the trust, Getty Oil, or the museum recalled the congratulations or the handshakes. As one writer put it, "Never . . . would so many handshakes be remembered only by one-half of the clasp."<sup>72</sup>

Later that evening, Liedtke telephoned Gordon at his home. Gordon's wife answered the phone and invited Liedtke over to drink some champagne and toast the deal. Liedtke declined. He had committed himself to a celebration with members of his entourage.<sup>73</sup> But Larry Tisch, a member of the Getty Oil board and a business titan in his own right,<sup>74</sup> did go to Gordon's suite to toast the deal.<sup>75</sup>

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<sup>68</sup>See PETZINGER, *supra* note 3, at 188-89. Assuming monthly compounding, a payment of \$5.00 made five years in the future would have a value of \$3.00 if a discount rate of 10% were used and \$2.50 if a discount rate of 14% were used. See HAMILTON & BOOTH, *supra* note 64, table 2-2 at 24.

<sup>69</sup>See COLL, *supra* note 3, at 319.

<sup>70</sup>See LIMAN, *supra* note 34, at 242.

<sup>71</sup>PETZINGER, *supra* note 3, at 192; see also COLL, *supra* note 3, at 321; LIMAN, *supra* note 34, at 243-44.

<sup>72</sup>PETZINGER, *supra* note 3, at 192. At trial, Pennzoil's trial counsel argued that the handshakes were intended to bind the deal, but in his memoirs, Liman says his real interest at that point was getting into the meeting room to have access to the platters of sandwiches he knew were there. He had not had a chance to eat while he was waiting to hear of the board's decision. LIMAN, *supra* note 34, at 243-44.

<sup>73</sup> See PETZINGER, *supra* note 3, at 193.

<sup>74</sup> See *infra* note 153.

<sup>75</sup> See PETZINGER, *supra* note 3, at 327.

While the businesspeople were celebrating, the lawyers (as usual) went back to work, hammering out the details and drafting the agreement. The PR people prepared a press release, but the Getty lawyers refused to allow them to send it out the media, saying that it mischaracterized the deal. It said that the Getty Oil board had “voted to accept a plan,” whereas the Getty Oil lawyers contended that the details of the plan were to be agreed to in the future. Moreover, the press release said that in addition to the \$110 cash, the selling shareholders would receive \$5.00 a share within five years. In actuality, the shareholders’ additional compensation (known as the “stub”) was tied to the price to be received upon the planned sale of Getty Oil’s insurance subsidiary, and the shareholders might receive more than \$5.00 if a favorable sale could be arranged.<sup>76</sup>

After a lot of hassling, everyone signed off on a new version of the press release.<sup>77</sup> As finally disseminated, the press release said (in part):

LOS ANGELES – Getty Oil Company, The J. Paul Getty Museum and Gordon P. Getty as trustee of the Sarah P. Getty Trust announced today that they have agreed in principle with Pennzoil Company to a merger of Getty Oil and a newly formed entity owned by Pennzoil and the Trustee . . . .

\* \* \*

The transaction is subject to execution of a definitive merger agreement, approval by the stockholders of Getty Oil and completion of various governmental filing and waiting-period requirements.<sup>78</sup>

The next morning, January 4, Geoff Boisi, the Goldman Sachs investment banker who had represented Getty Oil (and refused to give a fairness opinion), delivered his bill for the agreed minimum fee of \$6 million.<sup>79</sup>

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<sup>76</sup> See *id.* at 196.

<sup>77</sup> See COLL, *supra* note 3, at 328-29.

<sup>78</sup> *Texaco I*, 729 S.W.2d at 789; PETZINGER, *supra* note 3, at 198.

<sup>79</sup> See COLL, *supra* note 3, at 332.

About the same time, another investment banker was getting involved. Bruce Wasserstein is one of the great merger and acquisition specialists. In addition to a law degree from Harvard, Wasserstein holds an MBA from Harvard and an advanced degree in economics from Cambridge.<sup>80</sup> He is the author of a definitive history of modern corporate deal-making, an 800-page tome titled *Big Deal*.<sup>81</sup> When Wasserstein heard that an “agreement in principle” had been reached, he understood it, as most Wall Street people would have, as indicating that the parties were trying to work out a deal and that because the Getty Oil board had decided to try to sell their company, they would welcome higher offers. He set out to earn himself a fat fee by finding someone who would make the highest of those higher offers.<sup>82</sup>

Wasserstein’s eagerness to become the guy who had pulled off the biggest corporate acquisition in history (as well, perhaps, as being the guy who earned the biggest investment banking fee in history) didn’t overcome his legal training, so he made it his first order of business to make sure Pennzoil and the Getty interests didn’t really have a binding contract. Marty Lipton, the lawyer who had played such a big part in the negotiations, was a friend of his (networking pays), so Wasserstein called Lipton and asked,

“Is there a deal here?”

“There is no deal yet,” Lipton replied.<sup>83</sup>

Then Wasserstein called another friend, Getty Oil director Larry Tisch, also a veteran of many corporate takeovers.

“Is there a deal here?” Wasserstein asked.

“No, not yet,” was Tisch’s reply.

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<sup>80</sup> See PETZINGER, *supra* note 3, at 201. A “*Wunderkind*,” Wasserstein had entered the University of Michigan at 16 and Harvard Law School at 19. COLL, *supra* note 3, at 345.

<sup>81</sup> Ironically, the Getty Oil takeover gets only two and half pages in this 800-page book. WASSERSTEIN, *supra* note 32, at 189-93.

<sup>82</sup> One writer calculated that the fee of approximately \$10 million Wasserstein and his partner Joseph Perella earned from the deal worked out to an hourly rate of \$126,582. COLL, *supra* note 3, at 375. Collectively, the investment bankers involved in the deal received fees totaling \$47.1 million. See PETZINGER, *supra* note 3, at 239.

<sup>83</sup> See PETZINGER, *supra* note 3, at 202.

“Is there going to be a tender offer? A merger? What is the form of it?”

“Frankly, I don’t know if it’s worked out yet.”<sup>84</sup>

Not realizing the significance that others would place on it, Tisch neglected to mention the fact that he had toasted the deal with Gordon Getty and his wife.<sup>85</sup>

Boisi, Getty Oil’s investment banker, also called some potential bidders, trying to get a higher price for his client.<sup>86</sup> One bidder he called was Al DeCrane, president of Texaco. Boisi told DeCrane: “There was a handshake on price, but there are a lot of other issues and they’re working on a definitive agreement.”<sup>87</sup> Although other oil companies were also interested in Getty Oil, Texaco was the most logical buyer. Texaco needed Getty’s oil reserves. For years, Texaco had been selling oil faster than it could find new reserves to replace it. After a series of failed exploration ventures, Texaco was now in a position where if it did not get new reserves it would run out of oil in eight years.<sup>88</sup>

While this dealmaking was going on, the Pennzoil lawyers were working on the documents, and it was turning out to be a bigger job than anticipated. This deal was especially complex, not just because so much money was involved, but also because there were four parties instead of the usual two. Pennzoil, Getty Oil, the trust, and the museum all had concerns that had to be satisfied. Working out the terms of the stub was especially complex. Pennzoil’s law firm, which was in charge of preparing the first draft of the documents, flew in additional lawyers from Houston.<sup>89</sup> At 8:30 p.m. on Wednesday, January 4, the Pennzoil legal team finally got the drafts to their

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<sup>84</sup> *Id.* Washington Post writer Steve Coll has a version of the conversation that is slightly different but contains the same important phrases. COLL, *supra* note 3, at 347. Other players gave similar assurances. When one investment banker representing Texaco asked Sid Petersen, chairman of the board of Getty Oil whether Getty Oil had a firm contract with Pennzoil and the trust, he replied with a phrase that would often be quoted during the course of the coming litigation: “We do not. The fat lady has not yet sung.” *Id.* at 332.

<sup>85</sup> *See* PETZINGER, *supra* note 3, at 327.

<sup>86</sup> COLL, *supra* note 3, at 332.

<sup>87</sup> *See* PETZINGER, *supra* note 3, at 203.

<sup>88</sup> *See* WASSERSTEIN, *supra* note 32, at 191. *See also* DELANEY, *supra* note 2, at 127-28 (discussing Texaco’s problems with diminishing reserves).

<sup>89</sup> *See* PETZINGER, *supra* note 3, at 204-05.

Getty Oil counterparts, who had expected to have them twelve hours earlier.<sup>90</sup> At this point the Getty Oil lawyers had not only been waiting all day for the documents, but they had also been up most of the previous two nights working on the deal. They decided it was best to go home and get a good night's sleep so they would be fresh when they began their review of the documents.<sup>91</sup>

In the meantime, on the afternoon of January 4, Claire Getty, daughter of Gordon's deceased older brother George, obtained a restraining order from a California court ordering Gordon to refrain from signing "any legally binding documents" until a hearing was held the next day. Claire had long been concerned about Gordon's management of the trust, and she wanted time to study the Pennzoil deal before allowing it to go forward.<sup>92</sup>

Also on the afternoon of January 4, John McKinley, the Chairman of Texaco, called John Weinberg, Geoff Boisi's boss at Goldman, Sachs (Getty Oil's investment bankers). Weinberg assured McKinley that Getty Oil was not bound and that it was in fact seeking higher offers.<sup>93</sup> Hearing that, McKinley began looking for an investment banking firm he could hire to arrange a deal with Getty Oil. When his first choice wasn't available, McKinley hired Wasserstein's firm, First Boston. Wasserstein arrived at Texaco headquarters by chartered jet at four o'clock the next morning.<sup>94</sup> At about the same time, Marty Lipton arose early to begin reviewing the draft agreement on behalf of the museum. Before the sun was up, Wasserstein had called him to say he had a new deal in the works, one that would get the museum more money than the Pennzoil deal.<sup>95</sup>

For their part, the Getty Oil lawyers spent the day of the 5th reviewing the draft agreement and fielding calls from the Pennzoil lawyers, who were urging them to hurry up. Lipton and his associate, Patricia Vlahkis, had also spent the day reviewing

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<sup>90</sup> *See id.* at 206.

<sup>91</sup> *See id.* at 208.

<sup>92</sup> *See id.* at 207.

<sup>93</sup> *See id.* at 209.

<sup>94</sup> *See id.* at 209-12.

<sup>95</sup> *See id.* at 212.

the draft. Finding the agreement unacceptable as it stood, they drafted new provisions adding protections for the museum.<sup>96</sup>

In the meantime, McKinley had called Lipton and Petersen, telling them that Texaco was seriously interested and urging them not to commit to Pennzoil or to anyone else.<sup>97</sup> McKinley then convened a meeting of the Texaco board of directors, which approved his proposal to make an offer to buy Getty Oil.<sup>98</sup>

Late in the afternoon of the 5th, the Los Angeles Superior Court held a hearing on the temporary restraining order sought by Claire Getty. In the course of his argument, the lawyer representing Gordon said some things that would come back to haunt not only him and his client, but also Texaco, which would end up paying for what he said:

“There is presently a transaction agreed upon among Getty Oil Company, the J. Paul Getty Museum . . . the trustee . . . and Pennzoil Company.”

“This is an agreement which has been entered into after extremely careful consideration.”<sup>99</sup>

That evening, the Pennzoil lawyers were hard at work with their Getty Oil counterparts, negotiating the terms of the final documents. As the evening wore on, the Getty Oil people began quietly leaving one by one. At one in the morning, the Pennzoil lawyers realized that even though there were a few points left to be worked out, the last of the Getty Oil lawyers had left the negotiating session.<sup>100</sup> What the Pennzoil lawyers didn’t realize was that their Getty Oil counterparts had left because there was another deal in the works.

While this was going on, Texaco chairman John McKinley was meeting with Gordon to make an offer for the trust’s shares. During the meeting, one of the lawyers representing Gordon in the meeting took a phone call from one of the

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<sup>96</sup> *Id.* at 217-18.

<sup>97</sup> *See id.* at 214-15.

<sup>98</sup> The meeting lasted about three hours. McKinley left the boardroom at 4:50 PM. *Id.* at 216-17.

<sup>99</sup> *Id.* at 219-20 (emphasis in original).

<sup>100</sup> *See id.* at 222.

lawyers representing Gordon in the California injunction proceeding. The caller was reporting on the status of the California proceeding. He had just filed an affidavit in which one of Gordon's investment bankers, trying to show that the Pennzoil transaction was a "done deal" and couldn't be stopped by an injunction, had sworn under penalty of perjury that the Getty Oil board had "approved a corporate reorganization" and that the "principal terms of the transaction" were included in the previous day's press release.<sup>101</sup> In spite of this, the lawyer representing Gordon in the meeting advised Gordon in the presence of the Texaco negotiators that, the letter Gordon had signed for Pennzoil notwithstanding, Gordon was free to sell the trust's shares to Texaco. The handwritten insert saying his obligations were "subject only to my fiduciary obligations" gave him an out because he had a fiduciary obligation to the other beneficiaries of the trust to try to get a higher price.<sup>102</sup>

With that out of the way there was still the issue of the price Texaco would pay. Here, the negotiations bogged down because neither side would make the first offer. To get things moving, one of the investment bankers tracked down Larry Tisch and asked him to come over to help facilitate an agreement. Not only was Tisch one of the most respected businessmen in America, he was also thought to be a friend of Gordon's.<sup>103</sup> It was he who had drunk the toast with Gordon and Gordon's wife to celebrate the Pennzoil deal.

As Gordon and his advisors caucused separately, Lipton (who had also been called in to help facilitate a deal) and Tisch told McKinley that Gordon was not in a mood to bargain. If McKinley wanted a deal, he had to offer \$125 a share.<sup>104</sup> When Gordon and McKinley next met, McKinley said that he had expected to offer something in the neighborhood of \$122, "[b]ut," he said, smiling, "I have gotten some other indications here that there is another price that would be more agreeable to you, and I am prepared to offer –" "I accept," said Gordon before he finished. Then Gordon added, "Oh! You're supposed to give the price first!" Everybody in

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<sup>101</sup> *Id.* at 225.

<sup>102</sup> *Id.* at 226.

<sup>103</sup> In actuality, Tisch had only met Gordon three times. COLL, *supra* note 3, at 365. As to Tisch being a "friend" of Gordon's, that was the subject of an interesting exchange at the trial. See *infra* text accompanying note 153.

<sup>104</sup> COLL, *supra* note 3, at 366.

the room laughed and Gordon said “I think we can probably do business, if the courts okay it and the price is what I have heard.”<sup>105</sup>

Because Gordon was still under a temporary restraining order prohibiting him from signing legally binding documents, Marty Lipton drafted the following letter:

I regret that an order of the Superior Court in California prevents the trustee of the Sarah C. Getty Trust from entering into any legally binding agreement in any way concerning the stock or assets of Getty Oil Company. Therefore I as trustee cannot commit to sell the Getty Oil Company shares held by me as trustee to Texaco pursuant to the offer of \$125 per share being made by Texaco to all shareholders of Getty Oil Company. I believe that I have a fiduciary duty to seek to accept the offer by Texaco. It is my intention to request the court to lift the order. . . . As soon as I am able to do so, I intend to agree to sell or tender the shares to Texaco. . . . I will request Getty Oil Company to approve the Texaco offer . . . .<sup>106</sup>

Before he signed the letter, Gordon took the precaution of consulting yet another lawyer. He had his advisors track down Moses Lasky, who had represented the trust for many years and knew more about the trust than anyone else alive. When Lasky was found, eating dinner in a Chinese restaurant, he said he had no problems with the letter.<sup>107</sup> Thus assured, Gordon signed the letter shortly after midnight on January 6, 1984.<sup>108</sup>

Marty Lipton, ever the careful lawyer, told Texaco that his client (the museum) would go along with the deal only if it received an indemnity against claims arising out of the deal. What was more, Lipton didn't want just an ordinary, garden-variety indemnity. He wanted the indemnity to provide that on the museum's behalf “no representation is made with respect to . . . the Pennzoil agreement.” In other words, Lipton, whose assertion to Wasserstein that the Pennzoil agreement was not binding was what got Texaco involved in the first place, was now asking Texaco to agree (1)

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<sup>105</sup> PETZINGER, *supra* note 3, at 229. For a slightly different version of the exchange, see COLL, *supra* note 3, at 366.

<sup>106</sup> PETZINGER, *supra* note 3, at 229-30.

<sup>107</sup> *Id.* at 230.

<sup>108</sup> *Id.*

that they had not relied on that assertion and (2) that if Lipton's client were sued because the Pennzoil agreement really was binding, Texaco would cover Lipton's client's losses.<sup>109</sup> Looked at in this way, Lipton's stance seems overreaching in the extreme. But Lipton had legitimate reasons for wanting such an agreement. His client, the museum, was a charitable organization that didn't want to get caught up in business disputes. The museum's president, Harold Williams, was the former head of the Securities and Exchange Commission. Williams didn't want to get dragged into corporate squabbles, and he certainly didn't want the bad publicity that was likely to result from getting dragged into those squabbles.<sup>110</sup>

At first, the Texaco representatives resisted giving the museum an indemnity, but Lipton showed them the Pennzoil documents and gave them more assurances that even if Pennzoil sued, it couldn't win. The Texaco people gave in, relying not only on Lipton's expertise in mergers, but also on his reputation for wisdom and integrity.<sup>111</sup> When Gordon heard of this, he decided he wanted an indemnity as well. And Texaco gave him one.<sup>112</sup>

To make sure they had a binding agreement that could not be undone the way the Pennzoil deal had been, the Texaco lawyers worked through the night to draft a definitive contract. At noon the next day, the Getty Oil board of directors met via a hastily-arranged conference call and voted to "withdraw" the \$112.50 counteroffer they had made to Pennzoil and accept the \$125.00 offer made by Texaco.<sup>113</sup> When Liedtke threatened a breach of contract suit, Getty Oil's general counsel assured his Texaco counterpart that it was "the most absurd thing I've ever heard."<sup>114</sup> To beat Liedtke to the punch, Getty Oil's lawyers filed a lawsuit in Delaware (where Getty

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<sup>109</sup> *See id.* at 231-32.

<sup>110</sup> *See id.* at 233.

<sup>111</sup> *See* COLL, *supra* note 3, at 370-71.

<sup>112</sup> PETZINGER, *supra* note 3, at 233.

<sup>113</sup> *Id.* at 240.

<sup>114</sup> *See id.*

Oil was incorporated) asking for a declaratory judgment that there was no binding contract with Pennzoil.<sup>115</sup>

On January 10, Pennzoil filed its own lawsuit, also in Delaware, asking for specific performance of the Getty Oil-Pennzoil contract.<sup>116</sup> A few days later, the Pennzoil lawyers learned of the indemnities that had been granted to Gordon and the museum, and they amended their complaint to sue Texaco for the tort of intentionally interfering with the Getty Oil-Pennzoil contract. The indemnities were, they reasoned, a clear indication that Gordon and the museum representatives thought there was a contract with Pennzoil.<sup>117</sup>

Another suit was filed in California, this one by some of the beneficiaries of the trust.<sup>118</sup> Texaco settled it by agreeing to raise the price it paid for the Getty Oil stock to \$128 a share. This cost Texaco an additional \$240 million. Later, the law firm representing the beneficiaries asked the court to approve a fee of \$5 million, to be paid by the trust, for the firm's services in bumping up the price.<sup>119</sup>

Back in Delaware, the chancery court denied Pennzoil's request for a preliminary injunction. The court did not decide the question of whether Texaco was liable for interference with a contract among Pennzoil and the other parties—it reserved that issue for trial.<sup>120</sup> As things turned out, the Delaware court never got to hold the trial.

Hugh Liedtke was a good friend of Joe Jamail, one of the great personal injury lawyers of all time.<sup>121</sup> Jamail had won more than forty verdicts or settlements in

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<sup>115</sup> *Id.* at 240. Delaware was chosen not only because it was the state in which Getty Oil was incorporated, but also because the Delaware courts were known for their sophistication in corporate transactions. COLL, *supra* note 3, at 373-74.

<sup>116</sup> PETZINGER, *supra* note 3, at 241.

<sup>117</sup> *Id.* at 241-42.

<sup>118</sup> *Id.* at 246. The beneficiaries, through their guardian ad litem, a former dean of the UCLA Law School, sought to enjoin the sale of the trust's stock to Texaco and force the trust to enter into a transaction with Pennzoil. *Id.*

<sup>119</sup> *See id.* at 247.

<sup>120</sup> *Id.* at 258.

<sup>121</sup> COLL, *supra* note 3, at 384-85. According to Jamail, he and Liedtke had "traveled the world together with our wives." JAMAIL, *supra* note 2, at 138.

excess of \$1 million, more than anyone else in history.<sup>122</sup> He was famous, not only for his courtroom theatrics but also for his partying. He was a friend of Willie Nelson, and it was said that Mr. Nelson's song about "a good-hearted woman [i]n love with a good-timin' man" had been inspired by Jamail's long-suffering wife.<sup>123</sup> At first, Jamail resisted Liedtke's attempts to get him involved, but Jamail finally agreed to take the case because Liedtke's wife told him he should do it out of friendship.<sup>124</sup> Nevertheless, there was a problem. Jamail's strength was talking to juries, and the Delaware Chancery Court did not have jury trials.<sup>125</sup>

A clever lawyer solved that problem. The court rules provided that the party bringing a lawsuit could dismiss the suit at any time before an answer had been filed and that such a dismissal would be without prejudice to later refileing the same suit.<sup>126</sup> Normally, one of the first things a defendant's lawyer does is file an answer, but when the plaintiff seeks a preliminary injunction, as Pennzoil had done here, the defendant's first priority is to deal with the injunction. The answer gets put off until later. When lawyers are litigating to stop a takeover, the answer usually never gets filed. The goal is to stop the takeover, and all anybody cares about is whether the preliminary injunction is granted. A preliminary injunction will normally kill a takeover. When the court rules on the preliminary injunction, the matter is, for all practical purposes, over. Nobody worries about the lawsuit any more.<sup>127</sup> This case was different, however. It didn't go away when the preliminary injunction was denied. Nevertheless, the lawyers representing Texaco in Delaware were in the habit of not taking the time to file an answer, and they didn't file an answer in this case. This oversight became known as "the ten billion dollar boo-boo."<sup>128</sup>

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<sup>122</sup> PETZINGER, *supra* note 3, at 19. When he published his memoir in 2003, Mr. Jamail claimed to have "served as lead counsel in over 200 personal injury cases where recovery was in excess of \$1 million." JAMAIL, *supra* note 2, dust jacket.

<sup>123</sup> See JAMAIL, *supra* note 2, at 10; PETZINGER, *supra* note 3, at 19.

<sup>124</sup> See JAMAIL, *supra* note 2, at 139-40.

<sup>125</sup> As Jamail put it, "I could have tried the case in Switzerland, but I was not going to Delaware to try it in front of some jaded corporate judge." *Id.* at 140.

<sup>126</sup> See PETZINGER, *supra* note 3, at 261.

<sup>127</sup> COLL, *supra* note 3, at 387-88.

<sup>128</sup> See *id.* at 386.

One of the lawyers at Baker & Botts, the big Houston firm that had been representing Pennzoil in both the transaction and the litigation, realized what an opening Texaco had given them. Baker & Botts filed a dismissal in Delaware and 15 minutes later filed a complaint in Houston, where they had the opportunity to get not only a jury trial, but the hometown advantage as well.<sup>129</sup>

The Pennzoil forces wasted no time in exploiting the hometown advantage. Judge Anthony A. P. Farris was assigned to hear pretrial matters on the case, and two days after the assignment, Joe Jamail contributed \$10,000 to his reelection campaign.<sup>130</sup> Mr. Jamail, who was already a member of the steering committee for the judge's campaign, had previously contributed only \$100.<sup>131</sup> Moreover, the large contribution raised eyebrows because Jamail was a liberal democrat and Farris a conservative Republican.<sup>132</sup>

Texaco's Houston law firm countered by associating as co-counsel on the case another member of the judge's reelection campaign committee, but the lawyer they hired was a friend of Jamail, and when Jamail told him the case might destroy their friendship, the lawyer quickly withdrew from the representation.<sup>133</sup>

When Richard Miller, Texaco's Houston lawyer, found out about the \$10,000 campaign contribution, he had researchers go through the campaign finance disclosures of all the local judges. He found that for the period 1980 through 1984, Jamail had contributed a total of \$32,710 to nineteen judges. Of this, \$10,000 had gone to Judge Farris, and another \$10,000 to an administrative judge who had authority over Farris. Upon learning this, he filed a motion to have Judge Farris removed from the case. An out-of-town judge was called in to hear the motion.<sup>134</sup> This judge ruled that under the Texas constitution a judge could be removed from a case only if he or she (1) had a direct legal interest in the case, (2) was related to a

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<sup>129</sup> See PETZINGER, *supra* note 3, at 261.

<sup>130</sup> Jamail claims that the donation was made at the request of a friend and in lieu of payment to the friend for work the friend had done for Jamail. JAMAIL, *supra* note 2, at 141. He also claims he wrote the check before Judge Farris was assigned to the case. *Id.*

<sup>131</sup> See PETZINGER, *supra* note 3, at 284.

<sup>132</sup> See *id.* at 288-89.

<sup>133</sup> See *id.* at 284-85.

<sup>134</sup> See *id.* at 288-91.

party by blood or marriage, or (3) had previously provided legal services to a party. The mere appearance of bias, or even bias itself, was not grounds for recusal.<sup>135</sup>

In the hearing on the recusal of Judge Farris, Mr. Jamail had argued that any problems the campaign contributions might have caused were mitigated by the fact that Judge Farris would not actually preside at the trial, but would only hear the pretrial matters. Shortly thereafter, however, the court rules were changed. The new rules provided that the judge who handled pretrial matters would now preside over the trial as well. The change was made retroactive so that it applied to *Pennzoil v. Texaco*.<sup>136</sup>

The trial lasted five and a half months and created 24,000 pages of transcript.<sup>137</sup> (There were also fifteen thousand pages of transcripts of pretrial depositions in the case.<sup>138</sup>) The work was so intense that Miller, Texaco's lead counsel, moved out of his home and into a hotel near the courthouse for four and a half months.<sup>139</sup> Throughout the trial, Jamail and the Pennzoil team hammered away at a very simple theme: The Getty people had made a promise and were honor-bound to keep it. The Pennzoil legal team talked about "oil patch honor" and about multi-million dollar deals made by oilmen on the strength of a handshake.<sup>140</sup> They were able to get the jury to ignore the niceties of contract law.<sup>141</sup>

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<sup>135</sup> See *id.* at 291. This was in keeping with settled Texas law. See *Rocha v. Ahmad*, 662 S.W.2d 77 (Tex. Ct. App. 1983) (en banc). For a discussion of the problem of judges hearing cases involving attorneys who contributed heavily to their election campaigns, see Stuart Banner, *Disqualifying Elected Judges From Cases Involving Campaign Contributions*, 40 STAN. L. REV. 449 (1988).

<sup>136</sup> See PETZINGER, *supra* note 3, at 290-91.

<sup>137</sup> See *id.* at 420; JAMAIL, *supra* note 2, at 138 (indicating more than 25,000 pages of transcript).

<sup>138</sup> See PETZINGER, *supra* note 3, at 314.

<sup>139</sup> See *id.* at 311.

<sup>140</sup> See JAMAIL, *supra* note 2, at 137, 142.

<sup>141</sup> As Jamail put it, "Contract law is not exciting to me or anybody else except some crazed human being who looks at that crud all the time." *Id.* at 143.

The Pennzoil team also played to regional bias.<sup>142</sup> The bad guys were from New York. Jamail made a point of always referring to Texaco as “New York Texaco,” making the jurors remember that although the name of the company had originally been “The Texas Company,” it had long ago changed its name and moved its headquarters to New York. The Texaco people believe the Pennzoil team’s tactics went beyond regionalism and began playing on anti-Semitism, as many of the people representing Texaco, Getty Oil, the trust and the museum were Jewish.<sup>143</sup>

Shortly after Pennzoil finished its case in chief and Texaco started its defense, Texaco ran into bad luck. Judge Farris learned that he had cancer and left the case to seek treatment.<sup>144</sup> He was replaced by a judge who had been a boyhood friend of Mr. Jamail.<sup>145</sup> By this time the trial had been running for months, and the jurors were getting impatient. They were finding it hard to pay attention to the case, so Mr. Miller made a strategic decision. To avoid alienating the jury even more, he decided to cut his case down to the bare minimum. He decided against calling many of the witnesses he had planned to call.<sup>146</sup>

One of the witnesses Miller did call, however, was Chauncey Medberry, President of Bank of America. Mr. Medberry was the one Getty Oil director who had voted against the Pennzoil deal. In rebuttal of the evidence about handshake deals and oilpatch honor, Medberry testified that “there was no binding agreement on anybody, as I look at it.”<sup>147</sup> He went on to say, “You would not sell a ten-billion-dollar corporation based on a discussion that takes place in the middle of the night.

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<sup>142</sup> “Drawing on the powerful, coded, century-old rhetoric of Southern and Western populism in American politics, [the Pennzoil lawyers] talked in sinister tones about the concentrated power of New York lawyers and investment bankers.” COLL, *supra* note 3, at 389.

<sup>143</sup> See, e.g., PETZINGER, *supra* note 3, at 350-51 (problems of Getty Oil lawyer not testifying on Jewish holiday; accusations that judge told Jewish joke).

<sup>144</sup> See *id.* at 373-74. In his book, Washington Post writer Steve Coll says the cause of Judge Farris’s leaving the case was a heart ailment. COLL, *supra* note 3, at 448. But Petzinger’s description is much more extensive, so I think he is more likely to be correct. Judge Farris had had heart problems long before the case began. See PETZINGER, *supra* note 3, at 318.

<sup>145</sup> See PETZINGER, *supra* note 3, at 374-75.

<sup>146</sup> See *id.* at 380.

<sup>147</sup> See *id.*

There would have to be a document with all the terms agreed upon, hammered out, negotiated. That's the way business is conducted in this country."<sup>148</sup>

Miller also called Lawrence Tisch, the chairman of Loew's Corporation. Tisch was one of the Getty Oil directors who had voted in favor of the Pennzoil deal. He was nevertheless adamant that there was no contract. "I know what I voted on," he said.<sup>149</sup> Jamail, however, was able to get some good testimony out of him on cross examination. With respect to the fact that Getty Oil's investment banker submitted its bill on the day after the board vote, Jamail got Tisch, who had been involved in many mergers and acquisitions (and who was at the time working on gaining control of CBS<sup>150</sup>), to admit that investment bankers do not normally submit their bills until the deal is done.<sup>151</sup> Jamail also made a big thing of the champagne toast that Tisch had drunk with Gordon and his wife. Tisch's explanation that the toast was not intended to celebrate the completion of a deal, but only "the acceptance of a price that could lead to the agreement on a contract" came off as rather lame.<sup>152</sup> Tisch's cross-examination also produced an exchange that captures much of Jamail's message to the Texas jury:

- Jamail: "You're not friends with Gordon Getty?"
- Tisch: "No, sir."
- Jamail: "Did Gordon Getty think you were his friend?"
- Tisch: "Define 'friend' and I'll answer the question."
- Jamail: "Sir, I can't define the New York friendship."<sup>153</sup>

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<sup>148</sup> See *id.* at 381.

<sup>149</sup> See *id.*

<sup>150</sup> See WASSERSTEIN, *supra* note 32, at 371-72.

<sup>151</sup> JAMAIL, *supra* note 2, at 159.

<sup>152</sup> See PETZINGER, *supra* note 3, at 382 (emphasis in original).

<sup>153</sup> See *id.* at 382. Jamail is so proud of this exchange that in his memoir he sets it off by printing it on a page by itself. JAMAIL, *supra* note 2, at 135. There's a lesson here for any businessperson who thinks he can handle himself in the courtroom. Tisch wasn't a fool. He grew up on the streets of New York, worked his way through night school, and ultimately became a billionaire. See COLL, *supra* note

In the damages phase of the trial, Miller made what in retrospect turned out to be another multi-billion dollar mistake. It might have been a good decision, based on all that Miller knew at the time, but it turned out to be a bad one, just like calling an opponent's bluff in poker only to find he has that full house.

Pennzoil had made its argument for damages as follows: Getty Oil owned a billion barrels of oil reserves. If Texaco had not interfered, Pennzoil would have purchased Getty Oil (and its oil reserves) for \$3.4 billion dollars. The average cost of finding new oil reserves in the United States at the time was \$10.87 per barrel. Thus, to find a billion dollars worth of new oil would have cost Pennzoil \$10.87 billion. Pennzoil should therefore be entitled to the difference between the price it would have had to pay to find a billion barrels of oil and the price it would have had to pay for Getty Oil.<sup>154</sup>

While Pennzoil's theory was simple and seemingly logical, it was totally bogus. If Getty Oil was really that valuable, why was Texaco able to get it by paying only 10% more than Pennzoil was offering? Were all the large oil companies in the world (or for that matter all the large companies and rich individuals who had the wherewithal to put together a big deal) so stupid that they didn't know how valuable Getty was? Were they really so stupid they couldn't read the reports and do the math that the jury was being asked to do?<sup>155</sup> The answer, of course, is that things weren't as simple as Pennzoil's argument made out. As near as anyone could

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3, at 271. The acknowledged inventor of the "power breakfast," see PETZINGER, *supra* note 3, at 173, "he was regarded as one of the shrewdest, most determined corporate executives in the country" and had been on the cover of *Time* magazine. COLL., *supra* note 3, at 271.

<sup>154</sup> See PETZINGER, *supra* note 3, at 321.

<sup>155</sup> The U.S. District Court embraced this reasoning when Texaco had the enforcement of the judgment enjoined. The court said, "The best indication of the value of anything, including the stock of an oil company, is usually an arm's length sale between adequately informed parties, neither under any compulsion to buy or sell; indeed, that is the traditional definition of market value." *Texaco, Inc. v. Pennzoil Co.*, 626 F. Supp. 250, 255 (S.D.N.Y. 1986). On this basis, the court concluded that it was highly likely the damages would be reduced on appeal. *Id.*

Commentators have concurred. *E.g.*, DELANEY, *supra* note 2, at 133 (calling Pennzoil's damage theory "a strange way to calculate the damages" and citing other critical commentary).

In its post-trial brief, Texaco tried to hoist Pennzoil with its own petard, claiming that Pennzoil had attempted to take unfair advantage of the Getty Oil shareholders by paying them only \$2.6 billion for assets which, according to Pennzoil's evidence, were worth \$10.9 billion. Baron & Baron, *supra* note 47, at 258.

determine, the value of Getty Oil was very close to the price that Texaco had paid for it. Nevertheless, Miller decided not to put on witnesses to rebut Pennzoil's damages evidence.<sup>156</sup>

There was a good reason for not putting on evidence as to damages. Many of the best trial lawyers believe that when the defense puts on evidence as to damages, it lends credibility to the plaintiff's case, if not admitting that there is liability, at least admitting that the plaintiff has made a reasonable case for liability. Miller was a proponent of this theory, and it had served him well on many occasions.<sup>157</sup> Even so, Miller did not make the decision lightly. He had engaged expert witnesses on damages, prepared them, and even flown them to Houston so that they would be ready if he chose to use them.<sup>158</sup> But when he was finished with his other witnesses, he decided to roll the dice and not put on his evidence concerning damages.<sup>159</sup>

Although the judge admitted that he didn't know New York contract law, he refused to allow the parties to submit briefs on the subject. Instead, he told the parties to give him copies of the cases on which they relied. When both parties gave him a large stack of cases, he decided not to read them all, but instead to rely on the three cases that both sides had included in their submissions.<sup>160</sup> Over the objection of Texaco's lawyers, the judge gave the jury a charge that tracked almost verbatim the language proposed by Pennzoil. Among other things, it used the word "agreement" constantly and never contained the word "contract," implying that to find Texaco liable, all the jury had to decide was that Pennzoil had an "agreement" with the Getty interests, rather than a formal contract.<sup>161</sup>

In its deliberations, one individual dominated the jury, a left-wing activist who had managed bands, counseled draft dodgers, and helped publish an underground

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<sup>156</sup> See COLL, *supra* note 3, at 456.

<sup>157</sup> See PETZINGER, *supra* note 3, at 384-85.

<sup>158</sup> See *id.* at 385.

<sup>159</sup> Jamail refers to this as "a judgment call that would still be debated years later." JAMAIL, *supra* note 2, at 152.

<sup>160</sup> See PETZINGER, *supra* note 3, at 390-91.

<sup>161</sup> See *id.* at 391; COLL, *supra* note 3, at 453-55.

newspaper.<sup>162</sup> With his guidance, and angry at what it saw as double-dealing by Marty Lipton and the investment bankers involved in the deal, the jury returned a verdict awarding Pennzoil \$7.53 billion in compensatory damages plus \$3 billion in punitive damages.<sup>163</sup> The Wall Street Journal referred to it as “the Texas Common Law Massacre.”<sup>164</sup>

After the verdict was in, the legal maneuvering continued. Under Texas law, the judgment gave Pennzoil the right to obtain a lien on any of Texaco’s real property in the state, from gas stations to refineries, simply by recording an abstract of the judgment in the real property records of the county where the property was located.<sup>165</sup> It also allowed Pennzoil to obtain a writ of execution ordering state officials to seize Texaco property and sell it in order to satisfy the judgment.<sup>166</sup> To avoid this, Texaco would have to “fil[e] a good and sufficient bond to be approved by the clerk” in “at least the amount of the judgment, interest, and costs.”<sup>167</sup>

No company was willing to issue a bond for eleven billion dollars, so the Texaco legal team tried an end run around the Texas courts. Engaging in their own form of hometown justice, they went to the United States District Court in White Plains, N.Y., where Texaco had its headquarters and where the judge just happened to be a friend of one of Texaco’s New York lawyers. They convinced the judge to enjoin the enforcement of the Texas judgment on the ground that the bond requirement denied Texaco due process of law under the Fourteenth Amendment to the United

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<sup>162</sup> See PETZINGER, *supra* note 3, at 20, 400-08. In a calculated understatement, Jamail calls him “one of the more active jurors.” JAMAIL, *supra* note 2, at 157.

<sup>163</sup> See PETZINGER, *supra* note 3, at 400-09.

<sup>164</sup> *Id.* at 437. Arthur Liman attributes this to the efforts of Texaco’s public relations firm, headed by Linda Robinson, wife of American Express CEO James Robinson III. LIMAN, *supra* note 34, at 248. A less biased writer notes that Eastern papers tended to favor Texaco, whereas Texas papers favored Pennzoil, particularly when Texaco attacked the Texas judicial system. See COLL, *supra* note 3, at 474-75.

<sup>165</sup> See *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 4 (1987).

<sup>166</sup> See *id.* at 4-5.

<sup>167</sup> *Id.* at 5. Lest anyone believe that Pennzoil would not actually seize Texaco’s property, there was a precedent. When Sears had delayed in posting an appeal bond after Jamail had won a products liability case against it, Jamail had levied execution on a Sears store in downtown Houston. Sears immediately dropped its appeal and paid the judgment in full. See PETZINGER, *supra* note 3, at 413-14.

States Constitution.<sup>168</sup> Pennzoil appealed the decision to the Second Circuit. The Second Circuit upheld the district court<sup>169</sup> in spite of what many legal scholars thought was a great deal of contrary precedent.<sup>170</sup> Pennzoil appealed to the United States Supreme Court.

After the case had been argued to the Supreme Court, but before the Court had rendered its decision, the Texas Court of Appeals issued its opinion upholding the trial court's verdict in favor of Pennzoil, but reducing the punitive damages by \$2 billion.<sup>171</sup>

While Texaco was fighting in the courts, there had been a lot going on outside the judicial system. Texaco's bankers took steps to make sure they were protected in the event Texaco went broke.<sup>172</sup> They put restrictions on the way Texaco could move money among its accounts, and they put new minimum balance requirements on existing accounts.<sup>173</sup> Texaco found it more difficult to borrow the money it needed for its day-to-day operations, even when it was willing to put up good collateral. Some other oil companies refused to do business with Texaco unless it paid cash in advance. These precautions seem to have been unnecessary. It could be argued that Texaco was still a good credit risk because it had a book value (assets less liabilities) of at least \$13 billion,<sup>174</sup> a liquidation value of \$22 to \$26 billion,<sup>175</sup> and annual revenues of \$32 billion.<sup>176</sup> But there may have been other factors at work. When Texaco was doing well, it had played hardball with its lenders as well as with

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<sup>168</sup> *Texaco, Inc. v. Pennzoil Co.*, 626 F. Supp. 250, 256 (S.D.N.Y. 1986).

<sup>169</sup> *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1137 (2d Cir. 1986).

<sup>170</sup> See DELANEY, *supra* note 2, at 138.

<sup>171</sup> *Texaco I*, 729 S.W.2d 768, 866 (Tex. Ct. App. 1987).

<sup>172</sup> Mr. Jamail, although perhaps not an unbiased observer, says that the odds of Texaco becoming insolvent were "about the same as those of eradicating social diseases." JAMAIL, *supra* note 2, at 137.

<sup>173</sup> See DELANEY, *supra* note 2, at 136; see also PETZINGER, *supra* note 3, at 418-19 (describing actions of other creditors).

<sup>174</sup> See DELANEY, *supra* note 2, at 146.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 135

other oil companies.<sup>177</sup> Now that it was in trouble, these lenders and oil companies may have been looking to exact a little revenge. At a minimum, they were unwilling to take any risk to do a favor for someone who had refused to do favors for them. The New York Times quoted a New York banker as saying, “If it were Exxon or Mobil, all the big banks would rally around it.”<sup>178</sup>

There had also been continuing settlement negotiations between Texaco and Pennzoil, including talks of a merger between Pennzoil and Texaco, with Liedtke getting a top job in the combined company.<sup>179</sup> These discussions broke off when Texaco made an offer far less generous than Liedtke had expected.<sup>180</sup> Settlement was made more difficult by a worldwide drop in oil prices, which made Texaco’s settlement proposals less attractive.<sup>181</sup>

On April 6, 1987, the United States Supreme Court rendered its opinion, reversing the lower federal courts.<sup>182</sup> Now Texaco was required to post the bond. Moreover, its lenders came down even harder on it. Many had provisions in their loan agreements allowing them to refuse to make additional loans (and even to insist on immediate repayment of outstanding loans) if there was “a material adverse change” in Texaco’s financial position. At this point, many of the lenders invoked these clauses.<sup>183</sup>

Six days after the Supreme Court decision, Texaco reacted by filing a Chapter 11 bankruptcy, the largest bankruptcy in history.<sup>184</sup> A few days after it filed the Chapter

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<sup>177</sup> *Id.* at 136-37; *see also* COLL, *supra* note 3, at 337 (describing Texaco as “an unusually closed and autocratic company, dogged in the oil patch by a reputation for imperiousness, parsimony, and reactionary management”).

<sup>178</sup> *See* DELANEY, *supra* note 2, at 137.

<sup>179</sup> *See* COLL, *supra* note 3, at 474.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* One of the most intriguing of these proposals would have allowed Pennzoil to obtain the three-sevenths of the Getty gas and oil reserves that Pennzoil would have had if the original deal had gone through. The drop in oil prices meant that these reserves were much less valuable to Pennzoil or to anyone else. PETZINGER, *supra* note 3, at 431.

<sup>182</sup> Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 18 (1987).

<sup>183</sup> *See* DELANEY, *supra* note 2, at 143.

<sup>184</sup> *Id.* at 144.

11, Texaco offered to pay Pennzoil \$2 billion to settle the case.<sup>185</sup> Pennzoil, which now realized that the case might drag on for several years and that it would not get paid until the case was over, reduced its settlement demand. But the parties were still a few billion dollars apart.<sup>186</sup> The stalemate continued until November, when financier Carl Icahn acquired a large block of Texaco stock and made himself Texaco's largest single shareholder.<sup>187</sup> Icahn pushed for a settlement, and the bankruptcy judge announced that if Pennzoil, Texaco's other creditors, and Texaco's shareholders agreed to a plan of reorganization (which would necessarily include a settlement of the Pennzoil claim), he would consider the plan even if it wasn't approved by Texaco's management.<sup>188</sup> After some hard negotiating, these groups agreed to settle the case for \$3 billion, and Texaco's management reluctantly acquiesced.<sup>189</sup>

Jamail never disclosed how much he received from his contingency fee agreement. One writer says it was \$600 million,<sup>190</sup> another says it was only \$300 million.<sup>191</sup>

## II. Lessons from the Case

There are a number of lessons that we can learn from the case. With the benefit of hindsight, we can see what the lawyers who put these deals together did right and what they did wrong.

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<sup>185</sup> *Id.* at 149

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 150.

<sup>188</sup> *Id.* at 151.

<sup>189</sup> *Id.* at 152. In his memoir, Arthur Liman claims that the settlement was finally negotiated by Joe Jamail and Carl Icahn, a corporate raider who held a large block of Texaco stock, after Liman had gotten the two men together and they had engaged in a three-hour drinking bout. LIMAN, *supra* note 34, at 248. Jamail, who is not one to downplay his own importance (or his drinking), merely says they started with beer at 11 a.m. and that "[s]everal people helped work out a proposal for a three-billion-dollar settlement." JAMAIL, *supra* note 2, at 167.

<sup>190</sup> Harold A. Segall, *An Executive's Lesson in the Law From a Typical Business Encounter*, 23 FORDHAM URB. L.J. 257, 260 n.18 (1996).

<sup>191</sup> Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiffs' Bar in the Twenty-First Century*, 51 DEPAUL L. REV. 219, 221 (2001).

**Lesson 1: Make it clear whether you have a contract.**

Businesspeople love to enter into informal agreements that may or may not be binding contracts.<sup>192</sup> As in the Pennzoil-Texaco situation, these agreements to agree often lead to litigation. Even more often, they lead to extorted settlements, where one party who is willing to claim there is a contract and threaten litigation can get money out of another party who wants to avoid litigation.<sup>193</sup> To avoid questions, if a binding agreement is intended, this intention should be clearly stated; likewise, if the parties do not intend to be bound by their agreement, the agreement should state even more clearly that it creates no legally enforceable obligations.<sup>194</sup> To make sure that no argument can be made that negotiations have created a binding contract before the lawyers get all the details worked out, careful lawyers will often have the parties execute a document containing language like this:

Although the parties may exchange proposals (written or oral), term sheets, draft agreements or other materials, neither party will have any obligations or liability to the other party unless and until both parties' authorized representatives sign definitive written agreements. Exchanged terms are non-binding to the extent they are not included in such definitive written agreements. Either party can end these discussions at any time, for any reason (or for no reason at all), and without liability to the other party. Each party remains free to negotiate and to enter into contracts with others.<sup>195</sup>

**Lesson 2: Every time you draft a contract, consider whether an arbitration clause, choice-of-forum clause, or jury waiver would benefit your client.**

An arbitration clause wouldn't have helped Texaco because Texaco wasn't a party to the contract with Pennzoil. But in most business deals, you're worried

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<sup>192</sup> See Robert M. Lloyd, *Making Contracts Relevant: Thirteen Lessons for the First-Year Contracts Course*, 36 ARIZ. ST. L.J. 257, 282 (2004).

<sup>193</sup> *Id.* at 283.

<sup>194</sup> For a more extensive discussion, see GEORGE W. KUNEY, *THE ELEMENTS OF CONTRACT DRAFTING* 136 (2003).

<sup>195</sup> Cases in which language like this helped a party avoid a major liability include *S. Union Co. v. S.W. Gas Corp.*, 180 F. Supp. 2d 1021, 1044-45 (D. Ariz. 2002); *W.R. Grace & Co. v. Taco Tico Acquisition Corp.*, 454 S.E.2d 789, 790-91 (Ga. Ct. App. 1995).

primarily about litigation with the other parties to the contract. Here, arbitration has a number of advantages. First, you can provide that the arbitrators will be persons with extensive experience in transactions like those in question. Even if you don't, the arbitrators chosen will generally be sophisticated people—businesspeople, lawyers, academics with a practical bent, former judges. Arbitrators are less likely to favor the home team, to be swayed by the theatrics of a Joe Jamail, or to award outrageous verdicts. But there are dangers in arbitration, some of which can be minimized with a carefully drafted arbitration clause, others of which cannot.<sup>196</sup> Therefore, you should never unthinkingly add an arbitration clause to your documents (or, even worse, unthinkingly agree to the other side's arbitration clause). You need to consider carefully whether arbitration is the best thing for this client in this transaction.

If arbitration isn't appropriate (or if it isn't agreeable to the other side), a clause in which all parties waive their right to a jury trial will often be useful. While Texaco seems to have suffered some "home cookin'" at the hands of the Texas judges, most litigators think that judges are less likely to be biased than jurors and less likely to award outrageously generous damages.

You can also include a choice-of-forum clause providing that all disputes arising out of the contract will be settled in a certain court or courts. These not only give your client protection against bias, but they reduce travel costs and save the expense of hiring local counsel.

### **Lesson 3: Think of the way things will look in litigation.**

There are a lot of things that make sense from a business standpoint but will look bad if the case ever goes to litigation. The indemnity Texaco gave the museum and the trust is a great example. As part of a business deal, it made sense.<sup>197</sup> But when it came out in litigation, the indemnity put Marty Lipton in the position where

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<sup>196</sup> For a discussion of the advantages and disadvantages of arbitration, see Steven W. Sanford, *A Trial Lawyer's View of Sales Documents* in WHY DIDN'T THE COURT ENFORCE YOUR AGREEMENT? A LITIGATOR'S ADVICE TO ATTORNEYS DRAFTING TRANSACTIONAL DOCUMENTS (2002).

<sup>197</sup> See *supra* text accompanying note 109-110.

he had to say, in effect: “I was sure there was no contract, but I wanted an indemnity just in case there was.”<sup>198</sup>

Any time you say or write something that isn’t protected by privilege, you have to think of how it might be used against you or your client. For example, in *Penthouse International, Ltd. v. Dominion Federal Savings & Loan Ass’n*,<sup>199</sup> a federal district court entered a judgment for \$135 million dollars against a bank and its law firm when a deal fell apart.<sup>200</sup> The district judge, who tried the case without a jury, believed that the bank’s lawyer had raised bogus objections to loan documents in order to kill a deal because his client had committed to a loan in excess of its legal lending limit and was unable to find other lenders to participate in the deal.<sup>201</sup> The bank lawyer’s bullying and intimidating style as well as his characterization of loan documents prepared by another lender as “idiotic” helped the court conclude that the bank had hired the lawyer to kill the deal.<sup>202</sup> The judgment was reversed on appeal.<sup>203</sup> The Second Circuit held that it wasn’t the bank’s lawyer, but sloppy and unprofessional work on the part of the other parties that had killed the deal.<sup>204</sup> Still, the case cost a lot of money and a lot of sleepless nights, all of which might have been avoided if the lawyer had used a little more tact and circumspection.<sup>205</sup>

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<sup>198</sup> Alternatively, he could have said: “I knew there wasn’t a contract, but I wanted an indemnity just in case some dumb jury got it wrong.” But there would have been certain problems with saying it that way.

<sup>199</sup> 665 F. Supp. 301 (S.D.N.Y. 1987), *rev’d*, 855 F.2d 963 (2d Cir. 1988).

<sup>200</sup> *See id.* at 301, 312.

<sup>201</sup> *See id.* at 307-08.

<sup>202</sup> *See id.* at 307. The bank’s case was not helped by testimony that during the negotiations the bank’s chairman had responded to accusations that the bank was not acting in good faith by saying, “Screw good faith. We’re going to do it our way because we’re the co-leader.” *Id.* at 306.

<sup>203</sup> *Penthouse Int’l, Ltd. v. Queen City Sav. & Loan Ass’n*, 855 F.2d 963, 987 (2d Cir. 1988).

<sup>204</sup> Among other things, the mortgage that the other lender planned to use for a \$97 million dollar loan was a pre-printed “plain language” form that bore the heading: “Consult your lawyer before signing this mortgage – it has important legal consequences.” *Id.* at 969.

<sup>205</sup> Interestingly, Arthur Liman, who had represented Pennzoil in the negotiations to buy Getty Oil, argued the bank’s appeal to the Second Circuit. *See id.* at 964. It was he who had remembered the handshakes that those on the other side did not. *See supra* text accompanying notes 71-72.

Clients, especially, need to be warned that they're writing for posterity. The Texaco people discovered this when the notes they took during meetings were used against them. The jury focused on these notes during its deliberations,<sup>206</sup> and the Texas Court of Appeals used the notes to support its conclusion that Texaco knew there was a contract in force when it came into the deal.<sup>207</sup> The court said, "Other Texaco notes admitted into evidence implied that Texaco believed it had '24 hours' to 'stop the train' and 'take care of Liedtke [Pennzoil's CEO]'.<sup>208</sup>

Cases are legion in which notes, e-mails, internal memos, and the like were turned against their writers.<sup>209</sup> The blow that finally killed the accounting firm of Arthur Anderson and Company was a criminal charge that it had destroyed such documents to keep them from being used in the Enron litigation.<sup>210</sup>

#### **Lesson 4: You probably don't know all of the facts.**

Litigators learn early in their careers that they don't know all the facts. The client comes in, tells you the facts, and it sounds like a slam-dunk case. Then as you review the client's files, take discovery, and engage in settlement negotiations, you learn one bad fact after another. Pretty soon you're kicking yourself for ever taking the case. After this happens a few times, you become much more careful about the cases you take.

Pennzoil shows that lawyers who do deals have to have the same wariness. If the lawyers who said there was no contract between Pennzoil and the Getty interests had known all the facts, they wouldn't have been so confident in their assertions. Even without that knowledge, they probably would have chosen their words a lot more carefully if they had stopped for a minute to think of how little they really knew.

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<sup>206</sup> See PETZINGER, *supra* note 3, at 403.

<sup>207</sup> See *Texaco I*, 729 S.W.2d 768, at 801 (Tex. Ct. App. 1987).

<sup>208</sup> *Id.*; LIMAN, *supra* note 34, at 244. One writer described these notes as "the most powerful" of the documents that Pennzoil found during discovery. COLL, *supra* note 3, at 418. See also PETZINGER, *supra* note 3, at 250 (describing the delight of the Pennzoil lawyers when they discovered the notes).

<sup>209</sup> See, e.g., *State Nat'l Bank of El Paso v. Farah Mfg. Co.*, 678 S.W.2d 661, 671 (Tex. Ct. App. 1984) (notes taken by bank officers during meetings key to upholding \$18 million judgment against banks).

<sup>210</sup> See, e.g., KC Goyer, *Nancy Temple's Duty: Professional Responsibility and the Arthur Andersen Verdict*, 18 GEO. J. LEGAL ETHICS 261, 261-62 (2004).

Sometimes you can't trust what your clients tell you, even when you have no doubts about their basic honesty. Memory plays tricks on a person, especially when pride and money are at stake. Arthur Liman, a lawyer of unquestioned integrity, remembered shaking hands with a number of people after the Pennzoil board voted. The people on the other side of those handshakes did not recall them.<sup>211</sup> Also, clients will neglect to tell you things because they don't think they're important. Larry Tisch, a very sophisticated business executive with nothing to hide, saw no reason to tell Bruce Wasserstein about the champagne toast that was to play such a big part in Pennzoil's case.<sup>212</sup>

If this weren't enough, there's always the problem that people in an organization don't know everything their colleagues are doing. While the trust's representatives were telling Texaco one thing, its California lawyers were telling the court out there something else.<sup>213</sup>

**Lesson 5: You can't always foresee the way things will come back to bite you, but you should at least try.**

It's just the nature of things that statements businesspeople and lawyers make in one stage of the affair come back to bite them in a later stage. The seller talks about what a great deal the buyer is getting. This is used against the seller to show breach of warranty or to enhance damages. Similarly, things you say in one stage of a lawsuit can often be used against you in another stage or in a different lawsuit. Most of the time there is nothing you can do about this. Larry Tisch couldn't have been expected to know what effect his champagne toast with the Gettys would have. The lawyer who argued against the restraining order on Gordon's behalf couldn't know that saying the deal had been given "extremely careful consideration" would ultimately result in a major embarrassment to his client. But you have to understand that every time you try to sound like a confident advocate instead of a mealy-mouthed office lawyer, you're taking a chance that sometime, somewhere, some smooth-talking lawyer for a greedy plaintiff is going to turn those words against you as he tries to extract a big settlement from your client.<sup>214</sup>

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<sup>211</sup> See *supra* text accompanying notes 71-72.

<sup>212</sup> See *supra* text accompanying notes 75, 85, 152.

<sup>213</sup> See *supra* text accompanying notes 101-02.

<sup>214</sup> And if you're sure you can't be outsmarted by a trial lawyer, consider Marty Lipton. As a dealmaker, no one is better. One writer called him "the most respected and feared attorney on Wall

**Lesson 6: Maintain good personal relationships.**

Too often, businesspeople litigate when the rationality they supposedly pride themselves on would dictate otherwise. One of your jobs as a lawyer is to make your client see the other person's point of view without having the client wonder who's side you're really on.

You'll also need to keep your client from provoking the other side unnecessarily. Apologies and a settlement offer large enough that it didn't insult Hugh Liedtke might well have kept Pennzoil from suing Texaco. Similarly, the fact that New Yorkers were making fun of Baker & Botts for their handling of the Getty/Pennzoil deal may have made the Baker & Botts lawyers more willing to counsel litigation and more aggressive when they got into the litigation.<sup>215</sup> Had the Texaco people realized this earlier, they probably could have done something to make the Baker and Botts lawyers look better and feel better.

**Lesson 7: Networking pays—most of the time.**

When the verdict came in, Marty Lipton and Bruce Wasserstein probably wished they hadn't been such good friends.<sup>216</sup> But Hugh Liedtke's long-time friendship with Joe Jamail certainly paid off for him. Mr. Jamail made out pretty well, too. Being good friends with the judges didn't hurt Mr. Jamail either.

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Street." COLL, *supra* note 3, at 442. But everyone agrees that he made a bad impression on the Texas jury. See, e.g., COLL, *supra* note 3, at 443-47, 449-50; PETZINGER, *supra* note 3, at 405, 407-08, 423. Jamail points out how he deliberately chose jurors who would be offended by the very traits that made Lipton a good transactional lawyer. JAMAIL, *supra* note 2, at 142. After devoting three pages of his book to detailing how he had "fun" working over Marty Lipton ("nicking him, nailing him"), Jamail concludes: "But, respectfully, I must say that Marty Lipton... is the best acquisition lawyer in America." JAMAIL, *supra* note 2, at 155.

<sup>215</sup> Some New York lawyers claimed that the reason Texaco had been able to buy Getty Oil was that the Houston lawyers of Baker & Botts were slow in producing the Pennzoil merger documents because they lacked the merger expertise of the New York firms. See PETZINGER, *supra* note 3, at 253.

<sup>216</sup> See *supra* text accompanying notes 80-83.

### **Lesson 8: What goes around comes around.**

It's a cliché, but (to paraphrase Henry Kissinger) even clichés have some truth in them.<sup>217</sup> Throughout the case Texaco paid for its history of arrogance, hard bargaining, and refusing to follow the conventions of the oil business. If Hugh Liedtke had not had a longstanding dislike for Texaco, he might not have filed the lawsuit in the first place. If Texaco had been better liked in the business community, it might have found more favorable witnesses to explain to the jury how business is really done. If Texaco hadn't had a history of squeezing its bankers, the bankers would have found a way to help it post the bond.

### **Lesson 9: You can't predict the outcome of litigation.**

Even after the Pennzoil-Texaco lawsuit was moved to Houston, Texaco's lawyers, some of the best in the world, told their client it would win easily.<sup>218</sup> All through the course of the litigation, there were decisions or chance events, which, if they had gone the other way, might have changed the outcome. If the answer had been filed in Delaware, . . . if the jury's one Jewish member hadn't been unable to continue, making way for the alternate who came to dominate the jury, . . . if the court rules hadn't been changed, . . . if Judge Farris hadn't developed cancer, . . . If, if, if.

Once you get beyond the realm of summary judgment, it really does become a crapshoot, which is one more reason you have to try to structure the deal so that your client can get a summary judgment.

### **Lesson 10: Get some litigation experience.**

The best way to learn to see how your documents and deals will look in litigation is to do some litigating. Hugh Liedtke, a law school graduate himself, may have had this in mind when he brought in Arthur Liman to assist in the negotiations

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<sup>217</sup> Henry Kissinger, secretary of state under Richard Nixon, said of his famously-paranoid boss, "Even a paranoid has some real enemies." JAMES B. SIMPSON, SIMPSON'S CONTEMPORARY QUOTATIONS 211 (1988).

<sup>218</sup> See COLL, *supra* note 3, at 398. Texaco's trial counsel, a man with years of experience litigating before Texas juries, said that the worst case scenario was a verdict of \$250-500 million against Texaco. *Id.* at 408.

for the Getty Oil takeover. Liman was a litigator, not a corporate lawyer, but Liedtke had Liman aboard for “strategic counseling.”<sup>219</sup>

Law firms used to cross-train their lawyers, so the people who made the deals would know what their deals would look like in court and the litigators would know what to look for when they started digging into deals that had gone bad. That’s not done much anymore. Associates get paid so much that firms can’t afford the billable hours that always need to be written off when an associate is learning a new field.

There are still ways to get litigation experience though. Sometimes a litigation team needs a transactional lawyer for her technical expertise. Try to get these assignments. Then, if you can do it without upsetting the people you normally work with, try to expand your role in the litigation. Pro bono work is another way to get litigation experience. Even a little landlord-tenant case gives you useful insights.

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<sup>219</sup> See LIMAN, *supra* note 34, at 239-41.