IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-2875

FIRST SOUTH SAVINGS ASSOCIATION
and
THE RESOLUTION TRUST CORP., CONSERVATOR,

Plaintiffs-Appellees,
Cross-Appellants,

VERSUS

DANIEL J. LINNARTZ, et al.,

Defendants,

KITTIE PARTNERS 1984-1
and
WILLARD H. BURNAP,

Defendants-Appellants,
Cross-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 89 2720)

December 2, 1992

Before KING, WILLIAMS, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Willard Burnap and Kittie Partners 1984-1 (Kittie Partners)

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

appeal a grant of summary judgment in favor of First South Savings Association (First South) and the Resolution Trust Corporation (RTC). Burnap challenges the district court's award of $1,352,583.95 plus interest to the RTC and First South. We affirm as to the grant of summary judgment in favor of the RTC and First South but remand for a finding as to the reasonableness of the amount of a settlement entered into by the RTC.

I.

Kittie Partners was formed on August 16, 1984, by Walter Burnap, Lester L. Kelley, B. Max Burleson, and Daniel J. Linnartz. Willard Burnap, Walter Burnap's father, joined Kittie Partners later in 1984. Also on August 16, 1984, Walter Burnap, on his own behalf, executed a promissory note (the Note) for $3,230,000 payable to First South. Linnartz, Burleson, and Kelley jointly and severally guaranteed the payment of the Note pursuant to contemporaneous Guaranty Agreements. On November 21, 1985, Walter Burnap, this time in conjunction with Kittie Partners, executed a Modification of Real Estate Note and Lien. Kittie Partners at this time became a party to the obligation owed to First South.

On July 31, 1986, Linnartz and Burleson withdrew from Kittie Partners and entered into a Release and Indemnity Agreement (the Indemnity Agreement) with the remaining partners in Kittie Partners (Walter Burnap, Willard Burnap, and Kelley). In the Indemnity Agreement, the remaining partners agreed to

> release, indemnify and hold harmless Linnartz, Burleson [, and] . . . their respective assigns . . . from and

> against any claim, demand, recovery, obligation, loss, liability, cost or expense . . . that any Indemnified Party may incur or sustain for, on or by reason of any matter, cause or thing whatsoever, relating to, arising out of, or in connec[ti]on with any transaction, convey-ance, encumbrance, loan, mortgage, or other activity by, for or on behalf of the Releasing Party [both Burnaps and Kelley], or any other liability the Indemnified Party may have undertaken to pay (as . . . guarantor . . .) on behalf of Partners or [Walter] Burnap . . . .

Kelley resigned from Kittie Partners on August 31, 1987.[1] On January 1, 1988, Willard Burnap sold his interest in Kittie Partners to Walter Burnap, leaving Walter Burnap as the sole remaining partner in Kittie Partners.

On January 4, 1988, Kittie Partners sold all of its assets and liabilities to Kittie Petroleum, Inc. (KPI). First South, in a January 26, 1988, letter (the Release Agreement) to Walter Burnap, Kittie Partners, and KPI, consented to the conveyance of all of Kittie Partners's property and liability to KPI; First South agreed to look to KPI for payment of the Note. In addition, First South released "partners and the persons who were partners of [Kittie] Partners from any further liability for the Note . . . ." First South, however, "specifically d[id] not release, Walter Burnap or any person who has executed a personal guaranty of payment and performance in favor of First South with regard to the Note . . . ."

The Note went into default in mid-1989. First South gave appropriate notice, and its Trustee conducted a non-judicial foreclosure sale of some of the properties securing the Note.

[1] Kelley filed for bankruptcy and was dismissed with prejudice by the district court on October 4, 1990.

First South purchased these properties for the sum of $1,762,900. At the time of foreclosure, $3,115,483.95 was owed on the Note, and thus a deficiency of $1,352,583.95 remained.

II.

First South and the Federal Savings and Loan Insurance Corporation (FSLIC), which was First South's conservator at the time, sued Walter Burnap, Linnartz, Burleson, Kelley, and Kittie Partners on August 14, 1989, for the deficiency. Walter Burnap was nonsuited from the case without prejudice on February 23, 1990, after filing for bankruptcy.

First South and the RTC, which is First South's present conservator, entered into an agreement (the Settlement and Assignment Agreement) with Linnartz and Burleson on January 30, 1990. Linnartz and Burleson respectively consented to entry of judgment against each of them for the full amount of the deficiency, plus prejudgment interest at 14.2% per year, plus postjudgment interest to accrue at 10% per year. Then Linnartz and Burleson assigned to the RTC their rights against Kittie Partners and Walter Burnap under the Indemnity Agreement.

In exchange, the RTC agreed to "use its best efforts to obtain a judgment against Kittie Partners and the remaining individual partners" under the Indemnity Agreement. "If successful in obtaining such a judgment, [the RTC] will first exhaust all reasonable means of collection against Kittie Partners and its partners" before seeking to collect from Linnartz or Burleson under

the Settlement and Assignment Agreement. If the RTC is "wholly unsuccessful in obtaining a judgment against Kittie Partners or its partners under the Indemni[ty Agreement], the [RTC] will not file of record, or attempt to execute on, the Agreed Judgments [with Linnartz and Burleson for $1,352,583.95]. In such event, Linnartz and Burleson will pay to the [RTC] the aggregate sum of $25,000."

On February 14, 1990, the RTC added Willard Burnap as a defendant and added a claim for recovery against him under the Indemnity Agreement. On March 5, 1990, Kittie Partners filed a motion for summary judgment, claiming that the RTC had failed to prove that Kittie Partners was a maker on the Note. The district court granted the motion on April 26, 1990.

On June 18, 1990, the RTC moved for summary judgment based upon the Indemnity Agreement. The district court entered its final judgment on October 4, 1990, granting the RTC's summary judgment motion. The court ordered that Willard Burnap and Kittie Partners pay to the RTC $1,352,583.95, prejudgment interest of $188,108.96, costs, and postjudgment interest at 7.78% per year. The court also made final the agreed judgments against Linnartz and Burleson. Willard Burnap and Kittie Partners now appeal this judgment.

III.

In reviewing a summary judgment, we apply the same test as did the district court. Samaad v. City of Dallas, 940 F.2d 925 (5th Cir. 1991). We will affirm a summary judgment when the record reflects that there exists "no genuine issue as to any material

fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). See also Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986).

The district court correctly found that the RTC could recover from Willard Burnap on the Note pursuant to the Indemnity Agreement. Linnartz and Burleson personally guaranteed the Note between Kittie Partners and First South. Kittie Partners, including Willard Burnap, agreed to indemnify Linnartz and Burleson from any claim arising out of their guaranty of the Note. The RTC, as Conservator for First South, held a valid claim against Linnartz and Burleson, based upon their guaranty, when Kittie Partners failed to repay the deficiency.

Linnartz and Burleson agreed to a judgment with the RTC of $1,352,583.95 and agreed to assign to the RTC their rights to collect from Willard Burnap on the Indemnity Agreement. Thus, the district court properly found that the RTC, standing in Linnartz's and Burleson's shoes, had a right to collect from Willard Burnap under the Indemnity Agreement.

IV.

A.

Willard Burnap asserts that the June 26, 1988, Release Agreement between First South and Kittie Partners bars any recovery from Willard Burnap. The Release Agreement provides the following:

> First South hereby releases Partners and the persons who were partners of Partners from any further liability for the Note and under the Deed of Trust, but only regarding the Note and Deed of Trust and not concerning any other

> debt owed by any such person to First South and except to the extent such persons may be, and First South specifically does not release, Walter S. Burnap or any person who has executed a personal guaranty of payment and performance in favor of First South with regard to the Note and Deed of Trust, or with regard to any other debt owed to First South. [Emphasis added.]

A plain reading of this language shows that First South intended to release all persons, including Willard Burnap, from "any further liability" on the Note, with one exception: First South did not release any person who had "executed a personal guaranty of payment and performance" of the Note.

As we have stated, Linnartz and Burleson executed separate Guaranty Agreements with First South,[2] guaranteeing to First South (and "its successors and assigns") the "payment and performance of all other obligations hereafter owed by Walter S. Burnap and/or the Partnership [Kittie Partners] . . . under the [Note]." So, by the terms of the Release Agreement, both Linnartz and Burleson, as guarantors, continued to be liable on the Note.

Willard Burnap, on the other hand, never executed a personal guaranty of the Note. He argues, therefore, that the Release extinguished his liability regarding the Note. His argument is not persuasive. While the Release may have released him from "any further liability for the Note")) in other words, in his role as maker of the Note (based upon his status as a partner in Kittie Partners when it signed on to the modification and extension of the Note))) the Release Agreement did not release him in his role as

[2] Kelley also executed a guaranty of the Note, but, as previously noted, he was dismissed from the suit.

indemnitor of Linnartz and Burleson under the Indemnity Agreement.

The Release Agreement evidenced no intent to eliminate any party's duties as an indemnitor. Texas courts have placed special emphasis on the intent of the parties and the circumstances surrounding the execution of the document. The court in San Antonio Housing Auth. v. Underwood, 782 S.W.2d 25, 27 (Tex. App.)) San Antonio 1989, no writ), stated,

> Texas courts attempt to ascertain and give effect to the true intention of the parties to [the] release, and construe the release in light of the facts and surrounding circumstances as shown by the record. When construing a contract, a court should give effect to the intention of the parties as expressed or as apparent in the writing. [Citations omitted.][3]

Texas courts also disfavor broad constructions of release clauses.[4]

Thus, although Texas courts have not addressed the specific situation at issue in this case, applicable precedent shows that a release such as the Release Agreement between First South and Kittie Partners would not encompass a claim that arose after the release was executed. At the time the Release Agreement was signed, there is no evidence in the record that First South had any knowledge of the Indemnity Agreement between the remaining Kittie

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[3] See also Tricentral Oil Trading v. Annesley, 809 S.W.2d 218, 221 (Tex. 1991) ("To give effect to the parties' intent a release will be construed in light of the facts and circumstances surrounding its execution."); Crawford v. Kelly Field Nat'l Bank, 733 S.W.2d 624, 627 (Tex. App.)) San Antonio 1987, no writ) ("In construing a release, an effort will be made primarily to ascertain and give effect to the intention of the parties.")

[4] In Tricentral Oil, 809 S.W.2d at 221, the court found that a general-release-of-all-claims provision did not include a claim to trust property not expressly mentioned. In San Antonio Housing Auth., 782 S.W.2d at 28, the court held that a release agreement releasing a party from all further claims did not include a claim for court costs. In Crawford, 733 S.W.2d at 627, the court stated that "[g]eneral categorical release clauses are to be narrowly construed."

Partners and Burleson and Linnartz. The RTC and First South became assignees of the Indemnity Agreement in January 1990, almost two years after the Release Agreement was executed.[5] Accordingly, First South had no intention of including the Indemnity Agreement as part of its release of Kittie Partners from "any further liability."

Giving effect to the parties' intent at the time of executing the Release Agreement, and construing the release in light of the surrounding circumstances, we conclude that the Release Agreement did not release Kittie Partners or Willard Burnap from liability to Linnartz and Burleson under the Indemnity Agreement. Having established that the Release Agreement did not release Willard Burnap from indemnitor liability, we turn to the Indemnity Agreement.[6]

B.

Willard Burnap claims that the Indemnity Agreement is void because it creates circular liability. This argument does not hold water.

In contrast to this case, the classic circular liability case

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[5] Nor did First South have the power to release Kittie Partners (including Willard Burnap) from an Indemnity Agreement between Kittie Partners and Linnartz and Burleson, an agreement to which First South was not a party.

[6] Kittie Partners and Willard Burnap's reliance upon Tobbon v. State Farm Mut. Auto. Ins. Co., 616 S.W.2d 243, 245 (Tex. Civ. App.)) San Antonio 1981, writ ref'd n.r.e.), is misplaced. They claim that Tobbon holds that a valid release bars any subsequent action based upon matters involved in the release, thus eliminating any indebtedness Willard Burnap might have incurred on the Note. Tobbon, however, specifically limits the bar to matters covered by the release. As previously shown, Willard Burnap's liability stems from his role in the Indemnity Agreement, a matter not covered by the release.

involves three parties who form a triangle of interlocking liabilities: "A" is liable to "B," "B" is liable to "C," and "C" is liable to "A." For example, in Moore v. Southwestern Elec. Power, 737 F.2d 496 (5th Cir. 1984), cert. denied, 469 U.S. 1211 (1985), we discovered a circular pattern of indemnity when Valmac ("A"), an employer, indemnified SWEPCO ("B"), a power company; SWEPCO ("B") agreed to pay the plaintiff-employee, Moore's family ("C"); and Moore's family ("C") agreed to indemnify Valmac ("A"). We found that "[w]hen such circular patterns of indemnity develop, Texas courts resolve the matter by denying recovery to plaintiffs." Id. at 501. See also Panhandle Gravel Co. v. Wilson, 248 S.W.2d 779 (Tex. Civ. App.)) Amarillo 1952, writ ref'd n.r.e.); Starcraft Co. v. C.J. Heck Co., 748 F.2d 982 (5th Cir. 1984). In order to find a case of circular liability, we must see three distinct parties incurring a duty to pay or indemnify arising out of more than one agreement.

The crucial distinction between a true circular liability situation and the present case is that the latter involves only two parties: Linnartz, Burleson, and now the RTC ("A") and Willard Burnap ("B"). Willard Burnap agreed to indemnify Linnartz and Burleson under the 1986 Indemnity Agreement; Linnartz and Burleson agreed to indemnify Willard Burnap under the same agreement.

The RTC is not an additional party that has agreed to make Linnartz and Burleson whole as against Willard Burnap. The RTC, under the 1990 Settlement and Assignment Agreement, simply has replaced Linnartz and Burleson in a bilateral agreement. Because

the agreements here do not create a triangle of interlocking liability, they eliminate any question of circular liability.

Willard Burnap's next contention)) that the Indemnity Agreement is really a mutual release)) is equally without merit. He argues that the Indemnity Agreement not only obligates him to release and indemnify Linnartz and Burleson against any claim in connection with their guaranty of the Note but also obligates Linnartz and Burleson to release and indemnify him from any liability on the Note. He thus concludes that the RTC can recover nothing on the assignment of the Indemnity Agreement from Linnartz and Burleson to the RTC because, if the RTC recovered from him, it would have to indemnify him against the judgment.

An examination of the relevant language of the Indemnity Agreement shows the flaws in Willard Burnap's reasoning. Importantly, the portion relating to his obligation to Linnartz and Burleson is not identical to the portion relating to Linnartz and Burleson's obligation to him.

Willard Burnap is obligated to indemnify Linnartz and Burleson against any liability they

> may incur or sustain for, on or by reason of any matter, cause or thing whatsoever, relating to, arising out of, or in connec[ti]on with any transaction, conveyance, encumbrance, loan, mortgage, or other activity by, for or on behalf of [Willard Burnap], or any other liability [Linnartz and Burleson] may have undertaken to pay (as maker, co-maker, endorser, guarantor, indemnitor or otherwise) on behalf of Partners or [Walter] Burnap . . . . [Emphasis added.]

The portion relating to Linnartz's and Burleson's obligation to Willard Burnap repeats the non-emphasized language but does not

include the emphasized language.

Specifically, while Willard Burnap assumed the responsibility of indemnifying Linnartz and Burleson with respect to their obligations as makers and guarantors, Linnartz and Burleson did not do the same for him. Linnartz and Burleson were leaving Kittie Partners. They naturally sought an Indemnification Agreement that would protect them from liabilities they may have incurred as guarantors during their tenure at Kittie Partners. To have structured the Agreement as a mutual release would not have benefited them. Since each party agreed to indemnify the other for different possibilities, the Agreement was not a mutual release, and the RTC, as Linnartz's and Burleson's assignee, is entitled to collect on it from Willard Burnap.

Willard Burnap proceeds to claim that Texas law provides that a promise to indemnify does not create any liability until the promisee has incurred liability, loss, or expense. Actually, Texas law requires only that the indemnitee suffer actual loss when "the obligation of indemnity is against damages or injury . . . ." Holland v. Fidelity & Deposit Co., 623 S.W.2d 469, 470 (Tex. App.)) Corpus Christi 1981, no writ). "Where the obligation binds the indemnitor to protect the indemnitee against liability, the indemnitee need not have suffered an actual loss for the right to indemnification to arise." Id. In the Indemnity Agreement, Willard Burnap agreed to indemnify Linnartz and Burleson against any liability; hence, Linnartz and Burleson need not have suffered any actual loss to recover under that agreement.

C.

Texas law does require that "liabilities be fixed and certain." Id. Willard Burnap claims that Linnartz's and Burleson's liability under the Settlement and Assignment Agreement with the RTC is not fixed and certain.

Under the Settlement and Assignment Agreement, Linnartz and Burleson consented to the entry of judgments against them for the full amount of the deficiency on the Note ($1,352,583.95), plus pre- and postjudgment interest, and assigned their rights under the Indemnity Agreement to the RTC, which, in return, agreed to "use its best efforts to obtain a judgment against" Willard Burnap. If successful, the RTC would "first exhaust all reasonable means of collection against [Willard Burnap] before filing the Agreed Judgments of record and executing upon the Agreed Judgments."

The RTC also agreed as follows:

> 4. Subject to the provisions of Paragraph 5 below, if the [RTC] is wholly unsuccessful in obtaining a judgment against [Willard Burnap] under the Indemni[ty Agreement], the [RTC] will not . . . attempt to execute on, the Agreed Judgments. In such event, Linnartz and Burleson will pay to the [RTC] . . . the aggregate sum of $25,000.00 . . . .

Paragraph 5 provides that the RTC will execute the agreed judgments against Linnartz and Burleson if Willard Burnap "successfully raise[s] a legal defense to [his] liability under the Indemnification; which defense arises from the acts, omissions, or representations of Linnartz and/or Burleson."

Linnartz's and Burleson's liability is fixed and certain at the sum of $1,352,583.95 plus interest. The only question is out

of whose pocket this sum actually will come. The Settlement and Assignment Agreement merely addresses the order the RTC will follow in attempting to collect the money owed to it.

Under the Settlement and Assignment Agreement, the RTC has agreed first to seek and collect a judgment against Willard Burnap. If the RTC collects the full judgment from him, Linnartz and Burleson need pay nothing. If the RTC is "wholly unsuccessful" in obtaining a judgment against Willard Burnap, then Linnartz and Burleson must pay the RTC $25,000.

There are three ways for the RTC to collect on the agreed judgments against Linnartz and Burleson: (1) If Willard Burnap successfully raises a defense arising from "the acts, omissions, or representations of Linnartz and/or Burleson," the RTC may execute on the Agreed Judgments; (2) if the RTC only partially collects on a judgment against Willard Burnap, it may collect the outstanding sum from Linnartz and Burleson; and (3) if the RTC is "wholly unsuccessful" against Willard Burnap, and Linnartz and Burleson fail to pay the RTC $25,000, then the RTC presumably can execute on the Agreed Judgments against Linnartz and Burleson for $1,352,583.95 plus interest.

The Settlement and Assignment Agreement does not affect Linnartz's and Burleson's liability but only the order in which the RTC will attempt to collect on that liability, which is fixed at $1,352,583.95 plus interest. The only thing not fixed is the extent to which Linnartz and Burleson will be required to satisfy the judgment out of their own pockets. As the court noted in

Holland, 623 S.W.2d at 470, the indemnitee's actual loss is irrelevant. Thus, the liability here meets the "fixed and certain" test.

D.

Willard Burnap's last substantive complaint is that Linnartz and Burleson violated the 1986 Indemnity Agreement by entering into a settlement with the RTC without prior notice to him. The notice provision states, "Any notice of a claim hereunder by any party hereto shall be given in writing at the address indicated below . . . ." This provision does not require that notice be given prior to entering into a settlement agreement involving a claim for indemnity. Willard Burnap received written notice of a claim when the RTC served its First Amended Complaint on him.

Finally, Willard Burnap contends that the district court incorrectly awarded summary judgment, as "numerous genuine issues of material facts existed." He then lists twelve "issues" that he claims preclude summary judgment. We find that none of these "issues" supports a reversal, however. Several "fact issues" are actually questions of law; several others involve factual matters but are unsupported by the summary judgment record. In short, Willard Burnap brews up a batch of unsupported complaints, none of which can ward off summary judgment.

V.

Remand on one issue is necessary, however. Texas law requires

that "in order for a settling indemnitee to recover the amount of the settlement from the indemnitor, the indemnitee must show a potential liability and that his settlement was reasonable, prudent and in good faith under the circumstances." Getty Oil Corp. v. Duncan, 721 S.W.2d 477 (Tex. App.)) Corpus Christi 1986, no writ) (citing Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co., 490 S.W.2d 818, 824 (Tex. 1972), overruled on other grounds, Ethyl Corp v. Daniel Constr. Co., 725 S.W.2d 705 (Tex. 1987)). The reason behind this rule is a fear that settling indemnitees may agree to inflated settlements at the expense of indemnitors.

The district court made no explicit finding that the settlement between the RTC and Linnartz and Burleson was "reasonable, prudent and in good faith." In order to establish the reasonableness of the settlement, we remand this issue to the district court. We expect the district court to conduct proceedings to determine whether the agreement Linnartz and Burleson reached with the RTC was reasonable, prudent, and in good faith under all of the circumstances, including from the perspective of the indemnitors, Willard Burnap.

Having determined that the district court correctly granted summary judgment, we need not reach the RTC's claims, in its cross-appeal, that the court erred in refusing to allow the RTC to amend its complaint to allege that the Release Agreement was procured by fraud. Finally, we have reviewed Willard Burnap's additional reasons to overturn the grant of summary judgment and find them to be without merit.

VI.

We conclude that the district court correctly found that Willard Burnap is liable to the RTC under the Indemnity Agreement and the Settlement and Assignment Agreement. We therefore AFFIRM the summary judgment in favor of the RTC and First South, except that we REMAND for a finding as to the reasonableness of the amount of the settlement between Linnartz and Burleson and the RTC.

JERRE S. WILLIAMS, Circuit Judge, concurring:

I am in agreement that the opinion for the Court accurately states the current law and reaches the correct result.

This opinion is written to express my view that the law controlling this decision is grossly unfair to indemnitor, Willard Burnap. We have here the spectacle of a $1,352,583.95 judgment established by agreement between the indemnitees, Linnartz and Burleson, and the creditor without the opportunity of the indemnitor to participate, although he is now held liable in this summary judgment which is under appeal.

What has happened in effect here is that the RTC has purchased this huge judgment to serve as the basis of the indemnification for a maximum payment or settlement of a $25,000 obligation on the part of the indemnitees. This bargain-basement sum is less than 2% of the obligation subject to the indemnitees. The indemnitees escape virtually unscathed while the indemnitor carries this overwhelming burden.

The Court properly recognizes that the Texas law requires that there must be a hearing and the indemnitees must show that the "settlement was reasonable, prudent and in good faith under the circumstances." But, the remaining problem is that no matter how good the hearing before the court, it is not a full-fledged adversarial trial. The indemnitor is saddled with this huge judgment without ever having had the opportunity to participate in a trial as to its validity and as to his obligations as indemnitor. In the meantime, the indemnitees sit back relaxing knowing that they never can be liable jointly for more than $25,000 on this judgment of over $1.3 million.

The opinion of the Court takes the position that it is up to the parties to provide in the indemnity agreement if the indemnitor is to be a participant in the judicial establishment of the obligation leading to the indemnification.

My response to this facet of the law is that we don't state all obligations of the parties in basic documents. They are complicated enough as it is without spelling out every possible demand and obligation. We do not, for example, require that honesty be promised, that non-negligence be promised, and other similar things all in the writing. The law should not be amenable to upholding an obligation on the indemnitor in this case without the opportunity for him to participate in a trial.

So I do concur, but I regret that the law governing important business transactions has this harsh result in this kind of case. The required hearing on remand is obviously of some solace, but it is not a trial.