IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8176

CLAYTON W. WILLIAMS, JR., INC.,

Plaintiff-Appellant,

versus

KOCH OIL COMPANY, A Kansas Corporation,

Defendant-Appellee.

Appeal from the United States District Court for
the Western District of Texas
(M-92-CV-75)

(April 26, 1994)

Before REAVLEY, GARWOOD and HIGGINBOTHAM, Circuit Judges.

REAVLEY, Circuit Judge:*

Clayton W. Williams, Jr., Inc. (Williams) brought this action against Koch Industries, Inc. (Koch) and one of its divisions, Koch Oil Company. After a bench trial the district court ruled against Williams on its claims and in favor of Koch on its counterclaim. We affirm the take-nothing judgment on Williams' claims; we reverse the judgment on the counterclaim and render judgment against Koch.

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*Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

FACTUAL BACKGROUND

In 1980 by oral agreement Koch began purchasing oil produced from wells operated by Williams in the Pearsall and Giddings area of Texas. On January 15, 1991, they entered into a written crude oil purchase and sales agreement (the agreement). The agreement has a Kansas choice of law provision, and all agree that Kansas law governs the contract dispute. Article II of the agreement provided the price for lease level purchases by Koch:

> Koch shall pay Williams for the crude oil produced from the Committed Wells at least the highest price obtainable by Williams from time to time for crude oil produced and sold in the area where the wells are located. Payments by Koch to Williams for purchases made pursuant to this Article II shall be made not later than the 20th day of the month following delivery.

The agreement also provided Williams with hedging opportunities in Articles III and IV. Under the hedge provisions Williams would sell a portion of its future production at a set price, and prior to the expiration of trading for that month, would buy back from Koch an identical volume of oil at a price tied to Koch's posted price for the month. By hedging Williams obtained a cushion against a falling market price, which allowed more predictability for its planing.

In April of 1991 a company known as Wintershall Energy, which had a working interest in some of the wells, notified Williams that Koch might be underpaying Williams for its lease level crude. Williams then obtained a market survey that tended to show that Koch was paying less than the highest price obtainable. This suit followed. Williams claims that it presented unchallenged testimony that higher prices were being paid by competitors in the area, that Koch was aware of these higher prices, and that Koch itself was paying higher prices to producers in the area than it was paying Williams.

Koch counterclaimed, alleging that Williams had underpaid Koch for hedged oil. The district court rejected Williams' claims and awarded a judgment in favor of Koch on the counterclaim.

DISCUSSION

A. *Williams Underpayment Claim*

The Article II lease level pricing provision, quoted above, required Koch to pay Williams "the highest price obtainable by Williams." Both parties claim that the contract is unambiguous, and the district court agreed. The district court concluded:

> The phrase "highest price obtainable by Williams from time to time," as used in the January 15, 1991 contract, does not require Koch to pay a price to Williams merely because it is available to other producers in the area. Rather, the contract requires Koch to pay Williams the highest price *Williams* can actually obtain; that is, a price Williams can gain hold of or gain possession through it own efforts. If those prices are higher than those being paid by Koch, Williams has the obligation to notify Koch of the higher price prior to the 20th day of the month following delivery of the crude.

The district court further concluded that "Williams' failure to determine if other purchasers were willing to pay Williams a higher price for its crude oil than what Koch was paying constituted a waiver of Williams' right to receive a higher price under [the agreement]."

A district court's interpretation of a contract, including its initial determination of whether a contract in ambiguous, is a matter of law which we review *de novo.* *American Totalisator v. Fair Grounds Corp.*, 3 F.3d 810, 813 (5th Cir. 1993). Under Kansas law, the terms of an unambiguous contract are "given their plain, general and common meaning, so as to give effect to the intention of the parties at the time they contracted." *Vanderpool v. Higgs*, 690 P.2d 391, 393 (Kan. Ct. App. 1984).

We agree that the lease level pricing provision is unambiguous. Giving the provision its plain, general and common meaning, "the highest price obtainable by Williams from time to time for crude oil produced and sold in the area" means the highest price being paid for oil of comparable quality and quantity in the area. We hold, however, that it is a misreading of the contract to require Williams to (1) obtain offers for its crude from third parties and (2) communicate those offers to Koch within twenty days, if Williams wants the challenge the price being paid by Koch. That reading of the contract creates conditions on Williams' right to be paid according to the contract's terms which cannot be found in the agreement.[1] The

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[1] *Compare Mays v. Middle Iowa Realty Corp.*, 452 P.2d 279, 284-85 (Kan. 1969) ("[A]ppellant is not asking us to construe an ambiguous instrument but is in effect asking us to add to the terms already covered by the contract. . . . `The words incomplete and ambiguous are not synonymous. The language in a contract is ambiguous when the words used to express the meaning and intention of the parties are insufficient in a sense the contract may be understood to reach two or more possible meanings. A contract is not ambiguous when it fails to contain a restriction against a sale which one party says should have been inserted.'") (quoting *Wood v. Hatcher*, 428 P.2d 799, 803 (1967)).

agreement did not purport to limit the time for filing a claim for underpayment, other than to state that the agreement shall be interpreted under Kansas law. It did not obligate one party or the other to determine the highest prices being paid in the area for crude oil, nor did it obligate Williams to notify Koch of such prices. As we read the agreement, Williams had a contractual right to prove that higher prices were being paid for comparable oil during any period covered by the agreement in a court of competent jurisdiction, and to recover underpayments, so long as Williams brought its claim within the applicable Kansas limitations period.

Koch argues that under Williams' interpretation of the agreement, Koch would be required to exchange price information with its competitors to determine the highest price being paid in the area, and that such activity would violate the antitrust laws. We are not impressed with this argument. While the sharing of prices with competitors may sometimes evidence an illegal price-fixing agreement in restraint of trade, it would be highly unlikely to have a conspiracy by *buyers* to agree to pay the *highest* prices received by sellers in a particular market. The antitrust laws do not reach a claim "that simply makes no economic sense" or one where the alleged wrongdoers "had no rational economic motive to conspire." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 596 (1986).[2]

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[2] Williams also points out that prices of competitors are available in public severance tax records.

Koch further argues that the contract as a whole should be considered in construing "the highest price obtainable by Williams," and that we should take into account that Williams was both selling oil and buying it back under the hedging provisions. Koch claims that the price for outright purchases is not the same as the price Williams could receive under the complicated arrangement here. The district court agreed that in considering whether the price paid to a third party was "obtainable by Williams" under the contract, the price must be for crude oil "payable in the context of an exchange transaction." Again, we cannot agree with this interpretation of the contract. The contract does not say that Koch must pay the highest price Williams could obtain under a similar sale/hedging arrangement; it says Koch will pay the highest price obtainable by Williams. The plain, ordinary meaning of the clause is that Koch must pay the highest price being paid for like quality and quantity oil from similar wells in the area. The agreement separates its pricing provisions. The lease level pricing provision in Article II does not state or imply that it is to be determined by reference to the other pricing provisions concerning hedged oil.[3]

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[3] Further, a Williams representative and its first witness at trial testified that Williams was not interested in hedging "if it lessened the price we otherwise could get at the lease level." He later testified that "we expressed desire that we would not do the hedging unless we would get for our leased barrels a price that was as good as we would otherwise could receive and I know [Koch] understood that, they said on more than one occasion that we agree with you to have that type of concern, so I believe that they knew exactly what we were talking about." Williams' former president likewise testified that "we couldn't do [hedging] at the expense of jeopardizing the price at the

As further grounds for entering the take-nothing judgment, the district court found waiver and estoppel in its conclusions of law 12 and 13:

> 12. Williams' failure to determine if other purchasers were willing to pay Williams a higher price for its crude oil than what Koch was paying constituted a waiver of Williams' right to receive a higher price under the January 15, 1991 contract.
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> 13. To the extent Williams knew purchasers were willing to pay Williams a higher price for its crude oil and failed to notify Koch of the existence of the higher price in a timely manner constitutes an estoppel and precludes Williams from receiving a higher price for its crude.

These findings apparently are based on the court's view that Williams was obligated to go out and obtain offers from third parties to pay prices in excess of what Koch was paying, and to communicate those offers to Koch. As explained above, we do not agree with this reading of the contract. The contract did not place on either party the burden of determining the highest price available to Williams. Further, the evidence showed that once Williams had reason to believe that it was being underpaid it notified Koch of its concerns within a matter of days, tried to determine if it had a viable claim, and met with Koch to try to

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lease level; that had to be [a] separate transaction . . . . the royalty owners and the working interest owners should not be exposed to that gain or loss because it is a risk business, so that had to be a separate transaction from what was going on at the lease . . . ." He also confirmed that this understanding was communicated to Koch. Hence, even if we found it necessary to consider parol evidence we would conclude that "the highest price obtainable by Williams" did not mean the highest price Williams could obtain in a similar sale/hedging arrangement.

resolve the dispute prior to filing suit. We find no ground for estoppel or waiver in this normal conduct.[4]

Under Kansas law, a contractual waiver occurs where "a party has voluntarily and intentionally renounced or given up a known right, or has caused or done some positive act or positive inaction which is inconsistent with the contractual right." *Southwest Nat'l Bank v. Simpson and Son, Inc.*, 799 P.2d 512, 520 (Kan. App. 1990). Waiver must be manifested in some unequivocal manner, and mere silence of a party is not a waiver unless there is a duty to speak. *Patrons Mut. Ins. Ass'n v. Union Gas Sys., Inc.*, 830 P.2d 35, 39 (Kan. 1992). No action or inaction of Williams indicated a voluntary and intentional waiver of a right to be paid the price specified in the agreement.

Likewise we conclude that Williams is not estopped to assert its underpayment claim. To establish estoppel Koch must show that Williams, by its acts, representations, admissions, or silence when it had a duty to speak, induced Koch to believe certain facts existed and that Koch rightfully relied and acted upon such belief and would now be prejudiced if Williams were permitted to deny the existence of such facts. *City of Olathe v. Stott*, 861 P.2d 1287, 1293 (Kan. 1993). Further, to show estoppel by silence, Koch must show "(1) [Williams'] intent to mislead or willingness to deceive, (2) knowledge or reason to

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[4] Further, Koch is hardly in a position to claim that Williams should be equitably estopped, since evidence was offered that Koch was paying others a higher price than it was paying Williams, and did not disclose that information to Williams.

suppose that someone is relying on that silence, and (3) as a result of that reliance, that someone is acting or about to act as he or she would not otherwise act." *Id*. "Estoppel will not be deemed to arise from facts which are ambiguous and subject to more than one construction." *Tucker v. Hugoton Energy Corp.*, 855 P.2d 929, 937 (Kan. 1993). The facts here do not support an estoppel. Williams had no contractual duty to determine the highest available price in the area and notify Koch of such price, and hence Williams had no duty to speak and Koch had no right to rely on Williams' silence. Further, there is no evidence of an intent to mislead or deceive on the part of Williams.

Despite our disagreement with these legal conclusions of the district court, we nevertheless hold that the take-nothing judgment on William's underpayment claim should stand, because the district court's findings that Williams failed to establish a breach of the obligation to pay the highest obtainable price or the amount of damages are not clearly erroneous. Williams' damage evidence consisted of the testimony of its expert Jay Printz, who purported to calculate damages on the basis of field postings, prices Koch paid in different transactions and prices paid by other purchasers to other producers. The district court concluded that this testimony would not support a judgment for a number of reasons.

The court found that a purchaser posted price does not necessarily represent what the producer is actually paying for crude oil purchased from specific producers, or that the actual prices paid are the product of individual negotiations between purchaser and producer. The court also found that different prices can result from a number of factors, including the business relationship existing between the purchaser and producer and the economics of connecting the lease. Printz did not consider offers Williams had actually received for its oil. He excluded some third party transactions because he felt they were "special deals or one time deals." And yet he considered prices paid by Koch even though he had no idea whether they were also special deals or one time transactions. Printz changed his calculations several times and testified that he would not be surprised if his latest figures still contained logic or computational errors. The district court concluded that the proof of damages failed to demonstrate that Koch had not complied with its contractual obligations. This ruling is not clearly erroneous; the evidence presented of sales to Koch and other purchasers considered by Printz did not establish a higher price Williams could have received for its oil.

We recognize that Williams faced a difficult task in proving the highest price it could have obtained in a prior period, taking into account the quality, transportation costs, and quantity of the Williams crude, and perhaps others relevant factors as well. However, this difficulty is one of the parties' own making, since they chose not to employ a more definite pricing arrangement. "It is not the province of the court to make contracts for the parties. Its function is confined to an interpretation of the contract which the parties have entered into." *First Nat'l Bank of Olathe v. Clark*, 602 P.2d 1299, 1303 (Kan. 1979).

B. *Koch's Counterclaim*

The price that Williams was to pay Koch for hedged oil is set out in section 3.2 of the agreement:

> Williams shall pay Koch for the Hedged Oil purchased each month a price per barrel equal to the average of Koch's West Texas intermediate posted price for such month plus $.70 per barrel transportation cost from the leasehold to the point of delivery plus an additional amount equal to the per barrel premium, if any, paid by Koch to Williams at the lease level during such month.

The counterclaim centers on the meaning of the "per barrel premium" language.

Koch successfully argued that it was entitled to damages on its counterclaim because it waived "gravity deductions" on the lease level purchases from Williams, and that this waiver constituted a "per barrel premium" under the Article III hedging price provision. A gravity deduction is a price adjustment off the posted price to take into account the "gravity" or viscosity of the crude. Koch claims that it purchased crude from Williams at the lease level based on an agreed or "deemed" gravity that was superior to the actual gravity of Williams' crude. In other words, Koch claims that it was paying Williams a price equal to the price for a superior grade of crude. It therefore claimed that the waiver of the gravity deduction was a "premium" Koch paid for Williams' crude, and that this premium should have been included in the price Williams paid Koch for hedged oil. The court awarded judgment to Koch in the amount of $603,402 plus interest on the counterclaim. The evidence in support of the counterclaim consisted of the brief testimony of Kelli Ellington, a Koch accountant, and a summary exhibit she had prepared purporting to show amounts due Koch for unpaid premiums.

For several reasons we conclude that the district court erred in concluding that Koch had proved its right to recovery under the counterclaim. First, some of the alleged payments due were based on hedge transactions conducted between Koch and Citadel Marketing, Inc. (Citadel), a Williams affiliate. Citadel had a separate written agreement with Koch which did not call for payments of premiums. Koch offered no sound legal basis for ignoring the status of Citadel as a separate legal entity, piercing the corporate veil, or otherwise holding Williams liable for payments allegedly due from Citadel. The trial exhibit claimed unpaid premiums dating back to September 1990, yet the agreement between Koch and Williams indicated that sales of hedged oil to Williams were to begin in June of 1991. Second, Ellington did not explain how the premium was calculated according to her exhibit, stating only that it was provided to her by Koch management. Even assuming that the waiver of a gravity discount is a "premium . . . paid by Koch to Williams at the lease level" under the agreement, Ellington testified to no knowledge or predicate for a determination of the appropriate gravity deduction for the sales in question. Further, the only evidence offered as to whether the waiver of a gravity deduction should be considered the payment of a "premium" was the testimony of Printz, to the effect that the waiver of a discount off a posted price is not considered a premium in the industry. Third, Ellington's exhibit totalled premiums due for "exchanged volumes," and she admitted that "the volumes that were hedged would be different from the exchanged volumes." Article III of the agreement, however, only relates to hedged oil. Fourth, a summary chart can only be introduced as evidence to summarize "[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court . . . ." FED. R. EVID. 1006. The Rule does not contemplate summaries of oral evidence. At a minimum, the summary introduced at trial and purporting to show unpaid premiums would require examination of documentation confirming the monthly sales, Koch's postings and the actual gravity of the oil sold. Such documentation "shall be made available for examination or copying, or both, by other parties at reasonable time and place." The "summary" was not itself evidence of damages and could only be used in argument as a tabulation of Ellington's oral testimony. However, her testimony did not support that tabulation.

Koch failed to carry its burden of establishing its claim of underpayment by Williams for hedged oil.

CONCLUSION

The judgment is affirmed insofar as it is a take-nothing judgment against Williams on its affirmative claims for relief.

The judgment is reversed and rendered insofar as it awarded a money judgment to Koch on its counterclaim.

AFFIRMED in part, REVERSED and RENDERED in part.