

## PENNZOIL v. TEXACO

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*This paper discusses the Pennzoil v. Texaco litigation, which produced the largest civil judgment, \$10.53 billion U.S., and the largest civil settlement, \$3 billion U.S., in American history. It describes the facts of the case, provides an overview of the American legal principles respecting contract formation and tortious interference with contract, and considers some of the policy issues arising therefrom.*

### I. THE FACTS

Perhaps it would be useful to begin with some of the background to this well-publicized controversy and to identify some decisional points and their legal and policy implications. We rely on the facts as they were developed in the Trial Court and stated by the Texas Court of Appeals.

On December 21, 1983, Pennzoil commenced a tender offer of \$100 a share for up to 16 million shares or 20% of the stock of Getty Oil Company. The stock was then selling for about \$80 per share. At that time, the Sarah C. Getty Trust owned 40.2% of the Getty stock, with Gordon Getty as the sole trustee, and the J. Paul Getty Museum, of which Harold Williams was the President, owned 11.8% of the shares. Thus, Getty presented the rather atypical situation in which two men controlled the majority of the shares of a large and publicly-traded oil company, and were they so inclined, could have sold a controlling interest in the company without the approval of the Getty Board of Directors. In the period prior to December 1983, there was some tension between the management of Getty, including its Chief Executive Officer, Sidney Peterson, and Gordon Getty. Indeed, the evidence suggested that in November 1983, the Getty Board acted in the absence of Mr. Getty to sponsor a lawsuit by one of his relatives to have a co-trustee appointed for the Sarah Getty Trust.

In early January 1984, the Museum, the Trust, and Pennzoil entered into negotiations to alter the ownership of Getty Oil and executed a Memorandum of Agreement signed by Mr. Liedtke, the CEO of Pennzoil, Mr. Williams and Mr. Getty. Note that this piece of paper was not a "letter of intent" or a "memorandum of understanding" or an "agreement in principle"; it was a "memorandum of agreement" duly executed by the parties. And, while there indeed were handshakes, much more was involved than social congratulations and the popping of champagne bottles. Subsequently, the Chancellor in Delaware found no difficulties with the sufficiency of the writings under the New York Statute of Frauds, and the point was not pressed with seriousness in the Texas litigation.

The January 2, 1984 Memorandum of Agreement contained the critical terms of the proposed transaction. Pennzoil would increase its tender offer price to \$110 per share and buy over 23 million shares. Getty Oil was to purchase the Museum's shares at the same price, though later, for tax reasons, it was decided that Pennzoil would purchase those shares. All shareholders other than the Trust and Pennzoil were to be bought out at the same price, and the Trust was to own 4/7ths of the new Getty entity and Pennzoil the remaining 3/7ths. The Trust and Pennzoil agreed to work to restructure the corporation, but if they were unable to do so in a mutually satisfactory way by December 31, 1984, Getty Oil would be liquidated and the assets distributed in accordance with the ownership interests. Though the owners of the majority of the

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Getty shares had signed on, the agreement was contingent on the approval of the Getty Board of Directors, and Mr. Getty and Mr. Williams were to present the Memorandum of Agreement to the Board. The Agreement also was subject to the execution of a definitive merger document.

At this point in the story, note a number of important legal aspects of the case. First, the Memorandum of Agreement was executed by those having the power to sell Getty, though the parties inserted a condition subsequent of Board approval. From the standpoint of contract formation, the contract was formed on January 2. Board disapproval might discharge the obligations of the parties, but it had nothing to do with contract formation. Second, the designation of the piece of paper as an "agreement" is highly consequential. The major problem in the *Pennzoil* case, and in many agreements, is to identify a point in time when the parties intended negotiations to end and the writings to flower into binding contractual obligations. In modern law, this is purely a question of intent; in ancient law, we had the wax seal. Some might argue that it would be better to return to the clarity of the past with particular formal language providing a bright line between negotiation and contract. Third, despite the size of the transaction, it is absolutely clear that the parties were interested almost exclusively in the price of the shares and their ownership. The idea that big transactions require complex and lengthy writings is not always correct, and indeed, may be an unreliable indicator of the parties' intention to bind themselves at a point in time.

Returning to the facts, the Board, with the text of the Memorandum of Agreement before it, initially rejected the Pennzoil agreement by a nine to six vote because the price was thought to be too low. Mr. Getty and Mr. Williams, however, voted with the minority. Getty then considered a self-tender or other agreement with Pennzoil, and after a recess, Getty's investment banker counter-offered at \$110 plus a \$10 debenture. Pennzoil rejected this price and further negotiations followed. On January 3, by a vote of 15 to 1, the Getty Board, on the motion of Mr. Williams, counter-offered at \$110 plus a \$5 stub. The original notes of the meeting were destroyed after litigation began, and no official minutes were ever approved. The third edited version of the notes, however, stated that: "Mr. Williams then moved that the board accept the Pennzoil proposal provided that the amount be paid relating to ERC [the stub] be \$5 per share". Pennzoil accepted the counter-offer, there were handshakes all around, the champagne was broken out, golden parachutes were devised, indemnities were approved, Getty Oil Company issued a press release on its letterhead confirming its transaction with Pennzoil, and the investment banker submitted his bill, later testifying that he normally did so only when a deal was complete.

But Getty was not entirely happy with the deal. Mr. Peterson later told an interviewer from *Fortune Magazine*: "We thought there was a better deal out there, but it was a bird-in-the-handish situation. We approved the deal, but we didn't favor it". Thus, on January 5, Getty Oil, the Museum, and later the Trust began secret negotiations to sell Getty again. Mr. Lipton, the lawyer for the Museum, instructed his associate not to meet with Pennzoil's lawyers on that date, telling her to say they were not ready to discuss the definitive merger document. At this time, there were no express communications from Getty indicating any dissatisfaction with the Pennzoil transaction, no objective behaviour of this sort despite the certain knowledge that Pennzoil felt itself bound to the agreement.

These events tell us a number of things in terms of contract law. Even an "agreement in principle" may be binding, depending on the factual circumstances.

Where the parties use a variety of phrases to describe a transaction, the fact finder will need to resolve the question of the intention to be bound on the basis of the preponderance of the evidence. This is a classic jury function and clearly suggests that each case, to a large extent, will be bottomed on its own facts. Further, the question is not simply whether Getty thought itself to be bound or whether it perceived unresolved gaps in the agreement; the question is what Getty communicated to Pennzoil, the other contracting party. Thus, the law of contracts mixes an examination of subjective intention with an examination of objective behaviour that might cause the other party to rely on the existence of a contract. In other words, for hundreds of years and conventional wisdom notwithstanding, contract law focuses on both subjective agreement and objective fault in determining a relationship.

Moving along, on January 6, 1984, a Getty/Texaco agreement was announced at \$125 a share, and subsequently the formal documents were executed. The second sale of Getty, however, involved at least three unusual provisions. First, no warranty was made or given with respect to the Getty shares in relation to the earlier Pennzoil transaction. Second, Texaco indemnified the Company, the Museum, and the Trust with respect to any liability arising out of the Pennzoil transaction. Third, if Texaco were unable to consummate the purchase of Getty Oil, Texaco guaranteed the Museum precisely \$112.50 per share, the discounted value of the Pennzoil price.

On January 6, 1984, Getty Oil filed a declaratory action in Delaware, and on January 10, Pennzoil sought equitable relief, namely, specific performance of the contract, in its own suit against the Getty parties. Texaco also was joined as a defendant and charged with tortious interference with the Pennzoil/Getty contract. On February 6, 1984, the Chancellor in Delaware denied the requested preliminary injunction, citing the adequacy of Pennzoil's claim at law for damages. In reaching this conclusion, the Chancellor, a man with long experience in commercial litigation and not tainted as a Texas judge or attorney, opined that Pennzoil was likely to prevail in its allegation that a binding contract had been reached with the Getty parties. Pennzoil responded by dismissing its suit against Texaco in Delaware — Texaco having declined to file an answer there — and filed a tortious interference lawsuit in Houston in order to obtain a jury trial. In both Delaware and Texas, the parties agreed that New York law governed the substance of the dispute.

The mass media and many lawyers have examined this phase of the litigation and largely focused on Texaco's tactical blunder in failing to file an answer in Delaware. But, with all due respect, there are two far more important points to be made about the Delaware litigation. First, the Chancellor's decision indicates how foolish the ancient rules are about specific performance in the modern context. Specific performance should have been the remedy of choice, not the remedy of last resort, applicable only if damages were inadequate. The dissolution of the Getty/Texaco deal and adherence to the original Getty/Pennzoil contract would have obviated the necessity of valuing the huge assets in dispute. And that valuation process is more complex for the courts than specific performance would have been. The oil reserves, placed in Pennzoil's hands, would have been worth what they were worth, and there would have been no need to calculate the cost of Pennzoil securing those assets elsewhere in the marketplace. Second, a Delaware Judge, sitting without a jury, preliminarily reached the same decision on the binding nature of the contract as subsequent Texas Judges and the jury.

After extensive discovery, the case went to trial in July 1985, and the trial ended in November with the now-famous verdict, which was affirmed on appeal. Despite what one sometimes reads in the media, the drafting of the proposed jury charge

began months before the conclusion of the trial, and Pennzoil lawyers produced ten to fifteen drafts of the charge before final submission to the Trial Judge. The Judge's copy of the charge was fully annotated to the New York precedents and the Restatement (Second) of Contracts.<sup>1</sup>

## II. THE APPLICABLE LEGAL DOCTRINES

While it may appear surprising to some, the legal doctrines applicable to this litigation were not novel or innovative but were deeply embedded in New York's common law of contracts and torts. The fact that a case involves many billions of dollars does not mean that the result hinges on some radical extension of traditional legal principles. Support was found for the charge in the treatises of Professors Corbin, Williston, Murray and Farnsworth, in the two Restatements of Contracts, and definitively, in the case law of New York. While New York law, like that of any state, has its own departures and nuances, the fact is that there is something approaching a national law of contracts, particularly in terms of contract formation. This is an important point. If you wish to determine contract law in any particular jurisdiction, the Restatement and the treatises most often will yield an excellent first approximation. The real differences among jurisdictions may lie more in the diversity of rules of procedure and the allocation of functions between judge and jury than in substantive contract law.

Consider, for example, Special Issue No. 1: "Do you find from a preponderance of the evidence that at the end of the Getty Oil board meeting of January the 3d, 1984, Pennzoil and each of the Getty entities ... intended to bind themselves to an agreement" that included the price per share, the respective ownership interests, and the good faith effort to restructure Getty or to liquidate the company if agreement was not reached by December 31st, 1984? Perhaps this Special Issue sounds familiar, for this formulation of the intention to be bound is taught in every contracts course in America. A Restatement Comment (Section 33) makes this point well when it states that "where the parties have intended to make a contract and there is a reasonably certain basis for granting a remedy", the contract is enforceable. If there are open terms or terms to be discussed, these are only evidentiary of whether the parties did or did not intend to be bound — a point succinctly made in the instructions to the jury. In other words, the old and highly formalistic doctrine that there must be an agreement on all essential terms for a contract to come into being has been replaced by a global inquiry into intention to be bound.

But what of the fact that the formal merger documents had not been executed? The law of New York, as is the law of every other jurisdiction that we have examined, is that "the mere fact that the parties contemplate memorializing their agreement in a formal document does not prevent their informal agreement from taking effect prior to that event".<sup>2</sup> The correct answer, then, is that the parties control the intention to be bound to a contract and that they may choose to be bound immediately despite a promise to execute a formal writing, or they may choose only to be bound when the formal document is completed and signed. This principle, embodied in the jury instructions, hardly qualifies as a radical principle — except on some editorial pages. We have found American cases standing for this proposition going back to at least 1877. And Professor Corbin, writing in 1952 and not realizing how he might upset

1. The Trial Judge's Charge To The Jury and Pennzoil's Proposed Annotated Charge To the Jury are set out in Appendices "A" and "B", *infra*.

2. *V'Soske v. Barwick* 404 F.2d 405, 499 (2d Cir. 1968).

the shoguns of mergers and acquisitions, writes that this is a quintessential fact issue for a jury:<sup>3</sup>

It is a question of fact that the courts are deciding, not a question of law; and the facts of each case are numerous and not identical with those of any other case. In very many cases the question may properly be left to a jury.

If [the parties'] expressions convince the court that they intended to be bound without a formal document, their contract is consummated, and the expected formal document will be nothing more than a memorial of that contract. In very many cases the court has been convinced that such was the intention and has held the parties bound by a contract even though no document has been executed.

For the Trial Judge to have taken this hotly-contested factual question from the jury in Houston, as some have suggested, would have been an egregious error. The jury took its responsibilities seriously, and, weighing all of the evidence, it concluded, unanimously, that the parties did intend to be bound by the Memorandum of Agreement and by the subsequent action of the Getty Board.

Other aspects of the contract submission similarly were rooted in established law. Did Pennzoil and Getty have a duty to use reasonable efforts and to act in good faith to reach a definitive merger agreement? Common sense and the law tell us yes. Indeed, the evolution of this branch of contract law largely began with Justice Cardozo, perhaps the greatest state judge ever to sit on the Court of Appeals of New York, in *Wood v. Lucy, Lady Duff-Gordon*, a 1917 New York decision.<sup>4</sup> Subsequent New York cases and the Restatement build upon his wisdom. Is it in error to use the word agreement rather than the word contract in the jury charge? This is perhaps the silliest accusation of all by editorial room lawyers. Corbin opines that most courts use the words interchangeably, and this is the conclusion we reached after reviewing the New York cases. But, if your taste runs to the technical, an agreement is the factual predicate for a binding contract, an entirely appropriate task for a jury, while the word contract is a legal conclusion that juries do not typically decide.

Obviously, the size of the verdict and not the underlying legal principles is what makes the case so extraordinary. Though Pennzoil's loss in expectation terms was in excess of \$7 billion, and though Texaco's gain through its acquisition of Getty was in the \$10's of billions, some are simply offended by the numbers. Equally as important, some are concerned with any judgment that may trigger bankruptcy. But the question is not a function of the number of zeros in the judgment, nor is it a function of disappearing assets. The issues are ones of law and of who will own and control productive assets. Assets generally do not disappear in a bankruptcy proceeding, only ownership rights change. Further, the legal standard cannot be that if a party intentionally interferes with a large enough contract, and if the damages to the innocent party are massive enough, then the law will forgive all.

### III. CONCLUSION

More is at stake in the *Pennzoil v. Texaco* litigation than many imagine. Some see it as a symbol of uncontrolled juries and declining judicial competence — or even corruption. In our view, however, a major concern is whether corporate giants must live with the same standards of commercial morality and contract law as are applicable to the rest of us. There is a connection between the scandals in the

3. 1 *Corbin on Contracts* (1963) para. 30 at 97.

4. *Wood v. Lucy, Lady Duff-Gordon* 118 N.E. 214 (N.Y.C.A. 1917).

investment banking community, the search for profit irrespective of the law, and the type of corporate behaviour involved in the *Pennzoil* litigation. Another critical concern is whether the role of the states in contract and tort litigation is to be displaced by a new federalism, one that presumes that state courts are incompetent to apply the law of other states, to provide due process and to weigh federal constitutional claims. Fortunately, the United States Supreme Court unanimously rejected this radical reformulation of federalism.<sup>5</sup> And, finally, we may rightly be concerned about the impact of such claims on the traditional law of contracts.

Historians have long urged that free enterprise thrives and economic growth and efficiency are promoted only in legal systems that enforce contracts. Without contract enforcement, there is no security in bargains, no confidence in economic exchanges. If this principle is ignored, there is much to worry about in terms of the future of American commerce. At a minimum, the law of contracts will not apply equally to all, for large transactions will be exempted. And one might reasonably fear that that exemption will not be limited to mergers and acquisitions. If a corporation has a fiduciary obligation to breach a binding merger agreement, it can argue with equal plausibility that it has a duty to its shareholders to breach lease agreements or equipment or service contracts if it later can secure a more favourable price. And if corporations can dishonour their binding contracts, why not consumers, debtors, bankers and unionized workers?

Before embarking on such a disastrous course, returning the law to the Middle Ages and the rules against enforcement of executory contracts, we would do well to consider the policy implications of a doctrine that so thoroughly undermines our common law traditions, our national economy and our aspirations for moral behaviour in business affairs. As Justice Cardozo stated nearly sixty years ago, contract law “still places stability and certainty in the forefront of the virtues. ‘The field is one where the law should hold fast to fundamental conceptions of contract and of duty and follow them with loyalty to logical conclusions’ ”.<sup>6</sup>

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5. *Texaco Inc. v. Pennzoil Co.* 107 S.Ct. 1519 (1987).

6. B. Cardozo, *The Growth of the Law* (1924) 111.



may require another trial by another jury; then all of our time will have been wasted. The presiding juror or any other juror who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in this Charge in a sense which varies from the meaning commonly understood, you are given a proper legal definition which you are bound to accept in place of any other definition or meaning. By the term "preponderance of the evidence" as used in this Charge, is meant the greater weight and degree of credible evidence before you.

### INSTRUCTIONS

1. An agreement may be oral, it may be written or it may be partly written and partly oral. Where an agreement is fully or partially in writing, the law provides that persons may bind themselves to that agreement even though they do not sign it, where their assent is otherwise indicated.
2. In answering Issue No. 1, you should look to the intent of Pennzoil and the Getty entities as outwardly or objectively demonstrated to each other by their words and deeds. The question is not determined by the parties' secret, inward, or subjective intentions.
3. Persons may intend to be bound to an agreement even though they plan to sign a more formal and detailed document at a later time. On the other hand, parties may intend not to be bound until such a document is signed.
4. There is no legal requirement that parties agree on all the matters incidental to their agreement before they can intend to be bound. Thus, even if certain matters were left for future negotiations, those matters may not have been regarded by Pennzoil and the Getty entities as essential to their agreement, if any, on January 3. On the other hand, you may find that the parties did not intend to be bound until each and every term of their transaction was resolved.
5. Every binding agreement carries with it a duty of good faith performance. If Pennzoil and the Getty entities intended to be bound at the end of the Getty Oil board meeting of January 3, they were obliged to negotiate in good faith the terms of the definitive merger agreement and to carry out the transaction.
6. Modification or discussions to modify an agreement may not defeat or nullify a prior intention to be bound. Parties may always, by mutual consent and understanding, add new provisions spelling out additional terms that were not included in their original agreement.

### SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that at the end of the Getty Oil board meeting of January 3, 1984, Pennzoil and each of the Getty entities, to wit, the Getty Oil Company, the Sarah C. Getty Trust and the J. Paul Getty Museum, intended to bind themselves to an agreement that included the following terms:

- a. all Getty Oil shareholders except Pennzoil and the Sarah C. Getty Trust were to receive \$1 10 per share, plus the right to receive a deferred cash consideration from the sale of ERC Corporation of at least \$5 per share within five years;
- b. Pennzoil was to own 3/7ths of the stock of Getty Oil and the Sarah C. Getty Trust was to own the remaining 4/7ths of the stock of Getty Oil; and

- c. Pennzoil and the Sarah C. Getty Trust were to endeavour in good faith to agree upon a plan for restructuring Getty Oil on or before December 31, 1984, and if they were unable to reach such agreement then they would divide the assets of Getty Oil between them also on a 3/7ths - 4/7ths basis.

ANSWER 'WE DO' OR 'WE DO NOT': “ WE DO ”

### SPECIAL ISSUE NO. 2

Do you find from a preponderance of the evidence that Texaco knowingly interfered with the agreement between Pennzoil and the Getty entities, if you have so found?

ANSWER 'WE DO' OR 'WE DO NOT': “ WE DO ”

1. Knowledge of a fact can be shown either by direct evidence of what it knew or what it was told, or by indirect or circumstantial evidence. A fact may be established by indirect or circumstantial evidence when the fact is fairly and reasonably inferred from other facts proven in the case. In order to find that Texaco interfered with the agreement, if any, inquired about above, it must be shown by a preponderance of the evidence that Texaco wanted to cause the breach, or to prevent the performance of this agreement, or that Texaco knew that a breach or failure to perform would occur as a result of its actions.
2. In order to find that Texaco had knowledge of the agreement, if any, it is not necessary that Texaco had an accurate understanding of the legal significance of the facts which produced the agreement. If Texaco knew the facts that gave rise to the agreement, then it knew of the agreement, even if it did not believe that those facts gave rise to an agreement and even if it believed that any agreement that did exist violated the law. You may also find that Texaco knew of the agreement, if any, if you find that Texaco intentionally or wilfully refused to ascertain the facts or if it exercised bad faith. Texaco is also charged with all the knowledge, if any, of its agents and representatives, whether communicated to each other or not.
3. A party may interfere with an agreement by persuasion alone, by offering better terms, by giving an indemnity against damage claims to the party or parties induced to breach, or by any act interfering with the performance of a legal duty arising from the agreement, such as the duty of good faith performance.
4. A competitor has no privilege and is not permitted to interfere with the agreements of those with whom it is in competition. Also, a party is not justified in interfering with the agreement of another simply because it is advancing its own business interests.
5. You may find that Texaco knowingly interfered with the Pennzoil agreement, if any, even though the Getty Oil directors, the Museum's President, and Gordon P. Getty, Trustee, were fiduciaries. If those fiduciaries intended to be bound to an agreement with Pennzoil on January 3, they could not avoid that agreement by later seeking or accepting a higher price or a more beneficial arrangement with a third party.

### SPECIAL ISSUE NO. 3

What sum of money, if any, do you find from a preponderance of the evidence would compensate Pennzoil for its actual damages, if any, suffered as a direct and natural

result of Texaco's knowingly interfering with the agreement between Pennzoil and the Getty entities, if any?

ANSWER IN DOLLARS AND CENTS:

ANSWER: "\$7.53 BILLION"

1. The measure of damages in this case is the amount necessary to put Pennzoil in as good a position as it would have had if its agreement with the Getty entities, if any, had been performed.
2. Pennzoil must prove its damages, if any, with a reasonable degree of certainty. This does not, however, require proof to an absolute mathematical certainty. If a wrong has been done from which monetary loss results, you may make a just and reasonable estimate of the damage based on relevant data, including opinion evidence, even if the extent of injury cannot be proven precisely. Damages cannot be remote or contingent.

#### SPECIAL ISSUE NO. 4

Do you find from a preponderance of the evidence that Texaco's actions, if any, were intentional, wilfull and in wanton disregard of the rights of Pennzoil, if any?

ANSWER 'WE DO' OR 'WE DO NOT': "WE DO"

If and only if you have answered Special Issue No. 4 "We do", then you are to answer Special Issue No. 5.

#### SPECIAL ISSUE NO. 5

What sum of money, if any, is Pennzoil entitled to receive from Texaco as punitive damages?

ANSWER IN DOLLARS AND CENTS:

ANSWER: "\$ 3 BILLION"

Punitive damages means an amount that you may in your discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount you may have found as actual damages.

It is not necessary to show that Texaco was motivated by ill will or hatred of Pennzoil.

In assessing punitive damages, if any, you may take into account not merely the act or acts of Texaco itself. You may also take into account all the circumstances, including Texaco's motives and the extent of damages, if any, suffered by Pennzoil.

#### SPECIAL ISSUE NO. 6

Do you find from a preponderance of the evidence that at the end of the Getty Oil Company Board meeting on January 3, 1984, the Getty Oil Company, the Museum, the Trust, and Pennzoil each intended to be bound to an agreement which provided that the Getty Oil Company would purchase the Museum shares forthwith as provided in the "Memorandum of Agreement"?

ANSWER 'WE DO' OR 'WE DO NOT': "WE DO"

## SPECIAL ISSUE NO. 7

Do you find from a preponderance of the evidence that at the end of the Getty Oil Company Board meeting on January 3, 1984, the Getty Oil Company, the Museum, the Trust, and Pennzoil each intended to be bound to an agreement which provided for Pennzoil to have an option to purchase 8 million shares of Getty Oil Company stock as provided in the "Memorandum of Agreement"?

ANSWER 'WE DO' OR 'WE DO NOT': "WE DO"

## SPECIAL ISSUE NO. 8

Do you find from a preponderance of the evidence that the payment of \$110 in cash per share plus the ERC stub was not a fair price as of January 3, 1984?

ANSWER 'IT WAS NOT A FAIR PRICE' OR 'IT WAS A FAIR PRICE':

ANSWER: "IT WAS A FAIR PRICE"

You are instructed that a "fair price" is a price reached between a willing buyer, who is not required to buy and a willing seller, who is under no obligation to sell.

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After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked. It is the duty of the presiding juror:

1. to preside during your deliberations;
2. to see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge;
3. to write out and hand to the bailiff any communication concerning the case which you desire to have delivered to the judge;
4. to conduct the vote on the issues and participate in that vote;
5. to write your answers to the Issues in the spaces provided; and
6. to certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

After you have retired to consider your verdict, no one has any authority to communicate with you except the bailiff of this court. You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.

When you have answered all of the questions which you are required to answer under the instructions of the judge, and your foreman has placed your answers in the spaces provided, and signed the verdict as foreman or obtained the signatures, you will advise the bailiff at the door of the jury room that you have reached a verdict, and then you will return into court with your verdict.

ORIGINAL SIGNED:  
"SOLOMON CASSEB, JR."  
JUDGE PRESIDING

#### CERTIFICATE OF THE JURY

We, the jury, have answered the above and foregoing special issues as herein indicated, and herewith return same into court as our verdict.

(To Be Signed By the Presiding Juror If Unanimous)

ORIGINAL SIGNED:  
"RICHARD V. LAWLER"  
PRESIDING JUROR

APPENDIX B  
PENNZOIL'S PROPOSED ANNOTATED CHARGE TO THE JURY

NO. 84-05905

PENNZOIL COMPANY Plaintiff	IN THE DISTRICT COURT OF	HARRIS COUNTY, TEXAS
vs.		
TEXACO INCORPORATED Defendant		151st JUDICIAL DISTRICT

SPECIAL ISSUE NO. 1

Do you find that on the evening of January 3, 1984, Pennzoil and the Getty entities intended to bind themselves to an agreement that included at least the following terms:

- a. all Getty Oil shareholders except Pennzoil and the Sarah C. Getty Trust were to receive \$110 per share, plus the right to receive a deferred cash consideration from the sale of ERC Corporation of at least \$5 per share within five years;
- b. Pennzoil was to own 3/7ths of Getty Oil and the Sarah C. Getty Trust was to own the remaining 4/7ths; and
- c. Pennzoil and the Sarah C. Getty Trust were to endeavour in good faith to agree upon a plan for restructuring Getty Oil on or before December 31, 1984, and if they were unable to reach such agreement then they would divide the assets of Getty Oil between them also on a 3/7ths - 4/7th basis.<sup>1</sup> Answer: "We Do Not" or "We Do".

INSTRUCTIONS REGARDING ISSUE NO. 1

1. (Ladies and Gentlemen, the first instruction on the law that I am going to give you concerns what is meant legally by the term "agreement".) An agreement ordinarily takes the form of an offer or proposal made by one person to another, followed by acceptance of the offer by the other.<sup>2</sup> A person who accepts an offer on the condition that one or more terms of that offer be changed has made a counter-offer, which the person who made the original offer may then accept or reject.<sup>3</sup> Offers and counter-offers may be accepted in any manner or by any means reasonable under the circumstances, unless the offer expressly limits acceptance to a particular method.<sup>4</sup> Where the offer merely suggests or invites that the acceptance be communicated in a particular way, other methods of acceptance are permitted.<sup>5</sup> You should also understand that an offer or counter-offer cannot be revoked or withdrawn after it has been accepted.<sup>6</sup>

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1. Intent to be bound is a fact question: *Brown Bros. Electrical Contractors v. Beam Constr. Co.* 41 N.Y.2d 397, 393 N.Y.S.2d 350, 361 N.E.2d 999 (1977); *Pennzoil v. Getty* No. 7425 (Del. Ch. 6 February, 1984).
2. *Restatement (2d) of Contracts*, sub-s. 22(1) (1981).
3. *Id.* sub-s. 39(1), comment b, s. 59; 1 *Corbin on Contracts*, s. 82 at 349-352, s. 89 at 378-380 (1963).
4. *Supra* n. 2, sub-s. 30(2); and *Corbin, id.*, s. 77.
5. *Supra* n. 2, s. 30, comment b and s. 60; and *Corbin, supra* n. 3, s. 77 at 329 and s. 88 at 375.
6. *Supra* n. 2, s. 42, comment c; and *Corbin, supra* n. 3, s. 38 at 157-158 and 160-161.

An agreement may be oral, it may be written or it may be partly written and partly oral.<sup>7</sup> Where an agreement is fully or partially in writing, the law provides that persons may bind themselves to that agreement even though they do not sign it, where their assent is otherwise indicated.<sup>8</sup>

2. (If there was an offer and an acceptance, the law next seeks to determine whether the parties "intended to be bound" to an agreement. This is the first of several instructions on what is meant legally by the term "intent to be bound".) In answering Issue No. 1, you should look to the intent of Pennzoil and the Getty entities as outwardly or objectively demonstrated to each other by their words and deeds.<sup>9</sup> The question is not determined by the parties' secret, inward or subjective intentions.<sup>10</sup> This question is not determined by claims made after the dispute arose between the parties as to what they really meant or intended.<sup>11</sup> Nor is the question determined by private reservations of one of the parties, if any, that it did not disclose or make known to the others.<sup>12</sup> Thus, if the Getty entities knew or had reason to know that Pennzoil considered itself bound and if the Getty entities nevertheless had their own reservations which they failed to disclose or make known to Pennzoil, then the Getty entities are bound to the agreement.<sup>13</sup>
3. (This instruction concerns the question of intent to be bound in the situation where the parties to the agreement, if any, knew that there was still a further written document or documents to be signed.) Even though Pennzoil and the Getty entities knew that their agreement, if any, was subject to execution of a definitive merger agreement, you may still find that they intended to be bound on the evening of January 3.<sup>14</sup> Persons may intend to be bound to an agreement even though they plan to sign a more formal and detailed document at a later time.<sup>15</sup> On the other hand, you may conclude that they intended not to be bound until that document was signed. But for you to conclude that the parties did not intend to be bound until that document was signed will require more than just recognizing that the parties contemplated a definitive merger agreement.<sup>16</sup> Again, you are to focus on the objective or outward conduct of Pennzoil and the Getty entities to each other; it

7. 17 *Am. Jur. 2d Contracts*, s. 68 (1964); 21 *N.Y. Jur.2d Contracts*, s. 18 at 432 (1981). Texaco dropped its Statute of Frauds defense prior to the start of the trial.

8. 21 *N.Y. Jur. 2d Contracts*, *id.*, s. 16 at 429 (1982).

9. *Brown Bros. Electrical Contractors*, *supra* n. 1 at 361 and *Pennzoil*, *supra* n. 1 at 14-16; *Camrex Contractors (Maine) Ltd. v. Reliance Marine Applicators* 579 F.Supp. 1420, 1426 (E.D.N.Y. 1984); *Restatement*, *supra* n. 2 at 200, comment b and *Corbin*, *supra* n. 3, s. 9 at 20-21; *see also Mid-Continent Telephone Corp. v. Home Telephone Co.* 319 F.Supp. 1176, 1191 (N.D. Miss. 1970).

10. *Id.*

11. *Pennzoil*, *supra* n. 1 at 14, 16; *Camrex Contractors*, *supra* n. 9 at 1426; *J. Baranello & Sons v. Haussmann Industries* 571 F.Supp. 333, 339 (E.D.N.Y. 1983).

12. *Restatement*, *supra* n. 2 at s. 17, comment c 7; *Hotchkiss v. Nat'l City Bank* 200 F. 287, 293 (S.D.N.Y. 1911), *affd.* 201 F. 664 (2d Cir. 1912), *affd.* 231 U.S. 50, 34 S.Ct. 20, 58 L.Ed. 115 (1913).

13. *Restatement*, *supra* n. 2 at s. 20.

14. *V'Soske v. Barwick* 404 F.2d 495, 499 (2d Cir. 1968), *cert. denied* 394 U.S. 921, 89 S. Ct. 1197, 22 L.Ed.2d 454 (1969); *Corbin*, *supra* n. 3, s. 30 at 97; and *Pennzoil*, *supra* n. 1 at 15, 16: "...While parties are not bound until they have executed a formal document embodying their agreement if that was their intention, the fact that they contemplate memorializing their agreement in a formal document does not prevent their less formal agreement from taking effect prior to the execution of the formal document; that where the objective, contemporaneous evidence indicates that the parties have reached an agreement, they are bound by it, regardless of its form or the manner in which it was manifested".

15. *Id.*

16. *V'Soske*, *supra* n. 14 at 404 F.2d 499.

is not sufficient for Texaco to simply show that one or more of the Getty entities secretly intended or agreed among themselves not to be bound until the definitive merger agreement was executed.<sup>17</sup> If you believe that Pennzoil intended to be bound and that the outward conduct of the Getty entities at the time would have led reasonable people to believe that the Getty entities also intended to be bound, then they were bound.<sup>18</sup>

4. (This instruction concerns the question of intent to be bound in the situation where the parties knew that there were still other matters to be negotiated.) You may find that Pennzoil and the Getty entities intended to be bound, even if you believe they knew that there were matters on which they had not agreed or on which they expected future negotiations and even if you believe that the new matters, when agreed upon, were to be incorporated into the definitive merger agreement.<sup>19</sup> There is no legal requirement that parties agree on all the matters incidental to their agreement before they can intend to be bound.<sup>20</sup> Thus, even if certain matters were left for future negotiations, those matters may not have been regarded by Pennzoil and the Getty entities as essential to their agreement, if any, on January 3.<sup>21</sup> On the other hand, you may find that the parties did not intend to be bound until each and every term of their transaction was resolved.
5. (This instruction concerns the “duty of good faith” to complete a transaction when there is agreement and when circumstances indicate that the parties intend to be bound to that agreement.) Every binding agreement carries with it a duty of good faith performance.<sup>22</sup> It is fundamental to this duty that each party may not act to defeat or destroy the purpose of the agreement.<sup>23</sup> Good faith performance requires faithfulness to the agreed common purpose and requires actions consistent with the justified expectations and beliefs of the other party.<sup>24</sup> So, if Pennzoil and the Getty entities intended to be bound on the evening of January 3, they were obliged to negotiate in good faith the terms of the definitive merger agreement and to carry out the transaction.<sup>25</sup> The parties would have to allow each other a reasonable time

17. *Brown Bros. Electrical Contractors*, *supra* n. 9 at 1001; *Pennzoil*, *supra* n. 1.

18. *Id.* and *Restatement*, *supra* n. 2 at s. 27, comment b.

19. *Corbin*, *supra* n. 3, s. 29 at 94-95; *Salzman v. Barson* 239 N.Y. 332, 146 N.E. 618 (1925) (Cardozo, J.); *Camrex Contractors*, *supra* n. 9 at 1427-1428; *Park Inn Hotel v. Messing* 31 Misc.2d 961, 224 N.Y.S.2d 179, 184 (Sup.Ct. 1962); *J. Baranello*, *supra* n. 11 at 340-341; *Restatement*, *supra* n. 2 at s. 33, comment a; *see also Scott v. Ingle Bros. Pacific Inc.* 489 S.W.2d 554 (Tex. 1972); *Hall v. Buck* 678 S.W.2d 612, 629 (Tex. Civ. App. Houston [14th] 1984, writ *refd.* n.r.e.), *cert. denied* 105 S.Ct. 2704, 86 L.Ed.2d 720, 53 U.S.L.W. 3869 (1985); *Mid-Continent Telephone Corp.*, *supra* n. 9 at 1190.

20. *N.E.D. Holding v. McKinley* 246 N.Y. 40, 157 N.E. 923, 924 (1927); *Farr v. Newman* 18 A.D.2d 54, 238 N.Y.S.2d 204, 209 (App. Div. 1963), *affd.* 14 N.Y.2d 183, 250 N.Y.S.2d 272, 199 N.E.2d 369 (1964); *Pennzoil*, *supra* n. 1 at 15; *Corbin*, *supra* n. 3, s. 30 at 111.

21. *Corbin*, *supra* n. 3, s. 29 at 89-90; *Camrex Contractors*, *supra* n. 9 at 1428; *see also Scott*, *supra* n. 19 at 489 S.W.2d 556; *Mid-Continent Telephone Corp.*, *supra* n. 9 at 1190.

22. *De Laurentiis v. Cinematografica De Las Americas* 9 N.Y.2d 503, 215 N.Y.S.2d 60, 174 N.E.2d 736 (1961); *Rowe v. Great Atlantic & Pacific Tea Co. Inc.* 46 N.Y.2d 62, 412 N.Y.S.2d 827 at 830, 385 N.E.2d 566 (1978); *Restatement*, *supra* n. 2 at s. 205.

23. *Id.*

24. *Restatement*, *supra* n. 2 at s. 205, comment a.

25. *U.S. v. City of New York* 131 F.2d 909, 915 (2d Cir. 1942), *cert. denied* 318 U.S. 781, 63 S.Ct. 858, 87 L.Ed. 1149 (1943); *Mocca Lounge, Inc. v. Misak* 94 A.D.2d 761, 462 N.Y.S.2d 704, 706 (N.Y.App.Div. 1983); *Reprosystem, B.V. v. S.C.M. Corp.* 727 F.2d 257, 264 (2d Cir. 1984), *cert. denied* 105 S.Ct. 110, 83 L.Ed.2d 257, 53 U.S.L.W. 3237 (1984); *Candid Productions v. International Skating Union* 530 F.Supp. 1330, 1334-1335 (S.D.N.Y. 1982); *Pepsico, Inc. v. W.R. Grace & Co.* 307 F.Supp. 713, 720 (S.D.N.Y. 1969).

in which to agree upon the definitive merger agreement.<sup>26</sup> Also, one party or group of parties could not flatly repudiate or reject the agreement because of delay in completing the formal documents or completing the transaction.<sup>27</sup> Instead, the dissatisfied party must give the other party notice of the reasons for its dissatisfaction and must allow a reasonable opportunity to remedy or correct any asserted problems.<sup>28</sup>

6. (This instruction concerns the question of intent to be bound in the situation where the parties to the agreement knew that the agreement was subject to various approvals.) You may also find that Pennzoil and the Getty entities intended to be bound on the evening of January 3, even though they believed or intended that the agreement, if any, would be subject to regulatory and shareholder approval or other such requirements.<sup>29</sup> Parties who intend to bind themselves to an agreement may make their future performance under that agreement subject to the happening of certain events or the satisfaction of certain conditions.<sup>30</sup> Indeed, such events or conditions may be legally necessary to complete the transaction. If Pennzoil and the Getty entities intended to be bound, they had a duty of good faith to undertake to complete the transaction.<sup>31</sup> Consistent with the duty of good faith, no party could get out of the agreement if that party's own action prevented or made impossible the happening of the event or fulfilment of the condition.<sup>32</sup> On the other hand, you may find that Pennzoil and the Getty entities did not intend to be bound until all steps such as regulatory approval had been fulfilled.
7. (This instruction concerns whether you may find that the parties had an agreement and that they intended to be bound even if the evidence shows that they, subsequently, agreed to modify the agreement or to include additional terms.) You may also find that Pennzoil and the Getty entities intended to be bound on the evening of January 3, even if you believe that they later discussed or agreed to modify their prior agreement or to include additional terms in it.<sup>33</sup> Modification or discussions to modify an agreement do not defeat or nullify a prior intention to be bound.<sup>34</sup> Parties may always, by mutual consent and understanding, add new provisions spelling out additional terms that were not included in their original agreement.<sup>35</sup>

26. *Glen Cove Marina, Inc. v. Vessel Little Jennie* 269 F.Supp. 877, 879 (E.D.N.Y. 1967); see also *Mid-Continent Telephone Corp.*, *supra* n. 9 at 1196 ("Home was under a positive duty to allow Mid-Continent a reasonable time to agree upon a reorganization plan.")

27. *Glen Cove Marina, id.* at 879, citing with favour *Boswell v. U.S.* 123 F.2d 213, 215 (5th Cir. 1941); see also *Mid-Continent Telephone Corp.*, *supra* n. 9 at 1196 ("Home ... could not flatly repudiate the entire agreement without giving Mid-Continent notice of the reasons for its dissatisfaction and a reasonable opportunity to remedy the defects as Home saw them.")

28. *Id.*

29. *Restatement, supra* n. 2 at s. 224, comment d; 3A *Corbin on Contracts*, s. 649 at 110-111 (1963); see also *Mid-Continent Telephone Corp.*, *supra* n. 9 at 1191.

30. *Id.*

31. See nn. 24 to 30, *supra*.

32. *Restatement, supra* n. 2, s. 225 (illustration 8) and s. 245, comment a (illustrations 3 and 4); 3A *Corbin, id.*, s. 767 at 540 and s. 770 at 557; *Stern v. Gepo Realty Corp.* 289 N.Y. 274, 45 N.E.2d 440, 441 (1942).

33. *V'Soske, supra* n. 14 at 404 F.2d 495; *Restatement, supra* n. 2, s. 27, comment d; *Corbin, supra* n. 3, s. 30 at 111-112 (1963).

34. *Id.*

35. *Id.*; see also *Mid-Continent Telephone Corp.*, *supra* n. 9 at 1191.

## SPECIAL ISSUE NO. 2

Do you find that Texaco interfered with the agreement, if any, between Pennzoil and the Getty entities?<sup>36</sup> Answer: "We Do" or "We Do Not".

## INSTRUCTIONS REGARDING ISSUE NO. 2

1. (The next series of instructions concern Pennzoil's allegation that Texaco interfered with Pennzoil's agreement, if any. The first instruction relates to a legal requirement that Texaco must have had "knowledge" of the agreement in order to have interfered with it.) In order to find that Texaco interfered with the agreement, if any, between Pennzoil and the Getty entities, it must be shown that Texaco had knowledge of that agreement.<sup>37</sup> Texaco is also charged with all the knowledge, if any, of its agents and representatives, including John McKinley, Alfred DeCrane, James Kinnear, Patrick Lynch, William Weitzel, Bruce Wasserstein, Jim Parella, and Morris Kramer, whether communicated to each other or not, bearing on whether an agreement existed between Pennzoil and the Getty entities.<sup>38</sup> You are not required to accept as conclusive a denial by someone acting for Texaco that he had no knowledge or awareness.<sup>39</sup> Even if a person denies knowledge, you may consider all the circumstances that would suggest to a reasonable person that he or she has such knowledge, including, but not limited to, the person's interest in the outcome of the case, relationship to the parties in the case, self-interest, business relationship and all other matters bearing upon such testimony that a reasonable person would perceive as an explanation or excuse for the claimed lack of knowledge.<sup>40</sup> Texaco's knowledge can be shown either by direct evidence of what it knew or what it was told, or by indirect or circumstantial evidence.<sup>41</sup> A fact may be established by indirect or circumstantial evidence when the fact is fairly and reasonably inferred from other facts proved in the case.<sup>42</sup>
2. (This instruction concerns the degree of knowledge that Texaco must have had in order for you to find that Texaco interfered with the agreement, if any.) In order to find that Texaco had knowledge of the agreement, if any, it is not necessary that Texaco had an accurate understanding of the legal significance of the facts which produced the agreement.<sup>43</sup> If Texaco knew the facts that gave rise to the agreement, then it knew of the agreement, even if it did not believe that those facts gave rise to an agreement and even if it believed that any agreement that did exist violated the law.<sup>44</sup> You may also find that Texaco knew of the agreement, if any,

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36. *Israel v. Wood Dolson Co.* 1 N.Y.2d 116, 151 N.Y.S.2d 1 at 5, 134 N.E.2d 97 (1956).

37. *Id.*

38. *Scientific Holding Co. v. Plessey Inc.* 510 F.2d 15, 26 (2d Cir. 1974); *Benjamin Center v. Hampton Affiliates, Inc.* No.381, slip op. (N.Y. 22 October 1985).

39. *Sinram-Marine Oil Co. v. Reading-Sinram-S. Coals* 6 Misc.2d 293, 160 N.Y.S.2d 775 (N.Y. Sup. Ct. Div. 1957), *app. dismd.* 4 N.Y.2d 726, 171 N.Y.S.2d 114, 148 N.E.2d 321 (1958).

40. *U.S. v. Brawer* 482 F.2d 117 (2d Cir. 1973), *cert. denied* 419 U.S. 1051, 95 S.Ct. 628, 42 L.Ed.2d 646 (1974).

41. *State Enterprises, Inc. v. Southridge Co-op Section 1* 18 A.D.2d 226, 238 N.Y.S.2d 724, 726 (N.Y. App. Div. 1963); *Roulette Records v. Princess Production Corp.* 15 A.D.2d 335, 224 N.Y.S.2d 204, 207 (N.Y. App. Div. 1962), *affd.* 12 N.Y.2d 815, 236 N.Y.S.2d 65, 187 N.E.2d 132 (1962).

42. *Larson v. Ellison* 217 S.W.2d 420 (Tex. 1949).

43. *Restatement (2d) of Torts*, s. 766, comment i (1979); *Entertainment Events, Inc. v. Metro-Goldwyn-Mayer, Inc.* No. 74 Civ. 2959 (S.D.N.Y. 31 May 1978).

44. *Id.*

if you find that Texaco intentionally or wilfully refused to ascertain the facts or if it exercised bad faith.<sup>45</sup>

3. (This instruction concerns what state of mind Texaco must have had in order for you to find that Texaco interfered with Pennzoil's agreement, if any.) In order to find that Texaco interfered with Pennzoil's agreement, if any, it must be shown either: (a) that Texaco in fact wanted to cause the breach or to prevent the performance of Pennzoil's agreement,<sup>46</sup> or (b) that Texaco knew that a breach or failure to perform was substantially certain to occur as a result of its actions.<sup>47</sup> You need not find, however, that Texaco was motivated by malice, ill will, or an intent to harm Pennzoil.<sup>48</sup> A breach of an agreement occurs when any party to the agreement fails to do what was promised in the agreement or fails to carry out the legal duties arising from the agreement, such as any good faith obligations.<sup>49</sup>
4. (This instruction concerns what kind of conduct will legally support a finding that Texaco interfered with Pennzoil's agreement, if any.) There is no technical requirement as to the kind of conduct that may interfere with an agreement.<sup>50</sup> The law provides that a party may interfere with an agreement by persuasion alone,<sup>51</sup> by offering better terms,<sup>52</sup> by giving an indemnity against damage claims to the party or parties induced to breach,<sup>53</sup> or by any act interfering with the performance of a legal duty arising from the agreement, such as the duty of good faith performance.<sup>54</sup>
5. (This instruction concerns whether Texaco is privileged to interfere with Pennzoil's agreement, if any, because it is Pennzoil's competitor or for other reasons.) You may find that Texaco interfered with the Pennzoil agreement, if any, even though Texaco is a business competitor of Pennzoil.<sup>55</sup> A competitor has no privilege and is not permitted to interfere with the agreements of those with whom it is in competition.<sup>56</sup> Also, a party is not justified in interfering with the agreement of another simply because it is advancing its own business interests.<sup>57</sup> Further, Texaco may not justify its actions by arguing that the shareholders of Getty Oil

45. *Kelly v. Central Hanover Bank* 11 F.Supp. 49 (S.D.N.Y. 1935), *supp. op.* 14 F.Supp. 346 (S.D.N.Y. 1936), *revd.* on other grounds 85 F.2d 61 (2d Cir. 1936); *Entertainment Events, Inc.*, *supra* n. 43; *see also U.S. v. Brawer*, *supra* n. 40 at 482 F.2d 127: "The jury could reasonably conclude, from all the facts available to the (defendant), that his guilty knowledge could be established by the fact that he deliberately closed his eyes to avoid knowing whether he was committing an unlawful act ... or by the fact he had acted with reckless disregard ... and with a conscious purpose to avoid learning the truth ..."; *National Labor Relations Board v. Local 3 Bloomingdale* 216 F.2d 285 (2d Cir. 1954).

46. *Israel v. Wood-Dolson Co.*, *supra* n. 36.

47. *Restatement (2d) of Torts*, *supra* n. 43, s. 766, comment j.

48. *Hornstein v. Podwitz* 254 N.Y. 443, 173 N.E. 674 (1930).

49. *17 Am. Jur. 2d Contracts*, *supra* n. 7, s. 441.

50. *Restatement (2d) of Torts*, *supra* n. 43, s. 766, comment k.

51. *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.* 50 N.Y.2d 193, 428 N.Y.S.2d 628 at 634, 406 N.E.2d 44 (1980); *Restatement (2d) of Torts*, *id.*, s. 766, comment k.

52. *Guard-Life, id.*; *Gold Medal Farms v. Rutlan County Co-Op Creamery* 9 A.D.2d 473, 195 N.Y.S.2d 179, 185 (N.Y.App.Div. 1959); *Restatement (2d) of Torts*, *id.*, s. 766, comment m.

53. *American Law Book Co. v. Edward Thompson Co.* 41 Misc. 396, 84 N.Y.S. 225 (N.Y.Sup.Ct. 1903).

54. *Morris v. Blume* 55 N.Y.S.2d 196, 199 (N.Y.Sup.Ct. 1945), *affd.* 269 A.D. 832, 56 N.Y.S.2d 414 (1945).

55. *Restatement (2d) of Torts*, *supra* n. 43, s. 768(2); *Guard-Life Corp.*, *supra* n. 51.

56. *Id.*

57. *32 N.Y. Jur. Interference*, s. 29 at 189 (1963); *Peekskill Theatre, Inc. v. Advance Theatrical Co.* 206 A.D. 138, 200 N.Y.S. 726 (N.Y.App.Div. 1923); *Avon Products v. Berson* 206 Misc. 900, 135 N.Y.S.2d 867 (N.Y.Sup.Ct. 1954).

Company may have had an interest in competition for purchase of the Company's stock.<sup>58</sup> Nor may Texaco justify its actions by arguing that one or more of the Getty entities were dissatisfied with the Pennzoil agreement, if any.<sup>59</sup>

6. (This instruction concerns how the matter of "fiduciary duties" relates to the issues in this case.) You may also find that Texaco interfered with the Pennzoil agreement, if any, even though the Getty Oil directors, the Museum's President, and Gordon P. Getty, Trustee, were fiduciaries. If those fiduciaries showed an intention to be bound to an agreement with Pennzoil on January 3, they could not avoid that agreement by later seeking or accepting a higher price or a more beneficial arrangement with a third party.<sup>60</sup>

### SPECIAL ISSUE NO. 3

What sum of money do you find would compensate Pennzoil for its actual damages before taxes, if any, suffered as a direct and natural result<sup>61</sup> of Texaco's interference, if any, with the agreement between Pennzoil and the Getty entities, if any? Answer in Dollars and Cents.

### INSTRUCTIONS REGARDING SPECIAL ISSUE NO. 3

1. (These instructions concern the money damages, if any, which you may find.) The measure of damages in this case is the amount necessary to put Pennzoil in as good a position as it would have had if its agreement with the Getty entities, if any, had been performed.<sup>62</sup> In other words, you are to determine the full loss of benefit, if any, suffered by Pennzoil as a result of Texaco's interference, if any, with Pennzoil's agreement with the Getty entities, if any.<sup>63</sup>
2. Pennzoil must prove its damages, if any, with a reasonable degree of certainty.<sup>64</sup> This does not, however, require proof to an absolute mathematical certainty.<sup>65</sup> If a wrong has been done from which monetary loss results, you may make a just and reasonable estimate of the damage based on relevant data, including opinion evidence, even if the extent of injury cannot be proven precisely.<sup>66</sup>

### SPECIAL ISSUE NO. 4

What sum of money, if any, is Pennzoil entitled to recover from Texaco as punitive damages? Answer in Dollars and Cents.

58. *Felsen v. Sol Cafe Mfg. Corp.* 24 N.Y.2d 687, 301 N.Y.S.2d 610, 613-614 (1969).

59. *Gold Medal Farms, Inc.*, *supra* n. 52 at 195 N.Y.S.2d 179.

60. See Pennzoil's Trial Brief at pp. 52 to 56; see also *Restatement (2d) of Trusts*, s. 284 (1959); *Cross Properties, Inc. v. Brook Realty Co.* 37 A.D.2d 193, 322 N.Y.S.2d 773 (N.Y.App.Div. 1971), *affd.* 31 N.Y.2d 938, 340 N.Y.S.2d 928, 293 N.E.2d 95 (1972); *Jewel Companies, Inc. v. Pay Less Drug Stores Northwest, Inc.* 741 F.2d 1555, 1563 (9th Cir. 1984) (Calif. law); *Onanian v. Leggat* 2 Mass App. 623, 317 N.E.2d 823 (1974).

61. *Guard-Life Corp.*, *supra* n. 51; *Steitz v. Gifford* 280 N.Y. 15, 19 N.E.2d 661 (1939).

62. *Dillon v. Manger* 29 A.D.2d 759, 287 N.Y.S.2d 519, 521 (App. Div. 1968); *Hutchins v. Bethel Methodist Home* 370 F.Supp. 954, 964 (S.D.N.Y. 1974).

63. *Guard-Life Corp.*, *supra* n. 51 at 428 N.Y.S.2d 636; *Restatement (2d) of Torts*, *supra* n. 43, s. 774A(1) (A).

64. *Steitz v. Gifford*, *supra* n. 61.

65. *Id.*

66. *Doralee Estates v. Cities Service Oil Co.* 569 F.2d 716, 721 (2d Cir. 1977).

## INSTRUCTIONS REGARDING SPECIAL ISSUE NO. 4

1. Pennzoil is authorized by law to sue not only for its actual damages, if any, but also to sue for punitive damages in an amount found by you to be appropriate under the circumstances. In order to warrant the recovery of punitive damages, it is not necessary to show that Texaco was motivated by ill will or hatred of Pennzoil.<sup>67</sup> Pennzoil must show, however, that the acts of Texaco were taken in wanton or reckless disregard of the rights of Pennzoil.<sup>68</sup>
2. In assessing punitive damages, if any, you may take into account not merely the act or acts of Texaco itself; you may also take into account all the circumstances, including Texaco's motives and the extent of harm, if any, suffered by Pennzoil.<sup>69</sup> You may also include whatever additional amount of money, if any, you believe would be an appropriate amount to deter or discourage future acts like or similar to those wrongful acts committed by Texaco in this case, if any.<sup>70</sup>

## PRELIMINARY INSTRUCTIONS

1. In answering the following issues, you are instructed that the "Getty entities" means the Getty Oil Company and its Board of Directors, the Sarah C. Getty Trust and its Trustee, Gordon P. Getty, and the J. Paul Getty Museum.
2. All affirmative answers in this charge must be answered by a preponderance of the evidence. The term "preponderance of the evidence" means the greater weight and degree of credible evidence or testimony introduced before you and admitted in evidence in this case.
3. In determining the credibility of a witness, you may consider any matter in evidence that has a tendency to prove or disprove the truthfulness of his or her testimony; for example, demeanor and manner while testifying, the character of his/her testimony; the extent of his/her capacity to perceive, to recollect, or to communicate in a manner about which he/she testified; the existence or nonexistence of a bias, interest, or other motive in giving testimony; a statement previously made by him/her that is inconsistent with his/her testimony; the existence or nonexistence of any fact testified to by him/her; his/her attitude toward the action in which he/she testified or toward the giving of testimony.
4. You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind, as against the testimony of a lesser number of witnesses, which appeals to your mind with more

67. 36 *N.Y. Jur.2d Damages*, s. 175 at 295 (1984) and cases cited therein.

68. *Sharapata v. Town of Islip* 56 N.Y.2d 332, 452 N.Y.S.2d 347 at 349, 437 N.E.2d 1104 (N.Y. 1982); *Rupert v. Sellers* 65 A.D.2d 473, 411 N.Y.S.2d 75 at 85 (App. Div. 1978), *affid.* 50 N.Y.2d 881, 430 N.Y.S.2d 263, 408 N.E.2d 671 (1980), *cert. denied* 449 U.S. 901, 101 S. Ct. 272, 66 L.Ed.2d 132 (1980); *Robert B. Whitney v. Citibank* No. 81 Civ. 5832, *slip op.* (S.D.Y. 20 June 1985).

69. *Restatement (2d) of Torts*, *supra* n. 43, s. 908, comment e; *Moran v. International Playtex* 103 A.D.2d 375, 480 N.Y.S.2d 6 (N.Y.App.Div. 1984).

70. *Walker v. Sheldon* 10 N.Y.2d 401 at 404, 223 N.Y.S.2d 488 at 490, 179 N.E.2d 497 at 498 (1961); *Restatement (2d) of Torts*, *id.*, s. 908.

convincing force. You are not to decide an issue by the simple process of counting the number of witnesses who testified on the opposing sides. The final test is not the relative number of witnesses, but the relative convincing force of the evidence based on a preponderance of the evidence.

5. You are reminded that you must not consider as evidence any statement of legal counsel other than as a witness made during trial. However, to the extent that lawyers gave testimony during the trial of this matter, that testimony is not to be considered by you as a statement of the law to be applied in this case. I will be giving you a statement of the law to be applied in these instructions.
6. In arriving at your verdict, you are not to discuss or speculate about why any ruling has been made by the judge during the course of this trial, nor should you discuss or speculate about what result the judge would like. Your verdict must be based solely and entirely upon the testimony of the witnesses and the evidence admitted during the trial.
7. The intentional destruction of written evidence after litigation has commenced raises a presumption that the document destroyed was unfavourable to the party destroying it.<sup>71</sup>

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71. *Dow Chemical Co. (U.K.) v. S.S. Giovannella D'Amico* 297 F.Supp. 699, 701 (S.D.N.Y. 1969); *Curtis and Mfg. v. Douglas* 79 Tex. 167, 15 S.W. 154 (1890); *H.E. Butt Grocery Co. v. Bruner* 530 S.W.2d 340, 344 (Tex. Civ. App., Waco, 1975, writ dismd.); *Broomfield v. Texas Gen'l Indemnity Co.* 201 F.2d 746, 748 (5th Cir. 1953).