

In High Court Argument, Former Justice Revisits Opinion He Wrote

[By Mary Alice Robbins](#)

[Texas Lawyer](#)

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Former Texas Supreme Court Justice Craig Enoch may have experienced *deja vu* on Oct. 16 as he argued before the high court in a case that revisits an opinion he wrote — 1997's *Schlumberger Technology Corp. v. Swanson*.

"I felt I was reliving the debate when I was on the court that resulted in *Schlumberger*," Enoch says in an interview after the arguments in *Forest Oil Corp., et al. v. McAllen, et al.* Enoch, a shareholder in Winstead's Austin office, represents South Texas rancher James McAllen and other land-holding entities that sued Forest Oil and others for allegedly concealing the existence of pollutants and contaminants on property they leased for oil and gas wells.

The arguments also may have brought back memories for Geoffrey Harrison, an attorney for Forest Oil and its employee, Daniel B. Worden. Harrison is a partner in the Houston office of Susman Godfrey, which was one of the firms that represented plaintiffs John and George Swanson in *Schlumberger*, an opinion that caused them to lose an \$82 million judgment. The Swansons, consultants for a South African offshore diamond operation, had sued *Schlumberger*, alleging that the company fraudulently induced them to sign a release of their claims to an interest in the project.

According to Enoch's opinion in *Schlumberger*, in the release they signed the Swansons unequivocally disclaimed reliance upon representations made by *Schlumberger* about the feasibility and value of the mining project. In its 8-0 decision, the Supreme Court held that the disclaimer of reliance on the company's representations defeated the Swansons' claim of fraudulent inducement against *Schlumberger*. Justice Nathan Hecht is the only current member of the Supreme Court who was on the court when it considered *Schlumberger*.

McAllen, which is before the Supreme Court on an interlocutory appeal, also involves a disclaimer of reliance and a claim of fraudulent inducement.

According to McAllen's brief to the Supreme Court, McAllen and others entered into a settlement agreement with Forest Oil and other oil companies in 1999 to settle litigation over the alleged underpayment of royalties and the underdevelopment of minerals on oil and gas leases on properties known as the McAllen Ranch. McAllen alleges in the brief that as part of the settlement agreement, Forest Oil requested a provision to arbitrate personal injury, environmental and wrongful-death claims in connection with the settlement agreement. McAllen further alleges that Forest Oil knew about radioactive pipe and mercury-contaminated iron sponge on McAllen's property but told him that no pollution or contamination issues existed.

On Jan. 31, 2005, McAllen, several of his employees and other land-holding entities sued Forest Oil, Worden and ConocoPhillips Corp. in the 206th District Court in Hidalgo County. Among other things, the plaintiffs allege in their third amended petition that Forest Oil donated pipe contaminated with radiation for a corral to hold two African black rhinoceroses and other projects related to the rhinos' preserve without notifying McAllen or his employees that the materials were radioactive. The rhinos suffered "strange illnesses and skin lesions" and one subsequently died, the plaintiffs allege in their petition.

The plaintiffs also allege in the petition that Forest Oil contaminated the McAllen Ranch properties by burying mercury-contaminated iron sponge material in various locations.

Harrison denies the plaintiffs' allegations. "Forest Oil did not contaminate this property," he says in an interview after the Supreme Court arguments.

The defendants filed a motion to compel arbitration, which the 206th District Court denied, according to a December 2005 opinion by the 13th Court of Appeals. In an opinion written by Justice Nelda Rodriguez, the 13th Court affirmed the trial court's decision and concluded that the evidence was legally sufficient to support the plaintiffs' claim of fraudulent inducement. Then-Justice Federico Hinojosa and Justice Linda Yanez joined in the decision, which Forest Oil and Worden appealed to the Supreme Court.

ConocoPhillips did not join in the appeal. David Morris, an associate with Winstead in Austin, says the plaintiffs nonsuited ConocoPhillips in the spring of 2006.

The Exception and the Rule

In his argument before the Supreme Court, Harrison contended that the court should not permit the respondents — McAllen and the other land-holding entities that joined McAllen in challenging the appeal — to avoid their unambiguous written and signed agreements to arbitrate based on a six-years-after-the-fact statement that they were allegedly fraudulently induced by oral misrepresentations "by an unidentified person from an unidentified company." Harrison said the respondents agreed to arbitrate all personal injury, environmental and wrongful-death claims related to the McAllen leases. The respondents also confirmed that their counsel had read the entire content of those releases and explained the legal consequences of the releases, he told the court.

Hecht asked Harrison whether Forest Oil knew about the environmental issues before McAllen signed the settlement agreement that contained the arbitration provision.

Harrison said the record before the Supreme Court shows only that a disgruntled Forest Oil employee testified at a hearing on the motion to compel arbitration about his beliefs about certain contamination on McAllen's land. The employee "admitted under oath that he did not honestly know whether there was any contamination at all," Harrison said.

Chief Justice Wallace Jefferson asked Harrison if his argument would be different if there was no disgruntled employee but there was evidence that Forest Oil knew about the contamination, that its lawyers told McAllen no contamination existed and the company still included the arbitration provision in the agreement.

"My argument would not be different; it would be exactly the same," Harrison said.

Harrison said the disclaimer of reliance in the agreement that McAllen signed is modeled after nearly identical language that the Supreme Court considered in Schlumberger. The circumstances in McAllen match and surpass those upheld in Schlumberger, he said.

"Both sides were represented by highly competent counsel; the negotiation was at arms-length," Harrison said, noting that the parties reached the settlement agreement at a weeklong mediation attended by about 30 lawyers and, at times, up to 100 people.

"If a litigant — here Mr. McAllen — disclaims reliance when in fact he is relying, then his lawsuit, if he has one, is not against the settling party on the other side, but instead against his own lawyers for malpractice for letting him disclaim that reliance," Harrison argued.

Enoch began his argument by telling the court that looking at Forest Oil's briefs in McAllen made him think of the plot of a 1980s movie, "Absence of Malice," in which Paul Newman played the part of a Mafia chief's son who wakes up one day to find that a newspaper has written an article that implicates him in a murder. "The plot of the rest of the movie was simply this: What the newspaper said was accurate, but it wasn't true," Enoch said.

In tying the movie's plot to the briefs, Enoch said, "What we have is good briefing, marvelous briefing that is accurate but we believe, based on the record and based on the law, is simply not the correct conclusion."

Enoch said the case is not about avoiding a settlement agreement or about trying to avoid a new agreement resolving what to do about site cleanup. "This is only an argument, only a dispute about whether James McAllen, and the interests he signed on behalf of, is prohibited as a matter of law from asserting that he was fraudulently induced when executing an arbitration agreement over an existing personal injury, an existing environmental injury claim," Enoch said.

Justice Harriet O'Neill said a disclaimer of reliance, by its nature, is meant to take care of such situations "when somebody says what you told me wasn't right." O'Neill questioned the purpose of having a disclaimer of reliance clause is if it's not to prevent this type of claim.

Enoch said Schlumberger recognized the need for a mechanism through which parties could finally and fully resolve disputes. But he said Schlumberger was careful to note that "there is a tension here, because we don't want somebody in the middle of the negotiations to make a representation about a fact that they know will be relied on and then rely on a disclaimer of reliance in the contract to say, "King's X, there's no fraudulent inducement."

O'Neill said lawyers always make representations. "I guess what I'm worried about is the exception swallowing the rule," she said. "Somebody could always come back and say, "They misrepresented this; they misrepresented that.' And it seems like that could water down these disclaimers of reliance."

Enoch said the court knew in Schlumberger that it was possible for an exception to swallow the rule. "The court also knew that it's possible that if you didn't have restraint on fraudulent inducement that it could swallow any effort on the part of people to resolve their claims," he said.

O'Neill questioned whether there should be a requirement for every single representation to be set out in a disclaimer of reliance.

But Enoch said that under Schlumberger, it's not the language in the disclaimer but the circumstances in which the disclaimer is executed that the court should consider. Enoch said McAllen told the oil companies that he would not sign the arbitration agreement unless the companies told him they were not aware of any environmental problems on the property. "And the answer is, "We're not aware. Sign it,' " he said.

During Harrison's rebuttal argument, Justice David Medina said a party can do its due diligence and still not discover contamination for years. He asked what would be wrong with setting aside that specific provision in the arbitration agreement.

The answer, according to Harrison, is for a party to put his concerns in writing. Harrison said he asked McAllen at the hearing on Forest Oil's motion to compel arbitration why — if the allegation is true that the oil companies represented there was no contamination — he didn't ask them to put the representation in writing. "His answer was, "Good question.' He doesn't have an answer," Harrison said.

In an interview, Enoch says McAllen testified under oath that a representative of the oil companies told him that the representative was unaware of any contamination on McAllen's property. "After two years, not a single person has come forward saying that conversation did not occur," Enoch says.

But Harrison says McAllen has to live by the bargain he made in 1999. "Texas law requires it."