In the

Supreme Court of the United States

HOSPITAL BUILDING COMPANY,

Petitioner,

v. No. 74-1452

TRUSTEES OF THE REX HOSPITAL, et al.,

Respondents.

Washington, D. C.
February 25, 1976

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Wednesday, February 25, 1976.

The above-entitled matter came on for argument at 10:05 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JOHN K. TRAIN, III, ESQ., Alston, Miller & Gaines, 1200 C&S National Bank Building, Atlanta, Georgia 30303; on behalf of the Petitioner.

RAY S. BOLZE, ESQ., Howrey & Simon, 1730 Pennsylvania Avenue, N. W., Washington, D. C. 20006; on behalf of the Respondents.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in No. 74-1452, Hospital Building Company against the Trustees of Rex Hospital.

Mr. Train, you may proceed whenever you're ready.

ORAL ARGUMENT OF JOHN K. TRAIN, III, ESQ.,

ON BEHALF OF THE PETITIONER

MR. TRAIN: Mr. Chief Justice, and may it please the Court:

The question of law presented here in this case is whether a conspiracy between two business competitors to take over and dominate a market, to the exclusion of the third competitor, is actionable under the Sherman Act.

Specifically, whether the traditional interstate commerce tests for Sherman Act jurisdiction are met by the allegations of the complaint.

The business in question is the delivery of hospital services. The geographical market in question is Wake County, Raleigh, North Carolina.

Petitioner, Hospital Building Company, or HBC, owns and operates Mary Elizabeth Hospital in Raleigh.

The named conspirators are, essentially, the two competing hospitals in Raleigh: Rex Hospital and Wake Hospital, and various persons associated with or acting for them.

The conspiracy alleged is that these two competitors and the other conspirators, which have been referred to in our brief as the Raleigh Group, have conspired to allocate the market for hospital services in terms of customers and of output in Raleigh, to fix prices for hospital services, and to foreclose effective competition by HBC in that market.

This, we submit to the Court, is not second-rate conspiracy, as the Fourth Circuit majority opinion appeared to assume.

In order to accomplish the purposes of the conspiracy, the Raleigh Group has undertaken, among other actions, to prevent expansion through relocation and construction of an entirely new facility by HBC from an old 49-bed hospital to a new 149-bed hospital; a tripling of capacity and ability to compete.

QUESTION: So it's still a fairly small hospital? As hospitals go.

MR. TRAIN: Your Honor, there is -- Your Honor, there is no evidence in the record as to its size in comparison with other hospitals. We have before us only the allegations of the complaint, and the size of the market is not in the record, may it please the Court.

The basic issue before this Court --

QUESTION: I merely mention it because you say a tripling in the number of beds. If it had two and went to six,

it would still triple, but it would be pretty small.

MR. TRAIN: Yes, that's -- I understand that, Your Honor.

The basic issue before this Court is whether the complaint alleges facts sufficient to meet either or both of the two tests for jurisdiction under the Sherman Act: the in-commerce test and the affecting-commerce test.

The competition restrained by the conspiracy is real. Hospitals, whether government-owned, non-profit, or proprietary profit-making, such as HBC, compete to serve patients who pay for treatment there, or for whom payment is made by third parties. This is what the complaint refers to as paid hospital business.

Such competition is of the price and price equivalent variety, such as lower rates and charges, the inclusion of additional services in basic rates, and also of the non-price variety: more modern and pleasant facilities, larger staffs, more extensive and moderan equipment.

Just as in other businesses, hospitals compete by offering better services and facilities, lower prices, or both.

The provision of hospital services, the business of operating a hospital, involves much more than placing a bed in a building and hiring a staff. The hospital business is not just a local business.

Hospital services cannot be provided by HBC or by any

hospital without a continuing and substantial flow of drugs, equipment and supplies.

QUESTION: Mr. Train, let me ask you -- perhaps the record clearly discloses this -- but this, your client is a profit hospital, and for-profit hospital?

MR. TRAIN: That's correct, it's --

QUESTION: Is it owned by a group of physicians at all?

MR. TRAIN: No. The record shows that it is owned by Charter Medical Corporation, which is a regional group or chain, if you will, of hospitals and nursing homes located in Macon, Georgia.

QUESTION: Is admission --

MR. TRAIN: Excuse me.

QUESTION: -- restricted to specified physicians?

MR. TRAIN: Your Honor, again I emphasize, we're dealing solely with the complaint since the case was dismissed on a motion under 12(b)(6). There is nothing in the record to indicate that, but I'm sure it has staff rules and regulations like so many of them do.

QUESTION: Well, you were speaking of the three hospitals competing, and usually a profit hospital is restricted in its admission policies to patients of those physicians who own it.

MR. TRAIN: Well, Your Honor, --

QUESTION: I wondered whether your complaint shows this.

MR. TRAIN: Your Honor, physicians do not own this hospital, this is owned by a profit-making corporation. I do not believe that the patients who are subject to admission to a profit-making hospital are necessarily restricted to those of the physicians who own it. I believe -- and again I'm talking outside the record, because we don't have a record -- but I believe they are -- the limitation is that they must be admitted by members of a staff there, and I believe that typically the staff is wider than just those physicians who might own it.

In any event, as I say, this hospital is not owned by physicians, and there is no evidence of any restrictions on admissions to this particular hospital; or, for that matter, the other two hospitals in so far as this record shows.

Hospitals, of course, as we have stated, do not exist in a vacuum, they have to purchase goods and supplies just like any other business.

It is alleged in the complaint that a substantial amount of HBC's purchases of these supplies are purchased from out-of-State vendors. And, further, that 80 percent of the supplies of HBC are purchased pursuant to nationwide supply contracts, which are negotiated by HBC's out-of-State parent corporation, Charter Medical in Macon, Georgia.

A hospital, likewise, cannot function without management and administration. HBC purchases and receives management services from its out-of-State parent. Hospital services cannot be furnished unless they are paid for. And today that means receipts of payments from third-party payors, both private insurance carriers and governmental programs.

Almost 95 percent of HBC's billings are to third-party payors, and the source of such payments in a substantial number of cases is located outside the State of North Carolina.

In short, interstate commerce is at the heart of the operation of any hospital, and, in particular, is at the heart of the operation of Mary Elizabeth by HBC.

Drugs, supplies, equipment, and other goods are purchased in interstate commerce as ingredients of the ultimate product, hospital services, which is purchased by patients, the consumers.

In turn, bills are rendered to and payments received from out-of-State financial sources. HBC, as the operator of the hospital and the furnisher of hospital services, is at the center of and is an integral and essential connector between these flows of goods and payments in interstate commerce.

In these circumstances, we submit that any conspiracy to restrain competition by HBC in a limited market where there are only three competitors, HBC being one, in the furnishing of hospital services, is actionable in federal courts under

both the affects-commerce test and the in-commerce test, for jurisdiction under the Sherman Act.

We will discuss first the affects-commerce test.

We respectfully submit that a conclusion adverse to that of the Fourth Circuit is compelled by this Court's consistent application of the affects-commerce test to find jurisdiction under the Sherman Act with respect to so-called local conspiracies.

In such cases as South-Eastern Underwriters, Women's Sportswear and, most recently, Goldfarb, this Court has made clear that the designation of a particular business as local or intra-state does not answer the question of whether or not that business, or a conspiracy to restrain it, is subject to the Sherman Act.

South-Eastern Underwriters in particular teaches us that the distinction between what has been called local and what intra-state is a type of mechanical criterion which this Court has not deemed controlling in the measurement of federal power.

Notwithstanding this admonition, the Fourth Circuit majority, like the District Court in the St. Bernard Parish case cited in our brief, which was reversed by the Fifth Circuit, dealing with this same issue, the Fourth Circuit was mesmerized by its focus on the supposedly local nature of the hospital business.

As already noted, this characterization is a misconception. The essence of the hospital business is the interstate flow to, through, and from it, of goods, bills and payments.

QUESTION: Mr. Train, somewhere you'll comment on the Oregon Medical Society case, as you go along -- you don't have to do it now.

MR. TRAIN: I'd be pleased to comment on that case right now, Your Honor. In the Supreme Court opinion, the reference is to the few contacts with interstate commerce as consisting of payments made from the Oregon Medical Society association arrangement, the insurance for hospital payments from Oregon to other States where patients covered by the Oregon arrangements had gone to other States. The Supreme Court characterized those, I believe, as fortuitous and "sporadic I believe was another word that the Supreme Court there used.

QUESTION: Do you think times have changed in the 25 years since that case was decided?

MR. TRAIN: Well, I believe -- I can state my place that I think they have. I don't believe that case is authority in support of the Fourth Circuit's opinion here, since, as I say, in that case the Supreme Court, in commenting on the interstate commerce involvement, made it clear that it was not substantial, it was not a substantial effect on interstate commerce.

Here, and as opposed to sporadic and infrequent payments across State lines, we allege a continuing flow of such payments.

Now, I am referring, if Your Honor please, to the Supreme Court opinion in that case, not to the District Court opinion.

The question is not of characterization of something as local or intrastate, the question is whether interstate commerce is affected. As Mr. Justice Jackson said in Women's Sportswear, if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.

QUESTION: Well, Mr. Justice Jackson wrote the Oregon Medical Society decision too, didn't he?

MR. TRAIN: He did indeed, Your Honor. And, as I've just said, I think that can be squarely rationalized with our position here.

QUESTION: Well, why wouldn't you say in the Oregon Medical Society case, if you're right, tht although there -- admittedly there weren't many interstate contacts, there were some, and if interstate commerce feels the effect, it doesn't make any difference that the conspiracy charged is local?

MR. TRAIN: Because our position is not, Your Honor, that every conspiracy or every effect on interstate commerce is actionable. I think the cases have made it clear that the

effect must be what the cases deem substantial. This Court has measured that quantitatively, it's measured it qualitatively.

In the Oregon Medical Society case, I think we have a case where, according to the opinion written by Mr. Justice Jackson, there were just no substantial effects on interstate commerce.

The Fourth Circuit's majority opinion, may it please the Court, states the effect on commerce test in the words that have been used before by this Court and others. But then it reads it out of existence, as we see it, by engrafting upon it three additional conditions, not previously deemed to be a part of that test.

First, according to the Fourth Circuit majority opinion, the aim or object of the conspiracy, whether it is, quote, "directed at", end quote, a supposedly local activity is an element in determining the substantiality of the effect on commerce.

Jurisdiction under the Sherman Act is not, we submit, a function of intent, but rather a function of impact. Intent may be relevant in a limited sense to show the probable effect of an act, but where the effect is clear, intent, we submit, is not relevant to determine the substantiality of that effect under the Sherman Act.

In addition, we respectfully submit to this Court that the allegations of the complaint describe a conspiracy

directed not just at HBC, not just at an expansion of the hospital, but at an entire market. The goal of the conspirators being to control and allocate all of the paid hospital business in the Raleigh area.

This does not just keep HBC from competing, we respectfully submit; it keeps every one from competing. It denies entry to all potential entrants.

Second, the Fourth Circuit's majority opinion finds the complaint defective, for purposes of jurisdiction under the Sherman Act, because there is no showing that out-of-State suppliers or payors will go out of business.

We submit that the question is whether there is an effect on the flow of commerce, not whether there is an effect on out-of-State links or originators of that flow.

In Goldfarb, for example, this Court rejected the argument that there was no showing that purchasers were discouraged, and no showing that somehow the out-of-State lenders were affected anticompetitively by the conspiracy there found to be actionable.

Finally, in seeking to verbalize a formula for application of the Sherman Act, the Fourth Circuit majority engrafted a monopoly power requirement on the essential jurisdictional allegations. Section 1 of the Sherman Act, of course, is designed to reach restraint prior to the development of monopoly power.

This Court has never required the existence of anti-competitive power sufficient to drive a competitor out of business before finding the Sherman Act applicable, or, rather Section 1 of the Sherman Act applicable. Section 2, of course, deals with monopolies.

Again, may it please the Court, even accepting the Fourth Circuit's provision of the true test here, the power alleged on the part of the conspirators here, the power to allocate the market among themselves, the power to fix prices, and, crucially, the power to exclude HBC from the market represents precisely the danger Congress sought to guard against in its enactment of the Sherman Act.

Substantiality is a requirement which this Court has found to be satisfied, both quantitatively and qualitatively. It is certainly satisfied quantitatively if a not insubstantial amount of interstate commerce is affected.

The quantitative standard, may it please the Court, is satisfied in this case. The conspiracy here has operated to restrain a tripling in size of a business through its relocation and reconstruction in a new facility.

And perhaps, Mr. Justice Blackmun, this gets to your question as to the size or the quantity of what is involved here.

In 1972, this business purchased approximately $112,000 in supplies and equipment on a regular and continuing,

not a one-time basis, and a substantial amount of that was purchased from out-of-State sources.

Such purchases, it is alleged in the complaint, would increase substantially after expansion. HBC purchased $36,000 worth of management services from its out-of-State parent. That payment is based on a gross revenues formula, and, likewise, these purchases of management services would increase substantially upon expansion.

A substantial flow of capital, at least $4 million, communications and services in interstate commerce, will result in the relocation and the reconstruction in a new facility of Mary Elizabeth.

Finally, revenues are received in substantial amounts by HBC from out-of-State payment sources.

More patients would be served by a relocated and expanded hospital, and thus more revenues received from out-of-State payment sources.

The quantitative effects on interstate commerce here are both present and potential, but equally as real in each case.

The present effects lie in the immediate prevention of an expansion of the flow of commerce. The goods and services which would have been purchased by an expanded and relocated HBC, the capital and additional revenues which would have flowed to HBC from out-of-State. The potential effect is the terminal choking off of all activity if the conspiracy's

ultimate goal, the exclusion of HBC from the market, is achieved.

Perhaps one of the problems we have had in articulating the effect on commerce of the conspiracy is due to the fact that the conspiracy has blocked an attempt to expand and relocate and thus treble the capacity of HBC. We are, therefore, forced to talk about what might have been, and, we hope, what will be in the future.

In these circumstances, the fact that this action unquestionably falls within the line for Sherman Act jurisdiction that has been drawn by this Court is best demonstrated, perhaps, by turning the situation around.

If this case alleged the existence of a 149-bed hospital, and had the defendants combined and conspired to eliminate that hospital as a competitor for hospital services in the Raleigh area, and to reduce by two-thirds its ability to do business, and if the reduction in HBC's business resulted then in a significant decrease, a measurable decrease in the flow of goods, supplies, credit, reimbursements, and so on from out-of-State to HBC, then I think the lower courts would have had less difficulty in seeing that the substantially-affects commerce test for application of the Sherman Act had been met.

We submit that it's clear that there is no functional or legal difference for purposes of application of the Sherman Act between a conspiracy which prevents expansion

and entry of business competitor, and one which results in contraction.

Therefore, the effect on interstate commerce being both obvious and, we believe, substantial, the conspiracy causing these effects is actionable under the Sherman Act.

The quantity or extent of the flow of interstate commerce is not a lone determinative as to whether there has been a substantial effect on interstate commerce. This Court has observed just last term, in the Goldfarb case, that where there is an effect on interstate commerce, no specific magnitude of the effect need be proven.

As we have discussed, the impact here is sufficiently certain of measurement as to satisfy the quantitative requirements of the affects-commerce test.

In addition, the activities here in question, without regard to the specific magnitude of interstate commerce affected by them have effects which the Congress surely must have intended to prevent, by enactment of the Sherman Act.

The allegations of the complaint present a picture of perhaps the classic restraint of trade. Two competitors undertake to control and divide a market, to the exclusion of a third. The third, infused with management and capital by an out-of-State source, undertakes to become an effective competitor. By the actions taken pursuant to a noncompetitive arrangement, this initiative is thwarted.

In this case, we submit, what we have is not only the stifling of existing competition, the stifling of an existing competitor, but what we have is the denial of effective entry to a new entrant into the market through the erection of artificial barriers around that market.

In such a case, purchasers and consumers in that market are denied and deprived of the advantages of free competition, and the Sherman Act may be invoked against the conspirators.

We believe that jurisdiction is also present here under the in-commerce test. HBC operates in the flow of interstate commerce, and anticompetitive restraints on its activities thus impact directly on interstate commerce.

In the American Building Maintenance Industries decision in 1975, this Court has stated that to be in commerce, the corporation must itself be directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce.

HBC is a purchaser of a substantial amount of goods and services in interstate commerce. Management services essential to the functioning of HBC, and of its provision of hospital services, come from outside the State of North Carolina. The goods and management services purchased by HBC for its operations, which are an essential part of those operations, are purchased on a continuing and regularly

recurring basis. In all cases these goods, these services, purchased in interstate commerce, originating outside the State of North Carolina, are essential ingredients of the product, medical-surgical hospital services, which has been purchased by the consumer.

We have touched previously upon the interstate system of payments. What we refer to as the nationwide payment system, which today exists for the purchase of health care in general and hospital services in particular. In determining whether HBC is in interstate commerce, it is particularly appropriate to consider this developing nationwide system.

The existence, we respectfully submit, of a nationwide payment system establishes that those participating in it are in interstate commerce.

Finally, the series of federal statutes, which, by their own terms or through decisions of this Court, have specific application to hospitals demonstrates the strong federal interest in the furnishing of hospital services in this country today.

We do not argue that jurisdiction under the Sherman Act is conclusively presumed if the activities in question are regulated under federal statutes. We do say, however, that to the extent that the activities in question are the subject of other federal regulations, their supposedly local

character is diminished.

The pervasive regulation of health care services in this country today demonstrates the major federal concern in this area, and offers a strong indication that delivery of health care services is not solely a matter of local concern. Certainly the pervasive federal regulation of delivery of hospital services is inconsistent with the finding below that as a matter of law the provision of hospital services are a purely local activity.

QUESTION: What was the basis of Congress's exercise of its jurisdiction to adopt as pervasive regulation of the delivery of hospital services?

MR. TRAIN: Under the commerce clause, Your Honor. And, as the courts have pointed out, when Congress undertakes to regulate pursuant to its power under the commerce clause, it leaves -- it has one of two ways in which to go, in which to determine whether specific activities are subject to the regulatory system set up. One is where Congress itself makes a finding; the other is where Congress leaves it to the court to make a finding.

The Sherman Act, of course, is the latter type of statute.

QUESTION: Mr. Train, just as a matter of pure curiosity, are there many for-profit hospitals in the Southeast? Do you know?

MR. TRAIN: I think there are a fair number. Our client owns several, and I do know of other companies in that area. There is a substantial number of for-profit -- I would suppose perhaps as many in the Southeast, since that is a newly developing part of the country, as almost anywhere.

QUESTION: Are they increasing in number or decreasing, do you know?

MR. TRAIN: I believe they -- in fairness, I could say they are increasing a little bit; but I believe it's probably also fair to say the economy has been such that nobody is building much of anything right now.

QUESTION: When you talk about pervasive regulation of the health care, are you relying primarily on the Social Security Act provisions dealing with Medicare?

MR. TRAIN: We're not talking so much about health care as such, although we are relying on Social Security, we're also --

QUESTION: But that doesn't depend on the commerce clause.

MR. TRAIN: Excuse me. I mean -- I do not mean to say the commerce clause.

QUESTION: Well, I was asking you a moment ago --

MR. TRAIN: I was thinking of Fair Labor Standards Act. I was thinking of the Occupational Safety and Health Act.

I was thinking of the Wage-Hour Acts. I was not thinking of Hill-Burton, nor was I thinking of the Social Security Act.

QUESTION: Neither of those depend on the commerce clause --

MR. TRAIN: It's the general welfare clause. But, again, we think the point is that the enactment of such laws, under any source of power for the Congress, demonstrates there is a strong federal interest in the provision of hospital services, and --

QUESTION: Well, I don't see that bears on your case at all. I can see that you have an argument under the Fair Labor Standards Act, under the Occupational Health and Safety Act; but the spending power does not depend on interstate commerce.

MR. TRAIN: Yes, I --

QUESTION: Congress can spend, for whatever purpose it chooses, regardless of whether it bases any jurisdiction on commerce. And the fact that it may choose to spend, I would think, doesn't advance or detract the contention that it's jurisdictional; would you?

MR. TRAIN: We certainly don't rely on that, for the argument we make. I would like to make that very clear.

Mr. Justice Powell?

QUESTION: I was wondering whether you think, in view of the arguments you make, that the Sherman Act has

substantially the same coverage with respect to in-commerce and effect-on-commerce that the Fair Labor Standards Act has.

Or, putting it differently, can you think of any business, any local business that would not be covered by the Sherman Act under your argument?

MR. TRAIN: Your Honor, --

QUESTION: I tried to think of one under the Fair Labor Standards Act. Window washers of an office building are, for example.

MR. TRAIN: You say are?

QUESTION: They are. They have been so held.

MR. TRAIN: Your Honor, I think you would -- I think our position is you would have to have an analysis of the market and see what sort of facts were being alleged with respect to a particular occupation.

For example, with respect to window washers, it seems to me that if you had a case involving a Sherman Act complaint respecting a conspiracy of window washers, just like you had complaints, which courts have upheld, with respect to employing plasterers and with respect to journeymen or, rather, wholesale plumbers, you'd have to see whether there was a substantial effect on interstate commerce.

QUESTION: But you think they could be covered?

MR. TRAIN: Absolutely.

QUESTION: Right. I understand.

MR. TRAIN: If the allegations with respect to the substantial effect were there.

QUESTION: And if you had a small town with three restaurants in it, and two of them decided they were going to fix prices to put the third out of business, they would clearly be covered under your --

MR. TRAIN: No, not necessarily clearly. I think you would have to, again, make an analysis as the Ninth Circuit Court, for example, did in Page vs. Work. And you'd have to find what was the nature of the interstate commerce purchases, how important they were, whether they were a continuing part of the business of this business, and so forth.

QUESTION: Well, let's assume that the restaurants in question, instead of purchasing $112,000 in interstate commerce, purchased $12,000, and did so regularly.

MR. TRAIN: Well, as I recall, the lowest amount that I have -- that I recall seeing with respect to quantitative, the quantitative aspect of purchases is the recent Seventh Circuit decision as to which certiorari was earlier denied, the Finis P. Ernest case, where there was some statement that the contractor who had been, I believe, indicted under the Sherman Act, had purchased some ten thousand -- or, rather, had received some $10,000 from HUD in connection with a building project.

QUESTION: It might depend upon how large a percentage

the $12,000 was of the restaurant's total purchases.

MR. TRAIN: Of the restaurant's total purchases, and also of the total purchases with respect to the market.

QUESTION: Yes.

QUESTION: As the Fourth Circuit says, that not only no bright line, but no line at all, is there?

MR. TRAIN: I believe that's certainly true. It's a particularized case-by-case determination, based on a pragmatic economic judgment, and we believe that here the pragmatic judgment is that Congress would have intended to protect a market from the elimination of one out of three competitors.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Bolze.

ORAL ARGUMENT OF RAY S. BOLZE, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. BOLZE: Mr. Chief Justice, may it please the Court:

I submit that in this Sherman Act jurisdictional issue we should again look at the facts of this case. My client is Rex Hospital, a non-profit public hospital in Raleigh, North Carolina. As is alleged in the complaint, the product market here is the provision of hospital services in Raleigh and that is also the geographic market, Raleigh, North Carolina.

The provision of hospital services is, as I think

almost everyone knows, is essentially such things as the provision of a hospital room, provision of nurses' services, the provision of an operating room, a place where the doctor can come and serve the patient, the provision of meals to you while you're in the hospital, the provision of linens on your bed, all these various factors.

And it is true that at one time or other the bed that you lie in as a patient for a week in the hospital may have come from interstate commerce.

The surgical equipment used by the doctor when he operates upon you may at one time have been purchased in interstate commerce or from a local wholesaler who purchased it in interstate commerce. And that the medicines and drugs administered to you in the hospital may at one time have come from a manufacturer or a shipper in interstate commerce.

But, we submit, in virtually every walk of life this is the case. Indeed, I would submit that in virtually every interstate transaction it is eventually consummater in a local purchase, or a local delivery of a service.

That does not mean that since you are the ultimate recipient on that chain you become a part of interstate commerce for Sherman Act regulation.

QUESTION: Mr. Bolze, you know there's a provision in the Robinson-Patman Act that exempts hospitals, or at least has a different provision with respect to the purchase

of products by not-for-profit hospitals. Does that not necessarily imply that the hospital is engaged in interestate commerce when it purchases drugs, say, at a lower price than perhaps a wholesaler pays?

MR. BOLZE: Well, Your Honor, my first answer to that, of course, is we're not dealing with the Robinson-Patman Act, but the Sherman Act, and it's --

QUESTION: No, I realize that. But I'm suggesting Congress, in enacting that, must have made some assumption with respect to the transactions engaged in by hospitals.

MR. BOLZE: Well, Your Honor, I would submit that -- and I have not checked the legislative history of that part of the Robinson-Patman Act; but I would submit, and we do not contend here, that hospitals could not conspire in such a way as to come within the Sherman Act. And Petitioner makes the argument here that this is a constitutional question: Can hospitals ever come within the Sherman Act?

We do not argue that. We take the same position as was stated in the Goldfarb case and was stated in the Yellow Cab case, that there may be occasions when legal services or taxi-cab services, that local activities could be of such a nature that they could restrain trade under the Sherman Act. And I would submit that Congress, in writing the Robinson-Patman Act and putting that statement in, was not saying that hospitals are always within the Sherman Act, you have to look at the

individual restraint, which is what we're doing here.

So I don't think that that does get to our question.

QUESTION: Presumably only when the drugs come from out-of-State.

MR. BOLZE: Or -- or, Your Honor, if the hospital, as is in most of these prior Supreme Court cases, if the hospital conspires with the out-of-State drug company, such as the Frankfort Distilleries case, such that you have a restraint on that interstate flow of goods. Not as indirect restraint; a direct restraint.

And the Eighth Circuit, in the Bensinger case, talked about the amount of money. That was the exact issue. I think it was only several thousand dollars involved, but it was a large piece of machinery coming from out-of-State to be installed in a local restaurant. But the restraint was on the price of that piece of machinery. It clearly was interetate transaction, and the restraint applied to it, and therefore it was Sherman Act.

We do not here have an alleged conspiracy between the defendants here in Raleigh and these out-of-State suppliers of drugs.

So I think that's the question, you must deal with the restraint here alleged, and whether or not it is sufficient to be considered a restraint of interetate competition --

QUESTION: You don't contend that there must be an

out-of-State conspirator?

MR. BOLZE: Your Honor, I don't think --

QUESTION: The Goldfarb case settles that, doesn't it?

MR. BOLZE: Excuse me?

QUESTION: You don't have to have an out-of-State conspirator.

MR. BOLZE: No, you don't have to have one, but I think if you don't have one, as in Goldfarb, this local activity being restrained must be an integral and necessary part of this interstate commerce. And I submit ours is not that case. And that's what I would like to get to now, because these local activities, such as the purchase of goods and drugs by Rex Hospital, the receipt of -- or not by Rex Hospital, by plaintiff; and the receipt of products used at the hospital. These are not like Goldfarb, these are not the dominant ingredients of hospital services.

I submit that anyone who has been to a hospital will tell you that the dominant ingredient is the doctors and the nurses, those facilities provided to the patient, the dominant ingredient is not the drugs which came in at one time, or the bed that you lie upon.

Now, this is the --

QUESTION: The doctor would be in pretty bad shape without surgical instruments, wouldn't he?

MR. BOLZE: Yes, he would be, Your Honor.

QUESTION: And they came in interstate commerce, didn't they?

MR. BOLZE: At one time, Your Honor, yes, they did. And the book --

QUESTION: The replacements come in interstate commerce, don't they?

MR. BOLZE: Yes, Your Honor. And the chair you sit in, at one time may have come in interstate commerce.

I mean these, every walk of life has this connection, Your Honor.

QUESTION: Well, with respect to drugs, isn't there more or less of a kind of continuous flow which would distinguish it from the initial purchase of a bed and then replacing it fifteen years later or replacing a chair in the same way?

MR. BOLZE: Well, certainly we -- I mean, it's alleged here that there are so many thousand dollars' worth of drugs that are purchased each year and come into the hospital. Whether they are purchased from an outside, out-of-State supplier or a local supplier is not clear. I submit it doesn't make any difference.

The Solicitor General's brief says they all came from out-of-State. That's not correct.

But, yes, there would be a flow of drugs every year to

the hospital. There is a flow of food every year to the hospital, which comes from out-of-State. But we say these are incidental.

In the Yellow Cab case, those taxicabs, 3,000 taxicabs didn't come from Chicago. But yet that, the one alleged restraint there was considered to be intrastate and local.

In Oregon Medical, there were substantial -- it was found in the lower court and by the Supreme Court that there were complete conspiracy of the Oregon Statewide Insurance, medical insurance, and a conspiracy that the Statewide Insurance Plan would not compete with the local county insurance plan. This, I think, was Count Three, the only count that the District Court went off on and said there was no interstate commerce.

And it was found in the lower court and in the Supreme Court, by Justice Jackson, that these Statewide Insurance plans did make payments on their policies across State lines, because they had patients who belonged to this insurance plan going to other States and getting medical care. So there was a continuous flow there also.

But that --

QUESTION: Mr. Bolze, isn't the difference between the Oregon Medical case and this that, as a matter of fact, there was a finding of no adverse effect on interstate commerce?

MR. BOLZE: Exactly right.

QUESTION: Whereas here we have a complaint with no trial yet being held, and there is an allegation of an adverse effect; namely, that there will be a lesser flow of goods than there would be if the hospitals were permitted to expand.

MR. BOLZE: That is the allegation here, Your Honor, but -- we were taking that allegation as true, that that restraint was not sufficient.

Now, I submit, Your Honor, --

QUESTION: I understand that. I'm just going to the question of whether Oregon Medical controls. There you have as a matter of fact found and decided by the Supreme Court not to be clearly erroneous, no adverse effect.

Here you have an allegation of adverse effect.

So, are not the cases different?

QUESTION: An allegation that must be taken as true in the present posture of this case.

MR. BOLZE: Yes, but an adverse effect on a delay in the expansion of a hospital by four months, by 91 days, and therefore there would be some delay in drugs coming in to that --

QUESTION: But that's a different -- you're saying that adverse effect is not sufficient. I'm just directing my question to the point that Oregon Medical doesn't really dispose of this case. We have a question of whether these allegations are sufficient; I understand what you're arguing

about there.

MR. BOLZE: Yes. Well, I would say, Your Honor, on Count Three in Oregon Medical, which is the one I am discussing -- in the first two counts the District Court found there was no restraint of trade on the facts, so we don't get to interstate commerce.

On the third count, the district court found that it was not sufficient for interstate purposes, and that the Supreme Court upheld it on that finding.

QUESTION: The reason it was not sufficient was that there was no evidence, according to the findings, of any adverse effect at all.

MR. BOLZE: Well, the Supreme Court said that these flow of goods across State lines, which would be restrained, was not sufficient; it was sporadic and incidental.

My point, though, Your Honor, is --

QUESTION: I'm not sure I understood fully what you had in mind when you said that when a patient goes to a hospital, the dominant -- I think that's the word you used --

MR. BOLZE: Yes, Your Honor.

QUESTION: -- the dominant relationship is a personal one with doctors and nurses. Now, when a person consults -- and therefore these other peripheral matters, such as bandages, sheets, and pillowcases, presumably not very relevant now -- when a person goes to a lawyer, is the relationship between

the client and the lawyer less a personal relationship than with a doctor?

MR. BOLZE: No, Your Honor.

Your Honor, I would refer to your statement in Goldfarb, at the end, where you said that this is not a finding that every legal service might or might not come within the Sherman Act. We deal here with the facts in that case, which was that the price-fixing on legal fees for a title search was an integral part of an interstate transaction between the mortgagees, 55 percent of which were in D.C.

QUESTION: A title search which usually involved financing; that was the link, wasn't it?

MR. BOLZE: Yes, Your Honor. And 55 percent of the mortgages in that case came from D. C. into Fairfax County, which is substantial, and this Court found that without that -- without the -- the mortgagee said, "We will not grant the mortgage unless the title search is made", and the title search is what was being price-fixed.

So it's a direct link and it's an integral part.

I think that's in line with the Frankfort -- with the Mandeville Farms case; a direct link.

QUESTION: But the dominant relationship, to take the parallel that you were making, or that I'm making, the dominant relationship is still a very personal one between client and lawyer, too. Whether it is dealing with a title

search, with or without a connection with financing of the purchase.

I'm just a little puzzled why you put so much emphasis on the personal relationship aspect.

MR.BOLZE: Well, if I put that much emphasis on the personal relationship, I'm talking about the provision of hospital services, which includes -- I mean, the primary service you get in a hospital, I think, is the service provided -- well, the room, the nurses, the doctors, the use of the operating room. It's not the same -- it's not the same effect as what you get when you go into a drugstore to buy drugs. I mean, you're not going into a hospital primarily to buy drugs, you're going in primarily for hospital service.

I'm not -- I'll be the first to admit, there's no fine line, and this Court has said it many times; but I think this is primarily a local service we're dealing with here, and the restraint we're talking about is a restraint on local competition.

Now, this Court recognized in Yellow Cab: interstate commerce is an intensely practical concept drawn from the normal and accepted course of business.

You must look at the common understanding in the community to determine whether or not the facts alleged, the restraint alleged, is interstate commerce or intrastate commerce.

I would just like to point out, on these insurance payments, the revenues that come across State lines: Petitioner hospital does receive its income, and it's alleged in the complaint, over 56 percent of it from insurance companies, primarily Blue Cross, and also from Medicare and Medicaid.

The Solicitor General's brief states that therefore that makes 95 percent of their revenues, and they all come across State lines.

That is not the case. That's an error in that brief.

No. 1, Blue Cross payments to Petitioner hospital, the vast majority, and to our own hospital come from Blue Cross of North Carolina; just like most States, they have their own intrastate Blue Cross.

So it's not an interstate transaction. I'm sure they receive some payments from insurance companies across State lines. But not the majority.

Secondly, as to Medicaid and Medicare, the Solicitor General's brief is misread there, also; as is clear from the Federation of American Hospitals' brief filed and in our brief, Medicaid and Medicare is federal funding, it's paid through carriers and intermediaries, and in the State of North Carolina it's paid through Blue Cross of North Carolina.

When Petitioner's hospital has treated a patient that qualifies for Medicare payments, they submit -- the hospital submits its statement to Blue Cross of North Carolina, the

intermediary, and they -- that's where they get their payment for Medicare. They don't make a direct submission to Washington, D. C.

Here again, this is a distinction between Goldfarb, as the direct relationship and direct from outside the State into the State. We don't have that here.

QUESTION: Would it make any difference if the payment were made by Travelers out of Raleigh?

MR. BOLZE: Well, Your Honor, --

QUESTION: I just wondered why you're putting emphasis on Blue Cross of North Carolina.

MR. BOLZE: Oh, no. Only because Blue Cross of North Carolina is the intermediary for Medicare. If it was some other insurance company in North Carolina, I don't think it would make any difference.

My argument is still the same. It's not a direct link between the hospital and Washington, D. C.

I would not care who made it. It so happens that the intermediary is Blue Cross. But it could be Travelers.

QUESTION: So your point is that some of what's said in the Solicitor General's brief is just factually inaccurate; is that right?

MR. BOLZE: Yes. In the -- yes, the allegations in the complaint and both Petitioner and ourselves, they just make the statement they have these receipts of payments on

Medicare and Blue Cross. But it so happens they don't come across State lines.

QUESTION: They are not interstate, they are intrastate payments.

MR. BOLZE: They receive some insurance payments in interstate, but the vast majority is not.

Furthermore, in this Medicaid and Medicare, it is federal funding under the general welfare clause. And we are concerned about this argument, because, first of all, in that statute setting up Medicaid and Medicare, the amendment to the Social Security Act, the Act specifically states that nothing in this subchapter shall be construed to authorize any federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided.

It's stated in 42 U.S.C. Section 1395.

Yet what Petitioner would argue here by all these connections with Medicaid and Medicare is that since they receive this federal funding and have communications involving the federal funding, we should take these contacts with the federal government under the general welfare clause and use those to, we submit, expand the jurisdiction of the Sherman Act under the commerce clause.

Now, I submit that is far-reaching, and, furthermore, it was -- I noticed in the Federalist Papers, Madison's Papers

Nos. 41 and 45, he discusses the general welfare clause, and the argument that was made by opponents to the Constitution, that the grant of, in the first clause, of -- about general welfare and the common defense, people were saying that that meant the federal government could do virtually anything. And Madison specifically said there that that language is the same language that was in the Articles of Confederation, that they could provide for the general welfare; and it certainly didn't mean they could do anything.

In fact, and as he says there, the clauses following thereafter, the specific grants of power, such as the power to regulate interstate and foreign commerce, specifically qualify the powers of general welfare.

QUESTION: Well, Madison's view was rejected by this Court in Butler against the United States in favor of Hamilton's view, I think; wasn't it?

MR. BOLZE: I don't think it was rejected on this question of the general welfare clause, Your Honor.

Clearly, you can expand that. I think it's clear from this -- this Court has never interpreted the grant of power under the commerce clause to Congress as being as broad as their power of funding under the general welfare clause, which is what --

QUESTION: Well, no, I agree, but I thought you were saying that the general welfare clause is limited to the

areas in which Congress has an independent source of jurisdiction.

MR. BOLZE: No. No. No, Your Honor. I'm saying that he makes very clear that in reading the power to the federal Congress you can't say that the general welfare clause gives them power to do anything, to regulate commerce. You have to look to the specific grants thereafter.

QUESTION: But it does give them the power to spend for any purpose --

MR. BOLZE: Yes.

QUESTION: -- that isn't specifically limited by the Constitution.

MR. BOLZE: Right. But not to control intrastate commerce. Yes, Your Honor.

QUESTION: Mr. Bolze, let me go back to this business of Medicare payments.

MR. BOLZE: Yes, Your Honor.

QUESTION: I think the complaint alleges that a substantial number of persons hospitalized in the Raleigh area come from outside the State. It then gets their Medicare payments through North Carolina Blue Cross. Is there any aspect of interstate commerce with respect to those patients?

MR. BOLZE: Your Honor, first, there is some allegation of -- some treatment of patients from outside the State. In this brief before the Supreme Court, Petitioner apparently

has dropped that as one of its arguments.

But, bet that as it may, I am sure their hospital treats some patients from outside the State, and they might receive Medicaid.

I would submit, Your Honor, that however -- whatever the number of those patients are, and even if they do use Medicaid and Medicare, that still is an incidental contact. It certainly would not be nearly as substantial a connection as in Yellow Cab, where you have the transfer of interstate travelers to their local homes.

So I would submit, even though they treat some patients that come from outside the State, No. 1, Petitioner has essentially, in this Court, dropped that argument; and secondly, I submit, on the --

QUESTION: Well, he may have dropped the argument, but it's still in the complaint, isn't it? I read, "a substantial number of persons coming to the Raleigh area for treatment in the medical-surgical hospitals there reside in States other than the State of North Carolina."

MR. BOLZE: Yes, Your Honor, it's still in the complaint.

And I'm willing to -- I'm willing to go with that, that they do treat patients coming from outside the State. I'm submitting, under the case law, that is not considered a sufficient restraint, because they are not -- the restraint

we're alleging here -- that's what I want to get to next -- is what the language is in Apex Hosiery. We're not talking about a dollar amount, we're talking about whether or not a local restraint restrains interstate commercial competition -- we're not talking about a dollar amount, we're talking about the effect. And this is pointed out nowhere more clearly than the Apex Hosiery decision, which -- and I would like to just quote a couple of lines from it.

"It was in this sense a preventing of restraints on commercial competition that Congress exercised all the powers it possessed in the Sherman Act."

Further quoting from Justice Stone's opinion: "The Supreme Court has never applied the Sherman Act in any case, whether or not involving labor organizations, unless the Court was of the opinion that there was some form of restraint upon commercial competition in the marketing of goods and services. Restraints upon commercial competition have been condemned only when their purpose or effect was to raise or fix market price. It is in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices."

I submit, Your Honor, that's what the test of substantiality in an interstate area is, not a measure of dollars or cents; but a measure of -- and this, I think, is what Judge Craven in his majority opinion was talking about

below, that: does the local intrastate restraint have an effect of restraining commercial competition in interstate commerce? Not whether it delayed a $10,000 worth of goods coming into the State.

QUESTION: Mr. Bolze, if the dollar amount is irrelevant, I wonder what your view is on the Third Circuit case involving the Philadelphia hospitals, which I recall involved the curtailment of the number of hospitals in the market? Would you say that that case was correctly decided? And if so, how do you reconcile that with what you've just -- the argument you've just made?

MR. BOLZE: Your Honor, I reconcile it -- and I reconcile it the same way that Judge Craven did below; when you're talking there, as you were, in the Doctors' Hospital case, with the restraint which would effectively close down 100 hospitals in a two-State area, you are talking about interstate commerce. I don't even think that is an effects test, that's an in-flow test.

I think it was clearly distinguished by Judge Craven, and I think it's certainly not this case.

QUESTION: What's the difference -- there are two differences, one, there are more hospitals, and, two, you close down instead of preventing expansion.

MR. BOLZE: Well, there's a third, a very important one, those hospitals alleging restraint were in two States.

Philadelphia and Delaware -- or Pennsylvania and Delaware.

QUESTION: I see. If it were in one State, you would say the case would have been decided differently?

MR. BOLZE: No, sir, I don't say that. Because there were 100 hospitals involved.

QUESTION: Well, if you -- then you don't rely --

MR. BOLZE: Here we're talking about --

QUESTION: -- on the two-State point. The points you rely on are: one, the difference in the number of hospitals; and, two, the difference between ex pansion and curtailment.

MR. BOLZE: Your Honor, I would rely on all three. I submit again, under the language of this Court, the test in each Sherman Act case is one of degree. I would -- you have to look at -- there I would look at all three of those issues.

QUESTION: But even though you have 100 hospitals, what effect on interstate commerce is relevant?

Other than their purchases of supplies across State lines.

MR. BOLZE: Well, I think, closing 100 hospitals compared to a four-month delay in the expansion of a 91-bed hospital is just vastly different as to the effects it could have on commercial competition.

QUESTION: Then the difference -- the difference is entirely in the dollar value of the two situations.

MR. BOLZE: I say you can look at the dollar value, Your Honor, to see whether or not it would have a substantial effect on competition. But I say you can't just look and say, What's the dollar amount.

QUESTION: But the competition is not competition in the providing of hospital services.

MR. BOLZE: No, that's correct.

QUESTION: Rather than competition in selling goods and services to hospitals.

MR. BOLZE: Yes, Your Honor. I would --

QUESTION: And you say there's a de minimis effect here and there's a significant effect there, that's your difference.

MR. BOLZE: I say that there the effect could be such as to cause a suppression in commercial competition for those goods and services, because there are so many coming in. So it is -- yes, you can look at the dollar amount, but you can't --

QUESTION: The difference, if you have stated it correctly -- I want to be sure I understand your theory. The difference is between a substantial effect there and a de minimis effect here. You don't contend no effect here?

MR. BOLZE: I contend there would be some effect on the flow of goods. I contend there will be no effect as far as restraining trade.

QUESTION: Well, but the only effect in the other case is an effect on the flow of goods, that you -- it seems to me you've acknowledged that if that effect is substantial, then there's Sherman Act jurisdiction. And the difference, as I understand you, is that here you are contending the effect is de minimis.

Or is there something I'm missing?

MR. BOLZE: No -- well, I guess there is.

I feel the fact that the defendant there was operating in a two-State market, and it was concerned with 100 hospitals, --

QUESTION: Well, you're changing your position again.

MR. BOLZE: Well, I don't think I am, Your Honor, with all due respect.

QUESTION: But is it or is it not critical that there were two States involved there? I don't think you can have it both ways. Either it's critical or it is not.

MR. BOLZE: Your Honor, I would submit that it's a question of degree in each case, and I think there it was critical. I would have to look at all three tests there.

I do not think you can look at just the dollar amount.

Your Honor, I did want to get into this comparison to other statutes, Fair Labor Standards Act, National Labor Relations Act.

I would submit first, as Justice Frankfurter stated in Bunte Brothers:

"Translation of an implication drawn from the special aspects of one statute to a totally different statute is trecherous business."

Now, there's no doubt about it, the Fair Labor Standards Act, the Civil Rights Act, the National Labor Relations Act were drawn up, as this Court has found in numerous cases, including Maryland v. Wirtz, Fair Labor Standards Act, was drawn up, those statutes, in such a way that Congress made a decision that as a class of activities these payments, payments of substandard wages in class of activities could as a whole have an effect on interstate commerce.

Congress did not find that in the Sherman Act. The Sherman Act does not state that it applies to any local restraint if the parties involved have some connection with interstate commerce. The restraint itself must be on interstate commerce.

Justice Powell, I think, put it very clearly in Copp Paving: the jurisdictional inquiry under general prohibitions like these Acts and Section 1 of the Sherman Act, turning as it does on circumstances presented in each case, requiring a particularized judicial determination, differ significantly from that required when Congress itself has defined the specific persons and activities that affect commerce, and

therefore required federal regulation. Comparing Yellow Cab to the FLSA cases.

Of course the language of these statutes does vary, too, which is in our brief.

I would submit, under the Civil Rights Act, if you so much as treat one interstate patient, you come within that statute. That's not the test under the Sherman Act.

Finally, I would get back to the quotes in Yellow Cab and Goldfarb. We are not arguing that a hospital can in no way conspire, such as to restrain interstate trade. We're saying in the facts of this particular case, and the Sherman Act must be looked at in each case, there is not a restraint of interstate competition.

Now, this does not leave Petitioner without some relief. North Carolina, like most States, has a mini-Sherman Act. In fact, its language is identical to the Sherman Act, except it says "restraints of North Carolina trade" rather than "restraints of interstate trade". It has a treble-damage provision, providing people with suits, they can go into State court. So they are not left without a recourse.

Now, referring -- or keeping in mind the tremendous increase in antitrust cases in the federal courts, I think there were 457 antitrust cases in the federal courts in 1963 and there are 1467 in 1975, of which 1375 were non-government civil cases like these. Keeping that in mind, and the fact

that the State courts and the State statutes are there and they are being used more and more each day, and the ABA Anti-trust Journal each year puts out all the State cases, I would --

QUESTION: Those increases are about on a par, and perhaps even below increases in a lot of other areas, I'm not sure how important it is.

MR. BOLZE: That I don't know, Your Honor. I would just, because of that, though, and the fact that there are State statutes very similar to these, I refer back to the language of Chief Justice Hughes in Jones & Laughlin:

"Undoubtedly the scope of this power must be considered in light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, which would obliterate and set up a completely centralized government. The question is necessarily one of degree.

And it's a choice of degree in this case.

I would submit also in the South-Eastern Underwriters case, which is quoted quite a bit, Justice Black, after he referred to the fact that in enacting the Sherman Act Congress went to its entire under the constitutional powers, stated right there after, about our dual system of State and federal, and referred to a quote by Senator Sherman in enacting the Sherman Act, as follows:

"It is to arm the federal courts with the limits of

their constitutional power that they may cooperate with the State courts in checking, curbing and controlling the most dangerous combinations that now threaten the business, property and trade of the people of the United States."

In conclusion, we submit the subject matter test under the Sherman Act is one of degree, based on the unique facts in each case. There's no clear line. We submit, in such an area, the lower court must make that initial decision. And if it makes that decision based on the guidelines set down by this Court, we submit that the lower court here did, and its decision --

QUESTION: Mr. Bolze, your reference to Justice Black, I think he dissented in the Oregon Medical case.

MR. BOLZE: He may have, Your Honor.

QUESTION: Somewhat ambiguously --

MR. BOLZE: I'm not sure if he dissented on all three counts.

QUESTION: Somewhat ambiguously, he didn't indicate whether he thought the findings of fact were erroneous or whether he thought the evaluation of the legal aspects were erroneous.

MR. BOLZE: Yes, Your Honor.

But, in conclusion, we do feel in these types of cases, unless -- since no clear line or no clear rule can be laid down, you must put some control in the hands of the lower

court. And if it applies the rules correctly, as we think it did here, applied the guidelines, unless it is clearly erroneous, it should be upheld.

It was upheld here by the Fourth Circuit and also by the Fourth Circuit en banc decision which we feel applied your rules correctly under your cases, and it should be upheld.

QUESTION: Let me read Justice Black's comment in the Oregon case.

MR. BOLZE: Yes, Your Honor.

QUESTION: In full. It's two lines. Mr. Justice Black is of the opinion that the judgment below is clearly erroneous, -- the judgment below is clearly erroneous and should be reversed.

MR. BOLZE: Yes, Your Honor.

I take it -- as I say, the only reason I was quoting South-Eastern Underwriters was because it is a strong case for Sherman Act enforcement, it does have his statement in it, that it still is a dual system, and he does quote from Senator Sherman about the dual system. And that's the purpose I was quoting it.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:08 a.m., the case was submitted.]