ORIGINAL

In the

Supreme Court of the United States

HONORABLE HUBERT L. WILL, JUDGE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS,

PETITIONER,

V.

CALVERT FIRE INSURANCE COMPANY, ET AL.,

RESPONDENTS.

No. 77-693

Washington, D. C.
April 19, 1978

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HONORABLE HUBERT L. WILL, JUDGE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, Petitioner,	:	
v.	:	No. 77-693
CALVERT FIRE INSURANCE COMPANY, ET AL., Respondents.	:	

Washington, D.C.

Wednesday, April 19, 1978

The above-entitled matter came on for argument at 1:01 o'clock, p.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 P. STEVENS, Associate Justice

APPEARANCES:

MILTON V. FREEMAN, ESQ., 1229 - 19th Street, N.W., Washington, D. C., 20036, for the Petitioner.

LOUIS LOSS, ESQ., 1545 Massachusetts Avenue, Cambridge, Massachusetts 02138, for Respondents.

C O N T E N T S

ORAL ARGUMENT OF:	PAGE
Milton V. Freeman, Esq. for the Petitioner	3
In rebuttal	37
Louis Loss, Esq. for the Respondents	19

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-693, Honorable Hubert L. Will against Calvert Fire Insurance Company.

Mr. Freeman.

ORAL ARGUMENT OF MILTON V. FREEMAN, ESQ.

ON BEHALF OF THE PETITIONER

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

Petitioner in this case, the Honorable Hubert L. Will is the United States District Judge for the Northern District of Illinois. As this Court knows, he is one of our most distinguished trial judges. He has been asked on a number of occasions to address the seminars conducted by the Judicial Center for newly appointed United States District Judges, to instruct them. In the 1970-71 volume, he summarized the basic assumptions upon which trial courts work as follows: "The objective and responsibility of our legal system is to produce the highest quality of justice in the shortest time and at the lowest cost consistent therewith. Justice, particularly the highest quality, is unique in each case, must be handcrafted by the most skilled artisans available, each case tailored to its own characteristics. The production of justice is essentially a job shop, as distinguished from a mass production operation."

This case is a case which tests whether that standard will continue to be applied to the work of United States district judges.

The petition granted by this Court was to review a mandamus of a panel of the Seventh Circuit requiring Judge Will to proceed to try a case immediately, despite the fact that in his judgment the particular case should not be tried but should be stayed because the same parties had the same issues pending before a state court in a prior pending proceeding. Every issue was identical, and it was clear to him that it would be the most wasteful and duplicative exercise for him to proceed to act.

QUESTION: Was the security bar issue pending in the state court?

MR. FREEMAN: It was, indeed, Your Honor. It was a defense. It was the affirmative defense to the complaint in the state court, and it was the second count in the complaint in the federal court.

QUESTION: Could it have been disposed of in the state court, finally?

MR. FREEMAN: It could have been, it is conceded by Respondents here and --

QUESTION: And could not have been relitigated if it had been decided a certain way in the state court?

MR. FREEMAN: I am not sure what the other parties would say about it. I would think it could not be relitigated.

It was pending before that court. It could be decided by the state court. It was, in fact, Judge Will's thought that the issues being identical and between the same parties, that the litigation in the state court would dispose of the matter finally and he would never have to do anything further with it unless something unforeseen came up.

QUESTION: What other alternatives were available to him, other than deferring to the state court? Was there any other alternative?

MR. FREEMAN: He could have proceeded to try the case in a race with the state court to decide which issue first.

QUESTION: Any other alternatives?

MR. FREEMAN: I think there were none. And the issue that was presented to him was: Should he stay in the interest of avoiding duplicate and wasteful litigation? And he had no hestitation about that.

If I may, I would like to present to the Court the facts in the case.

The Calvert Insurance Company is a Baltimore, Maryland, insurance company that engaged in conversations with the American Reinsurance Corporation, which ran a reinsurance pool for casualty insurance. As of January 1, 1974, the Calvert Company -- the Maryland company -- joined the pool which consisted of 99 other insurance companies, to reinsure casualty risks. That took place in January of 1974. In early April, two events took

place which the parties are contesting before Judge Will. One is that a series of tornadoes occurred in the Middle West and the insurance publications said that reinsurers would be, quote, "murdered," unquote. Also, in early April 1974, the financial statements of the reinsurance pool for the year 1973 became available. Late April, the Calvert Company said, "We have been misled by the information we have been given as to the previous year's functioning of this pool. It is regarded by us as material and we believe we are entitled to cancel this agreement as of the day we entered into it, January 1, 1974, and avoid liability."

After some discussion, the parties agreed that Calvert would be excused after the year 1974, but the pool insisted that it was liable for the year 1974 and brought suit in a state court to 99 insurance companies, members of the pool, sued the Calvert Company and said, "We want a declaratory judgment that Calvert is responsible for the losses which appear to be likely to result in the pool."

QUESTION: Responsible in the sense of being obligated to defend them?

MR. FREEMAN: No, being obligated to respond to the losses. In other words, there were losses that were going to be in the reinsurance --

QUESTION: I see. I thought you said "law suits." You said "losses."

MR. FREEMAN: Responsible for the losses which appeared to be likely to result.

The state suit was brought, as I say, July 3, 1974, for a declaratory judgment. Calvert, by reason of diversity of citizenship, could have removed the case to the federal court. It did not do so. It filed various motions in the state court. And then on January 10, 1975, six months later, it filed denials, answers and counterclaims in the state court. And the denials, answers and counterclaims were that membership in the pool was a security, that the security had been sold to them 1) in violation of the 1933 Securities Act, in violation of Section 10 (b), Rule 10(b)(5) of the '34 Act -- this was by way of an affirmative defense -- that it had been sold in violation of the Illinois securities law, that it had been sold in violation of the Maryland securities law. And also there are certain additional defensees that the American people didn't have the right to sue and that there was a violation of the Illinois insurance statute.

On the very same day, a complaint was filed in the federal court. And the complaint in the federal court tracked exactly what the affirmative defenses were in the state court. In other words, Count I in the federal court was Securities Act of 1933, as the first affirmative defense was. Count II was violation of 10(b)(5) of the '34 Act. That was affirmative defense II. Count III was the Illinois securities law,

affirmative defense III. Count IV was the Maryland securities law, affirmative defense IV. Count V, common law, being misled, that was affirmative defense V. There were two additional affirmative defenses which were not reflected in the federal complaint. It was an absolute mirror image.

The federal suit asked, with respect to 10(b)(5), which is the essential thing that -- In the state court suit, the relief requested on the 10(b)(5) count was that there should be recision of the pool's contract. In the federal court, the claim was there should be recision -- identical -- or, in the alternative, $2 million damages. And that's the difference between the federal complaint and the state complaint.

The proceedings were brought before Judge Will and a motion to stay was made. Judge Will said, "This is a perfect case for a stay. The parties have a course of action pending before the state court. It has been filed six months before. This is reactive litigation, duplicative, wasteful. I will have no part of it. I will stay my action."

QUESTION: Suppose it goes to trial in the state court and goes to judgment. What's the status of the matter with respect to federal jurisdiction?

MR. FREEMAN: I would think the federal jurisdiction still persists, because he had not dismissed it. The case is still pending, but it might well be that a res judicata defense would be adequate to dispose of the motion.

QUESTION: There is always a reasonable likelihood that one of the parties won't like the result in the state court, isn't there? Then you relitigate it in the federal court? Are you suggesting res judicata might prevent relitigating it?

MR. FREEMAN: That's right. And that was, indeed, Judge Will's hope, that there might be no necessity for his using any federal judicial power, if the issues were fully litigated and decided in the state court.

QUESTION: What about the right to have the federal question litigated in the state court?

MR. FREEMAN: There is no question and it is conceded that the federal question, so-called, is a question which the state court not only has a right to decide but must, under the Supremacy Clause, decide. In other words, if there is a violation of federal law, that is a defense to a state court action.

QUESTION: To the exclusion of the federal court's right to try the case?

MR. FREEMAN: Oh, no, it's not to the exclusion. There is no question --

QUESTION: I am not sure I track what you mean about res judicata of the state court holding.

MR. FREEMAN: If there is a state court holding, res judicata applies between a state court and a federal court. The federal court does not have an exclusive right to try the

case, unless it wants to. The federal court has jurisdiction. It does not have to exercise that jurisdiction if the parties have another forum, state or federal, in which they can litigate. And if the issue is litigated in another forum and decided in another forum then -- For example, if the forum decides that Calvert was, in fact, misled, and is not bound, then that judgment should be presented to Judge Will and Judge Will will decide whether that is res judicata. Presumably, as I understand res judicata, it would be res judicata.

QUESTION: The same would be true of any diversity case, would it not? You have an action in a state court and with diversity of citizenship you have action on the same claims in the federal court. Whichever one you prosecute, the judgment will probably be res judicata in the other.

MR. FREEMAN: That's right. And that was Judge Will's hope here that the matter would be disposed of where it had first been placed in the state court, and that there would be no necessity to exercise federal jurisdiction. But if there were --, For some reason, the activities in the state court had not disposed of the matter, then he reserved the jurisdiction for a time when he could know how much federal judicial time and energy would necessarily be applying to that.

QUESTION: Would the hypothetical suggested by Mr. Justice Rehnquist prevail if one of the parties, having diversity and the right to try it in federal court, objected

to the proceedings in the state court and asked for removal? This is not a matter of volition in this case, is it?

MR. FREEMAN: Yes. You have a right --

QUESTION: One of the parties -- Go ahead.

MR. FREEMAN: I am saying -- the right to remove, which existed in this case, was granted by Congress for a period of 30 days. During that 30 days, that right not having been exercised, it was gone forever. In other words, if somebody is going to say, "I don't want litigation in the state court," he has to notify them promptly. That's what Congress said.

They didn't do that. They had a right to come into federal court. They did not exercise that right. They let the time pass. Six months later, they have started an independent lawsuit, raising the same issues, a reactive, duplicative lawsuit.

QUESTION: What was the source of the right to remove?

MR. FREEMAN: Diversity of citizenship.

QUESTION: On diversity grounds. Because the federal question was not introduced by the plaintiff, in this case.

MR. FREEMAN: That's right. There was no federal question. It was a simple declaratory judgment action under state law, filed in the Circuit Court of Cook County Law Department.

QUESTION: I see. And they could have removed

because of diversity?

MR. FREEMAN: That's right.

QUESTION: Was there complete diversity with all of the defendants in the state court?

MR. FREEMAN: Yes, apparently. I haven't counted all the 99, but I am so advised.

QUESTION: That surprises me a little bit, being in the Northern District of Illinois.

MR. FREEMAN: Right, but this was a Maryland corporation that was being sued. They had a right to remove it.

The Seventh Circuit granted a writ of mandamus. It said, "We recognize in this circuit, in exactly identical circumstances, Aetna State Bank v. Altheimer is a case of a 10(b)(5) claim in federal court parallel with a state claim of the same effect.

We recognize that the federal district courts have discretion. And that is the rule that we apply. And what Judge Will did in this case was perfectly correct, in accordance with our rule. And we follow Landis v. North American opinion by Mr. Justice Cardozo, and that is the rule in this Court.

However, since Judge Will ruled, the Supreme Court of the United States has decided the Colorado River case and Indian Water Rights case and we believe that we are obliged by the rulings of the Supreme Court to reverse our findings in

Altheimer, to reverse our adherence to Judge Cardozo's opinion in Landis v. North American, and to say that the district courts have no discretion whatsoever, that whenever a case raising a federal claim is presented to them they must try the case and we direct Judge Will immediately to try the case. We say our own Altheimer case, based on the Landis case, is overruled and reversed as no longer the law.

Four of the active judges thought that was such a remarkable ruling and such a misconstruction of the -- they wanted en banc consideration. Four of eight is not a majority and so we are here.

We say that, plainly, the Seventh Circuit panel misconstrued the Colorado River case. It was a case in which this Court was motivated by the same considerations of judicial economy by which Judge Will was motivated, that it was a specific case as to the construction of the McCarran Amendment and both majority and dissenting judges in that case proceeded from different views as to what was judicial economy. But in both cases the Supreme Court said, "We are concerned with conservation of judicial resources." And, in fact, on two occasions, the Colorado River case cited Landis v. North American which the Seventh Circuit panel felt had been overruled by Colorado River.

We say that if the decision below is not vigorously rejected by this Court it will encourage wasteful and duplicative litigation, it will make much more difficult efficient,

low-cost, high-quality justice. And that is why Judge Will insisted on taking this case up. The parties wouldn't take it up. Department of Justice has a rule that they will not represent judges when private lawsuits are involved by mandamus cases. And they suggested that he retain private counsel and he has done so. It is because of his devotion to the swift and economical administration of justice and his feeling that the necessity of having a ruling from this Court that applies not only to him and not only to this case, but to all other cases to show that this Court did not mean, in the Colorado River case, what the Seventh Circuit panel felt it meant.

This case is, consequently, not the most important aspect of the matter, but I would like to examine it to show what can happen if this kind of thing is allowed to go forward. Here is a very simple case presented to the state court. The Calvert people said, "We were misled." The pool people said, "You were not misled, it was a fair deal." And if perfectly clear Calvert was misled, they could be excused from performance. If they were not misled, they would not be excused from performance.

What is the result of the federal action? All kinds of irrelevant questions are raised. Is there a security? Is there a violation of 10(b)(5)? Is there a violation of Maryland law, of Illinois law? They don't make any difference.

QUESTION: Mr. Freeman, are you assuming that the test

of being misled is the same in the state proceeding as it would be under the Securities Act?

MR. FREEMAN: I would think that the test in the state proceedings would be less than it would be under the Securities Act. In other words, if there were a false statement or a misleading statement that was material, it would be a defense in the state proceedings, as a matter of common law, even without the requirements of deceit, intent to deceive, (?) syenter required by the Ernst & Ernst case. So that, they had a perfect defense, if they were, in fact, misled, even innocently by the pool people. In other words, if the earnings of the pool were material and they had been misstated and they had been misled by that into joining the pool, they were home free. On the other hand, no matter how many times the court decides that a security is involved, that doesn't help them because they have to prove that a false statement was made, that it was material, that they relied on it.

So the question which has been presented by this reactive federal lawsuit has nothing to do with the merits of the case. It will not dispose of it for or against Calvert. The sole issue which is involved is were they misled or were they not misled? But because of this running back and forth between the federal and the state courts, we stand now at a situation, in terms of swift and efficient justice, where four years, almost, after the lawsuit was filed in the state court

nothing has happened. The first deposition has not been taken, the first item of discovery has not been taken, while it is decided what should be done.

Judge Will saw that. He said, "I will not have any part of that. I will stand aside and I will let the state court decide that." But because the Court of Appeals panel, in this case, saw differently and they felt that this Court had obliged them to overrule what they regarded as a correct exercise of discretion, and they said that this Court had compelled them to deprive district courts of the jurisdiction that they had been previously thought to have under Justice Cardozo's opinion in the North American case.

It is most important that this Court correct those deficiencies, announce that it does recognize the necessity of district courts shaping remedies on a handcrafted basis, as Justice Will said, for the purpose of seeing to it that justice is provided economically and without unnecessary delay.

And it is for that reason that we are here and that Judge Will desires a ruling from this Court that its Colorado River decision has been misconstrued, that the rule of Landis v. North American remains the law and that he and his fellow district judges throughout the country have the kind of discretion that is necessary to see that efficient judicial process occurs and that justice is not unduly delayed by complicating and duplicative litigation.

QUESTION: Mr. Freeman, before you sit down, two questions. Did I correctly understand you to say that there has been no progress in the state court proceeding? I understood, from Judge Will's opinion, there had been discovery in the state court action and that that was going forth.

MR. FREEMAN: That was his understanding at the time, Mr. Justice Stevens, but I called Mr. Weithers, counsel for the American Reinsurance Company, yesterday morning and he told me that he had filed requests for depositions and had filed notices to admit and nothing has been done.

QUESTION: I don't understand why the delay and the pendency of the federal case should have slowed down the state.

MR. FREEMAN: I don't know what happened in the state case, but may I suggest from my own point of view that the state courts have great respect for the federal judiciary and if something is pending before the federal courts that may induce them to --

QUESTION: They may wait for each other forever.

MR. FREEMAN: Precisely, Your Honor.

QUESTION: That hardly produces the expeditious result that Judge Will was hopeful about, does it?

MR. FREEMAN: No, but if his stay order had been allowed to stand, then the rule would have been clear that the state courts did not have to wait on him, that they could have proceeded. And they would have felt free. It is only because

Judge Will's sensible and reasonable decision was overruled and a mandamus issued against him by the appellate court that the state courts properly regard the matter as of some consequence, as to whether the federal courts are or should be actively involved. And they think they are in a position where they may have to wait for each other -- for the federal courts -- and the federal courts have not said that they don't have jurisdiction.

QUESTION: My second question, Mr. Freeman; Is it perfectly clear that if -- I forget which company it is -- prevails in the state by proving there was deception and therefore they didn't have to participate in the pool, would it necessarily follow that they would not also be entitled to recover some damages? I don't know and --

MR. FREEMAN: The fact of the matter, as I understand from the brief, is that no money has been paid by them. They have just assumed the responsibility for the certain amount of losses and they have gotten the right to get a certain amount of premiums. They have not paid any money, as I understand it.

QUESTION: Because there could be cases in which a state case wouldn't necessarily end everything and then you would have to --

MR. FREEMAN: That's right, Your Honor.

QUESTION: But you say this is not such a case.

MR. FREEMAN: This is not such a case, and such a case

would be a question in which a remedy as to a stay would be shaped by the judge in his discretion, if he had it.

MR. CHIEF JUSTICE BURGER: Mr. Loss.

ORAL ARGUMENT OF LOUIS LOSS, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

If I may, I should like to begin by agreeing most decidedly with my brother Freeman, that Judge Will is an admirable judge. It just happens that Judge Will and Mr. Freeman and I have been very good friends for 40 years, all three of us.

Now, I'd like to get to the question.

Let me start, if I may, with a brief description of the statutory provisions on jurisdiction. I don't want to go through the facts again, but I would like to do this.

Under all of the FCC statutes, except the Securities and Exchange Act of 1934, the federal and state courts are given concurrent jurisdiction. For some reason, Congress in the '34 Act, said the federal courts shall have exclusive jurisdiction over all violations of this Act and all suits in equity or actions at law brought to enforce any liability or duty created by this Act. So that, it is impossible to bring a 10(b)(5) action -- that's the famous fraud rule under the Exchange Act which has been taking over the universe -- It is impossible to

bring such an action in a state court.

Now then, if X sues Y for breach of contract or for a declaratory judgment in the state court and Y has a defense based on Rule 10(b)(5), obviously, the state court must entertain and decide for the defense, under the Supremacy Clause. Otherwise, it might be giving a judgment under state law when there is a perfectly good federal defense.

However, that, in a sense, as I suggested in our brief, is an imperfection in our federal system. It's a necessary imperfection in our federal system, if you will. It doesn't follow that when X sues Y in a state court for, let us say, breach of contract, or in this case, since the alleged breach was anticipatory -- declaratory judgment -- it doesn't follow that when X sues Y in a state court, under state law, and Y has a 10(b)(5) defense and a 10(b)(5) counterclaim, because when Section 27 of the Exchange Act says exclusive jurisdiction of the federal court, it says over all actions, not just actions for damages, actions for recision as well.

So, it doesn't follow that when the state court defendant moves into the federal court, expeditiously, as a federal plaintiff for recision -- forget the damages for the moment, arguendo -- for recision in the federal court, it doesn't follow that in that case the federal court should go out of its way and ignore the exclusive jurisdiction that Congress mandated, and stay its hand indefinitely, while the

state court tries the whole case. So that, when it gets back to the federal court -- unless, of course, we win on the fraud charges at common law. But why should we be put to all of that litigation when we have federal claims and defenses? It doesn't follow that in that case the federal court should sit on its hands indefinitely until the state court finishes -- all the state courts finish -- and the case gets back to the federal court. At which time, the only decision left is res judicata or collateral estoppel. That is a rather strange way to exercise the exclusive jurisdiction that Congress gave to the federal courts.

QUESTION: There are going to be some cases, though, Mr. Loss, where the federal court, for one reason or another, is going to say there are related proceedings pending in another court and we are just not going to set a trial date or we're not going to have discovery for the next six months.

MR. LOSS: Of course, you are. We don't suggest for a moment that the federal court is completely without power to control its docket, although my brother so suggests.

QUESTION: The Seventh Circuit, in issuing a writ of mandamus, which I understood to entertain the idea that it was not a discretionary obligation of the judge at all, but a mandatory duty under which he labored which could be enforced by mandamus, seems to me to have said to Judge Will, "You simply don't have that kind of power," that you and I just said

the court does.

MR. LOSS: Not any more. But I suspect the reason the Seventh Circuit ordered Judge Will to proceed, quote, "forthwith," end quote, is the amount of delay that had already occurred. And Judge Will had already said, "As far as I'm concerned, this decision by the state judge that there is no security is res judicata. So, the Seventh Circuit, quite properly treated that as if it were a dismissal. And my brother, Freeman, twice answered questions a half hour ago by saying yes, a decision by the state court will be res judicata.

Now, we do not concede that, except arguendo. But I must concede arguendo that there is a good argument that any decision by the state court -- and the state appellate court has already decided there is no security -- will be res judicata if the case ever gets back to the federal court.

QUESTION: It is not a question of getting back to the federal court. Judge Will didn't dismiss, in the England sense or in the Pullman sense; he simply postponed prosecution of the case in the federal court, did he not?

MR. LOSS: Your Honor, he postponed it so indefinitely and so fully and so completely that the only question left for him, if it ever gets back, will be not was there a security, which is the question Congress intended him to decide, but is the safe decision res judicata or a matter of collateral estoppel?

QUESTION: But there are bound to be questions of

shadings and degree. How long do you wait? Are those all enforceable by mandamus?

MR. LOSS: No, Your Honor. The only thing that is enforceable by mandamus, as this Court very recently said in Thermtron v. Hermansdorfer, is that, the Court said, "a traditional use of the writ in any appellate jurisdiction, both a common law and in the federal court, has been to confine an imperior court to a lawful exercise of its prescribed jurisdiction, or to compell it to exercise its authority when it is its duty to do so."

QUESTION: In Thermtron, there was a dismissal.

MR. LOSS: In form. There was a dismissal and in form here there was a mere stay. But, as the Seventh Circuit correctly held, I submit, a stay that has all the effects of a dismissal, as this one does, must be treated like a dismissal for mandamus purposes. I can't see how my brother can have it both ways. He argues it is a mere stay, but then he also said yes, it was a res judicata. And I think his second position undoes his first.

QUESTION: Suppose a federal suit had never been filed until after the state suit had been completed? You must agree you cannot relitigate the matter in a federal court.

MR. LOSS: Of course.

Indeed, we worry about res judicata and collateral estoppel, though we don't admit it. We worry about it a great

deal and that's why we are here. That's why we are making the argument.

QUESTION: A fellow with a defense, if he doesn't want to get it tried in state court, needn't present it, either.

MR. LOSS: Well, if I may say so, we did everything we should have done. We raised these questions defensively.

QUESTION: And you certainly tendered it to the state court.

MR. LOSS: We had to or we might have just a default judgment.

QUESTION: Maybe, but you also asked for your federal claim to be adjudicated.

MR. LOSS: We had to, Your Honor, or we might have suffered a default judgment.

QUESTION: So, it is a defect in our system?

MR. LOSS: I think so.

QUESTION: Mr. Loss, how would you have suffered a default with judgment? I don't understand. You had several defenses.

MR. LOSS: Well, I suppose we could have answered solely on the ground that we had been induced to enter into the contract by fraud. But res judicata would bar us as to all, arguably.

QUESTION: On the security issue, if you hadn't raised it?

MR. LOSS: But res judicata, as I understand it, applies to all the issues that should have been raised if the cause of action was the same.

QUESTION: I see, could have been raised.

MR. LOSS: Yes.

We are not talking collateral estoppel now. We are talking res judicata.

QUESTION: That's the same case. It's collateral estoppel that applies in a different case, isn't it?

MR. LOSS: If it's basically the same case, and this is all one case.

QUESTION: But it wasn't. I thought it was two different actions, one in the federal court and one in the state.

QUESTION: Certainly, you couldn't present your counterclaim, you couldn't present the 10(b)(5) claim there at all.

MR. LOSS: If we have to someday, that's exactly what we are going to argue. But it is not clear, Your Honor, that -- We would say that a state court decision, without jurisdiction, cannot be res judicata. They will say they at least had jurisdiction defensively which we have to admit. That's the imperfection I talked about. In that state of affairs, the only thing that we can say certainly is that the questions of res judicata are terribly complex. And this is,

perhaps, one of the best reasons why Judge Will should have proceeded so as to avoid those questions.

QUESTION: What about the argument that you could have avoided all these complexities by removing?

MR. LOSS: The short of it is, Your Honor, that counsel for Calvert, his researches did not reveal, to his mind, the possibility of a security question until after 30 days had gone by. Now, if that kills us, we are killed. But I suggest to Your Honors that it shouldn't for a number of reasons. One, our negligence, if you like, or our failure to recognize that point for 30 days doesn't override the exclusive jurisdiction of the federal courts, insofar as it deprives the state courts of any --

QUESTION: But on the other side of the balance, I suppose, you mention that 10(b)(5) is sort of taking over the universe. That's an awful lot of litigation that may end up in the federal court if every 10(b)(5) and every antitrust defense that's ever available requires that the case be tried in the first instance in the federal court.

MR. LOSS: It does not, Your Honor, so require.

QUESTION: I thought -- The judge doesn't have the power to deny your right to go forward in the federal court.

MR. LOSS: No, no. If we had been satisfied to stay in the state court, the state court could have and should have -- would have had to decide the federal defense. But we wanted

our right -- and still do -- to have a federal court for various reasons decide this federal question.

QUESTION: So it has to only when the plaintiff wants it to.

MR. LOSS: Exactly.

Now, it is also purely fortuitous that there was diversity in this case. If there hadn't been complete diversity, we couldn't have been moved anyway. And I take it this Court would not want to lay down a rule that depends on that kind of fortuity. So that I think our failure to remove, regrettable though it was, should not be a very significant consideration in the decision of the case.

I suggest, if the Court please, that our case rests on three or four basic, simple, fundamental propositions that can be stated in as many minutes. One, as this Court very recently and unanimously held in the Colorado River case, I quote, "It is the duty of a district court to adjudicate a controversy properly before it." And in that same case, this Court called the duty a "virtually unflagging obligation." The Court recognized and, indeed, took the opportunity to summarize in a very useful way, if I may say so, the various extension doctrines and the like, but emphasized that all of those are exceptions to this virtually unflagging obligation.

QUESTION: The Colorado case, itself, was an exception, too, wasn't it?

MR. LOSS: In a sense, yes. And, indeed, our case applies a fortiori because in Colorado there was concurrent jurisdiction. Here there is exclusive federal jurisdiction.

QUESTION: But in Colorado there was dismissal, not simply withholding.

MR. LOSS: True, Your Honor, except our answer to that must be that in substance there was a dismissal here. This was not an ordinary stay. Ordinary stay is fine, and indeed, if the case comes back to Judge Will, if this Court affirms, subject to whatever the forthwith means, we would not object to Judge Will's staying this case for a few months if he had other business that was more important. We are not suggesting that the federal court has to drop everything and decide 10(b)(5) cases before other cases. But we are suggesting that when a federal court, quote, "stays," end quote, as indefinitely and completely as in this case, that's not consistent with the virtually unflagging obligation that the Court spoke about in Colorado.

QUESTION: It is not exactly indefinitely. If the state court rules, it wouldn't be indefinite, would it?

MR. LOSS: Well, the state court --

QUESTION: If the state court rules with all deliberate speed, then it wouldn't be permanent, would it?

MR. LOSS: The state court could do several things. One, we would hope to win on the common law defense.

QUESTION: If the state did nothing to stop the state court from moving immediately and setting down the schedule for the depositions and the schedule for the hearings and schedule for the decision.

MR. LOSS: True, Mr. Justice Marshall. When I said "indefinitely," I did not mean in a temporal sense. I meant until however long it takes the state court and the state appellate court to decide the question completely after which there is nothing left for the federal court to decide except the res judicata or collateral estoppel consequences. And that is simply not doing what I think Congress wanted the federal courts to do. The fact that we could get complete relief by successfully defending on one ground or another, including the federal ground, in the state court, should not deprive us of our right to have a federal court determine our action, our action for recision. Twenty-seven says "all action."

So the first proposition is that we start with the idea that abstention, and so on, is an exception. The second proposition is that, if anything, that applies a fortiori when the federal jurisdiction is exclusive, rather than concurrent, although we think it applies in either.

Third, subject to Mr. Rehnquist's point, which I hope I have answered, this left Judge Will with what this Court called a clear legal duty in Thermtrom, to decide the case enforceable by mandamus. And fourth, there are stays and stays,

and we don't suggest that the federal court is completely without power to control estoppel.

Now, everything that my brother has argued is an attempt, somehow, to get it out, as he must, one or another of these very simple propositions. First, he says we can get complete relief by successfully defending in the state court. Well, I've answered that one, I think. It is true, but we prefer to litigate the way Congress said we had a right to litigate, by bringing an action for recision in the federal court. And mind you, when we brought that, nothing had happened on the state side, except that we had filed a motion to the effect that that state action should have been on the equity side because it purported to be a class action. And that was overruled and there was an exchange of correspondence about discovery, but nothing at all.

The same day on which we filed an answer on the state side we filed the action on the federal side. Then, my brother, Freeman, says that Calvert doesn't need 10(b)(5). We have this state law defense. And everything else we did he says is a bunch of irrelevant questions, raises irrelevant questions. Well, I suggest, with all respect, these are not irrelevant questions. We chose other defenses and other claims which Congress gave us. For example, if we satisfy the courts someday that there is a security here there will be nothing left to litigate except a summary judgment motion, because anybody who

sells a security without registration is liable under the Securities Act. And nobody will enforce a contract that violates the registration provisions of the Securities Act.

So, I don't think it is for my brother, Freeman, to say that we are trying to litigate irrelevant questions.

Then the argument is made it's a mere stay, and I hope I've answered that.

QUESTION: Come, Mr. Loss, it isn't even a stay in the sense that Justice Cardozo referred to it in the Landis case where one court was staying an action in another court. This is simply Judge Will saying, "In the control of my own docket, I will not call this case for trial for six months." So it really doesn't even rise to the level of a stay.

MR. LOSS: Well, actually, the Seventh Circuit said in substance it is an abatement. Whatever it is the net effect, I must say again, with all respect, is to deprive us of our day in a federal court except ultimately on the question of res judicata. And that simply is not exercising exclusive jurisdiction to decide questions under the Exchange Act.

QUESTION: But then you must go further than, at least, the holdings of the Colorado case and the England case where you are talking about dismissals. And you've got to say that you are talking about calendar control of individual federal districts.

MR. LOSS: Whether there is a stay or a dismissal,

I respectfully suggest, is a matter of substance and not of terminology.

QUESTION: And in the Colorado case, the district court's dismissal was approved by this Court.

MR. LOSS: Yes.

If something has to be called a dismissal, then, obviously, we are finished.

QUESTION: You are not deprived of your ultimate day in the federal court, except -- Suppose you prevail in the state court on your federal defense.

MR. LOSS: Well, if we prevail on any of our defenses in the state court, we've won, and we don't need any further litigation.

QUESTION: I know, but I suppose if you have a 10(b)(5) claim, you might want to press it.

MR. LOSS: Well, first of all, 10(b)(5) was treated as a defense on the state side.

QUESTION: That means, I suppose, that there was a violation of 10(b)(5).

MR. LOSS: We allege it.

QUESTION: Well, assume you prevailed on that in the state court. If you were damaged by the 10(b)(5) violation, I suppose you could then press it in the only court you could press it in.

MR. LOSS: If we prevail on any of our defenses in the

state court --

QUESTION: No, I'm talking just about the 10(b)(5).

MR. LOSS: Certainly, if we prevail on that defense --

QUESTION: Then you could come right back to the federal court and move on.

MR. LOSS: We wouldn't even have to, Your Honor, because we would have got everything we wanted. They are suing us for a declaratory judgment that the contract is enforceable. And if we have a 10(b)(5) defense, they lose their case and we are finished. We've won.

QUESTION: I know, but what about damages?

MR. LOSS: Oh, well, at the moment --

QUESTION: That's the kind of a claim a 10(b)(5) claim is.

MR. LOSS: A 10(b)(5) claim, Your Honor, can be also a basis for affirmative recision.

QUESTION: I understand that. But, nevertheless, you could come back to federal court with your 10(b)(5) claim.

MR. LOSS: If there are any damages. If we have any they are very minimal in terms of how much money we spent --

QUESTION: So you are not precluded from return to the federal court, if you prevail in your defense. And if you don't, I am not sure you have much to complain about, either.

MR. LOSS: Well, I would respectfully suggest we do. If we lose in the state court, and that's considered res judicata,

we have lost our right to a federal forum.

QUESTION: Then you've got a right to bring it here by certiori.

MR. LOSS: That was going to be my clincher, Your Honor.

If this Court leaves this case to the state court, then this Court, inevitably, in cases like this, is going to be the first federal court on the scene and this Court is going to be under considerable pressure to grant more writs for certiorari than it is today.

QUESTION: When you talk about federal courts, do you mean federal courts on the same level as the Supreme Court? That's all you need for your argument.

MR. LOSS: Yes. But I do suggest that the net effect of leaving these cases to the state courts and ignoring the federal, exclusive jurisdiction of the federal district court, this will be the only way to correct federal errors, in this Court.

QUESTION: Does it make any difference, in your view, that the Colorado case was decided under the McCarran Act and you are dealing with a security --

MR. LOSS: Only this, Your Honor, that our case would be stronger because there there was concurrent jurisdiction and here, so far as 10(b)(5) is concerned, the federal jurisdiction is exclusive. If anything, this is a stronger case.

QUESTION: You are not in great trouble with the exclusive point. If it is, quote, "exclusive," end quote, how can you get it into state court?

MR. LOSS: Only by way of defense. Suppose, for example --

QUESTION: That's the difference. Now, is there any --

MR. LOSS: -- that I sue my brother, Freeman, for breach of contract, involving a patent. His defense is that the patent is invalid.

QUESTION: But that's the only difference?

MR. LOSS: That's right.

QUESTION: Even on that point the issue is whether there is a security. You really don't have any damage claim if you win. So that there isn't anything that's exclusive. The exclusive right is to recover damages, but this is a non-damage case.

MR. LOSS: Section 27 says, "Federal courts have exclusive jurisdiction over all action." And I don't think, with all respect, that it's for this Court to say that we can exercise that recision argument by way of defense in a state court. Congress said we have a right to a federal court.

QUESTION: But the judgment that would be entered if you prevail in the recision action, has precisely the same practical consequences as a judgment that would be entered in

your favor in the state court on the securities issue.

MR. LOSS: But that's only if we win, Your Honor.

QUESTION: You could lose in both courts, too. The judgment would be precisely the same, win or lose. If you lose, then you owe the money into the pool.

MR. LOSS: Yes, Your Honor, but we are entitled to our view, as counsel, that we have a better chance to win ultimately in the federal court system. We think the federal judges are more experienced in these matters. They know a great deal more about what a security is than the state courts do. There are hundreds of federal cases, only a handful of state cases. We are entitled to the federal jurisdiction. Congress gave it to us.

QUESTION: Another irony of this case has begun to sink in on me that, apparently, delay in this case is entirely to the benefit of your client, isn't it? You don't have to pay the money, while the case is still dragging on.

MR. LOSS: In that sense, it is true, Your Honor, but I don't think we have been delaying in any sense. We have nothing to gain, except perhaps the money. We would rather have the case determined. And, indeed, we were surprised and I think Judge Will was -- It never occurred to us when we filed this federal lawsuit that it would end up this way in deference to the state court. I still think it is a remarkable thing that happened. And Judge Will indicated his disappointment that the

state judge decided this question when he thought he was going to get to decide it. But once the state court decided it, he said, "It's res judicata, as far as I'm concerned," the best evidence that his so-called stay was a dismissal, in substance.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Freeman, do you have anything further?

REBUTTAL ORAL ARGUMENT OF MILTON V. FREEMAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FREEMAN: Yes.

First, I think I should make it clear that the reason that the state courts have not acted in this case and have waited is that every action, as I understand it, has been on a motion for stay by Calvert. So, if they are in a hurry to get justice, they are not in a hurry to get justice in the state court to which Judge Will remitted them.

Then, Mr. Loss says if we get it decided that this is a security, then we have some rights because you can't sell a security without registration. But that's under the '33 Act where there is no exclusive jurisdiction, as there is on 10(b)(5), where the Congress said suit may be brought in any court of competent jurisdiction. So, as far as the '33 Act is concerned, on which Mr. Loss is mentioning his reliance, that's something that Congress said you can go into a state court and you can bring affirmative actions in the state court.

So, there is no exclusive federal right.

That leads him down to 10(b)(5) and he says, "I've got a 10(b)(5) claim which will let me off in the state court, but I'd like to go into a federal court because I prefer that." And he's got a right to do that under the First Amendment. But it seems to me to be perfectly clear that that's what federal judges are for, to see that rights which are provided by statute are not abused so that the courts are made mere puppets to carry out the desires of litigants for one forum rather than the other when they are both able to give justice.

And, it seems to me, that that is the essential element here as to whether you are going to give trial judges the right to discretion free of the threat of mandamus when they exercise what the panel itself down below said was a correct decision on discretion, that this will result in more efficient justice more promptly.

QUESTION: Do I understand you to say, Mr. Freeman, or agree that the federal jurisdiction was exclusive but that exclusivity was lost by failure to move within 30 days to remove the case to federal court?

MR. FREEMAN: No, Your Honor. They are two separate and entirely -- one is the right to come into federal court by way of diversity. That was lost because they waited beyond 30 days. Congress gave them 30 days to decide where they wanted to litigate. They had the choice. They gave it up.

The other point is that there is, it is true, a statement in the Exchange Act that when you have a securities case and a violation of the Securities and Exchange Act and you want to sue for damages for that, then only the federal court may give you damages.

QUESTION: Only for damages.

MR. FREEMAN: Only for damages.

QUESTION: You agree with your brother, Loss.

MR. FREEMAN: Yes, we do.

QUESTION: An action for recision --

MR. FREEMAN: That is the difference. As a matter of fact, his pleadings in the state court are very clear on that point. They raise 10(b)(5) as a defense and they have a counterclaim and they leave 10(b)(5) out of the counterclaim.

QUESTION: Was there a prayer for damages in the federal court?

MR. FREEMAN: In the federal court, it was for recision.

QUESTION: And what else?

MR. FREEMAN: Or in the alternative, for $2 million in damages.

QUESTION: In damages?

MR. FREEMAN: Yes, or in the alternative.

QUESTION: Mr. Freeman, a colloquy has developed up here between me and one of my colleagues which may be wholly

irrelevant, but a case has come to my mind, cited in neither of your briefs and it didn't occur to me until now, called Bruce's Juices, decided maybe 20 years ago, about the availability of a defense to enforceability of a contract made in violation of federal law. I take it, the fact it's cited in neither brief means that neither of you considered it to be relevant here?

MR. FREEMAN: I think it is irrelevant, Your Honor. That was a question of whether -- and we were involved in that case.

QUESTION: Is that right?

MR. FREEMAN: That was the case of the suit on note and the defense was a violation of the antitrust laws. What the Court said was the amount of the note was of such a nature that they had no relation to the issue of the defense, so that it was not an appropriate defense to the claim on the notes. And the Supreme Court decided 5 to 4 that we could not make an antitrust defense and had to bring a separate antitrust suit. We couldn't even raise a defense in that case.

QUESTION: I see why you wouldn't cite it.

MR. FREEMAN: In this case, it is conceded that the defense of 10(b)(5) can be raised, it has been raised, it's before the state court, and neither party questions that the defense can be raised. Whereas, in Bruce's Juices, the point was that the defense of antitrust violation could not be raised in the state court on a suit on a note.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:57 o'clock, p.m., the case in the above-entitled matter was submitted.)