

In the

# Supreme Court of the United States

FRANK L. CARSON, LAWRENCE )  
HATCHER AND STUART E. MINES, )  
 )  
PETITIONERS, )

V. )

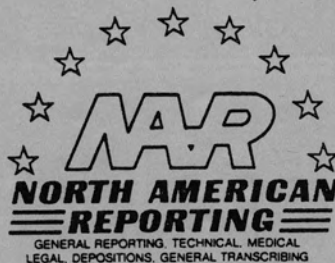
No. 79-1236

AMERICAN BRANDS, INC., ETC., )  
ET AL., )  
 )  
RESPONDENTS. )

Washington, D.C.  
December 10, 1980

Pages 1 thru 49

# ORIGINAL



1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - :  
3 FRANK L. CARSON, LAWRENCE :  
4 HATCHER AND STUART E. MINES, :

5 Petitioners, :

6 v. :

No. 79-1236

7 AMERICAN BRANDS, INC., ETC., :  
8 ET AL., :

9 Respondents. :  
10 - - - - - :

11 Washington, D. C.

12 Wednesday, December 10, 1980

13 The above-entitled case came on for oral ar-  
14 gument before the Supreme Court of the United States  
15 at 10:02 o'clock a.m.

16 APPEARANCES:

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as amici curiae.

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24 East Franklin Street, Richmond, Virginia 23219;  
on behalf of the Respondent Unions.

C O N T E N T S

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MILLERS FALLS  
ERASE  
COTTON CONTENT

1                                   P R O C E E D I N G S

2                   MR. CHIEF JUSTICE BURGER: We'll hear arguments first  
3 this morning in No. 79-1236, Carson et al. v. American Brands,  
4 Inc. Mr. Williams, you may proceed whenever you are ready.

5                   ORAL ARGUMENT OF NAPOLEON B. WILLIAMS, JR., ESQ.,

6                                   ON BEHALF OF THE PETITIONERS

7                   MR. WILLIAMS: Mr. Chief Justice and may it please  
8 the Court:

9                   This case is here on a writ of certiorari to the  
10 Court of Appeals for the 4th Circuit. The issue presented for  
11 decision in this case arises in the context of an employment  
12 discrimination suit commenced under Title VII of the Civil  
13 Rights Act of 1964, and 42 U.S.C. 1981. It is a case of first  
14 impression for the Court.

15                   The Court of Appeals for the 4th Circuit sitting en  
16 banc with Circuit Judge Hall writing the opinion for the  
17 majority, held in the decision of that court that the peti-  
18 tioners could not appeal an order of the district court below  
19 which rejected the parties' jointly proposed consent decree  
20 on the grounds that the injunctive provisions of that decree  
21 were in violation of Title VII, and on the grounds that the  
22 enforcement of those provisions would violate the Fifth  
23 Amendment to the Constitution of the United States.

24                   QUESTION: Mr. Williams, I get some impression from  
25 the papers that the respondents may have a different view about

1 going ahead with the consent decree. Whenever you wish, would  
2 you comment on whether that is the fact, if you know it, and  
3 if so, are they free to withdraw? And of course your friend  
4 will tell us something about that too, perhaps.

5 MR. WILLIAMS: Your Honor, we do not think that they  
6 are free to withdraw. We think that is a matter of contractual  
7 obligation. They made a motion in the district court; that  
8 court has stayed all further consideration of this matter  
9 until a decision by this Court.

10 Your Honor, Chief Judge Haynsworth and Circuit Judges  
11 Winter and Butzner dissented. They believe that the order of  
12 the district court was appealable under Section 1292(a)(1) as  
13 an interlocutory order denying an injunction. The petitioners  
14 believe that the 4th Circuit made an error in holding that this  
15 order could not be immediately appealable.

16 In our brief, petitioners presented two arguments in  
17 support of the appealability of the district court order.  
18 First, we believe that the order is appealable as an order  
19 denying an injunction under Section 1292(a)(1). Secondly, we  
20 believe that it is appealable under the collateral order excep-  
21 tion that this Court announced with regard to Section 1291 in  
22 Cohen v. Beneficial Industrial Loan Company.

23 Before I present my argument on the -- Mr. Justice?

24 MR. WILLIAMS: Would you feel that it qualifies under  
25 both sections?

1 MR. WILLIAMS: Yes, I do, Your Honor.

2 QUESTION: You don't feel there is any inconsistency  
3 in that position?

4 MR. WILLIAMS: No, I do not, Your Honor, for the  
5 simple reason that this is a case where the order said so many  
6 things that it had the effect of deciding some things on the  
7 merits and some things that were collateral to the merits.

8 QUESTION: In any event, you would be willing to win  
9 on either issue?

10 MR. WILLIAMS: Yes, Your Honor, I certainly would.

11 QUESTION: Did you argue the Cohen matter in the  
12 Court of Appeals?

13 MR. WILLIAMS: The matter was presented to the Court  
14 of Appeals, Your Honor. Also, if Your Honor would take a look  
15 at the decision by the 4th Circuit below, it's quite clear  
16 that one of the decisions that the 4th Circuit felt was  
17 dispositive of the matter was the 2nd Circuit decision in  
18 Seigal v. Merrick, which was decided entirely under Section  
19 1291.

20 Your Honor, let me give you some of the background  
21 to this case.

22 QUESTION: Before you do that, counsel, since as I  
23 understand the Cohen Doctrine it has to be not related to the  
24 merits, if you were successful in appealing this order under  
25 the Cohen Doctrine, could you appeal that part that related to  
the merits, too

1 MR. WILLIAMS: Your Honor, I think it's quite clear  
2 from the decisions of this Court that once an appellate court  
3 has jurisdiction by virtue of the ancillary jurisdiction that  
4 the Court has it can then reach out and decide all other issues  
5 in the case that require reversal.

6 Your Honor, this suit concerns employment discri-  
7 mination in the tobacco industry. This is an industry which  
8 has had a long history of official segregation and discrimi-  
9 nation with respect to blacks. The parties have reached a  
10 proposed consent order in this case. This is an order, Your  
11 Honor, which was reached after long discussions and after  
12 extensive discovery. It was a matter that was reached after  
13 the parties were quite aware, in part because of the discovery,  
14 of the basic strengths and weaknesses of their case.

15 The heart of the consent decree was contained in a  
16 series of provisions which enjoin the employer and the unions  
17 from further discriminating against the plaintiffs. Moreover,  
18 that consent decree had provisions which require the employer  
19 and the unions to take remedial action with respect to changing  
20 the seniority and the transfer rules so that those rules will  
21 not further discriminate against seasonal workers.

22 In common with other consent decrees, Your Honor,  
23 that settlement also had an exculpatory clause whereby the  
24 respondents could suffer the injury of a judgment against them  
25 without admitting liability.

1           Because this action was a class action, it was neces-  
2 sary to get approval of the district court under Rule 23(e)  
3 of the Federal Rules of Civil Procedure. The parties by vir-  
4 tue of this rule went to the district court. Now, at this  
5 point, and for the first time, Your Honor, the parties found  
6 themselves at loggerheads with the district court over the ques-  
7 tion of the legality of the proposed settlement. The district  
8 court by virtue of its powers under Rule 23(e) decided that the  
9 proposed consent decree with respect to those injunctive pro-  
10 visions to which I referred a moment ago was illegal, because  
11 those provisions, it said, violated Title VII and the enforce-  
12 ment of those provisions by a federal court, it said, would be  
13 arbitrary and capricious actions which would violate the Fifth  
14 Amendment to the Constitution of the United States.

15           Petitioners sought review of that determination in  
16 the Court of Appeals. The Court of Appeals, however, decided  
17 that it was not appealable. They said it was not appealable  
18 because that decision by the district court was simply what it  
19 deemed a step toward trial. That court did not deem the  
20 matter to be a decision of the district court which passed on  
21 the merits of the action commenced by the plaintiff.

22           That was rather surprising, Your Honors, since that  
23 same court also said that it was not appealable, no matter what  
24 the reasons were for the district court refusing the injunctive  
25 decree.



1 Now, let me give you some of the reasons for refus-  
2 ing that decree, which were stated by the district court in  
3 the opinion that accompanied this order.

4 First, the district court said that preferential  
5 treatment on the basis of race was unlawful except in those  
6 cases where the defendants had themselves committed discrimina-  
7 tion against those persons who were part of the plaintiffs'  
8 class. Secondly it said that since all of the seasonal workers  
9 were black any relief that was given to seasonal workers would  
10 in effect be preferential treatment based upon race and there-  
11 fore barred, again, by the Fifth Amendment and also by Title  
12 VII.

13 QUESTION: Mr. Williams?

14 MR. WILLIAMS: Yes?

15 QUESTION: The merits aren't before us, are they?

16 MR. WILLIAMS: That's correct, Your Honor.

17 QUESTION: Just the appealability, whether the dis-  
18 trict court was right or wrong in what he said about the pro-  
19 priety of the decree.

20 MR. WILLIAMS: That's correct, Your Honor. The only  
21 reason for going into the merits at all is so that this Court  
22 can make a preliminary assessment as to whether or not with  
23 respect to the argument under Section 1292(a) the merits were  
24 touched upon by the decree, and also to see if the collateral  
25 interests which the petitioners claim were adversely affected

1 were separate and apart from those merits.

2 QUESTION: Had you asked for a preliminary injunc-  
3 tion?

4 MR. WILLIAMS: Your Honor, we had not asked for a  
5 preliminary injunction and in view of the determination made  
6 by the district court, it is quite clear that a preliminary  
7 injunction would not and could not have been granted, because  
8 that court found that there were no vestiges of discrimination  
9 to be corrected or remedied. And given the fact that it is  
10 necessary with respect to a preliminary injunction to estab-  
11 lish that you have a prima facie case or that you have a sub-  
12 stantial chance of prevailing on the merits, it was clear to  
13 the petitioners and I think it would have been clear to the  
14 district court as well that that burden could not have been  
15 met by petitioners.

16 QUESTION: Would you say that a denial of a tempo-  
17 rary restraining order was appealable?

18 MR. WILLIAMS: A denial of a temporary restraining  
19 order?

20 QUESTION: Did you ask for ex parte pending a hear-  
21 ing on a request for a preliminary injunction?

22 MR. WILLIAMS, No, we did not, Your Honor, but with  
23 respect to the denial of the temporary restraining order,  
24 I think the law is quite clear that that is not appealable  
25 under Section 1292(a)(1), although the denial of a preliminary

1 injunction is of course appealable.

2 One further thing which the district court said, and  
3 I think I basically mentioned this before, Your Honor, is that  
4 despite the long history of segregation and discrimination  
5 which had existed in the tobacco industry, that there were no  
6 vestiges of discrimination to be overcome.

7 Now, as I tried to indicate before to Your Honors,  
8 petitioners have two arguments which they wish to present to  
9 this Court, one based on Section 1292(a)(1) and one based on  
10 the collateral order doctrine. Common to these arguments are  
11 certain policy considerations which I think must be kept in  
12 mind as you make a determination as to whether or not this  
13 order was appealable.

14 The first point which I want to emphasize is that  
15 there comes a time in every lawsuit when the parties have to  
16 make a basic decision as to whether or not this is a case which  
17 will be settled or a case which will be litigated. Petitioners  
18 believe that sound judicial administration requires that  
19 artificial barriers not be put in the place of parties attempt-  
20 ing to reach settlement in a case. Whether a settlement can  
21 be reached in any case, Your Honor, is a function of many  
22 factors.

23 One factor that the parties will always consider  
24 is the expense of further litigation, especially the expense  
25 of further litigation in relationship to the expenses which

1 have already been incurred. Another factor -- and this is a  
2 factor, we think, Your Honor, which is quite important in ra-  
3 cial discrimination cases and in labor management cases, and  
4 that is the desirability which the parties have to keep down  
5 forces of civil strife in the workplace. We think, Your  
6 Honor, that this is one of the reasons why the Congress of the  
7 United States has endorsed the idea that voluntary settle-  
8 ment and cooperation should be preferred means of resolving  
9 racial discrimination cases brought under the Civil Rights  
10 Act of 1964.

11 A third factor which affects settlement possi-  
12 bilities would be the parties' assessment of their chances of  
13 winning or losing a lawsuit. Now, this is an assessment, Your  
14 Honor, which will of course depend upon the time. The fur-  
15 ther a lawsuit progresses, the more likely the parties will  
16 tend to reach a different assessment as to their chances of  
17 prevailing, and therefore the terms of a settlement will vary  
18 with the progress of time.

19 Therefore, Your Honor, in a case like this, if the  
20 parties are denied the settlement that they themselves want  
21 and are forced to litigate further then the parties are being  
22 put in a position whereby they may never be able to retrieve  
23 the opportunity which they once had.

24 QUESTION: Which way, Mr. Williams, do you think the  
25 negative aspects of piecemeal appeals cuts in this case?

1 MR. WILLIAMS: Well, I think, Your Honor, in light  
2 of your past decisions, it is quite clear that one of the  
3 reasons why this Court has decided that piecemeal adjudication  
4 is bad is because of the expense and the time that it consumes,  
5 and also the cost to the parties and the Court and the public  
6 interest as a whole. And here one of the factors we're con-  
7 sidering is the question of cost and the question of time and  
8 expense.

9 So, in this particular instance, Your Honor, I think  
10 that where you have parties who do not themselves want to  
11 litigate and who are trying not to litigate, that to give  
12 them the opportunity not to litigate is the policy that best  
13 furthers the policies behind the avoidance of piecemeal liti-  
14 gation.

15 If in a case like this, where the district court  
16 erects a legal barrier to the parties' ability to settle the  
17 case, that matter should be reviewed, we believe, by an  
18 appellate court so that the parties can determine if they can  
19 or should not go further.

20 QUESTION: I suppose part of your argument is that  
21 if you allow an appeal you avoid piecemeal litigation, because  
22 if the appeal comes out a certain way the case is over.

23 MR. WILLIAMS: That's correct, Your Honor, and that  
24 is exactly the case here. If an appeal were allowed and if  
25 this case were decided favorably to the petitioners, that would

1 be an end to this litigation. Any other course, we think,  
2 would result in litigation for at least the next two or three  
3 years.

4 QUESTION: Is it not generally true that on the  
5 problem of piecemeal appeals that one of the propositions is  
6 that if it comes out one way, it will terminate the litiga-  
7 tion, and if it comes out the other way, it does not? Isn't  
8 that always true?

9 MR. WILLIAMS: Well, Your Honor, the only thing  
10 that the parties would have suffered in that particular case  
11 would have been a certain amount of delay if it comes out ad-  
12 versely, in this case, for example, to the petitioners. But  
13 here you have parties who have been willing, certainly up until  
14 now, to settle their claim, so that if it were determined that  
15 the district court was wrong in its ascertainment of the legal  
16 principles that govern decision in this case, then that would  
17 have helped the parties to have resolved this matter prior  
18 to the matter coming to this Court.

19 QUESTION: But, you're making more of a Cohen's argu-  
20 ment now than anything, I take it, and this kind of an argument  
21 would lead you to say that any denial of a motion for summary  
22 judgment would be appealable; because if that denial is re-  
23 versed, the case is over.

24 MR. WILLIAMS: No, we don't think the argument leads  
25 to that conclusion, Your Honor. We think that it's, for the

1 reason that was indicated in Goldstein v. Cox. Goldstein  
2 points out that your decision in Switzerland Cheese was not an  
3 order denying an injunction because the decision in that case  
4 turned upon an assessment of the facts, not on a determination  
5 of the legal principles. Where a motion for summary judgment  
6 is made and it is denied as a matter of law, then Goldstein v.  
7 Cox makes it clear that is for this Court an open question.

8 But also, Your Honor, in this particular case it's  
9 clear that the order of the district court reached the merits.  
10 Your Honor, I would like to reserve for further discussion five  
11 minutes of rebuttal time. My white light is on, my time is  
12 concluded. Thank you.

13 QUESTION: Could I ask you one question,  
14 Mr. Williams?

15 MR. WILLIAMS: Yes, Your Honor.

16 QUESTION: What if the district court had said  
17 there is now pending in the 4th Circuit a case which will  
18 decide the legality of this consent order and I think it will  
19 be decided in about three or four months so I'm going to with-  
20 hold my consent until the 4th Circuit hands down its opinion.  
21 Would you say that that sort of a refusal to enter a consent  
22 decree by the district court may allow you to appeal?

23 MR. WILLIAMS: It would not be appealable, Your  
24 Honor. That would simply be a step towards further litigation  
25 of the case, and also it would not pass on the merits of the

1 case. Thank you.

2 MR. CHIEF JUSTICE BURGER: Mr. Dalton.

3 ORAL ARGUMENT OF HARLON L. DALTON, ESQ.,

4 ON BEHALF OF THE UNITED STATES AND EEOC AS AMICI CURIAE

5 MR. DALTON: Mr. Chief Justice, and may it please  
6 the Court:

7 More often than not Title VII suits brought by the  
8 Government end up in consent decrees, thus encouraging volun-  
9 tary compliance and maximizing limited federal law enforcement  
10 resources. Indeed, before even commencing lawsuits, the  
11 Justice Department typically contacts potential defendants and  
12 invites them to sit down and discuss settlement, and advises  
13 them that should settlement be reached, that agreement must  
14 be memorialized in a consent decree.

15 Thus to the extent that the Government is forced to  
16 try cases which but for the district court's unreasoned objec-  
17 tion would result in a settlement that's fair to the defen-  
18 dants and that advances the rights of the parties, our ability  
19 to vigorously enforce Title VII and related statutes is ser-  
20 iously undermined.

21 Now, we submit that this is appealed from -- is  
22 appealed both as an order refusing an injunction and as  
23 a collateral order.

24 QUESTION: Mr. Dalton, you don't suggest that EEOC  
25 or Title VII actions are governed by different rules of



1 appealability than are set forth in 1291 or 1292?

2 MR. DALTON: No, not at all. We are not asking for  
3 a special rule relating to Title VII. But our peculiar inter-  
4 est in the case results from our experience under Title VII.

5 QUESTION: Mr. Dalton, before you proceed would you  
6 state precisely the elements of the injunction as you perceive  
7 them, the injunction that was denied?

8 MR. DALTON: My understanding is that there is a  
9 general element of prohibiting discrimination in the future,  
10 that there were --

11 QUESTION: Prohibiting what? Prohibiting discrimi-  
12 nation?

13 MR. DALTON: Yes. That there are mandatory features  
14 of the injunction. For example, the requirement that super-  
15 visory -- that hereinafter blacks be hired into supervisory  
16 positions until one-third of the supervisors are blacks.

17 QUESTION: Well, I can ask Mr. Williams when he  
18 resumes his argument.

19 MR. DALTON: I can do it but it's going to stretch  
20 me a bit. Common to all appealability theories, in our view,  
21 is the question of whether or not the order at issue is re-  
22 viewable following final judgment. As my brother Mr. Williams  
23 indicated, settlements are based upon the parties' assessment  
24 of the strength and weaknesses of their own cases, their  
25 assessment of the facts that the court is likely to find

1 credible. After the evidence is in, those perceptions change.  
2 Indeed, they're replaced by knowledge of the strengths and  
3 weaknesses of cases, of the parties' respective cases, by  
4 knowledge of what aspects of your -- what vulnerabilities in  
5 your own case have managed to escape detection. And once the  
6 final judgment is in, as a practical matter, the Court of  
7 Appeals can never return to the state of facts or perceptions  
8 that existed at the time the consent decree was entered into.  
9 Because if the litigated judgment is not defective for reasons  
10 under it, in order to return to the settlement proposal that  
11 arguably was improperly rejected by the district court, the  
12 Court of Appeals would in essence have to base its reversal on  
13 facts other than those proved at trial, and on merits other  
14 than those, if they appear following a fully litigated case.

15 Nor can prejudgment review be presumed as the Court  
16 of Appeals did in this case. There's no parallel in this kind  
17 of situation to Rule 23(c)(1) in the class action context where  
18 the rule invites the court to periodically reconsider the  
19 propriety of the class. Certainly a refusal of a consent  
20 decree is final as to the terms in that particular consent  
21 decree.

22 Moreover, the notion that the Court of Appeals  
23 touched upon of reconsideration of the consent decree, in this  
24 case by the district court, is meaningless in cases such as  
25 this one, and such as the City of Alexandria case which we cite

1 in our brief, in which the district court premised their  
2 refusal to enter the decree on their view that the decree  
3 itself has unlawful provisions and has no basis in fact,  
4 because there's no admission of liability on the part of the  
5 defendants.

6 Even in a case where the court premises its refusal  
7 to enter the decree on more equitable kinds of considerations  
8 rather than legal, reconsideration -- the possibility that  
9 that order may be reconsidered at some point by the district  
10 court is not an appropriate basis for denying appealability.

11 For example, the case of Santana v. Collazo, a case  
12 that began in the District Court of Puerto Rico and that ulti-  
13 mately wound up in the First Circuit Court of Appeals,  
14 Index No. 79-1531, the private plaintiffs and the Justice  
15 Department as interverors on their side submitted three suc-  
16 cessive, entered into three successive consent decrees with  
17 their adversaries, who were the authorities in the Commonwealth  
18 of Puerto Rico responsible for the juvenile justice system.  
19 On each occasion -- the first occasion was the district court  
20 asked the parties to make certain modifications in the consent  
21 decree. The parties returned to the table, made modifica-  
22 tions, and in each instance the Court of Appeals rejected that  
23 consent decree. So even where the court ostensibly is not  
24 basing its rejection on a view of the scope of Title VII,  
25 this motion for reconsideration is not the boon that one

1 would guess from the Court of Appeals --

2 QUESTION: Mr. Dalton, I take it that under your  
3 argument and that of your colleague, that the denial of the  
4 consent decree would be appealable by either party?

5 MR. DALTON: Oh, yes, absolutely.

6 QUESTION: Or both?

7 MR. DALTON: Yes.

8 QUESTION: And does that cause you any kind of  
9 problem?

10 MR. DALTON: No.

11 QUESTION: They'd both be taking the same position?

12 MR. DALTON: There may be difficulties, as indeed  
13 there were in this case, where no one wants to -- well, in  
14 this case what happened was that the plaintiffs sought to  
15 appeal the denial of the consent decree and the respondent-  
16 defendants wanted to take no position on that in the Court of  
17 Appeals, because they felt there were not in an adversary  
18 posture. Courts have tried various means of dealing with that  
19 problem. Some courts have invited the U.S. Attorney to file  
20 a brief. Others have appointed counsel for purposes of the  
21 appeal to take the other side.

22 QUESTION: I would suppose that in some cases it  
23 might be the other side that would be most eager to have the  
24 consent decree entered?

25 MR. DALTON: Indeed, indeed. As this Court said in

1 Weber, there are often business reasons why employers very  
2 much want to enter into consent decrees.

3 QUESTION: Is there any reason why the parties could  
4 not abide all the terms of the consent decree if they were in  
5 the posture Mr. Justice White suggested, abide those condi-  
6 tions voluntarily even if a district judge would not accept  
7 the decree?

8 MR. DALTON: Well, it is certain it's true that par-  
9 ties can enter into private settlements of lawsuits and any  
10 time a party --

11 QUESTION: Most times they do, in private litigation.

12 MR. DALTON: Indeed. And it is certainly true that  
13 when parties come to the point where they are willing to agree  
14 to terms of a settlement, they are much more inclined to abide  
15 by them voluntarily than not. However, the Justice Department  
16 routinely enters into consent decrees because they are  
17 enforceable by, among other sanctions, contempt, and because  
18 in the event of changed circumstances it's often much more  
19 useful to put the question of whether or not the agreement  
20 should be modified or indeed dissolved to an impartial judicial  
21 tribunal rather than to parties. So while it is certainly pos-  
22 sible that parties could enter into a private agreement, consent  
23 decree is in the judgment of the Government a much more  
24 useful device all around, from the standpoint of all the  
25 parties and the court.

1 I'd like to touch upon briefly, Mr. Chief Justice,  
2 your question about which way the evils of piecemeal adjudica-  
3 tion cut. I agree with my brother that the general notion  
4 that interlocutory appeals slow down the trial process is not  
5 in this context a terribly useful sense. What the parties are  
6 trying to do in a consent decree is to end the litigation.  
7 It's true, as Mr. Justice White points out, that the same can  
8 be said of the summary judgment motion. But what's left after  
9 a summary judgment motion even if a denial is upheld on appeal  
10 are only those issues as to which there is legitimate dispute,  
11 so that even though there may be a trial afterward it's a very  
12 truncated trial, and it's not the same kind of full trial  
13 on the merits.

14 Moreover, there are other independent reasons why  
15 this Court unanimously concluded, I think correctly, that  
16 a refusal to enter a summary judgment motion is not appeal-  
17 able, and those factors are not present here.

18 Moreover, I don't think that the floodgate of liti-  
19 gation feared by the Court of Appeals is an appropriate, is  
20 on balance a reasonable fear, when we're talking about refusals  
21 to enter consent decrees. To the extent that other reasonable  
22 alternative decrees are available, it seems to me it's in the  
23 parties' perceived interests to search out and reach for  
24 those agreements. The very factors that led the parties to  
25 enter a settlement in the first place that Mr. Williams

1 outlined and the desire to avoid the expense and delay of liti-  
2 gation would lead them to reach other reasonable agreements.  
3 The kinds of cases that would result in an appeal are precisely  
4 like those at bar where the court's refusal to enter the de-  
5 cree is based upon a misapprehension of the scope of the stat-  
6 ute or of the requirements of the law. If there are no fur-  
7 ther questions --

8 MR. CHIEF JUSTICE BURGER: Very well, Mr. Dalton.  
9 Mr. Wickham.

10 ORAL ARGUMENT OF HENRY T. WICKHAM, ESQ.,  
11 ON BEHALF OF RESPONDENT AMERICAN BRANDS, INC.

12 MR. WICKHAM: Chief Justice Burger and may it please  
13 the Court:

14 I'd like to suggest that counsel left out another  
15 very good reason to avoid piecemeal litigation, and I think  
16 that the two opinions filed in the 4th Circuit bear this out,  
17 and that is they're interfering with the orderly processes of the  
18 trial court. And I think the reading of the two opinions in  
19 the 4th Circuit shows exactly the type of jungle that we're  
20 getting ourselves into, permitting appeals of the nature that  
21 stands before this Court.

22 QUESTION: What is held up by the district court's  
23 action, except its proceeding with the trial? Is that  
24 what you're referring to, that the trial cannot proceed in the  
25 district court now?

1 MR. WICKHAM: Well, that's correct, but it's also  
2 the views expressed by the majority and the dissenting opinions  
3 concerning what the trial court did hold. Did he hold conclu-  
4 sively that the plaintiffs had no case on the merits, or did  
5 he hold his actions were a collateral order? And so forth  
6 and so on. It just shows you where the appellate court should  
7 not be, in an order of this type.

8 The dissenting opinion went on to say that the trial  
9 judge abused his discretion, that -- and so forth and so on.  
10 It went into the merits of the case and stated what they  
11 thought were the merits of this case, and I think that this  
12 whole case illustrates that this type of order should be,  
13 could not be appealed until it becomes final.

14 QUESTION: At some point would you comment on whether  
15 your client wishes to withdraw and if so whether you may with-  
16 draw or whether you're bound by some contractual consideration?

17 MR. WICKHAM: Well, Your Honor, after 28 months had  
18 passed from the time the trial court had this case until it  
19 got back, we did file a motion requesting a pretrial confer-  
20 ence for the purpose of setting a trial date, and in that mo-  
21 tion we stated that we now withdrew consent to the proposed  
22 decreee.

23 QUESTION: Did you state that you do withdraw con-  
24 sent?

25 MR. WICKHAM: Yes, sir.



1 QUESTION: And did you ask for leave of the court to  
2 withdraw your consent, specifically?

3 MR. WICKHAM: We went to the pretrial conference and  
4 the trial date was set for this case.

5 QUESTION: The answer, then, is, no?

6 MR. WICKHAM: No further order was entered or no  
7 further mention was made of the respondent's motion to with-  
8 draw its consent.

9 QUESTION: Mr. Wickham, then I take it the answer to  
10 my question is that you made no formal motion to the court for  
11 leave to withdraw your consent?

12 MR. WICKHAM: We did not make any formal motion ex-  
13 cept in the motion to ask for a pretrial conference and to set  
14 a trial date.

15 QUESTION: In that motion, although it wasn't a mo-  
16 tion to withdraw your consent, did you allege a right to with-  
17 draw or take the position you had a right to withdraw by rea-  
18 son of changed circumstances, or you just changed your mind  
19 about -- ?

20 MR. WICKHAM: We took, actually, no position, Your  
21 Honor.

22 QUESTION: I see.

23 MR. WICKHAM: We feel that changed circumstances  
24 would be a consideration for the trial court if we'd made a  
25 formal motion to withdraw our consent. It would be in the

1 nature of a Rule 60(b) motion. In effect, the consent decree  
2 could be entered and then it would be a 60(b) motion.

3 QUESTION: I see. A motion, a post-decree motion,  
4 but we would still have the problem here of whether refusal to  
5 enter the decree was to refuse that or an injunction --

6 MR. WICKHAM: Yes, sir, that really has nothing to  
7 do with why we're here today, as I see it, Your Honor.

8 QUESTION: Mr. Wickham, was the request for the set-  
9 ting of the trial date made before or after the Court of  
10 Appeals decided the case?

11 MR. WICKHAM: It was made after the the Court of  
12 Appeals decided the case. We made no request at all when this  
13 case was appealed from the trial court and then some 28 months  
14 later it finally got back to the trial court and at that time  
15 we made a request for a jury trial.

16 QUESTION: What jurisdiction did the district court  
17 have after a notice of appeal was filed?

18 MR. WICKHAM: I don't think it would have any juris-  
19 diction at that time. I think that was --

20 QUESTION: Once the notice of appeal had been filed,  
21 the district court could not address itself to the question  
22 whether you have the authority --

23 MR. WICKHAM: That is correct.

24 QUESTION: Or the power to withdraw your consent.

25 MR. WICKHAM: That is correct.

1 QUESTION: Was that considered by the Court of  
2 Appeals?

3 MR. WICKHAM: The Court of Appeals did not know we  
4 had withdrawn our consent. Our consent was not withdrawn  
5 until after the Court of Appeals -- after the mandate issued  
6 and it had returned to the district court, Your Honor.

7 QUESTION: Mr. Wickham, I don't understand. If the  
8 Court of Appeals is correct in holding the order was not  
9 appealable, I don't why a notice of appeal would deprive the  
10 district court of jurisdiction, because the notice of appeal  
11 would be a nullity.

12 MR. WICKHAM: Well, the district court granted a  
13 stay of these proceedings pending the petition for cert. in  
14 this case, Your Honor.

15 QUESTION: But in the interim, between the time the  
16 district court acted initially and the time the Court of  
17 Appeals acted, there was no jurisdiction in the district court,  
18 was there?

19 MR. WICKHAM: That's correct; no, sir.

20 QUESTION: Well, isn't that the issue we're called  
21 upon to decide today?

22 QUESTION: If the appeal was improper --

23 MR. WICKHAM: Well, theoretically that would be  
24 if there was no jurisdiction.

25 QUESTION: If it was an improper appeal, then the

1 appeal didn't have any effect on the district court --

2 MR. WICKHAM: Well, then, 'theoretically,' the district  
3 court would have jurisdiction, but hardly would the district  
4 court assert such jurisdiction pending the decision of the  
5 4th Circuit.

6 QUESTION: I understand that second point.

7 QUESTION: You won't know that for some little time  
8 yet, will you?

9 MR. WICKHAM: That's correct.

10 QUESTION: If the district court was deprived of  
11 jurisdiction and in fact the order -- then it must be because  
12 there was a right to appeal, and if it retained jurisdiction,  
13 it must be because the appeal was improper and it just chose  
14 to await the outcome of the Court of Appeals decision.

15 MR. WICKHAM: That's correct. But we did not make  
16 any decision to withdraw our consent until after the Court of  
17 Appeals had handed down its mandate, Your Honor. I guess  
18 that's the point I'm trying to make is that -- because I don't  
19 think it's very material to, really, what we've got to get at  
20 here, insofar as to whether or not the 4th Circuit has applied  
21 the proper test laid down by Coopers & Lybrand and by  
22 Gardner, to see whether or not this order was indeed appeal-  
23 able under either Section 1291 or 1292(a)(1).

24 QUESTION: If you didn't withdraw your consent,  
25 wouldn't the agreement that you entered into be enforceable

1 as a private contract?

2 MR. WICKHAM: Well, we take that position, that that  
3 is one aspect of withdrawal of consent is a contractual rela-  
4 tionship, and if we violate it is the remedy a suit for  
5 damages or what? The law is not clear on that subject at all,  
6 as far as we could find out. But we contend here that the  
7 so-called Weber-type rights that the petitioners claim they  
8 have lost by this denial of appeal are, after all, private  
9 rights. It's a voluntary, Weber-type right, which was made  
10 between the unions and the Company, and that same right could  
11 be agreed upon between the parties, and this case could be  
12 dismissed agreed, with prejudice, and the plaintiffs would lose  
13 none of their rights, the so-called Weber-type rights.

14 QUESTION: Well, they could in fact sue you on the  
15 contract, I take it?

16 MR. WICKHAM: That's certainly a possibility, Your  
17 Honor.

18 QUESTION: Well, I suppose the contract has a clause  
19 in it whereby your clients agree to the entry of a consent  
20 decree?

21 MR. WICKHAM: Well, you know --

22 QUESTION: Isn't it?

23 MR. WICKHAM: -- Justice Powell asked what the  
24 provisions of the consent decree were. The main provisions  
25 were --

1 QUESTION: All I want to know is --

2 MR. WICKHAM: We agreed. Yes, sir.

3 QUESTION: About the one provision. Didn't you  
4 agree to the entry of the consent decree?"

5 MR. WICKHAM: We indeed agreed to the entry of the  
6 consent decree; that's correct.

7 QUESTION: And so that is part of your contractual  
8 obligation?

9 MR. WICKHAM: That's correct.

10 QUESTION: And yet that part of the obligation,  
11 because of Rule 23, can be negated by the trial judge if he  
12 refuses to approve it, I suppose.

13 MR. WICKHAM: Well, the only part that would be ne-  
14 gated, it seems to me, -- we could still enter into a private  
15 agreement-like -- as someone pointed out a little while ago,  
16 many cases are settled, agreed, and the cases are dismissed.  
17 So the only thing that's really we're lacking here insofar  
18 as the plaintiffs are concerned would be a contempt proceeding  
19 if the respondents had indeed violated their agreement.

20 QUESTION: But if you entered a 25-paragraph settle-  
21 ment agreement and one of the paragraphs says, we will enter  
22 a consent decree, and the district court rejects the consent  
23 decree, that doesn't necessarily void the other 24 paragraphs  
24 of the agreement that you've entered into voluntarily.

25 MR. WICKHAM: It doesn't necessarily do so unless one

1 of the parties would insist upon a consent decree should always  
2 be protected by a contempt proceedings for a violation.

3 QUESTION: Well, I take it the Government suggests  
4 that it wouldn't enter into any settlements except in connec-  
5 tion with a consent degree.

6 MR. WICKHAM: I heard that suggestion, but this is  
7 a private action case. This is not the Government -- it's  
8 not the EEOC or any government agency in this case, Your Honor.  
9 So what I -- I think these considerations were a little dif-  
10 ferent. It's no -- absolutely nothing wrong with us entering  
11 into a contract and --

12 QUESTION: Is the consent decree -- is the agreement  
13 in the record?

14 MR. WICKHAM: Yes, sir.

15 QUESTION: It isn't in the printed record, is it?

16 MR. WICKHAM: You'll find it starting on page 26a,  
17 Your Honor.

18 QUESTION: Oh, I see. All right. I had looked for  
19 that; I didn't find it. Thank you very much.

20 QUESTION: That's just the consent decree on --

21 MR. WICKHAM: Well, that is the agreement. Is that  
22 what you asked me?

23 QUESTION: It really isn't the agreement.

24 QUESTION: No.

25 MR. WICKHAM: Well, that's all we have.

1 QUESTION: There's no separate agreement to enter --

2 MR. WICKHAM: No separate agreement, no, sir, I'm  
3 sorry. It's no separate agreement. We presented this proposed  
4 consent decree jointly at the last pretrial conference before  
5 trial.

6 QUESTION: And all of you moved for its adoption?

7 MR. WICKHAM: And we moved for its adoption at that  
8 time.

9 MR. WICKHAM: So that there really is no separate  
10 contract?

11 MR. WICKHAM: No separate agreement; no, sir.

12 QUESTION: So there would be nothing -- if the judge  
13 refuses to enter the decree, the motions are just denied  
14 and there is no obligation on anybody's part from there on,  
15 of any kind.

16 MR. WICKHAM: There's no obligation on anybody's  
17 part, that's correct, but there's also nothing to prevent the  
18 parties from negotiating a different type of agreement.

19 QUESTION: Well, I know, but that hasn't been done.

20 MR. WICKHAM: That has not been done.

21 QUESTION: Was there an oral agreement?

22 MR. WICKHAM: Ah --

23 QUESTION: I take it what you're saying is there's  
24 no written agreement.

25 MR. WICKHAM: Well, we agreed to propose the consent



1 decree found in the Appendix to the -- to the court, Justice  
2 White. -- It's hard for me to really say that we have agreed  
3 because everybody's looking toward a consent decree, at least  
4 the plaintiffs were looking for the consent decree, and they  
5 appealed the refusal to enter that order.

6 QUESTION: All three of you moved the court to enter  
7 the decree, in any event.

8 MR. WICKHAM: Yes, that's correct.

9 QUESTION: And just filed memos in --

10 MR. WICKHAM: And then the court asked us to file  
11 memos in support of that decree. And then --

12 QUESTION: Are the motions in the printed record?  
13 But I suppose they're in the record of trial here.

14 MR. WICKHAM: That's correct. Well, if I'm not mis-  
15 taken, it was an oral motion made at the final pretrial con-  
16 ference. The decree was presented to the court at the final  
17 pretrial conference and --

18 QUESTION: Every party moved for --

19 MR. WICKHAM: And every party moved to --

20 QUESTION: That must have been by agreement, via --

21 MR. WICKHAM: That's correct.

22 QUESTION: Was that by oral motion or by agreement?

23 MR. WICKHAM: It was by oral motion. We requested  
24 the court to have this proposed decree at the final pretrial  
25 conference. I don't think you'll find a formal motion on that.

1 QUESTION: Is it correct, then, Mr. Wickham to say  
2 that the consent decree contained the settlement agreement of  
3 the parties?

4 MR. WICKHAM: That's correct, sir.

5 QUESTION: And you wished to have the court approve  
6 it.

7 MR. WICKHAM: The district court, yes, sir.

8 QUESTION: Yes, yes.

9 MR. WICKHAM: Yes, sir. That's correct. It seems  
10 clear that this is not a final order under 1291 for the --  
11 the court did make a collateral determination and that --  
12 it's also equally clear that it's not a final order under 1291  
13 because the order did not conclusively determine claims for  
14 injunctive relief, and also it's clear that it's not final  
15 under 1291 because the petitioner can have an effective review  
16 of this order prior to and after final judgment. Now, the  
17 same test seems to apply as laid down by Gardner for the  
18 refusal of the injunction relief.

19 QUESTION: Well, the proposed decree here, the first  
20 paragraph, is that, your client agrees that -- and a permanent  
21 injunction entered against them enjoining discrimination, and  
22 then, paragraph 3, it provides for further injunctive  
23 relief, doesn't it?

24 MR. WICKHAM: Well, I think that if you read it --

25 QUESTION: You certainly -- if you didn't live up to

1 this decree which contained an injunction, you would be sub-  
2 ject to contempt.

3 MR. WICKHAM: No question about that, Your Honor.  
4 But it's our position that under Rule 1292(a)(1) the test is  
5 whether or not these petitioners were --

6 QUESTION: Right.

7 MR. WICKHAM: And if not, this type of injunctive  
8 relief is not such that it's covered by the provisions of  
9 1292(a)(1), and it's very clear that if it had effective  
10 review, number one, as you pointed out, they could ask for a  
11 preliminary injunction. They could have asked for that either  
12 before or after the refusal of consent decree. That would  
13 certainly be appealable, the refusal of that.

14 QUESTION: Why would that be?

15 QUESTION: But normally when three people go into  
16 court together to get a consent decree, it's not normal for  
17 one side to also ask for preliminary injunction, is it? Is  
18 that the usual procedure?

19 MR. WICKHAM: I don't think it is usual procedure,  
20 but it shows that -- it shows that if you don't ask for a pre-  
21 liminary injunction you must not feel that you have any  
22 reparable interest to protect, or to lose, so to speak.  
23 All I'm saying to you, Justice Marshall, is that under the  
24 test laid down in Gardner, that is an avenue open to the  
25 petitioners, and then --

1 QUESTION: Yes, I know, but you have to consider  
2 Gardner along with General Electric and --

3 MR. WICKHAM: Yes, sir, and it's --

4 QUESTION: You have to consider them together.

5 WICKHAM: And that's -- and certainly after final  
6 judgment it's reviewable, and effectively reviewable, because  
7 if after trial on the merits the petitioners got more than  
8 the consent decree gave them, they certainly wouldn't be  
9 harmed. And if they got less, they could argue to the Court  
10 of Appeals that the facts entitle them to more, entitle them  
11 to exactly the same relief that the consent decree gave them,  
12 or even more than that. So, they got effective review in this  
13 case. And finally, it's very clear that --

14 QUESTION: They're not objecting to the review,  
15 they're objecting to the results of review.

16 MR. WICKHAM: Well, I'm saying that to have effective  
17 review, there's not a final order within the meaning of  
18 Section 1292(a)(2), Justice Marshall. That's what I'm saying.

19 As to the fact that this Court has or has not con-  
20 clusively passed on the sufficiency of the claim, the court it-  
21 self, the district court itself, started out and says, "The  
22 plaintiffs have included a statement of facts in their brief in  
23 support of the proposed consent decree. For this purpose only  
24 we accept these facts to be true."

25 Now, with that statement it's very clear that the

1 court below, district court below did not conclusively find  
2 against the plaintiffs. And if you look at the plaintiffs'  
3 brief and the statement of facts in their brief, you'll see a  
4 lot more facts in there, a lot more facts, but they didn't present  
5 those facts to the court below. Now, you read those facts,  
6 and the respondents are very bad people, effectual discrimina-  
7 tion is still present everywhere. Those facts could have been  
8 presented to the trial court. Why they weren't? I don't know,  
9 but it shows that the district court did not pass on the suf-  
10 ficiency of their claim for injunctive relief.

11 Thank you, Your Honors.

12 MR. CHIEF JUSTICE BURGER: Mr. Levit.

13 ORAL ARGUMENT OF JAY J. LEVIT, ESQ.,

14 ON BEHALF OF RESPONDENT UNIONS

15 MR. LEVIT: Mr. Chief Justice and Justices of the  
16 Supreme Court:

17 The reason the unions didn't make a formal motion to  
18 withdraw their consent was because it obviously wasn't neces-  
19 sary. The district court judge had refused to enter the con-  
20 sent decree.

21 QUESTION: Well, the union did not want to undermine  
22 the consent decree. Why would they make a --

23 MR. LEVIT: Well, I'm talking, Your Honor, with  
24 respect -- when the case was remanded from the 4th Circuit  
25 back to the district court judge, and then at the time that a

1 pretrial conference was requested by the respondents, in that  
2 motion requesting a pretrial conference, the respondents  
3 stated that they withdrew their consent. They said nothing  
4 more except to say that they withdrew their consent. And at  
5 some time during the discussion between the court and counsel  
6 the question was raised by one of the justices, were any  
7 formal grounds for withdrawal of consent set out? And I felt  
8 that it would be --

9 QUESTION: What do you mean if they did not withdraw it,  
10 they said they would. "In support of this motion, the defen-  
11 dants assert that they do not now consent to the entry of the  
12 proposed agreement."

13 MR. LEVIT: Yes, sir.

14 QUESTION: What does that mean?

15 MR. LEVIT: That means that the consent --

16 QUESTION: That doesn't mean they're withdrawing it.

17 MR. LEVIT: Oh, I would submit, Your Honor --

18 QUESTION: If they want to withdraw, they withdraw.  
19 They don't say that word.

20 MR. LEVIT: Well, they do say, Your Honor, that they  
21 no longer consent, and I would submit to you that that's the  
22 same thing as withdrawing your consent.

23 QUESTION: But don't you usually file a motion?

24 MR. LEVIT: Oh, this was in a motion.

25 QUESTION: But this was a motion to ask for a

1 pretrial conference.

2 MR. LEVIT: Yes, sir.

3 QUESTION: That's what the motion is.

4 MR. LEVIT: Yes, sir.

5 QUESTION: This isn't a motion to withdraw.

6 MR. LEVIT: Well, it's a statement --

7 QUESTION: This isn't a motion to withdraw consent.

8 MR. LEVIT: Well, Your Honor, the reason --

9 QUESTION: And they say that this will be presented  
10 to the court at the pretrial conference. The record says that

11 MR. LEVIT: There was no need for a motion, Your  
12 Honor. The reason there wasn't a need for a formal motion to  
13 withdraw consent is because the district court judge had re-  
14 fused to enter the consent decree, so it was unnecessary to  
15 move him to do what he had already done.

16 QUESTION: Then it was unnecessary to withdraw the  
17 consent.

18 MR. LEVIT: Well, we wanted to make it a matter of  
19 record that the consent didn't exist.

20 QUESTION: But you didn't sign this, this written  
21 consent.

22 MR. LEVIT: No, I signed it, Your Honor. I believe  
23 it's page 67. No, 68a.

24 QUESTION: Yes, down at the bottom.

25 MR. LEVIT: We did sign it, Your Honor, the unions

1 did sign that. And we joined in that motion. But we felt,  
2 at least it was our position, that no formal withdrawal was  
3 necessary for those reasons.

4 QUESTION: Well, there never was any problem about  
5 withdrawing consent. Actually, you filed a motion, or you'd  
6 made an oral motion to enter the decree?

7 MR. LEVIT: We made a -- well, at the time that the  
8 consent decree was proposed to the district court, there were  
9 supporting memoranda filed by the parties in support of the  
10 entry of the decree, yes, sir.

11 QUESTION: But there -- was there an oral motion,  
12 was there? Or was it --

13 MR. LEVIT: Well, I believe it was posed when we  
14 presented it to the district court. We stated that we had a  
15 consent decree form and I believe counsel wrote the district  
16 court a letter indicating that a consent decree would be forth-  
17 coming to the court, that the parties were proposing to the  
18 court.

19 QUESTION: Well, you really -- what you're really  
20 saying, that you withdraw -- you're interested in withdrawing  
21 your motion that the consent decree be entered.

22 MR. LEVIT: Well, the two things occurred in such --

23 QUESTION: But your motion was denied?

24 MR. LEVIT: -- such distant points of time, Your  
25 Honor. That's the time that the district -- the consent



1 decree was presented and the time that it went -- and the  
2 appeal time, and the remand back, was a couple of years, and  
3 of course, one of the things I wanted to mention was that the  
4 evils of piecemeal litigation certainly involve the appellate  
5 court getting involved in the trial process. Now, counsel for  
6 the petitioners distinguished the Court's decision in Switzer-  
7 land Cheese on the ground that that was just a denial of  
8 motion for summary judgment, that there were material issues  
9 of fact. But I submit to you that we may have and do have  
10 basically the same thing here. If you look at the proposed  
11 consent decree, you'll see recitations in there where it's re-  
12 cited that the district court judge has reviewed the extensive  
13 discovery, and there was extensive discovery in this case.  
14 There were numerous depositions and extensive written inter-  
15 rogatories, and production of documents. And it recites that  
16 the district court has reviewed the discovery in this case.

17 So, the district court in denying entry of a consent  
18 decree may very well have done so for principles and on stan-  
19 dards which would be quite similar in denying a motion for  
20 summary judgment. And in that respect --

21 QUESTION: But Mr. Levit, didn't he tell us why he  
22 did so? Didn't he give his reasons? Weren't his reasons  
23 legal reasons rather than the reasons you now describe?

24 MR. LEVIT: I think that the reasons that he gave  
25 would very well encompass precisely what I'm presenting to you

1 that he felt that it was improper for several reasons that he  
2 stated but there's no question that he did review the record,  
3 that he did review the extensive discovery involved in the  
4 case. And for the appellate court to take that prerogative  
5 away from him when he may feel that there's a material issue  
6 of fact -- and I think it's apparent that he did feel that.

7 QUESTION: Well, but that goes to the merits of  
8 whether he acted properly in refusing to enter the decree,  
9 it seems to me.

10 MR. LEVIT: Yes, Your Honor, but the point is that  
11 the appellate court would have to get involved in the trial  
12 process, and the appellate court obviously didn't go through  
13 the discovery.

14 QUESTION: Anytime you review a complicated matter  
15 you have to look at the record.

16 MR. LEVIT: Well, I don't think the appellate court  
17 reviewed the discovery in this case. And that's the point  
18 that we're trying to make, is that the appellate court did not  
19 review the discovery in this case the way the district court judge  
20 did, and that's why the appellate court would not properly  
21 get involved in the trial process here.

22 QUESTION: Let me ask you one other question about  
23 your point that two years went by after you made your motion,  
24 and so that you didn't think it was necessary to allege changed  
25 circumstances -- if the Court should hold that the order was

1    appealable and sent it back to the Court of Appeals, and if  
2    the Court of Appeals should hold that the district court com-  
3    mitted error in refusing to enter the decree, I suppose it  
4    would have the power to reverse and say the decree should  
5    have been entered. And therefore it would have been necessary  
6    to allege some kind of post-decree events in order to get out  
7    of the bargain.

8           MR. LEVIT: Well, Your Honor --

9           QUESTION: But I suppose the review will take place  
10   as of the date that the district judge acted, and he either  
11   committed error on that date or he acted properly, one of the  
12   two.

13          MR. LEVIT: I don't think that that's necessarily so,  
14   Your Honor, because we can't ignore the terms of the proposed  
15   consent decree. And right at the outset of the proposed con-  
16   sent decree the parties state that they want to avoid the time  
17   and expense of litigation. And perhaps even more than the  
18   expense of litigation in this case is the time. After all, the  
19   union has a collective bargaining agreement to administer and  
20   the Company has a business to run, and when these parties  
21   entered into this proposed consent decree it was with the anti-  
22   icipation it would be entered within a reasonable period of  
23   time. And it may very well, from the union's point of view as  
24   a collective bargaining contract administrator result in utter  
25   chaos. Time may be very, very much more important than expense

1 here, for --

2 QUESTION: Well, that goes to the merits of whether  
3 the district judge should be affirmed or reversed, rather than  
4 to whether anything's appealable.

5 MR. LEVIT: But also, Your Honor, it goes very much  
6 to the merits of the proposed decree itself, because the  
7 parties weren't getting what they bargained for. If we're  
8 going to talk about it in terms of a bargain, the parties are  
9 not getting what they bargained for, and what they expressly  
10 bargained for, right at the outset of the --

11 QUESTION: Are you attacking the consent decree on  
12 its merits?

13 MR. LEVIT: I'm saying that the --

14 QUESTION: The one that you agreed to?

15 MR. LEVIT: The one that we agreed to we would have  
16 been happy with if it had been promptly entered. But what  
17 we anticipate --

18 QUESTION: As of right now you're not quarreling  
19 with the merits -- with the merits of it?

20 MR. LEVIT: We're not -- what we're saying now is --

21 QUESTION: You did sign it?

22 MR. LEVIT: Yes, we did. There's no question about  
23 that. Yes we did.

24 QUESTION: You don't want to go behind that now, do  
25 you?

1 MR. LEVIT: We have withdrawn our consent to it.  
2 We feel that we have a basic right to do so.

3 QUESTION: Well, show me where you withdrew.

4 MR. LEVIT: We withdrew when we stated in the motion  
5 to the --

6 QUESTION: That you wanted to withdraw it.

7 MR. LEVIT: That we no longer consented.

8 QUESTION: That's right, and you wanted that to be  
9 discussed at the pretrial conference. Was it discussed?

10 MR. LEVIT: There was no need to discuss it.

11 QUESTION: Well, why did you ask to do it if you  
12 didn't want to do it?

13 MR. LEVIT: Because we wanted to make it a matter of  
14 record that our consent no longer existed on that document.  
15 We didn't feel that we needed to set forth formal grounds or  
16 make a motion to have it withdrawn because the judge had  
17 already refused to enter it, and we felt it wasn't necessary  
18 under the circumstances to do it.

19 QUESTION: How do we stand now? Are you with the  
20 consent decree or not?

21 MR. LEVIT: Well, we don't --

22 QUESTION: You're against it now?

23 MR. LEVIT: Yes. That doesn't mean that --

24 QUESTION: You want your signature off of it.

25 QUESTION: That doesn't mean that you necessarily

1 would have had the right to withdraw your consent. You simply  
2 said you wanted to withdraw it if legally permissible.

3 MR. LEVIT: That's correct.

4 QUESTION: Well, really none of this goes to the  
5 issues before us, which is the appealability of the denial of  
6 the entry of the decree. Is that correct?

7 MR. LEVIT: Well, I think it does. Because I think  
8 that it's -- if there is no --

9 QUESTION: What happened two years later is really  
10 not -- it hardly bears on that issue, does it?

11 MR. LEVIT: But if there is -- I think it does, Your  
12 Honor, if there is no existing consent decree, then --

13 QUESTION: There was at the time that it was  
14 appealed.

15 MR. LEVIT: But if there isn't one now --

16 QUESTION: It's not being appealed.

17 MR. LEVIT: If there isn't one now, it's an exercise  
18 in futility.

19 QUESTION: So you're really, your argument is really  
20 that the case has become moot?

21 MR. LEVIT: Absolutely. Absolutely. It has become  
22 moot. There is no case or controversy, is our position.

23 MR. CHIEF JUSTICE BURGER: Mr. Williams, do you have  
24 anything further?

25 MR. WILLIAMS: Yes, sir.

1 ORAL ARGUMENT OF NAPOLEON B. WILLIAMS, JR., ESQ.,

2 ON BEHALF OF THE PETITIONERS -- REBUTTAL

3 MR. WILLIAMS: Mr. Chief Justice, just a few minutes.  
4 Your Honor, we do not believe that the case is moot. The case  
5 is moot only if the denial of the proposed consent decree is  
6 not appealable. But that is the very question that we have  
7 been trying to seek review.

8 Your Honor, one of the advices which --

9 QUESTION: I don't quite get that.--

10 MR. WILLIAMS: The consent decree --

11 QUESTION: Suppose the consent decree had said,  
12 until this case becomes final either party may withdraw from  
13 it. Suppose it said that and while the case was on appeal one  
14 of the parties withdraws?

15 MR. WILLIAMS: But that would be an entirely differ-  
16 ent matter, Your Honor. That would be the --

17 QUESTION: Well, I don't know what's so different.  
18 The submission is that either party was free to withdraw and  
19 that one of them has withdrawn. That's the submission.

20 MR. WILLIAMS: Well, that's the submission, Your  
21 Honor, but that's no basis in fact --

22 QUESTION: What do you disagree with in that submis-  
23 sion?

24 MR. WILLIAMS: Well, we believe that whether or not  
25 one can withdraw from a proposed consent decree would depend

1 upon elements of basic contract law, as well as upon  
2 the principles set forth under the Federal Rules of Civil  
3 Procedure.

4 QUESTION: Where do you find the agreement that the  
5 consent decree be entered?

6 MR. WILLIAMS: Well, Your Honor, we think that's  
7 manifested by the conduct of the parties, and we think that's  
8 manifested by their written signatures to the agreement that  
9 was being moved for the court to accept.

10 But, Your Honor, one of the things that I want to  
11 point out with respect to allowing a district court to make a  
12 legal determination as to what is allowable or not allowable  
13 without giving the power of review with respect to that deter-  
14 mination, is that in effect it does affect the parties' agree-  
15 ment to come to terms even out of court. Were the parties  
16 in this case to try to enter into an agreement that would  
17 basically achieve the same thing as this proposed consent  
18 decree, then the parties would find that with respect to  
19 third parties, there would be a question as to the legality  
20 of what they were doing because of noncompliance with Rule  
21 23(e).

22 Two, they would find that the opinion of the district  
23 court could be used as a basis to collaterally attack the  
24 validity of that out-of-court agreement which they were then  
25 trying to voluntarily comply with.



1           Your Honor, we think that a consent decree is needed  
2 in addition to any type of agreement that the parties might  
3 reach voluntarily in a case like this, in part because of the  
4 need, as this Court found in *United Steelworkers of America*  
5 *v. Weber*, to decide the rights of third parties.

6           Secondly, we think that it is needed because of the  
7 need for enforcement with respect to those kinds of mandatory  
8 things that the parties are supposed to do or not to do.

9           QUESTION: The *Weber* case didn't involve any consent  
10 decree, that was simply an agreement between the employer and  
11 the labor union.

12           MR. WILLIAMS: That's correct, Your Honor, but it  
13 did decide the rights of third parties with respect to the  
14 validity of that agreement.

15           Thank you very much, Your Honors.

16           QUESTION: Mr. Williams, before you sit down, maybe  
17 it's in the papers, but I did want to clear up one thing about  
18 the procedure. The proposed decree purports, as I understand  
19 it, to get rid of all damages -- for all members of the class.  
20 Did the procedure that was contemplated involve notice to the  
21 class?

22           MR. WILLIAMS: Yes, it did involve some notice, but  
23 there's a question as to whether or not those provisions are  
24 adequate, Your Honor. But we don't think that that would  
25 affect the parties' ability to settle the case as such.

1 So, thank you.

2 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

3 The case is submitted.

4 (Whereupon, at 11:05 o'clock a.m. the case in the  
5 above-entitled matter was submitted.)

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North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-1236

FRANK L. CARSON, LAWRENCE HATCHER AND  
STUART E. MINES

v.

AMERICAN BRANDS, INC., ETC., ET AL.

and that these pages constitute the original transcript of the proceedings for the records of the Court.

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