In the

Supreme Court of the United States

FEDERATED DEPARTMENT STORES, INC., ET AL.,	)	
Petitioners,	)	
v.	)	No. 79-1517
MARILYN MOITIE AND FLOYD R. BROWN, ETC.	)	

Washington, D.C.
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Pages 1 through 37

ORIGINAL

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Washington, D.C.

Monday, March 30, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 o'clock a.m.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in Federated Department Stores v. Moitie. Mr. Chapman, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF JEROME I. CHAPMAN, ESQ.,

ON BEHALF OF THE PETITIONERS

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

The Petitioners are here to ask the Court to reverse a decision of the Ninth Circuit Court of Appeals, which we believe is not only contrary to established principles but creates a very serious practical impediment on the ability of District Courts to coordinate and control multi-party complex litigations. It is our submission that the decision of the Ninth Circuit cut back on the normal rule of finality of judgments in the context of multiple-party, multiple action litigation which is exactly the opposite of what should have been done. That is, in these classes of cases there is more rather than less need for adherance to res judicata and the rule of finality.

We would like to take a few moments to describe briefly the background of this case and how it comes to this Court. And then to present what we consider the principal reasons why we believe that the Ninth Circuit decision is contrary to established principles of res judicata and out of step with the salutory trends in improving the

abilities of the District Court to control and coordinate complex cases.

The present case, Your Honor, started the same way as have hundreds of class action cases in the federal court. It's a class action for treble damages and attorneys fees and other relief, following on the heels of a federal government action. In April of 1976, the federal government obtained a misdemeanor indictment against Petitioners under Section 1 of the Sherman Act, charging that the Petitioners had agreed on the prices of women's clothings in their stores in Northern California. Shortly thereafter, a multiplicity of private class actions were filed; there were seven in all, two of those were filed by the same counsel. One of the actions, which was entitled Moitie v. Federated and Saks has been voluntarily dismissed by the Plaintiffs, and that action is not before this Court.

The other action is the Brown case, which is the only case that is before the Court this morning. The complaint in the Brown case, as I say, was largely patterned on the government's pleadings. It alleged that the Petitioners had agreed to charge certain prices in their stores on women's clothing and that the Plaintiffs and the class members that were purportedly represented had been injured by being overcharged on those purchases. The one difference was that unlike the government action and the other six

class actions, the Brown case alleged that the violations took place in Southern California, rather than in Northern California. Now, the cases proceeded in the District Court before a -- they were coordinated before a single judge and in July of 1976, the Petitioners moved to dismiss all seven cases for failure to state a claim under Rule 12(b)(6). There was extensive briefing on the motion, in fact, the District Court set aside one entire day for oral argument. And in January of 1977, the District Court dismissed all seven cases.

There were several issues considered, but the primary ground that was relied upon in the District Court's dismissal was that the Plaintiffs and class members as retail purchasers did not allege an injury to their business or property which would entitle them to treble damage recovery under the Clayton Act, Section 4.

The parties in five of the other cases appealed, and we've referred to these for convenience in our brief, as the Weinberg cases. The Weinberg cases all took an appeal from the dismissal of their actions to the Ninth Circuit. However, Brown deliberately chose to break away from the other cases at this point, and did not appeal. When the time for appeal had expired, the Respondent Brown filed a new action in the municipal court in Palo Alto-Mountain View judicial district, which was in all material respects

absolutely identical to the prior case. And we've referred to these again, for convenience, the prior dismissed action as Brown I; the second action, which is the action now before this Court as Brown II.

As I say, Brown I and Brown II were essentially identical, the same parties were involved, were alleged. There were the same descriptions of trade and commerce, exactly the same offenses charged, the same alleged effects of the offenses were charged, the same time period was covered, the period up to April, 1974. The same geographic area was covered in both complaints. They were the exact verbatim allegations of fraudulent concealment and verbatim the same allegations of the alleged injury.

The only difference which we submit, and we believe the -- both Courts below perceived as cosmetic differences -- was that the word antitrust was not mentioned in the Brown II complaint. Instead, the complaint was framed in terms of four theories under California law: fraud and deceit, unfair business practices, civil conspiracy and restitution. But there has never been any question at any time in this case that the gravamen of the two complaints, Brown I and Brown II, the basic thrust and core of both complaints is absolutely identical. They charge that the Petitioners agreed on their prices of women's clothing prior to April, 1974, in Southern California and

that that agreement had the effect of causing the --

QUESTION: Did the Brown case start in the state court?

MR. CHAPMAN: Pardon me?

QUESTION: Did the case start in the state court, Brown?

MR. CHAPMAN: The Brown case did not start in the state court, Mr. Justice White. The companion Moitie case as had one of the other seven cases named Musser, had originally been filed in the state court --

QUESTION: And how were they removed?

MR. CHAPMAN: They were removed on the basis of a federal question --

QUESTION: A federal question.

MR. CHAPMAN: -- and diversity of citizenship. There is complete diversity in this case.

QUESTION: So even if there were only state claims stated in those cases that started in the state court, they could have been removed?

MR. CHAPMAN: Yes.

QUESTION: And now Brown has stated both federal and state grounds?

MR. CHAPMAN: No, Your Honor. In Brown I, the factual allegation of the transactions and offenses were exactly identical to Brown II. But there was only one legal

theory mentioned in Brown I, and that was violation of the Sherman Act.

QUESTION: Federal; yes. And then in Brown II, state?

MR. CHAPMAN: Brown II mentioned fraud and deceit, unjust -- restitution, and --

QUESTION: Arising out of the same facts?

MR. CHAPMAN: Out of the same facts that were stated in identical fashion; they were verbatim copies of the -- Brown II were the verbatim copies --

QUESTION: Brown II was in the state court?

MR. CHAPMAN: Brown II was originally filed in the state court --

QUESTION: And then removed?

MR. CHAPMAN: -- and then it was removed.

QUESTION: On the grounds of diversity?

MR. CHAPMAN: It was removed on grounds of diversity, of federal question, and then there was an additional federal question -- ground -- that the -- the issue of the scope and effect of the first judgment itself raised the federal question.

QUESTION: Now why do you -- what's the basis for your argument that the state grounds alleged in Brown II are barred by res judicata? Because they weren't stated when they were first filed in the federal court, is that it?

MR. CHAPMAN: It's the standard principle of res

judicata, and I should say, Your Honor, that the -- both courts below held -- we submit, correctly -- that if Brown had been the only case that followed on the government indictment, had it stood alone, the standard principles of res judicata would apply. And that can be stated and has been stated in numerous cases in this Court, that a final judgment -- it was a final judgment in Brown I -- precludes the refiling of the same claim on matters that were raised or could have been raised in the initial case.

QUESTION: Now, do you have a case that, right on, that says if you file in the federal court and you state only federal cause of action, and you lose, and then you file in federal court a -- based on diversity, a state cause of action based on the same facts, that res judicata bars the second suit.

MR. CHAPMAN: Yes, Your Honor. There are specific suits in the antitrust field which we have cited in our reply brief. Most recently, the Fourth Circuit decision in Nash County Board of Education, that was a case which came up the opposite way. The initial case was filed in state court, alleging only state law antitrust grounds. And when that suit was concluded, another party actually, it was the privy of the first party filed in the federal court --

QUESTION: What if Brown II had stayed in the state courts and never been removed, and stated only a state cause

of action, could the state court have -- you would have asserted res judicata there too?

MR. CHAPMAN: Yes, res judicata --

QUESTION: But you might have lost. And would the state court be entitled to, not to try those claims and reject the res judicata claim?

MR. CHAPMAN: Well, Your Honor, it is our understanding, and we have never seen anything contra to this in any of the briefing or research in this case, that the same standards as to res judicata which are applied in the federal court are also applied in California. We believe that the state court --

QUESTION: Well, what if California didn't? And they went ahead and tried out their fraud claim? Now if California would permit that to go ahead, shouldn't the federal court permit it to go ahead if the case is removed, on diversity grounds?

MR. CHAPMAN: The federal court had a special interest in connection with Brown II in determining and avoiding circumvention of its initial judgment in Brown I. The federal court had already -- there had been active engagement in litigation in the federal court; it had devoted time and attention to these matters. Indeed, as Mr. Justice White pointed out, there were state claims that were before the federal court at the same time that Brown I

was dismissed. And it has -- consideration of both federal and state claims.

Once the federal court enters a judgment, this is really the heart of our case, Mr. Justice White, the rule of res judicata comes into play. There are crucial considerations in terms of avoiding vexatious and multiple litigation, conserving judicial resources and promoting respect for judgments, that come into play when that final judgment is entered -- which was entered in Brown I. It is certainly, and we considered it so, and the District Court considered it so, very much in the interest of the District Court to protect its own judgment and to determine the scope of that judgment.

QUESTION: Do you think then that you can get an injunction from the federal court if -- you should have been able to enjoin the filing of Brown II in the state court?

MR. CHAPMAN: Yes, Your Honor. We cite in our reply brief the Fifth Circuit's decision in Woods Petroleum, which was exactly that, where the Fifth Circuit held an injunction by the district court against a state proceeding based on an alleged state theory which was not but could have been alleged as a pendent claim in a prior federal case. And the Fifth Circuit, in Woods, adopted the same rationale that I've just spoken of -- that once there's a

final judgment in a federal court, the federal court does have the right to protect that judgment.

QUESTION: Well Mr. Chapman, supposing that in federal court you have 30 days to file your notice of appeal to the Court of Appeals, and in the California system you have 120 days to file your notice of appeal from an adverse decision of the Superior Court; do you think the principles of Angel v. Bullington and cases such as that would require the federal court to adopt the 120-day principle of California, rather than its own Federal Rules of Civil Procedure?

MR. CHAPMAN: No, Your Honor, by no means. I think that the procedural rules that govern the administration and management of cases within the federal courts are determined by federal law, and that the -- for example, the 30-day, or whatever period that's established in the Federal Rules of Appellate Procedure -- by statute would cover federal cases -- even though on substantive law matters, where a case is in federal court on diversity jurisdiction the federal court would be bound by state law. But certainly not on these procedural matters.

They say that there's a -- the -- the timing and manner in which the supposed state theories were raised in Brown II, are very troublesome. They -- all of these theories could have been, and there's no question about it, could have

been asserted at the same time that Brown I is filed, and this is another basic thrust of the -- this doctrine against splitting a cause of action in res judicata -- if you bring a case you should bring forth all your theories at one time. The complaint could have alleged state law theories; in fact, the same counsel had filed a complaint contemporaneously with Brown I, the Moitie case, which did allege state law theories.

QUESTION: Well didn't Moitie, when it started in the state courts state only a state law?

MR. CHAPMAN: Yes.

QUESTION: That's all it ever had in it?

MR. CHAPMAN: That is correct. And which, I'm saying with respect to Brown I, Your Honor, that it is difficult to see why Brown I --

QUESTION: Is the Moitie case here? Or not?

MR. CHAPMAN: No, Moitie has been voluntarily dismissed. Let me say, Your Honor, that when the Defendants argued for -- on the motion to dismiss before the district court, and I am again talking about the first cases, Brown I, Moitie I, the Weinberg seven cases -- we were faced with some complaints that alleged Sherman Act violations, other complaints that alleged Cartwright Act, California law violations. And we argued that the determining rule, that is, the standard for determining business or property, was

the same under federal law as under California law. So those issues were presented to the district court at the time that the district court dismissed Brown I and dismissed Moitie I. And it disposed of all seven cases including the case before this Court, in its entirety. The crucial difference was that in Brown, which is the only case before this Court, no appeal was taken; instead, an attempt was made to refile, with different theories, all of which could have been brought before the district court, they could have been in the original complaint but they were not. There could have been an argument presented to the district court in the context I've just mentioned that even if you hold that under federal law retail purchasers cannot, do not meet the business or property standard -- that these Plaintiffs could go forward under state law, that could have been done. There could have been a motion to amend the complaint; the federal rules are very liberal.

QUESTION: Mr. Chapman, may I ask you a question? Supposing Brown had simultaneously filed his state law theories in the California court, and his federal theories in the federal court. And as I understand it, the first Brown I was simply the federal theory, is that right?

MR. CHAPMAN: That is correct.

QUESTION: And the federal case--they both progressed with discovery and all the rest, and the federal

case had gone to judgment first. And you had prevailed, either on the legal theory that the Plaintiffs weren't -- didn't have standing, or that there was no federal violation of some kind, would you then have been entitled to dismissal of the state case; that's your basic theory, isn't it?

MR. CHAPMAN: Yes, that's correct. That was exactly what happened in the Fifth Circuit Woods case, which was an injunction action. There were -- the state case that was involved there had been filed simultaneously in fact, perhaps even prior -- but any event, it was proceeding simultaneously with the federal case. The federal case went to judgment first. And that's really the key factor of the res judicata -- application of res judicata, that once there's a judgment, it resolves the matter. Unless the judgment is directly attacked on appeal, as the Weinberg plaintiff did --

QUESTION: Well, when the Brown II complaint was filed, you did not in the state court move to dismiss on res judicata grounds, you removed?

MR. CHAPMAN: That is correct.

QUESTION: And then after you removed, you filed a res judicata motion?

MR. CHAPMAN: That is correct. And the district Court granted the motion, the matter then went to the Court

of Appeals. While Brown II was pending--after the dismissal of Brown II, the Plaintiff did appeal from that judgment --

QUESTION: Well Mr. Chapman, suppose in Justice Steven's example, the two cases being filed simultaneously and the federal case finishing first. Suppose the state -- you had then gone to the state court and said res judicata and the state court said, awfully sorry, but we don't apply res judicata that way in this state. And they tried the case and entered judgment against Federated, and the case then came up here. You wouldn't claim that California was constitutionally disentitled, would you?

MR. CHAPMAN: It's not a constitutional question, no, that's not part of our --

QUESTION: Well why shouldn't the rule in the federal court, in Brown, which was filed in the state and then removed, why shouldn't the state rule apply, of res judicata apply?

MR. CHAPMAN: Let me make clear, Your Honor, that the --

QUESTION: When it's removed on the basis of diversity?

MR. CHAPMAN: Every indication in every case that was ever referred to in the lower courts when this matter was briefed before the lower courts -- it wasn't briefed extensively here, because it wasn't the issue decided by the Ninth Circuit --

QUESTION: But why shouldn't the Ninth Circuit though focus on what the state law is?

MR. CHAPMAN: No, Your Honor. The fact is, there is no reason to believe there is any difference whatsoever between the California law and federal law on res judicata. If I may --

QUESTION: Well -- the Ninth Circuit didn't say that.

MR. CHAPMAN: If I may address specifically what the Ninth Circuit did? The Ninth Circuit stated that if there had only been the Brown case, that the normal standards of res judicata -- and it didn't purport to distinguish between federal or state law would apply and that the failure to appeal from the dismissal of Brown I would bar the refiling of Brown II.

QUESTION: Well both the federal courts by statute and the state courts by the Constitution are bound by the full faith and credit clause, are they not?

MR. CHAPMAN: Precisely. And the important element here is that this was a federal judgment and the scope of the federal judgment is a matter of federal law. This Court had held that in Stoll v. Gottlieb and other cases. But the crucial distinction as to what the Court of Appeals did was as follows: the Court of Appeals said again, if this was only one case, we would have no trouble applying res judicata.

But it noted that the Weinberg cases, the other five federal cases which were dismissed at the same time as Brown I, did appeal. They followed the orderly course and took their case up to the Ninth Circuit. Subsequently, this Court, in Reiter v. Sonotone, held that under Section 4 of the Clayton Act, retail purchasers do state a claim of injury to their business or property and so on the basis of that, the Weinberg cases were reversed by the Ninth Circuit and sent back to the district court.

A few months later, Brown II was argued in the Court of Appeals. And the Court of Appeals decided this case on one ground and one ground only, and that is that because the other plaintiffs in other separately filed independent actions, the Weinberg cases, did appeal and did obtain a reversal in their case that even though Plaintiff Brown had suffered a final judgment, had not attempted to appeal his case, but in fact attempted to refile in another litigation, that Brown is entitled to have his action reinstated because of the benefit of the appeal by the other parties. And that was the issue and the only issue raised in the petition for certiorari --

QUESTION: Mr. Chapman, are you saying that -- I guess you are, that if you file a federal cause of action in federal court, a federal question case, if out of those facts you have a pendent state claim you must file it.

Not only does the federal court have jurisdiction over these pendent claims, but it has -- would have absolutely no discretion to refuse to decide the pendent claims.

MR. CHAPMAN: Oh quite the contrary, quite the contrary. The rule is well stated in cases in this Court, and accepted in the restatement, again, it's a question of not splitting your cause of action and bringing all your cases at one time. The key of pendent jurisdiction is discretion.

QUESTION: Well wasn't Brown, when it was originally filed in the state -- in the federal court, weren't the state claims asserted only within the jurisdiction of the federal court because of pendent jurisdiction? Or what was it?

MR. CHAPMAN: The state claims could have been based on diversity or pendent jurisdiction; there was no ajudication of that point. The state claims were permissible there because there was diversity jurisdiction.

QUESTION: But none were alleged, I thought you said?

MR. CHAPMAN: In Brown there were none alleged. In five of the other cases, in two of the other cases they were alleged. But the key, Your Honor, if I may say this, is that --

QUESTION: Well, your argument doesn't depend on what happened in the other cases does it?

MR. CHAPMAN: That's exactly the point. But the Ninth Circuit decision depends solely on what happened to the other cases, and nothing else. The Ninth Circuit ruled--

QUESTION: But Mr. Chapman --

MR. CHAPMAN: -- solely that the only reason why res judicata should be relieved in this case was that the other cases were reversed on appeal. And we submit that that creates a premium for overriding the finality of judgment in just the worst kind of cases where you have a piling-on of multiple actions in the wake of a government antitrust case, which is very typical. The only reason that this case is here is because other parties in other cases did appeal and did obtain a reversal. And we believe that to allow relief from the finality of judgments because of actions taken by other parties would only impair the ability of the district courts to coordinate and control complex multi-party class actions.

QUESTION: Mr. Chapman, let me interrupt you again, because there's a point of the precise way in which litigation -- precise posture of litigation I'd like to clarify. Under the judgment of the Ninth Circuit, as I understand it, the district court is now free to try both the federal claim and the state claim, do you read it that way?

MR. CHAPMAN: Yes.

QUESTION: And your primary argument is they are

wrong in reinstating the federal claim on the basis of the five other -- reversal of the five other cases. But is it not true that there is an entirely separate legal problem as to whether or not the state claim survived, and isn't that problem one we must answer by knowing how California would interpret its doctrine of res judicata?

MR. CHAPMAN: Well I would answer in two ways. First, that the -- the answer is no, that is not what the Ninth Circuit did. The Ninth Circuit understood --

QUESTION: You just told me they are both still standing, both the state and federal claims are alive now.

MR. CHAPMAN: The Ninth Circuit understood that the application of res judicata would bar the entire claim and the term claim is not -- we're not dealing with forms of actions, it's the entire collection of rights and any legal theories that arise out of this transaction.

The Ninth Circuit held that normally federal or state claims would be barred if this were the only case. But it relieved Brown of res judicata, which opened up the entire claim because of what happened in the other cases.

QUESTION: Well in that --

MR. CHAPMAN: May I say, there's no question but that California law and federal law are absolutely identical on what is meant by res judicata. The problem in this case is that the Ninth Circuit refused to follow any of the

standards of res judicata by virtue of one fact and one fact alone, namely that the other cases, the Weinberg cases, were reversed on appeal. So there was no distinction between, there is no distinction between the law of California and --

QUESTION: Well yes, but if in Brown I -- there'd never been any appeals -- the district court had dismissed the complaint saying well I don't know anything about California law, but I know you're not a plaintiff qualified to sue under Section 4 of the Clayton Act; file any state law claims you want someplace else. You wouldn't say that you would be barred from going to the state court, I'm quite sure?

MR. CHAPMAN: The district court could have had discretion under the doctrine of pendent jurisdiction to pull out any --

QUESTION: But there were no state claims asserted, so all he could do on the basis of what had been filed before him, is say well I don't think you are a proper plaintiff under Section 4.

MR. CHAPMAN: On the contrary, Your Honor, the law against splitting a cause of action makes it clear that when plaintiffs bring their actions they cannot hold back theories in their back pockets and try out -- try their luck with the federal claim. If that doesn't work, then they have something else to fall, another line to fall back on

in state courts. And the cases that we cite on the standard of splitting a cause of action all go to that.

The district court does have discretion, but he must not be deprived of his opportunity to exercise discretion by not having the cases brought forward. And I would also say that the district court did know, as counsel concedes in his brief, that there was at least a potentiality of state cases at the time that Brown I was dismissed because Moitie --

QUESTION: Wouldn't you -- on this very argument, wouldn't you make a difference between claims that are just pendent to a federal claim or that are arguably pendent, and claims that could be brought originally in the federal court based on diversity? Because then, these diversity claims would independently be within the jurisdiction of the federal court and -- and there was diversity here.

MR. CHAPMAN: There was diversity -- I think, the important point, Your Honor, is this. If you don't have to, and we believe in this case that no issue with respect to pendent jurisdiction is before this Court --

QUESTION: Because there is diversity.

MR. CHAPMAN: Because there is diversity, but the basic rule against splitting a cause of action would apply no matter how the case got into federal court.

QUESTION: Well in any event, there's only one

issue before us, is there not?

MR. CHAPMAN: Yes sir.

QUESTION: In the present posture of the case?

MR. CHAPMAN: That's correct.

QUESTION: Only one question was raised in the certiorari petition, only one question is addressed in your original brief --

MR. CHAPMAN: That is correct.

QUESTION: -- and while the Respondent's brief canvasses the issues that my brothers have asked you about, that's not before us now, is it?

MR. CHAPMAN: That -- you are precisely correct. The question is to whether there is an exception from res judicata in multiple-party, multiple-action litigation where--

QUESTION: But what if the question is did the Court of Appeals -- if the question is, did the Court of Appeals properly reinstate these judgments. That's -- right?

MR. CHAPMAN: The Court of Appeals -- the question--

QUESTION: That is the question, you say they should not have reinstated either the state or the federal claims?

MR. CHAPMAN: The question is whether the Court of Appeals properly reversed the dismissal for res judicata. The grounds, which were stated by the Court of Appeals, was that res judicata would apply but for the action in the other multiple cases. And we say, Your Honor, that there is

absolutely no basis, indeed, Respondent presents no basis for the novel ruling of the Court of Appeals in this case.

I'd like to reserve the few moments I have for my response.

MR. CHIEF JUSTICE BURGER: Mr. Offstein.

ORAL ARGUMENT OF JERROLD N. OFFSTEIN, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

The facts have been developed. Seeing the noon hour approaching, I'm going to try to concentrate on points that we concentrated on. I believe the Court of Appeals sought and -- in my view, the Court of Appeals tried to do, was have the baby. It did not want litigation about the same complaints, if you will, and -- the same cognizable claim or not -- before both the federal and the state court.

And in so doing ignored its own ruling, in Hodge v. Mountain States Telephone Company. Now Hodge, is very interesting, because it causes me to disagree with a great deal of the authority cited by my opposition. Hodge is a case wherein summary judgment was had over both state and pendent claims, in the district court, the Ninth Circuit in 1977, reversed that saying, according to Mine Workers v. Gibbs if there is no substantial federal question, state claim as a matter of comity belong in the state courts.

That California law follows that is cited -- is stated very clearly in the case we cite as Merry v. Coast Community College, where the -- and I'm quoting the Ninth Circuit Court of Appeals consistently held that where a federal claim dismissed on a motion for summary judgment before there has been a substantial expenditure of the Court's time or energy on the case, proper exercise of discretion requires dismissal of the state claims without prejudice to plaintiff's right to litigate them in a proper state forum.

QUESTION: Well Mr. Offstein, I take it you would concede that the Ninth Circuit is bound by holdings of this Court in matters of federal law?

MR. OFFSTEIN: Agreed. Mine Workers v. Gibbs in this case.

QUESTION: I notice in your brief you give rather short shrift to the case of Reed v. Allen, which was decided in 1932, on page 8, you cited, simply saying that Professor Moore has criticized it in his treatise. Do you want us to overrule it?

MR. OFFSTEIN: I believe it should be, I believe it was bad law then. I believe that a rule, as many commentators have stated and many cases have said of equity must be equitably applied as this Court said recently in Brown v. Felsen -- that you have to sparingly apply such a rule so as to avoid shielding wrongdoing behind a technicality.

QUESTION: And that would be a case-by-case analysis.

MR. OFFSTEIN: Indeed, it is an equitable rule.

I want to emphasize two facts with which I disagree with my opposition. Principally what was disposed of in Brown I? It was the question of whether or not the plaintiff could maintain a cognizable claim under Section 4 of the Clayton Act. I was in a court of limited jurisdiction, they told me go away, in its entirety. I went to the Court of general jurisdiction with my claims. Merry v. Coast Community College, the very recent California case, Court of Appeals case on point, says I did the correct thing. Mine Worker v. Gibbs says I did the correct thing. I was -- there was nothing to which to append state claims once we had been directed to get out of the court of --

QUESTION: But you could have presented your state claims originally in the federal court, not just as pendent jurisdiction, but as -- on diversity grounds?

MR. OFFSTEIN: I don't believe there was diversity. One of the --

QUESTION: Oh, I see. I see.

MR. OFFSTEIN: -- features of the municipal court.

QUESTION: Well how was Brown removed, Brown II removed, eventually, on federal question?

MR. OFFSTEIN: In a blur. There were two issues that I believe defeat the diversity jurisdiction in the case

at bar, to-wit, Brown II. Point Number One: at the time we filed the action in municipal court, in California, the jurisdictional amount was $5,000.00 and that's what we pleaded per claimant. Not $10,000.00. Under Younger, Harris that cannot be aggregated. Moreover, no injunction was sought, so the jurisdictional amount, it seems to me cannot be generated that way.

Accordingly, in my mind, and I've never seen it actually adjudicated, there was never diversity jurisdiction in this case.

QUESTION: Well there wasn't federal question then, either?

MR. OFFSTEIN: In my mind there was not.

QUESTION: So there never -- the removal was wholly improper you think?

MR. OFFSTEIN: I do.

QUESTION: But the Court of Appeals has decided otherwise.

MR. OFFSTEIN: I think the Court of Appeals was trying to avoid piecemeal litigation that is permissible because it didn't like it. It tried --

QUESTION: Well suppose we disagree with you on the -- suppose we think it's important to know whether there was diversity jurisdiction and we disagree with you. Suppose we concluded yes there was diversity jurisdiction over the

state law claims and that they could have been filed originally with the federal claim in Brown I?

MR. OFFSTEIN: Yes sir.

QUESTION: Would that make any difference to you?

MR. OFFSTEIN: No sir. By Mine Worker v. Gibbs --

QUESTION: That's just a pendent case.

MR. OFFSTEIN: But once there's no federal nexus and once we haven't gone into -- Mine Worker v. Gibbs it seems to me there was a discussion in the beginning of the opinion where it said even if you were to get into the trial on the merits of the cause, and the only merits we've had heard are whether or not we had standing to maintain a cognizable claim under Section 4 in a court of limited jurisdiction.

QUESTION: But in Angel v. Bullington, the Court says the "merits" of a claim are disposed of when it is refused enforcement. I take that to mean it doesn't necessarily have to go through A, B, C, D, E, F if it dismisses it for some reason -- and judgment for the defendant.

MR. OFFSTEIN: I believe, Your Honor, as I understand the premises, the increments that add up to whether or not one is entitled to res judicata in effect, against an opponent, is whether or not some threshhold bar has prevented an actual dispute or a resolution of the substance of the dispute in the case at bar, whether or not certain

activity took place on the part of the department stores which caused injury, proximately caused injury to these people, these claimants in the class -- putative class.

QUESTION: Did you make any motion to remand the case?

MR. OFFSTEIN: I did, Your Honor, in Brown II. In Brown I there was nothing to remand. The Court sua sponte invited the motion from the defense to dismiss for want of standing under the Clayton Act. That motion was briefed, held under submission for a long time. It was granted, the actions were dismissed in their entirety. I read Mine Worker v. Gibbs, it said when there is nothing to append a state claim to, you don't belong in federal court. So we went to the only other available forum, the court of general jurisdiction, the state courts, whose rules of res judicata -- the facts at bar in this Merry v. Coast Community College case, say we did the right thing.

QUESTION: So then, you think California courts would not have sustained a plea of res judicata?

MR. OFFSTEIN: No sir.

QUESTION: On these facts?

MR. OFFSTEIN: Nor would the Ninth Circuit or this Court, I believe, under Mine Worker v. Gibbs. I believe the Ninth Circuit was trying to fashion an equitable remedy in a larger sense, was a little --

QUESTION: And that he arrived at that result by the wrong way, wrong --

MR. OFFSTEIN: Agreed. Hodge was their law, Hodge is what they should have followed, Hodge is what we did, following Gibbs. If this rule is undone, that allows someone who is barred on a threshhold bar from litigating the substance of their dispute between the parties, you have undone Mine Worker v. Gibbs and replete other cases --

QUESTION: Hodge is a Ninth Circuit case?

MR. OFFSTEIN: That's correct, Hodge v. Mountain States Tel. and Tel., 1977.

QUESTION: Well you, if you really mean what you say, it seems to me you are conceding -- if you say that the Ninth Circuit arrived at the right result for the wrong reason, you really are -- aren't you really suggesting or really conceding that the reinstatement of the federal claim is wrong?

MR. OFFSTEIN: Yes.

QUESTION: Of course, if that's true, I take it under the Cartwright Act you get treble damages, is that right?

MR. OFFSTEIN: I did not plead the Cartwright Act claim in Brown II, but yes sir, that is the case.

QUESTION: Well you would -- we just have a common law claim, is that what it is?

MR. OFFSTEIN: Yes.

QUESTION: So that means basically, you're asking for single damages in this?

MR. OFFSTEIN: Correct.

QUESTION: And also you don't have the benefit of the prima facie -- well what happened in the government case?

MR. OFFSTEIN: There was no indictment in the relevant geographic --

QUESTION: I see.

QUESTION: The California Court wouldn't have -- Brown II, when you filed in the state court, did you state your federal claim too, or was it all state?

MR. OFFSTEIN: I was told--I was dismissed for want of standing, I didn't see any other federal claim --

QUESTION: Well did you state a federal claim in the state courts in Brown II?

MR. OFFSTEIN: No, not in my case.

QUESTION: Solely state?

MR. OFFSTEIN: Correct.

QUESTION: Well, let's see now. The Court of Appeals gave you more than you asked for, then when they reinstated Brown I judgment, is that right?

MR. OFFSTEIN: When -- my law clerk asked me, when he saw the decision, what happened? I told him I didn't lose.

QUESTION: Well tell me what happened -- tell me what happens if the Ninth Circuit is affirmed, the judgment is affirmed by us? What are you going to do when you go back to the district court, say sorry, I don't want you to hear me on the federal claim?

MR. OFFSTEIN: I --

QUESTION: Just hear me on the state claim?

MR. OFFSTEIN: Well, at this point, the federal claim would now, somehow or other, be -- I would like to be in the state court. I think my clients have made -- I know my clients, one of them an attorney, has made the election to proceed in state court under the state claims. We have, frankly, a district judge which has shown no affection for the cause --

QUESTION: Well that doesn't answer my question. What are you going to do if we affirm? What are you going to do in the district court about the reinstated federal claim?

MR. OFFSTEIN: Well I believe --

QUESTION: Which you say you're not entitled to?

MR. OFFSTEIN: I'm sorry, I don't follow.

QUESTION: Which you just said you're not entitled to, as I understood it.

MR. OFFSTEIN: I was asked a narrow question and I tried to answer it straightforwardly.

QUESTION: Yes, you did, I think.

MR. OFFSTEIN: I believe we would be estopped from relitigating the question of whether or not we have standing under the Clayton Act.

QUESTION: Right.

MR. OFFSTEIN: And to the extent more is asked, I'm --

QUESTION: But you're not -- you are not barred from trying your state claim?

MR. OFFSTEIN: No sir. You're going to run right into the state of California if you rule that we can't in this Merry v. Coast Community College case. And I believe this is a paradigm case and I'm willing to stand or fall on its reasoning. The California Court of Appeals.

In that case, -- do I presume on the patience of the Court?

QUESTION: Perhaps this is a silly question, but you're not going back to the state court, you're going to confine yourself to the state claims, but you're in the federal court to stay, aren't you?

MR. OFFSTEIN: It's not clear to me to what --

QUESTION: There was a motion to remand that was denied. Didn't that settle where the case will be tried?

MR. OFFSTEIN: That could very well settle that. And it could be heard in the district court if that was their pleasure.

QUESTION: But if -- I don't know -- what do you suppose the district court will do if it were determined, for example, that the Court of Appeals was wrong in reinstating the federal claim and that only the state claims are there?

MR. OFFSTEIN: I believe it would have the express power to act under Mine Worker v. Gibbs.

QUESTION: Well it's hardly for the district court to determine that the Court of Appeals was wrong, is it?

MR. OFFSTEIN: No sir.

QUESTION: Well I'm saying if we said the Court of Appeals was wrong, in reinstating the federal claim.

MR. OFFSTEIN: I believe that the district court would have the option, as a matter of discretion.

QUESTION: Am I correct in understanding that you are no longer supporting the judgment of the Court of Appeals?

MR. OFFSTEIN: No. I support the ultimate conclusion of the Court of Appeals and much of its reasoning; I believe that it made an unusually elaborate --

QUESTION: Not its reasoning?

MR. OFFSTEIN: I made a great deal of its reasoning. And certainly its equitable premises, I believe that it made an elaborate ruling to try to avoid -- to give each side something. In their case --

QUESTION: It ruled primarily on equitable grounds,

as it said, but you now go -- you now go back to the federal court, and I understand you to say that you thought that was in error?

MR. OFFSTEIN: I said that it was -- Clayton 4 cause, if any, is now expired, and would be --

QUESTION: If you thought it was in error, why didn't you file a cross-claim?

MR. OFFSTEIN: Cross-petition in this court?

QUESTION: Cross-petition.

MR. OFFSTEIN: Because it was my reading of the rules, -- hopefully an accurate one, that once the case was brought up, irrespective of the narrow point, once the entire file would be brought forward the ultimate reasoning of the Court and the increments of its reasoning, I've been led to believe that this Court in particular deals with substance, not form. Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further?

ORAL REBUTTAL ARGUMENT OF JEROME I. CHAPMAN, ESQ.,
ON BEHALF OF THE PETITIONERS

MR. CHAPMAN: I would like, Mr. Chief Justice, to make two brief points. First, the issue that is presented in this petition is the Ninth Circuit's ruling that in multiple-party actions, the appeal by certain parties relieves the party who didn't appeal from the normal application of res judicata. It's our submission, for the reasons in our briefs,

that this would create a tremendous hardship and burden in the administration of complex, multiple-party class actions. The Respondent's submission, Your Honor, would, if accepted, create a burden in all cases, because he is arguing in favor of piecemeal litigation, that you don't have to bring forward once you come into a federal court, or whatever court with your first complaint, you don't have to bring forward all your theories, you don't have to bring forward all of your rights for recovery, you don't have to give the district court discretion to choose whether or not to handle all the cases at one time. So we believe that the issue presented by Respondents is not properly here, and we urge reversal of the Ninth Circuit and reinstatement of the district court's decision.

MR. CHIEF JUSTICE BURGER: Thank you gentlemen. The case is submitted.

(Whereupon at 11:47 o'clock a.m. the case in the above matter was submitted.)

CERTIFICATE

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. 79-1517

FEDERATED DEPARTMENT STORES, INC., ET AL.,

v.

MARILYN MOITIE AND FLOYD R. BROWN, ETC.

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

BY: William J. Wilson