OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1452

TITLE R. ANTHONY MARRESE, ET AL., Petitioners v. AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS

PLACE Washington, D. C.

DATE December 4, 1984

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(202) 628-9300

IN THE SUPREME COURT OF THE UNITED STATES

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R. ANTHONY MARRESE, ET AL., :

Petitioners, :

V. : No. 83-1452

AMERICAN ACADEMY OF :

ORTHOPAEDIC SURGEONS :

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Washington, D.C.

Tuesday, December 4, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:48 o'clock p.m.

APPEARANCES:

CHARLES W. MURDOCK, ESQ., Deputy Attorney General of Illincis, Chicago, Illinois; on behalf of Illinois, et al., as amicus curiae in support of petitioners.

MICHAEL T. SAWYIER, ESQ., Chicago, Illinois; on behalf of petitioners.

D. KENDALL GRIFFITH, ESQ., Chicago, Illinois; on behalf of respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Marrese against American Academy of Orthopaedic Surgeons.

Mr. Murdock, you may proceed whenever you are ready.

ORAL ARGUMENT OF CHARLES W. MURDOCK, ESQ.,
ON BEHALF OF ILLINOIS, ET AL., AS
AMICUS CURIAE IN SUPPORT OF PETITIONERS

MR. MURDOCK: Thank you. Mr. Chief Justice, may it please the Court, the facts, briefly stated, are these. Dr. Treister filed suit in state court to compel respondents to grant him a fair hearing on his application for membership.

The Illinois appellate court in a case of first impression held that under certain circumstances Illinois courts can inquire into membership practices of a voluntary organization, but these circumstances are limited to the situation in which the membership in the organization is a matter of economic necessity.

Accordingly, the Illinois appellate court dismissed the complaint. No evidentiary hearings were ever held. Petitioner then filed suit in federal court under Section 1 of the Sherman Act. The Seventh Circuit in a five-to-four en banc decision held that the federal

suit was barred on the basis of claim preclusion.

The position of the state can be summarized as follows. The preclusive effect, if any, of a prior state judgment on a subsequent exclusively federal cause of action should be limited to issue preclusion. The decision of the Seventh Circuit, standing as it does on claim preclusion, is unsound from a policy standpoint, unworkable and unnecessary from a practical standpoint, and unsupportable from a legal standpoint.

QUESTION: Mr. Murdock, in your amicus brief on behalf of the State of Illinois, you say, "The Attorneys General are greatly interested in the correct application of the laws of the United States." Is there any more particularized concern that you as Attorney General of Illinois have in this case?

MR. MURDOCK: Actually, we are more concerned about the effect that this case will have on enforcement proceedings. In effect, it establishes a rule that when you have both a state claim and an exclusively federal claim, the federal claim must be brought in the first instance in federal court, and then under pendant jurisdiction the state claims must be appended to it or else under claim preclusion arising out of the federal proceeding they will be lost and could not be brought in a state proceeding.

So, the net effect of this is that any time you have both a state claim and an arguably colorable exclusively federal claim, the state claim can never from a practical effect be determined in state court.

QUESTION: It will just drive all plaintiffs to federal court.

MR. MURDOCK: That's right, and that is why from a policy standpoint you are going to increase the work load of the federal court.

QUESTION: So your concern isn't just that the state is a potential antitrust plaintiff. You do have a kind of a broader picture than that.

MR. MURDOCK: Yes.

QUESTION: I suppose you would like to be able to have your own state courts enforce your own state antitrust act.

MR. MURDOCK: Well, not only our antitrust act, Your Honor, but the decision, we believe, also is unworkable because it assumes that when you bring -- when you file your first suit, you know what you have, and that simply is not the case.

If I can use an example derived from the Fifth Circuit's decision in Hayes versus Solomon, the lessor, when he files his state court proceeding, may realize that he has a breach of lease case, but it is not until

discovery and investigation that he may realize that the breach of lease is part of a broader scheme that also gives rise to a federal antitrust claim.

Now, under the Seventh Circuit's decision, arguably the federal claim is then barred because you started the state proceeding. If it proceeds to judgment, it will then bar the subsequent federal proceeding.

What happens here is that, in the example that I have just illustrated, plus we have found often from our own experience that what starts out as a consumer fraud case, for example, may turn into a securities case, or an antitrust case, or civil RICO case, and what happens is, the state's claim, the state suit is properly brought in state court.

Now, normally when there is discovery and additional investigation, and additional facts show there will be another claim, you simply amend your state court suit, but when what you discover is an exclusively federal claim you cannot amend your state court suit.

Now, Justice Flamm's solution to this impasse is to file two suits, a state court suit, the state claim in state court, the federal court claim in federal court. But what then happens is, you have two suits proceeding simultaneously. You will have duplicative

discovery, duplicative motion practice, and obviously one suit will go to judgment first.

Then, if these do involve the same transaction, the first judgment will undoubtedly have some preclusive effect on the second suit, and that means that any of the proceedings, or at least some of the proceedings in the second suit are redundant. Now, this certainly is not judicial economy.

Now, finally, or really, the state believes that issue preclusion will take care of most of the concerns that the Seventh Circuit raised. To take the parade of horribles example in Derish versus San Mateo, if you had a state antitrust statute that was identical to the federal antitrust statute and the state court suit first went to judgment and there was a trial, the second suit will be barred not on claim preclusion but on issue preclusion because a necessary fact for the federal suit will have been determined in the state suit.

Finally, Your Honors, the Seventh Circuit decision is legally unsupportable. This Court last term in Migra held that a federal court must look to state law to determine the preclusive effect of a state court judgment, and Illinois law is absolutely clear that the first court must have jurisdiction to determine the

claim sought to be barred in the second suit.

There are two Illinois decisions that establish that principle, neither one of which is cited in any of the briefs. These cases are Barton versus Southwick, 258 Illinois 515, and Phelps versus City of Chicago, 331 Illinois 80.

Phelps is directly on point. It involved a first action, an ejectment in which the City of Chicago did not assert the validity of certain tax deeds. While the suit was pending, a statute was amended which would have permitted such a claim to be brought in the ejectment proceeding.

Later, the city in a partition proceeding sought to raise assert the validity of the tax deeds. The Illinois Supreme Court held that had the first suit gone to judgment before the statute was amended, the first suit would not have been res judicata with respect to the validity of the tax deeds because that claim could not have been raised in the first suit, but since the first suit went to judgment after the statute was amended, the validity of the tax deeds could have been asserted, and therefore the city was estopped, precluded -- issue preclusion -- from raising that.

Thus Illinois clearly requires that the first court must have jurisdiction over the second claim in

order for the second claim to be barred by issue preclusion. Accordingly, the state would ask this Court to reverse the decision of the Seventh Circuit.

QUESTION: Does the state take a position on the correctness of the Fourth Circuit's decision in the Nash County case?

MR. MURDOCK: Your Honor, the Fourth Circuit's decision may be right in the result but wrong on the reasoning, since it involved, first of all, a settlement, and arguably out of a settlement of a claim you can assume a waiver, although -- actually were the documents that gave rise to the settlement.

It can be rationalized on that basis. Also I believe it did involve a statute that was almost identical to the federal statute.

Thank you.

CHIEF JUSTICE BURGER: Mr. Sawyier.

ORAL ARGUMENT OF MICHAEL T. SAWYIER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. SAWYIER: Mr. Chief Justice, and may it please the Court, this case presents the basic question whether the plurality opinion of the Seventh Circuit was correct in making what Justice Potter Stewart referred to as a completely unprecedented expansion of the res judicata doctrine for extremely dubious reasons.

After two successively vacated panel decisions, both dissented to by Justice Stewart, a five-to-four majority of the Seventh Circuit held that the present exclusively federal antitrust action is precluded by claim preclusion as the result of the Illinois court's dismissal of the petitioners' two previous Illinois court actions against the respondent.

However, because of the exclusive federal jurisdiction over federal antitrust actions, this action could not possibly have been brought in the Illinois courts. The actions that the petitioner did bring there were state common law actions, and had nothing to do with antitrust law, and those actions were dismissed at the outset for failure to allege a claim under that completely different body of law.

In 1976 and 1977, when those state court actions were filed, no practicing lawyer would have imagined that their outcome might preclude by claim preclusion any subsequent exclusively federal claim, yet that is the radical and unjust result of the Seventh Circuit's claim preclusion decision as here imposed upon the petitioners, thus in effect denying them any day in court with respect to their present exclusively federal claim.

At no point during the course of this action

has the respondent dared to attempt to defend the merits of the exclusionary actions that it took toward the petitioners. Instead, it is argued to the District Court that the petitioners do not need to see their application files, because the information contained in them, and I quote, "would not substantially add to or detract from their general understanding of the facts."

The petitioners' general understanding of the facts, Your Honors, is set forth at Pages 4 to 5 of their principal brief to this Court.

They have alleged that Dr. Treister was excluded from the respondent as a result of a conspiracy by the respondent's members to limit the output of expert testimony for plaintiffs in medical malpractice actions against orthopaedic surgeons in the Chicago area.

They have alleged that Dr. Marrese was likewise excluded for inherently illegal anticompetitive reasons. They have further alleged that the respondent's entire nationwide admission system is procedurally arbitrary and unfair, so unfair that the respondent in fact purports to prohibit any rejected applicant from questioning in any manner an adverse admission decision.

The petitioners have never received a hearing

on these claims, and unless this Court reverses the Seventh Circuit's radical claim preclusion decision, they never will receive such a hearing.

The states of the Seventh Circuit have ably demonstrated the strong policy objections to compelling plaintiffs with both state law and exclusively federal claims to bring their state law claims in federal court. Indeed, the spectacle of state governments having to litigate their state law claim in federal court is so objectionable that it by itself discredits the Seventh Circuit's approach.

But the petitioners would emphasize in addition the following three decisive points, any one of which is sufficient to require the reversal of the Seventh Circuit's claim preclusion decision.

First, there is an overriding federal rule of the nonpreclusion of exclusively federal claims by claimp preclusion as the result of previous judgments when the previous tribunals lacked subject matter jurisdiction over such claims.

Second, as the states of the Seventh Circuit have demonstrated to this Court, Illinois' claim preclusion rules have always recognized and applied this same fundamental could have been raised principle, which is the fundamental fairness limitation of the claim

preclusion doctrine.

Third, even if the Fourth Circuit's adoption of the identity analysis in Nash were correct, so that a state antitrust claim could ever conceivably substitute for an exclusively federal antitrust claim, this case is not that case.

The Illinois antitrust actions that were the only antitrust actions which petitioners could previously have brought in the Illinois simply are not the same as the present excusively federal action.

There are two principal lines of authority for the overriding federal rule of nonpreclusion. First, the long-established prior jurisdictional competency requirement of federal claim preclusion as embodied in the could have been raised limitation of that doctrine.

Second, the independent federal interest in what Judge Learned Hand referred to as the untrammeled jurisdiction of the federal courts over the various grants of exclusively federal jurisdiction.

QUESTION: Does this federal interest extend so far as to preclude a sort of issue preclusion if the same facts have been litigated in a state court action, albeit where you could not have litigated the federal claim, if that nucleus of facts has been litigated and the state court has made factual determination.

MR. SAWYIER: Your Honor, the petitioners do not take a position on that issue except to point out that in the case of the previous state court actions that are here concerned, there were no determinations of fact, there were no determinations of law except for a determination that a technical pleading requirement of Illinois common law that has nothing to do with the antitrust laws was not satisfied.

In fact, the petitioners have argued that the fact that there were no determinations in the Illinois court is itself an argument for the particular unfairness of the preclusion here.

QUESTION: So you don't have to deal with the Nash County decision one way or another?

MR. SAWYIER: We believe that just as the states of the Seventh Circuit have stated, the Nash case and for that matter the Derish case, the facts support our position because of the material differences between the Illinois antitrust statute and the Sherman Act and the Clayton Act as well as the fact that no antitrust action was in fact brought in the state courts.

But as for the question of issue preclusion as to issues of fact, the petitioners believe that issue preclusion of that sort may be consistent with the regime of exclusively federal grants of jurisdiction.

QUESTION: Well, the plurality at least thought that Section 1738 just wasn't applicable in this case, didn't it?

MR. SAWYIER: Yes, it did.

QUESTION: What if we -- you think that it is.

MR. SAWYIER: Your Honor, we believe that Section 1738 is generally applicable. The plurality's position that the statute was inherently inapplicable so that even in the absence of an overriding --

QUESTION: Suppose we agreed with you and disagreed with the Seventh Circuit in that regard. Do we need to go any farther, or did they go on and say even if 1738 is applicable, we are giving no more effect to the state court judgment than the state courts would. Didn't they say that -- didn't they disagree with you, or they disagreed with your position that the state courts would not give claim preclusion in this case?

MR. SAWYIER: The Seventh Circuit did not get into the question of state preclusion law.

QUESTION: It didn't. It didn't.

MR. SAWYIER: That is correct. Judge Flamm referred in passing to his particular --

QUESTION: If we disagreed with the Seventh

Circuit on the applicability of 1738, why should we go any farther?

MR. SAWYIER: Because, Your Honor, there is an overriding federal rule of nonpreclusion which avoids the necessity to get into these questions of state preclusion law.

QUESTION: I know, but I thought that if 1738 is applicable, the preclusion claim in the federal court has to be decided on the basis of how the state court would.

MR. SAWYIER: In general, that is absolutely correct, Your Honor, but in Kremer v. Chemical Construction Corporation, this Court pointed out two exceptions to the general rule of Section 1738, and the petitioners believe that the more important of those exceptions is not the implied statutory exception, although in Brown v. Felson that implied statutory exception was fully indicated.

The petitioners believe that the more important exception was the full -- the concept of the full and fair opportunity to litigate that is necessary for any preclusion. In Kremer --

QUESTION: Yes, but your position is that under state law there would be no preclusion in this case.

MR. SAWYIER: Absolutely, Your Honor.

QUESTION: I mean, if you follow their principle of preclusion, that you wouldn't get preclusion at all.

MR. SAWYIER: That's correct.

QUESTION: If you are right in that regard, why, we don't have to talk about what the federal rule would be, do we, if we disagreed on 1738.

MR. SAWYIER: Your Honor, we believe that this Court should decide this matter on the basis of a federal rule so that it is not necessary in administering the various grants of exclusively federal jurisdiction to inquire into state preclusion rules, although, to be sure, the petitioners are unaware of any state's claim preclusion rules that would call for the preclusion of a claim that could not possibly have been raised in the previous tribunal.

But, Your Honor, I would like to return to the concept of the full and fair opportunity to litigate in Kremer.

QUESTION: You mean as a federal rule.

MR. SAWYIER: Yes, Your Honor.

QUESTION: Of preclusion -- of nonpreclusion.

MR. SAWYIER: Of nonpreclusion. Precisely. If even the relitigation of exactly the same issue may

not be precluded, as this Court said in Kremer, even the relitigation of exactly the same issue may not be precluded.

QUESTION: You said that.

MR. SAWYIER: Unless the parties have received a full and fair opportunity to litigate it in the previous proceeding, then surely the initial litigation of an entire claim no aspect of which could have been litigated in the prior proceeding may never be precluded.

The jurisdictional impossibility of bringing a claim in the previous forum is the opposite of the full and fair opportunity to litigate it which this Court said in Kremer is necessary for preclusion.

The respondent has also been utterly unable to respond to the petitioner's third point concerning the materially different applicable standards of liability and damages as between the Illinois antitrust actions that they might have brought but did not and their present exclusively federal antitrust action.

Here and now, the petitioners challenge the respondents once again to say anything in response to their analysis of the applicable standards of liability and damages.

QUESTION: Mr. Sawyier, under your theory of

this federal rule that goes -- it is bigger than 1738, I guess, is the way you are putting it. Supposing that there had been an Illinois antitrust action filed and it was litigated and one of the issues was the good faith of the respondent, and the Illinois trial court found that the respondent acted in good faith at all times.

Now, supposing you now bring the federal antitrust claim, and for some reason the issue of good faith is again relevant. Now, can the respondent argue preclusion in the federal antitrust case by virtue of the earlier litigation?

MR. SAWYIER: Your Honor, the petitioners are not opposed to the application of issue preclusion as to issues of fact from a state court proceeding to an exclusively federal antitrust proceeding. They do say, however, that that is not the issue in this case, because there were no issues determined in the Illinois actions except for the technical pleading requirement of Illinois common law.

In conclusion, Your Honors, the petitioners respectfully ask this Court to reverse the Seventh Circuit's claim preclusion decision which the dissenters below rightly describe as an arbitrary and unjust denial of access to the federal courts.

That decision was not only arbitrary and

unjust. It offended the fundamental principle identified by Justice Stewart, the principle that parties, not judges, choose the forum. At the same time, and it is a necessary result of that decision, the petitioners respectfully ask this Court to reverse the criminal contempt decision.

That decision was absolutely dependent upon the claim preclusion decision, as demonstrated by the petitioner's supplemental brief concerning Roland Machinery Company v. Dresser Industries, Inc. The standard of review of discovery orders in the Seventh Circuit is that of whether any reasonable person could agree with them.

Your Honors, Justice Potter Stewart, Chief Judge Cummins, and the other dissenters on the Seventh Circuit agreed with District Judge Shader's discovery orders. Therefore, the only basis for the Seventh Circuit's criminal contempt decision must have been its holding --

QUESTION: Mr. Sawyier, as I read your petition, there are only three questions presented. I thought they all related to the res judicata.

MR. SAWYIER: That is certainly correct, Your Honor. However, in this case, the criminal contempt decision turned on the claim preclusion decision, and

the entire case is before this Court.

QUESTION: Well, wouldn't it be more consonant with our rules if we rule with you on the res judicata point to reverse and remand the Seventh Circuit and let them decide whether one is contingent upon the other.

MR. SAWYIER: The petitioners certainly are prepared to point out to the Seventh Circuit the fact that Judge Bowers' concurring opinion was a concurrence only in the result, and that Judge Bower was one of the members of the majority in Roland Machinery Company in which the Seventh Circuit emphasized the rule of discretion in the strong sense as to discovery orders such that the test is whether any reasonable person could agree with that.

In terms of that test, the only explanation for the Seventh Circuit's criminal contempt decision must have been its holding, its express holding that the criminal contempt fell with the case.

Thank you, Your Honors. We would reserve the remaining time.

CHIEF JUSTICE BURGER: Mr. Griffith.

ORAL ARGUMENT OF D. KENDALL GRIFFITH, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. GRIFFITH: Mr. Chief Justice, and may it please the Court, during the four years that this case

has been pending in the District Court and the Court of Appeals, this Court has issued a series of opinions dealing with the application of the full faith and credit statute, Section 1738, to res judicata cases where a prior state court judgment is being asserted as a bar in a later federal court action.

This case adds an additional element. That element is the fact that in this instance, the claim being asserted in the later federal court suit is within the exclusive jurisdiction of the federal courts. It is an antitrust claim.

It is the respondent's contention that the addition of this new element does not alter the standards for applying 1738 in these types of cases that have been announced by this Court recently. We further submit that when the nature and the purposes of the policies of both finality of judgments, full faith and credit, and exclusive jurisdiction are examined and compared, they do not affect the principles of finality of judgment which these recent cases have announced.

In Allen, this Court said that Congress specifically required federal courts to give preclusive effect to state court judgments when the courts of the rendering states would do so. In other words, the federal courts are to give the same preclusive effect to

a state judgment that the state would.

In Thomas versus Washington Gas, the Court noted that this means that it is the state that determines the extraterritorial effect of its judgments, but out of practical necessity, it must do so indirectly by prescribing the effect of those judgments within the state.

In this instance, then, the court, the federal court must determine whether Illinois, in view of the final judgments which it has rendered, would preclude further litigation between these parties as a result of the denial of the membership application.

The Illinois law of res judicata provides that final judgments by a court of competent --

QUESTION: I suppose we could remand on that question because the court below didn't deal with it, did it?

MR. GRIFFITH: The plurality opinions did, Your Honor. Judge Flamm discussed the Illinois law in great extent.

QUESTION: Can you cite any Illinois case holding that a subsequent claim is barred by a prior proceeding in which that claim could not have been raised?

MR. GRIFFITH: I cannot cite any case which

says the opposite, Your Honor. It has been represented here that Illinois has a jurisdictional competency requirement. That representation, we submit, is not correct.

And it is the result of taking words out of the Illinois definition of res judicata and other words out of the language describing the difference between claim preclusion and issue preclusion and twisting them.

The first language that is used is the Illinois requirement that the final judgment be by a court of competent jurisdiction. It is referring to the first court's jurisdiction to hear the first action, and the reason for that requirement is simple. If the first court didn't have jurisdiction, that judgment is null and void.

A null and void judgment can be collaterally attacked, and collateral attack, preventing collateral attack is what res judicata is all about.

Now, on the other hand, as the Court knows, there are two branches of preclusion, claim and issue. And they are distinguished by most courts by saying that claim preclusion precludes not only what was litigated, but what could have litigated.

What they are talking about there is not, we

submit, subject matter jurisdiction, because most res judicata cases and the cases in which that language was generated are two cases filed in the same court. The jurisdictions were the same, but what they are saying is just what happened in the Phelps case that Mr. Murdock cited to the Court.

If the second claim hadn't matured, or if you had a continuing tort and the second claim involved actions which took place after the first suit, that is something that could not have been raised in the first suit.

In the Phelps case, they were talking hypothetically, saying that if the case had been tried before this statute that was relied on in the second case was enacted then that matter couldn't have been raised in that first case because the statute wasn't in existence.

In other words, that cause of action was premature. A fact necessary for it wasn't in existence. So, there is no jurisdictional competency requirement. What they are doing is saying there is a jurisdictional competency requirement, and furthermore we are going to measure it not from when the cause of action accrues and when the party makes a decision as to whether he is going to sue, where he is going to sue,

what he is going to sue for, but you measure it after he has made that choice, after he, as Mr. Justice Potter Stewart said, has made the choice.

It isn't the court that made the choice here. It is the plaintiffs. They chose to sue in Illinois. If you let a plaintiff -- if you measure that from after the time the plaintiff has made the choice of where he is going to sue and selected the forum, you can always in exclusive jurisdiction matters, if he has got two claims cut of that single event, one of them is within the exclusive jurisdiction of some court, and others are common law, which he can bring in another court by waiting to measure could have been brought until after he sues he can always claim split. He can always ensure himself of multiple litigation of a single event.

QUESTION: Suppose we disagree with respect to the applicability of Section 1738. What should we do? Should we stop there and remand were the Seventh Circuit to decide what the state -- what effect the state rule would -- the state courts would give to this --

MR. GRIFFITH: Well, that -- maybe I don't understand, but if you decide that 1738 doesn't apply, that --

QUESTION: Does apply.

MR. GRIFFITH: Oh, I am sorry. Does apply. I

submit, Justice White, that you don't have to do that, because as I said, I think Judge Flamm --

QUESTION: Well, suppose we did it.

MR. GRIFFITH: -- defined -- I think the plurality opinions defined what the Illinois claim preclusion law is.

QUESTION: He didn't write the plurality?

MR. GRIFFITH: He did not write the plurality. That's correct, Your Honor.

QUESTION: What do you think he said the Illinois claim preclusion law is or was?

MR. GRIFFITH: He said that the Illinois law would bar further litigation in Illinois between these parties resulting from the --

QUESTION: Even though the second claim couldn't have been raised in the first?

MR. GRIFFITH: That's right, that's right, because this is one -- the action -- the language could not have been raised. You really only apply that when you are trying to decide whether it is claim preclusion or issue preclusion.

QUESTION: What was the vote in this case below? I mean, on the judgment.

MR. GRIFFITH: Five to four.

QUESTION: Five to four. Well, if we disagree

-- Judge Posner didn't think 1738 was applicable, right?

MR. GRIFFITH: That's -- yes, I think that is true.

QUESTION: Yes. Do you defend that?

MR. GRIFFITH: No, I think 1738 is applicable, and I think if you apply it --

QUESTION: Well, if that is so, what do you think the four people would say? They thought 1738 was applicable, didn't they?

MR. GRIFFITH: That's correct.

QUESTION: Well, now, if we disagree with Judge Posner, I would think then there would be a majority that would approach the case on the basis of what is the state law.

MR. GRIFFITH: I think you are right, Your Honor, because Judge --

QUESTION: We don't know what the people who joined Judge Posner would say about state law, do we?

MR. GRIFFITH: Well, we know what Judge Flamm would say.

QUESTION: Yes, Flamm, yes, but nobody else.

MR. GRIFFITH: That is one out of five.

QUESTION: But that is not quite enough.

MR. GRIFFITH: That's true.

If 1738 does apply, as we understand Allen and

Kremer and the other cases, you are not really concerned, though, with whether this could have been raised in Illinois. You are concerned with what effect Illinois would give that judgment. Once that is determined, you take that effect and apply it in the federal court.

The effect in Illinois is to preclude further litigation between the petitioners and the respondent over the rejection of this membership application. That is the effect. This is a suit between the petitioners and the respondent. It involves a rejection of the membership application.

It would be precluded -- that is what Illinois precludes, further litigation on that. Therefore this Court or the federal courts must give the same effect.

QUESTION: Was this decision below, was that before or after Migra?

MR. GRIFFITH: It was about three or four days before.

QUESTION: Right.

MR. GRIFFITH: That is correct. That is why Judge Posner went on the proposition that you need more.

QUESTION: It may have been that we should have vacated and remanded on Migra rather than taking

the case for plenary consideration. But here you are.

MR. GRIFFITH: That's right. I was going to say, Your Honor, I am here now.

(General laughter.)

QUESTION: You are not inviting that result.

MR. GRIFFITH: Well, no, obviously, I would like to see the case decided now along the lines I have said, although I am not really fearful of that. I think that when Migra and these cases are examined, along with the Illinois law of claim preclusion, this is where we are going to come out.

QUESTION: What do you think about your colleague's suggestion on the other side that there is an exception to 1738?

MR. GRIFFITH: Because of exclusive jurisdiction?

QUESTION: Well, because of the overriding federal interest and that -- yes. You are right.

MR. GRIFFITH: All right. I do not frankly understand that at all, and I guess it is because I --

QUESTION: You don't think there is a --

MR. GRIFFITH: I think that there is an interest. Obviously there is an interest because exclusive jurisdiction was granted, but I think you have to look at what is, just what does that mean, and I

submit that it means that if an antitrust action is filed, and if it is maintainable, then it must be filed and maintained in the U.S. District Court.

It does not mean that every antitrust claim must be filed. That decision still rests with the individual antitrust claimant, and if he never files it, and of course once he makes his decision he has to accept the consequences. If he never files it, he never has antitrust relief.

If he files it but he delays too long for some reason and the statute of limitations has run, he does not have and cannot get antitrust. The exclusive jurisdiction does not mean that it must be maintained, or the courts must entertain it once it comes to them.

QUESTION: If he wants to present a lot of evidence by hearsay and it is barred by the federal rules of evidence, he loses on the application of those rules of evidence just as someone would in any other case.

MR. GRIFFITH: That's correct. That's correct. The purposes of exclusive jurisdiction, that is one of them, to give him the advantage of the discovery procedures in the federal court, the rules of evidence, the experience and expertise of the federal bar in antitrust, and to provide uniform enforcement.

Now, all of these things relate to facilitating the prosecution and defense of an antitrust case. They all take place, and once a decision is made to file they all apply to actions that it was decided to present, and if the claimant decides not to file that action, none of those reasons really are there. They are not important.

And the failure to file doesn't frustrate any of those purposes. On the other hand, if in this instance the claim is not precluded, then the purposes of finality of judgment in 1738 are frustrated, because you have multiple litigation of a single event.

The respondent must defend a second time the claim that the rejection of membership was wrongful. A second court must entertain that action, and this is what claim preclusion, finality of judgments is all about.

Their purposes will be frustrated if this claim is not precluded. The purposes of exclusive jurisdiction will not be. Those all relate to what happens if a claimant decides to file. Here, the petitioners were the plaintiffs in the state court. This was their decision. They chose.

With respect to the argument of Mr. Murdock regarding the interests of the Attorneys General, if

they are dragged into federal court, then you have party reversal, and that is not this case. That presents another problem when someone is coerced into a jurisdiction, and he himself has a claim that is within the exclusive jurisdiction of another forum.

The state is either talking about that or they are talking about their own election to go to federal court first, and then they are afraid that they will be precluded from having their state forum. Well, again, that is their choice. If they, on the other hand, are made a defendant in a federal action, and they are worried about preclusion then of their state action that they would be bringing in the state as plaintiff, there you have party reversal. That is not this case.

QUESTION: They have a problem if they are simply substituting for the plaintiff in this case, don't they? Supposing they had sued the respondent in this case under the same state law the plaintiff did, and then lost on the state claim. Now, it is conceivable that perhaps they might have a federal claim of some sort, too, that would be precluded.

I thought their argument was, we want to be able to take our state claims to state court first, and not have to just join them as pendent claims in a federal action.

MR. GRIFFITH: Well, in this situation -- in other words, you are supposing that after the petitioners file this action in federal court, that the state then wanted to join it for some reason.

QUESTION: Let's posit a state antitrust law, and then the state sues to recover damages under the state antitrust laws, and loses for some reason or other. They say that they shouldn't be precluded from then filing a federal action because otherwise they will never file an action for state antitrust damages in state court. It will always be a pendent action to the federal one, because they can't risk going in two separate courts.

MR. GRIFFITH: Well, I am not so sure, in view of what the Court said in Migra, that they can't go in two courts. The problem here, of course, is that the petitioners waited until they had a final judgment in the state court, and then they brought a successive suit.

They didn't bring a current suit. And as the Court noted in Migra, if a party files a state action and a federal action, he can preserve the federal action if the state action is decided first by indicating that he is reserving his right to proceed on his federal claim in the federal court.

So, I think the options here are not just filing in the federal court and invoking pendent jurisdiction. The dismissal in state court can be without prejudice to the claim which is already pending and filed prior to the final judgment.

QUESTION: Yes, without prejudice, but what if it is just decided?

MR. GRIFFITH: Well --

QUESTION: What if it is just -- two concurrent suits, one of them is -- whichever one is decided first is going -- may at least affect some issues in the other suit.

MR. GRIFFITH: That's true.

QUESTION: And finally preclude, they will issue preclusion based on whichever case finished first. And there may be claim preclusion.

MR. GRIFFITH: Unless, of course, that was -- but that is what claim preclusion is all about, I submit, Your Honor. We unfortunately don't always get to have everything.

QUESTION: But don't you agree that one effect of this decision below is that plaintiffs may more often take their whole ball of wax to the federal court than to start a state case?

MR. GRIFFITH: Yes, and I think another effect

is --

QUESTION: And which means that they will take their pendent state claims over to the federal court.

MR. GRIFFITH: That's correct, but that they could do before this decision, and I think it also means that probably it will encourage more antitrust because they will not feel that they can wait, and they will make that decision in a timely way.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Sawyier?

ORAL ARGUMENT OF MICHAEL T. SAWYIER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. SAWYIER: Yes, Your Honor.

CHIEF JUSTICE BURGER: You have four minutes remaining.

MR. SAWYIER: The respondent has talked about the unfairness to it of the petitioners having had the opportunity to proceed in state court first and to exercise their right to a state court forum for their state law claims.

The petitioners believe that the true unfairness is the fact that they never had any opportunity, much less a full and fair opportunity to litigate the exclusively federal claim in the state court forum, and yet the Seventh Circuit has held in its

claim preclusion decision that the exclusively federal claim is barred by the technical pleading requirements of Illinois common law.

The petitioners would return, Your Honors, to the fundamental concept of a full and fair opportunity to litigate that this Court emphasized in Kremer. Kremer, of course, laid down the general principle or followed the Allen case in extending the general principle of the full faith and credit requirement of Section 1738.

But in Kremer this Court recognized that if the parties had not had a full and fair opportunity to litigate an issue in state court in the previous forum, then there would be no issue preclusion, notwithstanding the ordinary effect of Section 1738, and notwithstanding in particular what the state's preclusion rule said on that subject.

QUESTION: Don't you in order to get the lack of fair opportunity to litigate exception involved first show that the general principle is applicable, that is, that Illinois would say this was precluded? Then you would come in and say, well, even though Illinois says that, we didn't have a full and fair opportunity to litigate, but I don't think the exception makes a great deal of sense until you are first hooked by the general

proposition, which was that Illinois would preclude this.

MR. SAWYIER: In that sense, Your Honor, the full and fair opportunity to litigate concept might be regarded as something even more basic than an exception to Section 1738. It is a fundamental fairness requirement, and for that reason the petitioners maintain that the claim preclusion of an action that could not possibly have been brought in the previous forum is so fundamentally unfair, and so antithetical to the regime of exclusively federal rights that this Court should rule as a matter of a federal rule that no such claim preclusion can occur.

Your Honors, the respondent has chided the petitioners for taking words out of cases and twisting them. The petitioners submit that the respondent's discussion of the most recent Illinois Supreme Court pronouncement on the res judicata doctrine is a classic example of the fault for which the petitioners are criticized.

The respondent has noted that in Spiller the Illinois Supreme Court did not add the usual words in the original action after reciting the centuries old could have been raised test.

Your Honors, on the very next page of the case

report of Spiller the Illinois Supreme Court looked to the original action in the Illinois courts in deciding that there was no claim preclusion, and the three Illinois Supreme Court cases that it cited had all used those very words.

Thank you, Your Honors.

CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

(Whereupon, at 2:38 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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BY Paul A. Richardson

(REPORTER)