OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1616

TITLE PARSONS STEEL, INC., ET AL., Petitioners V. FIRST ALABAMA BANK AND EDWARD HERBERT

PLACE Washington, D. C.

DATE December 3, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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PARSONS STEEL, INC., ET AL., :

Petitioners, :

V. : No. 84-1616

FIRST ALABAMA BANK :

AND EDWARD HERBERT :

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Washington, D.C.

Tuesday, December 3, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 o'clock p.m.

APPEARANCES:

FRANK M. WILSON, ESQ., Montgomery, Alabama; on behalf of the petitioners.

M. ROLAND NACHMAN, JR., ESQ., Montgomery, Alabama; on behalf of the respondents

ALDERSON REPORTING COMPANY, INC.
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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 Parsons Steel against First Alabama Bank and Edward Herbert.

Mr. Wilson, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF FRANK M. WILSON, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. WILSON: Thank you, Mr. Chief Justice, and may it please the Court, the decisions of the courts below in this case destroy the balance between the coexisting equal independent court systems that form the basis of our federal system.

Petitioners here seek the reversal of an injunction of an ongoing state court proceeding. The Federal District Court's basis for that injunction was its determination that an earlier federal case barred the state action under principles of collateral estoppel and res judicata.

That issue had already been litigated fully and fairly in the state court at the time of the injunction. In addition, the injunction is directed toward the litigation, who was never a party to that earlier federal judgment, and whose only opportunity to litigate his issues came in the state court decision.

The case arises out of these circumstances. In February of 1979, a Montgomery steel company, Parsons Steel Industries, its parent corporation, and the stockholders of that corporation filed a lawsuit against the bank, a loan officer, and a number of other individuals in Montgomery County State Court. This is what we have come to call the state action in this case.

The issues there raised a number of claims under state law, purely under state law, fraud, conversion, breach of fiduciary duty, and a number of other claims. Approximately six weeks later, that steel company was adjudicated a bankrupt on the petition of several of its creditors, an involuntary bankrupt.

At that time its parent corporation and the shareholders of that corporation lost all authority to act for the subsidiary which was in bankruptcy. Some six weeks later, the parent corporation and its shareholders filed a second action in Federal District Court.

Although on very similar factual allegations -- the complaints are similar -- the legal claim made there was a violation of a narrowly drawn federal statute, the Bank Holding Company Act. It is undisputed in this case that no damages were sought on behalf of the trustee or the bankrupt corporation in that

proceeding. The cases proceeded parallel through the two court systems.

QUESTION: What relief was sought in the federal case?

MR. WILSON: Damages on behalf of the parent corporation only and its stockholders, nothing on behalf of the trustee.

QUESTION: Now, you said they were similar facts. Were they essentially the same facts alleged in the federal court proceeding?

MR. WILSON: At the time the complaints were filed, they were, very similar facts. There were amendments to both complaints during the course of these proceedings where additional allegations were made in both actions and they changed some, but at the time of the filing, there is no question that they were very similar, and there is no dispute about that aspect of it.

The federal court bifurcated the case. They issued a liability from damages. There was a jury verdict. The jury resolved the federal action issues in favor of the plaintiffs there. The trial judge granted judgment NOV, judgment outstanding the verdict. He held that there had been no proof which would sustain a jury verdict on any of the elements of that cause of action.

That was hotly disputed, as you might imagine, by the appellant. On the appeal, the Eleventh Circuit Court of Appeals affirmed on a different basis, and they held as a matter of law that the allegations made in the federal action did not constitute a violation of that statute.

After they received their JNOV judgment, the bank asserted that judgment as collateral estoppel and res judicata in the state action. That issue was litigated, pretrial, a jury verdict ensued after a trial on the merits, and that particular issue, the res judicata effect of the federal judgment, was fully and fairly litigated in the state court.

Only then, after a judgment for the --

QUESTION: The judgment was on the state matters.

MR. WILSON: Yes, sir, state law grounds --

QUESTION: A recovery on state law grounds?

MR. WILSON: Yes, sir, on state law grounds, but the federal issue, that is, the preclusive effect of the first federal judgment, was fully litigated there in the state court as an affirmative defense by the bank.

QUESTION: May I just ask there, do you agree that the preclusive effect of the federal judgment was a federal issue?

MR. WILSON: Absolutely, without question. Only then, after that issue had been fairly litigated in state court, did the bank request the injunctive relief which was ultimately granted by the Federal District Court. That court --

QUESTION: Mr. Wilson, would you be good enough to tell us if the record reflects when the state court decided the respondent's post-trial motions, and when the appeal was filed?

MR. WILSON: At the time the respondent sought the injunction in federal court, its posttrial motions were pending in state court. They have not been decided because once the injunction issued, no further proceedings took place in state court. There has been no decision on the postjudgment motions and no appeal in the state court. We are talking about trial level only in the state court.

QUESTION: Well, I guess the respondents take the position that the state court's res judicata determination was not final at the time that the federal injunction issued.

MR. WILSON: They take that position, and as a matter --

QUESTION: But I couldn't find dates in the record to know whether that has some validity or not.

MR. WILSON: It is factually correct. I do not believe it has any validity to the policy considerations this Court could make, because you could say the same thing about a petition for rehearing to the Alabama Supreme Court. Technically the judgment would not be final at that stage. However, there is no --

QUESTION: And so you agree --

MR. WILSON: I agree absolutely.

QUESTION: -- with that?

MR. WILSON: Yes.

QUESTION: Exactly at what stage was the state court proceeding when the federal court entered its order?

MR. WILSON: The bank had filed its postjudgment motions for new trial and judgment notwithstanding the verdicts.

QUESTION: Judgment had been entered then on the verdict.

MR. WILSON: Yes, sir. Yes, sir. Judgment had been entered, and that is -- the final judgment is Page 251 of the joint appendix, which was entered on February the 9th of 1983, and within the 30-day period they filed their postjudgment motions.

The Federal District Court refused to give full faith and credit to the state court determination

of the res judicata/collateral estoppel issue. The Court of Appeals in review of that particular issue as we raised it there held that the anti-injunction statute and the so-called relitigation exception to that statute is an exception to the Full Faith and Credit Act.

We believe that was erroneous as a matter of law, and that is one of our principal bases of seeking a reversal of the injunction. The Full Faith and Credit Act, as this Court has recognized on a number of occasions, in essence establishes our separate but equal court system, requiring both sides to give full faith and credit to the other decisions.

This Court has held --

QUESTION: Mr. Wilson, now, is a nonfinal judgment given preclusive effect under the full faith and credit clause?

MR. WILSON: A nonfinal judgment is not given preclusive effect under the Full Faith and Credit Act.

QUESTION: And you concede that this was not a final judgment.

QUESTION: Procedurally and technically I do concede that, although there had certainly been substantial -- substantial resources had been expended in preparing that judgment.

QUESTION: Well, would you say that if the

people, your opponents had appealed the judgment to the Supreme Court of Alabama, and while the appeal was pending it would still be a nonfinal judgment?

MR. WILSON: Justice Rehnquist, I would confess that I have difficulty with that issue. It appears to me that it is a final judgment when they determine it on the merits, but technically, for purposes of an appeal in the Alabama court system, it is not final because they have filed their postjudgment motions, but I don't think that that should -- I don't see that as a basis for this Court allowing an injunction after such substantial resources have been expended.

QUESTION: Well, so when you are talking about a final judgment, you are talking about how the Alabama court system would view that particular -- what if a judgment had gone exactly as far as the one in which your client participated in the Alabama court system? Would the Alabama courts have treated it as a binding judgment for res judicata purposes under state law?

MR. WILSON: Certainly. Certainly they would have under state law, and subject to its appeal, and of course if you are ultimately successful in having that judgment reversed on appeal, then its res judicata effect is eliminated, but for res judicata purposes

certainly it would be a final judgment.

QUESTION: What are you saying was the binding state ruling that the federal court ignored? What are you saying?

MR. WILSON: I am saying it was the trial court's entering a final jugment on the jury verdict, the --

QUESTION: On the state law issues?

MR. WILSON: And on the federal law affirmative defense asserted by the bank there of collateral estoppel, the preclusive effect of that earlier federal judgment. The affirmative defense was presented by summary judgment --

QUESTION: You would be arguing the same thing even if the affirmative defense had never been presented and ruled on.

MR. WILSON: I would still be arguing that this is too great of an intrusion into state court system. Yes, I would, but I don't think I would have the Full Faith and Credit Act to support my argument as I do now, because they have considered and determined that issue and given the --

QUESTION: So you say the state court may finally determine the federal question --

MR. WILSON: Certainly.

QUESTION: -- in a way that the federal court must observe, must respect.

MR. WILSON: Certainly.

QUESTION: Because of the Full Faith and Credit Act.

MR. WILSON: Absolutely, and that is the nature of the independent -- the independent nature of the two court systems. This Court ultimately can decide that issue. It is a federal issue presented in the state court and which formed the basis for a petition for certiorari later.

QUESTION: I suppose you would say then that the federal court could have enjoined the state action before judgment.

MR. WILSON: As far as the bar of the Full Faith and Credit Act, yes, they could have.

QUESTION: Yes.

MR. WILSON: I would still --

QUESTION: It is only when they rule finally on the res judicata question.

MR. WILSON: On the merits, and that is the point that is made by Judge Hill in his dissent in the Eleventh Circuit Court of Appeals opinion, and I think it is a good one, that you can resolve the two acts. What this Court has taught, when you look for an implied

repeal or an exception to the Full Faith and Credit Act, you look for some clear intention, some idea that the statutes cannot operate together without some deadlock, some direct conflict, and I would suggest that that conflict is eliminated if you construe the statutes together as Judge Hill did, that is, until that state court rules on the merits, you can have an injunction, assuming you have the other requirement for an injunction.

QUESTION: So you say that a federal court might have concluded before judgment in the state court that as a federal matter, that state court judgment should not -- that state court suit should not proceed to judgment, and it would have been, as far as the Full Faith and Credit Act was concerned, that was a permissible ruling, and it involves a ruling on a federal issue.

MR. WILSON: Correct, as far as the Full Faith and Credit Act.

QUESTION: But the next day, in a similar action, if the federal court waits until after judgment and the state court rules quite contrary to the federal court's view yesterday, the federal court must still observe it.

MR. WILSON: I do, and I think that the reason

is that the independent nature of the court systems are destroyed if you allow the Federal District Court to sit in effect in appellate review of that issue when it has been determined on the merits by the state court. Prior to that time -- there are going to be problems any time you have an injunction of a state court proceeding, and the policies, of course, as this Court has enunciated, weigh against it under any set of circumstances.

QUESTION: What if in my first example where the federal court issued the injunction before the judgment in the state court, suppose there is an appeal, and it comes up to this Court, and this Court rules that in these circumstances, in these circumstances, on the federal issue, any further litigation is precluded because the state cause of action should have been presented in the federal case? Then we say just as a federal matter here is the rule in this case. Could the state then ignore that?

MR. WILSON: I am sorry, Justice White, but I did not follow your question. If this Court ruled, the state court obviously could not ignore this Court's ruling regardless of when and where it was made.

QUESTION: The federal injunction in my first example is appealed up here, and we say, well, that is quite right, as a federal matter that federal judgment

precludes any further litigation on issues arising out of the same facts, period.

MR. WILSON: Let me ask you this. In your hypothetical, is there an injunction by the trial level court?

QUESTION: Right. Yes, yes.

MR. WILSON: In doing that --

QUESTION: An injunction issued, but it is before judgment in the state court. And that injunction is challenged, and it comes up here through the Court of Appeals. It is affirmed, and it comes here, and we affirm.

MR. WILSON: In that instance, there would have been no conflict between action by the state court and action by the Federal District Court. It would not have reviewed anything that occurred in the state court because of res judicata --

QUESTION: How about in the next case on very similar facts except that the federal court doesn't issue its injunction until after the state court rules and says there is no res judicata? Doesn't the state court in that situation have to respect this Court's ruling on the federal issue?

MR. WILSON: Certainly if this Court -- if this Court has ruled on the issue of the preclusive

effect of that federal judgment, then any court on either side of the dual system must of course respect this Court's decision on that issue.

QUESTION: I take it you say that our problem here is just to rule on the Full Faith and Credit Act, and not on the merits of the federal issue.

MR. WILSON: I do say that. I certainly do say that.

QUESTION: You think we should not ever reach that.

MR. WILSON: I say you should not reach that in this case, because that issue, you should allow the state courts the opportunity to resolve all issues before them before a federal court intervenes to correct any wrongdoing this Court might ultimately find.

QUESTION: I see, so if the state court made a mistake, it should come up through the state system and then come here?

MR. WILSON: Yes, sir, that is exactly my position, and there is a reason. The basic nature of the federal system requires that, although admittedly it creates problems any time you have a federal and a state court with similar issues before them at the same time.

QUESTION: May I ask one other question about when the timing -- if I understand, for purposes of your

full faith and credit argument, if the injunction had issued before the state court judgment had entered, it would be permissible.

MR. WILSON: If it were permissible, and if it met all the other requirements, yes. Under the Full Faith and Credit Act, it is permissible.

QUESTION: And your point is that it was after the judgment but before the posttrial motions were ruled on, and it was too late. What if the federal injunction had issued after the summary judgment motion had been denied but before the jury came in with a verdict? That is when the trial court actually made its legal analysis for the first time, I guess.

MR. WILSON: That's correct, but that raises the same question as raised by Justice Rehnquist's earlier question. At that point, there would be no final judgment for state law res judicata purposes. The denial of a motion for summary judgment is not a final judgment for purposes of application, and you could comply with the Full Faith and Credit Act because the Full Faith and Credit Act requires that the Federal District Court give the same preclusive effect to the state court adjudication as would be given in that state. And at that point it has no preclusive effect, because a denial of a summary judgment motion is not a

final judgment in Alabama courts for preclusive purposes.

There has been -- the suggestion in the Court of Appeals was and by the respondent here that somehow or another the 1948 amendment to the anti-injunction statute gave the Federal District Court an exception to ignore the Full Faith and Credit Act. I would like to address that very briefly and only say that it is clear that that amendment has unanimously been recognized by everyone concerned as restoring the law as understood prior to this Court's decision in Toucey.

That issue had never been presented in any case prior, was not presented there, and certainly the overruling of Toucey does not require that an additional power be given to the state court, that is, to reconsider an issue fully and finally adjudicated by the state court.

On the full faith and credit issue let me make one further point. The Court of Appeals raised a problem, that is, the requirement that the litigant must rush back to federal court to obtain an injunction any time there might be a decision on the merits. That is a problem that is going to be raised.

I would suggest to this Court that it is preferable to allowing a litigant such as the bank in

this case to make a strategic decision to present its res judicata defense and other affirmative defenses to the state court and have a judgment on the merits. In essence, the interpretation that the Court of Appeals has made allows the bank two bites at the apple, two adjudications of their res judicata issue, and that is something which even the policy of res judicata would not allow.

If you look to the --

QUESTION: Mr. Wilson, would you tell me, because I am not sure if you did before, and I want to get back to my question, the respondents cite an Alabama case for the proposition that the making of a judgment -- of a motion post-judgment for a new trial or a judgment notwithstanding the verdict means the judgment in Alabama law is not final for purposes of res judicata. They cited a case of Scott versus Lane.

Now, how do you distinguish the case, or what authority do you cite for the contrary proposition?

MR. WILSON: It is my understanding that the question was the res judicata effect for purposes of preclusion -- excuse me, for purposes of a final judgment for collection purposes and enforcement purposes.

I cannot distinguish the case any further than

that except to say that I don't have the same understanding that apparently the Court does.

QUESTION: You don't have contrary opinions of the Alabama court to cite to us on this point?

MR. WILSON: No, I do not, Justice O'Connor. Assuming that the Full Faith and Credit Act is not a bar to the injunction in the case, and that the Court reaches the injunction on its merits, I think it is important to distinguish the position of the different litigants as to that injunction.

The trustee stands in a different position from the other litigants. He was never a party to the earlier federal judgment. He was not represented in that federal judgment by anyone who had authority to represent him. At the time that judgment was filed, there had been a trustee appointed for that bankrupt corporation, and the officers and shareholders of the corporation had no authority to continue to represent the trustee. It is undisputed on this record that the trustee played no part in the decision to file that action, played no role in the prosecution of that action.

QUESTION: That is a little bit different argument than you have been making, because up until now it wouldn't make any difference whether he was party to

the federal suit or not.

MR. WILSON: It would make no difference. If you accept the petitioner's argument on the full faith and credit action you need go no further, and there are no other issues, because the trial court was precluded regardless of anything else. I am now making an argument in case you don't agree with me on that issue.

QUESTION: Before you leave that other, do posttrial motions challenge the ruling on the res judicata point?

MR. WILSON: Yes, sir.

This Court has considered on a number of occasions the question of preclusion of nonparties. Due process, if it requires anything, requires that a party, to be precluded, has had an opportunity in the earlier litigation to bring forth his arguments and to present the evidence that he wants to present.

There is simply no evidence in this record that the trustee was represented at all in the earlier federal judgment. In fact, the only basis that the Court of Appeals gives for its decision affirming the injunction as to trustee is its indication that the trustee should have joined in the earlier federal action, and by doing that he would have had the opportunity to litigate his issues.

I find it very difficult indeed to understand the argument that the other petitioners, the parent corporation and the shareholders, are barred because they split a cause of action. That is the basis for res judicata applying at all to them, and yet the argument is made that the trustee is barred because he did not do the same thing.

At all times the trustee had pending in state court the legal issues that he desired to raise. They were pending prior to the adjudication of bankruptcy. When the adjudication of bankruptcy occurred, the trustee took that property as any other property of the bankrupt corporation.

There was never any indication in the federal action that the trustee's interests were at stake. They sought no damages on his behalf. The defendant in fact in that case suggested that the trustee and the bankrupt corporation would be the only ones who had been damaged. The trial court continually denied that motion, denied that issue, and let the case go to trial.

The Eleventh Circuit Court of Appeals also discusses what it deems the concept of privity. Although this Court has taught in its earlier decisions that that is an ambiguous term in itself, I must argue that there are no factors which could support a finding

of privity in this case, even if you assume that is the test.

There was no direct relationship between the trustee and the other plaintiffs. That had been severed by the adjudication of bankruptcy, and if you look to the Eleventh Circuit Court of Appeals decision on this issue, you will note that they make an incorrect factual assumption, that is, that this federal action was pending at the time of bankruptcy.

The federal action plaintiffs made no attempt to represent the trustee, sought no damages on his behalf. Had they recovered in that action, there would have been no recovery for the trustee. In fact, the filing of the action itself is an indication that the interests were different in that they were there pursuing a claim of their own.

As to the remaining plaintiffs, even if this Court determines that the full faith and credit action is not a bar to the injunction, I would suggest that the injunction is simply too great an intrusion into the state court system to be justified by the circumstances presented by this case.

The argument has been made that the issues in state court could have been litigated in the earlier federal judgments. That, I would submit to the Court,

might be a justification for an injunction in an early stage of the state court proceeding, before substantial judicial resources had been invested by the state court, but here, where the state court has heard the case on the merits, a nine-day trial has ensued, substantial state court judicial resources have been consumed in the litigation, I would suggest that there would have to be a direct conflict between that earlier federal judgment and the current state action in order to justify an intrusion that great into the state court system.

QUESTION: Do you argue that the court was just wrong in saying there was res judicata at all?

MR. WILSON: Certainly. We argued that --

QUESTION: Because you can withhold your state causes of action if you want to.

MR. WILSON: My argument there --

QUESTION: What about Atlantic Coastline?

MR. WILSON: Atlantic Coastline in my opinion, Justice White, would form a better set of circumstances to justify an injunction than this case does. Atlantic Coastline there --

QUESTION: Atlantic said no, did it?

MR. WILSON: It did in fact, and it said that because the -- as I read Atlantic Coastline, the state issues had never been heard. There could be no direct

conflict between a resolution of those issues and a resolution of a feieral issue that said that there was -- if in fact that is what the federal court resolved, which of course is a question that was ultimately determined in Atlantic Coastline, then there would be no direct conflict between those issues, and I would suggest that because of the policy considerations here and the desire to limit intrusion into the state court, you should limit an injunction there to a situation where you are going to have a direct conflict between thos decisions so that a party cannot comply, for example, with both courts.

QUESTION: Do you think Atlantic Coastline stands for the proposition that plaintiff, like in this case, can go in and litigate his federal bank holding company issues and if he loses or if he wins, he still is free to go into the state court on his state causes of action? There is no -- is he free togo ahead or not?

MR. WILSON: Are you assuming that he litigates those and then files a state court action?

QUESTION: Yes.

MR. WILSON: I think there are circumstances under which Atlantic Coastline would not prohibit an injunction if it was a clear case.

QUESTION: Well, he could have joined it on just -- with his federal claim. He could have. He could have tried to, anyway. But he didn't. He said, I'd rather litigate my state causes of action in the state court.

MR. WILSON: Assuming there is some appearance that he did that intentionally to get the "two bites at the apple" other than -- I see a different circumstance here --

QUESTION: I assume collateral estoppel might apply on issues that were actually litigated, but do you think there would be just res judicata, just claim preclusion?

MR. WILSON: I think that there are two distinct questions to be decided. One is ultimately whether collateral estoppel or res judicata will apply, and the second is, should a federal court enjoin a state court proceeding. I think there has got to be more than the mere fact that res judicata and collateral estoppel might apply or even would apply to justify an intrusion into the state court system, so I would suppose that I would answer your question, yes, he could, assuming there was no more to justify the injunction than the mere fact that arguably he could have joined those issues and it would therefore be res judicata.

With the Court's permission, I will reserve the remainder of my time for rebuttal.

CHIEF JUSTICE BURGER: Mr. Nachman.

ORAL ARGUMENT OF M. ROLAND NACHMAN, JR., ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. NACHMAN: Mr. Chief Justice, and may it please the Court, in 1941, this Court in Toucey against New York Life decided to answer negatively the question, does a federal court have the power to enjoin state proceedings which seek to relitigate a claim which has previously been adjudicated by a federal court and reduced to judgment in the federal court.

The response of Congress was precise and direct. In 1948, it amended what was then Section 265 of the judicial code. It enacted Section 2283, and it wrote into Section 2283 the precise power and jurisdiction in the federal court to enjoin the relitigation of -- in these circumstances, and it empowered the federal court to protect and effectuate its judgment by enjoining state proceedings. We have -- 40 years -- excuse me.

QUESTION: That may solve your problem under the Anti-Injunction Act, but it doesn't really cover the res judicata point, does it?

MR. NACHMAN: Yes, sir. We submit that the

res judicata point is simply a red herring here. Congress made a precise judgment in 1948 that federal courts should be able to enjoin state proceedings.

QUESTION: In the Toucey case, which it's my understanding that change was designed to overrule, the state court proceedings, I don't believe they had gone to judgment.

MR. NACHMAN: With all respect, Your Honor, that is not correct. There were two cases that were involved in Toucey, and one of them was the Iowa-Wisconsin Bridge case.

In the Iowa-Wisconsin Bridge case, which was part of Toucey, there had been an attempt to foreclose a mortgage in the federal court, and the federal court had declined to foreclose the mortgage on the basis that there was invalidity and lack of consideration.

Thereafter, an obligee, Phoenix Insurance Company, brought five suits on the underlying notes in the Delaware court, and the Delaware court had decided in favor of the plaintiff in that case. It had been reduced to judgment, and indeed was on appeal at the time the federal injunction issued. So those were the precise facts that confronted this Court in Toucey.

QUESTION: So you say Toucey is on all fours with this case?

MR. NACHMAN: Toucey is on all fours with the petitioner's argument in this case, and the Congressional response to Toucey, the enactment of the relitigation exception in Section 2283 is on all fours with this case, because that is exactly what we have here.

And we have admission of counsel as he must, and there is a side by side comparison of the two complaints, which is attached as an appendix to our brief, and it is also in the record. The two complaints are virtually --

QUESTION: Do you say that that is true even if there were a final judgment in the state court before the application to the federal court for the injunction?

MR. NACHMAN: Yes, indeed, Justice O'Connor, because the very thing that Congress did in 1948 was to adopt the dissenting opinion of Justice Reed and the other dissenters to the effect that a plea of res judicata and subsequent review of that plea in the state court was not an adequate remedy to protect the federal judgment, and we don't have to speculate about what the Congressional history was. We don't have to apply general tenets of statutory construction and this sort of thing. This was a precise, discrete judgment that

Congress made with regard to relitigation, and otherwise, it would make no sense whatever, not only in terms of the legislative history, but in terms of tactics.

No prudent counsel could afford not to file a plea of res judicata in the state proceeding and gamble everything on getting a federal injunction, and yet as the Court of Appeals below pointed out, petitioner's argument, and the full faith and credit argument would mean that as soon -- that unless the federal court issued an injunction before a state court did anything, that the state court would take over, precisely what Congress wanted to prevent.

QUESTION: If you win on your -- suppose you win on your full faith and credit issue.

MR. NACHMAN: Yes, sir.

QUESTION: You still have the question of whether the federal court is right in saying that the federal judgment should preclude further state litigation.

MR. NACHMAN: Interestingly enough, Your Honor, and we don't understand it --

QUESTION: I don't either. I don't either.

MR. NACHMAN: -- but the petitioners don't even present that question for review.

QUESTION: Well, he said he did.

MR. NACHMAN: Their brief says that they don't. Reading from their brief, Page 28, Note 20, "The question of whether the courts below were correct in ultimately finding that the state action was barred by the federal judgment under principles of res judicata and collateral estoppel is not presented to this Court." I don't know what he means. We are here. This is the ultimate federal question. There is no --

QUESTION: It seems to me that the validity of the injunction rests not only -- depends not only on the Full Faith and Credit Act, but on whether they were right on saying it was res judicata.

MR. NACHMAN: Well, the Court of Appeals held that the District Court was correct.

QUESTION: Well, I know.

MR. NACHMAN: And that question is not now presented for review, so I assume that this Court approaches this matter on the assumption that the petitioner is not presenting --

QUESTION: What would you think we ought to do if we thought that under our cases the two courts below were wholly wrong in deciding that the federal issue barred further litigation on the state causes of action?

MR. NACHMAN: As I understand the rules of

this Court, Your Honor --

QUESTION: This is from the federal court. This is from the federal court.

MR. NACHMAN: -- I say this certainly with apology. If a question is not presented for review, the Court ordinarily doesn't decide it. I realize there are exceptions to that.

QUESTION: Ordinarily, you are quite right.

MR. NACHMAN: So we start with that premise. We think that the decision is absolutely correct, and we have pointed out numerous cases in our brief, and there are even more cited in the Court of Appeals decision which support it. We think it is a classic situation of a party bringing one action in the federal court and one action in the state court.

QUESTION: Do you think entertaining pendent state causes of action -- these were pendent, weren't they, or not?

MR. NACHMAN: They could have been. They weren't.

QUESTION: Well, I know they weren't, but they could have been pendent?

MR. NACHMAN: Yes, sir. In fact --

QUESTION: But does the Federal District Court have to entertain a pendent cause of action?

MR. NACHMAN: It doesn't have to, but that, as the cases point out, is no reason for not bringing it in order to avoid the bar of res judicata and collateral estoppel. The Harper Plastics case, for example, which we cite in our brief, makes that plain.

And the cases that -- and we have cited them in our brief -- that have been brought under the Bank Holding Company Act, without really any differentiation have always alleged state business torts and state interference and antitrust claims along with bank holding company claims.

But what we have here is almost identical transactions alleged in both courts, and in the federal court --

QUESTION: The UCC action was different, wasn't it?

MR. NACHMAN: No, ma'am. We disagree. If the Court will look at paragraphs of the state complaint and the federal complaint, both seek to the penny the damage done by wrongful deprivation of the assets of the subsidiary through foreclosure, $2.4 million plus.

We disagree entirely when counsel says that the interests of the subsidiary were not involved.

QUESTION: What if we disagree with you on your reading of whether Toucey can be distinguished, and

what if we think that if the state court judgment is final, that Toucey is distinguishable, and Congress did not intend to prevent the application of full faith and credit?

MR. NACHMAN: Well, Your Honor, we would disagree with that conclusion.

QUESTION: Yes, I know.

MR. NACHMAN: But beyond that we would say that in this case, as Your Honor brought out in questioning from petitioner's counsel, the state res judicata judgment is not final under state law by virtue of the then pending posttrial motions for judgment NOV and new trial.

QUESTION: But the Court of Appeals assumed that it was final, didn't it?

MR. NACHMAN: I don't think the Court of Appeals went into that question, Your Honor, because that suggestion that came from -- in the petitioner's brief that the federal injunction would have been permissible before finality was not made there.

QUESTION: But on Page A15 of the petition, the Court of Appeals opinion says in the absence of federal law modifying the operation of Section 1738, the full faith and credit, we would give the Alabama Circuit Court's res judicata ruling the same effect it would be

accorded in the state courts of that state.

They didn't have to decide what it was because they say, whatever it was, we are not going to accord it full faith and credit.

MR. NACHMAN: Well, yes, sir, I agree, and we certainly don't restrict our position to an argument that this was a nonfinal state judgment that was not entitled to full faith and credit. We state and have urged repeatedly here and below that what Congress did in the relitigation exception to 2238 was a discrete empowering of the federal court to issue an injunction to protect and effectuate its judgment.

QUESTION: Yes, but if we disagree with you on that point, as Justice O'Connor has hypothesized, the Court of Appeals really hasn't decided as a matter of Alabama law whether the state court proceedings have gone far enough to be res judicata, have they?

MR. NACHMAN: That precise question was not decided, but counsel has conceded that it is not final. We have cited authority --

QUESTION: I didn't understand him to concede it -- I thought he said it was final for res judicata purposes, that the Alabama courts would give a judgment like that res judicata. You argue otherwise.

MR. NACHMAN: I don't think there is any

question, Your Honor, that this is --

QUESTION: We don't decide questions of Alabama law here.

MR. NACHMAN: I understand, sir. But I think there is no question that there is -- that the Alabama judgment, that it would not recognize the preclusive effect of the earlier federal judgment was entered -- is not final because it was pending on posttrial motions at the time the injunction issued. There is really no question about that.

QUESTION: But your opponent doesn't say that it would not be res judicata. If we disagreed with your Toucey reasoning, I suppose the Eleventh Circuit would know far more about Alabama law than we would.

MR. NACHMAN: I will accept that premise, of course. All I am saying, Your Honor, is that I don't think there is any dispute between counsel here that this state res judicata judgment was nonfinal. It was pending on a motion for new trial, a motion for judgment NOV, and under Alabama procedure it is nonfinal. It won't support an appeal.

QUESTION: But that wasn't the hypothesis that the Eleventh Circuit --

MR. NACHMAN: No, sir, it was not. It was not, and we don't take that hypothesis here. We think

that the finality or lack of finality of the state judgment is irrelevant. Congress has empowered the federal courts to issue an injunction to protect and effectuate their earlier judgments when there is an attempt to relitigate.

QUESTION: Mr. Nachman, in terms of federalism and comity -- well, let me start over.

Given that a state court judgment of the court of first instance is on appeal, and therefore not final within the framework of the state system, in terms of federalism and comity, hasn't the proceeding gone tc such lengths that full faith and credit ought to come into play?

MR. NACHMAN: No, sir. We do not agree, Mr. Chief Justice. We think that the interests of federalism and comity and those principles, those underlying policies were indeed addressed by Congress when it enacted the relitigation exception in 1948. Congress opted for a choice of a policy position that it was an inadequate remedy to protect a federal judgment and to preserve the fruits to the victor in the federal judgment, that this federal judgment form nothing more than the basis of a plea of res judicata in a state court which could or could not be reviewed ultimately here under considerations which would show that they

involved matters of public interest as well as the private interest of the litigants, and where matters of public interest in those circumstances prevailed.

Now, as far as the extent to which the proceedings had gone in the state court, as we point out in our brief, these matters happened on the eve of the state trial, and we were faced with a new state judge, a denial of motion for summary of judgment a ccuple of weeks, three weeks before trial.

On three days before trial we urged, and this is all in the record, we urged the state trial court to postpone the trial, to give us a continuance, and to present an interlocutory review of the res judicata question to the Supreme Court of Alabama under a procedure which is similar to 28 USCA 1292(b), the interlocutory appeal federal statute. Alabama has a -- similar -- that was denied.

So, this was on a Friday, and the trial began on Monday. We urged indeed that our counterclaim in the state court be considered as having been barred by the early federal judgment just as the plaintiff's claim was barred, and that summary judgments be issued on those bases, so that that matter could be resolved.

We were not the ones pressing for a trial, which ultimately ensued. We had to pursue the trial.

We had to present all of our defenses in the trial. We couldn't simply singleshot the preclusion matter and ignore the others. So, that is the background, and at the earliest opportunity, when it was apparent that the state court was not going to grant appropriate and proper preclusive effect to the earlier federal judgment, that we sought the injunction and obtained it in the federal court.

But as the court below points out, the relitigation statute doesn't apply at particular points in time, and indeed it couldn't, because let us suppose that the state court, trial court agreed with us and the federal court about the preclusive effect of the earlier federal judgment. That could be reversed on appeal by the state appellate court, and then we would be back in the same situation where the injunction was necessary.

We think, moreover, Mr. Chief Justice, that an attempt to get the Alabama court to grant proper preclusive effect was if not required, certainly indicated by the judicial gloss which the federal courts have placed on 2283 since 1948, where they indicate in essence that the fact that Congress has accorded this authority and this jurisdiction on the federal court doesn't mean that it comes into play automatically.

And for that reason as well, it was felt that

it was necessary to give the state courts an opportunity to decide this question, and indeed, as I have mentioned a few moments ago, matters of practicality and prudence also dictated that, because if we did not present the res judicata and collateral estoppel defense to the state court, but simply sought an injunction in the federal court, and if we got it in the federal court and it was reversed on appeal, or if we didn't get it in the federal court, in the federal district court, then we really would have waived the opportunity to assert that defense in the state court.

So, there are all kinds of reasons why it has to be, the defense has to be asserted in the state proceeding, but none of this undermines or can undermine the authority that Congress conferred on federal district courts to issue injunction against state proceedings to protect and effectuate their judgment.

QUESTION: Mr. Nachman, may I interrupt you?

MR. NACHMAN: Yes, sir. Excuse me.

QUESTION: You have explained why you had to assert the defense in the state court proceeding, but I am still not quite clear on why, having asserted it in your pleadings, and maybe even in a motion for summary judgment, whatever it be, why you could not have then forthwith gone into federal court.

MR. NACHMAN: Because we would not have been able to -- we could have gone, but we would have been faced with a line of decisions which as we read them say you don't get this injunction automatically. You have got to show that the federal judgment is in danger. You have got to show that the federal judgment is in danger. You have got to show that there is a substantial basis for asserting in the federal court that the state courts are not going to give proper preclusive effect --

QUESTION: You surely had that when the state judge denied the motion for summary judgment.

MR. NACHMAN: On the basis of a general --

QUESTION: You were probably pretty busy those few days, I guess, if you were about to go to trial, but I don't understand. I mean, it seems to me that all of your arguments might explain waiting until whatever the date was, some time in January, when the summary judgment was ruled on, but I would think right after that your claim would have been totally ripe.

MR. NACHMAN: It may have been, Your Honor, but the recitation in the order denying summary judgment was that there was -- I am reading from Page 220 of the record. "The court is of the opinion that there are genuine issues as to material fact existing in this

cause, and that the motions for summary judgment are each due to be denied."

QUESTION: Yes, but they also on 219 said, "The court further finds that neither res judicata nor collateral estoppel precludes the prosecution of the instant claim."

MR. NACHMAN: That was an early order by a different judge who had recused himself.

QUESTION: Well, if that order had been entered, you surely were on notice that you were going to lose on those issues in that court, weren't you?

MR. NACHMAN: Well, at that time, Your Honor, the one on 219 was -- that order came down on March 17th of '82, I believe, which was before the Court of Appeals had affirmed the original federal judgment, and that was one of the -- this isn't in the record, but that was one of the arguments that was made to the court, that the federal judgment at that time was on appeal. The affirmance of the federal judgment didn't come down until June of 1982, and this first denial that Your Honor is referring to is in March of 1982.

QUESTION: The federal judgment was not final. May I go back to one other question? Justice Rehnquist asked you earlier about the Toucey case and Justice Reed's dissent there, which surely provides an

answer to the Anti-Injunction Act, but I am not clear on why you are so confident that that provides an answer to the full faith and credit problem, because even though it is correct, as you point out, that there was a judgment entered in the subsequent state proceeding in the Wisconsin Bridge case, Justice Reed didn't rely on that at all. Or he didn't discuss that problem. He doesn't even discuss the full faith and credit problem, if I understand his opinion.

MR. NACHMAN: He doesn't in so many words, Your Honor, but as I pointed out in answer to Justice Rehnquist, those were the underlying facts that confronted this Court when it decided Toucey, namely, a decision by the Delaware courts that despite the refusal of the federal district court to foreclose the mortgage, that the noteholders could sue in the state court and prevail on the notes which the mortgage was given to secure.

QUESTION: But Justice Frankfurter didn't rely on those facts at all.

QUESTION: Justice Reed's opinion just says litigation was commenced in the state courts. It doesn't say anything about it going to judgment.

MR. NACHMAN: But it does cite, Your Honor, in the opinion -- I think it is 14 Atlantic 2nd or

something like that, the Delaware decision is cited in Justice Frankfurter's decision.

QUESTION: Well, then I think that cuts against your argument, because if all members of the court knew it had gone to judgment, and neither Justice Frankfurter nor Justice Reed gave that any significance in their opinions, it would seem that their opinions would stand without it.

MR. NACHMAN: That may be, Your Honor, but what we are talking about is not what may or may not have been in the minds -- in those opinions. But what Congress wanted to do after it faced the Toucey opinion, and it wanted to make clear that federal courts had this power -- now, we submit in answer to Justice Stevens' questions as well that if the petitioner's res judicata argument is adopted, then 2283, the relitigation exception, is totally emasculated.

QUESTION: No, it would have to be exercised before judgment, is all.

MR. NACHMAN: The federal court -- beg your pardon, sir?

QUESTION: No, it would just have to be exercised before judgment. I mean, under your view, as I understand it, you could litigate this through the state supreme court system and finally lose on res

judicata and say, well, now, I will take a shot at the federal court, and enjoin the enforcement of judgment now that it is really final.

MR. NACHMAN: Yes, sir, because even if a state trial court gives appropriate preclusive effect to a prior federal judgment, that is always subject to reversal by the state appellate court, so in order to give the scope to 2283 that Congress intended per force it must apply to a decision of the state appellate court and permit an injunction of the state appellate proceedings as well as state trial proceedings.

Indeed, two of the cases we cite in our brief, the Silcox case and the Brown against McCormick cases, in both of those cases, the matters had gotten to the appellate courts before the federal injuntion issued, and in one of the cases the federal appellate court commended the parties for going that far in seeking to get the state to give the proper preclusive effect to the earlier federal judgment before seeking relief in the federal courts.

In answer to Justice White's question about the ACL case, that case as we understand it, and we have discussed it at some length in our brief, as we understand it, went on the point that because of the Norris-LaGuardia Act, the federal district court had not

decided earlier the question of whether there could be a federal injunction against -- a state injunction against -- excuse me, a federal injunction against picketing, and that simply there was a withholding of jurisdiction according to the majority analysis, Your Honor, and I believe Justice Brennan dissented, feeling that there had been a broader issue than just the withdrawal of jurisdiction under the Norris-LaGuardia Act.

But the point of the decision was that the federal district court had not decided the matter that was later decided by the state court which issued the injunction, and therefore the relitigation exception did not come into play.

QUESTION: What did this Court say about they the injunction wasn't issued by the federal court?

MR. NACHMAN: There was picketing at a railroad terminal in Jacksonville. The railroad went to the federal court to seek an injunction, and it was denied an injunction.

QUESTION: Yes, and why was it denied?

MR. NACHMAN: The majority felt because of the withdrawal of jurisdiction or injunction in labor disputes by the Norris-LaGuardia Act --

QUESTION: Well, and furthermore because there just shouldn't be injunctions.

MR. NACHMAN: That was Your Honor's view, and that was Mr. Justice Brennan's view. But the majority, as we understand it, said that that was the basis, and then that therefore the matter of whether or not to issue an injunction had never been litigated because the court felt that there was no authority to issue the injunction since it had been withdrawn, the jurisdiction had been withdrawn by the Norris-LaGuardia Act.

So, relitigation was said not to have been present in that case. Had it been present, I think it is fair to assume because Justice Black said it was --

QUESTION: It sounds to me that is sort of like why this federal judgment should have any preclusive effect at all, because ultimately all that happened was that the appellate court ruled that there was no cause of -- there was just, as a matter of law, just no violation of the Bank Holding Company Act. Why should that preclude anything?

MR. NACHMAN: Because the issues of whether or not those same facts provided a remedy under state tort law of fraud and commercial unreasonableness of sale and conversion should have been raised in the federal action.

QUESTION: Well, that's it.

MR. NACHMAN: And indeed there is ample

discussion in our brief --

QUESTION: You have to say that that is the federal rule.

MR. NACHMAN: Yes, sir.

QUESTION: Res judicata, that if you can -- that you either raise your pendent state law claims in the federal action or you are going to be foreclosed.

MR. NACHMAN: Yes, sir. And bear in mind, Your Honor, the plaintiff went to both courts. The plaintiff is the party of the petitioner here who sought to split this cause of action and seek one remedy in the federal court and another in the state court.

And with the brief time remaining, I would take issue with counsel, as we do at considerable length in our brief, that the interests of the trustee, the trustee representing the subsidiary, was clearly in privity with the Parsons interest.

The subsidiary was wholly owned by a plaintiff corporation, and the plaintiff corporation was 99 percent owned by the other two natural parties in the federal litigation. Their interests were identical, not just in privity. They did seek, as I pointed out in answer to a question from Justice O'Connor, a stripping of assets of $2.4 million.

We have pointed out various arguments and

evidence introduced, charges to the jury, and all that show that the interests of the subsidiary were involved in the federal litigation. The lawyer for the trustee participated in 15 depositions which were taken jointly and concurrently in the cases, and knowingly elected to stay out of the federal litigation.

If ever there was a case of privity and bar as a result of privity, this is it. We urge that the case be affirmed.

CHIEF JUSTICE BURGER: Mr. Wilson, you have one minute remaining.

ORAL ARGUMENT OF FRANK M. WILSON, ESQ.,
ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. WILSON: In that one minute, I would like to make just one point. We do not concede that under Alabama law the judgment in the state court was not final. I apologize to Justice O'Connor for a poor answer to her question. The Scott versus Lane case stands for the proposition that authorities in the federal court interpreting the rules of federal procedure are followed by Alabama as a matter of procedure. It is not a case on the substantive law of res judicata in Alabama. So I do not concede, I do not have any authority to offer the Court, but I do not concede that point.

Secondly, the trustee --

QUESTION: May I ask you on that point --

MR. WILSON: Yes.

QUESTION: -- if you are right on everything else, isn't the correct disposition if you win to send it back to the Court of Appeals to decide whether or not as a matter of Alabama law the judgment has preclusive effect?

MR. WILSON: If the only issue this Court feels constitutes reversible error is the full faith and credit issue, yes, Justice Stevens, that is correct. If you agree with me on my arguments concerning the anti-injunction statute, then there would be no need for them to determine that issue.

I thank the Court for its attention.

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

(Whereupon, at 1:58 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION.

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FIRST ALABAMA BANK AND EDWARD HERBERT

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BY Paul A. Richardson

(REPORTER)