ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

Corrected Copy

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1798

TITLE PENNZOIL COMPANY, Appellant V. TEXACO, INC.

PLACE Washington, D. C.

DATE January 12, 1987

PAGES 1 - 55

ALDERSON REPORTING
(202) 628-9300
20 F STREET, N.W.

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - -x

PENNZOIL COMPANY, :

Appellant :

v. : No. 85-1798

TEXACO, INC. :

- - - - - - - - - - - - - - - - - - - -x

Washington, D.C.

Monday, January 12, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:50 o'clock p.m.

APPEARANCES:

LAURENCE H. TRIBE, ESQ., Cambridge, Mass.;

on behalf of Appellant

DAVID BOIES, ESQ., New York, N.Y.;

on behalf of Appellee

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: You may proceed whenever you're ready, Mr. Tribe.

ORAL ARGUMENT OF

LAURENCE H. TRIBE, ESQ.

ON BEHALF OF APPELLANT

MR. TRIBE: Thank you. Mr. Chief Justice and may it please the Court:

At stake in this case is the integrity of the barriers that Congress and this Court have created to defend state courts from being sidetracked by federal flanking maneuvers. Now, nearly 200 years ago in the Anti-Injunction Act Congress assured the independent and the parallel existence of two separate tiers of courts, state and federal, with this Court at the apex of both.

It did so by enacting the Anti-Injunction Act, absolutely prohibiting injunctions such as the one entered here, unless expressly authorized by Act of Congress.

Now, there is only one Act of Congress that is a candidate in this case for such express authorization, and that is Section 1983. It is common ground, however, in this case that Section 1983 reaches only those who wield state power.

Now, that concept must stop short of private

litigants who merely ask the state courts for relief win at trial and then ask that the judgments in their favor be duly recorded, because if the state action concept reached that far then every state court proceeding would automatically become a target for a federal injunction and the 1983 exception would then utterly swallow the anti-injunction rule.

And indeed, quite apart from the impact on the Anti-Injunction Act, if the state action concept engulfed all who invoked judicial process and, with the help of court functionaries, record the judgments that they win, the distinction between private and public action so fundamental to this Court's jurisprudence would be obliterated.

Now, Texaco I think sees the threat here, but it says there's no problem because Pennzoil is not like an ordinary private plaintiff. Why not? Well, the reason, you see, is that the state of Texas abdicated to Pennzoil what they call a judicially unsupervised power to control disputed property and to decide whether Texaco will have to post full security to stay the judgment.

That theory about Texas law is a complete fantasy. It was not even adopted by the Second Circuit, which was content to observe that in order to enforce

its judgment Pennzoil would, as a judgment winner must in every state, act together with various functionaries in getting the judgment recorded and in the process of execution.

I want to examine --

QUESTION: Mr. Tribe, let me ask you where this goes. If we go along with you and assume that the private party who's reducing the judgment to effect a collection is not a state actor, what about these functionaries who are assisting him? Are they state actors?

Is the problem here simply that the wrong party was sued and that you could have sued someone else in federal court in Massachusetts and achieved this result?

MR. TRIBE: No, I think they would have preferred New York.

QUESTION: Oh, I'm sorry.

MR. TRIBE: Whoever they sued, I think there is a more fundamental problem. It's not just who you denominate as the actor, it's the concept of state action. The mere identification of functionaries would not solve the problem, because one could then always sidetrack a state proceeding by identifying the clerk with whom a complaint was filed or some other

functionary.

The real question is whether there is any problematic state action that can be adjudicated in this particular lawsuit. Of course, they didn't sue --

QUESTION: So you're not saying -- your basic argument is not that this is not a state actor, but that there is no state action here?

MR. TRIBE: Well, in the background of the case, in enacting its laws Texas acted. But that was true also in Flagg Brothers, and it's always true. We're saying that no state action is properly challenged in this lawsuit, not that the state of Texas has never acted.

Indeed, the government of Texas acted in a four and a half month trial to adjudicate the liability between these parties, and in doing so it rendered a judgment that is final and claim preclusive under Texas law.

It is that fact, the adjudication of that judgment, which is simply recorded in the form of a lien if the lien statute comes into operation in this case. They try to present the picture that somehow Pennzoil is the repository of an abdication of state responsibility, that the courts of Texas are somehow not supervising the power Pennzoil is wielding, and that it is for this

reason that the 1983 exception suddenly opens the door to a federal flanking maneuver that otherwise would be unavailable.

Indeed, Justice Scalia --

QUESTION: Well, this is very close, though, to Lugar versus Edmondson Oil, isn't it, in terms of asking what's under color of state law? I didn't happen to support that judgment, but --

MR. TRIBE: Justice O'Connor --

QUESTION: -- it seems to me that this is a pretty close relative of Lugar.

MR. TRIBE: It's a distant relative of Lugar, I think, Justice O'Connor, because in Justice White's majority opinion in Lugar care was taken --

QUESTION: The opinion for the Court.

MR. TRIBE: In the opinion for the Court in Lugar, great care was taken --

(Laughter.)

MR. TRIBE: Great care was taken to distinguish the case of an ex parte pre-judgment attachment where the state was abdicating power to a private party. There is all the difference in the world between allowing private parties to go around deciding, let's see, we'll seize this oil company or we'll take that asset, and simply enforcing a judgment.

And with respect to the lien statute, all that's being done, it's like recording a mortgage, or in an example Justice Stevens once gave, recording a car transaction. It's simply recording your place in line.

Now, there is of course also the bond provision but the bond provision does not delegate power to Pennzoil. If anything, it delegates some power to Texaco. That is, if they can post a full bond then automatically they're entitled to stay the judgment.

It also leaves power in the hands of the courts of Texas, quite obviously. The trial court in this very case entered a stay unsecured preventing any enforcement action for a full three and a half months, as paragraph 7 of the judgment. And if Texaco had bothered to ask for an extended standstill, if they wanted to have an unsecured judgment for a longer time, it would be not Texaco, but the courts of Texas, that would decide whether they were entitled under Texas law and under federal law to that relief.

It seems to us that, despite the attempt to make this look like an abdication of state power, what we really have is a distant relative of Lugar, but a distant relative separated by a vast chasm, because unlike Lugar, in this case all we have is a winning plaintiff.

And a 1983 that becomes an excuse whenever you have a constitutional complaint that you can make, that becomes an excuse for sideswiping state proceedings and engaging in federal flanking maneuvers, isn't just an express exception to the Anti-Injunction Act; it ends the meaningful operation of that Act.

And one of the answers Texaco gives I just want to spend a moment with, and that is they suggest, in line I think with your question, Justice Scalia: Oh, come on; there's really no impact on the Act; if you want to have us do it over again, we'll sue some state functionaries.

But of course, they concede in their brief in this Court that a suit against state functionaries where discretion is exercised, as it would be here, would be premature in a case like this. They're simply speculating that the functionaries of Texas will effectively destroy them without giving them a meaningful opportunity.

QUESTION: Mr. Tribe, can I ask you a question on state action. Supposing that Texas had the procedure that it has for corporations that are owned by Yankees, but all other corporations and Southerners have a right to appeal without posting any bond at all. Would there be state action that you could challenge in that case?

MR. TRIBE: Well, I would think then, Justice Stevens, the proper way to challenge what the state had done would be to ask the state, as Texaco has never done, to obliterate that distinction, to make a proper motion, and on denial in review in this Court there would be state action, just like Shelly v. Kramer.

That is, when the state courts --

QUESTION: Well, that really isn't my question. That's really a different answer -- I mean, a different line of argument.

Would there have been state action if you brought a 1983 challenge against the procedure on those facts? I think your answer would be no.

MR. TRIBE: No, if you merely sued the private party, and you couldn't sue the legislature --

QUESTION: Well, I think you said earlier to Justice Scalia, even if you sued the right functionaries it wouldn't make any difference.

MR. TRIBE: I think regardless of whom you sue, you would not be suing the responsible state actors, in that case those who crafted an impermissible rule of law.

There was in Flagg Brothers state action lurking in the background, but there was not state action that was properly brought before a federal

court.

QUESTION: Under this case, could you go shopping in Hawaii and Anchorage?

MR. TRIBE: Well, I think they could go shopping anywhere where they could find a federal judge and bring a flanking maneuver anywhere. Forum shopping is open season.

Now, it seems to us that in a sense that ends the case. That is, if there is no 1983 exception the Anti-Injunction Act is not a vague, fuzzy doctrine; it's a flat bar. But just in case the Court is not persuaded, I do think it's important to recognize that there is far more wrong with what the courts below did than that.

That is, even if Section 1983 were available on some theory, the Second Circuit nonetheless impermissibly separated the sword of Section 1983 from the abstention shield that this Court in Mitchum v. Foster carefully assured would serve as a backstop to protect state proceedings precisely when the 1983 sword was available to create an exception to 1983.

QUESTION: To the Anti-Injunction Act.

MR. TRIBE: An exception to the Anti-Injunction Act, sorry, to 2283, the Anti-Injunction Act.

The entire architecture of the Mitchum doctrine was designed to assure that there would be no gap within which state proceedings would be left utterly unprotected, either by the absolute barrier of the Anti-Injunction Act or by the rather more porous shield of the abstention doctrine.

QUESTION: Well, it isn't altogether clear what proceeding was enjoined by the district court, is it? I mean, there wasn't a proceeding going on, was there?

MR. TRIBE: Justice O'Connor, the trial and the appeal were the proceeding in which the complaints that they had ought to have been raised. The injunction was against invoking any state procedure for enforcing this judgment or for dealing with the problem of security.

But just as this Court in Trainor v. Hernandez, where there was a clear bifurcation between the attachment procedures of the state and the substantive action against the alleged welfare cheaters, just as in that case the Court said that it would not allow a kind of baloney-slicing approach to be taken by litigants who want to engage in flanking maneuvers, so here the fact that they choose to focus on whatever procedures might surround the issue of the bond and the

security should not take this Court's attention from the fact that Texaco was not a litigant in aimless search of a court in which to appear.

They were before a trial court of plenary jurisdiction, the very court that gave them a three and a half month fully unsecured stay, during which it is clear that any respect for the courts of Texas would have led them, not to a federal court in White Plains or Anchorage or Hawaii, but right back into the court where they were litigating.

And as we point out in our reply brief, there were at least five avenues of procedural relief manifestly available to them. The plenary power of the trial court to supervise its own judgments plainly here -- as the district court itself expressly found, the trial court had the power and the duty to entertain their request to reduce the bond on federal constitutional grounds.

QUESTION: Well, Mr. Tribe, it isn't all that clear to me at least what might have been available in Texas. Do you think a Pullman type abstention might have been available or appropriate for a federal district court here?

MR. TRIBE: We think not, Justice O'Connor. The reason is that, as this Court recognized in Moore

versus Sims, one of the purposes of Younger abstention is to allow questions of state law that may be ambiguous to be resolved in the state courts where the case is already pending.

If this case had not originated in the courts of Texas, if they were not before a trial judge with plenary jurisdiction, if it had originated in the federal courts and then they brought a complaint raising doubtful questions about state law, then a Pullman type abstention might make sense.

But nothing could make less sense than to bounce back and forth from the courts of Texas to the federal courts, back to Texas again, while the question they could easily have resolved by asking the court for relief could have been resolved there.

QUESTION: It makes some difference in answering Justice O'Connor's question rally on whom the burden is to show that there was or was not a state remedy. I mean, I think that that might be controlling here on this issue.

MR. TRIBE: Well, Chief Justice Rehnquist, as this Court repeatedly has said, unless it plainly appears that there was no remedy, one can't simply indulge a negative and hostile presumption. And in that sense, what the Court said in Middlesex and Juidice

suggests that the burden would be controlling.

But we don't think there's even any genuine doubt here. That is, there are numerous cases -- we've cited them in the reply brief and elsewhere -- in which the Texas courts in the exercise of their plenary jurisdiction have suspended judgments, even money judgments, without bonds; the Fairbanks case, for example, and there others.

We think they are conjuring doubts where doubts don't exist. There are in addition the stay of judgment statute clearly available in the trial court, 65.013. There is mandamus from the court to the clerk to reduce the bond.

In the LeCroy case, which we have discussed throughout this proceeding, in the LeCroy case, which Texaco does not respond to, there was a clearcut state rule in Texas that said you couldn't file a complaint unless you paid an additional $75. No ambiguity about it at all.

But Texas has an unusually generous open court procedure. A writ of mandamus was sought from the trial court to the clerk. Mandamus was issued within a week. The Supreme Court of Texas affirmed.

That is, the state law here is not really unclear. All the way from 1890 in the Dillingham case

to 1986 in the LaCroy case, the courts of Texas have been extraordinarily generous in eliminating alleged obstacles to meaningful access to the judicial process.

QUESTION: Well, Mr. Tribe, are you really arguing for a Younger abstention?

MR. TRIBE: Absolutely. We initially say the Anti-Injunction Act is a bar.

QUESTION: Yes, I understand that.

MR. TRIBE: Falling back from that, we say that Younger abstention was required under Trainor.

QUESTION: And what is the state interest that's meant to be protected?

MR. TRIBE: The interest, as in Juidice, in ensuring the enforceability of state judgments. It seeems to us very bizarre to say that there is a state interest in conducting trials, but no interest in seeing to it that the results of those trials are worth more than the paper they are written on.

QUESTION: Well, his premise is it really is a major piece of state action.

MR. TRIBE: Well, the state acts in conducting the trial, that we don't deny, as I suggested to Justice Stevens.

QUESTION: Well, and in enforcing its judgments.

MR. TRIBE: And in making sure its judgments are enforced.

QUESTION: -- under 1983.

MR. TRIBE: Well, we say that 1983 does not apply, and therefore you don't even need to reach Younger.

QUESTION: Well, if they don't have jurisdiction under 1983, what do they have jurisdiction under?

MR. TRIBE: Well, we don't believe that the federal district court in White Plains had any jurisdiction in the premises whatever. And we believe that among the reasons was that, apart from the remedies available in the trial courts, there are two important remedies that continue to be available in the appellate courts of Texas, which they have made no effort whatever to exhaust.

There is the request under 365(b) to reduce a bond if it's deemed excessive and, most important, there are the parallel to the All Writs Statutes in Texas, giving an appellate court the power that was exercised in Pace v. McEwen.

QUESTION: You say they've got these remedies, but suppose they had resorted to them and they had been denied.

MR. TRIBE: Then they'd have come straight here.

QUESTION: They're supposed to come here.

MR. TRIBE: Exactly.

QUESTION: And that wouldn't justify the federal court doing anything.

MR. TRIBE: Exactly. It was the wrong federal court. That is, there is a federal court with appellate concern and appellate jurisdiction to protect, and I'm looking at it. This is the relevant federal court.

In Nebraska Press and in --

QUESTION: Well, it isn't a question of exhaustion; it's a question of availability.

MR. TRIBE: Well, I think it's a multi-faceted prism, Justice White. And we think that we win regardless of which facet one looks through. In fact, let me focus on the question of the right or the wrong court in just a moment, after I come back to Chief Justice Rehnquist's question of the burden.

You see, I do think they're arguing that the usual burdens should be reversed here, because even though the Texas parents involved in Moore versus Sims were not allowed to speculate that Texas remedies might not be adequate -- this Court said such hostile speculations and predictions of futility will not do --

and even though the Virginia prisoner in Smith v. Murray was not allowed to speculate, and even though the Ohio school teachers in the Dayton Christian Schools case were told that forecasts of frustration will not do, they have an argument which in essence says that: for us uncertainty was terrifying, because we had no way of knowing what would happen in the Texas courts; there's this three and a half month grace period, but for all we know those Texas judges will interpret it in a nasty way, or for all we know, even though in its own terms that grace period can only expire after a complete adversary hearing, it will be unreasonably cut short.

Therefore, our bankers and our financiers are nervous. Therefore we need instant relief, and nothing less will do.

It's a kind of Fortune 500 exception for federalism. Everybody else has to take the rule as they find it, but we are now told that if you are rich enough and big enough to project your fears onto the stock exchange display board then you've got a better deal.

I do want to reserve time for rebuttal, but I want to suggest how important it is that this is the right Court. This Court would have required exhaustion, as it did even in Volkswagenwerk in Michigan. They had requested relief from the Michigan Supeme Court, even

though that court had not acted.

But what the district court in this case did was create an analogy to Monroe and Patsy. It said that because the Section 1983 plaintiff has a choice of forum and may as an original matter choose to go to federal court, we'll simply extend it a little to the defendant in a pending state proceeding.

That makes all the difference in the world, because what they got was a stay in aid of appellate jurisdiction, and the one court that could have been asked for it, this Court, if the courts below had denied relief, instead gets the case through the back door, through an avenue of relief that completely disorients the structure of federalism in place since the Anti-Injunction Act of 1793.

Thank you.

QUESTION: Mr. Tribe, I take it your last argument is that there is just no denial of due process anyway?

MR. TRIBE: Well, that's correct. If you were to reach the merits, we think that it's clear that security was needed, as the district court found, although I should say that if this case goes back to the Texas courts that in those courts I can formally represent on behalf of Pennzoil that what we want is a

flexible security arrangement.

If the injunction is reversed, we are going to take no action whatever to enforce it, as long as they promptly ask the Texas courts for some suitable form of relief.

QUESTION: Is this a preliminary injunction?

MR. TRIBE: It is preliminary in name, but final in effect, since no further proceedings need to be conducted.

QUESTION: Mr. Tribe, you said if this case goes back to the Texas courts. Isn't it still there?

MR. TRIBE: On the merits it is there, on the merits it is there. They've sideswiped the jurisdictional issue.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Tribe.

Mr. Boies, we'll hear from you.

ORAL ARGUMENT OF DAVID BOIES, ESQ.,

ON BEHALF OF APPELLEE

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

I'd like to begin with just a few moments of the facts of how we got here. A judgment was entered in the Texas court for $10.5 billion. At the time that

judgment was entered, at the time that we had the proceeding in federal court, and indeed today, I think it is common ground that, as the Court of Appeals said, there is no serious dispute that, should Texaco be required to liquidate its substantial assets, it would be able to pay Pennzoil's judgment in full.

That was not only the conclusion of the courts below; it is what Pennzoil has said, and said repeatedly. As supplemental finding 137 of the district court's findings indicates, Pennzoil has repeatedly said two things: one, that Texaco's net assets are approximately twice the amount necessary to satisfy the Pennzoil judgment; and second, that Pennzoil itself, as is set forth in Pennzoil's own words in supplemental finding 137, does not have any doubt that if that judgment is ultimately affirmed it will be collectible from Texaco.

And indeed, as is indicated in the briefs, Pennzoil in the Texas courts as late as last July, when we were arguing the appeal from the Texas trial court judgment, again said that Texaco's assets were more than enough to satisfy the judgment.

QUESTION: Does this argument go to the fact that there would have been or was a due process violation by requiring this bond?

MR. BOIES: Yes, it does. Yes, it does, Justice White. This is part of the basis for the lower court's conclusion that there was at least fair grounds to litigate, since it was the preliminary injunction standard that was applied, that there was a due process problem.

QUESTION: Well, Mr. Boies, I guess that doesn't answer their priority argument, though, does it? That the purpose -- the filing of the post-judgment request put their priorities in place.

MR. BOIES: Justice O'Connor, I think it does answer the priority issue, because under Texas law the reason for the priority is to assure collectibility. That is, a judgment winner deserves priority in order to assure that he will be able to collect that judgment ahead of other potential creditors.

Here there are two points that I'd urge the Court to keep in mind. The first is that as long as it is clear, as the amount of assets and Pennzoil's own statements indicate is the case, that there is enough money there for it to be collectible, priority is not really a consideration.

Second, in this particular case, because if the judgment was executed on or if the lien were to be attached it would be the case, as the district court

found, that Texaco would be placed into bankruptcy, though priority wouldn't occur because Texaco would just be an unsecured creditor, the only assumption that you could have for priority would be somehow Texaco and Texaco's other creditors would allow those liens to be attached or allow the judgment to be executed without going into chapter 11.

And as the court below found, that simply wasn't in accord with the facts.

So that there is no priority, no meaningful priority, that could be achieved or was needed to be achieved in order to achieve the purpose of the Texas statutes of bond and liens, which is protecting the collectibility of the judgment.

QUESTION: Well, what if other people, after Pennzoil got its judgment, got similar judgments against Texaco? There would have come a point when Texaco couldn't have satisfied all those judgments, I take it?

MR. BOIES: Yes, Your Honor. If you have a situation in which there were multiple $10 billion judgments against Texaco, there would come a point when Texaco's assets would not be sufficient to satisfy them. That point was never raised or the possibility of that point was never raised in the court below.

QUESTION: Well, it may not have been raised,

but that's what most priority statutes are for. You don't have to show that there's a present inability to meet the demand. You get a priority because later judgments may come along that would force bankruptcy.

MR. BOIES: But I would urge the Court to consider two facts in this particular context, Your Honor. First, the amount of the difference between the judgment and the total net assets is such that it is at a minimum very unlikely that priority would become a factor.

And second, that no priority as a practical matter was going to be achieved through the bond and lien provisions, because, unless you make the wholly irrational assumption that Texaco and Texaco's other creditors would simply stand by while these liens and bonds --

QUESTION: And this is an argument directed to the merits, I take it?

MR. BOIES: This goes as part of the Court of Appeals' consideration that there was fair ground to litigate the issue of the due process.

QUESTION: Is the view of the Court of Appeals then that a bond statute that may be perfectly fair in 99 percent of the cases can be enjoined in the rare case where it feels it's unfair?

MR. BOIES: I think it is the view of the Court of Appeals that there is at least fair grounds to litigate that, where you have a bond that is unnecessary and impossible to achieve, for all the reasons both the district court and the Court of Appeals indicate, and would have the kind of effect that this bond would have, it can be enjoined on an as-applied basis.

QUESTION: I don't why you put the "unnecessary" in there. You'd make the same argument if it was just impossible.

MR. BOIES: I think the argument if it were just impossible, Justice White, would not be nearly as strong as where it is both impossible and unnecessary.

QUESTION: Well, I know, but you'd still be making it. And I would suppose the Court of Appeals really went on the impossibility side of it, didn't it, that Texaco just couldn't satisfy this bond?

MR. BOIES: Well, the impossibility --

QUESTION: Without going -- and that it would precipitate bankruptcy.

MR. BOIES: I think the impossibility was an important part of the Court of Appeals' decision. At page 1155 of the Federal Reporter opinion, the court emphasizes again and again that there is no serious dispute that, should Texaco be required to liquidate its

assets, the judgment will be collectible.

So that I think that the Court of Appeals does rest its conclusion on both of those assets.

QUESTION: But where do you get jurisdiction in White Plains?

MR. BOIES: Justice Marshall, I think that that's a question I clearly want to address.

QUESTION: I hope so.

MR. BOIES: Under 1983, under Section 1983, if there is state action certainly there was jurisdiction for the court to entertain this claim. We believe that Lugar, rather than Flagg Brothers, is the right analogy.

In Lugar, just as here, there was a requirement that what happened was that the attachment be taken to a state official, that that state official --

QUESTION: Well, could you have filed it in Anchorage?

MR. BOIES: Could this case have been filed in Anchorage?

QUESTION: Yes, sir.

MR. BOIES: I think --

QUESTION: And then go from there to Honolulu while you're at it.

MR. BOIES: I don't think so, Justice

Marshall.

QUESTION: Well, what's the difference? Why is New York so peculiar?

MR. BOIES: Well, one of the differences was, Your Honor, of course, New York was the home of --

QUESTION: You admit you're shopping? You admit that?

MR. BOIES: We don't, Your Honor. New York was the place where the bankruptcy petition, because it's the principal place of business of Texaco, was going to be filed.

One of two things was going to happen: Either these bond and lien provisions were going to be enjoined or the company was going to go into bankruptcy. Both of those petitions were prepared and both were available to the court.

If we had not gotten the relief that we seek, the company would have gone into chapter 11. It would have gone in in the federal court in New York. And that was a very important reason for choosing that forum. We weren't going to go shopping --

QUESTION: Is that in the record?

MR. BOIES: What? Yes, Your Honor, I believe that is in the record.

QUESTION: Are factors like that mentioned in

the venue statute? I mean, ordinarily the reasons the plaintiff has, it isn't a very discretionary thing as to whether you can or cannot lay venue in a particular place.

MR. BOIES: No, but where the injury occurred typically is, Your Honor.

QUESTION: Well, you say the injury occurred in New York, rather than Texas?

MR. BOIES: Well, New York was the situs where all of the transactions took place, and indeed the Texas court was applying New York law to this case.

QUESTION: Well, but the injury your client suffered was the refusal of a Texas court to relieve the bond requirement under Texas law, wasn't it?

MR. BOIES: And the injury would certainly have occurred in Texas, Your Honor, I agree with that. It would also have included New York and probably some other states where Texaco has its substantial assets.

QUESTION: And so you say you could file this action wherever you could find Pennzoil doing business?

MR. BOIES: I think it is conceivable under the venue statutes that other places could have been chosen. I don't think it's anywhere in the country. But as a practical matter, Texaco was going to choose the place, in New York, that made logical sense, because

that was the place that, in the absence of success in this motion, would have been the situs of the bankruptcy petition.

QUESTION: Mr. Boies, can I ask you a question, if your three elements, your necessity, impossibility, and so forth, justify this extraordinary relief. It seems to me that those basic allegations could be made in quite a number of cases involving smaller companies having difficulty getting the security for an appeal, but might go into bankruptcy just meeting the timing problem. That's not unique to this situation.

Do you think that the size of the company has anything to do with the issue?

MR. BOIES: I do not believe that the size of the company has anything to do with it.

QUESTION: So that any time a litigant who is having a great deal of difficulty posting appropriate security could make comparable allegations, it has a 1983 claim?

MR. BOIES: I think that where you have the combination of impossibility and lack of need, that is true.

QUESTION: It could make the allegations and is entitled to a hearing on those allegations, that's

what I really should say.

MR. BOIES: Assuming that he makes out a prima facie case.

QUESTION: Word for word the same as yours, except we're a grocery store and we own some vacant land out in Iowa.

MR. BOIES: And if the same allegations could be made --

QUESTION: We will go into bankruptcy if we have to pay this judgment.

MR. BOIES: -- entitled to go into court.

QUESTION: That we can't sell the farm that fast.

MR. BOIES: It's a little more than that, Your Honor, because although the size of the company doesn't I think determine the rule of law, the size and the amount of judgment here does have something to do with the impossibility.

QUESTION: Well, size relative to the amount of assets you can readily accumulate.

MR. BOIES: There are two elements to impossibility. One is the size of the judgment relative to the size of the company.

QUESTION: Right.

MR. BOIES: The other is the size of the

judgment relative to the worldwide bonding capacity. As the district court found --

QUESTION: Well, in my hypothetical I just have bonding companies don't particularly want to do business with us based on just this Iowa asset. There are a lot of situations where it's hard to get a bond.

MR. BOIES: Right, and I think that if you have just the situation where you have a bonding company that doesn't want to do business with this farm or small business, you may not have the lack of need that you do in a case such as this.

QUESTION: No, they say in due course we can liquidate this asset, we go into bankruptcy and there'll be plenty of money to pay the judgment. You have to have that, too, I assume.

MR. BOIES: I think that there's a strong argument that many of the same policies that underlie the Court of Appeals decision would apply there. The one that doesn't is the absolute impossibility, which comes not because the bonding company decides it doesn't want to do business, but because of the unprecedented size --

QUESTION: Well, the plaintiff alleges absolute impossibility in each case and then he's got to prove.

MR. BOIES: Then he's got to prove it, yes. And then it's up to the court to make, obviously, to make a decision whether there's any substance behind the mere allegations.

I do want to deal with the -- go back to the 1983 point because I think it is important to the question of jurisdiction. Here it is not merely a question, as Pennzoil suggests, that they wanted to record their judgment. Their judgment is recorded.

What they now want to do with that judgment is take a copy of that judgment and, just as was done in Lugar, take it to state officials who then will use it either to execute in case no bond is posed or to attach liens under the lien statute.

And this is exactly what happened in Lugar. Now, in Lugar, Lugar was a pre-judgment --

QUESTION: And you litigate. When they try to enforce it, you litigate it.

MR. BOIES: But when they try to --

QUESTION: Isn't that right?

MR. BOIES: Under Texas --

QUESTION: Or are you just going to pay it?

MR. BOIES: Well, under Texas law there is no opportunity to litigate it unless you bring in state court what we did in federal court, an independent

action to try to stop them from doing that.

QUESTION: Well, why didn't you do that?

MR. BOIES: We chose, Your Honor, the federal forum.

QUESTION: Well, why didn't you use the federal forum in Texas? You knew they have district courts down there.

MR. BOIES: Yes, Your Honor, we did. And we seriously considered whether the case be brought in Texas or in New York. Those are the only two forums that we considered. We didn't consider Anchorage. But we did, though, however, decide that we wanted to be in the place where Texaco had its principal place of business.

A fundamental part of that decision was the fact that that's where the bankruptcy petition was going to be filed. We were not going to file the bankruptcy petition someplace other than the principal place of business of Texaco.

So if we were in a situation where we were going to federal court, we decided choosing between, as the venue statutes clearly gave us the right to do, between going into New York and going to Texas.

QUESTION: The venue statute on injunctions clearly gave you that right? What venue statute? The

bankruptcy venue statute doesn't apply to an injunction case.

MR. BOIES: No. But Your Honor, it was certainly our belief -- and this was not challenged by Pennzoil below -- that we had the right under the venue statute --

QUESTION: The general venue statute?

MR. BOIES: The general venue statute, to choose whether we came into New York or Texas. That obviously didn't give us necessarily jurisdiction without proving the 1983 claim.

QUESTION: That's right.

MR. BOIES: But if you assume that we had a 1983 claim --

QUESTION: Can you survive here without the 1983 claim?

MR. BOIES: No, Your Honor, I don't believe we can.

QUESTION: Well, how do you get under it?

MR. BOIES: I think we get under it, Your Honor, as they did in Lugar, by demonstrating that what you have is state action in terms of the attachment under the bond, either the execution under the bond provision or the attachment under the lien.

QUESTION: Do you really think 1983 was passed

to protect multi-million dollar, billion dollar corporations?

MR. BOIES: Your Honor, I think 1983 was passed to protect important civil rights, and I believe that those important civil rights, as this Court has repeatedly held, include rights of property as well as other civil rights.

QUESTION: That it only applies to a multi-billion dollar corporation. Well, you have said it several times.

MR. BOIES: No, Your Honor.

QUESTION: You said that's the basis, because it's so much money involved. Now, there's no statute on that. There's no statute that says a fat cat wins and a small cat loses.

MR. BOIES: No, Your Honor, we're not arguing that and if I have made that argument I apologize. The argument that I am making is an argument that I think ought to apply to all companies that come into court and all individuals that come into court with a valid 1983 action.

QUESTION: Let me just interrupt you right there. I'm interested in whether there is a limiting principle to your argument with respect to the applicabilty of Section 1983. May every defeated

litigant who, for whatever reason, can't get bond automatically become entitled to go into federal court under 1983? If not, why not?

MR. BOIES: I think there are two aspects of it. One is the 1983 bar and one is the substantive bar, that is whether you can make out a due process claim. With respect to the 1983 bar, I think you have to show that what you're attacking is not the merits of the judgment. That is, you're not in court just because you lost.

QUESTION: Why not?

MR. BOIES: Because I think that if what you are attacking, if what you're trying to do is attack the underlying merits of the judgment and in effect do what Pennzoil counsel says we're trying to do, which is sidetrack and stop the state proceeding, Your Honor --

QUESTION: At least the district court judge must have agreed with something.

MR. BOIES: Yes, although even our original complaint, Your Honor, only asked for an injunction on the timing of enforcement. We never asked the district court to do anything to interfere with the normal appellate processes.

Those appellate processes are going forward. We've argued the case in the court of appeals down in

Texas. There's been no attempt at any point ever to suggest that we wanted any court other than the normal appellate route in Texas and ultimately to this court, if necessary, to decide the merits of the case. There is no attempt to take those merits issues of whether or not there was a tort and how much damage ought to be --

QUESTION: What is your second safeguard, in answer to Justice --

MR. BOIES: The second safeguard is the fact that we think it is going to be an unusual case where you are going to have a clear case that the bond is not necessary and a clear case where the bond would be truly impossible to post and, third, a case where execution or putting on liens would have such great difficulty and cause such irreparable injury.

QUESTION: Wouldn't the ability to post the bond depend to some extent on whether or not the party had a deep pocket?

MR. BOIES: It would, Your Honor, in relationship, certainly, the size of the pocket to the size of the judgment. And I do take --

QUESTION: Does 1983 jurisdiction depend on the size of the pocket?

MR. BOIES: It does not. I think that to the extent that's relevant at all, it only gets relevant

when you begin to talk about lack of need.

QUESTION: Well, to a certain extent, the shallower the pocket the more need for a bond.

MR. BOIES: Precisely, precisely right, Your Honor. And I think that that -- if you had a shallow pocket, if you had a situation where Pennzoil really needed this security, contrary to what they have said, contrary to what the Court of Appeals said, you would have a different and much more difficult situation.

QUESTION: You'd put them right into bankruptcy in the effort of collecting your judgment.

MR. BOIES: That sometimes happens.

QUESTION: Without any 1983 problem at all?

MR. BOIES: I think that's right, Your Honor. I think that there are occasions, many occasions, where companies will, under at least the current law, be forced to that choice.

QUESTION: So it certainly in your mind doesn't raise any due process problem if the size of the bond that the state law requires is impossible to meet by the defendant?

MR. BOIES: I think it does --

QUESTION: Unless you have this other aspect to it?

MR. BOIES: I think it does raise issues, Your

Honor. It is, I think, a more difficult case than the case we're confronted with, where you have both impossibility and lack of need. I think it does raise problems, but I think those problems are not nearly as severe as the problems we have in this particular case.

I want to try to address the question of remedies, because there's some implication Texaco just jumped into federal court, apparently without any reason other than preferring the federal court to a state court. As the supplemental findings of the court, the district court below, findings 82 through 91, demonstrate, there was an attempt to get a hearing down in Texas with the court before whom the matter was pending to see whether there was any possibility of resolving this under Texas procedure.

On December 13, Texas counsel for Texaco wrote the court outlining the problems and asking for a hearing. This was after the judgment had been entered. Pennzoil opposed such a hearing. Pennzoil now says there were lots of remedies.

QUESTION: Did you submit in that letter or in any filing down there any constitutional issues?

MR. BOIES: We did not expressly assert the constitutional --

QUESTION: Well, or impliedly?

MR. BOIES: Well, we raised the question that we were going to, unless some relief was granted, be driven into bankruptcy, and that the security was not needed. We did not identify the constitutional issues, Your Honor.

We were trying at the outset to just get a hearing at which we could raise the issues. Pennzoil, who has taken the position before this Court that there were many remedies for us down in Texas, took the position down in Texas at that time -- and this again is reflected in the court's findings -- that the only thing the court had the jurisdiction to do then was deal with a new trial motion under 349(b) of the Texas Rules of Civil Procedure.

QUESTION: Can I ask you, Mr. Boies, suppose there just weren't any remedies there. Do you think that this would be a Younger case?

MR. BOIES: Your Honor, I don't think that it would be a Younger case because, as this court in Middlesex points out, there are three steps that you have to go through to determine whether or not Younger is applicable.

First you have to determine that there is a proceeding.

QUESTION: Well, there was. There was, wasn't

there?

MR. BOIES: Well, I think that footnote 9 in the Trainor case suggests that this is not a proceeding.

QUESTION: Well, assume there is a proceeding going on down there. If there isn't you don't have too much to worry about.

MR. BOIES: Right.

Second, there has to be a vital or important state interest.

QUESTION: And that's what you really --

MR. BOIES: And we really say that there is no vital or important state interest. Mr. Tribe says that --

QUESTION: Although enough to trigger 1983.

MR. BOIES: There is state action to trigger 1983, but the state interest --

QUESTION: All right.

MR. BOIES: -- has to be in the proceeding.

QUESTION: Right.

MR. BOIES: Mr. Tribe properly identifies what that proceeding is. He says it's the underlying proceeding, the proceeding that's going on down in Texas courts.

QUESTION: Well, the interest is to enforce

the judgment, he said.

MR. BOIES: Yes. But that interest would exist in every case. That would mean that every case under 1983, contrary to certainly the implication of Mitchum v. Foster --

QUESTION: Would be a Younger abstention case.

MR. BOIES: -- would be a Younger abstention case.

QUESTION: Is your state action the action of the court?

MR. BOIES: No, Justice Marshall.

QUESTION: Well, what is it? What is the state action here?

MR. BOIES: The state action would be the action of the sheriffs and the abstract personnel.

QUESTION: But they're not before your court. They're not in White Plains.

MR. BOIES: No, they're not, Your Honor. What we have done is we have sued, as was done in Lugar, we have sued the private individuals who, as they did under Lugar, have the power --

QUESTION: Without Lugar are you lost?

MR. BOIES: Well, I wouldn't say that we were lost. I would say that if Lugar had -- if Lugar were

reversed, our argument would be very much more difficult.

QUESTION: Well, suppose Lugar was distinguished. Would you be lost?

MR. BOIES: I don't think we would be lost, Your Honor.

QUESTION: Well, what else would you have.

MR. BOIES: It would depend on how it was distinguished.

QUESTION: What else would you have?

MR. BOIES: I think what we would have if Lugar were distinguished is that we would have the fact of the state action. That would exist whether or not --

QUESTION: Your state action is an appealable order, right?

MR. BOIES: I would say state action would include something even if it were not directly appealable.

QUESTION: But it is in this case, it is an appealable order?

Well, I'll finish my sentence. And instead of appealing it, you go to White Plains.

MR. BOIES: I think, with respect, Justice Marshall, that's not right. The LeCroy case which Pennzoil counsel relies on, where relief came not a week

after the complaint was filed, but two months after the complaint was filed. It came a week after the hearing, but it took two months to get the hearing.

In the LeCroy case, that was not an appeal. That was a case where they brought an original action. The Texas Attorney General who appeared before the Second Circuit has not appeared here, but did appear before the Second Circuit, said that the only remedy was to bring an original action either in the appellate court or the supreme court.

He conceded at pages 9 and 10 of his reply brief before the Court of Appeals that bringing it in the appellate court would have waived some important appeal rights of Texaco. So the practical remedy that the Attorney General of Texas said we had, and the only one, was to bring an original action in the state of Texas supreme court.

QUESTION: You mean an action of a state court is not appealable to any court in the state, right?

MR. BOIES: Excuse me?

QUESTION: Because if not, it's appealable here.

MR. BOIES: The judgment on the merits ultimately will be appealable here, Your Honor. The state action on the bond and lien provisions -- if we

had brought an original action, I think we could have brought an original action in the state of Texas, as opposed to bringing it in the federal courts in New York.

But I think that one of the things that this court's decisions have held is that when you are talking about bringing an original action, if you've got 1983 jurisdiction there's no -- and you're not talking about enjoining a criminal proceeding or other proceeding where there's an important state interest -- you do have the ability and the choice to choose a federal forum to vindicate that federal right.

And while I'm not at all suggesting that the federal rights of large corporations are more important than the federal rights of individuals or the federal rights of small corporations, I think when we begin to divide federal rights and when we begin to treat the enforcement of the federal rights of citizenship that all people and all companies ought to enjoy under the Constitution, I think we endanger those rights for everybody, because I think that the principle that where you have a federal right you have, absent some special circumstances, the right to have that cause of action adjudicated in a federal forum is something that this court has repeatedly held to be of critical

significance.

And here we believe that under Younger, which would be the appropriate issue if you had a 1983 action, you do not have that important vital state interest. And even if you did, we believe you'd come under one of the exceptions to Younger in the sense that you do not have an adequate remedy or, as the court in Gibson against Berryhill indicated, an adequate opportunity to raise and have timely decided, 411 U.S. 577, your constitutional claims.

It's not merely the opportunity to raise; it is the opportunity to have timely decided. And the importance of that timeliness aspect was reinforced in the Middlesex case Mr. Tribe refers to, where they did say, where the court did say, you've got to have a plainly inadequate remedy.

But they then went on to quote the Gibson against Berryhill language to show that if your remedy is untimely it is inadequate.

QUESTION: Mr. Boies, I take it that if you win in this case you won't be back in court on 1998?

(Laughter.)

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Boies.

MR. BOIES: Thank you.

CHIEF JUSTICE REHNQUIST: Mr. Tribe, you have eight minutes remaining.

REBUTTAL ARGUMENT OF

LAURENCE H. TRIBE, ESQ.

ON BEHALF OF APPELLANT

MR. TRIBE: Thank you, Mr. Chief Justice.

I think that this case as it has now emerged is all about the question of limiting principles and whether there are any, whether instead we're being asked for a railroad ticket good for one company only, which will then come back to haunt the jurisprudence of this court and the faith of this country in the rule of law.

I think Justice Powell's question was critical about the question of limiting principles for this extraordinary theory about state action that has been advanced in this Court. The theory basically is you invoke the courts of the state, and if you ever dare to do anything as radical as trying to enforce the judgment there is enough state action to provide a 1983 lawsuit anywhere where venue can be found.

The limiting principle suggested is primarily a theory about the substantive argument here, about due process. That was Mr. Boies' answer to Justice Powell. It was we'll rarely have as strong a due process argument as we have here.

Arguments on the merits are hardly limiting principles for threshold doctrines like state action. It would be like saying the Anti-Injunction Act means that you can never get an injunction to stay proceedings in any state court, unless of course you happen to have a valid claim on the merits.

Essentially, that removes the shield of the Anti-Injunction Act absolutely. That can't be a limiting principle, and we have yet to hear one. It seems to me that if one accepts their point of view, it means that there is a 1983 action whenever you have any constitutional argument you'd like to make arising out of a state proceeding; you don't really have to make it in the ordinary course and on review, and on review here.

QUESTION: Well, that's really the Rooker-Feldman line of cases, isn't it?

MR. TRIBE: Well, there is a relationship, Mr. Chief Justice. But even quite apart from Rooker-Feldman, that is, it is true that part of the limit that they derive is that if you really seek to review the merits of the judgment, rather than something that you can carve out, then Rooker-Feldman will stand in the way.

They did, of course, try to review the merits

of the judgment. They asked the district court to retain jurisdiction over the entire matter. But that is not sufficient protection for a doctrine that would essentially make every private litigant a state actor, because that problem will arise even outside the Anti-Injunction Act context.

QUESTION: Yes, but I wonder if your point under the Rooker-Feldman Act isn't perhaps stronger than your 1983 state action.

MR. TRIBE: Well, we think it's certainly as strong, Chief Justice Rehnquist. I mean, under the Rooker-Feldman point it's not just those two decisions; it's the very fundamental point that the kind of relief they got is quintessentially appellate, a stay in aid of jurisdiction.

The Second Circuit I think may have been confused here. It cited the Nebraska Press opinion of Justice Blackmun in chambers, saying that it's not enough to be able to come straight up because when the state's highest court drags its feet, as they keep saying they fear the courts of Texas would do, there is no way to get relief here.

But that isn't true. I mean, on the very facts of Nebraska Press, when the state supreme court delayed, as when the Michigan supreme court delayed,

there was relief here. And we don't think Congress has ever conferred the kind of pseudo-original, pseudo-appellate jurisdiction to win stays in aid of appeal without any exhaustion, by analogy to Monroe v. Pape and Patsy v. Board of Regents.

Now, one of the reasons that the limiting principle question is so fundamental goes to Justice White's question about Younger, the question of how far our theory of the Younger case carries you. Are we committed to the view that in every civil proceeding you might have a Younger problem?

It really depends on the lawsuit. Certainly if, as in Juidice, which was an ordinary private debt matter, you sue a state official, which they carefully chose not to do to avoid Younger, the fact that the underlying proceeding was purely civil does not deprive the state, New York in that case, of a fundamental interest in enforcing its judgment.

But the reason you don't get to the Younger issue, Justice White --

QUESTION: It would be a Younger case any time you went into federal court to try to block the enforcement of a judgment.

MR. TRIBE: If you're trying to block the enforcement of a judgment, we think that's right.

QUESTION: Right across the board.

MR. TRIBE: But ordinarily you wouldn't get the federal court to reach the Younger issue, because 2283 would be a bar. That is, unless you accept their absolutely all-engulfing state action theory.

QUESTION: Well, I know, if you accept that. But you have to accept that before you get to Younger.

MR. TRIBE: That's true. But it seems to us that the fundamental reason that Younger does not begin to consume the universe, even on our view of the matter, is that in most ordinary civil litigation 2283 is a bar to injunctive interference, but there is no bar and no 1983 entre.

Let me quickly turn to the other area where I don't think they have provided a limiting principle, and that is on the merits. We did stipulate in the Texas courts, and we repeat it now, that we are happy to live with flexible arrangements analogous to those under Rule 62.

We don't demand in this case the full security to which we think we might be entitled.

QUESTION: Why not?

MR. TRIBE: Well, because it's not in our interest to see them driven into bankruptcy, Justice Stevens.

QUESTION: Don't you just want to get paid?

MR. TRIBE: We want to get paid, but we don't want to have the world come crashing down. And even though bankruptcy isn't a boogeyman, we're interested in a reasonable accommodation.

But what they did was go to a set of courts that couldn't --

QUESTION: If you're that reasonable, maybe you could have settled this dispute and not taken our time.

(Laughter.)

MR. TRIBE: I think efforts -- I'm told efforts have been made about that.

But the point really is that their theory says that if you're solvent -- and they're quite solvent, as they point out -- if you are solvent, then no security is needed. Well, that doesn't answer the priority question Justice O'Connor asked, and it doesn't answer Justice Rehnquist's question when the Chief Justice said, what about later creditors.

That was what the district court said was the real problem here, other creditors could come in. Now, Mr. Boies seems to have a crystal ball. He says no real problem. The only courts in a position to assess that are the courts of Texas, where this case clearly

belongs.

Now, Justice White says, isn't impossibility a limiting principle? You know, when something is impossible it hardly matters if it's relatively impossible or absolutely impossible. If you're just a poor farmer who can't make liquid assets out of that land in Iowa, it's just as impossible for you as it is for Texaco. We do not argue --

QUESTION: He says it's only impossible if the judgment exceeds the bonding capacity of the whole world.

MR. TRIBE: Well, it's only impossible in a metaphysical sense. But the impossibility that counts constitutionally is whether you can put the money together, and they've never really answered that.

It seems to us we're not arguing that the due process clause shouldn't apply to huge corporations, but we are arguing that a kind of Dow-Jones due process, where only huge corporations can take advantage of the principle by escalating to absolute impossibility, is untenable.

So that neither jurisdictionally nor substantively do they offer this Court any way to rule for them without setting a terrible precedent. This case is colorful today because of the dollar figures,

but it will long be remembered for a different reason. The question will be: Were fundamental principles of federalism and due process bent and twisted to make a special deal for huge corporations? We don't think they should be.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Tribe.

The case is submitted.

(Whereupon, at 2:50 p.m., oral argument in the above-entitled case was submitted.)

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

CERTIFICATION

ion Reporting Company, Inc., hereby certifies that the
ied pages represents an accurate transcription of
tonic sound recording of the oral argument before the
me Court of The United States in the Matter of:

#85-1798 - PENNZOIL COMPANY, Appellant V. TEXACO, INC.

hat these attached pages constitutes the original
cript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)