SUPREME COURT
OF THE UNITED STATES

In the Matter of:

SYEWART ORGANIZATION, INC., et al.,

Petitioners,

v.

RICOH CORPORATION, et al.

No. 86-1908

Pages: 1 through 42

Place: Washington, D.C.

Date: February 29, 1988

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IN THE SUPREME COURT OF THE UNITED STATES

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Petitioners,

v. : No. 86-1908

RICOH CORPORATION, ET AL.

Washington, D.C.

Monday, February 29, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

F. A. FLOWERS, III, ESQ., Birmingham, Alabama;
on behalf of the Petitioners.

SCOTT M. PHELPS, ESQ., Birmingham, Alabama;
on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in number 86-1908, Stewart Organization, Inc. versus Ricoh Corporation.

Mr. Flowers, you may begin whenever you're ready.

ORAL ARGUMENT OF F. A. FLOWERS, III, ESQ.

ON BEHALF OF PETITIONERS

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

The issue in this case is whether State law or Federal law governs the enforceability of a forum selection clause in a contract between two private parties in a suit brought in Federal Court.

A brief history of this case is as follows: Petitioner sued respondents in the United States District Court for the Northern District of Alabama. Petitioners asserted the State law claims of breach of contract, breach of warranty, fraud and deceit. Petitioners also asserted a claim against respondents for a violation of the antitrust laws.

In response to the Complaint, respondents filed a motion to dismiss or transfer based on a forum selection clause contained in the contract. The District Court held that Alabama law, rather than Federal law, governed the enforceability of the forum selection clause and that Alabama

refuses to enforce such contractual provisions.

The District Court also expressly held that an Alabama forum was as convenient as a New York forum if not more convenient.

The Eleventh Circuit Court of Appeals accepted an interlocutory appeal over the forum selection clause issue pursuant to Section 1292(b). The Court ultimately sitting en banc fashioned a wholly judge made rule in favor of contractual forum selection clauses. There were five dissenters in the Court below.

It is undisputed in this case that the contractual provision before the Court today is absolutely unenforceable in an Alabama State Court. There is no question about that.

The question in this case is whether a Federal District Court sitting in Alabama should enforce that very same contractual provision. That issue and this case can be resolved based solely on the plain language of the Rules of Decision Act and the clear command of the Rules of Decision Act.

Under the Rules of Decision Act, the Federal Courts are directed to first look to State law for applicable rules of decision. If there is no Federal law governing the issue before the Court, the Federal Court must use rules drawn from State law.

On the other hand, if there is a Federal law that

addresses the question before the Court, the Federal Court can apply the Federal law, assuming it's constitutional, regardless of the displacement of State law which results. The plain language of the Act is clear. Except where a Federal law otherwise provides or requires, the Federal Courts are required to apply State law.

In this case, there is no Federal law addressing the enforceability of contractual forum selection clauses. Nor has Congress expressed a policy either way on the enforceability of forum selection clauses.

QUESTION: Mr. Flowers, can I ask you a question?

MR. FLOWERS: Yes, sir.

QUESTION: There was also a choice of law provision in the contract, wasn't there?

MR. FLOWERS: Yes, sir.

QUESTION: And the parties agreed to apply New York law?

MR. FLOWERS: Yes, sir.

QUESTION: Now, does New York law have any bearing on the issue we're talking about?

MR. FLOWERS: New York law, Justice Stevens, does enforce forum selection clauses. However, it is settled that the courts in New York, the courts of Alabama, and the Eleventh Circuit refused to give effect to a choice of law clause when to do so would be in contravention of a public policy of the

State whose law would otherwise apply.

This Court's decision in Griffin v. McKoch which is discussed in my Reply Brief supports that conclusion as well. And the Burger King decision decided three years ago also recognizes that principle.

QUESTION: Excuse me. You're not saying that Alabama would decline to apply New York substantive law, as well? Or are you?

MR. FLOWERS: Alabama law would refuse to apply New York law with respect to the forum selection clause.

QUESTION: I understand that, but what about with respect to the substance of the dispute?

MR. FLOWERS: New York law would govern, assuming there was no conflict with the laws of Alabama. Alabama enforces choice of law clauses with the one exception that I mentioned.

QUESTION: If Alabama's willing to apply New York substantive rules, what is the Alabama interest in not allowing the other -- I understand you say there is a rule, but why do they have such a rule for a case like this where another State's law's going to apply any way?

MR. FLOWERS: Well, it really gets down to the point that the fulfillment of the expectations of the parties is not the only interest in contract law, and the Courts of New York and Alabama and the court below recognized that the public

policy of the forum State must be considered in deciding whether to apply or give effect to a choice of law clause.

QUESTION: I understand, but what is Alabama's interest? Why is there such a public policy? What policy is being implemented?

I can understand if if the case had been brought in a State court, they might want to say, our courts ought to go forward, but why does Alabama care whether Federal judges in New York or in Birmingham decide this case?

MR. FLOWERS: Well, I don't think it's a question of whether the State law is concerned with what the Federal courts do. My answer to your question is that when a Federal court is faced with an issue that is not governed by Federal law, the Federal court should decide the case the same way that a State court sitting in the same State would decide the issue. I think that is the plan of the Rules of Decision Act.

Alabama's policy against forum selection clauses is an adoption of the common law rule. Under the common law, the parties to an agreement or contract could not prevent a Court from hearing their dispute, and the common law approach also recognized the interest of the State in providing a local and convenient forum for its residents.

As I mentioned, Alabama is the common law rule. It has no Federal origin, and that being the case, a Federal District Court in Alabama should decide the issue the same way

that the State Court would which is it's unenforceable.

QUESTION: That isn't true in every situation, Mr. Flowers. Cases like Hanna against Plumer and some other cases say that in some situations, the District Court does not necessarily decide the case the same way as the State court would. And I don't know that you fully responded to Justice Steven's point that this is just a question whether a Federal District Judge in Alabama will try the case or a Federal District Judge in New York will try it. The Alabama State courts aren't involved at all.

MR. FLOWERS: Well, that's true. But under this Court's decisions in Murphree and Neirbo, language such as the Redwing Carriers case, the Alabama Supreme Court that the parties cannot oust the jurisdiction of a State Court, the Court has considered that language in other cases and has come to the conclusion that when no Federal law otherwise governs, like there was in Hanna, there was a Federal law that governed over the State law, that the District Court should decide the issue the same way.

Now, obviously, Chief Justice Rehnquist, there are cases in which a Federal law controls over the State law and Hanna v. Plumer is an example. But this case does not involve simply venue, or which court is appropriate. Venue is appropriate in Alabama and venue is appropriate in New York. This case doesn't involve which court is suitable; it involves

whether State law or Federal law governs the enforceability of a party's choice between two suitable courts in a contract.

QUESTION: Well, Mr. Flowers, I guess at least one or more of the Judges in the Court of Appeals thought that in making the venue, in deciding the venue issue that the parties' contractual provision is one of the factors to be considered.

Is that a sensible inquiry to make in connection with application of Section 1404, do you suppose?

MR. FLOWERS: First of all, the Court below did not base their decision to transfer on 1404(a).

QUESTION: Do you think that the Court could have? And that the parties' contractual agreement should be a factor in making that decision?

MR. FLOWERS: I don't think so, and for this reason. First, to give effect to a forum selection clause under 1404(a) would mean that you're allowing Federal law to control after you've determined that the Rules of Decision Act says that under State law, the clause is not enforceable.

On the other hand, should the Court believe that the contractual provision should be considered by the Court, it should not be given conclusive effect like respondents ask the Court to do.

This Court has repeatedly emphasized that the District Court must retain flexibility in ruling on Section 1404(a) motions. This individualized case by case

consideration of convenience and fairness militates against a per se rule such as the one that respondents offer in this case. They've lost on the 1404 convenience issue.

QUESTION: Wasn't the District Court, though, partly influenced by his view that the Alabama law should be given controlling significance here?

MR. FLOWERS: Chief Justice Rehnquist, the Order by the District Court is a short one but in his finding that Alabama was as convenient forum as a New York forum, he did not say in his Order whether he considered the forum selection clause issue in making that determination of convenience.

I think that the forum selection clause issue really goes to the section requirement under 1404(a) of the interest of justice. And the District Court did not need to reach that question since he found that Alabama was a convenient forum and respondents did not seek an interlocutory appeal on the 1404(a) issue.

QUESTION: You acknowledge that that's the second requirement and not just part of the first?

MR. FLOWERS: Interest of justice?

QUESTION: You think that's a separate requirement?

MR. FLOWERS: Yes, sir, I think that there must be a finding of convenience in the parties of interest, and further convenience of the parties and witnesses, and further that it be in the interest of justice to support a transfer, and I rely

on Ex Parte Collett.

QUESTION: For which purpose you can consider any other factors and not just the convenience of the parties and witnesses?

MR. FLOWERS: Well, you can --

QUESTION: That would make a big difference to me, if you think that there are two reasons why you can order a change of venue, either for the convenience of parties and witnesses, or in the interest of justice.

MR. FLOWERS: No, sir, I'm contending that you've got to have both. I think this Court's said you've got to have both, convenience of the parties and witnesses, and in the interests of justice, is the way I understand Section 1404(a).

As I mentioned, there is no Federal law governing the enforceability of forum selection clauses. Congress has not expressed a policy regarding forum selection clause. The Court below therefore was required to apply State law under the plain language of the Rules of Decision Act.

The clear command of the Rules of Decision Act, like the language of the Act, also requires the application of State law in this case. It is now well settled that the phrase, the laws of the several states contained in the Rules of Decision Act, include the unwritten or common law of a state as well as the statutory law of the state. The enforceability of forum selection clauses involve questions of common law, as I

mentioned earlier, common law approach was that parties to a contract cannot agree to prevent a Court from hearing their case.

There's no conflict in this case between any Federal law, including the Venue Statutes, and Alabama's laws and policy against forum selection clauses.

QUESTION: Counsel, could the lower Court here, the District Court, have ordered that part of the action be transferred to New York and part retained in Alabama, assuming the requisite findings had been made? Are there precedents to allow that?

MR. FLOWERS: Justice Kennedy, the District Court held that the claims that were not -- the non-contract claims could not be transferred to New York, even if the others could, which he said they couldn't, either.

The Second Circuit in the Bense case, and the Eleventh Circuit in this case have held that all claims could be transferred to the chosen forum.

QUESTION: I just want to know, is there substantial authority in cases for Federal courts to transfer parts of actions and keep others? Does that happen from time to time?

MR. FLOWERS: I do not know of any case holding the retention of claims.

QUESTION: I mean, because the District Court seemed to be influenced by that consideration in its order. And I

just can't quite understand that.

MR. FLOWERS: Well, I don't think that's the strongest point of his Order, but I'm just not aware of any cases other than the Bense case out of the Second Circuit and this one.

QUESTION: I agree that's not the strongest point in his Order.

MR. FLOWERS: Anyway, Alabama's law is an adoption of the common law policy. Much of the law of contracts, including the enforceability of forum selection clauses, is shaped by the common law and announced by the State courts. The court below, however, not based on Section 1404(a), they simply fashioned a wholly Judge-made rule in favor of forum selection clauses.

QUESTION: May I ask another question, Mr. Flowers?

I suppose Alabama law would also oppose, would consider it contrary to public policy to have an arbitration provision in the contract for arbitration in New York, for example?

MR. FLOWERS: That's correct, unless the Federal Arbitration Act applies.

QUESTION: Then the Federal Statute would override that.

MR. FLOWERS: Right.

QUESTION: It's kind of ironic in a way -- I understand your point, but -- that arbitration which is a

greater intrusion on the judicial process in Alabama than having it tried by another judicial forum in New York would override the policy but this action would not. That's because there's a rule in one and there's not in the other, is your point?

MR. FLOWERS: That's right.

I'm glad you brought the arbitration context up. This case is very analogous to the Bernhardt case decided by the Court in the '50s. Mr. Bernhardt sued for breach of an employment contract in the Vermont State Court. The defendant removed it to Federal Court. The District Court held that Vermont law, rather than Federal law, governed the enforceability of the forum selection clause, and the Second Circuit held, well, this is merely a procedural question, therefore, Federal law governs.

This Court granted the writ and held that under the Rules of Decision Act in Erie, State law governed. The Court held it would be an inequitable administration of the law of the State to allow Vermont law to prevail only in the State court and not in the Federal court when there was no conflict. In Bernhardt, the Federal Arbitration Act had already been passed, so Congress had expressed a policy in favor of arbitration, but the Act did not apply to the case before it, because it didn't involve an interstate or maritime transaction.

It's also interesting to note that the rationale behind the common law approach against arbitration clauses is the same rationale that's behind forum selection clauses, and that is, parties cannot agree in a contract to prevent a court from taking jurisdiction or to hear the case.

QUESTION: Well, wasn't the reasoning of the Eleventh Circuit majority, obviously they ruled against you, really that there is a Federal rule here, or Federal law, it's the Venue Statute?

MR. FLOWERS: That's what they said, but I don't seen anywhere in the Venue Statutes that address this question. Venue is proper in Alabama and it's proper in New York.

QUESTION: Well, I know, but the contract certainly is aimed at controlling which Federal Court, if there's a diversity case, would try the case, which is a venue question, surely.

MR. FLOWERS: Well, the appropriate venue is determined by the Venue Statute.

QUESTION: What does venue mean? It means where may or should an action be brought.

MR. FLOWERS: That's correct.

QUESTION: And the contractual provision is aimed directly at that question.

MR. FLOWERS: Yes, sir. But we must remember, Justice White, that the Federal Courts did not have --

QUESTION: And so the party argues that the Alabama Federal Court just isn't the proper Federal Court to hear the case.

MR. FLOWERS: Well, I submit that, with all due respect, Your Honor, your analysis is wrong, and I say that for this reason. That in VanDusen, the Court held that under 1404(a), where the case may have been brought, and the Court says you determine that question by looking at the Venue Statute. We've got to remember that the Federal Courts do not have unlimited power. The question in this case is whether there is a Federal law to override the State law. And there's not.

But I'll assume, Justice White, that let's say this is a matter of Federal concern. That leaves two other questions, however. The next question is, is it a decision for this Court to make, or is it a decision for Congress. The enforceability forum selection clauses involve numerous policy considerations.

For example, should this Court, or Congress, sanction and reinforce the great disparity and bargaining power between franchisers and franchisees? If we enforce forum selection clauses like the Southern District of New York, become congested, this Court has recognized that a State has an interest in providing a local and convenient forum for its residents.

QUESTION: Of course, you could have had an Alabama forum if you had just sued in Alabama courts.

MR. FLOWERS: No, sir, we had a Federal antitrust claim. We had to sue in the Federal court because --

QUESTION: This was an antitrust claim.

MR. FLOWERS: There's one antitrust claim, yes, sir.

But the Court's held repeatedly that the mere vesting of Federal jurisdiction in the Federal court does not give rise to authority to create judge-made rules of decision.

There are other interests involved concerning forum selection clauses. This case is before the Court on a motion to dismiss or transfer and a limited record. Congress is better equipped to resolve the question in this case. But we don't know if Congress will act. It may not. So State law must govern this particular case. We've got to decide this case before we can go on and take some depositions and go to trial.

QUESTION: Suppose this had been an antitrust claim, so you had to sue in Federal court and then all of the arguments about diversity and Erie, things like that just wouldn't be relevant.

MR. FLOWERS: No, sir, I'd disagree, Justice White. Because this Court has held repeatedly in Federal question cases, Little Lake is one, that the mere vesting of jurisdiction in the Federal courts does not give rise to the

power to create law. You've got to look at the issues.

QUESTION: Well, that may be so, but it certainly avoids all the Erie arguments that you can make, doesn't it?

MR. FLOWERS: No, sir, I don't think so.

QUESTION: Well, it certainly makes Bremen against Zapata more relevant if it isn't a diversity case, don't you think?

MR. FLOWERS: Well, in a sense. The Court has very broad powers in creating rules of decision in admiralty and generally in the antitrust cases decided by the Court, you look to the policy of Congress to determine how to resolve a particular issue before the court. There is no policy by Congress regarding forum selection clauses to decide this issue, and the policy considerations that I've mentioned indicate that such clauses should not be enforced as a matter of Federal law.

But let's look at the Bremen. The Bremen analyzed the enforceability of forum selection clauses as a matter of contract, not as a matter of venue, not as a matter of 1404(a). It doesn't make any sense to analyze forum selection clauses in admiralty in terms of contract law, and then in terms of venue in all other cases. The more coherent approach would be to analyze all cases in terms of contract law.

The venue argument asserted by respondents also creates a confusing anomaly. Choice of law clauses are

governed by State law under the Klaxon rule. It makes no sense to apply State law to a choice of law clause in a contract, but to apply Federal law to another clause in the same contract.

When all is said and done in this case, the question remains, what authority did the Court below have to fashion a judge made rule in favor of forum selection clauses. It had none and the judgment should be reversed.

QUESTION: I'm not sure that it's so anomalous to apply Federal law to some clauses in the contract and State law in the others. Suppose there's a provision in the contract agreeing to shorten the statute of limitations for the Sherman Act, anti-Sherman Act claim?

MR. FLOWERS: Well, you simply have a Federal law that applies.

QUESTION: That's right.

MR. FLOWERS: You'd apply Federal law.

QUESTION: The Court would say, even if that's permissible under Alabama law, we don't care. It's not permissible under Federal law.

MR. FLOWERS: That's right.

QUESTION: So it's thinkable that you could apply Federal law to some.

MR. FLOWERS: Sure, but there's no Federal law governing enforceability of forum selection clauses, except this venue argument.

QUESTION: But that's a different point. That was your earlier point.

MR. FLOWERS: Yes, sir.

Mr. Chief Justice, unless the Court has any questions, I'd like to reserve the balance of my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Flowers.

We'll hear now from you, Mr. Phelps.

ORAL ARGUMENT OF SCOTT M. PHELPS, ESQ.

ON BEHALF OF RESPONDENTS

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

The answer to the question, which United States District Court will hear this case involving diversity and federal question jurisdiction is an answer in which the State of Alabama simply has no legitimate interest.

That's the first of four points that I want to make, that there is no State interest that precludes the transfer of this case pursuant to 28 U.S.C. 1404(a).

Next, that the application of a Federal Rule to this case in no way violates the holding of this Court in Erie v. Tompkins.

QUESTION: Before you get into whether there's any State interest, I really worry about importing into the Federal Venue Rules, the kind of choice of law determinations that have

become standard in conflict of laws now. Are you saying that that's how we should resolve Erie type questions, whether, even though the State law is thus and such, there is a real interest on the part of the State?

Or is it a false conflict? You're familiar with the false conflict?

MR. PHELPS: I think there are a number of parts to that question. And the way that I would go about it is I would say that if there's no State interest involved, no legitimate State interest, the State interest as announced by Red Wing Carriers is to protect the jurisdiction of the Courts of the State of Alabama for a case that has Federal jurisdiction, Sherman Act claims. And that interest simply is not invoked.

I would then look at the other side and see what evidence there is of a Federal interest. And the evidence of the Federal interest is the breadth of the Venue Statutes, the general Venue Statutes, the Clayton Act Venue Statute, and the statutes dealing directly with transfer.

And then I would look, much like the court did in another Alabama case that came to the Court, Burlington Norther v. Woods dealing with Alabama ten percent appeal penalty, and see if the breadth of the Federal Statute covers the question. And I think it does.

QUESTION: Suppose you have an Alabama contract rule that says that the insurance company cannot be held liable for

penal damages in any event, all right? And the suit happens to be between an Alabama insured and a New York insurance company, all right? You could say the same thing that you're saying here. Alabama has no interest really in protecting the New York insurance company against penalties. It's after all an Alabama insured, a New York insurance company. So therefore should the Federal court not apply Alabama law on that point?

MR. PHELPS: No, unless I misunderstood the hypothetical. The Alabama interest would be not protecting the insurance company, it would be protecting the plaintiff in that case.

QUESTION: No, no, no. The plaintiff wants to get a penalty against the insurance company so the insurance company willfully failed to settle, but Alabama law is no smart money against insurance companies. That's the Alabama law. In this case, it works to the detriment of an Alabama citizen. It doesn't further any State policy that Alabama would sensibly be concerned with. What does Alabama care what happens to a New York insurance company?

And you're saying the same thing here. What does Alabama care what happens to Federal Courts?

MR. PHELPS: Well, I am saying that. You're right. In this case. And the difference is I think the enactment of a comprehensive scheme for venue, the legitimacy of a Federal interest on the other side, the pronouncements of Congress

dealing with transfers in the interests of justice and the decisions of this Court creating a strong presumption in favor of the contractual choice of forum provisions.

And that's that's the way I would distinguish the hypothetical that you've put.

QUESTION: Two different lines of analysis, aren't there? Because one says there should be an affirmative Federal rule approving choice of law clauses, and the other just says there is already a Federal venue statute which governs the question. You can factor in a choice of law clause.

MR. PHELPS: I think that I am citing more of the second because I don't see it quite as distinct in two questions as the Chief Justice has put it.

Rather, I see it as the transfer statute says for the interests of the parties and for the witnesses and in the interests of justice, a transfer can be made between various districts.

QUESTION: Now, did either of the Courts below rely on that, on 1404?

MR. PHELPS: The Eleventh Circuit relied solely on the notion that venue is inherently a matter of Federal concern, which I think is equally a good position. But again, I never separated in the way that either the Court has. When we came to the Court originally to transfer the case, we filed a motion under 1404(a).

QUESTION: But the District Court ruled against you.

MR. PHELPS: Because of his presumption that Alabama law applied. Once you decide to enforce the forum selection clause, you then go to the next step of what is the power then for the Court, the district court, to actually make the transfer. And that power is under 1404(a) or 1406(a) which is for improper venue.

QUESTION: Yet, the district court ruled against you on 1404, and as I read the Eleventh Circuit majority, they didn't rely on 1404.

MR. PHELPS: I don't think that they ever really addressed 1404, actually. They absolutely --

QUESTION: Well, Tjoflat did.

MR. PHELPS: Tjoflat did in the concurring opinion. That's right.

QUESTION: I think the majority was aware of that?

MR. PHELPS: I would presume so, yes, sir.

The majority simply discussed the Federal interest, the Federal rule in presuming that the clauses should be enforced, and then directed the district court to transfer it pursuant to 1404(a). That was the direction, the mandate back to the district court.

The opinion did not discuss 1404(a) except in the concurrences of Judge Tjoflat.

QUESTION: Mr. Phelps, a little while ago, you

mentioned Burlington Northern. You don't cite it in your brief. The other side doesn't cite it. The only time it's cited is in the Petition for Cert.

Does it have any bearing at all? It was decided, as I recall, one day before the en banc decision came down.

MR. PHELPS: It does, and I apologize for the oversight in the brief. That argument came to the Court based on the Alabama ten percent appellate penalty. If you took an appeal in Alabama and had a money judgment against you, and that appeal was affirmed, you had to pay an additional ten percent penalty.

The issue presented to this Court was whether that applied in Federal Courts sitting solely in diversity. And the argument that was made that Rule 38, dealing with frivolous appeals, could exist in its own sphere of operation.

The Alabama rule was not limited to frivolous appeals. It applied to any appeal, any appeal in which you lost having a money judgment against you. But the Court rejected that. This Court rejected that argument, finding that the sphere, the sphere of influence of Rule 38 in the Appellate Rules of Procedure was such to indicate a clear intent that there was not sufficient room for a contrary State law, a contrary State policy to exist.

QUESTION: A unanimous decision.

MR. PHELPS: Yes, sir.

QUESTION: And do you think it helps you or hurts you?

MR. PHELPS: I think it helps. I think it helps when you get to this issue.

QUESTION: But you don't cite it?

MR. PHELPS: Yes, sir, that's right.

But I was going to tell you about it.

QUESTION: You do now.

MR. PHELPS: I do now. I was going to tell you about it.

I do think so. It gets to the issue of the type of conflict that is required between the State practice and the Federal practice. And it's clear that the venue statutes are written very broadly, the transfer statute is written broadly, for a good reason. So that Congress wouldn't sit and list every factor, every single factor which may be in or not in the interest of justice.

The basic place that we miss one another in this argument is on the basic premise of what the Alabama policy means to this case. And the petitioners argue that the Alabama Supreme Court, in the Redwing Carriers case addressed this issue and forecloses it. And there's no question but in Redwing Carriers, Alabama Supreme Court considr3ed a forum selection clause and elected not to enforce it.

But a forum selection clause, when put to a State

Court, is a very different question than when that same clause is put to a Federal Court.

Put to a State court, it inherently raises questions of jurisdiction because the State doesn't have a power, a method, a 1404(a) to transfer a case any place else. Can't make a State Judge in New York take it.

When the clause is put to a Federal court, it is solely a question of venue which among several places where venue is proper under 1391, should this case be heard in the interest of justice. And the Alabama Supreme Court recognized that distinction in the Redwing Carriers opinion. Because they held that they would not enforce agreements that served to oust the jurisdiction of the Court.

Now, the analysis on this seems to me to be much like the analysis that this Court went through in Byrd v. Blue Ridge. In Byrd, the question came from South ?Carolina of whether or not the South Carolina practice of submitting the issue of the plaintiff's employment by the defendant to the Judge, rather than a ju7ry, would be binding in Federal court.

And rather than just blindly following the South Carolina practice of submitting that issue to the Judge, this Court analyzed the reasons for the South Carolina policy. And the South Carolina policy was related directly to the South Carolina Workmen's Compensation practice. And the fact that that issue typically was a jurisdictional issue connected with

reviewing the judgments of the South Carolina Industrial Relations Board.

Finding that that State interest simply missed the mark in Federal court. Had no place in a Federal court analysis. This Court applied a Federal Rule, or allowed the Federal court to submit the question to the jury, rather than a judge.

The Alabama State interest in this case of protecting its own jurisdiction is just as inapplicable in this case. This is not solely a diversity case. It's never seen a State courthouse. It was filed originally in Federal court. Because of the exclusive nature of the Sherman Act claims, it couldn't be filed in State court.

The Alabama State policy just doesn't apply.

In addition to the venue scheme, the series of --

QUESTION: May I ask, you say the policy doesn't apply. Well, isn't one aspect of the State's policy to protect its citizens from what it perceives to be disparate bargaining power with these large out of state franchisers who cram these contractual provisions down the throats of the local citizens?

Isn't that part of what must motivate this rule?

MR. PHELPS: There's nothing in the opinion that suggests that. But let me assume that that is a basis. I mean, there's not a word in there that suggests that. But if that is a basis, this Court, following the Bremen rule, would

not transfer it. The Federal rule would protect the State interest in that sense.

The Bremen doesn't say any time there's a forum selection clause, you transfer it.

QUESTION: Well, it's hard to read -- I find it hard to read the Eleventh Circuit opinion by the majority as indicating that the transfer would be limited by 1404 considerations. They just say the forum clause is enforceable and transfer it.

MR. PHELPS: The good thing about -- the wisdom of the Bremen rule is that it matches up very nicely with 1404. The Eleventh Circuit did say the cause is enforceable, transfer it.

QUESTION: So it didn't go through the relevant requirements under 1404.

MR. PHELPS: It didn't go through it beyond deciding that the forum selection clause should be given a strong presumption.

QUESTION: Strong? Strong -- it didn't say that. What would the Court have done if they thought that the transfer was not in the public interest or in the interests of justice, for example?

MR. PHELPS: They would have not transferred it.

QUESTION: How do you know that?

MR. PHELPS: Because the case was reasoned by the

Eleventh Circuit as the Bremen controls. And under the rational of the Bremen case, should the conclusion that you are reaching be reached, the case would not be transferred.

QUESTION: Well, how do we know that it was convenient to the parties to transfer it?

MR. PHELPS: The District Court made a finding in a very inverted way that supports that position. The District Court's finding was that Alabama is no less inconvenient or no less convenient than New York.

QUESTION: Exactly. So then it sounds to be like the Eleventh Circuit didn't care about convenience.

MR. PHELPS: No. I think what happens is, under the Bremen, is the burden is flipped, and once you reach the decision that there is no substantial inconvenience or it is not unreasonable to enforce the forum selection clause, then it is enforceable, and that specific factual finding by the District Court, although in a different context, supports the transfer.

QUESTION: Well, you say the judgmental analysis the discretion comes in the Bremen itself, and Judge Tjoflat would say it's factoring the forum selection clause into 1404. You would reach the same result, though, I take it?

MR. PHELPS: That's what I'm saying, is that they fit together and they get to the same place. And it would keep -- it addresses the question, Justice Stevens, that you raised of

protecting the Alabama citizen in the context of an overreaching or unreasonable bargain as a result of unreasonable bargaining power on the part of someone, the Bremen analysis would not transfer that case. If that is in fact the interest of the State court, is protected under the Bremen rule.

But that's not the interest the State court has announced.

QUESTION: Mr. Phelps, can I come back to your assertion that it makes a difference what the purpose of the State rule is in determining whether you will apply State law or Federal law.

Suppose you have a State statute of limitations, and it's absolutely clear from the legislative history of it, in fact, it says it in the statute of limitations and the State Supreme Court says it in the opinion applying it that the only purpose of this statute is to protect our courts against the burden of old litigation. We want to deal with fresh litigation. That's the only purpose of it.

Do you think in that case the Federal court would not apply the State statute of limitations?

MR. PHELPS: No, the Federal court would. It would have to under York, I would think, versus Guaranty Trust.

QUESTION: So then what difference does it make here whether the purpose of this State rule is to protect their

courts or to protect their citizens?

MR. PHELPS: The analysis in that cases changes slightly, and it's like York. And the problem there is that that particular fact situation so directly impacts and controls the outcome of the litigation, it makes the issue of whether you file the lawsuit in state court or Federal court a matter of choice where the result would be different, and clearly, that's prohibited under Erie.

The difference in this case and that is it's not like the statute of limitations in York, or it's not like res judicata principles that the Court considered in Angel v. Bullington. It simply deals with means and methods by which the parties are going to enforce their respective rights of in one another. The twin aims of Erie as they've been described dealing with inequitable administration of justice, and forum shopping, do not apply in this case. They would in the hypothetical that you put.

There is no inequitable administration of justice principally because the parties have agreed to the New York substantive law applied. And whether the case is resolved in Birmingham or whether the case is resolved in New York, there's no showing and there's no --

QUESTION: Makes a lot of difference. Do you think that wouldn't result in forum shopping to bring suit in the Alabama court if you know if you bring it there, you can stay

there, whereas if you brought it in Federal Court, you couldn't stay there?

MR. PHELPS: Not in this case. Because this has got the Sherman Act claims in it. This case can't go the other side of the street.

The Erie question was whether it was right for the result on one side of the street to be different from the result in the Federal courthouse on the other side of the street. And the forum shopping in this case, you never get to the other side of the street. You can't get it to the State courthouse. The exclusively Federal nature of the Sherman Act claims makes it go to the Federal courthouse.

It's not the same kind of forum.

You're troubled with me, I take it?

QUESTION: Well, the rule that you're urging on us, though, and it is the first time I hear that you want it to apply only when the cause of action involves both a diversity cause of action and a Federal claim? Is that -- I mean, it seems to me the rule you're urging on us would apply to a pure diversity claim, wouldn't it?

MR. PHELPS: I think it would.

QUESTION: Well, in that case, it would make a difference. It would be a forum shopping.

MR. PHELPS: Yes. But I don't think you have to reach that in this case, though. That is not this case.

This case is just the analysis with the Sherman Act claim. Now, I think the answer is the same in that case, which is another case someday. But in that sense, the forum shopping notion would have to just be put in place with the other questions to be answered. But you don't have to reach that in this case. The Sherman Act claims take care of that in this case.

The forum shopping, it's not the same kind of forum shopping that the Court was concerned about in Erie but the forum shopping that would result in this case results from the application of a State rule. Because plaintiffs can always submit to the jurisdiction of the court. They do that by coming in and filing a complaint. And people who could find it only moderately inconvenient, whether they be from Mississippi or Georgia or whatever, could all go to Alabama and initiate in Federal court, their lawsuits under the Sherman Act. And solely for the purpose of avoiding the forum selection clause. And that type of forum shopping is equally bad.

QUESTION: I suppose you would agree if the validity of some substantive provision in the contract was at issue in a Federal court, you'd probably look to State law, some State law any way, the applicable State law?

MR. PHELPS: Absolutely.

QUESTION: And so why not look to State law with respect to the validity of this forum selection clause?

MR. PHELPS: Because the State law that is announced does not apply. The case doesn't deal with the jurisdiction of the State court. It shouldn't be blindly followed, which the Court declined to do in Byrd.

The area of concern is venue where among a series of proper places the case could be tried, should it be tried. To get it there, it has to be transferred. There is a direct statute dealing with transfers. It is sufficiently broad to cover this issue, and the forum selection clause in dealing with the question of whether or not it should be transferred should be given great weight, as it has been given great weight in other circumstances.

QUESTION: Well, what if there hadn't been a Federal issue in this case and the suit had been brought in a State court?

MR. PHELPS: That's -- Justice Scalia was working on me about that.

QUESTION: Yes.

MR. PHELPS: I think the analysis is exactly the same. It gets to the same place because of the controlling interest involved in the Federal court. This is the decision of the Eleventh Circuit. It just manifestly is a Federal concern. The State interest doesn't match up, and it should be therefore governed by the Federal Rules.

This case doesn't reach that case. I mean, this case

you can solve a lot of things by keeping in mind that it has the Sherman Act exclusively Federal claims in it.

QUESTION: May I give you a converse case. Supposing the suit had been brought in New York, and there was a motion to transfer it down to Alabama, notwithstanding the contractual provisions in the contract to the contrary, and the Judge had said, well, we have a terribly crowded docket here. All the witnesses and the facts are all down in Alabama. I'm going to go ahead and transfer it.

Would you think a Federal judge would have power to do that in defiance of the contractual provision?

MR. PHELPS: I think that it would be an abuse of discretion for him to do that.

QUESTION: Even if all the interest of justice factors point to Alabama as the logical venue for the trial?

MR. PHELPS: No. I didn't understand that part of it.

I think it would be within the district court's discretion to view a lot of factors and reach a decision that the venue selection clause should be ignored or should not be given effect. But the venue selection clause ought to be given a presumption of correctness. In another case, Justice Blackmun's going to point out we left out of our brief, Mitsubishi Motors v. Solar Chrysler Plymouth, the citation of which I have that one written down, is 473 U.S. 614. And the

reason I thought he'd call that to my attention is because he wrote the opinion, the Court indicated that the Bremen and Scherk established a strong presumption in favor of enforcement of freely negotiated contractual choice of forum provisions.

And that's the presumption I'm talking about. There could be a set of circumstances, there could be a set of facts where it's unreasonable under the circumstances to enforce the provision, but that would be within the discretion of the court.

Let me deal in the last couple of minutes with the notion of the facts in this case and why the facts as presented to the district court indicate that transfer is appropriate. Under the Bremen and Scherk and other cases like that, the essential test has been put that the burden is on the party trying to avoid the freely negotiated bargain to prove that they would be affectively deprived of their day in court.

The burden is on the side trying to get out of the contract, get out of their deal. And that burden simply has not been met in this case. The district court's finding that I alluded to earlier that the Alabama forum is no less convenient than a New York forum in fact tends to prove the opposite. But specifically, what the Court had to consider in this case was the nature of the Stewart organization, the plaintiff below.

The Stewart organization is controlled principally by two individuals, Walter Stewart, who is a professional

accountant, Jim Snow who is a professional accountant, both of whom are senior partners in a Birmingham based accounting firm, both who have had a run a number of businesses. Mr. Stewart has had great success in taking businesses that were not doing well and turning them around, and making them do better, which led to the panel in the Eleventh Circuit referring to him as the man with the midas touch.

There simply is no showing that Mr. Stewart has been taken advantage of by Ricoh. In fact, what he says to justify avoiding his bargain is, I didn't read the contract. They put it to me and they told me I had to sign it, they weren't going to change it, and I didn't read it. But that's no excuse for a person who is in that position who is dealing in that kind of businesses.

Compare it to the Szukhents in the Szukhent v. National Equipment Rental case. The Szukhents were farmers in Michigan who needed a piece of farm equipment to do their work. And they entered into a contract to rent that equipment from a New York company. That contract appointed a lady by the name Florence Weinberg as their agent to receive service process.

They'd never met her. They didn't know that that provision was in the contract. They had no dealings with her. They were as surprised as anybody when they received the summons and complaint in the mail from Ms. Weinberg. But the Court held the Szukhents to that bargain, and there certainly

is no basis in this record to excuse the Stewart organization from their bargain.

There is nothing about the Court's holding in Erie v. Tompkins that prevents the enforcement of the parties agreement. And we ask that the Eleventh Circuit opinion be affirmed.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Phelps.

Mr. Flowers, you have six minutes remaining.

ORAL ARGUMENT OF F. A. FLOWERS, III, ESQ.

ON BEHALF OF PETITIONERS - REBUTTAL

MR. FLOWERS: I want to address three basic points in respondent's argument.

Respondent's argument reduces itself to three basic propositions. One that the Federal Court had Federal question jurisdiction because of the antitrust claim. It's been settled since April 25, 1938, that the mere vesting of jurisdiction in Federal Courts does not give rise to authority to Federal law.

That's right. If it's controlled. If the issue before the Federal Court is controlled by Federal law or policy, sure. You fashion Federal law. But when the issue before the Court is not governed by a Federal law or policy, the Federal court should decide that issue the same way that a State court sitting in the same State would decide.

The second point that respondents make is that the

forum selection clause in this case is basically a question of venue and procedural and therefore Federal law governs. They're wrong on that claim because of the reasons stated in our reply brief.

Justice Blackmun, with respect to the Burlington Northern Railroad case and with respect to the Byrd case, there was a direct conflict in Burlington Northern between Rule 38 of the Federal Rules of Appellate Procedure, and the Alabama Ten Percent Penalty law. The Court held that Federal law governed, obviously correct. When Federal law governs, it controls over state law.

In Byrd, the Court said three times in the opinion that Federal law decided whether a judge or jury would hear the case under the "influence" if not the command of the Seventh Amendment. All of these cases that the Court has decided in this area can be analyzed under the Rules of Decision Act.

The question of whether a forum selection clause should be given effect under Section 1404(a) is really not before the Court. They did not appeal on the 1404(a) issue only on the forum selection clause issue. And we submit that the Court need not reach that question.

Should the Court decide to so do, however, we think that it would be appropriate to remand that question to the District Court for further findings on the interest of justice analysis.

Again, respondents want to have a per se rule in favor of forum selection clauses. There's a great disparity in bargaining power, and their arguments in the venue statute simply cannot bear the weight that they wish to place on them.

Mr. Chief Justice, unless the Court has any further questions, I don't have anything else to say.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Flowers.

The case is submitted.

(Whereupon, at 10:56 a.m., the case in the above-entitled matter was submitted.)

REPORTERS' CERTIFICATE

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HEARING DATE: 2/29/88

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I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States

Date: 2/29/88

Margaret Daly
Official Reporter

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