OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CALIFORNIA, ET AL., Appellants v. ARC AMERICA CORPORATION, ET AL.,

CASE NO: 87-1862

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IN THE SUPREME COURT OF THE UNITED STATES

CALIFORNIA, ET AL.,

Appellants

v. : No. 87-1862

ARC AMERICA CORPORATION, ET AL.,

Washington, D.C.

Monday, February 27, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:31 p.m.

APPEARANCES:

THOMAS GREENE, ESQ., Deputy Attorney General of California, Sacramento, California; on behalf of the Appellants.

ROY T. ENGLERT, JR., ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; United States, as Amicus Curiae, in support of Appellants.

THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of Appellees.

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P R O C E E D I N G S

(1:31 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in number 87-1862, California versus ARC America Corporation.

Mr. Greene, you may proceed whenever you're ready.

ORAL ARGUMENT OF THOMAS GREENE

ON BEHALF OF APPELLANTS

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

This case comes to the Court today from the Ninth Circuit on appeal. The question presented today is whether state downstream purchaser remedies for victims of anticompetitive conduct are preempted by Section 4 of the Clayton Act.

The lower court determined that these downstream purchaser remedies stand as an obstacle to the accomplishment of the full purposes and objectives of federal antitrust law. There was no assertion by the lower court that federal law occupies the field of antitrust, nor was there an explicit finding by the lower court that it was impossible for price fixers to pay both state sanctions and federal sanctions.

The issue before the court today is whether

there is an irreconcilable conflict between state and federal law with respect to these remedies.

We believe the decision below warrants reversal for two major reasons. The first of those is that the assertedly preemptive policies focused upon by the lower court were confined by their very terms, by the very terms of Illinois Brick and the legislative history of the federal antitrust laws to the Section 4 federal remedy. As a consequence, there is no conflict in this case between Congressional policies and state law.

Secondly, not only do state downstream purchaser remedies not frustrate the federal scheme, we believe that they indeed advance Congressional policies of deterrents and compensation for victims of price fixing.

The lower court imputed three policies to Congress which assertedly preempted states' laws. Those were avoidance of unnecessarily complex litigation, creation of specific incentives for federal section 4 plaintiffs, and elimination of multiple liability for antitrust defendants.

With respect to complexity, our reading of this Court's decision in Illinois Brick is that the complexity concern was focused on the imposition of a

burden upon federal plaintiffs to show that they had not passed on the anticompetitive injury further down the stream of commerce. We believe that states' laws do not alter that provision of federal law. We do not impose that burden upon them as a matter of state law. Their federal remedy remains unimpugned and uncomplicated by any sort of pass-on determination.

We do not perceive there to have been a Congressional policy, nor indeed a policy articulated by this Court in Illinois Brick with respect to some broader anti-complexity policy of the -- in the federal system.

Even assuming that there were such a policy, we don't believe that that would be implicated by states' remedies here. First, pragmatically, since Illinois Brick's state downstream purchaser actions are being brought in state court in the states in which legislatures have indicated that they are willing to bear the burden, whatever that may be --

QUESTION: And brought solely -- and brought solely under state law?

MR. GREENE: And brought solely under state law, that's absolutely correct.

QUESTION: Could the court of -- could the -- this -- there was a settlement here, I guess?

MR. GREENE: That's correct.

QUESTION: So, there wasn't a judgment?

MR. GREENE: That's also correct.

QUESTION: If the judgment -- if it had gone to trial and the judgment had been entered under federal law as well as under state law, what then, about downstream recovery?

MR. GREENE: Well, you'd have the downstream purchaser's claim under the laws of a separate sovereign, so you would have them both claiming under -- on the basis of the distinct laws upon which they --

QUESTION: So, there could be recovery in that case?

MR. GREENE: Absolutely.

QUESTION: This case --

QUESTION: And even in the fact of the Ninth Circuit's opinion?

If the Ninth Circuit opinion remained the law?

MR. GREENE: Correct.

QUESTION: You could still have a state claim for indirect purchaser damages -- or did that opinion --

MR. GREENE: If --

QUESTION: -- purport to preempt that as well.

MR. GREENE: Well, the situation with respect in California, the effect of the Ninth Circuit decision

is to be essentially a decision which has the effect of a decision of a sister state, so it does not have precedential force within the state of California.

If this court were to adopt in essence the decision of the Ninth Circuit, that would be correct. We would be unable to go forward.

QUESTION: Mr. Greene, you're relying on the separate sovereign theory. I suppose that would apply to claims by the direct purchaser as well. Why -- why couldn't the direct purchaser, having recovered once under the federal statute, on your theory, having recovered once under the federal statute, he could recover against under the state statute. Would there be no preemption of that?

MR. GREENE: There would be no preemption of that. As a matter of state law, that would not happen.

Perhaps the more analogous situation would be a situation in which a direct purchaser recovered under Section 4 and then you also had the imposition of state civil penalties, for example, the Henderson Brothers out of the -- the Henderson Brothers decision out of the Second Circuit essentially, that kind of situation.

But in terms of the -- the direct purchaser coming again under state law, state law would not allow that.

QUESTION: Well, it wouldn't --

MR. GREENE: If the state were to modify its law, it might be possible.

QUESTION: It wouldn't in this case, but if the state supreme court said we don't care whether you recovered under the laws of a separate sovereign or not. We're going to give you recovery again, you'd say that would be okay as far as federal law was concerned?

MR. GREENE: I think that is absolutely right. I mean, as a matter of supremacy clause analysis, there is no indication that we have been able to find in the legislative history of the Sherman Act to indicate that there is some sort of federal cap of any kind. So, we believe that this matter is given to the states and insofar as they exercise their judgment in that area, then that judgment should be respected.

So, as I was saying --

QUESTION: In this case or in any case, if there's a limited amount of funds because, say, the defendant is judgment proof beyond a certain point, do the direct purchasers have first claim under federal law?

MR. GREENE: I think that's more properly a matter that should be assessed under probably the bankruptcy laws of the United States.

The principle that the appellees in this case

have forwarded to the Court is the notion that the direct purchasers' remedy takes precedent over virtually anything, and we see no logical stopping place for that.

For example, we don't know if that means, for example, that a contract claim, which is based on state law or a tort claim for an injury, a personal injury, would be bumped by the direct purchaser's claim. We think that it's more properly a matter of bankruptcy, and I think that that would be our response.

QUESTION: If it were true that indirect purchasers recover, I suppose you could argue in a case where the defendant has limited assets that that would discourage federal suits by a direct purchaser?

MR. GREENE: We would think that that situation is so unlikely that it really should not be a basis for your decision.

I think that given the legislative history of -- of the federal acts, particularly the fact that they have strongly supported the idea of state antitrust and indeed there is some relatively recent history which we cited in our briefs which indicates there may be explicit approval of just these kinds of remedies, I think some tension which may be at play underlying your question, I think that's probably fine and does not render our statutes unconstitutional.

QUESTION: I must say I -- it seems to me that -- well, let's just do it on a state-by-state level. It seems to me when a state adopts a tort provision providing for somebody to recover for injury caused, that state doesn't envision that -- that the person recover again and again and again under the law of other states, and that's why the second state if -- if the person having once recovered should seek to recover again by suing in another state under that state's tort law, the second state would say no, our law won't let you do it.

Now, when there are two states, neither one can bump the other. So, whichever one he happens to sue first in, wins.

MR. GREEN: Um-hum.

QUESTION: But I don't know why when -- when you apply that same -- that same intent at the federal level it isn't the case that the federal law just bumps the state law.

We've provided for recovery and if you recover from us under the Sherman Act or under the Clayton Act, we don't care what a state wants. If a -- a state cannot give you a recovery for the same tort. Don't you think that's the intent that somebody who passes a tort statute normally has?

MR. GREENE: Well, I think that the situation post-Illinois Brick is that our state statutes provide for recoveries only if you are injured, in fact, and to basically the extent of your injuries in fact. So, in effect, the federal system has become in many ways sort of a federal civil penalty system insofar as actual injuries passed down the chain of commerce.

So, I think that in terms of the tort point to follow up on that, here we have injury -- recoveries by plaintiffs who've been injured in fact by anticompetitive conduct.

Because of that, they do not duplicate recoveries at another level. I mean, they are getting only for their -- the injuries that they have, in fact, sustained. So, you don't have a duplicative situation.

QUESTION: Well, we didn't say -- that's not the theory of our decision in Illinois Brick. The theory of our decision -- we're being faithful to -- to the statute in Illinois Brick. It says the person injured.

We have said in Illinois Brick that the person injured has -- has recovered. I mean, isn't that the theory of our case? We -- we don't avow that we're giving recovery to somebody who hasn't been injured.

MR. GREENE: Well, I think that's -- that's

correct, but you also do not --

QUESTION: So --

MR. GREENE: -- in the analysis in Illinois Brick you also did not indicate that downstream purchasers had not been injured. I mean, the fact that it is passed on does not suggest that, you know, folks who are, you know, for example, the taxpayers in this case didn't, in fact, pay an overcharge. The buck stopped with our taxpayers, basically.

That's not to say that the direct purchasers did not sustain some injury and certainly sufficient to support a Section 4 recovery. But, in fact, the injury has stopped with us in this case.

With respect to state downstreaming, with respect to the complexity point, federal courts will hear these matters in most cases in our judgment if at all as pendent state law claims. And under the pendent state law claim doctrine, that is totally discretionary with the -- with the federal trial court.

There is the bare possibility that in some cases federal and state claims might be heard together in diversity actions, but in our judgment, the more complex the antitrust action at the state level, the less likely because of the complete diversity requirement these matters will actually come to federal

court.

Ultimately, however, we cannot and it is very difficult for us to see that diversity jurisdiction, one of the major tools of the Constitution to create and preserve the federal system, should now turn into an enemy of that system itself.

With respect to incentives for direct purchasers, the claims based on state law do not diminish by their own operation the direct purchasers' recovery under federal law. As the California Supreme Court noted in its Union Carbide decision, questions of whether overcharges were passed on essential to the indirect purchasers' California claim are irrelevant to and thus not subject to inconsistent determination in a suit on the direct purchasers' federal claim.

Federal law as construed by Illinois Brick provides a particular recovery as determined by this Court. State law does not limit that recovery. There is simply no impact of state law on federal law.

In our judgment this case is essentially on all fours with the Silkwood decision. Federal law has established a certain sanction at the federal level. States have now gone forward and provided yet an additional sanction, and that's perfectly reasonable under the Constitution.

QUESTION: Mr. Green, is there any way that a corporation that's sued under -- under the Clayton Act can avoid after having fought hard and won -- he gets a jury verdict that there's no conspiracy in restraint of trade. Is there any way he can avoid having to relitigate the same conspiracy, the same conspiracy charge under state law?

MR. GREENE: Well, I think that would -- that would really turn on doctrines of collateral estoppel and res judicata. I would think that depending on the relationships of the parties, I would think that that would probably be very likely that he would be able to.

QUESTION: Why? The plaintiff in one case is -- is the direct purchaser. In the other case it's the consumers. They choose not to come into the first action. Indeed, there's no need. It would be useless for them to come into the first action because under Illinois Brick they can't recover, right?

MR. GREENE: Um-hum.

QUESTION: The defendant could not implead them either, could he?

MR. GREENE: The only precedent is --

QUESTION: No, because they have no interest in the case. So, it seems to me we're setting up a situation where -- you know, if you ever go to trial,

you've got to try it again under state law, even if you win. Is that right?

MR. GREENE: Well, I think that that's -- that may be possible. I think, again, it would depend on the doctrines of collateral estoppel and ultimately on relationships of the parties. But that's not dissimilar from the same situation that was created in your double jeopardy cases.

For example, in Heath there were two trials involving the same alleged murder, one in one state resulted in life imprisonment. The second one resulted in, as I recall it, the death penalty. Two trials, two sanctions, and that is okay from our perspective under the -- under the Constitution.

Pragmatically I think that in all likelihood --

QUESTION: Oh, I have no doubt it's okay. My only question is whether Congress intended it. That's all. I think that's what we're discussing here.

MR. GREENE: Certainly.

QUESTION: I'm sure it can happen.

MR. GREENE: But the -- the Congressional history with respect to the antitrust laws is so firmly supportive of the notion of state efforts in the antitrust area. Indeed, the federal antitrust laws were initially enacted as a supplement to state law. And

there's a long history of mutual supportive behavior on the state side and the federal side. Grants have gone from the federal government to the states in order to arm them to be able to deal both under state and federal law in the antitrust area, other specific provisions, 15 USC 15 (f) requires federal authorities, my federal colleagues to cooperate with my investigative efforts in order to keep fresh and vigorous the two-tiered antitrust enforcement system which the -- the preemption of these kinds of statutes would have a direct impact on.

QUESTION: It's critical for recovery under state law that -- that -- I think that you said that you would have to prove or pass on?

MR. GREENE: You have to prove that you have been injured. That's certainly --

QUESTION: Well, I know -- by the direct purchaser having passed it on, is that it?

MR. GREENE: You would have to show that it certainly came from someplace, that's right. But it would be the burden of the person claiming under state law to show that and in most cases that would be something that would be shown in a state proceeding, in state law.

QUESTION: And so if the -- if there hasn't been a pass-on, no recovery?

MR. GREENE: Absolutely. Right.

QUESTION: If there's been a partial pass-on, just partial recovery?

MR. GREENE: That would be correct. That's right.

It strikes us that not only do these state statutes not frustrate the purposes and goals of Congress, they do indeed advance those purposes and goals. Certainly one of the key points made in the Illinois Brick decision was the importance of deterrence and enforcement.

This case itself was brought by the Arizona Attorney General's office, who was investigated using state subpoena power. It is clear that downstream purchasers, particularly we think when represented by state Attorneys General --

QUESTION: Wasn't this case pendent to a federal case? Didn't it originate in the District Court in Arizona?

MR. GREENE: It was initially filed -- the State of Arizona filed a -- a complaint in Federal District Court in the District of Arizona, which was based on both a violation of Section 1 of the Sherman Act and a violation of the Arizona antitrust act.

But it was the Arizona state officials who

investigated the case and first --

QUESTION: And so the District Court's jurisdiction over the state antitrust laws was pendent, was it not?

MR. GREENE: Was pendent, certainly, and it was filed in 1976, before this Court's decision in Illinois Brick. And ultimately, as a side note, the trial court in 1984, I believe, actually separated the state claims off on a Gibbs analysis, so -- just before a trial which actually, in fact, never came off. Those claims were separated.

Unless there are further questions at this time, I would like to reserve the balance of my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Mr. Englert.

ORAL ARGUMENT OF ROY T. ENGLERT, JR.

AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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

The Ninth Circuit in this case adopted quite a remarkable proposition. The states are powerless to deviate from federal law in providing remedies for conduct that is deemed to be illegal by both federal law and state law.

The court adopted that position because it saw

a conflict between the state law and the three policies that Mr. Greene has mentioned.

We agree that the three policies that are embodied in Illinois Brick and that were mentioned are important to construing the Clayton Act. But whether they give rise to preemption is a different question. We think they do not.

First, a general point about preemption. A federal statute can permit that which it does not require. It follows that the policies to be taken into account in determining what a state statute -- what a federal statute requires, which is what this Court was doing in Illinois Brick, can be quite different from the policies taken into account in determining what a federal statute forbids, what a federal statute permits the states to do.

That point deserves to be underlined especially in this case because both Hanover Shoe and Illinois Brick were exclusively concerned with what Section 4 of the Clayton Act requires.

In answering that question the Court looked to a number of policies, not particularly closely grounded in the statutory language or legislative history, but of course that was legitimate because the statutory language and the legislative history provided very

little guidance to the Court in how to answer that question.

So, the Court looked to general concerns of compensation deterrence which appropriately inform the construction of how far the federal statute reaches.

To the extent there's ambiguity in the Clayton Act on those questions, it left the field open for the court to impose -- not to impose, to discern -- rational policy in that case.

In preemption cases the question is different. Congressional ambiguities suggest that the states are free to do what they think is best. They're free to discern appropriate policy.

QUESTION: Are you suggesting that a state could provide an additional remedy for violation of the Clayton Act?

MR. ENGLERT: I think so, Your Honor. I don't know of anything in the Clayton Act --

QUESTION: Well, you have to -- the case would have to go forward in the federal court.

MR. ENGLERT: I don't know of anything, Your Honor, that would prevent a state from saying that for price fixing we want the measure of recovery under state law to be fourfold damages. And if treble --

QUESTION: Now, you're talking about -- I just

said that -- the action in the federal court is solely under federal law, federal antitrust law.

MR. ENGLERT: All right.

QUESTION: And so then the question of remedy comes up, and the --

MR. ENGLERT: The states can't govern the remedy for the federal conduct. There's no question about that.

QUESTION: All right.

MR. ENGLERT: But the states can --

QUESTION: So -- so, you're really talking about a recovery under the state antitrust law.

MR. ENGLERT: That's correct.

QUESTION: Well, that isn't -- you've been talking more generally than that.

MR. ENGLERT: Well. The states can proscribe the same conduct that the federal government proscribes.

QUESTION: Exactly.

MR. ENGLERT: Can provide a larger measure of recovery, and they can provide that larger measure of recovery notwithstanding a smaller federal recovery that has already taken place.

QUESTION: Right.

Need they credit the federal recovery against the state recovery?

MR. ENGLERT: They certainly need to give full faith and credit to the federal judgment. If the state measure of damages is quadruple damages, they would have to credit the treble damages that have already been awarded. But --

QUESTION: What's your authority for that?

MR. ENGLERT: They can't disregard the federal judgment, Justice Kennedy. I think general supremacy clause jurisprudence suggests that a state court can't disregard a federal judgment.

QUESTION: Well, suppose the state just said then six times.

MR. ENGLERT: If that was the state's intention, the state could do that. The state could credit the treble damages and say and we want an additional treble damages.

Ordinarily that doesn't happen, and that's why in response to the question Justice Scalia was raising earlier, the direct purchaser ordinarily can't go to federal court, get his recovery, and then get recovery for the same amount under -- in state court because state law generally doesn't provide for sextuple damages.

As a matter of state law, that's not what ordinarily happens.

QUESTION: Right. But assume a state that

thinks otherwise, and the state law says we don't care whether this plaintiff has recovered under the Clayton Act or not. We want to give him under our state law triple damages.

MR. ENGLERT: I think that's fine.

QUESTION: That's fine. So, you get six times despite the fact the Clayton Act says only three.

MR. ENGLERT: That's right because the -- the Clayton Act goes only so far in punishing illegal conduct. It doesn't go beyond that and say in addition to stopping at some point in our punishment, we want to protect against further punishment.

QUESTION: Well, I come back to the suggestion I made earlier. The reason that a state normally would not allow a person to recover in the second tort action for the same tort is that it's just generally understood in our system that you allow one recovery per tort. And the person who injures somebody pays once.

And -- now, state to state there's no way of enforcing that understanding. But where you have a federal statute that's based on that tort type of understanding, I don't know why it would allow a state to -- to upset the understanding by saying we're going to allow tortfeasors to be -- to be liable twice instead of just once.

MR. ENGLERT: Because this statute was never meant to prctect tortfeasors. It was meant to punish tortfeasors. This is a point Chief Justice Berger made in his opinion for the Court in Texas Industries v. Radcliffe Materials where again, extra liability above threefold what the price fixer had caused was at issue. The Chief Justice said, the Sherman Act and the provision for treble damages action under the Clayton Act were not adopted for the benefit of the participants in a conspiracy to restrain trade.

The very idea of treble damages reveals an intent to punish past and to deter future unlawful conduct, not to ameliorate the liability of wrongdoers.

Congress acts against a certain background of understanding, but that background of understanding is often based on what Congress expects state law will do. It doesn't impose a new federal rule, merely based on the understanding of what state law is likely to be like.

Here the states have not imposed additional damages on top of the federal recovery for the same victims. The states have chosen to compensate different victims.

The Ninth Circuit thought that allowing recovery under these state statutes would frustrate the policy announced in Illinois Brick of encouraging

antitrust lawsuits, that it would remove the incentives to sue. We don't think that's right.

The concern in Hanover Shoe and Illinois Brick was underdeterrence. The Court was afraid in the Court's own language, that the violaters might retrain -- might retain the fruits of their illegality.

Here there's no question at all of that. The only question is are we going to take -- how many times are we going to take the fruits of their illegality from them?

Under federal law we already have taken three times, and the state law raises the potential of taking it more times than that.

If there's any concern in this case it's against -- it's with overdeterrents of the antitrust laws, not underdeterrents.

But as we've been discussing, there's nothing in the Clayton Act and the structural legislative history to suggest that Congress had a carefully calibrated scheme that it meant to go so far and prevent anyone else from going further.

I'd also like to mention on that point the California v. Zook case, which was a case many years ago decided by this Court in which the state had gone further than federal law in proscribing the precise same

conduct that federal law proscribed.

Although the Court was closely divided on that case, five to four, the Court explicitly said that it saw no problem in -- in the states imposing harsher penalties for the same conduct than the federal system imposed for that conduct, and indeed we see that in the double jeopardy dual sovereignty cases as well.

If the court has no further questions, thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Englert.

Mr. Olson, we'll hear from you now.

ORAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF APPELLEES

MR. OLSON: Thank you, Mr. Chief Justice, and may it please the court:

This Court has twice determined that federal indirect purchaser litigation would have an impermissible impact on the enforcement of the antitrust laws. In the words of Illinois Brick, the effectiveness of the antitrust treble damages action would be substantially reduced by adopting a rule that any party in the chain of distribution may sue to recover the fraction of the overcharge allegedly absorbed by it.

The state indirect purchaser laws at issue in this case authorize precisely such litigation and are preempted because they weaken antitrust enforcement in exactly the same manner and to an equal or even greater extent as the federal indirect purchaser claims rejected by Illinois Brick.

There are two overriding issues that dominate this case. The first is the effect, the pernicious effect of state indirect purchaser remedies on federal antitrust enforcement, and the second, of course, is whether those effects present an intolerable obstacle to the accomplishment of federal policy and trigger the preemptive force of the supremacy clause.

Turning first to the effects of the state indirect purchaser remedies on the federal direct purchaser treble damage remedy, in this case a conflict between the state law and the federal law was inevitable because the state indirect purchaser laws reject, directly reject the federal approach to antitrust enforcement.

They are commonly referred to, these state laws, as Illinois Brick repealers, and the reason that they are referred to as Illinois Brick repealers is that by and large they were enacted for the purpose of overturning to the extent of indirect purchaser recovery under state law, this Court's decision in Illinois Brick.

QUESTION: Well, Illinois Brick didn't deal with state law, did it?

MR. OLSON: No, it dealt with federal law. But the --

QUESTION: Well, I don't know how there can be a conflict.

MR. OLSON: The Illinois --

QUESTION: As far as overruling, you can't overrule a case that had nothing to do with an issue.

MR. OLSON: The Court -- the states have indicated and the California court has described the legislature's intent in California as enacting the

minority opinion or the dissenting opinion in Illinois Brick. Now, I recognize --

QUESTION: Now, I think they did. I think they undoubtedly did under state law. Under state law.

MR. OLSON: Illinois Brick, I submit, respectfully, Justice White, has to do with what mechanisms and devices may affect adversely the effectiveness and the enforceability of the federal antitrust laws.

And what the states have done is enact the very mechanisms that this Court said were destructive.

QUESTION: And I take it your position would be the same if this suit had been brought in the state court and -- and obviously there couldn't express -- couldn't allege any federal antitrust claim, just solely a state law antitrust recovery in that case?

MR. OLSON: Yes, our position would be the same. In fact, the Court should be aware that that case is now before this court because on February 6 a petition for certiorari was filed in the Union Carbide case. Earlier developments in that case are referred to in the briefs, but that issue is presented in the cert. petition filed before this Court on February 6th.

The reason why there is such a direct conflict here is that California and the fed -- California and

the other state statutes have approached antitrust enforcement in diverse separate ways. The Congress' approach as explained in Hanover Shoe, Hawaii versus Standard Oil, Illinois Brick and numerous other decision of this court, is a balanced deterrence of anticompetitive conduct through a range of enforcement mechanisms, including injunctions, criminal penalties, and the centerpiece of the federal antitrust remedy, the treble damages, private treble damages remedy.

QUESTION: Mr. Olson, I would find it helpful if sometime in your argument you could lay out kind of specific facts that show a conflict. Perhaps in this particular case.

MR. OLSON: We will do that because it's important to address the specific ways in which the state statutes affect in this case and generally the federal antitrust remedy.

But first of all, if I may, I wanted to point out that the -- as this Court has interpreted the federal legislation, the balanced deterrents compensates victims as well as precluding or preventing violations of the antitrust laws and punishes violaters, but the Court has repeatedly held -- and Illinois Brick is one of those cases -- Hawaii versus Standard Oil is another -- Associated General contractors is a third -- that

widening the circle of compensated victims is not a permissible objective if the effect of widening the circle of compensated victims has a deleterious effect on the deterrent remedy of the direct purchaser provisions of the federal law.

By the same token, if we -- if a mechanism enhances the punishment of the violater, that is not permissible, according to this Court, if it imposes multiple or duplicative recovery under the antitrust laws, as this Court repeatedly held -- has held in the same cases that I've referred to before.

The states, on the other hand, are primarily virtually exclusively interested in compensating victims. And, in doing so, has expanded the circle of people who may bring lawsuits under the antitrust laws in ways which have a direct and harmful effect on the federal remedy.

The three things mentioned by this Court in Illinois Brick -- I think that it is responsive to your question, Chief Justice Rehnquist -- are the complexities, the dilution of the federal recovery --

QUESTION: What my question was directed to -- and don't feel bound to get to it -- is give us an example of the kinds of recovery, so many dollars for this, so many dollars for that, that would show the

conflict.

MR. OLSON: Well, in this case, specifically, there is an express amount of money, based upon settlements. If the indirect purchasers participate in this litigation, the direct purchasers will get less money.

My client -- I'm one -- my client is a direct purchaser -- will get less of a settlement fund and its recovery under the federal antitrust laws will be diluted because of participation by the indirect purchasers.

QUESTION: So, you don't represent a defendant. You represent another plaintiff.

MR. OLSON: That's correct. I should have made it clear when I stood up to speak that I represent in this case a direct purchaser. We are challenging the state statutes because those state statutes authorize in this case the amount of my client's recovery, the diminution of my client's recovery.

In fact, by a very substantial amount, because the state -- although the amount of the claims has not yet been determined because of this process that's been going on for 13 years, if we -- if this court overturns the Ninth Circuit, we will go back to the District Court for long, complicated pass-on litigation of exactly the

same variety that was described by this Court in Illinois Brick, and that this 13-year ordeal will go on for I don't know how much longer.

QUESTION: Well, I suppose -- I suppose if the settlement had been clear or the settlements -- were there more than one?

MR. OLSON: Yes, there were seven, I believe.

QUESTION: If the settlements had been clear that they were only settling the federal law issue, why --

MR. OLSON: Well, I submit, Justice White, that that is -- it's a very interesting point. There are very few defendants out there in the real world who are going to settle with just the direct purchasers or just the federal claims because you are going to be facing state litigation --

QUESTION: State litigation.

MR. OLSON: -- perhaps California litigation, perhaps Arizona litigation, perhaps Alabama litigation, perhaps Minnesota litigation, and each one of those statutes are different and provide different measures of recovery for different indirect purchasers.

The Minnesota statute has this provision that the appellants have pointed out to discourage the courts from allowing duplicative recovery, but the California

statute doesn't have any such provision.

QUESTION: Was your -- was your client party to a settlement?

MR. OLSON: My client was an unnamed class member who came in to participate in this settlement. There are direct participants in the settlement, in the various different settlements and there are class members that have come in.

This case is perhaps a prototype of some of the things that your opinion --

QUESTION: I suppose there should have been really should have been two classes.

MR. OLSON: There were three classes.

QUESTION: There should be at least a class of direct purchasers and a class of indirect purchasers.

MR. OLSON: Well, it started out that way.

QUESTION: But I can't believe that one would -- would really adequately represent the other.

MR. OLSON: Well, there are some problems with respect to that. As a matter of fact, the problems are even greater than that, Justice White, because my client, in addition to being a direct purchaser, also happens to be an indirect purchaser.

We are here today, of course, objecting to the decision in -- I mean supporting the decision because

our interest in this case is substantially greater as a direct purchaser.

But the State of California was a direct purchaser and an indirect purchaser, and that's the way it's going to be in much antitrust litigation. The -- the point of the complexities that this Court talked about in its decision in Illinois Brick is graphically illustrated by this kind of antitrust litigation.

This was a so-called nationwide conspiracy to violate the antitrust laws. There are many, many, many claimants that have filed claims pursuant to these settlements. There were several different District Court proceedings that were involved and brought into this case.

The complexities that you described for the Court in Illinois Brick as insurmountable and unmanageable and insuperable are squared, if anything, when you add in, to this litigation, the participation of indirect purchasers under state indirect purchaser statutes of the nature that are involved in this litigation. And there is no way to avoid those complexities.

There will be multiple inconsistent state laws, multiple inconsistent litigation, possible conflicts among the various state laws. These cases

will inevitably, in most cases, be litigated in the federal courts because of diversity litigation or because there's a crossover between the indirect and the direct purchasers if they are not. And pendent jurisdiction is particularly appropriate under the standards established by this court for pendent jurisdiction.

QUESTION: Isn't there something less drastic to control the situation that you point out in these combined cases in the federal courts that doesn't require you to preempt a simple one-plaintiff lawsuit based on state law in state court?

MR. OLSON: Well, Chief Justice Rehnquist, very seldom are these state or these antitrust cases one plaintiff --

QUESTION: No, but by hypothesis, you have to deal with those. If you have to say there's preemption here, you're preempting something that may not happen very often, but it seems to me the argument is very weak there.

MR. OLSON: It seems to me that the argument is very strong because this Court determined that the -- the practical effect of indirect purchaser litigation, wherever it exists to the extent that it influences at all the state court proceeding, is going to lengthen

that process, make it more complicated, make it less attractive for participation by direct purchasers, will almost invariably reduce the potential recovery by the direct purchasers because you're going to have complete -- competing claimants for the same fund, and you have on the defendants' side of this the possibility of multiple or duplicative recoveries.

Now, this Court specifically said that the complexity in Illinois Brick -- that the complexities and complications that were described in Illinois Brick won't be the same in every case, but they are very severe in this case, the case that brings this problem to this court --

QUESTION: Well, I suppose --a lot of your problems would disappear if it were -- if you could always tell at a glance whether something had been passed on.

MR. OLSON: Well, that's a very good point. It is impossible to tell.

QUESTION: But if it were at a glance, why I don't suppose that the direct purchaser would be deprived of anything if he had passed it all on and you could know he did.

MR. OLSON: Well -- well, if the Court adheres to its decision in Hanover Shoe and Illinois Brick, you

may have a less -- you may eliminate the problem of the complexities --

QUESTION: Yes.

MR. OLSON: -- that the litigation brings about. But no matter how simple it is, if Illinois -- if Hanover Show remains the law and Illinois Brick remains the law, then the direct purchasers were damaged the moment they paid the overcharge. Therefore, they are entitled to 100 percent trebled of the recovery. And if there is any direct purchaser participation, they will be competing for the same -- for money from the defendant. That will mean that invariably there will be duplicative and multiple recoveries.

Ard as I understand the teachings of this Court in case after case, it is a very significant concern of this Court that there not be duplicative and multiple recoveries under the antitrust law.

QUESTION: But they're competing only where there's a settlement. If there's no settlement, the defendant might be held liable on all the claims under all the various theories.

MR. OLSON: If -- no, I respectfully submit that if the -- if the case proceeds to judgment under Hanover Shoe and Illinois Brick, the direct purchasers are damaged to the full extent of the overcharge.

Whether they passed it on or not.

If they didn't pass it on, there may not be any subsequent recovery by any of the indirect purchasers, but the appellants' brief recites people who have written Law Review articles and economists who say that passing on is the rule and not the exception.

There are almost always, according to the appellants, be a pass-on. If there's a pass-on, then there are indirect purchasers who are going to be claiming multiple recoveries.

QUESTION: But the state can surely grant additional relief under its statute. All the claims under the federal statute could be satisfied and there still might be additional liability under the state statute.

MR. OLSON: The state -- the state can grant additional relief, I submit, when that additional relief does not create an obstacle to the effect of enforcement of the federal statute or an obstacle to the achievement of the federal goals.

In this case, the additional relief that the state is granting is the right to participate and make more complicated --

QUESTION: But you're speaking in terms of the settlement. Are you saying that just having a

consolidated lawsuit in federal court where there's no settlement -- it goes to a jury verdict and the jury finds against all the defendants -- that's a sort of complication because you have pendent state claims?

An easier way to solve that is for the District Court to say there's no pendent jurisdiction.

MR. OLSON: Well --

QUESTION: You don't have to throw out the state statutes as preemptive.

MR. OLSON: There's three answers to that. In the first place, as I understand Illinois Brick, that is precisely the scenario that the Court was concerned about in Illinois Brick, a large piece of litigation, although that case did go to a settlement where there are conflicting claimants involving complicated insuperable problems in terms of proving the amount of the pass-on.

There's not an answer to say that there simply should be a denial by the District Courts of pendent jurisdiction in those cases because the District Courts won't be able to deny the existence of the litigation in diversity cases in the first place.

In the second place, as I understand this Court's decision in United Mine Workers versus Gibbs, the very reason -- all of the reasons for pendent

jurisdiction come to play in this case. The defendant --

QUESTION: But you want to have your cake and eat it too. You say that -- that one of the reasons we want pendent jurisdiction here is because we want to get everything together and consolidate it. And then -- but the very fact of consolidation creates this complexity that you say necessitates the preemption of state law. I don't think you can have it both ways.

MR. OLSON: We are not seeking pendent jurisdiction or seeking -- we're not seeking to have it both ways. I'm simply saying that the Court -- if the Court -- if the District Courts follow the guidelines established by this Court for whether or not to grant pendent jurisdiction, the Court will consider that the defendants -- and I'm not representing a defendant -- the defendants will be interested in pendent jurisdiction because it will otherwise have completing -- competing tandem pieces of litigation --

QUESTION: Well, yes, but -- but if a -- if this case had gone to trial and there were state claims and there were federal claims in it, it seems to me that the state claims, if the state claims are just presented by indirect purchasers, let's just assume the only state claims were indirect purchaser claims. They should never go to the jury under your theory. They should be

dismissed.

MR. OLSON: I'm not sure I understand the question. If there's a -- if the State of California statute, for example, is constitutional --

QUESTION: Well, I'm just saying in this case under your theory if there were only indirect purchasers asserting state law claims, their claims should be dismissed and they should never go forward.

MR. OLSON: You mean in the federal court?

QUESTION: Yes.

MR. OLSON: I'm not sure I understand why. I must be missing a part of your question.

QUESTION: Well, I thought you said they were preempted, that they could never recover.

MR. OLSON: That's right. If -- they will not recover if they're preempted.

QUESTION: So, they should be dismissed at the outset.

MR. OLSON: Yes. Yes.

QUESTION: Okay.

MR. OLSON: That is -- that is the result.

QUESTION: I'll ask you why in a minute.

QUESTION: No comment.

MR. OLSON: If -- the problem that one of the questions related to is -- the question that was raised

by one of the questions is what if the indirect purchaser litigation is confined over here to the state court and the direct purchasers are allowed to proceed, assuming that there's no identify as there often will be between the direct and indirect purchasers.

And I'm saying that it seems obvious to me that the litigation will nonetheless be complicated and this is what will happen. There will be in the first place multiple litigation going on at the same time, which will --

QUESTION: Tell me what time, what do you mean multiple litigation? You mean some in state court and some in federal?

MR. OLSON: Yes.

QUESTION: Well, under your theory you go right into state court and say if they are indirect purchaser claims, you say dismiss them.

MR. OLSON: Yes. I'm -- I must be missing --

QUESTION: And if you win here --

QUESTION: I think that's assuming that you win here.

QUESTION: If you win here, well, what --

MR. OLSON: I'm trying to give you a reason why we should win here, and one of the reasons why we should win here in response to another question, was

that the litigation does not become more simple if the indirect purchasers are confined to state court litigation because you have multiple simultaneous litigation going on. You have an almost impossible situation with respect to settling the litigation. You have simultaneous two ring circuses full of discovery and -- and -- and you have a race to the judgment because the defendant presumably will only have limited funds, and that funds will be available first of all to the first person to get there.

You have the risk of inconsistent factual and legal adjudications in the federal forum and the state forum. So, no matter what happens, if these laws are not preempted, the complications that the Court was concerned about in Illinois Brick are, if anything, worse under state indirect purchaser litigation than in the federal litigation.

Furthermore, the other problem, the dilution of the recovery, the part one of the Illinois Brick formulation was the complexities that indirect purchaser litigation would bring to the table. And as I've pointed out, state legislation makes the problem even worse.

The dilution that the Court was concerned about of recoveries is every bit as great if not more

great. Here, for example, we have the absolute certainty of dilution if indirect purchasers participate.

QUESTION: But that's only because of the settlement.

MR. OLSON: Yes. Only because of the -- well, it's because of the settlement in this case. If there isn't a settlement, it will be possibly more difficult to settle the litigation at all, which would be inconsistent with the policy that this Court has encouraged and is a part if antitrust --

QUESTION: But there won't be any -- there won't be any necessary dilution if it goes to a jury verdict.

MR. OLSON: There will be dilution depending upon the amount of the assets of the defendant.

QUESTION: Well, assume you have a defendant that's good for any judgment rendered against him.

MR. OLSON: If you have and if you assume -- and I don't think that that's necessarily something that this Court ought to assume -- in multiple complicated nationwide antitrust litigation where you're already talking about treble damages and you're already talking about a case which is in this one -- and this case lasted 13 years and will probably go on for another decade -- the resources that are drawn down from the

defendant as a result of simply participating in the litigation.

Yes, you may have some defendants that can afford that and then treble damages on top of it and then possible sextuple or ninetuple damages because under the state statutes, for example California's, it's not clear that the rule of Hanover Shoe, the pass-on might not be applied unequally. In other words, there may be 100 percent recovery, as there must be under Illinois Brick and Hanover Shoe at the direct purchaser level.

There may be if -- if all of the overcharge was passed on, there may be to the first tier of indirect purchasers, there may be another 100 percent recovery trebled. There may be a third tier and a fourth tier and a fifth tier. That may not always be the case, but it's potentially the case.

If -- if the pass-on is not handled equally, as this Court put it in Illinois Brick, that's very much the potential. So, in those kind of cases, Chief Justice Rehnquist, there is a very strong possibility of a dilution of recovery by the direct purchasers.

And, what there will be for certain -- and I've alluded to this -- is that there will be multiple duplicative recoveries, almost invariably, because we

know under Hanover Shoe and Illinois Brick the direct purchasers have got to recover treble damages times the entire amount of the overcharge. So that any recovery by any indirect purchaser is going to be an additional recovery for the same overcharge. And that, as I understand it, is a policy that's strongly frowned upon under the antitrust laws by the teachings of this Court in Hawaii versus Standard Oil and various other cases.

Thus, I think it's clear that the concern of the effect of the indirect purchaser remedy on federal antitrust litigation is every bit as great, if not more great in the state when the law -- when the -- the litigation is authorized by state law as it is -- as it would be if it was authorized by federal law.

Now, the question is does that bring about a preemption in the operation of the supremacy clause. We submit that it most clearly does. In the first place, this Court has repeatedly -- and there's no question -- in this litigation that the standard for preemption that we're talking about in this case is obstacle preemption. Whether or not the state law -- and there was some discussion when Mr. Greene was speaking about separate sovereign and a separate state remedy under a separate sovereign.

There's always, of course, going to be a

separate sovereign when we're talking about preemption. And this Court has repeatedly held that where the state law provides an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, then there will be preemption.

Recently this Court held in International Paper versus Aulette that the state law is also preempted if it interferes with the methods by which the federal statute was designed to achieve its goal. In that case, the Clean Water Act was involved, and in response to a point that Mr. Greene made, there's always the possibility or there's frequently the possibility that the states may argue that we're seeking to accomplish the same goals.

The litigants in that case made the same point in International Paper versus Aulette. We're seeking to accomplish the same goal. Nonetheless the Court held that because the state remedy interfered with the effectiveness of the federal remedy, the state statute was preempted.

QUESTION: Are you helped at all, Mr. Olson, by our opinion in Boyle versus United Technologies.

MR. OLSON: I believe we're helped by that. I believe that we're also helped by your very recent opinion in Wisconsin Public Industry versus Gould I

believe it was in which a state court -- a state statute there debarred a contractor if it had violated federal labor law on three separate occasions, and it was the unanimous opinion of the court in that case that the statute was preempted.

With respect to the Boyle case, I think the same -- some of the same considerations apply, although we're talking about the -- a federal statute here and the federal common law in the Boyle case. But I think that the -- much of the teachings of that case in terms of the analytical process of considering the effect of the state statute on the federal concern is very much apropos.

The Illinois Brick concerns, contrary to what my opponents have said, are the concerns of Congress. My opponents have repeatedly said in their briefs and even here today, that what the court was talking about in Illinois Brick was something removed from Congressional concerns, something on the order of jurisprudential concerns for the efficiency of litigation in the courts.

But, as I go back and examine the decision in Hanover Shoe and Illinois Brick, it's very clear that the court there was articulating what Congressional policies are, and it is the law, of course, of the land,

as this Court has explained it, that those are Congressional policies which are being undermined.

In -- it is interesting -- and this is -- I draw this from a footnote in the Associated General Contractors case -- Senator Edmunds during the debates that led to the enactment of the Sherman Act specifically said if we want to entangle this legislation and make it difficult for it ever to accomplish its objectives -- and I'm not quoting, I'm paraphrasing -- one of the ways in which we could do it is to invite everybody into the litigation, allow any party to participate in the litigation, and that will bring about the collapse of the remedy. That's precisely what has happened here.

As we've said the indirect purchaser litigation is a mechanism that as a matter of law substantially impairs the effectiveness of the private treble damage remedy. State remedies would be even worse. They would be more complex. They would bring about certain dilution of the recovery of direct purchasers in many cases, and the risk of dilution in other cases. And it's the risk that should be of greatest concern because the risk of dilution of the recovery will be what deters the direct purchaser from bringing the antitrust remedy at all.

And there will be a certainty of multiple overlapping recovery. For all of these reasons, the indirect purchaser legislation provides serious obstacles to the effectiveness of the enforcement of the direct purchaser remedy under the antitrust laws and is preempted.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Olson. Mr. Greene, you have three minutes remaining.

MR. GREENE: Thank you, Mr. Chief Justice. Unless there are further questions of the Court, the state submits.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Thereupon, at 2:27 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 87-1862 - CALIFORNIA, ET AL., Appellants v. ARC AMERICA CORPORATION, ET AL.,

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BY Judy Freilicher

(REPORTER)