ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CHARLES QUACKENBUSH, CALIFORNIA INSURANCE COMMISSIONER, ET AL., Petitioners v. ALLSTATE INSURANCE COMPANY

CASE NO: 95-244

PLACE: Washington, D.C.

DATE: Tuesday, February 20, 1996

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IN THE SUPREME COURT OF THE UNITED STATES

- X

CHARLES QUACKENBUSH, CALIFORNIA :

INSURANCE COMMISSIONER, ET AL., :

Petitioners :

v. : No. 95-244

ALLSTATE INSURANCE COMPANY :

- X

Washington, D.C.

Tuesday, February 20, 1996

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

KARL L. RUBINSTEIN, ESQ., Los Angeles, California; on behalf of the Petitioners.

DONALD F. DONOVAN, ESQ., New York, New York; on behalf of the Respondent.

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 95-244, Charles Quackenbush, California Insurance Commissioner, v. Allstate Insurance Company.

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

ORAL ARGUMENT OF KARL L. RUBINSTEIN

ON BEHALF OF THE PETITIONERS

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

Commissioner Quackenbush is the last of a line of several insurance commissioners who have struggled for going on 10 years to marshall the assets and to effectively administer one of the largest property and casualty insurance insolvencies in the history --

QUESTION: Perhaps you should say the most recent, rather than the last.

(Laughter.)

MR. RUBINSTEIN: Exactly correct, Your Honor.

However, we have a final liquidation dividend plan which has been recently approved by the Superior Court in California, and we're hoping that during Commissioner Quackenbush's administration we'll be able to complete this case, and actually the issues before this

Court are crucial to that issue.

What has happened, the Court is already aware because we have explained it in the briefs and you're aware of how we got here, it is Commissioner Quackenbush's position, and that he urges upon the Court, that the Ninth Circuit erred in improperly permitting an appeal based upon an antiquated and inappropriate standard distinguishing between equitable remedies and legal remedies and thereby prevented, or would forbid, this district court, and any district court in a similar case, from considering issues that legitimately relate to abstention, such as the failure to recognize the need for a consolidated proceeding in a State court, which can protect itself from being dissipated through dozens and in this case it could have been hundreds of Federal court litigations, would disturb, and in fact destroy, a fundamental interest of the State of California --

QUESTION: What authority do you -- you see, when you say it's a matter of discretion whether the court will provide relief or not, I don't care whether you call it equity or antiquated or anything else, the crux of the matter is, I can understand this abstention doctrine when the court below has discretion as to whether it wants to grant relief or not.

Then the case is brought before it and the court

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says, well, I don't have to grant relief even if you have a good case, and therefore I think I shouldn't even hear this case. I'm going to send it back to State court. That makes sense to me.

But where the court has no discretion, where the plaintiff is entitled to judgment from that Federal court, where does the Federal court get the power to send it back to State court? It's a statute that says the case is removable.

MR. RUBINSTEIN: Assuming --

QUESTION: Where does the power come from?

MR. RUBINSTEIN: Assuming the hypothetical, Justice Scalia, you're exactly correct, and -- however, the question comes, is there a Federal -- fundamentally the question is, is there now a Federal court of equity, and the fact is there is not a Federal court of equity. There is a single district court which sits postmerger with equitable powers --

QUESTION: Which has discretion to deny judgments that are -- judgments for money, has discretion to say, well, you're entitled to this money, but I just think I'm not going to give it to you. Do Federal courts now, under this new order of the world, have that power?

MR. RUBINSTEIN: Of course not, Your Honor. However --

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QUESTION: So I don't care whether you call it equity or not, the fact is, if the court must grant relief, it seems to me the court must entertain the case.

MR. RUBINSTEIN: The question is, what is the power of the court to grant relief, and what is the relief requested of the court?

In this case, the relief requested of the court, the key relief requested, was the motion by the insurance commissioner to invoke the reasoned discretion of the district court to apply the abstention doctrines which have been long-established by this Court, and that is the reasoned discretion of the district court.

QUESTION: Whose discretion doctrines have been long-established in cases where the court was able to say, yes, you have a good case but I'm not going to give you relief. Those are the cases in which that's been well established.

MR. RUBINSTEIN: I don't agree with that, Your Honor. I believe that under the principles of Burford and under the principles of Colorado River, for example, that the Federal district courts have been recognized to have a reasoned discretion.

QUESTION: I'm not talking about deferral, I'm talking about dismissal. I'm not talking about simply sitting on the case and waiting for a State court to act.

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I'm talking about --

QUESTION: Well, I think the Court's opinion in Fair Assessment supports your proposition.

MR. RUBINSTEIN: Precisely.

QUESTION: That was not a request for an injunction. It was a request for legal relief, and we said the court could turn it down.

MR. RUBINSTEIN: That's exactly correct, Mr. Chief Justice.

QUESTION: What did the court do in that case? Did it dismiss?

MR. RUBINSTEIN: In Fair Assessment?

QUESTION: Yes.

MR. RUBINSTEIN: In Fair Assessment it dismissed, Your Honor.

QUESTION: Are you sure it dismissed?

MR. RUBINSTEIN: I mean, it remanded, Your Honor.

What I'm seeking here is an affirmance that a court has the power --

QUESTION: That's not my recollection.

MR. RUBINSTEIN: That a court has the power to remand the case. I would make this argument, Justice Scalia, that a Federal district court in a case such as this case, which is a State court proceeding which has

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been removed to the Federal district court, and on proper motion by the Commissioner of Insurance of California to invoke that court's jurisdiction to remand the same case back to the State court proceeding is completely within the jurisdiction and the discretion of the Federal district court.

QUESTION: Was this case dismissed in the Federal court?

MR. RUBINSTEIN: No, Your Honor. It was remanded back to the State court.

QUESTION: Without any dismissal.

MR. RUBINSTEIN: That's correct, Justice O'Connor. What happened was, the Federal district court remanded the case and took no further action other than to send it back to the same State court from which it came.

QUESTION: Would we have to overrule Thermtron in order to make the appeal possible?

MR. RUBINSTEIN: Not in our opinion, Justice Breyer. We're not opposed to this Court overruling Thermtron.

QUESTION: Thermtron said no appeal would lie, that it could only be breached by mandamus --

MR. RUBINSTEIN: That's --

QUESTION: -- remand.

MR. RUBINSTEIN: That's correct, Justice

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O'Connor. In the broader sense we're not opposed to a reversal of Thermtron. However, Thermtron squarely held that a remand, which does nothing other than remand the case, is not reviewable by appeal but only by mandamus.

QUESTION: So -- but don't -- that poses the problem. Doesn't that pose the problem? This was -- do I not understand this? This was a case in which the district court remanded the case in light of the Burford abstention, is that right?

MR. RUBINSTEIN: Yes, Your Honor.

QUESTION: All right. So isn't this identical to Thermtron?

MR. RUBINSTEIN: Yes, Your Honor.

QUESTION: All right. So is there any way we can say that the -- wouldn't we have to say, unless we overruled Thermtron, that the court of appeals was wrong to hear this case because it wasn't appealable?

MR. RUBINSTEIN: Yes, Your Honor, and --

QUESTION: So we do have to overrule Thermtron.

MR. RUBINSTEIN: In the sense as to that issue --

QUESTION: Thermtron was mandamus.

MR. RUBINSTEIN: Yes.

QUESTION: Yes, so -- but it said you could only review it through mandamus, so you couldn't review it

through an appeal, and here they reviewed it through an appeal.

MR. RUBINSTEIN: What I meant by our not being opposed to overruling Thermtron is that we agreed with the dissent in Thermtron that the -- a remand order should be totally barred from --

QUESTION: Well --

MR. RUBINSTEIN: -- being reviewed. However --

QUESTION: You have the dissent in Thermtron, which did not prevail, you have the opinion in Thermtron, which did prevail, and then the Ninth Circuit, here, is even further over than the -- because it said not only -- we don't have to worry about mandamus because you can appeal this, and it seems to me the majority opinion in Thermtron makes that quite clearly wrong.

QUESTION: That's what I'm worried about, exactly.

QUESTION: Yes.

MR. RUBINSTEIN: The majority opinion in Thermtron said that a remand order is not reviewable by appeal. We understand that to be the law. We're relying on that as the law, and the majority opinion said that it's only reviewable by mandamus.

The Ninth Circuit ruled other -- ruled that it was reviewable under the Cohen collateral --

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QUESTION: But Mr. Rubinstein, if the Ninth Circuit didn't do that, wouldn't it have run smack against another decision of this Court, that is in the Moses H. Cone case, was, what sense would it make to say that if the Federal court stays the action, then the review is by appeal under the Cohen doctrine, but if it remands, then either there's no review at all, or only mandamus review?

MR. RUBINSTEIN: That's -- it is correct, Justice Ginsburg, that the two decisions have issues that are not exactly on all fours with one another. However, there are distinctions between dismissals and remands as we understand the cases, and that's how we find that the cases work together.

QUESTION: Mr. Rubinstein, suppose the case had come up this way. Allstate sues in a diversity action for the reinsurance claims that it says are due it. Mission then puts in a compulsory counterclaim and says, district judge, you should abstain, and the district judge says, I think you're right, and so I'm going to stay this action while the whole thing goes forward in a State court.

MR. RUBINSTEIN: Yes, Your Honor.

QUESTION: And Allstate wants to take an appeal. Wouldn't Allstate be squarely under Moses H. Cone in taking that appeal?

MR. RUBINSTEIN: An appeal from the dismissal,

yes, Your Honor.

QUESTION: Appeal from the stay.

MR. RUBINSTEIN: Yes, Your Honor, and part of the demonstration in this case as to the problems with the Ninth circuit decision is that in another case arising out of the State receivership court, the Morgan Stanley case, the Ninth Circuit in a similar situation where the suit was filed in Federal district court in the first instance, and we, on behalf of the Insurance Commissioner, moved to dismiss, the Ninth Circuit did dismiss based on the same considerations that -- the same type of considerations that the district court remanded the instant case on.

And so it therefore seems, looking at the Ninth Circuit precedent, that had this particular case been brought in the first instance in the district court, the Ninth Circuit would have sustained a dismissal, whereas because it was a remand, the Ninth Circuit refused to sustain the remand but only, the only distinction being that the Ninth Circuit felt that the district court would not have the discretion to remand even though it would have had the discretion to dismiss, and the only underpinning being the perceived distinction between law and equity.

QUESTION: Mr. Rubinstein, you've raised two questions in your certiorari petition. One is whether a

remand order based on abstention is appealable, and the second is whether the abstention powers of Federal courts are limited to actions in equity.

Now, if this couldn't be appealed at all, then I suppose you don't get to the second question.

MR. RUBINSTEIN: Well, Your Honor, I think we do get to the second question because it was reviewable by mandamus.

QUESTION: But that's quite a different standard. In an appeal, all you have to show was that there was error in the ruling below. In mandamus, you have to show a clearly established right.

It seems to me that if the Ninth Circuit had known that it could only review this order by mandamus it might have come out quite differently than it did reviewing it by appeal. Do you disagree with that?

MR. RUBINSTEIN: Your Honor, I agree with that.

Mr. Chief Justice, we would urge --

QUESTION: Mr. Rubinstein, what do you do, then, with the Ninth Circuit saying to this Court, we're puzzled. You have Moses H. Cone, which indicates it should be appealed. You have Thermtron, which indicates it should be mandamus. Please straighten us out. Which should it be?

MR. RUBINSTEIN: Justice Ginsburg, as I as going

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to say, I agree with the Chief Justice's characterization so far as it went. However, we urge this Court to reach the second issue, because the second issue is an issue which permeates not only this case, but the second issue permeates all similarly situated insurance commissioners across this country.

QUESTION: But Mr. Rubinstein, if it's not appealable we're not going to reach the second issue, so you have to persuade us that this is appealable, and to do that you have to overcome what the Court said in Thermtron, so I would think that would be your first line of attack here.

MR. RUBINSTEIN: Well, certainly we stand on Thermtron, and --

QUESTION: You're saying its not appealable, are you not?

MR. RUBINSTEIN: Yes. We say it's not appealable.

QUESTION: Well, if it's not appealable, then it never was in the court of appeals, and we certainly can't do anything more on the merits.

MR. RUBINSTEIN: I understand --

QUESTION: What your --

MR. RUBINSTEIN: -- Mr. Chief Justice, what you're saying, and Justice O'Connor, I understand what

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you're saying.

QUESTION: So you, to get to the point you really want to make, your opponent would have to prevail on the appealability question, and then you would have to prevail on the merits.

QUESTION: What do you want us to do, flip a coin between Thermtron and Moses Cone?

MR. RUBINSTEIN: No, Your Honor, I --

QUESTION: I mean, they do go in different directions. Why should we adopt one rather than the other?

MR. RUBINSTEIN: I think that you should adopt the doctrine that this Court established in the Penn General case and Pennsylvania v. Williams, which says that -- which we cite in our briefs, that in the case of an insurance insolvency, that the Federal district courts do have the reasoned discretion if it's appropriate in that given case to remand cases --

QUESTION: -- the appealability issue now. Which --

MR. RUBINSTEIN: -- or to dismiss cases in favor of the underlying procedures.

QUESTION: I'm talking about the appealability issue, the first issue. Why should this be nonappealable as you say? Why should we essentially repudiate Moses

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Cone?

MR. RUBINSTEIN: I don't believe that it's necessary to repudiate Moses Cone, but if you have a choice, if this Court sees itself as having that choice, then we strongly recommend that you stand with Thermtron.

QUESTION: Because, as -- that's what I -- what are the merits -- you're probably almost neutral on this issue, so you'd be quite helpful in looking --

(Laughter.)

QUESTION: In looking this up -- we had a case in the First Circuit called Garcia which raised this. We looked --

MR. RUBINSTEIN: I know the case.

QUESTION: And it seemed as if Thermtron's statement, which was quite brief on this point, grew out of two 19th Century cases, one called Wiswall and one something else, which was making a very old-fashioned, since-discarded distinction between mandamus and appeal as a way of dismissing jurisdictional orders.

QUESTION: Almost as old as law and equity, really.

QUESTION: That's right.

QUESTION: Really old stuff.

QUESTION: And the difference being that it wasn't followed any more, except in the -- and then we

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have the anomaly with Moses Cone, which if you stay it, you get an appeal. If you don't know that, you don't ask for the stay, you can't get an appeal, so it seemed anomalous, plus, perhaps, overridden by events.

So that was the argument for not following it, or for overturning it, and so I'm putting that to you to get what you felt were the strongest reasons for following it. Simply stare decisis, is it, and -- which is a powerful argument, of course.

MR. RUBINSTEIN: Well, stare decisis, of course, Your Honor, but beyond that there's a question of giving the -- recognizing the fact that the district courts need to have the discretion to control their own dockets in part and also, from the position of this Court, you do have a massive judiciary to consider, and if all remand orders are going to be appealable, then the number of appeals in the Federal system will increase by 3,000 or more, if I understand the data.

QUESTION: But that sounds like an argument to get rid of Thermtron, too, and to go back to -- which I think was your very first position, everything comes under 1447(d). There are no appeals of any kind from a remand order.

MR. RUBINSTEIN: Well, since you get to the same place with Thermtron, then Thermtron satisfies the need,

but there's one other point I'd like to make, and that's it, that as a matter of substance, it seems to me that a remand order, which is dealing with a case that began other than in the Federal system, and sends that same case back to the system where it began, is qualitatively different, substantially different from a case that begins in the Federal system.

So in terms of wise judicial policy, I would simply rhetorically ask, what sense does it make for the Federal judiciary to burden the Federal appellate process with cases that really started somewhere else, and under abstention doctrine, should go back to where they started.

QUESTION: Mr. Rubinstein, in your brief you make the point that in Moses H. Cone there were separate State and Federal proceedings, whereas here there's only one proceeding. It was moved from State to Federal court.

MR. RUBINSTEIN: Yes, Your Honor.

QUESTION: But there weren't two independent proceedings.

MR. RUBINSTEIN: That's the point that I'm -- I just was trying to make, is that the remanding of a case that started in State court, and it's the only proceeding, sending that back to State court is significantly different than dealing with a case that starts in the Federal system, at least in terms of the judicial

philosophy, it seems to me.

QUESTION: Why?

MR. RUBINSTEIN: Why should we burden --

QUESTION: I'm not getting it. Why is it qualitatively different?

MR. RUBINSTEIN: Because --

QUESTION: They have a right to be in a Federal court. What difference does it make whether they get that -- whether they exercise that right by removal or by an action originally filed?

QUESTION: Or alternatively, if getting rid of the case at the Federal level is a final judgment for one purpose, why isn't it a final judgment for the other?

QUESTION: Yes.

MR. RUBINSTEIN: Again, the -- it's not final in a sense of remand, because the same case that started continues where it began.

QUESTION: So far as the exercise of Federal jurisdiction is concerned, it is absolutely final.

MR. RUBINSTEIN: Well, not necessarily.

QUESTION: You mean, they might remand again?

MR. RUBINSTEIN: No.

QUESTION: Well, then, if you don't assume that it's because they can remand again, once it's out, it's out, and it's just -- it's out just as finally as if it

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were dismissed as an action originally brought there.

MR. RUBINSTEIN: For the purposes of argument, Your Honor, I'll accept that. I --

QUESTION: Well, is there any argument about that?

QUESTION: But if --

QUESTION: I mean, once -- if the Federal court remands a case to the State court, the Federal court doesn't have any more jurisdiction over it as far as I --

MR. RUBINSTEIN: Over that particular case. However, the only reason that I say for purposes of argument in this case is because I didn't want to confuse our other argument, which is that if it -- if this State court in determining issues such as arbitrability or contract law issues, if that State court in some way creates some Federal right, the same case in essence, not procedurally the precise same case, but in all -- in substance, all the pieces of the case, if there's a Federal right, that Federal right is not extinguished by the remand.

QUESTION: Okay, but absent that speculative possibility, there doesn't seem to be a difference between the remand in the one kind of case and the dismissal in the other. Why, therefore, should we treat them as qualitatively different, as you were saying?

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MR. RUBINSTEIN: For the reason, Justice Souter, that I said, which is their --

QUESTION: The speculation that a Federal issue may arise in the State case and get taken up?

MR. RUBINSTEIN: No, Your Honor, because the one case begins as a Federal case in the Federal court. The other case starts in State court.

QUESTION: No, but the qualita -- what you call a qualitative difference, which, you know, assumes a qualitative difference relevant to this issue, is simply a procedural difference.

MR. RUBINSTEIN: Well, no, because the intervening thing that has occurred is that a Federal district court, based on abstention doctrine, which is important to Federalism issues and comity issues, has determined, in the exercise of that discretion, that that case for those reasons should be in the State system.

If this Court --

QUESTION: But the decision, the reasons for making that decision are going to be the same reasons whether the case got there by removal, or whether the case got there by being filed there in the first place. They're the same reasons, aren't they?

MR. RUBINSTEIN: Well, they're not precisely the same reasons, and in terms of -- if -- in the terms of

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asking me if there are any other differences, that's the only other difference, other than the ones I've already mentioned to Justice Breyer.

QUESTION: Mr. --

MR. RUBINSTEIN: But I see -- it may not be enough to swing the argument one way or the other. It's only the last of the differences that I can discern.

QUESTION: Mr. Rubenstein, could I come back to Fair Assessment? You really -- I had not thought we had abstained in a case where there was a legal issue. I don't read Fair Assessment as being an abstention case at all. I read it as holding there is no 1983 cause of action, period.

The opinion says taxpayers must seek protection of their Federal rights by State remedies, provided, of course, that those remedies are plain, adequate, and complete, and they open, we seek review of the State decisions in this court.

This wasn't saying, we're not going to decide the 1983 action, we're going to let the State courts decide it. It said there's no cause of action under 1983.

MR. RUBINSTEIN: That's --

QUESTION: That's quite a different issue.

MR. RUBINSTEIN: That's not how I understand the case, Your Honor, and --

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QUESTION: Well, how do you explain the language I just read to you, remanding them to their State remedies provided, of course, that they're adequate?

MR. RUBINSTEIN: Well, because the -- the cause of action was cognizable in State court, and --

QUESTION: That's a State remedy? A Federal cause of action cognizable in State court is a State remedy?

MR. RUBINSTEIN: Well, in some instances. I'm not --

QUESTION: I never heard language used that way. I mean, you can --

MR. RUBINSTEIN: Well, RICO is --

QUESTION: It might be anything you want.

MR. RUBINSTEIN: RICO is cognizable in both systems, and is RICO a State remedy when it's in State court and a Federal remedy in Federal court, or --

QUESTION: Well, I think it's a weak case for the point you're making. Do you have another one? Is that the only one you know of where we have -- although the statute tells us to entertain a case -- just told the Congress, well, you've told us to do that, but actually we think we shouldn't.

QUESTION: Thibodaux.

QUESTION: Except in areas where we have

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discretion not to give relief.

QUESTION: What about Thibodaux?

MR. RUBINSTEIN: Well, Thibodaux's a case in point --

QUESTION: Frankfurter says that.

MR. RUBINSTEIN: Thibodaux's a case in point, but another case --

QUESTION: Thibodaux.

MR. RUBINSTEIN: -- that sounds similar to the point that you're making, Your Honor, is Colorado River. After finding that none of the abstention doctrines applied, the Court then nevertheless found that there should be a deference to the State proceedings.

QUESTION: Well, can you tell us, what is the source of this rule? Is the rule that you're proposing that all Federal courts in all kinds of actions have a duty under a principle of comity not to interfere unnecessarily with State court proceedings?

I mean, is that the way the generalization plays out?

MR. RUBINSTEIN: Well, I'm not going to rely only on comity, but to further principles of Federalism and to promote "Our Federalism" as recognized in the Younger case and concepts of comity. That is the source in the rationale, as I understand it, for the abstention

doctrines.

QUESTION: What would you say, just so you can get the main thing that I think interests you the most -- that's what I'm trying to ask this for. I take it somebody might say, this case here is a simple breach of contract case. You have an insurer that has some reinsurance contracts with Allstate, and itself did some reinsurance with Allstate, and another person called Northbrook who may reinsure.

It's just breach of contract. The contracts have an arbitration clause. There's no reason here in deciding whether to go to arbitration or what the contracts read to go send this matter back to a State court. It's run-of-the-mill, simple, every day. Give us "Our Federalism" in Thibodaux and any other set of principles you want, you still don't have to send it back.

I'm only making this argument to get your response, because I think it's at the heart of what you want to say.

MR. RUBINSTEIN: Well, the response, Your Honor, first of all is it would subject this Commissioner, if that were the rule, and all commissioners similarly situated, to dozens, or even hundreds of litigations in various Federal courts across this country and possibly even to litigations in other countries.

It would defeat California's interest in an efficacious, orderly, consolidated rehabilitation or liquidation process in insurance insolvency such as this, and it's not just California but other cases, where billions of dollars and hundreds of thousands of policyholders are at stake.

QUESTION: Did the court dismiss the case in Thibodaux? Did the court -- did the case remain in Federal court or not?

MR. RUBINSTEIN: I don't recall precisely at this moment --

QUESTION: But that's crucial.

MR. RUBINSTEIN: -- Your Honor, but I believe that the case --

QUESTION: The court just sat on the case, waited for the State --

MR. RUBINSTEIN: The case --

QUESTION: -- court to act.

MR. RUBINSTEIN: The case went to State court, Your Honor, as I understand it.

QUESTION: The State went -- I don't think so.

MR. RUBINSTEIN: I think the --

QUESTION: I'm not entirely clear on why there would be more litigation if you allow Federal courts to get into the act instead of just having the State tribunal

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do it, certainly not to be decided by the Commissioner of Insurance.

MR. RUBINSTEIN: If the Commissioner cannot marshall the assets --

QUESTION: Well, he can't marshall the assets till he knows what the merits of this very basic contractual issue is, and some court's going to have to decide it, and may have to decide it in several different forums.

MR. RUBINSTEIN: But as this court recognized in Allied and Bendix, the issue of arbitrability is a matter for contract law, and the States are free, and in fact would have the duty to determine whether or not an arbitration clause should be enforced consistent --

QUESTION: And they'd have to decide that by the same rules of law that the Federal judge would decide, wouldn't they?

MR. RUBINSTEIN: No, because there are local issues involved, and particularly where we're dealing with a comprehensive and massive insurance insolvency, the issue of whether the arbitration clause stands shoulder to shoulder with the insolvency clause, and how it interrelates with the claims statutes of the State of California which require a certain procedure to occur with respect to these same claims in the State proceeding, that

also would be shredded if all these cases could be moved to Federal courts, hither-thither, as opposed to being administered in this claims process.

QUESTION: Yes, but each of these cases could have been brought, I suppose, in a State court.

MR. RUBINSTEIN: No, they couldn't, under the --

QUESTION: In the court of another State other than California, couldn't they?

MR. RUBINSTEIN: That's -- that's incorrect as well, because --

QUESTION: Well, isn't it true that, let's say if Allstate wants to sue on -- as plaintiff in its reinsurance contracts and Allstate has a place of business in some other State, it's not -- it doesn't have to go to California to sue, does it?

MR. RUBINSTEIN: Yes, it does.

QUESTION: Why?

MR. RUBINSTEIN: Because this is -- under the Bank of New York case, this is an in rem or quasi in rem proceeding and, in addition to that, over 10 years ago this Court issued injunctions requiring exactly that.

QUESTION: Thank you, Mr. Rubinstein.

MR. RUBINSTEIN: Thank you, Your Honor.

QUESTION: Mr. Donovan, we'll hear from you.

ORAL ARGUMENT OF DONALD F. DONOVAN

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ON BEHALF OF THE RESPONDENT

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

This case is about the obligation of Federal courts to exercise the jurisdiction conferred on them by Congress, both courts of appeals and district courts.

I'd like to address the holdings of the court of appeals in turn, first that the district court's remanding of this case on both the grounds was an appealable order under section 1291, and second that the Burford doctrine afforded the district court no discretion to enter that order.

With respect to appealability, the issue is whether there is an exception under section 1291 for reviewable remand orders. That is, remand orders that do not fall within the bar of section 1447(d) and therefore are reviewable either by a mandamus or appeal.

The Court held in the Cohill case that district courts have authority to remand cases even when Congress has not expressly authorized remand on a particular ground if the court would otherwise have authority to dismiss that case in order to allow proceedings to go forward in the State court.

The district court here exercised its authority under Cohill. It could have dismissed after deciding the

Burford motion. Instead, it chose to remand, and the question before the Court with respect to appealability is whether or not the district court's decision to remand rather than dismissing means that its order on the Burford motion, its decision on the Burford motion is reviewable only by mandamus rather than appeal, as it would be --

QUESTION: Well, what do you make of the language in Thermtron on that point?

MR. DONOVAN: Well, the language in Thermtron, Your Honor, as we pointed out, is language which did assume that an appeal was not available and therefore mandamus would lie, but Thermtron has to be understood on the basis of the case that it, in turn, relied on, which is the Wiswall case, and Wiswall should be understood in light of the case that it in turn cited, the Comstock case. Those cases --

QUESTION: You mean we should repudiate language in Thermtron?

MR. DONOVAN: Well, I think that the --

QUESTION: Are you?

MR. DONOVAN: Well, I think that the language in Thermtron poses a difficulty, yes, but I'm -- but the language in Thermtron, the assumption in Thermtron that in fact appeal was not available was, if it was a holding, as close to dictum as a holding can come. It was not argued

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in that case.

QUESTION: Well --

MR. DONOVAN: It was not discussed in the case. It was not --

QUESTION: But it was necessary to the Court's reasoning --

MR. DONOVAN: In a technical sense, yes, it was a holding, but in fact --

QUESTION: So you're asking us to depart from the holding in Thermtron.

MR. DONOVAN: We're looking --

QUESTION: Are you?

MR. DONOVAN: Yes. We're asking that you at least go beyond the holding in Thermtron, that's correct. That single sentence in Thermtron that relies on Wiswall suggests, at least as to finality in the traditional sense, as opposed to a final collateral order, that appeal would not be available.

As to --

QUESTION: We've never held that any appeal will lie from an order remanding, have we?

MR. DONOVAN: So far as I'm aware, the appeal -- you have held in the Waco case that there are elements of an appeal -- excuse me, from a remand order that can be appealed. The Waco case was a case in which there was an

element, the holding prior, in logic and in fact, in fact made the remand available, but it's true that in that case the remand itself was held not reviewable, but the substantive --

QUESTION: So --

MR. DONOVAN: -- decision that was incorporated in the remand order --

QUESTION: -- we have never held --

MR. DONOVAN: -- was.

QUESTION: -- then, that an appeal will lie from a remand order.

MR. DONOVAN: So far as I'm aware, no, the Court has not --

QUESTION: And you're asking us to do that here.

MR. DONOVAN: What we're asking is to apply basic and fundamental principles --

QUESTION: You are asking us to hold that an appeal will lie from a remand.

MR. DONOVAN: That's correct. That's correct, and the reason that we're asking that the Court hold that is because it's compelled by every notion of finality. The question here is what -- how do you treat section -- reviewable remand orders that are not barred by section 1447(d)?

If you look to the Court's definition of

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finality under section 1291, that is the only source by which you can answer that question, because jurisdictional course is conferred by Congress, and if you're outside the bar of 1447(d), you must be within section 1291.

Section 1291, the traditional Catlin definition: are there any further proceedings in the district court, no, there are not going to be. That's the very purpose. The very definition of a remand order is to completely end the case in the district court.

If you look to the Moses H. Cone decision, they are effectively out of Federal court. Again, the very purpose of a remand order is to move the parties out of Federal court fully, finally, expressly, literally.

QUESTION: Yes, but -- maybe it's technical, but there is the difference that in the remand situation the litigation goes on. It's true it doesn't go on in the Federal court, but the case goes on, which wasn't true in Cone.

MR. DONOVAN: That's -- well, it is in fact -- it's only technically not true in Cone, but the notion that the case continues in the State court really is a completely formalistic difference.

In fact, the purposes -- we're talking here about jurisdiction under the diversity statute in the Federal district court and under section 1291 in the court

of appeals. What happens in the State court really doesn't matter.

For purposes of the district court's decision, there's nothing that's going to happen in the district court.

QUESTION: Well --

MR. DONOVAN: For purposes of the court of appeals, "a final decision" in section 1291, this is a final decision, because it is all the district court can do.

QUESTION: Isn't Justice Stevens right that the litigation goes on, but that this is the paradigm case of a final collateral order?

MR. DONOVAN: That's right.

QUESTION: And so it's really appealable under Cohen, if you were to be technical about it, but, of course, it's not more nor no less appealable than Thermtron itself. Thermtron was an appealable collateral order, in your view.

MR. DONOVAN: That's -- Thermtron, if the case had -- if the Court had looked at it in Thermtron I believe that is what it would have concluded.

For purposes -- again, for purposes of finality, whether we're talking about the final collateral order doctrine or traditional finality, what is it that is final

here?

What's final is the district court's decision on the Burford motion. That is never going to be reviewed again. For example, in the final collateral order cases it's generally a decision, do we review now, or do we review later?

Here, it's now or never. For all purposes, that decision is final. There will be no subsequent opportunity to review.

So it's clear that under the Court's cases again, Catlin, final collateral order, Moses H. Cone, this is as final as anything can be.

QUESTION: If we agree with you on this and hinge it on the Cohen doctrine rather than saying it's a final decision within the strict meaning of 1291, it would not be the case, would it, that all remand orders would necessarily be appealable?

We could still apply the importance prong of our Cohen jurisprudence and not permit appeal of every remand where the only issue alleged is some factual issue, as opposed to the quite important legal question involved in this case.

MR. DONOVAN: That may be the case. I should say, however, though, that even applying finality in the traditional sense, it's not clear that all remand orders

would be final. It would suggest, however, that a remand order here, because all that's before the Court, a Burford-based remand order where a district court has exercised its exceedingly narrow, as I will describe in a moment, discretion to refrain from going forward in a particular case, those would generally be --

QUESTION: What orders -- what remand orders would not be final, if your views prevail?

MR. DONOVAN: Well, for example, it -- I think it remains an open question whether or not a remand order under the court's discretion, district court's discretion with respect to the supplemental jurisdiction statute. I don't think --

QUESTION: Well --

MR. DONOVAN: -- that's before the case --

QUESTION: -- that's the of the proceeding in Federal court, isn't it?

MR. DONOVAN: Well, it would depend on the circumstances in which that came up, Mr. Chief Justice. If -- for example, if it was a -- the supplemental cases pose various fact circumstances.

Frequently, for example, the case, if the court declined to exercise supplemental jurisdiction after dismissing finally the Federal claims, that would be final in any event, and I think there's also a question with

respect to the 1447(d) bar itself with respect to supplemental jurisdiction, because there's a mention actually in the statute not about remand, but there is a mention about, decline to exercise jurisdiction.

This Court has not yet decided whether or not supplemental jurisdiction remands would be subject to the 1447(d) bar, and that, again, is not before the Court.

QUESTION: Right.

MR. DONOVAN: But it's a question that may eliminate that class of cases.

What really is before the Court now, I believe, are cases based on a substantive determination that clearly would be a dismissal, for example, of Burford abstention motion, or perhaps a forum, a selection clause.

I'd like to go -- return to the point about Thermtron, because Thermtron itself did state in a single sentence that appeal was not available. It did so in reliance on Wiswall and Comstock.

In order to give effect to Wiswall and Comstock today --

QUESTION: Well, it also relied primarily on the statement in the statute that they shouldn't be reviewed by appeal or otherwise, didn't it?

MR. DONOVAN: I don't think that was what Thermtron was talking about. Thermtron -- the discussion

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in the last part of the Thermtron decision about whether -- how one reviews, having decided that this was clearly reviewable, did not rely on any congressional language.

In fact, it relied essentially on the single sentence from Wiswall, and what it relied on was the notion that a remand order, as Wiswall would have it, was a refusal to hear and decide.

That is the same kind of theory that was applied at that time to a whole host of orders, including the Comstock case, which Wiswall expressly relied on, demonstrates, because Comstock was a subject matter jurisdiction case. And there are many cases of that era, in fact the other cases cited in the margin in Wiswall are all subject matter jurisdiction cases.

QUESTION: Just a simple point. You keep saying 1447(d). I take it that, regardless of how this case comes out, there's a statute. We had one in the bankruptcy area. These statutes prevent most reviews of remand orders. We're only talking about a small category where the statute doesn't apply, is that right?

MR. DONOVAN: That's exactly right.

QUESTION: All right. Am I right in saying it's a small category?

MR. DONOVAN: I think --

QUESTION: Am I right in saying that the statute, irrespective of what we do, would bar most reviews, and we're only talking about a small category?

MR. DONOVAN: We're talking, by definition, about remand orders that are on extrastatutory grounds. That is a very small category of cases.

The two principal areas in which I'm aware from reviewing the courts of appeals decisions are forum selection clauses and Burford grounds. Those are decisions that, by definition, would otherwise be substantive decisions, and if incorporated, as the district court could have here, in a dismissal rather than a remand, would be generally appealable without question.

So again, back to Thermtron and Wiswall with respect to the function of mandamus and appeal. Those cases stood for the proposition that a refusal to hear and decide, quote unquote, at the outset of the case, was reviewable only by mandamus, and that was the point. That was the basis on which they held an appeal did not lie.

There's no question today that in fact a refusal to hear and decide on the grounds of subject matter jurisdiction or personal jurisdiction or Burford grounds themselves is, of course, a final order, and a quote-unquote final decision within section 1291, and clearly reviewable.

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Mandamus, on the other hand, today, is generally regarded as an unusual means of interlocutory intervention in very unusual circumstances and, in fact, the kinds of standards that the Court mentioned earlier during the course of Mr. Rubinstein's arguments are specifically formulated in order to avoid allowing mandamus to become a means of evading the finality requirement of section 1291.

In light of Wiswall and Comstock, in general finality principles there's simply no need to apply that function of mandamus. There's simply no need to put those kinds of straitjacket on mandamus.

In fact, if you look at the Thermtron decision itself, Thermtron did not refer to any of those formulations. Thermtron said, of course mandamus is available here because the district court has improperly refused to go forward.

In other words, if --

QUESTION: Is it going to make any difference, then, whether a remand order is reviewed by mandamus or reviewed by appeal?

MR. DONOVAN: If the Court were to hold, we think erroneously, but if the Court were to hold that mandamus was the proper remedy, we think the Court would have to make clear that mandamus would apply in the Wiswall-Comstock sense, which is whether we issue --

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whenever a district court does not go forward. But it's that very key that makes it clear that there's no reason to allow 19th Century writs to interfere today with the basic understanding of appeal --

QUESTION: Well, Thermtron is not a 19th Century case. It was decided about 15 years ago.

MR. DONOVAN: That's true, and Thermtron did, in fact, recite the language from the earlier cases. But Thermtron, again, was a case in which this point was not raised by the court, was not raised by the parties, was not discussed at any length at all. It simply quoted Wiswall and Comstock, and I think it would be fair to look at that case in light of, for example, Moses Cone and the whole arena of finality decisions.

In fact, I think it is important to do so, because without looking at that sentence and examining it in light of other cases, what you would do is simply confuse the law. You would have a mandamus standard that would essentially, would have to recognize that mandamus readily issued, as Wiswall and Comstock would have recognized, when a court improperly goes to go -- improperly refuses to go forward.

But you don't need to resort to mandamus today, because it is well understood today that in that situation, appeal lies.

Section 1291 says a final decision, and that kind of determination, a substantive decision, is a final decision.

QUESTION: You're going to get to the merits question.

MR. DONOVAN: I'm going to get to the merits right now --

QUESTION: I knew you were.

MR. DONOVAN: -- Justice Scalia.

With respect to the Burford doctrine, the court of appeals held that the Burford doctrine afforded the district courts no discretion to go forward. That holding was correct for at least two fundamental reasons. First of all, neither the liquidator nor Allstate sought any relief that the district court had discretion to withhold.

Secondly, Allstate's removal of this action to Federal court had no effect whatsoever on any administrative process, on any attempt by the State to formulate State policy on any distinctively local issue, and I'd like to address those two points in turn.

If you look at this Court's cases in Burford and Alabama Public Service Commission, and NOPSI, and also the brief treatment of the Burford doctrine in Lumbermen's Mutual, it becomes very clear what the purpose, the justification, and the scope of the Burford doctrine is,

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for the Court explained very clearly in NOPSI a Federal district court simply does not have discretion to abstain.

What a Federal court does have is discretion in determining whether or not to grant particular types of relief, whether or not to give a particular remedy.

In the Burford doctrine specifically, the Burford doctrine recognizes that a court may have discretion to withhold injunctive relief.

QUESTION: Mr. Donovan, if you'd stay by the mike, you would not fade in and out and --

MR. DONOVAN: My apologies.

QUESTION: -- I would not get seasick.

MR. DONOVAN: My apologies.

What -- the Burford doctrine recognizes a specific type of discretion in the district courts, and that is to withhold injunctive or other discretionary relief where that relief would interfere with State policymaking on distinctively local concerns. I'd like to address those two points in turn.

First, it -- there's some question, I believe, whether or not the -- this point is one that can ever arise in a remand situation. The rule of Burford, the Burford doctrine, this is not about labels. The liquidator continually accuses the court of appeals of relying on a label, but the court of appeals clearly did

not.

What the court of appeals did is look at the nature of the action before the district court, and the purpose of the Burford doctrine, and it held they didn't fit.

It cannot be a matter of labels, and it surely is not a matter of the formal merger of law and equity. That did not change the substantive principles applicable to the grant of injunctive relief.

This is a matter -- the issue here is the -- balancing a Federal court's obligation, virtually unflagging as it's always described, to go forward to exercise its jurisdiction, and on the other hand, it's discretion, to determine whether or not to grant particular types of relief.

It's hard to see --

QUESTION: Virtually unflagging duty, if you'll notice in Color -- is attended by about half-a-dozen exceptions, which makes one think perhaps it is not a virtually unflagging duty.

(Laughter.)

MR. DONOVAN: Well, I think the --

QUESTION: They're like the warrant requirement, really.

MR. DONOVAN: They're not -- but what they're

not -- however many exceptions there may be, what the teaching of NOPSI said, and what it clearly is not, is some kind of freewheeling authority on the part of the district court to weigh a little State law here and a little inconvenience to the liquidator there.

It is a requirement that the Court rigorously identify some source of discretion that will allow it not to go forward.

QUESTION: Why should discretion, as such, make the difference? Why shouldn't the difference be, should the discretion be exercised one way or the other, which is to say, no abstention at all?

MR. DONOVAN: Well, discretion matters because it's only discretion that can legitimize a decision to go forward. If the Court does not have discretion whether or not to grant the request of relief, then it has, pursuant to the diversity statute, an obligation to go forward and exercise its jurisdiction.

QUESTION: But there's no categorical reason why a so-called unflagging responsibility should suddenly flag when we get to a discretionary judgment.

MR. DONOVAN: Well, that's right, and that's why --

QUESTION: So there's no reason, in principle, to say that discretion is the determinant here, is there?

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MR. DONOVAN: Well, that's correct, and I think that's why in the first statement in the court's NOPSI decision is a flat statement that a district court simply does not have --

QUESTION: Well, if that's the case, then, then it follows that it really isn't the discretionary nature of the act which justifies abstention at all, is it?

MR. DONOVAN: It is the --

QUESTION: If you accept the so-called unflagging responsibility.

MR. DONOVAN: It is not the discretionary nature of the act. It is whether or not a court has some element of discretion in affording a particular type of relief.

For example, one cannot --

QUESTION: That's -- I'm not getting your distinction.

MR. DONOVAN: Well, as I -- for example, the liquidator has argued here that the court -- the district court should be understood to be exercising equitable discretion whenever it abstains. That's circular reasoning. One can't characterize the act as discretionary and therefore justify the exercise of discretion.

What the Court has taught in NOPSI is that you need to identify discretion in withholding a particular

type of relief.

QUESTION: All right. So they say -- I'm just trying to get you right to the merits. What they say, I take it, is that we have many contracts, many contracts of reinsurance. They're not all necessarily worded the same way. There are tens of thousands of policyholders.

There are questions of interpreting these words, not all of which are the same, and questions about whether we send the matter to arbitration. The answer may differ in different cases.

In order to protect and get uniform answers, to protect the shareholders, the State of California has centralized judicial review in one court, just as the State of Texas had done in Burford. And there is no difference between the State of Texas in Burford treating a claim about what State law requires in terms of how much oil you take out of a well. We need central, uniform decisions, and the question of how we interpret 15 or 20 or 1,000 different contracts, whether we send them to arbitration or not. If anything, it's more complicated here in Texas, not less.

I'm trying -- those, as I see it, are the merits, and I'm trying to see what your response is to that.

MR. DONOVAN: Well, the difficulty -- first of

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all, the -- as we've explained in the brief, California has not centralized. They have not purported to do so.

QUESTION: They said in their brief they had one court, one single court that reviews all the decisions coming out of this administrator.

MR. DONOVAN: The -- there is a court in California which is handling the liquidation proceedings. That court does not have exclusive jurisdiction. In fact, it's authorized the liquidator to sue elsewhere, and in fact it couldn't arrogate to itself exclusive jurisdiction to feeding Federal jurisdiction as a matter of constitutional authority.

This action was filed as a separate action, and is not part of the liquidation proceeding, but let's get past those points.

The reason why that argument fails under the Burford doctrine is, the Burford case was about a very specific circumstance. The court held that a Federal district court would have discretion to withhold injunctive relief where the Federal plaintiff comes into court and asks the Federal court to interfere with State administrative processes that were ongoing.

Now, there was a specific circumstance as well in the State administrative processes. That is, the nature of the oil wells were such that you couldn't grant

a well -- a permit to a well-holder here without affecting how much pressure there was in the well there. They were necessarily interconnected, and that --

QUESTION: Yes, like giving money to one policyholder will inevitably affect how much another one gets.

MR. DONOVAN: But that would affect only in the sense that any -- that does not affect the absolute -- the rights under a contract.

What happens here, it doesn't affect California's regulation. If you step back, there are stark differences between what was going on in Burford. First of all, as I said, what Burford involved was interference in NOPSI -- was administrative process. There is no administrative process here.

Allstate is not attempting to interfere with the liquidator's exercise of his regulatory responsibilities in any way. It's not going to Federal court to ask the court to issue an injunction to enjoin the liquidator from doing something.

It's going to Federal court to ask the court to resolve a straightforward commercial action, and in that commercial action, Allstate will have to prove facts and argue law just like the liquidator. They will be equal before them. They're not -- Allstate's not trying to

interfere.

We're not, for example, going and saying, the liquidator can't go forward with his liquidation in State court. We're not interfering in any way with the regulatory capacity.

Secondly, there isn't any administrative proceeding. This is a civil action, pure and simple. It's a civil action in State court, it's a civil action in Federal court.

Thirdly, there's nothing distinctively local. Yes, Mission happens to be in California. There's no record as to where its policyholders are, but the important point for NOPSI purposes is there's nothing distinctively local about it.

QUESTION: Mr. Donovan, you seem to be making a very good outline for an opinion that Judge Norris might have written but, in fact, it seemed to me that he defused labels, and he says there's a bright line between law and equity and you can't have any kind of an abstention when you have a case for money damages.

MR. DONOVAN: Well, I was trying to respond to Justice Breyer's question, and just to finish that up, the last point is, I don't think there's any policymaking here. What the liquidator is doing is acting like trustee. The money, if he recovers from Allstate, is not

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going to the public treasury, it's going to creditors of the Mission or the State.

But to respond to your question, Justice Ginsburg, I think the Ninth Circuit very carefully explained that it is the nature of the relief sought that justifies any exercise of discretion to go forward, and here, there is no relief that would permit the court not to have gone --

QUESTION: I'll have to read the decision again, but I had the impression that the Ninth Circuit was telling district judges it's all very easy. If it's at law, then there is no abstention.

MR. DONOVAN: I don't think that's the case, because it did point out, for example, citing Professor Shapiro's article, that the common law prerogative writs afforded some discretion, so I don't think it did make that sharp distinction.

QUESTION: It's pretty true, though. I mean, as a matter of fact --

MR. DONOVAN: Well --

QUESTION: -- it's usually equitable relief in which courts have discretion to withhold or grant.

MR. DONOVAN: It's very hard to imagine circumstances --

QUESTION: Nothing surprising about that, is

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there.

MR. DONOVAN: -- in which there would be discretion, witness this case.

QUESTION: Yes, and you stand by the point that we've never done Burford abstention in a case involving legal relief.

MR. DONOVAN: There's no case that I'm aware of.

QUESTION: Never dismissed.

MR. DONOVAN: I think the only -- the only other --

QUESTION: Thibodaux in fact did not involve a dismissal, did it? Thibodaux involved --

MR. DONOVAN: Thibodaux is --

QUESTION: -- a deferral of action by the Federal --

MR. DONOVAN: And Thibodaux really is basically Pullmanlike. It cited Pullman, it did not cite Burford, and as importantly as --

QUESTION: It's last line is, by retaining the case, the district court, of course, reserves power to take such steps as may be necessary for the justice --

MR. DONOVAN: That's --

QUESTION: It was a retention of jurisdiction.

MR. DONOVAN: That's correct. There's also a line about postponing the exercise of that jurisdiction.

On the merits, as well, it's an entirely different case. The court pointed out it was a peculiar and special circumstance of eminent domain.

But to go back to the question, in fact, if you look at the relief here, what do you have? You have a straightforward commercial action, and you have a commercial action in which the defendant has moved to compel arbitration on virtually all of these contracts.

Where does the discretion lie? Either we're right on the contract defenses or the liquidator is right, but the court doesn't have any exercise of discretion in that.

Furthermore, with respect to the motion to compel, which the liquidator in his reply has now suggested affords some element of discretion -- the liquidator's argument is a stay is equitable and therefore there's an equitable element in the case -- that's wrong for at least two reasons.

First of all, the Federal Arbitration Act cases of this Court have made it crystal clear that a district court has no discretion to stay in the face of a valid arbitration clause. Section 3 of the Federal Arbitration Act says shall, and that's what it means.

Secondly, even if the district court had had some element of discretion in refusing to go forward on

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the motion to compel arbitration, that would not, in turn, confer discretion not to go forward with the entire case.

What the district court should have done here was decide the motion to compel. With respect to the Burford motion itself, the first thing the district court should have looked at is, do I have any discretion to withhold the relief sought in the motion to compel arbitration? Clearly, the district court did not.

There is also no other case that could possibly have supported the exercise of discretion here. Mr. Chief Justice pointed out the Fair Assessment case, but that case, even if it is viewed as an abstention case, is reliant on a long line of comity cases in a very particular area, the tax administration area, and it specifically relied on a holding that in fact a declaration under section 1983 would effectively shut down the tax administration system, and there's nothing remotely comparable here.

What the district court's opinion really relies on is some notion that the --

QUESTION: That goes to your other point. I mean, it goes not to your appealability -- not to your point of whether it's absolutely precluded if nondiscretionary relief is sought, it goes to the point of whether, assuming it isn't absolutely precluded, should it

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have been granted here. But you acknowledge that Fair Assessment is contrary to your position?

MR. DONOVAN: No, we don't acknowledge that Fair Assessment is contrary to our position. What the court in Fair Assessment did was looked at a series of cases in which the court -- that arose out of the injunction and declaration area and hold that a particularized comity principle applicable when plaintiffs, Federal plaintiffs sought to in effect shut down State tax systems would justify a similar application with respect to a section 1983 action.

That has nothing to do with this case here, nor has the liquidator really ever suggested --

QUESTION: Was the plaintiff remanded to a 1983 action in State court in that case?

MR. DONOVAN: The plaintiff was remanded to State court specifically, without regard to what his action was, but it was regarded -- it was -- the assumption was that he would have an adequate remedy in State court and was therefore referred to a State court remedy.

What the liquidator has asked --

QUESTION: What do you say the respondent wants in Pennsylvania v. Williams?

MR. DONOVAN: I think the respondent was

completely misunderstood, both that case and its exception.

The court made clear in Commonwealth Trust Company v. Bradford that it has no application to in personam actions. The problem with the liquidator's argument here is that this is a classic in personam action. This is an action by an individual on a contract for money damages against a legal person. That is, the corporation. That is classic in personam.

The rule of Pennsylvania v. Williams, Penn General and Pennsylvania v. Williams, is an exception to the general rule that in rem jurisdiction must be exclusive. That rule arises from practical necessity only when the court can actually control assets, and therefore, that's a rule that by itself applies only to in rem actions.

The exception acknowledges that in some circumstances with respect to in rem actions a Federal court can cede control even though it acquired jurisdiction first to the State court.

That has -- neither the exception nor the rule has anything to do with this case, which the Court has repeatedly said. To the contrary, there is a long line of decisions in this Court which have repeatedly said that in liquidation contexts, business, insurance companies, trust

administration, an in personam claim against a liquidator, or receiver, or whatever outside the liquidation or receivership court does not interfere with that court's control of the assets.

The liquidator argues here that this is in effect in rem. He relies on Morgan Stanley. That was a case to recover possession and control of mortgage notes that were specifically in rem. It was a full faith and credit case as well.

But this clearly is not an in rem case and pulling a couple of phrases out of context about marshalling assets cannot turn it into one.

This is a classic in personam action. It's a contract action against a corporation. Clearly, this falls within the scope of the court's cases, but it said that that does not interfere with the case.

What this case amounts to is a simple, commercial contract action in which the defendant has asked to compel arbitration on virtually all of the contracts at issue.

The liquidator's argument amounts to an argument that because there are some State law issues here, or potentially State law issues, and because it's inconvenient for the liquidator to defend this, he is entitled to remove it -- to defeat Allstate's removal to

Federal court. There is no authority that would support that proposition.

There is no exception in the diversity statute for State law issues, clearly not. The very premise of diversity is that Federal courts are fully competent to decide State law issues.

Likewise there's no convenience exception in the removal statute. Clearly, if Allstate has a right to remove, the liquidator's convenience cannot defeat that.

The case comes down to a simple contract action for money damages.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Donovan. Your time has expired.

The case is submitted.

(Whereupon, at 12:04 p.m., the case in the above-entitled matter was submitted.)

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CHARLES QUACKENBUSH, CALIFORNIA INSURANCE COMMISSIONER, ET AL., Petitioners v. ALLSTATE INSURANCE COMPANY

CASE NO: *95-244*

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Mari Federico

(REPORTER)