OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: MARY ANNA RIVET, ET AL., Petitioners v. REGIONS BANK OF LOUISIANA, ET AL.

CASE NO: 96-1971

PLACE: Washington, D.C.

DATE: Wednesday, January 21, 1998

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IN THE SUPREME COURT OF THE UNITED STATES

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MARY ANNA RIVET, ET AL., :

Petitioners :

v. : No. 96-1971

REGIONS BANK OF LOUISIANA, :

ET AL. :

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Washington, D.C.

Wednesday, January 21, 1998

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

APPEARANCES:

JOHN G. ODOM, ESQ., Savannah, Georgia; on behalf of the Petitioners.

CHARLES L. STERN, JR., ESQ., New Orleans, Louisiana; on behalf of the Respondents.

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 96-1971, Mary Anna Rivet v. the Regions Bank of Louisiana.

Mr. Odom.

ORAL ARGUMENT OF JOHN G. ODOM

ON BEHALF OF THE PETITIONERS

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

The issue in this case, Your Honors, is whether a novel res judicata exception should be engrafted into the settled rules of Federal removal jurisdiction. Before we address these removal issues, I believe it would be helpful to set out in the nature of the action that we filed in State court below on behalf of these petitioners.

Your Honors, my clients loaned $1.3 million in 1984 to other sophisticated individuals in a transaction at a time of high interest rates, at an interest rate of 20 percent with a note and a subsequent mortgage up to an amount of $5 million. We took a note and we took a mortgage on the real property, or the leasehold estate which is at issue in this case.

Basically our State action filed 10 years later is a standard mortgage foreclosure action seeking either

to recognize our mortgage or to have our debt paid. It's a hybrid in personam in rem action which is permissible under Louisiana law.

There's a second aspect of our claim which is similar but distinct. That is, a prior bankruptcy proceeding, as the Court is aware, had authorized the respondents in this action or their predecessors in interest to procure cancellation of our lien, which was duly recorded in the conveyance records of Orleans Parish, and it empowered them to do that. They left bankruptcy court one day in 1986 with the right to have our lien canceled according to the Louisiana lien cancellation procedure.

They never took advantage of that right. The bankruptcy court acknowledged, we take the position, Your Honors, implicitly Louisiana's procedure to have liens cancelled. It acknowledged a two-step process, because it not only ordered the subject property to be sold free and clear of all liens, it also ordered that the recorder of mortgages erase the liens.

This was never done and now, in a footnote, if you will, to this argument, they've waited too long and since the filing of this lawsuit their right to execute on those liens has expired under Louisiana law.

QUESTION: Am I correct in understanding you're

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explaining why res judicata won't bar your claim?

MR. ODOM: Your Honor, I'm just trying to give a little background to the facts, because I feel that -- I feel that it would be important. The facts are somewhat tangled and I thought it would be good to lay those out. We don't feel it's -- there are a variety of reasons why we don't believe res judicata would bar our claim and those we will all adjudicate below, assuming that it's remanded, of course.

Your Honors, it's important to remember in that connection that two of the four persons that we sued were not even present in the bankruptcy proceeding, and two of our four petitioners did not appear in the bankruptcy proceeding and received absolutely no notice of it.

We claim against these two --

QUESTION: May I ask, does that have anything to do with any issue except whether there's estoppel here? I'm just a little puzzled why we have to get into the facts in this case.

MR. ODOM: Your Honor, it's important for us, we believe, to show the Court exactly how far this doctrine will go if a res judicata exception is carved out on the facts of this case and, that being so, you would have to see that this is not even a proper res judicata situation, because two of the four persons were not even -- two of

the four persons we sued were not even a part of the bankruptcy proceeding.

Therefore, my point in bringing these to the Court's attention, Your Honor, is, look at how far this goes. Where it's going is, if you have any part of a claim that a bankruptcy procedure has affected in any way someone, or that person's privity and interest in any way, or that can be alleged, that's going to be brought up by defendants as a res judicata exception. It doesn't have to be a complete res judicata exception. Indeed, it wasn't in this case.

QUESTION: But your point, as I understand your brief, is that even a narrow res judicata exception should not be recognized.

MR. ODOM: Absolutely, Your Honor.

QUESTION: So you're just saying this is the parade of horribles. If we take the first step, we go down the slippery slope.

MR. ODOM: Yes, sir. That's exactly what I'm trying to suggest.

And Your Honor -- well, we believe that the opinions below were not even internally consistent, if you will, in that connection, because they likened their new jurisdictional basis to -- of complete preclusion to complete preemption, but complete preemption, as this

Court has stated over and over again, really means complete preemption.

It means that Congress has so thoroughly occupied a whole field of the law that any State law claim is really a Federal claim, but here complete preclusion, as they use it, is not complete because this State action was not completely precluded by res judicata.

To show just how far it goes, Your Honor, not only did the district court below decide the case on the merits, decide that there was no claim there, that the plaintiffs were dead, if you will, and use that as a basis for removal jurisdiction, he then used that removal jurisdiction to get supplemental jurisdiction over the two parties who were not involved in the res judicata aspect, and so what we have is the decision on the merits that the claim was completely precluded being used as justification to assert supplemental jurisdiction over parties whose claim -- against whose claims we did not have a completely precluded claim, so it really is not even internally consistent and it does show, if you will, the parade of horribles.

But fundamentally, Your Honors, as we've stated in our brief, res judicata is an affirmative defense and removal cannot be based on an affirmative defense. It's codified in the statute, it's been reconfirmed many times

by this Court, most recently by Franchise Tax Board, by Caterpillar, and by Oklahoma Tax Commission --

QUESTION: And I take it if we adopted your position we could leave intact the doctrine that originated in Avco v. Aero Lodge, the preemptive -- the preemption doctrine.

MR. ODOM: Yes, Your Honor. We don't urge an -- that the preemption doctrine has to be overruled. That is now so firmly in -- fixed in the jurisprudence of this Court that we believe that it has worked well. It's fine. It doesn't have to be overruled.

But the Court has been very careful about articulating any further exceptions to the well-pleaded complaint rule if the Avco doctrine be an exception. I know there's academic dispute about that.

What is clear with respect to the facts of this case is that, even if the affirmative defense, the Federal affirmative defense is the only real issue in the case, even if it is absolutely dispositive of the merits and is the only thing that has to be decided below, it cannot be used as a basis for Federal removal jurisdiction.

Now, there is nothing special about the res judicata affirmative defense as opposed to any other affirmative defenses that might be raised by someone below as a justification for removing a case to Federal court.

Indeed, Your Honors --

QUESTION: Well, they could be to the extent the Anti-Injunction Act makes an exception, the relitigation exception. That does show that there is something special about relitigating a case that was resolved in Federal court.

MR. ODOM: Your Honor, that does show that Congress has recognized the relitigation situation, has addressed it in the appropriate way after full consideration, and has crafted the relitigation exception to section 2283. That is a different remedy, though, than removal based upon res judicata, because, as this Court's ruling in Chick Kam Choo makes clear, the 2283 relitigation exception to the Anti-Injunction Act is narrower than the full range of res judicata.

It also is an equitable proceeding, and the Court does not have to enjoin a State court from relitigating something that's previously been decided. The Court can take full cognizance of all the facts and circumstances, the equitable arguments on both sides. I dare say if that exception had been applied in this case there are equities on both sides of this case that would need to have been considered.

It's far different from enlarging the scope of Federal removal jurisdiction by making res judicata an

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affirmative defense, a permissible basis for removal jurisdiction.

QUESTION: Your claim, leaving aside the bankruptcy, is wholly State in origin. There's no Federal argument to it, is there?

MR. ODOM: That's absolutely correct, Your Honor. In fact, in trying to cast in my own mind as to whether there would be any conceivable way that our claim could be recharacterized as a Federal claim, I can't imagine how our claim could have been recharacterized on the face of the pleadings or any other way so as to state a Federal cause of action.

There is no general Federal law of mortgages that I'm aware of. There's no Federal statute that deals with the issues that we're talking about. We have a third party beneficiary claim against the Browns under Louisiana State law, under the Louisiana State law doctrine of stipulation pour entree, which is similar to the third party beneficiary doctrine.

All of those are third party claims. Not a single one is a Federal claim. That's why we feel so strongly that this cannot be cast as an artful pleading case. There's no way that we could have artfully recast any of our pleadings. There's nothing we could have artfully recast.

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Even if the statute and the jurisprudence of the Court allowed us to plead on the face of our pleadings an affirmative defense to somehow get ourselves into Federal court, I don't see how it could have been recast in an artful way as a Federal affirmative defense, so it's an entirely State law cause of action, something that we could not have brought in Federal court.

The res judicata issue that they try to bring us in on removal is something that we did not bring -- it's somebody else's bankruptcy. It's a very far cry from the simple situation where A sues B in Federal court and loses and then A goes back down to Federal court, to State court and brings the identical claim in State court leaving out one or two words. That's the situation that the Court had in the Moitie petition. It's a very far cry from that.

It wasn't our bankruptcy. Two of our petitioners weren't even there, had no notice of any of it. Two of the defendants weren't even there, and the State courts -- the Federal court had to acknowledge that they weren't bound by the res judicata that he used to remove the case and assumed supplemental jurisdiction over them and dismissed that claim as well.

I think that there is nothing special about res judicata. If you were to allow the res judicata defense to establish removal of jurisdiction it's hard to see why

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other defenses, other affirmative defenses might not be as worthy, but the Court has already spoken to that.

Indeed, Your Honors, any given application of res judicata is likely to be less significant than any given application of the tribal immunity defense, because tribal immunity is the result of a solemn treaty between the Congress of the United States and a sovereign Indian nation.

It's hard to think of how something could be more completely extinguished than a claim of -- based on -- claim falling to the defense of tribal immunity, yet this Court in Oklahoma Tax Commission in 1989 said that that has to be decided by the State courts. The State courts are presumed competent to decide these issues of Federal law. They do it all the time.

The respondents say that our claim was completely extinguished by the res judicata effect of the bankruptcy court below, and that's what makes it so different. But Your Honor, that's exactly what the defendants argued in Caterpillar.

They argued that the collective bargaining agreement governed by Federal law completely extinguished the State law contract claims in that case and in that case again this Court said, that kind of extinguishment doesn't mean anything. You cannot use an affirmative

defense to establish removal jurisdiction in this case.

QUESTION: What do you do with the footnote in our Moitie case, Mr. Odom?

MR. ODOM: Your Honor, the more one reads Moitie, the more difficult it is to see how so many people became convinced that this Court was articulating a new theory of removal jurisdiction based on res judicata. No such theory is mentioned in footnote 2 or anywhere else. Justice Brennan's vigorous dissent which everyone cites doesn't even address that. It doesn't mention anything about a res judicata defense. It addresses only the preemption aspect of it and the antitrust aspects.

The -- if you consider the language employed by the Court in the Moitie footnote, the Court defers to the factual findings by the district court below and notes that at least some of those claims were sufficiently Federal in character to support removal jurisdiction, at least some of the claims. That's not the language of complete preclusion. If it was completely precluded, we believe the Court would have said so.

And Your Honors, with all respect, the Moitie decision is virtually a treatise on the law of res judicata. It goes into every aspect of it, from the history of it in our jurisprudence to the way it's used and the way it has to be used and we dare say that, if

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there had been some intention to highlight this aspect of the law of res judicata, it would have been mentioned.

And Your Honors, the Court in Moitie, this Court actually remanded the issue of res judicata to the court of appeals to decide, stating that it was "unnecessary for the Court to reach that issue."

But if the Court in Moitie had been using complete preclusion, res judicata as its ground for removal jurisdiction, then the res judicata issue would already have been decided. There wouldn't have been anything to remand to the Ninth Circuit for consideration. There would have been nothing to send back.

QUESTION: Well, what made the case -- what was the Federal character of the claim, as distinguished from the preclusion defense?

MR. ODOM: Your Honors, it's clear from reading the Moitie opinion and the opinions below that the sufficient Federal -- sufficiently Federal character of the claims brought in State court was an intent to rely on Federal law, an intent to really state Federal claims in State law disguise.

This becomes crystal clear when one looks at the unreported district court opinion which, Your Honor, I confess I did not do until last week, when I came and looked at your archives upstairs, but it's in there on the

third floor.

The district court's opinion below makes it absolutely clear that the second complaint, filed after the Federal complaint was dismissed, was identical in every respect to the Federal claim that had been there. Indeed, in oral argument it was made plain that the only word that was changed in the second complaint was the word antitrust.

The Court -- the discussion of that which makes it very clear, two-paragraph discussion, is found at pages 16a and 17a of Judge Spencer Williams' June 30, 1977 opinion below.

The -- the -- and also makes it clear that the State law plaintiffs had pleaded identical words from the Government's civil claim and the Government's criminal claim, criminal action, two separate Federal actions.

They had initially -- they had initially indicated their intent to be in Federal court by filing the case in Federal court. I'm speaking of the Browns now. Mrs. Moitie originally filed in State court. She did not wind up before this Court. It was the Browns' claim that wound up before this Court, even though the case is called Moitie.

The Browns had originally evinced their desire to be in Federal court by filing in Federal court. Then

they went back to State court, restated their complaint identically word for word, leaving out the word antitrust and copying the Federal pleadings of the Federal civil action and the Federal criminal action.

It is simply -- it is simply an application of the artful pleading doctrine in the antitrust context, and there's every reason to believe, as we set out in our brief, that that's exactly what it was. There is zero reason to believe, either in the opinion of the Ninth Circuit below, or in Judge Spencer Williams' opinion, or in the opinion of this Court, that there was an effort to involve some new exception to the removal jurisdiction doctrines articulated by the Court. While --

QUESTION: What did they -- I'm somewhat curious. I take it that the Browns' original Federal claim said the defendants had done something that violated the antitrust -- the Federal antitrust laws.

MR. ODOM: Yes, sir. It's --

QUESTION: Then they left out the word antitrust, so what were they claiming in the State court?

MR. ODOM: In the State court below, Your Honor, they alleged unfair competition and breach of contract. They may have alleged --

QUESTION: All right, so they had a list of defendants' activities they said that violate Federal

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antitrust, then they leave out the word antitrust, they say the same thing violates State law.

MR. ODOM: State law, various --

QUESTION: State -- unfair competition law --

MR. ODOM: Yes, sir.

QUESTION: -- contract law, or something.

MR. ODOM: Yes, sir.

QUESTION: Well -- they'd say, well, different claim.

MR. ODOM: Well --

QUESTION: A single activity can violate State law, it can also violate Federal law, and we said in Federal court it violated Federal law, and now we say the same thing violates State law, a different law.

MR. ODOM: Well, the artful pleading doctrine, Your Honor, exists for situations where the claim can be recharacterized as a Federal claim and I believe, on a straightforward basis, that's what the judge in the Moitie case did and that is what this Court was doing in saying that at least some of those claims were sufficiently Federal in character to support removal jurisdiction.

But in any event, it had nothing to do with the law of res judicata or carving out a new exception whereby an affirmative defense itself could be the basis for jurisdiction.

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What the district court did in that case was, in fact, accepted jurisdiction on the basis of the recharacterization of Federal claims and then, having acquired jurisdiction, dismissed those claims due to res judicata.

There was no linkage of res judicata to jurisdiction in the case anywhere along the line, including in this Court. There was no effort to establish jurisdiction by reference to res judicata. They did not accept jurisdiction because the claim was being dismissed on the basis of res judicata, and that's the odd conundrum that we articulated as issue 2 in our questions presented.

The Court in this case decided, made a decision on the merits and decided that the claim was completely destroyed and used that decision on the merits to justify having jurisdiction in the case. Nothing like that occurred in the district court's analysis in Moitie. He was simply applying a straightforward artful pleading doctrine case.

Your Honors --

QUESTION: Can you explain that a little further, because there are many instances, for example, constitutional law, where the facts are the same and a claim may be brought under the Federal Constitution, and then the same claim is made in the State court saying the

State constitution means something different, or more, so why is it different in the antitrust context?

MR. ODOM: Well, Your Honors, if a claim is brought under -- if we're assuming that a claim is originally brought in State court, and it also asserts violations of the Federal Constitution, I say that claim is immediately removable to Federal court on the --

QUESTION: No, I'm supposing a case in Federal court first.

MR. ODOM: Yes, ma'am.

QUESTION: And the Federal court says, you don't have that Federal constitutional right. Then you bring the same case over again in State court and say, but I have a State constitutional right based on those very same facts.

MR. ODOM: Well, in my view, Your Honor, that would be easily distinguished because the State constitution is a separate document and many of them are very, very different from the Federal Constitution. The claims would be -- if there were legitimate State constitutional claims they would possibly be vastly different from any Federal claims.

QUESTION: Well, isn't that the same thing with Federal antitrust law and State Valentine acts? The State antitrust laws remain in effect. They're not totally

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preempted by the Federal antitrust law, are they?

MR. ODOM: No, sir, they're not. They're not. There's no complete preemption under antitrust --

QUESTION: So then, how do you explain the consequence in Moitie?

MR. ODOM: Your Honor, in that case --

QUESTION: The outcome.

MR. ODOM: In that case the judge literally drew a chart, which is also in the record upstairs, of the differences -- of the differences in the claims. I think it's -- the way I explain it, Your Honor, is that it's a case-by-case analysis and, if there were a State law that were vastly different from the Federal law, perhaps that would mandate a different conclusion.

This Court was satisfied in the Moitie case that at least some of the factual findings by the district court supported jurisdiction. That is a good example of why I think the word factual finding was used. It is a comparison on a case-by-case basis to find out what is really going on and it seems to turn on, at least in part, on the intent of the parties to bring a Federal action, which was evinced very forcefully in the Moitie case.

Your Honors, our case essentially -- our argument essentially is that there's -- that there is no removal jurisdiction based on affirmative defense. This

is not a case of artful pleading, there is no way that it could have been recharacterized as a Federal complaint, and that Moitie does not dictate any kind of result of the type that my colleagues would like the Court to adopt, and we suggest that it would be a very bad idea for such claims to be -- such a rule to be adopted. It's hard to see where it would stop. It's easy to see from the facts of this case, as I indicated in response to Justice Stevens --

QUESTION: What if we were to say it stops with the first cases in which the answer turns on an interpretation of a Federal order, which here I guess one could -- part of your argument would be the scope of the bankruptcy's court's order, just what it means, and maybe you -- maybe we could say that's the scope of the doctrine.

MR. ODOM: Well, Your Honor, if one does that, then it's easy to see that the courts below will get into all kinds of factual considerations, such as who were exactly the parties before the court? Who were their privies? Who were the -- what part of the claim resolves what part of the State law claim? Are we dealing with husband and wife, as you know was an issue in this case. If we are, what are the State domestic relations laws? Is there a separate property agreement if there's a community

property State.

And you can see this turning into a mini trial on the basis -- on the issue of removal jurisdiction so much without any reason for it, because there's no harm -- any possible beneficial gain in efficiency or anything else that could be gained by making such a rule is far outweighed by the harm it would cause.

QUESTION: Let me ask you this one other question. Do you -- is the res judicata issue a matter of Federal law or State law, in your view?

MR. ODOM: Federal res judicata law, Your Honor.

QUESTION: Federal. You think it's Federal.

MR. ODOM: Yes, sir, and I believe the State court would apply Federal res judicata law and Your Honors, there is -- as Justice Ginsburg indicated, there is a remedy if anyone feels aggrieved by someone trying to relitigate something previously decided in Federal court. Section 2283, the relitigation exception, provides that remedy and provides a far more sensitive means of application than any kind of removal, absolute removal rule would supply.

Furthermore, the most obvious remedy is that we've got a cadre of 50 States with very competent State judges, and this Court has repeatedly stated that State court judges are competent to decide issues of Federal

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law. It's done on a routine basis. They do it every day. There simply is no harm here to fix, and the fix would require a terrible rupture of very subtle jurisprudence of this Court.

Your Honors, that concludes my argument. If there are no further questions, I'd like to reserve the balance of my time for rebuttal.

QUESTION: Very well, Mr. Odom.

MR. ODOM: Thank you.

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

ORAL ARGUMENT OF CHARLES L. STERN, JR.

ON BEHALF OF THE RESPONDENTS

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

Plaintiffs, in the guise of a State court foreclosure action, have launched a collateral attack on a prior order of the bankruptcy court, in this case the bankruptcy court sitting in the Eastern District of Louisiana. I'd like to take issue initially with a couple of comments that Mr. Odom made concerning the import or the order and its application under State law.

What's not at issue is what the order says. This is not a situation where we're arguing about does the order say X or does the order say Y. The order clearly states that a sale is going to be made under the auspices

of the bankruptcy court free and clear of all liens, mortgages, claims, et cetera, and the mortgage that the petitioners seek to foreclose on is specifically listed in the order. There's no question about that, and what petitioners are seeking to do is attack the validity of the order.

If you read their brief, I believe perhaps the clearest indication is on page 48 of the brief. They want to attack the validity of the order in terms of, were the proper parties there, was the proper notice given, was the proper procedure used.

QUESTION: Well, Mr. Stern, it was your client who removed the action, was it not?

MR. STERN: That is correct.

QUESTION: And in order to remove it, you have to comply with 1441(b), is that right?

MR. STERN: No question.

QUESTION: Any civil action in which the district courts have original jurisdiction, and how do you phrase your argument that a district court would have had original jurisdiction?

MR. STERN: Well, the -- that goes back to the question of how the artful pleading doctrine works in the first place. It requires some recharacterization. I believe Justice Breyer's question dealing with Moitie

points that out.

On its face, Moitie had only State causes of action. The argument here -- in that instance the recharacterization was that there was a Federal cause of action stated, although in disguise. Our position here is that the petitioners are in effect taking either an out-of-time appeal from the bankruptcy court order, or you could interpret what they're as a Rule 9724 motion, essentially a Rule 60 motion.

They are seeking to attack the bankruptcy court order. The Fifth Circuit saw the case that way and made specific reference in several points during its opinion to the fact that this is a collateral attack. This is, in disguise, an attempt to retry the bankruptcy case.

QUESTION: And why does that make it a civil action in which the district court would have had original jurisdiction?

MR. STERN: Well, if it's either an appeal or a Rule 60 motion the original court would have had -- the district court would have had original jurisdiction, essentially ancillary to the bankruptcy jurisdiction that it had in the first place. If you file a Rule 60 or a Rule 9024 motion in Federal court you don't need an independent basis for jurisdiction.

QUESTION: Well, but this was filed in State

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court, wasn't it? It seems extraordinarily unlikely that they would file what was really a 60(b) motion appended to an earlier Federal action and file that in the State court.

MR. STERN: Well, but that's the whole point of the artful pleading doctrine, is that you try to disguise what is, in effect, a Federal claim.

If you look at what they say the State court should have reviewed, what the State court has to do is essentially sit in review on what the bankruptcy court did.

QUESTION: But it seems to me you're expanding the artful pleading doctrine a good ways with your submission. The artful pleading doctrine, as I had understood it, was that you cannot by artful pleading avoid the possibility of removal, but I don't think it's ever been construed quite as broadly as you construe it.

MR. STERN: Well, the -- I would agree that the procedural context here makes it unique, but it's a procedural context that occurs over and over in bankruptcy.

One of the things that makes this case a little bit different from Moitie on the surface but not, I believe, once you look underneath it, is the fact that in bankruptcy typically a creditor comes in objecting to

something that's going to happen and what they're seeking to do is have a State court sit in review of the propriety of the order issued by the court simply by saying I'm going to foreclose on a mortgage that this order says no longer exists.

QUESTION: But are you saying that any time a plaintiff in State court, perhaps without legal justification, files an action which would require the State court to review some previous proceeding in Federal court, that that is automatically removable?

MR. STERN: There are two or three different arguments that we've made. One of the arguments would suggest that. The argument that speaks to the question of merger and bar and how you characterize a State court action that is precluded by a prior Federal judgment I think would lead to that result, but I think there are narrower ways that you can interpret Moitie if you so choose and Mr. Odom --

QUESTION: Well, let me give you a very narrow way to interpret Moitie.

The Court had a substantive issue it took the case to reach and the parties -- one of the parties brought up the problem that this -- maybe this stuff doesn't belong in Federal court anyway, so there's no jurisdiction and you can't reach the substantive argument

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and the Court goes through this footnote, the conclusion of which footnote is, we will not question here that factual finding.

It seems to me the Court is simply saying, we accept the determination of the district court which we take as a factual determination. I don't know that the Court itself endorsed it. It said, we will not question here.

MR. STERN: Whether the Court was endorsing the finding, so to speak, Your Honor, I think, though, to some extent begs the question, because the Court had to consider whether the case was properly before it in the first place and --

QUESTION: Ah, but we have a lot of jurisdiction that says -- a lot of jurisprudence that says, where question of jurisdiction is just accepted or assumed by the Court and not considered and ruled on, it won't be considered precedential --

MR. STERN: Well --

QUESTION: -- and I don't know that this isn't that.

MR. STERN: Well --

QUESTION: We will not question here that factual finding, is the bottom line.

MR. STERN: Well, with all due respect, first of

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all the jurisdictional issue was clearly brought to the Court's attention, because there is a dissent by Justice Brennan, 90 percent of which is devoted to the jurisdictional issues, and footnote 2 makes clear that the Court is considering the issue.

Secondly, there is the question of what factual finding means in that context. It's not a factual finding that a jury could make. This isn't the kind of issue that's going to go to the jury. It's essentially a legal characterization of a claim.

QUESTION: Well, if we take out the word factual in that last sentence, then Justice Scalia's explanation would be quite sufficient, would it not?

MR. STERN: Well, it would be sufficient to this extent. What it would be saying is that district courts have the authority to recharacterize claims if they believe that despite what -- despite the characterization that the plaintiffs give to a claim it is, in fact, something else.

QUESTION: Well, every single statement in a Supreme Court opinion isn't a pearl, so to speak.

(Laughter.)

QUESTION: And I mean, I think if you find something in a footnote that is rather vague, you expand on it or put great weight on it kind of at your peril.

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MR. STERN: Well, I recognize I'm speaking to the author of that footnote, so --

(Laughter.)

MR. STERN: There is a danger in reading too much into Moitie, into the footnote, but I think at a minimum what it stands for is recognition by the Court that there is such a thing as artful pleading. I mean, that much, it seems to me, is clear from the footnote and, secondly, that the doctrine of artful pleading is going to expand to some extent beyond the preemption cases.

QUESTION: Well, if you're right about that and that artful pleading consists of bringing a cause of action to which there is a defense that a Federal -- a prior Federal case gives a res judicata defense, then what would follow is not only you can remove it, but that State law claim to which there is a possible Federal res judicata defense can be brought originally in Federal court, so any State law claim, you know, how clear does the Federal bankruptcy defense or the other Federal res judicata defense have to be?

MR. STERN: Let me suggest that in this case, if you want to view Moitie at its narrowest -- and let's take your construction of Moitie, Justice Scalia. There's a factual finding that, despite what someone purports to say, it in fact is really something else.

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QUESTION: Right.

MR. STERN: And the Court on review doesn't need to disturb that.

That's what we have here. I mean, if you look at the opinion of the Fifth Circuit --

QUESTION: Okay -- I'll -- yeah.

MR. STERN: The joint appendix, page 81, and let me just read one sentence and then perhaps we can get to the core issue that you're speaking to.

It says, despite its intentionally deceitful garb, the core issue of the Miranne subsequent State court complaint was the efficacy of the final executory nonappealable order of the bankruptcy court that had freed the leased premises from, inter alia, the Mirannes' second mortgage.

Now --

QUESTION: And I agree with you, if this were a case like Moitie where this question was just an obstacle to our reaching the issue for which we took the case, we could get rid of it with a footnote that said we're not inclined to question the, you know, the district court's factual finding on this inconvenient jurisdictional question that's been raised.

Unfortunately, we took this case for the jurisdictional question. It's hard to write a footnote

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like that.

(Laughter.)

QUESTION: There couldn't be any text to which the footnote would attach itself.

(Laughter.)

MR. STERN: Is that why he's coming back?

QUESTION: But --

QUESTION: No, but why, if it's an open -- if it's an open question --

MR. STERN: Yes.

QUESTION: -- why should the law recognize any exception but for the possible preemption exemption? It's a doctrine that is supposed to be clear, so people don't spend all their money litigating jurisdiction and, therefore, you have to be, if you're a district judge or a party you have to know what you're doing, what court you're supposed to be in and the rule is absolutely clear, read the complaint.

If the complaint states a Federal cause of action, you know where -- you know it's possible to remove it. If it doesn't, you know it's not going to be removable. That helps the judges, it helps the parties.

Now, why wouldn't that be the rule, clear and simple, instead of having endless expenditure, as this case may illustrate?

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MR. STERN: Well, the rule as it had been stated in the Fifth Circuit was clear, and there was a ruling by the Ninth Circuit --

QUESTION: Oh, clear, but they say --

MR. STERN: It was clear for purposes of what we were doing. I mean, the fact is, of course, we're up here, and that makes it a whole different kind of case, but there was a very clear rule, and the rule that we have suggested in our brief is a clear rule.

QUESTION: What would be clearer that you -- you look at the face of the complaint. If it states -- the complaint I think here must say -- I couldn't find it in the documents, but I'm guessing the complaint must say there's a piece of paper called the Louisiana equivalent of a mortgage. It's on file somewhere. Go read that piece of paper. That piece of paper as a matter of State law says we're entitled to the building, or some money, or something. That's what it says, I take it.

You say, we have a defense. The defense is that the bankruptcy court makes that -- order makes that void. That sounds to me a classic case: State law claim, Federal defense.

Now, if that's what's going on, why should you be able to remove? How could we let you remove without eroding the basic doctrine, look at the face of the

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complaint?

MR. STERN: Let me answer that in two stages, because to some extent the initial part of your question deals with whether the artful pleading should apply even in preemption cases.

I mean, in a preemption case there is a State law claim being asserted -- Avco, Franchise Tax Board, and so forth -- yet in two of the four preemption cases the Court has said, despite what it appears to be, it is, in fact, a Federal claim and that requires delving into what the substance of the action is, delving into Federal preemption law and getting into all sorts of --

QUESTION: Mr. Stern, let's slice of one part of that, where there is no Federal law, where there's blanket preemption so State law effectively doesn't exist because Federal law covers the field entirely. That's one set of circumstance.

Here you have what appears to be just a garden variety, wholly State law claim. The Federal element comes into it only by way of a res judicata preclusion affirmative defense, which Rule 8(c) says it -- suppose you never raise that defense. This wouldn't -- it would still be a claim. You're supposed to judge it from the pleading, from the complaint.

If -- you're not obliged to raise res judicata.

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It isn't the kind of defense that a court raises on its own motion, like subject matter jurisdiction, so it's not even in the case until the defendant puts it there and the Federal rule seems to say the way it's supposed to come in is as an affirmative defense.

MR. STERN: Let me answer that in part by reference to a decision that's cited in our brief but isn't emphasized perhaps to the extent that it should be and that's the Celotex v. Edwards.

Now, that is not a jurisdictional case in the State v. Federal jurisdictional setting, but it is a question of a collateral attack on a bankruptcy court order. In that case, the bankruptcy court issues an injunction. The injunction prohibits execution upon a supersedeas bond.

A plaintiff in another forum, in another State but still in Federal court, seeks to execute upon that judgment and using the supersedeas bond, and what the Court said is that you can't do that. The only place you can go if you want to launch a collateral attack upon a bankruptcy court order, you have to go back to the original court and what this is, although it's filed in State court, it's the same thing. It is a collateral attack on a bankruptcy court order. It's an attempt to seek a State court review of that order.

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QUESTION: Do you think that's true even as to people who weren't parties to the bankruptcy proceeding?

MR. STERN: Excuse me, Justice O'Connor, I'm not sure I --

QUESTION: Do you think that your argument is true even as to people who were not parties and had no notice of the bankruptcy proceeding?

MR. STERN: Well, there are two sets of nonparties we're dealing with here. There is the issue of two of Mr. Odom's clients who were wives of the two people who were clearly represented in the bankruptcy, according to the text of the bankruptcy court order, and the answer to that is, yes, I think they do if they are considered privies to the parties who were there.

QUESTION: Well, answer my question in the abstract as to parties who were not privy to a prior bankruptcy proceeding in any way.

MR. STERN: Then I think that under those circumstances the answer would probably be no. At that point, you are far enough away from someone who is bound by what happened in bankruptcy court that you would have to stay in State court at that point.

That's not what we have and, frankly, in most settings like this, where someone seeks to collaterally attack an order of the Federal court you're not going to

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have that problem.

QUESTION: Celotex v. Edwards didn't involve removal, as I recall.

MR. STERN: No, I --

QUESTION: It said you have to go back to the bankruptcy court.

And it may be that your defense would prevail on the merits, but that's a question that the State courts are entitled to decide in the first instance and it could be reviewed here if you think they decided wrongly.

MR. STERN: There's no question that if we had wanted to have the State court review it, the State court had the power to review it and I agree with Mr. Odom that that review would have had to be conducted pursuant to Federal law, Federal law of res judicata, because it's a Federal judgment that is being interpreted.

The issue before you, though, is whether that's the only way that you could go. Celotex, while it's not a removal question, does have to do with whether the court that had the supersedeas bond in front of it had the power to ignore what the bankruptcy court to do -- excuse me, had the power to ignore the order of the bankruptcy court and litigate, relitigate that issue.

QUESTION: That's a res -- that's res judicata law, but the kind of law we're dealing with here is

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removal law, which is based, as we say, on 1441(b) and the well-pleaded complaint doctrine.

MR. STERN: That's correct. I didn't say that Celotex controlled by any means. I simply wanted to use it as an analogy, the suspicion that this Court has, that any Court has when there is a collateral attack being made upon a bankruptcy court order.

And then let me go back to Moitie. That may --

QUESTION: You keep using collateral attack on bankruptcy court order and I keep thinking, res judicata defense, district court order, what --

MR. STERN: Well, let -- I wanted to get back --

QUESTION: Do you get anything more out of it being in the bankruptcy court than in the district court?

MR. STERN: Well, I wanted to get back to Moitie, because I think that's the second part of the answer to your concern.

That very same argument was available in Moitie. It convinced Justice Brennan that the case did not belong in the Federal court. Moitie on its face stated only State causes of action, the second complaint in Moitie and, as you pointed out in the constitutional context, you can assert claims based upon State law and claims based upon Federal law based upon identical facts, so if there's

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not something more to Moitie than a factual finding, we're -- the Court is essentially saying district courts are free to recharacterize claims almost at their discretion.

I mean, then there are no rules. A court simply looks and says, well, this looks like the federal case I saw before. It's only based on State law, but it looks like the Federal case, so I'm going to recharacterize it and authorize removal.

QUESTION: Well, one question is whether the Federal court should take a footnote and run with it for all its worth or say, now, this was a footnote made en passant so we should be particularly careful about expanding it.

MR. STERN: I recognize that and my suggestion then, and I believe I may have begun the answer in response to one of the Chief Justice's questions, is that if you want to interpret Moitie that narrowly, still the characterization of what the Fifth Circuit has said about this case, which is, this is an attempt to retry what happened in the bankruptcy court, would still carry the day.

Under the narrowest construction of Moitie there has been in effect a finding by the court below that this is the bankruptcy case, because --

QUESTION: What work does that argument leave for 2283, where Congress thought about relitigating cases that already had run their course in the Federal court?

It seems to me that you'd never need -- if you have a case going on in the State court you would never need to resort to 2283. You'd simply remove it to the Federal court. It's over.

MR. STERN: Well, there are a couple of distinctions between how 2283 would work and how the -- Moitie --

QUESTION: Well, give me a case where you could get relief under 2283 but not via this removal that you claim.

MR. STERN: If the judgment of the Federal court were based entirely on State law, that would be one difference. The rules that all the lower courts have come up with have to do with whether the Federal court is adjudicating issues of Federal law, so that the subsequent claim is in effect a claim arising --

QUESTION: Is that true about 2283, it has --

MR. STERN: No. 2283 --

QUESTION: That it doesn't work in diversity cases?

MR. STERN: 2283 does work in diversity cases.

QUESTION: Yes.

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MR. STERN: So part of what I'm saying is that 2283 cuts more broadly in that sense. 2283 has also been applied in cases involving issue preclusion as opposed to claim preclusion. That is, there is an issue that may arise in the subsequent State court case which the defendant says is now precluded as a result of something that happened in Federal court. That would also be subject to a 2283 injunction.

We certainly don't contend that there would be any right to remove based upon the preclusion of a single issue in what is otherwise a State court case, so in both instances 2283 cuts differently and, to the extent that we're saying that what Mr. Odom has really filed is a Federal claim, there's already, in the case of a Federal cause of action filed in the State court in the event of a res judicata situation, the right either to remove or to seek an injunction. If --

QUESTION: If you didn't answer his complaint --

MR. STERN: That is correct.

QUESTION: -- he would get a default judgment under State law, pure and simple, right?

MR. STERN: If we did not answer his complaint, assuming he could prove up his case, yes.

I mean, he still has to prove it up to the --

QUESTION: Yes.

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MR. STERN: To the State court.

QUESTION: But there would be no Federal element in that at all --

MR. STERN: In the --

QUESTION: -- because you didn't raise -- because you didn't raise a defense.

MR. STERN: In the proof that he would offer, I am assuming that he would simply offer proof of debt, proof of mortgage, essentially, and you're correct.

QUESTION: So you must come in defensively to assert this protection of the Federal judgment.

MR. STERN: That's true. That was also true in Moitie.

QUESTION: But if -- if you leave -- I'd like to go back for a second, because I didn't get your answer to my particular question.

Normally, we look at the complaint and you, I think correctly, pointed out that there is one exception, namely, preemption.

Now, if -- forgetting the footnote in Moitie, is there any reason that we should have two exceptions? I mean, let us say, I'd start from the hypothetical position one exception is bad enough. Now, I want to know if there's any reason --

MR. STERN: Well --

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QUESTION: -- why we should go into two --

MR. STERN: Let me --

QUESTION: -- and what it will be. Of course, the concern is that if you have two, then there might be three, et cetera.

MR. STERN: Well --

QUESTION: And what you are asking for is an exception for a defense. We have a defense. We want to go into Federal court on the basis of the defense.

MR. STERN: Let me suggest a couple of policy considerations that do not apply across the board but do apply in situations like this arising out of bankruptcy, free and clear sales orders.

This is part of the essence of what bankruptcy courts do. Unlike the situation in Celotex, where there was a significant issue of bankruptcy jurisdiction, there's no issue of bankruptcy jurisdiction here.

The stability of titles is at issue. In effect, what we would have here is a procedural avenue that someone dissatisfied with an order of the bankruptcy could use and run to State court and you also have, not withstanding the general competence of State courts and their ability to consider bankruptcy issues -- courts rarely deal with bankruptcy issues and so what you would have, at least in the narrow type of situation that we

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have presented by this case, is a situation in which the stability of titles that are obtained through bankruptcy is at issue.

And that is exactly what we have here. We have a third party who's purchased this property. There are millions of dollars that have been put into a piece of property and now, 10 years after the bankruptcy court order, we have an attack in State court seeking to enforce the mortgage.

So in terms of policy considerations I would suggest those at a minimum might say that if someone is seeking to foreclose on a mortgage that is the subject of a free and clear sale order in bankruptcy court, that at least can be recharacterized as an attempt to appeal from or seek to modify the bankruptcy court order.

QUESTION: Mr. Stern, could I ask you about Moitie again? Why can't you explain the Moitie footnote -- and I think this is somewhat the way the petitioner characterized it. The Moitie footnote doesn't say anything about res judicata nor, for that matter, does Justice Brennan's dissent, to which you say the footnote must have been directed.

I don't believe he mentions res judicata even in the dissent, so we don't really know that the reason the Court is saying that this is an artful recasting of

essential Federal law claims was because of the res judicata defense. You're just assuming that.

It may well be that the Court was just saying, look, it was the same complaint filed. We just crossed off antitrust and put in Valentine Act, or whatever the name of the California law was. I really think that that's a more plausible reading of the footnote.

Now, maybe that -- whether that was right or wrong, it has nothing to do with this case, whether crossing off antitrust and putting in the name of a similar State -- that's what Brennan was addressing in his dissent. He said, there are State antitrust causes of action as well as Federal and if you bring them, it's not a Federal claim.

MR. STERN: Right, and that's the point. Whether you want to go the distance that we have suggested in our brief you go, or just go the very short distance that I tried to outline for Justice Breyer a moment ago, at a minimum what Moitie says is that courts, trial courts, courts of appeal do have some limited discretion to recharacterize a purported State cause of action that has been filed if, in their view, considering all the circumstances, this is really an attempt to file a claim or redo something under Federal law, and we're suggesting that the Fifth Circuit at a minimum said this is an

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attempt --

QUESTION: This is a collateral attack.

MR. STERN: Well -- yes. This is an attempt to seek State court review of what the bankruptcy court --

QUESTION: But isn't there the large difference that Mr. Odom's clients weren't trying to do anything under Federal law? In the Moitie situation you have people who brought a claim to Federal court and then they bring the same claim to State court.

Here, the -- I forgot the names of the people involved -- were not looking to be in Federal court at all. They were dragged in there because there was a bankruptcy, so it's -- are the cases distinguishable on that basis?

MR. STERN: On the surface, yes. I think when you look below the surface, no.

In order for there to have been a contested proceeding in the bankruptcy court in the first place, they had to file an objection to the trustee's proposal that the property be sold free and clear. If you look at the bankruptcy rules, the contested proceeding is triggered by their objection, so they, in fact, instigated the contested proceeding in bankruptcy court that forced the court to determine whether the property could be sold free and clear of their lien, and they lost.

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QUESTION: Well, but they didn't choose that court to walk into. They had in the bankruptcy no other choice. In the Moitie case, here's parties who go into a Federal court and then they do the same show over again in State court. It was their choice. They picked the Federal forum when they could have picked the State forum.

Once the bankruptcy is ongoing, these creditors have no place else to go.

MR. STERN: Well, let me suggest that the distinction doesn't really hold water if you take it a step farther. By that logic, if someone files a Federal constitutional claim in Federal court and a parallel State constitutional claim in State court, the State constitutional claim could be removed because it's nothing but the Federal constitutional claim and I don't think anyone believes that to be the law.

QUESTION: Thank you, Mr. Stern.

MR. STERN: Thank you, Your Honor.

QUESTION: Mr. Odom, you have 6 minutes remaining.

REBUTTAL ARGUMENT OF JOHN G. ODOM

ON BEHALF OF THE PETITIONERS

MR. ODOM: Thank you, Your Honor. May it please the Court:

I have just a couple of points to make in

response to some of the questions that were addressed to Mr. Stern.

As far as taking a footnote and running with it, I didn't make this obvious point in my argument, but we did make it in the brief. Taking this particular footnote and running with it, if you're a district judge below, is even less appropriate than in other circumstances, because here we had three unanimous opinions of this Court following the date of the footnote that expressly reconfirmed all of the fundamental elements of removal jurisdiction in exactly the way that we've argued, so a clearer view than that would be hard to find.

I agree with Mr. Stern that stability of titles is important, but under his view the State recordation doctrine is of no moment at all and can be completely ignored when, if there is a bankruptcy, a two-part bankruptcy judgment order, the first part where the judge snaps his fingers and says, poof, if you will, all liens -- the property may be sold free and clear of all liens, and the second part of his order orders and directs and authorizes the erasure of all the liens.

The second part is not taken care of and is not fulfilled, then if you simply allow him to rely on the first part of it, then it says that the entire State record, State title recordation policy is of no moment at

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all, because a party of another State is entitled to rely on what's on file down at the New Orleans conveyance office and under Mr. Stern's theory would not be. Stability of titles is important.

I will note that there was no adversary proceeding under Rule 7001 in the bankruptcy court below. This is an argument that we made below to suggest that the matter was not in fact actually litigated.

We didn't even have a cause of action at the date of the bankruptcy. Not only were two of our people not there, we didn't even have any cause of action because the Browns had not attempted to pass title in derogation of our mortgage at that time. The bank had not let its right to enforce the erasure order expire of that time -- at that time.

There was no -- our loan was not in default at that time. We were not claimants in the bankruptcy proceeding. This was a balloon payment, a one-time balloon payment that was not mature at the time of the bankruptcy. In fact, the loan had been made on it shortly before the bankruptcy.

The obligation sued upon is, in fact, a new post bankruptcy obligation due to the written waiver of prescription which we say, under State law, constitutes a novation. That's a --

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QUESTION: But that all goes to the merits --

MR. ODOM: It does.

QUESTION: -- of your claim, and --

MR. ODOM: It does. It does.

It's in the record, Your Honor. The --

QUESTION: No acceleration for insolvency?

MR. ODOM: No, sir.

QUESTION: A balloon payment with no --

MR. ODOM: No, sir.

QUESTION: Who wrote that?

(Laughter.)

MR. ODOM: I didn't write it, Your Honor. I'm not sure.

But the novations are in the record at pages 138 and 139 of this matter.

Your Honors, as far as any particular concerns about bankruptcy, obviously Congress can address that if it wants to. If it wants to pass a statute saying anything relating to bankruptcy is to be done a different way, then that's fine, it can.

If there are no further questions, Your Honor, I believe I have stated my argument as best as I can.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Odom. The case is submitted.

(Whereupon, at 1:57 p.m., the case in the above-

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entitled matter was submitted.)

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

BY Ann Marie Federico

(REPORTER)