ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: GRUPO MEXICANO DE DESARROLLO, S.A., ET AL., Petitioners v. ALLIANCE BOND FUND, INC., ET AL.

CASE NO: 98-231 c.1

PLACE: Washington, D.C.

DATE: Wednesday, March 31, 1999

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IN THE SUPREME COURT OF THE UNITED STATES

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GRUPO MEXICANO DE DESARROLLO, S.A., ET AL., :

Petitioners :

v. : No. 98-231

ALLIANCE BOND FUND, INC., ET AL. :

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Washington, D.C.

Wednesday, March 31, 1999

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

APPEARANCES:

RICHARD A. MESCON, ESQ., New York, New York; on behalf of the Petitioners.

DREW S. DAYS, III, ESQ., Washington, D.C.; on behalf of the Respondents.

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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 No. 98-231, Grupo Mexicano de Desarrollo v. Alliance Bond Fund.

Mr. Mescon.

ORAL ARGUMENT OF RICHARD A. MESCON

ON BEHALF OF THE PETITIONERS

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

The Court is being asked today to ratify a significant expansion in the powers of the Federal district courts to issue preliminary injunctions. This it should not do for two reasons.

First, there is no historical or statutory predicate for the issuance of a preliminary injunction to restrain the disposition of the assets of a defendant which assets are unrelated to the underlying cause of action and are located outside the jurisdiction of the court.

QUESTION: Mr. Mescon, do you mind giving us a little preliminary information here? I'm concerned basically with a potential mootness problem. Your suit, your petition rests, I take it, on -- on an -- an allegation that your client is entitled to damages by

virtue of an improper preliminary injunction.

MR. MESCON: That is correct, Justice O'Connor.

QUESTION: And there's a bond outstanding --

MR. MESCON: That is correct.

QUESTION: -- which could be -- the damages could be secured from the bond.

But as I understand it, the preliminary injunction has become a final injunction. Is that right?

MR. MESCON: That is correct, Your Honor.

QUESTION: And no appeal was taken from that.

MR. MESCON: The --

QUESTION: Is that right?

MR. MESCON: That is correct, Justice O'Connor.

QUESTION: Okay. So, tell me what's left and why we should be deciding it.

MR. MESCON: The issues that would -- that Your Honor has suggested would render this appeal moot arise in cases where the issue to be decided on the merits is the same as the issue to be decided in the preliminary injunction.

For example, in Camenisch, which is the case relied on primarily by the respondents, the claim was that the student was entitled to an interpreter under section 504 of the Rehabilitation Act. The injunction was granted. The case came to this Court before the case had

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been decided on the merits.

But let's assume that the case had come to this Court after the case had been decided on the merits. Clearly if the -- if the injunction had been vacated, the State would have had a remedy, namely, the remedy of recouping the amount of money it had paid for the interpreter.

That is not so here because there is no claim in this case that the permanent injunction was improper. There is no claim in this case that the plaintiffs did not have a probability of success on the merits. The claim in this case is as to the power of the court to issue the preliminary injunction.

QUESTION: And on that, you rest on New York law basically.

MR. MESCON: Right, that under -- no. The -- the power of the court -- the absence of the power of the court to issue a preliminary injunction is true both under traditional principles of equity and also under New York law.

QUESTION: What are your damages from -- what -- what would you receive if you showed that the preliminary injunction was wrong even though the -- the final injunction is okay?

MR. MESCON: Justice Scalia, if I could prevail

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on proving that and establishing damages, my damages would be the loss to GMD for the inability to restructure its debt, conduct its business, and organize its affairs during the 4 months of the pendency of the preliminary injunction, which damages --

QUESTION: Well, but it shouldn't have been doing that anyway. I mean, doesn't the preliminary injunction say that, in effect, it would have been wrongful to do that?

MR. MESCON: No. If absent the preliminary injunction --

QUESTION: Not the preliminary. The final injunction.

MR. MESCON: No. The final injunction says that when one has a judgment, one can restrain the assets of the debtor. The very point in this case is that before there is a final judgment, before there is a permanent injunction, there is no power in the court to restrain the assets of the debtor unrelated to the underlying --

QUESTION: You're talking about a period then just between the issuance of the preliminary injunction and the final injunction.

MR. MESCON: That is correct, Mr. Chief Justice.

QUESTION: And you say that that caused discrete, demonstrable damages to your client.

MR. MESCON: We would -- we have not yet proved that.

QUESTION: That's the theory of your case.

MR. MESCON: Yes, Justice Kennedy.

QUESTION: The theory behind that is that it may entirely be proper now to enjoin a certain use of those assets, but it would not have been wrong to use those assets for the other purposes, for want of which you have sustained damages.

MR. MESCON: That is correct. At any moment until April 17th, 197 -- 1998, when Judge Martin issued that permanent injunction, GMD was free to do with its assets whatever it wished to do.

QUESTION: Mr. Mescon, I thought Judge Martin said, look, I basically want to make sure that if there is, as I think there will be, a judgment for the plaintiff, there's something to realize it against, but I don't want to be rigid about this. Didn't he say that you could come back? He said, Grupo may seek modification on a showing of some need in order to keep the company going.

Given -- given that opportunity that he gave you, he didn't say you're immobile. He said, if you have a good reason to relax the injunction, come tell me and we'll talk about it.

MR. MESCON: Justice Ginsburg, you're correct.

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He did give us an opportunity to come and make an application for leave to make expenses, if you will, in the ordinary course of business. But what the company, which was clearly in significant financial straights, where it remains today, wanted to do is effect a restructuring of its debts, not merely to pay its current obligations as they were due, wanted to make, if you will, preferential payments perhaps, preferential under our bankruptcy code.

QUESTION: For parties other than this plaintiff.

MR. MESCON: Pardon me?

QUESTION: For parties other than this plaintiff.

MR. MESCON: Parties other than this plaintiff.

QUESTION: So, the -- what you -- you are arguing essentially, if I understand you, that you wanted to be able to deal with your other creditors so that there would not be -- the consequence of that would -- there would not be these assets against which the final decision could be realized.

MR. MESCON: I would only quibble with one part of your comment, Justice Ginsburg. We wanted to deal with these -- these assets not so there would be nothing available, but rather with the effect that there would be

nothing available. The purpose was not to eliminate assets available for these plaintiffs, but that would have been the effect of the action. With that qualification, I agree with Your Honor's observation.

QUESTION: So -- but the judges -- we're talking about a 3 and a half month period?

MR. MESCON: It's a week less than 4 months, Justice Ginsburg.

QUESTION: And you said something about the court hasn't power to do this preliminarily, and one of the reasons was, you said, in New York they wouldn't do it.

Suppose New York law were otherwise. Suppose New York law says, if you make out a very strong case on the merits and also a very strong case that unless there's an injunction during the pendency of the suit, the assets will be gone. We will give you that freeze worldwide. Suppose that were the New York law. What does the Federal court do?

MR. MESCON: Right. There actually have been statutes like that at different times in -- in our country. There was a statute in Mississippi in the late 19th century that -- that had something of that same content that was before this Court in Scott v. Neely. In those Swift v. Tyson days, this Court said we're not going

to apply the Mississippi State rule. We're going to apply the basic Federal equitable rule which is no injunction shall -- shall be issued.

QUESTION: But now we're in the Erie days.

MR. MESCON: But nowadays, after Erie against Tompkins, my answer to your question would be if a New York statute afforded this right to the plaintiffs in a diversity action in New York, they would have this right.

QUESTION: But you say we don't have to decide that as -- as things are in this case.

MR. MESCON: That is correct. First of all --

QUESTION: You're fortunately spared the --

MR. MESCON: Yes. We have the -- we have the benefit of -- of Judge McLaughlin's insights into what New York law provides. We have an explicit finding by the court of appeals as to what New York law is and New York law does not permit such an injunction.

QUESTION: Well, does -- does it work the other way around? Does the absence of a State mechanism to do this mean that under Erie the Federal court may not do it?

MR. MESCON: Yes. Yes, Justice Kennedy. I would say that this case and a diversity case is governed by Erie, and for that reason, we must look to New York State law. New York State law provides that such an injunction cannot be issued in the New York State courts,

and the old across-the-street argument applies. We shouldn't be able to do it --

QUESTION: Even if the rules explicitly gave the court authority?

MR. MESCON: Not so. If the rule --

QUESTION: You should make that clear.

MR. MESCON: If under Hanna -- if we -- if rule 65 were amended so as to give the Federal courts this authority, then in my view this would be within the Rules Enabling Act. It would be a proper exercise of congressional or court rulemaking authority, and therefore that would also, if you will, trump State law as -- as in Hanna, the service requirement --

QUESTION: You're saying neither -- neither rule 64 nor 65 authorize what was done here.

MR. MESCON: That is correct. Rule 65 does not authorize what was done here because rule 65 is -- is a -- is a mechanism, is a cookbook, is a recipe of how to get one. It doesn't -- it doesn't talk about substantive bases for a preliminary injunction. Cases like Sims Snowboard in the Ninth Circuit and the decision by Justice -- by Judge Clark in Frankie v. Wilchek in the Second Circuit suggest, though this Court hasn't decided it, that the question for -- of whether a preliminary injunction is procedural or substantive under Erie is that it is

substantive.

QUESTION: What do you do -- suppose A sues B in New York, a damage action, and A learns that B is about to transfer property in New Jersey to a relative, a fraudulent conveyance, and there won't be enough money around otherwise to satisfy the judgment. That must be somewhat common. I mean, it's occurred before. Is he without a remedy, the plaintiff in New York?

MR. MESCON: A and B are both in New York and the property is in New Jersey?

QUESTION: Yes, yes.

MR. MESCON: An action could be commenced in New Jersey and assuming the New Jersey attachment statute --

QUESTION: Yes, of course. You'd attach it and get an attachment action in New York. You get one in New Jersey.

MR. MESCON: Right. Or in Mexico.

QUESTION: So, what we have is a -- is a different route in New York of accomplishing the exactly precise same objective.

MR. MESCON: Yes, Justice Breyer, but a route that is not sanctioned by the traditional equity jurisprudence --

QUESTION: No, indeed. I guess since fraudulent conveyance is a legal action in fact -- it's not an action

in equity -- the -- we have an instance where a New York court would, indeed, permit an injunction to protect a judgment that's all legal. All legal.

MR. MESCON: I don't think that the New York courts would issue such an injunction.

QUESTION: No, no, but what they do is get to the same result in a different way.

MR. MESCON: Yes, by going to New Jersey and getting an attachment.

QUESTION: All right. So, in fact, why can't the Federal court, although it doesn't have exactly the same legal mechanisms because they're not involved in exactly the same thing, get to precisely the same result, which is in fact to attach property abroad to satisfy a likely judgment in a legal action?

MR. MESCON: Well, with regard to attachment certainly --

QUESTION: Don't call it attachment.

MR. MESCON: -- because rule 64 says that you look to State for attachment.

For rule 65, you don't do it because the court can't do it. It doesn't have the -- the courts don't have the power to exercise -- to issue injunctions with regard to restraining assets -- restraining assets and actions for money damages.

QUESTION: But, of course, they do in fact have that very power if the underlying action is equitable.

MR. MESCON: Of course.

QUESTION: And do they --

QUESTION: Mr. Mescon, I suppose that hanging a guilty person without a trial achieves the same result in a different way, doesn't it?

MR. MESCON: Yes, Justice Scalia.

QUESTION: I wasn't talking about that.

QUESTION: It's not permissible, is it?

MR. MESCON: But -- but certainly in an equitable action, they do have that power.

QUESTION: Right, and what happens --

MR. MESCON: And that's what the -- the decisions in this Court in Deckert and First National City Bank have said.

QUESTION: We accept that. Suppose it was just -- because this is an odd example, but I think it makes the point. Suppose it were an action for a fraudulent conveyance?

MR. MESCON: If this were an action for a fraudulent conveyance, it would depend on an analysis of the equitable principle of whether or not the plaintiff had a sufficiently connected interest in the object, in the subject of the claim to justify the -- the issuance of

an injunction, very fact-specific.

There are cases -- a good example really is -- even in First National City Bank, the question is how attenuated, how close is the relationship between plaintiff's claim and the object in question. I could conceive of a case where that relationship was significantly close, that the plaintiff's interest in the thing to be enjoined would justify the issuance of an injunction. I can think of many cases, routine money damages cases, like actions on a note, for example, as was here, where that connection would not be so close. And so, I --

QUESTION: Mr. Mescon, I -- I thought that the reason for New York's -- I mean, New York lets you put your hands on anything that's in New York -- that what was behind New York's limitation is the notion that New York lacks the power until there's a final judgment to put a freeze on assets outside. And if that's so, if it isn't a question of New York's policy of protecting this debtor from having its assets touched, but New York's notion of its own powerlessness that's at work, why should that be applicable in the Federal court which doesn't have that powerlessness?

MR. MESCON: It is clear from this Court's holding that a State's power to attach assets is limited

to assets within its own jurisdiction. So, with regard to attachment, New York could not attach assets outside of the State.

QUESTION: And -- and I don't want to interrupt your extended answer to the question, but these are -- are these intangibles? Are promissory notes intangibles?

MR. MESCON: Well, which notes are we talking about?

QUESTION: The promissory notes in -- in question here.

MR. MESCON: Well, there are the notes that were issued by the defendant to the plaintiff, and there are also those notes that the Mexican --

QUESTION: The notes they received from the Mexican Government.

MR. MESCON: They have -- they are to receive. They have not yet been received.

QUESTION: Right.

If -- would the case be different if those notes physically had been in some safe deposit box of a Chase Manhattan Bank in -- in New York?

MR. MESCON: The case would have been very different if they had been encased in a safe deposit box --

QUESTION: So the -- the location of the

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security itself is significant.

MR. MESCON: Well, it might be. Where the -- it depends I suppose on the nature of where it is located. If they were negotiable instruments and they were located in New York, I think under the attachment --

QUESTION: It depends on the choice of law theory, of which there are millions. Right?

MR. MESCON: Yes, Justice Scalia.

QUESTION: I mean, you can't give a sure --

QUESTION: Well, I -- I might have intervened with your answer to Justice Ginsburg.

QUESTION: Yes. I would like to get back to that. It -- it is an Erie question that I'm asking.

MR. MESCON: Right. I'm with you.

QUESTION: I -- I thought that the Erie assessment isn't just automatic. Well, we have no rule on point, so we look to see whatever the State does. I thought that there was then an examination to determine whether the State has any relevant policy. And it may be that the State has a policy. In fact, most cases it does.

But if -- and I may not be right about this. If the State is not putting on this kind of freeze because it thinks it can't rather than because it has made a judgment that is not a sound thing to do, then why should that apply in the Federal court?

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MR. MESCON: With regard to attachment, the power of the New York State courts is limited. They cannot --

QUESTION: Let's take attachment out of it and sequestration --

MR. MESCON: But in personam, the authority of the New York State courts is just as broad as the authority of the Federal district court.

QUESTION: Well, some courts have had a notion that they can't act extraterritorially.

MR. MESCON: With regard to assets outside their jurisdiction, but the -- the basis of Judge Martin's ruling was that he had in personam jurisdiction -- and this is indeed the basis in part of the First National City Bank holding -- in personam jurisdiction over the defendant, and therefore, based on that in personam jurisdiction, could enjoin conduct worldwide. And the Federal district court is no more powerful than the New York State Supreme Court with respect to that power.

The -- this principle in New York State law goes back very, very far. The legislative history is -- is not clear as to the origins, except that it stems back from traditional pre-1789 notions of what were the powers of the court in equity that were adopted as part of our -- the first judiciary act when we adopted the equitable

power and when we gave to the Federal district courts only those powers in equity which the English Courts in Chancery had in 1789.

QUESTION: Well, this -- now you -- you seem to be cut loose from what you said earlier. That is, you said New York could have such a preliminary injunction. If New York has a preliminary injunction, it would apply in the Federal courts.

MR. MESCON: That's correct.

QUESTION: So, it isn't a question of equity would not permit this kind of thing. It's simply a question, did the State do it, and you say --

MR. MESCON: Right. No. I was -- I'm sorry. I was just answering why I thought New York had the policy. I don't know what the policy of New York State was. I was surmising that it might have flowed from this traditional equitable notion that would have been as obvious to the New York State legislature as to anyone else that courts don't have powers to issue preliminary injunctions to restrain assets to satisfy a money judgment before judgment.

QUESTION: Suppose -- suppose that this -- that this Court thought that the old rule should be changed, that we have a global economy and debtors are too quickly depriving the courts of real jurisdiction. It's wrong to

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know that the defendant in front of you is secreting assets, and so we want to change the rule, as the English did in -- was it Mareva?

MR. MESCON: Mareva, Justice Kennedy.

QUESTION: And assume the Court wanted to do that. Would we have the authority to do that?

MR. MESCON: With the greatest respect and with some trepidation, this Court would not have the power to do that except perhaps by exercising its authority under the Rules Enabling Act to promulgate rules of civil procedure. But acting as a court, bound by the precedents about what the -- what courts of equity can do, and guided by the principles of Erie and with reference to New York State law, this Court could not do that.

QUESTION: Well, you say guided by what courts of equity can do. Suppose we think the old equitable rule is wrong and should be adjusted to the new dynamics of an economy and so forth.

MR. MESCON: Well, first --

QUESTION: You may disagree. We're just making the assumption.

MR. MESCON: Assets out of State are -- are not something new that's a function of the new global economy. In the sense, of course, of power, I suppose the answer to Your Honor's question is yes, the Court could do that. No

one could tell the Court not to do it, but I don't think it would be appropriate exercise of the Court's power for the Court to do it perhaps would be a better way to say it.

QUESTION: Well, just -- just because of the extant equity precedents?

MR. MESCON: Because of --

QUESTION: Or because of any other proper constraints on our authority?

MR. MESCON: That and the Erie doctrine.

QUESTION: Could one go into a New York court, the Supreme Court of New York, and get an injunction of the sort that was issued here?

MR. MESCON: No, Mr. Chief Justice.

QUESTION: And why is that?

MR. MESCON: It is because the law of New York State makes plain, as Judge McLaughlin described in his opinion below, that injunctions to secure funds for payments of money damages not in an equitable claim are not permitted by the courts of the State of New York.

QUESTION: Is that because it's covered by the attachment and you -- you -- if the attachment statute sets out certain requirements, you can't beat -- you can't kind of go on the side door and get an injunction?

MR. MESCON: That could be one reason. It is

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clear that attachments apply to property in State. It really goes back to Justice Ginsburg's question, why New York State doesn't afford this remedy. Perhaps because they think attachment is enough, perhaps because their guided by the same principles of the Chancery Court that have guided the Federal courts up until 1986 when the first of these decisions was made.

QUESTION: Mr. Mescon, you did say that New York would give this injunction, a permanent injunction. We have a permanent injunction which you're not challenging.

MR. MESCON: That's correct.

QUESTION: And apparently New York, just like the Federal court, would give such a permanent injunction after the plaintiff has won the lawsuit.

Going back to Justice O'Connor's question, have courts of appeals ever ruled on the validity of a preliminary injunction once the final injunction has been entered?

MR. MESCON: In a case in which the -- I do not know the answer to that question. But the -- in a case in which the issue raised by the preliminary injunction goes to the power of the court and is not at all dependent upon the merits of the case, then the entire rationale, which is a sensible rationale, for not deciding the preliminary injunction, after it's merged with a permanent injunction,

does not apply.

QUESTION: Well, I -- I don't see why your response is -- is that narrow. It seems to me that you might have a perfectly good case if the preliminary injunction was improvidently issued, but after a full hearing, a permanent injunction issues, and you don't challenge that. There was enough evidence developed on the permanent injunction hearing that you don't challenge it. But it seems to me you're still entitled to challenge the preliminary injunction if you suffered damages and there's a bond.

MR. MESCON: I -- I would like to adopt your position, Mr. Chief Justice, but I think some of the authorities cited by the respondent would limit our ability to -- to recover in such a case if the issue, for example, in -- if the issue were the same as the issue decided at the preliminary injunction.

QUESTION: What is the --

MR. MESCON: The judge, for example, deciding the preliminary injunction -- there wasn't enough evidence in the record for him to make an appropriate finding of --

QUESTION: But he guessed -- but he guessed right.

MR. MESCON: But he guessed right, yes, Justice

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Scalia. Then he's validated, if you will, by the final decision. And I think that's what the cases cited by respondent stand for and we don't dispute that --

QUESTION: But I thought -- I thought your -- your position -- correct me if I'm wrong -- is that there's a great difference from an injunction before we have adjudicated that there is a debtor and an injunction after there has been adjudication that the debt is owed.

MR. MESCON: Yes. Under New York law 5222 of the CPLR, which rule 69 makes applicable in the Federal courts, there is an absolute right in the court to enjoin a debtor from parting with any asset of any kind after there's a judgment until the judgment is satisfied. And we -- while initial notice of appeal from the final judgment did contest that, because the notice of appeal was filed within a couple of days of the final judgment, when we drafted our brief on the merits for that second appeal from the final judgment, we withdrew that claim because that injunction was proper and was permitted under New York law, which under rule 69 is applied in the district court.

QUESTION: Did you actually look up the -- and the reason I'm harping on this odd thing, I had to look it up once and fraudulent conveyances are legal actions. They're not actions in equity. A typical case is a case

where A sues B in a normal damages action, and then he thinks that B is going to convey to a friend some property and B is likely to become insolvent. I'd be surprised if injunctions weren't issued in that kind of case to prevent a -- a -- maybe rarely, but to prevent a real danger.

MR. MESCON: I believe they are not issued --

QUESTION: They're not?

MR. MESCON: -- Justice Breyer, because -- because if the action between A and B is unrelated to the asset --

QUESTION: Yes, it is. It is.

MR. MESCON: Then I believe that -- that is exactly, you know, Lister v. Stubbs was just such a case. You know, the -- the classic situation in which -- with the exception of Mississippi in the late 19th century, we don't enjoin fraudulent conveyances. The Federal rule up till 1986 was that in that case, as -- as unpleasant as it may have been, you have to go to New Jersey to get your injunction where there can be an attachment of the assets.

QUESTION: May I ask -- oh, excuse me.

QUESTION: You're not suggesting that New Jersey is more unpleasant than New York, are you?

(Laughter.)

MR. MESCON: No, Mr. Chief Justice.

QUESTION: Mr. Mescon, can I ask you a practical

-- how long did the trial take in this -- trial on the merits in this case take?

MR. MESCON: The trial -- there was a motion for summary judgment. There was --

QUESTION: And how long did it take the judge to decide it?

MR. MESCON: The -- the -- there was a period of several weeks of briefing, and I think the matter was sub judice for something on the order of a week. But I --

QUESTION: I was just wondering if the judge -- if you win and the judge had the same problem all over again, it seemed to me what the trial judge might do is say let's go to trial tomorrow, put your evidence in, we'll have a decision on the merits in 15 days. So, we would -- and then you would -- and if you lost on the merits then, you would have no -- no redress.

MR. MESCON: Right, Justice Stevens. And that -- that point is really I think what motivated the trial judge. He said to me could I do this after judgment, and I said, yes, Judge Martin, you could do it after judgment. And he said, well, I am sure that the plaintiffs are going to win this case, and if I could do it after judgment, I can do it now. And that tests the principle that we're raising. That really is where the rubber meets the road. But the point is, within the limits of due process, he

could have truncated it as far as he wanted to, but for whatever period --

QUESTION: But if he had truncated it by saying -- say, he did have the power, and if he truncated the trial, the preliminary injunction hearing, by saying I'm going to rely on this affidavit as enough evidence because I'm convinced what I'm going to do after all the evidence comes in, he could get away with that.

MR. MESCON: If -- if he -- within the limits of due process --

QUESTION: Yes.

MR. MESCON: -- if he had accelerated the trial and had somehow a finding on the merits within a day or 2 of the -- of the original ex parte application, then -- then the answer is yes.

QUESTION: But how would that have helped in a world where you can transfer money in 5 minutes?

MR. MESCON: But that was always -- there's nothing new about that, Justice Breyer.

QUESTION: No, but I mean, if it's a practical thing we're looking for, if you -- if you win this, then in -- in future cases, as long a there's 5 minutes' time between the complaint being filed and the trial on the merits, that's the same as if there were 10 years' time.

MR. MESCON: That's correct.

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Mr. Chief Justice, if there are no other questions, I'd like to reserve the balance --

QUESTION: Very well, Mr. Mescon.

Mr. Days, we'll hear from you.

ORAL ARGUMENT OF DREW S. DAYS, III

ON BEHALF OF THE RESPONDENTS

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

I wanted to address some of the issues that were just raised with my opposing counsel on the mootness issue and with respect to the Erie issue as well.

First of all, on the question of the applicability of Camenisch, we believe that Camenisch makes very clear that the issue of the ability to sue for damages on the bond is not a matter that can be resolved on an interlocutory appeal of a preliminary injunction. Of course, there is no preliminary injunction in existence at this point. It ceased to exist when it was converted to a permanent injunction by the district judge.

QUESTION: But -- but here the theory of the petitioner is -- is that the reason any mischief happened was because it was at the initial injunction stage.

MR. DAYS: I understand that, Justice Kennedy, but I think that what --

QUESTION: It's the difference between the

preliminary and the permanent injunction that is the very theory of his case, and that just wasn't involved in the case that you cite.

MR. DAYS: That is correct. It's not directly on point in that regard, but I think it can be used for this purpose. In Camenisch, it is true that there was the question of the ability to recover on the -- on the injunction bond, and what this Court said was that issue can be resolved after a trial on the merits and final judgment. There was a -- a nexus between those two.

What GMD argues here is that there is no nexus. There's no nexus between the preliminary injunction and the merit issue in this case, and we disagree with that. We think that the permanent injunction was in fact just an extension of the preliminary injunction. There is nothing in the record that suggests that the judge relied on any different authority for the permanent injunction than he invoked when he entered the preliminary injunction.

QUESTION: But that may be true, Mr. Days, but if -- if the petitioner is right, that the authority to issue the preliminary injunction is -- is nonexistent, whereas the authority to issue the permanent injunction is clear, I would think that would be enough to at least give the structure of a claim for damages on the bond.

MR. DAYS: Mr. Chief Justice, with -- with

respect, this Court has said that where one wants to have those types of issues resolved, they have to be resolved after trial on the merits and judgment. Any -- any person who's been --

QUESTION: But if -- if -- maybe you need a separate suit on the bond. I don't mean to decide that, but certainly if it were decided by this Court that the issue of the preliminary injunction in this case were improvident or unauthorized, that could be used in the suit on the bond, could it not?

MR. DAYS: Well, I think, Mr. Chief Justice, but what the district judge, in essence, found was that the activities of GMD that were preliminarily enjoined were correctly enjoined, and that's what the permanent injunction is all about.

QUESTION: Yes, but if we decide he was laboring under a misapprehension as to what his authority was to issue a preliminary injunction, then -- you know, that -- that goes to the merits of this case certainly to a certain extent. Then that would certainly be binding on the parties in a suit on the bond, would it not?

MR. DAYS: Yes, I think that is certainly possible, Mr. Chief Justice, but what it opens up is the ability of any party who's been dissatisfied with a ruling on a preliminary injunction to raise not just the basic

propriety of the issuance of the preliminary injunction, namely, whether it met the basic requirements of rule 65, but larger issues, or even issues as to do with whether there was irreparable harm. But I think this Court has said that those issues simply are inappropriately raised with respect to a preliminary injunction.

QUESTION: Well, but, Mr. Days, it wouldn't really -- it wouldn't really open up that Pandora's box if it only applied to cases in which it was contended that there was an absence of power during the interval between the time of the preliminary injunction entered and the judgment in the case was entered on the merits.

MR. DAYS: Yes. I -- I understand that to be the argument.

QUESTION: And I think he agrees it would be limited to that.

MR. DAYS: Yes.

Let me just mention one other factor with respect to the bond damage action, and that is, as was pointed out I think by Justice Ginsburg, the district judge here allowed GMD to come in and seek modifications from the preliminary injunction. GMD initially filed such a petition for -- or motion for modification and withdrew it. So, I think that one of the things that's presented here is the highly hypothetical nature of the claim on --

on the bond.

QUESTION: Well, that -- that would certainly perhaps be a defense to a damage -- a partial defense to a damages action, that you had it within your power to correct this situation without enduring it. But I -- I don't think that dispenses with the entire case.

MR. DAYS: Yes, Mr. Chief Justice.

Let me turn, if I may, to the Erie question. As we've indicated in our brief, we think that the Erie issue is not properly before this Court. It was not fairly included in the question presented, nor was it pressed or passed on in the lower courts. I think the colloquy between the Court and Mr. Mescon reflect the fact that what GMD is asking this Court to do is the work of the lower court judges, that is, the trial judge and the court of appeals.

Now, they have pointed to a decision by the Second Circuit in this case in which the court says all parties agree that this type of relief would not be available under rule 64 or New York injunction law.

First of all, that entire discussion in the lower courts was about the relationship between rule 64 and 65. Erie never came up, and I think one would search in vain to find even the word Erie mentioned in any of the filings in this court below until this Court got the

merits brief from GMD in this case.

And secondly -- and I know it's somewhat curious that the court says rule 64 and the injunction statute, but what it was saying was that under New York law, if one brings an attachment action pursuant to rule 64, one can also get an injunction in aid of that attachment process.

So, I think that it is unfair to look at that decision as a pronouncement on what New York law would, in fact, hold if those courts had been invited to consider Erie and go through the process that you were discussing with Mr. Mescon.

Let me turn to the basic issue here, though. I think Mr. Mescon has been very direct and very candid in saying that there's no historical or statutory predicate for what the district judge did here, and indeed, that this court has no power to authorize a Federal judge to do what Judge Martin did here.

I am reminded of a quotation from Justice Holmes in which he said that it is revolting to have no better reason for a rule of law than that's what was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past. Now, I don't necessarily want to embrace the revolting part of that statement by Mr. Justice Holmes,

but I think it does get to the heart of this.

What basically GMD is saying is that there were cases in the 19th century where parties sought to get freeze orders and were told that they were unable to do that, that the court simply could not provide that type of relief. Scott v. Neely, the Hollins case, and there are other cases that go to the same point. But those were pre-merger cases, and I think that if one thinks about them in terms of their being pre-merger, when courts were faced first, as was true in those cases, with a request for a final judgment that included the freeze order, that is, a freeze order that would take the defendants property and convert it in a way that would satisfy a money judgment that the plaintiffs were seeking --

QUESTION: Mr. Days, do you think that the merger of law and equity enlarged the -- the kind of remedies that were available?

MR. DAYS: I think, Mr. Chief Justice, what the merger did was allow a court, sitting on both law and equity cases, to use remedies that previously would have been available only in a court of equity after there had been some satisfaction of a judgment in -- on the law side of the court.

QUESTION: But do you think that if a court of equity couldn't have given it before there was a judgment

and then you merge law and equity, wouldn't the rules still be the same? You have to -- you know, you can get it in the same proceeding. You get a judgment, then you get an injunction. But you don't get an injunction before that.

MR. DAYS: Well, I think -- I think that certainly if the law had been clear in that respect, the courts had been very clear that no matter what the circumstances, no matter what the merger, no matter what happened to the Seventh Amendment rights that were always implicated in that type of situation, then we'd have a different -- different problem.

QUESTION: Do you have any cases to the contrary? Do you have any cases where, indeed, an injunction of this sort was issued?

MR. DAYS: We do not have a case that deals specifically with this question, but I think the -- this Court in -- in Dairy Queen v. Wood pointed out the kind of time-bound nature of decisions like Scott v. Neely.

QUESTION: There have been deadbeat creditors -- deadbeat debtors who -- who were going to try to get rid of their property forever. And now, maybe the rule that we have is not a good rule, and Henry IV notwithstanding. But the issue is not whether we can change it really. The issue is whether this Court ought to be the -- the

instrument of change or whether, you know, it's such a fundamental departure from what -- what courts have done in the past, that if indeed we want to give creditors more rights against debtors in this respect, it ought to be a congressional determination. I mean, that's -- that's really the only argument here.

MR. DAYS: Justice Scalia, I think that what rule 65 does is embody all of the principles of equity power, and I don't think those decisions that have been cited by -- by GMD stand for the proposition that they would absolutely have been foreclosed after a merger of law and equity.

QUESTION: But you don't have a single case that --

MR. DAYS: Well, I think that the fact that there haven't been many of these cases arising is reflective of the fact that in most instances we don't have the unique circumstances presented in this case. We have a situation where there is a party that admitted that it was subject to the personal jurisdiction of the court and to the laws of not only New York State, but of the Federal court's laws, whatever they might apply. It was a situation where there were no assets in the jurisdiction. Therefore, attachment was unavailable. Bankruptcy was not available because it's a foreign corporation and would not

be subject to the bankruptcy laws. And one can go down the list.

Under those circumstances, what we believe is the case, that if one looks at the nature of equity, the flexibility and the adapting to new circumstances that has always characterized the equity power of Federal courts, that it is not inappropriate for the equity court in 1999 to try to deal with this situation.

QUESTION: Are you saying that we're doing this to supplement the void in the bankruptcy laws?

MR. DAYS: No. I'm simply saying that it goes to the whole question of whether, for example, there's an adequate remedy at law, whether there's irreparable harm.

QUESTION: Well, I would have thought that would have been -- it's your argument, not mine -- not a bad argument because --

MR. DAYS: I'll accept it then, Mr. Justice Kennedy.

QUESTION: Assuming the assets were, say, in the State of California --

MR. DAYS: Yes.

QUESTION: -- in this case, GMD had its assets, I take it you could have initiated an involuntary bankruptcy proceeding?

MR. DAYS: Yes, that is correct.

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QUESTION: All right. So, then why aren't I correct in suggesting that what you're doing is simply trying to cure a gap or a void in the bankruptcy laws?

MR. DAYS: I think it's a very persuasive argument.

QUESTION: Equity simply fills in any gap that may result from an absence of a bankruptcy law in Mexico?

MR. DAYS: Well, I -- I won't -- I don't want to go to the point of seeing this as merely a gap-filling procedure. It is a procedure in which a Federal court is presented with a party and it is told, as Mr. Mescon has told this Court, you are completely powerless, no matter what the circumstance is, no matter what can be shown about irreparable harm, the inadequacy of legal remedies, the unavailability of attachment, the unavailability of bankruptcy, you have --

QUESTION: But it seems to me --

MR. DAYS: -- nothing that can be done.

QUESTION: That's -- that's the minimum of what you're doing, and you may be even doing more. You may be saying even if they can't go into bankruptcy, you ought to be able to attach a putative debtor's assets. And that's a -- that's a sweeping change in the law.

MR. DAYS: Well, I don't think it's a sweeping change. I think it merely is a situation where, as this

case reflects, all of the tools that would ordinarily be available to a litigant in the courts of this country are not available to the investors in this case because of the circumstances that I've just described.

QUESTION: I take it you say that the reason this isn't coming up a lot is obvious. There are attachment statutes. There are lots of other remedies, including bankruptcy, et cetera. And so, obviously -- but why isn't it -- and you're going to agree with this. What's the objection to it is what I'm looking for. The best evidence of what I'm about to say.

MR. DAYS: What is the objection to -- to this approach?

QUESTION: No. Of what I'm about to say, that the best evidence of what would happen after the merger of law and equity is what did happen after the law -- merger of law and equity, namely, Britain.

MR. DAYS: Yes, that is correct. I think in Mareva --

QUESTION: No. But there must be some objection to it because, I mean, at the moment I am tempted, which you will say, well, let's see what happens after law and equity. What did they do? But -- but are -- are there problems with it carrying that over here?

MR. DAYS: I'm not prepared to say that there

would be a wholesale transporting of the Mareva injunction approach to the United States, but I think it does say two important things. One is that the English courts are drawing from the same historical base that our courts are drawing from in terms of the nature of equity court power.

QUESTION: And you think we have the same freedom in developing new rules of equity as the -- as the House of Lords does? I mean, don't forget the supreme court of England is the House of Lords.

MR. DAYS: I understand that, Justice Scalia.

QUESTION: And we have the same -- we have the same authority to -- to revise equitable --

MR. DAYS: I think what it says is that to the extent that this Court has held and it's held for a number of years that, as long as Federal courts are applying principles of equity that were handed to the courts in 1789 in the first judiciary act, then they can continue to do that and they can determine --

QUESTION: I just found an old treatise somewhere. So, this is why -- I'll have to look it up, but I -- that said that basically you could get an injunction to prevent a fraudulent conveyance. And probably when I look that up, I'll discover, because you would have had it otherwise, that it isn't really in point or something.

But -- but I'm not sure. What was the reason that the -- the courts of equity wouldn't enjoin, say, a fraudulent conveyance where the -- the petitioner in equity said, I -- I need that injunction in order to protect my sure-to-come judgment in a lawsuit.

MR. DAYS: Yes. Justice Breyer --

QUESTION: What was the reason? Was it anything other than --

MR. DAYS: -- I -- I think the reasons aren't given. They simply were pronounced. If one looks at those cases, first of all, there's no discussion of irreparable harm. There is a clear concern about the problem of depriving a litigant of a jury trial right under the Seventh Amendment. And as Dairy Queen v. Wood says, those issues have been done away with. They're no longer problematic. Now, the court doesn't go on to say what follows from that, but we think what follows naturally from this is the power that the district court exercised in this particular case.

The second point I want to make about Mareva, however, is that the -- the courts have been able to apply that principle in a way that has not caused a floodgate to open up. They have used it very carefully and cautiously, and we think that under rule 65 and the demanding standards under rule 65, there's no reason why Federal

courts shouldn't do the same.

QUESTION: May I ask you to comment on an aspect of the case that I am just kind of puzzled about? If I understand you correctly, it is unlikely that many of these cases would arise except when a foreign debtor is -- - is in the picture. And if it were true that under the laws of the -- of Mexico, say, where you have certain transactions would be permitted that would be contrary to our bankruptcy rules and fraudulent conveyances under our rules, is it clear in your mind that a district court should be able to enjoin the performance of action -- of transactions that would be lawful under the law of Mexico although unlawful here?

MR. DAYS: Justice Stevens, that's obviously an issue that a trial judge, a Federal trial judge, would have to consider very carefully. I think that if that judge had power -- personal jurisdiction over the defendants before it, that judge could issue an order that would have extraterritorial effect requiring those defendants to do one thing or another. That's been part of our law for many, many years.

But I think what the judge did here is an example of caution under such circumstances. For one thing, he did not try to affect anything in Mexico as such with respect to insolvency proceedings. What he said was,

you may take advantage of whatever insolvency proceedings or rights are available to you in Mexico. GMD simply never availed -- insofar as I'm aware, availed itself of that possibility.

It also made clear that it went directly against the defendants and their privies not third parties, and that's been true under the Mareva injunctions as well. There's something called a Babanaft proviso which makes very clear that when a -- a worldwide Mareva injunction is issued by an English court, it's very limited so that it does not unwittingly or, indeed, intentionally affect proceedings in a foreign country.

QUESTION: Mr. Days, I'm a little concerned about your taking Erie out of the picture because you say they didn't mention it. But in the next case, I mean, we sit not for this case alone, do you agree that the way the game would be played is you look to see if rule 64 or 65 covers it, and if not, then you look to see what New York does and then -- and that would be the end of it?

MR. DAYS: Well, that's correct, Justice Ginsburg. But I -- the point I was making or should have made is that if one looks at this case and looks at every other case on this particular question of the power of Federal judges to issue a freeze order, one will look in vain in those cases as well for a discussion of Erie. The

debate has been over rule 65 versus rule 64. That doesn't mean that this Court shouldn't get to the Erie issue, but we thought it was incumbent us to point out that there were some, shall we say, missing of compliance with the rules of this Court on that -- in that regard.

QUESTION: But rule 64 says you can -- you can -- it's a permissive rule. You could do what the State makes available.

MR. DAYS: Yes.

QUESTION: Rule 65, at least Mr. Mescon tells us, is a how-to rule. It doesn't say circumstances in which you can get injunctive relief.

MR. DAYS: Yes. Well, Mr. Mescon would -- would have rule 65 be viewed as an empty vessel, but as we've indicated, it is really the embodiment of the principles of equity that have been in effect for over 200 years. And in the Erie analysis, we would say several things.

First, as we've indicated in our brief, there is no conflict between Federal law and New York law. Now, once again, this Court is going to have to resolve that issue because there's no guidance in the opinions of the lower court, but --

QUESTION: Well, I thought Judge McLaughlin, who knows something about New York law, said New York law -- you couldn't get this in New York.

MR. DAYS: Well, Justice Ginsburg, as I indicated earlier, I don't think that that particular comment can be read for the proposition that GMD invokes it for. It simply does not go to that lengths. It's about rule 64. It says nothing about what would happen under rule 65. And, indeed, we've mentioned the Zonghetti case, for example, under New York law, and it depends upon what level one wants to look at in interpreting New York law. And we have no definitive decision in that respect in this case.

But let me go beyond that and say that we think that rule 65 does control here, that there is -- if it's contrary to New York law, there's a direct collision. And Hanna v. Plumer says that under those circumstances --

QUESTION: What particular provision of rule 65 is it that you think is substantive rather than procedural?

MR. DAYS: Well, Your Honor, I -- it is not a question of whether it says explicitly that the rules of equity must apply, but what -- as we've indicated in our brief, rule 65 is a result of a development from --

QUESTION: I -- I take it then --

MR. DAYS: -- 1789.

QUESTION: I take it then there isn't anything in the rule that --

MR. DAYS: That is correct. This Court has not decided whether rule 65 is procedural or substantive for Erie analysis.

QUESTION: I thought none of the rules could be --

MR. DAYS: I beg your pardon?

QUESTION: I thought none of the rules could be substantive, because didn't Congress say in the Rules Enabling Act, you can't do things that affect substantive rights?

MR. DAYS: Well, that is -- that is correct, certainly, Justice Ginsburg. But I think that what this Court has held is that when a matter is procedural, then -- and it's expressed in Federal law and there's a direct collision between this Federal procedural rule and whatever the State rule may be, then the Federal rule controls.

QUESTION: Well, you would probably be willing to hazard this far at least, that if -- if the State in question under -- under rule 64 did not permit injunctions at all, you could still get an injunction in Federal court by reason of rule 65.

MR. DAYS: Well, in fact, rule -- under 64 --

QUESTION: I'm -- yes.

MR. DAYS: Yes. New York does permit

injunctions is what I'm saying.

QUESTION: No. But I'm saying suppose a State did not -- did not permit injunction at all.

MR. DAYS: Yes.

QUESTION: Would you be able to get an injunction in Federal court by reason of rule 65?

MR. DAYS: I would say yes, Your Honor, because as this Court has indicated, it tries to get -- and Justice Ginsburg's questions I think got to this point. What is the State interest? Well, we don't know what the State interest here assuming that the -- the defendants are right, GMD is right, about New York law.

But I think that we've set out in our brief an indication that there are several layers of New York law, and for example, where there's a showing of irreparable harm or possibility of insolvency, New York's courts do allow for this type of injunctive relief.

But we think that rule 65 is directly in conflict with what GMD asserts is the New York rule, and we think under those circumstances, it could be described as --

QUESTION: What -- what do you think rule 65 says substantively that is in conflict with the New York rule?

MR. DAYS: What New York -- what -- what rule 65

says -- and it has always been part of equity -- is when a party faces irreparable harm and has no adequate remedy at law, Federal courts remain open and available --

QUESTION: Is this -- you're not reading from the rule.

MR. DAYS: No, I'm not. I just happened to write some notes here, Mr. Chief Justice.

QUESTION: Well, but I mean, is there some sentence in rule 65 you can point to that --

MR. DAYS: I cannot point to some sentence, but I repeat, Mr. Chief Justice, that it has always been understand -- understood to be a bedrock principle of Federal equity, that when a party is experiencing irreparable harm and has no adequate remedy at law, that equity will come to the -- the support of that particular litigant.

QUESTION: Well, yes, that may be, but I think it would have to be derived from somewhere other than rule 65.

QUESTION: It wouldn't include whatever, I mean, like, you know, taking his mother hostage or something like that. Equity will come to his assistance within -- within the bounds of what equity has traditionally done. You're not saying whatever it takes, equity can do it.

MR. DAYS: No, I'm not saying that, but I am

saying --

QUESTION: Well, but that's the issue before us. Equity hasn't done this before. So, is -- is this - is this like taking your -- your mother hostage?

MR. DAYS: I certainly hope that's not the situation.

QUESTION: No, probably not.

MR. DAYS: But -- but even if rule 65 were not directly on point, we think that this Court's decisions in Byrd v. Blue Ridge Electric and, indeed, the discussion in Gasperini points to the fact that there are essential characteristics of Federal courts that need to be protected even where the Erie analysis comes into play. And we think what we have here is not merely a response of a judge to the claim of a plaintiff who has no other alternatives, it is a response to the fact that what GMD basically said to the court was, you can do nothing. Catch me if you can, but you have no power to do that. So, what we're talking about is a Federal court's ability to be able to issue an effectual judgment.

Now, this is a case where there was no defense on the merits, where the -- the defendant simply had no reason to challenge what was going on. It filed counterclaims and then basically did not oppose the dismissal of the counterclaims. And we think that --

QUESTION: Yes, but this wasn't, you know, catch me if you can. There's no contention here that -- that there was fraud going on. They -- they just wanted to do something that was convenient for the sake of their business. I mean --

MR. DAYS: There was no --

QUESTION: They didn't want to do it simply in order to avoid paying the judgment that might ensue from this. They -- they would have wanted to do it whether this -- whether this case was pending or not, wouldn't they?

MR. DAYS: Well --

QUESTION: I thought that's the agreed upon state of matters.

MR. DAYS: Justice Scalia, there is no explicit finding of fraud here. But I think that, as the court of appeals pointed out, the district judge thought that what was going on was less than benign. It has used in this opinion various characterizations, but it does talk about the duplicity of GMD and describes some of its conduct and arguments as particularly disingenuous.

Now, we're not arguing that there has to be a showing of fraud. There are many ways in which a party which as the investors here can be injured, injured in a way that means that they will never, in a real world,

recover anything from a just claim where there is no defense to a breach of contract claim. And that's the situation that we have here.

And so, the question really -- really becomes one of whether Federal courts can come to the rescue.

QUESTION: May I ask just a technical question about this, what's -- what's left here.

MR. DAYS: Yes.

QUESTION: We have a permanent injunction --

MR. DAYS: Yes.

QUESTION: -- and the possibility of a suit for damages against the bond. Is -- is there an appeal bond still in existence?

MR. DAYS: The appeal bond is still in existence. We have basically a final order on the underlying merits, namely, the breach of contract claim. We have the permanent injunction which was not appealed by GMD. And we have something called a turnover order in which the district judge basically said, the assets that you've been required to hold, now turn them over to the defendants.

I might point out that because GMD has made many efforts to distinguish your three cases in Deckert, DeBeers, and First National City, I see them as prismatic cases because apparently courts and litigants have held

them up in all kinds of ways and found different sources of light coming from them. But -- but basically this was a suit seeking damages, but it was also a suit that sought the establishment of a trust. So, if one wants to make connections between this case and some of the -- some of the earlier cases that have been at the center of this -- this debate, certainly the fact that a trust was requested -- it was denied by the district judge and perhaps properly so -- then we have an equitable claim.

QUESTION: Thank you, Mr. Days.

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

QUESTION: Mr. Mescon, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF RICHARD A. MESCON

ON BEHALF OF THE PETITIONERS

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

Several short points. On the question of whether Mareva injunctions are a good idea or a bad idea, there's been a lot written. It's referred to in the briefs. The question of how it would implicate our bankruptcy statutes, the question of how it would implicate the relationships between debtors and creditors, the question of how it would implicate our relations with other nations are all important, interesting questions that suggest that Mareva injunctions would not be a good

idea.

But in any event, whether they are or whether they are not, it is for the Congress to decide whether or not that is an appropriate extension of the judicial power in the United States because the lower Federal courts in this country --

QUESTION: I suppose the State legislature could make that decision.

MR. MESCON: And the State legislatures could do that as well, yes, Justice Stevens.

Second, the complaint in this case did not request any kind of establishment of a trust. There was a motion made, a preliminary injunction motion, that called for the creation of a trust, but that was not part of the permanent relief.

And finally, Justice Breyer, if I could turn to your question and make my third attempt to try to answer it. I hope this will be helpful.

First, in this case there was no allegation of a fraudulent conveyance. I start by saying that. All of the transfers were made in consideration of valid debts, frequently at a discount and so on.

But I think the cases that Your Honor may be thinking of relate to those in which the plaintiff had some interest, some traceable interest. I think the

phrase in the old cases sometimes --

QUESTION: That is, you don't have --

MR. MESCON: -- is follow the money.

QUESTION: You did -- I got -- picked that up from what you said.

MR. MESCON: Okay, fine.

QUESTION: You did answer the question, and it was helpful.

MR. MESCON: And finally, with regard to the question of the merger of law and equity, it is correct cases like Stainback and Gordon made clear that the merger of law and equity have made no fundamental difference on the powers of this Court acting as a court --

QUESTION: If we ruled for you, would we necessarily be disavowing the Marcos case, or are there distinctions between the two so that Marcos could stand and you could still prevail?

MR. MESCON: I cannot find the principal distinction between our case and -- the Marcos case cries out for something because the facts are very bad and the facts here are much more favorable to -- to our client, which makes this a -- a better case from our side of the table. But it's hard to think of a principled reason why the courts could do that.

If there are no further questions, thank you

very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Mescon.

The case is submitted.

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

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CASE NO: 98-231

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BY: Dona M. May
(REPORTER)