OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CALIFORNIA, Petitioner V. AMERICAN STORES COMPANY. ET AL.

CASE NO: 89-258

PLACE: Washington, D.C.

DATE: January 16, 1990

PAGES: 1 thru 49

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IN THE SUPREME COURT OF THE UNITED STATES

CALIFORNIA,

Petitioner

v. : No. 89-258

AMERICAN STORES COMPANY, ET AL.

Washington, D.C.

Tuesday, January 16, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:59 a.m.

APPEARANCES:

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REX E. LEE, ESQ., Washington, D.C.; on behalf of the Respondents.

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PROCEEDINGS

(10:59 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 88-258, California v. American Stores Company.

Mr. Horn.

ORAL ARGUMENT OF H. CHESTER HORN, JR.

ON BEHALF OF THE PETITIONER

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

This case presents the question whether Section 16 of the Clayton Act prohibits a district court from decreeing divestiture of a supermarket chain in California acquired in violation of the Clayton Act. The issue arises from the attempt of the American Stores Company, the parent to Alpha Beta, the fourth largest supermarket chain in California, to acquire Lucky Stores, Inc., the largest supermarket chain in California, the acknowledged low-price leader, for the purpose of merging those two supermarket chains into one dominant firm controlling 25 percent of every consumer grocery dollar spent by California consumers.

The district court below found that that merger almost certainly violates Section 7 of the Clayton Act. The district court found that that merger almost certainly

threatens irreparable harm to California consumers in the form of several hundred million dollars per year in -- higher grocery bills that the California customers will pay if this merger is allowed to be completed. The district court therefore entered a preliminary injunction which it found necessary to preserve the remedy of divestiture and other possible relief to prevent that harm from occurring if it found, following a trial, that indeed this merger does violate Section 7 of the act.

The court of appeals in this case affirmed both sets of findings by the district court. It affirmed the finding that this merger likely violates Section 7. It affirmed the district court's finding that this merger threatens the precise harm that Section 7 of the Clayton Act was designed to prevent. And it affirmed the district court's finding that California had made an adequate showing justifying preliminary injunctive relief on the record before it, which is the record before this Court.

But, the court of appeals held, based on its prior decision in ITT, that the preliminary injunction was overly broad, solely because the remedy of divestiture is not available, a conclusion it reached based not on the language of the statute, based not on the overriding purpose of Section 16 of the act and based on none of the policies underlying the substantive provisions under the

act. Rather, the Ninth Circuit concluded, based on a fragment of the legislative history which was -- it was presented with, that Congress did not intend solely to provide the divestiture remedy to private litigants.

We think the Ninth Circuit's approach fundamentally misinterprets the approach prescribed by this Court in cases like Porter v. Warner Holding. The inquiry ought not to be did Congress intend to prohibit a particular form of relief. The question is, by granting the injunctive powers for the courts to remedy antitrust violations, is there a clear and valid command by the Congress to preclude that relief.

QUESTION: Well, Mr. Horn, I guess the argument made by the other side in part is that at the time Congress considered this question and adopted the statute we are asked to examine, that there was generally regarded that there was a distinction between prohibitory injunctive relief and injunctive relief that required mandatory action, the so-called affirmative injunction. And their argument is that Congress had in mind only providing prohibitory injunctive relief.

Now, how do you respond to that argument?

MR. HORN: We agree with American Stores that in 1914 the distinction between prohibitory and mandatory injunctive relief was well understood by the Congress.

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And if Congress had intended to limit private litigants to prohibitory injunctive relief it would have said so clearly in the statute. That is not what it did. It provided the full scope of the injunctive relief to prevent -- to prevent threatened loss or damage by a violation of the antitrust laws. That is a long way from incorporating a distinction between prohibitory and mandatory injunctive relief.

And, by the way, the Ninth Circuit did not ground its decision on that distinction. That is American Stores' argument to support the Ninth Circuit rule. The -- - that distinction is not supportable by the language of Section 16. I think --

QUESTION: Now, Mr. Horn, the -- the order here was one to hold and operate the stores separately, in effect. Now, that is some kind of divestiture order in your view?

MR. HORN: Well, we don't think so. We think this is -- the order that was crafted by the district court is a straightforward prohibitory preliminary injunction maintaining the status quo and preserving the possibility of all available remedies following a trial.

The Ninth Circuit --

QUESTION: But that order has no purpose unless the court has the power to order divesture. I -- surely

you acknowledge that that -- that that order is beyond the proper discretion of the court if the court cannot order divestiture. Right? I mean it -- it assumes that if everything comes out a certain way, the court will order divestiture.

MR. HORN: It does preserve the divestiture. I mean, we don't dispute that.

QUESTION: And has no other purpose.

MR. HORN: I disagree. The district court could order, following a trial, a permanent hold separate of these two supermarket chains. That is a permanent injunction which would fall squarely within even American Stores' reading of Section 16. It would be prohibitory only, would order the American Stores to operate its firms independently of one another, and, for the reasons that we argued in the district court, while we don't believe that that is complete relief, we don't believe that that would be effective relief, it would nonetheless have the tendency over the long run to provide some relief from the injury threatened by this merger.

QUESTION: But the question you raised in your certiorari petition is whether divestiture is within the provision for injunctive relief in Clayton Act Section 16.

MR. HORN: That is correct, Justice Rehnquist, and that is the issue that we present because we do agree

that one of the purposes of the district court's preliminary injunction was to preserve the divestiture remedy, and we believe that the divestiture remedy falls squarely within the authorizing language of Section 16 of the Clayton Act. And I would like to turn to that.

QUESTION: Do we know that that was one of the things that the district court had in mind?

MR. HORN: I think we can fairly assume that because of the district court's discussion of the effect of the Federal Trade Commission's hold separate order from its tentative consent agreement and final approval, because Judge Kenyon said in his opinion that he was -- it would be a matter of verbal calisthenics to call this a completed merger which could not be prevented by effective injunctive relief at the permanent injunction stage following trial. And it seems clear to me that he thought he had the power to order the sale of the acquired firm if he felt, at the conclusion of a trial, that that was necessarily effective relief.

QUESTION: Let me, before you leave this preliminary point, you did preserve a second question in your cert. petition which I thought raised the question whether, on its own merits, the whole separate order could be sustained. You do, you ask -- your second question whether the court of appeals erred by reversing the

preliminary injunction and so forth and so on, which, it seems to me the question whether the whole separate order itself would be a valid form of relief, even if you could not get divestiture, is still before us.

MR. HORN: I think that is right. The question of whether a permanent injunction ordering the permanent holding separate of these two firms by American Stores would be an available remedy following trial is one of the issues we presented -- is still before you, and we believe --

QUESTION: We -- you petitioned on two questions, but I had thought we only granted on the first question. Am I wrong on that? The only question you have in your brief on the merits is divestiture being a form of injunctive relief.

MR. HORN: I understand that, Justice Rehnquist, but the petition presented two questions. The order from the Court granting that petition granted it and did not indicate a limitation to only the first. In the brief on the merits we did recast the principal issue that we think must be decided in this case. We did not intend to discard, and our reply brief preserves, the second question as well.

Turning to the language of the statute, the vehicle Congress chose in 1914 to supplement the

government enforcement effort under the anti -- nation's antitrust laws --

QUESTION: Don't you think you should have done that in your first brief, just out of courtesy to the respondents so they could have had a shot at it, too? I mean if, you know, if you were going to convert this into -- into an argument over a permanent hold separate, I would have liked to hear what the respondents had to say in writing on the point too. I frankly had thought that that was out of the case.

MR. HORN: Well, if anyone was misled we certainly apologize. That was not our intent, either to mislead or to indicate that that issue was not still before the Court.

QUESTION: You don't mention it in your statement of the question presented, and you don't mention it in your -- in your principal brief. What -- what else is one to think?

MR. HORN: Well, I think, Your Honor, that it's -- that it is also an issue which is fairly subsumed even with the divestiture issue which we did discuss, because the Ninth Circuit, in its opinion in this case, concluded that even the preliminary injunction mandating a temporary hold separate also amounted to divestiture under --

QUESTION: I agree it is subsumed, but to say it

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is subsumed is not to say it need not be argued.

MR. HORN: Well, I think all of the principles which we will -- which we did argue and are arguing today, that divestiture is available or applicable to the indivestiture portion of the Ninth Circuit's holding below and in ITT.

Turning to the language of Section 16, Congress provided to private citizens and the states the right to secure injunctive relief against threatened loss or damage by a violation of the antitrust laws. We believe this language is clear and that each of the three elements is plainly present in this case.

First, California sought in its complaint and the district court found that divestiture might be necessary to remedy the harm threatened by this merger. Secondly, California showed and the district court found that divestiture was a form of injunctive relief within the meaning of Section 16 that would prevent the very threatened loss that Section 7 was designed to prevent. And third, California showed and the court found that the injury threatened by this merger was that -- that this merger was a violation to antitrust laws and threatened the precise injury which Section 7 was designed to prevent.

Now, in light of American Stores' argument

referred to by Justice O'Connor, it is especially important to note two things about Section 16. First, Congress did not limit Section 16 relief to prohibitory injunctions. Second, Congress did not limit the Section 16 to injunctive relief directed only at threatened violations. Rather, Congress was focusing on injury to businesses and the consumers of this nation. And it was focusing on that injury whether from violations which were completed or ongoing or would occur in the future. And there is not a hint in the language or the history of Section 16 that Congress intended to limit that statute to only future violations of one of the substantive provisions.

QUESTION: Well, they argue that the language of the statute, of course, is that the relief can be obtained against threatened loss or damages.

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

QUESTION: Which could be interpreted as looking to the future.

MR. HORN: Clearly it does look to the future, because it is the future injury, but it is not limited to injury which flows only from future acts or from future violations, which is the next step of American Stores' argument. And we think it is especially important to note that Congress went out of its way to specifically

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authorize private litigants under Section 16 to enforce Section 7 of the Clayton Act.

That is important because in 1914 there was no Hart-Scott-Rodino Act. There was no Securities Exchange Act by which private litigants would learn in advance that persons were about to make acquisitions which would violate Section 7 of the Clayton Act and threaten them with injury. Private litigants would only learn about mergers violating Section 7 when they began to feel its effect, long after the stock had been purchased.

And Congress could not have intended to provide a remedy which would be wholly superfluous to the very provision of the Section 7 that it was asking Section -- private litigants to enforce. A more natural reading of the statute does focus on the threatened injury that individuals face from completed violations, or irrespective of whether the violation is complete or not.

QUESTION: One of the arguments that the respondents make is that Section 15, giving authority to the Federal Government, is cast in different and they say broader language than Section 16. What is your response to that?

MR. HORN: My first response is that it is not broader language. If anything, Section 15 of the act is the language which speaks of preventive language,

restraining violations, preventing violations. It is language which lends itself readily to the suggestion that it is directed only at future violations. But for 100 years this Court has recognized that that statute authorizes the government to seek, and the district courts to order, the relief directed at completed violations and affirmative structural relief. Section --

QUESTION: So your suggestion is that -- what was Congress' purpose in putting the authority of the Federal Government in different language than that of the private people?

MR. HORN: The principal reason for it is because Section 16, by conferring a private remedy, needed to import a standing limit, and that is why we have threatened injury. It is a standing limit which the government has never been required to show for it, to establish its rights to secure relief against antitrust violations.

Now, I would like to turn briefly, if I may, to the legislative history of the Clayton Act, since that is where the Ninth Circuit and American Stores' grounds what I think is the heart of its argument in this case. We know that Congress, in 1914, knew that Section 15 of the Clayton Act -- or the Sherman Act predecessor, had given the government the right to both prohibitory and mandatory

relief, and specifically the remedy of dissolution.

And we also know, by careful reading of the debates on the final conference bill in both the Senate and the House in 1914, that those two bodies were told by the floor managers of this bill that it provided the very same remedies under Section 16 that the Congress was providing to the government in Section 15. We know that Representative Webb in the House told the House in the final conference debate that this bill was as strong in civil remedies as it could be made. And it seems to us that that cannot be true if the most effective remedy for violations of Section 7 was not being provided. We think it is clear from those debates on the conference bill that the full scope of the injunctive powers of the courts was conferred on the courts by Section 16.

The only portion of the legislative history --

QUESTION: Excuse me, Mr. Horn, suppose -- suppose an acquisition had occurred 20 years ago that forms a new corporation that would be in violation of the Clayton Act. Would there be a cause of action for divestiture this -- at 20 years later?

MR. HORN: I think -- I think that the answer is there would be a cause of action, but whether -- the question whether it could survive the challenges that would be made under recognized equitable principles such

as Laches, clean hands and the rest, would be extraordinarily difficult in that case.

QUESTION: Well, it's a monopolized market. I mean, it turns out that in fact there is not as much competition as there might have been had that merger not occurred 20 years ago.

MR. HORN: Well, if the specific individual bringing that suit 20 years later could show that he first began to feel the effects of the behavior that that merger conferred on the offending firm, then I think he would be entitled to bring the case at that time. If that person could only show that he had begun to feel the effects 20 years ago, and sat on his rights for 20 years, then I think he is going to have a difficult case indeed. But that does not go to the availability of a cause of action. It simply goes to how the equitable principles would be applied by courts to address it.

QUESTION: But you are obliged to argue, in order to sustain your case, that whenever there is an acquisition that violates the act, it is a continuing violation that extends indefinitely into the future. Because -- because the language of Section 16 is not just injunctive relief against threatened loss, but it's injunctive relief against threatened loss by a violation of the antitrust laws. So your position is the

acquisition is not the violation of the antitrust laws. Your position is the continuing operation of the acquired firm jointly is a continuing, perpetual violation of the antitrust laws. That is necessary to your case, right?

MR. HORN: I don't think it is necessary, but I happen to agree that that is correct. It's not --

QUESTION: Why isn't it necessary? I mean, that's how the provision reads. It's a threatened loss or damage by a violation of the antitrust laws. Now, if you say the only violation here is the -- is the acquisition, that is past. It is not a threatened violation; it has happened.

MR. HORN: The acquisition has happened. But the injury that it threatens and that it causes is continuing and continuing. And that is what this district court found. That's what the Ninth Circuit found. And there is nothing to suggest, in the language of Section 16, that we must establish an ongoing violation. What we must establish is that there is ongoing injury. And that is what we have shown.

QUESTION: You, you think that what the court under Section 16 is supposed to enjoin is not the violation but the loss? Does a court enjoin loss? That is very strange. I -- you know, I would read Section 16 to say what it provides for is an injunction against

violation. And the violation is the acquisition.

MR. HORN: I don't see how you can read the statute that way, Justice Scalia, with respect. The statute directs district courts to prevent injury caused by violations. Now, I agree that that statute can be and should be read to give the district courts power to unwind an illegal act after it occurred if that's the effective way to prevent injury. But Section 16 has commanded the district courts to design relief effective to prevent injury which flows from violations, and it matters not whether they are completed, past, ongoing or threatened.

QUESTION: So, in light of your answer that the period of time that elapses is irrelevant, I take it then it is unimportant, other than for the way it may bear on the equities and the court's discretion, it is unimportant that the operational aspects of this merger had not taken effect?

MR. HORN: I think it is unimportant to the specific question whether a district court has the power to decree divestiture. I think it is not unimportant if the Court decides to, which we oppose, but if the Court were to buy into the distinction between prohibitory and mandatory. Then I think that the failure to bequeath the operational aspects of the merger makes the availability of a permanent hold separate still an important question.

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QUESTION: Well, how does that aspect of your argument work? You are asking us to see whether a merger has been completed operationally? We don't look to the Delaware law?

MR. HORN: No, I don't think you do look to the Delaware law. I don't think Delaware law can control the question of the availability of relief under Section 16.

QUESTION: Well, it controls when the merger was effective. If, by hypothesis, we are, we do draw a line between post and pre-merger filings, then isn't it Delaware law that controls?

MR. HORN: I don't think so, Justice Kennedy, because the only thing that the Delaware law did was it enabled American -- the short form merger provision under the Delaware law did was it enabled American Stores to acquire the stock which had not been tendered by the Lucky shareholders. That is what the short form merger provision does. And the hold separate order was entered in place long before -- or not long before, but before that merger law was activated by American Stores. And the hold separate order required the operational separation of these two firms, and that order was still in place when the preliminary injunction was entered.

So it seems to me that a permanent injunction restricting the completion of what the whole purpose of

this merger was the integration of the two firms, and that is what the district court found would confer on American Stores the power to charge higher prices. If that is correct, and we think this Court is bound by those findings, then a permanent order separating the two firms is available relief.

In conclusion --

QUESTION: Suppose there had been no hold separate order, but the operational aspects of the merger just hadn't taken effect yet? Would there still be authority of the court to order a divestiture?

MR. HORN: Yes.

QUESTION: So what is it that we look to? Whether or not the operational aspects of the merger have been completed?

MR. HORN: Well, in the question of whether divestiture is available, I think that is not a relevant inquiry. I think that if we are addressing whether divestiture is available, the question is does Section 16 authorize it. We believe it does, and it doesn't make any difference whether even the operational aspect has been completed.

QUESTION: But I am asking, assuming we disagree with you on that point.

MR. HORN: Then I think they would have had to

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have complete the operational aspects in order to preclude us from divestiture.

QUESTION: Is there any authority to guide us in that area?

MR. HORN: I don't think there is any authority which has specifically addressed that question.

In conclusion, I would like to highlight one important feature of American Stores' argument. There is more at stake in this case than Section 7 or the availability of divestiture in this case, because its proposed distinction between the availability of prohibitory and mandatory relief under Section 16, if that is what this Court were to decide, would have a severe impact on enforcement of all the substantive provisions of the antitrust laws, not just this case or just Section 7.

It would require this Court, for example, to conclude that a person facing injury from the inability to have access to a central facilities controlled by a monopolist, in cases like Otter Tail or Associated Press, is entitled to no relief to redress that injury. It would require the Court to conclude, for example, that persons facing ongoing injury from violations of Section 1 of the Sherman Act, in cases like Zenith and Silver, are not entitled to affirmative relief to redress the injury that they face from those violations. This Court has rejected

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those arguments in Zenith, Hazeltine, Otter Tail and Associated Press, and we think they must be rejected here.

QUESTION: Mr. Horn, what if the merger -- a merger has taken place and years later a private plaintiff comes in and seeks divestiture?

MR. HORN: Then I think that is very much like the ITT case, which was the genesis of this rule. And I think that the private plaintiff would have a cause of action and would have a very difficult burden perhaps of establish -- of meeting the equitable principles, or overcoming the equitable principles of Laches and the rest, which would entitle him to specific --

QUESTION: Well, what are the standards in your view for the private plaintiff to get a divestiture order?

MR. HORN: I think the standards are whether or not divestiture is the relief necessary to prevent the harm caused by the violation. And it doesn't make any difference whether the violation is completed or not. The question is is it necessary to prevent the injury. The district court below found in this case that it was. And that is why he entered the injunction preserving the divestiture remedy.

I would like to reserve my remaining --

QUESTION: Mr. Horn, I don't want to take your time looking for it, but when you get back up will you

tell me where in your reply brief you preserve the, or you argue the point about a hold separate? I, I can't find it at a quick look.

MR. HORN: I'll be glad to do that.

QUESTION: Thank you.

MR. HORN: Thank you.

QUESTION: Thank you, Mr. Horn.

Mr. Lee.

ORAL ARGUMENT OF REX E. LEE

ON BEHALF OF THE RESPONDENTS

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

First, just very briefly with respect to what issue is before this Court, I think that the second question presented, fairly read, does not include anything other than what the second question presented says, which is whether a preliminary injunction preserving the possibility of divestiture is authorized by Section 16. It says nothing about any hold separate agreement. The brief appears to acknowledge the correctness of the Ninth Circuit's ruling on that aspect of the case. And then, Justice Scalia, it is in footnote 1, and the way it is raised is, was this final under Delaware law. And if there is anything on which this Court did not grant certiorari it was to decide who was right as a matter of

Delaware law.

Now, the case really boils down to a simple matter of statutory interpretation. The petitioner is quite right in this respect. That in 1914 Congress expanded the package of remedies available to private plaintiffs to include equitable relief. And in that respect their relief is the same as that of the Federal Government. But the further proposition, that private remedies were to be identical to those of the Federal Government, is rejected by the statute on its face and by every rule of statutory interpretation that is applicable here. If the package of private remedies were identical, then why two separate sections? And why separate language in each of the sections? Now, we are told that the reason is that the government must -- doesn't need to show any injury, and that is just flat wrong. These are, as Mr. -- as Mr. Horn has pointed out --

QUESTION: Yes, but Mr. Lee, the government doesn't have to show injury to itself.

MR. LEE: But it does have to show some kind of injury.

QUESTION: But it doesn't have to show -- it doesn't have the standing problem that a private litigant has.

MR. LEE: That is correct. But I would observe,

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Justice Stevens, that if that was the purpose of the separate language, then it is strange -- it's a strange way to express it.

QUESTION: But you know, the separate language, it was interesting to me that neither side quoted Section 15 in the brief. And I suppose the reason is that there isn't that much difference between the two sections.

MR. LEE: Oh, but there is.

QUESTION: Section 15 talks about prevent and restrain also.

MR. LEE: The difference is this. The difference is this, and we did, in fact, with respect, quote Section 15.

QUESTION: Not the whole section.

MR. LEE: That is correct. Oh, I apologize. Yes, we did not quote the whole section.

QUESTION: You just quote the jurisdictional language. Go ahead anyway.

MR. LEE: I guess it was just because we were up against the page limits. I wondered about the same thing, but --

The crucial language -- the crucial language in Section 15 does need to be noted, and that it is, that it is proceedings in equity, and that is quite different from the language --

QUESTION: As opposed to injunctive relief.

MR. LEE: As opposed to, on the other hand, injunctive relief, and then there are two important qualifiers. One is threatened loss or damage, which does not appear in Section 15, and -- and then it goes on to say -- and then it goes on to say --

QUESTION: Well, the private plaintiff has to show antitrust injury, I suppose.

MR. LEE: Yes, but the language really goes beyond just requiring that he show antitrust injury. This is the language that is just an insuperable obstacle, in my view, for the petitioner --

QUESTION: You are reading at 16 now?

MR. LEE: Yes, in 16, and it is printed in the petitioner's brief. It is the end of the relevant language: "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity." Conduct. That's what the private plaintiff is entitled to enjoin. Not structure. Not status.

QUESTION: Yes, but Mr. Lee, you rely heavily on a distinction between prohibitory and mandatory injunctions. And what is the language in Section 15 that authorizes a mandatory injunction in your view?

MR. LEE: Just the fact that the difference in

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language --

QUESTION: The language is to prevent and restrain.

MR. LEE: That is correct.

QUESTION: And you think that clearly authorizes a mandatory injunction?

MR. LEE: Well, what it talks about is equitable proceedings or equitable relief.

QUESTION: But the relief that can be granted is to prevent and restrain.

MR. LEE: That is correct. That is correct.

QUESTION: And that is the language you say clearly differentiates one section from the other, and one allows mandatory and the other does not.

MR. LEE: Well --

QUESTION: Well, it may -- they may be different, but I am not sure which way it leans. It may -- you say it prevents the private mandatory injunction and permits the -- I would think you could argue that it is just the reverse.

MR. LEE: Well, except that the mandatory-prohibitory distinction also looks toward a difference between conduct, behavior, things that people do, on the one hand, and structure on the other, referring back to Justice Scalia's hypothetical about the corporation that

has been in existence. If you look at the legislative history, which I intend to get to in just a moment, it is full of examples. The Rogers -- the Rogers-Carlin exchange, the Floyd-Untermeyer exchange, about the difference between on the one hand prohibiting conduct, things that may happen in the future. And they specifically refer to why not give them a mandatory injunction; they don't have it now. That is in the Rogers exchange. On the one hand, and structure, and structure on the other.

QUESTION: Well, but does that mean there is no jurisdiction to dissolve a patent pool, for example, or to require the stock exchange to change its regulations and require fair hearings and that sort of thing?

MR. LEE: Let me say two things in that respect, Justice Stevens. The first is we think that there is jurisdiction to dissolve a patent pool, that you can do that with a prohibitory injunction. Certainly there is nothing in the Zenith case, and certainly nothing in the Silver case, that would reject that.

The second point that I want to make is that this distinction between prohibitory and mandatory is part of a larger distinction that is really the one that is the ultimate distinction in this case, between conduct on the one hand and structure on the other. And the one thing

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that is undeniable is that in Section 16 Congress referred to threatened conduct that will cause loss or damage.

Now, the only answer, the only answer that the petitioner has to that language is that what they really meant to do by that provision was to incorporate the familiar -- requirement of the familiar restriction that you have to show that you are going to suffer injury that is not -- that is not redressable by -- excuse me, for which there is no other adequate remedy. And I have two responses to that. In the first place, that just isn't what the -- that is the only language, that is the only explanation they have for that threatened conduct language. And that just isn't what it says. If Congress had intended by that language to prohibit -- to incorporate the familiar equitable requirement of inadequate other remedy, then Congress would surely -- would have said so. The language it used, threatened conduct that will cause loss or damage, just doesn't say that.

Moreover, by its express language, Section 16 does incorporate the entire package of equitable remedies, by this language: "when and under the same conditions as injunctive relief against threatened conduct is granted by courts of equity."

QUESTION: Let me just be sure I understand you.

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The threatened conduct, what is the threatened conduct that would justify a dissolution of a patent pool? Why is that different than the dissolution of a business enterprise?

MR. LEE: Excuse me. I guess I misunderstood Your Honor when you said the dissolution of the pool, as opposed to -- I think, while that is not this case, I think that the dissolution of the pool, the actual dissolution of the pool, as opposed to what the Ninth Circuit referred to as symptomatic relief prevented the individual acts from occurring, could well be.

QUESTION: Well, what is your position -- I am not really sure I understand you. What is your position, does a Federal court having an antitrust violation having been proved and thinking it is necessary, one, say in a patent case to dissolve a patent pool, or in a motion picture case to set up competitive bidding instead of having clearances, does the court have the power to do that or not?

MR. LEE: Well, I cannot see any instance in which prohibitory relief would not be adequate to prevent any offenses --

QUESTION: Well, that's not an answer to my question.

MR. LEE: -- by a patent pool.

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QUESTION: All you're saying is it is prohibitory relief to -- you just, you enjoin the continuance of the patent pool.

MR. LEE: That's right. That's right, and any acts --

QUESTION: Well, that is just a play on words, isn't it?

QUESTION: Can't you enjoin the continuance of the combined operation of these two stores?

MR. LEE: The Ninth Circuit has acknowledged that there is the power to enjoin the actual acts, the symptomatic relief. But what you can't do, and where it really makes a difference, is in the merger case. I don't think it does in the patent pool case.

QUESTION: Excuse me, where --

MR. LEE: In the merger case, to actually dissolve the structure itself.

QUESTION: With a patent pool, Mr. Lee, isn't there a continuing agreement, which is what the -- you know, what the Sherman Act and the Clayton Act are ultimately directed against. Combinations and agreements. Isn't there a continuing agreement to leave the patents in a pool?

MR. LEE: And you simply prohibit --

QUESTION: That is the violation. And that

violation can be enjoined.

MR. LEE: That is correct.

QUESTION: But when there has been an acquisition of a company, there's no further agreement that is keeping that acquisition in effect.

QUESTION: Well, what about --

QUESTION: It's in effect as a matter of property.

MR. LEE: Exactly.

QUESTION: What about an injunction against continuing to vote the stock of the subsidiary?

MR. LEE: Well, as far as -- well, I think that is different. In the case of the patent pool you simply prohibit the future enforcement. Now, insofar as voting the stock is concerned, I think in most instances that could also be handled through a prohibitory injunction.

QUESTION: You could. You're saying that would be a permissible form of relief to say that you may not appoint the managers or vote the stock in the acquired company? That is pretty close to divestiture.

MR. LEE: That is pretty close to divestiture. That is pretty close to divestiture.

QUESTION: Well, a year after a merger takes place, a plaintiff who thinks he has been hurt by the merger that he thinks violated antitrust laws can sue and

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get some damages, I suppose, if he can prove antitrust injury.

MR. LEE: Of course he can. Of course he can.

QUESTION: And I suppose then that the day after the merger there is or was threatened loss or injury.

MR. LEE: That is correct, and those also can be --

QUESTION: And you say that he can't get an injunction -- he can't sue to get an injunction the day after the merger on account of the threatened loss or injury?

MR. LEE: Well, he can get an injunction to sue against threatened loss of injury, and he can sue on account of conduct. But the distinction that is drawn --

QUESTION: Well, can't he -- I take it you say though that even though he can prove the day after the merger that he is really threatened with loss or injury, you cannot avoid -- you cannot get an injunction to avoid that loss or injury by getting a divestiture order.

MR. LEE: By -- strictly from the existence of the --

QUESTION: Loss or injury.

MR. LEE: -- of the --

QUESTION: You have to wait to get hurt.

MR. LEE: That is correct. And if there is one

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thing that comes shining through the legislative history, and I --

QUESTION: You must wait to be put out of business.

MR. LEE: Not wait to be put out of business, but wait for --

QUESTION: Well, why, you do have to wait. You can't get an injunction, because this merger is going to do exactly what you fear. And a year later you can get all the money you want for being put out of business. But you cannot get an injunction against it.

MR. LEE: What you can get an injunction against is specific practices, such as improper pricing, perhaps even undue concentration in the --

QUESTION: Well -- well on that basis you will say, on that basis you would say the merger just isn't illegal, unless you get some other injury.

MR. LEE: I am not sure I understand.

QUESTION: Well, you -- I would think if, even a year later then, that he would have some trouble recovering, unless he proves some special practices that occurred from the merger.

MR. LEE: That is correct. That is correct.

Justice White --

QUESTION: Could the state have gotten an

injunction, a prohibitory injunction before the merger took place?

MR. LEE: Then -- then it would have been -- then they would have been enjoining conduct. They would have been enjoining an act, which was the act of going ahead.

QUESTION: But some of these distinctions are really a little bit evanescent, I think. As someone has pointed out from the bench, I forget who, a distinction between a prohibitory and a mandatory injunction can frequently be reversed just by changing the -- changing the syntax. And your difference is between conduct and structure. One may be enjoined, the other not? I think that's a rather -- blurred at the edges at least, isn't it?

MR. LEE: Well, I think both of them, Mr. Chief Justice, are helpful, and the conduct-structure distinction is one that is most clearly demonstrated not only by the language, because it does talk about conduct, but also by the legislative history. Time after time this very point was made in the course of the legislative history. Probably the most noted example was the exchange between Messrs. Floyd and Untermeyer, in which Mr. Floyd, who was one of the three sponsors of the bill, said we did not intend by Section 16 to give the individual the same

power to bring a suit to dissolve the corporation that the government has.

QUESTION: Well, there is a distinction, perhaps, between dissolution and other divestiture orders, and maybe, maybe you have put your finger on what it was that really bothered the legislators. But perhaps it didn't bother them that there would be an order of the type involved in this case.

MR. LEE: That is the argument that our opponents make, Justice O'Connor. I submit that a careful and objective reading of not only the legislative history but what was happening in the country at the time, just completely dispels that proposition. There are so many evidences that the word that was used at that time for any -- in Justice Brandeis' -- Mr. Brandeis' words at that time, change in the status of the corporation was dissolution.

The most frequent example that the legislators used in referring to what they meant by dissolution was the Standard Oil case. And in the Standard Oil case, and I am reading now from pages 78 and 79, the language is very clear. It commanded, referring to the district court, the dissolution of the combination. Dissolution. And therefore in effect directed the transfer by the New Jersey corporation back to the stockholders of the various

subsidiary corporations. What they did in the Standard Oil case was a classic example of divestiture. They referred to it as dissolution.

QUESTION: But that was a massive divestiture in Standard Oil. It wasn't just divesting of one acquisition. There were just a number of other companies involved, weren't there?

MR. LEE: That is correct. But, Mr. Chief Justice, I was responding to Justice O'Connor's question about the distinction between dissolution and divestiture. And the point is that dissolution is the word that was used at that time to describe any kind of change of status. The --

QUESTION: My point was that one could have described the Standard Oil decree as dissolution without feeling it would necessarily embrace a much smaller divestiture.

MR. LEE: Possibly, except that though -- the only difference was the scale. One was simply larger than the other. And I think any doubt on that subject is laid to rest by what is probably the closest case to being on point that we have, which is, to be sure, a Second Circuit case, but I offer it for a couple of reasons. It was the Cambria Steel case written by Judge Hand a short time after the Clayton Act was passed, and it involved a case

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that in no respect is distinguishable from this one.

Cambria Steel was a small steel company that had been acquired by Bethlehem.

QUESTION: How was it acquired?

MR. LEE: I'm not sure that the opinion discloses that, Justice White, whether it by stock or asset acquisition.

QUESTION: What was it here?

MR. LEE: Excuse me?

QUESTION: What was it here? How was -- how did this merger take place?

MR. LEE: How did -- oh, in this case it was a stock acquisition.

Minority shareholders of the Cambria company, in the language of the court, sought to unravel the transaction and restore to the Cambria company -- here is the answer, the assets so taken, so it was an asset acquisition.

QUESTION: All right.

MR. LEE: And what Judge Hand said was that this simply wasn't an injunction suit within the scope of Section 16. He says, and I quote, the suit at bar, whatever it is, is not a suit for an injunction. Indeed it is really a suit for the dissolution of a monopoly pro tanto. And then this line: "I cannot suppose that anyone

would argue that a private suit for dissolution would lie under Section 16 of the Clayton Act."

QUESTION: Well, Mr. Lee, in your view the acquisition of control that would amount to an antitrust violation of another company, if it has been completed, could never be attacked in court by a private plaintiff or by the state acting under the same statute, if it has already occurred.

MR. LEE: That is correct.

QUESTION: And, of course, most of these things are handled before the state or a private person would know it is going to take place. So you would just cut off that remedy all together.

MR. LEE: Yes, Justice O'Connor, and let me say a couple of things in that respect. The first --

QUESTION: You don't think that is what Congress had in mind?

MR. LEE: Oh, I have no -- yes, I really do think that's what Congress had in mind. Now, whether it was good policy or not is a debate that has raged from 1914 through 1975, the Hart-Scott-Rodino Act. Brandeis was solidly on one side and Senator Nelson solidly on the other. It is not an easy policy question. And as you can see from the amicus briefs that have been filed here, it involves complex issues not only of antitrust policy, but

labor as well.

But the fact of the matter is that is exactly what Congress intended. And I would simply invite the Court to those exchanges between a variety of people, not only Floyd-Untermeyer but also the Brandeis-Carlin exchange.

Once the --

QUESTION: This was in hearings.

MR. LEE: This was in hearings.

Once the --

QUESTION: Not on the floor. How about in the Senate?

MR. LEE: On the Senate side there were no hearings, Justice White.

QUESTION: Well, so much the better maybe.

(Laughter.)

MR. LEE: The one thing that happened on the Senate side that is significant is the introduction of this Reed Amendment, which clearly would have given the -- excuse me, would have given the states the power that they seek here, and the Reed Amendment was rejected.

Let me just mention briefly, let me just mention briefly the -- the statement by Mr. Brandeis. The Clayton Act was a major initiative of the Wilson Administration. And this Boston lawyer, Louis D. Brandeis, appeared on

behalf of the Wilson Administration. And at this time the exchange with Messrs. Carlin -- excuse me, with Messrs. Untermeyer and Rogers had already occurred, in which they had said you ought to give more. And specifically would it not have helped you if you could have brought suit for the dissolution of the trust? This section only gives you injunctive relief.

And then Mr. Carlin said to Mr. Brandeis it has been suggested to us that we ought to give the individual the right to file a bill in equity for the dissolution of one of these combinations, the same right which the government now has. And here was the response by Mr. Brandeis: "It seems to me that the right to change the status, which is the right of dissolution, is a right which ought to be exercised only by the government, although the right for full redress against future wrongs is a right which every individual ought to enjoy."

Now, a couple or three points. One is that this statement, like Judge Hand's, shows, in answer to Justice O'Connor's question, that the word that they used in those days was dissolution, and indeed, in the second DuPont case, this Court observed just exactly that. That dissolution and divestiture are largely interchangeable. They have been over the years, and we so regard them.

The second point, and even more important, is

that regardless of whether you call it dissolution or divestiture or anything else, it is the change in status that we are talking about. And there is no question that there is a difference in that respect between what the Federal Government can do and what everyone else can do.

QUESTION: You're perfectly content with saying that it is a reasonable reading of Section 15 to say that government can get an injunction requiring divestiture?

MR. LEE: Oh, of course. Of course the government can, under --

QUESTION: Well, but do you have to say it is a fair reading of the language.

MR. LEE: Of course I do. Of course I do. And it is a fair reading of the language, because the language is not only broader, but even more important, it is not limited -- it does not have in it the word conduct. And you do not have behind it the kind of legislative history that you have here.

Again, I repeat, it was a debate that raged, it was an intense debate. Should we -- one of the metaphors that was used was grinding the poor defendant between the upper and the nether millstones of the Federal enforcement on the one hand, and then once he finished with that, then he has to go through another gauntlet. There is no question they knew what they were doing. And what they

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were doing was exactly what these various congressmen responded to these New York lawyers, that they weren't going to give them: the same relief that the government had.

That, in opposition our opponents refer to one legis -- one piece of legislative history in which Senator Nelson did use the words same relief. What he was really saying was same injunctive relief. In fact, those were his exact words. The same injunctive relief. Senator Nelson in fact did not take the position, and he knew that the relief was not the same. In any event the argument proves too much because no one contends that the two are the same. If they were the same, then the states would have criminal prosecutorial authority, which they don't have.

And later on, in connection with another statute -- excuse me, with another section of the statute, Senator Nelson, who would have liked private individuals to have had this broad remedy, made that precise point. Doesn't it strike you, he said, as a bit unfair that Section 16, to which he specifically refers, gives this right of injunctive relief, but only the Federal Government has the broader powers.

Just a word about the relevance of Hart-Scott-Rodino. It was an amendment to the Clayton Act, and as a

consequence the legislative, the legislative history of the Hart-Scott-Rodino Act, under this Court's decision in Bell v. New Jersey, is persuasive. By that time we were using the word divestiture in our lexicon, in 1976, and there was a proposal that state attorneys general be given this divestiture remedy. And Chairman Rodino, who of course was one of the sponsors of Hart-Scott Rodino, said in the clearest words which the English language is capable, the state attorneys general should not be authorized to file parens patriae suits seeking divestiture.

Now, my opponent's answer to that, his only answer, is that Chairman Rodino's views were really rejected later on by Senator Hart. The citation that they give simply do not support that proposition. Senator Hart was not saying anything at all about divestiture. What he said was that the courts, that the states do have the authority to bring parens patriae suits, and that that is sufficient and cites in support Georgia v. Pennsylvania Railroad.

I invite the Court's attention to Georgia v. Pennsylvania Railroad. It is a decision by this Court, and of course obviously, if it had resolved the divestiture issue, then we would not be in this Court, because it would be dispositive. All it said was that the

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states do have the authority to bring parens patriae suits. That is what Senator Hart said was sufficient. He did not say anything about divestiture. And the only statement on that comes from Chairman Rodino.

Just one final point. This case does not implicate any issues of federalism. The policy issues for the State of California are of course to be resolved by the California legislature. And if the California legislature really wants its own attorney general to have this kind of power, then it should be for the California legislature to make the judgment. Those are just as difficult policy issues today as they were in 1914, as they were in 1976, but they should be resolved in the initial instance by the California legislature and not by the attorney general.

Mr. Chief Justice, unless the Court has questions I have nothing further.

QUESTION: Thank you, Mr. Lee.

Mr. Horn, you have four minutes remaining.

REBUTTAL ARGUMENT OF H. CHESTER HORN, JR.

ON BEHALF OF THE PETITIONER

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

Justice Scalia, in response to the question you asked me, we refer to the second issue at footnote 1 of our reply brief, because that footnote discusses whether

or not this Court can -- must reverse the Ninth Circuit's decision below, even if it agrees with American Stores, because the preliminary injunction which Judge Kenyon entered is indisputably prohibitory and it preserves an indisputably prohibitory permanent relief of a permanent hold separate order.

QUESTION: Very subtle.

MR. HORN: Pardon?

QUESTION: That's a very subtle way of making the argument.

MR. HORN: In response to several questions from several justices, I think it is fair to say that American Stores agrees that this Court has decided, in cases like Zenith and Silver, that affirmative injunctive relief is available under Section 16 of the Clayton Act. And if they are not willing to go quite that far, they clearly agree that whatever that relief was it could be characterized as prohibitory. It seems to me that this case is just like those cases in that respect.

The district court below, following a trial, could readily frame a prohibitory injunction prohibiting American Stores from holding the stock of Lucky or the assets of Lucky acquired in violation of Section 16 of the Clayton Act.

It is probably worth remembering here that when

this Court decided United States v. DuPont one of the things that this Court noted is that indeed Section 7 does prohibit not only the acquisition but the continued holding of assets acquired in violation of Section 7, and that is how the decree in the second DuPont decision was actually framed.

And -- so the difference between prohibitory relief and mandatory relief is not going to get American Stores very far down the road. And it's a debate which really ought to be beside the point under Section 16. Section 16 asks the district court to prevent injuries that face individuals and businesses from violations --

QUESTION: So you think the big debate was just a lot of hot air before the Congress about whether private parties should have the power to dissolve a combination?

MR. HORN: No, I don't think that was a lot of hot air at all, Justice White. The debate which American Stores refers to --

QUESTION: Well, you could say well that's a prohibitory injunction, continuing to have the combination.

MR. HORN: But the debate in the Congress in the early stages of the hearings before the Clayton subcommittee did not speak to the difference between prohibitory and mandatory relief, except with a minor

exchange where he was urging that mandatory relief ought to be available. And it is important to note about those early exchanges that they were discussing a much different bill than was ultimately introduced into the Congress and passed by that Congress.

Section 13 of the bill that was being discussed in those exchanges between Representatives Floyd and Carlin and those witnesses was going to amend the Sherman Act. And it was not going to add the new substantive provision which is found in Section 7, which was ultimately added by the Congress. That debate focusses on a proposed amendment giving private litigants the right to seek injunctive relief against the trusts, the restraints of trade violations under Section 1 and Section 2.

QUESTION: To dissolve a monopoly.

MR. HORN: And that is precisely right. And that is what, that is what Mr. Brandeis was saying. He was saying that the ability to attack these nationwide trusts, like the ones which Congress was so upset about in the decrees in Standard Oil and American Tobacco, that kind of attack really belonged in the hands of the Federal Government. But no one at that point was yet debating what relief was available to enforce Section 7 of the Clayton Act, because that bill was a separate bill which was not being discussed and would not have involved

Section 13. The separate bill was going to add a whole new provision of law not in the Sherman Act, creating this new substantive liability.

Now, it is important, I think, to again remember that the bill that ultimately came out of the Congress now --

QUESTION: Well, that may be -- that may be the case, but if you say that Section 16 doesn't give authority to dissolve a trust, how come it gives authority to order divestiture that's in -- that violates Section 7?

MR. HORN: I don't say that Section 16 doesn't give authority to violate the trust. I say that Congress changed its mind from the early debate in February of 1914 to the debate on the conference bill when Senators Nelson and Shields made it so perfectly clear.

QUESTION: Okay.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Horn.

The case is submitted.

(Whereupon, at 11:59 a.m., the case in the above-entitled matter was submitted.)

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