ORIGINAL

In the

Supreme Court of the United States

JAMES JEFFERSON McLAIN, ET AL.,

PETITIONERS,

V.

REAL ESTATE BOARD OF NEW ORLEANS, INC., ET AL.,

RESPONDENTS.

No. 78-1501

Washington, D. C.
November 6, 1979

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IN THE SUPREME COURT OF THE UNITED STATES

JAMES JEFFERSON McLAIN, et al., Petitioners,	:	
v.	:	No. 78-1501
REAL ESTATE BOARD OF NEW ORLEANS, INC., Et al., Respondents.	:	

Tuesday, November 6, 1979
Washington, D. C.

The above-entitled matter came on for argument at 1:54 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

RICHARD G. VINET, ESQ., 144 Elk Place, Suite 1202, New Orleans, LA 70112; on behalf of the petitioners.

FRANK H. EASTERBROOK, Deputy Solicitor General, Department of Justice, Washington, D.C. 20530; as amicus curiae on behalf of the petitioners.

HARRY McCALL, JR., ESQ., Chaffe, McCall, Phillips, Toler & Sarpy, 1500 First NBC Building, New Orleans, Louisiana 70112; on behalf of the respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-1501, McLain against Real Estate Board.

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

ORAL ARGUMENT OF RICHARD G. VINET, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This is an anti-trust suit. It was brought seeking triple damages and an injunction against the real estate brokers in New Orleans, Louisiana.

The plaintiffs are buyers and sellers of one- to four-family homes in New Orleans. They bring this suit on their own behalf, and also as a class action.

The defendants are two local professional associations of realtors, six real estate firms who variously dealt with the plaintiffs in their own transactions; and finally, a defendant class consisting of all the real estate agents and brokers who operated in the New Orleans area during the limitation period of the suit.

Your Honors, the suit charges price fixing in commissions for the sale of real estate brokerage services. The effects on the plaintiffs are alleged to be that the prices of homes are artificially raised to buyers and/or that the proceeds received by sellers, when they sell their

homes, are artificially reduced.

The factors of interstate commerce involved in the transactions are: the financing aspects of the sales; the title insurance aspects of the sale; and also, governmental loan guarantees through the Federal Government.

Defendants, after the suit was filed, moved to dismiss the case on the grounds that it failed to state a claim upon which relief could be granted, or that alternatively, any claim that it might have stated didn't arise under either Federal question jurisdiction or under diversity.

The realtors state that their activities are not in interstate commerce, and their activities don't substantially affect interstate commerce.

The suit was filed in October of '75, and in the fall of '76, the trial court ordered discovery to be had on the jurisdictional issue. Specifically, the discovery was designed to show whether or not there was a substantial involvement of interstate commerce in the real estate transactions; and secondly, whether brokerage--or real estate brokerage--was a necessary and integral part of the transaction which was, in the words of the trial court, inseparable from its interstate aspects.

Pursuant to the discovery order, depositions were taken and submitted to the court. Thereafter, the case was dismissed. The trial judge failed to find a sufficient nexus

with interstate commerce to justify the exercise of Federal jurisdiction.

The judgment was later affirmed in the Fifth Circuit Court of Appeals, and this past May, this Court granted certiorari.

May it please the Court, Your Honors, the allegation of the complaint, and the evidence that we developed from discovery, support the exercise of anti-trust jurisdiction in this case.

Because these transactions involve land does not limit the application of traditional jurisdictional analysis to the facts that we alleged and the facts that we adduced.

Realtors don't sell land, Your HOnors; they sell service, or more properly, an array of services which are indispensable to the buyer or seller of homes in today's real estate markets.

QUESTION: Mr. Vinet, let me make sure I understand your contention.

It isn't that you should have had more of an opportunity to present evidence on the interstate commerce or affecting interstate commerce aspects in the district court. It's that as a matter of law the district court should have ruled in your favor?

MR. VINET: I'm not sure that I understand Your Honor's question.

I think we've raised the point in the Fifth Circuit that we had no discovery on the issue, or the merits, the price-fixing issue. And we've contended that the--that the ultimate fact of the lawsuit--the price-fixing is also a jurisdictional fact.

That wasn't the point I was making just now, however, Your HOnor.

QUESTION: What is your position with respect to the necessary connection with interstate commerce, which the trial court found was lacking?

Is it that you didn't have enough chance to develop your case on that, or that the trial court, affirmed by the Fifth Circuit, simply was wrong on the evidence before it?

MR. VINET: It's a little bit of both, Your Honor. But essentially, I think the trial court interpreted this Court's decision in Goldfarb to require something alone the lines of an in-commerce showing in order to justify jurisdiction.

That's why he talked about necessary and integral, and inseparable from the interstate aspects. I think he was looking for some sort of a procedural relationship, much like--you've got to have a title--

QUESTION: So your answer is that the district court on the facts before it should have ruled for you?

MR. VINET: Yes, Your Honor, but not because it

found facts that didn't exist, but because it applied a standard that wasn't broad enough.

QUESTION: Well, that's--but on the facts, if it had applied the right standard, you should have won?

MR. VINET: That's exactly right, Your Honor.

QUESTION: And by the right standard, do you mean the standard that--or something like the standard that was applied in Goldfarb?

MR. VINET: Your Honor, Goldfarb is distinct from this case. Goldfarb--well, yes, in the sense that Your Honor cited the opinion by saying that, were they engaged in interstate commerce, or did their activities substantially affect interstate commerce?

Well, I believe that Your Honor found, in fact, that they were more engaged in interstate commerce than they were affecting interstate commerce, in the sense of the Mandeville Island kind of cases.

It's more like Yellow Cab, where the ride between the train stations was part of the journey. That's what the title lawyers were like.

Now, we're saying the realtors aren't like that. They're a little bit different. Their effect on interstate commerce is more of an economic thing; it's more of a structural way that the real estate market functions. In fact, I was just going to talk about that, about how

the real estate market actually works.

QUESTION: But that's basically a factual question. You have a factual finding by the district court, affirmed by the Court of Appeals, against you on that point, don't you?

MR. VINET: We have a factual finding to the effect that real estate brokers don't stand in quite the same relationship to the transaction as title lawyers do, Your Honor. And in that sense, we lost the case. Because I believe that we--the district court and the Court of Appeals expected us to show that.

But--

QUESTION: You say they should have applied a different standard?

MR. VINET: That's it, Your Honor. They should have applied an affectation of commerce standard as opposed to an in-commerce standard, is essentially what we're--

QUESTION: And supposing we agree with you? Do we then send the case back for those courts to apply the--what we decide is the proper standard?

MR. VINET: On, no, Your Honor, I believe that the evidence we've developed, taken in conjunction with the allegations of the petition, for which there was neither evidence nor discovery, would support a jurisdictional finding. And I believe that Your Honors could find that in fact

jurisdiction does exist on this record, as it exists right now in terms of the evidence.

QUESTION: Well, didn't we say in the Rex case a couple years ago, written by Justice Marshall, that summary judgment rulings, rulings on a question as a matter of law, were not favored in this kind of a case?

MR. VINET: Indeed you did, Your Honor; that's very correct.

QUESTION: And what you're asking us to do is to make--to find a summary judgment, is to enter summary judgment here.

MR. VINET: Well, no, Your Honor, we weren't seeking a summary judgment. The realtors were in the sense of that.

On the jurisdictional issue, Your Honor, all we're asking you to say is that we're entitled to go back and have a trial.

QUESTION: Yes, but weren't there factual disputes even on the jurisdictional issue?

MR. VINET: I don't know if there were factual disputes, Your Honor. The question was simply what facts we had to show.

If we had to show that real estate brokers are like title lawyers, and that you can't get along without a real estate broker, well then, no, we didn't show that, because that's not true.

If we had to show that what a realtor does in bringing together a buyer and seller is a necessary concomitant of the real estate market just as finding your title--finding your financing in interstate commerce, and that without both of those elements working together, you don't have a real estate market; if we had to show that, I think we have shown it, and I think that justifies the Court exercising jurisdiction.

QUESTION: You say your opponents in effect concede that? What you just said? There isn't any factual dispute about it?

MR. VINET: Well, I think that they would--they have, in fact, testified that the majority of real estate transactions, in fact 60 percent of real estate transactions in New Orleans--I'm sorry, in a majority in New Orleans, they testified, are handled through real estate brokers. Nationwide the figure is about 60 percent.

I think that from that we can deduce that 60 percent of loans are granted, 60 percent of title policies are written, 60 percent of VA and FHA loans are granted, because somehow, somewhere, a real estate agent has performed his function of getting a listing, finding a buyer, bringing them together, and confecting a purchase agreement.

I think that that--that's a conclusion that can amply be drawn from the fact that the real estate agents--

QUESTION: What is the--what is the brokerage rate in--

MR. VINET: In New Orleans, Your Honor, it's 6 percent.

QUESTION: And you're essentially claiming that--that the absence of competition between real estate brokers has an affect on interstate commerce?

MR. VINET: Indeed we do, Your Honor.

QUESTION: In terms of--absence of competition in terms of rate?

MR. VINET: Well, Your Honor, we can't--

QUESTION: Price-fixing, price-fixing among brokers in terms of their brokerage rate, their charge, the 6 percent, affects interstate commerce; that's your--

MR. VINET: Yes, Your Honor, we takenthat position. We say that the 6 percent itself quantitatively affects movement of resources in commerce--

QUESTION: And if they were competing, if they were free, if each individual was free to reduce his rate, what would happen?

MR. VINET: Well, Your Honor, I think the housing prices would largely dgo down, particularly in the houses which are the easiest to sell. I mean, it would seem to me that not all houses are equally difficult to sell. And the easier ones to sell, you could sell them cheaper.

QUESTION: And therefore, what? If the price went down on a house, itwould sell even more easily, and it would--I suppose it would sell more easily to out of State buyers, just like it would sell more easily to in-State buyers.

MR. VINET: That's correct, Your Honor. But the fact is that the buyers--the buyers would have to finance relatively less of the purchase price; the sellers would receive relatively more--

QUESTION: Well, how would the price going down for a particular house affect the mortgage market?

MR. VINET: Okay. Well, Your Honor, if you assume that--in the--

QUESTION: I mean the interstate--getting money interstate for loans. That's what your point is.

MR. VINET: Okay. Well, Your Honor, let's assume that the price goes up because of the price-fixing. If the amount of money that you finance on the home is equal to, say, 80 percent of the appraised value; and the downpayment is equal to the difference between the amount that you can finance and the amount that the home costs, it seems to me that--

QUESTION: It's going to be harder to finance?

MR. VINET: That's it, Your Honor. And some people may even be driven out of the market altogether, and won't

participate in any of the interstate transactions to obtain money at all if the price goes too high as a result of price-fixing.

It's the presence of an artificial and non-competitive element of the cost of the house.

But--

QUESTION: Do the--do they supply the brokerage rates for raw land? Say there's a--I suppose there are lots for sale in and around New Orleans?

MR. VINET: Yes, Your Honor. No, we are dealing here only with residential real property; in other words, property with houses on it, one- to four-family. We have no standing, I think, to talk about raw land or commercial--

QUESTION: Or even just lots that are--I suppose real estate brokers handle those, don't they?

MR. VINET: Real estate brokers handle those, but I don't know--

QUESTION: They're not involved in this case?

MR. VINET: No, sir, it has nothing to do with the case.

Mr. Justice Powell?

QUESTION: Yes, may I ask this question: Did the discovery order of the district court limit your depositions to evidence relating to in-commerce?

MR. VINET: Yes, Your Honor, that's true; that's

correct.

QUESTION: Did you object to that?

MR. VINET: Yes, Your Honor, we did. We have always taken the position that--

QUESTION: It involved it?

MR. VINET: I beg your pardon?

QUESTION: You wanted evidence with respect to the effect on commerce as well as in-commerce?

MR. VINET: Yes, Your Honor.

QUESTION: And the district court refused to allow you to introduce that evidence?

MR. VINET: Well, yes, Your Honor, we were not able to go beyond the scope of trying to bring the case within the factual pattern of Goldfarb.

QUESTION: Which was in-commerce?

MR. VINET: Which--well, it turns out to be that way. I don't think any of us really talked about it in terms of in-commerce or affectation of commerce at that time. But--

QUESTION: The depositions you introduced seem to me to address primarily the theory of in-commerce rather than the effects upon commerce.

MR. VINET: That's correct, Your Honor. And, well, you can find it in the Fifth Circuit opinion, for example, they took the position that the question of whether they fix prices is a separate analytical concept divorced from the

threshold jurisdictional issue. And that's what we faced all along. We were stopped at the threshold, and couldn't get beyond that to the merits of the suit.

I believe that the ultimate facts in this case are jurisdictional.

QUESTION: Well, Mr. Vinet, there's no indication in the Court of Appeals opinion, which I just read over, that your claim was that you were limited in your deposition to showing only whether or not this was in commerce. And the Court of Appeals opinion discusses at great length both the question of whether or not the defendants' activities were in commerce, and whether or not their activities affected commerce.

MR. VINET: If Your Honor please, I don't think we were, at that time, characterizing Goldfarb as an in-commerce as opposed to an affection--

QUESTION: Well, no, I'm referring to my brother Powell's question as to whether or not your grievance is that you were limited in your discovery.

MR. VINET: We--that is not our primary grievance.

QUESTION: That's not what was dealt with in the Court of Appeals opinion at all.

MR. VINET: Oh, yes, Your Honor, there is in fact a section--

QUESTION: Well, they deal--they talk about the

fact--

MR. VINET: Right.

QUESTION: --of price-fixing, the fact that this may be a gross price-fixing doesn't affect the jurisdictional question at all.

MR. VINET: Well, that's the position that they take. And we say that that's wrong.

QUESTION: Well, I know. But that's a different subject. That subject is somewhat different from my brother Powell's question.

MR. VINET: Well, Mr. Justice Brennan, the rest of that-

QUESTION: My name is Stewart.

MR. VINET: Oh, pardon me.

QUESTION: That's all right; it's a mirror image.

[Laughter.]

MR. VINET: Mr. Justice Stewart, what I was going to say--Your Honor, we took the position throughout in the Court of Appeals that if we could have had discovery to show that these realtors--and produce evidence that these realtors engaged in price-fixing, we could have beated the jurisdictional issue.

That became important when the Fifth Circuit recharacterized the dismissal as a factual tack on jurisdiction whereby the allegations of the petition were no longer accorded the presumption of truthfulness. And that's what

happened to us with that contention.

QUESTION: I see.

MR. VINET: Because at that point we could no longer even rely on our complaint as providing a factual basis for the court to rule on.

Your Honors, we would just--earlier I mentioned the primary function of the broker is bringing buyer and seller together. And in trying to show the relationship between the local activity of brokerage and the interstate activity of financing and title insurance as being necessary concomitants of the local market and the land, I would like to suggest some of the other things that brokers do.

Not only do they secure the listing and find you a buyer and take care of the purchase agreement, they counsel purchasers. They know about the money market. They counsel sellers about the land market. They know about the VA and the FHA and they tell you how you can qualify.

They provide assistance, logistical support, liaison with the attorneys, with the title examiners, with the other professionals involved, like the appraisers and surveyors.

When you have a problem, you call the agent. If you need a title, the agent brings it over. If you've got--you need your termite inspection, the agent will arrange it for you.

The realtor is interested in pushing the sale through. Because after all, he's not going to get paid unless the sale takes place. And--

QUESTION: Technically, doesn't a realtor earn his commission when he brings a willing seller and a willing buyer together?

MR. VINET: Your Honor, there are some Louisiana cases which say--

QUESTION: Isn't that the law in Louisiana?

MR. VINET: Yes, Your Honor. And the cases--let me explain the factual context in which those cases arise. He brings a willing buyer and the willing seller together, and if for some reason the buyer changes his mind and decides to back out of the sale or they try and gyp him out of his commission, the courts have held that he's got a cause of action to cover his commission.

QUESTION: He's still owed his commission, right.

MR. VINET: As a practical matter, however, the purchase agreement--we have deposition testimony in the deposition of Mr. Derbes, page--Appendix page 263, to the effect that the listing agreement, or the purchase agreement will provide that a good faith effort has to be made to get the loan, but payment of the commission is contingent upon the obtaining of financing.

And that's the basis of my saying that they push

the transaction through so that they can be paid.

Your Honors, realtors know the local money market. They sometimes even escort purchasers to lending institutions. And lending institutions are quite aware of the importance of realtors as a source of referral business.

We have evidence that Caruth Mortgage Company sends brochures to 300 people a week about their interest rates, and trying to entice people to come in. And the same with Security Homestead; daily they're in contact with real estate agents, seeking interest quotes.

The same with title insurance. All of these related services that are in interstate commerce recognize the importance of the realtor to their operations and to the continued operation of the land market.

The realtors sell expertise. They sell know-how. They make the local market land, and they merchandise houses as a commodity.

Now, if the local housing market depends on real estate brokers, it's equally dependent on interstate commerce. We've at great length in our brief talked about all the substantial amounts of money involved; about how it comes from depositors who are located out of state or in-state; how advances are secured by homesteads from the Federal Home Loan Bank; about how the secondary market operates and paper is discounted--paper is discounted and sold

into articles--and the notes themselves cross state lines.

QUESTION: Mr. Vinet, let me ask you one more question.

At page 39A of your petition for certiorari, which is a part of the Court of Appeals' opinion, the paragraph beginning at the bottom of the page: "With our endorsement of the district court's determination that this particular real estate activity neither occurs in, nor substantially affects, interstate commerce..."

Now, do you say that's the wrong standard to be applied for jurisdictional purposes?

MR. VINET: Well, Your Honor, it's the right language, but it wouldn't make sense.

QUESTION: Well, then you're attacking a factual finding.

MR. VINET: Well, no--

QUESTION: And two courts have decided against you.

MR. VINET: Mr. Justice Rehnquist, what I'm saying is that "substantially affects," for the purposes of the Court of Appeals and the lower court, meant the same thing as "in commerce." They were the same test. "Necessary and integral part of the interstate transaction, inseparable from its interstate aspects," which is what this--the Court's language in Goldfarb. That's how the Court found jurisdiction

in Goldfarb. And our opinion, or our position, is that the district court and the Court of Appeals perhaps feeling that land is completely unique and it doesn't cross state lines, or it doesn't move in commerce, feeling all that to be the case, that the district court just took that same language, and they said, well, that's the way the Supreme Court found jurisdiction in Goldfarb, and that's the only way it can be found. Because land is, they say, the quintessential local product.

And they use the language, substantial effect, Your Honor, but if you read the opinion, you're going to see that what they wanted us to show was that real estate brokers are like title lawyers. And we didn't show that.

What we showed was a market dependence on local activity of real estate brokers, and upon interstate commerce, to keep the market going. If realtors make the market, interstate commerce permits it to survive.

MR. CHIEF JUSTICE BURGER: Your time has expired now, counsel.

MR. VINET: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Easterbrook.

ORAL ARGUMENT OF FRANK H. EASTERBROOK, ESQ.,
AS AMICUS CURIAE ON BEHALF OF PETITIONERS.

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

The Court of Appeals thought that petitioners in this case were trying to argue that real estate, which it termed the quintessentially local product, is part of interstate commerce. It said that the answer was no, because there had been no showing that the activities of brokers were essential to loans in exactly the way the activities of lawyers were essential to loans in the Goldfarb case.

Without that, the Court of Appeals said, there could be no finding of interstate commerce.

Petitioners argue here, and the United States agrees, that that was erroneous as a matter of law, and that interstate commerce--

QUESTION: But you say that real estate was what the Court of Appeals thought was involved. The quotation I just read from their opinion says, this particular real estate activity, which I take it is brokerage.

MR. EASTERBROOK: I understand that, Mr. Justice Rehnquist.

QUESTION: How do you explain it?

MR. EASTERBROOK: The Court of Appeals opinion is internally inconsistent in that respect. There are other portions of the opinion that appear to say that they're asking the question whether real estate itself, rather than the brokerage services, is part of interstate commerce.

I take it that real estate is not part of interstate commerce, unless you have a river meandering, and you have an original jurisdiction case. But this is quite a different matter entirely.

The argument--the argument, I think, is a rather straightforward argument, one of practical economics, as the Court put it in the Rex Hospital case. And it runs almost identical to the argument that this Court accepted in Burke v. Ford.

It runs something like this: Brokers sell information and assistance in conducting transactions. Their services aren't tied to the land, but rather, are tied to the clients and to the clients' money.

A price-fixing agreement, setting the price of those services, increases their price. When the price of a commodity is increased, less of that commodity is purchased. If less brokerage service is purchased, it is less likely that buyers and sellers will get together on a real estate deal. And that's particularly important for interstate movers, who often rely on brokers as their sole source of information about the market of the state into which they're moving.

QUESTION: Is it your understanding of Rex that it held, as a matter of law, that there was jurisdiction, or simply it said that the trial court should have decided

it as a factual question?

MR. EASTERBROOK: It said that it had to be decided as a factual question. It did say, however, that the standards, the legal standards used by the lower court for disposing of that factual question were erroneous; the same kind of argument we make here.

That--the final touch of that is that a reduction in the number of real estate transactions which is caused by this increase in the price of information and service will affect the interstate money market at the same time as it affects the interstate movement of people.

That's a rather straightforward argument. The effect on commerce can be traced clearly and unambiguously in the same way it was traced in Burke v. Ford. And therefore, we think the Court of Appeals was wrong in saying that plaintiffs should not even be allowed to prove at trial that interstate commerce was affected by this transaction.

In fact, if the Court of Appeals argument is that plaintiff isn't even to be allowed to prove it at trial, the contention is that the activities of brokers are completely outside the powers of Congress under the commerce clause.

The Sherman Act, it's been held, expresses all of the power that Congress has to exercise. And if the

Sherman Act expresses all of the power Congress has to exercise, and if, as the Court of Appeals held, the Sherman Act does not apply to the activities of brokers at all, it must follow that Congress has no power over brokers.

That seems an extraordinary proposition that Congress has no power over a multibillion dollar industry that affects, according to the census figures, at least 3 million people who move from state to state every year.

That's a rather significant affect on commerce for a case in which the Court of Appeals argues that there is none.

In a series of earlier cases--take, for example, the Perez case, which held that the commerce clause reaches local loan-sharking activities; one $2,000 loan made on the streets of one city; no proof of interstate commerce; but the commerce clause applied because lending activities as a whole affect interstate commerce.

QUESTION: Well, but that's not the same standard as you use on an anti-trust case. You have to prove the fact that your particular case has an affect on commerce.

MR. EASTERBROOK: Mr. Justice Rehnquist, it's one of the oddities, I think, of the Sherman Act cases, that that is the standard at the same time as the holding is that the Sherman Act expresses all of the power that Congress has to exercise.

It's a difficult argument.

QUESTION: But is it nonetheless--

MR. EASTERBROOK: It is nonetheless the holding. But it applies sometimes in--it applies with more or less rigor. And there is an interesting difference, I think, in the treatment ordinarily, in a case like Rex Hospital, and the treatment in what might be called the failed conspiracy cases.

Take, for example, the Socony Vacuum Oil case, the famous early per se rule case, in which the Supreme Court held that the Sherman Act applied and banned the agreement in the Socony Vacuum Oil case.

Even though there was absolutely no proof that the agreement had been successful; the Court said: Well, it may be that this agreement was a miserable failure, but the Sherman Act applies nonetheless.

Now, if you assume that the agreement was a miserable failure, that it did not achieve its objectives, you're assuming at the same time that no commerce at all was affected. So if you follow it to that step and say that in a particular case there's always a need to prove substantial affect on commerce, that's also the same thing as saying that the failed agreement cases, the attempt cases, the conspiracy that breaks down before it gets off the ground, are outside the scope of the Sherman Act.

QUESTION: Well, would you say it's impossible to logically conclude that the real estate board of Greater New York City is engaged in activities which affect commerce, but the real estate board of a town in the Shenandoah Valley in Virginia is not engaged in those activities?

MR. EASTERBROOK: I think it would be extremely difficult to do that unless the real estate board of the small town in that hypothetical was able to show that no one had moved into or out of that town within the period of the statute of limitions.

QUESTION: So there's no substantial requirement at all?

MR. EASTERBROOK: The requirement, I think, and it's a way that the failed conspiracy cases can be dealt with at the same as cases like Rex Hospital, is that the commerce subject to the conspiracy be substantial; that is, in the failed conspiracy cases, one of those failed conspiracies was the business of oil. There was a lot of interstate commerce in oil; everybody agreed that was substantial.

In the real estate business, the kind of commerce involved is interstate commerce in the movement of people from one state to another, in the movement of money from banks across state lines in the secondary market in real estate financing purchases by institutions like the government National Mortgage Association.

That's clearly substantial here. It's substantial in the same way that it was substantial in the failed conspiracy cases.

QUESTION: Mr. Easterbrook, I want to be sure I understood your answer in your colloquy with my brother Rehnquist.

Do you concede that--logic aside--the test in the case--in a case such as Perez, i.e. did Congress have constitutional power to enact this legislation, and that in this particular case, if there were generalized power on the part of Congress to enact this legislation, the petitioner Perez cannot be heard to say, "Well, I--my loan was not in interstate commerce"?

MR. EASTERBROOK: I think that to be the holding in Perez.

QUESTION: That is, I take it, the holding in Perez from which you know I--with which you know I disagreed.

MR. EASTERBROOK: Yes.

QUESTION: Is that a different test from the ordinary, traditional under test under the--of whether or not something is in, or affects, interstate commerce under the anti-trust laws?

MR. EASTERBROOK: It--the test--

QUESTION: Logic aside.

MR. EASTERBROOK: Logic aside, the test has been

applied differently.

QUESTION: Do you concede that this--the test was quite different?

MR. EASTERBROOK: Oh, yes; the two have certainly been applied differently. They've been applied differently quite traditionally.

But that difference in application, however the test has been phrased, has never made a difference in the result, ever since the Mandeville Island Farms case, which was the first of the cases holding squarely that the Sherman Act reaches transactions that affect commerce, even though they aren't in it.

And since the Mandeville Island Farms case, that difference in the phrasing of the test--surely an important difference in the phrasing of the test just looking at words--has never made a difference in the outcome, at the same time the failed conspiracy cases have been decided in the--/

QUESTION: Well, in the Perez case, Congress might have worded the criminal statute to have said that loan-sharking that affects interstate commerce shall be a criminal offense. And then it would be open to the defendant to say, "Well, my loan-sharking did not--was not in inter-state commerce, and did not affect it."

MR. EASTERBROOK: Right.

QUESTION: That would--that would make it a--

MR. EASTERBROOK: Of course, and that's what most of the gun cases say, guns that have travelled in interstate commerce, or things of that sort.

QUESTION: Well--

MR. EASTERBROOK: But there's--

QUESTION: --that are in or affect?

MR. EASTERBROOK: Uh-huh, but there's been an interesting difference even between those cases and the Sherman Act cases, Mr. Justice Stewart. In the gun cases, there has been a series of decisions that the travel of even a single gun from one state to another, the statute that says, "in or affects commerce" meets the in-or-affects-commerce test.

If that's what "in or affects commerce" means, and the gun cases certainly hold that, the same reasoning applied to the Sherman Act would mean that travel of even a single dollar or a single person. And there's some tension between that line of cases and the language in the Sherman Act cases saying the effect has to be substantial.

QUESTION: Right.

MR. EASTERBROOK: Even though the language of the statutes is very similar.

QUESTION: You read the--you seem to read the Fifth Circuit holding as meaning--as holding, in fact, that under no circumstances can the real estate brokerage business ever be read as in or affecting interstate commerce.

MR. EASTERBROOK: I think that's what the Court was saying. There is, in fact, a brief paragraph on pages 41 and 42 of the Appendix to the petition saying that we recognized that we have today made the very strong holding that Congress has no power over the real estate business.

QUESTION: Well, then, what do you think--on page 39A, the paragraph that was read to you before, "With our endorsement of the district court's determination that this particular real estate activity...", do you take--say that phrase, "this particular real estate activity," means all real estate brokerage business, or the one claimed and shown here?

MR. EASTERBROOK: Certainly, the New Orleans real estate brokerage business, Mr. Chief Justice.

QUESTION: All New Orleans real estate?

MR. EASTERBROOK: I think so. As the court, before it gotto page 39, had just spent two pages discussing the argument that plaintiff should be allowed an opportunity to prove on trial some of the allegations in their complaint. And it said they weren't entitled even to that opportunity to prove--

QUESTION: That is, some allegations of the price-fixing?

MR. EASTERBROOK: Yes. And in the allegations with respect to interstate commerce, one of the questions

that the plaintiffs propounded in an interrogatory, for example, was: State the number of people who cross state lines to use your service? who go from one state to the other by use of your service? That question appears in the interrogatories at pages 91 and 101.

The respondents, the defendants, objected even to answering that interrogatory; it was never answered. And so the Court of Appeals holding is that interstate commerce--it can be known to a certainty that interstate commerce is not affected, even though we have no idea how many people cross state lines to use the service.

That is, I think--

QUESTION: Did the plaintiffs take that unanswered question to the judge?

MR. EASTERBROOK: I'm sorry, Mr. Justice White?

QUESTION: Well, did they attempt to get an order to answer the question?

MR. EASTERBROOK: The judge, after receiving the response, simply took the case under advisement, and then dismissed it under Rule 12, without ever dealing with the objection to the taking of the interrogatories.

QUESTION: Well, before--

MR. EASTERBROOK: There was no motion to compel discovery.

QUESTION: And the plaintiff didn't assign that as

error?

MR. EASTERBROOK: He--on appeal, the plaintiff did not assign as error any of the particular refusals to answer, but instead made the more general argument that he was entitled to a trial.

That more general argument I think would comprehend the particulars of, "they didn't answer this question, the didn't answer that question, they didn't answer the following question."

But there was no motion to compel discovery; in that sense, the procedural "t's" were not crossed.

QUESTION: I take it the--on the theory the Court of Appeals used, if the brokerage rate, agreed-upon brokerage rate, was 20 percent instead of 6, or even 50, that the result would have been the same?

MR. EASTERBROOK: I think the result would have been quite the same, from the Court of Appeals point of view.

QUESTION: And I take it your argument would be the same if it was 1 percent?

MR. EASTERBROOK: If--it would be the same if the fee were increased by any amount by the price-fixing.

QUESTION: Yes.

MR. EASTERBROOK: Let me suggest, by the way, that that's an important difference between--

QUESTION: Well, you--I take it your assumption

is that inevitably the price is higher than it would be if the agreed rate--the price of real estate is higher than if the agreed rate were one percent?

MR. EASTERBROOK: Yes, yes. But I think it's important, though, Mr. Justice--

QUESTION: And that if there was competition, prices would be lower in some cases?

MR. EASTERBROOK: Yes, that's certainly our assumption.

But I think it's important to understand, and this complements the Goldfarb arguments, the Goldfarb case was decided on the explicit assumption that what the lawyers did had no effect on prices, something that the court's opinion said twice, that is, there had been no claim that in fact prices went up.

The problem in showing interstate commerce in Goldfarb, on the assumption that the lawyers' prices had not been increased by this fee schedule, was how to show any effect on commerce at all. In that sense--

QUESTION: Well, to the contrary, there's--you'll find statements in there also that no lawyer felt free to charge anything less than the fixed rate.

MR. EASTERBROOK: Exactly, Mr. Chief Justice.

QUESTION: And the evidence in the case was, that of all the 36 lawyers who were fooled, as it were, they all

said they were not free.

MR. EASTERBROOK: Oh, I'm not disputing that in any way. My observation was only that they all felt free to follow this fixed rate. There had been no particular allegation that this fixed rate was higher than the rate that would prevail in the market.

And so in that sense, finding that the lawyers were indispensable to the interstate commerce was essential to finding an effect on interstate commerce. Here the allegation is that the rate has been changed, and so you find a different change of causation--different chain of causation to the effect on commerce.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. McCall.

ORAL ARGUMENT OF HARRY McCALL, JR., ESQ.,

ON BEHALF OF THE RESPONDENTS.

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

I would like initially to respond to Mr. Justice Rehnquist's question, because I think this is one of the more important questions before this Court. And that question was, whether we contend that there was a factual issue?

And the short answer to that question is, we not only do not concede that there is no factual issue, but we contend that there was a factual issue, and that that factual

issue was adversely resolved against these petitioners, and that absent some showing of clear error, that that factual resolution should stand.

Second, as to the contention that these petitioners were deprived of the opportunity to show the affect on commerce, and that they were restricted by reason of the district court's order limiting them to the Goldfarb case, the fact of the matter is that these petitioners embraced Goldfarb closely and joyously from the very beginning. The term that they used in some of their memoranda was that "Goldfarb loves the instant case."

Now it followed from that that when the district judge called his pre-trial conference in September and suggested that there be discovery, he was following precisely the lead that petitioners had suggested that he follow. He said, You have talked about Goldfarb; I'm going to give you an opportunity to show that Goldfarb did, in fact, as you say, love this case.

The question was asked whether there was any objection on petitioner's part to that alleged limit to petitioner's discovery. And the answer is, no. This record will be examined with care, and there will be no indication of any objection whatsoever.

The plain fact of the matter is that this concept of affecting interstate commerce through the alleged affect

on the sale of houses by reason of the supposed fixed commission is an afterthought. And what this Court is being asked to do is, to supply what these petitioners didn't supply in the lower court.

This Court is not being asked to review whether, on the facts before it, the district court reached the correct decision. It's not being asked whether, on the record before it, the Court of Appeals correctly affirmed the holding of the lower court.

What this Court is being asked to do is to go behind the record, and to assume that had these petitioners put on a different case, that the result would have been different.

QUESTION: So you don't read the Fifth Circuit opinion as your friend does, namely, that the brokerage business, real estate brokerage business could never be shown to affect interstate commerce?

MR. McCALL: I think the answer to that, Mr. Chief Justice, lies in the portion that was read either by yourself or one of the other Justices, namely, on this particular case. The Court of Appeals didn't make--

QUESTION: I didn't quite say, on this particular case.

MR. McCALL: Or these particular circumstances.

QUESTION: It's page 39, "this particular real

estate activity." There's a certain ambiguity in the word "activity," perhaps. That is, if he was talking about the activity embraced in the pleadings, or--that's one thing; if it's the activity in the whole metropolitan area of New Orleans, that's something else.

But you read it narrowly?

MR. McCALL: I stand corrected, Mr. Chief Justice, on the language in the Court of Appeals decision. But as I read the phrase, "this particular real estate activity," it relates to the particular activity with respect to which there was evidence before the Court; and that what the Court of Appeals did was, that it restricted its holding to the facts which it had before it; and that it did not make a sweeping holding that under no circumstances could there be a situation in which real estate brokers might not have some affect--effect--on interstate commerce.

QUESTION: In this sense, is it your position that this is roughly parallel to a complaint and a showing where there--depending on diversity of citizenship, there's either a flawed or no allegation of diversity, and nothing to supplement that, and the court then decides that this is not a diversity case, and therefore, no jurisdiction?

Is that the kind of situation we have, in your view?

MR. McCALL: No, Your Honor, I don't think so.

I think we have a better situation than that, because this--it must be borne in mind--decision was not on the face of the complaint. But this decision was rendered after these petitioners had the opportunity to adduce evidence in support of their allegation.

And I think it is important for this Court to realize, to recall, that it was in September, I believe early in September, that the district judge entered his order saying that discovery should take place.

And as I have pointed out, there was no objection to that. The record is completely silent on any objection by these petitioners at that time, or at any other time, to the supposed limits on discovery.

Now, what the judge did was, he said, I'm going to order discovery--all this appears in the record. And a month later he called another pre-trial conference, and he said: "I will give you until December 31st"--it was then early in October--"in which to complete your discovery." No objection at that time, no suggestion that the breadth of the discovery should be increased.

It was not until the middle of December that the first notice of taking a deposition was issued. On or about December 21st, I think it was, these petitioners moved to extend the time in which their discovery could be conducted.

And it will be noted that that motion does not

recite that they were improperly restricted as to what their scope of discovery should be.

The basis for that motion was, that they didn't have time to set up the depositions, that they were having difficulty in getting the deponents.

So I would say that I think that we should lay at rest any suggestion that the district court improperly, in any way, limited the discovery by these petitioners. Because had they really thought that there was such limit, clearly it was incumbent upon them to say so.

You don't come to a Court of Appeals and say, the court has improperly instructed the jury, without taking exception to the jury charges. And for these petitioners now to say, "Well, we tried our case on one theory below, and we adduced evidence on that, but had we thought about it as we now think about it, we would have put in different evidence."

QUESTION: Mr. McCall---

MR. McCALL: I'm sorry, Your Honor.

QUESTION: --you have referred a couple of times to trying to case on one theory. There really was not a trial here, was there?

MR. McCALL: Mr. Justice Stevens, there was no trial as such.

QUESTION: There was a granting of a motion to

dismiss.

MR. McCALL: But what there was was that the motion to dismiss was predicated on evidence submitted by these petitioners.

QUESTION: Well, the court treated it as though it was in the nature of a motion to dismiss supported by affidavits, which is treated as a motion for summary judgment.

MR. McCALL: Well, more than an affidavit, Your Honor.

QUESTION: Well, depositions.

MR. McCALL: Mr. Justice Stevens, there was actual evidence taken.

QUESTION: But isn't it true that in that kind of disposition all factual inferences are taken most favorably to the losing party?

MR. McCALL: I would think not. I would think that the rule that applies there is the "clearly erroneous" rule. You had a factual determination on evidence.

QUESTION: Were there any findings of fact made?

MR. McCALL: Not as such, no.

QUESTION: No proceedings in--before the trial judge of cross-examining witnesses or anything like that?

MR. McCALL: No, sir. All that was done by deposition.

QUESTION: But it seems to me normally, when you

have a motion to dismiss supported by affidavits and treated as a summary judgment, you basically say, well, the issues are either undisputed, or if there is a dispute, you take the view of the facts most favorable to the losing party.

Isn't that the customary rule?

MR. McCALL: In general, I think, yes, that is the rule.

QUESTION: Then why wouldn't that rule apply to this case?

MR. McCALL: But I don't think it applies in this case, because you don't have a motion to dismiss or summary judgment in the conventional sense. It seems to me that where the petitioners have the opportunity to take their evidence, and actually do so by contradictory depositions--

QUESTION: And the judge, in effect, says, "Well, I take everything you have proved, and assuming it to be true, it's still not enough." Isn't that the normal way you do that?

MR. McCALL: Not where evidence is submitted by both sides, as I appreciate it, as it is in this case.

QUESTION: Well, but the trial court can't resolve factual disputes, if the plaintiffs' affidavit shows one thing and the defendants' another, he can't make a finding of fact. He--as Justice Stevens says, he has to resolve any dispute like that in favor of the party against whom the

motion to dismiss is directed.

MR. McCALL: That is correct, where you have affidavits, as I appreciate it, Mr. Justice Rehnquist. But what we had here, in effect, was a separate trial on the issue of jurisdiction.

QUESTION: Well, how--I'm not--I don't think I fully understand that. Because you could have a proceeding on affidavits plus depositions, or you could have by consent or presumably by the trial judge's order, a severed issue from a trial, and say, we're going to have a trial of fact on this issue, and I'm going to hear witnesses, or whatever submissions you have, and then I'm going to make a finding of fact.

And I'm not sure from hearing all of the counsel what it was that happened.

MR. McCALL: Well, it's our appreciation of what happened is that the trial judge first, the motion to dismiss was submitted on affidavits.

QUESTION: Whose motion to dismiss was it?

MR. McCALL: It was the motion to dismiss by the respondent realtors.

QUESTION: Supported by affidavits?

MR. McCALL: Yes. Those affidavits are in the record, the two affidavits. That motion was opposed by affidavits submitted in behalf of the petitioners. And that motion was then argued. And it was--

QUESTION: And there couldn't have been an issue of material fact, or the judgment--or the court couldn't have entered a judgment, could it?

MR. McCALL: At that point, I think that's correct.

QUESTION: Well, after the argument on whatever was submitted, there couldn't be an outstanding issue of material fact, could there?

MR. McCALL: No, sir.

QUESTION: And have--permit the court to enter judgment?

MR. McCALL: At that point, that's correct.

QUESTION: So where was it--what factual finding did the court come to except that there is no factual issue?

MR. McCALL: Well--

QUESTION: He came to a legal conclusion that there was no showing of an effect on commerce, or there was--or whatever his standard was, he didn't think the facts in the record satisfied it.

MR. McCALL: That is correct.

QUESTION: Well, is that a--is that what you call a factual finding?

MR. McCALL: Yes, if you will bear in mind that subsequent to the hearing--

QUESTION: A factual finding although he wasn't entitled to make factual findings.

MR. McCALL: Well, that's where I--with all due respect, Mr. Justice White--you and I disagree.

QUESTION: Yes.

MR. McCALL: Because following the hearing on the motion on the affidavits, there was an order permitting these plaintiffs to take evidence, which they did. And it was only on the basis of that evidence that the court then made its findings of fact, and reached its conclusion as expressed in--

QUESTION: Because, at the very end of the trial court's opinion, in footnote 7, after all this took place, page 23A, "In any event, no genuine issue of material fact appears to preclude judgment in defendants' favor pursuant to Rule 56."

It seems to me at the very bottom line of his opinion is, after everything's all over, is, there is no genuine issue of fact. Which means to me that he's assuming the facts most favorable to the other side. That's the standard boilerplate you use in that situation.

MR. McCALL: I'm afraid, Mr. Justice Stevens, you have me on the hip there.

QUESTION: I think I do.

MR. McCALL: He did so find that.

QUESTION: Yes.

MR. McCALL: But let me then suggest to Your

Honors that even if you treat it as a motion for summary judgment on which you resolve the issues most favorably to the person against whom the decision goes, that you still have a decision which is correct on the facts and on the law.

QUESTION: But is it a factual--is it any kind of a factual conclusion that is entitled to the respect of a two-court fact finding? Such as you have suggested it was?

MR. McCALL: I'm afraid I have to back down on that one, Mr. Justice White. I don't like to do it.

QUESTION: No, I wouldn't think you would.

MR. McCALL: But I can't answer your question any other way. And I think that under those circumstances, it doesn't do my argument any good about the factual issue, in the absence of a "clearly erroneous" rule.

Let me then, if I may, address what I would formally have considered my second line of defense on that, and say to Your Honors that irrespective of whether you consider this a motion for summary judgment, with all doubts to be resolved in favor of these petitioners, that then I say that there is no issue which can be resolved favorably to these petitioners which would change the decision either of the district court or of the Court of Appeals.

And the reason I say that is, that as I appreciate the law--and I think it is quite clear--putting aside all this talk about the reach of the Sherman Act being the same

as Congress' power over interstate commerce, the test is, is it in interstate commerce, or does it substantially affect interstate commerce?

Now, these petitioners have abandoned any contention that there, the activities of these respondents occurred in interstate commerce. They have explicitly done that in their briefs. And they have done it for the same reason that I had to back down in response to the questions that Mr. Justice Stevens and Mr. Justice White asked me: They couldn't do anything else.

However, then the question becomes: Have they shown, or can the evidence in anyway be construed or resolved to show a substantial effect on interstate commerce? And we would submit that both of the courts correctly resolved that issue.

Now, let me if I may address that.

QUESTION: Well, what if it--what if real estate brokerage were 50 percent? Would you be making the same argument or not? An agreed-upon--an agreement among brokers not to compete, and that their agreed brokerage rate was 50 percent.

And I suppose you would concede that that kind of a brokerage charge to a seller might cause him to raise his house price?

MR. McCALL: I think that the question would be

somewhat more difficult in that case.

QUESTION: So is it the question of what is substantial?

MR. McCALL: I think that addresses the question of subatantiality.

QUESTION: And so it does that? You would agree that that would have an effect?

MR. McCALL: Let me say, with reservations I will agree to that.

QUESTION: And six percent doesn't have enough of an effect?

MR. McCALL: Well, the point that I wanted to make on that is--and I'm sorry not to answer your question more briefly and directly--is that what we're talking about is the six percent commission on the first $100,000. It's a sliding scale; it goes down after that.

If the suggestion is that the maintenance of a six percent rate on housing has an effect on the lending and title insurance, I would submit first that there is no evidence--

QUESTION: Let's don't skip over one--

MR. McCALL: All right.

QUESTION: Do you agree that it has an effect on house prices?

MR. McCALL: No, I would not agree to that.

QUESTION: If there was no agreement, and people were free to compete, you don't think house prices would ever be lower?

MR. McCALL: Well, the way you have stated it, Mr. Justice White, I think I would have to say, yes, they might be. But I would say--

QUESTION: If some broker decided to cut his rate to two percent, I suppose a seller might be willing to cut his price some.

MR. McCALL: Well, let me--

QUESTION: Is that right or not?

MR. McCALL: I think this is a possibility. But what I would strongly suggest to this Court is, that we're not dealing with possibilities in this case.

QUESTION: Does this record, Mr. McCall, show the aggregate amount of commissions in New Orleans- in a given year on all real estate transactions in which a broker was involved?

MR. McCALL: No, Mr. Chief Justice.

QUESTION: It would run into, I would assume, a good many millions of dollars, wouldn't it?

MR. McCALL: Not, the commissions, no, sir.

QUESTION: Not so?

MR. McCALL: No, I would be greatly surprised if

six percent commissions amounted to that much, to millions of dollars. I don't know. It's conceivable.

But what I would--

QUESTION: Well, then, it's quite different from Washington, D.C., because the aggregate commissions here must easily match the figures in this area.

But let's assume--let's assume--

MR. McCALL: I won't dispute that, because I don't know.

QUESTION: Well, let's assume it's $5 million in a given year. Then the next step would be the response that you gave Mr. Justice White: Does this have an affect upon the price of houses? And I think you conceded that probably it could have some effect.

MR. McCALL: What I think I said, and what I would like to say, is that I would have to accept the possibility, but I would say that I don't believe it. And what I think is most important, for purposes of this decision is, there is no evidence to that effect; none whatsoever.

Now, if we talk about the effect of real estate commissions on the cost of houses, the price of houses, certainly in the New Orleans area there has been what I would describe as a quantum leap in the cost of residential houses. The level of real estate commissions has not changed in any respect.

QUESTION: Well, it doesn't have to, because in a dollar amount, it goes up.

MR. McCALL: It does in dollar amount, that's true. But where, then, is the demonstration that the level of real estate commissions has had any effect on the price of houses?

QUESTION: Well, you wouldn't ask--you wouldn't ask for independent proof if the rate was 50 percent, would you?

You just said you wouldn't.

MR. McCALL: All right, sir, I won't ask for proof on 50 percent. But at 6 percent, I will.

QUESTION: Hasn't the rate itself gone up?

MR. McCALL: No, sir.

QUESTION: It has in most places from 5 percent to 6 percent in the last ten years or less.

MR. McCALL: Let me say that the record is silent on that.

QUESTION: Well, I thought the question was--

MR. McCALL: But I don't think it happened.

QUESTION: Wasn't the question, wouldn't there necessarily be an effect on the price of housing if you had free competition by contrast with a price-fixed commission? That was the question, wasn't it?

QUESTION: Yes.

MR. McCALL: Have I not answered that, Mr. Justice

Stewart?

QUESTION: Well, we were talking about whether or not a commission has an effect on housing. Of course it does, on the price of housing; we will assume it does.

But that wasn't the question.

MR. McCALL: I'm sorry.

QUESTION: The question was: If there were free competition among real estate brokers, and some of them might fix their rate at one percent or two percent or three percent or seven or eight percent, depending on the individual house to be sold, perhaps, or their economies of scale, or their efficiencies, or whatever, wouldn't free competition, at least arguably, make some housing cheaper than it is now under a price-fixed six percent rate?

That was the question.

MR. McCALL: I think the answer to that is, there's a theoretical possibility it could. But I'm not persuaded that it will. And I think you have a question of how far down can real estate commissions go? And people stay in business.

QUESTION: Well, suppose--what should a trial judge do, for anti-trust purposes, when he's making a--when he's going to resolve that at the beginning of a case? Should he resolve that in your favor or the other side's favor? When you say, I just can't be sure that it would.

MR. McCALL: And your question is, how should he resolve it?

QUESTION: And he should say, the plaintiff hasn't proved it, or what?

MR. McCALL: I should think, Mr. Justice White, that if he gives the plaintiff an opportunity to prove it, and the plaintiff doesn't prove it, that he is justified then in resolving it adversely to him.

Let me if I may--

QUESTION: Of course, even if you admit all this, it's irrelevant so far as the Federal anti-trust laws go if it's all in intrastate commerce?

MR. McCALL: Well--

QUESTION: No matter how egregious the violation might be of the anti-trust laws if it were affecting interstate commerce, it's no violation of Federal--so far as the Federal laws go if it doesn't affect interstate commerce, or isn't in interstate commerce.

QUESTION: But isn't the only way--isn't the only way that--or is it the only way that the agreed-upon brokerage rate can affect the mortgage market by interstate travel is by affecting the price of the house?

MR. McCALL: It's the only way that I can conceive of its doing so.

QUESTION: Yes. So the first step is to talk about

the price of the house. And the next question is, well, even if the price would go up or go down depending on whether there's an agreement or not, is the mortgage money market affected, interstate mortgage money market affected? Or the interstate sale of houses affected?

MR. McCALL: That is where the record is completely devoid of any proof. And if I may continue on the line suggested by Mr. Justice Stewart, I think we should bear in mind that the activities of real estate brokers as such are clearly intrastate commerce.

Now, the suggestion is that you bridge the gap between that intrastate commerce and the, I would say, undisputed interstate commerce in lending and title insurance, is that you accept as a given, without any proof, that the price of houses will, if increased by maintenance of the percentage on real estate brokers' commissions, and that that in turn will affect the number of transactions and the amount of sales and the amount--therefore, the amount bought.

We say first, that that is not by any means proven. But second--and I think it sis important for me to make this point--we would respectfully submit that what we're talking about is an incidental effect. It is not such an effect as is contemplated by the line of decisions which has been mentioned here, and I wish to treat that particularly.

These petitioners rely heavily on Mandeville Island. Now, Mandeville Island was a very special case, because the whole process of growing sugar and refining sugar was so closely integrated that this Court concluded that they were inseparable.

But Mandeville Island was not the genesis of this affectation doctrine. We have to go back to the Shreveport rate cases. We have to go back to first and second Coronado, we have to go back to Apex Hosiery against Lieder. And as I appreciate what was held in those cases, Shreveport rate held that it was permissible for the anti-trust--for the Interstate Commerce Commission to act with respect to purely intrastate rates because they directly affected interstate rates. In first Coronado, and in second Coronado, what this Court held, as I appreciate it, is that the activity of the union in not only calling a strike but in the violence and all of that in first Coronado was held not to be in interstate commerce because it was not intended to affect interstate commerce, nor was it inevitably--nor would it inevitably do so. But--

QUESTION: The Coronado Coal cases were criminal cases, weren't they?

MR. McCALL: U.S. against--yes, they were both criminal cases; both of them. But in second Coronado, they went back and they took evidence, and the critical finding

there was that the purpose of the strike was to diminish the amount of coal which was available in interstate commerce. And the Court said, with that, we now find that you have a direct affect on interstate commerce. You have a substantial affect.

Now, when Apex Hosiery came along, you had another strike (this was not a criminal case). This was where the strikers pulled a sit-down strike, and they prevented the movement in interstate commerce of substantial amounts of hosiery. And what this Court held was, that that was not a case which affected interstate commerce in the sense required for application of the Sherman Act.

And I submit--

QUESTION: Well, that, of course, was not the kind of restraint--not a business-type restraint, rather than because the commerce power didn't reach it, wasn't it?

MR. McCALL: I'm sorry, Your Honor, you say was that a business-type restraint?

QUESTION: In the Apex case, it sort of went off on the theory that a labor dispute is not the kind of restraint that the Sherman Act is--

MR. McCALL: No, sir, that was not the basis of it. As I appreciate the Apex Hosiery opinion, the Court made no distinction as to whether it was a labor dispute or an industrial dispute--an industrial restraint. They said

that the criterion was whether the object of the restraint was on the interstate commerce, or whether it was a--had a purely local intention.

I could stand corrected on that but--

QUESTION: I believe it did, too.

MR. McCALL: --I'm quite sure that that's what Apex Hosiery stands for.

So that--I see my time is running out--let me just conclude by saying that I would respectfully submit that the criterion is: Is there a real effect? Mandeville Island does not answer these questions. You have to go back of Mandeville Island.

And if you go back to the origin of this doctrine of the affectation of interstate commerce, you will find that the activities of these respondents, who are clearly engaged in intrastate commerce, do not meet the requisite test for affecting interstate commerce so as to come within the Sherman Act.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:01 o'clock, p.m., the case in the above-entitled matter was submitted.]