ORIGINAL

In the

Supreme Court of the United States

NAVARRO SAVINGS ASSOCIATION,

PETITIONER,

V.

LAWRENCE F. LEE, JR., ET AL.,

RESPONDENTS.

No. 79-465

Washington, D. C.
March 18, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

NAVARRO SAVINGS ASSOCIATION, Petitioner,	:	
v.	:	No. 79-465
LAWRENCE F. LEE, JR., ET AL., Respondents.	:	

Washington, D. C.,

Tuesday, March 18, 1980.

The above-entitled matter came on for oral argument at 1:20 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
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

BERNUS WM. FISCHMAN, ESQ., Lackshin & Nathan, 707 Central National Bank Building, 2100 Travis, Houston, Texas 77002; on behalf of the Petitioner

JAMES A. ELLIS, JR., ESQ., Carrington, Coleman, Sloman & Blumenthal, 3000 One Main Place, Dallas, Texas 75250; on behalf of the Respondents

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in 79-465, Navarro Savings Association v. Lee.

Mr. Fischman, you may proceed whenever you are ready.

ORAL ARGUMENT OF BERNUS WM. FISCHMAN, ESQ.,
ON BEHALF OF THE PETITIONER

MR. FISCHMAN: Mr. Chief Justice, and may it please the Court: I am Bernus Fischman, of Houston, Texas, for the petitioner, Navarro Savings.

Your Honors, certiorari was granted in this case to review a decision of the Court of Appeals for the Fifth Circuit which held that the citizenship of a Massachusetts business trust, in this case a real estate investment trust, was that of each of its trustees as opposed to its some 9,500 beneficial shareholders.

The petitioner believes that the case, although one of first impression on the narrow point now before this Court, that is as to a real estate investment trust is a particular species of business organization, although it is a case of first impression, that it is well governed by previous decisions of this Court.

The principal decision or pair of decisions which we believe are governing in this case are Morrissey v. Commissioner, cited in the brief, and that of United

Steelworkers v. R. H. Bouligny, Inc. The Bouligny case -- well, let me deal first with Morrissey. Morrissey holds that a real estate investment trust is an association as opposed to some other species of entity. It says in effect in the holding -- the holding of the case is that it will be taxed as an association under the applicable provisions of the Internal Revenue Code.

QUESTION: They don't purport to govern diversity jurisdiction, do they?

MR. FISCHMAN: No, Your Honor. The Morrissey case is addressed particularly to the statutory construction of the Internal Revenue Act, but I thin a careful reading of the case -- and we say this in our brief -- the case does not confine itself to application on the narrow issue of what is this entity for purposes of the Internal Revenue Code. What it does say is this entity is a business trust and we will treat it as such incidentally for tax purposes.

QUESTION: My question was not so much that the Morrissey case may not have relied on the Internal Revenue Code but that perhaps it may have been wrong in relying on the Internal Revenue Code. Since we do have diversity jurisdiction in fairly carefully defined statutes setting out what shall be the tests for jurisdiction in the federal courts, why go to the Internal

Revenue Code?

MR. FISCHMAN: I don't believe we are looking to the Internal Revenue Code, Your Honor, to determine where the jurisdiction lies. As we say in the brief, it is really a two-point analysis. All Morrissey says is this entity is a business association. We are not going to treat it as a conventional trust because it has the features of continuity or perhaps perpetual life, it has the features of transferability of interest, it is an active on-going business organization that has the object of making money and distributing the gains to the beneficial interest holders. It is not a trust. That is all that we say Morrissey holds.

To find out where the jurisdiction lies, one must then look to the Bouligny case which is in itself only the natural outcropping of its antecedents of the prior decisions of this Court in Chapman v. Barney in 1887, I believe, a decision of this Court in which it was held as a matter of notice by the Court, as opposed to anything that was suggested by either of the parties in their briefs, that the Circuit Court at that time did not have jurisdiction because the entity there is called an express company, it was in essence a joint stock association and therefore, as has been characterized, a mere partnership, and the Court said we must look to the

citizenship of each of the constituent members of this entity that have aggregated themselves for the purposes of conducting business.

The next case to come along was the --

QUESTION: You are talking about the 1887 case now?

MR. FISCHMAN: Yes, Your Honor.

QUESTION: Do you think the changes in modes of doing business from that time to this has anything to do with how this case should be viewed?

MR. FISCHMAN: None whatever, Mr. Chief Justice. We believe that the basic principle is one that adheres from the earliest concepts of our system of federalism which is that ordinarily these cases belong in the state courts, and this was pointed out in the Carlsberg decision which we have cited in our brief, that this federalism concept that says these cases belong in the state courts unless there is a good reason they belong in the federal courts.

If you go back to the problems that this Court, the antecedents that this Court had in wrenching with the decision of what to do with corporations, they were artificial persons, they had no citizenship of their own. So originally, in Bank v. Deveaux the Court said we are not going to treat them as an entity, we are going to

look to the citizenship. The Court then reversed itself in the next case, and then finally in the Marshall v. Baltimore & Ohio case, the Court said, all right, we are going to treat this entity as being comprised of its individual shareholders, its beneficial interest holders, but we are going to indulge in the fiction that all of these people reside in the state of incorporation, and this persisted until the 1958 amendments to the Judicial Code which said we are now going to codify that fiction, but there has been no other effort on the part of Congress to recognize real estate investment trusts, limited partnerships, joint stock associations, or other forms of unincorporated associations.

QUESTION: But what you have just said suggests at least to me that over the last century the varying modes of business and practices have been reflected in decisions of the courts.

MR. FISCHMAN: This is true, Your Honor, but if we look to the Bouligny case we find that a labor union is certainly a type of entity that I don't believe existed in any great quantity during the early part of the development of this country. The labor unions became strong really as entities at the beginning of this century.

In the Bouligny case, this Court said, speaking through Mr. Justice Fortas, that we will not extend this

rule to comprehend the labor unions, we will not indulge in the same fiction for the labor union that we have indulged in in the corporation, and the Court could conveniently say that I think because at that time the corporation had been treated by Congress, and this is why the opinion says that pleas for extension of the diversity jurisdiction should be addressed to the Congress, and I think that is what the respondents have argued here in part of their brief. We finally get down to it and they say this is what the rule ought to be, this Court should create a fictional citizenship for this one particular type of entity, as Massachusetts business trust.

QUESTION: But wouldn't you agree too that pleas for contraction of diversity jurisdiction should be addressed to Congress?

MR. FISCHMAN: I don't believe that it would represent a contraction, Your Honor. Mr. Justice Rehnquist, because the rule traditionally has been that it must be the citizenship of the individual person and not an aggregation of persons. I don't believe it is contracting the federal jurisdiction, the diversity jurisdiction of the federal district courts.

QUESTION: I take it you think this decision expanded it.

MR. FISCHMAN: I think unquestionably, Your

Honor. For example, the Carlsberg court treated -- this was a Third Circuit decision and the Carlsberg court said that it would in fact be expansive of the jurisdiction. The court says --

QUESTION: Is there Circuit Court case against you?

MR. FISCHMAN: No --

QUESTION: Except one I can think of?

MR. FISCHMAN: -- the instant case. There are other cases, Your Honor, and we have --

QUESTION: How about the Second Circuit?

MR. FISCHMAN: The Second Circuit has not ruled directly on this issue. The Second Circuit concerned itself with the case called Colonial Realty v. Bache & Company. Now, that case did not deal with the Massachusetts business trust, it dealt with a limited partnership. Now --

QUESTION: But it gave the limited partnership a separate existence, didn't it?

MR. FISCHMAN: It did, Your Honor, and it --

QUESTION: And traditionally that would have been subject to the individual membership rule?

MR. FISCHMAN: It should have been and arguably that case --

QUESTION: That was an expansion of jurisdiction,

too, you think?

MR. FISCHMAN: We believe clearly it was. The Colonial Realty v. Bache case has been extensively criticized in the decision of the Third Circuit in the Carlsberg court, Carlsberg v. Cambria Savings & Loan. Now, that case likewise involved a limited partnership. And what the Court said is we are unwilling to engraft upon conditional diversity principles the provisions of Rule 17 to determine diversity, to determine the citizenship of the parties. Rule 17, if it does do that, then perhaps it conflicts with Rule 82. Under the construction that the respondents have argued for, Rule 17 would become in effect a jurisdictional rule as opposed to one that merely determines the capacity of the party, and I think that is what Rule 17 was directed at.

It seems that the respondents have sort of put the cart before the horse. They are saying let us look to Rule 17 to determine where the jurisdiction is and then we will see if there is diversity. It doesn't make sense, and this is what the Court in Carlsberg looked at. And as the respondents concede in their brief, there really is no practical difference between the limited partnership and the real estate investment trust.

Now, I would like to turn for just a moment and discuss the cases that were cited extensively by the

respondent, the several lines of cases, Dodge v. Tulleys, Wyoming & Susquehanna Railroad v. Blatchford, and --

QUESTION: Well, if we had taken the Second Circuit case and affirmed it, I suppose you probably wouldn't even be here.

MR. FISCHMAN: Well, of course we are here, Your Honor, with all due respect because the Court granted certiorari and --

QUESTION: I know, but you might not have petitioned. If we had previously agreed with the Second Circuit in the limited partnership case, would that have ruled this case, do you think?

MR. FISCHMAN: It certainly would have a telling effect upon it.

QUESTION: Yes.

MR. FISCHMAN: It certainly would. I don't know that the Court will see any distinction between the Second Circuit case and this case. I honestly don't see any distinction between the limited partnership and the real estate investment trust. They all have continuity of interest, they all have a body of shareholders who have delegated to a group of trustees, curators, managers, directors, whatever you would call them, the managerial duties of their entity, but it doesn't change the basic fact that they are the real parties in interest in this

case, if real party in interest analysis is indeed even the correct way to approach the case.

QUESTION: For all practical purposes, what do you regard as the differences between a corporation with directors and 9,500 stockholders and this situation? Practical, now.

MR. FISCHMAN: Mr. Chief Justice, I don't think there are any practical distinctions in the two.

QUESTION: That is what the Fifth Circuit seemed to think, wasn't it?

MR. FISCHMAN: I think that it may be correct, Mr. Chief Justice, but I think what they are doing then is they are engrafting or they are establishing there a whole new species of quasi-corporation, if you will, into the diversity jurisdiction.

QUESTION: That has been going on over the last hundred years, hasn't it, to some extent?

MR. FISCHMAN: I think the decisions of this Court, Mr. Chief Justice, show that when it has reached this Court, the Court has held that the citizenship of the unincorporated association is that of its members. I think to say otherwise is to in effect overrule Bouligny, at least implicitly, and created for the labor union, for example, a form of second class citizenship. I can't really see any distinction between the modern labor union

and the modern business trust. They are both comprised of aggregates of people, of citizens, of live human beings who come together under one banner for the purpose of conducting their business and accruing gains or benefits to the parties.

QUESTION: There is one difference I suppose with the union, is that for most of its litigation, not every case, because Bouligny teaches to the contrary, most of its litigation probably has a federal question that it can assert when it sues an employer under a federal statute. There isn't an awful lot of litigation with unions that is based on diversity, is there, in the federal courts?

MR. FISCHMAN: I am really not prepared to answer that, Mr. Justice Stevens. I could only say this: In the Bouligny case the issue involved libel brought by the company against the union which was clearly a state created right --

QUESTION: That's right.

MR. FISCHMAN: -- and clearly belonged in the state unless there was some bona fide basis for it.

I want to respond briefly to the cases that deal with trusts. Several of these cases were cited and I think are distinguiable on the fact that all of the parties did in fact have diverse citizenship even including the

beneficial interest holders and including the trustees. That is the case of Dodge v. Tulleys and Bullard v. City of Cisco. In those cases which are relied upon by the trustees in this case, you already had diversity anyway and I don't think that the points made in those cases are necessary for the decision that was ultimately made.

In the Wyoming & Susquehanna v. Blatchford case, the Court held there was no jurisdiction because the trustee in the case did have the same citizenship as one of the defendants. They were both residents of Pennsylvania. So I don't know how much those cases furnish a dichotomy between the line of cases of Bouligny, Chapman v. Barney, Great Southern Fireproof Hotel, which was a case that involved a limited partnership which was decided by this Court, and as nearly as I can see squarely conflicts with the Second Circuit case which this Court denied cert on but certainly did not hear and affirm.

I will save the balance of my time, Your Honors, if I may for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Ellis.

ORAL ARGUMENT OF JAMES A. ELLIS, JR., ESQ.,

ON BEHALF OF THE RESPONDENTS

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

First, I must disagree with my learned colleague as to the essence of the holding of the Fifth Circuit. It is my reading of the decision by the Fifth Circuit that the individual plaintiffs who allege that they were trustees of a business trust were the real parties in interest and that it was their citizenship that governed the question of diversity of citizenship jurisdiction.

QUESTION: That is the test you are proposing, real party in interest?

MR. ELLIS: That is I believe the essence of the test, that's correct, Your Honor. Like Mr. Morrissey case in the Morrissey case, the plaintiffs in this case were trustees of an express trust. The long line of decisions that are cited in the briefs by both sides hold two basic premises that I think are essential to the analysis of this case.

Those cited by Mr. Fischman on behalf of his clients, including Chapman v. Barney and Marshall v. Baltimore & Ohio Rail Road, and the Bouligny case all stand for this proposition, that an unincorporated group of individuals that by state law or otherwise have the right to sue in a joint name are nevertheless -- that joint name is nevertheless not a citizen. Citizenship is a status that is attributed only to flesh and blood individuals. And when there is a suit in a joint name,

it becomes incumbent upon the court to determine who really are the flesh and blood individuals that are suing in that name.

The cases which we cited I think hold to the proposition that when a suit is brought in the name of a trustee for the benefit of the beneficiary, really and truly then it is the citizenship of the plaintiff, the trustee and not the citizenship of the beneficiary that governs the question of diversity jurisdiction.

Only when it is a non-personal suit, that is a suit by an entity or in the joint name of several individuals do we have the question that counsel poses and that is trying to determine the citizenship of that name or that entity.

To analyze this case, we think it is important that the Court consider the basic purpose of the diversity jurisdiction. Mr. Chief Justice Marshall early in this Court's history commented that the drafters of the Constitution either had apprehension as to the impartiality of the state courts or at least viewed with indulgence the possible fears and apprehensions in that regard that suitors might have.

The purpose of the diversity jurisdiction is to provide a device to give some protection against local prejudice. Another kind of prejudice that is -- prejudice

is a subject that this Court deals with in many ways. Of course, this is not prejudice based on race, religion or sex but it is prejudice against United States citizens based upon their domicile, their citizenship in a state other than the state of the opposing party, the state that --

QUESTION: You wouldn't have that in Texas, surely?

MR. ELLIS: I'm sorry, I didn't understand the question.

QUESTION: You wouldn't have that in Texas, would you?

MR. ELLIS: Your Honor, I must say that there is that apprehension among some litigants in Texas and I suspect in most of the other states also. I must say that that was one of the reasons that this case was brought in the federal court rather than the state court. Whether it is true or not, no one will know, but the apprehension of local prejudice is one of the motivating factors for bringing the suit in federal court.

QUESTION: What difference is there, you would get the same jury? You would get the same people on the jury.

MR. ELLIS: Your Honor, I disagree with that. In the federal court in Dallas, the juries are selected

from the Dallas Division of the Northern District of Texas, encompassing both rural and urban localities. In the state court -- of course, in Arkana County, where venue would have been placed in the state court system here, the jury would have been selected only out of that rural county and we feel that it is a significant difference to be able to choose both the bar respect of jurors and the Article 3 judge to hear the case.

QUESTION: Do you have any Article 3 judges who were formerly state judges?

MR. ELLIS: Certainly.

QUESTION: Yes.

MR. ELLIS: Yes, sir, there are a number of Article 3 judges --

QUESTION: I know.

MR. ELLIS: Yes. I must say though that those judges who have become Article 3 judges in Texas no longer have to stand for election in partisan elections, as other judges do and we feel have a greater capacity for impartiality.

QUESTION: Let's now get into discussion of what we don't know about.

MR. ELLIS: Yes, sir. I would like to move to the --

QUESTION: The point is if you have diversity

of citizenship here, then you have a right to bring your lawsuit into federal court without showing any prejudice or anything else and if there isn't you don't.

MR. ELLIS: That's correct. That's correct. And the question is a simple question and we think that the answer is an easy answer: Is this a controversy between citizens of different states? The question is who is the controversy between. We must examine the controversy, that is the controversial facts out of which the case arose, the case itself as pleaded by the plaintiffs and the parties to both the controversy and the lawsuit.

The answer we think should be not mere theory but a real and practical answer.

Now, who is the controversy between? Is it between the plaintiffs on the one hand, all of whom are individuals who are citizens of a state other than Texas, and on the other a Texas corporation that has its principal place of business in Texas.

What is the controversy? The controversy is a suit between the plaintiffs who allege that in their capacity as trustees they entered a business transaction that involved the defendant, Navarro Savings Association. They contend that they lent $850,000 and accepted a note payable to them as trustees, and that as part of that transaction they received a take-out commitment, a

commitment to make a loan from Navarro and that there was a breach of that commitment. They claim damages and seek relif.

Of course, there was no trial in this case. It will be incumbent upon the plaintiff upon remand to prove that they are entitled to the relief they seek, including that they are entitled to receive that relief in their capacity as trustees.

There was no challenge in the trial court that the plaintiffs, the individual trustees here lacked capacity to sue, there was no challenge that they were not the real parties in interest, there was no challenge that any of the 9,500 beneficial shareholders were necessary or indispensable parties to the lawsuit. There was no challenge that there was any improper joinder of plaintiffs or collusion or any other improper device to create diversity jurisdiction.

QUESTION: I assume all the trustees are shareholders.

MR. ELLIS: It is alleged that three of the eight are shareholders.

The trial court dismissed the case apparently by following this argument: Premise number one, this is a suit by the trust rather than by the individual plaintiff trustees. We disagree strongly with that, and the

Court of Appeals, of course, held very specifically that the trust was not a party to the lawsuit, it was the individual trustees who were the plaintiffs. But premise number one is that this is a suit by the trust.

Premise number two is that the trust is not a citizen. We agree with that. The trust is not a citizen.

Premise number three is that we must determine what the citizenship of that trust is and we conclude that it is that of all of the shareholders and therefore it is really a suit by 9,500 people who were not involved in the transaction, who were not named plaintiffs, who have no involvement in the litigation. That is the argument we contend that the trial court's dismissal of this case was based upon, and we think that it is not correct and that the Fifth Circuit was correct in reversing.

The proper analysis we think is this: Assuming that we were in error as to premise number one and that this really and truly was a suit by the trust rather than by the trustees --

QUESTION: When you say "by the trust," are you using the term "trust" to mean Massachusetts business trust as opposed to corporation or individual as a method of doing business?

MR. ELLIS: I believe that that is the sense in which I am using the word. Of course, a trust is hard to

define metaphysically. It is a relationship between some beneficiaries on the one hand and some trustees on the other. In this situation, of course, there is a right to sue in the name of the trust and the question is who is it really that is suing in the name of the trust.

QUESTION: Is the trust a person or a thing?

MR. ELLIS: Again, I believe that it is a series of rights and responsibilities between some beneficiaries, some people here and some trustees, some people over here, and that it is not a thing or a person.

QUESTION: Well, if you had to choose between the two alternatives Mr. Justice Rehnquist gave you, wouldn't you say it is a thing?

MR. ELLIS: It is a thing in the sense that of course it has no citizenship, it is not a flesh and blood person, of course.

QUESTION: It is an entity.

MR. ELLIS: It is an entity, that is one way to view it, that's correct.

QUESTION: What does it call itself when it issues things to its shareholders or its interest holders?

MR. ELLIS: I believe --

QUESTION: Or its beneficiaries, what does it call itself?

MR. ELLIS: It calls itself generally Fidelity

Mortgage Investors, using the name of the trust as the thing that is communicating with the beneficiaries.

QUESTION: Isn't the answer to the question that it is simply a name?

MR. ELLIS: It is a name. It is simply a name.

QUESTION: It is a trust to which a name has been given.

MR. ELLIS: That's correct.

QUESTION: Do you see any anlogy to this trust and to the trust of a corporate trustee for mortgage or debenture holders?

MR. ELLIS: In many ways I believe it is the exact same.

QUESTION: Do you have any authority that answers the question as to who is entitled to sue with respect to divestiture jurisdiction and where the party is the corporate trustee or the trustee or a mortgage or debenture agreement?

MR. ELLIS: Your Honor, we have cited a number of those in our brief, decisions by this Court.

QUESTION: All right.

QUESTION: Well, that is the usual rule for express trust, isn't it, that the trustees can sue?

MR. ELLIS: That's correct, and that is the rule that we rely on.

QUESTION: But that wasn't the rationale of the court below, was it?

QUESTION: I think it was. The trust agreement itself describes it as an express trust, doesn't it?

MR. ELLIS: Yes, it does.

QUESTION: Who holds title to the property?

MR. ELLIS: It is the trustees who hold legal title.

QUESTION: That is what I am talking about.

t MR. ELLIS: That is correct.

QUESTION: They are the only people who can convey it, aren't they?

MR. ELLIS: That's correct, they are the only people who have a right to manage it, the only people who have a right to collect debts owed to the body of the trust, the only persons who have a right to sue.

QUESTION: So the court did analogize it to the express trust.

MR. ELLIS: I believe they in fact held that it was an express trust.

QUESTION: And it is also like the limited partners in a limited partnership?

MR. ELLIS: By analogy, the court below referred to the limited partners in a limited partnership, that is --

QUESTION: As being the ones who have the citizenship for suit?

MR. ELLIS: That is correct. The general partners have the citizenship that counts for purposes of a suit in the name of that partnership.

QUESTION: The general partners.

MR. ELLIS: The general partners, excuse me, Your Honor.

QUESTION: Then the 9,500 other people who have some sort of interest in the corpus of the trust, they have no right to manage or convey property or that sort of thing?

MR. ELLIS: Your Honor, that is correct. They have no rights in that regard at all.

QUESTION: But they do have a right to kick out the trustees tomorrow if they want.

MR. ELLIS: They do have that right on a majority vote, that's correct.

QUESTION: Is that fundamentally different, do you think, from the right of stockholders to dismiss directors?

MR. ELLIS: No, Your Honor, I don't believe it is fundamentally different. I believe it is essentially the same.

The question then is who sued in this case.

We think this is the test that is most simple, most basic and most correct, who sued. Who are the real plaintiffs? If it is some individuals who sued and if there is no need for adjustment of the parties by adding or subtracting parties or realigning the parties, that is if the people, the individuals who sued are real parties in interest with capacity to sue, then it is their citizenship that governs and this case we contend is decided by that principle.

If, on the other hand, it is a name that sues, Fidelity Mortgage Investors in this case, the Court must determine who it is that is behind that name, whose citizenship must govern. In that regard, we think that it will be proper to look to the state law and to the documents establishing that trust or limited partnership to determine who has the right to sue as between the beneficiaries and the trustee on the one hand, who can be sued, who has limited liability, who has unlimited liability, who has the right to transact business from which the controversy arose, who is the agent for whom. And by looking at those principals, it can be determined that in this case the real people who sue, even if it was FMI, Fidelity Mortgage Investors who brought the suit was the trustees, not the beneficiaries.

The Marshall decision cited by the defendants

court below in fact seemed to imply or at least it can be read to imply that even with regard to a corporation, it is the directors and officers whose citizenship governs. I will be the first to admit that the language of that decision is not clear when this Court created a conclusive presumption that a corporation has its citizenship for diversity purposes in the state of its incorporation. It was not clear whether the Court was presuming the citizenship of the directors and officers, on the one hand, or whether it was presuming the citizenship of the shareholders on the other. I believe it can be read either way. But if it is read in the former, that is entirely consistent with all of the analysis that we are suggesting to the Court.

We think that the analysis that we are requesting the Court to adopt is consistent and supportive of the basic purpose of diversity jurisdiction. The beneficial shareholders in this case will not be revealed or participate or revealed to the court or to the jury, nor will they participate as plaintiffs in the lawsuit. It is not realistic we think to hold that they are really the parties to this lawsuit, that they are really the parties whose citizenship governs the diversity jurisdiction.

QUESTION: Did they have anything to say about

whether the lawsuit should be brought?

MR. ELLIS: They have nothing whatsoever to say, Your Honor. Under the trust document, they have no right to participate in that decision. It is the trustees alone who can do that.

The rule that we are suggesting is a simple and realistic approach. It requires no analysis of both the naturalization and domicile of those 9,500 people who were uninvolved in this transaction and in this litigation. We submit then that the Court of Appeals was correct.

But we have a second position that I would briefly mention, Your Honors, and that is this, that if the metaphysical question is decided this way, that it really is the 9,500 shareholders who are the real parties here and who should have sued or who should be the parties, the three plaintiff individuals who are beneficial shareholders alternatively brought this action as representatives of all of the other shareholders. Rule 23.2 of the federal rules specifically provide that as an alternative method for creating diversity jurisdiction when it is an unincorporated association.

QUESTION: Mr. Ellis, do the members of the beneficiaries have any rights as individuals? Isn't the right, if it exists, the right in the entity? How can you have this a class action? I am not quite --

MR. ELLIS: Well, Your Honor, we do not agree that the rights of the individual shareholders are the rights at issue in this lawsuit.

QUESTION: Then it can't be a class action on their behalf, can it?

MR. ELLIS: That's correct, it cannot be, if our assumption is correct.

QUESTION: Then there is no merit to your alternative argument.

MR. ELLIS: Well, there is our alternative argument. Our primary argument is that it is the trustees whose citizenship governs, it is the trustees who are the real parties. Our alternative argument --

QUESTION: If it had any merit, that wouldn't be your alternative argument, would it?

MR. ELLIS: Well, Your Honor, we were surprised when this case was dismissed. That is our alternative argument. We think our major argument is the proper position to take in the case.

QUESTION: What about your federal question?

MR. ELLIS: Again, that is another alternative argument that we have, and that is that the Court of Appeals failed -- excuse me, the trial court failed to develop the record or to allow development of the record before it decided that there was no federal question in

the case. The Court of Appeals did not make any determination of the propriety of that, and we would merely say that if the Court should conclude here that there is no diversity of citizenship jurisdiction in this case, the case should at least be remanded to the Fifth Circuit for determination of the federal question.

QUESTION: And then what?

MR. ELLIS: If the Fifth Circuit determines that there is a federal question alleged in the case, then it should remand the case for trial and development of that federal question.

QUESTION: On what, on the federal question or on some attendant issue?

MR. ELLIS: It should remand it for a trial on the issue of which it has jurisdiction, namely the federal question jurisdiction. But of course it also has pinned jurisdiction in that instance to all causes of action arising out of the same circumstances.

QUESTION: But the thing you want tried is really a pendant issue, isn't it?

MR. ELLIS: It is pendant to the federal claim, that's correct.

QUESTION: And so there is some discretion as to whether to entertain it?

MR. ELLIS: I don't think there is any

discretion. If the court has jurisdiction, it must entertain it.

QUESTION: What, jurisdiction over the federal question and therefore you must entertain a pendant issue?

MR. ELLIS: I believe that that is correct, that the court does have pendant jurisdiction over --

QUESTION: Yes, you have it if you want to exercise it. Do you think there is some requirement of it?

QUESTION: I thought Gibb said to the contrary.

MR. ELLIS: Your Honor, you may be correct on that. I am not familiar with that case at this time.

In conclusion, we would merely urge the Court to affirm the Firth Circuit. We think the reasoning there is proper, correct and practical and reaches a just conclusion.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Fischman, do you have anything further?

ORAL ARGUMENT OF BERNUS WM. FISCHMAN, ESQ.,
ON BEHALF OF THE PETITIONER -- REBUTTAL

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

It would seem that the primary question that has developed here is exactly what is Fidelity Mortgage Investors, is it an entity, is it an unincorporated

association, is it an aggregation of individuals or just what.

The entity is in fact an unincorporated business association. It is not a trust in the traditional sense of an express trust. It may call itself one, but if one reads carefully the declaration of trust in this case, one could find that this entity can be almost anything it wants to be because, for example, as pointed out in the declaration of trust, which is in the appendix to the briefs, the trust can delegate -- excuse me, the trustees have the power to delegate their authority to any one of their membership, any one of the trustees or --

QUESTION: That may be so, but short of that what power does an individual member have?

MR. FISCHMAN: The same power, Mr. Justice, that --

QUESTION: He can vote out the trustees.

MR. FISCHMAN: -- precisely the same power which the shareholders of a corporation have, and that is by whatever the appropriate majority is to vote out the people that are either defending a lawsuit that they would like compromised, or to compel the institution of a lawsuit that they want. There is absolutely no difference in terms of the economic functions of a real estate investment trust and the modern corporation or, for that matter,

a limited partnership or a general partnership such as a joint stock association.

QUESTION: But a corporation is a plaintiff or defendant regardless of who its shareholders or directors or officers are.

MR. FISCHMAN: Precisely, Mr. Justice.

QUESTION: It is the corporation that is the party.

MR. FISCHMAN: Only by original fiat of this Court and --

QUESTION: And now by statute.

MR. FISCHMAN: And now by statute. Our whole point is centered on the fact that this might be a wonderful argument, it might be just an absolutely magnificent idea for real estate investment trusts to have access to a federal forum, but it is up to Congress to make that determination, as this Court has aptly determined in the Bouligny case.

QUESTION: You would think there is a fundamental difference between a labor union and all the other categories we have been talking about?

MR. FISCHMAN: Only in the sense that the labor union is not organized in the ultimate sense for a financial profit, but it does have as its goal the distribution of benefits to its membership. It is on-going, it has

business, it has officers, it has members who control ultimately the decisions of its managers, its president, its stewards. So in that sense there really is no real difference.

I think if the Court here extends diversity jurisdiction in effect and expands it to accommodate the Massachusetts business trust, you create an infinite possibility for deceptive practices, if you will, to create jurisdiction. I think that is clearly an issue which the Court will have to confront. And I would point out to the Court that this particular lawsuit was not originally commenced in the federal district court in the Northern District of Texas. It was commenced in the state district court in Dallas, Texas, and only when a plea of privilege was sustained transferring this case to the county in which Navarro has its headquarters was the suit dropped and refiled in the Northern District.

So some of the argument that there is the local prejudice doesn't completely ring true. It was the particular forum within the state of Texas that the respondents were seeking to invoke.

This Court must consider the Marshall v. Baltimore & Ohio Rail Road case, where it was simply stated that in creating this fiction, we are not going to disregard the fact that the corporators -- and those were

in fact the people who were referred to in that opinion. I can understand counsel's confusion with that term, but the corporators as used in that somewhat quaint or antiquated language simply means the shareholders of the corporation, were the ones whose residence would be looked to to determine citizenship for diversity purposes.

I would respectfully submit to the Court that you must in order to hold diversity jurisdiction in this case, you must overrule Marshall v. Baltimore & Ohio Rail Road, you must implicitly overrule Bouligny and the cases which are its antecedents, and I think you will do so with all the attendant risk that you will increase the litigation which will be filed in federal forums as a direct result of that holding.

I would also respectfully point out to the Court that in this particular case, for example -- of course, it doesn't appear particularly from the record one way or the other whether all of the trustees of the Massachusetts business trust are before the court. But it should be pointed out that there is no requirement under the argument which respondents advance that all of the trustees be before the court.

Suppose, for example, they had several trustees who were residents of the state of Texas. It would be rather convenient to simply ignore their existence and

bring the action in the name of only those trustees who were non-Texas residents. And there is nothing in what the respondents argue that would make that in effect a collusive joinder to confer jurisdiction. It is simply an omission to bring forward those parties who would in effect destroy the diversity jurisdiction of the federal court.

The trust cases, the express trust cases, Dodge v. Tule ys -- first, as we pointed out, we believe, we respectfully submit are distinguishable. An express trust in the sense of a mortgage indenture or in the case of Bullard v. City of Cisco, you had a bond holders committee but that bond holders committee was organized for one limited purpose, and also all of the shareholders, from a close reading of the case, says that the persons who elected to join with the bond holders committee, number one, had citizenship diverse from all of the defendants. That was the first point.

Moreover, all of those bond holders who contributed their bonds to the committee --

QUESTION: Did the signatories of this agreement give to the trustees the right to file suit?

MR. FISCHMAN: Unquestionably, Mr. Justice.

QUESTION: Well, how do you retain it after you give it away?

MR. FISCHMAN: By simply voting out the trustees, Mr. Justice.

QUESTION: I mean how can you file a lawsuit?

MR. FISCHMAN: I don't follow the Court's question.

QUESTION: You delegated to the trustees the right to control, to sue, and what have you. Why do you now have the right to be in a lawsuit?

MR. FISCHMAN: Do you mean as individuals?

QUESTION: Yes.

MR. FISCHMAN: Because the delegation is merely the creature of those parties.

QUESTION: Well, what actually was done to withdraw that delegation?

MR. FISCHMAN: Because in retaining --

QUESTION: Have you withdrawn it yet?

MR. FISCHMAN: They have not, but they ultimately, as the true parties in interest, if that is indeed the appropriate analysis at all, have that power simply by removing those trustees.

QUESTION: But they haven't done it.

MR. FISCHMAN: No, that's true, they haven't done it in this case.

QUESTION: Well, that is the case I am talking about, this one.

MR. FISCHMAN: I understand that, Mr. Justice Marshall, but I believe that the point is that they may do it and in positing that power in the shareholders, you make it no different than the shareholders of a corporation. But the only reason that a shareholder of a corporation was not a party --

QUESTION: There is another difference, a corporation has a state statute declaring it to be a corporation and giving it the right to sue and be sued, but you don't add that.

MR. FISCHMAN: I would respectfully submit that that means if you then refer the federal court to the law of the states to determine federal jurisdiction, which I don't believe this Court has ever held was properly the function of the federal forum. As pointed out in the Carlsberg case, that jurisdiction has to appear from the record itself, it has to be there to begin with.

Under that particular argument, the only reason that a corporation has, if you will, a birth certificate is because the state gave it one. That's fine, but that does not change the ultimate fact that the corporation metaphysically exists only in the contemplation of the law. It doesn't exist, I can't reach out and touch the corporation. I can only reach out and touch individuals who own property and who have some conflict with my

client.

What I cannot see is any difference between that type of entity and the corporation. It is the same thing. And the only thing that gives a corporation the right to be there is because originally a court created fiction and then ultimately an act of Congress.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:08 o'clock p.m., the case in the above-entitled matter was submitted.)

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