In the

Supreme Court of the United States

JOHN P. FOLEY, JR., ET AL.,

Petitioners,

v.

BLAIR & COMPANY, INC., ET AL.,

Respondents.

No. 72-1154

Washington, D.C.
November 12, 1973

Pages 1 thru 43

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

JOHN P. FOLEY, JR., ET AL.,

Petitioners,

v.

BLAIR & COMPANY, INC., ET AL.,

Respondents.

Washington, D. C.
Monday, November 12, 1973

The above-entitled matter came on for argument at 1:38 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNA, 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

APPEARANCES:

LEO H. RAINES, ESQ., 521 Fifth Avenue, New York, New York 10017; for the Petitioners.

HARVEY R. MILLER, ESQ., 767 Fifth Avenue, New York, New York 10022; for 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 Foley v. Blair Company, 72-1154.

Mr. Raines, you may proceed.

ORAL ARGUMENT OF LEO H. RAINES, ESQ.,

ON BEHALF OF THE PETITIONERS

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

Blair & Company was one of the larger stockborkers in New York, and it apparently ran into very severe financial trouble at the end of its fiscal year 1969. And it appears that between 1969, that is September of 1969 and September of 1970, they gradually liquidated their company by giving away, literally giving away branches of their stockbrokerage concern to other concerns to which some of their employees or officers went and became members of. They paid out or permitted subordinated debenture holders who were members of their board of directors to get their money out of the money, and late in Spetember of 1970 they entered into a contract with the New York Stock Exchange Special Fund, by the terms of which the Special Fund was permitted to appoint a person as a liquidator to liquidate Blair & Company. And, as a matter of form, the Special Fund loaned $1,000 to Blair & Company and proceeded to appoint a man, Mr. Scorese, as a liquidator, in a very carefully drawn, and very ornate and very carefully

drafted contract in which his powers were specifically set forth, and in a power of attorney which clearly set forth all of his powers.

And I submit to you, without going to deeply into the record, that there isn't a power that appears in the contract or that appears in the power of attorney that differs in any way from any power that was even given to any receiver or any trustee that was ever appointed by any court or was ever appointed by any insolvent debtor. He was given greater power than a receiver, because he didn't have to file a bond, he didn't have to apply to a court for leave to sell anything or to dispose of anything, and, what is most important, as distinguished from other agents, he was the sole judge of his own powers.

Q Did he have any powers vis-a-vis the creditors of Blair & Company that Blair & Company itself would not have had?

MR. RAINES: He had no greater power.

Q That was my question.

MR. RAINES: He had no greater power. He could settle, compromise, dispose or pay out any creditor's claim.

Q Just as Blair & Company itself could have done, because his appointment?

MR. RAINES: Could have done, yes, just as it could --

Q And he didn't have any special defenses to any

creditors' claims that Blair & Company would not have?

MR. RAINES: None that I was aware of. None that I was aware of.

Q What if you were not a member of the exchange and you wanted to get after Blair and the exchange liquidator was in charge?

MR. RAINES: I don't quite understand your question, Your honor.

Q Would you go to court or would the exchange expect you to deal with their liquidator?

MR. RAINES: Well, now, this is one of the issues in the case. Apparently the position taken by the New York Stock Exchange is that it is a power greater than the court, because while the constitution of the exchange, as I understand it, the powers were limited to arbitration within the New York Stock Exchange. And, as a matter of fact, these very petitioners sought to rescind their contract, because what had occurred here was --

Q But an ordinary non-exchnage creditor wouldn't have been barred from sueing Blair & Company in a court --

MR. RAINES: Not at all.

Q -- just by the appointment of a liquidator?

MR. RAINES: Not at all, sir. Not at all.

Q But an exchange member might?

MR. RAINES: An exchange member might have, but my

clients, who were subordinated creditors, were in an extremely difficult position because being subordinated they were debenture holders who put their money in on a subordinated basis at a time when insiders have already taken their money out. And in order for my client to go into court and to sue as a subordinated creditor, they would have been faced with the overwhelming burden of having to establish firstly that there was sufficient assets in Blair & Company to pay all of the unsubordinated creditors before their right to sue would arise.

Now, the problem in that case is that before they could proceed with such a suit, before they could proceed with the proof to establish their right to bring such a suit, four months would easily have elapsed within which any act of bankruptcy such as preference, fraudulent conveyance would have expired.

We were confronted with a very, very difficult problem, in that we found on practically two-day's notice -- am I departing from your question?

Q Well, somewhat. I just wondered, just briefly, whether you thought the liquidator had any power to keep exchange members from sueing and --

MR. RAINES: I don't --

Q You just don't know?

MR. RAINES: I don't know, and I don't know that it enters into my problem.

Q If he did have, it would be through his own private agreement and not any --

MR. RAINES: As a result of the constitution of the New York Stock Exchange, which compels resort to the procedures within the exchange.

Q But this is part of a self-governing mechanism that is authorized by statute?

MR. RAINES: This is the great problem here. I don't know that it is authorized by statute, it is authorized by the Securities and Exchange Commission, where the New York Stock Exchange is permitted to avoid the consequences of other acts by arrangements with the commission. I do know that these petitioning creditors in this case, when they sought to rescind their contract with Blair & Company, they are compelled to go through what seemed to us a very unfair and one-sided arbitration procedure.

The basic question on this appeal lies in the fact that within four or five days of the appointment of the liquidator, we petitioned Blair & Company into bankruptcy. We cited three acts of bankruptcy, two of which were eliminated by referee Herzog and were not pursued inasmuch as he has in favor on the basic issue of the appointment of the liquidator.

Our position was, as with Shakespeare, that a rose smells as sweet no matter what its name, that this Mr. Scorese, although named as the liquidator, and at other times as an

agent, actually came within the intent of this statute, and a reading of the history of this statutes bears this out. This statute was first enacted in the Bankruptcy Act of 1903, and it was subsequently amended on several occasion into its present form. And throughout the several amendments, the basic expression that was involved here was the doctrine of the appointment of somebody to take charge of the liquidation. This was the essential concept, in the use of the words in the statute, it apparently was limited to a receiver or a trustee.

But at the time this petition was filed, every case, every text, as I have cited in my brief before this Court, which I won't bother to repeat here, held that a liquidator came within the scope of this statute. It could have been a very simple thing for these petitioning creditors to have gone into the state court of New Jersey and moved for the appointment of a state court receiver and then file a petition in bankruptcy which would have clearly come under section 3(a)(5) of the Act. But because of the exigencies of the situation where the four-month period was about to run out, and as a matter of fact, we filed it on the last day, was about to run out on about $3.5 million worth of preferences.

Based upon the texts and upon the laws, we filed it, and as it had been promulgated to that date, we filed the petition directly, and our position on this appeal and the decision of Referee Herzog below, and the decision of Judge

Cooper below have clearly held that the appointment of Mr. Scorese came within the scope of section 3(a)(5) of the Bankruptcy Act, despite the fact that in their wisdom the attorneys who represented Blair & Company or the New York Stock Exchange chose to denominate and designate purely as a matter of naming Mr. Scorese not as a trustee, which he actually was, not as a receiver, which he actually was, but as a liquidating agent.

Q Could I ask you, Mr. Raines, time is running --

MR. RAINES: Yes, sir.

Q -- are you going to get to the effect of the chapter 11 proceeding on which you are bringing --

MR. RAINES: I will, if you want to ask me this question. I have submitted a memorandum on the question of mootness and I was prepared to argue the case in chief rather than the question of mootness.

The chapter 11 proceeding was filed as a result of the filing of this petition. There would have been no chapter 11 if we had not filed the petition.

Throughout two years, there was the threat of confirmation of the chapter 11, but it was never confirmed. Just before this case came up for argument, on October 2, the most amazing order of confirmation was entered. In the 25 years that I have personally practiced before the bankruptcy courts, I have never seen such an order of confirmation. Because

two-thirds of the claims which are supposed to be taken care of in the order of confirmation are reserved for later litigation.

My client has a block of stock that is worth a million dollars which is unregistered and it cannot be transferred, and this stock is being held in limbo and is going to be the subject of further litigation. We have already made a motion directed to this order of confirmation. We did not know the order was entered. It is our opinion that the order was entered --

Q You did have notice of the proceeding at which it was going to -- at which the thing was being taken up, did you not?

MR. RAINES: In the practice of bankruptcy, when the original chapter 11 is filed, the referee sends out a notice of first meeting and in the same notice he says a notice -- a date of confirmation is also set. This date was set two years ago, and it is constantly postponed and postponed and postoned, and it is virtually impossible to keep up with every single adjournment that takes place. We never knew when the hearing on confirmation took place.

Q Well, isn't it a practice that once you appear and sign up as one of the interested parties before the referee that you get notices of --

MR. RAINES: We never get repeated notices, sir. We must appear on every occasion, and I am frank to state that I don't have the staff to do it. We must appear on every occasion,

make a note of every adjournment, and then on the one particular occasion when the debtor elects to hold his hearing on the question of feasibility and the question of whether the settlement is in the best interest of creditors, they simply hold it, and then they submit the order of confirmation to the referee relatively ex parte. There is no new notice.

Under section 355 of the Bankruptcy Act, creditors are supposed to receive a notice of the entry of an order of confirmation, but we never received such a notice and --

Q Is the order of confirmation on appeal?

MR. RAINES: Sir?

Q Is the order of confirmation on appeal?

MR. RAINES: No, sir, we did not know that it was entered. We have made a motion to reconsider the order of confirmation, but presuming --

Q Where is that pending?

MR. RAINES: Before Referee Ballard. But it is only in relation to our particular problem. We could not make it at-large. This is a most peculiar chapter 11. There was never a committee of creditors appointed.

Q Well, let's assume that it isn't, though, that it is a perfectly normal chapter 11 and that it is a final order in chapter 11, and that that proceeding is over. Would you still contend that this case is not moot?

MR. RAINES: I would still contend that it is not moot

sir, and, interestingly enough, in one of the cases on which I draw heavily in my approach to this Court, Bank of Marin v. England, the same question was also raised as to whether the decision was moot, and this Court held that there was going to be further litigation even outside of the bankruptcy proceeding. And there will be further litigation in this case. The determination of what happens to our Rogers stock is specifically keyed to whether or not there is going to be an adjudication here by an exhibit which I attach to my memoranda.

Q Except there isn't going to be an adjudication now, is there?

MR. RAINES: Well, I am asking this Court to reverse the Court of Appeals and direct an adjudication.

Q Well, do you mean in face of the chapter 11 controversy?

MR. RAINES: Yes, the chapter 11 order of confirmation tends to be satisfied. There is a six-month period within which a motion can be made to set aside an order of confirmation.

Q Can there be --

MR. RAINES: Sir?

Q Can there be an adjudication until it is set aside?

MR. RAINES: Well, the adjudication is separate from the order of confirmation.

Q Yes, but normally chapter 11 proceedings or after chapter 11 proceedings supersede a bankruptcy adjudication.

MR. RAINES: They supersede it in the sense that they set it aside.

Q That's right.

MR. RAINES: That's right. They do not dismiss it. The problem -- one of the problems in this case is that when we moved to rdismiss the chapter 11 proceeding early in the proceeding, Referee Ballard held up the decision for about nine or ten months, and when the Court of Appeals came down with the decision reversing the court below and vacating the order of adjudication, in part of his decision, which I put in my memorandum, he said "I can't dismiss the proceeding now because in view of the fact that there is no order of adjudication, this court would lose jurisdiction of this case and it would be sort of throwing the case to the wolves, and this was one of the reasons that Referee Ballard gave for refusing to dismiss the chapter 11 proceeding.

Q Do attorneys for petitioning creditors in an involuntary bankruptcy proceeding -- are they normally allowed fees?

MR. RAINES: Yes, they are allowed fees.

Q On the other hand, if you petition alleging an act of bankruptcy, and it turns out not to be an act of bankruptcy, you may not get fees?

MR. RAINES: Well, that is a question before Referee Ballard with which there might be some disagreements.

Q Yes. And the attorneys for petitioning creditors in an involuntary bankruptcy proceeding is entitled to fees --

MR. RAINES: Yes, sir.

Q -- and if that proceeding is superseded by a chapter 11 case --

MR. RAINES: He is still entitled to fees.

Q -- he is still entitled to his fee.

MR. RAINES: Yes.

Q But if he is superseded by a chapter 11 proceeding and the bankruptcy proceeding itself was invalid, you may not be entitled to fees?

MR. RAINES: May not be. I am not --

Q Is that enough to make this case not moot?

MR. RAINES: I think it would -- I did not so state in my memorandum because I felt that my personal affairs is of no concern to this Court. But since you have been good enough to raise it, it certainly is one of the elements that I am deeply concerned with. There also is a question of costs. My client has lost $3 million and he is now faced with a bill of costs in the Court of Appeals in excess of $4,000.

Q Well, the costs outstanding don't prevent something from becoming moot, I think.

MR. RAINES: Well, it is a consideration. It is an

element of consideration. But basically the reason I say it is not moot is because, as I argued in my memorandum of law judge, this decision of Judge Friendly's of the Court of Appeals, is in my opinion one of the most dangerous.

Q But that doesn't prevent it from being moot, even if it is totally 100 percent wrong, the case still might be moot.

MR. RAINES: It could be moot on the matter of theory, but it isn't moot because there is much litigation that is still to follow in this case. And the question of adjudication becomes of paramount importance in this subsequent litigation.

Q I want to make it clear what you -- a while ago you answered that if you were entitled to fees in the involuntary bankruptcy proceeding, if you were, and then a chapter 11 proceeding came along, the chapter 11 proceeding would have to recognize your claim to fees.

MR. RAINES: Well, I would be entitled to fees as attorney for petitioning creditors.

Q Right.

MR. RAINES: The bankruptcy proceeding does not lapse. It merely is set aside. It is --

Q The chapter 11 proceeding must pick up the estate's obligation to you for fees?

MR. RAINES: That is my opinion, sir, sir.

Q It is your opinion, but is it the law?

MR. RAINES: There are cases so holding.

Q And you don't get them unless this was an act of bankruptcy?

MR. RAINES: Well, I can't answer that, because that is a question that I have had occasion --

Q You don't want to concede that?

MR. RAINES: No, no. I know of no case that holds that if it is subsequently not adjudicated --

Q Well, let's put it this way: If it was in fact an act of bankruptcy, then you are home free on the fees, is that it?

MR. RAINES: Well, if the law is that I get it whether it is adjudicated or not, then I am home free.

Q Suppose it is if you only --

MR. RAINES: If I win.

Q -- only if you win on this on the merits.

MR. RAINES: As far as Leo Raines is concerned, it is a very important and non-moot case.

I have rested, if I may go back to my case in chief, I have rested my position on this appeal, as I did below, on the fact that this Court has ruled again and again on basic paramount issues that the bankruptcy act and the federal courts have paramount and exclusive jurisdiction of the liquidation of insolvent estates. And based upon the cases of Bank or Marin v. England, and Pepper v. Litton, there is doctrine that substance will not give way to form, and that technical

considerations will not prevent substantial justice from being done.

Now, these principles were followed by other courts. In 1941, in the District Court of Oklahoma, a petition was filed which was technicall incorrect, and the court itself, in rendering its opinion, stated that it had very serious doubts whether technically it can within the specific scope of the statute, but the court said the court will not stand on the technicality with reference to form when substance is alleged. And it held that, despite its doubt, that the appointment of a liquidator by contract constituted an assignment for the benefit of creditors, nonetheless firmed it sufficient to constitute an act of bankruptcy.

Now, this case, in the matter of R. V. Smith, was cited in Colliers, cited in Remington, the two leading texts on the subject as the guide to which we attorneys follow. And as I have cited in my brief, Colliers specifically said in so many words that a liquidator appointed by contract came within the scope of the statute.

In 1953, Judge Weinfeld, who I am certain Your Honors will recognize as one of the outstanding jurists on the question of bankruptcy, wrote a landmark decision in which he argued and in which he stated -- if I may, I have cited it in my brief here -- again, following the principle of Pepper v. Litton:

"It is not required that the transferee of the property

be formally 'appointed' as 'trustee' by a ceremonial document referring to him as such. The method adopted to effect the transfer is immaterial. It is the end result that counts. Any action by one who is insolvent which effectivaly causes the transfer of his property to another for final liquidation purposes appoints the transferee a 'trustee to take charge of his property' under section 3, sub. 2(5)."

Now, this is the point we make here. Mr. Scorese, whether you made him an agent, a liquidator, a trustee or a receiver, was the identical person given the identical powers. He was given completely in charge, unlike an agent, as I have cited in Boger on Trusts, unlike an agent. He had no responsibility to his principal. As you read the contract, you realize that he was the sole judge of his own acts. He was a trustee in every sense of the word, although called an agent. And as I say to Your Honors, in looking at the substance rather than the language used, rather than the form, you must hold that Mr. Scorese's appointment was as a trustee in every sense. He was fully in charge and responsible to nobody. He could buy, he could sell, he could transfer, he could sign, he could do everything that an owner could do.

But in an attempt to avoid the paramount and exclusive jurisdiction in these courts, he was deliberately given another name in the hope of avoiding the consequences of his appointment.

And so I say my basic argument is that in looking at the substance of his appointment, we came clearly within the scope of the intent of Congress in enacting 3(a)(5). And the latest manifestation of Congress' intent is in the enactment of the Stockholders Protective Investment Act, where in section 5, under this new law, which frankly was occasioned as a result of the Blair insolvency and the insolvency of a few other large stock brokerage houses, the Congress specifically designated the appointment by a court and specifically stated that a court could find the jurisdiction under this Act if it found that the particular debtor is the subject of a proceeding pending in any court or before any agency of the United States, or any state in which a receiver, trustee or liquidator for such member has been appointed.

So that if a liquidator is appointed, if they do this again, that is if the Stock Exchange takes it upon itself to control its own liquidation under the Stockholders Protective Investment Act, Congress has declared its intention that liquidations must be under court control and not under private control.

This has been a tragic situation because if this order of confirmation stands, approximately $10 million was withdrawn illegally out of this corporation and this liquidator, this so-called representative who was supposed to take charge of these assets, did nothing to investigate. They gave away branches of

their company throughout the United States and no investigation was ever made.

In the record is the story of a give-away, of $100,000 to a man by the name of Wygod, as liquidating damages for a contract that was never performed, then within a few weeks prior to the filing of the petition and prior to the filing of the -- prior to the appointment of the liquidator, and he never did a thing to get that $100,000 back. There are $21 million of subordinated creditors who have been wiped out in this chapter 11 proceeding, completely wiped out, all at the liquidation of a private liquidator appointed by the New York Stock Exchange. This is the situation where under a section 3(a)(5) we have a right to supersede a court appointed receivor. We have a right to supersede a statutory assignment for the benefit of creditors, to supersede a common law deed of trust, and yet the court below has held that we cannot supersede the appointment of a private liquidator. Now, that is not justice, that is not the intent of the law.

This court, that is the federal courts, have exclusive jurisdiction and I respectfully ask Your Honors to reverse the Court of Appeals below and reinstate the adjudication of bankruptcy here.

Thank you very kindly for your attention.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Raines.

Mr. Miller?

ORAL ARGUMENT OF HARVEY R. MILLER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. MILLER: Mr. Chief Justice and may it please the Court: My name is Harvey R. Miller, and I represent the respondents in this case.

It is our position, Your Honors, that the cause presented today is moot by reason of the termination of the chapter 11 proceedings.

Approximately two weeks ago, we filed a memorandum in which we suggested that the cause is moot. Subsequently to the filing of that memorandum, Mr. Raines filed a reply or an answering memorandum, and basically Mr. Raines has raised twelve points.

He agrees one-hundred percent with each of the authorities which we have cited to show that the cause is moot. However, he says that the court should consider the merits of this matter for the following reasons:

One, he did not receive notice of entry of the order of confirmation. Notice of the hearing to consider confirmation of the arrangement was given by the bankruptcy court to all parties in interest, including Mr. Raines and his clients. Under rule 77(d) of the Federal Rules of Civil Procedure, as well as rule 922(a) of the Rules of Bankruptcy Practice, which became effective on October 1, 1973, there is no requirement that notice of entry be given, and it specifically states that

lack of notice of the entry does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed. The order of confirmation is final for all purposes, distribution has been made to creditors, administration expenses have been paid.

Q Mr. Raines mentioned a motion to set aside your confirmation --

MR. MILLER: There is. We were served, Your Honor, with a motion, which I believe is returnable to December 5, to reconsider his clients' claims, and I will get to that, if you will, Your Honor.

Mr. Raines says in his second point that the order of confirmation was entered prematurely. Mr. Raines, on behalf of his client, made a motion to dismiss the chapter 11 proceeding, and the basis of the dismissal of the chapter 11 proceeding was that you could not have an arrangement in this type of a case. And as I have found in practicing in the bankruptcy court, when you don't have much law it becomes almost academic to cite Pepper v. Litton, because the bankruptcy practitioners take the position that under Pepper v. Litton you can do anything.

Well, the motion to dismiss was denied by an order and an opinion of Reveree Babbit, dated February 16, 1973, and in the final paragraph of that opinion, Referee Babbit said, "Foley's motion must be denied in all respects, and upon this order becoming final, it is expected that Blair will move

promptly to confirmation of its arrangements. Its creditors have waited long enough."

Subsequently to February 16, and with the constant prodding of the bankruptcy court, over 9,500 claims were objected to and were resolved, over 9,000 claims were expunged, distributions were made to all of the customer creditors during that period of time. The arrangement was confirmed thirty months after it was filed. I respectfully submit that nobody could say that it was a premature confirmation.

Further, Your Honor, in the brief in opposition that we filed in this proceeding, at least three times we say that confirmation of the arrangement was imminent and that we were moving toward confirmation.

The point which Mr. Raines --

Q Do you think it would have any impact whatsoever on the finality of the confirmation if the Court of Appeals were reversed?

MR.MILLER: None whatsoever, Your Honor.

Q You would say that because the case -- you think the case is moot?

MR. MILLER: The proceeding is terminated, Your Honor, under the authorities which we have cited in the memorandum suggesting --

Q Well, what about the fee question?

MR. MILLER: Mr. Raines has reserved his right to file

an application for allowance.

Q But the confirmation in paying administrative expenses did not schedule his fee claim?

MR. MILLER: Mr. Raines -- in fact, Your Honor, I happen to be in the court house that day when Mr. Raines' partner appeared, and I was called in by Judge Babbit who asked me if I had any objection if Mr. Raines filed his application subsequently, and I believe there was a letter from the referee in which --

Q I know, but he is not entitled to his fees unless this was an act of bankruptcy.

MR. MILLER: No, I am not certain, Your Honor, that I would agree with that principle. He is entitled to a fee. Maybe the quantum of the fee would be different.

Q Well, let's assume that it would be for a moment.

MR. MILLER: It may well be, Your Honr .

Q If this was an act of bankruptcy and he was entitled to have an involuntary adjudication, he is entitled to fee.

MR. MILLER: He may be entitled to a lawyer's fee.

Q And as an expense of administration the chapter 11 proceeding would have to recognize.

MR. MILLER: Yes, Your Honor. I would agree with that, Your honor.

The third point which Mr. Raines has raised is that

arrangement was voted and approved by the slim vote of general unsecured creditors. We have set forth in our subsequent memorandum the actual findings that the bankruptcy court made in respect of the acceptance of the plan, and of the 7,633 customer creditors whose claims aggregated $37,380,000, 6,350 customer creditors whose claims aggregated $33,100,000 accepted the arrangement. Of the general creditors, 93 creditors, whose claims totalled $3,261,000, 66 accepted the arrangement, and their claims aggregated $2,800,000, hardly a slim majority.

Q What would be the source of the enhanced fee, as put in your terms?

MR.MILLER: In my terms, Your Honor?

Q Where would that come from if the fee were enhanced because of circumstances suggested by Justice White?

MR. MILLER: Under section 64(a) of the bankruptcy act, Your Honor, which is entitled "priorities," the court is authorized to allow one reasonable attorney's fee in respect of the attorney for petitioning creditors. My understanding of the precedents in connection with the matter is if you sustain the petition, then you are entitled to a greater fee, depending upon the type of opposition you met, the complexity of the problems, the amount of time which was devoted to it, the quality of your opposition. So there is a possibl ity that he could be entitled to a greater fee if this Court were to reverse the court --

Q Who psys it?

MR. MILLER: Pardon?

Q Who pays it?

MR.MILLER: Blair would pay it, Your Honor. It is an administration expense and it would have to be paid from the estate.

Q Well, if you are totally unsuccessful in petitioning on behalf of a creditor for bankruptcy, you get nothing, I take it?

MR. MILLER: The literal language of the statute, Your Honor, doesn't seem to indicate that. I would certainly argue that in connection with Mr. Raines.

Q Well, I would sure argue, if I were representing the --

MR. MILLER: Well, I have seen, Your Honor, where the bankruptcy court has given a token fee of $100 or $250.

Q Well, who pays it if there is no adjudication of bankruptcy?

MR. MILLER: If the bankruptcy proceeding, Your Honor, is superseded by a chapter 11 proceeding, whether there has been an adjudication or not -- for example, if immediately subsequent to the filing of the involuntary petition, without going to trial on the issue of adjudication, Blair had filed a chapter 11 proceeding immediately, the question of adjudication was never resolved because you have a constructive adjudication in the chapter 11 proceeding --

Q If the adjudication is resolved adversely to the petitioning creditor, though, then there is no question of the fee?

MR. MILLER: I would think not, Your Honor, although I have heard from Mr. Raines' partner to the contrary.

Mr. Raines' fourth point, Your Honors, in respect to the mootness point, is that I made a statement before the Second Circuit Court of Appeals that if the District Court decision was reversed, Blair would move to dismiss the chapter 11. I never made any such statement.

His fifth point is that 80 percent of the claims included in the schedules of distribution are subject to objections as to allowance. Mr. Rains pays no attention to the fact that approximately 9,500 claims were objected to, trials were heard before the bankruptcy court, and those claims were resolved. Moreover, there aren't objections pending as to 80 percent of the claims. All Blair did was reserve its right to file objections, if necessary. If Blair does not file objections within 90 days, then those claims are allowed automatically.

His next point is that Foley's motion to dismiss the chapter 11 petition was denied by the referee in bankruptcy who was strongly influenced by the decision of the United States Court of Appeals. Mr. Raines does not advise the court in his memorandum that an appeal was filed from the denial of the motion to dismiss the chapter 11 proceeding, was heard in the

United States District Court for the Southern District of New York, and the referee in bankruptcy was affirmed, and former Chief Judge Sylvester Ryan held that the grounds argued by Folwy for dismissal to be frivolous and without merit or substance. Mr. Foley never took an appeal from that decision, and that is a final decision.

His next point is that New York Stock Exchange is being unjustly enriched and creditors might possibly get a greater return in liquidation under the supervision of the court appointed trustee. Well, even if this Court were to reverse the chapter 11 proceeding as finished, besides which -- and specifically provided by chapter 11 of the bankruptcy act, you may have a provision in an arrangement whereby upon the confirmation or the conclusion of the proceeding, the remaining assets of the debtor are transferred to a third party. Usually it is the party who put up the money.

Now, in the case at bar, the New York Stock Exchange advanced $20.4 million to satisfy customer creditor claims in this case. The assets remaining to Blair in no way measure up to $20.4 million. In addition, in order to confirm a chapter 11 proceeding under section 366 of the bankruptcy act, the bankruptcy court must make a determination that the arrangement is for the best interest of creditors. The phrase "best interest of credits" has been construed to mean and require a determination by the bankruptcy court that the creditors will receive

more in satisfaction of their claims pursuant to the chapter 11 arrangement than they would receive in a liquidation of the estate in ordinary bankruptcy.

There was an evidentary hearing before the referee in bankruptcy and he made a finding that this arrangement was in the best interests of creditors, that they would receive more under the arrangement than they would receive in the event of a liquidation under ordinary bankruptcy chapters 1 through 7.

Mr. Raines' next point is that an adjudication in bankruptcy can be used as a fulcrum upon which a more complete investigation and interrogation to the very justice of the plan and a reconsideration of the best interests of creditors should be predicated.

This arrangement was proposed by Blair on May 25, 1971. Mr. Foley and all of the other creditors had at least two and a half years to conduct whatever investigations they desired into the terms of the arrangement, the assets, liabilities and affairs of Blair. In point of fact, Mr. Foley, through his attorneys, conducted extensive examinations of officers, employees of Blair, as well as the liquidator.

We submit that the bankruptcy proceedings were terminated by the final order of confirmation. Mr. Raines goes on in his next point, he says the decision of the United States Court of Appeals for the Second Circuit is a dangerous decision. He uses the words "fraud, chicanery and deceit," they are just

replete throughout his brief. He says that the decision is a royal road or a beacon light to fraud and deceit and chicanery.

He never once mentions that there are other acts of bankruptcy which could be alleged if Blair was engaged in fraud. If Blair did make a fraudulent conveyance, section 3 has six acts of bankruptcy, if he missed on this one he could have filed a petition in which he alleged there was a fraudulent conveyance, in which he alleged that there was a preference, in which he alleged that Blair admitted in writing its inability to pay its debts as they matured, and its willingness to be adjudged bankrupt.

Mr. Raines has referred to a four-month period. Many of the acts of bankruptcy in section 3 are not limited by a four-month period. A fraudulent conveyance can be six years under state law, in New York state, that is.

His next statement, andwhich he persists in making, is that Blair is guilty of a give-away of $100,000 which has never been pursued or recovered by the liquidator. That so-called give-away was in connection with the sale of the management contract for the Blair Fund. It is the position of Mr. Foley that Blair should have received a profit on the sale of that management contract. Subsequent decisions by the Second Circuit Court of Appeals in Rosenfeld v. Black have established now that you cannot make a profit on the sale of that contract. In any event, that transcation was never consummated. Blair did

deposit with the prospective purchaser $100,000 to serve as liquidator damages in the event that it did not perform in accordance with the contract.

Mr. Foley and Mr. Raines keep insisting that nothing was done to recover that $100,000. We have told Mr. Raines, we have told Mr. Foley that an action was commenced in the Supreme Court of the State of New York that every effort was being made to recover that $100,000, and it just goes over the waterways.

The action was commenced in 1971. In point of fact, it was tried three or four months ago, and by decision dated October 31, 1973, was decided by the Supreme Court of the State of New York, unfortunately for the defendant.

His next point is that Blair seeks -- Foley, I'm sorry -- seeks the recovery of securities he deposited with Blair and which are subordinated to the claims of other creditors. This is not the first effort that Mr. Foley has made to recover his securities. Before the bankruptcy proceedings, Mr. Foley commenced an action against Blair. The action was commenced in the Supreme Court of the State of New York, New York County. Blair moved to stay that action pending arbitration. The Appellate Division of the State Supreme Court directed that the parties proceed to arbitration. Mr. Foley litigated his right to receive back those securities. He lost the arbitration. The securities were deemed to be the securities of Blair for the satisfaction of claims of creditors. The only reason why these

particular securities were not sold is that there are unregistered and they are restricted. Some of the securities are subject to the one percent rule. Otherwise they would have been sold. He has no right to those securities, the arbitration award was confirmed by an order of the Supreme Court of the State of New York. Mr. Foley never took an appeal from that decision.

In point of fact, I might also add that Mr. Foley has pending at the present time two plenary actions. He is sueing all of the officers and directors of Blair, alleging 10(b)(5) violations and common law fraud, et cetera, he is also sueing the New York Stock Exchange in a plenary action in which he is asserting that the New York Stock Exchange failed to exercise and perform its duties of self-regulation. So that point has nothing to do with what this Court may do with this particular matter.

His next to the last point is that he is liable, Mr. Foley, for costs awarded by the United States Court of Appeals for the Second Circuit. As Mr. Justice Rehnquist has pointed out, there is an unbroken line of cases which establishes the rule that controversy as to costs alone does not salvage an otherwise moot case. And a lead case is Walling v. Rooter & Coe, 321 U.S. 671, and other cases are cited in the footnote of Mr. Justice Fortas in the back of the Marin case.

Q Do you think that goes for attorneys' fees, too?

MR. MILLER: I think so, Your Honor. I don't see that Mr. Raines is in any better position to change this controversy from one which is moot simply because he has an interest in getting a fee --

Q It is not him, it is his client that has got the interest.

MR. MILLER: He wants a fee out of this proceeding.

Q Well, I know, but his clients -- he might collect it from his clients. It is the client that has got the interest.

MR. MILLER: That is the cost of the administration of the proceeding, Your Honor.

Q Well, I agree with that --

MR. MILLER: And I don't think it changes --

Q -- of the chapter 11 proceeding, yes.

MR. MILLER: And suppose we stay in ordinary bankrupcty, Your Honor, it is the cost of the -- I would put that in the same category as the costs which were --

Q But it isn't -- an attorney's fee -- it isn't an issue of an attorney's fee in this litigation in the Court of Appeals?

MR. MILLER: I am not quite sure I follow you, Your Honor.

Q Well, the attorney's fee is not in connection with these proceedings.

MR. MILLER: Right. If I understand what Your Honor

is saying --

Q It is in connection with proceedings in the bankruptcy court.

MR. MILLER: Yes, Your Honor. If I understand what Your Honor is saying, Your Honor is saying even though a matter may be moot, the fact that an attorney has a fee involved in it may change that from being a moot matter.

Q A client has a --

MR. MILLER: Well, I don't know what arrangements Mr. Raines made with his client. He may have a contingent fee basis, I don't know.

Q But it is the petitioning creditor that gets the fee, isn't it?

MR. MILLER: No. The act reads in those terms, Your Honor, but the application is made by the attorney and the order of the bankruptcy court --

Q I understand, but it is nevertheless the petitioning creditor that --

MR. MILLER: Well, the act reads, Your Honor, the act as I recall it says that the petitioning creditor shall be reimbursed for the fees which they may have paid to their attorneys.

Q Exactly. Exactly.

MR. MILLER: Which I would argue, Your Honor, is the cost of the proceeding. In fact, I would say that this petition was filed --

Q Is it not the cost of the bankruptcy proceeding, it is not a cost of this proceeding?

MR. MILLER: Of this particular proceeding, no, Your Honor.

Q All right.

MR. MILLER: The last statement or the last point that Mr. Raines makes is that the situation is a scandal. I don't think I have any words which can respond to that argument.

I might point out to Your Honors that when this petition in bankruptcy, this involuntary petition in bankruptcy was filed, there were 28,000 customers of Blair who had securities and credit balances at Blair. If this proceeding had gone through involuntary bankruptcy proceedings under chapters 1 through 7, and Mr. Foley made an application for the appointment of a receiver, which was denied by the District Court, the fees which would have been paid out of this estate, and there would have been receivers, attorneys, accountants, disbursing agents, et cetera, would have exceeded $7 million based upon the properties which were in the possession of Blair at the time that the petition was filed.

We respectfully submit to Your Honors that this case is moot. Irrespective of what the Court may do, and I certainly would not favor the Court reversing the Second Circuit Court of Appeals --

Q I take it, Mr. Miller, of course all of these events have arisen since the decision of the Court of Appeals?

MR. MILLER: Which events, Your Honor?

Q This issue of mootness.

MR. MILLER: Yes, Your Honor, although we did argue in opposition to the petition for certiorari.

Q Yes. But I am just wondering what view the Court of Appeals might take of this issue.

MR. MILLER: I couldn't venture a guess, Your Honor.

Q Should we decide it or should we let them take a crack at it first?

MR. MILLER: I think a remand might be appropriate, Your Honor.

Q Let me be sure I understand your last response, Mr. Miller. Were you telling us that the case was not moot when the Second Circuit decided it?

MR. MILLER: At the time the Second Circuit decided it, Your Honor, I believe that there was still pending the motion to dismiss the chapter 11 proceeding. Assuming that Mr. Raines and Mr. Foley had been successful in dismissing the chapter 11 proceeding, we would have had to rely upon dismissal of the ordinary bankruptcy petition. We were faced with a situation in which the fees that would have been paid out of this estate would have made it impossible to satisfy customer claims in full. It would have required $35 million in order

to have accomplished that fact.

We believe that the decision, the order of confirmation, which was not appealed from, and which I submit to Your Honors, Mr. Raines knew it was coming on to be heard, he had been following this proceeding, his partner checks the docket all the time, was a resignation on his part and, moreover, he never took an appeal from the motion to dismiss the chapter 11 petition, in which he raised exactly the same points he is raising in his motion coming on in December, Your Honors.

And I might add, Your Honors, I will go into the case in point, the merits of this matter -- we respectfully submit that the appointment of an agent to liquidate property who, as Mr. Justice Stewart points out, has no right, has no power over creditors, he cannot affect creditors.

Mr. Justice White asked could we stay broker-dealers who did business with Blair. We could not stay them. The only grounds that Blair might have had to stay a plenary action was that there was an arbitration contract, and compel whoever was sueing Blair to go into arbitration under the rules of the New York Stock Exchange. But that is only as to member firms. If an over-the-counter broker had sued Blair, there would be a plenary action. We had absolutely no power to deal with creditors.

Q But it was a -- the liquidator did have some powers vis-a-vis other people, vis-a-vis members of the exchange?

MR. MILLER: Of the exchange?

Q Yes.

MR. MILLER: No, Your Honor, he did not.

Q Well, he could keep them from perhaps going into court directly?

MR. MILLER: Only because there was an arbitration contract between Blair and --

Q I understand that.

MR. MILLER: -- and there were many -- in fact, at the time of the appointment of the liquidator, there were many plenary actions pending.

Q I understand.

Q Mr. Miller --

MR. MILLER: Yes, sir.

Q -- am I right in thinking, under New York law, that if there had been a state court receiver appointed, then the remedies of the creditors would have had to be directed against the receiver rather than against Blair?

MR. MILLER: Exactly, Your Honor. And in effect, what would happen upon the appointment of a receiver would be that the property would pass into custodialegis, and creditors would be constrained to file claims with the receiver and they would share pro rata. This is exactly the point in Bonnie Classics, which is relied on very heavily by Referee Herzog and Judge Cooper.

In the case of Bonnie Classics, when the corporation decided to liquidate under the New York stock corporation law, the board of directors became vested with title as trustees and creditors were restrained from proceeding against the property of the corporation. They had to wait until the assets were liquidated, the assets were distributed.

Every case in which it has been held that there is a receiver or trustee appointed under 3(a)(5), there has been an inhibition against the creditors proceeding. This was not the case in connection with Blair. In fact, there is a District Court case in re Ambrose Matthews & Co., which we cite in our brief, in which there was a similar type agreement, and the court held -- and this is a District Court decision in New Jersey -- as the instrument brought about no change in title to the property, either absolute or conditioned, nothing was conveyed or transferred by it, and it could not hinder to delay or defraud creditors because any creditor could proceed to satisfy his claim from the corporation's property to the same extent as though the instrument did not exist. That is exactly the situation which occurred in connection with Blair.

Essentially, Mr. Scorese was an agent of the board of directors of Blair. He had no greater powers than the board of directors had, and he dealt with the property -- in fact, he could be removed by Blair. All Blair had to do at that point in time was pay back the New York Stock Exchange $1,000 and Mr.

Scorese's appointment was vacated.

And I might add, on the $1,000, Your Honor, it is simply a question in order to trigger the appointment of a liquidator. The Exchange had to advance some money. Eventually, $20.4 million came into this case.

Now, in connection with the merits of the matter, under section 3(a)(5), the statute is very specific in talking about a receiver or a trustee. It is our position that the receiver or trustee must be judicially appointed or appointed pursuant to a statute. And Mr. Raines has alluded to the development of section 3(a)(5). We have set forth in some detail in our brief how the statute was developed. The point which is relied upon very heavily by the petitioners here is that in the 1926 amendment to section 3(a)(5), the words "appointed pursuant to the laws of any state or territory" were deleted. As Chief Judge Friendly has noted in the majority opinion in the Court of Appeals, that is also set forth in our brief, the elimination of those words were described in the House report as only a phraseology, there was no intent to change the substance of the statute. And Chief Judge Friendly has gone into great detail in connection with the legislative history.

Furthermore, when Congress intended to use the language, an agent authorized to liquidate property, Congress has used that language in section 2(a)(21), which was amended as part of the -- brought into the bankruptcy act as part of the Chandler

Act in 1938, it specifically refers to an agent authorized to liquidate property.

In 1952, the statute was amended again, section 69(d), and that language was put into the statute, and 69(d), the statute puts under the jurisdiction of the court an agent authorized to liquidate for the purposes of accounting. We submit, on the basis of the amendments and the legislative history that if Congress had intended to include as an act of bankruptcy the appointment of an agent authorized to liquidate, it would have said so, as Chief Judge Friendly has pointed out.

We believe, and we submit to the Court, that this is a matter for the legislature to deal with. And I might point out to the Court that there is presently pending before the House and before the Senate a new bankruptcy act, H.R. 10792, which is legislatively going to change the acts of bankruptcy and will include in those acts of bankruptcy an agent authorized to liquidate property.

Now, on the basis of that, we submit that this is something that should be left to the legislature. This Court should not enlarge section 3(a)(5) so that a petition can be filed simply because an agent is appointed to liquidate.

Filing a bankruptcy petition is not a matter which should be taken lightly. There are many, many factors that are involved, there are many, many people that are affected by the filing of the petition. In this case, customers were adversely

affected.

The Securities and Exchange Commission issued a release in which they pointed out that the administration of these proceedings had cost an additional $5 million by reason of the bankruptcy petition. They criticize the filing of the petition and the allowance of the commission.

This is a situation which frankly I was a little surprised to be here this morning. I was sure this is a case that requires no further action by any court. The case is finished. The customers have been satisfied. The creditors have received distribution to the extent their claims have been allowed, and very substantial administration expenses have already been paid out.

Q Do you realize that there are practices here if we hold a case moot, to vacate the judgment of the Court of Appeals and also the District Court?

MR. MILLER: I have no objection to that, Your Honor.

Q Then you wouldn't have any authoritative decision in the Second Circuit with respect to whether this was an act of bankruptcy.

MR. MILLER: Your Honor, I would say in case of the particular situation that has come before the Court today, this will never happen again. Mr. Raines has quoted the specific act, he has misquoted it, where a member firm or any broker-dealer who is registered under the 34 act incurs financial difficulties

of one type or another --

Q Got a new statute.

MR. MILLER: Yes. It is an obligation of the exchange to advise the SEC, and then an application is made for the appointment of a trustee. This situation could never arise again in connection with member firms, so that it is really a sui generis case, and it does not establish a precedent which is going to do harm to the administration of the bankruptcy act. Hopefully, we are going to have a new bankruptcy act. It is called the Bankruptcy Act of 1973, in the House bill. Hopefully, it will be passed within a reasonable period of time.

Q How many years? In the 1970's?

MR. MILLER: Well, I am afraid, Your Honor, that the--

Q In the 1980's?

MR. MILLER: -- the Treasury Department may have some objections to it.

Thank you very much, Your Honors.

MR. CHIEF JUSTICE BURGER: You have about two minutes left, Mr. Raines, if you --

MR. RAINES: No, that is wuite all right. I have said what I had to say. I would only be repeating myself.

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

[Whereupon, at 2:35 o'clock p.m., the case was submitted.]

- - -