In the

Supreme Court of the United States

HENRY A. KOKOSZKA,

Petitioner,

v.

RICHARD BELFORD, Trustee in the Bankruptcy of the Estate of Henry A. Kokoszka, Bankrupt,

Respondent.

No. 73-5265

Washington, D. C.
April 22, 1974

Pages 1 thru 39

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

IN THE SUPREME COURT OF THE UNITED STATES

HENRY A. KOKOSZKA, Petitioner	:	No. 73-5265
v.	:	
RICHARD BELFORD, Trustee in the Bankruptcy of the Estate of Henry A. Kokoszka, Bankrupt, Respondent.	:	

Washington, D. C.

Monday, April 22, 1974

The above-entitled matter came on for argument at 11:22 a.m.

BEFORE:

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

APPEARANCES:

THOMAS R. ADAMS, ESQ., Legal Aid Society of San Mateo County, 6836 Mission Street, Daly City, California 94014, for the Petitioner.

BENJAMIN R. CIVILETTI, ESQ., Venable, Baetjer and Howard, 2 Hopkins Plaza, Baltimore, Maryland 21201, for the Respondent.

I N D E X

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-5265, Kokoszka against Belford.

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

ORAL ARGUMENT OF THOMAS R. ADAMS

ON BEHALF OF THE PETITIONER

MR. ADAMS: Mr. Chief Justice, and may it please the Court: This case involves the question of the interpretation of the Bankruptcy Act. The question is whether a wage-earner's post bankruptcy receipt of his tax refund check is property within the meaning of the Bankruptcy Act.

The bankrupt contends that the disposition of this case should be controlled by this Court's decision four years ago in Lines v. Frederick. In Lines the Court analyzed the meaning of the word "property" and rejected a mechanistic accounting type approach to defining "property". For example, Lines involved the question of whether or not a bankrupt's vacation pay was property. It was clear in Lines that the vacation pay was entirely earned and accrued at the time of the bankruptcy and it was also clear that the vacation pay was a result of labor that had been performed in the pre-bankruptcy past.

The facts in this case are similar. Mr. Kokoszka, the bankrupt, was employed for three and a half months in the year 1971. He claimed the correct number of exemptions

with his employer for withholding purposes, and he became entitled to a tax refund check of $241 because the withholdings was based on the premise that he would be employed for the entire year. Thus, when Mr. Kokoszka filed his bankruptcy in 1972, his tax refund check, like the vacation pay in Lines, was entirely accrued and earned at the time of bankruptcy and it was the result of prebankruptcy labor. In Lines this Court specifically stated that the definition of property cannot be resolved by reference to such questions as the time of vesting. Instead the Court emphasized that more traditional tests, as in Segal v. Rochelle, that property should be defined by reference to the purposes of the Bankruptcy Act. In this regard the Court must analyze the relationship of the asset in question to the debtor's fresh start and the possible entanglement of the asset in the debtor's pre-bankruptcy past.

Utilizing this analysis in the Lines case, certain important factors were present which resulted in that decision, and those same factors are present in this case. For example, the tax refund check does not represent an investment or a savings account or some other voluntary form of property. It is entirely the result of involuntary actions as the result of the withholding laws of the United States, as vacation pay --

QUESTION: Well, the designation of a number of exemptions is a voluntary act, is it not?

MR. ADAMS: Yes, the designation -- but he claimed

the proper number of exemptions, as he should do under the law in order to approximately end up with either no tax refund check or no taxes due at the end of the year.

QUESTION: Would the case be different in your estimation had he claimed, as he has the privilege of doing, a number of exemptions that do not coincide with the facts?

MR. ADAMS: Yes, I do think the case would be different because in that case, for example, if he had not claimed as many exemptions as he was entitled to, the fund in question would be similar to a savings account. He would have created a greater tax refund check.

Now, in one of the cases that discussed this issue, the Cedor case, the opinion of the judge in the Northern District of California specifically held that because that part of the tax refund check was a result of voluntary activity, that it should be regarded as property under the Bankruptcy Act. In this case we are dealing with the tax refund check that was the result of no particular voluntary action by the bankrupt except that he was just complying with the tax laws.

Another important aspect of this asset, an important aspect that was also present in Lines is that the tax refund check is not received until after the bankruptcy. It is a post-bankruptcy event, part of the debtor's future. Like vacation pay, it is not particularly reachable or payable to the bankrupt until the time that it is actually received.

In Mr. Kokoszka's case, he filed his bankruptcy on January 5, 1972. He filed his income tax return in February, and he received his tax refund check about two months later. Thus, vacation pay, like the tax refund check, importantly is a post bankruptcy event, part of the debtor's future.

But perhaps the most important aspect of the Lines case is that vacation pay was entirely wages. In this case similarly the tax refund check here is derived entirely from wages. It consists entirely of wages. The bankrupt has been compelled to accept the delayed receipt of wages which he otherwise would have received as a result of the withholding laws of the United States. But for the withholding laws, this money would have been available for his use, and he would have used it for his support at the time of his regular paycheck. The Ninth Circuit decision in the Cedor case and the Eighth Circuit decision in the Gehrig case focus on the practical realities of the importance of wages to a bankrupt.

A bankruptcy, as we point out in our brief and as those courts referred to, is frequently a last resort for a debtor. He has used up all his assets by the time he is forced to go into bankruptcy. He depends entirely on his receipt of future wages in order to make his fresh start. In Mr. Kokoszka's case, he earned only $2400 in 1971. At that level of earning, all of a person's wages are necessary for items of immediate support and consumption, as this Court

noted in the case of James v. Strange.

Additionally Lines was a confluence of streams of decisional law both in the Bankruptcy Act and outside of the Bankruptcy Act. In Lines the Court quoted and emphasized its holding in Sniadach that wages were a specialized kind of property in our system. Both the Cedor court and the Gehrig court felt that given the specialized nature of wages and the condition of the bankrupt, that to deprive the bankrupt of his tax refund check would work an equivalent hardship as to deprive him of his vacation pay, perhaps the more so because the debtor has already been forced to accept the delayed payment of these wages which he needed.

In any event, the contention of the bankrupt in this case is that the tax refund check is as important a part of the family budget as vacation pay.

Now, the court below, the Second Circuit, did not apply this same analysis and attempted to distinguish Lines v. Frederick in this regard by claiming that vacation pay was a periodic wage payment, like a person's regular paycheck, whereas this is not. That court's distinction, we submit, is both unrealistic and not in keeping with this Court's decision in the Lines case. It is unrealistic because a debtor needs his wages for support whether they are paid to him on a regular basis or not. They are just as important to his fresh start.

The Second Circuit's distinction is not consistent with Lines v. Frederick because in Lines this Court rejected focusing on technical distinctions such as whether or not the property was paid in a periodic way or not, and focused instead on a broader examination of the practical realities to the bankrupt and the relationship of the asset to the debtor's fresh start.

Another important case cited by the court below was Segal v. Rochelle. That brings us to the question of whether or not this asset is in some way entangled in the debtor's prebankruptcy past, the second test which this Court has emphasized. The bankrupt's position in this case is that Segal v. Rochelle does not require a result contrary to what the bankrupt is urging. In that case we dealt with a business bankrupt who was entitled to receive a loss carryback refund. As this Court noted in Lines, Segal really wasn't a fresh start case. In Segal a business had ceased to operate, and the job of the trustee was simply to marshal the assets for the benefit of the creditors.

Also, there is no causal link to the prebankruptcy past in this case, as the Court found important in the case of Segal v. Rochelle. There the Court noted the peculiar nature of a loss carryback refund check and found that it was the result of those very losses which had precipitated the bankruptcy. There is no such problem here.

Thus, to summarize this part of the bankrupt's position, we contend that Lines requires the Court in examining the definition of the meaning of the word "property" focus on practical realities and to analyze the relationship of the asset to the debtor's fresh start. Lines marked the rejection of a more mechanical approach to defining property by focusing on whether or not, when it was earned, when it was accrued, whether it was the result of prebankruptcy labor. Instead, Lines focused on the relationship of the asset to the debtor's fresh start. The fact that it was not an investment or other kind of voluntary creation, that it was a post bankruptcy event, and that it consisted entirely of wages which traditionally are the only means for a bankrupt to achieve his fresh start.

Thus, in Lines, this Court held that the wages represented by the vacation pay were essential to a debtor's fresh start.

Seven months later, in Perez v. Campbell the Court also held that a debtor shouldn't be deprived of his driver's license because of the burden that that would place on his earnings. The position of the bankrupt in this case is that the tax refund check, being wages -- the loss of the tax refund check would be as serious a burden on the debtor's fresh start as the loss of vacation pay or the loss of a driver's license.

The second issue in this case is whether or not the Federal wage exemption statute, the Consumer Credit

Protection Act exempts 75 percent of the tax refund check. The Court need not reach this issue if it rules in the bankrupt s favor on the first question. However, we contend that the CCPA should apply by the terms of the Bankruptcy Act, by the terms of the CCPA for an independent policy reason, and by reference to administrative materials.

First the Bankruptcy Act. Many exemption statutes, State exemption statutes, do not ever refer to bankruptcy. They are not written particularly with bankruptcy in mind. But they apply to a person who goes bankrupt because the Bankruptcy Act requires that they apply. It specifically states in section 6 that the bankrupt be allowed all State and Federal exemptions. The CCPA, being a partial Federal wage exemption statute, should apply to bankruptcy by the requirements of the Bankruptcy Act in section 6.

QUESTION: Connecticut, as I understand it, doesn't have any exemptions relative to this case, is that right?

MR. ADAMS: Essentially that's right, Mr. Justice. There is a wage exemption statute which, being smaller than the Federal statute in this case, would not apply.

QUESTION: Well, let's assume the Court decides against you on both of these points, i.e., that the point you have just completed arguing that the whole business is exempt or (b) that 75 percent is exempt under the Federal statute, would there be a Connecticut statute exempting any of

this?

MR. ADAMS: To be honest I'm not sure. There is a Federal wage exemption -- or I mean, excuse me, Connecticut wage exemption statute. It only applies to consumer credit, garnishments for consumer credit. So I don't think it would apply. But that would be a question of interpretation of Connecticut law which doesn't presently exist. In any event, it would probably only protect about $65 if it did apply.

QUESTION: And then, of course, be subject to construction as to whether or not a tax refund is the equivalent of wages, too.

MR. ADAMS: There would be a number of problems interpreting the Connecticut statute to get it to apply in this case.

QUESTION: Unlike many States, there isn't, as you submitted, a State exemption statute that cuts much significance here at all, is there?

MR. ADAMS: That's correct. That's correct. For example, in California, which is known for having liberal exemption statutes, only 50 percent of the earnings attributable to the last 30 days would be exempt. So a tax refund check would come to a very small percentage.

QUESTION: We dealt with that in Lines or mentioned it.

MR. ADAMS: Yes, you referred to it specifically.

QUESTION: Mr. Adams, you cite the Eighth Circuit's Gehrig case. On the CCPA issue the court was unanimously against it, was it not?

MR. ADAMS: Yes, your Honor.

QUESTION: And on the main issue it was two to one in your favor.

MR. ADAMS: Was it two to one? Yes, it was two to one, that's right. Excuse me, Mr. Justice.

Let me just, though, although the Lines issue is often thought to be the main issue in this case, as Mr. Justice Blackmun just referred to, the value to the bankrupt of the application of the 75 percent Federal exemption statute is an important right which we are seriously urging before this Court.

But as I was saying, a number of State exemption statutes apply not because in their own terms they refer at all to application in bankruptcy, but because of the Bankruptcy Act. In the CCPA we have a slightly different statute. It should apply in a bankruptcy context not only on account of the Bankruptcy Act, but on account of its own terms. Congress specifically stated that the CCPA was passed in order to achieve the uniform application of the bankruptcy laws.

In this case a uniform wage exemption statute rather than the widely varying wage exemption statutes which apply in the States.

Most of the criticism of the CCPA both by the court below, by the Gehrig court and by opposing counsel, has been an attempt to narrow the meaning of the terms of the CCPA. An examination of that statute, however, shows that it was a broad statute, very broadly drafted by Congress, and additionally being a remedial statute, it is entitled to be liberally construed in favor of achieving its purposes.

Thirdly, there is a policy ground for the application of the CCPA. This was noted by the district court in the Cedor case involving a question of fairness. It is that the exemption should not be defeated and creditors should not be allowed to get the entire tax refund check merely because the debtor has been forced to accept the delayed receipt of that money due to the operation of the withholding law.

Finally, in this regard, there are a number of administrative materials which are cited in our brief which support our position, our interpretation of this Act and its application in this situation, and those administrative materials are entitled to great weight.

In conclusion, an examination of the relationship of this asset to the debtor's fresh start in the same practical way that this Court made that analysis in Lines should yield the result that a wage-earner's post bankruptcy receipt of a tax refund check is not property within the meaning of the Bankruptcy Act. As far as the Federal wage exemption statute

is concerned, it should apply here by the terms of the Bankruptcy Act, it should apply by the terms of the CCPA for an independent policy reason, and by reference to supporting administrative materials.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Adams.

Mr. Civiletti.

ORAL ARGUMENT OF BENJAMIN R. CIVILETTI

ON BEHALF OF THE RESPONDENT

MR. CIVILETTI: Mr. Chief Justice, and may it please the Court: We are dealing here with a tax refund claim which at the time of the petition in bankruptcy was fixed and certain as to amount and demandable and collectible.

The argument made by the petitioner is that a wage-earner bankrupt's tax refund claim is not property because it is necessary to his fresh start, I think runs counter to the meaning and the purpose of the Bankruptcy Act, its historical development and interpretation and specifically conflicts with the pertinent part of the definitional sections of the Act under section 70a(5) and under section 6 of exemptions. Furthermore, the petitioner's argument misinterprets, I believe, the concept of a fresh start and the rationale of the petitioner's position would impose substantial confusion and uncertainty in the bankruptcy law.

First, the scheme of the bankruptcy law generally is

in two parts, first, marshaling the assets at the time of the filing of the petition, all of the property of the bankrupt with certain exceptions which is nonexempt vest by operation of law in the trustee.

The second part of that scheme is section 6, the exemption part, which provides specifically that local conditions shall govern local statutes which assets which may be maintained by the particular bankrupt in order to assure that he can survive and so that he can have at least those basic essential requirements in which he can then cause to begin his new life.

The concept of a fresh start incorporates both those ideas of assets to the trustee and exemptions to the bankrupt and also and most importantly, the idea provided by section 17 of a discharge, an effective,valuable discharge, to the bankrupt so that he can begin his new economic life free of the burden of his pre-existing debt.

So that the three elements, I suggest, for a fresh start are, one, the proper discharge; two, specified assets or items of value which provide a base and an opportunity to start anew provided by exemption; and, three, the opportunity and the safeguard that future earnings and after-acquired property can be used, retained, and accumulated by the bankrupt in his new economic effort.

The petitioner twists and distorts the traditional

concept of fresh start into the overriding proposition that the bankruptcy law must provide, it seems to me, a protected fund sufficient to meet the needs of the bankrupt. The primary support suggested by the petitioner in his argument and in his brief is the case of Lines v. Frederick decided in 1970. There in essence the question was presented whether credits accrue or pay accrue during pre-bankruptcy work for vacation and layoff time periods to come about in the future after the date of the filing of the petition in bankruptcy were property within the meaning of the Act.

This Court determined that whatever characteristics of property for other purposes that those credits or accrued pay might have or possess, they are overshadowed in comparison to their similarity to future earnings and the purposes of the Act as embodied in the term "fresh start." The similarities of the accruals to future wages were, one, the fact that the accrued credits or pay were not payable or collectible on demand by the petitioner at the time of the filing of the petition at all but would ordinarily be payable at the future event -- vacation or layoff. In fact, the accrued pay or credits were designed and specifically tied to one or the other of those two events as a substitute payment for future period of time which but for vacation or layoff would be working time in which the bankrupt would receive the very weekly earnings which would be cause to sustain him.

The only relation back at all of the accrued credits or the vacation pay to the pre-bankruptcy past was that the prior regular working period was the basis for accumulating the accrual on a percentage formula as to hours or days and its equivalent in money. I believe it was one hour per month or one hour per week.

It is readily apparent that here the facts are entirely different from those crucial determinations there which made accrued vacation pay look like and be treated the same as future wages which indeed are protected and should be protected both by the discharge and by the concept of fresh start.

One, the tax refund claimed here is fixed and certain as to amount, determinant, demandable, and collectible.

Two, there is no design, no specification or intent to relate or identify the accumulation of periodic payments required as withholdings for expected tax liability and which constitutes the reason for the refund claim to any period of future working time or as a substitute for regular earnings as sustenance to the wage-earner, in the event of future lost time for layoff, vacation leave, sick leave, or any other reason. The tax refund claim is simply not the equivalent to future wages or substitute for future wages during the suspended working period in the future.

Lastly, it seems to me that all the characteristics

of the tax refund claim relate back to the prebankruptcy past during the very accumulation of debt which resulted in the filing of petition of bankruptcy.

In this regard, I think it is speculation to suggest that perhaps the Eighth and Ninth Circuits have suggested in the cases of In re Gehrig and In re Cedor that the wage-earner would not have used the amounts periodically withheld for the payment of debts. Certainly they are small amounts and they would not have made a tremendous impact on the debts at the time if received. But it is certain and probable that they would have been spent and they would have been spent either to reduce in part the debt or to prevent the further accumulation of debts for expenses incurred at the time, and thus it seems to me that they relate to the very part of the period which created the debt and necessitated bankruptcy.

The further argument is made by the Ninth Circuit's adoption of the district court opinion in an effort to bring the tax refund closer within the Lines v. Frederick case that the amount of a tax refund may generally be said to be an amount that by reason of past experience is anticipated by the wage-earner as an annual event, i.e., either vacation pay and the potential layoff, and that to deprive the wage-earner of that planned-on annual recurring payment cannot be said to be less severe than the deprivation of two weeks' paid vacation.

It seems to me that that statement, that type of analogy, not only being somewhat illogical, is a further distinction between a tax refund claim and accrued vacation pay or credit, because in the ordinary course of events and if the taxpayer follows the withholding guidelines properly, although vacation pay is indeed paid and received in the future by a wage-earner as an annual event, the minimum payment of income on taxes withheld periodically during the year and accumulated over the course of a year is not calculated nor anticipated to be repaid as an annual event to the taxpayer. Rather it is intended, designed, and anticipated to be paid and retained by the Government as the wage-earner's income tax on those earnings.

It seems to me that cut to its essence, the petitioner's argument is that because the tax refund claimed has its origins in withheld payments from wages, the refund is wages, and because the debtor has not collected the refund at the time of the filing of the petition, although he had a right to do so, it is somehow future wages.

The petitioner's argument amounts to ignoring the definition of property in section 70a(5), ignoring the definition and design of exemptions, I think ignoring the traditional concept of "fresh start" and the entire fabric of the Bankruptcy Act in adopting a new and controlling rationale for inclusion or exclusion of items of value in the debtor's estate and to

base that decision entirely in a wage-earner's case on a determination of the amount of a fund free of creditors and necessary or sufficient to meet the bankrupt's needs.

I don't think that this rationale has any place in this Court's decision on the existing and statutory case law. If there is to be such a change and such a drastic one, then certainly the legislature and the Congress should mandate it. And in fact the Commission on the Bankruptcy Laws of the United States has reported to the Congress as of July 30 of 1973 proposing substantial revisions in the bankruptcy law and proposing that as to this particular issue under a provision with regard to exemptions that income tax refunds, accrued vacation pay, receivables, cash, and securities be considered to be exempt in the aggregate of not more than $500. But the standard proposed by the petitioner is unsound and its application would result, it seems to me, in severe discrimination between bankrupts. One bankrupt may indeed need $75 for medical treatment, a second $500 for his wife's operation, and a third $2,000 for the tuition for his children's education. All certainly are legitimate and valid needs. But in no sense can it be said that such a standard would achieve the purposes of the Act nor that the tax refund claim in varying amounts, which in some instances may amount to in excess of a thousand dollars, would serve these varying purposes or needs.

There is a suggestion in the brief that because the

amount of the tax refund in this case is small and because administration costs and expenses are significant in some instances, that very little of this amount of money will trickle down to the creditors and therefore wouldn't it be better to give it to the needy bankrupt?

The answer to that, I think, comes in different ways. One, administration costs and expenses are not necessarily evil. They are in the Act and they are in fact under section 64 given first priority with regard to payments from the assets accumulated.

Secondly, there is no support in the record in this case that the $250.90 would be exhausted by administrative costs and expenses, and in other cases where the refund may be substantially greater, there is no suggestion that such administrative costs and expenses would even substantially eat into the asset.

QUESTION: Of course, if one were to follow that argument, I suppose you might just as well give up the idea of having any kind of a bankrupt turn over any property.

MR. CIVILETTI: If you were to follow the argument of the petitioner?

QUESTION: Yes.

MR. CIVILETTI: I think that's correct, especially in the wage-earner's case, because it seems to me that in one route or another one either direct or indirect all the

property or all assets are derived from his only source, which is wages.

QUESTION: And there is very seldom anything left for distribution to creditors in a large majority of those cases.

MR. CIVILETTI: That's true. I think the Brookings study showed in 70 percent of the cases there were no asset cases at all.

Third, if as the petitioner points out on page 16 of his brief, a survey indicates that the average dividend to unsecured creditors is only 7 percent, then that alone does not seem to me justification to further reduce the percentage on one of the basic designs of the Act, to return money to the creditors, from 7 percent to closer to zero.

Fourthly, and perhaps most importantly, and I think it occurs in varying degrees in varying districts and jurisdictions, abandonment is available where appropriate in such small asset cases. I think the California cases suggest that some of the referees there in the district courts there have adopted the policy of if the refund claim is the only asset and it's less than $150, that they will treat it as an abandonment as a no-asset case, no trustee will be appointed, and the $10 will be even saved in the cost to the bankrupt.

QUESTION: ....district, a matter principally of practice or policy.

MR. CIVILETTI: Yes, indeed, it does, at least that is my understanding from review of the cases and the record.

QUESTION: Does the law purport to give a trustee that kind of discretion?

MR. CIVILETTI: It purports to, yes. Whether or not it's a proper exercise of discretion or it's abused in those instances where, for instance, the amount of the tax refund claim might be seven hundred dollars or eight hundred or fifteen hundred dollars -- I believe in the Cedor case, the amount was about $660.

QUESTION: But the statute does give the trustee the discretion to abandon?

MR. CIVILETTI: The trustee has the discretion to abandon if authorized by the referee. The referee would have to authorize the abandonment, and the trustee, I do not believe, could do so without that authorization.

QUESTION: But the trustee didn't abandon the $660 in the Cedor case, did he?

MR. CIVILETTI: No.

QUESTION: Does the new proposed code alter that in any way?

MR. CIVILETTI: The abandonment provision? I do not know, your Honor.

QUESTION: I thought that in many no-asset cases, no trustees were appointed at all.

MR. CIVILETTI: That's true.

QUESTION: And the referee himself determines the no-asset case, and trustees are not appointed. Once trustees are appointed, you do have a problem then in marshaling assets. Then there must be a decision about abandonment.

MR. CIVILETTI: There are two decisions, Mr. Justice White. One is if the referee finds that there is only, for instance, a tax refund which looks to be $150, he can at that point determine that that asset should be abandoned, the referee, and not appoint a trustee and treat it as a no-asset case.

The second situation is where the same, let us take the same $150 tax refund claim and perhaps some uncertainty as to other assets and then a trustee is appointed. Then a second decision, it would seem to me, would have to be made by the trustee initially as to whether to pursue the tax refund claim if he determine there were no other further assets and then have the authorization received for such abandonment by or from the referee.

QUESTION: What did the Court of Appeals suggest to the district courts here --

MR. CIVILETTI: In the Second Circuit case, in our case? It suggested that if the need of the bankrupt were great enough that a deprivation of the amount of the tax refund claim, $150, $200, $300, would amount to a substantial

inequity, a severe hardship or harshness, then it could reasonably conclude that an abandonment was proper.

QUESTION: But how about the situation where administrative expenses would eat up any asset, including a tax refund? Didn't the court address itself to those situations?

MR. CIVILETTI: Yes. That was another reason, I believe, stated or expressed in a few sentences why the court suggested that either the appointment of a trustee was not necessary or if one had been appointed, then a very quick determination that abandonment was proper.

QUESTION: So in the Second Circuit I take it this question about tax refunds will never arise unless there is a possibility of a distribution to creditors after administrative expenses would be paid.

MR. CIVILETTI: I am not certain of that, of agreement with that statement.

MR. CHIEF JUSTICE BURGER: We will resume there after lunch.

[Whereupon, at 12 noon, a luncheon recess was taken.]

AFTERNOON SESSION

(1 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Civiletti, you may proceed.

RESUMED ORAL ARGUMENT OF BENJAMIN R. CIVILETTI

ON BEHALF OF THE RESPONDENT

MR. CIVILETTI: Mr. Chief Justice, and may it please the Court: Mr. Justice White, I misspoke myself in answer to a question that you addressed to me prior to the noon recess with regard to abandonment and the Second Circuit's opinion and direction to the lower courts and to Kokoszka. There they restricted the application of abandonment to the situation wherein the assets available to the trustee would be entirely consumed by the trustee's fee and other administrative expenses and there was no creditor who showed other available assets which could be reached. And Judge Webster in the dissent in Gehrig took the same positions.

QUESTION: Any time predicted administrative expenses eat up the assets, including any tax refund, there won't be any trustee appointed at all?

MR. CIVILETTI: I would think that is a fair conclusion.

QUESTION: Yes.

MR. CIVILETTI: My argument has proceeded along the lines that there is no legitimate distinction between the

principles applicable to this case and those of past cases concerning property -- Segal v. Rochelle and the antecedent cases, Legg v. St. John, and in mind the concept of "fresh start", Local Loan v. Hunt.

The Segal case I suggest was a more difficult case than the one presented here because the petitioner filed for bankruptcy before the end of the tax year, and thus any refund was not demandable nor collectible immediately, nor at the time of the filing of the petition in bankruptcy, nor was the amount thereof fixed nor truly determinable with exact certainty. Furthermore, the carryback tax loss resulted in a tax refund which the trustee was found entitled to receive even though the tax was paid. It had been paid from the individual earnings of the bankrupt taxpayers. There was no suggestion in that case in the opinion in that case by this Court that the amounts in Segal respectively of $283 and $1600 for Gerald Segal in the carryback years of 1960 and 1959 and like amounts for Sam Segal could not have been well used by them in obtaining the necessary fresh start in their new economic life. The Court took, I suggest, pains to emphasize the loss carryback claim there was sufficiently rooted in the prebankruptcy past and so little entangled with the bankrupt's ability to make an unencumbered fresh start, that it should be regarded as property under section 70a(5) despite the substantial differences which I suggest make this

case considerably easier in determination of the question of property.

The tax refund claim is fixed and certain as to amount, demandable and collectible at the time of the filing of the petition, and I suggest has no relationship to future wages nor after-acquired property, both of which elements were certainly controlling in the Lines case and had some effect in the Segal case.

A decision upholding the Second Circuit and the trustee would not only be consistent with Lines v. Frederick but would further serve to confirm the plain meaning and intent of the principles recognized so clearly in the case. Future wages and after-acquired property are necessary essential elements of the concept of a fresh start. There is no legitimate distinction, I suggest, between a tax refund claim and any other monies or funds obtained by payroll withholding from past wages pursuant to a savings plan, a Christmas club, a bond-a-month plan, a retail layaway plan, an educational loan repayment plan or agreement, union dues, auto insurance, auto insurance, real estate tax, or any other established payroll deduction which could result in a refund or repayment from a second or third source.

QUESTION: I suppose petitioner's argument is that most of the thingsyou mention are voluntarily undertaken by the wage-earner, whereas the income tax withholding is not

voluntary.

MR. CIVILETTI: Well, the term "voluntary", I think that is true, Mr. Justice Rehnquist. I think that they would argue that that is a distinction. I suggest that, number one, the meaning of "voluntary" varies depending on its application and that pursuant to a loan agreement, for instance, once the decision is made, then that payment or deduction from payroll might well no longer be considered to be voluntary.

Similarly, here, as Mr. Justice Blackmun pointed out, the voluntariness to some extent is available to the taxpayer in the manner in which he prescribes his withholding, and it is adjustable during the course of the year depending on changes in circumstances by him.

Turning to the Consumer Credit Protection Act, my argument there is a very short and brief one. It is not applicable because the tax refund claim here does not come within the definitional term of earnings in that Act; it is not compensation paid or payable for past services; it does not come within the definition of the term "disposable earnings" because it is not that part of earnings remaining after deductions allowed by law; and lastly, it is not within the definition of garnishment, which in the language of the statute means any legal or equitable procedure through which the earnings of any individual are required to be withheld

for the payment of any debt.

Here, if this is property, then it vests in the trustee by operation of law, and it is not required to be withheld for the payment of any debt pursuant, for instance, to provisions of seizure or collection under section 70c of the Bankruptcy Act.

The reference in the Consumer Credit Protection Act, specific reference in that Act to Chapter 13 of the Bankruptcy Act and saying that the provisions of the Consumer Credit Protection Act do not apply to Chapter 13 arrangements was made because Chapter 13 arrangements do apply to future wages, do specifically provide for deductions for the payment to creditors for past debts pursuant to the plan approved by the referee and therefore it was necessary in order to make clear that the 25 percent limitation would not apply to such arrangements that Chapter 13 should be specifically referred to in the Consumer Credit Protection Act.

Thank you.

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

Mr. Adams, do you have anything further?

REBUTTAL ORAL ARGUMENT OF THOMAS R. ADAMS

ON BEHALF OF THE PETITIONER

MR. ADAMS: Mr. Chief Justice, and may it please the Court: I would like to take a few moments to discuss some brief items in rebuttal.

First, I want to object to a characterization of the bankrupt's position in this case that we are arguing that any time the bankrupt has some sort of needs, that the Bankruptcy Act ought to let him keep some property or that we are arguing that all property derived from wages is somehow not property within the meaning of the Bankruptcy Act.

Now, it's true that there is some material in our brief on the needs of the bankrupt here, but that material is there to emphasize an important point, and as this Court found in Lines v. Frederick, wages are a special kind of asset in our system. The material on Mr. Kokoszka's situation and the material on his needs are there to show the importance of wages --

QUESTION: What if the bankrupt has owing to him six months of unpaid wages? Say his employer is in financial trouble and he just hasn't paid him. And then the employee goes into bankruptcy because he can't pay his bills either. Now, the wages owing him are property that pass to the trustee, I take it.

MR. ADAMS: Well, that's a similar example as was dealt with by the Sixth Circuit in the Aveni case.

QUESTION: The Federal law doesn't particularly make the wages an exempt item.

MR. ADAMS: I think the Federal law as far as the exemption statute is concerned, the Federal law protects wages

whether they are paid or yet payable. So if the wages held by the employer have already been paid, they would be exempt. If the employer was holding an account of wages due so that the wages were payable --

QUESTION: But they are not excluded because they are not property.

MR. ADAMS: Well, excuse me. I was getting to that point. I thought you had moved on to the exemption statute.

QUESTION: Well, they are arguing to be property they wouldn't be exempt, we wouldn't have to exempt them, I suppose.

MR. ADAMS: Well, conceptually that's true. I think the problem -- I would argue, Mr. Justice White, that they would not be property under the Bankruptcy Act.

QUESTION: I know you do.

MR. ADAMS: And I think that the same reasons would apply. It was an involuntarily created asset; it's derived entirely from wages; and it's received entirely at the post bankruptcy event. In many ways --

QUESTION: Your proposition is, in my example I gave you, if a bankrupt has six months of back wages due him from his employer, he may collect them from his employer and not turn them over to the trustee.

MR. ADAMS: I would like to point --

QUESTION: Is that really your proposition?

MR. ADAMS: I would like to say it wasn't my proposition because it's a very hard example. But I would say that --

QUESTION: You really can't find anything in the Bankruptcy Act that would let him keep six months worth of back wages, can you?

MR. ADAMS: What I would say to that point is that the bankrupt in that situation -- I would be interested in the examination of additional facts. I think you can see that that is in a very exceptional circumstance.

QUESTION: I don't know.

MR. ADAMS: Under straight analysis --

QUESTION: Would that be so uncommon?

MR. ADAMS: I think, in my experience as a bankruptcy attorney, I have never seen that. But I assume that --

QUESTION: My example is not the situation in Lines. At least in Lines the amount that was involved there on its face was to sustain a person for a future period.

MR. ADAMS: That's correct.

QUESTION: Not so in my example, when the wages were payable at the time. And not so apparently in the case we have before us, because the withheld wages weren't to sustain him at all. They were to be taken away from him and paid to the Government.

MR. ADAMS: I think the only real difference between

your case, Mr. Justice White, and the case at bar is that you have just given me an example where there is potentially a very large amount of money involved, whereas typically we have a very small amount of money involved in a tax refund case.

I don't think that --

QUESTION: The only thing, if State law might exempt wages up to a certain amount. So the exemption section might make some of those wages exempt in part or in whole. But it wouldn't be because they aren't property.

MR. ADAMS: Well, let me get to my point, Mr. Justice White, and that is I think that the situation in the example that you have given is one where we have -- you are talking about a fund of wages which would have never been available in a practical sense for the creditors if they had been paid to the --

QUESTION: He would have paid his bills with them. And this is what has driven him into bankruptcy, he hasn't been able to get his wages.

MR. ADAMS: The wages -- I want to speak in terms of a practical matter here. Wages are 75 percent exempt at least according to the Federal statute. In order for the creditors to obtain those wages, there are a number of State law procedural safeguards as well as several constitutional safeguards.

Now, this fund has been created which has only

increased the incredible hardship on the bankrupt. I think although what we are talking about in your case is a substantial fund of money, from the point of view of the bankrupt, it was also a substantial loss, a deprivation of wages which he needed for his support in the past.

QUESTION: And it throws him into bankruptcy.

MR. ADAMS: Threw him into bankruptcy.

QUESTION: ... the administration of a nationwide Bankruptcy Act can't depend on whether or not a particular asset that is claimed to be property is or is not "substantial." Then we would just have an endless line of cases through the Federal courts saying $150 wasn't substantial, $600 was.

MR. ADAMS: Mr. Justice Rehnquist, I agree entirely with that point. I was stating that although I felt the only distinction between our case and Mr. Justice White's example was the size, I don't think that is a valid way to distinguish assets within the meaning of the Bankruptcy Act, although I would note that if the Court is concerned about the line-drawing problem in this case, which is really only presented in my view by exceptional circumstances, another alternative is to apply the Federal wage exemption statute to the tax refund check which clearly does draw lines established by Congress.

I would like to go on and discuss the problem of

abandonment. The Second Circuit suggested that abandonment was an alternative. I don't think in the first place it's a practical alternative. At the time of the filing of the schedules, the referee is not going to know, especially if the tax refund check hasn't been received yet or a return hasn't even been filed, whether or not there are going to be any assets in the estate. Once he appoints a trustee, he is going to feel that he is going to have to pay that trustee whether or not any of the assets are going to pass on to the creditors.

Secondly, it's going to result in a nonuniform application of the bankruptcy laws. The material in our brief, the Stanley & Girth material supports that.

Thirdly, as just a practical matter, abandonment is never used or used very rarely in the administration of the bankruptcy courts. That is supported also by the Stanley & Girth survey. Since the Kokoszka opinion, we have done a survey of our own which I can submit to the Court with its permission in the form of an affidavit from one of the attorneys in this case demonstrating that in the Second Circuit since the Kokoszka opinion, there haven't been any abandonments pursuant to that opinion.

QUESTION: How about in no-asset cases just not appointing trustees?

MR. ADAMS: Although that's an alternative that is recognized by the -- it's never done. It's never done.

QUESTION: You mean appointment -- in every case trustees are appointed?

MR. ADAMS: Except in very rare cases, the reason being that the referees don't know whether or not to believe the material on the schedules or not and they want to appoint someone to look into it.

QUESTION: You mean referees don't know whether to believe it so they appoint a trustee.

MR. ADAMS: Right, to look into the situation. And once they do, then you are caught up in the circle again.

QUESTION: In the district of Arizona we have just had all sorts of no-asset wage-earner cases where there really wasn't any doubt about the fact there were no assets.

QUESTION: The same was true of Colorado.

QUESTION: I will say according to the material in the briefs this is done quite routinely in California.

MR. ADAMS: No. A trustee is appointed in California in virtually every case. Similarly in Connecticut where Mr. Kokoszka comes from.

QUESTION: But then in California, the abandonment is utilized apparently on tax refund claims below a certain dollar figure.

MR. ADAMS: There the court rule as to $150 tax refund checks was established in some districts in Southern California.

QUESTION: Right. So it isn't apparently wholly unworkable or impractical.

MR. ADAMS: Well, I don't know, Mr. Justice Stewart, as to whether or not fees and so on had to come from some other area in the application of that rule. But I know that as a practical matter, the referees feel that they can't believe the bankrupt necessarily and they want to appoint a trustee to see if there were other assets they need to count. That sort of thing.

Finally, I would just like to say that as to the Gehrig court's analysis of the CCPA issue, they were dealing only with an analysis of the voluntary aspect of the tax refund check that had been created due to overwithholding.

QUESTION: Mr. Adams, I doubt that the supplemental material that you suggested would be helpful to us. We think the record is adequate as it is now before us.

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

MR. CHIEF JUSTICE BURGER: Mr. Civiletti, you appeared in this case at the request of the Court and invitation of the Court to file a brief amicus after we encountered a different kind of abandonment on the part of the trustee, and on behalf of the Court I thank you for your assistance to us in this matter.

MR. CIVILETTI: I welcomed the privilege.

MR. CHIEF JUSTICE BURGER: The case is submitted

gentlemen.

[Whereupon, at 1:18 p.m., the oral argument in the above-entitled case was concluded.]