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SUPREME COURT, U. S.
WASHINGTON, D. C. 20543

In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

THOMAS W. MOORE, JR., etc., et al.,

Respondent.

No. 74-687

Washington, D.C.
October 15, 1975

Pages 1 thru 32

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IN THE SUPREME COURT OF THE UNITED STATES

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 UNITED STATES OF AMERICA, :
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 Petitioner, :
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 v. : No. 74-687
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 THOMAS W. MOORE, JR., ETC., ET AL., :
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 Respondent. :
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Washington, D. C.

Wednesday, October 15, 1975

The above-entitled matter came on for argument at
 10:56 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:

MRS. HARRIET S. SHAPIRO, ESQ., Office of the
 Solicitor General, Department of Justice,
 Washington, D. C. 20530, for the Petitioner.

THOMAS OSA HARRIS, ESQ., 10405 Town & Country Way
 #405, Houston, Texas 77024, for the Respondent.

I N D E X

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THOMAS OSA HARRIS, ESQ., for the Respondent

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MRS. HARRIET S. SHAPIRO

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 74-687, United States against Moore.

Mrs. Shapiro, you may proceed whenever you are ready.

ORAL ARGUMENT OF MRS. HARRIET S. SHAPIRO

ON BEHALF OF PETITIONER

MRS. SHAPIRO: Mr. Chief Justice, and may it please the Court: This case is here on the Government's petition for certiorari to review the judgment of the Court of Appeals for the Fifth Circuit. It involves the interpretation of 31 U.S.C. 191, which provides that when a person indebted to the United States becomes insolvent, the debts due to the United States shall be paid first. The issue here is whether that priority of the United States applies only when the precise amount of the debt is established before insolvency or whether all debts due to the United States at insolvency, whether liquidated or not, are to be paid first.

The facts here were stipulated. Emsco, which is a Texas corporation, breached three contracts with the Defense Department. After it had breached the contracts it assigned all its property to respondent to be sold for the benefit of its creditors. And that act, of course, established its insolvency.

Shortly thereafter the Government relet the contracts that Emsco had breached, and the amount of Emsco's debt to the

Government was determined. It was determined by settlement of two of the contracts and by charging Emsco for the excess costs of reprourement on the other.

The priority statute requires that when a person indebted to the Government becomes insolvent, the debts due the United States shall be paid first. And a voluntary assignment for the benefit of creditors is one of the ways in which insolvency can be shown under the statute. It is also an act of bankruptcy, so that when there is an assignment for the benefit of creditors, the creditors have a choice. They can either consent to the assignment and take their share of the debtor's estate under the conditions in the assignment, or if they prefer the protection of the bankruptcy laws, they can petition to have the debtor declared a bankrupt, in which case the assignment is void.

If there had been a petition in bankruptcy here, it's clear that the Government's claim on these contracts would have been debts provable in bankruptcy, because the Bankruptcy Act expressly defines debts to include unliquidated or even contingent claims. These are provable debts, and so long as they are liquidated or can be estimated soon enough so that they can be paid without unduly delaying the administration of the estate, they are allowable.

In addition, the Bankruptcy Act gives a priority to debts owing to any person, including the United States,

entitled to a priority under Federal law so that the Bankruptcy Act incorporates the priority statute by reference.

A number of cases, both in this Court and in the courts of appeals, have assumed that this priority applies to claims like the ones here which were unliquidated when insolvency occurred, so that if there had been a bankruptcy, we submit that these claims would not only have been provable but would have been entitled to a priority.

But there wasn't any petition in bankruptcy here. The Government simply asserted its claims to priority under the priority statute. When the claim was denied, the Government brought suit and the district court, following the established principles, found that the Government was indeed entitled to its priority.

But the court of appeals reversed. It interpreted this 175-year-old statute without considering any of the previous cases which had construed it, the policy it was designed to serve, or even the longstanding practice under it. The court held that the phrase "debts due" means only those debts which would have been entitled to be recovered under common law action of debts. Since the claims here were not for fixed and certain amounts presently payable at insolvency, they were not debts due at common law, and therefore the court held they were not entitled to priority.

We submit that that decision is simply wrong, both

on the basis of precedent and because of its undesirable practical effects.

The precedents are entirely clear in holding that the priority statute applies not only to debts which are due in the sense of being presently payable at the moment that insolvency occurs, but that it also applies to debts where the obligation has accrued but the time for payment has not yet arrived. In fact, the respondent doesn't really dispute this.

But we submit that that fact alone should demonstrate the common law action for debt which requires that the debt be presently payable is not an appropriate standard for defining debts due. Indeed, if the standard were strictly applied, there could be some question about whether taxes would be within the priority at all since there is some precedent indicating that taxes aren't common law debts. And, of course, the status of taxes which have accrued but which are not payable at the precise point of the insolvency would be still more uncertain.

There isn't any such uncertainty now. The priority statute clearly applies to all accrued taxes, including unliquidated ones, and to those which have accrued but are not yet due when the insolvency occurs.

The priority statute also has long been assumed to apply to contract debts of the sort involved here where the

obligation has been established by the time that the insolvency occurs but the precise amount of the obligation is not settled until later.

The effect on Government revenues of altering this longstanding interpretation of the priority statute is hard to estimate. Indeed, for the tax applications, we really haven't been able to get any estimate because the effect of the decision is so unclear. What it does is create questions, but there is really no way of telling what the precise impact of it would be.

On the contract applications, the Defense Department has estimated that in a typical year perhaps some \$20 million in Government claims in defense contracts alone might be affected.

There is a further reason why the decision below should be reversed. In addition to its break with precedent and its effect on Government revenues, it provides a practically unworkable standard for the person who must distribute the insolvent's estate. He must decide whether a given Government claim is entitled to priority, and if he guesses wrong, he may be personally liable to the Government for the amount paid to the other creditors.

It's therefore very important to have clear standards for determining when the priority applies, and the limitations of the common law action for debt are certainly not the

kind of clear standards that are appropriate.

Respondent seems to agree that the decision below can't really mean exactly what it says. He suggests that nevertheless this Court should limit the debts to which the priority statute applies to ones which have been liquidated before the insolvency occurs. But that limitation, too, is unsupported by precedent and it's also unrelated to the purpose of the priority statute.

The courts have consistently interpreted the statute as applying to all types of debts. They have recognized that its broad purpose is to protect the Federal revenues. And when a particular debt is liquidated is not significant in terms of that policy. The Government's interest in assuring that the debt owed to it will be paid is not related to the time that the precise amount of the debt is determined.

But there is an appropriate source of guidance for determining the meaning of the debts in the priority statute. That source is the Bankruptcy Act which uses the precise term, and as used in the Bankruptcy Act, the term "debts" explicitly includes unliquidated and contingent claims.

QUESTION: Of course, the Bankruptcy Act came along a hundred years later than the statute on which this case is based.

MRS. SHAPIRO: That's right. The current Bankruptcy Act did. There was an earlier Bankruptcy Act about

1800 which also recognized certain contingent claims as debts. And the priority statute refers in effect to the Bankruptcy Act since one of the acts which makes it applicable is any act of bankruptcy. And moreover, the Bankruptcy Act refers to the Priority Act in defining debts which are entitled to priority. So there is a distinct cross-reference. Both Acts deal with insolvency and protect Federal interests by providing Federal priorities. So both reflect similar policies. And moreover, they are overlapping in the sense that a case involving one statute will very often also involve the other.

So differences in interpretation of identical languages under these circumstances almost certainly will lead to confusion and such differences should be avoided unless they are clearly required by the statute's language or by its purpose, and no such difference is required here. Unliquidated claims are debts under the Bankruptcy Act, and for that reason they also should be considered debts under the Priority Act.

This interpretation of the Act has an entirely practical advantage, not only to the Government but also to those who contract with it. From the Government's point of view, the priority should attach when the contract is breached. If it does not, the debtor can manipulate the time at which he becomes insolvent in order to avoid the Government's priority.

And he may very often want to do that in order to prefer creditors with whom he may want to deal later. Manipulation wouldn't be difficult. He would simply have to make an assignment for the benefit of creditors or file an involuntary petition in bankruptcy promptly after he breached his contract before the Government has a chance to liquidate its damages.

But to try to protect itself from having its priority defeated in that way, the Government in its turn would have to liquidate its claims as rapidly as possible, even perhaps by terminating contracts where it had doubts about the contractor's solvency. And that certainly is not a policy that would benefit contractors. It might very well lead to increased litigation over contract termination and it could increase business instability by tending to push borderline companies into insolvency.

QUESTION: Well, if you are right debts due does include unliquidated claims, certainly it's in the interest of disposing of the insolvent estate for the Government to liquidate its claims as rapidly as possible.

MRS. SHAPIRO: Certainly.

QUESTION: Otherwise, the insolvent estates are going to be tied up indefinitely, if you are correct in your basic premise.

MRS. SHAPIRO: Certainly, the Government does have a very strong interest in liquidating the claims as promptly

as possible.

QUESTION: You just told us your interest is strong the other way. But however that may be, the interest of settling the insolvent estate is very strong in favor of getting these claims liquidated and handled.

MRS. SHAPIRO: That's perfectly true. All I am saying is that it's important not to have the Government's priority turn on the speed with which it can liquidate the estate. There certainly is no chance that the Government is going to delay liquidation if its priority doesn't turn on that. All I am saying is that you shouldn't have a rule that says, OK, the minute you think that there may be insolvency, you have to rush in and liquidate immediately on pain of losing your priority.

The Government certainly doesn't have any interest in delaying liquidation. It's not going to do so. It certainly didn't do so here. And in fact --

QUESTION: About six years after the assignment?

MRS. SHAPIRO: No. In fact --

QUESTION: Liquidated?

MRS. SHAPIRO: In fact, I think that respondent would agree that the point of liquidation is when the contract was relet. And here the last one -- well, the first contract was relet within the period within which the non-priority creditors could submit their claims, before December 1,

'66. The second one was liquidated within the time within which the assignment could still have been voided by a petition in bankruptcy. And the final one was liquidated within -- assuming there had been a petition in bankruptcy, then you have six months to file claims. And the final claim was liquidated within that six months. So the Government hasn't delayed, and it doesn't normally.

As I say, all I am saying really is you shouldn't put a penalty on the Government of losing its priority if it fails to liquidate before there is an assignment for the benefit of creditors.

QUESTION: Wasn't one of these claims contingent as well as unliquidated, contingent in the sense that there was a controversy as to whether or not there was a claim, a valid claim?

MRS. SHAPIRO: The respondent, or Emsco, did maintain that I believe all three of the contracts were terminated for the benefit of the Government rather than breached by Emsco.

QUESTION: Your position makes no distinction between claims that are contingent and those that are merely unliquidated, does it?

MRS. SHAPIRO: Well, what we claim is that this claim was unliquidated -- these claims were unliquidated, but were not contingent. Certainly the fact that there was litigation concerning the type of breach does not, we believe,

make the claim contingent when the conclusion of the Contract Appeals Board was that in fact there had been a breach as of the time the breach occurred, that the finding of the Board relates back to the moment of the breach.

Certainly, so long as the obligation of the debtor is fixed, so long as the cause of action has accrued by the time there is an assignment or other act of insolvency --

QUESTION: Does that mean that so long as the Government makes a claim? Because if the claim is contested at the time of the assignment, the obligation would not necessarily be fixed, then, would it?

MRS. SHAPIRO: I think it makes a difference about what happens to the -- the result of the contest if in fact there is a determination that the Government's claim was valid.

QUESTION: Suppose it were a tort claim contested?

MRS. SHAPIRO: I don't believe that makes any difference, as long as the result is that the Government's claim is upheld.

QUESTION: But it may not be upheld for six or seven years as a result of litigation. What happens during that period of time?

MRS. SHAPIRO: Well, the other provision that's in the Bankruptcy Act which we believe certainly might well be applicable to the priority statute is that if the claim can't

be either liquidated or estimated within a time which would permit the reasonably prompt administration of the estate, then it's not a provable claim.

QUESTION: But that provision is not applicable to this; it's applicable to bankruptcy. And that's the very problem with your case. If we had such a provision here, you would have a manageable situation. But that provision isn't -- you're not really seriously submitting that that provision is applicable to this statute, are you?

MRS. SHAPIRO: There is no real reason why it couldn't be --

QUESTION: It would be nice if it were. That's your point.

MRS. SHAPIRO: Well, the other possibility, of course, is that the assignee can set aside an amount necessary to meet the Government's claims.

QUESTION: In this case that would have required the setting aside of assets that would have deprived other creditors of any recovery at all, would it not?

MRS. SHAPIRO: Yes, that's true, it would have.

QUESTION: The administration problem is really that puzzling.

MRS. SHAPIRO: Well, the court in United States v. Barnes faced up to that and decided that the priority statute in fact applied, provided that the Government did have a

priority and in those circumstances the policy of giving the Government a priority, the Congress had decided that it applied, that it should prevail.

QUESTION: Certainly there is no question of the Government having been given a priority by statute. It was given a priority with respect to debts due the United States and the question in this case is whether the meaning of not only debts, but debts due. There is no question about its priority; the question only is what it covers.

MRS. SHAPIRO: Well, yes, that certainly is correct. Yes.

QUESTION: That's the issue in this case.

MRS. SHAPIRO: Well, my conclusion really is that a decision permitting private creditors to get a larger share of the assets of the insolvent's estate is a change for Congress to make.

QUESTION: On that could I ask you, I notice that on page --in the footnote on page 17 of your brief, you say that if there is no priority, the other creditors will receive substantial portions of their debts and the United States will receive nothing.

MRS. SHAPIRO: Yes.

QUESTION: And I see that on page 3 of your opponent's brief it is said that if there is no priority, the United States will receive 40 percent.

MRS. SHAPIRO: I don't know how they got the 40 percent.

QUESTION: Do you still maintain that the United States will get nothing?

MRS. SHAPIRO: Under the terms of the assignment, that provided for payment to the nonpriority creditors who submitted claims by the 1st of December 1966. The Government did not submit a claim as a nonpriority creditor by December 1, '66. So under the terms of the assignment, the Government would get nothing.

QUESTION: But you could have filed as a nonpriority creditor.

MRS. SHAPIRO: We could have, but we thought we had a priority on the basis of the practice up to that point.

QUESTION: Could the Government have improved its position in that regard by filing a petition for bankruptcy upon the occurrence of the assignment?

MRS. SHAPIRO: The Government can't by itself file petition for bankruptcy when there are more than 12 creditors.

QUESTION: It can join as one of the three, or whatever --

MRS. SHAPIRO: It takes 12.

QUESTION: It takes 12?

MRS. SHAPIRO: It takes 12 if there are more than 12 creditors.

QUESTION: I thought it was three.

MRS. SHAPIRO: I'm sorry, you're right. 95(b), it's by three or more. Yes.

QUESTION: I didn't think I'd been on the bench that long.

(Laughter.)

MRS. SHAPIRO: I would like to reserve the rest of my time.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Harris.

ORAL ARGUMENT OF THOMAS OSA HARRIS

ON BEHALF OF RESPONDENT

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

The question in this case is whether unliquidated contractual claims of the United States constitute a debt due within the meaning of the priority statute. I would differ with Ms. Shapiro. Several times she said all debts, and, of course, that's the question we are talking about right now whether this type of claim is a debt within the meaning of the statute.

It appears to me that there are four factors that are important to the resolution of this case. And two of those factors would indicate a narrow decision, a narrow interpretation of the statute. Two of them would indicate

a more expansive interpretation of the statute.

The first two involve the meaning of the term "debt due" at common law at the time approximately when this statute was first written. The statute was first written in the 1780's and it has been carried forward substantially unchanged since that time.

The second factor, again which I think would indicate and lead to a narrow interpretation of the statute is the concept of fairness to all creditors in this situation, including the Government and including the other creditors who dealt with Emsco.

The factors favorable to the Government's position are a line of cases indicating that this particular statute should be construed liberally for the purpose of protecting the Government's purse, also a line of cases in which the matter of priority has just been assumed with no real discussion.

Ms. Shapiro has adequately related the facts giving rise to this controversy. The only thing I might add was that this company, Emsco Screen Pipe Company, was in a failing financial situation when it entered into these contracts with the Government and managed to sort of prolong its existence only for another couple three months and ultimately went into the assignment for benefit of creditors.

QUESTION: What bearing does that have? Does it have any?

MR. HARRIS: Yes, sir, it does, because -- it has a bearing on it, in my view, because the second factor that I think is important is the matter of fairness to all creditors.

In this case the Government was dealing with Emsco on a business basis just like its other creditors and it seems to me that we've got a different situation from a taxing authority dealing with the tax recipients and taxpayers.

QUESTION: Wouldn't your thesis put a burden on the Government to make a careful inquiry into the potential solvency of every one of its contractors?

MR. HARRIS: Yes, sir, that inquiry is required, I believe, in making --

QUESTION: Well, they do on their own, but then that means if it's going to affect their priority, the Government is going to probably disfavor a great many contractors who need the business, are they not?

MR. HARRIS: That is one of the disputes that arose in this particular case, your Honor, not this trial, but at the trial of the Navy's claim, because the company argued that there was a misunderstanding between the Government and the company at that time and that the company was not really financially able to perform this contract and the Government was required to make a determination that it was, and there was some confusion in that and the company thought it was, but a wrong standard was applied, and it should never have been

awarded this contract in the first place.

These arguments are kind of detailed a little bit in the brief, but the main point I wanted to cover was whether the idea of this unliquidated claim was a debt due within the statute and in accordance with the common law definitions.

There was a question as to the time of the liquidation of the Government's claim, and the claims were liquidated soon after the time of the assignment for the benefit of creditors. This lawsuit was generated to determine the applicability of the priority statute to unliquidated claims.

The first and I think the most important factor in the resolution of this case and interpretation of the term "debt" was what the term meant to the framers of the legislation. And to get some indication of that, we have gone back to look at the particular meanings of the term "debt" and "debt due" in the common law. And our argument is that the common law did not comprehend a debt as an unliquidated claim, that if you have a debt where the matter was, say, on a promissory note, it might not be presently payable but it was readily ascertainable and it was a sum certain.

Some force was given to this argument by a case from this Court in 1948, Massachusetts v. the United States. In that case Massachusetts was arguing with the United States over again the proceeds of an assignment for the benefit of creditors. There were two taxes that were owed. There were Federal

unemployment taxes owed, and there were State unemployment taxes owed. And the assignee took the position that he was entitled to pay the State unemployment claims to the extent of 90 percent of the Federal Government's claims because there was a provision in the Federal Government's statute that you could get 90 percent credit for any amounts payable to a State fund that had been provided.

And the Federal Government took the position that they couldn't do that, that at the time of the insolvency all rights were fixed and you had to pay the full amount of the unemployment tax claim.

This background is important because it bore on the resolution of the problem by the Court in that case. It said, the Court said, that you had to look to the moment of insolvency as to what the situation was at that time in order to determine whether priority applied. You couldn't look to events that happened after insolvency in order to determine whether there was a debt.

QUESTION: There was a little difference in the Massachusetts case that they were disputing liability, weren't they?

MR. HARRIS: I beg your pardon, sir?

QUESTION: In the Massachusetts case they were disputing liability.

MR. HARRIS: That's correct.

QUESTION: And there is no dispute here.

MR. HARRIS: Well, there is no dispute as to the liability, only to whether it was a debt at that time.

QUESTION: But not as to amount.

MR. HARRIS: Not now. At the time of the insolvency, of course, there was no way of knowing what the amount was owing to the Government, and at that particular time it could have worked out any number of ways.

QUESTION: Only one judge on the Fifth Circuit followed that theory.

MR. HARRIS: Yes, sir. Actually two judges on the Fifth Circuit said that what you have to do is look to see at the time of insolvency as to whether it was a debt presently payable or not. I think that was to some extent a wrong answer in making the debt be presently payable, because that was not a necessary requirement of the common law term "debt" because the common law term included debts that were presently payable and debts meaning a sum certain that would be payable at a designated time in the future. And the only thing you had to do was wait for the time to pass. There was no happening of the subsequent event that would liquidate the damages.

In the Massachusetts case the language that we rely on is the following: It says, "It is at least doubtful in the statute's wording that obligations wholly contingent

for ultimate maturity and obligation upon the happening of events after insolvency can be said to fall within the reach of 'debts due' at the time of insolvency." And further it says that Congress drew the line for the operation of the statute close to, not at, the commonly accepted meaning of debt as distinguished from other forms of obligation.

QUESTION: Do you think that statement was necessary to the holding in that case, or was it just a side observation by way of dicta?

MR. HARRIS: Well, when I first got involved in this I thought it was just dicta, but then as I became more closely acquainted with the case, I think that was an integral part of the whole, or at least an integral part of an alternative reasoning.

QUESTION: Does not the -- taking it as part of the holding, does not it refer to maturity and obligation in the conjunctive? Is there any doubt about the obligation in this case?

MR. HARRIS: Well, I think the focus of the inquiry that was indicated in Massachusetts was that you look at the time -- the events at the time of insolvency. And if you have to look to subsequent events, contingent events, as he calls them in that language, then it would not be a debt due in common law.

QUESTION: But the contingency that the Court was

referring to in that language you rely on has both elements, maturity and obligation, does it not?

MR. HARRIS: That's correct, yes, sir.

QUESTION: That's not true here, is it? There is no doubt about the obligation, isn't that correct?

MR. HARRIS: The obligation was fixed, but the thing I want to emphasize is that you have to look at events beyond the time of insolvency in order to determine whether there was any obligation, because damages could have been zero. Then I suppose that may be a metaphysical way of approaching it, but if you have to look at events subsequent to the time in question, then it would not be a debt in accordance with common law thinking.

Another case that we think bears on this case is the case of United States v. State Bank of North Carolina, which was decided in 1832. That case involved a customs bond which was executed before the insolvency, payable after the insolvency. And Justice Story said that this was nonetheless a debt due, even though it wasn't presently payable. To get to that result he went to common law thinking, and he said, if you want to know what debt means, look to the common law and we are going to apply it in the sense of the common law term meaning a debt presently payable -- excuse me, a present debt, that is, presently obligated but payable in the future. The emphasis was that you did not look to subsequent events.

Keying in on that particular language -- it's in Latin, I couldn't pronounce it too well, but it's debitum in praesenti, solvendum in futuro. Keying in on that language, I looked at the other cases and brought them before the Court in my brief, and those other cases also stressed the importance in the concept of the language at the time that it was written in the statute. You couldn't look, or you shouldn't look to events after the time of the insolvency to determine if it was a debt or not. Debts -- I am convinced that debts in the terms of the statute meant things like promissory notes and bonds, that type of fixed sum certain obligation.

There has been some discussion as to taxes, as to whether they are debts or debts due. There have been previous cases out of this Court that indicate that taxes are certainly a debt due within the meaning of the statute.

QUESTION: Would you exclude -- is there still a debt due if the taxpayer is contesting in the amount?

MR. HARRIS: Yes, sir, because the events that have generated the tax have happened at the time of a particular insolvency. They may be disputed. Take a net worth case --

QUESTION: I thought the events which precipitated the liability here happened before the insolvency?

MR. HARRIS: Yes, sir.

QUESTION: It's just the amount that is not yet

determined. How is that different from a tax case?

MR. HARRIS: A tax case at the time of insolvency, you've got all the facts you need. You can, once you work out the dispute, you can figure out what the tax is as of that particular moment. Whereas in the instant case you can't do that until the subsequent event after insolvency takes place. And that subsequent event is a repurchase of the contract. It could be that there would be no damages.

QUESTION: Does that exclude all contractual type claims? Supposing there's a promise to deliver the Government a thousand bricks and that promise is breached so that you have a clear breach, the only question is assessing damages. Now, I suppose the Government could go about proving damages by simply producing testimony as to what those bricks would have been worth without necessarily letting a contract for new bricks, and that by your test might simply focus on the events that occurred prior to the breach. Would that then be a debt due?

MR. HARRIS: Well, I don't think it would be a debt due because you still have to look to the subsequent event.

QUESTION: What subsequent event?

MR. HARRIS: Of proving up what the damages were.

QUESTION: Then you say even though the testimony at the proof talked about events that occurred prior to the breach, the mere fact that the proceeding took place after the

breach is enough to take it out of the debt classification?

MR. HARRIS: No, sir. No, sir. Let me back up a second. I think that if you have^a/liquidated damages clause within the contract, then you would have a debt due as of the time of insolvency. If you didn't have a liquidated damages clause, the damages are going to be fixed in some sense by the loss of value to the Government, either a repurchase or some other way of determining what the value of that contract was, you have to have a determination after, a subsequent event after the insolvency itself to determine whether there were any money damages at all.

To distinguish that from a tax case, you have to have a hearing, of course, but you know what the numbers are. In the leading case of this Court which talked about taxes as a debt due, the Court was very careful to use the language that taxes were a sum certain or a sum that could be reasonably and quickly ascertained. And I think by that sort of mathematical calculation type thing, it was being careful not to get away from whatever the common law concept of debt was for this statute. That case was Price v. United States, which is cited by both counsel.

There has been some questioning of the Court, as I understand, about the problem of the difference between a contingent event and a mere dispute event. Now, we might say -- the Government has raised the point in their reply

brief -- we might say that in the event, say, taxes are disputed at the time of the insolvency, they are not necessarily contingent because you are not looking to subsequent events.

I think the second factor that's of importance in this case is the concept of the fairness to all the creditors, and I raise the question again, why in this situation should the Government be given particular special treatment because they were in a business relationship with Emsco?

Take the situation that Emsco had never bid on this contract, then the contract would have been relet or they would have been let to other parties at a higher price perhaps, but it would have been the same price that the Government wound up paying anyway rather than coming into this --

QUESTION: How can we speculate that, Mr. Harris?

MR. HARRIS: Well --

QUESTION: Usefully.

MR. HARRIS: In the instant case, there is some evidence in the record that at least with respect to the Navy's contract the contract was relet to the second lowest bidder at their bid price. It's on page 44 of the appendix, I believe.

But the point I am trying to make is whatever the second bid would have been at the time, if Emsco had not bid, the Government would have been paying a higher price. Eventually

they wound up paying a higher price anyway. But the fact that Emsco bid on the case and eventually went insolvent works in this case to the Government's advantage because they are getting a lien on all the assets that Emsco had at the time.

We pointed out in our brief that if the priority is extended to the Federal Government, the other creditors get nothing and that is, of course, the large part that -- we think at least you can say it's harsh on the other creditors, perhaps not unfair, but harsh.

Ms. Shapiro has indicated that the Government gets nothing if the priority statute is interpreted in such a way that unliquidated claims are not debts due.

Now, I think she is probably wrong on that because under the Texas law, the assignment for the benefit of creditors, the assignee is compelled to recognize creditors, even late filing creditors if they just notify the assignee of their claims and elect to be treated as a participating creditor.

We have always in this situation treated the Government as a claimant, another creditor, and I never really even thought that if priority did not extend, that the Government would not receive its pro rata share of the indebtedness. We brief the case all along in that vein.

The question of the practical aspect of the manipulation by the creditor of the Government by somehow

running into bankruptcy or running into assignment for creditors soon after contractual default in order to curry favor with the remaining creditors is a spectre that I suppose is possible, but I think you need to balance that horrible example or that horrible imaginable against the situation of the present harshness on the present creditors.

As I indicated, there are two factors that I think are favorable to the Government in this case, and those are the cases that indicate that this statute is supposed to be construed liberally to protect the Government's purse. And my only response to that is what limits are involved in that. If you look to the State Bank case, United States v. State Bank of North Carolina, Justice Story said, well, this language in here has to be applied reasonably, you have to give it reasonable interpretation. In order to give it that reasonable interpretation, he said look to the common law meanings. He didn't extend it to all claims or all obligations. He said look to the common law meanings, and we are talking about a present debt.

Other factors that militate for a decision for the Government would be the cases in which priority has been assumed even though there has been no real confrontation of the issue. There are a number of those cases. To follow that approach would be sort of law by accident, because I don't think there has been any real -- there is no clear

argument of the question.

In closing, let me say that I believe this is a narrowly drawn statute. The statute did not in its terms apply to torts, didn't apply to obligations, didn't apply to claims. It was drawn in terms of debt. And as the term was used, I believe that the common law would indicate it did not comprehend unliquidated claims.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mrs. Shapiro?

REBUTTAL ARGUMENT OF MRS. HARRIET S. SHAPIRO

ON BEHALF OF THE PETITIONER

MRS. SHAPIRO: My first point is that the Massachusetts case really was deciding that a debt is not due when the debtor can at the point of insolvency decide whether he is going to pay the United States or the State. In that kind of a situation you have a contingent debt that it's much harder to say is a debt due.

Tax claims can be contingent in the sense of uncertain. For example, you can have an accrual basis taxpayer who has got a mine. The results of profits from the mine won't be determined for a period of time. Or when there is a sum in litigation or when there is a sales contract where the amount payable isn't determined until the end.

And finally, in the standard contract terms for damages, the liquidated damage clause is ordinarily not the

exclusive remedy. There is also a provision for contingent or consequential damages or other damages that result. The damages here could have been determined at the moment of breach. There is no necessity to wait for the recontracting.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Shapiro.

Thank you, Mr. Harris.

The case is submitted.

[Whereupon, at 11:43 a.m., the argument in the above-entitled matter was concluded.]