ORIGINAL

In the

Supreme Court of the United States

UNITED STATES OF AMERICA,	)	
	)	
PETITIONER	)	
	)	
V.	)	No. 77-1644
	)	
ZAC A. CRITTENDEN, JR., A/B/A CRITTENDEN TRACTOR COMPANY	)	
	)	

Washington, D. C.
January 8, 1979

Pages 1 thru 39

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ZAC A. CRITTENDEN, JR.,]
d/b/a CRITTENDEN TRACTOR COMPANY

]

- -

Washington, D. C.

Monday, January 8, 1979

The above-entitled matter came on for argument at 1:25 o'clock p.m.

BEFORE:

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

APPEARANCES:

STEPHEN R. BARNETT, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C., on behalf of the Petitioner

HOWELL HOLLIS, III, ESQ., Freeman & Hawkins, 618 Fulton Federal Building, Atlanta, Georgia, 30303, on behalf of Respondent Zac A. Crittenden, Jr., d/b/a Crittenden Tractor Company

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: You may proceed, Mr. Barnett.

ORAL ARGUMENT OF STEPHEN R. BARNETT

ON BEHALF OF THE PETITIONER

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

This case, too, involves competing liens in a tractor. The Federal Government at this time, through the Farmers Home Administration of the Department of Argiculture, had a lien on the tractor as security for loans it made to the farmer. After this lien had been established, the farmer took the tractor to the Respondent for repairs, and the question is whether the Respondent's statutory repairman's lien takes precedence over the earlier Federal lien under principles of superpriority, or, on the other hand, whether the Government's lien prevails under the principle of "first in time, first in right".

The FHA makes loans pursuant to what is now the Consolidated Farm and Rural Development Act to farmers who are "unable to obtain sufficient credit elsewhere to finance their actual needs at reasonable rates and terms." Thus, like the SBA, the FHA is engaged in lending not to make a profit, but to serve a policy interest of the Federal Government.

The distinction that my brother in the former case tried to make between sovereign and commercial functions of the

Government, we submit, is not a valid distinction, and this Court made that clear in cases such as Indian Point. When the Government lends money through the FHA, it is performing a governmental, a sovereign function, for reasons of policy.

QUESTION: Indian Point is under the Federal Tort Claims Act, isn't it?

MR. BARNETT: Yes. It is cited in our brief in Kimbell.

Indeed, the provisions of the FHA policy is written into the security agreement in this case, at appendix page 10, where it expressly provides that if at any time it appears to the FHA that the debtor can obtain a reasonable loan elsewhere -- that is, a loan on reasonable terms elsewhere -- the debtor will, at the FHA's request, apply for that loan and pay off the FHA.

This was apparently quite a tractor in this case, because between November 1972 and July, 1973, the farmer brought it in to Respondent for repairs a total of seven times. In each case Respondent made the repairs and returned the tractor to the farmer, who did not pay his bill. By July of 1973 the amount of the bill was $1600.

When the Respondent brought the tractor in again for the eighth time, in December, 1973, this time for repairs that raised the account to $2100, Respondent kept possession of the tractor while awaiting payment.

When the tractor was finally sold in 1978 -- incidentally, it was sold for $1500, less than the repair bill, although admittedly this was five years after the repairs had been made.

QUESTION: Are tractors like passenger automobiles? Is there artivicial obsolescence?

MR. BARNETT: I don't know, Mr. Justice Stewart. I'm not a farm boy.

QUESTION: I'm not, either. That's the reason I asked the question.

MR. BARNETT: While the Court of Appeals in Kimbell Foods rejected the choateness rule for determining lien priorities, the Court of Appeals in this case rejected the even more fundamental rule of first in time, first in right, a rule that goes back in this Court to the 1827 decision in Rankin v. Scott, in which Chief Justice Marshall stated that the principle is believed to be universal, that a prior lien gives a prior claim which is entitled to prior satisfaction out of the subjected funds.

QUESTION: The Fifth Circuit also rejected the principle that Federal law would refer to State law in this case, didn't it? Didn't it say we don't have to cite what Georgia law is in this case because we're going to follow a general common law UCC principle?

MR. BARNETT: Yes, it did, not quite a UCC principle.

The Court here took a rather hybrid approach. It started with the UCC, but the UCC in this case incorporates State law. The Court then looked to see what the Georgia law was, decided that either Georgia law was unclear or it was unfavorable. The Court then looked back to the UCC, decided that it would adopt the UCC provision, but without the part of the UCC provision that says unless State law provides otherwise, and then finally the Court picked up a piece of the Federal Tax Lien Act of 1966 to complete its collage.

QUESTION: What if this Court were to decide that as a matter of Federal law the reference would be to Georgia law in this case? Does the Government agree with Judge Elliott's opinion that the District Court was right, or does the Government think it should be sent back for consideration by the Court of Appeals for the Fifth Circuit as to what Georgia law is?

MR. BARNETT: Well, we take the position that Georgia law -- that the District Court was wrong, that under Georgia law there is no such superpriority here, but it's not a position we rely on. It's a question of State law.

But to answer the broader implications of your question, Mr. Justice Renhquist, if the Court here were to take the position that State law governs, we think there would be all sorts of problems with that rule.

For one thing, I believe it would destroy the uniformity which we insist that this Court has recognized, beginning

with the Clearfield Trust case.

The Court here recognized that. The Fifth Circuit here relied on Kimbell and its earlier Hext case. The Fifth Circuit, in stating that the Federal law governs, stated the principal reasons supporting the application of Federal law is the need for a uniform rule of decision to govern the rights of the United States in the administration of a large-scale program.

Now, that uniformity would be particularly destroyed in a situation of this case, where the States are quite split on the question of superpriority for repairman's liens.

As we note in our brief on page 27, Note 24, there are at least 13 states that have been held to have statutes which deny the repairman the superpriority. Those are 13 decided cases -- I'm sorry. To find the 13, the ALR connotation cited there lists 10, and our citations include three more. Those are cases that have held the States have such statutes, and there may be other States that do. Thus, there would be quite a divergency in what the rule is under State law, and we submit this would make it quite difficult for Federal agencies to administer their programs.

Now, the Zell case, which has been cited in opposition to this principle, was a case involving a State law of marital property, and while the Court there followed that law, there was a statement in the opinion saying that if the SBA regulations were to the contrary, the result might be different. The SBA

regulations now are to the contrary. We submit that that case is very var from the questions of commercial law as are involved in this case.

In Little Lake Missouri as well, this Court pointed out that the land acquisition there, although it was an acquisition of land, the kind of thing traditionally governed by local law, "is one arising from and bearing heavily on the Federal regulatory programs. The choice of law is therefore a Federal decision."

In Myree v. Dekalb County, in applying State law, the Court said, "The question here does not require a decision under Federal common law since the litigation is among private parties and no substantial rights or duties of the U.S. hinge on the outcome."

Well, in this case, the substantial rights and duties of the U.S. do hinge on the outcome. The litigation is not between private parties, but the United States is involved. We submit that not only does Clearfield Trust apply but the principle of uniformity that is embodied in Clearfield Trust would be inconsistent with borrowing or adopting State law as well.

QUESTION: Mr. Barnett, I take it you think the SBA, by regulation, could subordinate its lien to purchase money mortgages and has --

MR. BARNETT: It has. And it --

QUESTION: And I take it that you think that by regul-

ation it could have come out with the other result on purchase money mortgages?

MR. BARNETT: Yes, I think it could, by regulation.

QUESTION: And similarly here, it could if it wanted to, provide by regulation, that their liens would not be subordinate to mechanics liens laws?

MR. BARNETT: I think it could by regulation.

QUESTION: But it has been silent on that.

MR. BARNETT: Yes, it has.

The specific security agreement here gives it the specific authority to subordinate its lien if it wishes to in this case.

QUESTION: Yes, but you think by regulation the SBA could protect itself?

MR. BARNETT: I don't see why -- Could protect itself? Yes.

QUESTION: From later-developing mechanics liens?

MR. BARNETT: Oh, no, no. I'm sorry.

QUESTION: Well, say it has a lien on a piece of property that the borrower sends to a mechanic, and he does some work on it and says "pay the bill" and the owner says "I can't pay". So he just holds it.

Now, could the SBA provide that its existing lien nevertheless is prior to the mechanics lien?

MR. BARNETT: No, I don't think so. I misunderstood.

I thought you were asking whether they could subordinate its lien by regulation. In this case it tried to protect itself by providing in the security agreement that the borrower may not encumber the tractor without its permission.

I don't think the SBA could do that simply by regulation.

QUESTION: Congress could, I suppose.

MR. BARNETT: Congress could.

QUESTION: But you don't think under the statute the SBA would have the authority to so provide by regulations.

Where did it get the authority to subordinate its interest to purchase money mortgages?

MR. BARNETT: I don't know. I will have to retract my statement, Mr. Justice White. I simply don't know whether it would have the authority under regulation to do that or not, to protect itself, to enact a rule that we are saying here is the rule of Federal common law.

QUESTION: You mean the rule that this Court would enact --

MR. BARNETT: Yes, would recognize it's sort of a common law. I don't know. I rather doubt -- I don't want to say whether the SBA would have that authority under regulation.

QUESTION: What if the FHA here had foreclosed so that it stood in the shoes of the tractor owner, and the tractor was being held by the repair people pursuant to the mechanic's lien,

and the only claim made was the amount owed for that particular repair bill, the eighth time. Do you think the FHA could have gotten a writ of replevin or something and force the tractor repairman to surrender it?

MR. BARNETT: Yes.

As I was saying, the "first in time" rule goes way back in this Court and has been uniformly applied by this Court. The Second Circuit, for example, recognized that in the MacArthur Senior Village case.

The Congress, in the Tax Lien Act of 1966, did of course make some exceptions to the rule in the case of Federal tax liens. But as the Second Circuit pointed out, those exceptions were carefully tailored. In particular, the Second Circuit in the MacArthur Senior Village case noted one such exception, in the Tax Lien Act, 26 USC 6323(b)(7), which applies to mechanics liens for the repair or improvement of a personal residence containing not more than four dwelling units, occupied by the owner of such residence, but only if the contract price is not more than one-thousand dollars.

Now, if the decision of the Court of Appeals here were upheld, the decision that relies in part on the Federal Tax Lien Act, one may wonder among other things what the law would be with respect to this particular kind of mechanics lien or any other particular kind. Would the Court here give superpriority to that kind of lien, even though the Tax Lien Act would not? Would

it give superpriority only up to the amount of a thousand dollars? Would it incorporate the limit of only four dwelling units in the residence?

This is, we submit, an example of the kind of uncertainties that are created by the decision here. And, we submit, it wouldn't help to adopt any of the alternatives to the Court of Appeals ad hoc eclecticism here, for the reasons I noted a few moments ago in response to Mr. Justice Rehnquist. We submit it would not help to adopt State law. For one thing, State law is very inconsistent on the precise question here. For another thing, uniformity is important, we think, and yet another thing, the policy that State law should not be able to hold sway over Federal property interests is involved.

Now, of course, it can be said that if this Court were to adopt a rule of borrowing State law, the Court is, of course, always free to examine a particular State law to determine whether it is hostile to Federal interests or aberrant.

But we submit that would be a lot of ad hoc lawmaking for this Court to do, and would involve supervision and criticism of State laws in a very large area, the whole of commercial law, which would be an approach inferior to that of adopting or adhering to the clear Federal rule of "first in time, first in right." It is --

QUESTION: Unless that happened to be varied by an agency regulation?

MR. BARNETT: Well, again, I don't know about agency regulation, but certainly it could be varied by Congress.

QUESTION: Didn't the SBA regulation on purchase money mortgages vary that?

MR. BARNETT: It varied by subordinating its claim. My point is, I'm not sure that -- yes, the agency regulation can subordinate its claim. I am not sure whether it can strengthen or protect its claim.

The result reached by the Court of Appeals here is one that no one could have predicted, and one, we submit, should not be upheld, because it would create havoc with commercial transactions.

Now, it may be suggested -- it has been suggested -- that the model U.C.C. should be adopted instead, because it is supposedly uniform, as State law isn't, on this question, and because it would not be such a unique concoction as the Court of Appeals reached here. However, we submit that that alternative would not be acceptable, either --

QUESTION: Mr. Barnett, I take it from what you said a while ago -- I just want to check it. You said thirteen States would permit the creditor lienor to replevin the property from the mechanics lienholder?

MR. BARNETT: Yes, at least 13 States have statutes that have been held to give priority to the earlier lienor against the subsequent repairman. I assume that would allow a replevin

as well as --

QUESTION: Without paying his bill?

MR. BARNETT: Yes.

If the U.C.C. is looked to, one problem was that here-- and it is a problem that implicates the Kimbell case as well -- is that the U.C.C. here itself refers to State law, so that if State law is inconsistent, the resulting rule would be inconsistent as well.

As I mentioned in the Kimbell argument, that, it seems to us, is a problem with adopting the U.C.C. in the Kimbell situation. How do you exclude the situation in mechanics liens that is presented here? Just what is the scope of the rule that is being adopted? How would one know to what extent and with respect to what kinds of liens the Courts should use the U.C.C. or should not.

QUESTION: Don't State courts also frequently differ in their interpretations of provisions of the U.C.C.?

MR. BARNETT: That is another respect in the U.C.C., that it is inconsistent. It is not uniform. It has not been adopted everywhere. It has not been adopted in Louisiana at all.

The provisions of the original U.C.C., the 1962 version, have themselves not been adopted everywhere, as illustrated by Georgia's failure to adopt the provision in this case, and amendments are not adopted immediately, if at all, and judicial interpretations vary.

As the First Circuit pointed out in the Chicago Title case, with respect to mechanics liens in particular, there are many local eccentricities. We see no way in which those eccentricities could fail to lead to confusion and uncertainty in the situation in this case, and we see no way in which if the U.C.C. were adopted in the Kimbell situation, those uncertainties would not creep into the rule to create havoc in the general rule, and we submit that it is for Congress to determine to what extent Federal contractual liens and in what precise respects Federal contractual liens should be subordinated to the U.C.C., to State law, or anything else.

Aaain, we find it significant what Congress did in the 1966 Tax Lien Act, was to reject the proposal that it simply adopt State law and place Federal tax liens on the same basis as other liens under State law, but instead, adopted a carefully-crafted set of Federal rules for Federal tax liens.

QUESTION: Do you need the transposition of choateness from the tax insolvency field under the commercial loan field in this case to win for you?

MR. BARNETT: No, we don't in this case, because in this case it's "first in time" by any definition. We don't have to rely on the choateness rule in this case at all.

QUESTION: Choateness really isn't an issue here. The lien simply didn't exist --

MR. BARNETT: Exactly. Whatever choateness means,

a lien is presumably inchoate when it does not yet exist.

QUESTION: Right.

QUESTION: So what's really being challenged here is the "first in time" rule?

MR. BARNETT: Yes, exactly.

Well, Respondent has made an equitable argument that it is somehow unfair to the -- unfair for the first lienor to be given priority on the basis of "first in time, first in right", that the repairman contributes value to the chattel and that it is unfair to deprive him of a prior lien for that value.

We think there are several reasons why that argument should not be accepted. One is, it is significant that it has not been accepted in a number of States, at least thirteen. The equity that is so clear to Respondent is apparently not so clear to the legislatures in those States.

In addition, it should be noted that in reality we are not -- the "first in time" rule does not mean the first lienor has an unchangeable primacy. It simply sets a starting point from which the parties may deal, a clear starting point. If it is true that the value of the repairs would increase the value of the chattel more than the price of the repairs, then it follows that the first lienor would presumably consent to a release of a portion of the collateral for the repairs. And indeed, the FHA, in the security agreement in this case, retains precisely that option. In the record at A-9, the security agreement on one

hand requires the debtor to care for and maintain the collateral in a good and husbandlike manner, and it goes on to provide in paragraph 3(f) that the FHA has the right to advance funds for the preservation or protection of the collateral, with such advances to be added to the amount of the note at the same rate of interest.

So the question really is, who decides whether the repair will increase the value of the chattel and is it a provident thing to do. The first lienor, the FHA here, has tried to maintain -- to retain that right of decision, and we submit that under the rule of "first in time" that right appropriately belongs to the first lienor and that there is nothing inequitable about that case.

The repairs may well be reasonable, but it's conceivable, however, that they are not reasonable. Without suggesting they were unreasonable in this case, it might be pointed out that we have more than two-thousand dollars worth of repairs on a tractor that was eventually sold for only five thousand. It is conceivable that the FHA, if asked, as it was entitled to be asked, would have decided "No, it might be better for the farmer to buy a new tractor."

QUESTION: How much did the court below say the mechanics lienor had a first lien for?

MR. BARNETT: The Court of Appeals said only for the $500 worth of repairs --

QUESTION: And that's all you're appealing?

MR. BARNETT: That's all we're appealing in this case.

QUESTION: And that was the latest --

MR. BARNETT: That was the last visit to the shop, the last trip to the shop.

While that's all we're appealing in this case, Mr. Justice White, the principle of whether the --

QUESTION: But in the Fifth Circuit, that's all you're subordinated to, and on any other rransaction.

MR. BARNETT: Well, yes, but the repairman might keep possession from the very start.

QUESTION: Well, I'll guarantee you, he would never run up $2,000. That certainly wasn't on the first go-around. He isn't going to use it.

MR. BARNETT: Well, one may wonder here why he went up through $1500 and returned the tractor each time without doing anything to see whether the farmer would ever be able to pay. Indeed, that raises a question of the so-called practical problems that Respondent cites, arguing that there is no way for a repairman to protect himself if the "first in time" --

QUESTION: Mr. Barnett, how do you suggest we leave the matter to Congress? I mean, either way we decide it will obviously leave it to Congress. You just want us to decide it your way and then leave it to Congress.

MR. BARNETT: Exactly. We say that our way is the way

that accords with the "first in time" rule that this Court has followed since 1827. That is not only in the traditional way, but we suggest it is the clear and certain way, rather than a way which would cause all sorts of uncertainty and complications.

But it is certainly true, that one way or the other --

QUESTION: What is the rule under the model Uniform Commercial Code?

MR. BARNETT: The model Uniform Commercial Code says that the repairman in possession has superpriority, unless the repairman's lien is created by a State statute and that statute provides otherwise. At least 13 State statutes do provide otherwise. And thus, the rule under the model Code depends on the rule in the States.

Thank you. I would like to resevve the rest of my time.

MR. CHIEF JUSTICE BURGER: Mr. Hollis?

ORAL ARGUMENT ON BEHALF OF RESPONDENT

ZAC A. CRITTENDEN, JR.

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

The broad impact of this case is reflected in the amicus briefs that were filed both in this case and in the Kimbell case, but the impact is broader than that because the individuals that the Federal loan programs were designed to protect and to benefit are going to be affected by the decision of this Court if

it overrules the Fifth Circuit.

This is true because the utilization of the "first in time" choate lien doctrine ultimately creates a situation where a lender or where a mechanic will not deal with one who has previously or is going to deal with the Federal Government.

Apparently the Government had abandoned the choate lien concept in the context of this case. In their brief they utilize the Kimbell argument as their first argument, and I gather today that counsel has admitted to the Court that choateness is not a concept and not a doctrine that this Court need consider in determining whether or not to extend or amplify the "first in time" rule.

However, the "first in time" rule incorporates and embraces the concept of choateness, so it is somewhat difficult to separate the two.

The question is whether to expand a rule that was developed in the context of the tax lien statute and the insolvency statute into the commercial arena --

QUESTION: The "first in time" rule was applied by courts long before the term "choate" was coined, wasn't it?

MR. HOLLIS: The choate test was, in my understanding, was developed to determine that point in time at which a competing lien was entitled to compete with a Federal lien. So you need to utilize it when you consider the "first in time" doctrine to determine that point in time which a competing lien may or may

not compete.

QUESTION: But if you go back to 1827, to the case that applied the "first in time, first in right" rule as the Federal rule, the Court adopted it -- it wasn't creating a Federal rule; it was just adopting what it felt was the common law rule, wasn't it?

MR. HOLLIS: That's correct.

Nothwithstanding that fact, the Government attempted to apply the concept of choateness in this case, and did so in their brief.

QUESTION: I understand that in Georgia, if this had been private, there would be no problem. I mean, if it had been a private loan or private instrument, you would have no problem.

MR. HOLLIS: There would be no problem if we were in the State court. But there is a problem inasmuch as the Government contended in the Fifth Circuit that the State law is not clear as to whether or not the mechanic would have a priority under a strict Georgia statute.

QUESTION: But you say it is clear?

MR. HOLLIS: I say it is clear, by virtue of the argument which we made in the latter portion of our brief, in which the District Court judge applied in this case.

QUESTION: Do we have to buy that in order to affirm?

MR. HOLLIS: No. This Court can affirm the Fifth Circuit by adopting the Federal common law rule based upon the

Uniform Commercial Code that the Fifth Circuit adopted.

You start from the proposition, as the Court has suggested it will, that the Federal law must pertain, then the next question is, what law -- or what will be the rule of law. It has been suggested that you can go directly to State law and say we will apply State law, period, or we will fashion a Federal rule based upon something, whether it be State law or in the case of the Fifth Circuit, upon the model Uniform Commercial Code.

The rule, so fashioned, at least does this: It is a commercial rule that was designed and developed for use in a commercial transaction. It is not a rule that was designed to determine tax priorities; it is a rule that comports with 1962 instead of the late 1800's. It's a recent rule.

The other aspect of utilizing a Federal common law rule based upon the Uniform Commercial Code, as we will indicate a little early, and as the Court has become aware with respect to SBA and FHA, the regulations themselves direct the lending offices and the direct the agencies to utilize and incorporate and take advantage of and consider local law and local enterprise when determining how to transaction their business on a local level under the Uniform Commercial Code. It does embrace a concept of locality, the very same law which the Government relied upon in this case to originally protect its security interests.

This Court has never applied the "first in time" rule

to any area of commerce. It has been restricted to the tax lien area and the insolvency statute, though the Government has prevailed upon some of the lower courts to extend and amplify that doctrine. There is no statutory basis at all for extending the doctrine.

Again, the FHA regulations belie the point that the Federal Government makes in its brief. They contend that the "first in time" rule is a uniform, universal rule, and that there are no exceptions --

QUESTION: Does the FHA statute say that whenever money is advanced the Government shall have a lien?

MR. HOLLIS: No. The statute itself requires that FHA advances be secured as the Secretary deems necessary and appropriate, so it directs that FHA conduct themselves as a commercial lender, that they take back security for moneys advanced. The regulation --

QUESTION: Well, the tax laws say that at a certain time in the process of collecting taxes the lien shall arise. It specifically gives the Government -- it creates the lien.

Is there anything similar to that in the FHA, or in any of the regulations? Do the regulations say that -- what kind of paper the FHA takes to evidence its lien and that sort of thing?

MR. HOLLIS: The regulations -- Reading the regulations is similar to the experience of reading the Uniform Commercial

Code. You have the concept of a security agreement which was developed in the --

QUESTION: So all this is right in the regulations, I take it?

MR. HOLLIS: Yes, sir. It's part and parcel. For example, there is even one portion of the regulations that informs the local lender about an esoteric farm loan for less than $2500, which is a model U.C.C. provision. It's really a--

QUESTION: So what if you found in this set of regulations a provision that is strictly in conflict with (a), the Uniform Commercial Code, the model act, and (b) the way it's enacted in a particular State? Would you think the regulation would govern?

MR. HOLLIS: Under the Government's position --

QUESTION: I'm talking about your position. What if, say, the regulation was flatly contrary to a provision in the Uniform Commercial Code as adopted in the relevant State; would the regulation govern or not?

MR. HOLLIS: To determine priorities?

QUESTION: Yes, for example.

MR. HOLLIS: We contend that it would not, that the Uniform --

QUESTION: Because why?

MR. HOLLIS: Because the Court should apply a Federal rule, such as the one fashioned by the Fifth Circuit --

QUESTION: I know. But you apparently concede that it would be Federal law.

MR. HOLLIS: I don't concede that this Court should apply Federal law. But apparently the Court has already indicated that the base question is whether or not to consider this as a Federal case or as a purely State case.

QUESTION: Well, aren't there two different questions: One is whether it is a Federal question as to the priority of the lien; another question is, conceding that it's a Federal question, does the Court deciding that Federal question refer to a body of State laws, to a body of Federal common law, or to some other body of law.

MR. HOLLIS: I think that's exactly what I'm attempting to say, is that those are the two questions. First, are we going to decide it conceptually as a Federal rule, and then be fashioned as a Federal rule, or go directly to State law as a Federal rule.

QUESTION: But if it is a Federal law, then if it is a Federal question, and an agency regulation was issued governing the disputed issue precisely, wouldn't it take precedence over the State law?

MR. HOLLIS: I suppose, if the regulation was not in conflict with the Federal rule that was adopted, that it would.

QUESTION: If it weren't in conflict with the statute, with the Federal statute?

MR. HOLLIS: Well, in this instance it would have to be

in conflict with the case law because there is no statute.

QUESTION: If we decided in this case that it was the duty of the courts, State and Federal, to apply State law, for example, that as a matter of Federal law or whatever the duty was to apply State law, then the FHA could hardly come out with regulations to the effect that the State law would be disregarded, could it?

MR. HOLLIS: The way I understand it, and the way I understood the discussion earlier, the FHA can issue almost any kind of regulations it wants to.

QUESTION: Quite in defiance of what might be decided in this case by this Court? That's my question.

MR. HOLLIS: I'm not sure whether they --

QUESTION: Let's say this Court should decide in this case and its predecessor that what is applicable is the body of State substantive law in this area, whatever the State might be, of each of the 50, wherever the transaction is made. Could the FHA in this case, or the SBA in the previous case, then come out with rules or regulations saying that State law shall be wholly disregarded and that our liens shall have this and that and the other priority regardless of the provisions of State law?

I'm just referring now to my brother White's question.

MR. HOLLIS: I think they could, but it would not seem to me they would be enforceable regulations.

QUESTION: Why not, unless we put our decision on a

constitutional basis, saying that this is the only way the Government can run its business, by constitutionally following State law.

None of our cases ever suggested the "first in time" rule and choateness was constitutionally routed, did we? It has just been a sort of Federal common law that Congress is perfectly free to pre-empt and supersede. Similarly, I suppose one of its agencies, if it was authorized by statute to do so.

QUESTION: Yes, but it isn't a question of whether there's any statute giving it such authority. You're not assuming there is some statutory basis for FHA to draft one set of priority rules and the SBA to draft another set, and each government agency to draft rules that it thinks will help in these priority lien situations, are you?

QUESTION: And all such rules inconsistent with whatever the Court says in these two cases.

QUESTION: I don't know. I think you are partially relying on it because the FHA has already subordinated some of its liens to -- some State liens, when it didn't have to, hasn't it?

QUESTION: Yes.

MR. HOLLIS: If the "first in time" rule is applicable, it has.

QUESTION: In case you feel like an innocent bystander (Laughter) -- do you agree with the implication contained in my

broth Stevens' question, that the agency would have to have either implied or express authority under the statute to draft the regulations which my brother White has referred to?

MR. HOLLIS: The way I read the regulations, the enabling act, the agency is given the authority to do specific things, one of which is to make farm loans or operating loans. They are entitled to draft legislation or regulations to implement that. There is nothing in the enabling statute which would give the Government the authority to have a superpriority.

So I would not think the drafting of regulations which granted the Government superpriority over mechanics liens and purchase money security interests and so forth would be a valid exercise of the agencies power.

We draw on two statutory -- two pieces of legislation to support our position that the "first in time" rule should not be extended. One is the Uniform Commercial Code and the other is the Tax Lien Act of 1966, which as the Court indicated in the Kimbell argument earlier eroded the basis for the extension of the "first in time" rule and, in fact, makes a specific exception with respect to mechanics liens and those who retain possession of personal property for the purpose of asserting a repair lien.

QUESTION: With respect to Federal tax claims?

MR. HOLLIS: With respect to Federal tax claims alone. We contend in our brief that the logical extension of the "first in time" rule would mean that the Government would take superiority

over purchase money security interests.

In its reply brief, the Government notes that in analyzing that contention, that the purchase money security interest would fail, it relies upon the Tax Lien Act of 1966 and the Uniform Commercial Code and some tax revenue rules. The importance of this is that the Government turns to statute and State law and tax law to determine that it may or may not, as it chooses to do so, have a priority over purchase money security interests. So the Government flounders for a basis for this exception, but it cannot be found.

If "first in time" prevails, it has no exceptions. So what we're asking this Court to do is, number one, not extend the doctrine in the first instance, and number two, to carve out an exception, if it is so extended, such as that exception found in the Tax Lien Act, but more particularly, we would wish that this Court apply the rule of law that the Fifth Circuit applied out of a Federal common law based upon commercial rules.

QUESTION: Aren't there some problems, Mr. Hollis, if you apply a Federal common law, presumably the reason that you're doing it is to achieve some sort of certainty; and yet, if you resort to the U.C.C. as interpreted by the States, you run into quite a variety of interpretations of some provisions.

MR. HOLLIS: Well, the policy question, from the other side of the coin, is are you putting certainty into the commercial business arena. Certainly it is certain and sure and clean

for the Government.

But it is reasonable to anticipate that people will attempt to make an effort to work within the confines of the choate lien doctrine, the "first in time" rules. So if the "first in time" rule is expanded so that the Government has a superpriority over after acquired liens, the private sector will then come in and make an effort to work with those rules. So you have complexity on the private level, which is, of course, counterbalanced by the uniformity and simplicity on the Federal side.

QUESTION: Quite apart from differing constructions of the U.C.C. by the various state courts, you have in this context the U.C.C. itself gives this super seniority to mechanics liens of this type, unless the lien is created by State law and unless that State law provides that there should be no super seniority. And we are told there are some 10 to 13 States that don't give super seniority, so you wouldn't get anything like uniformity in this area, would you, under the U.C.C. itself?

MR. HOLLIS: Under the U.C.C. itself you would not.

QUESTION: No. Because it defers to State law in this respect.

MR. HOLLIS: Under the Fifth Circuit rule you would get uniformity.

QUESTION: But you don't know where the Fifth Circuit is going from one case to another under Judge Goldberg's opinion, do you?

MR. HOLLIS: Well, there were faced with a mechanics lien, and the priority, vis-a-vis affected security interest by the Government. They decided that one question.

QUESTION: Yeah. Then where do we go next?

QUESTION: Was that a John Deere tractor?

MR. HOLLIS: Alis-Chalmers.

QUESTION: With someone named Zac Crittenden as the mechanic.

MR. HOLLIS: There are traditional exceptions to a "first in time" rule as a layman would know it, that "whoever gets there first wins". Some of the exceptions are the purchase money security interest. Others are the statutory liens that States recognize. Those are traditional in nature. So you're talking about a rule that the Fifth Circuit fashioned to deal with a very traditional kind of case, a very normal kind of transaction on a very local, low level.

From the standpoint of the Tax Lien Act of 1966, they carved out a similar exception for a repairman and for an attorney's lien, and for a perfected purchase money security interest. So you're talking about exceptions to the time-honored "first in time" rule, and you're talking about traditional exceptions. There is nothing so unusual or esoteric about the mechanics lien. It has been around for years, especially one that is possessory in nature.

QUESTION: What is the situation -- if it's possibly

relevant, and if you know -- in most of the States as to the lien of the material man, the painter or anyone else who paints a house that has a mortgage on it? In all the States I know about first-hand, which would be six or seven, the material man's lien was superior to the lien of the mortgage, even though the mortgage was first in time.

Is there any relationship between these two in terms of doctrine?

MR. HOLLIS: There is the relationship, the concept of the material man or the mechanic, that he is one who improves or enhances the value of the property.

QUESTION: He is -- Well, if he doesn't enhance it, he at least is preserving the security, isn't he?

MR. HOLLIS: At least, at least. And the Fifth Circuit fashioned in this case to provide protection for one who says that it does not preserve it.

QUESTION: Let me put it another way. If you know, do you know of any States in which the material man's lien would be subordinate to the first lien of the real estate mortgage in the circumstances I mentioned?

MR. HOLLIS: I cannot name the States, but there are States that do not, for example, have a statutory material man's lien in the first instance, or that do not give it priority to a prior perfected first mortgage. The similar situation is true with respect to personal property, apparently, because the

Government has cited some laws of some 13 States which do not give a superpriority to the repairs of the mechanic. So the rule would vary, depending upon the State.

In its brief the Government seemed to elevate the importance of its lending programs to a constitutional level, and whatever the underlying or underpinnings of the Government lending programs are, they are certainly different from the functions it performs as a taxing entity. In the tax arena, the Government is an involuntary predator, and the debtor is simply a neutral party.

However, in a Government lending program the Government participates with, bargains with, considers with, talks with its prospective borrower. It's a voluntary enterprise and it is characterized by a commercial business dealing. A rule which comports with commercial business dealings is one fashioned by the Fifth Circuit, a Federal common law rule based upon the Uniform Commercial Code. But the utilization, expansion and amplification of a "first in time" rule which does not comport with commercial expectations, inasmuch as it does not recognize any exception but is all-encompassing and, of course, in conjunction with the choate test, is one by and through which as the Fifth Circuit said the Government always wins. So the utilization of a commercial doctrine as opposed to one that does not recognize the realities and practicalities in dealing with the business world would be a more appropriate rule for this Court

to fashion in the absence of any Congressional legislation to the contrary.

It has been suggested that the Government needs to fulfill a particular interest in protecting its property. However, as the exceptions to the Tax Lien Act of 1966 reflect, the attorney's lien, the repairman's lien, the Government is not hurt by the recognition of exceptions to the "first in time" rule.

Insofar as the purchase money security interest is concerned, the Government never had it; if the Government was not on the scene, the debtor would not have had an opportunity to ever obtain additional collateral. But the proprietary interest that the Government has in the debtor's collateral and the debtor's property is not defeated, divested, defeased, or eroded by the failure to apply the "first in time" rule. The Government, in fact, is better off in this case, after the tractor is repaired, than before it was repaired --

QUESTION: Did you say earlier you thought the District Court was right on Georgia law?

MR. HOLLIS: I believe the District Court was correct with respect to --

QUESTION: So you think under Georgia law, if the FHA had been a private lender, having perfected its lien the way it was perfected here, it would have been subordinate to the mechanics lien?

MR. HOLLIS: No. I think that under Georgia law it

would have -- Yes, yes, it would have been subordinate to the mechanics lien.

QUESTION: Not only for the last bill but to all of them; is that right?

MR. HOLLIS: I contend that, and I contended it in the Fifth Circuit.

QUESTION: But isn't that what the District Court --

MR. HOLLIS: That's what the District Court did.

QUESTION: And you think that's consistent with Georgia law?

MR. HOLLIS: As the Fifth Circuit noted, there is not any case where anybody ever gave the property back and went and got it again.

QUESTION: Well, the District Court expressly found that whether under Georgia law or under Federal --

MR. HOLLIS: Federal or State.

QUESTION: Did the District Court so find with respect to the first six repair jobs?

MR. HOLLIS: The entire repair bill.

QUESTION: But you're no longer asking -- You're just trying to defend the last $400 as I remember it. You haven't cross-petitioned?

MR. HOLLIS: I have notcross-petitioned.

QUESTION: You do not now have a claim for the first five repair bills as I understand it.

MR. HOLLIS: By virtue of not having cross-petitioned, that's true.

QUESTION: That's true. But as a matter of the rule to be adopted, it really makes a difference whether you say you adopt the Uniform Commercial Code without the reference to State law, or whether you would just adopt the Uniform Commercial Code.

MR. HOLLIS: We believe the Fifth Circuit's rule, where it adopted the Uniform Commercial Code with reference to State law, is the appropriate rule.

QUESTION: I know. But then it didn't follow that. It didn't go -- It didn't follow Georgia law in that --

MR. HOLLIS: It didn't decide the whole case.

In fact, the District Court held that we had an equitable lien on the tractor. The Fifth Circuit said it did not feel compelled to reach that question in light of the view it was taking of the case.

Then, insofar as the Georgia law is concerned, the Fifth Circuit looked to see whether or not a mechanics lien was available under Georgia law, and determining that it was, made reference to the Uniform Commercial Code, the Federal Tax Lien Act.

On the question of complete and total possession, the Fifth Circuit noted it could find no case on the subject, and we couldn't either.

QUESTION: Clarify for me, if you will, what do you say is the status now here in this Court, of the District Court finding

about Georgia law?

MR. HOLLIS: I believe that the District Court's decision with respect to Georgia law could be the basis for this Court upholding its interpretation of Georgia law in granting Crittenden the superpriority in this case.

QUESTION: Now, what did the Fifth Circuit do about that?

MR. HOLLIS: The Fifth Circuit did not need to reach the question of --

QUESTION: Should we decide that here when the Fifth Circuit -- Assuming we thought we should reach it, should we decide it here when the Fifth Circuit did not reach it?

MR. HOLLIS: I don't believe that this Court should decide it, first of all, or secondly, that they need to; that it can either remand it to the Fifth Circuit or it can adopt the opinion of the --

QUESTION: But I take it you agree, that if the Court concluded we needed to decide that, we needed to decide it, we shouldn't decide it here when the Fifth Circuit didn't reach it; is that right?

You say we don't need to reach it, but -- I'm talking hypothetically now.

MR. HOLLIS: I don't believe you need to decide that.

In conclusion, the choate lien test and the "first in time" rules transported into the commercial area cannot help but

create confusion.

I see my time has run out.

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

REBUTTAL ORAL ARGUMENT OF STEPHEN R. BARNETT

ON BEHALF OF THE PETITIONER

MR. BARNETT: One single point, Mr. Chief Justice.

The question has been suggested that the Clearfield Trust case and the policies inherent in it perhaps need reconsideration by the Court. I would simply point out that the court below in both of these cases explicitly held that Federal law governs.

The cert petition presented no question on this score, and if the Court would be interested in reconsidering Clearfield Trust, we would be interested in submitting a brief on that question.

Now, I know it hasn't been suggested that Clearfield Trust be reconsidered with respect to the question of whether its a decision of Federal law or not. But we would submit that if State law is to be borrowed on a wholesale basis, that implicates the policies embodied in the Clearfield Trust decision. We submit that the main policy embodied there is uniformity, and if State law is to be borrowed on a wholesale basis, one is going to encounter uncertainty, sacrifices of the Federal interest, and perhaps even more uncertainty than one would have if one decided that

it was a State --

QUESTION: But it doesn't remove the matter from Congressional reach or from agency reach if Congress gave the agency the regulatory authority.

MR. BARNETT: That is true, that is true.

I simply wish to suggest that if that question is to be reconsidered, we would be willing to submit a brief on it.

Thank you.

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

[Whereupon, at 2:20 p.m., the case in the above-entitled matter was submitted.]