ORIGINAL

In the

Supreme Court of the United States

G. GARVIN BROWN, III)
)
PETITIONER,)
)
V,) No. 78-58
)
MARK PAUL FELSEN,)
)
RESPONDENT.)
)

Washington, D. C.
February 21, 1979

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IN THE SUPREME COURT OF THE UNITED STATES

G. GARVIN BROWN, III, Petitioner,	
v.	No. 78-58
MARK PAUL FELSEN, Respondent.	

Washington, D. C.

Wednesday, February 21, 1979

The above-entitled matter came on for argument at 1:16 o'clock, p.m.

BEFORE:

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

APPEARANCES:

CRAIG A. CHRISTENSEN, ESQ., Dawson, Nagel, Sherman & Howard, 2900 First of Denver Plaza, 633 Seventeenth Street, Denver, Colorado 80202; on behalf of the Petitioner

ALEX STEPHEN KELLER, ESQ., Keller, Dunievitz & Johnson, 950 Seventeenth Street, Denver, Colorado; on behalf of the Respondent

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 78-58, Brown v. Felsen.

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

ORAL ARGUMENT OF CRAIG A. CHRISTENSEN, ESQ.,

ON BEHALF OF THE PETITIONER

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

This is a suit filed by the petitioner in the Bankruptcy Court seeking a determination that a debt owed him by the respondent and evidenced by a pre-bankruptcy state court judgment was not dischargeable, based upon section 17a(2) and (4) of the Bankruptcy Act.

The Bankruptcy Court granted summary judgment for the respondent, determining the debt to be dischargeable, and that order was affirmed by the District Court for the District of Colorado and by the Court of Appeals for the Tenth Circuit. This Court granted certiorari.

The facts upon which that summary judgment was entered are as follows: In June 1975, Jefferson Bank & Trust Company began an action against the respondent, Mr. Felsen, his company, Le Mans Motors, and the petitioner, Garvin Brown. The bank's claim against the respondent was based on a promissory note he had executed. The bank's claim against

Mr. Brown, the petitioner, was premised upon a guarantee of that note he had executed in favor of the bank.

Mr. Brown filed a crossclaim against Mr. Felsen based upon indemnity. No claims of fraud were pledged in the state court action by Mr. Brown against the respondent.

Shortly after the respondent's deposition, the parties all stipulated to judgment. Mr. Brown stipulated to entry of judgment in favor of the bank and against him; the respondent stipulated to the entry of judgment in a like amount in favor of Mr. Brown and against the respondent. The state court entered judgment based upon that stipulation. No evidentiary record was made.

Thereafter, the respondent filed his petition in bankruptcy and Mr. Brown commenced an adversary proceeding to have it determined that the debt owed him by the respondent was not dischargeable. Mr. Felsen moved for summary judgment, contending that, despite the obligation of the Bankruptcy Court to determine dischargeability, since no fraud had been pled in the state court action, the Bankruptcy Court could not go beyond that record, it being res judicata, and the debt would have to be termed dischargeable in the absence of that fraud finding.

QUESTION: Had he filed the claim?

MR. CHRISTENSEN: In the state court, Your Honor?

QUESTION: No, in the Bankruptcy Court.

MR. CHRISTENSEN: Mr. Brown?

QUESTION: Yes.

MR. CHRISTENSEN: I don't believe he had filed a claim.

QUESTION: Would he have to?

MR. CHRISTENSEN: No, I don't believe he would have to by virtue of the adversary proceeding because the court is bound there to enter judgment. The claim would only go to his rights to distribution from the estate --

QUESTION: I see --

MR. CHRISTENSEN: -- not to his eventual rights to collect it.

QUESTION: Well, if the bank didn't list him as a debtor, he is going to be included anyway.

MR. CHRISTENSEN: Well, he wouldn't be included in the distribution.

QUESTION: Is that right?

MR. CHRISTENSEN: He would not share in the distribution from the estate, the same with a secured creditor who may opt not to file a claim for the deficiency, but it doesn't relate to his rights between he and the debtor with regard to the security. I am talking from recollection. I am not sure, perhaps the claim was filed in this matter.

QUESTION: And what is the jurisdiction for the court?

MR. CHRISTENSEN: The Bankruptcy Court?

QUESTION: Yes.

MR. CHRISTENSEN: Section 17c provides that the creditor who wants to seek a determination of non-dischargeability must file, and that filing was made on a timely basis.

QUESTION: Well, you are suggesting, however, that he doesn't have to have been determined to be a creditor by filing a claim?

MR. CHRISTENSEN: No, not -- he would have to to share in the distributions from the estate, but not to retain a non-dischargeable claim to be collected from post-bankruptcy assets. In any event, if that were important, I would want to supplement the record. I just don't recall whether a claim was filed. I believe it was, but I am not sure.

QUESTION: Well, I was asking just what the jurisdiction of the court was.

MR. CHRISTENSEN: Yes. It comes up, I believe, under 17c, under 1254, review of the bankruptcy determinations.

I submit to the Court that the decision of the Tenth Circuit ought to be vacated and the petitioner allowed to proceed on his complaint. I submit that for three reasons. Number one, the 1970 amendments to section 17 of the Bankruptcy Act place exclusive jurisdiction over section a(2) and a(4) determinations in the Bankruptcy Court. So that reliance for this determination on the wording of a judgment issued by a

prior court without this jurisdiction is a misplaced reliance.

Second, the Bankruptcy Act is a federal statute. It requires a uniform nationwide interpretation with respect to these fresh start provisions, and it ought not to have the fresh start for dischargeability provisions dependent upon the various standards --

QUESTION: What if the issue had been raised in the state litigation and there had been allegations of fraud under Colorado law and there had been some determinations that way? I suppose you would take the same position, that fraud is a federal concept and it would have to be relitigated?

MR. CHRISTENSEN: That's correct. I would say that collateral estoppel -- I would say two things. First of all, dischargeability --

QUESTION: Except on facts, you would say just facts?

MR. CHRISTENSEN: That's right, to the extent any facts have been actually litigated by the parties and actually determined, those facts would be binding. The Bankruptcy Court would consider those facts with any other facts that the parties would wish to put before the court and weigh the facts against the federal standard which is made applicable by 17a and b.

QUESTION: But there wouldn't be any such thing as res judicata.

MR. CHRISTENSEN: Well, there would be no res judicata because the claims aren't the same. State fraud is not the same as the grounds for dischargeability in --

QUESTION: It is fundamental to your case, I take it?

MR. CHRISTENSEN: That's correct, Your Honor.

QUESTION: Well, we don't have to decide here any possible instances in which a bankruptcy court might in pursuing the authority given under the '70 amendments treat factual adjudications in the state court as binding on it?

MR. CHRISTENSEN: I don't believe you have to reach that point. While it might be instructive, this is a case in which no evidentiary record was made --

QUESTION: To accept your assertion the way you made it, it is broad enough to cover those situations?

MR. CHRISTENSEN: That's correct.

The third reason that I have for asking this Court to vacate the Tenth Circuit rule is that the rule established by the Tenth Circuit will discourage settlements and it will force unnecessary litigation on already crowded courts, so that a creditor might preserve his federal rights under section 17 of the Bankruptcy Act from loss from the failure to assert a prior state court remedy, reviving in another form the very abuse that Congress meant to cure by passing the 1970 amendments.

Previously, the two-step process worked in reverse in which a debtor might seek the protection of the Bankruptcy Court and be granted his discharge. A creditor could then go to state court and seek to obtain a finding of non-dischargeability; the discharge being in the nature of affirmative defense, a default judgment might be entered against the debtor, he relying on the mistaken assumption that his discharge was automatic and need not be pled. Congress pointed out in the legislative history which is cited to the Court in our brief that it wished to instead place exclusive jurisdiction in the Bankruptcy Court. Now, presumably the creditor may go to the State court before the bankruptcy proceeding and seek a judgment necessarily under the Tenth Circuit rule that will include findings of fraud. Presumably, if those findings are entered, the converse of the Tenth Circuit rule will be true and they will be binding upon the bankrupt and, as I say, reviving in but the converse, the very abuse which Congress meant to cure.

I listened with interest as Mr. Justice Stevens announced the ruling in a Bankruptcy Court case this morning. I have not read that opinion, obviously, but I understood Mr. Justice Stevens to state that the Court's reasoning was that the application of state law in that particular case was going to be mandated because there was no applicable federal standard for the matter and that it was more properly the

function of the state courts to determine rights in that particular instance.

It seems to me that that same reasoning applied to this case would require the vacation of the Tenth Circuit rule. There are specific applicable federal standards in this case. They are contained in section 17a of the Bankruptcy Act as to which debts are dischargeable and which are not.

More importantly with respect to the second reason, here Congress, in section 17c of the Bankruptcy Act, which remains fundamentally unchanged in the new Act to take effect this October, placed exclusive jurisdiction for two kinds at least, section 17a(2) and 17a(4) claims for dischargeability determination in the Bankruptcy Court, removing that jurisdiction from the state courts.

It seems to me that creditors ought not to be encouraged to go into the state courts prior to a bankruptcy seeking default judgments based upon fraud, nor should state courts be forced to try issues which are not necessary to the rendition of judgments on commercial paper in order that a creditor may preserve his rights to later raise the federal right for a determination of dischargeability.

QUESTION: I presume that the holder of a promissory note against a solvent signer of it has no particular interest in getting a judgment based on fraud if he can simply get a judgment on the note?

MR. CHRISTENSEN: That is absolutely true, Your Honor, absolutely true, especially if the fraud to be maintained as a false financial statement that perhaps only materializes later. But even if known at the time, the remedy to be afforded by the state court is going to be identical, is going to be the same amount unless you want to establish the situation where you force the creditor to seek punitive damages or some other extraordinary judicial remedy because of the fraud.

I think that perhaps some clemency, if you will, on the part of the creditor, that is of raising only the issues that are necessary to his judgment on the commercial paper would be the more expedient and the more orderly course of action. I do not think that it ought to be made mandatory that a creditor assert a state right at one point in the proceedings when he does not even know that there may or will be a bankruptcy in order to preserve a federal right at a later stage.

By analogy, one might suggest that had Mr. Brown in this case received stock from Mr. Felsen as consideration for his executing the guarantee, would he have equally been compelled to raise questions of fraud in the delivery of the or the obtaining of the stock for a guarantee in the state court in order to preserve his remedies under the Securities Acts for those claims upon which exclusive jurisdiction is given to

the Federal District Courts.

QUESTION: Do you think the Tenth Circuit would have come out the same if there had been no state court litigation? I read their opinion as holding more the idea that anything that was litigated or might have been litigated in the state court is binding on the Bankruptcy Court, not that you had to go to state court to litigate.

MR. CHRISTENSEN: No. I think had there been no state court litigation, there would have been no judgment for the Bankruptcy Court to refer to. I would agree, they are talking in terms of what had been litigated. However, it is interesting that in the two Tenth Circuit cases, both Raley and this case, there was no litigation, if you will. One is a default judgment and one is a stipulated judgment. The respondent suggests that perhaps the petitioner in this case could have asked the respondent to stipulate as to its non-dischargeability. However, I don't think that is a remedy available to a creditor.

QUESTION: Some of the most successful litigators specialize in default judgments.

MR. CHRISTENSEN: That is correct. I understand that. But I do not tbelieve that in either the case of a default judgment or a stipulated judgment that there have been any issues litigated between the parties which bear on a federal right under section 17. They certainly establish

whether or not a debt is due and owing from one party to another. I don't think they establish the federal character of that debt.

For those reasons and for the reasons cited in our brief, the petitioner would ask that this Court vacate the judgment of the Court of Appeals for the Tenth Circuit and allow the petitioner to proceed upon his complaint in the bankruptcy case.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well. Mr. Keller.

ORAL ARGUMENT OF ALEX STEPHEN KELLER, ESQ.,

ON BEHALF OF THE RESPONDENT

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

On behalf of the respondent, we suggest that the Tenth Circuit's decision is supported both by good law and by common sense. Counsel suggests that the determination of dischargeability in the Bankruptcy Court is exclusive. I don't find the word "exclusive" in the statute that has been cited. It simply says that the Bankruptcy Court shall determine dischargeability, and we don't quarrel with that, and that is in the 1970 amendment to the Act.

But when petitioner says that there is a distinct difference between proving fraud in a state court and proving fraud in the Bankruptcy Court, I disagree with the petitioner.

The definition of "fraud" under Colorado law, which we have cited in Morrison v. Goodspeed, element four, on intent, is the same as fraud in the federal system. And to say that the Colorado law on fraud is substantially different from the state law simply isn't a fact. It is a distinction without any real difference.

If a state court in Colorado, and I suspect most states, finds a misrepresentation intentionally made, and so on, and finds fraud, that that is substantially the same as what the Bankruptcy Act says is nondischarging.

QUESTION: Well, I take it that -- did you understand counsel to say that he thought the intent of the federal law of the dischargeability provision was to make sure that the fraud which barred dischargeability was the same country-wide, would be the same country-wide?

MR. KELLER: No, sir. I understood counsel to say that in our case --

QUESTION: I understood him to say that the standard would be a federal standard applicable country-wide.

MR. KELLER: I understood counsel to say that, but I can't really argue against that.

QUESTION: You can't?

MR. KELLER: No. I think --

QUESTION: Well, you don't suggest that the Colorado law on fraud is the same as the law of fraud in every state,

do you?

MR. KELLER: No, I don't.

QUESTION: Well, then --

MR. KELLER: I say it is as stringent as the law in the Bankruptcy Court. I am not familiar with the common law of the other forty-nine states and therefore I can't tell you whether all of the elements required in Colorado are true in all the states.

QUESTION: Well, why do you agree so readily that it has to be -- that the Bankruptcy Act contemplates a national standard of fraud, rather than picking up the fraud standard from the state in which the Bankruptcy Court is sitting or picking up the fraud standard of any state law which might govern the transaction?

MR. KELLER: The reason I say that --

QUESTION: The case that Mr. Justice Stevens announced this morning seems to think that the state law would govern, and the state law might be different in every state.

MR. KELLER: Well, I could, of course, be entirely in error, but the way I read the --

QUESTION: I am sure you could buy that.

MR. KELLER: Oh, yes, very readily, Mr. Justice White. The Bankruptcy Act does in fact go into some more detail about what is fraud than it does with respect to who

gets the rent as between the trustee and so on and so forth.

QUESTION: So you think that perhaps the bankruptcy law did contemplate a national standard of fraud with respect to dischargeability?

MR. KELLER: I think it contemplates a national standard in the light of good common sense, but I don't think it talks about nit-picking slight differences. I frankly don't know the law on fraud in every state.

Counsel says that to reach a contrary result to petitioner's position, that is to sustain the Tenth Circuit, means that the courts in the states are going to be overly crowded with creditors unnecessarily trying to plead and prove fraud when they shouldn't have to, but the crowding of the courts --

QUESTION: They often don't need to to get their judgment.

MR. KELLER: Right, and I think that is one of petitioner's arguments. But the state courts are crowded as are the federal courts, and in the case of the creditor who has a bona fide fraud claim -- I don't mean an after-thought like this one, I mean a bona fide fraud claim which he urges throughout and pleads it, which they didn't do here, that kind of a creditor has many ways to protect himself.

The petitioner suggests, as I said in my brief, that we could stipulate the non-dischargeability. That is

against the law. That isn't what I said in my brief. What I said in the brief was that the creditor can seek a stipulation that the question of fraud is preserved, may be raised in the Bankruptcy Court, he's not waiving those claims. He can do all sorts of things. But the first thing he has to do is plead it, which he didn't do in the state court.

QUESTION: I thought he did refer to misrepresentation.

MR. KELLER: No, Your Honor.

QUESTION: He did not?

MR. KELLER: No, sir. There was an affirmative defense, an affirmative defense, not a crossclaim, in which Mr. Brown said that there were misrepresentations by other defendants, in the plural.

QUESTION: He did not include -- he did not charge Mr. Felsen with misrepresentation?

MR. KELLER: No, sir, no crossclaim against Mr. Felsen of fraud, and counsel for petitioner just a few minutes ago conceded that.

QUESTION: Well, I thought, as Mr. Justice Powell did, that in the answer there was a statement that he was induced to sign such a guarantee by representations and non-disclosures of material fact by the defendant.

MR. KELLER: I believe --

QUESTION: That is on page 35 of the appendix.

In fact, it says "the other defendants." There are only two other defendants in this case, aren't there?

MR. KELLER: That's correct. I see on page 35 an affirmative defense. I don't see an allegation of fraud in any crossclaim, and the Tenth Circuit, in the case at bar, in its opinion found that there was a casual reference to fraud in the answer, and it does not meet by rules of civil procedure, it does not meet Morrison v. Goodspeed, and was disregarded by the Tenth Circuit. That was in the affirmative defense.

QUESTION: Mr. Keller, is it not true that pleading fraud would not have done the guarantor any good in the state court action? I guess the guarantor was the only solvent party in the state court proceeding.

MR. KELLER: In the action by the bank against the guarantor, it would have availed him nothing. In the guarantor's crossclaim against Mark Felsen, had he chosen in his crossclaim to plead fraud, which he didn't do on page 36 in the appendix, number five, had he chosen to do that, then the bankrupt, when it came time to try to stipulate to a judgment, had merely three choices: (a) he could stipulate that he was guilty of fraud --

QUESTION: Which is unlikely.

MR. KELLER: Unlikely -- (b) he could stipulate on the guarantee, that he was liable under the guarantee, which

is what he did, or (c) he could stipulate for judgment against himself on the guarantee, but the creditor at that point had properly pleaded, could well have insisted on a clause that fraud is not waived, it is asserted for convenience, it is not asserted in the stipulation or judgment that none of the creditor's rights on fraud are waived.

QUESTION: Mr. Keller, all of the crossclaim by Brown against Felsen appears at page 38 of the appendix?

MR. KELLER: Yes, sir.

QUESTION: And there, as I read it, there is no mention of a liability based on fraud.

MR. KELLER: Not a hint.

QUESTION: If there had been, would your case be significantly different? Assuming a judgment makes no reference to fraud, which controls, the complaint or the judgment?

MR. KELLER: I believe the judgment controls, because --

QUESTION: If there had been an allegation of fraud and no mention of it in the consent judgment, your argument would be the same, I take it?

MR. KELLER: It would be weaker, but it would be essentially the same.

QUESTION: Then what the Tenth Circuit is saying in effect is that if Brown did not affirmatively crossclaim against Felsen in the state court based on fraud, the Bankruptcy

Court cannot exercise its power under the '70 amendments to decide independently or de novo, whatever you want to call it, whether or not that particular debt was obtained by fraud.

MR. KELLER: That's correct, Your Honor. The Tenth Circuit I think relied on the difference between a consent judgment and a judgment by default on the one hand, and I believe they referred to U.S. v. Armour, in which Justice Marshall -- and I quoted it in my brief -- talked at length about a consent judgment, and it is a waiver to litigate the issue.

QUESTION: Well, what issue? The issue was never raised.

MR. KELLER: The issue of fraud.

QUESTION: The issue was -- typically, a creditor going against a debtor or a guarantor going against the person whom he guaranteed, if he feels the person he guaranteed is solvent, just wants a judgment. He doesn't care whether it is based on a contract or fraud or something else, and the fact that he fails to urge the ground of fraud would not ordinarily be thought of as a waiver in some subsequent proceeding.

MR. KELLER: When he stipulates in a judicial sense and enters into a consent judgment based entirely on contract and indemnity, entirely on that, he has waived his right to any --

QUESTION: That is only if you can say it is a classical res judicata is applicable and that anything that was litigated or might have been litigated is foreclosed. Isn't that true?

MR. KELLER: That is certainly one of the situations. I think this is a classic case of res judicata.

QUESTION: Well, that is a rather stringent standard to apply in view of the '70 amendments to the Bankruptcy Act, don't you think?

MR. KELLER: Well, the '70 amendments, do they really change the substantive law or do they simply change the procedure? Now, in Grady v. Nicholas, Justice McWilliams, of our Tenth Circuit, said that the '70 amendments clean up the procedural aspects but don't really change the substantive law of bankruptcy. That is what the Tenth Circuit has said in a case some five or six years ago, and essentially that is probably true.

Interestingly enough, even in the 1970 amendments, nothing is said by Congress as to what happens when a state court proceeding is finished, because there are four situations in which one can find himself: Situation one is where no state proceeding has ever been commenced. There, of course, the creditor has a clean shot to litigate the fraud question. The second situation is where there is a state case pending at the time the petition in bankruptcy is filed. Now, the statute

deals with that, in section c(4). The Congress specifically said that when a state court case is pending and a complaint is filed on non-dischargeability for fraud, the proceedings are stayed. The Congress specifically spoke to that.

Interestingly enough, when it comes to the situation such as we have, where a state court proceeding has been concluded in their entirety, there isn't a word in the Bankruptcy Act and the Congress has not dealt with the question, so it is a wide open issue.

Well, what happens when a state court proceeding has been concluded. That is one of the issues in this case. If the creditor has properly pleaded fraud, we have one set of circumstances. If he has never raised it, we have another.

QUESTION: In a state court proceeding?

MR. KELLER: Yes, sir. When the creditor -- and this is the essence I think of the Tenth Circuit's position -- when the creditor has never hinted fraud in his crossclaim or in his complaint and has said nothing about it and permits the case to go on and on and finally agrees to a consent judgment, which under Armour & Company is identical to a litigative case, has he then waived his right to ever litigate fraud? Is he barred by res judicata? That is the question.

QUESTION: Why should there be a waiver? There is really no purpose in alleging fraud in that case. How has the debtor been prejudiced by his failure to do so? I just

don't understand why he should take the trouble to inject an unnecessary issue into that lawsuit.

MR. KELLER: There are many reasons to raise fraud in a state court proceeding.

QUESTION: You mentioned punitive damages, but I think you start with the proposition that this person is pretty nearly insolvent anyway. You have a judgment-proof debtor here.

MR. KELLER: In our case, it so happens that -- but let's take the case --

QUESTION: Well, that is almost by hypothesis. We are dealing with people who go through bankruptcy.

MR. KELLER: Well, they go bankrupt after the conclusion of the state court and that is hindsight.

QUESTION: If they are totally solvent and could pay the debt 100 cents on the dollar, even then why litigate fraud if he can sign a note and say I owe the money? Why would you take the trouble to raise fraud if you can get money more quickly by settling it?

MR. KELLER: There are, at least under Colorado law, some additional benefits by being able to plead fraud. Exemplary and punitive damages is one of them. Body execution is authorized under Colorado law, and that is another. It is admittedly rarely used, but it is one of the remedies you have in a fraud case.

QUESTION: It is not very helpful when one of your debtors is a corporation though.

MR. KELLER: No.

QUESTION: Mr. Keller, may we come back to whether or not there was any reference to fraud in the crossclaim. Will you take a look at page 38 of the appendix. That is a crossclaim, isn't it?

MR. KELLER: Yes, sir.

QUESTION: And you said, as I understood it, that there is not a word in it with respect to the misrepresentation. What about the first sentence under the word "Preliminary" -- "hereby incorporated by reference his previous Answer as if fully set forth herein."

MR. KELLER: Well, that was the previous answer, and I am not sure --

QUESTION: The previous answer is on page 34, as I understand it, and on page 35, in paragraph 3, under "Affirmative Defenses," as the Chief Justice read to you, it seems to him and to me that that suggests that misrepresentation was charged with respect to all of the defendants.

QUESTION: Also paragraph 5 on page 36.

QUESTION: Paragraph 5 is the one I read to you, Mr. Keller.

MR. KELLER: And that is the one I am referring to, and that is included in the affirmative defense, which uses

loose language, "misrepresentations and non-disclosures of material facts" which is incorporated by reference in the preliminary sentence on page 38. But in the Tenth Circuit opinion and in our brief, we refer to the Colorado Rules of Civil Procedure and the case of Morrison v. Goodspeed, which specifically set forth how you plead fraud. This is in our judgment nothing.

QUESTION: Your position now is that although it is mentioned in the cross complaint, it isn't properly pled?

MR. KELLER: Well, I would say, yes, it is mentioned.

QUESTION: It is incorporated by reference, whatever he said in the --

MR. KELLER: Yes.

QUESTION: -- in the answer.

MR. KELLER: But to say --

QUESTION: But you say it is not properly pled.

MR. KELLER: But to say that paragraph 5 on page 36 is an allegation of fraud, I don't construe --

QUESTION: Paragraphs 3 and 5, yes.

MR. KELLER: I don't construe it that way. He says justly unfair and unconscionable and overreaching. To say that that is a pleading of fraud is going a long ways. The Tenth Circuit applying the law of Colorado and its own rejected that argument.

QUESTION: Well, how much more do you need to say in

a pleading to make out a fraud claim than to say that this was done by misrepresentation and non-disclosure of material facts?

MR. KELLER: Under --

QUESTION: What rule of Colorado --

MR. KELLER: Rule 9(b) of the Colorado Rules of Civil Procedure --

QUESTION: Is it in here anywhere?

MR. KELLER: Yes, sir, it is on page five of our brief, about two-thirds of the way down. It says "shall be stated with particularity." And then we have the case of Morrison v. Goodspeed, which is a Colorado case, which sets out what you have to plead, and the Tenth Circuit -- and Judge Barratt wrote the opinion -- applied those rules in reaching its decision.

So we say that in our case, in the case at bar, the question of fraud is an after-thought, coming after the completion of all prior proceedings, the state court had already acted, the creditor did not perfect his rights in those state court proceedings, and simply the creditor wants a second bite at an apple which never existed because there was no fraud properly urged in the state proceeding.

Thank you.

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

ORAL ARGUMENT OF CRAIG A. CHRISTENSEN, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. CHRISTENSEN: Very briefly, Your Honor.

Mr. Chief Justice and may it please the Court: First, Mr. Keller suggests that the word "exclusive" with respect to the subject matter jurisdiction of the Bankruptcy Court under section 17 does not appear in the statute. That is true. But I would cite to the Court section 17c(2) which is mandatory to a creditor. It says a creditor who contends that his debt is not discharged under clause (2), (4), or (8) of subdivision a -- and we are dealing here only with sections (2) and (4) -- must file an application for determination of dischargeability within the time fixed by the court. Then it goes on in subsection (3) and requires that court to hold a hearing upon notice and to determine dischargeability.

I really don't think that there is much dispute that the exclusive jurisdiction for the determination of this type of dischargeability lies in the Bankruptcy Court.

QUESTION: Well, it may be so, that you have to go to the court, but the questionis what are the ingredients of that decision.

MR. CHRISTENSEN: That is correct, Mr. Justice White.

QUESTION: You seem to concede yourself that if the whole case turned on a fact that had been determined against the creditor in the state proceeding, there wouldn't be much

to the exclusive jurisdiction of the Bankruptcy Court.

MR. CHRISTENSEN: If the issue had been determined against the debtor?

QUESTION: If it had been determined against the creditor, if there is a crucial fact determined against the creditor who is claiming non-dischargeability, there wouldn't be much of a proceeding in the Bankruptcy Court, would there?

MR. CHRISTENSEN: No. I think there would be collateral estoppel if as a matter of fact it was determined that --

QUESTION: Even though it was exercising exclusive jurisdiction?

MR. CHRISTENSEN: That's correct, and in the exercise of that jurisdiction the facts that had been previously determined in litigation would be --

QUESTION: Counsel was just suggesting that that is the case here, that if you want to have the Bankruptcy Court -- that you can get the Bankruptcy Court to exercise its exclusive jurisdiction here, too, it just happens to be bound by the state court.

MR. CHRISTENSEN: I understand that contention. I would disagree with that contention, for two reasons: Number one, I don't believe that those issues ever were raised or litigated in the state court, so that those facts, wherever found -- he is not contending the facts were found adverse to

to my client; he is contending my client waived his right to ever have those facts determined. That is really the issue before the court, whether my client waived a federal right by failing to pursue a state right, and I believe that the best analogy that I can suggest to the Court is had Mr. Brown received stock and the same pleadings would have been filed in the state could, would he have waived all of his rights to any securities law violations for which exclusive jurisdiction was placed in the Federal District Courts.

QUESTION: What if the creditor sues in the state court for fraud?

MR. CHRISTENSEN: And if it is actually litigated, I think those facts are binding. If it is by default judgment, then --

QUESTION: Let me suggest to you, what if he gets a judgment for fraud?

MR. CHRISTENSEN: It depends on the nature of that judgment.

QUESTION: All right. And can he file it as a claim?

MR. CHRISTENSEN: Yes. The Ninth Circuit has dealt with that --

QUESTION: And what if there are no assets and then he wants a determination of dischargeability?

MR. CHRISTENSEN: Well, the --

QUESTION: Would the Bankruptcy Court redetermine the

legal question of fraud?

MR. CHRISTENSEN: I think that if it had actually been litigated, it would redetermine to the extent that the facts --

QUESTION: Fraud is my question.

MR. CHRISTENSEN: -- found don't reach the standards of section 17.

QUESTION: So you say it works both ways?

MR. CHRISTENSEN: Yes.

QUESTION: Both ways, I mean the legal issue of fraud would never bind the Bankruptcy Court, even if the creditor had gotten a judgment for fraud in the state court?

MR. CHRISTENSEN: Not the legal test, that's correct. The facts found -- if the facts were found that a material misrepresentation was made, that fact would be binding, but the state court determination of fraud under its state standards' pleading requirements would not bind the federal court's determination of federal law for non-dischargeability.

QUESTION: Has there been a lot of cases on this?

MR. CHRISTENSEN: I believe that there have been five since the 1970 amendments that have reached the circuits.

QUESTION: And is there some general view about whether there is a national standard or not?

MR. CHRISTENSEN: I believe that four of the five circuits to reach the question have allowed the Bankruptcy

Court to consider the matter again, with extensive evidence.

QUESTION: What about the standard?

MR. CHRISTENSEN: The standard applied --

QUESTION: Is it a national standard?

MR. CHRISTENSEN: I don't know that either courts have ever addressed that question. They always talk in terms of the federal act, but they never say specifically whether that federal act is being interpreted in light of state standards or not, Mr. Justice White. The closest indication would come out of the Ninth Circuit, the Houtman case. There fraud was actually litigated and determined to exist, and the debtor went into Bankruptcy Court, the credit presented that case and the Ninth Circuit said, no, that may be prima facie, but it is not going to be the standard exclusive, we are going to let the debtor raise additional evidence.

QUESTION: That is close the example I gave you.

MR. CHRISTENSEN: Yes, that is the closest one to the --

QUESTION: You said four out of five, what about the fifth?

MR. CHRISTENSEN: The fifth is the Tenth Circuit, that is this case.

QUESTION: Oh, I see.

MR. CHRISTENSEN: So it is contrary.

QUESTION: You haven't specifically backed up to

this rule 9(b). How do you think that enters into the case?

MR. CHRISTENSEN: The Colorado Rule of Procedure?

QUESTION: Yes.

MR. CHRISTENSEN: I think two observations are necessary there, Mr. Chief Justice. First of all, I must concede to this Court that the crossclaim itself does not ask for any relief based specifically on fraud, and it does not ask for the extraordinary type of remedy, of punitive damages or bodily execution that might be available for fraud. So where the case turning solely on whether fraud had been pled in accordance with that rule, I am not certain that it absolutely has been. I believe it has. It talks in terms of misrepresentation, it identifies the misrepresenting parties, it states that the facts are material, and I think the implication, although not stated, is that there was reliance that the guarantee would have been executed.

But the second and more important thing is I don't think that federal rights ought to turn on the various fifty standards in the states for fraud and their pleading requirements. I don't think that --

QUESTION: Why not?

MR. CHRISTENSEN: Because I think the fresh start provisions are probably the most essential ingredient to a bankrupt. If he doesn't obtain the fresh start, there is little or no benefit for him to seek the protection of the

Act. And to make those fresh start provisions turn upon where he has his residence at the time of the filing of the petition --

QUESTION: It did before 1970, didn't it?

MR. CHRISTENSEN: Absolutely.

QUESTION: Well, you concede that if the issue of fraud had been fully litigated that there would be a collateral estoppel.

MR. CHRISTENSEN: Only on the facts.

QUESTION: Only on the facts.

MR. CHRISTENSEN: That's correct, because as I understand it, collateral estoppel would only go to facts found. Res judicata goes to the identicality of the legal issue --

QUESTION: You would say the state decision could have -- they could have concluded there was fraud under state law and the federal court could determine there wasn't any fraud or that there was, regardless of what the state court concluded on the facts?

MR. CHRISTENSEN: That's correct, because the legal standards may be different.

QUESTION: But it would have to be on the basis of a different legal standard, not on an overturning of the factual determination.

MR. CHRISTENSEN: I think that's correct. To the

extent the facts have been litigated, I believe the parties have to live with them. But to the extent that the legal standards are different, the Bankruptcy Court has a federal obligation to apply its own standards. Obviously, Mr. Justice White, it has begged the question to assume that those will be national standards instead of state standards. That is one of the questions this Court must decide. But I would argue that the better rule is to allow the parties to be bound by the facts and to allow the Bankruptcy Court to make this separate legal determination, otherwise you force the creditors in every single case to plead and prove or otherwise dispose of fraud just to preserve a federal right for those few cases in which bankruptcy actually happens. And for that reason I would ask that this Court vacate the Tenth Circuit judgment and allow the petitioner to proceed.

QUESTION: You don't -- I take it you don't -- do you think there is anything specific in that legislative history?

MR. CHRISTENSEN: It is cited in the brief, Mr. Justice White, the legislative history, and --

QUESTION: But is there something specific that reads right on it or not?

MR. CHRISTENSEN: I'm sorry, I didn't hear your question.

QUESTION: Is there something that reads right on it

out of the legislative history?

MR. CHRISTENSEN: I think that in the brief, at page 7, it talks --

QUESTION: Page 7 to 9 is where you deal with it.

MR. CHRISTENSEN: -- it talks about exclusive jurisdiction at the very top, where we cite the Senate and the House reports.

QUESTION: But that doesn't get you very far along the line, does it?

MR. CHRISTENSEN: With respect to the federal as opposed to state standards?

QUESTION: Yes.

MR. CHRISTENSEN: No, there is nothing in the legislative history that makes that definitive statement as it does about exclusive jurisdiction.

QUESTION: Or it doesn't help you one way or another with respect to collateral estoppel.

MR. CHRISTENSEN: Well, I think it does, because I think -- not on collateral estoppel, but on res judicata, I don't believe that that is binding if the first court had no subject matter jurisdiction, and if Congress intended and did in fact, as they state, put exclusive subject matter jurisdiction in the Bankruptcy Court, I don't think res judicata would apply.

The Colorado courts -- and we have cited these cases

in our brief -- have specifically said they lack subject matter jurisdiction to determine dischargeability issues.

QUESTION: But that is a post-bankruptcy determination.

MR. CHRISTENSEN: That's correct.

QUESTION: Yes.

MR. CHRISTENSEN: I think it would be applicable in a pre-bankruptcy if you pled your case in terms of a federal dischargeability instead of a state remedy for which they had jurisdiction.

Thank you.

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

(Whereupon, at 1:59 o'clock p.m., the case in the above-entitled matter was submitted.)

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