

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-184
TITLE UNITED STATES, Appellant
v.
SECURITY INDUSTRIAL BANK ET AL.
PLACE Washington, D. C.
DATE October 6, 1982
PAGES 1 - 50



ALDERSON REPORTING

(202) 628-9300
440 FIRST STREET, N.W.
WASHINGTON, D.C. 20001

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -x
:
UNITED STATES, :
:
Appellant :
:
v. :
:
SECURITY INDUSTRIAL BANK ET AL. :
:
- - - - -x

No. 81-184

Washington, D.C.

Wednesday, October 6, 1982

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:48 a.m.

APPEARANCES:

ALAN I. HOROWITZ, ESQ., Office of the Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
the Appellant.

HENRY F. FIELD, ESQ., Chicago, Illinois; on behalf of the
Appellee.

- - -

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
ALAN I. HOROWITZ, ESQ., on behalf of the Appellant	3
HENRY F. FIELD, ESQ., on behalf of the Appellee	24
ALAN I. HOROWITZ, ESQ., on behalf of the Appellant -- rebuttal	45

- - -

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in United States against Security Industrial Bank.

Mr. Horowitz, I think you may proceed when you are ready.

ORAL ARGUMENT OF ALAN I. HOROWITZ, ESQ.,
ON BEHALF OF THE APPELLANT

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

The issue before the Court here is whether the invocation by the various debtors in these consolidated cases of Section 522(f)(2) of the new Bankruptcy Code violates the Fifth Amendment.

Using as an example the cases of one of these debtors, the relevant facts are as follows. On April 14, 1978, Richard and Sharon Hunter took out a small loan from appellee Beneficial Finance Company. The total amount financed was \$2,459. The Hunters executed a printed security agreement in connection with this loan in which by the typing of an X in the appropriate box they pledged as security for the loan, and I quote, "all household goods, excluding motor vehicles but including household furniture, television sets, electrical appliances, stereo phonographs, furnishings, carpets, draperies, chinaware and other household goods

1 of every kind owned by them and located in or about
2 their residence."

3 QUESTION: Does it include after-acquired
4 property?

5 MR. HOROWITZ: It includes substitutes for the
6 property, and I believe it includes after-acquired
7 property. I'm not sure.

8 The Hunters estimated the replacement value of
9 these goods -- that is, the value that it would -- the
10 amount that it would cost them to go out and acquire the
11 goods again -- at \$2,500, approximately the value of the
12 loan. They retained possession of all of these goods.
13 None of them were turned over to the finance company as
14 a pledge.

15 Shortly after the entry of this loan in
16 November 1978 the President signed into law the
17 Bankruptcy Reform Act of 1978 which became effective
18 almost a year later on October the 1st, 1979. Some time
19 after that October 1979 date when the Act became
20 effective, which is about one -- at least one and a half
21 years after the loan was entered into -- the Hunters,
22 unable to pay their debts, filed a petition and
23 bankruptcy.

24 To prevent Beneficial Finance from seizing all
25 of their household goods pursuant to this boilerplate

1 security agreement, the Hunters invoked Section
2 522(f)(2) of the new Bankruptcy Code to avoid the fixing
3 of a lien on those goods that came within the debtors'
4 exemptions provided by the Code.

5 Now, to briefly explain the operation of
6 Section 522(f)(2), it is a limited provision enacted by
7 Congress that is an integral part of Congress' reform
8 that was specifically directed at the specific problems
9 of consumer debtors.

10 QUESTION: Much like the Fraser-Lempke Act?

11 MR. HOROWITZ: Very different from the
12 Fraser-Lempke Act, Justice Rehnquist. The Fraser-Lempke
13 Act was a one-time bailout of the farmers there who were
14 unable to continue paying the mortgages on their farms
15 because of the Depression. But there was no real
16 amendment of the Bankruptcy Code there. In fact, the
17 amendment in the Fraser-Lempke Act was retroactive
18 only. It would have had no effect at all on future
19 mortgages that were entered into. The law remained the
20 same.

21 Here there was a wholesale change essentially
22 in the Bankruptcy Code, and this was a provision set up
23 for the way the new Bankruptcy Code would operate. The
24 issue in this case is sort of the incidental effect of
25 that change in the Code as it applies to security

1 interests that were entered into before the act was
2 passed.

3 In order to guarantee bankrupt debtors a fresh
4 start, which this Court has repeatedly recognized as one
5 of the key reasons for bankruptcy, Congress established
6 a set of federal exemptions with specific dollar
7 limitations on certain goods that if deemed to be
8 necessary for the debtors to continue after bankruptcy
9 -- items such as household goods, tools of the debtor's
10 trade, and the home.

11 Congress found, however, that similar
12 exemptions in the past provided under state law had
13 proven ineffective in guaranteeing the debtors this
14 fresh start because, as in this case, consumer finance
15 companies had obtained blanket liens in all the debtor's
16 household goods, thus enabling these creditors to levy
17 on the exempt property or to use the threat of
18 repossession of the exempt property to compel the debtor
19 to reaffirm the debt after bankruptcy.

20 To safeguard these exemptions and make them
21 effective, Congress enacted Section 522(f)(2) which
22 enables the debtor in the bankruptcy proceeding to avoid
23 the fixing of the liens on certain of the exempt
24 property.

25 This avoidance provision is fairly limited.

1 It applies only to certain kinds of liens --
2 nonpossessory, nonpurchase money, security interests.
3 It applies to only certain categories of the exemptions
4 that were provided by Congress; for example, liens on
5 motor vehicles or liens on a home are not included
6 within the avoidance provision. And finally it is
7 limited by the dollar limitations on the value of the
8 exempt property. Valuable property cannot be subject to
9 avoidance under these provisions.

10 This is the provision that the Hunters invoked
11 enabling them to emerge from bankruptcy in unencumbered
12 possession of their furniture, silverware and other
13 household goods. And the appellees challenged the
14 Hunter's invocation of this section as violative of the
15 Fifth Amendment.

16 Now, despite the fact that the Court of
17 Appeals found -- did not challenge the Congress -- the
18 need for this legislation and the fact that it was
19 important to achieve the congressional purposes, the
20 court found that the application to the security
21 interest involved in this case in fact violated the
22 Fifth Amendment. The Court of Appeals relied
23 exclusively on this Court's decision in Louisville Joint
24 Stock Land Bank v. Radford, decided in 1935, and it felt
25 itself bound by that decision.

1 QUESTION: Mr. Horowitz, I suppose the problem
2 of the Fifth Amendment question could have been avoided
3 if it had been determined that the provision was not
4 intended to be retroactive, right?

5 MR. HOROWITZ: Yeah. Well, one of the --

6 QUESTION: What leads -- what leads you to
7 believe that Congress intended retroactive application
8 of this section?

9 MR. HOROWITZ: Well, there's nothing at all in
10 the legislative history in the statute that suggests
11 that the section wouldn't be retroactive. The act as a
12 whole seems to apply retroactively. There's a savings
13 clause that makes clear that bankruptcy proceedings that
14 were begun before the effective date of the act are to
15 be decided under the old act; that all bankruptcy
16 proceedings commenced after October 1979 are to be heard
17 under the provisions of the new act. There's no special
18 exception for any provisions of the act, and it wouldn't
19 make any sense for Congress -- it would just leave a gap
20 essentially in the statute. There would be no law to
21 apply if the new law didn't apply.

22 Now, the Court of Appeals rejected this, this
23 contention. They also found there was no evidence for
24 it. The appellees have briefly argued that the statute
25 should be read to be not retroactive; but they're also

1 unable to find anything directive of Section 522(f).
2 Essentially their position is that the entire Bankruptcy
3 Code should not be applied to any security interests or
4 any other claims that arose before the enactment date of
5 the act. And that would just leave chaos essentially.
6 It would postpone the effective date of the act for many
7 years. And there's just simply no evidence of that.

8 So I think we're pretty much stuck with the
9 fact that Congress made the statute retroactive, and
10 we'll have to address the constitutional question.

11 QUESTION: Is the exemption -- is the amount
12 that's involved -- isn't the exemption limited to \$200?

13 MR. HOROWITZ: Well, it's limited to \$200 in --

14 QUESTION: With respect to household goods?

15 MR. HOROWITZ: Yeah. Well, \$200 in each
16 item. So it's conceivable that the total can be more
17 than \$200.

18 QUESTION: As to each item.

19 MR. HOROWITZ: Yeah.

20 CHIEF JUSTICE BURGER: On quite a large house
21 if that's the application, you could have quite a large
22 exemption -- one of the Rockefeller homes, for example.
23 Two hundred for each item is --

24 MR. HOROWITZ: Any household good is exempt up
25 to a value of \$200 on that item. The idea of the

1 exemptions is that these items aren't really -- used
2 silverware, used chairs, things like that don't have
3 much of a resale value; they're not worth very much to
4 other parties. They are worth something to the debtor
5 who has to go out and replace them. I think \$200 was
6 meant to make sure that real luxury items that were
7 worth a lot of money didn't come in under this
8 exemption. So if you have, for example, an expensive
9 stereo, that would be worth more than \$200, and that
10 wouldn't be exempt; but most items probably will fall
11 under that. And the idea is for the debtor to be able
12 to retain essentially his living room furniture and his
13 bedroom furniture, things like that. If the \$200 is an
14 aggregate, probably everything -- most people own a
15 total of things that are worth more than \$200.

16 The reasoning of the Court of Appeals is that
17 these blanket security interests in household goods must
18 be characterized as property under the Fifth Amendment,
19 and hence, avoidance of these security interests under
20 Section 522(f) necessarily must be a taking without just
21 compensation in violation of the Fifth Amendment.

22 But this superficial analysis utterly fails to
23 address the peculiar nature of the property interest
24 that is involved here, and it is only on that property
25 interest that Congress narrowly and exclusively focused

1 its attention.

2 Unlike the traditional type of property
3 interest, and certainly unlike the real estate mortgage
4 that was involved in Radford, the creditor here has no
5 interest in actual physical possession of the subject
6 property or in applying that property to satisfy the
7 debt, even if the debtor defaults.

8 Congress found that the used household goods
9 secured by these blanket liens are generally of
10 negligible resale value such that it does not pay for
11 the creditor to physically repossess them. Rather, the
12 value of the liens to the --

13 QUESTION: Well, the bankrupt should never
14 worry then.

15 MR. HOROWITZ: Well, he has to worry because
16 the creditor can use it as a lever in order for him to
17 pay his debt.

18 QUESTION: Oh, no.

19 MR. HOROWITZ: That's one --

20 QUESTION: If it's true, if he -- all he'd
21 have to know is what Congress' finding was, that there
22 was no interest in repossessing.

23 MR. HOROWITZ: Well, Congress' finding is that
24 it's not worth it in dollar terms.

25 CHIEF JUSTICE BURGER: We'll resume at 1:00.

1 (Whereupon, at 12:02 p.m., the case was
2 recessed for lunch, to be reconvened at 1:00 p.m., the
3 same day.)

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 AFTERNOON SESSION

2 CHIEF JUSTICE BURGER: You may continue, Mr.
3 Horowitz.

4 ORAL ARGUMENT OF ALAN I. HOROWITZ, ESQ.,
5 ON BEHALF OF THE APPELLANT -- Resumed

6 MR. HOROWITZ: Thank you, Mr. Chief Justice,
7 and may it please the Court:

8 Before the break I was discussing the
9 congressional findings here that the used household
10 goods secured by these liens are in fact of no resale
11 value, and therefore, the creditor has no interest in
12 possession of them. Rather, the value of the liens to
13 the creditor is when the property remains in the
14 possession of the debtor. It is the threat of
15 repossession of the goods which gives the debtor a
16 powerful incentive to agree to various demands of the
17 creditor -- for example, to reaffirm the debt -- that
18 provides the creditor's interest in the lien, because
19 the replacement value of these goods to the debtor is so
20 high that he cannot afford to have them repossessed.

21 Justice White asked me whether in fact the
22 individual debtor didn't really have to worry about this
23 because of the congressional findings, but, of course, I
24 think the debtor is in no position to call the
25 creditor's bluff and --

1 QUESTION: But I think that there are
2 repossessions in --

3 MR. HOROWITZ: Well, there certainly --

4 QUESTION: -- In enough cases to make the
5 threat real.

6 MR. HOROWITZ: There certainly would be
7 repossessions just for the very sake of making the
8 threat credible.

9 QUESTION: Well, and not only that but they
10 repossess them when their debt isn't very much.

11 MR. HOROWITZ: When it's not -- to reaffirm
12 the debt. That can happen, yes, sir.

13 QUESTION: They can collect their \$600 by
14 repossessing the household goods, and they do.

15 MR. HOROWITZ: Well, depending on how much the
16 transaction costs are for having to repossess the items
17 and hold a garage sale to sell them. It may be worth
18 the creditor's while. In the vast majority of cases
19 they're used as a threat.

20 QUESTION: Mr. Horowitz, is there anything
21 illegitimate about using liens to encourage payment, and
22 isn't that really the normal function of a lien?

23 MR. HOROWITZ: Well, there's certainly nothing
24 illegitimate about it. It's one of the normal functions
25 of a lien, most liens, most security interests, at least

1 the kind that this Court has dealt with in the past.
2 And takings cases have a second purpose, and that is
3 that the creditor takes the security with the
4 expectation that he will take the collateral in lieu of
5 the debt if in fact there's default on the debt. That
6 was certainly the case in Radford.

7 That aspect is absent here. Here the
8 creditor, for example, does not value the property in
9 determining how much money he's going to lend to the
10 debtor. That's really irrelevant to it. He just looks
11 at the debtor's income prospects. And so you have cases
12 like this one in fact that I mentioned with the Hunters
13 where the amount of the loan at the beginning is in fact
14 in excess of the value of the collateral.

15 Now, this --

16 QUESTION: Well, that may make it a poor loan,
17 but that doesn't mean that the people might not want to
18 foreclose the security and get what they could out of
19 it, even though it doesn't pay off the debt.

20 MR. HOROWITZ: Well, but in fact the goods are
21 of such negligible value that it's usually just not
22 worth the creditor's while to foreclose. There may be
23 exceptions, but it's usually not worth his while to try
24 to collect these goods and have a fire sale and try to
25 get \$25 or whatever they're worth.

1 Now --

2 QUESTION: Mr. Horowitz, does the term
3 "appliance" in this section include refrigerators, deep
4 freezers, television sets, video equipment?

5 MR. HOROWITZ: Well, it hasn't really been
6 litigated in this case as to exactly what items are
7 covered by that definition. It's a little broad.

8 QUESTION: Is there any reason to think --

9 MR. HOROWITZ: I think "appliances" certainly
10 was meant to cover things like refrigerators and
11 dryers. TV sets -- many courts have held, I think, that
12 TV sets are covered by that language.

13 QUESTION: Are covered?

14 MR. HOROWITZ: Yes.

15 QUESTION: But you wouldn't suggest, would
16 you, or have you already said that you regarded them as
17 having little value on resale?

18 MR. HOROWITZ: Well, it varies. As I said,
19 there is this limitation of \$200 all together; that this
20 section wouldn't even cover if there was, in fact -- so
21 the goods by definition here have a resale value of less
22 than \$200.

23 Now, you could have a case where the debtor
24 had a lot of goods that were worth \$199, and it might be
25 worth it for the creditor to go in.

1 QUESTION: It isn't right that the good has a
2 value of less than \$200, just that the interest involved
3 is only to the extent of \$200. You could have a \$500
4 refrigerator, but the exemption would only cover \$200.

5 MR. HOROWITZ: That's right. And then if you
6 had a \$500 refrigerator, then I don't think the debtor
7 could use Section 522(f)(2) to protect against the
8 creditor repossessing the refrigerator because --

9 QUESTION: He'd just get \$200 out of the
10 proceeds of resale.

11 MR. HOROWITZ: I think that's right, yes.

12 Now, getting back to what Justice O'Connor
13 asked me, it is true that the security interest here is
14 as a means of -- is to encourage the debtor to repay his
15 debt, and that is a legitimate purpose of a security
16 interest. But what you have here because --

17 QUESTION: Well, he -- excuse me. He would
18 use his -- he would use his -- he uses the section. If
19 he gets \$200 back, he uses the section, because the lien
20 then is removed from the \$200.

21 MR. HOROWITZ: Yeah, exactly. But it doesn't
22 --

23 QUESTION: Provided he -- or if they repossess
24 a television set, the lien would give them the \$500 if
25 it's worth \$500. But he --

1 MR. HOROWITZ: Right. That would reduce the
2 value of the security interest.

3 QUESTION: Exactly.

4 MR. HOROWITZ: But it doesn't completely --

5 QUESTION: Well, it reduces it by enough to
6 get it down to \$200. It protects \$200 worth of interest
7 in the television set.

8 MR. HOROWITZ: Right. But the argument that's
9 been made here by the Tenth Circuit and by the appellees
10 is that there's no value left to the security interest
11 at all, and that's in fact not true.

12 QUESTION: Well, I suppose when Congress
13 enacted these provisions they had some information about
14 the average secondhand value of most household items and
15 then arrived at this \$200 figure.

16 MR. HOROWITZ: Yeah. Well, they did. There
17 was a study done by the FTC which investigated these
18 kind of practices and found that usually it was not -- I
19 think the \$200 figure, I don't know if that was based on
20 a study or just on Congress' perception of what it was
21 fair to leave the debtor with and what would be a luxury
22 item otherwise.

23 I think what is significant about these
24 security interests is that their only use is as a means
25 of compelling the debtor to repay, and therefore, you

1 don't really have an independent property interest here,
2 as the Tenth Circuit found; but the security interest
3 here cannot as a practical matter be separated from the
4 debtor's personal obligation.

5 Now, of course, the creditor ordinarily has a
6 right to have the debtor satisfy his personal
7 obligation. But here you have a debtor in bankruptcy,
8 and the whole point of bankruptcy is to discharge the
9 debtor's personal obligation and to allow him to have a
10 fresh start unencumbered by prior debt. So the question
11 here is why should these debtors who have the security
12 interests but that are in fact are no different from the
13 personal obligation, why should they be in any better
14 position than the unsecured creditor to also --

15 QUESTION: Well, are you saying that a debtor
16 who has given a chattel mortgage on his personal property
17 the way it happened here is no different than a debtor
18 who simply is given an unsecured obligation?

19 MR. HOROWITZ: It's not that he's no
20 different, but for the purposes of the Fifth Amendment
21 the question is whether such a sharp line should be
22 drawn between the kind of paper security interest that
23 you have here where in fact there's no actual interest
24 in taking the property or in reselling --

25 QUESTION: Well, but there is -- there is a

1 property interest created under the laws of most states
2 by that sort of security. And for you to say that there
3 isn't really any just begs the question. There
4 certainly is an interest.

5 MR. HOROWITZ: But for the purposes of the
6 takings clause of the Fifth Amendment it's important to
7 focus on the type of property interest you have here. I
8 think this question is discussed well in the Seventh
9 Circuit's recent 7 to 1 en banc decision in the Gifford
10 case on this exact question.

11 The fact is that there is very little in the
12 sense of Fifth Amendment property that is being taken
13 away from the debtor here. What's being taken away is
14 his expectation of repayment by the debtor, and that's
15 the same thing that is always taken away in bankruptcy
16 from unsecured creditors and from everyone else.

17 QUESTION: Mr. Horowitz, under your arguments
18 what type of destruction of liens, if any, would be
19 compensable under the Fifth Amendment takings clause?

20 MR. HOROWITZ: What kind of destruction of
21 these liens, these kinds --

22 QUESTION: Of any liens, if not these.

23 MR. HOROWITZ: Well, I mean, for example, in
24 the Armstrong case the Court held that the destruction
25 of the liens there was compensable. And this Court --

1 QUESTION: You agree with that?

2 MR. HOROWITZ: Yes, I'd agree with the
3 Armstrong case. This Court has said many times that
4 these takings cases have to be decided on an ad hoc
5 basis by looking at all the factors. You have to
6 balance what the government interest was here.

7 In a case like Radford where Congress
8 essentially just passed a bailout -- it wasn't part of
9 just a bankruptcy code kind of revision -- you have much
10 less of a government interest in that kind of thing and
11 a commensurate lesser property interest.

12 QUESTION: And I take it you concede that
13 under Kansas law the liens here are liens on specific
14 property.

15 MR. HOROWITZ: Well, I would agree that
16 there's a property interest created under Kansas law by
17 these liens. Whether they're -- I disagree that they're
18 liens in specific property in the sense that this Court
19 used that term in Radford.

20 QUESTION: Any difference under Colorado law,
21 the five Colorado cases?

22 MR. HOROWITZ: I don't know of any difference
23 in the state laws.

24 QUESTION: Do you know whether self-help was
25 allowed or did they have to foreclose these liens if

1 they wanted through court? Can't they just go and
2 repossess?

3 MR. HOROWITZ: I think the security agreement
4 provides that --

5 QUESTION: They just go and repossess. They
6 drive up to the house and take the goods.

7 MR. HOROWITZ: The debtor has to pile all the
8 furniture in his living room, I think, and make it ready
9 for them, and then they can go in.

10 Now, what happens --

11 QUESTION: And under the laws of both states
12 that is permissible.

13 MR. HOROWITZ: I believe that's correct.

14 QUESTION: Well, there are some practical
15 problems in what has been described as repossessing. It
16 isn't really repossessing because they've never had
17 possession.

18 MR. HOROWITZ: That was addressed there. No.
19 Repossession is used --

20 QUESTION: And this isn't like repossessing an
21 automobile which has a license number and a serial
22 number and is readily identified. This is an amorphous
23 mass of material, some of which might belong to the
24 son-in-law or mother-in-law or what not.

25 MR. HOROWITZ: Yeah. Well, the debtor --

1 QUESTION: Does that enter into creating some
2 problems here?

3 MR. HOROWITZ: The debtor is usually required
4 to make a list of some of the property he has, so --

5 QUESTION: At the time --

6 MR. HOROWITZ: I suppose -- at the time he
7 enters into the loan.

8 QUESTION: -- The lien is --

9 MR. HOROWITZ: Yes.

10 QUESTION: At the time the lien attaches.

11 MR. HOROWITZ: Right. The lien is not
12 restricted to that property, but that gives the creditor
13 something.

14 QUESTION: All the new property coming in.

15 MR. HOROWITZ: Yes.

16 QUESTION: But there are some practical
17 problems with respect to the after-acquired property,
18 aren't there?

19 MR. HOROWITZ: Well, I'm not sure how the
20 after-acquired property is handled under the laws of
21 these various states. There could be litigation, I
22 suppose, over whether particular property is covered by
23 the lien. But on the other hand, the language I read
24 from the lien says all property in a house, so that well
25 may cover all after-acquired property.

1 I think the real defect in the Court of
2 Appeals' reasoning here is that it simply found that
3 because these liens could be construed as a property
4 interest and because their value is undoubtedly impaired
5 by the invocation of Section 522(f), the court concluded
6 that there must be a taking here; that in fact the court
7 has repeatedly recognized in recent years -- the Penn
8 Central case, for example -- that you have to look at
9 both the investment-backed expectations of the creditor
10 and the nature of the government action to determine
11 whether there is a taking.

12 Since my time is short, I think I'll refer to
13 the brief pretty much for that statement. But I think
14 if you look at the Penn Central test, there is in fact
15 -- in view of the limited expectation of the creditors
16 here there is in fact no taking.

17 I'd like to reserve the remainder of my time.

18 CHIEF JUSTICE BURGER: Mr. Field.

19 ORAL ARGUMENT OF HENRY F. FIELD, ESQ.,

20 ON BEHALF OF THE APPELLEE

21 MR. FIELD: Mr. Chief Justice, and may it
22 please the Court:

23 We have two grounds that we are presenting
24 today upon which we believe the judgment below should be
25 affirmed, and I'd like to discuss them in turn. The

1 first ground is that the 1978 Bankruptcy Act may not be
2 applied in this situation because of its
3 unconstitutionality, because of the integral nature of
4 the judiciary provisions which have been held
5 unconstitutional already. I will address that after we
6 first respond to the Government with respect to the
7 retroactive application of 522(f).

8 As this Court noted in the questionings of the
9 Government, the real vice here is not whether Congress
10 can decide for the future that the policy of the federal
11 government in bankruptcy will be that certain kinds of
12 interests are or are not protectable. The question is
13 whether Congress or committees of Congress or testimony
14 before Congress can be used to decide whether the
15 transaction in existence at that time between A and B is
16 in fact void because unconscionable, because a subject
17 of overreaching, because the interest was only used for
18 threat purposes, et cetera -- whatever the
19 justifications are.

20 The real vice in this statute is that it
21 usurps the judicial function of deciding cases between
22 existing parties and decides as a matter of legislative
23 policy, at least as interpreted by the Solicitor
24 General, that A's contract with B was unconscionable.

25 Now, in the record of this case before this

1 Court there's not a trace of suggestion that these
2 transactions are in fact unconscionable, the subject of
3 overreaching, the property is held by these creditors
4 only for threat purposes, et cetera.

5 I think each of these justifications would be,
6 as we pointed out, true -- at least the threat
7 justification -- true with respect to all creditors. As
8 Justice O'Connor has pointed out, there is no
9 difference. And the principle upon which the Government
10 is urging this Court to destroy or permit the
11 destruction retroactively of vested property rights
12 admits of no real distinction between myself here --

13 QUESTION: Well, the Government's position
14 just isn't threats or overreaching or anything. It's
15 saying that whatever interest a creditor has is de
16 minimis in the property; that it's just not a reality.
17 They have a lien, but it's a paper lien. It's just not
18 worth anything. At least it can't be worth enough to be
19 called a taking.

20 MR. FIELD: I think that's --

21 QUESTION: It's just -- it's just -- has no
22 substance.

23 MR. FIELD: I think that's their argument,
24 Your Honor.

25 QUESTION: Yeah.

1 MR. FIELD: However, it's patently false
2 because -- and although, again, it might be permissible
3 to make that judgment in the future, that's certainly
4 not true of the cases that are before this Court, and
5 it's certainly not true -- there's no substance to any
6 such suggestion of the record here.

7 QUESTION: Well, if Congress -- if Congress
8 viewed that -- took that view about these kinds of liens
9 for the future, it certainly was a considerate judgment
10 that these kinds of liens aren't worth very much,
11 because they certainly didn't do it as to mortgages on
12 real estate.

13 MR. FIELD: Well, that may be. Whether it's a
14 considered judgment or not I can't tell. It might pass
15 due process standards if that were the attack; that is
16 to say that if Congress can make this rule for the
17 future, might well pass due process. It's a rational
18 exercise of Congress' power.

19 But the standard and the problem before this
20 Court is not that. It's the problem of the attack or
21 the destruction of the pre-existing interests which have
22 nothing -- as to which those findings are irrelevant and
23 constitutionally have to be because Congress cannot
24 decide the case between A and B. That's for this Court
25 on review of the trial of a case to decide the question

1 between A and B as to whether under equitable principles
2 or state law an existing property right is or is not
3 valid.

4 The principle --

5 QUESTION: Well, it isn't quite correct to say
6 that all these property rights were destroyed as of the
7 date of the enactment of the statute. It only affects
8 people who go bankrupt after the statute was passed.

9 MR. FIELD: That's exactly correct, Your
10 Honor. And so --

11 QUESTION: So that at the time the statute was
12 passed no rights were immediately affected by it.

13 MR. FIELD: That's correct. Well, and our
14 position is that with respect to this lien voiding, no
15 rights would ever be vested --

16 QUESTION: If you're right. But just assume
17 the statute is valid. It still didn't of its own force
18 invalidate any contractual relationships. It took a
19 subsequent act of bankruptcy, didn't it?

20 MR. FIELD: That's correct. And the
21 suggestion of that that I take --

22 QUESTION: And it only applies to those
23 debtors who go bankrupt.

24 MR. FIELD: Exactly. So that it's a -- the
25 suggestion I take from that is that Congress certainly

1 did not construe that these interests were of that
2 character generally; that is, they chose only to abolish
3 or limit them in a small context -- that is, bankruptcy.

4 QUESTION: Well, Congress can't legislate the
5 way a state legislature could in the very broad
6 context.

7 MR. FIELD: That's correct.

8 QUESTION: It was just dealing with bankruptcy.

9 MR. FIELD: That's correct. That's correct.

10 QUESTION: Do you think it could have changed
11 the order of priority -- I don't know what the order of
12 priority was -- to make these junior to some claims to
13 which they were previously senior in the future?

14 MR. FIELD: No.

15 QUESTION: See, what they've done here really,
16 it says they'll be treated like general creditors is
17 what --

18 MR. FIELD: Correct. Absolutely.

19 QUESTION: But you say they couldn't even
20 rearrange the order of priority.

21 MR. FIELD: Well, there are principles on
22 which such a decision could be made a court; that is,
23 the Pepper v. Litton situation --

24 QUESTION: Well, supposing they just said in
25 the new act these claims will be junior to wage claims

1 -- previously it was the other way around; I don't know
2 whether that's true or not -- would that be a taking?

3 MR. FIELD: If it resulted in the destruction
4 of -- yes, I believe it would --

5 QUESTION: It would result in a diminution of
6 the value of your lien.

7 MR. FIELD: Yes. I think that would be if the
8 result was --

9 QUESTION: And if you take any change in the
10 order of priority it would violate the terms.

11 MR. FIELD: Yes. And historically this Court
12 has always interpreted such changes to be for the future
13 only for that very reason.

14 The principle that the Government urges really
15 does not permit this Court or anyone else to distinguish
16 between finance companies which are here before the
17 Court and corporate mortgage bond holders in multi,
18 multi-million dollar, billion dollar corporate
19 reorganizations, railroad reorganizations; that is, the
20 bald principle put forth by the Government is that
21 nonpossessory, nonpurchase money security interests are
22 not property interests. And I think you have to start
23 with that, as this Court has already indicated. You
24 start with that and where you come out is I believe
25 under the clear guidelines this Court has established

1 that if it's a property interest recognized under state
2 law, it is a property interest, and that's what we have
3 here. Therefore --

4 QUESTION: What about when Congress first
5 introduced the four-month preference period into the
6 Bankruptcy Act -- was it the act of 1898? -- when a
7 property interest perfectly good under state law was
8 voidable in bankruptcy if it was incurred within four
9 months of the filing of the petition.

10 Now, that, I suppose, is an impairment to a
11 certain extent of that property. Is there any reason
12 why Congress can't apply that retroactively?

13 MR. FIELD: It was not done, Your Honor.

14 QUESTION: It wasn't?

15 MR. FIELD: No. That was construed to apply
16 in the Auffm'ordt case that we've cited, Auffm'ordt v.
17 Rasin. It was construed to apply prospectively --

18 QUESTION: Only prospectively.

19 MR. FIELD: -- To avoid the problem we're
20 talking about here.

21 So this Court and the guidelines of this Court
22 have been very clear about what is a property interest,
23 and the Government's argument in that regard flies smack
24 in the face of uncontradicted cases and opinions by this
25 Court -- you can tick them off: the Radford case, the

1 Armstrong case, many other case, the General Motors case
2 -- where liens were upheld.

3 So the fact that this is a nonpurchase money,
4 nonpossessory lien is irrelevant. Those are most
5 liens. The only exception perhaps is a pledge.

6 QUESTION: You're going to comment on Penn
7 Central.

8 MR. FIELD: Penn Central. The Penn Central
9 case, the Grand Central Station case, is -- was urged as
10 a taking in that case. The Court held that it was not a
11 taking because although the highest -- perhaps the
12 highest use of that property was restricted, the owner
13 of that property was nonetheless able to gain a very
14 substantial return, the historical return, and could in
15 fact have built a 50-story building on that property if
16 he was able to pass through the Commission.

17 I don't believe the Penn Central case in any
18 way suggests that -- any analogy here. It poses an
19 interesting counterpoint between a regulatory act and
20 what you have here which is a total destruction. In the
21 Penn Central case they said you have to be careful about
22 how you build 50-story buildings in New York. They took
23 a strand out of the bundle of rights, and this Court
24 upheld that action on that ground.

25 QUESTION: So it's a matter of degree.

1 MR. FIELD: No, not completely. I think what
2 you have here is a different concept. You've got a lien
3 that's on the goods, and in this case the goods are all
4 specific items which are, if the lien is upheld, the
5 value of those items resorts to the creditor; if the
6 lien is not upheld, it completely eliminates -- it's
7 completely eliminated. So that it's not a question here
8 of a degree. There is either a lien which is valid and
9 a creditor gets security and value for the security that
10 he held, or the lien is invalid and the creditor gets
11 nothing.

12 QUESTION: Well, that's not true, is it, if
13 the items are worth more than the \$200?

14 MR. FIELD: Well, that's true, Your Honor, in
15 -- I was referring only to the cases before this Court.
16 It is certainly conceivable, as Justice White pointed
17 out earlier, that you'll have cases where the property
18 is worth more than the lien, and therefore you'd have a
19 voiding of the lien only in part. However --

20 QUESTION: There would be a voiding of the
21 lien.

22 MR. FIELD: Yes. And -- and with respect to
23 that part, the lien voiding is total; that is, it's
24 unlike Penn Central in the sense that where Penn Central
25 could nonetheless build a 50-story building, to the

1 extent of the destruction here, the destruction is -- to
2 the extent of the lien voiding, the destruction is
3 total. There is nothing left. There is no strands left
4 for the owner of the property. It's not like a
5 regulation where one of the strands is removed. There's
6 no strand left at all. It's a different concept, and in
7 that sense it's even further than the Loretto case, Gene
8 Loretto's case this Court had just before the break in
9 the term, where in a much less dramatic fashion the
10 cable TV company was allowed to intrude onto the
11 physical property.

12 In this case -- in a limited extent, and that
13 was deemed a taking without further reference to
14 purported justifications. In this case you have a more
15 dramatic, more extreme situation. You've got, to the
16 extent of the lien, the property affected by the statute
17 is totally destroyed. It's not just that somebody can
18 put -- can restrain our interest, can prevent us from
19 selling under certain circumstances, can otherwise
20 regulate our conduct. We have no property.

21 QUESTION: Mr. Field, if the Auffm'ordt case,
22 which you mentioned or implied by a question I asked, is
23 rightly decided, that sounds like it's fairly good
24 precedent for saying that an act like this applies only
25 prospectively, and that you pick out simply a section of

1 the act that may raise these kind of problems and say it
2 applies only prospectively.

3 MR. FIELD: I think that's true, Your Honor.

4 QUESTION: But do you make that argument?

5 MR. FIELD: Yes. We affirm that argument,
6 Your Honor.

7 QUESTION: You don't really cover it in your
8 brief.

9 MR. FIELD: I think that's correct, but that
10 was the argument made, and it has been an argument we
11 have made, and we do affirm it in this case. We do
12 believe that it is possible to do that; that is, that
13 the constitutional problem of retroactivity could be
14 avoided by construing this section to only apply to the
15 future. There's support in the legislative history for
16 that. We've cited that in our brief. And the normal
17 canon of avoiding constitutional questions would serve
18 to operate to effectuate the results.

19 QUESTION: Is there also some support in the
20 language of Section 522(f) itself where it says that the
21 debtor may avoid the fixing of a lien on an interest of
22 the debtor and property to the extent that such lien
23 impairs an exemption to which the debtor would have been
24 entitled under subsection (b) by saying he wouldn't have
25 been entitled to an exemption prior to the effective

1 date --

2 MR. FIELD: I think that's a --

3 QUESTION: -- Of the act.

4 MR. FIELD: -- Possible construction, although
5 I myself have never really been happy or able to
6 understand completely why that phraseology was written
7 that way.

8 In any event, what we have here is, I would
9 urge, a different bird than this Court has seen in many
10 of its regulation cases, including the case that Justice
11 Blackmun suggested. We've got really a simple problem,
12 not a complex problem. The Government has made it
13 elaborately complex. They have used impermissible
14 congressional findings to try to attack pre-existing
15 situations. They've called the liens here weak. But
16 when you come to the bottom line, the Constitution
17 protects all liens, all property interests that are
18 recognized by state law.

19 Now, there's no dollar sign on the Fifth
20 Amendment. This Court has reaffirmed that many times.
21 So that the de minimis aspect of this situation is not
22 really relevant. Whether it's de minimis or not to the
23 Government, it's extremely important to this industry
24 because there are many, many millions of dollars of
25 property and value involved in the aggregate. The way

1 this statute works, for example, as Chief Justice Burger
2 was asking earlier, \$200 in each item can cumulate to
3 quite an enormous total.

4 QUESTION: Well, what about the -- what about
5 the suggestion, though, of the Government and apparently
6 of Congress that there's hardly ever a repossession, and
7 hence, the property interest is just de minimis?

8 MR. FIELD: That, again, could be a point for
9 the future, but how they can say that could possibly
10 bear on or be relevant to A's interest -- does A get a
11 chance to testify to the contrary? A says I want my
12 property -- I loaned so-and-so \$5,000 on this security:
13 B, C, D, E, F, these items. They were --

14 QUESTION: Well, do you think congressional
15 judgment is infirm, that there's hardly ever a
16 repossession on this kind of a lien, and hence, it's of
17 negligible value? Is that judgment just wrong?

18 MR. FIELD: Yes. I think that -- well, in my
19 personal opinion that judgment --

20 QUESTION: Fine.

21 MR. FIELD: -- Is wrong. But that's not
22 really before the Court.

23 QUESTION: Well, I don't know. I think it --
24 I think that -- that it is before the Court.

25 MR. FIELD: Okay. Then I think that that

1 judgment has to be looked at a little differently than
2 the taking question I would see as being a retroactive
3 aspect.

4 QUESTION: You do agree that you're entitled
5 to win even if the Congress is quite right just because
6 you have a property interest, pure and simple, whether
7 you use it or not.

8 MR. FIELD: That's correct. Whether you
9 choose to use it, whether you choose to repossess.
10 That's absolutely correct, Your Honor.

11 QUESTION: He's the only one who can waive it.

12 MR. FIELD: That's correct.

13 QUESTION: Congress can't waive it for him.

14 MR. FIELD: Precisely, Your Honor. He has the
15 interest, and it would be shocking, and it really
16 creates an irrebuttable presumption of a past fact; that
17 is, that you, the litigant, don't want to do something,
18 but you don't have -- you're deprived of your
19 opportunity to say otherwise.

20 The second ground on which we would urge this
21 Court to consider affirming the case below is that the
22 Bankruptcy Reform Act of 1978 was constructed with an
23 infirm centerpiece, as this Court has recognized in the
24 Northern Pipeline decision, and that because of this,
25 the bankruptcy courts, which were the sole courts

1 intended and designed to administer the Bankruptcy Act,
2 may not function. In other words, the Bankruptcy Act
3 may not be administered, and because it may not be
4 administered, what happens is that no court can
5 administer the 1978 act, and there is no way that those
6 provisions can be --

7 QUESTION: Do you read that as the Court's
8 holding in Northern Pipeline?

9 MR. FIELD: No, Your Honor. The Court's
10 holding in Northern Pipeline was limited to the fact
11 that the bankruptcy courts are unconstitutional -- the
12 jurisdictional grant in the 1978 act was
13 unconstitutional in part, and it was unseverable, and
14 that unless Congress does something, that jurisdictional
15 grant and the court system which is behind it in 241
16 cannot function.

17 Now, as a matter of intention and as a matter
18 of practice there's no way that the 1978 act can
19 function apart from those courts.

20 QUESTION: Well, this kind of claim, whether
21 or not a debtor is entitled to an exemption, is
22 something that could have been clearly decided by an
23 old-fashioned referee. It certainly wouldn't take an
24 Article III judge to decide this kind of thing.

25 MR. FIELD: Your Honor, that -- whether that's

1 true or not -- and that's true as the matter of a
2 referee under the prior act -- but under the -- the
3 result of the Northern Pipeline opinion is that the
4 grant of jurisdiction is unconstitutional -- is
5 inseverable and therefore inoperative. You don't need
6 to reach in this case the further question of whether it
7 would be unconstitutional to -- whether or not to apply
8 that in this situation because what you have is a
9 statute that no longer operates. So the -- what the
10 result of that is is that the prior act revives to
11 govern bankruptcies.

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 QUESTION: I think you read a lot more into
2 the Northern Pipeline case decision than I would have.

3 MR. FIELD: Well, that may be, Your Honor, but
4 at the minimum the Northern Pipeline decision holds that
5 the grant of jurisdiction of the bankruptcy courts is
6 inseverable and partly unconstitutional. Therefore, the
7 bankruptcy courts under the '78 Act cannot function.

8 And that raises the further question of well,
9 then, who can and how does the bankruptcy -- how does
10 the bankruptcy system devised under that Act function?

11 QUESTION: These, of course -- these cases
12 were all decided before the Northern Pipeline case.
13 Doesn't the case of Chico Valley Drainage District,
14 decided after the holding that the Municipal Bankruptcy
15 Act was unconstitutional, say that the fact that the law
16 was unconstitutional doesn't mean that nothing happens
17 as a result of adjudications made under it?

18 MR. FIELD: Chico deals with the situation of
19 a closed case and under the Linkletter doctrine that
20 this Court has announced, in this case our clients can
21 take advantage of the Northern Pipeline ruling and can
22 urge the position we urge both in this case and as
23 amicus in Northern Pipeline while other cases may not,
24 because we had presented this issue on appeal in this
25 Court at the same time, and under the Linkletter

1 doctrine that allows us to take advantage of that
2 rule -- the ruling in that case -- for our clients.

3 And the effect of that is that with respect to
4 us the decision below was correctly decided, not because
5 the court below lacked jurisdiction at all. It lacked
6 jurisdiction under the 1978 Act, but it had jurisdiction
7 under the prior Act and under the prior Act these liens
8 were protected so that the decision of the Court of
9 Appeals and a decision of the referee, as we would call
10 him now -- the bankruptcy judge referee -- is correct
11 because substantively the Act that he had to guide
12 himself by --

13 QUESTION: Your lien is valid under State
14 law --

15 MR. FIELD: Your lien is valid under State law
16 and there is no -- and you should argue -- I suppose you
17 do -- that there is no bankruptcy Act to avoid them.

18 MR. FIELD: Absolutely, Your Honor.

19 QUESTION: Well, you don't need any -- if this
20 provision is invalid, it is just invalid, and --

21 MR. FIELD: That is absolutely correct, Your
22 Honor. Our position is that these liens are valid under
23 the only governing law, which is with respect to us and
24 this case could be made prospective again so that other
25 cases aren't affected. With respect to us, the '78 Act

1 is inapplicable. The prior law applies and our liens
2 are protected.

3 QUESTION: Why do you need the prior law?

4 MR. FIELD: As an alternate ground of
5 decision, Your Honor. If the lien voiding provision
6 were retroactively applied to us, we would need the
7 prior law.

8 QUESTION: It is the doctrine of dependent
9 relative revocation at will, isn't it -- that this
10 bankruptcy act was no good. The repeal of the old one
11 wasn't any good.

12 MR. FIELD: Absolutely.

13 QUESTION: But you wouldn't need the old Act.
14 All you need is to eliminate the law that invalidates
15 your lien.

16 MR. FIELD: Well, you still have to ask
17 whether the court below had jurisdiction to apply some
18 bankruptcy law.

19 QUESTION: Right.

20 MR. FIELD: And the --

21 QUESTION: You don't care whether they apply a
22 bankruptcy law or not. You hope they don't. All you
23 want's your lien.

24 MR. FIELD: No, but if there was jurisdiction
25 below, we would still have to fight it out in that court

1 as to whether our interest was valid or invalid and
2 presumably --

3 QUESTION: But the Court would have to have
4 some authorization under the bankruptcy statute to
5 invalidate your lien, which you wouldn't have.

6 MR. FIELD: That's correct. Therefore, the
7 result below was right. The petition was frivolous. It
8 should have been dismissed, and it was.

9 QUESTION: Well, it would have had
10 jurisdiction, wouldn't it, to invalidate your lien on
11 some entirely different theory such as unconscionability
12 or something or other -- you didn't sign the papers
13 correctly.

14 MR. FIELD: Precisely. A Pepper versus
15 Litton --

16 QUESTION: And that kind of issue, you are
17 saying, would be adjudicated under the old Act rather
18 than the new Act?

19 MR. FIELD: Precisely. It's a Pepper versus
20 Litton situation. It doesn't exist in this case, but it
21 would have been competent for that court below to have
22 invalidated our lien had proof established that we were
23 insiders, that there was some monkey business in the
24 obtaining of the lien, or some such situation.

25 Thank you, Your Honors.

1 QUESTION: Mr. Horowitz.

2 ORAL ARGUMENT OF ALAN I. HOROWITZ, ESQ.,

3 ON BEHALF OF APPELLANT - REBUTTAL

4 MR. HOROWITZ: Thank you, Mr. Chief Justice.

5 I'd like to take issue with Mr. Field's

6 statement that this Court cannot distinguish between

7 different kinds of property. Clearly this Court can and

8 must distinguish between property interest like the fee

9 simple and real property or mortgage and real property,

10 and the kind of security interest that's involved here.

11 All of the takings cases that this Court has

12 decided involve making judgments by this Court as to the

13 character of the government action, the economic

14 expectations. They don't admit of a bright line rule,

15 and certainly an important feature that the Court must

16 consider in these cases is the nature of the property

17 interest that hasn't been prominent in some of the

18 Court's recent decisions because they were always

19 dealing in these cases with a traditional real property

20 interest.

21 Here we have this fairly negligible property

22 interest that is almost indistinguishable from the right

23 to collect on the debt, and the Court has to take that

24 into account.

25 As far as whether the lien has been totally

1 destroyed here, as the Tenth Circuit said, we have
2 discussed in our brief the fact that it really isn't,
3 and Justice Stevens has alluded to that. I would just
4 urge the Court to compare the destruction that you have
5 here with the destruction in Anders against Allers, the
6 Eagle feathers case, and I think that you will agree
7 there is no more of a total destruction here.

8 But even assuming that there is, I think it's
9 very instructive to look at the Armstrong case, which
10 Justice O'Conner alluded to. If you look at the Court's
11 analysis in that case, the Court quickly decided that
12 the lien involved there in fact was a compensable
13 property interest and that the lien there was totally
14 destroyed.

15 The Court then went on for several pages to
16 decide whether in fact that was a taking. Clearly, the
17 fact that the property interest was destroyed was not
18 sufficient to show as a taking, and there they found the
19 taking only because the nature of the government action
20 was a taking of the property for the government's own
21 benefit in its entrepreneurial capacity and indeed three
22 Justices dissented on that ground.

23 So I think here you also have to look at the
24 taking analysis set out in Penn Central, and because
25 this is an ordinary government regulation like the

1 minimum wage legislation and because it does not
2 interfere with the substantial expectation of the
3 creditor.

4 QUESTION: Well, you are really just saying
5 the lien isn't worth much.

6 MR. HOROWITZ: That's right. It wasn't worth
7 much as a property.

8 QUESTION: -- Eastman and Loretto or not? The
9 lien isn't worth much.

10 MR. HOROWITZ: Well, it's worth even less than
11 Eastman and Loretto because there you at least have a
12 real property, a traditional kind of property interest,
13 which was someone's possession of property. Here you
14 have --

15 QUESTION: This is not a lien? A chattel
16 mortgage isn't a traditional form of a lien?

17 MR. HOROWITZ: Not in this context, where
18 there's no expectation of possession.

19 QUESTION: Well, but a non-possessor of
20 property interest originated about the 16th Century,
21 didn't it, in personal property? I mean, that's no
22 brand new type of thing.

23 MR. HOROWITZ: Well, Justice, all I can say is
24 that if there were no property interest here of course
25 we wouldn't be here, because then there would be no

1 claim of a taking at all. But I think the Court has to
2 take into account the fact that the property interest is
3 weak and that it's very hard to separate the property
4 interest here from the debtor's personal obligation, and
5 the fact is that the whole idea of bankruptcy is to
6 discharge the debtor's personal obligation.

7 Now creditors' expectations are always hurt or
8 disappointed to some extent by bankruptcy legislation
9 and actions of bankruptcy courts. I think if you look
10 at some of the cases this Court has decided -- the Local
11 Loan versus Hunt case, for example, where there was a
12 lien in future wages that was valid under state law, and
13 the Court held those constitutional for that lien to be
14 invalidated.

15 You have to look at the nature of the lien, to
16 some extent, and the nature of the government interest.
17 I'd like --

18 QUESTION: Let me ask you, supposing a state
19 passed a statute that invalidated liens like this
20 retroactively. Would that be valid, in your judgment,
21 to say we will no longer hold this kind of lien to be
22 enforceable?

23 MR. HOROWITZ: Well, I would state you have
24 the additional problem of the contract clause, which
25 forbids any impairment of contract by the state. That's

1 why states, I think, can't pass bankruptcy legislation
2 to start with. Here you do have an impairment of the
3 property interest. Our argument is that that impairment
4 does not rise to the level of a Fifth Amendment taking.

5 So I think there would be a lot more problem
6 with the state.

7 QUESTION: Would you say such a state law
8 would be invalid under the contract laws?

9 MR. HOROWITZ: That's my immediate reaction,
10 yes.

11 QUESTION: I don't suppose -- Congress
12 couldn't really have thought that there never was a --
13 never was a repossession in these kinds of cases.

14 MR. HOROWITZ: No.

15 QUESTION: As a matter of fact, maybe out of a
16 hundred you would say -- ten out of a hundred, one out
17 of ten, that is probably a repossession. Then Congress
18 thought well, that's not enough for the future. But it
19 took care for the past of all of them, not only the
20 nine, but the one too.

21 MR. HOROWITZ: Well, I mean one problem here
22 is that the creditor here is not seeking to enable to
23 use his lien entirely, and that is to be able to get the
24 debtor to reaffirm the debt -- have the whole lien
25 survive.

1 QUESTION: That isn't the only use of the lien
2 in every single case. It just isn't.

3 MR. HOROWITZ: But in passing legislation
4 Congress has to make the general judgment as to what --

5 QUESTION: That may be so for the future.

6 MR. HOROWITZ: Well, if it was only for the
7 future, there would be no Fifth Amendment claim at all,
8 obviously, because there wouldn't be any taking of any
9 property if this Act was already on the books that these
10 liens could be avoided. That would just be ridiculous
11 to claim the Fifth Amendment, so I mean it is only the
12 retroactivity that raises the taking question at all.

13 QUESTION: I agree with you.

14 MR. HOROWITZ: And I think it's necessary to
15 consider the nature of the regulation in doing so.

16 My time has expired.

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

19 (Whereupon, at 1:44 o'clock p.m., the case in
20 the above-entitled matter was submitted.)

21

22

23

24

25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of: United States, Appellant v. Security Industrial Bank Et Al., No. 81-184

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY Pine Howard
(REPORTER)