

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1020

TITLE OHIO, Petitioner v. WILLIAM LEE KOVACS, dba B & W
ENTERPRISES, ET AL.

PLACE Washington, D. C.

DATE October 10, 1984

PAGES 1 - 60



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
OHIO, :
Petitioner :
v. : No. 83-1020
WILLIAM LEE KOVACS, dba B & W :
ENTERPRISES, ET AL. :
- - - - -x

Washington, D.C.

Wednesday, October 10, 1984

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 1:01 o'clock p.m.

APPEARANCES:

E. DENNIS MUCHNICKI, ESQ., Assistant Attorney
General of Ohio, Columbus, Ohio;
on behalf of Petitioner.

KATHRYN A. OBERLY, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.;
On behalf of the United States Government as
amicus curiae.

DAVID A. CALDWELL, Cincinnati, Ohio;
On behalf of the Respondents.

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>
E. DENNIS MUCHNICKI, ESQ.	
On behalf of the Petitioner	3
KATHRYN A. OBERLY, ESQ.	
On behalf of the United States Government	23
DAVID A. CALDWELL, ESQ.	
On behalf of the Respondents.	36

1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We'll hear arguments
3 next in Ohio v. Kovacs. You may proceed whenever you're
4 ready, counsel.

5 ORAL ARGUMENT OF E. DENNIS MUCHNICKI, ESQ.

6 ON BEHALF OF THE PETITIONER

7 MR. MUCHNICKI: Thank you, Mr. Chief Justice,
8 may it please the Court, this matter is before the Court
9 pursuant to a petition filed by the people of the State
10 of Ohio, seeking a writ of certiorari to the United
11 States Court of Appeals for the Sixth Circuit.

12 The people of Ohio seek reversal of the
13 determination that a bankruptcy court may discharge the
14 duty of a debtor to comply with the state court
15 injunction to abate a public health hazard by cleaning
16 up a hazardous waste -- a toxic waste facility.

17 In this argument, Ohio wishes to make three
18 basic points.

19 First, as a matter of public policy, the
20 decision below treats the goals of the bankruptcy system
21 as absolute values which transcend virtually every other
22 matter of public policy, including the protection of
23 public health and safety.

24 Secondly, as to the factual context of this
25 case, Ohio is not before this Court seeking compensation

1 for past harm or expenses, but rather we are attempting
2 to prevent future harm by obtaining compliance with an
3 injunction to abate an ongoing nuisance and health
4 hazard.

5 QUESTION: It's been abated now, hasn't it?

6 MR. MUCHNICKI: No, it has not, Your Honor.

7 The drums -- the drums that were -- the
8 materials that were in the drums or that remain in the
9 drums have been removed, but the most serious problem
10 that still exists is the pollution of the ground water
11 which is used by the City of Hamilton for its water
12 supply.

13 And right now, as a result of the past
14 practices on that site, the soils of the site are so
15 thoroughly saturated with toxic wastes that they are now
16 an ongoing source of pollution, that every day more
17 pollution is leaching into the ground water and you have
18 a continuing violation.

19 QUESTION: Is the receiver still in
20 possession?

21 MR. MUCHNICKI: The receiver is still in
22 possession.

23 QUESTION: And Kovacs is out of possession.

24 MR. MUCHNICKI: The receiver has equitable
25 possession. Kovacs still has partial title to the --

1 legal title to the site.

2 QUESTION: But the receiver is in charge of
3 the site, I take it.

4 MR. MUCHNICKI: Yes. Although right now,
5 actually, US EPA is exercising authority jointly with
6 him. But the receiver, under the state court order, has
7 equitable possession of the site.

8 QUESTION: But Kovacs couldn't literally carry
9 out the terms of the injunction. He couldn't enter the
10 premises and take charge of it and carry out acts that
11 he thought were justified.

12 MR. MUCHNICKI: You mean now?

13 QUESTION: Yes.

14 MR. MUCHNICKI: No, he could not. What he --

15 QUESTION: Because the State dispossessed him
16 of the property by putting a receiver in charge.

17 MR. MUCHNICKI: They created -- they put the
18 receiver in equitable possession of the property.

19 QUESTION: Well, I know, but he's the one that
20 sooner or later took some steps, but then the United
21 States took some steps and removed the toxic wastes from
22 the surface.

23 Is that right?

24 MR. MUCHNICKI: The waste that remained --

25 QUESTION: Well, what did the receiver want

1 from Kovacs but money?

2 MR. MUCHNICKI: What the receiver wants and
3 what the people of the State of Ohio want is completion
4 of that cleanup.

5 QUESTION: I know, but is the receiver -- the
6 receiver is in charge of it. What does he want from
7 Kovacs? He doesn't want any physical help from him or
8 any advice. They want money.

9 MR. MUCHNICKI: They may --

10 QUESTION: Maybe they should get it for that,
11 but isn't that what they want from him?

12 MR. MUCHNICKI: What he wants is the
13 performance of certain acts which probably wouldn't
14 require the expenditure of money.

15 QUESTION: Well, what acts do they want him to
16 do? They don't want him to do anything. They just want
17 money.

18 MR. MUCHNICKI: Well, they want the acts of
19 removal of the soils and --

20 QUESTION: Yes, but he can't perform those
21 acts because the receiver is in charge.

22 MR. MUCHNICKI: That's true; he cannot. But
23 he --

24 QUESTION: Well, then what do you want out of
25 him?

1 MR. MUCHNICKI: He may be able, with the
2 receiver's agreement -- and the receiver would be happy
3 to have him come in and do those things -- it's not
4 where the receivers will not let him on the site. The
5 receiver would be more than happy to have him come
6 back. In fact, that's what we're trying to obtain.

7 QUESTION: But the receiver would be as happy
8 as he could be if he just paid over the money.

9 MR. MUCHNICKI: The receiver -- he would not
10 be paying money to the receiver. I think he would
11 probably be paying the money to a contractor to do the
12 work.

13 QUESTION: Nevertheless --

14 MR. MUCHNICKI: And that, in and of itself --
15 that is the situation. But that is not a factor which
16 is dispositive of the issue, because as to the third
17 point which we wish to make in this case -- as to the
18 interpretation of the word "claim," Ohio's position is
19 based on both the language of the code and the
20 legislative history, whereas the decision below finds
21 support neither in the code language nor in the
22 legislative history.

23 QUESTION: You stated that the receiver would
24 be very happy to help him do all these things. Where do
25 we find that out? Does the record show willingness to

1 cooperate?

2 MR. MUCHNICKI: Yes. Well, the receiver
3 joined in the original motion to have the state court
4 hold a hearing to determine the extent of Mr. Kovacs's
5 further obligations. That was the hearing which the
6 bankruptcy court held -- stayed.

7 So the receiver was trying to bring Mr. Kovacs
8 before the court so that he could get further
9 instructions from the court, both through the receiver
10 and Mr. Kovacs.

11 QUESTION: Has the receiver any responsibility
12 for the cleanup?

13 MR. MUCHNICKI: The receiver effectively is
14 the alter ego of Mr. Kovacs.

15 QUESTION: Does he have responsibility to
16 effect the cleanup -- the receiver?

17 MR. MUCHNICKI: Yes.

18 QUESTION: Is that by force of the injunction?

19 MR. MUCHNICKI: That is by force of the order
20 appointing him. He is specifically appointed with the
21 directive to implement the cleanup contained in the
22 injunctions. And the order appointing receiver, then,
23 had an injunction, a continuing injunction against Mr.
24 Kovacs to cooperate with the receiver.

25 The net effect is the receiver would supervise

1 it.

2 QUESTION: Where is that injunction? Is that
3 a separate injunction from what it was -- it's still the
4 same injunction that was issued against Kovacs
5 originally, isn't it?

6 MR. MUCHNICKI: Yes, it is. Well, there is
7 the original injunction and then the order appointing
8 the receiver --

9 QUESTION: Right.

10 MR. MUCHNICKI: -- repeats the original
11 injunction and then has also another injunction in it,
12 stating Mr. Kovacs is to continue to cooperate with the
13 receiver in implementing the injunction.

14 QUESTION: But the receiver has got the
15 responsibility for cleaning it up.

16 MR. MUCHNICKI: The receiver and Mr. Kovacs
17 have the responsibility. There is nothing in the order
18 appointing receiver which says Mr. Kovacs no longer has
19 that responsibility.

20 QUESTION: Is the order in the --

21 MR. MUCHNICKI: It is in the Appendix.

22 QUESTION: In the printed Appendix?

23 MR. MUCHNICKI: Yes.

24 There's -- anyhow, the order -- in other
25 words, it adds the receiver to the cleanup effort. It

1 does not subtract Mr. Kovacs. And that's a critical
2 factor.

3 QUESTION: Does the record tell us whether Mr.
4 Kovacs has or has not cooperate with the receiver?

5 MR. MUCHNICKI: The record indicates that when
6 Ohio -- the State and the receiver wish to bring Mr.
7 Kovacs into the state court. Mr. Kovacs asked the
8 bankruptcy court to prevent that proceeding from going
9 forward. And we certainly --

10 QUESTION: Well, but I'm asking about the
11 cleanup. In the cleanup activities, in which I guess
12 he's ordered to cooperate with them, does the record
13 show whether he has or has not cooperated?

14 MR. MUCHNICKI: The record would show that he
15 has not cooperated in coming back to the state court the
16 way the receiver wanted him to, to further define his
17 responsibilities.

18 So we would say yes, the record indicates that
19 he has not been cooperative.

20 QUESTION: But all he wouldn't do, he wouldn't
21 cooperate in the receiver trying to find out what his
22 post-bankruptcy income was.

23 MR. MUCHNICKI: Correct.

24 QUESTION: Well, that hasn't got anything to
25 do with the cleanup of the site.

1 MR. MUCHNICKI: Well, I think it does, because
2 as you have just suggested yourself --

3 QUESTION: Well, I know, but this is his
4 bootstrapping. Assuming you've got a right just to the
5 money, then you ought to have a right to find out what
6 his income is.

7 MR. MUCHNICKI: Correct.

8 QUESTION: But I don't know that that's such a
9 failure to cooperate in the cleanup.

10 MR. MUCHNICKI: Well, it has basically stopped
11 the cleanup effort. And as of now, there has been no
12 further -- there has been no cooperation from Mr. Kovacs
13 to the receiver as of this time.

14 Now, turning to the first issue which we wish
15 to put before the Court, and that is the basic policy
16 matter that's presented by this case -- now, in
17 reviewing the decisions below, we see that in all of the
18 decisions, there is not one reference or one expression
19 of concern for this interest of the State to clean up
20 the site and protect the public.

21 The sole --

22 QUESTION: Was the situation exactly the same
23 at the time you appeared before the Sixth Circuit as it
24 is today?

25 MR. MUCHNICKI: No.

1 QUESTION: And did you make the same
2 arguments, or what was the status then?

3 MR. MUCHNICKI: The status then was the drums
4 had not removed from the surface either. Other than
5 that -- and I don't think we were aware of the extent of
6 the ground water contamination.

7 QUESTION: So you didn't really argue before
8 the Sixth Circuit the ground water contamination and so
9 forth?

10 MR. MUCHNICKI: We did -- yes, we did, Your
11 Honor. We argued, first of all, that the drums were
12 there and they, in themselves, were a hazard. And we
13 were pretty sure, because of the past operational
14 practices and stuff leaching into the soil, that there
15 was ground water contamination, and we did point out the
16 soil was contaminated and had to be removed.

17 Yet, in the opinion below, or in all three of
18 the opinions, there is no discussion of that interest.
19 The sole focal point is on the interest of the debtor.
20 It treats bankruptcy, basically, as an absolute right
21 where the bankruptcy judge basically determines the
22 relevance of the rest of the United States Code, or in
23 the laws of the states.

24 It's as though bankruptcy is always the
25 supreme policy.

1 Now, the Third Circuit, in the recent Penn
2 Terra case, recognizes that on its face, the bankruptcy
3 code recognizes that there are other policies which at
4 times are to prevail -- one of which, specifically
5 referenced, is protection of the environment.

6 In the automatic statutory stay provisions,
7 Congress said we did not want to interfere with the
8 states and their police power enforcement activities; in
9 the removal provisions, so that you cannot remove an
10 enforcement action to the bankruptcy court; in 28 USC
11 959E, there is a specific provision requiring trustees
12 to operate in compliance with state law.

13 In the legislative history of section 105
14 dealing with discretionary stays, there is specific
15 reference to the fact that any discretionary injunction
16 must protect the legitimate interest of the state in its
17 law enforcement.

18 Thus, in Penn Terra, they recognized that the
19 bankruptcy code is one title of the United States Code;
20 it does not overrule everything else.

21 Similarly, the court below did not recognize
22 the repeated holdings of this Court which have held that
23 there will not be a preemptive effect created --
24 preemption of state regulation, absent clear and
25 expressed congressional language.

1 And in the bankrupt --

2 QUESTION: Mr. Muchnicki, when you're talking
3 here, you're talking basically about the dischargability
4 of a claim in bankruptcy, aren't you?

5 MR. MUCHNICKI: We are talking about whether
6 the duty to comply with the injunction is a claim in
7 bankruptcy.

8 QUESTION: And therefore can be discharged.

9 MR. MUCHNICKI: Correct.

10 QUESTION: Well, certainly, the first place
11 you'd look for that is the bankruptcy court. I mean the
12 thing comes up under the bankruptcy statute, not under
13 any other statute.

14 MR. MUCHNICKI: That is correct, Your Honor.

15 But in determining whether the -- after you
16 look at the code and you see the definition of claim,
17 one then has to say is this obligation a claim. And
18 what is the effect of that interpretation, particularly
19 when there's no indication anywhere in either the
20 language of the code or in the legislative history that
21 injunctions to abate nuisances were to be construed as a
22 claim.

23 QUESTION: But if you say it's not a claim,
24 then presumably Ohio is not entitled to share with other
25 general creditors in the bankrupt's estate. Wouldn't

1 that be the case?

2 MR. MUCHNICKI: Yes. If something is not a
3 claim, you would not share in the estate. That is
4 correct.

5 QUESTION: Do you really want that sort of
6 result here?

7 MR. MUCHNICKI: Yes, we do, to a certain --
8 here's -- yes, we do, because it may wind up that, in
9 fact, we do wind up sharing in the estate, in that the
10 estate has to be used to comply with the law. We are
11 not a -- we do not have a claim that we fit within the
12 priorities.

13 Now, for past expenditures -- for example, if
14 we were able to do the cleanup and had a bill, that bill
15 might be a claim. But in terms of having ongoing
16 problems, that is not a claim.

17 QUESTION: Under law, could the State move in
18 and undertake this and then, a little bit later, seek to
19 get reimbursement?

20 MR. MUCHNICKI: It is unclear on that. I
21 think Ohio law provides for a lien on the property,
22 that's all.

23 QUESTION: For what?

24 MR. MUCHNICKI: A lien on the property.

25 QUESTION: Just a lien, not some positive

1 action?

2 MR. MUCHNICKI: Right. Now --

3 QUESTION: Normally, in most states, if there
4 is a fire, for example, and a building is imposing a
5 hazard after the fire is over, falling debris and
6 collapsing walls, there is inherent authority in the
7 local governments to go in and take care of it if the
8 owners don't.

9 Now, isn't there something like that in Ohio?

10 MR. MUCHNICKI: Yes, and what you get is a
11 lien on the property. Now --

12 QUESTION: Well, a lien isn't going to take
13 care of the toxic wastes. Are you saying Ohio has no
14 authority to go in and do this?

15 MR. MUCHNICKI: I think it is not a question
16 of authority, Your Honor; it is a question of ability.
17 We don't have the ability to do it.

18 QUESTION: Well, you can hire people to do
19 it. The city council doesn't go out and tear the walls
20 down of a partially burned building, but they hire
21 somebody to do it if the owner doesn't do it.

22 MR. MUCHNICKI: The fact of the matter is, if
23 you look at the situation, I'll give you an example of
24 what Ohio is facing with leached toxic waste sites.

25 We have 28 sites right now on the national

1 priority list. We have 23 more that are being evaluated
2 for placement on it. We have 800 more that we are still
3 investigating. We don't have the money to clean those
4 all up.

5 QUESTION: Well, doesn't your answer to the
6 Chief Justice's question suggest that Ohio is not
7 prevented by anything except lack of money from cleaning
8 up this site, and what you're really concerned about
9 here is money.

10 MR. MUCHNICKI: Well, yes, money will be
11 required to take up the site. But what we are concerned
12 about is how Congress treated this, and what did
13 Congress decide in terms of the definition of claim?

14 And I think when you look at that language,
15 the claim is to find, in terms of equitable remedies,
16 and whether we can compel the debtor to perform the
17 injunction, the definition of claim for equitable remedy
18 says "an equitable remedy for breach of performance, if
19 the breach gives rise from an alternative right to
20 payment."

21 Now, to begin with, the breach of performance
22 is a contractual phrase. It does not refer to
23 violations of law. Indeed, when you think about the
24 difference between a contractual situation where two
25 people voluntarily agree to do something, in this

1 situation where the public has not agreed to have Mr.
2 Kovacs impose his obligations on the people of Hamilton,
3 you can see it's a whole different thing than the breach
4 of performance we talk about in contracts.

5 Similarly, here we do not have an alternative
6 right to payment. Any payment would be made to
7 effectuate the injunction. In fact, the court below
8 even recognizes, and Mr. Kovacs recognizes in his brief,
9 that any payment made here is not an alternative to
10 performance; it is to facilitate the performance.

11 So we have a completely different situation
12 than the contract, which is the example in the
13 legislative history. And when you search through the
14 legislative history or the language of the code, there
15 is nothing which suggests that an injunction to evade an
16 ongoing threat is dischargable in bankruptcy.

17 Indeed, the language is clearly to the
18 contrary, as is the legislative history.

19 QUESTION: Could I ask you if -- do I read
20 this order appointing the receiver correctly, that it
21 did order the Defendants to pay over to the Division of
22 Wild Life \$75,000?

23 MR. MUCHNICKI: Yes, and that's not at issue
24 there. We agree that's a claim.

25 QUESTION: And that is discharable?

1 MR. MUCHNICKI: Yes.

2 QUESTION: And, hence, based on that claim,
3 you couldn't try to collect from his post --

4 MR. MUCHNICKI: With regard to that 75 --

5 QUESTION: So what money are you asking from
6 him?

7 MR. MUCHNICKI: What we're trying to do is get
8 him to perform the acts required by the injunction which
9 are not at claim. The monetary obligation to pay the
10 fine fits under the right to payment part of the
11 definition of claim. We're talking about the equitable
12 obligatio.

13 QUESTION: Of course, some things are claims
14 but they aren't dischargable --

15 MR. MUCHNICKI: That's true.

16 QUESTION: -- under the Bankruptcy Act.

17 MR. MUCHNICKI: That's true.

18 QUESTION: That isn't part of your case here?

19 MR. MUCHNICKI: That is not presented here.

20 QUESTION: But when you say you want
21 performance from him, you don't actually want this
22 particular individual to come down to the site with a
23 pick and shovel and start digging himself?

24 MR. MUCHNICKI: No, that's true.

25 QUESTION: You want him to put up the money

1 required by the injunctive decree so that some
2 contractor can be hired to do it?

3 MR. MUCHNICKI: I'd say that's correct.

4 QUESTION: So the receiver can do it, because
5 the receiver has the obligation to carry out the terms
6 of this injunction. That's what it says.

7 MR. MUCHNICKI: So does Mr. Kovacs.

8 QUESTION: Well, I just said what the
9 receiver --

10 MR. MUCHNICKI: But the receiver has no
11 funds. He has nothing also.

12 QUESTION: So he wants money?

13 MR. MUCHNICKI: Yes.

14 QUESTION: The receiver has certain inherent
15 authority to credit of the estate, doesn't he?

16 MR. MUCHNICKI: There is nothing left in the
17 estate.

18 QUESTION: Nothing at all?

19 MR. MUCHNICKI: Not in the estate that is run
20 by the receiver. There was some in the bankruptcy
21 estate.

22 QUESTION: Can I ask you one question? Is the
23 obligation that you want to have immune from being
24 discharged, is that part of the order appointing the
25 receiver of February 4, 1980?

1 MR. MUCHNICKI: Yes. That's included. The
2 injunction --

3 QUESTION: Which paragraphs of that order do
4 you say are not --

5 MR. MUCHNICKI: The injunction to cooperate
6 with the receiver which I believe is paragraph --

7 QUESTION: Where is that? I always have
8 trouble finding exactly where --

9 QUESTION: I think the closest thing to it is
10 that he's supposed to let the receiver into the site and
11 not interfere with his efforts to clean it up. I don't
12 see any order to cooperate.

13 MR. MUCHNICKI: It's on page JA-15. And the
14 middle injunction: to fully cooperate with the receiver
15 in the performance of such duties, and referring to the
16 duty to implement the injunction.

17 I'd like, if there are no further questions --

18 QUESTION: I have one, actually. Now, would
19 the State be prohibited by the judgment and orders of
20 the Sixth Circuit from proceeding against Kovacs for
21 contempt for any prior failure to comply with the
22 injunction?

23 MR. MUCHNICKI: We believe that that would be
24 the case. Certainly, to give you --

25 QUESTION: Why do you say that?

1 MR. MUCHNICKI: Well, Your Honor, let me give
2 you an example of what we encountered previously in the
3 bankruptcy court. The first time we appeared -- when we
4 filed the mere motion requesting -- for the hearing to
5 determine what his current status was, and then the
6 debtor moved for imposition of the stay, the bankruptcy
7 judge -- his first question was why he should not hold
8 me in contempt. And I didn't feel I had done anything
9 other than ask for a hearing, an informational hearing.

10 And the bankruptcy judge made it quite clear
11 that he construed this to be very broad, and therefore I
12 tend to think that if I were to file a motion to hold
13 Mr. Kovacs in contempt, that would be viewed as an
14 attempt to compel him to pay and the bankruptcy court
15 would find me --

16 QUESTION: Well, I guess we don't know that.
17 At least the Sixth Circuit in its opinion said that if
18 Ohio had elected to have a money penalty assessed
19 against Kovacs for the environmental damage he caused,
20 we would have faced a different question, and that would
21 not have been subject to the automatic stay.

22 MR. MUCHNICKI: The Sixth Circuit did say
23 that. But even if we go into that penalty, it does not
24 accomplish the cleanup which is necessary to protect the
25 public, and I think that is our primary concern here.

1 Thank you.

2 CHIEF JUSTICE BURGER: Ms. Oberly.

3 ORAL ARGUMENT OF KATHRYN A. OBERLY, ESQ.

4 ON BEHALF OF THE UNITED STATES GOVERNMENT

5 MS. OBERLY: Thank you, Mr. Chief Justice, and
6 may it please the Court, some of the Court's questions
7 to the counsel for the State of Ohio indicate what we
8 think is one of the mistakes made by the Court of
9 Appeals in --

10 QUESTION: Do you think we're falling into the
11 same error that the Court of Appeals fell into?

12 MS. OBERLY: Yes, Your Honor, I think you're
13 headed in that direction.

14 The principal mistake seems to be in assuming
15 that it makes no difference to the State or to the
16 Federal Government in an enforcement action whether we
17 get compliance with the injunction or whether we get
18 money.

19 In fact, it makes a significant difference.
20 Hazardous waste sites are quite complex to clean up.
21 They require years of effort, long-term monitoring, and
22 the important purpose that an injunction serves, that
23 money doesn't serve, is that it keeps the responsible
24 party present and under the supervision of the court
25 until the cleanup is accomplished.

1 What Respondent is essentially arguing for and
2 what the Sixth Circuit agreed with is a buyout of your
3 obligations under the injunction which does not protect
4 the public, because we don't know at the time of the
5 buyout whether or not the amount that the injunction is
6 exchanged for will be sufficient to protect the public
7 health in the long term.

8 QUESTION: Before these waste dumps were
9 opened and operated, did they secure a license of some
10 kind from the State?

11 MS. OBERLY: Not in this case, Your Honor.
12 New dumps now do have to be permitted under federal law,
13 and presumably Ohio has comparable state law. But that
14 is not the case --

15 QUESTION: Is the Ohio state law something
16 since this event arose?

17 MS. OBERLY: Yes, Your Honor, it is. But both
18 federal and state law impose basically strict liability
19 for leaving hazardous wastes behind, even if it was done
20 before the new permitting requirements.

21 QUESTION: But if ultimately there isn't any
22 money anywhere in the private source to do this, where
23 lies the obligation?

24 MS. OBERLY: Well, the obligation still lies
25 with the responsible party, but then it falls to the

1 public to pick up the tab for the responsible party is --

2 QUESTION: Because the State allowed them to
3 do it, either by license or by leave.

4 MS. OBERLY: The State didn't allow them to do
5 it. He just did it.

6 QUESTION: Well, you say they license them
7 now, though?

8 MS. OBERLY: Yes, because we've all learned a
9 lot more about the problem. But in the meantime,
10 Congress has also chosen to impose liability for past
11 disposal practices that are currently harming the
12 public. And that's what we have --

13 QUESTION: I think you would like us to judge
14 the case as though a receiver had never been appointed,
15 and I think that may be the right way of judging it,
16 because then the question would be, is he still subject
17 to the obligations of the injunction?

18 And then the question would be, can you go
19 around and find assets of his to carry out a duty that
20 could never be discharged in bankruptcy?

21 MS. OBERLY: That's correct. And I don't
22 think the appointment of the receiver makes any
23 difference.

24 QUESTION: I think you have to address that.
25 You certainly didn't in your brief.

1 MS. OBERLY: Well, Your Honor, it doesn't
2 change the fact that Kovacs is under an obligation to
3 clean up.

4 QUESTION: It does change the fact that his
5 obligation under the injunction has been taken over the
6 receiver and all the receiver wants from him is money.

7 MS. OBERLY: The receiver wants him to help to
8 perform. One of the aspects of the injunction
9 appointing the receiver is that he not interfere with
10 the receiver.

11 We submit that he has --

12 QUESTION: He doesn't interfere with him by --
13 he interferes with him unless he pays the money.

14 MS. OBERLY: No, he has done more than that.
15 When he filed for bankruptcy, Your Honor, he essentially
16 put the receiver into bankruptcy because the receiver
17 had control of his assets under this order, but the
18 receiver didn't want to go into bankruptcy.

19 And so Kovacs has actively - Respondent has
20 actively interfered with the receiver's ability to carry
21 out the injunction by taking the assets that the
22 receiver was supposed to have.

23 QUESTION: And what do you draw from that in
24 terms of the receiver's ability to collect -- to get
25 money from him out of his post-bankruptcy earnings?

1 MS. OBERLY: That he's made it impossible by
2 getting a ruling from the bankruptcy court that this
3 debt is dischargable, and therefore the receiver has no
4 assets, whether pre-bankruptcy or post-petitioner
5 earnings, that he can use to effectuate this cleanup.

6 QUESTION: Do you say this is a debt, or is it
7 something else?

8 MS. OBERLY: No, Your Honor., We agree with
9 Ohio that it is not a debt that was intended to be
10 covered by the bankruptcy code. The code, we feel, was
11 intended to deal with basically contractual and
12 commercial obligations, and this is a classic example of
13 something that is not contractual. The public didn't
14 contract with Mr. Kovacs. There is no contract at all
15 here.

16 There's a breach and defiance, if you will, of
17 a state court injunctive order. That is not, in our
18 view, something the bankruptcy code was intended to
19 address.

20 QUESTION: Well, neither -- the Court of
21 Appeals certainly didn't agree with that, and neither
22 did the bankruptcy court.

23 MS. OBERLY: We wouldn't be here if we didn't
24 think those courts were wrong, Your Honor.

25 QUESTION: Well, I know, but you are

1 essentially saying that the federal court is wrong in
2 construing Kovacs's obligation under state law. And
3 what are we supposed to do --

4 MS. OBERLY: First of all, Your Honor, one of
5 the problems with this case is that, since the
6 bankruptcy proceedings began, Ohio has been prevented
7 from going back to the state court --

8 QUESTION: Do you think the bankruptcy court
9 thought that Kovacs was in -- what you claim is that he
10 was in contempt of court by filing the petition of
11 bankruptcy. He was interfering with the receiver
12 contrary to the injunction.

13 MS. OBERLY: We think that he was. The
14 bankruptcy court disagreed.

15 QUESTION: I know. But the federal court
16 obviously didn't think so.

17 MS. OBERLY: That's correct.

18 QUESTION: And obviously, under state law, he
19 was not in violation.

20 MS. OBERLY: The state court hasn't had an
21 opportunity -- no court has -- no federal court in this
22 proceeding has addressed what the state court would
23 think has happened to its injunction.

24 QUESTION: Well, what the state court -- but
25 I'm sure that the bankruptcy court must have considered

1 what Kovacs's obligations were under state law.

2 MS. OBERLY: There's nothing -- excuse me,
3 Your Honor, but there is nothing in this opinion of the
4 bankruptcy court, the district court, or the Sixth
5 Circuit to indicate that those courts thought that
6 Kovacs's obligation had been satisfied.

7 Instead, they said --

8 QUESTION: I didn't say that.

9 MS. OBERLY: What they said was that --

10 QUESTION: I didn't say that. Do you think
11 they thought he was in violation of the injunction to
12 file the bankruptcy petition?

13 MS. OBERLY: They didn't address that,
14 although the State asked them to. But it wasn't
15 addressed by any of the courts.

16 What they said was that this injunction can be
17 cashed in for money. And if it can be cashed in for
18 money, it's a debt dischargeable under the bankruptcy
19 code.

20 QUESTION: Suppose the District Court had
21 addressed it and said, yes, we think Mr. Kovacs is in
22 violation of the state court injunction. What would
23 they have done then?

24 MS. OBERLY: I think they should have
25 abstained to the state court to determine the scope of

1 his obligations.

2 QUESTION: Exactly. Well, then, so they
3 rejected the claim that he was in violation of his
4 injunction.

5 MS. OBERLY: Without writing an opinion
6 explaining they were doing that.

7 QUESTION: Well, they rejected it
8 nevertheless. So we're supposed to disagree with them
9 on what his obligations were under --

10 MS. OBERLY: No. I think that what's most
11 important is that the state court that issued this
12 injunction and the order appointing a receiver be given
13 an opportunity to decide whether Kovacs has discharged
14 his obligations and whether or not he's interfered with
15 the receiver.

16 And I don't think it's appropriate to have
17 bankruptcy judges, who have no expertise in
18 environmental obligations, determining whether or not
19 that state court injunction has been satisfied.

20 QUESTION: May I ask -- assuming that we have
21 two insolvent people here, apparently, both Kovacs and
22 the State of Ohio. Supposing both had hundreds of
23 millions of dollars, had all the money in the world to
24 do the work, could the injunctive obligation then be
25 cashed in to --

1 MS. OBERLY: No, Your Honor. We would take
2 the position it can't.

3 First of all, we don't have all the money in
4 the world. So that's --

5 QUESTION: No, but why couldn't Ohio do the
6 cleanup and say pay us back?

7 MS. OBERLY: For two reasons that I gave. The
8 first is that you can't really estimate what the cost of
9 cleanup is going to be at the time an injunction is
10 entered, and so an injunction --

11 QUESTION: But you know it by the time you do
12 the work.

13 MS. OBERLY: No, you may not, Your Honor,
14 because 20 years from now, you may find out that the
15 remedial measures you took, the containment measures to
16 clean up ground water, your monitoring of ground water,
17 proves that the problem hasn't been solved.

18 And if you've left the Defendant buy out on
19 day one, the State and the public are left holding the
20 bag for any additional remedial measures that aren't
21 covered.

22 QUESTION: Do you think a person who gets, in
23 this sort of situation, who has millions and millions of
24 dollars, there is no way in the world he can discharge
25 his obligation by paying the State whatever they think

1 is necessary?

2 MS. OBERLY: I think that's correct. We do in
3 federal cases sometimes settle for money at the outset,
4 but the releases are worded in such a way that if it
5 turns out the money we settled for is not adequate to
6 protect the problem down the road, five years from now
7 or ten years from now we discover the contamination has
8 spread and it's not been sufficiently contained or
9 removed, we have drafted a consent decree that keeps
10 those defendants on the hook, so to speak, and does not
11 release them for their original buyout amount.

12 And the reason is that neither the Federal
13 Government -- we have three insolvent parties here.
14 Neither the Federal Government, nor Ohio, nor Mr. Kovacs
15 has enough money to deal with what is an enormous
16 problem, not just at this site, but nationwide.

17 And I would like --

18 QUESTION: Ms. Oberly, this is sort of like
19 ships passing in the night. Wouldn't you be satisfied
20 if the State of Ohio was free to go into a local court
21 and say, look, your obligation under the injunction,
22 your obligation to clean up is not a claim, and the
23 federal court hasn't said it is. You're under an order
24 to clean up, and you're still under the order. Now, get
25 with it and work or face contempt.

1 Now, let's assume the State of Ohio was
2 perfectly free to do that. Would you be satisfied?

3 MS. OBERLY: I may have missed the first
4 part. But if Ohio were free to go back into state court
5 and seek contempt, say either do it, either perform, or
6 we're going to hold you in contempt? Yes, we would be
7 satisfied, but --

8 QUESTION: Well, I suggest to you that all the
9 Court of Appeals did is say the receiver is trying to
10 get money, just get money from the Defendant, and not
11 trying to force him to go clean up himself. They're
12 trying to get money from him, get money from out of his
13 post-bankruptcy earnings, and they just focused on
14 that.

15 MS. OBERLY: My time is expired, but --

16 QUESTION: You may answer, of course.

17 MS. OBERLY: If I may answer the question, I
18 think that is the fundamental error in this case in
19 equating an injunction to do a specific act with just a
20 desire to get money.

21 Ohio doesn't want the money. Ohio wants
22 Kovacs or the receiver to perform the injunctive
23 obligation..

24 QUESTION: I think the Court of Appeals is
25 talking about the money, not about the obligation.

1 MS. OBERLY: That's correct, and that was --

2 QUESTION: Not about the obligation.

3 MS. OBERLY: That was its error, because by
4 talking about money, it was able to say, because we're
5 talking about money, this is a debt that is dischargeable
6 under the bankruptcy code.

7 QUESTION: If all it was doing was talking
8 about the money, it wouldn't -- they weren't saying that
9 the State of Ohio cannot enforce the obligations under
10 the injunction.

11 MS. OBERLY: They've discharged and approved
12 the discharge of the entire injunction. So I don't see
13 how Ohio would have any basis for going back into state
14 court on a contempt motion when the underlying
15 obligation has been discharged.

16 QUESTION: Ms. Oberly, I also would like to
17 ask one more thing. Do you think that the bankruptcy
18 judge has jurisdiction to determine how the Ohio courts
19 would view the obligation of Kovacs under the
20 injunction, and the extent to which performance has been
21 given or not?

22 MS. OBERLY: I think, if he has jurisdiction,
23 and I have my doubts about that, I think it would be
24 something he should abstain.

25 QUESTION: Is there something in the

1 bankruptcy code presently that tells the bankruptcy
2 judge what the judge should do in those circumstances?

3 MS. OBERLY: It says that Ohio, or a person in
4 Ohio's position can file a motion for abstention. But
5 then it also provides that denial of that motion is not
6 reviewable by appeal or otherwise.

7 QUESTION: Right. And it isn't mandatory that
8 the bankruptcy judge abstain.

9 MS. OBERLY: That's correct. But in the new
10 bankruptcy 1984 statute that was passed this summer --
11 it provides that when a bankruptcy court is called upon
12 to decide matters involving laws in addition to the
13 bankruptcy code, that those can go directly to the
14 district court, Federal District Court.

15 That still would not solve my problem, because
16 I believe this belongs in state court to determine the
17 extent of Kovacs's obligations under the injunction.
18 But if we at least get it in a court that's slightly
19 more familiar with balancing bankruptcy against
20 environmental obligations, then I don't think that
21 that --

22 QUESTION: But there's nothing in the
23 bankruptcy code, either under the new amendments or
24 otherwise, that would require sending it back to the
25 state court.

1 MS. OBERLY: That's correct.

2 If I may say one other thing, the Super Fund,
3 which is a code name for a federal statute that's been
4 passed several years ago to provide money to clean up
5 hazardous waste sites, has been entered into this case
6 or injected into this case somewhat late, and no one has
7 really properly briefed it, and I leave it up to the
8 Court, but it may be that the Court would wish further
9 briefing or a memo about the effect of Super Fund and
10 federal monies.

11 Since I have not had time to address it,
12 probably the other parties won't either. It may be
13 helpful to the Court for someone to submit something
14 else on that issue. We would be happy to do so.

15 CHIEF JUSTICE BURGER: Very well.

16 Very Caldwell, we'll count on you to clear
17 these matters up for us now.

18 ORAL ARGUMENT OF DAVID A. CALDWELL, ESQ.

19 ON BEHALF OF THE RESPONDENTS

20 MR. CALDWELL: Mr. Chief Justice, may it
21 please the Court, I think in analyzing this obligation,
22 there is really only one point in time which is
23 relevant, and that is on the date of bankruptcy,
24 September 2, 1980.

25 It matters little what the nature of the

1 obligation was a year before that. The only critical
2 thing is what obligation did the bankrupt owe on the
3 date of bankruptcy.

4 You recall by that time, the Chem-Dyne site
5 had been in the possession of a receiver for nearly
6 eight months, and also in possession of all of Mr.
7 Kovacs's then existing assets.

8 Now, this receivership was imposed in order to
9 enforce the agreed judgment entry of July 1979. Whether
10 we call that judgment entry injunction or whatever, it's
11 clear that it came about as a result of an agreed
12 settlement of a disputed lawsuit.

13 The State of Ohio, with all of its expertise
14 in July of 1979, made a value judgment that they should
15 accept the agreement of Bill Kovacs to pay for some dead
16 fish and to remove the waste stored on the surface of
17 the site, period. And the entry recites that that is a
18 compromise, et cetera, et cetera. And the Attorney
19 General admits that that agreement was made in full
20 satisfaction of the obligations of Kovacs.

21 Now, admittedly, the obligation to clean up
22 the surface was not performed by Mr. Kovacs. That's why
23 the receiver was appointed.

24 QUESTION: I don't see anything in the
25 settlement or the order appointing the receiver or

1 anything else that released Kovacs from his obligations
2 under the injunction.

3 MR. CALDWELL: No, except that it replaced --

4 QUESTION: I know the receiver undertook to do
5 it.

6 MR. CALDWELL: The receiver is ordered to do
7 it, and it's a little hard to visualize these two
8 arm-wrestling over who has control of the site. And, as
9 a matter of fact, the first thing the receiver did was
10 fire Mr. Kovacs as president of Chem-Dyne. He was out
11 of a job.

12 Now, it's a little difficult as a practical
13 attorney to imagine that Mr. Kovacs, out of possession --

14 QUESTION: Well, that's all well and good, but
15 I don't see anything -- if the state had -- if the
16 receiver quit or he was discharged and receivership
17 liquidated, do you think Mr. Kovacs would have any
18 remaining obligations under the --

19 MR. CALDWELL: No, I do not, because I think
20 the --

21 QUESTION: You think it was agreed that the
22 receiver would take it over.

23 MR. CALDWELL: I think that's the natural
24 consequence of it, because the receiver took all of his
25 assets, both personal and corporate, and the court then

1 ordered the receiver to apply those assets to the
2 cleanup. And I think it's --

3 QUESTION: Well, do you think that's the
4 source of the Court of Appeals' observation that Kovacs
5 cannot personally clean up the waste he wrongfully
6 released into Ohio waters? He cannot perform the
7 affirmative obligations properly imposed upon him by the
8 State court?

9 MR. CALDWELL: Well, I think that's --

10 QUESTION: Is that because the receiver had
11 the job, or what?

12 MR. CALDWELL: I think it's a necessary
13 characteristic, if you're talking about an obligation
14 here that involves the expenditure of millions of
15 dollars, you're talking about a human being who has a
16 family to support, and you take everything he owns; can
17 you imagine any State court, after the money is all
18 gone, holding him in contempt because he doesn't quit
19 his job in New Jersey and come back here and clean up
20 that site?

21 I think that would be an aberration in equity
22 jurisprudence.

23 I think, realistically --

24 QUESTION: Well, of course, Kovacs didn't
25 exactly live up to his obligations either.

1 MR. CALDWELL: Well, there's no question.

2 QUESTION: He didn't pay over the \$75,000.

3 MR. CALDWELL: No question about it, and no
4 question that that's an obligation --

5 QUESTION: Instead, he filed for bankruptcy.

6 MR. CALDWELL: He failed to cooperate by
7 filing bankruptcy. He availed himself with the fresh
8 start that is the very spirit of the bankruptcy laws.

9 The State has ignored the fact that throughout
10 this -- and I've never seen an answer to it -- that what
11 the State settled for here was the surface cleanup.
12 Now, they obviously found later that some of these
13 chemicals that seeped into the soil and so on, obviously
14 what they found out was that maybe they didn't make such
15 a good deal.

16 Well, that's all well and good, but I don't
17 think the State of Ohio can now be heard to say you,
18 Kovacs, have to clean up the soil underneath. And the
19 real significance of this is that everything Kovacs was
20 obligated to do has now been performed, and the cost of
21 that is liquidated, and there's no question that that
22 obligation, that bill, is dischargable in bankruptcy.

23 The only difference, in effect, between now
24 and back in September of 1980 is that now the obligation
25 is liquidated. We have a dollar figure. The money has

1 been spent. And we know that claims in bankruptcy are
2 dischargable, not based on the fact of whether they're
3 liquidated or unliquidated.

4 QUESTION: But your opponent claims that
5 Kovacs's obligations under the injunction haven't been
6 fully performed. Do you disagree with that?

7 MR. CALDWELL: I certainly do. I certainly
8 do. Kovacs didn't settle for digging up all the soil on
9 the site. He settled for moving 850,000 gallons of
10 liquids and 4,000 barrels, period.

11 QUESTION: Well, what if we disagree with you
12 on that, that the obligations are not completely
13 discharged under the injunction? What would you say
14 then about this ability to collect money?

15 MR. CALDWELL: I think, even if you disagree,
16 that the whole obligation of Kovacs is now performed,
17 you're still looking at a money obligation. All of it
18 may not be liquidated as of today, but it's still
19 something that somebody else is going to do.

20 QUESTION: Well, is that a question that ought
21 to be addressed by some court, somewhere along the line,
22 the extent to which under the State court injunction,
23 there is a continuing obligation of some kind?

24 And it just looks, at least from the opinions
25 below, that nobody addressed that question. No court

1 yet has really looked at that.

2 Now, where should that be addressed, and who
3 has the jurisdiction to do it?

4 QUESTION: Well, since the adoption of the
5 1978 Code, the determination of the dischargability of
6 bankruptcy claims has been pretty well lodged in the
7 Federal court.

8 Now, back when I started practice, you could
9 run through bankruptcy and then later sue on it in State
10 court, and the State court would determine whether that
11 claim was discharged. Well, that practice --

12 QUESTION: Well, shouldn't part of the inquiry
13 encompass, at least at the first level by the bankruptcy
14 judge, the extent to which Ohio would say there is a
15 continuing obligation remaining under the injunction?

16 Is that an appropriate inquiry to be made?

17 MR. CALDWELL: I don't think that's a matter
18 of state law, Your Honor.

19 QUESTION: Ms. Oberly reads the Court of
20 Appeals opinion and the opinion below as indicating that
21 any equitable obligation imposed upon Kovacs is
22 dischargable and has been discharged.

23 Do you read the opinions the same way? Do you
24 read the bankruptcy court's ruling and the Court of
25 Appeals' ruling as effectively disposing of and ending

1 any obligation of Kovacs under the injunction?

2 MR. CALDWELL: Oh, yes; I think so, because --

3 QUESTION: So you say that a court has
4 addressed it, namely, the Court of Appeals and the
5 Bankruptcy Court?

6 MR. CALDWELL: Your Honor, we're looking --

7 QUESTION: Well, yes or no?

8 MR. CALDWELL: Pardon? Yes. They're looking
9 at the same facts everyone else is looking at, that the
10 thing that brought this matter into court was a motion
11 of the State, seeking to garnish my client's wages.

12 Now, he describes it in all different evasive
13 things, but we call that a judgment debtor exam in Ohio.

14 QUESTION: The Assistant Attorney General told
15 us that since these problems arose, Ohio law now
16 requires some kind of a license for waste dumps and that
17 sort of thing?

18 MR. CALDWELL: I'm sure that's true.

19 QUESTION: Does it also require them to put up
20 a bond to cover situations like this? And did it
21 apply?

22 MR. CALDWELL: I'd have to defer to my
23 colleague, but that's a typical State regulatory
24 scheme.

25 QUESTION: But it didn't apply at the time?

1 MR. CALDWELL: No. This site began, really,
2 in the infancy, just on the eve of real environmental
3 awareness, and Ohio -- I don't know whether it was
4 behind anywhere else -- but there was no licensing
5 required at that time.

6 QUESTION: Counsel, in the old classical case
7 where you are enjoined from maintaining your wall or
8 your bridge over my property, and you go into
9 bankruptcy, that discharges that?

10 MR. CALDWELL: I think not. The cost of
11 taking it down may well be an obligation to the State.
12 But you don't acquire the future right to maintain your
13 bridge or the future right to conduct an activity to
14 pollute it, certainly. That's not discharged.

15 QUESTION: The job was you were ordered to
16 take it down, and you say you can't take it down because
17 you're bankrupt.

18 MR. CALDWELL: I think that obligation might
19 well be discharged.

20 QUESTION: You got any cases for that?

21 MR. CALDWELL: No, Your Honor. None of us
22 have any cases on that portion. But I have not seen,
23 and we researched this, of course, at the lower level,
24 any cases that hold a person may be held in contempt
25 where the performance is financially impossible.

1 I mean you reach the point where you're
2 talking about involuntary servitude. If there is an
3 equitable obligation today, would anybody require the
4 man to quit his job, come back to Ohio where he has no
5 employment, to do something that costs millions of
6 dollars when he has not the money to do it? I can't
7 believe that.

8 QUESTION: Well, about a child support
9 decree? I mean certainly --

10 MR. CALDWELL: Child support, there's a clear
11 example of the differentiation here. That, of course,
12 is specifically non-dischargeable. It's an obligation
13 that's capable, presumably capable of being met out of
14 weekly wages, and Congress determined -- Congress
15 determined that obligation is not dischargeable.

16 QUESTION: But I was addressing myself to your
17 insistence that because he has no money and is in New
18 Jersey -- has moved to New Jersey from Ohio --
19 therefore, who in his right mind would suggest he ought
20 to perform his duties under the Ohio injunction? I
21 don't think that's a very appealing argument.

22 MR. CALDWELL: Well, the appeal -- maybe I
23 didn't state it properly -- is the possibility of
24 doing. We're talking about something that's infinitely
25 impossible.

1 QUESTION: You're saying that if he were cited
2 for contempt, the Ohio court in Butler County would
3 probably say no, you're not in contempt because it's
4 impossible for you to perform?

5 MR. CALDWELL: That's right, just as in child
6 support cases, you can't find in contempt the
7 quadraplegic who can't earn any money to pay child
8 support.

9 When we're talking about a multimillion dollar
10 obligation against a wage earner, you have the same
11 result.

12 QUESTION: Mr. Caldwell, can I ask you a
13 question, please? Assume we didn't have the complex
14 facts we have here. We had a simple case in which
15 somebody polluted a large area of land and the
16 Environmental Agency went into court and got an order
17 that said clean it up, do whatever you have to to clean
18 it up. And they started to work, trying to clean it up,
19 and they ran out of money and went into bankruptcy, but
20 there was no settlement, no completion, they don't know
21 how much more it would cost to just have that kind of
22 general open-ended obligation.

23 In your view, would that -- and then the man
24 was broke, and moved to New Jersey, as this man did.
25 Would that be dischargable?

1 MR. CALDWELL: I think it would.

2 QUESTION: That's basically the same case in
3 your judgment.

4 MR. CALDWELL: I think it is.

5 Now, the State and the Federal Government have
6 indicated many times, over and over in this case, that
7 the rulings of the court below are seriously hampering
8 the enforcement efforts of the State and Federal
9 Government. And I say that that simply is not so.

10 You look at this case; they succeeded in
11 putting Mr. Kovacs out of business in very short order,
12 taking all of his assets and applying them to the
13 cleanup.

14 Now, what would be the consequences of
15 reversal? Would it really accomplish what the State
16 claims they're seeking, if they could garnish Mr.
17 Kovacs's wages once a month? Would that really --

18 QUESTION: Forever, apparently.

19 MR. CALDWELL: Forever. Would that ever
20 really make a dent in the environmental problem in the
21 country?

22 Secondly --

23 QUESTION: Well, it might, of course, serve as
24 a deterrent to other people who might otherwise think
25 that they had to do to get out from under one of these

1 State court injunctions is to file for bankruptcy, and
2 then it's over.

3 And so if there is a lingering effect, even if
4 Mr. Kovacs can't begin to pay the real cost of this
5 thing, if he has to pay something, whatever the court
6 determines is appropriate and that can be paid, maybe
7 that is a deterrent. That's the question.

8 QUESTION: I'm sorry. Your Honor, the word
9 "deterrent" to me, as a lawyer, always brings about the
10 criminal laws, not the bankruptcy laws.

11 And we have criminal laws --

12 QUESTION: No, not the bankruptcy law. We're
13 talking, aren't we, about the continuing effect of the
14 State court injunction for the removal or prevention of
15 pollution. We're not really talking about the
16 bankruptcy.

17 MR. CALDWELL: I know what you're saying, Your
18 Honor, but I think it's always been the philosophy that
19 the bankruptcy laws are not to be used as a deterrent.
20 Any deterrent effect of any of these laws is to be
21 brought about by prosecuting criminals.

22 QUESTION: Yes, but we're really talking about
23 whether the bankruptcy, the automatic stay provision of
24 the bankruptcy law extends to cover a State pollution
25 injunction in some of its permanent features and

1 aspects.

2 I think the State injunction, for instance,
3 said that the Defendant -- that Mr. Kovacs and his
4 employees were permanently enjoined from causing
5 anything injurious to the health and property of
6 individuals in the public.

7 And that would be a theoretically permanent
8 continuing type obligation.

9 MR. CALDWELL: That is to refrain from future
10 acts, certainly. We're not talking about the automatic
11 stay today. We're talking about dischargability.

12 But there's no question you can't buy the
13 right to continue to pollute.

14 But at any rate, the State really cannot
15 demonstrate any real hindrance to the enforcement
16 efforts through the decisions of the lower court. In
17 fact, as one of Your Honors pointed out, a reversal
18 would prevent them from participating in any future
19 corporate liquidation.

20 QUESTION: But the State's point is that if
21 your client doesn't pay for it, they have to pay for
22 it.

23 MR. CALDWELL: Well, that isn't really --

24 QUESTION: That's the State's position.

25 MR. CALDWELL: I know. That isn't really

1 true. The whole toxic waste situation cannot be
2 belittled certainly. It was a product of American
3 industry. Mr. Kovacs didn't cause the toxic waste
4 problem.

5 QUESTION: We all know that.

6 MR. CALDWELL: Through the suits against the
7 generators, the courts have recognized that industry as
8 a whole should bear the cost, and they are as a
9 practical matter in this case.

10 Suits against the companies generating this
11 waste have already been settled, which paid for the
12 cleanup of the surface.

13 QUESTION: United States brought those suits,
14 I take it.

15 MR. CALDWELL: That's right.

16 QUESTION: And they settled them and the money
17 has been used to clean up the surface.

18 MR. CALDWELL: Right. They settled with some
19 companies. Some of them didn't settle. Presumably,
20 they'll get the cost of the rest of it from these
21 companies.

22 Now that cost is, of course, passed on. But I
23 don't think a realistic answer to the problem is denying
24 an individual a discharge in bankruptcy, because it
25 isn't going to bring about the result that the State

1 desires, the needs in this matter.

2 QUESTION: Well, why should, though, the --
3 you really don't think that these kind of equitable
4 obligations to perform are just normally dischargable in
5 bankruptcy, do you?

6 MR. CALDWELL: Well, if you're talking about
7 an affirmative obligation to do something --

8 QUESTION: I suppose claims under contracts
9 are discharged, even though they could be specifically
10 enforced.

11 MR. CALDWELL: If Kovacs had filed bankruptcy
12 in September 1979 instead of '80, we might have a
13 different question. But that isn't the fact in this
14 case.

15 QUESTION: What changed it in '80?

16 MR. CALDWELL: In '80, he's already out of
17 possession and there's no --

18 QUESTION: The receiver is in possession.

19 MR. CALDWELL: Right. Right.

20 QUESTION: And you've made the settlement.

21 MR. CALDWELL: That's right. The cost of it
22 is ascertained. As a matter of fact, it's been paid by
23 someone else.

24 QUESTION: So if the day after the injunction
25 was entered he filed for bankruptcy, and the question

1 came up of dischargability, you would be taking a
2 different position.

3 MR. CALDWELL: Depending on which side it was
4 on.

5 (Laughter.)

6 QUESTION: Well, I'm asking you whether your
7 position is whether, ordinarily, equitable obligations
8 like this are dischargable?

9 MR. CALDWELL: You can certainly make an
10 argument that they are dischargable. The legislative
11 history which has been quoted in here, more in the
12 State's brief and ours, tends to indicate that what
13 Congress was concerned about was the dischargability of
14 an obligation relating to future conduct. Don't do this
15 in the future.

16 QUESTION: Well, if what you have suggested to
17 us -- and your colleague, your friend seemed to imply
18 the same thing -- the cost of meeting this problem is
19 going to run into millions or hundreds of millions.

20 MR. CALDWELL: No question.

21 QUESTION: Then, isn't the question of
22 dischargability in bankruptcy really academic, unless
23 this man wins a billion dollar lottery or something?

24 MR. CALDWELL: Well, you may be correct, Your
25 Honor. I know that in my experience it's much easier to

1 avoid paying a \$10 million judgment than it is a \$1,000
2 judgment.

3 And my client is not an irresponsible person.
4 If he were, he would have moved to Australia by now. He
5 is going on -- he has a background in chemical
6 engineering. He has a right to a discharge, and he's
7 interested in protecting his right.

8 To give the State of Ohio the right to destroy
9 his life by garnishing his wages every month or so would
10 deny him that right. That's really what we're talking
11 about.

12 It's academic in the sense that a reversal
13 will never give the State what it wants unless the
14 Attorney General is somebody out of Charles Dickens. It
15 could only be a punitive thing; it couldn't achieve
16 anything of worthwhile value in cleaning up the
17 environment.

18 QUESTION: May I ask a factual question? I
19 understood Ms. Oberly to say that he has, in fact, been
20 discharged. The discharge is already complete.

21 Is that right? I thought it was --

22 QUESTION: Yes. He has been granted a
23 discharge.

24 QUESTION: He has been. And it's a total
25 discharge with no continuing obligation of any kind?

1 MR. CALDWELL: Well, I think the answer to
2 that question depends on --

3 QUESTION: This case.

4 MR. CALDWELL: -- the decision of this Court.

5 QUESTION: Well, that's right.

6 QUESTION: But if the judgment, if the
7 judgment is affirmed, there is a discharge.

8 MR. CALDWELL: Then this obligation will fall
9 under the discharge; yes.

10 QUESTION: Any obligation under the injunction
11 -- except not to --

12 MR. CALDWELL: I don't think if he goes back
13 to Hamilton, Ohio and starts dumping anything into the
14 river again --

15 QUESTION: No. No.

16 MR. CALDWELL: I think he will have no further
17 monetary obligation to pay money into the --

18 QUESTION: Or to do anything to clean up the
19 site if it still needs cleaning up.

20 MR. CALDWELL: I think that's right. Now,
21 there is one --

22 QUESTION: And that's the result of the
23 opinions below.

24 MR. CALDWELL: Yes. One point that was raised
25 in the State's reply brief that we, of course, couldn't

1 address, and that was the suggestion that if this case
2 is affirmed, this property will revert to Mr. Kovacs's
3 possession, and he'll be free to go back in business.

4 Well, that, of course, is absurd. The State
5 court receiver has the power of sale, and presumably he
6 will sell the property to satisfy whatever remaining
7 financial obligations there are.

8 QUESTION: Didn't the bankruptcy court take
9 charge of the property in the hands of the receiver?

10 MR. CALDWELL: No, they did not.

11 QUESTION: So Kovacs's property was never
12 committed to paying his bills?

13 MR. CALDWELL: Well, you have to remember, you
14 have a piece of property, the toxic nature of it being
15 notorious all over the Midwest; do you really think that
16 any --

17 QUESTION: Did the trustee -- was there a
18 trustee appointed?

19 MR. CALDWELL: A trustee was appointed.

20 QUESTION: Did he abandon the property?

21 MR. CALDWELL: Not formally, but he wouldn't
22 touch it with a ten-foot pole.

23 (Laughter.)

24 QUESTION: So anyway, it was never listed as a
25 part of the assets of the estate?

1 QUESTION: Because it's not an asset.

2 MR. CALDWELL: I'm not sure of that. I'm not
3 sure of that. It's either --

4 QUESTION: Well, was it an asset if it was
5 loaded with the stuff?

6 MR. CALDWELL: Pardon?

7 QUESTION: Was it an asset if you can't sell
8 it?

9 MR. CALDWELL: Well, I guess anything is an
10 asset.

11 QUESTION: Well, nevertheless, the property is
12 still in possession of the receiver?

13 MR. CALDWELL: Oh, yes.

14 QUESTION: Never was a turnover ordered.

15 MR. CALDWELL: No. The bankruptcy trustee
16 didn't want that property.

17 QUESTION: So the receiver is still in
18 possession.

19 MR. CALDWELL: Right.

20 QUESTION: And it's not part of the bankrupt
21 estate?

22 MR. CALDWELL: Well, the bankruptcy court has
23 not dealt with it, and as I say, no trustee wants to
24 grab it until it's cleaned up.

25 QUESTION: Well, the trustee has been

1 discharged, hasn't he?

2 MR. CALDWELL: No, I don't think so.

3 QUESTION: May I ask a followup to a question
4 Justice Rehnquist asked earlier? If you prevail in this
5 case and this obligation, whatever it is, is treated as
6 a claim within the meaning of the bankruptcy statute,
7 then does that mean that the State is a general creditor
8 to the extent it has a monetary demand on your client?

9 MR. CALDWELL: You mean to share in the
10 bankruptcy estate?

11 QUESTION: Maybe there's nothing there; I
12 don't know. Is there in that estate?

13 MR. CALDWELL: I don't think there is that
14 estate, simply because the State court receiver had
15 spent everything that there was in the way of assets by
16 the time he went bankrupt.

17 CHIEF JUSTICE BURGER: Your time has expired,
18 counsel. If you have a fact statement to make, you make
19 it; yes.

20 MR. MUCHNICKI: Two fact statements. First of
21 all -- and if the Court would wish, I will send them a
22 copy. Apparently the receiver intends to file a motion
23 to terminate the receivership next week. He no longer
24 has the money to pay for his bond. If you wish, I will
25 supply a copy of that to the Court.

1 QUESTION: The Court should be provided with a
2 copy.

3 MR. MUCHNICKI: He simply has nothing left,
4 and he can't even pay for his receivership bond anymore.

5 QUESTION: He wants discharge, then.

6 MR. MUCHNICKI: Yes.

7 QUESTION: What's he going to do with the
8 property?

9 MR. MUCHNICKI: The property will revert, I
10 would assume, to Mr. Kovacs because here is the --

11 QUESTION: Or to the trustee in bankruptcy.

12 MR. MUCHNICKI: Well, here is the status of
13 the property. The property -- the Chem-Dyne is owned by
14 Hierco Realty, which is a partnership; it was part of
15 the bankruptcy. The partners of Hierco Realty are Mr.
16 Kovacs and the Chem-Dyne Corporation which is not in the
17 bankruptcy. The net effect is that neither the
18 bankruptcy trustee nor the State court receiver could
19 figure out who owned the property or who had it, but the
20 bankruptcy trustee said he didn't want it.

21 QUESTION: Who owns Chem-Dyne?

22 MR. MUCHNICKI: The Chem-Dyne Corporation, all
23 the stock is owned by Kovacs, but the stock --

24 QUESTION: It shouldn't have been too hard to
25 figure out who owned the company.

1 MR. MUCHNICKI: I think on that suggestion,
2 that would certainly show where it is.

3 Also, as to whether there was a turnover
4 action, in fact, the bankruptcy trustee did file a
5 turnover action --

6 QUESTION: What happened?

7 MR. MUCHNICKI: -- against the receiver, and
8 the receiver had to turn over the most important thing,
9 being like the tank trucks and the pumps and the things
10 that he was using to do the cleanup.

11 QUESTION: Now, are these facts in the record
12 that was before the Court of Appeals?

13 MR. MUCHNICKI: No, that was not in the
14 record. That happened after.

15 QUESTION: Should we not decide the case on
16 the same record they did?

17 MR. MUCHNICKI: Well, I was simply responding
18 to the factual question that was raised.

19 QUESTION: I know, but the inference was
20 previously given that the property would revert, and I
21 just couldn't see -- understand that. That's all.

22 MR. MUCHNICKI: Well, it would be my
23 understanding, what the receiver apparently intends to
24 do is to file a motion to dissolve it, and at that point
25 the property will go back to Mr. Kovacs. But I will

1 provide the Court with whatever --

2 QUESTION: Whatever factual information you
3 provide, it would be more helpful to the Court if it's
4 provided as an agreed statement of what the facts are.
5 Whether it's relevant to the decision of this case
6 remains to be seen.

7 MR. MUCHNICKI: Thank you, Your Honor. We'll
8 attempt to do that.

9 CHIEF JUSTICE BURGER: Thank you, counsel.

10 The case is submitted.

11 We'll hear arguments next in United States v.
12 Boyle.

13 (Whereupon, at 2:03 c'clock p.m., the case in
14 the above-entitled matter was submitted.)
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#83-1020 - OHIO, Petitioner v. WILLIAM LEE KOVACS, dba B&W ENTERPRISES, ET AL.

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

BY Paul A. Richardson

(REPORTER)

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'85 JAN -2 P 3:56