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PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES, Petitioner v. RON PAIR ENTERPRISES, INC.

CASE NO: 87-1043

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,

Petitioner

V. : No. 87-1043

RON PAIR ENTERPRISES, INC.

Washington, D.C.

Monday, October 31, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 o'clock a.m.

APPEARANCES:

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

I. WILLIAM COHEN, ESQ., Detroit, Michigan; on behalf of the Respondent.

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C O N T E N T S

P_R_O_C_E_E_D_I_N_G_S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 87-1043, United States v. Ron Pair Enterprises.

Mr. Wallace, you may proceed whenever you're ready.

ORAL ARGUMENT OF LAWRENCE G. WALLACE

ON BEHALF OF THE PETITIONER

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

This case presents a narrow question of statutory construction dealing with the rights of secured creditors under the Bankruptcy Code in the collateral securing their claims. The question is to be distinguished from any question of priorities under the Code because the Code treats secured claims separately, and to the extent the collateral is consumed meeting the rights of secured creditors, it does not pass into the general assets of the estate available for distribution to other creditors, priority or general creditors.

The particular question concerns post-petition interest allowed to holders of secured claims by Section 506(b) of the Code. The general rule under the Code is that all claimants who would have a basis for it in the

absence of bankruptcy are allowed pre-petition interest. This is memorialized by negative implication in Section 502(b)(2), and the general rule further is that the right to interest is then cut off upon the filing of the petition in bankruptcy, except as the Code otherwise provides.

The right to interest, incidentally, resumes again after the confirmation of the plan of the debtor in possession or of the trustee by the Bankruptcy Court. This is provided by Section 1129 of the Code, which created the possibility of stretching out payments under the plan, and in return for that, all creditors whose payments are stretched out are given a right to interest, and the right to interest for federal tax creditors under the tax liens is in 1129(a)(9)(C).

So what we are really talking about is whether there is a right to interest during this intervening period, the post-petition, pre-confirmation period. And that's what we mean by post-petition interest.

Now, the provision at issue is set forth on page 2 of the government's brief, and Section 502(b) is one of the provisions, and indeed, the most important provision in the Code that allows post-petition interest, and the precise question here which -- and the Code in this provision deals with this question by

statute for the first time. It was previously just a matter of judge-made rules. The question is whether Section 506(b) applies to all secured claims with respect to the right to post-petition interest, or whether it carries forward a distinction that had been recognized by some courts of appeals prior to the Code between consensual and nonconsensual secured claims, with only the consensual ones being awarded post-petition interest.

The consensual ones are those created by contract, typically, secured claims of financial institutions or other business institutions. The nonconsensual claims, in addition to the tax lien claims such as are involved here, would include mechanics' liens or workmen's liens or liens arising from the execution of a judgment, in favor of a judgment creditor such as a tort victim.

And the question is whether this category of claimants, including the government tax liens, benefit from the same rule that some courts previously applied only to claims created by agreement.

In the particular case it is stipulated that the collateral securing the government's tax lien which has been perfected is amply sufficient to cover both the claim and any interest that would be accrued under

Section 506(b).

QUESTION: Mr. Wallace, to what kinds of property does the government's tax lien extend?

MR. WALLACE: Well, typically to real property and any other assets to which a security interest could attach, the same as is true of many commercial liens today that are created by agreement.

There was a time when it was typical for the commercial lien to attach to only one particular piece of property, but it is much more commonplace in commercial practice now for the lien to be as oversecured as the secured creditor can make it. And this is what is known in the parlance as an oversecured claim as well because it is secured by more than the value of the claim plus any interest that would be accrued.

The starting point for any question of statutory interpretation is, of course the statutory language, and if we look at Section 506(b), it seems apparent from the language that two categories of rights to payments are set up in the final several lines of the provision. There shall be allowed to the holder of such claim interest on such claim, set off by commas then from "and any reasonable fees, costs or charges" provided for under the agreement under which such claim

arose.

Facially, that seems to provide for two different categories, a more comprehensive right to interest on any oversecured claim, and a qualified right to fees, costs or charges provided under an agreement, if the claim arises from an agreement, if those fees, costs or charges are reasonable. That would be the ordinary way to read the language.

The Respondent, in order to adapt the language of --

QUESTION: Mr. Wallace, can I interrupt for just a second?

It is true that the words "such claim" -- you are saying there are two kinds of such claims, and you use the same words, "such claim," to describe both of them.

MR. WALLACE: Yes.

QUESTION: The words "such claim" are used repeatedly in the sentence.

MR. WALLACE: I believe that the "such" refers back to the fact that the claim has to be an oversecured claim --

QUESTION: Correct.

MR. WALLACE: -- to put it in the shortest verbiage.

The beginning part of subsection (b) explains that we're talking only about oversecured claims and only to the extent that the oversecured aspect would cover the interest payments. So the "such" really has to refer back to that. Otherwise, that limitation on the right to post-petition interest would be lost in the subsequent clauses.

QUESTION: Mr. Wallace, you do concede that the majority rule before the new Code was to the contrary, that interest would not be allowable?

MR. WALLACE: We concede that indeed.

QUESTION: Isn't -- is it a little odd that there is nothing in the legislative history and nothing more explicit than the placement of commas to change a rule like that?

MR. WALLACE: It's a little odd that there's nothing in the legislative history. I would not say that there's nothing more explicit than the changing of commas, which I will get to in a moment, but I do, I do agree that the case probably never would have reached this Court if the legislative history had addressed this precise question, which it did not. If anything in the legislative history had said we are now rejecting the rule that several courts of appeals had adopted, there would be no basis on which any court would have ruled

against the holders of a claim like ours, a nonconsensual, oversecured claim. And I don't think the case would be here.

So it is --

QUESTION: I suppose most of the government's claims would fit in this oversecured category.

MR. WALLACE: That is correct.

QUESTION: Certainly if taxes are due, the government asserts a lien on everything the taxpayer owns.

MR. WALLACE: That is correct, and it is also correct with respect to judgment liens, and for the most part, workmen's or mechanics' liens would be similarly oversecured.

QUESTION: Yes, but there is a difference in mechanics' liens because they do just attach to a limited number of assets, I presume.

MR. WALLACE: That is correct, and that is --

QUESTION: Whereas the tax lien will -- covers the whole estate.

MR. WALLACE: But there is no basis to distinguish them from tax liens under this provision.

QUESTION: Right.

MR. WALLACE: They are nonconsensual liens, and if nonconsensual liens are not entitled to

post-petition interest, mechanics' liens would fall along with ours for that purpose.

QUESTION: May I ask, isn't it true that customarily in a mechanic's lien foreclosure that under most state statutes, doesn't the lienor get attorneys' fees and costs?

MR. WALLACE: Insofar as I am aware --

QUESTION: And if so, I wonder why there is a distinction in this statute between interest on the one hand and fees. Does it make any difference to anybody except in a tax case? I don't -- it's kind of a strange --

MR. WALLACE: Well, I read the last provision of subsection (b) as indicating that the Bankruptcy Court is to see whether fees provided for in an agreement are reasonable --

QUESTION: Right.

MR. WALLACE: -- because otherwise those fees should not be paid to the detriment of other creditors.

QUESTION: Right.

MR. WALLACE: But this is way of protecting other creditors from some extravagant term written into agreements.

QUESTION: Well, I understand, but I was thinking in a mechanic's lien case there probably is no

agreement for fees, but the practice, apart from bankruptcy, might well be to recover fees, and I just wonder why they should get interest but no fees. Sort of a strange distinction in the statute, because I gather they would get -- under your view they would get interest but not fees or other reasonable costs.

MR. WALLACE: Well, I don't see -- I don't see a basis for them to get fees . There may be assets that survive the estate from which they would have a right under state law. I don't know whether that would be discharged. I'm sure you could instruct me about mechanics' liens because I have never been involved in that kind of practice.

In any event, in order to fit their contentions within the language of the statute, Respondents say that the commas should be erased, and then Section 506(b) can be read their way.

There are several difficulties with this contention, as we see it. In the first place, we should not start off erasing either words or punctuation as the approach to interpreting what Congress has enacted. Punctuation marks are put into statutes to clarify their meaning, and they should not be lightly discarded or ignored.

In the second place, and I think of very

considerable importance, erasing the commas at issue here would create an ambiguity rather than resolve an ambiguity. It seems to us that while the statute is quite clear as written, there would be an ambiguity without the commas as to whether the doctrine of the last antecedent, a maxim of statutory construction that we discuss on pages 16 and 17 of our brief, would still require the same reading that we say is plain on the face with the commas.

We have cited several cases there in which courts have held that the modifying language under the doctrine of the last antecedent applies only to the words or phrases immediately preceding the modifying language. The very first case that we cite there, Quindlen v. Prudential Insurance Company, is one in which there were no commas between the provisions of the statutory language at issue. It was a section of the Louisiana Insurance Code that said this section shall not apply to temporary life insurance binders nor to contracts of life or health and accident insurance which do not contain a provision for cancellation prior to the date to which premiums have been paid.

And the question is whether that modifying language related back to the beginning language or not. There was no comma there.

So the suggestion is one that would introduce an ambiguity.

The third problem with their suggestion is that it would be an awkward way to draft this provision to accomplish the result for which they contend, not only because of the ambiguity that would then exist, but because the Code elsewhere, when it wants to refer only to consensual secured claims, uses a term of art, security interest, which is defined in the definitions section of the Code, in Section 101(45), as "a lien created by agreement."

So there would have been a way provided for in the definitions section of the Code itself to accomplish that result.

And the fourth and also quite important fault with the suggestion that we need only erase the commas, is that under their reading of the language, it would still constitute a departure from the prior cases, as we explain in our reply brief. It just would be a departure from the prior court of appeals cases that they would favor to the one that the language appears to suggest because they would prevail in this case.

But under the prior cases, the distinction was based entirely on the method under which the security was obtained. It was a distinction simply between

consensual and nonconsensual liens. But those cases did not hold what the language of 506(b) obviously would require, that a court would have to look to the terms of the agreement in the consensual lien to see whether the agreement provides for interest. If the lien was consensual, it didn't matter whether the agreement specified interest under the old cases. So they would still be contending for a departure from the law unless the words the Congress enacted are to be totally ignored, contrary to every principle of approaching statutory construction.

Now, in addition to the language of the statute, the context rather strongly suggests that oversecured claims are referred to comprehensively in Section 506(b). It is part of Section 506, which is the general provision that defines the determination of secured status for all categories of secured claims, and as we explain in our brief, each of the other subsections obviously refers comprehensively to all categories of secured claims. So there is no reason suggested by the context for reading Section 506(b) more narrowly.

Then if we look to the legislative history, it simply does not address this question, which seems on balance to be to our advantage to us because this could

not qualify as one of the rare cases in which literal application of the statute will produce a result demonstrably at odds with the intentions of the drafters. There's nothing to show that the drafters did not intend this.

And it seems to us that the Court of Appeals and Respondents are trying to give more weight that can be borne by the mere absence of an explicit indication in the legislative history that Congress intended to change the rule that had been adopted by some courts of appeals but in which the Service, incidentally, had never acquiesced. And that's why the question had continued to be litigated up to the time of the enactment of the Code.

QUESTION: Mr. Wallace, can I interrupt you with another question, because I've been puzzling with this language as I've been listening to you.

MR. WALLACE: Sure.

QUESTION: Am I correct in understanding your argument to advise us that in the pre-Code law, the liens that were consensual and evidenced by a written agreement really could have been of two -- one, they didn't have to mention interest in order to have interest be allowable on such claims, but they did have to mention fees or costs for fees or costs to be

allowable.

MR. WALLACE: Well, I really don't know whether they had to mention fees or costs, but I don't know any other basis on which fees or costs could have been allowed. So I suppose they would have had to.

But interest was allowed not on the basis of a term in the agreement specifying it, but solely on the basis that it was a consensual lien.

Now --

QUESTION: It seems to me that that distinction that you identify perhaps provides an explanation for the two kinds of such claims, both of which would be written claims, but one of which would say nothing, and therefore you could get interest on it, and the second of which might refer to fees and costs, and therefore require the language the end to fit. And that might explain the commas.

MR. WALLACE: Conceivably that distinction could have been written into the law that way. The difficulty is that the language used by Congress does not in any way restrict the --

QUESTION: Well, it would fit this language if one read the words "such claim" to refer only to consensual claims.

MR. WALLACE: But there's no antecedent for

that, if I may say so, Mr. Justice. There's nothing for the "such" to refer back to the first time the word "such" is used other than the explanation that it has to be an oversecured claim. There's no other possible antecedent. There's no --

QUESTION: No, but the language at the very end refers to the agreement, the agreement under which such claims are proposed --

MR. WALLACE: Yes, but such is used --

QUESTION: -- which seems to think that there is an agreement in all of the claims referred to in the sentence.

MR. WALLACE: Well --

QUESTION: Well, that's the --

MR. WALLACE: One would have to read that back and say that the "such," the first time it's used, does not have a prior antecedent, but that the whole thing should be read sort of from the back to front. It's a strained reading of the text that would not occur in the absence of an effort to preserve prior law beyond what would seem to be justified by the text.

We have discussed the legislative history in some detail to show that Congress was well aware of reasons why the rationale that had been expressed in the prior cases had become largely outmoded by changes in

commercial practice and by the Federal Tax Lien Act of 1966 which adopted an approach to notification of other creditors of federal tax liens and clarification of filings that was quite comparable to the protection afforded by the Uniform Commercial Code for consensual liens, so that the two main rationales that had been expressed in the older cases, that it was harder for creditors to find out about tax liens, and that consensual liens typically applied only to one piece of property, had both become largely obsolete, and Congress was aware that they had become obsolete.

So there is considerable reason why Congress would not have wanted to preserve the old rule.

And then on the last two pages of our reply brief, pages 13 and 14, we explain an anomaly that would be introduced into five -- Section 506 itself if the old rule were read into 506(b) because 506(d) gives a secured claimholder the right to skip the bankruptcy process altogether and preserve his claim, and that way he would have a right to interest, and he would have an incentive to skip the bankruptcy process if he had to sacrifice his right to post-petition interest in order to invoke his rights under 506(b).

So all of these reasons add up to us to the proposition that the proper course for the courts here

in interpreting this provision is to take Congress at its word and give effect to the provision as Congress enacted it. That is what the Fourth Circuit quite properly concluded in the Best Repair decision that is in conflict with the decision of the Sixth Circuit in this case, and that is the judgment we submit this Court should reach.

QUESTION: Mr. Wallace, you say that the government hadn't acquiesced in the prior decisions that had not allowed interest on involuntary liens.

Were there any decisions that agreed with the government? Or was it --

MR. WALLACE: We had not managed to win that point. We've collected the prior decisions on page 25 of our brief. You'll note that they were not uniform. The Harrington case, as we explain in the footnote on page 25, really deviated quite substantially from the other pre-Code decisions. The last of the decisions, the First Circuit decision in Boston and Maine Corporation, was decided after the Code was enacted, but it still dealt with pre-Code law. And it's an indication that the government was continuing to contest the issue in additional circuits.

So the law had not been entirely settled, but the Service's view had not prevailed. We were unable to

find any cases in which it had.

QUESTION: Could I ask you, this was a reorganization?

MR. WALLACE: Yes, Chapter 11, a reorganization with a debtor in possession.

QUESTION: And you think the secured creditor can just stay out of the reorganization proceeding and foreclose his property?

MR. WALLACE: Later on, that's right. He can preserve his claim for the -- to assert against the reorganized --

QUESTION: He can preserve his claim without filing, but does that -- does it follow that he may then foreclose on property that may absolutely frustrate the reorganization?

MR. WALLACE: Under 506(d) he can preserve his claim, I mean, but the timing of it --

QUESTION: Well, I know what you say but I don't -- but that's different than saying he may stay outside and foreclose his -- foreclose on his security.

MR. WALLACE: He may not be able to do it while the reorganization is in progress.

QUESTION: Well, if he may not be able to do it outside and he has to -- he can preserve his claim, and the reorganizatior -- the reorganization court is

bound to recognize his secured claim, but then the question still remains about post-judgment interest.

Do you have -- do you have some instruction --

MR. WALLACE: I have some information that a creditor could be forced in by the debtor himself filing the claim on his behalf, as these things work.

That is, you know, a point that we make at the end of our reply brief, which is something of a make way point. I think our case stands quite strongly without it, and I'll reserve the balance of my time, if I may.

QUESTION: Thank you, Mr. Wallace.

We'll hear now from you, Mr. Cohen.

ORAL ARGUMENT OF I. WILLIAM COHEN

ON BEHALF OF THE RESPONDENT

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

The Court of Appeals correctly followed the decisions of this Court when it concluded that Section 506(b) of the Bankruptcy Code does not overrule pre-Code law, and that the language of the statute does not provide for the payment of post-petition interest on oversecured, nonconsensual liens.

The decision of the Court of Appeals followed three recent decisions of this Court which focused on the proper rule of statutory construction in this

situation. The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intention specific.

QUESTION: Is that true, Mr. Cohen, in a case where you have the Bankruptcy Code of 1978 that really was out to change a whole lot of things? I mean, that isn't simply like a single law changing an earlier decision.

MR. COHEN: We believe, Your Honor, that Section 506(b) did codify pre-Code law. It codified the entitlement of secured creditors to interest if they were consensual secured creditors. It didn't abrogate --

QUESTION: But that's not how it reads.

What do you do with Mr. Wallace's point that there is no way to read this to codify pre-Code law if you consider these cases standard pre-Code law? This language, no matter how you read it, requires that interest be provided for in the text of the agreement, and the pre-Code law didn't divide between whether it was provided for in the text or whether it was not, but rather, it divided between voluntary and involuntary liens, whether interest was explicitly provided for in the voluntary lien or not.

MR. COHEN: Well, the voluntary lien, Justice,

was a lien that would be created by agreement, and the reason that the Section 506(b) adopts the pre-Code law is the rational behind that was to allow secured creditors only if they negotiated for, only if they bargained for interest to be entitled to interest. And --

QUESTION: Are you saying the pre-Code law did require that the agreement contain a provision for interest?

MR. COHEN: Yes, I am.

QUESTION: Which of those cases say that?

MR. COHEN: The five court of appeals cases, all the courts of appeal decisions that dealt with the issue of whether or not a tax lien was entitled to interest stated that it was required to be included in the agreement. All the courts of appeal decisions required that. The Bass case, the Kerber case --

QUESTION: They certainly have a basis to --

MR. COHEN: The Bass case; the Boston and Maine Corporation case, which was a First Circuit case; the Kerber Packing Company Case, which was the Seventh Circuit case; the Harrington case, Fourth Circuit; and the Mighell case, which was the Tenth Circuit. All cases required a secured creditor to have a provision for interest in his agreement, required him to be a consensual secured creditor in order to be entitled to

interest.

QUESTION: May I ask you, because you seem to disagree with Mr. Wallace on what the pre-Code law was, are the cases that you just called our attention to cases in which the government was making a claim for interest, or are those cases in which a private secured creditor was asking for it?

MR. COHEN: Always, in all of those cases, the government is making a claim for interest. The courts of appeals decisions --

QUESTION: Do you have any cases involving private creditors who were claiming interest, and they said -- and the court said no, you can't have it because it's not in your agreement. That's what Mr. Wallace says their cases so hold.

MR. COHEN: I'm not aware of any, Your Honor, but I believe that the reason that Mr. Wallace is making the distinction is that he is overlooking the rationale for the decision, the rationale for the requirement that a creditor must be a consensual creditor in order to be entitled to interest.

QUESTION: What is the rationale? I don't uncerstand.

MR. COHEN: That in order to be able to share interest, to be entitled to interest before other

creditors get paid, you have to have bargained for interest. The courts universally recognized that if a party did not bargain for interest, he ought not be entitled to it because the result of giving a creditor interest who didn't bargain for it is to deprive all of the creditors below that creditor of their right to share in the distribution.

In most insolvency states, estates, there's barely enough to pay the principal of claims let alone interest, and if the assets of the estate are consumed by the payment of interest, it's likely that there will be no distribution to the creditors below.

QUESTION: Gee, but that doesn't seem to me in accord with what the law usually does. If I make a contract with you and under that contract money is due on a certain date, and I don't provide in the contract that if you don't pay it on that date you'll have to pay me interest, the law would still give me interest, wouldn't it?

MR. COHEN: The general rule is that interest stops on the date of bankruptcy, Your Honor. Interest stops for secured creditors and unsecured creditors, and that's been the law of this Court.

QUESTION: That's what you're telling me.

MR. COHEN: Yes.

QUESTION: But I'm saying that seems to me contrary, the fact that it has to be spelled out in the agreement and that it's not enough that the agreement is simply consensual, so that it would be an implied term.

Wouldn't it be an implied term of any agreement because the law always gives interest?

MR. COHEN: No, it is not.

QUESTION: No?

MR. COHEN: It is not.

QUESTION: -- wouldn't say that if they were claiming interest before the bankruptcy petition was filed.

MR. COHEN: No, because the --

QUESTION: Well, even if it, even if it isn't stated in the agreement, you're going to get interest under the law up till the time of the petition in bankruptcy. It may be the general rule that after that you don't get interest, but you do before.

MR. COHEN: You would only be entitled to interest, Your Honor, if the agreement provided for it, or if a particular statute --

QUESTION: Wait a minute, wait a minute. Up till the time of the petition. You mean, you're not going to get interest in bankruptcy unless it's specified in the agreement?

MR. COHEN: Only if the agreement provides for it or if a statute gives you interest.

There are many creditors, Your Honor, who do not get interest even up to the date of bankruptcy. But --

QUESTION: Well, that may be, that may be so, but how -- in an ordinary contract case?

MR. COHEN: If the statute that created the contract, or the contract between the parties entitled that creditor to interest, he would be entitled to interest up to the date of bankruptcy.

QUESTION: What about a, what about a seller of goods who delivers the goods and the payment is due, and it is not paid, and there's no provision in the contract for interest, and then the buyer goes into bankruptcy, and interest -- if you had gone to court, the -- no doubt that you would have gotten prejudgment interest.

MR. COHEN: If the law of the jurisdiction, Your Honor, gave you interest --

QUESTION: Well, it doesn't? Isn't it -- as Justice Scalia asked you, isn't it normally that courts give you interest up to the date of judgment?

MR. COHEN: Yes, but it's different here, and the reason that it's different is because this Court has

seen fit to say on many occasions that interest stops on the date of bankruptcy. In the New York v. Saper case this Court --

QUESTION: Well, let's assume in a state, in a state where the law is by judicial decision that in the contract case I gave to you --

MR. COHEN: Yes.

QUESTION: -- interest accrues up to the date of judgment.

MR. COHEN: Okay.

QUESTION: Now, surely in a bankruptcy case, wouldn't you -- if there hasn't been any judgment, nevertheless, here comes bankruptcy, a claim is filed, wouldn't the claim be allowed if it claimed interest up to the date of bankruptcy?

MR. COHEN: Yes, up to the date of bankruptcy.

QUESTION: Thanks.

QUESTION: Well, isn't the reason for cutting off interest with bankruptcy a statutory provision rather than judicial decision?

MR. COHEN: It's a -- it was originally a judicial decision, Your Honor. Originally in the --

QUESTION: But isn't it now -- didn't the '78 Code provide by statute --

MR. COHEN: It did. It codified that

prohibition against the accrual of interest, and really, the situation that we have today is precisely the same. The case law developed exceptions to the general rule.

The general rule, as you have suggested, Chief Justice, is in Section 502. That section says that interest does not accrue after the date of bankruptcy. The exceptions to that rule were discussed in the case law. and there were three exceptions that were developed as a result of the cases that discussed the issue.

The first exception said that interest was allowed in those estates where the debtor was solvent; where there was enough to pay all creditors both principal and interest was allowed to be paid.

The second exception arose in the situation where the secured creditor was in possession of the collateral, and the collateral earned income after the date of bankruptcy. In that situation the secured creditor is entitled to interest.

The only exception that the government says applies today is the third exception, and that's the exception that evolved that allowed interest in situations where the collateral exceeded the debt.

But all of the courts of appeal that decided the issue before the adoption of the Bankruptcy Code stated unequivocally that interest is not to be paid to

an oversecured tax claimant. And those are the decisions that we've cited in our brief, and there are a number of reasons for that.

First of all, as an aside, I think it's important to note that the Internal Revenue never asked at the time of the adoption of the Code and at the time of all of the revisions to the Code after that in 1978, never asked that interest be paid on the oversecured claims due Internal Revenue.

QUESTION: They never asked them.

MR. COHEN: They have never asked for that.

QUESTION: Congress, asked Congress?

MR. COHEN: That's correct. As a matter of fact, they cited, the Commissioner of Internal Revenue cited the Nicholas case. The Nicholas case stands for the general proposition that interest stops, and it cited the decisions of this Court that interest stops on the date of bankruptcy. That case specifically referred to New York Saper, and the New York v. Saper case was a case that extended that general rule to tax claims. That case was cited by the Commissioner of Internal Revenue.

The table of derivation of House Rule 8200 stated that the present law, in reference to Section 506(b), was In re Black Ranches. Well, In re Black

Ranches was an Eighth Circuit Court of Appeals decision which said that interest is payable to an oversecured consensual creditor, not to a nonconsensual creditor.

QUESTION: Consensual creditor or creditor where it's provided for in the agreement.

MR. COHEN: Yes. A --

QUESTION: Yes what?

MR. COHEN: A consensual creditor is a creditor whose securec claim arises by agreement.

QUESTION: Oh, I have no doubt it arises out of the agreement. Is it provided for in the agreement?

This case that you're quoting, did this case say that the provision for interest has to be in the agreement, which is how the statute reads?

MR. COHEN: I am not aware of the answer to that, Your Honor.

QUESTION: Mr. Cohen, let me just be sure -- you've cited us the Nicholas case and the Black Ranch case.

MR. COHEN: Yes.

QUESTION: Are these cited in your brief?

MR. COHEN: Yes. They are cited in the amicus brief and, I believe the Black Ranches case is cited in our case. The Nicholas case is cited in the amicus brief.

QUESTION: But not in yours.

MR. COHEN: I would have to check, Your Honor.

QUESTION: Does this case involve post-petition interest?

MR. COHEN: Yes.

QUESTION: Is the government entitled to interest on its claim up until that time?

MR. COHEN: It's only entitled to interest up to the date of bankruptcy.

QUESTION: But it is entitled to that.

MR. COHEN: Yes, it is, and it's entitled to interest after the date of confirmation. And the reason that the law has denied --

QUESTION: So the oversecured, the oversecured creditor is one whose security is greater than the principal plus interest up to the date of the petition.

MR. COHEN: Yes.

The reason that the law has denied the government's right to interest after the date of bankruptcy is based on the equitable rule that where the exaction and collection of interest is not fair to other creditors because of the initiation of the insolvency proceeding, in other words, the power to pay, the power to pay the claim is stopped as a result of the bankruptcy proceeding, it unfairly penalizes other

creditors because there us rarely enough to pay the principal amount of the claim, let alone interest.

And as I said earlier, the City of New York v. Saper stood for the proposition that this general rule which applied to all claims, secured and unsecured claims, also applied to tax claims.

The three exceptions to the general rule we've discussed earlier, and the five courts of appeals decisions were also discussed. There is nothing in the statute itself or in the legislative history that reflects an intention on the part of Congress to change the existing law.

QUESTION: Well, how about the placement of the commas?

MR. COHEN: Well --

QUESTION: Certainly that gives at least a presumption, doesn't it, that --

MR. COHEN: Except that this Court, Your Honor, has held on several occasions that punctuation should not be a part of the law, that if the punctuation is confusing, if the punctuation --

QUESTION: Well, what's confusing about this punctuation?

MR. COHEN: If you look at Section 506(b), you see that the last clause in that section, provided for

under the agreement under which such claim arise, qualifies the word "interest" just as it qualifies the terms "reasonable fees, costs or charges."

QUESTION: Well, but that certainly isn't at all apparent to me just by reason of the placement of the commas.

MR. COHEN: Well, I realize, Your Honor, that we all read the statute differently, and I also realize that there's no way that the ambiguity in the statute for one person is necessarily going to exist for another person.

QUESTION: No, but our decisions are not based on subjective understandings. There is supposed to be some general rule as to how one reads an English sentence.

MR. COHEN: I appreciate that, and the cases have talked about that. But there were two courts of appeal decisions after the Code that said that that language is ambiguous. The Sixth Circuit and the First Circuit found the language ambiguous.

QUESTION: But we now have it before us and can determine for ourselves whether it's ambiguous or not.

MR. COHEN: And that's precisely why we're here today. The courts have split on this issue. It's

the opinion of many, including legal scholars who have discussed this section, that the language is ambiguous, and as a matter of fact, when you apply the rules of construction that the government asks the Court to adopt today, you find that the cases that have discussed those rules of construction have used language that we have in this case and found exactly the opposite.

In the Moore case, Justice Brandeis found that language, exactly the same as we have in this case today, should be interpreted in an opposite way. He said that when you apply a clause to words that would make as much sense if you applied it to all the words as it would if you applied it to just a few words, it should be applied to all of the words.

And in this case, if you applied that principle discussed in the Moore case by Justice Brandeis, you would find that the term "provided for in the agreement" applies to interest as well as fees. And that's the position that the courts of appeals have said, and that's the position that we believe is the appropriate decision for this Court to make.

The --

QUESTION: Counsel, the government points out that Sections (a) and (c) apply to nonconsensual liens. I suppose Section (d) does also?

I am not --

MR. COHEN: 506(d), Your Honor?

QUESTION: I'm sorry, subsection (a) of 506 --

MR. COHEN: Yes.

QUESTION: And (c) apply to nonconsensual liens?

MR. COHEN: Yes.

QUESTION: How about (d)?

I'm not --

MR. COHEN: I believe it does, yes.

QUESTION: I believe it -- so under your view, only Section (b) applies to consensual liens only.

MR. COHEN: No. What I'm saying is that 506(b) has to be interpreted in light of the pre-Code decisions. The pre-Code decisions can be read consistently with this section, and that is that interest is not allowed under the pre-Bankruptcy Code decisions --

QUESTION: Well, how is that different from saying that only Section (b) applies tc consensual liens only?

MR. COHEN: Well, only Section (c) applies to -- I'm sorry. (b) applies to oversecured consensual liens, and if a lien is oversecured, Your Honor, then it falls within subsection (b). Subsection --

QUESTION: I understand that, but I simply want to see if it's correct -- maybe it isn't -- that uncer your view, the only section, the only subsection in 506 that applies exclusively to consensual liens is subsection (b).

MR. COHEN: I'm sorry, exclusively to --

QUESTION: Under your view, subsection (b) applies only to consensual liens, correct?

Tell me if it's incorrect.

MR. COHEN: I believe that's correct.

QUESTION: All right. And that's -- and all of the other subsections apply to consensual and nonconsensual liens, correct?

MR. COHEN: I believe so.

QUESTION: All right.

No, that is somewhat of an anomalous statutory scheme, is it not?

MR. COHEN: Well, it would be, Your Honor if you were not reading (b) in light of the pre-Code decisions.

So what I am asking the Court to --

QUESTION: Well, but at the outset we look at the words of the statute, and you're telling us that it's ambiguous. Certainly in the context of the entire section it seems that the government's reading of the

statute is eminently plausible.

MR. COHEN: It's plausible, but it disregards the prior law, it disregards the fact that there is no legislative history to explain why the law would be changed, and it disregards the rationale for the law which we believe was carried over into the Bankruptcy Code. We believe that this section should be read to carry over the prior law that existed before 1978.

QUESTION: Why do you need legislative history to show that a change is made? Congress can surely make a change in a statute without even having a committee meeting, can't it?

MR. COHEN: It can, Justice Scalia, but when that change is going to be made, there's usually a reference in the legislative history to explain the reason that the change is going to be made.

QUESTION: Sometimes, not always. Maybe the explanation is simply that the Justice Department didn't like the prior rule, they hadn't acquiesced in the cases, and they, they got to the --

MR. COHEN: But that's precisely the point I --

QUESTION: -- they got to the right Senators or Members of the House and got it changed.

MR. COHEN: That's precisely the point I was trying to make a moment ago. The Internal Revenue

Service never requested Congress to make a change. They specifically cited a case that stood for the proposition that we believe stands for the law that we're asking you to confirm today, and the Justice Department never asked Congress to make a change on this issue.

The reason that they never asked is because they recognized that the law was continued and would continue as it had been pre-Code. They had asked the courts five times to change the law so that they would be entitled to interest, and in all five times they were rebuffed.

QUESTION: Mr. Cohen, can I get back to the text and ask -- my problem with the text is not just the comma, although I do tend to read commas since they are written there. It's also, it's also the text itself. What is the -- it seems to me there's no utility in repeating the phrase "such claim" unless you mean to separate the meanings the way the government has contended.

That is to say, if the passage meant what you say, why wouldn't it have read, leaving out the comma, there shall be allowed to the holder of such claim interest and any reasonable fees, costs or charges provided for under the agreement? But it doesn't say that. It says interest on such claim and any reasonable

fees, costs or charges provided for under the agreement under which such claim arose.

I don't see any reason for the first "on such claim." You know, what else would it be interest on?

MR. COHEN: There are legal scholars who have discussed that issue, and probably the leading treatise on bankruptcy law is Collier's on Bankruptcy, and he specifically discussed this point. Collier suggests that the reason for the comma is to interpret this section in a way that would eliminate the right or prevent interest being charged on anything but principal.

There are some contracts that provide that interest can be charged on top of the costs, the fees, and the charges, and it is Collier's interpretation that it was precisely the intention of the drafters in inserting the comma here to make sure that interest would only be included or charged on the claim and not on the other items.

QUESTION: That's, that's a good explanation.

QUESTION: Not just -- that's not just the reason for the comma; it's the reason for saying "on such claim."

MR. COHEN: Correct.

Now, the government suggests that the doctrine of the last antecedent is an answer to the issue if the

Court is not satisfied with the grammar, with the construction, or with the placement of the words in the sentence, but the doctrine of the last antecedent, as we have suggested, is nothing but an aid to construction, and the Moore case specifically discussed that same doctrine and came to an opposite conclusion.

We're asking you really not to rely on the comma in interpreting the law, but rather, to look to the law as this Court has interpreted it in other decisions and as five courts of appeal decisions before the adoption of the Bankruptcy Code interpreted it, and as two courts of appeal decisions since the Code was adopted have interpreted that decision.

If there was no pre-existing law, I think that the government's argument would be more persuasive about the rules of statutory construction, but the decisions of this Court which the government overlooks in discussing this issue are diametrically opposed to what they're saying. The government is saying that there is no precedential value in the prior decisions of this Court, and yet you recently said in United Savings v. Timbers of Inwood that Section 506(b) codifies pre-Code law. You said in Midlantic v. -- in Midlantic National Bank and Kelly v. Robinson that it's presumed that Congress is aware of judicial precedent and that it's a

normal rule of statutory construction that if Congress intends to change judicially created concepts that are in existence at the time a statute is adopted, it makes that intent specific.

What the government does in this case is they twist and turn in an attempt to get out from under those three decisions. They specifically forget that all three cases, the Midlantic case, Timbers of Inwood, and Kelly v. Robinson, dealt with the statutory construction of the Bankruptcy Code, and Timbers dealt with the meaning of Section 506(b).

QUESTION: Mr. Cohen, just so I know what you're urging upon us is the principle we should adopt, you want, you want us to adopt, and you say this is what the pre-Code law was, the principle that if you have a voluntary lien, you can get interest, post-petition interest if, but only if your agreement specifically says I am entitled to interest, and if it doesn't specifically say that, although in a normal lawsuit, outside of bankruptcy, you'd be allowed interest, you can't get it.

MR. COHEN: Well, I think, Your Honor, that you may be mixing up two concepts. You talked about an involuntary lien. I am distinguishing between a consensual lien and a nonconsensual lien.

QUESTION: All right. I said a voluntary lien, I believe, and if you want to say consensual, that's fine. It's a consensual lien, right?

MR. COHEN: Yes.

QUESTION: Pursuant to an agreement in which you lend me -- I lend you money or whatever.

MR. COHEN: Right.

QUESTION: And you would allow -- you want us to interpret this language so that post-petition interest would be allowed only if the agreement by which I lend you the money specifically says I'm entitled to interest if you don't pay me the money.

MR. COHEN: That's correct.

QUESTION: If it doesn't specifically say that, then there would be no post-petition interest.

MR. COHEN: That's correct, because the general rule is that interest stops on the date of bankruptcy. It's only the three narrow exceptions that we spoke about in our brief and that the amicus brief addresses, only in those three narrow exceptions that the general rule changes.

QUESTION: Mr. Stein, there's a little bit of a problem with the language under your reading because the interest on such claim, it seems to me, is not necessarily just interest on the principal, but it also

could be interest on the principal plus interest that accrued to the date of the petition.

MR. COHEN: I am suggesting that the language of 506(b) is ambiguous, and that's why we --

QUESTION: What is allowable? Is it interest on the principal or interest on the amount of the claim at the time it's allowed?

MR. COHEN: Interest on the amount of the claim up to the date of bankruptcy.

QUESTION: But it has to be supported by a provision in the agreement that says you get interest on the principal.

MR. COHEN: It has to be supported by an agreement that says you get interest.

QUESTION: Without saying what it's on? That would be an unusual agreement.

MR. COHEN: It would be, Your Honor. Most agreements specifically define what's -- what interest is calculated on. It's Collier's that made the distinction that that's how it saw the comma, that the comma was really intended to limit the accumulation of interest only on that portion of the claim that was the claim itself, and not costs and fees.

QUESTION: Does Collier say that the agreement itself must provide for interest, or does he make simply

the distinction between consensual and nonconsensual liens?

MR. COHEN: He says that the precedent suggests that it has to be provided in the agreement. He believes that the precedent, the pre-Code precedent is the proper interpretation of this section.

QUESTION: Is the person who writes Collier's still named Collier?

(Laughter.)

MR. COHEN: No, he's not, Your Honor.

QUESTION: -- J. W. Moore.

MR. COHEN: Several people who are contributing authors to Collier's.

In the Kelly v. Robinson case, this Court told us that of course the starting point in every case involving construction of a statute is the language itself. In citing Justice O'Connor, the Court said in expounding a statute, we must not be guided by a single sentence or a member of a sentence, but look to the provisions of the whole law and to its objects and policy.

It's our belief that the objects and policy of this law mandate that the Court looks to the general rule that would deny the payment of interest as of the date of bankruptcy, and only in the three narrow

exceptions which the courts have dealt with should the government be seen as a party that potentially would be entitled to interest.

In the face of the confusing comma and the patent ambiguity of Section 506(b), as well as the absence which the government admits of any indication whatsoever that Congress intended, considered or even contemplated changing the case law which had preceded 506(b), we respectfully urge you to look at the pre-Code cases and to continue to make the decisions based upon the reasons that were enunciated in those decisions. At the very least, the government's --

QUESTION: Mr. Cohen, your time has expired. Thank you.

MR. COHEN: Thank you.

QUESTION: Mr. Wallace, you have two minutes remaining.

REBUTTAL ARGUMENT OF LAWRENCE G. WALLACE

ON BEHALF OF PETITIONER

MR. WALLACE: The very first of the pre-Code cases we cite on page 25, In re Kerber, is one in which the court of appeals said that the exception has been recognized by the courts to the extent of allowing post-bankruptcy interest to creditors who are deemed to have bargained for collateral to secure not only the

principal obligation but the interest thereon as well.

As the questioning has suggested, the law ordinarily deems that when a payment is due on a certain date and it isn't made on that date, that interest is then implied to the creditor.

Now, this Court's decisions in Midlantic and Kelly quite properly were cautious about affecting areas other than bankruptcy, important areas such as abandonment of property to the detriment of health and safety or obligations to make restitution to victims of crime, which Congress could not have, may not have anticipated.

But here we are dealing with a core bankruptcy matter, and to refuse to give effect to what Congress enacted because of an absence of legislative history is not easy to reconcile with Article I of the Constitution which does not require legislative history in order for Congress to make a change in the law. A majority vote in each House and the signature of the President is enough to supersede prior judge-made law.

QUESTION: Mr. Wallace, am I correct that you no more can point for us to a pre-Code case which denied interest on a consensual secured claim because interest was not specified in the agreement than can the other side point to a case which granted it?

MR. WALLACE: I cannot, Mr. Justice. We looked --

QUESTION: So that's sort of a standoff.

MR. WALLACE: -- at cases which denied post-petition interest to nonconsensual claims and said that they were available for consensual claims. We were not examining cases that might have distinguished between consensual claims.

The pre-Code law did not have the kind of flat rule that Corgress has provided. The courts were always saying, well, the bankruptcy referee can do what's equitable in the particular case. So all of the --

QUESTION: Thank you, Mr. Wallace.

MR. WALLACE: -- rules were malleable.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:03 a.m. the case in the above-entitled matter was submitted.)

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:

No. 87-1043 - UNITED STATES, Petitioner V. RON PAIR ENTERPRISES, INC.

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

BY alan friedman

(REPORTER)