

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: SHELDON BARUCH TOIBB, Petitioner
v. STUART J. RADLOFF

CASE NO: 90-368

PLACE: Washington, D. C.

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

2 (1:57 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 90-368, Sheldon Baruch Toibb v. Stuart Radloff.

5 Mr. Lieb, you may proceed whenever you are
6 ready.

7 ORAL ARGUMENT OF PETER M. LIEB

8 ON BEHALF OF THE PETITIONER

9 MR. LIEB: Mr. Chief Justice, and may it please
10 the Court:

11 The issue in this case is whether an individual
12 who has no business is eligible for chapter 11 of the
13 Bankruptcy Code. The amicus in this case has urged this
14 Court to adopt a business requirement for chapter 11, even
15 though such a requirement is contrary to the plain
16 language of the statute and would add a complexity to
17 bankruptcy cases that was not intended by Congress.

18 Section 109(d) of the Bankruptcy Code by its
19 terms provides that a person, except for a stockbroker or
20 a commodities broker, who is eligible for chapter 7 is
21 also eligible for chapter 11. Section 101.37 of the code
22 defines the word "person" to include an individual,
23 partnership, or corporation. The plain meaning of these
24 words is that, except for a stockbroker or commodities
25 broker, an individual, partnership, or corporation who is

1 eligible for chapter 7 is also eligible for chapter 11.
2 And since there is no dispute in this case that an
3 individual without a business is eligible for a chapter 7,
4 the statute by its terms makes them eligible for chapter
5 11 as well.

6 Now, the use of the word "person" in section
7 109(d) cannot be viewed as a legislative oversight or a
8 carelessly chosen word. In section 109 Congress focused
9 exclusively on eligibility for the various chapters, and
10 Congress demonstrated in section 109 that it knew how to
11 limit eligibility for the various chapters, and that it
12 even knew how to distinguish some persons from other
13 persons. Section 109(e), for example, limits the
14 eligibility in chapter 13 to some individuals.

15 Congress also demonstrated in section 1304 that
16 it knew how to distinguish individuals who were engaged in
17 a business from individuals who were not engaged in a
18 business. And so we believe that the amicus' concession
19 in this case that there is no express business requirement
20 in the code for chapter 11 is a clear indication that no
21 such requirement was intended by Congress.

22 The amicus --

23 QUESTION: Mr. Lieb, if you're right, does this
24 mean that consumer debtors can be placed into involuntary
25 bankruptcy under chapter 11 by creditors?

1 MR. LIEB: It does mean that, although we think
2 it's unlikely that that will happen very often.

3 QUESTION: Why is that?

4 MR. LIEB: Because -- because -- for the same
5 reasons that we think that consumers will not generally --
6 well, it doesn't generally make sense for a consumer to
7 use chapter 11 because of the complexity and the length of
8 a chapter 11 proceeding. And for the same reasons
9 creditors will not want to put consumer debtors into
10 chapter 11 because of the added complexity and the length
11 of the proceedings. It may make sense in most cases to
12 force them into chapter 7.

13 QUESTION: Well, Congress certainly expressly
14 rejected that under chapter 13, didn't it?

15 MR. LIEB: Congress did reject that in chapter
16 13, but there were peculiar reasons for rejecting that in
17 chapter 13 which don't apply in chapter 11. Congress'
18 principal concern in chapter 13 was a concern with
19 involuntary servitude, and that's reflected in statements
20 in the legislative history. And that's because in chapter
21 13 a plan must provide for the payment of future wages
22 pursuant to the plan of reorganization. There isn't any
23 such requirement in chapter 11 that future wages be used
24 in the plan of reorganization. In fact section 541(a)(6)
25 expressly excludes future wages from property of the

1 estate. And so the concern about involuntary servitude
2 that was expressed in the legislative history just doesn't
3 apply in chapter 11.

4 The amicus has suggested in its argument that
5 the exclusive purpose of chapter 11 is to resuscitate
6 failing businesses, and that making individuals eligible
7 for chapter 11 without a business serves no purpose of the
8 Bankruptcy Code, and we think that this is plainly wrong.
9 A fundamental purpose of the Bankruptcy Code is to
10 maximize the value of the estate, and there are instances
11 when a liquidation or reorganization in chapter 11 will
12 maximize the value of the estate versus a liquidation in
13 chapter 7. In chapter 7 a trustee is appointed and the
14 trustee is under a duty presumed to section 704 to
15 liquidate the assets to cash as expeditiously as possible.
16 And expeditiously is the word used in section 704.

17 In chapter 11, by contrast, in most cases no
18 trustee is appointed, and chapter 11 offers individual
19 debtors the flexibility to propose plans of reorganization
20 which liquidate or reorganize over an extended period of
21 time. And there were certain types of assets which when
22 sold in a chapter 11 -- chapter 7 setting, in the forced
23 sale atmosphere that often accompanies sales by trustees,
24 which will yield less in chapter 7 than if they are sold
25 pursuant to a chapter 11 plan. And I am thinking in

1 particular of illiquid assets such as real estate or
2 perhaps stock in a closely held corporation. If sold
3 pursuant to chapter 7 they may well yield less, and the
4 estate may be diminished to the extent that they yield
5 less.

6 In addition, an individual may be more familiar
7 with his assets, and for this reason can add value to the
8 estate. In this case, for example, the principal -- one
9 of the principal assets was the debtor's causes of action.
10 And the individual debtor's participation in the lawsuits
11 that he hopes to bring may be critical to their success.

12 And finally, whereas -- and this could be in
13 contrast with the trustee where a trustee may be unwilling
14 to pursue a lengthy litigation, and even if the trustee is
15 willing to pursue the lengthy litigation, that would, that
16 may not be the most efficient way of pursuing litigation
17 because of the added expenses and trustee's fees that
18 might accompany his involvement in the litigation.

19 . There is one other instance where it may make
20 sense --

21 QUESTION: Well, in your example about your
22 property, why would the debtor -- if it's going to be sold
23 in one proceeding or another, why would it, why would he
24 want to sell it in chapter 11 rather than chapter 7?

25 MR. LIEB: Well, in a --

1 QUESTION: Just to help the creditor?

2 MR. LIEB: Well, the -- if I take it your
3 question is asked what is the individual debtor's motive,
4 the motive is to yield as much as possible to pay off his
5 creditors in full and hopefully to regain some of the
6 value that may exist in the asset.

7 QUESTION: I thought maybe his desire would be
8 to retain the property for himself and maybe, maybe he's
9 got -- he obviously doesn't have a steady income or he'd
10 be in 13, I suppose.

11 MR. LIEB: Well --

12 QUESTION: But it may be he has potential to
13 earn money --

14 MR. LIEB: Well, it's --

15 QUESTION: -- and pay off his creditors in full.

16 MR. LIEB: That's another scenario where it
17 might make sense, although in this case because of the
18 individual debtor's high level of debt he wouldn't qualify
19 for chapter 13. So 13 is not available, given those
20 limits.

21 QUESTION: But he can get in chapter 11.

22 MR. LIEB: He can get into --

23 QUESTION: You think.

24 MR. LIEB: We submit that he can get into
25 chapter 11. There is another instance where it may make

1 some sense for individuals without businesses to use
2 chapter 11, and that's the situation in which an
3 individual has no business but wants to get back into
4 business. And he may want to use chapter 11 to pay off
5 his creditors so that he can have dealings with them in
6 the future and retain his, as good a credit rating as
7 possible.

8 QUESTION: What does he have to show to get a
9 plan approved under chapter 11?

10 MR. LIEB: Well, what he has to do is provide a
11 disclosure statement which is approved by the court. The
12 plan then must be approved by at least one class of
13 creditors, which approval is defined to include --

14 QUESTION: And he can scale down the unsecured,
15 I suppose, if he can --

16 MR. LIEB: Well, he can't scale down the
17 unsecured creditors to such an extent that they would get
18 less in chapter 11 than in chapter 7 --

19 QUESTION: Yes.

20 MR. LIEB: -- because of the best interest test.

21 QUESTION: Sure. Sure.

22 MR. LIEB: But he -- so his plan must at least
23 provide the same amount that a hypothetical chapter 7
24 debtor would -- creditor would receive.

25 QUESTION: Before the credit down operates.

1 MR. LIEB: That's correct. He also has to get a
2 sufficient vote from creditors in order to --

3 QUESTION: And he can't scale down secured
4 creditors? He can postpone them?

5 MR. LIEB: He can postpone secured creditors,
6 and secured creditors -- I mean, if secured creditors feel
7 like they are not getting as much as they are entitled to,
8 they may, they can vote against the plan and prevent it
9 from being confirmed. So -- but in any event --

10 QUESTION: Can the creditors clearly prohibit
11 the chapter 11 plan if they choose?

12 MR. LIEB: If a sufficient number or amount of
13 creditors in one class votes against it, then they can
14 prevent the plan from being confirmed.

15 QUESTION: Well, what if all there is basically
16 is some consumer debt and a home with a mortgage on it?

17 MR. LIEB: Right.

18 QUESTION: Can the holder of the mortgage
19 prevent the chapter 11?

20 MR. LIEB: It, I think it depends on whether the
21 -- on the given facts of the case and whether, for
22 example, the consumer debt and the mortgage debt are
23 lumped into one class. If --

24 QUESTION: Well, what is normally done in that
25 regard?

1 MR. LIEB: I think in -- that secured creditors
2 are often considered in a different class. And if the
3 secured creditor is in a different class and votes against
4 the plan, it -- he can still prevent the plan from being
5 confirmed if he can establish that he would receive less
6 than he would in the chapter 7 liquidation.

7 QUESTION: Well, under chapter 11 I take it the
8 debtor can propose and the court can approve a lower rate
9 of interest on the mortgage, and can modify the maturity
10 of the debt?

11 MR. LIEB: A debtor could propose that, but if,
12 for example, the secured, the mortgagee would not receive
13 the same amount doing the arithmetic that he would receive
14 in a chapter 7 liquidation and decided to object, the plan
15 can't be confirmed, pursuant to section 1129.

16 The amicus' -- has -- principal arguments come
17 out of references in the code and the legislative history
18 to the business uses of chapter 11. And, to be sure,
19 there are numerous references in the code and the
20 legislative history to the business uses of chapter 11.
21 But we believe that those references demonstrate Congress'
22 expectation that chapter 11 would be used primarily by
23 businesses. We don't think that they demonstrate an
24 intent to limit chapter 11 to businesses.

25 In fact these -- both the Senate and the House

1 reports state that chapter 11 is primarily designed for
2 businesses, not exclusively. And they also both indicate
3 that consumers will not use chapter 11, not because they
4 are ineligible for chapter 11, but because in most cases
5 the procedures are just too complex. The House report
6 also states that the report distinguishes between business
7 debtors and consumer debtors, but that it also plainly
8 states that the bill itself makes no such distinction.

9 The amicus also urge this Court to be fearful of
10 the fact that if individuals are eligible for chapter 11
11 this might open the floodgates to abusive or bad faith
12 filings. But there are numerous protections in the code
13 to deal with situations if there are additional bad-faith
14 filings brought upon by the result that we urge. In
15 particular, section 1112(b) of the code gives the
16 bankruptcy court discretion to dismiss the case or convert
17 it to chapter 11 -- to chapter 7, for cause. And clearly
18 cause would include the bad-faith situation that is
19 suggested. In fact a number of courts are using section
20 1112(b) to convert cases to chapter 7 in situations when
21 the filing is found to be in bad faith. And the court can
22 do this, use section 1112(b) at any time during a case,
23 immediately after the filing up until the time when the
24 plan is being confirmed.

25 In addition, as I stated earlier, a chapter 11

1 case must be submitted to creditors for their vote, and if
2 the case is brought in bad faith it is hard to imagine
3 that a plan would be attractive enough to creditors that
4 creditors would give it the necessary votes.

5 And finally, again at chapter 11, section 1129
6 of the code provides that a plan cannot be confirmed over
7 the objection of any creditors unless those creditors
8 would receive the same amount that they would receive in a
9 hypothetical chapter 7 liquidation. And so there are
10 protections to deal with the situation of abusive filings
11 which might be brought on by the courts.

12 We therefore submit that Congress plainly
13 intended to make individuals without businesses eligible
14 for chapter 11, and that forcing individuals who are not
15 eligible for chapter 13 to use chapter 7 disserves the
16 fundamental policy of the Bankruptcy Code of maximizing
17 the value of the estate.

18 I'd like to reserve my remaining time, if there
19 -- unless there are any further questions at this time.

20 QUESTION: Very well, Mr. Lieb.

21 Mr. Marzen.

22 MR. LIEB: Thank you.

23 ORAL ARGUMENT OF STEPHEN J. MARZEN

24 ON BEHALF OF THE RESPONDENT

25 UNITED STATES SUPPORTING PETITIONER

1 MR. MARZEN: Thank you, Mr. Chief Justice, and
2 may it please the Court:

3 It's not at all unnatural to reorganize consumer
4 debts in chapter 11. If an individual proprietor who owns
5 a mom and pop store has debts, he can, he or she can file
6 under --

7 QUESTION: What does the term "consumer debt"
8 mean, Mr. Marzen, as you just used it? Is it a word of
9 art?

10 MR. MARZEN: It's actually defined in the
11 Bankruptcy Code itself under 1017.

12 QUESTION: How is it defined?

13 MR. MARZEN: It's defined to mean debts
14 contracted primarily for a personal, family, or household
15 obligation. That --

16 QUESTION: So then a mom and pop store, its
17 indebtedness would be a consumer debt?

18 MR. MARZEN: A mom and pop store could have
19 business debts and consumer debts.

20 QUESTION: But they would be distinct from one
21 another?

22 MR. MARZEN: Yes. The code does provide a
23 distinction. I think raising that point has two very
24 important indications. First, since the code does define
25 consumer debts, if Congress wanted to exclude individuals

1 with purely consumer debtors from chapter 11 it would have
2 been very easy to add a phrase to section 109(d). Along
3 with stockbrokers and commodity brokers who are excluded
4 from chapter 11, Congress simply could have added the
5 phrase individuals with only consumer debts, and that
6 would have had the same effect as the Eighth Circuit's
7 judgment in this case.

8 The second point, and based on the definition of
9 consumer debtor in the code, is that it is very wise for
10 Congress not to include such a bar. It's a very difficult
11 threshold inquiry for a bankruptcy court to decide the
12 primary reason why debts were contracted. So if you
13 adopted an ongoing business requirement or a consumer debt
14 limitation as part of a chapter 11 threshold inquiry, the
15 bankruptcy court would have to figure out why primarily
16 debts were contracted.

17 Looking at petitioner's debts in this case
18 indicates how difficult that can be. The entire schedule
19 of debts is basically credit card debts, utility debts,
20 many of which were contracted for a business purpose as
21 part of this petitioner's consulting business or as part
22 of his business to get -- to solicit charitable
23 contributions, both of which were businesses. So it's
24 very, it's a very inappropriate and difficult inquiry to
25 have at the start of a bankruptcy litigation.

1 If a mom and pop store does file under chapter
2 11, the store can adjust and reorganize both the business
3 debts and the consumer debts as defined in the code. In
4 fact in 1990 according to statistics from the
5 administrative office of U.S. courts, more than 2,500, or
6 12 percent of chapter 11 cases were filed by individuals
7 primarily with consumer debts. So it's not at all
8 unnatural for bankruptcy courts to reorganize cases when
9 the primary debts to reorganize are consumer debts. Given
10 that that's the case, there's no reason in the Bankruptcy
11 Code or in bankruptcy policy to prevent mom and pop from
12 going in and reorganizing just their consumer debts, and
13 not bring in the store as well.

14 Three points very briefly this afternoon.
15 First, reorganization serves a useful purpose. Second, it
16 won't be subject to abuse. And third, it's dictated by
17 the code regardless of whether we think it's a good idea.
18 Chapter 11 serves a useful purpose for reorganizing
19 consumer debts for two reasons. One is that some assets
20 are worth more in chapter 11 than they are in chapter 11.
21 And that's because some assets have no ready market
22 because there is no pool of competing buyers.

23 A possible example here is petitioner's stock.
24 The corporation's only assets are licensed to -- licenses
25 to build low-head hydroelectric power plants on some

1 rivers. The only offers we have are from corporate
2 insiders, and the number of licenses and the amount of
3 money at stake probably is not sufficient to get
4 disinterested buyers or at least the large number of
5 disinterested buyers assumed by the efficient market
6 hypothesis, to bid on these assets and get a fair return
7 in a liquidation sale. In these kinds of situations it
8 may well be better to reorganize rather than liquidate.

9 The second and more typical example of when it
10 makes sense to reorganize under chapter 7 rather than --
11 reorganize under chapter 11, excuse me, rather than
12 liquidate, is when there's an asset that the debtor for
13 whatever reason wants to have, be it a family homestead
14 or, in this case, stock that the petitioner really deeply
15 concerns about. As petitioner pointed out, there is no
16 requirement and it's not possible under chapter 11 to
17 force the debtor to give up his future wage income.

18 Under chapter 11, however, the petitioner or
19 debtor can, if he or she wants, pledge future wage income
20 in order to redeem an asset that would otherwise be
21 liquidated under chapter 7. In that case the debtor can
22 give a better deal to the creditors in return for getting
23 them to return an otherwise non-exempt asset, in this case
24 petitioner's stock. That sort of deal may propose
25 benefits for the creditors and the debtors.

1 Second, individuals with purely consumer debts
2 will not be able to abuse chapter 11. Petitioner has
3 already described the authority under section 1112(b)
4 which allows a court to dismiss a chapter 11 case for
5 cause. And the statute describes 10 non-exclusive factors
6 for what may constitute cause, and the cases that amicus
7 cites on page 10 of his brief indicate that courts use
8 this policing power with fair degree of regularity.

9 The only point I would like to add here is the
10 role of the United States trustee, which is my client in
11 this case. The U.S. trustee, under 28 U.S.C. 586 has a
12 role in supervising every chapter 11 case. Under section
13 1112(b) the U.S. trustee is specifically authorized to
14 come in and file a motion so that if this, if there is an
15 abusive chapter 11 filing, if there is no possibility of
16 effectuating plan, if there is no money or income to fund
17 a plan, the U.S. trustee's duty and obligation is to come
18 in and file the motion and take care of the case. And
19 that is in fact what the U.S. trustee does right now in
20 the Eleventh Circuit, where the rule under the Moog case
21 is that consumers can file chapter 11 petitions.

22 My final point is that the Bankruptcy Code makes
23 consumer debtors eligible for relief under chapter 11.
24 The plain language of the code has been described, and in
25 response to Chief Justice Rehnquist's question I have

1 already described how unadministerable it would be to have
2 any other limit.

3 With that, I have nothing further.

4 QUESTION: Thank you, Mr. Marzen.

5 Mr. Hamilton, we'll hear now from you.

6 ORAL ARGUMENT OF JAMES HAMILTON

7 BY INVITATION OF THE COURT AS AMICUS CURIAE

8 IN SUPPORT OF JUDGMENT BELOW

9 MR. HAMILTON: Mr. Chief Justice, and may it
10 please the Court:

11 May I begin by thanking you for the honor of
12 appearing before you as amicus curiae to defend the
13 judgment below. Petitioner and the Solicitor General
14 would have this Court conclude that this is a simple case.
15 They would have this Court conclude that, to use
16 basketball parlance, this is a slam-dunk for the
17 petitioner because of the plain language of the statute.
18 They say that sections 109(b) and (d) do not exclude
19 consumer debtors who do not operate businesses from the
20 broad group that may be debtors under chapter 11, and thus
21 such consumer debtors may proceed under that chapter even
22 though it is designed and intended for business debts.

23 May I respectfully suggest that the issue is not
24 that simple. May I submit that just because, as I
25 concede, consumer debtors are not excluded by section 10

1 -- by the section 109 threshold definition, as the
2 Solicitor General refers to it, this does not mean that
3 consumer debtors may proceed to obtain relief under
4 chapter 11, for section 109 is not the only gatekeeper to
5 relief under chapter 11.

6 Now section 109(b) and (d) in essence provide
7 that persons may be debtors under chapter 7 and 11 only if
8 they are not certain entities. Now, while the plain
9 language of 109 does not exclude consumer debtors from
10 chapter 11, section 109 must be read in the context of the
11 code as a whole. This principle, of course, is a
12 commonplace of statutory interpretation. It is a
13 principle repeated by this Court in many, many cases,
14 including those interpreting the code. Indeed recently
15 this Court said in reference to the code in *Timbers of*
16 *Inwood Forest* that statutory construction is a holistic
17 endeavor.

18 Now, it is evident from several other provisions
19 of the code that certain persons who are not excluded as
20 chapter 7 debtors by the language of section 109(b) may
21 not proceed to relief under that chapter, and let me give
22 you one example. As petitioner concedes, an individual
23 consumer debtor who is able to pay his debts cannot
24 proceed to relief under chapter 7. Rather, the case will
25 be dismissed pursuant to section 707(b), because allowing

1 such debtors to proceed would be, in the language of the
2 statute, a substantial abuse of the provisions of this
3 chapter.

4 Now there are also various cases establishing
5 that while chapter 11, chapter 11 is available to
6 individuals who operate businesses, that chapter is not
7 available to individual consumers, and these cases are
8 cited at page 10 of our brief. Some courts have concluded
9 that a consumer, nonbusiness debtor who attempts to use
10 chapter 11 does not act in good faith, and thus is subject
11 to dismissal under section 1112(b) of that chapter which
12 allows dismissal for cause.

13 These courts, exercising the broad discretion
14 and the flexibility that is given them by section 1112(b),
15 have concluded that for an attempt to reorganize or to
16 rehabilitate to be in good faith there must be something,
17 that is there must be a business to reorganize or
18 rehabilitate, and if there is not dismissal for cause is
19 appropriate. Indeed the statute itself says that
20 dismissal is proper in the absence of a reasonable
21 likelihood of rehabilitation.

22 These cases under section 1112(b) are consistent
23 with section 1129(a)(3), which requires that
24 reorganization plans be proposed in good faith.

25 Now, it is apparent that section 1112(B) as

1 interpreted by these cases stands as a further
2 qualification to the eligibility requirements in section
3 109. It is, in other words, another gatekeeper to relief
4 under chapter 11.

5 Now, it may be remarked that section 1112(b)
6 does not specifically require dismissal of a chapter 11
7 case because where there is no business to reorganize, and
8 this of course is true. But it is also true that section
9 707(b) does not specifically require dismissal of a
10 chapter 7 case for substantial abuse where the debtor has
11 the ability to repay his creditors. But courts
12 nonetheless have had no trouble reaching this result by
13 reviewing Congress' intent as evidenced in the statute and
14 in the statute's legislative history.

15 Let me turn then to those portions of the code
16 and its legislative history that demonstrate that consumer
17 debtors should not be allowed to proceed to obtain relief
18 under chapter 11 even though they meet the threshold test
19 for chapter 11 that is set forth in section 109. I
20 believe it is difficult to dispute that chapter 11 was
21 designed and intended to provide reorganization relief for
22 corporate and individual business debtors, and not for
23 individual consumer debtors. The fundamental provisions
24 of chapter 11 focus on the plight of the business debtor.

25 For example, sections 1107 and 1108 authorize

1 the debtor in possession or the trustee to operate the
2 debtor's business. Section 1103 authorizes an equity
3 security holders committee to investigate the operation of
4 the debtor's business and the desirability of the
5 continuation of that business. Section 1106 authorizes a
6 similar investigation into the debtor's business by the
7 trustee. And the list goes on. Other examples are
8 collected at pages 9 and 10 of our brief.

9 Now these provisions and many others show that
10 chapter 11 was essentially structured for the business
11 debtor and not for the consumer debtor.

12 QUESTION: Mr. Hamilton, what is your response
13 to a point made by Mr. Marzen that if we accepted your
14 contention we would be establishing kind of a very
15 difficult jurisdictional test? How do we define when
16 someone is a business debtor and when not?

17 MR. HAMILTON: Well, this is obviously, Mr.
18 Chief Justice, a factual question. In this particular
19 case it was easy for the court to decide that Mr. Toibb's
20 debts were consumer debts, that he was not operating a
21 business, and therefore he was a consumer debtor and not a
22 business debtor. I believe in any situation you will have
23 a factual question. But in many of the situations that
24 are dealt with in the cases that we have cited, the court
25 had no difficulty making this determination.

1 QUESTION: The difficulty with having it such a
2 heavily factual question is, of course, that the
3 bankruptcy court might rule one way and a district court
4 or court of appeals reviewing the judgment another way,
5 and you might just have a lot of wheel spinning.

6 MR. HAMILTON: You may have factual questions.
7 I will concede that. But as I said, courts heretofore
8 have had no trouble in making this determination.

9 QUESTION: Courts that have followed the Eighth
10 Circuit rule in this case?

11 MR. HAMILTON: That's correct, yes.

12 Now, there is after all another chapter, chapter
13 13, that is designed and intended for consumer debtors.
14 And I would suggest that its very existence raises
15 questions about the propriety of consumer debtors using
16 chapter 11. And it's also important to look at the
17 legislative history relating to chapter 11, which shows
18 yet again that it was intended solely for business
19 reorganizations. For example, the Senate report at page 9
20 says that chapter 11 deals with the reorganization of a
21 financially distressed business enterprise. The House
22 report on chapter 11 reorganizations does not even mention
23 consumer debtors.

24 But the clearest indication that chapter 11 does
25 not apply to consumer debtors is found in the House report

1 section on liquidation. The House report plainly says
2 that if consumer debtors cannot use chapter 13, then
3 chapter 7 is the -- or straight bankruptcy -- is the only
4 remedy available to them. With the Court's indulgence, I
5 would like to read this brief passage which says, some
6 consumer debtors are unable to avail themselves of the
7 relief provided under chapter 13.

8 QUESTION: Would that be provided they don't
9 have regular income?

10 MR. HAMILTON: That would be one reason, yes.
11 Either no regular income or debts exceeding certain
12 limits.

13 For these debtors straight bankruptcy is the
14 only remedy that will enable them to get out from under
15 the debilitating effects of too much debt. I submit to
16 the Court that this passage could not be clearer. And
17 although we referenced it several times in our brief, the
18 petitioner in his reply brief has elided any mention of
19 it.

20 I will concede to the Court that there is some
21 ambiguity in certain other passages in both the House and
22 the Senate report as to whether chapter 11 is available to
23 individual consumer debtors. But this ambiguity, I
24 submit, should not mitigate the force of this precise,
25 this unqualified statement that I have just referred to.

1 Moreover, the principal ambiguous passages which are cited
2 at pages 13 and 14 of our brief can best be interpreted to
3 mean that individual business debtors can use chapter 11,
4 but individual consumer debtors cannot. To read these
5 passages to say that any individual can proceed under
6 chapter 11, as petitioner and the Solicitor General do, is
7 to ignore the definitive passage from the House report
8 that I have just quoted.

9 Now, other code provisions, principally those in
10 chapter 13, demonstrate that chapter 11 is not intended
11 for consumer nonbusiness debtors. Chapter 13 of course is
12 the chapter that allows certain consumer debtors to devise
13 debt repayment plans, that allows them to retain their
14 assets and to pay their creditors out of future disposable
15 income over a 3- to 5-year period. Chapter 13 allows only
16 voluntary plans. In other words, creditors may not force
17 debtors into chapter 13 debt repayment plans.

18 There is good reason for this. Congress wisely
19 recognized that a debt restructuring plan, in the words of
20 the Senate report, only works where there is a willing
21 debtor who wants to repay his creditors. Now whether
22 creditors should be able to force consumers into chapter
23 13 plans was a hotly disputed issue when the code was
24 passed. The credit industry lost in its attempt to enact
25 legislation that would do just that.

1 But under chapter 11 creditors can force debtors
2 into involuntary bankruptcy plans. Consequently, if
3 consumer debtors are eligible for chapter 11 they could be
4 forced into such involuntary plans. But such plans
5 seemingly would be inherently infeasible if consumer
6 debtors with no businesses were unwilling to cooperate
7 with plans to restructure their lives and plans that would
8 force them to find money to repay their debts. For
9 example, the rather unique plan proposed here would have
10 no chance of being effected unless Mr. Toibb was willing,
11 because the Court could not force Mr. Toibb to go out and
12 obtain an unsecured loan to pay off his creditors.

13 More importantly, it is difficult to conclude
14 that Congress would expressly refrain from forcing
15 consumer debtors into chapter 13 plans, and then turn
16 around and decide that consumer debtors could be forced
17 into chapter 11 involuntary plans without clearly stating
18 the congressional intent that this be so. I also must
19 observe that Congress decided that consumer debtors like
20 Mr. Toibb, with unsecured debts over \$100,000 and no
21 regular income, could not use chapter 13. It is difficult
22 to conclude, therefore, that Congress would decide that
23 such debtors could nonetheless use chapter 11 without
24 being much more specific about it. And to the contrary,
25 the House report section that I have cited to you makes it

1 very clear that consumer debtors can only use chapter 13
2 and chapter 7.

3 And finally there are additional policy
4 considerations that counsel against allowing consumer
5 debtors to use chapter 11. The stated congressional
6 purpose of chapter 11 is to return businesses to viable
7 states, to protect jobs, to protect investors, and to use
8 the assets of the business to repay the debtor's debts.
9 And none of these laudatory goals is served by allowing
10 consumer debtors to reorganize under chapter 11.

11 And I should say in response to Mr. Lieb that
12 there is no indication in the legislative history that
13 consumer debtors should be allowed to use chapter 11 in
14 order to maximize their assets in liquidation. Moreover,
15 to allow consumer debtors to use chapter 11 would give
16 them a benefit that was apparently unintended by Congress.
17 And if I may I would like to explain this.

18 Chapter 13 protects the assets of the debtor,
19 but it requires use of disposable income to repay a
20 debtor's creditors. Chapter 7, on the other hand,
21 protects post-petition income earned by personal services,
22 but not assets, which must be liquidated to pay a
23 creditor. Chapter 11 protects both assets and post-
24 petition income earned by the debtor for personal
25 services.

1 Thus a punitive chapter 11 consumer debtor might
2 protect both his assets and his disposable income. For
3 example, to allow Mr. Toibb to reorganize under chapter 11
4 would allow him to protect his stock and would allow him
5 to protect any post-petition income he might earn by
6 personal services, even if that income amounted to
7 \$100,000 or \$200,000 a year.

8 QUESTION: But that's only if some feasible plan
9 to pay off these debts over a period of time.

10 MR. HAMILTON: Well, I -- assuming that the plan
11 that he has suggested would be approved by the court, then
12 he would protect his asset, his stock, he would protect
13 any post-petition income he might make, regardless of the
14 amount.

15 QUESTION: But the creditors would get more than
16 they would get in chapter 7?

17 MR. HAMILTON: They would get the same thing
18 under his plan, because -- they would get \$25,000,
19 basically, minus some expenses.

20 QUESTION: But they wouldn't lose anything?

21 MR. HAMILTON: They wouldn't lose anything in
22 the circumstances.

23 QUESTION: Except the time when they would get
24 it.

25 MR. HAMILTON: The time might be different, yes,

1 depending on how long it took the plan to be worked out.
2 But there is no indication, Justice White, that Congress
3 intended such a result as I have just described.

4 QUESTION: To what extent can the creditors
5 prevent the chapter 11 proceeding?

6 MR. HAMILTON: Well, the creditors of course,
7 classes of creditors can object by a vote. And if they
8 vote against it, there is no plan unless the cram down
9 provisions work. And in that situation they would get at
10 least what they would get in a chapter 7 liquidation.

11 QUESTION: If that's so, then what's the harm in
12 it?

13 MR. HAMILTON: What is the harm? In this
14 particular circumstance there may be, it might be no harm
15 to Mr. Toibb's creditors. But I think the question,
16 Justice O'Connor, is a question of congressional intent.
17 Did Congress intend that a chapter 7 -- I'm sorry, a
18 chapter 11 consumer debtor would have, a punitive chapter
19 11 consumer debtor would have the right to protect both
20 his stock, in this case, and his post-petition income.

21 QUESTION: Well, I suppose one way of trying to
22 ascertain Congress' intent once we start speculating about
23 it is to ask the question Justice O'Connor asked. What
24 harm would come from consumer debtors utilizing chapter
25 11? They must have asked themselves that question, don't

1 you think?

2 MR. HAMILTON: They may well have asked that
3 question. I know of no discussion in the legislative
4 history about that particular question. What I do know
5 about, Mr. Chief Justice, is the statement that I have
6 quoted to you that says the only provisions, the only
7 chapters available to consumer debtors are 13 and 7. I
8 would suggest that the very fact that post-petition income
9 is excluded from the chapter 11 estate is in itself strong
10 evidence that Congress did not intend that this chapter be
11 used for consumer reorganizations, because such income is
12 normally needed to pay off the debts of a bankrupt
13 consumer.

14 And finally, without some clear expression of
15 congressional intent, I submit that the bankruptcy and
16 other courts should not be saddled with the chore of
17 ruling on a flood of consumer debtor chapter 11 plans that
18 may be filed if this Court clears the way. It think it is
19 not fanciful to expect that many of these consumer plans
20 will be jerry-built, will be infeasible, and will be a
21 burden on the court. I suspect that the bankruptcy courts
22 have enough to do in ruling on proposed chapter 11
23 business reorganization plans, almost 90 percent of which
24 fail.

25 If it please the Court I will rely on our briefs

1 for our remaining contentions. I will be most happy to
2 respond to any questions that the Court may have.

3 QUESTION: Thank you, Mr. Hamilton. We
4 appreciate your appearing amicus in this case.

5 Mr. Lieb, do you have anything further? You
6 have 5 minutes remaining.

7 MR. LIEB: Mr. Chief Justice, I have nothing
8 further to add unless there are any questions that the
9 court has.

10 CHIEF JUSTICE REHNQUIST: Very well. The case
11 is submitted.

12 (Whereupon, at 2:41 p.m., the case in the above-
13 entitled matter was submitted.)

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CERTIFICATION

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Sheldon Baruch Toibb, Petitioner v. Stuart J. Radloff

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BY *Raymond H. Hartzel*
(REPORTER)

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