OFFICIAL TRANSCRIPT

ORIGINAL

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION. CURTIS REED JOHNSON, Petitioner

V. HOME STATE BANK

CASE NO: 90-693

PLACE: Washington, D.C.

DATE: April 16, 1991

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SUPREME COURT, U.S. WASHINGTON; D.C. 20503

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1	IN THE SUPREME COURT OF THE UNITED STATES
2	X
3	CURTIS REED JOHNSON, :
4	Petitioner :
5	v. : No. 90-693
6	HOME STATE BANK :
7	x
8	Washington, D.C.
9	Tuesday, April 16, 1991
10	The above-entitled matter came on for oral
11	argument before the Supreme Court of the United States at
12	11:03 a.m.
13	APPEARANCES:
14	W. THOMAS GILMAN, ESQ., Wichita, Kansas; on behalf of the
15	Petitioner.
16	CALVIN DEE RIDER, ESQ., Wichita, Kansas; on behalf of the
17	Respondent.
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1	FROCEEDINGS
2	(11:03 a.m.)
3	CHIEF JUSTICE REHNQUIST: We'll hear argument
4	next in No. 90-693, Curtis Johnson v. Home State Bank.
5	Spectators are admonished not to talk until they
6	leave the courtroom. The Court remains in session.
7	You may proceed, Mr. Gilman.
8	ORAL ARGUMENT OF W. THOMAS GILMAN
9	ON BEHALF OF THE PETITIONER
10	MR. GILMAN: Thank you. Mr. Chief Justice, and
11	may it please the Court:
12	This is a bankruptcy case where the Court has
13	been asked to decide whether an in rem liability that
14	survives a chapter 7 discharge is a claim as defined in
15	the bankruptcy code in a subsequently filed chapter 13
16	bankruptcy.
17	The court below held that such a liability is
18	not a claim. We respectfully contend that that decision
19	should be reversed. The thrust of our argument is that
20	the plain meaning of the bankruptcy code requires a
21	reversal.
22	The essential factual background in this case is
23	as follows. Curtis Johnson operates a farm near Belpre,
24	Kansas. In 1984, he defaulted on his loan to the Home
25	State Bank in Lewis, Kansas. On March 23, 1984, the bank

1	initiated a State court foreclosure proceeding. At that
2	time the bank was the owner of the second mortgage on the
3	property at in question. Later, the bank acquired the
4	first mortgage, which was previously owned by Travelers
5	Insurance Company.
6	It's important to note that the first mortgage
7	which was owned by Travelers Insurance Company and is now
8	owned by the bank has never been foreclosed. As we stand
9	here today that mortgage is not foreclosed. Also, it's
10	important to note that both mortgages contain provisions
11	of signing oil and gas proceeds in the event of a default.
12	On October 9, 1984, Mr. and Mrs. Johnson filed a
13	chapter 7 bankruptcy. They received their discharge in
14	that bankruptcy on April 11, 1985.
15	QUESTION: That's a liquidation.
16	MR. GILMAN: That's correct.
17	No reaffirmation agreement was entered into
18	between the bank or the Johnsons in the chapter 7
19	bankruptcy. About the time of the discharge, the bank
20	obtained relief from stay and continued with its
21	foreclosure action in the State court proceeding.
22	QUESTION: But did the in the chapter 7
23	proceeding, did the general creditors receive any equity
24	in the property that would be left after the foreclosure
25	if there were some equity?

1	MR. GILMAN: No, in fact the in the chapter 7
2	procedure the bank was what we call undersecured, meaning
3	that there was no equity in this property whatsoever. The
4	general creditors in the chapter 7 did receive a dividend
5	from other property that was nonexempt, but it wasn't from
6	the equity in the property that's at issue in the
7	foreclosure.
8	QUESTION: When you say undersecured, the value
9	of the bank security was not sufficient would not be
10	sufficient to pay off a face of its note?
11	MR. GILMAN: That's correct.
12	QUESTION: In that position would the bank be
13	entitled to participate with the general creditors to the
14	extent of the unsecured balance?
15	MR. GILMAN: Absolutely.
16	QUESTION: Was that sort of order made?
17	MR. GILMAN: It's made as of a matter of course,
18	and it was in this case, yes. They participated in the
19	unsecured class of creditors and received a dividend from
20	the from the nonexempt property along with the rest of
21	the unsecured creditors.
22	QUESTION: Based on the appraised value of the
23	property?
24	MR. GILMAN: No, in this case what it was was
25	oil and gas proceeds that had accrued before the filing of

1	the chapter 7 and were in suspense and were available for
2	the trustee in the chapter 7 proceeding to take charge of
3	as first creditor.
4	QUESTION: Those being the only assets
5	available, I take it?
6	MR. GILMAN: Those were the only as I recall
7	those were the only assets available for unsecured
8	creditors.
9	QUESTION: Mr. Gilman, now the court below did
10	not address the questions of feasibility or good faith
11	MR. GILMAN: That's correct.
12	QUESTION: I take it. And if we were to
1.3	agree with you that the code allows these sequential
L 4	filings, I assume that on remand the question of
1.5	feasibility and good faith of the chapter 13 filing would
16	be open?
17	MR. GILMAN: Yes, that's right, Your Honor. In
18	fact, I contend that if the Court agrees with me and
19	allows the serial filing that the matter should be
20	remanded to the district court to take up those issues
21	that the bank raised in their appeal from the bankruptcy
22	court to the district court.
23	The bank obtained their judgment and foreclosure
24	by summary judgment and proceeded with the sheriff's sale.
2.5	The bank was the successful bidder at the sheriff's sale

-	and parenased the property in that means.
2	Thereafter, the Johnsons appealed
3	QUESTION: Was it the only bidder there?
4	MR. GILMAN: Excuse me?
5	QUESTION: Was it the only bidder?
6	MR. GILMAN: Yes.
7	Thereafter the Johnsons appealed the sale
8	procedure in the foreclosure to the Kansas Supreme Court,
9	which reversed the decision regarding the sale and
10	remanded the matter back to the State trial court for
11	another sale. Before the second sale could be conducted,
12	Curtis Johnson filed the instant chapter 13 bankruptcy
13	that's at issue here. That was filed on March 2, 1987,
14	and the only debt scheduled in that bankruptcy were the in
15	rem liabilities that passed through the chapter 7
16	discharge.
17	QUESTION: What was his purpose in doing that?
18	MR. GILMAN: In filing the chapter 13?
19	QUESTION: Yes.
20	MR. GILMAN: His purpose is to try to retain
21	ownership in his farmland. And what he's proposing to do
22	in the
23	QUESTION: To delay the foreclosure, I suppose?
24	MR. GILMAN: Well, it's true that it did delay
25	the foreclosure, but

1	QUESTION: Wasn't wasn't that one of his
2	purposes?
3	MR. GILMAN: No, I think his honest purpose was
4	to try to pay for his land and retain his land. There was
5	really no specific reason to delay the foreclosure.
6	QUESTION: He would he would in the
7	ordinary course of events if the forecloser went forward,
8	he would have a limited time to get it back, wouldn't he?
9	MR. GILMAN: That's correct. And under
10	QUESTION: And a shorter time than what his
11	chapter 13 plan called for.
12	MR. GILMAN: No question about that.
13	QUESTION: Well
14	QUESTION: But I suppose in a chapter 13
15	proceeding, if its allowed, the bankrupt can press for a
16	reduction of the interest rate and a stringing out of the
17	payment opportunities and so forth.
18	MR. GILMAN: That's one of the purposes of
19	chapter 13 is to string out the payment
20	QUESTION: The so called cram-down provisions
21	MR. GILMAN: Right, and chapter 13
22	QUESTION: would be available.
23	MR. GILMAN: Yes, in chapter 13 it's it's an
24	almost automatic cram-down as opposed to in chapter 11
25	where you have to do more

1	QUESTION: So the the foreclosure would just
2	not take place if it were allowed?
3	MR. GILMAN: That's correct. The foreclosure is
4	stayed automatically under section 362 by the filing of
5	the chapter 13 petition.
6	QUESTION: Do creditors get to express a view
7	under chapter 13
8	MR. GILMAN: Oh, yes.
9	QUESTION: as to whether they should go
10	further?
11	MR. GILMAN: Oh, yes. And there this was a
12	heated, contested confirmation of this client.
13	QUESTION: And if under chapter 13, the debtor
14	fails to meet his payment schedule, can the bank at that
15	time ask to be relieved released from the automatic
16	stay?
17	MR. GILMAN: It'd be it would be dismissed.
13	If the creditor if the debtor did not make his payments
19	under the plan after it was confirmed by the bankruptcy
20	court, the case would be dismissed. The automatic stay
21	would be lifted, and they would proceed with their
22	foreclosure action and sale.
23	QUESTION: In under this chapter 13 cram-
24	down provision, is it just the interest of the creditors
25	that are considered or adjusted against one another or is
	9

1	the debtor's interest, too, considered as to whether the
2	thing should go forward?
3	MR. GILMAN: In the chapter 13 proceeding, the
4	interests of the debtor take have a greater weight than
5	the interest of the creditor, in my view.
6	QUESTION: Did you say that the did you say
7	that the amount of the debts that are listed in a chapter
8	13 petition may be scaled down by the plan or just strung
9	out?
10	MR. GILMAN: Well, the amount that's listed is
11	the amount that's owed. The question of whether or not
12	it's secured or not
13	QUESTION: Well, just forget it. This is
14	suppose it's not there's no secured debt at all. The
15	it's just a straight chapter 13 proceeding. There's
16	never been a prior chapter 7 proceeding, just an ordinary
17	13 proceeding. Does may the plan call for payment of
18	50 percent of the debt scheduled?
19	MR. GILMAN: It can call for payment of 0
20	percent of the unsecured debt scheduled and be confirmed.
21	QUESTION: And does that often happen?
22	MR. GILMAN: In my experience, this happened a
23	couple of times.
24	QUESTION: Uh-huh, uh-huh.
25	MR. GILMAN: But

1	QUESTION: Now, what if what if do you
2	think the same can happen when the only debt scheduled is
3	a secured debt?
4	MR. GILMAN: That's normally when it does
5	happen.
6	QUESTION: You mean you mean that you
7	he let's assume that let's assume that the only
8	thing there is is a claim against property. There's no
9	personal debt. Do you think they would confirm a chapter
10	13 plan that let him keep the property without paying
11	anything?
12	MR. GILMAN: No. It couldn't be confirmed in
13	that situation.
14	QUESTION: No, of course, it couldn't. Could it
15	be scaled down if that's the only claim?
16	MR. GILMAN: The debt no, the debt the
17	claim would be allowed in the amount of the value of the
18	collateral and you would have to propose in your plan to
19	pay the value of the collateral
20	QUESTION: The entire the entire amount.
21	MR. GILMAN: The entire value of the collateral.
22	QUESTION: Not the entire amount of the debt?
23	MR. GILMAN: No, under section 506 of the
24	bankruptcy code, the amount the amount of the secured
25	debt is tied to the value of the collateral. And that's
	11

1	where we come up with the term "undersecured." So if the
2	property is worth \$100,000, but the bank has a debt
3	against it or a mortgage and and a note worth \$150,000,
4	their secured claim is only \$100,000, and in chapter 13
5	that's what he'd have to pay.
6	QUESTION: Well, the debt the debt has
7	actually been discharged in the it's just a claim
8	against a property that hasn't been discharged.
9	MR. GILMAN: That's the nut of the issue here.
0	QUESTION: Yes.
1	MR. GILMAN: The the debt has been discharged
2	and the question is what is the effect of a discharge on a
.3	debt. And it's clear under the bankruptcy code that the
4	discharge in a bankruptcy prohibits a creditor from
.5	proceeding with in personam rights but that in rem rights
6	pass through the discharge.
7	QUESTION: And why does the in rem right pass
.8	through? I think because of a specific provision?
9	MR. GILMAN: Yes, section 5
20	QUESTION: I mean that that claim against the
21	property is not discharged.
22	MR. GILMAN: That's correct.
23	QUESTION: Because of a provision in the
24	statute.
2.5	MR. GILMAN: That's correct.

1	QUESTION: Because you have to claim here that
2	the claim against the property is a claim is a debt.
3	It's a for purposes of 13.
4	MR. GILMAN: Well, I want to use the terms claim
5	and debt coextensively as we learned in Davenport. And
6	yes, I do claim that the claim against the property is a
7	debt and a claim.
8	QUESTION: Because otherwise otherwise the
9	claim against the property would be discharged in chapter
10	7.
11	MR. GILMAN: No, a secured debt a lien passes
12	through a chapter
13	QUESTION: Well, I I know but why does it?
14	Only because it the statute says specifically that,
15	well that it won't be discharged.
16	MR. GILMAN: Yes, that's correct.
17	QUESTION: Why do you have to prove that it's a
18	claim or a debt for purposes of chapter 13? I must say,
19	reading your brief, I don't see what the you set forth
20	statutes' definitions section. So what? What is the
21	operative provision of the statute that uses the word
22	claim or debt?
23	MR. GILMAN: Well, the reason we have to show
24	that there that the bank has a claim is because in
25	order to address the claim in the bankruptcy, the claim

1	has to exist. If they don't have a claim in the
2	bankruptcy
3	QUESTION: Where where is the section? What
4	is the operative section of the statute? All you set
5	forth in your brief are the definition sections, which
6	are, you know they're meaningless. Why
7	MR. GILMAN: Well, section
8	QUESTION: Where does it say that you have to
9	have a claim?
10	MR. GILMAN: 109 provides that section
11	QUESTION: 1 109?
12	MR. GILMAN: Section 109 is the eligibility
13	provisions is the eligibility statute, and that says
14	that they have to have a certain amount of claims in order
15	to be eligible for a chapter 13 bankruptcy. But I think
16	the operative provision that you're asking me about is
17	section 1325 which provides what must be set forth in a
18	chapter 13 plan in order to be confirmed, and the word
19	and/or debt is used throughout that statue.
20	QUESTION: Why didn't your client file under
21	chapter 13 in the first place?
22	MR. GILMAN: He was not eligible at the time to
23	file a chapter 13 because he had too much debt.
24	QUESTION: So he first got rid of some of the
25	debt under chapter 7?

1	MR. GILMAN: Essentially that's correct.
2	Our the thrust of our argument is that the
3	plain meaning of the bankruptcy code requires a reversal.
4	As I mentioned section 101(4) is the definitional
5	provision at issue. It defines the term "claim" and the
6	phrase that's key in that definition is "right to
7	payment." The rights the bank has are to receive the land
8	as a result of the foreclosure or to receive proceeds from
9	the sale of the land if the bank is not the successful
10	bidder at a foreclosure sale. And in addition, the bank
11	has the right to receive oil and gas income from the land.
12	The question of whether that whether or not
13	that fits in the common term of the word "payment" I don't
14	think is really up to dispute. I think it's common
15	practice and commonly understood that collateral is taken
16	as an alternative source of payment. Banks typically take
17	collateral to make sure they're paid in full or in part
18	and and in case the debtor does not pay the debt.
19	In fact, this Court has recognized on a couple
20	of occasions that collateral constitutes payment. In
21	United Savings v. Timbers of Inwood Forest, the Court
22	stated that it is common ground that the interest and
23	property referred to by section 362(d)(1) includes the
24	right of a secured creditor to have the security applied
25	in payment of the debt upon completion of the

2	Similarly, in Long v. Bullard the Court states
3	that on the 9th of February, 1878, Bullard brought suit in
4	the Superior Court of Bib County, Georgia, to subject the
5	property to the payment of his debt.
6	And finally, even the Kansas Bankers Associate
7	Association, who filed the amicus on behalf of the
8	bank, admits in their brief probably unintentionally
9	that collateral rights constitute a source of payment.
10	They say at page 13 on the brief that Kansas banks, like
11	other creditors, enter into loan transactions secured by
12	real property with an expectation that debtors will not be
13	allowed to manipulate the bankruptcy code to frustrate the
14	creditor's contractual right to apply the value of
15	collateral to satisfy the loan obligations.
16	Other provisions of the bankruptcy code also
17	recognize that rights in collateral constitute a right to
18	payment. As I mentioned, section 1325 bears directly on
19	this issue. It provides that in order for a it
20	provides that a credit or a debtor can propose a plan
21	where he proposes to transfer the property that the
22	secured creditor has a security interest from a mortgage
23	in and satisfaction of the secured claim. That's also
24	true with regard to section or chapter 12, in section
25	1225(a)(5) and in chapter 11, in section $1129(b)(2)(A)(3)$
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reorganization.

1	dealing with the indubitable equivalent.
2	So we believe the plain meaning of the statute
3	requires a reversal. But I now want to examine the
4	question of whether the plain meaning fits within other
5	provisions of the bankruptcy code. And we believe it
6	does.
7	If a if an in rem right is not a claim in
8	bankruptcy excuse me the section excuse me
9	section 102(2), in my view would be rendered worthless.
10	Section 102(2) provides that a claim against the debtor
11	includes a claim against property of the debtor. In my
12	view that's a direct statement by Congress that in rem
13	rights constitute a claim in a bankruptcy proceeding.
14	QUESTION: At the
15	QUESTION: Well, is that dischargeable under a
16	chapter 7?
17	MR. GILMAN: Because in section 524, Congress
18	specifically said that only the in personam rights are
19	dischargeable in chapter 7 or any other chapter of the
20	bankruptcy code.
21	QUESTION: You mean the in personam right to
22	payment?
23	MR. GILMAN: Yes, I do. Also, section
24	QUESTION: Mr. Gilman, why would I don't
25	understand why Congress would do it that way. I mean you
	17

say your client couldn't go right ahead with chapter 13 1 because his debts were too high. He wouldn't have 2 qualified under 13, so he goes through 7 first and reduces 3 4 his debts, and then goes through 13. Why would Congress want to do that? I mean, say, you know, they could have 5 just -- just had a, you know, a higher debt limit for 13 6 7 if they wanted that, couldn't they? 8 MR. GILMAN: Well, what they eventually did was 9 pass chapter 12, Your Honor, for farmers, which is 10 specifically the problem that was being encountered throughout the -- especially the Midwest. 11 12 QUESTION: Well, but that wasn't -- we're just 13 talking about 7 and 13 right now, and it just seems to me 14 quite contrary to what must have been the congressional 15 intent. If they -- if they wanted a higher debt limit for somebody who can qualify under 13, they would have said 16 17 so. And it seems to me to be whipsawing the --MR. GILMAN: But on the other hand --18 19 QUESTION: -- the creditor to proceed under 7 20 first and lower your debt, and they proceed under 13. 21 It's very strange. MR. GILMAN: But on the other hand, they didn't 22 limit it anywhere in the code. There's -- the only 23 24 limitation on filing after the chapter 7 in section 109 in

25

the --

1	QUESTION: Unless you're wrong about the meaning
2	of claim.
3	MR. GILMAN: Well
4	QUESTION: Maybe that's how they limited it.
5	MR. GILMAN: That's true, but I I think that
6	the plain language and also the decision in Davenport
7	requires a holding that an in rem right is a is a
8	claim.
9	QUESTION: I'm sure I'm sure it is, but it
10	isn't discharged in the chapter 7. And Congress and
11	Congress and the reason is that Congress says that that
12	kind of a claim isn't discharged.
13	MR. GILMAN: Exactly. That's exactly my point.
14	QUESTION: And so they wanted to save that
15	they wanted to save that kind of a claim. And yet you say
16	that nevertheless they intended in 13 to take that claim
17	and string it out over 10 years maybe.
18	MR. GILMAN: No, well, I'm saying that they did
19	not pass anything that would prohibit my client from
20	filing a chapter 13 after he gets a discharge on chapter
21	7.
22	QUESTION: Well, you can say that you can say
23	like the court of appeals did for example, that the right
24	to payment they're talking about is right to payment from
25	the debtor not from property.

1	MR. GILMAN: But that but that's not in the
2	statute, and I think section 102(2) belies that statement.
3	QUESTION: Well, I
4	QUESTION: Well, all all it says all 102
5	says is that claim against the debtor includes claim
6	against property of the debtor. I don't see how that
7	belies it right on its face.
8	MR. GILMAN: Well, if Congress did not mean to
9	include in rem liabilities as claims, then I don't see
10	what the purpose of section 102(2) was.
11	QUESTION: Well, but I simply as a matter of
12	language it doesn't seem to me that your position just
13	automatically establishes itself. You have to at least
14	look to other parts of the statute.
15	MR. GILMAN: I agree with that. And I'd be
16	happy to go into the other parts of the statute that I
17	think help support my reasoning. The next one I would go
18	to is section 502(b)(1) which states that a claim in a
19	bankruptcy proceeding will be allowed unless the claim is
20	unenforceable against the debtor and property of the
21	debtor, which means that a claim in a bankruptcy will be
22	allowed if a creditor has a claim against the debtor
23	personally or against his property. That to me seems
24	another seems to be another clear statement that in rem
25	liabilities should constitute claims in this bankruptcy.
	20

1	QUESTION: You say unless it's unenforceable
2	against the debtor or property of the debtor?
3	MR. GILMAN: The language of the statute is
4	unless it's unenforceable against the debtor and property
5	of the debtor.
6	QUESTION: Right. Well, this claim is not
7	enforceable against the debtor and property of the debtor.
8	It's enforceable only against property of the debtor.
9	MR. GILMAN: That's true, and I believe that the
10	the way I understand that section is that I in
11	either case.
12	QUESTION: If it meant either, it would have
13	said "or." If it means in addition, it says "and."
14	MR. GILMAN: It says it will be
15	QUESTION: It has to be it
16	MR. GILMAN: It says it will be allowed unless
17	the claim is unenforceable.
18	QUESTION: Unless it's unenforceable against
19	both
20	MR. GILMAN: Both.
21	QUESTION: It has to be unenforceable against
22	both the debtor and against property.
23	MR. GILMAN: And in this case, it's enforceable
24	against property of the debtor and therefore the claim
25	will be allowed.

1	QUESTION: Where does this section appear, Mr.
2	Gilman?
3	MR. GILMAN: Section 502(b)(1).
4	QUESTION: I'm not I don't mean where does it
5	appear in the statute. Where does it appear in the
6	briefs?
7	MR. GILMAN: I don't have
8	QUESTION: I may I say I had this problem
9	with your whole brief. There sections are referred to
10	
11	QUESTION: Well, I Mr. Gilman I asked Mr.
12	Gilman where it appeared in his briefs, and I think he
13	should answer that question. Please answer it.
14	MR. GILMAN: Can I
15	QUESTION: Yes.
16	MR. GILMAN: It should be on page 22. It's not
17	set forth verbatim in that
18	QUESTION: Well, why don't you set these things
19	forth verbatim, Mr. Gilman, if you're going to rely on
20	them?
21	MR. GILMAN: I assumed that the Court would have
22	available the statutes to look at. I apologize if that's
23	an error, too.
24	QUESTION: Go ahead.
25	MR. GILMAN: Also, in touching on section 524
	22

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1	which Justice White keeps referring to, I believe that
2	section also supports the notion that a claim an in rem
3	liability is a claim in a bankruptcy. That section says
4	that a discharge in a case under this title operates as an
5	injunction against the commencement or continuation of an
6	action, the employment of process, or an act to collect,
7	recover, or offset any such debt as a personal liability
8	of the debtor. The phrase "as a personal liability of the
9	debtor" modifies the term debt and implies at least that
10	some other type of liability must exist besides a personal
11	liability. If it's not a personal liability, it's my view
12	it has to be an in rem liability.
13	Also, Congress demonstrated that it knew how to
14	limit the term claim to in personam situations when it
15	wanted to. In section 303(b) of the bankruptcy code, it
16	sets forth the situations where an involuntary petition
17	can be filed against an individual. The language of that
18	section makes clear that in order to
19	QUESTION: Where does that section appear in
20	your brief?
21	MR. GILMAN: I don't believe I cited it in my
22	brief, Your Honor. I'm sorry.
23	QUESTION: You're here to argue a particular
24	section of the code that you don't cite in your brief?
25	MR. GILMAN: It was cited by the amicus in its
	22

1	brief.
2	QUESTION: Well, I don't think that's an
3	adequate substitute.
4	MR. GILMAN: I apologize, Your Honor. I was
5	just making my argument if I can.
6	QUESTION: You may proceed, but please don't
7	ever file another brief like that in this Court that does
8	not does not quote sections of the statute on which you
9	intend to rely.
10	MR. GILMAN: I'll make sure that I don't, Your
11	Honor.
12	That section makes clear that a claim or an
13	involuntary action can only be initiated against an
14	individual when there is an in personam claim against that
15	individual.
16	Also, I believe that recent activity in Congress
17	demonstrates that they continue to support a broad
18	interpretation of the term "claim." As the Court will
19	recall last terms it entered its decision in Pennsylvania
20	Department of Public Welfare v. Davenport. In that case,
21	the Court held that restitution obligations imposed in
22	conjunction with criminal penalties constitute claims and
23	are therefore dischargeable in chapter 13 bankruptcies.
24	Congress reacted to that decision with the
25	Criminal Victims Protection Act of 1990. It's important
	24

1	to look at what both Congress did and did not do. The way
2	Congress reacted to it was by amending section 1328 to
3	provide that restitution obligations are not dischargeable
4	in chapter 13. Even though the Court in Davenport
5	concentrated heavily on the construction of the word
6	"claim," Congress did not amend the definition of claim
7	and allowed that definition to remain unchanged even after
8	the decision in Davenport.
9	And therefore, I believe that Congress, having
10	noted the decision in Davenport, would continue to support
11	a broad construction of the term "claim" which would
12	include an in rem liability.
13	Lastly, I want to touch on what Justice White, I
14	believe, keeps continuing to hit on, and that is whether
15	this what we're proposing to do here is fair. Is it
16	fair to the creditor for what we are proposing to do? And
17	we believe it is, because had Curtis Johnson
18	QUESTION: I don't know that I even mentioned
19	the word "fair."
20	MR. GILMAN: Well, maybe I'm picking that up
21	from your argument
22	QUESTION: It may be.
23	MR. GILMAN: Had Curtis Johnson been available
24	had available chapter 12 at the time he had to file his
25	chapter 7, he could have proposed exactly the same

1	treatment that he's proposing in this case to the bank.
2	In other words, he could have proposed a plan in chapter
3	12 which would have provided for no payments to unsecured
4	creditors and would have provided only for the payment of
5	the value of the collateral the bank holds. And that plan
6	would have been confirmable in a chapter 12 proceeding as
7	long as he demonstrated he was using all of his disposable
8	income.
9	All we are asking to be able to do in this case
10	is to allow Curtis Johnson to pay the bank the value of
11	its collateral at the bank's contractual rate of interest
12	over a period of 5 years. And we don't believe that is
13	unfair.
14	If there are no other questions, that's all I
15	have at this point. I would reserve the remainder of my
16	time for rebuttal.
17	QUESTION: Very well, Mr. Gilman.
18	Mr. Rider, we'll hear now from you.
19	ORAL ARGUMENT OF CALVIN DEE RIDER
20	ON BEHALF OF THE RESPONDENT
21	MR. RIDER: Mr. Chief Justice, and may it please
22	the Court:
23	We are asking this Court to affirm the Tenth
24	Circuit decision, because it correctly found that an in
25	rem remedy is not a claim. We tend to address two areas
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2	decision.
3	First, the Tenth Circuit took into account the
4	chapter 7 filing and the effect of the discharge. And
5	second, the Tenth Circuit found that there is no claim, no
6	right to payment, and no nonrecourse loan agreement.
7	The Tenth Circuit decision can also be affirmed
8	on the alternative ground or alternative issue of good
9	faith. Now, for many years the status quo between debtors
10	and creditors has been maintained. In rem rights have
11	been preserved under the act and the bankruptcy codes so
12	that creditors can proceed. Those creditors' rights are
13	preserved to proceed against property that's securing the
14	debts that are being discharged in the 7 chapter 7.
15	Now, recently some courts have judicially
16	created a chapter 20 bankruptcy, which for in this
17	instance chapter 20 is the filing of a chapter 13 after
18	receiving the discharge in a 7. These other courts have
19	gone beyond the confines and intent of the code.
20	What the Tenth Circuit decision is does is
21	bring this back within the purpose, spirit, and intent of
22	the bankruptcy code. If an in rem remedy is a claim for
23	purposes of the bankruptcy code, then every mortgage, home
24	loan, farm loan, commercial loan would be improperly
25	affected and impaired. Secured parties will lose their
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that exemplify the soundness of the Tenth Circuit

1	bargained for State law contractual rights to realize on
2	their security their collateral that is securing the
3	the debts that are being discharged in the chapter 7.
4	Upon a default, the secured party would have no
5	right. If bankruptcy is filed, there would be really no
6	reason to lift the automatic stay because creditors could
7	not proceed against the property which secured the debt
8	because that right to proceed, that in rem remedy, would
9	be a dischargeable claim or debt in bankruptcy.
10	We submit to this Court that Congress didn't
11	intend to destroy or impair in this way a secured party's
12	rights in a collateral. In this
13	QUESTION: Theoretically is your position as
14	simple as this. That chapter 7 in effect extinguishes the
15	personal obligation. The result of that is that the
16	previous in rem remedy becomes legally an interest in
17	property owned by somebody else. Is it as simple as that?
18	MR. RIDER: The
19	QUESTION: That's why it's not a claim anymore.
20	MR. RIDER: To a point, Justice Souter. The in
21	rem remedy passes through the chapter 7 and it's a right
22	the interest in property belongs to the creditor to
23	the mortgagee. And the mortgagee is simply trying to
24	realize on its own property interest
25	QUESTION: That's it. In other words, it's the
	28

1	the so-called in rem remedy is reduced simply to an
2	interest in property which can be realized upon just as if
3	the mortgagee had received an undivided interest as a
4	common owner. It could go ahead and realize upon its
5	property in that case.
6	MR. RIDER: Yes, the mortgagee can proceed and
7	realize upon that property. Sure.
8	QUESTION: Okay.
9	MR. RIDER: This Court has long recognized the
10	history in the in its Bullard case and Louisville v.
11	Radford case that the bankruptcy
12	QUESTION: May I may I just interrupt here to
13	I want to be sure I understand Justice Souter's
14	suggestion. Is it an interest in property in a different
15	sense than it was before the chapter 7 discharge?
16	MR. RIDER: Before the chapter 7 discharge
17	excuse me, Justice Stevens, are you talking about the
18	interest in property? The bank's interest in property?
19	QUESTION: The in rem claim of the first
20	mortgagee to which gives him right to foreclose, have
21	the property sold, and you get the property. Is it a
22	different sort of interest in property than it was before
23	the chapter 7 discharge?
24	MR. RIDER: Before the chapter 7 discharge, the
25	estate the chapter 7 estate either had the property

1	or
2	QUESTION: Right.
3	MR. RIDER: in this instance, the debtor
4	QUESTION: The debtor property is subject to the
5	first mortgage land.
6	MR. RIDER: Yes, and the or the debtor would
7	hold the property and the debtor would have the property.
8	And yes, upon that discharge, all the debtor has left is
9	is an interest in the property at a redemption right.
10	QUESTION: And but who has possession of the
11	property?
12	MR. RIDER: The upon the discharge, the
13	debtor has possession of the property.
14	QUESTION: The same possession he had before the
15	discharge?
16	MR. RIDER: Yes.
17	QUESTION: And how did how did I don't
18	quite understand your response to Justice Souter. How is
19	the interest in property that exists after the chapter 7
20	discharge any different from the interest in property that
21	the bank possessed immediately before the discharge.
22	MR. RIDER: Well, the bank the bank has that
23	in rem in rem right before the chapter
24	QUESTION: Right.
25	MR. RIDER: I may have misunderstood Justice
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Souter's question. The bank has that in rem remedy before 1 2 the chapter 7 filing --3 QUESTION: Right. 4 MR. RIDER: -- and still has that in rem remedy 5 after the chapter 7 discharge. 6 QUESTION: And it no longer has a personal 7 claim, correct? 8 MR. RIDER: That's correct. 9 QUESTION: Mr. Rider, what -- is it the case 10 that if this is a claim or a debt under chapter 13 it 11 would necessarily be one under chapter 7 so that it would automatically have been discharged? Is that the position 12 13 you're taking? 14 MR. RIDER: That -- that is one of our 15 positions. That's correct, Justice Scalia. 16 OUESTION: The only thing that prevents this from -- from being discharged in chapter 7 is the fact 17 18 that it's not a claim? MR. RIDER: It is not a claim, and the long 19 20 recognized history that these mortgage liens passed 21 through --22 That's because of a specific QUESTION: provision, isn't it? They -- the secured debts. 23 The 24 security interest is not discharged.

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That is correct.

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MR. RIDER:

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1	QUESTION: The claim against the property is not
2	discharged.
3	MR. RIDER: The in rem remedy against the
4	property is not discharged.
5	QUESTION: Well, which is correct? I mean they
6	both can't be correct. Your answer to me is no, then? It
7	is not the case that the only reason this survives chapter
8	7 is because it's not a claim. It survives chapter 7
9	because there's a statutory provision that says it
10	survives chapter 7, is that right?
11	MR. RIDER: That is correct.
12	QUESTION: All right.
13	MR. RIDER: In the Bullard case and this Court's
14	case of in Louisville v. Radford, it's been long
15	recognized that the bankruptcy does not destroy a mortgage
16	even on exempt property. And what we're what we're
17	asking here is essentially what Justice Stevens stated in
18	the unanimous view of the of this Court in Butner v.
19	United States that the mortgagee should be afforded in
20	Federal bankruptcy court the same protection it would have
21	under State law if no bankruptcy had ensued.
22	Now, in this case, Johnson filed the chapter 7
23	liquidation, received the discharge, received the benefits
24	of that chapter 7 bankruptcy, freedom from unsecured debt
25	and fresh start, but wanted to hold on and not give up the
	22

1	property even after the even after the lifting of the
2	stay, which was about the same time as the discharge. The
3	discharge the automatic stay was lifted so the bank
4	could proceed in rem against the property. But they were
5	prevented from doing so by the subsequent filing of 7.
6	It's our position that the purpose of the
7	chapter 7 was never completed or satisfied. The bank was
8	never able to attempt to realize or to realize on that
9	property.
10	QUESTION: Well, you're dealing with a very
11	complicated, intricate statute as you know. Your opponent
12	says that in at least one other case where Congress wished
13	to prohibit the use of one kind of chapter proceeding
14	after another, it has specifically said so. It did not
15	say so here. It did not specifically prohibit use of the
16	13 after 7. What's your response to that?
17	MR. RIDER: Mr. Chief Justice, our response is
18	that there the specific prohibition is not there, but
19	there are other code provisions, specifically one I've
20	cited in my brief, code section 706 that allows a one-
21	time conversion from a chapter 7 to a 13. If the debtor
22	finds it finds himself or herself in a chapter 7 with
23	some nondischargeable debts that are or debts that
24	can't be discharged in a 7, the debtor has that one-time
25	right to convert to a 13 if they meet the debt limits of
	33

1	the chapter that they're going to the chapter which
2	is chapter 13. And this
3	QUESTION: (Inaudible) 6(d), quoted on page 21
4	of your brief. A case may not be converted to a case
5	under another chapter this title unless the debtor may be
6	a debtor under such chapter.
7	MR. RIDER: Yes, that is correct.
8	QUESTION: And you say if you're not allowed to
9	convert a fortiori you should not be able to start afresh
.0	in that section?
.1	MR. RIDER: Congress contemplated a debtor
.2	moving into filing a 7, if he can't if there's
.3	nondischargeable debts, they can move on. What the
.4	petitioner the debtor is attempting to do in this case
.5	is what was specifically prohibited by section 706. And
6	also cannot do that because the debtor cannot do that
17	because of the debt limit that they had. The debtor had
18	approximately five times the amount of debt that a chapter
19	13 would allow.
20	QUESTION: I don't under are they two
21	separate arguments?
22	MR. RIDER: It's the same one. The debtor would
23	have had the opportunity.
24	QUESTION: He couldn't have been a debtor under
25	chapter under the other title under chapter 13

1	within the meaning of 706(d) only because his debt would
2	have been too high.
3	MR. RIDER: That's that is
4	QUESTION: There is no other reason he couldn't
5	have been a debtor under that, right?
6	MR. RIDER: Under the chapter 13.
7	QUESTION: Okay.
8	MR. RIDER: That's correct.
9	And also, as a further question, even if as a
10	further answer to your question, Justice Scalia, even if
11	the debtor was could meet the eligibility requirement
12	of chapter 13 we submit that the provisions of 706
13	indicate congressional intent that the conversion method
14	be used rather than the discharge in 7 of the debt, and
15	then moving on to the 13.
16	QUESTION: Mr. Rider, can I ask you this may
17	be an unrealistic hypothetical, but I'm trying to think
18	this crazy case through. Supposing a father or some
19	friend was willing to pledge a piece of property, a
20	security for another person's loans his son's loan that
21	developed the property but the father did not
22	personally undertake any personal responsibility for
23	just said if you can't some set it up in some fancy
24	way that the property would be security, but if you
25	couldn't if the primary debtor didn't pay off the debt,
	25

1	you could have recourse against the pledged property. And
2	there nobody could pay. Would the father in that
3	situation be eligible for chapter 13 relief?
4	MR. RIDER: The father could still file a 13
5	can still would still be able to schedule debts in a
6	13. But in that case, if the property if there was no
7	right to payment if the creditor has no right to
8	payment, that property could not be scheduled.
9	QUESTION: Well, the his right to payment
10	would be strictly by selling the property and collecting
11	the proceeds. It's security for security for the son's
12	loan is what I'm trying to think of. Sometimes you do
13	you know somebody will put up security for someone else's
14	loan. And I was just wondering, wouldn't there be the
15	kind of debt your opponent argues for here? Wouldn't you
16	have a claim against that property, even though you didn't
17	have an in personam claim against the owner of the
18	property?
19	MR. RIDER: Justice Stevens
20	QUESTION: I guess your position is no?
21	MR. RIDER: No, no, that that is correct.
22	Our position is no, Justice Stevens, that you still must
23	have a right to payment from that debt or you still must
24	have a claim and that while that debtor could file a
25	chapter 13, he could not schedule that specific property

1	In the In his chapter is.
2	The Tenth Circuit recognized the effect of the
3	chapter 7 discharge. First as we discussed the effect of
4	the discharged lowered the amount of unsecured debts.
5	Secondly, under 727(b) a discharge is a discharge of all
6	debts and any liability of a claim except those specific
7	debts that are enumerated in section 5.3 that are
8	nondischargeable. The debtor comes out of a chapter 7
9	with a fresh start, no claims, no debts, no obligations.
10	But petitioner is saying that somehow a debt or
11	a claim escaped or survived the chapter 7 discharge. We
12	submit that that is inconsistent that, upon the discharge
13	of all debts, that that creates a debt. Or upon the
14	discharge of any liability of a claim, that creates a
15	claim.
16	But yet what we have here is an in rem remedy, a
17	remedy of the bank, the right to foreclose. It's not a
18	and if it is a in rem if an in rem remedy is a claim or
19	a debt, it could be discharged in 7. We submit that that
20	was never the intent of Congress. The in rem remedy in
21	this case arose as I believe I discussed with Justice
22	Stevens arose before the chapter 7 bankruptcy. The in
23	rem remedy was a pre-petition remedy, along with the debt

that was discharged. Those were together before the

24

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chapter 7.

1	On section 101(9) defines creditor as a claim
2	against the debtor that arose at the time of or before the
3	order for relief, which the order for relief is the
4	petition. A creditor is someone that has a claim against
5	the debtor before the filing of the petition. Now, if we
6	were a creditor and we were in chapter 7 because of
7	discharged debts if we were a creditor in that chapter
8	7, according to the discharge provisions, again, of
9	727(b), it provides a discharge of all debts and claims
10	that arose before the order for relief, before the filing
11	of the petition.
12	Now, all of those occurred before the 7. If an
13	in rem remedy is a claim, it's discharged in the 7.
14	QUESTION: Mr. Rider, what do you do about the
15	provision that a claim against a debtor includes a claim
16	against property of the debtor? What what is your
17	explanation of that?
18	MR. RIDER: First
19	QUESTION: This is a claim against property of
20	the debtor, right?
21	MR. RIDER: This
22	QUESTION: And therefore, that seems to me it
23	seems by that paragraph 2 to be a claim against the
24	debtor.
25	MR. RIDER: It is our contention, Justice
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1	Scalia, this isn't a claim against property of the of
2	the debtor. To have a claim against property of the
3	debtor in section 102(2), you must still have a claim, a
4	claim against the debtor. You must still have a right to
5	payment either a right to payment or a right to an
6	equitable remedy for breach of performance, if such breach
7	gives rise to a right to payment
8	QUESTION: Even though the claim the claim
9	need not be against the debtor, but the claim the owner
10	the property in question must be the property of the
11	debtor, but you're saying the you must have a claim
12	against somebody, even if not the debtor.
13	MR. RIDER: You must still the strict
14	language of the code talks about a claim against the
15	debtor including a claim against property of the debtor.
16	And it is our belief and our contention that you must
17	still have that claim. We don't have a claim under
18	101(4)(a), a right to payment. We are not seeking to
19	pursue a nonexistent claim against the debtor. What we
20	have is a right to an equitable remedy.
21	QUESTION: Give me an example of where there is
22	a claim against property of the debtor without a claim
23	against the debtor.
24	MR. RIDER: I believe in you may have an
25	example where a for instance a farmer. A farmer would

1	come into the bank, take a loan, pledge property, and also
2	pledge additional security. Here is my property. I'm
3	just pledging this property with no personal liability
4	enter into a so-called nonrecourse loan agreement with the
5	bank where it's just this property. The bank still
6	would still hold a claim, and they would hold a claim
7	against property of the debtor.
8	The claim against property of the debtor wasn't
9	defined in the code or in the pre-code, in the act.
10	It's a difficult concept. One thing that we have
11	considered is also in this case is this property of the
12	debtor, upon the commencement of a case, all interests of
13	the debtor go into the estate.
14	QUESTION: Well, Mr. Gilman, in your answer when
15	he pledges the property on a nonrecourse basis, he still
16	couldn't realize against that property if he did not have
17	the antecedent or the independent debt, right? Equity
18	wouldn't let him do it.
19	MR. RIDER: I'm sorry, Justice Souter, I'm not
20	sure
21	QUESTION: No, I'm saying he gets a pledge of
22	the property. He can't enforce against that pledge
23	without having the antecedent debt.
24	MR. RIDER: The
25	QUESTION: If the let me put it this way. If
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1	the debtor comes along and pays him 100 percent of the
2	debt, no court is going to let him sell the property.
3	That's all I'm saying. Isn't that correct?
4	MR. RIDER: That's correct.
5	QUESTION: All right. Then isn't the kind of
6	the ultimate answer to the problem that's being put to you
7	the one which you gave to me and I think gave to Justice
8	Stevens. In the situation that we've got, the chapter 7
9	proceeding extinguishes the antecedent debt it
10	distinguishes the personal obligation, and therefore, it
11	distinguishes the claim against property as that term is
12	used. Something has got to be left. And what's left is a
13	pure property interest owned by the bank. Isn't that your
14	position?
15	MR. RIDER: I believe that is our position that
16	we have the property interest to pursue against our
17	collateral
18	QUESTION: And it's a property interest, pure
19	and simple. It's not a claim.
20	MR. RIDER: That's correct.
21	QUESTION: Whereas in the pledge situation, it's
22	not just a property interest, pure and simple, because the
23	right to realize upon it is still dependent upon the

relationship of debtor and creditor, which is independent

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of it.

1	Mr. Kibbit. In the honiceourse foun agreement.
2	QUESTION: Yes.
3	MR. RIDER: Yes, in that case.
4	QUESTION: Okay.
5	MR. RIDER: In this case, we do not to
6	further answer Justice Scalia's question, we do not have a
7	right to payment, and in the second definition of claim
8	the right to an equitable remedy for breach of performance
9	if such breach gives rise to a right to payment.
10	Now, normally in Kansas, a right to an equitable
11	or excuse me foreclosure in Kansas is an equitable
12	remedy. And that equitable remedy normally gives rise to
13	a right to payment, but because of the discharge, we have
14	no right to payment. There is nothing, as in section
15	101(4)(b), nothing for the debtor to breach that would
16	give rise to the right to payment. And even if there was
17	a breach, that breach would not give rise to a right to
18	payment, because every all rights to payments have been
19	have been discharged in the chapter 7 bankruptcy.
20	Now, we recognize, as this Court did in
21	Davenport, that claims are to be construed to contain all
22	legal obligations of the debtor. First, we don't believe
23	that this is a legal obligation of the debtor not an
24	enforceable obligation.
25	QUESTION: Well, the amount of the bank's claim
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1	against the property, I take it, must always be calculated
2	by reference to the antecedent debt. There would be
3	provisions for interest I take it and attorneys' fees, all
4	of which can only be calculated by reference to the
5	documents that created the original debt.
6	MR. RIDER: That is correct.
7	QUESTION: And so it's somewhat artificial to
8	say that the bank has simply a claim or an interest in
9	the property, because that interest must be defined by
10	reference at least to an antecedent document.
11	MR. RIDER: That's we must look at the
12	document to determine what was there even but even
13	though all of that has been discharged and there's no
14	personal liability on it.
15	QUESTION: Is it fair to I'm sorry I
16	didn't want to interrupt your answer.
17	MR. RIDER: In this case what we're saying is
18	that the claim Congress, in this specific instance,
19	limited the definition of claim in $101(4)(b)$, where
20	Congress stated in the legislative history that rights to
21	an equitable remedy for breach of performance with respect
22	to which such breach does not give rise to a right to
23	payment, are not claims. And therefore, they would not be
24	susceptible to discharge and bankruptcy. The definition
25	of claim is specifically limited there and we're to the

2	case.
3	QUESTION: May may I just follow up on
4	Justice Kennedy's question? Is it correct to say this
5	that the identification of this property interest is
6	dependent upon two valuations. One is the extent of the
7	antecedent debt plus interest and so on, collection costs
8	whatever the agreement originally provided. And number
9	two, is subject to the limitation of the actual value of
10	the property so that a debtor after chapter 7 a
11	creditor after chapter 7, that is could have an
12	interest in the value of the property defined by the
13	extent of which is defined by the antecedent debt,
14	provided that that does not exceed the value of the
15	property the value of the property always being the
16	ultimate limit. Is that correct?
17	MR. RIDER: To to an extent, Justice Souter.
18	The value that a that value that a creditor seeks after
19	the after the discharge or the creditor seeks during
20	the foreclosure is the value of the entire judgment.
21	QUESTION: In fact, maybe that maybe my
22	question reflects a confusion. Is the is the extent of
23	his interest, i.e., the value that may be ultimately
24	realized out of the property is that determined in the
25	chapter 7 proceeding so that so that that's all behind

specific instance and circumstances that we have in this

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1	nim at that point?
2	MR. RIDER: The value of the property?
3	QUESTION: Yes, in chapter 7 does the does
4	the bankruptcy court in effect say, look, you own a piece
5	of property you own this property to the extent of
6	\$10,000. Is that what they is that the result of
7	chapter 7?
8	MR. RIDER: Yes.
9	QUESTION: So he knows the extent the dollar
10	amount at least of his interest once chapter 7 is over.
11	MR. RIDER: That is correct.
12	QUESTION: Okay.
13	MR. RIDER: But then you move on to the chapter
14	13 and that value is determined again.
15	QUESTION: What happens to the equity of
16	redemption in the chapter 7 proceeding?
17	MR. RIDER: In the chapter 7, if if the if
18	the if the debtor retains the property, Chief Justice
19	Mr. Chief Justice, then the debtor retains that right
20	of redemption. It's our position that a right of
21	redemption is not a right to payment. That's an interest
22	of the debtor and property, which isn't necessarily
23	property of the debtor, but it's an interest of the debtor
24	and property. A right of redemption and this debtor
25	still has that right of redemption

1	QUESTION: So he retains that after the
2	conclusion of the chapter 7?
3	MR. RIDER: He still even this plan is set
4	to conclude in less than a year. It's a 5-year plan. The
5	banks only received the one payment during that plan. And
6	it will conclude next March. The debtor still has that
7	right of redemption.
8	QUESTION: No, I asked you if he still had it at
9	the conclusion of the chapter 7 proceeding. Are you
10	telling me about the chapter 13 proceeding or the chapter
11	7?
12	MR. RIDER: Both, Your Honor. He he had it
13	at the conclusion of the chapter 7. And essentially
14	that's what the debtor is doing is extending that right of
15	redemption period. That's the only interest he has.
16	QUESTION: But he does retain that after chapter
17	7?
18	MR. RIDER: Yes. But it is our contention that
19	the right of redemption, it's a right of the debtor. It's
20	not a right to payment. We cannot require this debtor
21	we cannot enforce this debtor to redeem that property.
22	And furthermore, the redemption is something that when
23	the debtor redeems, the debtor redeems at one time
24	redeems the full judgment
25	QUESTION: It's a right to regain title to the
	46

-	property.
2	MR. RIDER: Exactly. And they must pay the
3	judgment, the cost, the interest, the property taxes upon
4	the right to redeem not as a debtor in chapter 13 is
5	scheduling value value of land. And that the
6	redemption must be paid within that 6 months, not 5 years
7	Or in this case it's been approximately 7.
8	QUESTION: Can you help me with one other thing
9	that I just really don't understand? This is a case
10	involving an undersecured claim. And say the property is
11	thought to have a value of \$50,000 when the chapter 7
12	proceeding is ended. And then you go into the chapter 13
13	and it's ultimately sold for more than that. Does the
14	bank get the excess over the \$50,000 that it was thought
15	to have as long as it's under the amount of the original
16	note?
17	MR. RIDER: No, the bank the if I
18	understand your question, the property is increasing in
19	value?
20	QUESTION: No, the property the there's a
21	\$100,000 note secured by a property. At the time of the
22	chapter 7 proceeding is thought to have a value of only
23	about \$50,000. So you then extinguish the personal
24	liability, and the bank has an in rem claim for at least
25	\$50,000 against the property. They then go into either

1	foreclosure or chapter 13 and they sell it for \$60,000.
2	They just underestimate it's actual who gets the 10?
3	MR. RIDER: I in that specific instance,
4	Justice Stevens, that's something that I'm not exactly
5	clear on. I know the bank has the right to that value,
6	but I do not believe that they would have the value
7	have the right to what's left, because there would be
8	nothing
9	QUESTION: Is there some kind of a dollar figure
10	set on the value of the property in the chapter 7
11	proceeding?
12	MR. RIDER: Yes.
13	QUESTION: And that's their that's the extent
14	of the in rem claim is that figure, then?
15	MR. RIDER: Yes.
16	QUESTION: So if it produces more, we don't know
17	what happens to the to the
18	MR. RIDER: That's right.
19	QUESTION: They cannot recover against the
20	property up to the full amount of their claim?
21	MR. RIDER: Oh, yes, yes, I'm sorry. Yes, yes.
22	QUESTION: Up to the full amount of their claim.
23	MR. RIDER: Yes.
24	QUESTION: No matter what the property you
25	know, if it's sold 2 years later and it's gone up in the
	4.0

1	interim, they can get the full amount of their claim.
2	That's how I understand it works, isn't it?
3	MR. RIDER: The full the full amount
4	QUESTION: Of their claim.
5	MR. RIDER: Yes, of their claim. That's right.
6	QUESTION: No more than that, but up to there.
7	MR. RIDER: That's correct. The full amount of
8	their undersecured claim. I thought that Justice Stevens
9	was talking about under unsecured in the chapter 7.
10	QUESTION: Well, I in my hypothetical if you
11	sell the property for 60, the bank gets the full 60. Is
12	that that's what Justice Scalia is assuming. And that
13	you agree with that?
14	MR. RIDER: If the value of their claim is
15	their allowed claim, yes.
16	QUESTION: But the original value the
17	original in personam claim was worth \$100,000 in my
18	hypothetical, which has been discharged in the chapter 7
19	proceeding. And they've left with an in rem claim against
20	the property. And is the value of that claim still
21	\$100,000 if the property produces that much at a sale?
22	MR. RIDER: From what I what I've discussed
23	with Justice Scalia, the value the value of their
24	allowed the bank is entitled to the value of their
25	allowed claim.

1	QUESTION: In the original proceeding?
2	MR. RIDER: Yes.
3	QUESTION: Oh, okay. So that's
4	QUESTION: And would the would the claim be
5	allowed ordinarily in the in the amount of 100,000 if
6	that was the amount of the bank's note?
7	MR. RIDER: Well, the if that's the amount
8	the bank is allowed the only the amount of their
9	secured claim their allowed secured claim.
10	QUESTION: Well, supposing I have supposing
11	there's a note for \$100,000 which I have given you. And
12	I've given you a mortgage on my farm, and I go into
13	chapter 7 and you file a claim, did what happens?
14	MR. RIDER: I'm sorry. I'm not clear on that,
15	Mr. Chief Justice.
16	QUESTION: Yes, I think both Justice Scalia,
17	Justice Stevens, and I are trying to get an answer from
18	you which seems to be very difficult to get out of you.
19	Can you
20	MR. RIDER: I apologize for that.
21	QUESTION: The debtor has a has a has
22	executed a note for \$100,000. He's given a mortgage to
23	secure that note on a farm. He goes into chapter 7
24	bankruptcy. The creditor makes a claim based on the note
25	and the mortgage. Is that claim allowed in the amount

1	that the let's say the mortgage will not pay the full
2	100,000. It will only pay 50,000. Is the claim allowed
3	for 100,000, because that's the amount of the note?
4	MR. RIDER: No, in fact in this case, what was
5	our claim was much more. Our claim was something for
6	500,000, and it and it was only allowed for a
7	approximately 270,000 was the allowed amount of the claim.
8	QUESTION: Well, did the amount for which it was
9	allowed have anything to do with the value of the
10	security?
11	MR. RIDER: The yes, it yes, it did.
12	Thank you, Your Honor. I have no further
13	questions.
14	QUESTION: Thank you, Mr. Rider.
15	Mr. Gilman, do you have rebuttal? You have 2
16	minutes remaining.
17	REBUTTAL ARGUMENT OF W. THOMAS GILMAN
18	ON BEHALF OF THE PETITIONER
19	MR. GILMAN: Thank you, Mr. Chief Justice. I
20	just want to clear up a couple little points here. One,
21	the amount of the the amount the bank can receive when
22	they go through the foreclosure depends on the amount of
23	the mortgage document, irrespective of the well,
24	irrespective of the note after the chapter 7 discharge.
25	QUESTION: And even though the in personam claim

1	has been discharged?
2	MR. GILMAN: Right. So in this case what
3	happened was the amount of the note was for roughly
4	\$350,000, but the bank never increased the amount of the
5	mortgage from the original \$100,000, and so therefore,
6	their in rem amount is determined by the \$100,000 mortgage
7	amount. The remainder of the of the promissory note
8	has been discharged in bankruptcy. That's in the
9	foreclosure.
10	In the in the bankruptcy proceeding, the
11	amount of the claim is determined both by the amount on
12	the mortgage, which is \$100,000, and the amount of the
13	value of the property so that if the property was worth
14	\$110,000, they would be oversecured but their claim would
15	only be allowed for \$100,000. If it was worth \$90,000,
16	even though they had a
17	QUESTION: And the 10 would go back to the
18	debtor?
19	MR. GILMAN: The 10 would be equity for the
20	unsecured creditors.
21	QUESTION: All right.
22	QUESTION: But it's determined not by the value
23	of the property at the time of this of the section 7
24	proceeding, but the value of the note secured by the
25	property.

1	MR. GILMAN: The value of the mortgage.
2	QUESTION: Well, okay all right, the value of
3	the mortgage.
4	MR. GILMAN: But
5	QUESTION: But then in your chapter 13
6	proceeding, you use the value of the property as you as
7	what you have to pay off over a period of time.
8	MR. GILMAN: You use both the value of the
9	property and the and the amount of the mortgage. In
10	other words, if the mortgage amount is more than the value
11	of the property, then it the amount of the claim in the
12	13 will be the value of the property. On the other hand,
13	if the mortgage amount is less than the value of the
14	property, then the amount of the claim will be just the
15	mortgage amount.
16	I wanted to touch also on Justice Souter's
17	QUESTION: Thank you, Mr. Gilman. Your time has
18	expired.
19	MR. GILMAN: Oh, I'm sorry.
20	CHIEF JUSTICE REHNQUIST: The case is submitted.
21	(Whereupon, at 12:04 p.m., the case in the
22	above-entitled matter was submitted.)
23	
24	
25	

CERTIFICATION

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CURTIS REED JOHNSON, Petitioner, v. HOME STATE BANK

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