

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: UNITED STATES, Petitioner, v. NORDIC VILLAGE,  
INC., DAVID O. SIMON, TRUSTEE

CASE NO: 90-1629

PLACE: Washington, D.C.

DATE: Monday, December 9, 1991

PAGES: 1 - 41

**LIBRARY**  
SUPREME COURT, U.S.  
WASHINGTON, D.C. 20543

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

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

'91 DEC 17 AM 0:55



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

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
RICHARD H. SEAMON, ESQ.	
On behalf of the Petitioner	3
MARVIN A. SICHERMAN, ESQ.	
On behalf of the Respondent	21
REBUTTAL ARGUMENT OF	
RICHARD H. SEAMON, ESQ.	
On behalf of the Petitioner	38



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

2 (11:00 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in No. 90-1629, United States v. Nordic Village, Inc.  
5 Mr. Seamon.

6 ORAL ARGUMENT OF RICHARD H. SEAMON

7 ON BEHALF OF THE PETITIONER

8 MR. SEAMON: Mr. Chief Justice, and may it  
9 please the Court:

10 This case arises under the Bankruptcy Code. The  
11 trustee in bankruptcy appointed for the respondent --

12 QUESTION: Mr. Seamon, before you get started,  
13 don't our rules provide that briefs should have a summary  
14 of the argument?

15 MR. SEAMON: That's correct.

16 QUESTION: Is the Solicitor General's office  
17 subject to those rules?

18 MR. SEAMON: Yes, I believe it is.

19 QUESTION: Where is the summary of argument in  
20 your brief?

21 MR. SEAMON: It is lacking one, and that is an  
22 oversight for which I apologize the Court.

23 QUESTION: Would you say that again? I didn't  
24 hear it.

25 MR. SEAMON: That was an oversight for which I

1 apologize to the Court.

2 The -- to continue, the trustee in bankruptcy  
3 appointed for the respondent in this case, Nordic Village,  
4 brought this adversary proceeding and recovered a \$20,000  
5 money judgment against the Internal Revenue Service. The  
6 Sixth Circuit upheld the judgement on the ground that the  
7 United States had waived sovereign immunity under section  
8 106(c) of the Bankruptcy Code. Thus, the issue is whether  
9 section 106(c) of the code authorizes a bankruptcy trustee  
10 to recover money from the Government.

11 This Court previously addressed the scope of  
12 section 106(c) in a case involving an individual State,  
13 namely, Hoffman v. Connecticut Department of Income  
14 Maintenance. In Hoffman, the Court concluded that section  
15 106(c) does not authorize monetary relief against the  
16 States. We submit that the same conclusion should apply  
17 in cases involving the United States.

18 The facts of this case are undisputed and may be  
19 summarized briefly. Nordic Village was a restaurant in  
20 Lake County, Ohio, that filed a petition for relief under  
21 Chapter 11 in March 1984. After the petition was filed,  
22 the IRS filed a proof of claim against the estate seeking  
23 payment of overdue employment taxes.

24 Also, after the petition was filed, an officer  
25 of Nordic Village, Josef Lah, drew a check for \$26,000 on

1 Nordic Village's corporate bank account which he used to  
2 get a \$20,000 cashier's check payable to the IRS. Mr. Lah  
3 delivered the \$20,000 check to the IRS and had them apply  
4 it against his personal taxes.

5 The trustee for Nordic Village then brought this  
6 action seeking to recover the \$20,000 payment on the  
7 grounds that it was an unauthorized postpetition transfer.  
8 The bankruptcy court agreed, and held that the transfer  
9 was voidable, and entered the \$20,000 judgment against  
10 IRS. And the District Court for the Northern District of  
11 Ohio affirmed.

12 On appeal to the Sixth Circuit, the Government  
13 argued that the \$20,000 judgment was barred by sovereign  
14 immunity. The Government relied on the decision in  
15 Hoffman. Hoffman, like this case, involved a voidable  
16 payment of taxes. In Hoffman, as here, the trustee argued  
17 that section 106(c) of the code authorized recovery.

18 QUESTION: May I just get one factual thing  
19 straight, Mr. Seamon?

20 MR. SEAMON: Yes.

21 QUESTION: I gather you didn't make the  
22 sovereign immunity argument in the district court. And  
23 was the reason for raising it in the Sixth Circuit that  
24 Hoffman was decided in the interim?

25 MR. SEAMON: That's correct.

1 QUESTION: So you in fact learned that there was  
2 an available sovereign immunity argument.

3 MR. SEAMON: I don't think that the Government  
4 was aware the availability of the argument before then.

5 In Hoffman, the Court rejected the argument that  
6 recovery of a voidable tax payment was authorized under  
7 section 106(c). In an opinion written by Mr. Justice  
8 White, a plurality of the Court concluded that section  
9 106(c) cannot be construed to authorize retroactive  
10 monetary relief against the States. Mr. Justice Scalia  
11 concurred in that conclusion on the ground that Congress  
12 lacks authority under the bankruptcy clause to subject  
13 unconsenting States to retroactive monetary relief.

14 In this case, the Sixth Circuit declined to  
15 follow the plurality's interpretation in Hoffman and  
16 adopted instead the views of the dissenting members in  
17 Hoffman. Thus, the court upheld the judgement against the  
18 Federal Government, which it recognized could not be  
19 entered against a State.

20 QUESTION: Do you think the requirements for a  
21 clear statement are the same in waiving Federal sovereign  
22 immunity as they are for finding abrogation of a State  
23 Eleventh Amendment immunity?

24 MR. SEAMON: They are very closely similar and  
25 have been described in virtually identical terms. I would



1 suggest that there is -- there may well be some difference  
2 between the formulation in the Atascadero case of the  
3 clear statement rule and the standard for Federal  
4 sovereign immunity cited in a case like Ruckelshaus. But  
5 I don't think that -- in any event, I don't think that  
6 Congress would have discerned a difference between the two  
7 statements, especially at the time it was drafting the  
8 code. And in any event, I think in drafting the statute  
9 at issue here, clearly it didn't intend to have a  
10 different rule apply to the States as opposed to the  
11 United States based on any difference in the standards for  
12 waiving the two forms of immunity.

13 QUESTION: Of course, the incompatibility you  
14 describe only exists if you assume that the judgment of  
15 the court was based upon the rationale of the plurality  
16 opinion. There's no incompatibility at all if the  
17 judgment of the court is thought to have been based on the  
18 rationale of the concurrence. That is to say, it's quite  
19 feasible that Congress may -- might want to waive its own  
20 sovereign immunity, but does not have the power to waive  
21 the sovereign immunity of the States. There's nothing  
22 strange about that.

23 MR. SEAMON: No, there is nothing strange about  
24 that, Your Honor. And in fact, in certain other statutes,  
25 Congress has drawn a distinction between suits against the

1 United States and suits against individual States. I  
2 would cite as an example some of the citizen suit  
3 provisions in the environmental statutes like RCRA and  
4 CRCLA. You can bring a citizen's suit against the United  
5 States and then against State entities to the extent  
6 permitted by the Eleventh Amendment.

7 The Congress didn't draw the distinction in this  
8 case, even though it recognized that there were  
9 limitations on its power with regard to the States. And I  
10 would suggest that the fact that it didn't draw a  
11 distinction on the face of the statute, but recognized a  
12 limit in terms of its power over the States suggests that  
13 it wanted to waive Federal sovereign immunity to the same  
14 extent it believed it could abrogate State sovereign  
15 immunity.

16 QUESTION: May I just be clear on what you just  
17 said? You're telling us that, in the Clean Water Act and  
18 those other citizen suit provisions, Congress has adopted  
19 different standards for the waiver of the Federal  
20 sovereign immunity, of the waiver of the Eleventh  
21 Amendment?

22 MR. SEAMON: Let me be clearer than I perhaps  
23 was. I'm saying that when Congress is legislating close  
24 to the limits of what it thinks that its constitutional  
25 authority is, and it intends to allow actions against both

1 kinds of sovereigns, in certain cases it will embody in  
2 the statute itself its recognition that maybe some suits  
3 against the Federal Government would be permitted, even  
4 though the same suit wouldn't permitted against the State.

5 QUESTION: And the Clean Water Act citizen suit  
6 provision, in your view, is an example of such a  
7 situation.

8 MR. SEAMON: I'm citing the Clean Water Act  
9 provision as an example of where Congress is drawing a  
10 distinction of Congress' recognizing --

11 QUESTION: It's a different rule for the Federal  
12 defendant against a State defendant.

13 MR. SEAMON: It's recognizing that there may be  
14 a different rule, and perhaps --

15 QUESTION: Well, I think you said there was a  
16 difference and that's an example of the difference.

17 MR. SEAMON: If I did, I wasn't being clear  
18 enough. What I meant to say was that it's an example of  
19 Congress being sensitive to the possible differences that  
20 may evolve in the process of construing such a statute.

21 QUESTION: Mr. Seamon, the lower courts found,  
22 did they not, that the IRS knew or should have known of  
23 the transfer's voidability?

24 MR. SEAMON: It made the latter finding that the  
25 IRS should have known that the \$20,000 --

1 QUESTION: On what did they base that finding?

2 MR. SEAMON: They based that finding on a  
3 notation on the \$20,000 check stating that the remitter  
4 was Swiss Haus, Inc., which was the doing business name  
5 for Nordic Village.

6 QUESTION: And yet you don't mention that at all  
7 in your brief, do you?

8 MR. SEAMON: We -- I don't believe we state that  
9 in the brief. We stated that in the petition. And --

10 QUESTION: Well, it seems to me it's critical of  
11 the lower court's finding, and I'm a little surprised that  
12 you haven't mentioned it in the brief.

13 MR. SEAMON: Your Honor, we stated that in our  
14 petition to make clear all of the issues that were  
15 presented at the lower court. And we also stated in our  
16 petition that we do not at this level dispute the finding  
17 below that the transfer was voidable. The findings by the  
18 lower court regarding the notations on the check were part  
19 of its holding that the transfer was voidable. That issue  
20 is not before the Court, and that's why we didn't raise it  
21 in our brief on the merits.

22 It is correct that the incompatibility in this  
23 case only exists between the result in Hoffman and the  
24 result reached by the Sixth Circuit below. Nonetheless,  
25 we believe that the plurality in Hoffman construed section



1 106(c) correctly. It does not clearly authorize monetary  
2 relief against Governmental units. And because I'm going  
3 to begin by talking about the language of section 106, I  
4 would refer the Court to the appendix to our petition at  
5 page 57a where section 106 is reprinted.

6 Section 106(c), which is the provision at issue  
7 here, was added late in the legislative process and in  
8 some respects, it is not a model of drafting clarity.  
9 Therefore, section 106(c) is best understood in the  
10 context of section 106 as a whole. Sections 106(a) and  
11 (b) are the provisions that Congress clearly designed to  
12 deal comprehensively with the problem of money claims  
13 against governmental units. That is clear because section  
14 106(a) and (b) use the word claim, which is defined in the  
15 code to mean any right to payment. Thus, section 106(a)  
16 and (b) considered together address all money claims that  
17 a trustee may have against the Government, whether they  
18 arise under a provision of the code or come from a source  
19 outside of the code.

20 While 106(a) and (b) are quite comprehensive in  
21 the sense that they address all money claims, they're  
22 quite restrictive in setting forth conditions for  
23 recovering the money. 106(a) allows affirmative recovery  
24 only when the Government has filed a claim against the  
25 estate, and the estate has a compulsory counterclaim.

1 That is a very narrow category of cases that would permit  
2 affirmative monetary relief of the sort that was awarded  
3 here.

4 106(b) is slightly broader in scope inasmuch as  
5 it reaches permissive counterclaims. By the same token,  
6 it limits the kind of relief available. Under section  
7 106(b), the trustee can only get an offset of the estate's  
8 claim with respect to the Government's claim against the  
9 estate. And as is clear, 106(a) and (b) both apply only  
10 when the Government has filed a claim against the estate.

11 In contrast to 106(a) and (b), section 106(c)  
12 contains nothing that is suggestive of monetary relief.  
13 It consists of two subparts, both of which must be  
14 satisfied for 106(c) to apply. Together they allow a  
15 court to make a determination of an issue arising under  
16 any of over 100 code provisions that contain one of three  
17 trigger words that are specified in 106(c)(1). The  
18 plurality in Hoffman construed the language of 106(c) as  
19 indicative of declaratory relief rather than monetary  
20 relief. That is clear, in our view, not only on the face  
21 of the statute, section 106(c) itself, but also when  
22 106(c) is contrasted with (a) and (b), whereas (a) and (b)  
23 refer broadly to claims, and clearly indicate that  
24 Congress was thinking of monetary relief. 106(c) refers  
25 to the courts making determinations of an issue, which is

1 much narrower language than the language of claim used in  
2 106(a) and (b).

3 QUESTION: Well now you make a distinction  
4 between the power of the trustee to void a transfer and  
5 the power to sue for recovery of money. Is that right?

6 MR. SEAMON: Yes. Because the code itself  
7 distinguishes those two concepts by treating -- voiding,  
8 having a separate set of avoidance provisions from the  
9 recovery provision.

10 QUESTION: And the transfer section is section  
11 549?

12 MR. SEAMON: Yes, regarding postpetition  
13 transfers like this one.

14 QUESTION: And do you think that a transfer  
15 could be voided by the court against the Federal  
16 Government if none of the trigger words appear in 549?

17 MR. SEAMON: No, I don't think that's so. I  
18 think that in this case, the significant provision is  
19 section 550, and the fact that section 550 contains a  
20 trigger word allows suits to void transfers.

21 QUESTION: And you think 550 applies even though  
22 none of the trigger words are in 549?

23 MR. SEAMON: That's correct. 550 embraces a  
24 variety of provisions that regard a avoidance of different  
25 kinds of transfers. Postpetition transfers like what

1 we're talking about here, as well as fraudulent  
2 conveyances and preferential transfers, we would say that  
3 you look to section 550. And that -- and under section  
4 106(c), 550 is brought in by virtue of (c)(1). But you  
5 must also look to (c)(2) to determine what sort of relief  
6 is authorized; (c)(2) in effect specifies the consequences  
7 of applying (c)(1). (c)(2) says that when a provision has  
8 been triggered, the Court in that circumstance can render  
9 a determination of the issue that has arisen under the  
10 trigger provision. And that language regarding  
11 determination of an issue, especially when compared to  
12 106(a) and (b), clearly seemed to limit relief beyond that  
13 contemplated in 106(a) and (b).

14 QUESTION: May I ask you, Mr. Seamon, under your  
15 theory they can't recover the money. Supposing the  
16 transfer had been, say the Government had seized an  
17 automobile just before the -- could the debtor's estate  
18 get that back?

19 MR. SEAMON: I think I would need to know more  
20 facts, but I believe that yes, because that would be the  
21 situation, essentially in Whiting Pools, where there was  
22 seizure and restraint of tangible property. In that case  
23 it was immediately before the petition was filed. That is  
24 exactly what 106(c) was designed to do.

25 QUESTION: What if they seized a suitcase full



1 of money?

2 MR. SEAMON: Then I do not think that --

3 QUESTION: They get the suitcase, but not the  
4 money?

5 MR. SEAMON: Cases start to get hard when you  
6 talk about identifiable funds. I think in general it is  
7 the same kind of problem that arises in the Eleventh  
8 Amendment context. You have Edelman v. Jordan on the one  
9 hand, and ex parte Young on the other. And in individual  
10 cases you need to look at the trustee's claim and say,  
11 what is he or she really seeking? Is it in effect  
12 retroactive monetary relief?

13 In general, though, I would say that there will  
14 be very few claims that would entail the handing over of  
15 money that will be permitted under section 106(c). The  
16 clearest example would be some sort of specie remedy where  
17 you have rare coins and those were seized in a Whiting  
18 Pools kind of situation.

19 QUESTION: Mr. Seamon, may I ask you a question  
20 which may well be answered in Hoffman, I just don't  
21 remember. Does the language, any assertion of sovereign  
22 immunity, in (c) have a breadth sufficient to reach  
23 monetary recovery?

24 MR. SEAMON: The Court did address that phrase  
25 in Hoffman, and if I'm recalling it correctly, said that

1 that indicates that 106(c) is in fact a waiver of  
2 sovereign immunity, but doesn't answer the question of the  
3 extent to which sovereign immunity has been waived.

4 QUESTION: It's just insufficiently specific.

5 MR. SEAMON: That's correct. It suspends the  
6 defense of -- the defense of sovereign immunity with  
7 respect to whatever relief is authorized under section  
8 106(c), but you still need to look at the language  
9 following that phrase to determine exactly what is  
10 authorized.

11 And the other indication, besides contrasting  
12 (c) with (a) and (b), that reinforces the narrow scope of  
13 the relief authorized under section 106(c) is that (c)  
14 does contain the provision subpart (c)(2). We think that  
15 it is improper as the Sixth Circuit suggested here, to  
16 look at the provisions that have been triggered to  
17 determine what kind of relief is authorized. Rather you  
18 have to go on to (c)(2) and determine it by reference to  
19 that provision.

20 If, as the Sixth Circuit was suggesting here,  
21 and as the trustee argues, you simply look to whatever  
22 relief is authorized in the trigger provision, then  
23 subpart (c)(2) become superfluous. It then becomes merely  
24 a restatement of subpart (c)(1).

25 QUESTION: Is there any explanation, Mr. Seamon,

1     you think (c) was -- 106(c) was added after (a) and (b)  
2     were already in place in the congressional --

3             MR. SEAMON: Yes.

4             QUESTION: -- why this was added?

5             MR. SEAMON: Yes, to refer to the legislative  
6     history, it indicates that 106(c) was added primarily to  
7     resolve a conflict among the circuits, and that conflict  
8     had to do with the availability of declaratory relief  
9     rather than monetary relief. The floor managers of the  
10    legislation referred to a case called Gwilliam which was  
11    out of the Ninth Circuit, and the Gwilliam case held that  
12    a bankruptcy court could determine whether a tax debt was  
13    dischargeable, whether or not the IRS had filed a claim  
14    against the estate.

15            There was contrary precedent in the Fifth  
16    Circuit, and so 106(c) essentially codifies the holding in  
17    Gwilliam so that even when a governmental unit has not  
18    filed a claim against the estate and brought itself within  
19    (a) and (b), it is still subject to declarations by the  
20    court, the bankruptcy court, that have to do with the  
21    Government's rights in the property of the estate.

22            So to the extent that Gwilliam is codified,  
23    Congress -- the legislative history suggests -- also  
24    intended to allow binding determinations on matters in  
25    addition to tax debts. Thus, under the rationale of the

1 way that section 106(c) operates is that the Government is  
2 bound by discharges in bankruptcy. If you look through  
3 the code, all of the discharge provisions in the various  
4 chapters contain a trigger word. And to the extent that a  
5 Government debt has been brought into the estate and is  
6 part of a reorganization plan or an order of relief or  
7 whatever, that is discharged, and the Government is bound  
8 by that discharge order.

9 Thus, section 106(c), even though it does not  
10 authorize monetary relief, nonetheless serves a very  
11 important function. It gives the court a broad array of  
12 declaratory types of powers. And it also, in certain  
13 circumstances, allows incidental injunctive relief of the  
14 sort that was upheld in Whiting Pools.

15 I mentioned Whiting Pools a moment ago. To  
16 discuss it a little further, it involved tangible property  
17 that had been seized prior to bankruptcy filing. The  
18 seizure was effected by the IRS, and before the seized  
19 tangible property was sold, the trustee sought turnover of  
20 the property to the estate. In effect, the Court was  
21 determining in that case, and rather than employ self-help  
22 remedies of the type that would be authorized under the  
23 tax code, the Government had to resort to the Bankruptcy  
24 Code for relief, just like other creditors.

25 The important distinction between Whiting Pools



1 and this case is that it involved tangible property rather  
2 than a claim for monetary relief.

3 QUESTION: Mr. Seamon, do you have any idea how  
4 it occurred to anybody to draft (c)(1) that way? I mean,  
5 instead of just mentioning the sections, pick out a couple  
6 of words? Why would that occur to anybody to do something  
7 like that? It's almost like a game.

8 MR. SEAMON: It's part of -- it stems from the  
9 fact that 106(c) was added after all of the rest of the  
10 code had been drafted.

11 QUESTION: No, but I mean why wouldn't you just  
12 name the sections instead of, you know, saying a provision  
13 that contains these, what you called trigger words.

14 MR. SEAMON: It may well be --

15 QUESTION: I've never seen a provision like  
16 that.

17 MR. SEAMON: Nor have I. And it may well be  
18 that it is a product of haste or that in fact there are a  
19 fairly lengthy list of provisions that include one of  
20 these three trigger words. I think there are something  
21 like 111 in the code. When you look at what provisions  
22 are triggered, there doesn't seem to be any rigorous logic  
23 between what was included and what was excluded. And  
24 again, I would suggest that there was -- to the extent  
25 that it was logical, there was a broader kind of logic

1 going on that Congress started with the Gwilliam case that  
2 concerned declaratory relief in the tax area, and thought  
3 it would be a good idea to generalize that holding so that  
4 declaratory relief was available in other areas where the  
5 Government had not filed a claim against the estate, and  
6 thereby brought itself under (a) and (b).

7           You had this conflict in the circuits out there  
8 that it wanted to resolve. And while it was at it, it  
9 considered what sorts of kind of major actors in the code  
10 would cover declaratory relief of the sort that it had in  
11 mind.

12           I think the only other thing that one can say  
13 about what the choice of the trigger words was is that the  
14 selection of governmental unit as a trigger word is  
15 significant in as much as it suggests that where Congress  
16 used the term governmental unit elsewhere in the code, it  
17 wasn't thinking about waiving sovereign immunity. It had  
18 to go back after the fact and add it as a trigger word.  
19 That is important inasmuch as, you know, likewise in the  
20 trigger provisions that address monetary recovery, there  
21 too, Congress was not thinking about sovereign immunity.  
22 And that is another reason why it is inappropriate to look  
23 to the trigger provisions to determine what kind of relief  
24 is authorized.

25           The third of the three trigger words, entity, I

1 would suggest brings in some very important provisions  
2 that Congress would rationally have wanted to subject the  
3 Government to, such as the substance of the automatic stay  
4 provision, as well as a code provision which authorized  
5 the trustee to void the fixing of certain statutory liens  
6 that attach after a bankruptcy petition has been filed.  
7 That provision only contains the trigger word entity and I  
8 think it is a situation where Congress chose entity with  
9 the idea of having particular provisions apply.

10 In any event, it is hard to figure out the logic  
11 of the way section 106(c) is drafted. What you can say  
12 about it with confidence is that it does not clearly speak  
13 to the issue of monetary recovery. And inasmuch as it is  
14 a waiver of sovereign immunity, Congress had to speak  
15 clearly, as it did in (a) and (b), if it intended to  
16 subject governmental entities to monetary relief under  
17 that provision. Because it is not clear, it cannot be  
18 construed in the manner that the Sixth Circuit adopted.

19 And if there are no further questions, I'd like  
20 to reserve the balance of my time.

21 QUESTION: Very well, Mr. Seamon.

22 Mr. Sicherman, we'll hear from you.

23 ORAL ARGUMENT OF MARVIN A. SICHERMAN

24 ON BEHALF OF THE RESPONDENT

25 MR. SICHERMAN: Mr. Chief Justice, may it please

1 the Court:

2 The appellant and appellee in this case have one  
3 serious difference. The appellant believes its sovereign  
4 immunity exists in all instances under all conditions.

5 The appellee suggests that sovereign immunity doesn't  
6 exist under all circumstances and in all conditions.

7 Section 106 of the Bankruptcy Code clearly deals with the  
8 topic of a waiver of sovereign immunity, but neither  
9 section 106 of the Bankruptcy Code nor any other provision  
10 of bankruptcy law creates sovereign immunity where it does  
11 not already exist.

12 Sovereign immunity does not exist to deprive a  
13 court of its in rem jurisdiction over that which is in the  
14 actual physical custody and control of the court. I'm not  
15 speaking about property of the estate in the intellectual  
16 control of the court, I'm talking about dollars.

17 QUESTION: This was not a case that was  
18 approached to court below, was it?

19 MR. SICHERMAN: To please the Court, this has  
20 been argued in this case from the original complaint. The  
21 Sixth Circuit --

22 QUESTION: Well, you haven't answered my  
23 question.

24 MR. SICHERMAN: The answer is no, the Sixth  
25 Circuit decided the case on a sovereign immunity issue.



1 QUESTION: Well, it decided the case based on  
2 its construction of the statute.

3 MR. SICHERMAN: That is correct.

4 QUESTION: And that it didn't decide the case  
5 based on the argument you are now making.

6 MR. SICHERMAN: It didn't reach that argument.

7 QUESTION: Well, all right, but it didn't use  
8 that. And it seems -- I think what you're arguing would  
9 argue for a much broader relief than the Sixth Circuit  
10 gave you.

11 MR. SICHERMAN: It would. And we did.

12 QUESTION: You didn't cross appeal.

13 MR. SICHERMAN: No, we did not. But I don't  
14 believe, Your Honor, that if this money was in the court's  
15 custody, that the Sixth Circuit erred. I believe the  
16 Sixth Circuit posture that sovereign immunity did not  
17 prevent the lower court from awarding relief was a  
18 recognition that the money was in the court's custody,  
19 that where it was removed from the custody of the court  
20 improperly, the improper postpetition transfer by Mr. Lah,  
21 that what was happening was a restoration to the  
22 bankruptcy court of a possession of that which was in the  
23 court's possession.

24 This is not a, shall we say, reduction of the  
25 money in the Federal till, because it was a restoration.

1 I'm the first to acknowledge in saying restoration is  
2 different from a judgment to pay is a play on words. But  
3 the fact remains that the money was being restored to that  
4 place where it belonged.

5 QUESTION: What do you think is the closest case  
6 from this Court that supports your position, Mr.  
7 Sicherman?

8 MR. SICHERMAN: If it please the Court, we had  
9 the Far East Lines. We go all the way back to, I think  
10 it's Bull v. United States.

11 QUESTION: You're saying that is the closest  
12 case that supports your --

13 MR. SICHERMAN: That is the closest I can come.  
14 There's Bull, and there's another case of that same  
15 vintage, Your Honor, United States v. State Bank. Now  
16 they dealt with the concept of restoration. They did not  
17 deal with pure in rem.

18 The in rem position, the closest we come is a  
19 Ninth Circuit decision in Far East -- Pacific Far East  
20 Lines. And there are other cases, such as Matter of  
21 Retail Stores Delivery --

22 QUESTION: Yes, I'd asked you about cases from  
23 this Court. Bull v. United States is a case --

24 MR. SICHERMAN: It's the closest I can come,  
25 Your Honor.

1 QUESTION: And it's from this Court?

2 MR. SICHERMAN: Yes. And State Bank.

3 QUESTION: State Bank is a case from this Court?

4 MR. SICHERMAN: Yes, Your Honor. Cites to State  
5 Bank are 96 U.S. 30. Bull, Your Honor, is 295 U.S. 247.  
6 They're as close as anything we have found.

7 Your Honor, the Government position is that  
8 sovereign immunity is of such significance that the  
9 sovereign is not bound, or should not be bound by  
10 determinations of courts. The Ninth Circuit in Pacific  
11 Far East Lines clearly stated that the sovereign immunity  
12 of the United States did not prevent a bankruptcy court  
13 from compelling the return of property which was part of  
14 the bankruptcy estate. The Ninth Circuit went on to say  
15 that sovereign immunity protects the property which  
16 belongs to the Government independent of the bankruptcy  
17 process, but where the property has been transferred from  
18 the bankruptcy estate, the bankruptcy court retains  
19 jurisdiction.

20 QUESTION: The property. You mean they have the  
21 right to get back the same bills that went --

22 MR. SICHERMAN: No, Your Honor, money -- if it  
23 were my pen, my pen might be identifiable, although this  
24 cheap Papermate pen I'm sure there are many of. Where  
25 it's dollars, they're a fungible commodity. Fortuitously,

1 in the case at bar in the lower court, as Justice Stevens  
2 notes -- I'm sorry, I believe it was Justice Blackmun  
3 pointed out, the money was clearly traceable in the  
4 concept of a fixed number of dollars.

5 Mr. Lah purchased, with funds of the debtor in  
6 possession that he no right to do, an official check or  
7 money order from the Ameritrust Company in Cleveland.  
8 That Ameritrust official check indicated the remitter as  
9 Nordic Village, Inc, or Swiss Haus. I think it said Swiss  
10 Haus, as I reflect upon it. Mr. Lah took that check down  
11 the street -- and in the City of Cleveland the Internal  
12 Revenue to the Ameritrust main office is about 5  
13 blocks -- went into Internal Revenue and had -- gave the  
14 check to an Internal Revenue collector and asked that the  
15 money be applied to his personal tax obligations. The  
16 record below is silent as to who drew what I believe was  
17 two or three lines through the name of the remitter. The  
18 court below found, and the Government has not appealed or  
19 made an issue, that the Government was on sufficient  
20 notice of the impropriety of the transfer of these funds,  
21 that they were coming out of a bankruptcy estate.

22 QUESTION: Would it make any difference whether  
23 the Government was on notice or not if you're relying on  
24 the theory of, what do you say, restoration to the estate  
25 as something that belongs to it?



1           MR. SICHERMAN: It said -- I would say, Your  
2 Honor, if we rely on the theory of restoration, and the  
3 Government had knowledge. We certainly have a stronger  
4 entitlement to restoration than if the Government were an  
5 unwitting party who had been duped. Our brief --

6           QUESTION: Well, you'd have a stronger equitable  
7 claim, but it wouldn't be any stronger as far as the  
8 doctrine of sovereign immunity is concerned. I mean,  
9 you're either just taking back what's yours or you're  
10 taking something that belongs to the United States. And  
11 if it's your theory of restoration it really doesn't -- as  
12 far as sovereign immunity is concerned, it doesn't matter  
13 whether the Government knew about it or not, right?

14          MR. SICHERMAN: The court below, trial court and  
15 the district court, felt it important to determine that  
16 the Government knew, because under section 550 of the  
17 Bankruptcy Code there are provisions where there's a  
18 third-party transferee -- let me rephrase that, Your  
19 Honor. Where the trustee is seeking to recover money from  
20 the initial transferee, good-faith/bad-faith knowledge are  
21 unimportant. Where the trustee is seeking recovery from  
22 one other than the initial transferee, whether called  
23 immediate or intermediate transferee, a question of good  
24 faith or knowledge becomes important.

25           In this case in the court below, they first

1 found that the Government was in fact the initial  
2 transferee. On the appellant's request in the district  
3 court for a modification of the judgment, then District  
4 Court Judge, now Chief District Court Judge Lambrose  
5 concluded that either they were the immediate  
6 initial -- I'm sorry, either they were the initial  
7 transferee, or if they were the mediate or intermediate  
8 transferee, they were on knowledge and had notice. So  
9 it's both pieces together, Your Honor.

10 QUESTION: Mr. Sicherman, don't you think that  
11 your reliance on Bull against United States may be  
12 somewhat limited by our later decision in the Dalm case?

13 MR. SICHERMAN: Yes, Your Honor.

14 QUESTION: Which said that really Bull just  
15 applied to equitable recoupment in tax cases.

16 MR. SICHERMAN: Yes, Your Honor, that is a  
17 serious problem. The Court asked what the closest case I  
18 could find is or had, that's as close as I can get.

19 QUESTION: What you're saying is it may not be  
20 very close, but it's the best you can do?

21 MR. SICHERMAN: I hate to use the expression  
22 standing in these chambers, but it's kind of like  
23 horseshoes, Your Honor, that's as close as I can get on  
24 that point.

25 We have -- going directly to the issue of

1 sovereign immunity and the question of waiver/nonwaiver.  
2 The plurality and the dissent -- plurality and dissenting  
3 opinions of this Court in the Hoffman case appear to agree  
4 that 106(c) of the Bankruptcy Code was a waiver of  
5 sovereign immunity with respect to the Federal Government  
6 in that the Federal Government, according to the plurality  
7 opinion, would be bound by a determination of issues by  
8 bankruptcy courts even where the Federal Government did  
9 not appear and subject itself. Which, of course, puts us  
10 back to the problem of what is a determination of an issue  
11 in 106(c).

12 And to deal with that, you really have to start  
13 by reading -- and I think in part I answer Justice  
14 Scalia's question about the strange structure of the  
15 language of 106(c). If the Court will indulge me, I have  
16 been a bankruptcy practitioner for 31 years. I have lived  
17 through the trauma of the 10 years of legislation that  
18 started with the Ford Foundation grant. So if on occasion  
19 I slip off into what I know, please just check me and say,  
20 hey, you're off base.

21 106(c) was created in part to cure different  
22 arguments. If we go back, the Bankruptcy Commission,  
23 whose report was beginning of the serious legislation that  
24 gave rise to the 1978 Bankruptcy Code, perceived a  
25 bankruptcy law where the jurisdiction of the bankruptcy

1 court would be all-encompassing, or as we called it,  
2 pervasive -- any matters arising in, arising out of, et  
3 cetera, which this Court found constitutionally infirm in  
4 Marathon as an improper grant. There was also tied with  
5 that a concept of being able to void multiple different  
6 pieces of litigation in nonbankruptcy forms.

7 When you come back to reading section 106(c)(1),  
8 if you start in a vacuum, which is a peculiar way to  
9 interpret a statute, but will help if you indulge me in my  
10 explaining what I believe is meant -- if you read a  
11 provision in this title that contains creditor entity or  
12 governmental unit -- applies to governmental units, which  
13 is 106(c)(1), read in a vacuum, unless intended to mean  
14 that any provision that says creditor or entity includes  
15 governmental unit, 106(c)(1) has no meaning. If you are  
16 going to read all of the words of the statute, then it  
17 must anywhere the word creditor or entity appears it is  
18 intended to include the governmental unit.

19 If you will go on to 106(c)(2), if you come to  
20 the conclusion that a determination means any judgment or  
21 decision on any issue binds a governmental unit, then you  
22 can take 106(c) and you can say that anywhere creditor,  
23 entity, or governmental unit appears, a decision of the  
24 bankruptcy court would bind the governmental unit.

25 When we get back to Hoffman, this Court is



1     troubled by -- if 106(c) says what I'm suggesting it was  
2     intended to mean, what is the role of 106(a) and 106(b)?  
3     The answer lies partly in the fact that when you read  
4     106(a) you find the word claim appearing twice.

5             A governmental unit is deemed to have waived  
6     sovereign immunity with respect to any claim against such  
7     governmental unit -- that was the first claim word -- that  
8     is property of the estate and that arose out of the same  
9     transaction or occurrence out of which such governmental  
10    units claim arose.

11            The word claim is used in 106(a) as two  
12    different concepts. You have a proof -- you have the  
13    definition of claim in the Bankruptcy Code. Section 101.5  
14    defines claim as a right to payment. You also have the  
15    writing, called a proof of claim, which is dealt with in  
16    Bankruptcy Code section 501, and in rules 3001(a). And I  
17    should add as a side comment, the filing of a proof of  
18    claim needs to be perceived as equivalent to the filing of  
19    a short form of complaint for money only in a  
20    nonbankruptcy court.

21            Now we deal with what 106(a) means. If the  
22    Government files this proof of claim, the piece of paper,  
23    because that's where their claim arose, in the bankruptcy  
24    court they have agreed to be subjected to any counterclaim  
25    or cross claim that arose out of the same

1 transaction -- the typical compulsory counterclaim  
2 provision of the Federal Rules of Civil Procedure.

3 So that if the Government files a proof of claim  
4 arising out of a defense contract that has nothing to do  
5 with the word creditor, entity, governmental unit -- it  
6 has filed a proof of claim because the debtor hasn't  
7 finished performing on a defense contract. The debtor  
8 says, but I have done more work than you have paid for,  
9 Mr. Government, you owe me money. That would be the  
10 106(a) counterclaim arising out of.

11 Interesting, if we read 106(a) and don't  
12 recognize that the word claim is being used in two  
13 different senses, we come to the conclusion that maybe the  
14 Government doesn't have to file a proof of claim for a  
15 106(a) waiver of sovereign immunity, which is contrary to  
16 every case I've read -- which is why I focus on the dual  
17 meaning of claim in 106(a).

18 There is a third meaning of claim that we need  
19 to keep sight of. And that is a claim is a cause of  
20 action, as we learned when I was in law school. So each  
21 time we see the word claim in 106, we have to think in  
22 terms of which meaning is it being used as. When you get  
23 to 106(b), the offset provision, you have again the word  
24 claim appearing twice.

25 Now, one of the problems with the word -- with

1 the structure of 106(b) is it deals with an allowed claim.  
2 There shall be offset against an allowed claim or  
3 interest. Under the provisions of Chapters 9 and 11, and  
4 106 is as significant and applicable in Chapters 9 and  
5 Chapter 11 as it is in Chapter 7 -- if the creditor is  
6 scheduled by the debtor for the correct amount and is not  
7 scheduled as being disputed, unliquidated, then in that  
8 event under bankruptcy rule 3003(b)(1), and section 502 of  
9 the Bankruptcy Code, that creditor's claim is deemed  
10 filed, and if not objected to, will be allowed.

11 If we now look at 106(b), if that creditor has a  
12 deemed allowed, deemed filed claim in a Chapter 9 or 11,  
13 and it would be more frequently an 11 than a 9 -- there  
14 are very few 9's -- and if we did not have 106(b), and if  
15 we look at 502(d) of the Bankruptcy Code, a creditor who  
16 received a preference, or voidable transfer who does not  
17 restore it, their claim shall be disallowed. So if the  
18 bankruptcy court determined that a governmental agency or  
19 unit got a preference, the total claim could be  
20 disallowed. If the preference were \$5, and the  
21 governmental unit's proof of claim were \$50 million, the  
22 failure to return the \$5 would be a basis of disallowance  
23 of the \$50 million claim.

24 QUESTION: Mr. Sicherman, I think the basic  
25 argument you're up against here, as you probably realize,

1 is that since (a) and (b) specify quite limited bases in  
2 which sovereign immunity is waived, how can you read (c)  
3 in its much broader language to constitute an across the  
4 board waiver? Do the sections you've just been referring  
5 to that would govern the operation of (a) and (b), do they  
6 contain key words or trigger words such as are contained  
7 in (c) (1)?

8 MR. SICHERMAN: Some do and some don't, Your  
9 Honor. It is the totality of bankruptcy law. I am aware  
10 of the fact that why (c) is in there --

11 QUESTION: But you've got to make us aware of  
12 it.

13 MR. SICHERMAN: I'm trying. I suggested a few  
14 moments ago, Your Honor, I have lived with bankruptcy law  
15 and may jump a little fast. And I implore the Court to  
16 slow me down when I go too fast.

17 QUESTION: Well, it's not necessarily a question  
18 of going too fast, but you only have half an hour.

19 (Laughter.)

20 QUESTION: And I presume you're still getting to  
21 the reason.

22 MR. SICHERMAN: I am getting right at it.

23 QUESTION: Okay. You've got about 8 minutes  
24 left.

25 MR. SICHERMAN: What I'm suggesting, simply put,



1 is the correct reading would be to recognize that 106(c)  
2 is a waiver of sovereign immunity wherever the trigger  
3 words appear. In addition thereto, that where the  
4 governmental unit filed a proof of claim, and the debtor  
5 has a counterclaim that is unrelated to the trigger words,  
6 that's what 106(a) is. Where the governmental unit has a  
7 proof of claim, whether filed or deemed filed, and there  
8 is a settle off or disallowance, that 106(b) will override  
9 502(d), and therefore the Government will only have a  
10 settle off and not a total disallowance.

11 Taken collectively, it means (c) was the  
12 intent -- which goes right back to where we were with the  
13 Bankruptcy Commission -- of the broad waiver.  
14 Additionally, since it is the Federal Government whom we  
15 are claiming has waived sovereign immunity, and Congress  
16 has passed the Bankruptcy Code, that waiver does not have  
17 to meet the Atascadero standard. It is a simple waiver.  
18 It is here.

19 In substance, the waiver by Congress in 106(c)  
20 is a sufficient waiver of the Federal Government's  
21 sovereign immunity, if there is sovereign immunity under  
22 the facts of this case, which unfortunately takes us back  
23 to the topic of, this was property in the custody of the  
24 court and has been removed.

25 QUESTION: Mr. Sicherman, can you tell me

1 something? What puzzles me about 106(c) is the first  
2 phrase of it. Can you explain to me, you know, it says,  
3 except as provided in subsections (a) and (b). Now what  
4 the rest of (c) does, no matter how you interpret the rest  
5 of (c), what the rest of (c) does is broadly or narrowly,  
6 it waives sovereign immunity. Right? I mean, that's the  
7 only thing we're arguing about, whether it does it in some  
8 limited way as to issues or does it broadly.

9 MR. SICHERMAN: Except as provided --

10 QUESTION: What is the -- how could (a) and (b)  
11 possibly be an exception to what is done in (c)?

12 MR. SICHERMAN: My hypothetical of a Government  
13 contract claim, Defense Department contract, had nothing  
14 to do with any section of the code where the word  
15 creditor, entity, or governmental unit applied.

16 QUESTION: All right.

17 MR. SICHERMAN: The Government says, this  
18 defense contractor didn't finish work on these torpedoes.

19 QUESTION: Right.

20 MR. SICHERMAN: Therefore, we had to send the  
21 torpedoes to somebody else to do. We had a cost overrun  
22 as a result of that. We have a claim. The Chapter 11  
23 debtor or the Chapter 7 trustees -- Chapter 7 debtor's  
24 trustee says we did more work than we had to, you guys  
25 caused all the delay, Defense Department, you owe us for

1 the cost overruns. In fact, you're the guys who ended up  
2 pushing us into bankruptcy with your Mickey Mouse games  
3 that we couldn't finish your project. So we've got  
4 damages for our bankruptcy case having to be filed because  
5 of you.

6 106(a) says even though you don't have the  
7 preference, the trigger words, et cetera, you have a  
8 waiver of sovereign immunity if they file that proof of  
9 claim.

10 QUESTION: I understand that, but that would not  
11 be an exception from (c) at all, it would be in addition  
12 to (c). I mean, isn't there a difference between in  
13 addition to and except for?

14 MR. SICHERMAN: Your Honor, there is a  
15 difference. Your statement that it would have been  
16 prudent to have said in addition to those provided instead  
17 of except for. If you -- and I'll watch my red light  
18 quickly -- if you take time to read the Bankruptcy Code  
19 versus the Bankruptcy Act, you will find the writing style  
20 has changed. Speculation is, on the eve of passing the  
21 act under pressure, IRS people were drafted to help on the  
22 drafting. And that explains why there are certain  
23 similarities in some of the language and the drafting of  
24 the Bankruptcy Code to the tax code. And it is difficult  
25 reading.

1 But I suggest that the except means in addition  
2 to that which is provided. So that under (a) and (b) you  
3 have jurisdiction without trigger words, and under (c) you  
4 have the trigger words.

5 QUESTION: Well, Mr. Sicherman, I would say that  
6 the tax code can frequently be difficult, but my  
7 experience with the Bankruptcy Code is that it's  
8 frequently garbled, which I regard as quite different than  
9 being difficult.

10 (Laughter.)

11 MR. SICHERMAN: To please the Court, that is one  
12 topic that I cannot defend. I have said that from 1977  
13 onward. It is garbled. It is difficult to read. It is  
14 not straightforward. And fortunately I don't have to  
15 defend the draftsmen on that topic in this Court today.

16 If there are no other questions, my time is  
17 about up, I will rest.

18 QUESTION: Thank you, Mr. Sicherman.

19 Mr. Seamon, you have 4 minutes remaining.

20 REBUTTAL ARGUMENT OF RICHARD H. SEAMON

21 ON BEHALF OF THE PETITIONER

22 MR. SEAMON: I have three points to make, and I  
23 can make them briefly. First, in terms of respondent's  
24 arguments on the facts, they're simply beside the point.  
25 If sovereign immunity has not been waived, then the merits



1 are irrelevant and that was one of the reasons that we did  
2 not raise the question about the voidability of the  
3 transfer.

4 Second, with respect to the in rem theory of  
5 jurisdiction that the respondent is asserting here,  
6 whatever its merits, it simply doesn't apply. We're  
7 talking about money, and there may be close cases where  
8 money is arguably erased, but this is not one of them.  
9 The money is --

10 QUESTION: Are we free to accept his argument  
11 here? Even if we thought it was pretty good?

12 MR. SEAMON: Even if you thought that, I think  
13 that inasmuch as it wasn't raised below, I doubt that the  
14 Court should entertain it at this point.

15 QUESTION: The question to whether we should,  
16 would it change the judgment below if we accepted his  
17 argument?

18 MR. SEAMON: The judgment below, in my mind,  
19 can't be defended as an exercise of in rem jurisdictions.

20 QUESTION: No, but that's not my question.

21 MR. SEAMON: I'm sorry.

22 QUESTION: The judgment below requires the  
23 Government to turn over the money that was wrongfully  
24 transferred to it, right? And if we accepted his first  
25 argument, you have exactly the same judgment.

1 MR. SEAMON: It would seem like for it to be an  
2 in rem order, it would have to order the Government to  
3 turn over the very same dollars that were taken out --

4 QUESTION: No, if you accepted his argument that  
5 the in rem theory he advances requires the Government to  
6 repay the same amount of money that would be paid under  
7 the -- then it would be permissible, wouldn't it?  
8 Wouldn't it be the same -- couldn't we affirm the  
9 judgment's already been entered if we agreed with his  
10 argument? I'm not saying we should or would.

11 MR. SEAMON: Yes, I believe that is correct.  
12 Again, my point would be on the merits of the argument. I  
13 just don't think it works, certainly, here. And in any  
14 event, I don't think that as we discuss in our reply  
15 brief, there is no in rem exception to the waiver of  
16 sovereign immunity. In the U.S. Code there are examples  
17 of instances in which Congress has felt it necessary to  
18 waive sovereign immunity with respect to certain exercises  
19 of in rem jurisdiction. So the two are simply  
20 inconsistent.

21 QUESTION: Mr. Seamon, I know you have very  
22 little time left, and I don't want you to give me what the  
23 answer is, but is there an answer? It would just give me  
24 great comfort to know that some rational person thinks  
25 there is one, to why (c) says except as provided in

1 subsections (a) and (b).

2 MR. SEAMON: There is an answer. It does not  
3 make the except as phrase perfectly grammatical. It means  
4 that money relief against Governmental units is not  
5 available except as provided in subsections (a) and (b).  
6 Now, while that is not grammatically -- the point was not  
7 grammatically made, the reason that I say that is what it  
8 means is that this same construction is used elsewhere in  
9 the code.

10 I would refer the Court to page 57a of our  
11 appendix. We reprint section 549 on that page. And  
12 549(a) of the code begins in the same way. It is the  
13 provision regarding postpetition transfers. And 549(a)  
14 sets forth a general rule for voiding postpetition  
15 transfers. It begins by saying, except as provided in  
16 subsections (b) or (c). (b) or (c) create exceptions to a  
17 general rule, and I would say that the same wording does  
18 the same thing in subsection 106(c).

19 Thank you.

20 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Seamon.

21 The case is submitted.

22 (Whereupon, at 11:58 a.m., the case in the  
23 above-entitled matter was submitted.)  
24  
25

## CERTIFICATION

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

**No. 90-1629 UNITED STATES, Petitioner v. NORDIC VILLAGE, INC., DAVID O. SIMON, TRUSTEE**

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

BY Michael S. Simon

(REPORTER)