

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: WILLIAM BARNHILL, Petitioner V.

ELLIOTT JOHNSON, TRUSTEE

CASE NO: 91-159

PLACE: Washington, D.C.

DATE: January 14, 1992

PAGES: 1 - 45

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

LIBRARY  
SUPREME COURT, U.S.  
WASHINGTON, D.C. 20540

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

'92 JAN 23 A9:58

1                   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - -X

3   WILLIAM BARNHILL,                   :

4                   Petitioner                   :

5                   v.                   :   No. 91-159

6   ELLIOT JOHNSON, TRUSTEE,                   :

7   - - - - -X

8                                   Washington, D.C.

9                                   Tuesday, January 14, 1992

10                   The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   11:06 a.m.

13   APPEARANCES:

14   WILLIAM J. ARLAND, III, ESQ., Albuquerque, New Mexico; on  
15       behalf of the Petitioner.

16   NANCY S. CUSACK, ESQ., Roswell, New Mexico; on behalf of  
17       the Respondent.

18

19

20

21

22

23

24

25

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	
WILLIAM J. ARLAND, ESQ.	
On behalf of the Petitioner	3
NANCY S. CUSACK, ESQ.	
On behalf of the Respondent	26
REBUTTAL ARGUMENT OF	
WILLIAM J. ARLAND, ESQ.	
On behalf of the Petitioner	42



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

2 (11:06 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in 91-159, William Barnhill v. Elliot Johnson.  
5 Mr. Arland, you may proceed.

6 ORAL ARGUMENT OF WILLIAM J. ARLAND

7 ON BEHALF OF THE PETITIONER

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

10 We're here today on a petition for writ of  
11 certiorari from the Tenth Circuit Court of Appeals for  
12 Johnson v. Barnhill. The purpose today is to uphold the  
13 intent of Congress and to promulgate the policies -- the  
14 public policies espoused by Congress in the bankruptcy  
15 laws, to promote unity of the law, equal distribution  
16 among creditors of equal priority of the property of the  
17 estate of the debtor, and to in fact bring the preference  
18 provisions of the Bankruptcy Code into conformity with  
19 modern commercial practices and the Uniform Commercial  
20 Code.

21 The specific section which is being challenged  
22 at this time is section 547(b) of the Bankruptcy Code. We  
23 are asking this Court to uphold and to find that a date of  
24 delivery rule for the purposes of 547(b) satisfies and  
25 meets and promotes the three policies just mentioned as

1     opposed to a date of honor rule.

2             Section 11, or 11 U.S.C. 547(b) describes the  
3     purposes, or the events and transactions, by which a  
4     trustee may set aside transfers made by a debtor to its  
5     creditors. It does not define within 547(b) itself what a  
6     transfer is, nor does it delineate whether or not a  
7     rule -- a date of delivery rule or a date of honor rule  
8     should be adopted in analyzing whether or not the  
9     transactions fall inside the preference window, which is  
10    the 90-day period immediately preceding a filing of the  
11    case.

12            The facts in this case are essentially very  
13    short and very simple. On November 18, 1985, the debtor,  
14    Alan Antweil, delivered to William Barnhill, a creditor of  
15    Antweil, a check. The check was dated November 19, 1985.

16            QUESTION: Do you know why it was post-dated one  
17    day?

18            MR. ARLAND: I do not know why it was post-dated  
19    one day, Justice Blackmun. I do know that it was  
20    delivered in the evening of November 18.

21            QUESTION: Would it be any difference if it were  
22    post-dated a month or so?

23            MR. ARLAND: If it were post-dated a month or  
24    so, I believe it would be different, Justice Blackmun. It  
25    would in fact not be a contemporaneous exchange and would

1 not be a cash transaction as a check is normally looked  
2 to. The post-dating here was only one day, and in effect  
3 it became a cash transaction the very next day on  
4 November 19.

5 The check was presented for honor on November 20  
6 and was honored by the bank. The November 20 date is the  
7 90th date, so that for the purposes of 547(b) the transfer  
8 if a date of honor rule is accepted would be on or within  
9 the 90-day period, November 20 being the day --

10 QUESTION: That's the final date here.

11 MR. ARLAND: I'm sorry --

12 QUESTION: That's the final date here,  
13 November 20.

14 MR. ARLAND: November 20, Justice Blackmun, is  
15 the final date here, yes.

16 QUESTION: Well, does your response to Justice  
17 Blackmun -- is it based partly on 547(c) as well as  
18 547(b)?

19 MR. ARLAND: No, Mr. Chief Justice, it's not  
20 based on 547(c) itself. My response to Justice Blackmun  
21 was merely centered upon the effect of giving a post-dated  
22 check in a transaction, the difference being, I believe,  
23 when a check is considered a credit transaction and when a  
24 check is considered a cash transaction.

25 Inasmuch as the post-dating was only one date,

1 and that date, the November 19, was still outside the  
2 preference window, the date of the check being outside the  
3 preference window, it became a cash transaction on  
4 November 19, and so it had no application with respect to  
5 a credit transaction that would have fallen within the  
6 preference period.

7 QUESTION: Is your answer based in part on the  
8 fact that the hypothesis of a 1-month post-dating would  
9 have brought the date written on the check within the  
10 preference period?

11 MR. ARLAND: Yes, it would, Mr. Chief Justice.  
12 That would be the position, and I believe in that instance  
13 that in fact the transaction would have fallen  
14 within -- if it was -- quite frankly, according to the  
15 Uniform Commercial Code, had the post-dating exceeded 30  
16 days, which I believe section 3503 of the Uniform  
17 Commercial Code provides that if a check is presented for  
18 honor within 30 days of its date of delivery, then it is  
19 essentially considered a reasonable period of time and  
20 essentially is a cash transaction.

21 If it exceeds the reasonable time of 30 days,  
22 then in fact the transaction date is the date the check is  
23 honored, so that if the day that Justice Blackmun was  
24 referring to were 31 days or greater -- the presentment  
25 date was 31 days or greater than the date of the check,



1 then by all means it was a credit transaction and the  
2 transaction would have fallen within the preference period  
3 as long as the honoring was done 31 days after the date of  
4 the check.

5 QUESTION: Would the same be true if a check  
6 were given as sort of a security deposit not to be cashed  
7 until certain events occurred, or unless certain events  
8 occurred?

9 MR. ARLAND: In any -- if -- I believe, Justice  
10 O'Connor, speaking specifically about 547(c), in which it  
11 is as surety for it, I believe that it would be. To  
12 answer your question directly, yes, I think it would be.

13 QUESTION: It would be what?

14 MR. ARLAND: It would be a credit transaction  
15 until the date of the check, at which time it does become  
16 a cash transaction. We have another element there,  
17 Justice O'Connor, of the check being presented as  
18 security. Normally a check, in commercial practice when a  
19 check is presented it is considered a cash transaction as  
20 long as it is honored within a reasonable period of time  
21 and the date of the check is equivalent to the date of  
22 delivery.

23 QUESTION: Are you sure that the UCC considers  
24 it not to come within that rule if it's cashed within  
25 30 days of its date but beyond 30 days after the actual

1 delivery of it? You say that the --

2 MR. ARLAND: Justice Scalia, the two issues that  
3 are raised are, one, the reasonable period of time from  
4 presentment for honor from date of the check is 30 days.  
5 The second part is that if the check is presented or  
6 honored subsequent to the 30 days, is that the date of  
7 honoring?

8 I am -- my interpretation and understanding of  
9 the code is that the answer to the first question is  
10 30 days is reasonable. I am not certain --

11 QUESTION: 30 days from the date -- the date on  
12 the check.

13 MR. ARLAND: 30 days from the date on the  
14 check is reasonable.

15 QUESTION: Right, that's what I understand.

16 MR. ARLAND: Subsequent to the 30 days if it is  
17 presented for honor that is not reasonable, and that is  
18 considered the day of the transaction at that point in  
19 time.

20 QUESTION: Right, but it doesn't matter for that  
21 purpose when the check is actually handed over. If I give  
22 you a check now that's dated 30 days from now, that  
23 becomes a cash transaction 30 days from now, does it not?

24 MR. ARLAND: Yes, it does, Justice Scalia -- it  
25 does. It becomes a cash transaction at the time that the

1 check can be honored and is presented at that time.

2 To that extent, if one presents a -- does not  
3 present a check within that 30-day period, then the  
4 Uniform Commercial Code I believe tells us that in fact  
5 that is not substantially a cash transaction, because the  
6 giving of a check is a conditional transfer as defined  
7 under 101, section either 48 or 54 of the Bankruptcy Code.

8 The condition is, is that it will be presented  
9 within a reasonable period of time, and that upon  
10 presentment it will be honored. Then it relates back to  
11 the date of delivery.

12 QUESTION: If you post-date the check there are  
13 two conditions. One is that the later date come about,  
14 and the second is that it be presented, and it becomes a  
15 cash transaction when the first condition is met, and then  
16 still subject to the subsequent presentation.

17 MR. ARLAND: I would agree with you, Justice  
18 Scalia, only in the instance where the post-dating of the  
19 check exceeds 30 days. That's when it becomes a cash  
20 transaction -- correction. If the post-dating of the  
21 check is within 30 days, the condition -- and it is  
22 presented within 30 days, it is a -- the condition is  
23 removed and it goes back to the date of delivery.

24 If the presentment is made in -- in 31 days or  
25 in excess of 31 days, then the delivery date is of no

1 force and effect because we're beyond the 30-day  
2 reasonable time.

3 QUESTION: May I just ask a little different  
4 question on post-dating? Supposing that 93 days before  
5 bankruptcy a post-dated check was delivered dated 7 days  
6 later, just not a -- forget the 30-day problem, just think  
7 about a 7-day problem for a moment. Would you say the  
8 date of delivery or the date of the check is the critical  
9 date?

10 MR. ARLAND: I would -- Justice Stevens, I think  
11 that in that instance the date of the check is the  
12 critical date.

13 QUESTION: So the date of delivery rule for  
14 which you're arguing is one -- the date of delivery or  
15 date of the check, whichever is later.

16 MR. ARLAND: Yes, Justice Stevens, whichever is  
17 later. I think as a practical matter, the way our  
18 commercial system is devised, until the date on the check  
19 arrives one has no claim to the funds that underlie the  
20 validity of that check, and therefore the date on the  
21 check, if it is beyond the date of delivery, must  
22 control -- must control.

23 547(b) is -- as I say, it doesn't define a date  
24 of delivery or a date of honor rule for us, and in fact to  
25 the extent that we can look solely to 547(b) to tell us



1     whether date of delivery or date of honor rules should  
2     apply, it doesn't do that.

3             However, we know that the Bankruptcy Code itself  
4     is a great statutory scheme, and we can look within the  
5     code when sections of the code do not provide us with a  
6     clear-cut answer. Section 101(48) and (54) defines what a  
7     transfer is, and I think that is where we have to begin.

8             It in fact shows that a transfer is any mode of  
9     transaction or a transaction of transfer whether it is  
10    absolute, whether it is conditional -- it is a very broad  
11    definition. A check is certainly a conditional  
12    conveyance. It is a conditional transfer.

13            QUESTION: What is conveyed? The principal  
14    point your opponent makes is it has to be transfer of  
15    property of the debtor. What property of the debtor is  
16    being transferred?

17            MR. ARLAND: I believe, Justice Scalia, that the  
18    definition under 101(48) says the transfer of an interest  
19    of a debtor in property, as opposed to the transfer of  
20    interest to property.

21            The interest that's being transferred between  
22    the debtor and the creditor -- and those terms only apply  
23    if the payor on the check subsequently files for  
24    bankruptcy -- is that the payor on the check is  
25    representing by giving this check on the date on the check

1 that there are sufficient funds in his account to cover  
2 that check.

3 There is an underlying principle of good faith  
4 under the Uniform Commercial Code which is specifically  
5 applicable to this case that I as payor of the check am  
6 representing that those funds are in my bank.

7 QUESTION: But a representation by the payor is  
8 not a transfer of an interest, it's just a representation,  
9 and in fact UCC says, as I understand it -- correct me if  
10 I'm wrong -- that the check does not operate as an  
11 assignment of the funds.

12 MR. ARLAND: We are not talking about an  
13 assignment of the funds, Justice Scalia.

14 QUESTION: Well, the question is what interest  
15 in property is transferred, and your answer to Justice  
16 Scalia was that there is a representation made that funds  
17 are in the bank, but that doesn't sound to me like a  
18 transfer of any property.

19 MR. ARLAND: Well, the transfer of the --

20 QUESTION: The question here is if he can stop  
21 payment on the check.

22 MR. ARLAND: He may stop payment on the check,  
23 but I believe that once the check is delivered, Justice  
24 Kennedy and Justice White, and if I can answer Justice  
25 Scalia's question and consolidate my answer here, is that

1 when a check is transferred that is the end of a  
2 transaction, a previous transaction, a transaction where  
3 you have a vendor or a vendee.

4 Goods or services are delivered. Those goods  
5 and services are then paid for by a check. In the  
6 commercial world, when a check is delivered that  
7 transaction is terminated. That's the end of that  
8 transaction. Once the check is given, it is --

9 QUESTION: Not if the check isn't honored.

10 MR. ARLAND: If the -- but it is a conditional  
11 transfer, Justice Kennedy, which is covered under 101(54).

12 QUESTION: Well, then it seems rather odd to say  
13 the transaction is ended but it's conditional.

14 MR. ARLAND: The conditional portion, Justice  
15 Kennedy, with all due respect is the check. The  
16 vendor-vendee transaction has in fact terminated. That is  
17 the termination.

18 If, as Justice White has suggested -- if a stop  
19 payment order is issued on the check prior to it being  
20 honored, then the condition of the transfer has not been  
21 met. There is no way for the check to be honored, and  
22 therefore you have no date problem because you don't  
23 revert back to the date of delivery. There is no  
24 honoring.

25 QUESTION: But if you look at the matter as a

1 completed transaction under your analysis at the time of  
2 the delivery, it is a completed transaction which did not  
3 involve the transfer of an interest in property.

4 MR. ARLAND: It transferred an interest in  
5 property --

6 QUESTION: In what property?

7 MR. ARLAND: In the property that is represented  
8 by the cash in the bank.

9 QUESTION: Did it transfer an interest in the  
10 bank account, do you think?

11 MR. ARLAND: It transfer -- it conditionally  
12 transfers it upon honoring, but it relates back to the  
13 date of delivery, Justice Stevens. If in fact there's a  
14 dishonoring of the check for some reason, that is a  
15 separate cause of action.

16 Uniform Commercial Code section 3122 tells us  
17 that in fact as of the date of the check, that is  
18 submitted, the cause -- a new cause of action arises for  
19 the vendor on the check itself, and I believe that there's  
20 a separate question there.

21 QUESTION: Well, wouldn't it be more accurate to  
22 describe the transaction that way, rather than as a  
23 transfer of property? The check gives the vendor, the  
24 drawee of the check, a different cause of action against  
25 the drawer. He now has a cause of action on the check and



1 not just on the open account.

2 MR. ARLAND: Mr. Chief Justice, in fact the  
3 Uniform Commercial Code under article 3802 tells us that  
4 the receiver of the check, the payee on the check, has his  
5 option. He may proceed under the underlying agreement, or  
6 he may proceed on the check. He may elect his remedy,  
7 sir.

8 QUESTION: Why isn't this a conditional transfer  
9 of a chose in action? Is there anything in the UCC that  
10 prohibits that?

11 MR. ARLAND: No, Justice Scalia, there's nothing  
12 in the UCC that prohibits that. In essence --

13 QUESTION: The person who has money in the bank  
14 has a cause of action against the bank for the amount of  
15 that deposit, right?

16 MR. ARLAND: Correct, Justice Scalia.

17 QUESTION: And he can assign to another person  
18 outright or conditionally part of his claim against the  
19 bank. It's not binding upon the bank, but as between the  
20 two of them it's binding.

21 MR. ARLAND: Correct. The interest in property  
22 can be the chose in action.

23 QUESTION: So it's a chose in action that's been  
24 transferred.

25 MR. ARLAND: Correct. Correct.

1 QUESTION: So if the bank chose to honor it,  
2 it's in trouble with the drawer.

3 MR. ARLAND: Yes, Justice White, you're correct,  
4 the bank is in trouble -- if it wrongfully fails to honor  
5 it the bank is in trouble with the drawer. I think the  
6 perception, Justice White --

7 QUESTION: But not with the drawee.

8 MR. ARLAND: Not with the drawee, no, that's  
9 correct, Justice White.

10 QUESTION: So how come if it's a transfer, why  
11 isn't the bank in trouble with the drawee? He's got some  
12 right in that account. Why can't he sue the bank?

13 MR. ARLAND: He cannot for wrongfully  
14 dishonoring. The payor is the only one who has the right  
15 under the Uniform Commercial Code to --

16 QUESTION: Well, why can you ever say it was a  
17 transfer to him, conditional or otherwise?

18 MR. ARLAND: Because of the relation back  
19 doctrine.

20 QUESTION: I mean, what happened to his interest  
21 in the property that you say was transferred? What  
22 happens to it when the bank dishonors -- wrongfully  
23 dishonors the check?

24 MR. ARLAND: If the bank --

25 QUESTION: It disappears into thin air.

1 MR. ARLAND: Justice White, if the bank  
2 wrongfully dishonors the check I believe that in fact the  
3 payor on the check would have a cause of action against  
4 the bank as well.

5 QUESTION: Why, sure, but not the payee.

6 MR. ARLAND: The payee does not have --

7 QUESTION: But you say that there was a transfer  
8 to the payee --

9 MR. ARLAND: That's correct --

10 QUESTION: -- at the time of delivery of the  
11 check.

12 MR. ARLAND: There's a transfer of an interest  
13 in property, a conditional transfer.

14 QUESTION: Well, what happened to his interest?

15 MR. ARLAND: The payee's interest is, by not --

16 QUESTION: I mean the drawee -- the drawee.

17 There was a delivery of a check to the drawee, is that it?

18 MR. ARLAND: Yes, Justice White.

19 QUESTION: And you say that was a transfer.

20 MR. ARLAND: Yes, it is.

21 QUESTION: A conditional transfer.

22 MR. ARLAND: Yes, Justice White.

23 QUESTION: But then you would think that he had  
24 an interest in the property that he should be able to  
25 vindicate against the bank if the bank wrongfully

1 dishonors the check.

2 MR. ARLAND: I don't believe that's the case,  
3 Justice White, because the transaction -- it's a  
4 three-party transaction. The emphasis in the Bankruptcy  
5 Code, and we must remember that's what we're talking  
6 about, is the Bankruptcy Code, is the relationship between  
7 the payor and the payee, or the drawer and the drawee on  
8 the check. That's who we're interested in, and we're  
9 interested in tolling a time of when this transfer takes  
10 effect, and commercial business practice just doesn't take  
11 place that way.

12 As a matter of fact, when we give a check --

13 QUESTION: So we know what we're talking about,  
14 isn't the drawee the bank? I always thought the bank  
15 was --

16 MR. ARLAND: There is a drawee bank. The  
17 drawee -- you have the payor. That's the person who signs  
18 the check. You have the payee, that's who the check's  
19 made out to.

20 QUESTION: The bank is the drawee bank, right?

21 QUESTION: That's right.

22 MR. ARLAND: That's correct.

23 QUESTION: And the payor is also the drawer.

24 MR. ARLAND: That's correct.

25 QUESTION: On the drawee.



1 MR. ARLAND: Yes, that's correct.

2 QUESTION: I'm talking about the fellow to whom  
3 the check was delivered. You say there was a transfer to  
4 him --

5 MR. ARLAND: That's correct.

6 QUESTION: At that time.

7 MR. ARLAND: That's correct, Justice White.

8 QUESTION: And yet he cannot vindicate that  
9 interest that was transferred to him, you say, by a suit  
10 against the bank.

11 MR. ARLAND: The transfer of interest was not  
12 the payor's actions against the bank itself for wrongful  
13 dishonor of the check. That wasn't the transfer. The  
14 transfer was of the liability that the bank owes to the  
15 payor. The payor transferred his liability, or the bank's  
16 liability to him to the payee.

17 QUESTION: Well then, why can't the payee sue  
18 the bank, then?

19 MR. ARLAND: Because he --

20 QUESTION: He's had something transferred to  
21 him.

22 MR. ARLAND: Because, Justice White, it is not  
23 an assignment. It is not an assignment in the classic  
24 sense. It is a conditional transfer.

25 QUESTION: It isn't perfected yet, and the

1 Bankruptcy Code anticipates that some of these things  
2 could be perfected later. It becomes perfected when the  
3 bank gets the check and honors it, and before then it's  
4 good as between the payor and the payee, but it's not  
5 binding on the bank and the liability is between those  
6 two.

7 MR. ARLAND: Justice Scalia, that is correct --

8 QUESTION: And that's why the Bankruptcy Code  
9 talks about perfection.

10 MR. ARLAND: At 547(e), Justice Scalia, is where  
11 the Bankruptcy Code directs its attention to perfection.  
12 It has largely been held by most courts that that section  
13 applies solely to real property interest in mortgages and  
14 the relation-back doctrine is clearly stated in 547(a)  
15 to (b).

16 QUESTION: Well, 547 also talks about a  
17 substantially contemporaneous transfer, which I take it at  
18 least can be interpreted as the attempt of the Bankruptcy  
19 Code to accommodate this delay between the time the check  
20 is given and the time that it is honored, and that  
21 language has the effect of showing that even if you wait  
22 till the time that it's honored it's substantially  
23 contemporaneous.

24 MR. ARLAND: Yes, 547(c) adopts that, Justice  
25 Kennedy, that's correct, and for the purposes of (c)(1)

1 and (c) (2) this furthers -- we want to have a  
2 substantially contemporaneous exchange or a cash  
3 transaction represented by a check because the purpose of  
4 547(c), the exceptions to 547(b), is to promote vendors  
5 doing business with a debtor or a vendee who's sliding  
6 into bankruptcy. We don't want to have a chilling effect  
7 on having nobody do business with this individual.

8 QUESTION: But 547(c) deals with the normal  
9 course of business, doesn't it?

10 MR. ARLAND: Yes, it does, Mr. Chief Justice.

11 QUESTION: So how you would treat a check under  
12 the normal course of business section might not be  
13 determined, I would think, for 547(b) purposes.

14 MR. ARLAND: That is certainly the position of  
15 the trustee in this case, and I would submit to the Court  
16 that to serve the purpose of the uniformity of the law as  
17 espoused in McKenzie v. Irving Trust, that in fact it  
18 makes no sense and it is illogical to have two different  
19 dates apply within the same section or subsection of the  
20 Bankruptcy Code. As a matter of fact --

21 QUESTION: If you're talking about two different  
22 purposes, one is to determine was this the kind of  
23 transaction you would expect in the normal course of  
24 business? If a person is paid by check presently dated  
25 for 10 years and continues to do that, it's the normal

1 course of business, but I don't see why it would be  
2 illogical to say a somewhat different test might apply in  
3 determining whether there's a transfer.

4 MR. ARLAND: Mr. Chief Justice, if in fact the  
5 date of honor rule were to satisfy an equality of  
6 distribution among creditors, which in fact 547(b) is  
7 designed to do, then I could not quarrel with you.  
8 However, I can show this Court by a hypothetical example  
9 that a date of honor rule does not treat creditors  
10 equally.

11 If we will assume for a moment that a check is  
12 delivered to two creditors dated on the same day which is  
13 outside the preference window, one of the creditors is an  
14 in-State or even an in-town creditor, the other is  
15 out-of-State.

16 The in-State creditor receives the check on a  
17 given date outside the preference period, deposits it the  
18 next day as in this case, and the check is honored on that  
19 day. The date of honoring in that instance is clearly  
20 outside the preference period.

21 However, the out-of-State creditor, by virtue of  
22 his location, is not quite as fortunate. He must take  
23 that check, deposit it in his bank, usually wait a 3- to  
24 10-day clearing period on the check before it's then  
25 presented to the in-State bank. If during that period of



1 time subsequent thereto that period of honoring of the  
2 out-of-State check falls within the preferential transfer  
3 period, we have not satisfied through the date of honor  
4 rule one of the stated policies of 547(b).

5 QUESTION: I would think when you talk about  
6 treating creditors equally you mean treating similarly  
7 situated creditors equally, and on the facts you give I  
8 think a very good argument can be made those creditors are  
9 not similarly situated.

10 MR. ARLAND: I think if they're trade creditors  
11 both based on antecedent debts, Mr. Chief Justice, that  
12 they are similarly situated creditors. They are of equal  
13 priority.

14 If we assume, and we must assume for the  
15 purposes of the argument and the hypothetical, that they  
16 are of the same class -- that is, they will be treated as  
17 in the same class under 1129 for the purposes of a plan,  
18 which is what we are attempting to resolve, it seems to me  
19 that there is a clear distinction, Mr. Chief Justice, that  
20 in fact they are between the treatment of two creditors of  
21 equal priority, just because one happens to be located out  
22 of the State, or out of the jurisdiction in which the  
23 transaction took place.

24 If there are no further --

25 QUESTION: May I just ask one little -- your

1 position is date of delivery, assuming the check is  
2 honored within 30 days.

3 MR. ARLAND: That is correct, Justice Stevens.  
4 The date of delivery is the date that satisfies all three  
5 of the public policy --

6 QUESTION: And you can answer this question in a  
7 word, I think. Suppose the fellow who writes the check  
8 and delivers it promptly then writes -- goes to the bank  
9 and withdraws his account so that the check cannot  
10 possibly be honored. Does the person to whom the check is  
11 delivered then sue on the check or on the original debt?

12 MR. ARLAND: I believe that the person to whom  
13 the check is delivered is faced with an election of  
14 remedies, Justice White, where he may either sue on the  
15 check or sue on the transaction.

16 QUESTION: May he sue on the check?

17 MR. ARLAND: He may sue on the check, Justice  
18 White, or he may sue on the transaction at his option.

19 QUESTION: What would be his cause of action on  
20 the check, that there was an assignment, or what?

21 MR. ARLAND: His cause of action on the check  
22 would be against the payor on the check probably for  
23 fraud. In other words, you delivered this check to me and  
24 you represented it to me that you had funds sufficient to  
25 cover this, and that --

1 QUESTION: Is this an action for fraud, or what?

2 MR. ARLAND: Pardon me?

3 QUESTION: What is this, an action for fraud?

4 MR. ARLAND: It would be an action for civil  
5 fraud.

6 QUESTION: But the payor warrants that the check  
7 will be paid, does he not?

8 MR. ARLAND: He warrants -- yes, Mr. Chief  
9 Justice, Justice White's --

10 QUESTION: So you don't need an action for  
11 fraud, it's an action on the warranty that's implied by  
12 the drawing of a check.

13 MR. ARLAND: It --

14 QUESTION: You have to have knowledge for fraud.  
15 You don't want to make people have to prove that the other  
16 person knew he had no money in the bank.

17 MR. ARLAND: Under the facts that were presented  
18 by Justice White, if you write a check one day and  
19 withdraw all the funds the next day before that check has  
20 had a chance to clear, you may have sufficient grounds for  
21 fraud. I don't want to get into that, but --

22 QUESTION: I'm just really giving you an  
23 opportunity to say well, this shows there must have been a  
24 transfer if you can sue on the check.

25 MR. ARLAND: It's a conditional transfer, yes,

1 it is, Justice White.

2 If there are no further questions, I'd like to  
3 reserve the remainder of my time for rebuttal.

4 QUESTION: Very well, Mr. Arland. Ms. Cusack,  
5 we'll hear from you.

6 ORAL ARGUMENT OF NANCY S. CUSACK

7 ON BEHALF OF THE RESPONDENT

8 MS. CUSACK: Thank you. Mr. Chief Justice, may  
9 it please the Court:

10 As Mr. Arland has already indicated, this case  
11 revolves around an attempt by a bankruptcy trustee to  
12 recover money as a voidable preference under section  
13 547(b) of the Bankruptcy Code.

14 The check which is at the center of this  
15 controversy is a check which was post-dated. It was dated  
16 and delivered prior to the 90-day preference period but in  
17 fact was honored on the 90th day, prior to the bankruptcy  
18 filing.

19 It is in this context that the Court must decide  
20 whether, for purposes of 547(b), it is the date of honor  
21 or the date of delivery which controls, and in making that  
22 decision whether or not the bankruptcy court acted  
23 properly in dismissing our lawsuit, which had initially  
24 been filed --

25 QUESTION: For purposes of this case it's



1 irrelevant that it was post-dated.

2 MS. CUSACK: I don't think in fact it is  
3 irrelevant, because --

4 QUESTION: Well, the check became a cash  
5 transaction the next day, which was before the 90th day.

6 MS. CUSACK: Well, Your Honor --

7 QUESTION: Is that right?

8 MS. CUSACK: Well, under -- our contention is  
9 that when a transfer takes place it is to be determined in  
10 accordance with State law, and under State law, in fact, a  
11 post-dated check is considered generally speaking to be  
12 effective as of the date of honor.

13 QUESTION: Is that the -- that is the  
14 unmistakable law of New Mexico?

15 MS. CUSACK: I believe it is, sir.

16 QUESTION: What do you mean, effective? When is  
17 a currently dated check deemed effective?

18 MS. CUSACK: Our position is also that --

19 QUESTION: On the date of honor, of course --

20 MS. CUSACK: Currently dated check is also the  
21 date of honor.

22 QUESTION: Yes. You're not saying anything as  
23 far as the difference between post-dated and currently  
24 dated is concerned. Your position is that the check has  
25 no effect until it's honored.

1           Isn't there an assignment of the chose in  
2   action, though? When I write a check, am I not saying --  
3   am I not saying to the person that I give the check, you  
4   are entitled to my cause of action against the bank?  
5   Isn't that what the whole thing is?

6           MS. CUSACK: Well, Your Honor, we would say that  
7   that's not what the whole thing is. For there to be a  
8   valid assignment or a valid transfer it's contemplated  
9   that there must be some kind of transfer of dominion or  
10   control over the property being assigned or being  
11   transferred, and in fact --

12           QUESTION: Well, for the transfer to be  
13   perfected that has to happen, and that's why the code in a  
14   later section says what the rules are for perfection, and  
15   that occurred within the requisite period here, the honor.

16           MS. CUSACK: But -- I'm sorry to disagree with  
17   you, but as -- I don't see that there is an assignment,  
18   because of the fact that had there been a valid  
19   assignment, a valid transfer, in fact the transferor would  
20   have had no further ability to deal with those funds and  
21   the transferee would have had the ability to deal with  
22   those funds, and that's not what happens.

23           A check is issued, and up until the time that  
24   that check is honored, the issuer retains the ability to  
25   stop payment on that check, to close the account, to issue

1 other checks, which may in effect have the effect of  
2 depleting the account and rendering that check absolutely  
3 useless; in addition the account can be garnished, so in  
4 fact there is no transfer or no change in control or  
5 dominion over those funds, so that in fact there is no  
6 assignment, no transfer of interest in property, and that  
7 will not take place until such time as that check is  
8 honored.

9 QUESTION: Counsel, you really were suggesting  
10 that the word transfer as used in the Bankruptcy Code, and  
11 which is defined in the Bankruptcy Code, is controlled by  
12 State law. I thought that would be a Federal question.  
13 It may be that you might be persuaded that -- you look  
14 around for probably any evidence of what it means, but you  
15 don't really think this is a question of State law.

16 MS. CUSACK: Well, actually, Your Honor, I do  
17 think it's a question of State law.

18 QUESTION: The word transfer in all the --

19 MS. CUSACK: The Court -- under the context of  
20 the Bankruptcy Code, first of all Congress has received  
21 constitutional authority to establish uniform laws on the  
22 subject of bankruptcies throughout the United States, and  
23 Congress exercised that authority by enacting the  
24 Bankruptcy Code.

25 Under the terms of the Bankruptcy Code there

1 were some general definitions given in terms of what a  
2 transfer was. 101 indicates that a transfer is a method  
3 or a mode of disposing of an interest in property.

4 However, it's clear, and the McKenzie case makes  
5 it clear, that there are certain issues that have not been  
6 dealt with within the Bankruptcy Code itself and have not  
7 been specifically defined, and as a matter of fact there  
8 has been a policy to have certain issues determined in  
9 accordance with State law, and one of those issues is when  
10 the transfer takes effect, when a transfer is made, and so  
11 that in fact is an issue that is determined in the  
12 court --

13 QUESTION: Of course, that isn't what the court  
14 of appeals decided, is it?

15 MS. CUSACK: Well, in fact the court of appeals  
16 did refer to the McKenzie case.

17 QUESTION: I know it referred to it, but it  
18 didn't for a minute suggest that a transfer is -- only  
19 takes place when State law says it does.

20 MS. CUSACK: That wasn't the specific holding of  
21 the court of appeals, no, sir, you're right. The court of  
22 appeals indicated that a transfer only took place at such  
23 time as the check was honored, which in fact is consistent  
24 with what our State law indicates.

25 QUESTION: And it thought the -- it thought that



1 its holding was consistent with the Uniform Commercial  
2 Code.

3 MS. CUSACK: Absolutely.

4 QUESTION: As adopted in New Mexico.

5 MS. CUSACK: As adopted in the State of New  
6 Mexico, which again provides that a transfer takes place  
7 upon honor.

8 QUESTION: Mrs. Cusack, what do you make of  
9 subsection (e) (1), which is on page 33a of the  
10 petition -- I'm sorry, (e) (2), which seems to make a  
11 distinction between two types of transfer, just a transfer  
12 plain and simple and a perfected transfer. It seems to me  
13 that your argument assumes that there's no transfer unless  
14 it's a perfected transfer, but (e) (2) says for purposes of  
15 this section a transfer is made at the time -- A, at the  
16 time it takes effect between the transferor and the  
17 transferee if it is perfected at or within 10 days after  
18 such time.

19 Now, it seems to me it's -- that is meant to  
20 cover exactly this situation. If I gave you the money  
21 right now, that's a completed transfer -- it's perfected.  
22 What does it mean to have a transfer which takes effect  
23 between the transferor and the transferee but is not yet  
24 perfected? What does that cover, if it doesn't cover  
25 this?

1 MS. CUSACK: Well, let me remind the Court that  
2 in this specific instance what we're doing is attempting  
3 to recover the money, and with respect to money you cannot  
4 have a transfer made until you have it in hand.

5 Likewise, you cannot perfect an interest in  
6 money until you are holding that money in your hand. This  
7 section, though, can also contemplate situations where,  
8 for example, a transfer is made as between two parties and  
9 yet it's not perfected until such time as to third  
10 parties. There is no creditor that can come in and take a  
11 superior interest.

12 For example, a deed to a house. I may deed my  
13 house to you, but if the deed is not recorded, while the  
14 transfer may be effective between the two of us, it's  
15 simply not perfected until such time as that is filed of  
16 record.

17 QUESTION: I think your mistake is to say that  
18 this is a transfer of money. It's not a transfer of  
19 money, it's a transfer of a chose in action, which is  
20 property. It's a transfer of a claim for money.

21 MS. CUSACK: But there's no  
22 enforceable -- again, what -- first of all, what we're  
23 seeking to recover under 547(b) is not a recovery of that  
24 claim for money. We are seeking within the parameters of  
25 the preference suit to recover that \$157,000 which in fact

1 was transferred and which Mr. Barnhill received.

2 Getting the check back, which represents the  
3 chose in action, isn't going to do anything as far as the  
4 bankruptcy estate or the trustee is concerned.

5 QUESTION: You would agree that if the payee  
6 could enforce it against the bank, if the bank dishonors  
7 it, then your position would be different.

8 MS. CUSACK: I think our position in that  
9 instance would be different if he could enforce it against  
10 the bank, but in fact he cannot.

11 As I indicated previously, Congress has  
12 constitutional authority to establish uniform laws and has  
13 enacted that authority by enacting the Bankruptcy Code.  
14 What is a transfer and when it is completed is necessarily  
15 a Federal question because it does arise under the terms  
16 of the Federal statute, which of course is intended --

17 QUESTION: I thought a minute ago, Mrs. Cusack,  
18 you told Justice White that that was a matter of State  
19 law.

20 MS. CUSACK: The Federal question has not been  
21 answered, and consequently in accordance with the McKenzie  
22 case the Court has said that in the event that that  
23 question is not answered pursuant to law, then it becomes  
24 a matter of deference to the State. It's a State law in  
25 this case that governs.

1 QUESTION: You mean if it's not answered by the  
2 Federal statutory provision.

3 MS. CUSACK: If it's not answered by the Federal  
4 statute, and it's certainly -- the issue of when a  
5 transfer is made specifically is not answered within the  
6 statute.

7 QUESTION: Ms. Cusack, do you take the position  
8 that under New Mexico law when the check is delivered that  
9 it does not at least conditionally transfer a chose in  
10 action to the payee?

11 MS. CUSACK: No.

12 QUESTION: Would New Mexico recognize that it  
13 conditionally transfers a chose in action to the payee  
14 when the check is delivered?

15 MS. CUSACK: What New Mexico recognizes is that  
16 when a check is tendered there is a conditional payment  
17 and there is a doctrine of relation back that is in effect  
18 in the State of New Mexico, and what New Mexico recognizes  
19 is that that conditional payment is subject to the  
20 condition of a transfer taking place.

21 QUESTION: Is New Mexico's law substantially  
22 different from that of most other States --

23 MS. CUSACK: No, I think it's very similar.

24 QUESTION: In this regard, or is it the same?

25 MS. CUSACK: It's the same as the law in most



1 States.

2 QUESTION: And when you look at the definition  
3 in the Bankruptcy Code 101 of what a transfer means, it  
4 means every mode, absolute or conditional -- or  
5 conditional -- of disposing or parting with property or  
6 with an interest in property. Do you say that the  
7 delivery of a check does not meet that definition?

8 MS. CUSACK: I think that the delivery of the  
9 check comes within the definition of what a transfer is  
10 under 101 --

11 QUESTION: Under 101.

12 MS. CUSACK: Because 101 is a very expansive  
13 definition and it indicates, at least in my mind, that one  
14 way that an individual can make a transfer of an interest  
15 in property is indirectly through the delivery of the  
16 check.

17 However, what's important for purposes of 547(b)  
18 is making a determination in fact when the transfer takes  
19 place so that the trustee knows and the other creditors  
20 know what assets ultimately will be available for  
21 distribution to those creditors and to the estate.

22 Under 547(b) the trustee is allowed to recover  
23 any transfers of a debtor's interest in property so long  
24 as certain things have made -- so long as those transfers  
25 have been made within 90 days and they have been payment

1 for an antecedent debt, and it's again going back to the  
2 idea of dominion and control. There in fact is no  
3 transfer between the transferor or the transferee until  
4 those funds have been tendered and until -- and in  
5 actuality those funds have been removed from the  
6 bankruptcy estate.

7 QUESTION: May I just question that, because  
8 perhaps it's the same point Justice Scalia made, but I  
9 want to be sure I understand your answer. Subsection  
10 (e)(1)(b) contemplates -- it refers to transfers of  
11 fixtures or property other than real property, and surely  
12 contemplates that a transfer can occur before it has been  
13 perfected, because it talks about a transfer, when a  
14 transfer will be perfected, and then in (e)(2) it says  
15 it's perfected if it's within 10 days and another -- you  
16 can't get another lien against the property.

17 Now, if the transfer date and the perfection  
18 date are different, doesn't the date of honor establish  
19 the perfection date and the date of delivery establish the  
20 transfer date? Why isn't that a correct analysis?

21 MS. CUSACK: Okay, our contention is with  
22 respect to money, the assets that we are seeking to  
23 recover, there is no transfer of those funds until such  
24 time as the transferor loses dominion or control over  
25 those funds --

1 QUESTION: I understand --

2 MS. CUSACK: And the transferee is able to  
3 exercise control and in this circumstance --

4 QUESTION: But would you not agree that the  
5 point you're describing is the point at which the transfer  
6 has been perfected?

7 MS. CUSACK: But it's also the point in time  
8 when the transfer has been made.

9 QUESTION: You're saying that with respect to  
10 checks, delivery of checks, there is no difference between  
11 the transfer date and the perfection date.

12 MS. CUSACK: When you're dealing with a check,  
13 that's correct.

14 QUESTION: Mrs. Cusack, you're not seeking money  
15 any more than the payee of the check is seeking money.  
16 You are not seeking some particular dollar bills that the  
17 bankrupt owns. You are seeking to assert a chose of  
18 action against the bank on behalf of the trustee.

19 MS. CUSACK: No, sir, we're not --

20 QUESTION: You say that the bank owes the estate  
21 money, isn't that what you're saying?

22 MS. CUSACK: No, sir, we're not. As a matter of  
23 fact, what we're seeking to recover is \$157,000 that was  
24 paid to Mr. Barnhill as a result of a settlement agreement  
25 that had been reached, so no, we're not seeking to recover

1 any funds --

2 QUESTION: Paid to him by whom?

3 MS. CUSACK: It was paid to him by the debtor,  
4 so we're not seeking to recover any money from the bank.  
5 We're seeking to recover a preferential transfer from  
6 Mr. Barnhill.

7 QUESTION: No, but to the extent you say that  
8 money that the bank gave to the petitioner here should  
9 have been given to the trustee, or should have remained in  
10 the estate, you're asserting a chose in action. You're  
11 not asserting a claim for particular property.

12 MS. CUSACK: Well, we're asserting a claim for  
13 those funds once Mr. Barnhill's check is honored, which  
14 will in effect increase our estate. So long as that --

15 QUESTION: Against the bank, for any money that  
16 the bank has, not any particular money. There's no  
17 segregated fund for your client in the bank -- this is his  
18 money. You're just asserting a claim against the bank.

19 MS. CUSACK: That's correct, and if Mr. Barnhill  
20 issues us a check and it's not honored, then there will be  
21 no transfer of any funds and no increase for the benefit  
22 of the estate, that is correct.

23 But I also might remind the Court that the  
24 drawer will retain full control over that chose in action  
25 until such time as --



1 QUESTION: Yes, but that just means that it's  
2 conditional, doesn't it? I mean, it doesn't prove  
3 anything more than that the transfer is conditional.

4 MS. CUSACK: The payment is conditional, and it  
5 is conditional upon the transfer being made. In fact,  
6 there is --

7 QUESTION: Well, but for that proposition you  
8 rely, as I understand it, on the position that the payee  
9 cannot enforce it against the bank.

10 MS. CUSACK: That's right, the payee cannot  
11 enforce it against the bank because again he has no right  
12 to exercise any kind of dominion or control.

13 QUESTION: But don't you also rely on the  
14 proposition that the payor may stop payment or may also  
15 withdraw his funds before the check clears?

16 MS. CUSACK: Absolutely, or that the funds may  
17 be garnished or levied against. So in other words, there  
18 are many things that can happen, notwithstanding the fact  
19 that these checks are outstanding.

20 Under 547(b) in essence there is a mandate, if  
21 you will, that the trustee look not only what assets are  
22 there in the estate as of the date of the bankruptcy  
23 filing, but in fact that he take a backward look and look  
24 to see what assets were in the bankruptcy estate and make  
25 a determination as to what happened to those assets in the

1 90 days immediately preceding the bankruptcy.

2 If the trustee, in doing that, and in doing his  
3 preference screening, looks on the 90th day immediately  
4 preceding the bankruptcy filing, looks to see what's in  
5 the account, regardless of how many checks may be issued  
6 and how many checks may be outstanding, the fact is that  
7 as of that period in time it is the debtor who has control  
8 over all of the funds which remain in the bank account.  
9 Again, the issue of control and dominion over those funds  
10 becomes material.

11 Mr. Arland has indicated that a date of delivery  
12 rule will conform with modern commercial practice, and he  
13 has indicated repeatedly that when a transaction is -- or  
14 when a check is given the transaction stops. In fact,  
15 that's an oversimplification of what happens. First of  
16 all, I think intuitively one can see that payment by check  
17 is not the same as payment by cash. For example, if I  
18 issue a check, I'm assured of the fact that I will be  
19 asked for an ID because of the fact that if the check is  
20 not honored the transaction will not stop.

21 In many States, including the State of New  
22 Mexico, statutes prohibit certain transactions from going  
23 forward until cash or immediately available funds are in  
24 place, and in addition I think that one has to be aware of  
25 the fact that the UCC provides that a tender of a check,

1 in and of itself, does not operate to terminate an  
2 obligation, but in fact only operates to suspend that  
3 obligation and to suspend until it's determined whether or  
4 not the check has paid the obligation which has to be  
5 collected.

6 I think that under the terms of the date of  
7 honor rule there is certainly a unity of law that is  
8 presented, because of the fact that the Bankruptcy Code  
9 has consistently deferred certain matters to decisions  
10 under State law. For example, exemptions are decided  
11 under State law.

12 The fact that a determination of when a transfer  
13 is made is to be decided under State law is also  
14 consistent with that unity, in effect helps to promote  
15 that by in fact ensuring that someone who does business in  
16 a certain State is not going to receive a windfall or be  
17 unduly penalized in the event that an individual goes into  
18 bankruptcy. He can also structure his or her commercial  
19 transactions in such a way so that he knows that in terms  
20 of consistency what is going to happen in the Federal  
21 court is going to be consistent with what happens in the  
22 State court.

23 For these reasons, we would ask for an adoption  
24 or for a determination that in fact it is the State law  
25 that controls in making a determination when a transfer

1 takes place, and that in fact the Court reject the  
2 implementation of a date of delivery rule.

3 QUESTION: Are you aware of any States where the  
4 result would be different than it is under New Mexico law  
5 according to your view of the case?

6 MS. CUSACK: I'm not aware of any States where  
7 that would be different. Basically, the States have all  
8 gone ahead and passed the Uniform Commercial Code, and  
9 basically it's in effect throughout all 50 of the States,  
10 so I'm not aware of any situation where any State is in a  
11 differing situation.

12 I do think the cases that have evolved are  
13 consistent, that in fact a transfer of a debtor's interest  
14 in property when a check is issued, or when there has been  
15 a check issued, that transfer under the UCC takes place at  
16 the time the check is honored. Again, there is no  
17 assignment of any funds in the account, and there's no  
18 transfer of that dominion or control until such time as  
19 that happens.

20 QUESTION: Thank you, Ms. Cusack. Mr. Arland,  
21 do you have anything in rebuttal? You have 2 minutes  
22 remaining.

23 REBUTTAL ARGUMENT OF WILLIAM J. ARLAND

24 ON BEHALF OF THE PETITIONER

25 MR. ARLAND: Yes, Mr. Chief Justice, I'd like to



1 take the 2 minutes for rebuttal if I might.

2 QUESTION: Mr. Arland, may I ask you one  
3 question?

4 MR. ARLAND: Yes, Justice.

5 QUESTION: Why isn't your position that there's  
6 a conditional transfer here defeated by the fact that the  
7 payee cannot enforce that transfer against the bank if  
8 it's dishonored?

9 MR. ARLAND: My position is that because the  
10 nature of a check is that it is a conditional transfer,  
11 and that it is recognized within the Uniform Commercial  
12 Code and in the bankruptcy courts.

13 QUESTION: Then why can't it be enforced against  
14 the bank?

15 MR. ARLAND: Because the concept of how commerce  
16 works and how banks honor checks does not permit it. If  
17 we have a dishonor of a check within the preference period  
18 subsequent to delivery, you don't have a preference  
19 action, there's no question of that, because there's  
20 nothing -- nothing has changed hands.

21 It is the conditional nature, however, of giving  
22 of a check and its relation back to the date of delivery  
23 that puts it in a unique circumstance. It's much like the  
24 547(e) provision, and the honoring of the check you can  
25 analogize, as we have in our brief, to the perfection of a

1 security interest in either personal property or real  
2 property. There is a definite relation back doctrine that  
3 must be taken into consideration.

4 QUESTION: But isn't -- you say it's a relation  
5 back, but doesn't the relation back occur only because the  
6 check is an authorization to pay, and if the person  
7 authorized accepts the authorization then the payment  
8 subject to conditions you've mentioned relates back, but  
9 it is not a chose in action in the sense that it can be  
10 enforced against the bank as the holder of funds.

11 MR. ARLAND: The definition of property under  
12 541 would cover a conveyance by check. The property  
13 itself would be that chose in action.

14 QUESTION: A nonenforceable authorization to a  
15 third party?

16 MR. ARLAND: I'm sorry, Justice Souter.

17 QUESTION: A nonenforceable authorization to a  
18 third party would fall within the definition of property?

19 MR. ARLAND: I do not believe it unenforceable.  
20 I believe that the check --

21 QUESTION: Well, you can't enforce it against  
22 the bank. That's what's holding me up.

23 MR. ARLAND: You can present it to the bank for  
24 honoring. If it is wrongfully dishonored -- and that  
25 would be the only reason it would be dishonored, in which

1 the payee would have a cause of action or would want to  
2 enforce it against the bank if the bank wrongfully  
3 dishonored it. That's the only reason --

4 QUESTION: If it's wrongfully dishonored, can it  
5 sue the bank? I thought you conceded that it could not.

6 MR. ARLAND: The payee can -- if it's wrongfully  
7 dishonored, he cannot, but what he can do is he may sue  
8 the payor. The payor may then sue the drawee bank for  
9 wrongfully dishonoring the check.

10 QUESTION: Well, that's great, but it doesn't  
11 affect the transfer. You simply go back to your  
12 original --

13 MR. ARLAND: But it does affect the transfer,  
14 Justice Souter, with all due respect, if one looks to the  
15 Bankruptcy Code, and the Bankruptcy Code under  
16 section 101(54) provides for conditional transfer. The  
17 conditional transfer is a transfer in and of itself. The  
18 fact that the presentment of the check occurs within the  
19 period does not affect the date of transfer, which is the  
20 date of delivery itself.

21 CHIEF JUSTICE REHNQUIST: I think you've  
22 answered the question, Mr. Arland. Thank you. The case  
23 is submitted.

24 (Whereupon, at 11:59 a.m., the case in the  
25 above-entitled matter was submitted.)

## CERTIFICATION

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

NO. 91-159 - WILLIAM BARNHILL, Petitioner V.

ELLIOTT JOHNSON, TRUSTEE

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

BY Michelle Sanders

(REPORTER)