

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ROBERT J. TAYLOR, TRUSTEE, Petitioner V.

FREELAND & KRONZ, WENDELL G. FREELAND

AND RICHARD KRONZ

CASE NO: 91-571

PLACE: Washington, D.C.

DATE: March 2, 1992

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ROBERT J. TAYLOR, TRUSTEE, :

4 Petitioner :

5 v. : No. 91-571

6 FREELAND & KRONZ, WENDELL :

7 G. FREELAND AND RICHARD F. :

8 KRONZ :

9 - - - - -X

10 Washington, D.C.

11 Monday, March 2, 1992

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States at

14 10:03 a.m.

15 APPEARANCES:

16 TIMOTHY B. DYK, ESQ. ESQ., Washington, D.C.; on behalf of

17 the Petitioner.

18 PHILLIP S. SIMON, ESQ., Pittsburgh, Pennsylvania; on

19 behalf of the Respondents.

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1 PROCEEDINGS

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 91-571, Robert J. Taylor,
5 Trustee, v. Freeland & Kronz. Mr. Dyk.

6 ORAL ARGUMENT OF TIMOTHY B. DYK

7 ON BEHALF OF THE PETITIONER

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

10 The question in this Chapter 7 bankruptcy case
11 is whether section 522(1) of the code, which provides for
12 the raising of challenges to exemptions, in combination
13 with Bankruptcy Rule 4003, which generally requires that
14 that objection be made within 30 days after the meeting of
15 creditors, is an absolute bar as, the Third Circuit held
16 in this case, to a challenge to the exemption raised at a
17 later time.

18 There is a conflict in the circuits on this
19 issue. There are three different positions that the lower
20 Federal courts have taken. One represented by the Third
21 Circuit in this case, which held that the 30-day period is
22 an absolute bar, a second line of cases that the court at
23 a later time can reexamine the exemption de novo, and a
24 third line of cases holding that after the 30-day period
25 the exemption may be challenged if it lacks a good faith

1 statutory basis.

2 We are urging in this case that the Court adopt
3 this third position, which is represented by decisions of
4 the Fifth, Sixth, and Eighth Circuits.

5 In a bankruptcy case the first act is the filing
6 of the petition by the debtor, and at the same time that
7 the petition is filed the debtor will also file a schedule
8 of assets and a list of claimed exemptions, and in this
9 case when the petition was filed on October 24th, 1984,
10 the debtor made a claim of exemption for a lawsuit which
11 she had pending against TWA, and she characterized it in
12 the schedules as a claim for lost wages with the value
13 unknown. At that time, the case had wound its way through
14 the State system. She had been successful in convincing
15 the commonwealth court to affirm a judgment in her favor,
16 and the case had been briefed and argued before the
17 Pennsylvania supreme court.

18 Within the time allowed in the code, the trustee
19 appointed by the court, the petitioner in this case, held
20 a meeting of creditors as he was required to do and
21 examined the debtor about her assets, and in particular
22 about this claim, and noted at the time that this was a
23 possible asset case, meaning there were possible assets
24 here to satisfy the claims of creditors, that asset being
25 the claim against TWA, and shortly after the meeting of

1 creditors he wrote to counsel for the debtor and advised
2 them that he considered this claim to be an asset of the
3 estate, i.e., that he considered it to be nonexempt.

4 The claim continued and ultimately was resolved
5 by settlement in favor of the debtor, and she collected
6 approximately \$110,000, and the question now is, the case
7 having remained open for this time for the express purpose
8 of pursuing this claim, whether the trustee in bankruptcy
9 can now go after these proceeds, which were allowed to him
10 in the amount of \$23,000 here by the bankruptcy court --
11 can go after these proceeds to satisfy the claims of
12 creditors.

13 Now, the contention is by the respondents and
14 the holding of the Third Circuit is that that is not
15 permissible because section 522(1) of the Bankruptcy Code
16 says that if there's no objection filed within 30 days
17 after the creditors meeting that the property claimed as
18 exempt is exempt.

19 QUESTION: Is that in the code?

20 MR. DYK: That is in the code, in 522(1) of the
21 code.

22 The time period -- 30-day time period is not
23 specified in the code but in --

24 QUESTION: That's what I wanted to know.

25 MR. DYK: Yes, that's in Bankruptcy Rule 4003.

1 It specifies the 30-day period.

2 QUESTION: Mr. Dyk, do you claim that all of the
3 recovery is open for the trustee to seek recovery? I
4 thought you thought only a portion of it was recoverable.

5 MR. DYK: We have only pursued a portion of it,
6 and the Bankruptcy Court only allowed a portion of it to
7 be reached, the \$23,000, but I think that at the time that
8 the bankruptcy petition was filed that there was a strong
9 argument that all of that could be reached, even the part
10 covered by attorney's fees, because there was no equitable
11 lien with respect to the claim itself, but only an
12 equitable lien under State law that would have arisen
13 after the proceeds were received.

14 QUESTION: But I guess as the case comes to us
15 we don't have to get into that. We deal only with a
16 portion of it.

17 MR. DYK: The judgment of this Court would only
18 determine a portion of it, and we're only claiming the
19 right to the \$23,000. The claims of the creditors in this
20 case were only \$11,000, so the \$23,000 will be sufficient
21 to cover that and the administrative expenses.

22 QUESTION: Did you argue the application of the
23 new sentence in section 105 in the court below?

24 MR. DYK: No, that was not argued in the court
25 below. It has come up in some other cases, but it was not

1 argued in the court below here.

2 QUESTION: So it's being urged for the first
3 time here.

4 MR. DYK: That's correct, Justice O'Connor, and
5 we believe that's appropriate, because what the second
6 sentence of section 105(a) says is that no provision of
7 the code shall be construed to prevent a challenge based
8 on an abuse of process, and the question of whether 522(1)
9 was a bar to the trustee's claim here was something that
10 was heatedly contested in the lower court, and we're
11 merely saying in this Court that section 105(a) instructs
12 as to how to interpret section 522(1).

13 QUESTION: If it were to apply, how do you think
14 abuse of process should be defined?

15 MR. DYK: Well, I think it certainly doesn't
16 mean abuse of process in the common law sense, but if you
17 look at Prosser or the Restatement of Torts, abuse of
18 process in the common law sense would be, for example,
19 using a writ of sequestration to get property or the
20 improper issuance of criminal process, or the use of
21 process to commence an improper civil action.

22 QUESTION: You think that the claiming of an
23 exemption which the statute doesn't allow is an abuse of
24 process?

25 MR. DYK: I think it is an abuse of process not

1 in the common law sense but in the sense that this Court
2 has used the term abuse of process, for example, in the
3 Cooter & Gell case. What is involved here in section
4 105(a) is not the conferring of a right of action on the
5 trustee or the party of interest. It's not conferring a
6 common law right of action, it's simply saying that the
7 time limits of the code will not be enforced if there's an
8 abuse of process.

9 I think there are some interesting comparisons
10 that can be made between these provisions of the
11 bankruptcy rules that govern here and the Federal Rules of
12 Civil Procedure, and in some respects that's a rather
13 exact parallel.

14 Under the Federal Rules of Civil Procedure, if a
15 complaint is filed and allegations in the complaint are
16 not controverted under Rule 8(d) of the Federal Rules of
17 Civil Procedure the allegations of the complaint are to be
18 taken as true, and I think one could look at 522(1) as
19 essentially saying the same thing, that if a claim is made
20 for an exemption and there's no timely objection to that,
21 that the exemption will be taken as established, but just
22 as under the Federal Rules of Civil Procedure that that is
23 not the end of the matter, so, too, we suggest that under
24 the Bankruptcy Code that's not the end of the matter,
25 either.

1 In other words, that merely because you file a
2 late answer doesn't mean that the court does not have the
3 power to come in and give relief from a default later on
4 in the course of the proceedings.

5 QUESTION: What is the process that is abused
6 here, the filing by the debtor claiming the exemption?

7 MR. DYK: Well, Chief Justice, we're not
8 suggesting that the term abuse of process was used here in
9 the common law sense. We suggest that it was meant --

10 QUESTION: Well, no, but surely -- I mean, when
11 you say abuse of process, there's a verb and a preposition
12 and a noun, and the noun is process, and what is the
13 process?

14 MR. DYK: The claim is that the abuse of process
15 was the act of filing the list of exemptions and making a
16 claim of exemption that did not have a good faith
17 statutory basis.

18 QUESTION: So the listing of exemptions is a
19 form of process, in your view.

20 MR. DYK: Not of the common law, but within the
21 scope of section 105(a). There's no -- we suggest that if
22 you look at section 105(a) there's no question but that in
23 dispensing with these time limits where there's an abuse
24 of process that Congress was concerned with the situation
25 in which improper claims or claims without reasonable

1 basis --

2 QUESTION: But the first sentence, Mr. Dyk,
3 begins the court may issue any order, process, or
4 judgment, and that suggests that they're talking about
5 process in the sense of something of a writ, or something
6 that the court issues.

7 MR. DYK: Well, I think that the language of the
8 second sentence, which refers to no provision of this
9 title providing for the raising of an issue by a party in
10 interest, shall be construed to preclude the court from
11 sua sponde taking any action or making any determination
12 necessary or appropriate to prevent an abuse of process.

13 The language of that sentence suggests to us
14 that what they were talking about was a concern with the
15 time limits in the code and the language fits rather
16 exactly with section 522(1), and what they are suggesting
17 is that the time limit would result in an abuse of process
18 in the sense of a bad faith claim, or something of that
19 sort, that the claim would have power to excuse.

20 We don't think that section 105(a) really made
21 any change with respect to the inherent powers of the
22 bankruptcy courts in this area, and in fact there is
23 authority that even before this provision in the code,
24 even under the old Bankruptcy Act, that the bankruptcy
25 courts did have equitable powers in this area to do the

1 sort of thing that we are urging should be done in this
2 case.

3 QUESTION: Under your submission, Mr. Dyk, I
4 take it it becomes relevant whether there's a colorable
5 basis for the claim, or a reasonable basis for the claim,
6 and my concern is is that that propels us into something
7 of a collateral inquiry, and this case illustrates the
8 point. The issue isn't really presented in this case, but
9 it illustrates the point. Isn't front pay exempt?

10 MR. DYK: Front pay, to the extent it's
11 necessary for the support of the debtor, would be exempt.
12 Back pay is not exempt.

13 QUESTION: So it seems to me that in this case
14 if she thought there was a possibility of front pay that
15 that was the basis for claiming the exemption.

16 MR. DYK: If that were the case, that would be
17 true, but I think that the record pretty clearly
18 establishes first of all that the claim at the time of the
19 bankruptcy filing was worth \$110,000 and the later
20 calculations made at the time of the settlement show that
21 only approximately even as of that time only about
22 30 percent of that claim was for front pay as opposed to
23 back pay.

24 QUESTION: But then to that extent at least it
25 would be exempt, would it not?

1 MR. DYK: It would be exempt to the extent that
2 it was a claim for front pay, but after all at the time of
3 the filing of the bankruptcy petition the award of the
4 Pittsburgh Human Relations Commission that was being
5 defended had a provision in it that she would recover from
6 the time that she was discriminated against up until the
7 time that her class of supervisor was no longer employed
8 by TWA in Pittsburgh, and that was a date before the
9 filing of the bankruptcy petition.

10 So if you just looked at the Human Relations
11 Commission decision there wouldn't have been any award of
12 front pay but merely an award of back pay for the period
13 before the filing of the bankruptcy petition.

14 QUESTION: But at a minimum does not this
15 illustrate the complexity and the difficulty of enforcing
16 the rule that you propose?

17 MR. DYK: Well, I think that there can be
18 situations in which it is complex, but it is not such an
19 unusual thing, after all, under Rule 11, and there is an
20 equivalent of Rule 11 in the bankruptcy rules which is
21 section 9011 that the courts routinely make this kind of
22 determination and make a determination as to whether
23 claims have a reasonable basis. That is essentially the
24 standard that we are urging here that ought to be applied
25 under section 522 and section 105(a).

1 QUESTION: Do you have any idea, Mr. Dyk, what
2 percentage of people filing for bankruptcy are represented
3 by attorneys when they file as opposed to, say, people who
4 start civil law suits in the Federal courts?

5 MR. DYK: I don't know the answer to that,
6 Mr. Chief Justice, but one of the problems here is that
7 the bankruptcy courts are inundated with this filings.
8 Last year there were 880,000 bankruptcy filings, 291
9 bankruptcy judges to deal with all of those filings, and a
10 real need on the part of the bankruptcy courts to rely on
11 the good faith of debtors in claiming exemptions,
12 otherwise the whole system would collapse.

13 QUESTION: How many -- what percentage of all of
14 the filings involve a trustee?

15 MR. DYK: Well, all of the Chapter 7 filings
16 would involve a trustee and the vast --

17 QUESTION: Which is this one.

18 MR. DYK: Which is this one, and the vast --

19 QUESTION: So it isn't the bankruptcy judges
20 that are any more -- they are more inundated than the
21 trustees.

22 MR. DYK: The trustees have been pretty
23 inundated, too, even --

24 QUESTION: Well --

25 MR. DYK: Even --

1 QUESTION: The trustee is the person who failed
2 to object here, or any creditors failed to object --

3 MR. DYK: Well, the -- Justice --

4 QUESTION: Isn't that right?

5 MR. DYK: That is correct. The creditors would
6 not have objected. You're dealing with a situation in
7 which there was \$11,000 in claims. No creditor has a
8 sufficient monetary incentive to raise an objection or to
9 investigate the case. They rely on the trustee --

10 QUESTION: Well, you seem to have it now. The
11 creditors seem to have an interest now.

12 MR. DYK: Well, I think it's not the creditors,
13 it's the bankruptcy trustee who's --

14 QUESTION: Well, the trustee certainly didn't do
15 what he should have done.

16 MR. DYK: He did not do what he should have done
17 in the technical sense, but what he did was immediately
18 after the meeting of creditors he wrote a letter to the
19 debtor's counsel handling this TWA case for her and
20 advised them specifically of his position.

21 This was not a case in which the trustee laid
22 back and did not inform people of his position, and the
23 case was specifically kept open for this purpose. There
24 was not technical compliance with the bankruptcy rules in
25 the sense that there was an objection filed with the

1 court, but everybody knew what the trustee's position was
2 at the time, and the bankruptcy court was made aware of
3 it, too, but these kinds of slip-ups are going to occur
4 when you have this many bankruptcy proceedings.

5 At the time that this case was going on, the
6 trustee here had approximately two or three hundred of
7 these cases a year, which I think is typical of bankruptcy
8 trustees all across the country.

9 QUESTION: Where did you file -- where did the
10 trustee file the suit?

11 MR. DYK: He filed it within the context of the
12 bankruptcy proceeding. It's a so-called adversary
13 proceeding within the context of the bankruptcy, and the
14 bankruptcy was not closed at the time that this claim was
15 asserted in the adversary proceeding. Essentially what he
16 was doing was --

17 QUESTION: Was it -- a bankruptcy judge ruled on
18 it?

19 MR. DYK: Yes. The bankruptcy judge ruled on it
20 and determined that the exemption should be invalidated to
21 the extent of \$2,300. He did not agree with the trustee's
22 position to invalidate the whole \$110,000 of the
23 settlement. He said I'm going to exercise discretion, I'm
24 only going to set aside the exemption to the extent of
25 \$23,000 and not the whole settlement.

1 QUESTION: What if it had been closed, Mr. Dyk?
2 What if the whole bankruptcy proceeding had been closed?
3 You'd be making the same argument anyway, wouldn't you? I
4 mean, I don't see that this provision -- does this
5 provision say as long as 105(a) -- does that apply only
6 when the proceeding is still open?

7 MR. DYK: Well, I would think it would only
8 apply while the proceeding was still open.

9 QUESTION: Why is that?

10 MR. DYK: Well, if you look at the bankruptcy
11 proceeding as being parallel to ordinary civil proceedings
12 in the Federal courts the filing of the petition is like a
13 complaint, the objection to the exemption is like the
14 answer, and then the closing of the case is like final
15 judgment in the case, so if after the closing of the case
16 there were a desire to reopen the judgment in a sense, one
17 would have to proceed under the bankruptcy rule.

18 It's equivalent to Rule 60(b) of the Federal
19 Rules of Civil Procedure, and that rule is bankruptcy rule
20 9024, but -- and there's another rule, 5010, which
21 provides for the reopening of closed cases, but in other
22 words you would have to take this additional step of
23 trying to reopen the case before you could challenge the
24 exemption.

25 One might look at the effort to challenge the

1 exemption before the closure of the case as similar to an
2 effort to set aside a default within the Federal Rules
3 context relying on Rule 55.

4 QUESTION: Well, I -- it makes a big difference
5 to me how I view this case if I think, well, it's only
6 going to apply where you have a trustee who didn't make a
7 technical objection but he did write to the lawyers and he
8 did know there was a problem there and kept the case open
9 in order to be able to use 105(a), and if he hadn't done
10 that, bygones is bygones, once there's the discharge and
11 the case is closed it's all over with, but I'm not sure
12 that that's what would happen. You say the case could be
13 reopened whenever somebody combs through the whole thing
14 and finds out there was a mistake.

15 MR. DYK: Well, I wasn't suggesting that the
16 case could be opened without a very substantial showing.
17 I mean, it's like the reopening of a judgment under
18 Rule 60(b), that there would have to be a significant
19 showing and I'm also --

20 QUESTION: Like bad faith?

21 MR. DYK: A significant --

22 QUESTION: Like bad faith? Wouldn't that be a
23 significant showing?

24 MR. DYK: Well, I think under Rule 60(b) you
25 could -- after the 1-year period after the judgment you

1 could only reopen the judgment for a showing of fraud.
2 Mere bad faith wouldn't be sufficient.

3 Now, it's true that under the bankruptcy rule
4 and the Bankruptcy Code they don't have the same strict
5 time limits of Rule 60(b), but we would agree, and I think
6 that the interpretation of the rules and cases would
7 support that, that this would have to be within a
8 reasonable time.

9 QUESTION: Arguably, you would also have to make
10 a showing of cause for the trustee's not making the
11 objection soon, if it was apparent on its face --

12 MR. DYK: Yes, I --

13 QUESTION: Which you don't think is necessary in
14 order to recover here, right?

15 MR. DYK: Well, I think the showing of good
16 cause similar to what appears in Rule 55, the default
17 provision of the Federal Rules, would be an appropriate
18 gloss on this, and if you look back to the equity practice
19 before the adoption of Rule 55, which would govern both
20 the bankruptcy courts and Federal courts, I think there
21 would need to be some showing of good cause necessary for
22 that kind of reopening.

23 QUESTION: Well, after all the rule just says a
24 trustee or creditor may file within 30 days. Do you
25 concede that that means that after 30 days under the rule

1 they're just foreclosed, unless you can rely on 105?

2 MR. DYK: Well, unless you can rely on 105 or
3 equity practice to reopen it. I mean, it's just like 8(d)
4 of the Federal Rules of Civil Procedure, which says if you
5 don't controvert an allegation it's taken as admitted. If
6 you don't controvert the exemption it's taken as admitted
7 after 30 days, but our suggestion is that that does not
8 restrict the power of the bankruptcy court to come in
9 after the 30-day period and to reopen where there's a
10 showing of good cause and bad faith.

11 QUESTION: Well, but again, why don't we impose
12 a cause requirement there and not just a cause requirement
13 in order to reopen? That is to say, in addition to the
14 fact that there be no legal basis for the claimed
15 exception, why don't we impose also a requirement that
16 there be some plausible reason why the trustee did not
17 object as he should have?

18 MR. DYK: We agree that that would be an
19 appropriate gloss.

20 QUESTION: Even when no reopening is necessary.

21 MR. DYK: Even when no reopening is necessary.

22 QUESTION: What's the good reason here?

23 MR. DYK: Well, we would, I think -- one could
24 look at the parallel in Rule 55 of the Federal Rules of
25 Civil Procedure which has a good cause requirement in it

1 to set aside a default before the entry of judgment, and
2 the good cause requirement under Rule 55 is interpreted as
3 being essentially a three-part test, that there be a
4 meritorious defense, no prejudice to the other party and
5 no bad faith by the party seeking to reopen the judgment,
6 and so we would suggest that that might be the way that
7 good cause would be defined, and if that were defined in
8 that way, we would think that the trustee in this case
9 would easily satisfy it.

10 QUESTION: Do we really want to import that much
11 of the rather complicated Federal Rules of Civil Procedure
12 into bankruptcy proceedings?

13 MR. DYK: Well, Mr. Chief Justice, I don't think
14 that we're suggesting that we import the Federal Rules of
15 Civil Procedure into the bankruptcy proceedings. I think
16 what I'm suggesting is that there are two bases here for
17 reading 522(1) as not being an absolute bar.

18 One is the specific language of section 105(a),
19 which allows the courts to dispense -- expressly allows
20 the courts to dispense with the time limits where there's
21 an abuse of process, and that in turn is based on the
22 historic equity powers of the bankruptcy courts to reopen
23 while the case is still pending based on a showing of good
24 cause.

25 QUESTION: But you're also saying we should

1 carry over at least concepts from the Federal Rules of
2 Civil Procedure, and it seems to me if we carry over two
3 or three in this case the next case we're going to be
4 asked to carry over some more, and pretty soon we won't
5 know what concepts from the Federal Rules of Civil
6 Procedure apply in bankruptcy and which don't.

7 MR. DYK: Well, it's not so -- the suggestion
8 that I'm making, Mr. Chief Justice, is not so foreign to
9 the Bankruptcy Code. Section 9006 of the bankruptcy rules
10 is a very close parallel and was modeled after rule 6 of
11 the Federal Rules of Civil Procedure, and it is rule 9006
12 of the Bankruptcy Code that the respondents are relying on
13 here to say that the court cannot extend the time for
14 filing the objections after the 30-day time period has
15 run, so there is an exact parallel here between --

16 QUESTION: But there you have a bankruptcy rule
17 that very closely tracks a Federal Rule of Civil
18 Procedure, but it strikes me some of your argument, or
19 your rule based on 8(d) and 55 and 60(b), you're just
20 drawing analogies without any real reference point in the
21 Bankruptcy Code.

22 MR. DYK: Well, the reference point in the
23 Bankruptcy Code, Mr. Chief Justice, would be the
24 provisions of section 105, which for a long time have
25 confirmed the continuing power of the bankruptcy courts to

1 act as courts of equity.

2 I'm not suggesting that the specific provisions
3 of the Federal Rules of Civil Procedure be imported in
4 here and applied to bankruptcy. I'm simply saying that
5 those Rules of Civil Procedure to some extent are modeled
6 after the old equity practice in that quite apart from the
7 second sentence of section 105(a) the bankruptcy courts
8 retain these inherent equitable powers to reexamine
9 actions that were taken in the course of proceedings.

10 QUESTION: So the negligence of the trustee
11 should really never be a bar where there's an abuse of
12 process.

13 MR. DYK: No, I'm not suggesting that, Justice
14 White. I think that the -- if there was egregious --

15 QUESTION: Well, the trustee -- do you think the
16 trustee should have filed a claim -- I mean, should have
17 filed an objection?

18 MR. DYK: Well, there's no question that he
19 should have filed --

20 QUESTION: Why didn't he?

21 MR. DYK: Why didn't he? I think there were two
22 reasons: one, he wasn't convinced that the debtor's
23 representations that there was a valuable claim here were
24 correct, and second, while it doesn't appear in the
25 record, my understanding is that the practice at that time

1 in that district was the trustees voiced their objections
2 by notations at the meeting of creditors rather than the
3 filing of formal objections. That wasn't consistent with
4 the rules, but it is an explanation as to why he proceeded
5 in this way rather than in the correct way.

6 QUESTION: Well, he did disregard the rule.

7 MR. DYK: He did disregard the rule, there's no
8 question about that, but he did --

9 QUESTION: Not just negligently, on purpose.

10 MR. DYK: Well --

11 QUESTION: Isn't that right?

12 MR. DYK: I suppose on purpose in the sense that
13 he thought that it was permissible to disregard it and did
14 that, but he did advise the debtor immediately after the
15 creditors meeting about the claim that he had. There
16 wasn't any prejudice to the creditor here.

17 Mr. Chief Justice, I'd like to reserve the
18 remainder of my time.

19 CHIEF JUSTICE REHNQUIST: Very well, Mr. Dyk.
20 Mr. Simon, we'll hear from you.

21 ORAL ARGUMENT OF PHILLIP S. SIMON

22 ON BEHALF OF THE RESPONDENTS

23 MR. SIMON: Mr. Chief Justice, and may it please
24 the Court:

25 The respondents are requesting that they be

1 allowed to retain their fees in this case. They
2 prosecuted a cause of action for the debtor through three
3 appellate courts in Pennsylvania.

4 Petitioner has framed the issue in terms of
5 whether, under section 522(1) of the code, a bankruptcy
6 court may exempt property because no one objected. The
7 plain language of section 522(1) provides unless a party
8 in interest objects, what's claimed as exempt is exempt.
9 The language is not ambiguous, nor has petitioner argued
10 that it is.

11 QUESTION: But Mr. Simon, is it not true that
12 the real objection is that he didn't make a timely
13 objection? He did make known his objection.

14 MR. SIMON: I don't believe that is -- it is --
15 I don't believe that is true, because the trustee
16 commenced an action under section 549 of the code to
17 recover property transferred. He did not at that point,
18 as his complaint will show, specifically call into
19 question the exemption claimed, et cetera. He just simply
20 claimed that it was property of the estate.

21 QUESTION: Well, that's a pretty good challenge
22 to the claim of exemption.

23 MR. SIMON: In a manner of speaking, it is,
24 but --

25 QUESTION: Well, it can't be both exempt and

1 property of the estate.

2 MR. SIMON: We responded that it was not
3 property of the estate because it had been prior -- had
4 been exempted out of the estate under the clear language
5 of section 522(1).

6 QUESTION: Yes, but that would not be a complete
7 answer if there were no timeliness requirement. He could
8 say well, I'll make my objection now. Your basic argument
9 is the objection was made too late.

10 MR. SIMON: That's certainly correct.

11 QUESTION: So the real question is not on what
12 522(1) requires or means, but rather what the bankruptcy
13 rule requires.

14 MR. SIMON: Certainly the bankruptcy rules flesh
15 out the code requirement.

16 QUESTION: Well, if you didn't have the
17 bankruptcy rule you'd have no case, because he could say
18 I'm now making my objection.

19 MR. SIMON: That's true, but formerly he has
20 never, to this day, objected.

21 QUESTION: Well, he might do it today. He'd
22 still be okay, if it weren't for the bankruptcy rule --

23 MR. SIMON: That's certainly correct.

24 QUESTION: Because the estate's still opened,
25 isn't it?

1 MR. SIMON: That's certainly correct, Your
2 Honor.

3 QUESTION: Well, he filed his suit, though, in
4 the bankruptcy court, right in the bankruptcy case.

5 MR. SIMON: That's correct.

6 QUESTION: Well, that's a -- and if he was
7 trying to recover property he certainly was objecting to
8 the claim of exemption.

9 MR. SIMON: My point, I guess, is that there is
10 nothing in his complaint that --

11 QUESTION: Said objection.

12 MR. SIMON: Made him realize that it had been
13 objected -- or, excuse me, claimed as exempt. There's
14 nothing in his complaint that makes him aware, or makes us
15 aware, excuse me, that he was calling into question a
16 specific exemption.

17 QUESTION: Well, but you responded by saying
18 that the property was exempt.

19 MR. SIMON: That's true, certainly.

20 The courts that have not enforced the clear
21 language of section 522(1) and rule 4003 have done so
22 largely on the basis that it would create a scheme of
23 exemption by declaration, so to speak. This is a policy
24 argument, and we don't believe you reach policy arguments
25 in a case where the language is so clear, the legislative

1 history is so clear --

2 QUESTION: May I just make one other
3 observation? On the rule, you're reading the word may as
4 thought it said must, aren't you?

5 MR. SIMON: I'm reading the word may, I believe,
6 to say a creditor may object, he does not have to object,
7 but the time limit set out later in the rule -- may object
8 within 30 days of a meeting of creditors held pursuant to
9 a certain rule unless further time is granted by the court
10 within such period, and further bankruptcy rule --

11 QUESTION: So you're saying that it really means
12 must, and that's a fair reading. I'm not suggesting it
13 isn't, but you really are reading the word may as though
14 it said must.

15 MR. SIMON: As it regards the time limit,
16 certainly.

17 QUESTION: Yes.

18 QUESTION: Mr. Simon, what do you suppose the
19 meaning of section 105 is, and could the second sentence,
20 the new sentence added to section 105, ever be relied upon
21 in one of these bankruptcy cases to overcome the failure
22 to make a timely objection to an acclaimed exemption?

23 MR. SIMON: I believe it can, frankly. The
24 second sentence of 105 states that there is no provision
25 of this title shall be construed to prevent the court from

1 sua sponte taking action necessary or appropriate to
2 enforce orders, rules, and abuse of process.

3 QUESTION: What do you think abuse of process
4 means as applied to an exemption claim?

5 MR. SIMON: Well, certainly if there was no
6 objective basis in fact, or no arguable basis in law, it
7 was clearly an outrageous matter. If it was a perversion
8 of the process, yes, it could be read that way, and
9 properly read that way. However, we don't believe that
10 factually exists in this case.

11 QUESTION: Well, the court below had no --
12 apparently made no reliance upon, did not consider, the
13 possible application of section 105.

14 MR. SIMON: That's certainly true.

15 QUESTION: So is it still open in the court
16 below to consider that possibility?

17 MR. SIMON: Well, again, to some extent pardons
18 must be bound by what they raise or don't raise, and this
19 particular provision speaks in terms of court orders,
20 rules, and abuse of process. Certainly the rules are very
21 strict in this arena, as they are in -- throughout the
22 Federal Rules of bankruptcy procedure. They generally
23 provide for short time limits to expedite and move cases,
24 and clearly --

25 QUESTION: Well, is there any express time limit

1 for use of section 105, and if so, what is it?

2 MR. SIMON: No, there certainly is not, Your
3 Honor. It is a general -- it is in a provision of the
4 code that speaks to the general equity powers of the
5 court. However, here you have a specific, if you want to
6 term it legal statutory scheme, partly set out in the
7 code, of course, and partly set out in the rules.

8 QUESTION: I want to be clear of your position.
9 You said that if the claim has no basis in law or is
10 outrageous or is a perversion of the process, then the 105
11 section would apply. It seems to me that that brings you
12 much closer to Mr. Dyk's position than I had thought your
13 brief indicated, or are you saying that --

14 MR. SIMON: Well --

15 QUESTION: 105 is not applicable in any event?

16 MR. SIMON: Pardon me. I believe it must be
17 read in light of the specific rules in statutory scheme.
18 For example, if on the 30th day of the running of the
19 objection period the court had allowed extension
20 because -- on its own motion or ruling had allowed
21 extension and directed the trustee to review the claim of
22 exemption, that would be perfectly proper, perfectly
23 within the equity powers of the court.

24 QUESTION: Well, I take it no one contends the
25 court lacks the power -- or do you contend that the court

1 lacks the power to give an extension of time if the
2 trustee requests it?

3 MR. SIMON: No. Certainly under rule 4003, if
4 it's requested within the period and granted within the
5 period --

6 QUESTION: Well, what is your position if the
7 claim -- the exemption has no basis in law, which was your
8 phrase? Does the failure to file an objection within
9 30 days prevent the trustee from later claiming that that
10 was an improper listing on the exemption sheet?

11 MR. SIMON: Yes, certainly there must be a
12 bright line.

13 QUESTION: So that it doesn't make any
14 difference that there was no basis in law. I just want to
15 know what your position is.

16 MR. SIMON: Eventually it must not. Eventually
17 there must be a bright line. I'm trying not to be
18 overrestrictive of the reading of the equitable --

19 QUESTION: Well, bright lines are usually
20 overrestrictive of cases where fairness might call for a
21 different result, aren't they?

22 MR. SIMON: Certainly. I guess I'm suggesting
23 that 105 must be read in relation or construed with the
24 code section and the rule sections, and they are so strict
25 and so clear, as you will -- if you will, that the

1 equitable provisions must again be --

2 QUESTION: But --

3 MR. SIMON: Construed strictly.

4 QUESTION: But time limits are always strict. I
5 mean, a time limit is a time limit, and you know, 105
6 applies -- 105(a) applies to provisions providing for the
7 raising of an issue by a party. You acknowledge, however,
8 that abuse of process is not process in the common law
9 sense, that abuse of process means abuse of the --
10 embraces abuse of the judicial process.

11 MR. SIMON: Certainly.

12 QUESTION: Okay.

13 MR. SIMON: In this case, however, the only
14 action taken by the court was approximately 3-1/2 years
15 after the objection to exemption period had run. That is,
16 if you will, a 40-times extension of the objection to
17 exemption period. At some point, there must be finality
18 in these matters.

19 QUESTION: Did you know -- I take it the trustee
20 did notify some people that -- about his position with
21 respect to the estate's interest in the possible recovery.

22 MR. SIMON: That's certainly correct, Your
23 Honor.

24 QUESTION: Did the debtor know that?

25 MR. SIMON: My client, Freeland & Kronz, knew

1 that by letter directed to them, and that was an inquiry
2 letter which they answered.

3 QUESTION: So it was no surprise that the
4 trustee made a claim 3-1/2 years later.

5 MR. SIMON: Well, indeed it -- whether it should
6 or should not have been a surprise, it was.

7 QUESTION: Although it was wholly consistent
8 with his letter 3-1/2 years before.

9 MR. SIMON: To some extent. He claimed in the
10 letter that the net proceeds of the cause of action were
11 property of the estate. That was before the exemption to
12 objection period had run. There was really no way to
13 knowing whether he, after further inquiry, thought it was
14 unlikely there would be a recovery and did not choose to
15 exempt, or object to the exemption, or he just failed to
16 take action for some other cause.

17 QUESTION: Mr. Simon, your finality requirement
18 would simply be satisfied by the finality of the closing
19 of the case, wouldn't it?

20 MR. SIMON: It could be, certainly.

21 QUESTION: Why wouldn't that be enough?

22 MR. SIMON: Well, simply stated, I guess,
23 because there's specific code and rule language that calls
24 for an earlier deadline, and --

25 QUESTION: Well, doesn't that -- I mean, if

1 that's your criteria, you're reading 105 pretty much out
2 of the statute, aren't you?

3 MR. SIMON: I am reading 105 to be severely
4 limited, because it contains the language necessary or
5 appropriate to enforce orders, rules, or prevent abuse of
6 process. There were no prior orders here, and --

7 QUESTION: No, but you're not depending on
8 orders, you're depending on process, and you have conceded
9 that process can be an abuse of the judicial process, not
10 process referring to some document issued, and the
11 judicial process is an on-going one which only concludes
12 with the closing of the case.

13 MR. SIMON: Well, if I stated that or implied
14 that, it's broader than I intended.

15 QUESTION: Well, I thought -- I guess we'd
16 better get clear on that, because I thought that Justice
17 Scalia specifically asked you that question to clarify
18 that point, so I think we do not understand what you mean
19 by abuse of process.

20 MR. SIMON: When I say process, the code and the
21 rules, the statutory scheme is the process, or is --

22 QUESTION: Well, if the statutory scheme is the
23 process, then I suppose the process continues until the
24 case is closed.

25 MR. SIMON: But I -- I'm not sure if I

1 understand the inquiry of the Court, but --

2 QUESTION: Well, the inquiry started with your
3 claim that in administering 105 there is an interest in
4 finality which must be served in construing it as to when
5 a 105 sua sponte objection may be raised, and I said,
6 isn't that interest served sufficiently by saying it's got
7 to be raised before the case is closed, and since you
8 concede that process means judicial process, i.e. the
9 whole statutory scheme, it would seem consistent with your
10 view of process to say that a 105 sua sponte objection
11 could be raised by the court or inquiry could be made by
12 the court at any time until the case is closed.

13 MR. SIMON: Well, certainly the case closing
14 could be a deadline, but I guess I'm saying that there is
15 a specific deadline in this statutory scheme, and there is
16 no real reason for going outside of that scheme except in
17 very extreme and unusual cases where there are -- where --
18 and you don't have that concern not only specifically in
19 this case but the court did not really take any sua sponte
20 action except years into the future in this case after the
21 exemption period had run.

22 QUESTION: Basically your defense here is that
23 this is not an extreme case, isn't that right? I mean --

24 MR. SIMON: Certainly.

25 QUESTION: Why isn't it an extreme case? Do you

1 say that there was a valid legal basis for exemption of
2 the entire claim?

3 MR. SIMON: Absolutely, because under the
4 exemption scheme the debtor had three arguable bases for
5 exemptions under 522(d)(5), the so-called wild card
6 exemption allows \$4,150 in any property. Also, future
7 earnings, and arguably, though perhaps weak, a claim for
8 loss of pension.

9 It's unquestionable that her attorneys claimed
10 loss of pension rights, whether ultimately there was an
11 entitlement.

12 QUESTION: Well, would that have covered the
13 entire claim? I mean, you're talking about a claim that
14 was worth \$110,000. You know, the \$6,000 isn't going to
15 cover much of that.

16 MR. SIMON: We don't believe that that was,
17 indeed, on the appropriate date, the date of the petition
18 filing, that that lawsuit was worth \$110,000.

19 QUESTION: Well, the claim -- that's what had --
20 I thought that the letter from your firm to the trustee
21 said that, that that had been what the award had been.

22 MR. SIMON: There was a letter --

23 QUESTION: Did I make this up? I don't think I
24 made it up.

25 MR. SIMON: No. No, certainly there was a

1 letter from an associate in the firm of Freeland & Kronz
2 that responded to the trustee's inquiry, and that letter
3 certainly did state that there was no way of ascertaining
4 the value of the claim to Ms. Davis other than calculating
5 back pay and interest, and he had calculated that at
6 \$110,000.

7 That occurred after the petition date, and it
8 was based on the assumption that there was final liability
9 which turned out -- at that time, which turned out to be
10 incorrect, at least at that time.

11 But more importantly, at that time there had not
12 been damages testimony. The Pittsburgh Human Relations
13 Commission had entered an order that said you're entitled
14 to wage loss for a period from 1976 until the time that
15 the defendant no longer employed a certain category of
16 employee in Pittsburgh, and if you make that calculation,
17 as we have done in our brief, that amounts to roughly
18 \$9,000 or \$10,000 in damages, so at that point in time,
19 the burden was on the debtor through her attorneys to in
20 effect reverse that commission order.

21 Now, they later went forward towards a trial on
22 damages and the matter was, of course, eventually settled,
23 but at that point in time, at the critical point in time,
24 the filing of the bankruptcy petition, liability was not
25 finally determined.

1 Yes, the case has a see-saw history and the last
2 court that had ruled was in the debtor's favor, but more
3 importantly the claim that it was worth \$110,000 in my
4 client's word was -- at that time was a flight of fancy.
5 There was a specific commission order in place, and those
6 damages were severely limited, and the testimony at trial
7 was similar, that the only evidence presented was the
8 claim was not as valuable at that time.

9 QUESTION: Are you saying --

10 QUESTION: Mr. Simon, did your opponent rely in
11 the court of appeals on bankruptcy -- on section 105(a)?

12 MR. SIMON: No, Your Honor. That was not
13 raised.

14 QUESTION: Not raised at all.

15 MR. SIMON: No.

16 QUESTION: Mr. Simon, as I understand it, you're
17 saying, number 1, the amount of the claim was low at the
18 relevant period, i.e., maybe \$9,000 or \$10,000, and I
19 think you're also saying that the value of that claim as
20 an asset was not even the amount of the claim itself,
21 because it was subject to contingencies.

22 MR. SIMON: That's certainly correct.

23 QUESTION: Yes, okay.

24 MR. SIMON: If there are no further inquiries
25 from the Court, I would ask to be excused.

1 QUESTION: Very well, Mr. Simon.

2 Mr. Dyk, do you have rebuttal? You have
3 3 minutes remaining.

4 REBUTTAL ARGUMENT OF TIMOTHY B. DYK

5 ON BEHALF OF THE PETITIONER

6 QUESTION: Let me -- do you agree that your
7 clients did not raise the issue of section 105 in the
8 court of appeals?

9 MR. DYK: That is correct, Mr. Chief Justice.
10 The issue in the court of appeals, however, was whether
11 section 522 was a bar, and that's the same issue in this
12 court as in the lower courts, and we're suggesting that in
13 interpreting section 522, that the Court should look to
14 section 105, which --

15 QUESTION: But you didn't suggest that to the
16 court of appeals.

17 MR. DYK: That's correct.

18 QUESTION: Nor in your petition for certiorari.

19 MR. DYK: That's correct. It was -- well, the
20 petition for certiorari noted the conflict in the circuits
21 and --

22 QUESTION: Well, I know, but you didn't even
23 cite --

24 MR. DYK: That's correct, we did not, in the
25 petition.

1 QUESTION: And the first time it appeared here
2 was in the briefs.

3 MR. DYK: In the opening brief, that's correct.

4 Just to respond to one point, the bankruptcy
5 court -- and this appears at page 40(a) of the appendix to
6 the petition, the bankruptcy court made a specific finding
7 that the court finds that the value of the cause of action
8 on October 24, 1984, and that's the date of the filing of
9 the bankruptcy petition, was \$110,000 -- specific
10 finding -- and the letter from the respondent's own lawyer
11 characterized it at that time as a claim for back pay and
12 interest. There's no exemption under the code for back
13 pay and interest except to the extent of the catch-all
14 exemption which everyone agrees in this case would only
15 allow an exemption of \$3,950.

16 QUESTION: Mr. Dyk, if a trustee is puzzled as
17 to whether the exemption is applied, is there a
18 formulation where he can have some sort of a running
19 objection just to leave the time open, or is his only
20 option to ask for a hearing?

21 MR. DYK: He could ask for an extension of time
22 under rule 4003, and if the extension of time is granted
23 before the expiration of the period the court can act on
24 the extension of time. What we're suggesting is that
25 there is an additional power in section 105 and in the

1 prior equity practice which allows the court to remedy a
2 default of this kind.

3 I just note for the Court's benefit that there
4 is a case that we didn't cite in our brief. I call
5 opposing counsel's attention to it. It's Wayne Gas
6 Company, 300 U.S. 131, which does discuss the equitable
7 powers of a bankruptcy court to do this sort of thing.

8 QUESTION: Do you think the question you did
9 raise in your petition subsumes this position --

10 MR. DYK: Justice --

11 QUESTION: This is just another argument for
12 saying 522 didn't bar.

13 MR. DYK: That's correct, Justice White. It
14 seems to us that relying on section 105 in this context,
15 which uses the word construed --

16 QUESTION: But I suppose you -- even if we get
17 to 105, I would suppose that it wouldn't surprise you if
18 we said we're not going to fool with 105. I mean, we're
19 not going to decide the case based on that, we're going to
20 send it back.

21 MR. DYK: Well, I -- it wouldn't surprise me,
22 Justice White, if the case were ultimately sent back for a
23 decision by the bank --

24 QUESTION: To see what effect 105 had.

25 MR. DYK: Well, to have him exercise his

1 discretion under section 105, yes.

2 Thank you.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Dyk.

4 The case is submitted.

5 (Whereupon, at 10:57 a.m., the case in the
6 above-entitled matter was submitted.)

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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. 91-571 - ROBERT J. TAYLOR, TRUSTEE, Petitioner v.

FREELAND & KRONZ, WENDELL G. FREELAND AND RICHARD F. KRONZ

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

BY: Michelle Sanders

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