

ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: DONALD NEAL RAKE, ET AL., Petitioners v.

WILLIAM J. WADE, TRUSTEE

CASE NO: 92-621

PLACE: Washington, D.C.

DATE: Monday, March 22, 1993

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DONALD NEAL RAKE, ET AL., :

4 Petitioners :

5 v. : No. 92-621

6 WILLIAM J. WADE, TRUSTEE :

7 - - - - -X

8 Washington, D.C.

9 Monday, March 22, 1993

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 12:59 p.m.

13 APPEARANCES:

14 DAVID A. CARPENTER, ESQ., Tulsa, Oklahoma; on behalf of
15 the Petitioners.

16 LAWRENCE A.G. JOHNSON, ESQ., Tulsa, Oklahoma; on behalf
17 of the Respondent.

18 RONALD J. MANN, ESQ., Assistant to the Solicitor General,
19 Department of Justice, Washington, D.C.; as amicus
20 curiae, supporting the Respondent.

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1 PROCEEDINGS

2 (12:59 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 92-621, Donald Neal Rake v. William J. Rade --
5 Wade, pardon me.

6 Mr. Carpenter.

7 ORAL ARGUMENT OF DAVID A. CARPENTER

8 ON BEHALF OF THE PETITIONERS

9 MR. CARPENTER: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 The Tenth Circuit in this matter has just
12 plainly missed the mark. They have adopted a case of this
13 term -- or this Court, the Ron Pair case, United States v.
14 Ron Pair Enterprises Inc., which only superficially bears
15 any relationship to the facts framed here.

16 But having committed that mistake, the Tenth
17 Circuit has compounded that error by misreading the Ron
18 Pair decision so as to require the petitioners to pay
19 interest not only on an arrearage in a Chapter 13 plan,
20 bankruptcy plan, but also with respect to fees, costs, and
21 other charges. And that is found in the final paragraph
22 of the Tenth Circuit opinion.

23 The Ron Pair decision of this Court specifically
24 holds, by reason of its grammatical construction, that
25 interest is to be paid only upon the allowed secured

1 claim, and is grammatically separated from the
2 contractually required fees, costs, and other charges.

3 So in any event, and I -- the brief of the
4 respondent and also the Government failed to rebut this
5 point. The Tenth Circuit court of appeals must be
6 reversed, at least for the purpose of correcting this
7 issue.

8 Otherwise, we believe that the Ron Pair decision
9 does not even apply to the facts framed in a Chapter 13
10 cure scenario. First, the case of Ron Pair dealt
11 exclusively with whether or not there was a distinction
12 between a consensual versus a nonconsensual lien on an
13 oversecured claim, and if that distinction made any
14 difference with regard to paying interest as required
15 under section 506(b) under a Chapter 11 plan of
16 reorganization.

17 Secondly, Ron Pair did not involve the specific
18 framework of Chapter 13. It is a Chapter 11 proceeding,
19 and there are certain statutory limitations in Chapter 13,
20 specifically section 1322(b)(2), that are inapplicable in
21 every Chapter 11 proceeding.

22 Third, Ron Pair did not involve a long-term
23 debt, as that term is -- is not employed, but intended
24 under Chapter 13.

25 QUESTION: Are you to talk about the statutory

1 provisions?

2 MR. CARPENTER: Yes, Justice White, as I am.
3 This -- the statutory provision, section 506(b), requires
4 that where a claim is oversecured the allowed secured
5 claim must be paid interest and must also be paid its
6 contractually provided for fees, costs, and other charges.
7 We feel that section 506(b), however, does not apply in
8 the cure scenario found under Chapter 13, specifically
9 section 1322(b)(5).

10 QUESTION: In the what scenario? I didn't get
11 what adjective you used.

12 MR. CARPENTER: I'm sorry. A cure scenario
13 where a debtor in a Chapter 13 proceeding has fallen
14 delinquent in home mortgage payments and desires to cure
15 that arrearage, or cure that default. Under section
16 1322(b)(5), the Code provides that he may -- he or she may
17 do so, and maintain regular payments. That is the upshot
18 of 1322(b)(5). That particular paragraph applies only to
19 what I have termed long-term debts; that is to say, a debt
20 whose normal maturity date would not come to pass until
21 completion of all Chapter 13 plan payments.

22 QUESTION: In what -- and you rely on
23 1322(b)(2).

24 MR. CARPENTER: I rely on 1322(b)(2), yes,
25 Justice White. I also rely on 1322(b)(3) and (b)(5).

1 QUESTION: Well, you say -- you say that
2 1322(b)(2) prohibits modification of the terms of the
3 mortgage.

4 MR. CARPENTER: It prohibits plan modification,
5 Justice White. It does not prohibit Code modification of
6 the home mortgage. And by home mortgage I, of course,
7 refer to a -- an allowed secured claim that is secured
8 solely by real property which constitutes the debtors
9 principal residence.

10 QUESTION: Well, by extending the time for
11 payments you certainly are -- are modifying the terms of
12 the mortgage, aren't you?

13 MR. CARPENTER: No, Justice White.

14 QUESTION: The plan -- the plan provides for
15 extended payments, doesn't it?

16 MR. CARPENTER: The plan provides that in order
17 to effect a cure --

18 QUESTION: Uh-hum.

19 MR. CARPENTER: -- Under section 1322, the cure
20 must be effected within a reasonable time.

21 QUESTION: Uh-hum.

22 MR. CARPENTER: That is not further defined in
23 the Code. In practice, it is implied to be not longer
24 than the length of the Chapter 13 plan, which could be
25 anywhere from 1 month to 5 years.

1 QUESTION: Well, certainly the acceleration
2 clauses in the -- in the mortgage -- typical mortgage,
3 then, are -- are set aside.

4 MR. CARPENTER: Your Honor, Mr. Chief Justice,
5 the -- the -- what is set aside is the right to
6 immediately foreclose and accelerate. This, however, is
7 not a plan modification as petitioners view it. It is a
8 modification that is imposed by the Bankruptcy Code
9 itself, section 1322(b)(5).

10 QUESTION: You say that requires that?

11 MR. CARPENTER: I'm saying that if the debtors
12 choose to avail themselves of the cure provisions of
13 paragraph (b)(5), that it is the Code and not the plan
14 which constitutes the modification. It does have the --
15 the limiting language, "notwithstanding the provisions of
16 section 1322(b)(2)."

17 QUESTION: But the plan says how -- how far
18 deferred it's going to be, doesn't it?

19 MR. CARPENTER: The plan --

20 QUESTION: The Code doesn't -- doesn't provide
21 for an automatic answer.

22 MR. CARPENTER: No --

23 QUESTION: So it's either done by the plan or
24 it's not done.

25 MR. CARPENTER: That is correct, Justice Scalia.

1 However, the treatment is not initiated by the plan per
2 se, it is initiated by the Code.

3 QUESTION: Well you can say that about any
4 treatment of anything under the plan. The Code authorizes
5 a plan to -- to adjust any indebtedness, right?

6 MR. CARPENTER: Uh --

7 QUESTION: So, I mean, I don't know why this is
8 any different from any other indebtedness under it, as far
9 as that goes.

10 MR. CARPENTER: I do acknowledge your point,
11 Justice Scalia, and that is -- that is a valid point.
12 However, we feel that that is not the end of the story, if
13 you will.

14 QUESTION: Can I ask -- it seems to me that the
15 crucial language in this is -- it seems to me that the
16 crucial language is whether -- what we're really arguing
17 about is whether this is an allowed secured claim provided
18 for by the plan, right?

19 MR. CARPENTER: I do not necessarily acknowledge
20 that as being a correct statement, Justice Scalia.

21 QUESTION: You don't.

22 MR. CARPENTER: I think that --

23 QUESTION: Well, what do you think the crucial
24 language is?

25 MR. CARPENTER: I think that by virtue of

1 effecting a cure under section 1322(b)(5), the debtors
2 elects to maintain payments, and hence as to the
3 maintained payments there is a continuation of the
4 preexisting, prebankruptcy contract. And therefore that
5 contract is not provided for by the plan. It is only the
6 cure aspect that is dealt with inside the plan.

7 QUESTION: Well, it -- I'm -- let me begin with
8 1325, anyway. 1325 provides that you give current value,
9 and you make sure that current value isn't diminished as
10 for anything -- as for any -- any distribution on account
11 of the claim covered by the plan, distributed under the
12 plan.

13 MR. CARPENTER: That is correct, Justice Scalia.

14 QUESTION: And you were arguing, at least at one
15 point in your -- in your brief, that this is not a claim
16 provided for by the plan. You're saying it's a claim that
17 exists on its own as a simple contractual obligation
18 that's been preserved, right?

19 MR. CARPENTER: Yes. Yes, Justice Scalia.
20 There's authority to that effect among the circuits.

21 QUESTION: Well --

22 MR. CARPENTER: However, it is my position that
23 section 1325 is not even invoked when a cure under section
24 1322(b)(5) is effected, because maintenance of the
25 payments implies with it necessary contractual payment of

1 interest on the allowed secured claim.

2 QUESTION: If that is so, how do you explain the
3 language of 1328, which says that "The court shall grant
4 the debtor a discharge of all debts provided for by the
5 plan," okay, "except any debt provided for under
6 1322(b)(5)." So 1328 refers to 1322(b)(5) as a debt
7 "provided for by the plan."

8 MR. CARPENTER: Yes, Justice Scalia, it does.
9 And I believe that that -- I think the congressional
10 intent there is to -- and I don't want to particularly get
11 hung up on the phrase "provided for by the plan" --

12 QUESTION: Well, I do. It seems to me central
13 to the -- to the case.

14 MR. CARPENTER: My belief is that Congress, in
15 section 1328, indicated that where there will be a -- a
16 continuation of a long-term debt past the end of the plan,
17 it would be inappropriate, whether secure or unsecured,
18 to -- to allow a discharge. I will -- I will concede that
19 1328 does refer to provision by the plan under 1322(b)(5).

20 QUESTION: Do you have some interpretation of
21 that language, of 1328, that is consistent with your
22 argument here?

23 MR. CARPENTER: No, Justice -- Mr. Chief
24 Justice, I do not. I believe that -- that the term
25 "provided for by the plan," however, still does not

1 necessarily invoke the provisions of section 1325, because
2 maintenance of the payments under 1322(b)(5) will
3 necessarily require maintenance of the existing prefiling
4 contractual rate of interest that would be paid on -- on
5 the allowed secured claim.

6 QUESTION: So then you feel that 1325 may be
7 inconsistent with that part of 1328.

8 MR. CARPENTER: To that extent I do believe it
9 is, Your Honor.

10 Specifically, I would like to draw the Court's
11 attention to the meaning of the word cure. Cure is found
12 in various places throughout the Bankruptcy Code. It is
13 found in section 365 dealing with executory contracts and
14 unexpired leases. It is also found in section 1124
15 dealing with prepetition defaults and various types of
16 claims or interests.

17 It is found in two places in section 1322, one
18 in paragraph (b)(3) and one in paragraph (b)(5). (B)(5),
19 of course, refers to debts that would mature subsequent to
20 the final payment under a Chapter 13 plan, which leaves
21 (b)(3), a fortiori, to apply, although not -- so limited
22 by its terms, it would not have any meaning apart from
23 relating only to a short-term debt, one that would
24 normally mature within the scope of the Chapter 13 plan.

25 The provisions in section 365 and 1124 that deal

1 with cure both require the debtor, as a function of cure
2 under those sections, to not only cure the default, but to
3 compensate the claimant for any monetary loss and to
4 assure future performance under the cured default.

5 That language is conspicuously absent from the
6 two provisions in section 1322. There is no requirement
7 of compensation, no requirement of assurance. There is
8 merely either the curing or waiving of a default under
9 section 1322(b)(3), or the curing of the default under
10 (b)(5).

11 We feel that Congress' intentional elimination
12 of the compensation and assurance language found in 365
13 and 1124 indicate clearly that the time value money, which
14 would equate to the compensation factor in 365 and 1124,
15 are specifically to be disregarded under cures either
16 under section 1322(b)(3) or (b)(5).

17 There's additional language in the section
18 1322(b)(5) that specifically requires the cure to be
19 effected within a, quote, reasonable time. That is not,
20 as I indicated, further elaborated in the Code, but is
21 nonetheless, I believe, Congress' intention that the
22 bankruptcy court, which is, in the best of all possible
23 circumstances, on a case-by-case basis, to make a factual
24 determination of what should constitute a reasonable time.

25 That, I believe, is consistent with the

1 framework of the Bankruptcy Code in general and harmonizes
2 all of the apparently and superficially conflicting
3 sections of the Bankruptcy Code in Chapter 13. But since
4 there are various competing interests, the mortgagee has
5 an interest and that competes with the interests of the
6 debtor.

7 But more importantly, and perhaps more to the
8 point, the general unsecured creditors have a very
9 distinct interest in whether or not interest must be paid
10 in curing arrearages. The general unsecured creditors
11 essentially get whatever's left over at the end of a
12 Chapter 13 plan unless the Chapter 13 debtor is so well
13 heeled that he may fully fund the plan, notwithstanding
14 what objections might be raised, and pay unsecured
15 creditors 100 percent of their face amount of their
16 claims.

17 In those fairly rare instances -- I do note, by
18 the way, that petitioners Yell are in a 100 percent plan.
19 But in those fairly rare instances, if interest is
20 required to be paid, then that interest is going to be
21 essentially borne on the backs of the general unsecured
22 creditors. Since they have no vote in whether or not a
23 Chapter 13 plan would be confirmed, I think the interests
24 of the general unsecured creditors are being preserved by
25 the bankruptcy court in allowing a cure without interest.

1 I think that section 506(b) does not apply to
2 the case before the court today, for the reason that I
3 believe section 506(b) is a general statute, one of
4 general application. In fact, that has been a
5 determination found by the Third Circuit in the case of
6 Wilson v. Commonwealth Mortgage Corporation, found at
7 895 Federal Reporter, Second Series, at page 128.

8 Chapter 5, along with chapters 1 and 2, tend to,
9 if you will, float over the entire administration of a
10 bankruptcy proceeding to provide a general administrative
11 guidance, and is to give way where there are specific
12 instances of apparent conflict between Chapter 5 and, in
13 this case, Chapter 13. In any event, I would note that
14 there is no language in section 506 which would tend to
15 determine anything relative to what is necessary under a
16 cure.

17 I would like to point out that the -- of course,
18 the position of the petitioners is supported by the
19 majority of the circuits that have ruled on this issue, as
20 well as the leading treatise in the bankruptcy field, that
21 of Collier's, and, to the view of the petitioners, is the
22 only way to harmonize all of the various competing
23 sections in Chapter 13.

24 We feel that the respondent's view cannot
25 harmonize both 506(b) and 1325 with the nonmodification

1 rule of section 1322(b)(2). We also feel that the
2 respondent is seeking here to expand his contractual
3 rights in a way that is not authorized under section
4 1322(b)(2).

5 The respondent's own contract is a form drawn up
6 by his assignor for the purpose of determining the
7 relative rights of the parties at its inception. It
8 specifically dealt with the issue of default and
9 delinquency by providing for late payment penalties. We
10 feel that this amounts to a private remedy, and is -- if
11 section 506(b) does apply, is the functional equivalent to
12 the interest requirement under section 506(b).

13 We have a very strong feeling that the Tenth
14 Circuit opinion has skewed inappropriately the very
15 delicate balance struck by Congress in dealing with the
16 competing interests that I've previously mentioned.

17 The home mortgage contract, by and large in this
18 country, is a contract of adhesion. Debtors, mortgagors,
19 have virtually no power to effect change in the language
20 drawn up by the mortgagee on its form contract. The
21 mortgagee has the ability to protect itself from the
22 application of section 1322(b)(2) by merely requiring that
23 delinquent installments shall continue to bear interest at
24 a specified rate or at the contract rate, until paid.

25 That is not what was done. What was done is

1 that the mortgagee determined that a late payment should
2 bear with it a penalty of either \$5 or 5 percent of the
3 penalty, whichever payment was less.

4 We also feel that the opinion of the --

5 QUESTION: And would you say that if they
6 adopted such a provision and such a provision provided for
7 10 percent interest, and the legal rate of interest that
8 would otherwise apply under the Bankruptcy Code was less
9 than that, that they'd get the higher amount of interest?

10 MR. CARPENTER: I do, Your Honor.

11 QUESTION: In bankruptcy?

12 MR. CARPENTER: Yes, Justice Scalia, I believe
13 that it would by reason of section 1322(b)(2).

14 QUESTION: Uh-hum.

15 MR. CARPENTER: And I believe the -- the courts
16 that have followed the position of the petitioners here
17 have determined that where the contract of the parties
18 calls for interest, interest must be paid on those
19 arrearages. Where the contract is silent, it should stay
20 silent.

21 QUESTION: Well, if you're going to follow just
22 the contract, certainly if the mortgagee here had been
23 allowed to accelerate, the accelerated principal would
24 have borne interest, would it not?

25 MR. CARPENTER: Yes. Yes, sir, Mr. Justice --

1 Mr. Chief Justice, it would.

2 QUESTION: So to that extent, the mortgagee is
3 being deprived of something that he would have had under
4 the contract.

5 MR. CARPENTER: Yes, Mr. Chief Justice, that is
6 correct. And virtually every creditor is denied something
7 in the bankruptcy scenario. In the case of the home
8 mortgage, it is the right to accelerate and foreclose.

9 QUESTION: Yes. But I thought your argument was
10 that we ought to hold these people to the terms of their
11 contract.

12 MR. CARPENTER: With respect to whether or not
13 interest should be paid.

14 QUESTION: But not to the other provisions.

15 MR. CARPENTER: Not to the other provision.
16 That would require congressional enactment to overrule, or
17 to repeal, rather, section 1322(b)(5).

18 If it please the Court, I would like to defer my
19 additional time for rebuttal.

20 QUESTION: Very well, Mr. Carpenter.

21 Mr. Johnson, we'll hear from you.

22 ORAL ARGUMENT OF LAWRENCE A.G. JOHNSON

23 ON BEHALF OF THE RESPONDENT

24 MR. JOHNSON: Mr. Chief Justice, and may it
25 please the Court:

1 One of the confusions has been the lack of
2 attention to text in the interpretation of the Bankruptcy
3 Code. Ron Pair was singular in breaking that, in that the
4 courts looked at the text and said we're going to follow
5 the text, that legislative history is not relevant where
6 there's no ambiguity, this is a clear statute.

7 506(b) only provides for interest postpetition.
8 It doesn't have any -- really, any relevance to the fact
9 of what's going to be after confirmation. 1322(b) -- I
10 mean (b)(5) calls for a cure. In my research, cure was
11 first found in Louisville v. Radford. Cure says, "cure
12 the default."

13 In most instances in Chapter 13 bankruptcies,
14 there's a race to the court. The mortgagee has
15 accelerated, he's filed foreclosure and obtained a valid
16 judgment in the State court. When the Chapter 13 is
17 filed, 362 stays his right to accelerate, to foreclose, to
18 take possession, as you will. These are serious
19 modifications that are found under 362.

20 506(b) only provides pre-Code recognition under
21 Vanston Bondholders to his right of interest postpetition,
22 whereas any other creditors, under secured creditors,
23 unsecured creditors, are not entitled to interest. So
24 (b)(5) only has that application. It's when you get to
25 section 1322(b)(2) that it calls for interest upon the

1 allowed claim.

2 QUESTION: Excuse me. (B)(5) only has that
3 application, or 506(b) only has that application.

4 MR. JOHNSON: 506(b).

5 QUESTION: (B) only has that application.

6 MR. JOHNSON: 506(b), Justice Scalia, gives you
7 interest under Vanston, pre-Code, from postpetition up to
8 the time of confirmation.

9 QUESTION: When you concluded that, you said so
10 (b)(5) only has that application, and I thought you were
11 talking about 1322(b)(5).

12 MR. JOHNSON: I'm talking about -- 1325(b)(2) is
13 the time value statute that applies to the forced loan
14 that is brought upon the mortgagee. We are forced to
15 endure delay in payment for a period of 3, now getting
16 more and more, 5 years.

17 Now, when we talk about the approved claim that
18 we're talking about, or the allowed claim, one must look
19 at official form 10 of the bankruptcy forms for filing a
20 claim in a Chapter 13 case. It's two-horned. You file
21 for what your balance is due, then you file for what your
22 arrearages are. Depending upon the nature of
23 acceleration, your arrearages may not include anything but
24 interest.

25 However, if you filed a foreclosure action and

1 you had to advance insurance, had to advance title report,
2 court costs, endure -- incur attorney fees; sometimes in
3 a -- in a contested case they can be quite substantial.
4 Those are part of the arrearage claim.

5 There are two claims when you -- when you have
6 this term "allowed claim" in a Chapter 13. You have an
7 allowed claim for the balance due upon the mortgage. Then
8 if you have \$5,000 or \$6,000 in arrearages that you
9 incurred prepetition in acceleration in the State court,
10 those are part of what comes under 1322(b)(5), cure.

11 That cure was dealt with by Congress in the 10
12 years that the committee was to undergo the modernization
13 of the Bankruptcy Code. They came across with a sweeping
14 statement that the Bankruptcy Code could modify -- and
15 that term is likewise first used in Louisville v. Radford.
16 They could modify secured claims.

17 Well, that's not really clear what that term
18 "modify" means, except that Radford said "modify" means
19 modify substantive claims, and that includes many factors.
20 For instance, the very essence of a mortgage is full
21 payment with interest. That was discussed at length in
22 the Radford case. And whether or not the payment of
23 interest is a substantive right subject to modification
24 was not clear.

25 But when this committee report was approved by

1 the House and sent to the Senate, it still contained
2 this -- this broad sweeping power of Congress under the
3 Code to be able to modify secured claims.

4 Mr. Vaughn from the American Bankers'
5 Association and Mr. Wies from the American Mortgage
6 Bankers' Association appeared at the Senate hearings and
7 objected not to the deacceleration clause of 1322(b)(5).
8 They objected to two things: the bifurcation and the
9 modification of the home mortgage. So the Senate then had
10 a compromise amendment that went back, and that was what
11 is now the present Code provision, that you can modify
12 secured claims under (b)(2), but not secured claims where
13 you have a first lien upon the principal residence of the
14 debtor.

15 Now, that says nothing about whether you're an
16 unsecured creditor or an oversecured creditor. It means
17 that because of the social purpose, the good acts that the
18 mortgage association does in encouraging homeownership and
19 protecting mortgage -- mortgages, that we're going to
20 protect mortgages, these particular mortgages, against
21 modification.

22 And as I set out in my brief, there are all
23 sorts of violence that's being performed under the excuse
24 that we're not modifying. As Justice -- Chief Justice
25 Rehnquist said, when you're deaccelerating, you're

1 certainly modifying a right. You're modifying the right
2 to accelerate, you're modifying the right to proceed to
3 foreclosure.

4 But then, what other things can be modified?
5 Well, here we have a right to be paid in full, to have our
6 lien pass through bankruptcy, as in Dewsnap v. Timm. We
7 have a right to full payment with interest, and we believe
8 that these are substantive rights.

9 Yet, as you will hear next month, if I have a
10 mortgage for \$50,000 on a \$100,000 piece of property, I
11 can be stripped \$50,000. In other words, my mortgage is
12 there unsecured as to \$50,000 and secured to \$50,000, but
13 the courts say that that's not modification. Hence the
14 confusion and hence why we are here in this particular
15 case, dealing with interest on arrearages.

16 This Court has had a long-standing rule that was
17 started back in the thirties where in Billings v. United
18 States, at 232 U.S. 261, it said, "It was long ago here
19 decided, in view of the true conception of interest, that
20 a statute was not necessary to compel its payment where,
21 in accordance with the principles of equity and justice
22 and enforcement of an obligation, interest should be
23 allowed."

24 It was strange that in the history of the world,
25 in the law of Moses, the 12 tablets of Rome, even the

1 Church of England found that the exaction of interest was
2 ungodly. And it wasn't until the common law in the United
3 States that interest was allowed by the courts, and
4 certainly a departure from the common law of England at
5 the time the Constitution was written. So interest, in
6 the Federal context, has always been allowed by the courts
7 in the breach of an obligation where you had an
8 expectation of payment.

9 Now, 1322(b)(5) really says to the debtor pay
10 what you owe now if you have an arrearage, and it's
11 equivalent to pay what you owe over a period of time with
12 time value interest. But if you pay in full what you owe
13 over a period of time without time value interest, it's
14 not equivalent to, quote, pay what you owe now.

15 There is a question begging in this case as to
16 what rate of interest. Are we going to have the State law
17 application of interest or are we going to have a Federal
18 application of interest?

19 QUESTION: What section do you rely on
20 specifically to give you a right to interest?

21 MR. JOHNSON: 1325(b)(2).

22 QUESTION: You don't think 506(b)'s got anything
23 to do with it.

24 MR. JOHNSON: 506(b).

25 QUESTION: (b).

1 MR. JOHNSON: 506(b) is the oversecured creditor
2 postpetition right to be paid interest. That is a general
3 statute. However, it would be illogical, I think, to say
4 that 506(b) could not be used as justification for payment
5 over a period of 5 years to an oversecured creditor. But
6 I feel that the explicit language of Congress in
7 1325(b)(2) provides for time value interest.

8 QUESTION: Do you -- do you accept the
9 Government's argument in its footnote 7, I guess, that
10 506(b) wouldn't apply after confirmation because it has
11 the effect of, in effect, allowing a claim, and the time
12 for that has then passed?

13 MR. JOHNSON: I adopt the Government's
14 interpretation that 506(b) -- (b)(2) provides only for
15 interest postpetition.

16 QUESTION: Of course, they say the opposite on
17 page 15, so you can -- you can -- you can adopt their view
18 without losing anything.

19 (Laughter.)

20 MR. JOHNSON: Thank you.

21 QUESTION: Do you -- will you tell me again the
22 section that you say you rely on? You said 1325(b)(2).

23 MR. JOHNSON: 1325(b)(2) is found at page A-5 of
24 the petitioners' petition for certiorari, set out in full
25 there on page A-5. It says that the -- "Except as

1 provided in subsection (b), the court shall confirm a plan
2 if, (A), the holder of such claim has accepted the plan."

3 QUESTION: Wait -- wait a minute. Where are you
4 reading from?

5 MR. JOHNSON: A-5 of the petition for
6 certiorari.

7 QUESTION: Well, whereabouts on A-5?

8 MR. JOHNSON: (ii) under -- under (B) on A-5,
9 where it starts "the value."

10 QUESTION: Yes, okay.

11 MR. JOHNSON: "As of the effective date of the
12 plan, of property to be distributed under the plan on
13 account of such claim is not less than the allowed amount
14 of such claim."

15 QUESTION: That's -- that would be section
16 1325(a)(B)(ii).

17 MR. JOHNSON: (a)(B)(ii). That is also
18 synonymous with 1129 under Chapter 11 plans, which in the
19 legislative history Congress said is to be identical to
20 the Chapter 13 provision. The difference being, however,
21 that in a Chapter 11 plan, a creditor can propose a plan.
22 However, in a Chapter 13 plan a creditor cannot propose a
23 plan, and 1322(b)(2) is meant to protect the creditor.

24 QUESTION: So, for what period or periods of
25 time are you asking interest?

1 MR. JOHNSON: Well, actually, since I'm an
2 oversecured creditor.

3 QUESTION: Yes.

4 MR. JOHNSON: I'm entitled to that minimal
5 amount of interest from the time the petition is filed
6 until the plan is confirmed, which is normally a month or
7 two. If there are amendments, it might run as far as 3
8 months. That's not much money. The big money is where
9 I'm forced to make a loan to the debtor for 5 years, and
10 so that's the basis of which we are asking for interest.

11 QUESTION: And there's no question, at
12 repetition you would have a right to interest.

13 MR. JOHNSON: There's no question as to that.
14 And, again, we get another question begging, what if I'm
15 an undersecured creditor?

16 QUESTION: Yes, yes.

17 MR. JOHNSON: I think under 1325, an
18 undersecured creditor is likewise entitled to interest,
19 even though -- and, see, it's not even mentioned whether
20 you're an oversecured creditor or an undersecured creditor
21 in 1325. Now --

22 QUESTION: You say there's no question about
23 your right to it if -- prepetition interest, but under
24 State law you wouldn't get interest on the arrearage,
25 would you?

1 MR. JOHNSON: Oh, yes. Under State law I would
2 get Treasury plus 4 points.

3 QUESTION: On the -- on the arrearage.

4 MR. JOHNSON: On the arrearage.

5 QUESTION: Even though it's not provided for in
6 the contract.

7 MR. JOHNSON: Right. It's not in the contract,
8 but in Oklahoma, if you apply State law -- and I don't
9 want to get into that trap. I don't think that State law
10 interest would apply in this case, nor do I think this
11 Court should apply a rule of State law application of
12 interest. The reason why is because it would encourage
13 forum shopping, it would cause windfalls.

14 QUESTION: But you can't forum shop for your
15 home mortgage. You can't move the home around.

16 MR. JOHNSON: Well, if you move out of State and
17 you get another venue and they don't object --

18 QUESTION: It has to be the principal residence,
19 doesn't it.

20 MR. JOHNSON: Principal residence of the debtor.

21 QUESTION: You have to -- you filed a claim in
22 this case.

23 MR. JOHNSON: Yes.

24 QUESTION: And you asked for -- you asked for
25 interest on the arrearages, I suppose.

1 MR. JOHNSON: Yes.

2 QUESTION: Was it allowed as a secured claim?

3 MR. JOHNSON: It's an allowed claim. Yes, sir,

4 it's an allowed claim.

5 QUESTION: All right, all right. And at what

6 rate?

7 MR. JOHNSON: That was not handled in the lower

8 court. I kick myself that we didn't raise this

9 question --

10 QUESTION: Yeah.

11 MR. JOHNSON: -- Because I hate to come back on

12 what interest rate.

13 QUESTION: That's all right.

14 MR. JOHNSON: Is it going to be State law, is it

15 going to be Federal law? I think it should be Federal

16 law. If it's Federal law, then I think there should

17 either be one of two rules.

18 QUESTION: So what -- 506 -- 506 gives you

19 interest postpetition.

20 MR. JOHNSON: Yes.

21 QUESTION: At what rate?

22 MR. JOHNSON: Quiet. It's silent.

23 (Laughter.)

24 QUESTION: All right. So, but --

25 MR. JOHNSON: Commonly, it's market rate, 8

1 percent.

2 QUESTION: All right, all right. And that's what
3 you're asking for your -- in this case, for all of the
4 interest you claim.

5 MR. JOHNSON: Yes. But, I'm again -- I want to
6 urge in the 5 minutes I have, I want to urge that there's
7 nothing cutting across any State interest by applying a
8 Federal rule of interest in this case --

9 QUESTION: Right.

10 MR. JOHNSON: -- Where Congress has been silent.
11 I ask that there be a Federal rule and that the Federal
12 Court here apply a uniform interest rate under the
13 bankrupt -- under the constitutional uniformity.

14 QUESTION: Now, do you support the judgment of
15 the Tenth Circuit?

16 MR. JOHNSON: Yes, I do.

17 QUESTION: And the rationale?

18 MR. JOHNSON: No. The rationale is a little
19 shady under 506(b). I'm sorry, but I'm here under 1325.

20 QUESTION: So you want it affirmed on another --
21 on another basis.

22 MR. JOHNSON: Yes.

23 QUESTION: I think -- fees and expenses, was
24 there interest allowed on those too?

25 MR. JOHNSON: Yes, because that's part of my,

1 quote, allowed claim.

2 QUESTION: That's part of your allowed.

3 MR. JOHNSON: That's something that really
4 should be hammered across, is that when I file a claim, I
5 file a claim for interest, I file a claim for \$35,000 due
6 on the mortgage, then if -- I file a claim also for the
7 arrearages, which can be interest, taxes advanced,
8 insurance advanced, court costs, and attorney fees. And
9 interest is allowed on attorney fees under Federal law.

10 QUESTION: So you think if we just -- if we
11 followed the rationale of the Tenth Circuit we would be in
12 error.

13 MR. JOHNSON: I don't want to say that, Justice
14 White.

15 (Laughter.)

16 MR. JOHNSON: I want to say that you would pick
17 another, more rational ground to establish the rule of
18 law.

19 QUESTION: But you wouldn't mind -- you wouldn't
20 mind if we agreed with the Tenth Circuit.

21 MR. JOHNSON: No, sir, no.

22 QUESTION: But you do -- but under the Tenth
23 Circuit rationale you wouldn't get interest on the fees,
24 would you?

25 MR. JOHNSON: Yes, I would.

1 QUESTION: I thought they relied on 506(b).

2 MR. JOHNSON: Well, but under 506(b) -- and I
3 don't want to trample on Justice O'Connor's comma.

4 QUESTION: But the fees are after the comma.

5 MR. JOHNSON: But in 506(b) they all go
6 together.

7 QUESTION: Oh, no, the comma --

8 MR. JOHNSON: Interest is an unqualified right.

9 QUESTION: You ignore the comma in 506(b) for
10 your purposes, then. That's not what the Court did in Ron
11 Pair.

12 MR. JOHNSON: Well, in Ron Pair the comma was
13 not ignored, no. It set it off as a separate clause and
14 says "and if the agreement so provides," attorney fees and
15 so on.

16 QUESTION: Yeah, I understand.

17 MR. JOHNSON: No, I got interest on all of that
18 and I think I'm entitled to interest under it, and would
19 be under the Federal rule.

20 QUESTION: Mr. Johnson, I don't see anywhere in
21 your -- either of the questions presented by the
22 petitioner for certiorari, where any question regarding
23 the rate of interest is presented.

24 MR. JOHNSON: No, but in deciding this case, I
25 believe that the Court should grab that one feature,

1 because it's a very integral part of the question. It
2 doesn't give a full and complete disposition of the case
3 unless you say we're going to apply a Federal rule of
4 evidence in this case.

5 QUESTION: You mean a Federal rule of interest.

6 MR. JOHNSON: Yeah, the Federal rule of
7 interest, and you're going to apply a uniform rate of
8 interest, and it will either be, one, contract rate,
9 market rate -- the contract rate is, after all, what the
10 parties bargain for -- or you will apply a Treasury bill
11 rate over --

12 QUESTION: Did you brief the -- did you brief
13 the question of the rate of interest?

14 MR. JOHNSON: No, sir, I did not.

15 QUESTION: And you're asking -- so you're asking
16 us to decide it without it being raised in the petition
17 for certiorari, without your having briefed it.

18 MR. JOHNSON: I'm doing it under the equity
19 powers of this Court, that in order to decide a case you
20 will decide it completely. Because it is leaving a very
21 rough ground behind. In other words, when we go back --

22 QUESTION: Well, you say on the provisions of
23 the Bankruptcy Code, which is Federal law.

24 MR. JOHNSON: But the Bankruptcy Code is silent
25 as to the rate. The Bankruptcy Code is silent as to

1 whether State law will apply or Federal law will apply as
2 to interest. If it's silent, I think that this Court
3 should fill that gap, and I don't think that's asking too
4 much, because there's going to be extensive litigation.
5 There's already extensive litigation in the lower courts
6 as to what the rate it.

7 QUESTION: Thank you, Mr. Johnson.

8 Mr. Mann, we'll hear from you.

9 ORAL ARGUMENT OF RONALD J. MANN

10 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

11 SUPPORTING THE RESPONDENT

12 MR. MANN: Thank you, Mr. Chief Justice, and may
13 it please the Court:

14 This case considers the availability of interest
15 for oversecured creditors in Chapter 13 bankruptcy cases.
16 In our view, the problem is resolved by the precise
17 wording of three related statutory provisions, sections
18 506(b), 1322(b)(5), and 1325(a)(5) of the Bankruptcy Code.

19 I'd like to look first at the language of the
20 statute and then address a number of points raised by
21 petitioner. The first part of the question is whether
22 interest is available, what I'll call preconfirmation
23 interest, from the date the petition is filed until the
24 effective date of the plan.

25 In our view, that's governed by section 506(b)

1 of the Bankruptcy Code. I understand from Justice Scalia
2 there may have been some ambiguity in our brief, but I
3 don't think that there's -- I did not mean anything in our
4 brief to suggest that that provision would apply after the
5 date of confirmation. I'm somewhat puzzled as to what in
6 my brief might suggest that view, but that's certainly not
7 our view.

8 QUESTION: Well, you say -- well, never mind.

9 MR. MANN: In our view, section --

10 QUESTION: You seem to say that on page 15. You
11 say, "and thus the interest provided under section 506(b)
12 must be paid to compensate creditors for the delay
13 occasioned by a cure permitted" --

14 MR. MANN: Occasioned by the pendency of the
15 bankruptcy case, by which I refer to the pendency --

16 QUESTION: That's not what you say on 15. You
17 say it "must be paid to compensate creditors for the delay
18 occasioned by a cure permitted by 1322(b)(5)," that's what
19 you say on 15. You stick with footnote 7, though, anyway.

20 MR. MANN: I stick with footnote 7 and I meant
21 the portion --

22 QUESTION: Okay.

23 MR. MANN: That sentence referred to the portion
24 of the cure that occurs before the plan is confirmed.
25 1325 covers the portion after the plan.

1 But looking at the preconfirmation interest, the
2 relevant statute is section 506(b), and this is on page 1a
3 of our appendix. The first operative clause of that
4 statute provides that there shall be allowed to the holder
5 of an oversecured claim interest on such claim; it states
6 that without qualification.

7 As the Court explained in Ron Pair, this section
8 should be read as having two different clauses. The first
9 provides for interest in all cases and the second clause,
10 after the comma, provides for reasonable fees, costs, and
11 charges, but only to the extent that they're provided for
12 under the agreement under which the claim arose. Now,
13 this case involves a claim for interest. Therefore, the
14 bankruptcy courts should have allowed the claim for
15 interest without regard to the terms of the agreement
16 under which the claim arose.

17 Now, there's been some discussion as to how that
18 works with respect to fees, costs, and other charges. If
19 there was an allowed secured claim for something that
20 would be a fees, costs, or other charges provided for
21 under the agreement, section 506(b) would allow interest
22 on that claim, because it provides for interest on your
23 allowed secured claim.

24 You would look to the agreement and determine
25 that he might have an allowed secured claim, for example,

1 if he had been required to advance taxes on the real
2 property. And then under 506(b) he would be entitled to
3 interest if he was oversecured and had an allowed secured
4 claim for that.

5 QUESTION: But why -- I don't -- isn't that
6 always the case? Everything after the comma will
7 always -- will always bring you back to before the comma.

8 MR. MANN: But the question of the part after
9 the comma is that if the agreement does not provide that
10 you're entitled, for example, to collect compensation from
11 a debtor for a certain type of fee, for example title
12 searches. If under State law, under their mortgage they
13 have not asked to be compensated for that, Federal law
14 does not grant them a right to that. The only way that
15 they could collect compensation for attorney fees,
16 insurance advances, advances to pay taxes, is if the
17 agreement under which the claim arose provides for that.

18 QUESTION: But if it does provide for that, it
19 is part of the claim anyway.

20 MR. MANN: It is part of their allowed secured
21 claim.

22 QUESTION: So it's a strange provision.

23 MR. MANN: It is a strange provision, and I
24 think the Court's opinion in Ron Pair reflected that.

25 Turning to the availability of interest for the

1 period after the plan, which as petitioner and respondent
2 both agree, is really the important monetary aspect of the
3 case. We agree with Justice Scalia that this really turns
4 on the language of section 1325(a)(5), and that's at page
5 2a of our appendix.

6 And what it says is "with respect to each
7 allowed secured claim provided for by the plan," the
8 debt -- the creditor is entitled to present value
9 payments. In this case, it's acknowledged that the claim
10 is an allowed secured claim, and it seems to us quite
11 clear that the claim was provided for by the plan.

12 The plans are set forth in the joint appendix,
13 and they state that the arrearages will be paid out over
14 specified monthly periods and stated monthly installments.
15 Under any natural reading of the phrase "to provide,"
16 those claims were provided for by the plan and accordingly
17 are entitled to compensation for delay under 1325(a)(5).

18 I'd like to address two other points that have
19 come up. The first one is with respect to the suggestion
20 that in other provisions of the Bankruptcy Code,
21 specifically sections 1124 and 365, Congress expressly
22 provided for compensation for delay, but somehow in this
23 case the statute is any less clear.

24 The argument is made at some length in the
25 amicus brief filed in support of petitioners that the

1 problem with that argument is that it looks solely to
2 section 1322(b)(5). The place where Congress provides for
3 compensation for delay in this context is 1325(a)(5), and
4 as I've mentioned, this claim is clearly covered by that
5 section, and it just as clearly provides for compensation
6 for delay as any of the other provisions.

7 QUESTION: If it is so clear that it covers the
8 compensation for delay in payment, why do you suppose they
9 didn't tell us how to figure out the interest rate?

10 MR. MANN: There are no provisions in the
11 Bankruptcy Code that discuss the topic of exactly what the
12 rate of interest should be. And I -- I do agree with
13 respondent that it is quite an important question. It
14 also seems quite clearly not to be before the Court in
15 this case. The lower courts are struggling with it, and
16 there are quite a number of approaches that could be
17 taken.

18 But I do think it's fair to say that under any
19 reading of the statute after Ron Pair, there are clearly
20 some cases in which interest is going to be paid under the
21 Bankruptcy Code to oversecured creditors, and the statute
22 simply does not state what the interest rate is.

23 QUESTION: Of course, if we'd ignored the common
24 interest rule in -- after interest in Ron Pair, we
25 wouldn't have this problem, because the interest would

1 have been set by the instrument itself then.

2 MR. MANN: If Ron Pair had been decided the
3 other way, that would deal with the problem for pre --
4 preconfirmation.

5 QUESTION: We wouldn't have this problem, yeah.

6 MR. MANN: But it seems quite clear -- I think
7 you would agree that under section 1325(a)(5), somebody is
8 going to be receiving compensation for delay under that
9 provision. The opinion in Inwood of Timbers -- Timbers of
10 Inwood Forest strongly suggests that's the purpose of the
11 provision, and I think all the people that have looked at
12 that provision understand that it provides compensation
13 for delay. The question in this case is simply whether
14 the claim at issue here is covered.

15 And finally, one thing I would like to -- to add
16 to emphasize the reasons why it makes sense for there to
17 be interest created by these various provisions, we have
18 to remember that section 502(b)(2) of the Bankruptcy Code
19 disallows all claims for interest after the petition has
20 been filed. So the availability of interest before the
21 petition under the contract of the parties is not
22 particularly relevant to the issues that are before the
23 Court here, because the Code has expressly disallowed
24 those claims.

25 So the only way that a creditor, in our view,

1 would be entitled to interest after the bankruptcy
2 petition has been filed is if he can identify a provision
3 in the Bankruptcy Code that entitles him to compensation
4 for delay. It's a uniform bankruptcy law and Congress has
5 enacted uniform provisions to compensate people for delay
6 during the pendency of bankruptcy proceedings.

7 QUESTION: Tell me, what is the provision that
8 disallows interest generally again?

9 MR. MANN: It's section 502(b)(2).

10 QUESTION: 502(b)(2).

11 MR. MANN: If there are no further questions, I
12 thank the Court.

13 QUESTION: Thank you, Mr. Mann.

14 Mr. Carpenter, you have 10 minutes remaining.

15 REBUTTAL ARGUMENT OF DAVID A. CARPENTER

16 ON BEHALF OF THE PETITIONERS

17 MR. CARPENTER: Thank you, Mr. Chief Justice,
18 and may it please the Court:

19 Interest on an arrearage of a home mortgage in
20 the early years of that mortgage is essentially interest
21 on interest. Very little of the monthly payment made to a
22 mortgagee constitutes a reduction of principal or an
23 allocation to an escrow for insurance or taxes, where
24 those are escrowed in a monthly mortgage payment.

25 There's been a great deal of discussion by

1 respondent with respect to the legislative history giving
2 rise to the current status of the Bankruptcy Code. I
3 assert that there are no provisions of the Bankruptcy Code
4 present before this Court today that are unambiguous --
5 or, excuse me, that are ambiguous, and therefore resort to
6 legislative history is without merit and should not be
7 indulged in by the Court, and this Court has so determined
8 on several occasions.

9 QUESTION: Does that mean you think the
10 legislative history is against you?

11 MR. CARPENTER: No, Justice Stevens, I do not.
12 I think that the legislative history, however, is not
13 particularly instructive or enlightening in light of the
14 actual language used by Congress in enacting the various
15 chapters -- or sections of the Bankruptcy Code with which
16 we're dealing today.

17 Other than deacceleration of a home mortgage and
18 the right to foreclose pending continuation or maintenance
19 of payments under a Chapter 13 plan, there is no
20 modification of a home mortgage, and that is consistent
21 with the interaction of sections 1322(b)(2) and (b)(5).
22 There just may not be any modifications of the home
23 mortgage except to allow a cure.

24 Therefore, the respondent's argument with
25 respect to what else can be modified in his mortgage, and

1 especially raising the specter of the Fifth Circuit case
2 of Nobelman which is currently pending before this Court,
3 are irrelevant to the issues today.

4 QUESTION: Excuse me. Gee, if you take that
5 position, strictly speaking, to allow a cure is simply to
6 allow you, right now, to pony up all the money that's due.
7 That's allowing a cure.

8 MR. CARPENTER: That --

9 QUESTION: You --

10 MR. CARPENTER: I disagree, Justice Scalia, I'm
11 sorry.

12 QUESTION: What?

13 MR. CARPENTER: I disagree for this reason.
14 Section 1322(b)(5) specifically limits the application of
15 1322(b)(2). It permits cure within a reasonable time, and
16 that is what I believe Congress intended for the
17 bankruptcy courts on a specific case-by-case basis, fact-
18 specific case, to determine.

19 In certain cases it would be 36, perhaps even as
20 many as 60 months, a 5-year plan. In certain cases it
21 might only be 10 months. In fact, if there's not a very
22 extensive arrearage, the -- I believe the bankruptcy
23 rules, as they relate to distributions by a Chapter 13
24 trustee, prohibit payments of less than \$15. And so if
25 there's a \$150 arrearage that is due as of the date of

1 filing of the petition, it could not be stretched out past
2 6 months, unless there's an exorbitant amount of interest
3 that this Court would ultimately determine is appropriate.

4 QUESTION: May I ask you a question on this
5 modification issue? As I understand the claim here, it's
6 just for the arrearages, it's not for the balance due on
7 the entire note. And the -- if -- in your view, if they
8 fail to make -- comply with the plan, covering -- making
9 the cure in monthly payments over a period of time, would
10 the mortgagee retain the right to accelerate the basic
11 note and foreclose?

12 MR. CARPENTER: Only upon application to the
13 bankruptcy court, Mr. Justice Stevens, relating to relief
14 from the automatic stay under section 362.

15 QUESTION: I see. And what if --

16 MR. CARPENTER: And --

17 QUESTION: -- But after -- I'm assuming after
18 confirmation of the plan, and they go -- makes payments
19 say -- I think under this it's 5 years, wasn't it, to pay
20 this off, or whatever period.

21 MR. CARPENTER: I don't --

22 QUESTION: But 2 or 3 years later he misses a
23 payment, and then the mortgagee would still have the right
24 to accelerate, wouldn't they, to foreclose.

25 MR. CARPENTER: He would have the right, yes,

1 Justice --

2 QUESTION: Subject to approval of the bankruptcy
3 court.

4 MR. CARPENTER: Yes, Justice Stevens. He would
5 have to file an application for relief from the automatic
6 stay.

7 QUESTION: So there has not been a modification
8 that included a surrender of the right to accelerate.

9 MR. CARPENTER: Not a complete and total
10 surrender for all purposes.

11 QUESTION: Just a postponement of it, if they --

12 MR. CARPENTER: Postponement pending maintenance
13 of the payments under section (b) (5), 1322(b) (5), yes,
14 sir.

15 QUESTION: Mr. Carpenter, I had -- I had
16 understood that the purpose of 1322(b) (2) was to give some
17 special status to home mortgages, to make that an
18 especially attractive investment. But -- but what you
19 propose makes it an especially unattractive investment.
20 It's the only one in which you can make a modification to
21 the plan and not provide for present value, isn't that
22 right?

23 MR. CARPENTER: That is correct, Justice Scalia.

24 QUESTION: Why would Congress want to single out
25 home mortgages for that special disability? I mean it

1 makes it an especially unattractive investment.

2 MR. CARPENTER: I don't know that it makes it
3 unattractive. There is certainly no evidence before the
4 Court, at any of the levels bringing this matter to a head
5 today, that would reflect that position. Section
6 1322(b)(2) is a two-edged sword, and that's exactly what
7 Judge Ginsberg, in the in re Stamper case cited in our
8 authorities, held. That there is -- there is no right to
9 modify either in favor of the creditor or in a manner
10 detrimental to the creditor. It just cannot be modified
11 other than the interplay of section 1322(b)(5).

12 QUESTION: Well, it can be modified, but only in
13 one way, to the advantage -- to the advantage of the -- of
14 the debtor.

15 MR. CARPENTER: I think --

16 QUESTION: By -- by extending the payments and
17 allowing no interest on those payments, whereas every
18 other oversecured creditor, you have to allow interest on
19 the payments.

20 MR. CARPENTER: That is correct, Justice Scalia.
21 The difference here is that I believe Congress has struck
22 a very delicate balance among the various competing
23 interests, as I said. What drives a Chapter 13
24 bankruptcy, that it does not -- does not have sufficient
25 revenues to pay all creditors in full, are the claims of

1 the general unsecured creditors.

2 To the extent that they must bear the burden of
3 paying the interest -- because it is not money that goes
4 back to the debtor under any scenario. It is paid to the
5 general unsecured creditors, and where they can only
6 receive less than 100 percent of their allowed claims,
7 then they pay that interest. Congress has struck this
8 delicate balance among all the competing interests. The
9 amount of debt --

10 QUESTION: But why should Congress -- you're
11 saying Congress may favor the general creditors, but why
12 should Congress single out the home mortgagee for
13 disfavorable treatment as compared to other secured
14 claimants?

15 MR. CARPENTER: Well, Mr. Chief Justice, they
16 were singled out for especially beneficial treatment under
17 section 1322(b)(2) because under a Chapter 13 plan a ny
18 claim of any sort, other than a home mortgage, may be
19 modified, and that is usually to the -- to the detriment
20 of the creditor. And so they are protected to the extent
21 that their underlying claim cannot be modified other than
22 the -- the --

23 QUESTION: Well, other than the ways you say it
24 can be.

25 MR. CARPENTER: The deacceleration and the --

1 and the holding off of foreclosure, yes, sir.

2 Again, I would -- I would remind the Court that
3 it is within the strict power of mortgagees generally, and
4 the respondent here specifically, to modify their
5 underlying documents. There is no question that -- the
6 well reasoned circuit opinions and Judge Ginsberg opinion
7 specifically state that where the contract would provide
8 for interest on an arrearage, that that must be honored
9 under a cure of -- under section 1322(b)(5), because of
10 its interplay with (b)(2).

11 But where a creditor, for whatever reason,
12 elects not to, you know, place that particular provision
13 in his contract, he is stuck with his bargain. What is
14 happening today is the respondent is asking for this Court
15 to expand his contractual rights, and that is what
16 Congress has closed the door on. Congress has said you
17 may not expand the rights of the home mortgage. You may
18 not contract them, but you may not expand them.

19 QUESTION: Mr. Carpenter, your adversary says
20 that they would get this interest as a matter of State
21 law, so it wouldn't be expansion.

22 MR. CARPENTER: That is -- that statement was
23 made, Mr. Justice Stevens, but in actuality the -- the
24 interest that was provided -- that was mentioned, the
25 Treasury rate plus 4 points, is the State judgment rate,

1 not a default rate. It is -- there is no judgment rate,
2 or there's no interest rate that would be provided prior
3 to a State court judgment. Only upon completion of a
4 foreclosure proceeding, pending the sheriff's sale at a
5 foreclosure, would there be any postjudgment T-bill plus
6 or Treasury rate plus 4.

7 QUESTION: No, but if they did foreclose and you
8 got a judgment, then they would get this interest,
9 wouldn't they?

10 MR. CARPENTER: Yes, for the brief period of
11 time until such time as the sheriff was able to appraise,
12 sell --

13 QUESTION: Right.

14 MR. CARPENTER: -- The property and the court
15 confirmed it, under Oklahoma procedure. That's a fairly
16 brief period of time.

17 QUESTION: Well maybe so, but at least
18 conceptually it does compensate them for the delay.

19 MR. CARPENTER: Under that scenario, yes. That
20 is, however, fairly late in the foreclosure procedures.

21 We are asking that this Court specifically
22 overturn, reverse the Tenth Circuit. Their reliance upon
23 section 506(b) is not applicable. They even misread this
24 Court's opinion in Ron Pair in requiring interest on
25 costs, fees, and other charges, and specifically the --

1 QUESTION: Do you agree -- let me just be sure I
2 understand. You argue, of course, that 1325(a)(5)(a)(2)
3 is not applicable.

4 MR. CARPENTER: It is not applicable because,
5 Your Honor --

6 QUESTION: Now, do you agree, though, that if it
7 were applicable, it would compel a payment of interest on
8 the arrearage?

9 MR. CARPENTER: No, sir, I do not believe that
10 it would be applicable even --

11 QUESTION: Well, I know -- don't say it's not
12 applicable. That's not my question.

13 MR. CARPENTER: Yes, sir.

14 QUESTION: If it were applicable, would you
15 agree that interest was due?

16 MR. CARPENTER: No, Mr. Justice Stevens, I would
17 not, for the simple reason that section 1322(b)(2)
18 prohibits that modification and a maintenance of payments
19 under 1322(b)(5) maintains the existing payment structure
20 that existed prefiling, repetition, and does not extend
21 to -- and does not even invoke section 1325.

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
23 Carpenter.

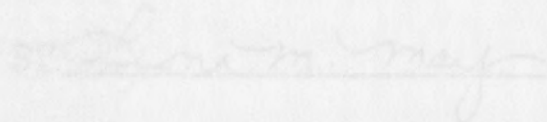
24 MR. CARPENTER: Thank you, Mr. Chief Justice.

25 CHIEF JUSTICE REHNQUIST: The case is submitted.

1 (Whereupon, at 1:07 p.m., the case in the
2 above-entitled matter was submitted.)
3

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7 The United States in the Matter of No. 02-821
8 Donald Neal Hake, et al., Petitioners v. William J. Wade,
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Donald Neal Rake, et al., Petitioners v. William J. Wade,

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BY *Lona M. May* -----

(REPORTER)