

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

**THE SUPREME COURT  
OF THE  
UNITED STATES**

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SUPREME COURT, U.S.  
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CAPTION: THINGS REMEMBERED, INC. v. ANTHONY A.  
PETRARCA

CASE NO: No. 94-1530

PLACE: Washington, D.C.

DATE: Monday, October 2, 1995

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**CORRECTED VERSION**

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   THINGS REMEMBERED, INC.,                   :

4                   Petitioner                   :

5                   v.   :   No. 94-1530

6   ANTHONY A. PETRARCA                         :

7   - - - - -X

8   Washington, D.C.

9   Monday, October 2, 1995

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

13   APPEARANCES:

14   STEVEN D. CUNDRA, ESQ., Washington, D.C.; on behalf of  
15                   the Petitioner.

16   JOHN C. WEISENSELL, ESQ., Akron, Ohio; on behalf of the  
17                   Respondent.

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	STEVEN D. CUNDRA, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	JOHN C. WEISENSELL, ESQ.	
7	On behalf of the Respondent	25
8	REBUTTAL ARGUMENT OF	
9	STEVEN D. CUNDRA, ESQ.	
10	On behalf of the Petitioner	46
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (11:06 a.m.)

3 JUSTICE STEVENS: Mr. Cundra, are you ready?

4 We'll now hear argument in Number 94-1530,  
5 Things Remembered v. Petrarca.

6 Mr. Cundra.

7 ORAL ARGUMENT OF STEVEN D. CUNDRA

8 ON BEHALF OF THE PETITIONER

9 MR. CUNDRA: Justice Stevens, and may it please  
10 the Court:

11 The case before the Court today concerns whether  
12 an order of a district court remanding a case on  
13 jurisdictional or other than equitable grounds, a case  
14 which had been removed pursuant to Federal Bankruptcy  
15 Court jurisdiction, may be reviewed for error in the  
16 circuit court.

17 It is petitioner's contention that the  
18 bankruptcy removal statute, 1452 of title 28, which  
19 prohibits review in the circuit court of equitable remands  
20 does not apply to the remand in this case, as it was on  
21 jurisdictional or other than equitable grounds, and that  
22 the general removal statute, 1447, has no application in  
23 the bankruptcy removal context.

24 Since neither bar to review is applicable to the  
25 remand in this case, which was premised on a demonstrably



1 erroneous holding that the removal was simply untimely,  
2 petitioner Things Remembered should be permitted to appeal  
3 this remand and to seek the correction of that holding.

4 QUESTION: May I ask a preliminary question?  
5 The briefs mainly argue about whether either statute  
6 prohibits review. Would you explain to me what statute  
7 grants you the right to review, and in what language?

8 MR. CUNDRA: The statute that would grant the  
9 right of review would be 158(d), I believe, of title 28,  
10 which grants review from final orders or decisions of the  
11 district court sitting as an appellate court over  
12 bankruptcy matters.

13 QUESTION: And is this a final order?

14 MR. CUNDRA: I think it is a final order in the  
15 context of this Court's holding in the Cohen case, that it  
16 is a -- under the collateral order doctrine, it finally  
17 determines a disputed issue between the parties, it's an  
18 important issue that doesn't go to the merits of the  
19 controversy, and would be unreviewable on appeal.

20 QUESTION: But your theory is it's a collateral  
21 order under Cohen? That's --

22 MR. CUNDRA: Yes, Justice.

23 QUESTION: And you have -- you're relying on the  
24 Third Circuit Pacor case for that preliminary -- for how  
25 you characterize this as a Cohen v. Beneficial --

1 MR. CUNDRA: Yes, Justice. I believe there are  
2 other cases which address that issue as well.

3 QUESTION: Can you explain to me what sense it  
4 would make to say that, in general, removal is not  
5 reviewable at all, then we know Congress wanted to take  
6 into account a different -- to make the remand larger  
7 rather than smaller, and then to say -- and for that  
8 larger, no review but for what was always understood never  
9 to be reviewable, suddenly in the bankruptcy context it's  
10 reviewable? What possible sense does that reading make?

11 MR. CUNDRA: One has to consider the context.  
12 The context is the Bankruptcy Reform Act of 1978. Prior  
13 to 1978, this country's bankruptcy jurisdiction was  
14 extremely limited. The only jurisdiction of the  
15 bankruptcy court was that referees in bankruptcy who had  
16 the jurisdiction, which was called summary jurisdiction,  
17 which was only property in the actual or constructive  
18 possession of the court.

19 There was also plenary jurisdiction, but it was  
20 only by consent.

21 In 1978, Congress determined that the Bankruptcy  
22 Act was not being effectively administered -- Chapter 11  
23 cases, what are now Chapter 11 cases were not being  
24 effectively administered, and it passed a brand new  
25 statute with a very broad jurisdiction over all cases

1 arising in, arising under, or related to a bankruptcy  
2 case.

3 And Congress determined that in order to be  
4 effective it had to grab all litigation in whatever court,  
5 Federal, State, or tribal, and bring it into one central  
6 forum so that the bankruptcy court could adjudicate the  
7 estate of the debtor and adjudicate in a fair manner  
8 consistent with the interests of all creditors, not just  
9 the two private litigants, and it created the central  
10 forum.

11 It created a new court which ultimately the  
12 delegation of power was so great to an Article I court  
13 this Court struck down that statute, or had it amended in  
14 the Northern Pipeline and Marathon decision.

15 But that's what justified the broad jurisdiction  
16 to get all matters before one court. It justified the  
17 removal statute, which is unlike any other removal  
18 statute, reaching into any court, even a Federal court, to  
19 bring a case before the bankruptcy court.

20 But recognizing there may be inequities in that  
21 even though it was to prevent delay of bankruptcy cases,  
22 it provided a broad remand power to the bankruptcy judge  
23 which would not be reviewable, and that remand power that  
24 was not reviewable was not only for decisions to remand  
25 but also for decisions not to remand, a bar to appellate

1 review in that context that does not appear in the general  
2 removal context, 1447. A decision not to remand is  
3 reviewable under 1447. A decision not to remand under  
4 1452 is not reviewable, because it's a discretionary  
5 decision.

6 QUESTION: May I interrupt you just there?

7 In -- forgetting bankruptcy for a moment, a  
8 decision not to remand is reviewable in the ordinary case,  
9 you think?

10 MR. CUNDRA: Under 1447 a decision not to  
11 remand --

12 QUESTION: It's not prohibited, but is that a  
13 collateral order, a decision not to remand?

14 MR. CUNDRA: A decision not to remand would not  
15 be a collateral order, it would be reviewable at the end  
16 of the case.

17 QUESTION: Oh, but not immediately reviewable.

18 MR. CUNDRA: Not immediately reviewable.

19 QUESTION: Oh, okay.

20 MR. CUNDRA: Subject matter jurisdiction, for  
21 instance.

22 That's one of the issues here. Respondent would  
23 have this Court read jurisdiction into 1452(b), bar of  
24 appellate review, and if you did that, or reinterpret  
25 equitable to mean jurisdictional, that means that a

1 district court's decision not to remand, a district  
2 court's decision to assume jurisdiction where it has no  
3 jurisdiction, would not be reviewable.

4 QUESTION: Under your theory, if an action  
5 within 1452 is removed but the removal is untimely, its  
6 motion is made too late under 1446, what authority does  
7 the Court have to remand the case back to the State court?

8 MR. CUNDRA: In a case of a removal under  
9 1452 --

10 QUESTION: That's untimely.

11 MR. CUNDRA: That would be governed by  
12 Bankruptcy Rule 9027 --

13 QUESTION: Well, what about --

14 MR. CUNDRA: Which sets forth the time limits --  
15 I'm sorry.

16 QUESTION: Yes.

17 MR. CUNDRA: And the time limits that are set  
18 forth in 9027 can be enlarged by the bankruptcy court  
19 under Bankruptcy Rule 9006, and it's to treat any remand  
20 motion as a contested proceeding under 9014. It can  
21 determine what the nature of the relationship is to that  
22 estate, how important it is to have that case in order to  
23 efficiently adjudicate that debtor's estate to determine  
24 whether that entity is going to be reorganized, or it's  
25 going to be liquidated, whether a major business



1 enterprise will be liquidated or reorganized.

2 QUESTION: Perhaps you've answered my question  
3 in such detail that I couldn't quite follow it, but my  
4 question is, what is the authority of the court to remand  
5 a case that is untimely removed, under your theory?

6 MR. CUNDRA: In the bankruptcy --

7 QUESTION: Because if you say 1447, then we say  
8 that your argument fails, so I have to know what your  
9 theory is.

10 MR. CUNDRA: In the bankruptcy context, if it  
11 has not been properly removed under 1452(a) from a Federal  
12 or State court, then it -- the court would not have  
13 jurisdiction and would have to return it or dismiss it.

14 The procedure in the bankruptcy context of how  
15 you accomplish that is provided by 9027(d), which is a  
16 motion to remand, to return the case to the jurisdiction  
17 from which it came in the first place if there was no  
18 authority to remove it in the first place.

19 QUESTION: But under your view, you cannot refer  
20 to 1447 for any case that's removed under 1452, or am I  
21 misstating your position?

22 MR. CUNDRA: One should not, because they were  
23 separate statutory schemes which are both comprehensive in  
24 their own domain, and exclusive within their own domain.  
25 They cannot be treated together.

1 QUESTION: So much so that there is no express  
2 provision for remand of untimely removed cases under 1452.

3 MR. CUNDRA: In the statute, it doesn't use the  
4 word remand. The bankruptcy rule that's applicable to  
5 1452, proved by this Court, does, and it provides in  
6 9027(d) that would be by a remand motion under 9014 of the  
7 bankruptcy rules.

8 QUESTION: Well, Mr. Cundra, generally we don't  
9 find any kind of repeal by implication of another statute  
10 because a new one's adopted, and it's unclear to me why  
11 you think that section 1447 does not remain available to a  
12 district court even though there may be a bankruptcy  
13 proceeding.

14 I mean, the district court remanded in this case  
15 because of a procedural defect, and I don't see why 1447  
16 wasn't available to the court to rely upon to get that  
17 defect corrected.

18 MR. CUNDRA: Under the facts of this case, even  
19 if you imported 1447 into 1452 --

20 QUESTION: Don't import it. Just say, it's  
21 still on the books, it's available to the court, and  
22 that's what the court can look to.

23 MR. CUNDRA: If you were to do that in this  
24 case, it would not change the result that there is no  
25 basis to bar review of this remand order, because 1447

1 requires the -- to be nonreviewable, the remand order --  
2 mot -- order, rather, has to comply with 1447(c), and when  
3 it comes to procedural defects, you have to make a motion  
4 to remand within 30 days, or you waive any objection to an  
5 assumption of jurisdiction. In this case --

6 QUESTION: Well, isn't it also your point that  
7 that statute justifies remands to State court, whereas the  
8 bankruptcy statute applies to remands to both State and  
9 Federal courts.

10 MR. CUNDRA: State, Federal, and tribal --

11 QUESTION: Right --

12 QUESTION: Yes, but this was a remand to a State  
13 court.

14 MR. CUNDRA: Yes, it was.

15 QUESTION: So we don't have some of these other  
16 potential problems here. This was a remand to a State  
17 court.

18 MR. CUNDRA: It was, but 1447, even if it  
19 applied, would not provide a basis for barring appellate  
20 review, because the case here that was removed to the  
21 bankruptcy court was removed on September 25. The remand  
22 motion wasn't filed until November 25.

23 That's 60 days later, and the only bar to  
24 appellate review that's authorized under 1447(d) and this  
25 Court's holding in Thermtron is a remand motion made in

1 compliance with 1447(c).

2 A motion on procedural defects 60 days after  
3 removal is not in compliance. Therefore, there would not  
4 be a bar --

5 QUESTION: But I --

6 MR. CUNDRA: -- under the facts of this case.

7 QUESTION: All right. I don't know about the  
8 facts of this case. That is to say, I thought we took  
9 this case in order to review the relationship of the  
10 statutes, not whether some time thing was complied with or  
11 not, but I guess we'd have to remand it on that point. I  
12 haven't thought through that point.

13 But in terms of the statutes, doesn't it make  
14 what Justice O'Connor just said, perfect sense? I mean,  
15 you have two statutes. 1447 deals with jurisdictional  
16 defects and with defects in the removal procedure, and it  
17 says there, we're not going to review those.

18 Then in the bankruptcy area, quite often there  
19 are other bases for remanding. The other bases are, you  
20 say to the judge, do what you think is right. So they do  
21 it on equitable grounds, and that's covered by 52, and 52  
22 says you can't review the ones under us, and 47 says you  
23 can't review the technical things under us, and it all  
24 seems to make sense.

25 Now, I'm putting that to you so you can explain

1     why it doesn't make sense.

2                 MR. CUNDRA: I believe it doesn't make sense for  
3     the following reasons.

4                 First, you have to relate it to what the basis  
5     of the enactment is, which is this broad expansion of  
6     jurisdiction in the bankruptcy courts with the  
7     corresponding remand, and with jurisdiction not being  
8     defined, not delineated by Congress -- very broad, related  
9     to the case, but not delineated, left to the courts to  
10    flesh out that jurisdiction.

11                Now, that jurisdiction, because bankruptcy  
12    courts before only had summary jurisdiction, had no in  
13    personam jurisdiction, now that jurisdiction of related-  
14    to means all of this litigation we are going to be  
15    removing from State or Federal courts that were never  
16    removable under bankruptcy before, never.

17                And how should we delineate that related-to  
18    jurisdiction? Congress didn't delineate it. It left it  
19    to the courts to delineate it, and since it's only being  
20    delineated or defined by the courts in removal cases, we  
21    needed to have the court of appeals review that and  
22    establish a Nationwide understanding of what this new  
23    jurisdiction is that never existed in our history before.

24                QUESTION: But may I interrupt? Is it not true  
25    that in view of the larger docket in the bankruptcy courts



1 they also gave additional grounds for removal on any  
2 equitable ground, which presumably might have been  
3 intended to pick up the problem in the Thermtron case that  
4 if the docket is heavy in that court, they think the case  
5 might be disposed of more promptly in the court it was  
6 originally filed, therefore they have power to remove. To  
7 remand, I mean.

8 When you expand the remand power there, doesn't  
9 it seem somewhat inconsistent to say they would -- and  
10 they said no review of those, so wouldn't it be more  
11 consistent with the overall approach you describe to give  
12 the bankruptcy courts greater control over their docket by  
13 letting them have final authority on whether or not to  
14 remand?

15 MR. CUNDRA: Yes. The context, though, is an  
16 expansion in jurisdiction, not an expansion in removal.

17 QUESTION: Accompanied by an expansion of the  
18 power to remand.

19 MR. CUNDRA: Correct.

20 QUESTION: On grounds that would not be  
21 available in a nonbankruptcy context.

22 MR. CUNDRA: The new jurisdiction was so  
23 broad --

24 QUESTION: Right.

25 MR. CUNDRA: And that you could remove cases

1 from any court to the bankruptcy court, a power never  
2 before possessed.

3 QUESTION: Well, would you not agree that if  
4 they did remand -- say this is -- a bankruptcy court had a  
5 case, a carbon copy of Thermtron, and they decided to  
6 remand it, which they could because of their crowded  
7 docket. That remand would not be reviewable.

8 MR. CUNDRA: In the bankruptcy context, that's  
9 correct.

10 QUESTION: Right.

11 MR. CUNDRA: The two schemes operate separately  
12 and independently of each other.

13 QUESTION: Suppose the judge in this case said,  
14 I'm not 100 percent sure about strict time limit, but I  
15 think you should have come here sooner, so for equitable  
16 reasons I'm remanding this because I think you dawdled --  
17 an equitable notion like laches, no fixed -- that would  
18 not be reviewable, right?

19 MR. CUNDRA: That is correct.

20 QUESTION: So it's the judge's label, what he  
21 wants to put on it. He can make it immune from review if  
22 he says, laches.

23 MR. CUNDRA: Yes.

24 QUESTION: But it's reviewable if he says, time  
25 bar under the statute.

1 MR. CUNDRA: Yes. In this case, the bankruptcy  
2 court in New York never got to hear this case and make  
3 those decisions. The only bankruptcy court that had an  
4 opportunity to review this case was the Ohio Bankruptcy  
5 Court, and it found it had jurisdiction, it ordered it  
6 transferred to New York, and it said to the home  
7 bankruptcy court, so those considerations could be  
8 evaluated in the context of the debtor's case.

9 And it did not rule on the motion to remand. It  
10 did not rule on extension. It made no rulings in this  
11 case. It deferred those to the home bankruptcy court who  
12 had jurisdiction over the case, but it did find that there  
13 was subject matter jurisdiction because the claims were  
14 specifically and exclusively addressed in the Bankruptcy  
15 Code.

16 The New York Bankruptcy Court in this case  
17 entered an order retaining jurisdiction of this case when  
18 it arrived, which order is still in effect. It found  
19 jurisdiction connection with its bankruptcy, but it never  
20 got there because of the erroneous holding that a claim  
21 removed in 30 days from the time it's asserted is untimely  
22 because the lawsuit in which the new claim had been filed  
23 had been pending for some period of time.

24 And that's one of the great distinctions between  
25 the bankruptcy removal, which is a claim removal statute,

1 a cause of action removal statute. It does not remove the  
2 case. It's the only removal statute that is only claim-  
3 specific. The general removal statute is case-general.  
4 You remove the civil action.

5 Bankruptcy removal jurisdiction is only a claim  
6 removal. You could have a 20-count complaint and remove  
7 only one count, the count that related to the bankruptcy,  
8 and that's --

9 QUESTION: Well, even if that's so, I would  
10 think that your normal interpretation of statutes would  
11 lead you to conclude that the court should retain the  
12 power that it has under 1447 to remand cases or to remove  
13 them.

14 I mean, I just don't see why under your theory  
15 we should be so restrictive of the power of these  
16 bankruptcy courts.

17 MR. CUNDRA: The power of the bankruptcy courts  
18 is much greater. If they have a question about  
19 jurisdiction, all they have to do is remand for an  
20 equitable ground. If they feel they have clear  
21 jurisdiction, but --

22 QUESTION: There may be other grounds, such as  
23 the one in this case, that isn't equitable, and why  
24 shouldn't they have the power to send it back?

25 MR. CUNDRA: The court -- bankruptcy court can

1 simply by determining it's not going to -- if it were  
2 late, beyond the 90 days of 905 -- of the bankruptcy  
3 removal versus the general removal, it can either expand  
4 that time or not in its discretion, that's true, and that  
5 power does not exist in the general removal statute.

6 Also under bankruptcy removal, the respondent  
7 here can wait a year before he makes his motion to remand,  
8 and the court can still decide it. But under the general  
9 removal statute, that has to be made in 30 days or is  
10 waived, and the judge has no power to raise it sua sponte,  
11 a procedural defect.

12 It's statutory, 1446(c), and if one were to  
13 apply that in this case, then that bar of review for  
14 procedural defects does not apply to this case because the  
15 motion in the bankruptcy court was filed 60 days later.

16 QUESTION: Well, but whether or not it was  
17 timely is a question dealt with by the courts below, and  
18 we don't have to address that. I mean, that's something  
19 that on review at the end of the case can be addressed,  
20 but under 1447, there's no immediate appeal.

21 MR. CUNDRA: There is a -- under 1447 an  
22 immediate appeal if the motion was filed more than 30 days  
23 after removal, and then the court remands. There is no  
24 bar to a review of that decision. It's only a motion made  
25 within 30 days on those grounds that would not be subject



1 to appellate review.

2 QUESTION: I'm confused by your answer. I  
3 thought under the general removal remand scheme a remand  
4 order is not reviewable, period. Are you telling me that  
5 there is something in the 1441 to 1447 regime?

6 MR. CUNDRA: Yes.

7 QUESTION: What?

8 MR. CUNDRA: 1446(c), which describes the two  
9 remand motions that are the subject of 1447(d), which this  
10 Court held in Thermtron must be read in pari materia, that  
11 it's a narrow bar to appellate review, and it's limited by  
12 what's in 1446(c), and what's in 1446(c) as to procedural  
13 defects is a motion made in 30 days on that grounds --

14 QUESTION: It doesn't say -- I'm sorry. It  
15 doesn't say on that ground.

16 I mean, I take it what their answer to this  
17 point is going to be is you in fact did -- I can't  
18 remember which -- I get mixed up here, but whoever wanted  
19 it remand, made a motion to remand, all right, and they  
20 made it under 52, and the lower court, the district court  
21 says, I don't think I can do it under 52, but I can do it  
22 under 47, so he remands it under 47, and certainly he has  
23 the authority to go on some other statute, even if the  
24 motion that was before him mentioned the wrong statute,  
25 and I would think that is what they're going to say cures

1 the problem of the 30 days, if I have it right. You can  
2 tell me I don't.

3 MR. CUNDRA: Perhaps respondent better address  
4 that in his argument.

5 But one of the problems that that creates --

6 QUESTION: I mean, that would strike me as a big  
7 problem with this 30-day argument.

8 MR. CUNDRA: The court evaluated it under both  
9 removal schemes.

10 QUESTION: And they remanded it. The lower  
11 court remanded it under 47.

12 MR. CUNDRA: The district court remanded --

13 QUESTION: The district court remanded it under  
14 47, and what you want to do is appeal that remand under  
15 47, and now you want to say that's not in the case.

16 MR. CUNDRA: I think the court remanded it under  
17 both removals. There was a dual removal here to two  
18 different courts.

19 QUESTION: And your -- let me make sure I  
20 understand your argument about the 30-day thing. If I  
21 understand it correctly, it is that you cannot use the  
22 second sentence of 1447(c) in a case where you can't use  
23 the first sentence, that 1447(c) comes all of a piece, and  
24 you can't use the remand authority of 1447(c) in a case  
25 where the 30-day time limit is not applicable.

1 MR. CUNDRA: Correct. I believe that's --

2 QUESTION: There's nothing in the text that  
3 really says that. I mean, if the second sentence had  
4 begun, if at any time before final judgment in a case  
5 properly brought within said 30-day period, comma, then  
6 you'd have a good point, but it really doesn't mention the  
7 30 days in the second sentence.

8 I mean, what your opponent's going to say is,  
9 we're not relying on the first sentence of (c). We're  
10 just relying on the second sentence.

11 MR. CUNDRA: The second sentence is subject  
12 matter jurisdiction. There is no finding of a lack of  
13 subject matter jurisdiction here. The lack of  
14 jurisdiction in the words of the district court was the  
15 untimely -- in the court's view, an untimely removal, even  
16 though it was within 30 days of when the claims were  
17 asserted in the action.

18 QUESTION: And sometimes this Court has said,  
19 and a rigid time bar is mandatory and jurisdictional, so  
20 do you think that those expression are wrong when they  
21 type a rigid time bar, no give, no good cause for  
22 extension, as mandatory and jurisdictional?

23 MR. CUNDRA: Under the general removal, yes.  
24 Under the general removal, the jurisprudence that's  
25 developed is that any defect of that nature is waived

1 unless a motion is filed within 30 days, and that a court  
2 cannot sua sponte dismiss it on the basis of a failure to  
3 meet the time. It's mandatory, but not jurisdictional, is  
4 the jurisprudence that has developed.

5 With respect to how you interpret (c), or (d),  
6 rather, to limit it to the precise matters that are in  
7 (c), Justice Scalia, is the holding in Thermtron that the  
8 two can't be read in pari materia, and that the only  
9 remands which can evade appellate review are ones that are  
10 precisely within the four corners of 1446(c).

11 QUESTION: Under -- what I have from their brief  
12 is, it says the bankruptcy court held that TRI had timely  
13 removed the case under the general removal statute, namely  
14 47. Now, is that accurate, and if not, why not?

15 MR. CUNDRA: The bankruptcy court found the  
16 removal was timely.

17 QUESTION: And you did not, it says, appeal any  
18 aspect of that ruling, is that accurate?

19 MR. CUNDRA: The only order that the bankruptcy  
20 court entered was an order transferring venue to have the  
21 remand decision handled by another court.

22 The remand decision was not determined in the  
23 bankruptcy court. It was reserved for the home bankruptcy  
24 court to make the decision.

25 QUESTION: In this case, was it clear that a

1 claim was removed but not the entire case?

2 MR. CUNDRA: Yes. With respect to the amended  
3 complaint, the new claims to \$12 million that were  
4 asserted arising out of the conduct of Child World in the  
5 bankruptcy case leaves rejection damages under 502 of the  
6 code.

7 QUESTION: So your position is that if a claim  
8 is removed, then 1447 can't apply, because 1447 talks  
9 about cases.

10 MR. CUNDRA: Civil action, removal of the civil  
11 action. You can't remove a claim under 1441 to 1447. You  
12 either remove the whole action or you don't.

13 QUESTION: Well, what if you removed all the  
14 claims in the case? Haven't you removed the case?

15 MR. CUNDRA: Then you would -- yes.

16 QUESTION: Have all the claims in this case been  
17 removed?

18 MR. CUNDRA: Yes.

19 QUESTION: I thought your answer would be no.  
20 That was my question. You --

21 MR. CUNDRA: There was a dual removal. One was  
22 of the civil action under 1441, which went to the  
23 district --

24 QUESTION: A dual removal. A dual --

25 MR. CUNDRA: -- court, and then a separate



1 removal that was done under the bankruptcy, which went to  
2 the bankruptcy court in Akron. They were consolidated  
3 later, but at the time relevant here in terms of the  
4 timeliness, they were in separate courts under different  
5 removal schemes.

6 QUESTION: Is it not true that under the general  
7 removal scheme you can end up with a claim rather than a  
8 case?

9 That is, under 1441(c), while the case is  
10 initially removed, the court can return claims within that  
11 case and keep only the separate and independent claim.

12 MR. CUNDRA: If there is no basis of Federal or  
13 diversity jurisdiction on those other claims, correct.  
14 1441 --

15 QUESTION: But the court would have the option  
16 to keep the entire case. It doesn't have to. It can peel  
17 off the pieces that would not be independently reviewable,  
18 and you end up under 1441(c) with essentially a claim, not  
19 a case, removed.

20 MR. CUNDRA: Only, I believe, Justice Ginsburg,  
21 if those other claims are separate and independent, and  
22 not in any way related or pendent to the claim upon which  
23 you're removing Federal jurisdiction, and I think that's  
24 in 1441, and it provides for remand of the separate and  
25 independent claims for which there is no --

1 QUESTION: It provides for a retention of the  
2 separate and independent claim --

3 MR. CUNDRA: Or to remand --

4 QUESTION: -- and the return of the others.

5 MR. CUNDRA: Right, which are remanded.

6 If I have any more time, I'd like to reserve it  
7 for rebuttal.

8 QUESTION: Thank you.

9 MR. CUNDRA: Thank you.

10 QUESTION: Mr. Weisensell, you may proceed.

11 ORAL ARGUMENT OF JOHN C. WEISENSELL

12 ON BEHALF OF THE RESPONDENT

13 MR. WEISENSELL: Justice Stevens, and may it  
14 please the Court:

15 This Court should affirm, consistent with prior  
16 decisions of this Court, particularly in Rice and  
17 Thermtron, that the Sixth Circuit holding -- that this  
18 Court should affirm the Sixth Circuit holding that the  
19 Sixth Circuit has no jurisdiction under 1447(d) and also  
20 under 1452(b) to review the district court order.

21 Initially, I'd like to address some of the  
22 comments that Mr. Cundra made and some of the questions  
23 that were posed by some of the justices.

24 Justice Ginsburg accurately pointed out in  
25 asking Mr. Cundra questions that 1447 does preclude the

1 relief sought here. There's nothing anywhere in any of  
2 the legislative history, and I believe that Justice  
3 O'Connor touched on this also, to indicate that when 1452  
4 was enacted, that there was any intention on Congress'  
5 part to change the provisions in 1447 that provide for  
6 remand of cases on a jurisdictional basis or bases in a  
7 defect in the removal procedure.

8 There's nothing to indicate anywhere an  
9 intention to change that, and this Court has held on a  
10 number of occasions that it will not repeal legislation  
11 simply by implication, whereas the petitioner argues here  
12 that since 1452 does not talk about a remand on a  
13 jurisdictional basis, that certainly that's not intended  
14 by 1452.

15 Justice Kennedy also --

16 QUESTION: What would you do with 1447 if a  
17 whole case isn't removed, but just a particular claim?  
18 Would you then say 1447 doesn't apply?

19 MR. WEISENSELL: I believe 1447 does apply in  
20 that case, Your Honor, depending upon the basis of the  
21 remand order. If it's a jurisdictional remand or a remand  
22 based upon a defect in the removal procedure itself, I  
23 think 1447 applies and that case ought to be remanded and  
24 there is no review of that order.

25 QUESTION: So your position is that the two

1 statutes cover the entire universe of possible remand  
2 orders.

3 MR. WEISENSELL: I think -- Justice Kennedy, I  
4 believe that 1447 covers all jurisdictional remands and  
5 all remands on a defect in the procedure of the removal.  
6 I think that 1452(b) --

7 QUESTION: To State court.

8 MR. WEISENSELL: Correct, Your Honor, and  
9 that's --

10 QUESTION: Which is a major limitation.

11 MR. WEISENSELL: And that's -- but that is what  
12 we have in this case. This is a State court --

13 QUESTION: I understand that, but in response to  
14 Justice Kennedy you have to acknowledge that there's a big  
15 hole. 1447 only covers remand to State courts.

16 MR. WEISENSELL: I believe that's correct, Your  
17 Honor.

18 QUESTION: So the whole of the universe is not  
19 covered.

20 QUESTION: Of -- and it talks only about cases.

21 MR. WEISENSELL: 1447 does talk about removal of  
22 cases.

23 QUESTION: You use the term civil action in  
24 1446 --

25 MR. WEISENSELL: Civil action.

1 QUESTION: -- so it is entire cases, yes.

2 MR. WEISENSELL: And any case removed from a  
3 State court, the district court may issue all necessary  
4 orders, et cetera.

5 Getting back to the question, Justice Kennedy,  
6 1452 I believe only provides for an additional basis for  
7 remand in bankruptcy cases. There's -- again, I'll get  
8 back to the point I made earlier. There's no indication,  
9 no intention that that was going to change the 1447  
10 remands and the fact that those types of orders are not  
11 reviewable, and in this case, this case was not removed --  
12 excuse me, was not remanded on a basis that is provided  
13 for under 1452.

14 The petitioner wants this Court to take a strict  
15 constructionist view of that statute, and -- but they skip  
16 the first sentence of the statute. They want the Court to  
17 jump right to the second sentence of 1452(b), which  
18 provides that in order entered under this subsection  
19 remanding a claim or cause of action or a decision to not  
20 remand is not reviewable by appeal or otherwise.

21 Well, in order to get to that point, you need to  
22 look back to what are they talking about under this  
23 section, the court to which such claim or cause of action  
24 is removed may remand such claim or cause of action on any  
25 equitable ground. That provides for an additional basis



1 for remand in bankruptcy cases, and this case was clearly  
2 not remanded on an equitable ground, so you don't get to  
3 the second sentence of that section.

4 QUESTION: What do you do with a remand that is  
5 not on an equitable ground as you interpret what equitable  
6 ground means -- it's on a jurisdictional ground -- but the  
7 remand is not to a State court?

8 MR. WEISENSELL: I think --

9 QUESTION: What is that governed by?

10 MR. WEISENSELL: I think under that situation,  
11 Your Honor, you need to look to the legislative history  
12 that has developed since 1887 where this -- and then  
13 interpretations of this Court of remand orders generally  
14 that provide that those types of orders are not reviewable  
15 for the reasons of judicial economy and the fact that  
16 parties should not be litigating over where to litigate.  
17 That's the point that's --

18 QUESTION: You say it's not covered by this  
19 statute, however.

20 MR. WEISENSELL: I don't believe that it is,  
21 Your Honor.

22 QUESTION: So then it's Thermtron, is that  
23 right?

24 MR. WEISENSELL: I believe so, whether or not --  
25

1 QUESTION: So anything that's not -- I mean, in  
2 a nonbankruptcy case, outside the jurisdictional and  
3 defect in removal proceeding area, Thermtron, and so the  
4 answer would be the same.

5 MR. WEISENSELL: Well, 1447 provides for remands  
6 on jurisdictional bases. If it's on a jurisdictional  
7 bases, I believe that you are within the statute, so you  
8 don't get to that --

9 QUESTION: Oh, but just a State court, so that  
10 brings us back. Suppose it's to some other State agency  
11 or some other court.

12 MR. WEISENSELL: I think that that may be  
13 correct, Your Honor, but again in this case this is a  
14 removal from a State court, and also a remand to a State  
15 court, and I believe you do tie back into 1447 on that  
16 basis in this particular case.

17 QUESTION: How frequent are removals from -- of  
18 the Federal district court, that's even strange language,  
19 because every other place where there is transportation  
20 within the Federal system it's called transfer and not  
21 removal.

22 MR. WEISENSELL: That's correct, Your Honor, and  
23 although the petitioner does point out an example in their  
24 brief, frankly, in my 10 years of practice I have never  
25 seen a case that has been removed from another Federal

1 court to a bankruptcy court.

2 QUESTION: You will acknowledge that this is not  
3 a tightly drawn statutory scheme.

4 MR. WEISENSELL: I -- particularly the 1452  
5 sections, subsection (a) and subsection (b) of 1452, and I  
6 think the reason for that again, Your Honor, is that  
7 Congress had the whole legislative history of 1447 and  
8 what led up to that and the act of 1887 and 100 years of  
9 the statute and the history behind that and the  
10 interpretations of this Court before it when it enacted  
11 the Bankruptcy Reform Act of 1978, which put in place I  
12 believe it was 1478 at that time, which became 1452, and I  
13 believe that's the reason why there is no further  
14 delineation.

15 The Congress could certainly have said in 1452  
16 that it expressly intended that these particular orders  
17 would be the only kinds of orders that there would not be  
18 a review of, and it didn't say that, and that gets back to  
19 my point earlier that this Court has held on occasions  
20 that it will not repeal legislation by implication. Where  
21 there's a statute that does not specifically repeal a  
22 prior code section, this Court is not going to do that as  
23 well.

24 QUESTION: And you assert that we have inherent  
25 authority to preclude not just immediate review, but to

1 preclude all review of the decision to remand in cases  
2 that fall between these two statutes.

3 That is, where the remand is not to a State  
4 court and therefore not covered by 1447, but on the other  
5 hand, the remand is not for equitable reasons. You say  
6 that in that situation, we have inherent authority simply  
7 to decline review.

8 I mean, I can understand that we might have some  
9 authority to say we won't review it right away. We won't  
10 allow an interlocutory review. But to say, we won't  
11 review it at all --

12 MR. WEISENSELL: Well, I believe the code  
13 sections say, Your Honor, that in order -- remanding or  
14 deciding not to remand is not reviewable by the court of  
15 appeals or by the United States Supreme Court by appeal or  
16 otherwise.

17 QUESTION: Ever.

18 MR. WEISENSELL: I'd say the answer's yes.

19 QUESTION: Ever.

20 MR. WEISENSELL: Pardon me, Your Honor?

21 QUESTION: Ever. You couldn't do it at the end  
22 of the trial, either. They're just simply not reviewable,  
23 remand decisions.

24 MR. WEISENSELL: Well --

25 QUESTION: Suppose you remand a case to State

1 court, you couldn't at the end of the line come back and  
2 argue to the U.S. Supreme Court, well, there was a  
3 misconstruction of the remand statute so we should not  
4 have had to suffer the State court judgment.

5 MR. WEISENSELL: I believe in the situation that  
6 Your Honor just indicated I think the answer's yes, that  
7 is not reviewable, although as Mr. Cundra indicated, the  
8 question of jurisdiction itself could be reviewed if the  
9 case is retained by the Federal court at the end of --

10 QUESTION: Yes, if it's retained --

11 MR. WEISENSELL: -- that litigation.

12 QUESTION: -- because subject matter  
13 jurisdiction is always reviewable.

14 MR. WEISENSELL: Correct. Correct, but I  
15 believe if the case is remanded our position, and it's  
16 supported by the statutes, is that it is not reviewable.

17 QUESTION: But once you remand it to the State  
18 court, that's it. That question is not going to come up  
19 to a Federal forum.

20 MR. WEISENSELL: Correct, and that's the  
21 intention of the statute, is to get on with the  
22 litigation, and that's the whole point of why we're here.  
23 I think this is an important -- the Bankruptcy Reform Act  
24 was intended to be a fair and credible statute, and to  
25 operate quickly and efficiently, and to have these



1 disputes resolved.

2 Now we're here, 3-1/2 years, going on 4 years  
3 after this simple State court breach of contract action  
4 was filed in Summit County, Ohio. We're here coming up on  
5 4 years on this case, and we haven't litigated anything  
6 other than the question of where this case ought to be  
7 litigated.

8 Now, the petitioner had indicated in its reply  
9 brief that that's because we didn't do anything to  
10 prosecute that case in the interim. That is not -- not  
11 necessarily correct, Your Honor. because we did attempt to  
12 have -- and this ties in with the question that I believe  
13 Justice Kennedy had earlier of whether or not in this case  
14 was there a claim removed, or was the entire case removed,  
15 and I believe Mr. Cundra indicated that the entire case  
16 was removed, which is also why you get back to 1447.

17 But we have attempted to litigate this case. We  
18 filed a motion in the State court to have a status  
19 conference set and get a trial date, and the petitioner's  
20 response there was that the trial court had absolutely no  
21 jurisdiction over that case because the entire case had  
22 been removed and was now pending before the United States  
23 Supreme Court.

24 So we have attempted to litigate those issues,  
25 and we've been estopped from doing that because there is

1 no jurisdiction in the State court because the entire case  
2 has been removed, which answers the question of whether  
3 this was a claim or a case that was removed. The entire  
4 case was removed. It was removed from a State court, and  
5 it was remanded on jurisdictional grounds. I think that  
6 ties you directly back in to 1447, and the order is not  
7 reviewable, on appeal or otherwise, by the Sixth Circuit  
8 or even by this Court.

9 Mr. Cundra indicated that somehow there was a  
10 defect in the remand procedure because the order -- or,  
11 excuse me, the motion to remand was filed sometime in  
12 November of 1992. It's correct, as he indicates, that  
13 there were two separate removals. One was a removal to  
14 the bankruptcy court, and one was another removal to the  
15 district court. Those were ultimately consolidated.

16 There were two separate remand motions filed.  
17 One was filed on October 23 of 1992, and if you look at  
18 the joint appendix at page 2a, it gives you the chronology  
19 of those events. That's well within the 30 days provided  
20 for the time to file the remand motion. Those cases were  
21 then consolidated, and Judge White of the bankruptcy court  
22 addressed that issue and found that the motion had been  
23 timely filed.

24 At any rate, this argument, similar to other  
25 arguments, as we indicate in our brief were not preserved

1 because the petitioner did not complain about the results  
2 that came out of the bankruptcy court. They were  
3 satisfied with the fact that the bankruptcy judge was  
4 going to ship the case off to New York, so when we filed  
5 our appeal, they didn't appeal any of those rulings.

6 And I would analogize this to, let's say, a  
7 personal injury case where a plaintiff files a personal  
8 injury action and gets a plaintiffs' verdict, but for an  
9 amount that maybe that person is not necessarily satisfied  
10 with, or the defendant files a notice of appeal on the  
11 liability issue.

12 The plaintiff cannot sit back and go through  
13 that whole procedure at the court of appeals and then come  
14 to this Court or to the court of appeals and argue at oral  
15 argument that they want to have the case -- have an  
16 additional amount of judgment, that they're appealing the  
17 amount of the verdict that was rendered in their favor.

18 In this case, they've waived their right to  
19 raise a number of these arguments that they're raising  
20 now.

21 There was a question posed as to whether or not  
22 Thermtron in the bankruptcy context reaches the correct  
23 result, that being that in the bankruptcy context, if the  
24 case is -- if, for example, the bankruptcy judge says that  
25 my docket is too crowded and I want to remand this,

1 petitioner's position is that under 1452, that that's the  
2 correct result. Well, that just doesn't make sense. That  
3 flies in the face of the history behind this Court and  
4 this Court's decisions on the basis for remand.

5 The bankruptcy court itself did rule on the  
6 motion to remand. Mr. Cundra indicated that the  
7 bankruptcy court did not do that. The bankruptcy court  
8 found that the removal was not timely. The bankruptcy  
9 court also found, as I believe Justice Kennedy pointed  
10 out, that the general removal was timely, and again, that  
11 ties back into our argument that we're here on the 1447  
12 question, not on the 1452 question.

13 QUESTION: Do I understand your view on 1452 to  
14 be it's essentially supplemental, it applies to the extent  
15 that it applies, and to the extent that there's any hole,  
16 you still have the basic removal remand scheme?

17 MR. WEISENSELL: Yes, Your Honor.

18 QUESTION: That's --

19 MR. WEISENSELL: Yes. 1452 is supplemental. It  
20 provides an additional basis for remand in bankruptcy  
21 cases.

22 QUESTION: Well, it applies both as an  
23 additional basis for removal and -- no, an additional  
24 basis for remand. That's right.

25 MR. WEISENSELL: Correct.

1 QUESTION: Yes.

2 MR. WEISENSELL: Justice Scalia asked Mr. Cundra  
3 a question concerning how to read the 1447 statute, and I  
4 think that that was an astute question, Your Honor,  
5 because even though they're asking this Court for a strict  
6 constructionist view of the statute, in their brief they  
7 in fact insert the language that you suggested that would  
8 need to be inserted into 1447 in order to reach the result  
9 that petitioner wants to reach.

10 At page 26, they say that the language of  
11 1447(b) actually reads as follows: an order remanding a  
12 case, and then they have in parenthetical, for lack of  
13 subject matter jurisdiction to the State court from which  
14 it was removed, by filing of a notice of removal -- again,  
15 that's in parentheticals -- pursuant to section 1446(a) is  
16 not reviewable on appeal or otherwise.

17 Although they're asking this Court to strictly  
18 construe the statutes, and particularly 1452, they want to  
19 insert language into 1447.

20 QUESTION: Of course, they're relying on  
21 Thermtron, I guess, for doing that, aren't they?

22 MR. WEISENSELL: I don't understand, Your Honor.

23 QUESTION: Well, Thermtron made it -- said that  
24 you don't read 1447(d) as broadly as the plain language  
25 suggests, because --



1 MR. WEISENSELL: Well --

2 QUESTION: -- there is a category of removals  
3 that is reviewable by mandamus.

4 MR. WEISENSELL: That's correct. If there is a  
5 basis that is not provided in any statute anywhere --

6 QUESTION: Yes.

7 MR. WEISENSELL: -- which, again, I don't  
8 believe is this case, because I think you -- that this is  
9 properly not reviewable under 1447.

10 QUESTION: Well, it was something more than just  
11 not provided for. It was an off-the-wall category, the  
12 mandamus.

13 MR. WEISENSELL: I would agree with you, Your  
14 Honor, in the Thermtron case.

15 The petitioner's argument, and one of the  
16 justices, and I don't recall which one, indicated that if  
17 you accept their argument there is no mechanism to remand  
18 cases where there is no jurisdiction under a 1452 removal,  
19 that's correct, and that is the basis why 1447 then  
20 applies in those cases.

21 1452 creates an additional basis, but you still  
22 have 1447 in the jurisdictional cases. Otherwise, in a  
23 1452 case where there is no jurisdiction, the court's  
24 stuck with the case, and they can't remand it.

25 QUESTION: But I take it you have to accept that

1 result if the removal was from a Federal court.

2 MR. WEISENSELL: Pardon me, Your Honor?

3 QUESTION: If the removal was from a Federal  
4 court rather than a State court, would not that anomaly  
5 exist, that there would be no statutory basis for  
6 remand --

7 MR. WEISENSELL: I suppose --

8 QUESTION: -- if there was no jurisdiction to  
9 remove?

10 MR. WEISENSELL: I suppose it would, but there  
11 have been decisions from this Court that have held in that  
12 situation that the court would have jurisdiction to simply  
13 dismiss the case at that point.

14 QUESTION: Well, that may be, but I mean,  
15 whatever other good arguments you might have, one of your  
16 good ones is not, my opponent's position leaves a big hole  
17 that isn't covered by either of the provisions, because  
18 your solution leaves a big hole that isn't covered by  
19 any --

20 MR. WEISENSELL: Well --

21 QUESTION: -- of the provisions as well.

22 MR. WEISENSELL: That's correct.

23 QUESTION: And you say, well, we're just going  
24 to have to fumble around and do our best with that, and I  
25 suppose your opponent says the same thing.

1 MR. WEISENSELL: That's correct, Your Honor.

2 QUESTION: So let's call the hole-in-the-statute  
3 argument a draw.

4 (Laughter.)

5 MR. WEISENSELL: Okay.

6 QUESTION: Why is there a hole in the statute?  
7 I'm just testing my own understanding of it, but forget  
8 bankruptcy. Outside the bankruptcy area there are all  
9 kinds of cases where people remove cases, and then they  
10 ask for remand, and there is the case where you're  
11 remanding on a jurisdictional ground, or a defect in  
12 removal proceeding ground, and there may be other grounds,  
13 I don't know.

14 There could be a million grounds, and the  
15 ones -- the jurisdictional or removal defect are covered  
16 by 47, and the others are covered by Thermtron. Is that  
17 right? I'm asking because I'm trying to --

18 MR. WEISENSELL: I think that's right --

19 QUESTION: Outside bankruptcy.

20 MR. WEISENSELL: -- but I think I --  
21 unfortunately I think I also need to concede that there  
22 still is a hole in the statute for cases that are not  
23 removed from State court.

24 QUESTION: Well, they would simply be governed  
25 by Thermtron, because anything not covered under the

1 statute -- I mean, I can call it a hole or not a hole, I  
2 just --

3 QUESTION: And Thermtron is not a statute.

4 QUESTION: No, that's right. That's right.

5 QUESTION: And he's conceding that Thermtron is  
6 not a statute.

7 QUESTION: But it's not un -- I'm trying to  
8 figure out how unusual it is.

9 QUESTION: Well, there would be no hole in the  
10 statute if you construed the word equitable to read  
11 appropriate. Then there would be no hole in the statute.

12 MR. WEISENSELL: If you construed it that way,  
13 certainly, and one of our arguments is also that 1452  
14 includes jurisdiction within it. I was responding to  
15 points that --

16 QUESTION: Right, I understand.

17 MR. WEISENSELL: -- Mr. Cundra made, and I  
18 haven't really had a chance to --

19 QUESTION: You have an alternative ground --

20 MR. WEISENSELL: -- get into my portion of it,  
21 but --

22 QUESTION: -- that there is no hole in the  
23 statute.

24 MR. WEISENSELL: Correct, Your Honor.

25 QUESTION: Yes.

1 MR. WEISENSELL: And that is --

2 QUESTION: That's your alternative argument.

3 MR. WEISENSELL: And that relates back to the  
4 legislative history behind 1452, where they talk about  
5 such things in that legislative history as jurisdiction by  
6 ambush, and it's not equitable for a party to be subject  
7 to jurisdiction in some distant bankruptcy court when all  
8 they have is a simple State court action that they're  
9 entitled to have and have a right to have litigated in the  
10 State forum of their choice, which is precisely our case  
11 here.

12 We filed a simple State court breach of contract  
13 action in Summit County Common Pleas Court 3-1/2 years  
14 ago, going on 4, it's been removed, their attempt to have  
15 it removed to some distant bankruptcy court in New York.

16 It's precisely the type of situation that's  
17 covered by the legislative history of 1452, which uses  
18 terms like equity and jurisdiction, to me it appears as  
19 interchangeably in that legislative history, and that's  
20 why I believe that the legislative history of 1452  
21 intended to include that within the word equitable, I  
22 believe the layman's term use of the word equitable as  
23 opposed to what you or I or other lawyers might mean by  
24 that term when they use that term in another context.

25 QUESTION: Why does it have to be the layman's



1 approach? You are giving alternative arguments. One is  
2 that 1452 is an add-on. It doesn't displace 1441 to 1447.

3 The other is, it is self-contained, but a judge  
4 in deciding what is equitable, what is appropriate, can  
5 say the closest thing that I have is the scheme of 1441 to  
6 1447, so I will plug that into the word equitable. It is  
7 equitable, appropriate, to remand on any ground that a  
8 court would have remanded under in 14 -- under the 1441 to  
9 1447 regime.

10 MR. WEISENSELL: Your Honor, I believe that's a  
11 slightly different interpretation, but it serves the  
12 purpose, and I would agree with your analysis that you can  
13 plug that in, and in fact a portion of the legislative  
14 history does indicate, and I'm citing to the House report  
15 and Senate report at the time of the enactment of the  
16 Bankruptcy Reform Act.

17 And I'm on page 51 thereof, where it indicates  
18 presumably an order of the bankruptcy court refusing to  
19 accept jurisdiction and in effect remanding the matter to  
20 another court would not be appealable in the same manner  
21 that an order of the United States district court  
22 remanding a case to the State court from which it was  
23 removed is not reviewable, on appeal or otherwise.

24 And then they footnote there as authority for  
25 that 28 U.S.C. 1447(d), and also this Court's decisions in

1 a number of cases, including the Thermtron case, so  
2 Congress was aware of the 1447 scheme at the time that it  
3 enacted 1447, and I think your analysis can also be used  
4 to plug that in as a "equitable ground" when there is no  
5 jurisdiction under 1452.

6 Just one other point, Your Honors. As we  
7 indicated in our brief, there are a number of other  
8 special removal statutes, and we cited a couple of cases  
9 under the Federal Drivers Act, and also under the  
10 Financial Institutions Reform Recovery and Enforcement  
11 Act, and those cases, in those statutes there are specific  
12 removal and remand provisions that are set up.

13 And those cases also indicate, although they are  
14 not decisions of this Court, they are decisions from other  
15 circuit courts of appeals, that in enacting those  
16 statutes, that Congress did not intend to set aside 1447  
17 and in fact 1447 does apply to those other statutes that  
18 also have very specific remand -- removal and remand  
19 procedures.

20 I cite the Court to that authority which again  
21 is not from this Court, it's from other circuit courts of  
22 appeals, but as authority for the congressional intent not  
23 to repeal by implication 1447 at the time that it enacted  
24 1452.

25 And if there are no further questions, I'm

1 concluded.

2 QUESTION: Mr. Cundra, you have about 2 minutes.

3 REBUTTAL ARGUMENT OF STEVEN D. CUNDRA

4 ON BEHALF OF THE PETITIONER

5 MR. CUNDRA: Thank you, Justice Stevens.

6 Two quick points. The concept of reading  
7 jurisdiction into 1452, whether you consider it equitable  
8 to do that or import 1447 or not, cannot -- would  
9 fundamentally change the law of jurisdiction that's ever  
10 existed with respect to removal and remand, because 1452  
11 deals with the decisions not to remand as well, so  
12 retention of jurisdiction under 1452 would be forever  
13 unreviewable by any court.

14 1447 --

15 QUESTION: -- at the end of the final judgment.

16 MR. CUNDRA: I'm sorry?

17 QUESTION: Why wouldn't it be reviewable when  
18 they get a final judgment?

19 MR. CUNDRA: It says a decision not to remand  
20 under 1452 never be reviewed by appeal or otherwise at any  
21 time. That's an absolute bar. It's not just a --

22 QUESTION: It even mentions the Supreme Court of  
23 the United States explicitly.

24 MR. CUNDRA: Yes.

25 QUESTION: I mean, but the obvious -- I mean, I

1 don't know if that means that when it's part of the final  
2 judgment you wouldn't look to see if the court was without  
3 jurisdiction. I mean, normally, the "or otherwise" is  
4 because you often review on mandamus. It really means you  
5 never could even look to jurisdiction.

6 MR. CUNDRA: That would be the result, because  
7 that's the only statute that makes unreviewable a decision  
8 not to remand. There are decisions to remand that are  
9 unreviewable, but that's the only one that makes a  
10 decision not to remand unreviewable.

11 QUESTION: But if it was really a case of  
12 subject matter jurisdiction, the Constitution would trump  
13 any such statute, right, because Article III says what  
14 Congress can tell the Federal court they can do.

15 MR. CUNDRA: One would hope.

16 QUESTION: So subject matter jurisdiction is  
17 always reviewable because of the limitation on -- the  
18 constitutional limitation on the court's authority.

19 MR. CUNDRA: Which then, reading it in would  
20 make it unconstitutional, the statute to be read as  
21 including jurisdiction would render it unconstitutional.

22 The two schemes do not relate to each other.  
23 Not only do they relate not on the issue of remand or not  
24 to remand, one is bankruptcy of a cause of action, 1447  
25 is the whole case. Bankruptcy, any plaintiff, any

1 defendant, any other party, and the second scheme,  
2 general, is only all defendants --

3 JUSTICE STEVENS: Mr. Cundra, I think we have  
4 your position. Your time has expired. Thank you.

5 The case is submitted.

6 (Whereupon, at 12:02 p.m., the case in the  
7 above-entitled matter was submitted.)



# CERTIFICATION

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

*THINGS REMEMBERED, INC. v. ANTHONY A. PETRARCA*

*CASE NO:*      *No. 94-1530*

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

BY *Don Mani Federico*

(REPORTER)