

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

CAPTION: FIDELITY FINANCIAL SERVICES, INC., Petitioner v.  
RICHARD V. FINK, TRUSTEE  
CASE NO: 96-1370 c-1  
PLACE: Washington, D.C.  
DATE: Monday, November 3, 1997  
PAGES: 1-49

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   FIDELITY FINANCIAL SERVICES,       :

4       INC.,                               :

5                   Petitioner               :

6               v.                               :   No. 96-1370

7   RICHARD V. FINK, TRUSTEE               :

8   - - - - -X

9                               Washington, D.C.

10                              Monday, November 3, 1997

11               The above-entitled matter came on for oral  
12   argument before the Supreme Court of the United States at  
13   1:00 p.m.

14   APPEARANCES:

15   MICHAEL P. GAUGHAN, ESQ., Kansas City, Missouri; on behalf  
16       of the Petitioner.

17   RICHARD V. FINK, ESQ., Standing Chapter 13 Trustee, Kansas  
18       City, Missouri; on behalf of the Respondent.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	MICHAEL P. GAUGHAN, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	RICHARD V. FINK, ESQ.	
7	On behalf of the Respondent	26
8	REBUTTAL ARGUMENT OF	
9	MICHAEL P. GAUGHAN, ESQ.	
10	On behalf of the Petitioner	48
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		



1 PROCEEDINGS

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 96-11370, Fidelity Financial Services, Inc.  
5 v. Fink.

6 Mr. Gaughan. Is that the correct pronunciation  
7 of your name?

8 MR. GAUGHAN: Yes, Mr. Chief Justice --

9 CHIEF JUSTICE REHNQUIST: Please proceed.

10 ORAL ARGUMENT OF MICHAEL P. GAUGHAN

11 ON BEHALF OF THE PETITIONER

12 MR. GAUGHAN: -- and may it please the Court:

13 This case involves an interpretation of the  
14 preference provisions of the Bankruptcy Code, found at 11  
15 U.S.C. section 547. That is on pages 1 through 5 of  
16 petitioner's brief.

17 The issue in a nutshell is whether or not the  
18 petitioner, Fidelity Financial Services, timely perfected  
19 its lien so as to qualify for the enabling loan exception  
20 provided in 547(c)(3).

21 It is undisputed that Fidelity satisfied all the  
22 requirements of 11 U.S.C. section 547(c)(3), subsection  
23 (A). The only other requirement is set forth in  
24 subsection (B). That states that the security interest  
25 must be perfected on or before 20 days after the debtor

1 receives possession of such property, meaning the financed  
2 property.

3 When a transfer is perfected is defined by the  
4 Bankruptcy Code at section 547(e)(1)(B). That states that  
5 a transfer of an interest in property other than real  
6 property is perfected when a creditor on a simple contract  
7 cannot obtain a judicial lien which is superior to the  
8 interest of the transferee. That determination must in  
9 turn be made by reference to State law, in this case  
10 Missouri State law.

11 Missouri has a statute -- it's been on the books  
12 since 1965. It's found at 301.600 Revised Statutes of  
13 Missouri. It states that a lien on a motor vehicle or a  
14 trailer is perfected as of the time of its creation if  
15 certain steps are taken within 30 days. It is undisputed  
16 that Fidelity satisfied all of the requirements of this  
17 State statute within 21 days at the earliest, 26 days at  
18 the latest.

19 QUESTION: So it satisfied the requirement of  
20 Missouri law, as you said, but it did not do it within 20  
21 days.

22 MR. GAUGHAN: The physical act of perfecting the  
23 lien occurred outside of the 20-day grace period  
24 established in 547(c)(3). However, under Missouri State  
25 law -- that is correct. Under Missouri State law, if the

1     lien is perfected within 30 days it is deemed perfected as  
2     of the time of its creation. Therefore, under those  
3     circumstances there would be no transfer for or on account  
4     of an antecedent debt under section 547(b)(2), or,  
5     alternatively, the creditor could raise the enabling loan  
6     shield under 547(c)(3).

7             QUESTION: Well, it certainly is possible that  
8     Congress intended that its provision, the 20-day provision  
9     after receiving possession of the property is what  
10    governs.

11            MR. GAUGHAN: Of course, Congress also included  
12    the 547(e)(1)(B) section, which incorporates State law, in  
13    defining when a transfer is perfected, and for preference  
14    purposes, of course, when a transfer occurs is when it is  
15    perfected, when it's made, and that incorporates State  
16    law, so State law is implicit in that consideration.

17            QUESTION: Then we have to accept the  
18    possibility that in place of the 30 days here it could be  
19    the 60 days in West Virginia, I think it is, it could be a  
20    year in some State, if some State wanted to take that  
21    position -- in effect, there would be no guaranteed end  
22    point on your position.

23            MR. GAUGHAN: I agree that in effect there would  
24    not necessarily be an end point. However, up to this  
25    point, to my knowledge only 60 days is the longest limit

1 that has been established, in West Virginia and I think in  
2 New Mexico for recreational vehicles.

3 QUESTION: What happens in a State like  
4 Massachusetts, as I understand it, that has a shorter  
5 limit? The period becomes whatever is the longer period?

6 MR. GAUGHAN: Justice --

7 QUESTION: The State, or the Federal?

8 MR. GAUGHAN: Justice Ginsburg, I'm sorry, but  
9 I'm not aware of that provision in the Massachusetts law.

10 QUESTION: Well, let's just imagine a State --  
11 your State has a 30-day provision. Let's say another one  
12 says you've got to do it within 10 days or it doesn't  
13 relate back.

14 MR. GAUGHAN: Correct.

15 QUESTION: So what happens under such a statute?

16 MR. GAUGHAN: Well, under the current  
17 interpretations of the code, if the lien is perfected  
18 within 20 days the Federal law controls.

19 QUESTION: So it's the longer -- it's whichever  
20 gives you more time, the State or the Feds. That's your  
21 position, essentially.

22 MR. GAUGHAN: That is the position that we take.

23 QUESTION: Then I don't --

24 QUESTION: But you can't perfect it within 20  
25 days. You can't perfect it under State law between 11 and



1 20 days, so the shorter period would de facto govern,  
2 wouldn't it?

3 MR. GAUGHAN: Well --

4 QUESTION: It has to be perfected within 20  
5 days, but in Massachusetts on the hypothesis it cannot be  
6 perfected after the tenth day.

7 MR. GAUGHAN: Of course, we're referring to the  
8 Missouri statute, which includes a provision that deems  
9 the perfection to relate back to day 1.

10 QUESTION: No, but --

11 MR. GAUGHAN: It back-dates the perfection.

12 QUESTION: I understand that, but this is an  
13 important point, and it's a point that helps you, by the  
14 way, because if it is correct that the Massachusetts  
15 10-day provision would supersede the 20-day, you have  
16 available the argument that this statute cannot possibly  
17 provide a uniform period anyway because it's conceded that  
18 State law can shorten it, and we're only arguing about  
19 whether State law can lengthen it.

20 MR. GAUGHAN: True.

21 QUESTION: Then that's right, isn't it? I mean,  
22 isn't just what Justice Scalia said right? I mean, if it  
23 isn't right, I'm not understanding this whole --

24 QUESTION: I think it's right.

25 MR. GAUGHAN: Well, if Justice Scalia says it's

1 right, it must be right.

2 (Laughter.)

3 QUESTION: No --

4 (Laughter.)

5 QUESTION: I don't necessarily accept that  
6 argument, but the -- I mean, do we understand this  
7 correctly?

8 MR. GAUGHAN: Well, my understanding of the  
9 current court interpretations are that if the State's  
10 provision is less than 10 days, they still allow the 20-  
11 day grace period. We will take the position that State  
12 law controls. Whatever State law says --

13 QUESTION: And is that because of the definition  
14 of perfected?

15 MR. GAUGHAN: That is correct.

16 QUESTION: In other words, assuming Justice  
17 Ginsburg's State with 10 days, if it's 15 days, it simply  
18 can't be perfected under State law.

19 MR. GAUGHAN: What the State statutes at  
20 issue --

21 QUESTION: I mean, is that the argument?

22 MR. GAUGHAN: Well, the argument, Justice  
23 Kennedy, I believe is that under State law there is a  
24 period of time within which a creditor can perfect its  
25 lien, and if it performs the required, stated

1 requirements, then the lien is deemed perfected as of day  
2 1, the date that the loan was --

3 QUESTION: And if it doesn't do that, then it's  
4 not perfected within the meaning of the Federal statute.

5 MR. GAUGHAN: Correct.

6 QUESTION: But it could still be --

7 QUESTION: No, but it is perfected. It just  
8 doesn't relate back. You can perfect between 11 and 20,  
9 but the --

10 MR. GAUGHAN: Certainly, Justice Scalia --

11 QUESTION: Under State law we're talking now.

12 MR. GAUGHAN: Certainly, Justice Scalia --

13 QUESTION: I see.

14 MR. GAUGHAN: -- if we go beyond -- if it could  
15 be perfected 3 months down the road --

16 QUESTION: You're right.

17 MR. GAUGHAN: -- it's perfected 3 months down  
18 the road.

19 QUESTION: Okay. So you don't have that  
20 argument. You're right.

21 QUESTION: May I ask, Mr. Gaughan, is the  
22 provision -- see, this is Missouri, isn't it.

23 MR. GAUGHAN: Yes.

24 QUESTION: In Missouri, that deems the lien  
25 perfected as of the date of the initial transaction, is

1 that typical of State laws?

2 MR. GAUGHAN: Justice Stevens, to my knowledge,  
3 there are at least 20 States that have that provision in  
4 their State statutes.

5 QUESTION: In all of those States, the 20-day  
6 Federal period has no meaning?

7 MR. GAUGHAN: Well, in seven of those States the  
8 perfection-back period is more than 20 days. It's either  
9 21 days, 30 days, 60 days. There are seven States that  
10 have those provisions.

11 QUESTION: Why would Congress need the 20-day  
12 provision at all under your reading?

13 MR. GAUGHAN: Well, of course, a vehicle loan is  
14 a different animal than a regular secured transaction. In  
15 a regular, secured transaction the security agreement, the  
16 note, the financing statement is all executed at the same  
17 time. Therefore, there is no delay. It's signed upon  
18 consummation of the loan transaction.

19 On a vehicle loan, particularly with this type  
20 of transaction that involves dealer paper, where the buyer  
21 goes to the dealership, they don't ask who's going to make  
22 the loan. They just ask to buy the car, and the dealer  
23 arranges the financing, and the package is sent on to a  
24 lender, so there is inherent delay built into that system  
25 from the outset.



1           So the 20-day might make sense, I suppose, in a  
2       commercial transaction or a regular consumer goods-type  
3       transaction, where you have a financing statement that  
4       might need to be filed, but --

5           QUESTION: Oh, I don't understand your answer,  
6       because you're saying there's one category of transactions  
7       which typically are performed immediately.

8           MR. GAUGHAN: Correct.

9           QUESTION: So there's really no delay. There's  
10      a second category of transactions, because of the delay  
11      you need a relation-back period.

12          MR. GAUGHAN: That's correct.

13          QUESTION: It seems to me in that category, if  
14      the State law always controls, the 20-day Federal period  
15      doesn't serve any function at all.

16          MR. GAUGHAN: Well, the 20-day period, of  
17      course, establishes when the security interest must be  
18      perfected. Then in the same section the statute says it's  
19      perfected when State law says it's perfected, so if it's  
20      perfected within State law, within that 20-day period,  
21      it's perfected under the statute.

22          QUESTION: So you say the 20-day requirement has  
23      no independent significance.

24          MR. GAUGHAN: I would say that the 20-day  
25      requirement established by Congress simply requires that

1 the security interest be perfected within 20 days.

2 If State law in turn says that the transaction  
3 is deemed perfected as of day 1, it's still perfected  
4 within that 20-day period. It's just on day 1 of the  
5 period.

6 QUESTION: No, but nothing is gained that would  
7 not be gained by having the general 10-day period. As  
8 long as State law says it relates back to day 1, or  
9 sometime within the first 10 days, then nothing was  
10 accomplished. No change in the law of any practicality  
11 that I can see was accomplished by providing the second  
12 20-day period for these kinds of loans.

13 MR. GAUGHAN: And I would concede that.

14 QUESTION: Why did Congress do it?

15 QUESTION: Well -- then I don't understand this.  
16 I read an amicus brief -- it's quite possible I don't, by  
17 the way.

18 In an amicus brief it said there are 23 States  
19 that have no relation-back, so I thought that those  
20 States, those 23 States, I don't know what their  
21 perfection laws provide, but some of those 23 States could  
22 say that a secured interest is perfected at the time of  
23 filing, and that filing takes place up to 20 days later,  
24 and under the earlier law, that would not have worked,  
25 because you had to do it within 10 days.

1           So I thought the point of this 20-day period was  
2   in respect to those 23 States, to make certain that their  
3   perfection laws applied and that a secured interest that  
4   corresponded to and was consistent within those 23 States  
5   would trump the trustee's effort to get the property back.  
6   Is that right?

7           MR. GAUGHAN: Well, of course, the congressional  
8   statement I think was that it was amended to bring the --

9           QUESTION: Do you have an additional argument in  
10   your -- is what I said right?

11          MR. GAUGHAN: Correct.

12          QUESTION: It is correct.

13          MR. GAUGHAN: Correct.

14          QUESTION: All right. Then that gives meaning  
15   to this.

16          Now, your point is that whether you win or you  
17   lose it has meaning, as I take it. Now, you're making an  
18   additional point that if a State which has a statute that  
19   says it is perfected beyond the 20-day period, of which  
20   there are only seven --

21          MR. GAUGHAN: Correct.

22          QUESTION: -- that that State also says, by the  
23   way, you are to consider it as having been perfected much  
24   earlier, on day 1, then it is for purposes of the Federal  
25   statute perfected earlier, within the 20-day period.

1 MR. GAUGHAN: Correct.

2 QUESTION: That's your argument.

3 MR. GAUGHAN: Correct.

4 QUESTION: All right, then -- go ahead.

5 MR. GAUGHAN: And, of course, under the Missouri  
6 scheme, then, if the lien is perfected within the 30-day  
7 period, the lien relates back to day 1.

8 If that is the case, there is no transfer on  
9 account of an antecedent debt, or the enabling loan  
10 provision would certainly apply.

11 Two circuit courts of appeal have followed this  
12 line of reasoning, In re Hesser out of the Tenth Circuit,  
13 In re Busenlehner out of the Eleventh Circuit.

14 QUESTION: May I ask you to amplify on your  
15 answer to Justice Breyer, because it was my understanding  
16 that Congress was responding to what the majority of the  
17 States were doing. That is, they had a period longer than  
18 10 days. They had a 20-day period, and it related back.  
19 Now, Justice Breyer recited something from a friend of the  
20 court brief that apparently said that most States don't  
21 have a relation-back, or over 20 States don't have any  
22 relation-back.

23 MR. GAUGHAN: Well, I think it all began under  
24 the old act. Of course, back then the trustee had to  
25 prove that the creditor had reasonable cause to believe



1 that the debtor was insolvent, and we didn't have the 90-  
2 day presumption period.

3 QUESTION: Well, let's just -- is it true or not  
4 that some 20-odd States have no relation-back period?

5 MR. GAUGHAN: The 20-odd States, it's true that  
6 they don't have a specific relation-back period that says  
7 it's back-dated to day 1. However, there's a grace period  
8 under the Uniform Commercial Code in that State that would  
9 apply, under for purchase money security --

10 QUESTION: Which means that the creditor would  
11 prevail over any intervening creditor who tried to levy on  
12 the property.

13 MR. GAUGHAN: That is correct, Justice Ginsburg.

14 QUESTION: Well --

15 QUESTION: So that is in effect a relation-  
16 back.

17 QUESTION: Is there a difference in your view,  
18 Mr. Gaughan, between what you describe as the grace period  
19 in the Uniform Commercial Code and a provision  
20 specifically saying there's a relation-back?

21 MR. GAUGHAN: It's a very minute difference, of  
22 course, because one simply says that there is a grace  
23 period within which if certain steps are taken the lien is  
24 perfected. The other one says that if certain steps are  
25 taken the perfection is back-dated to day 1. They

1 certainly accomplish the same objective.

2 QUESTION: There are no -- in function, they're  
3 identical. That is, they stop any other creditor from  
4 getting in front.

5 MR. GAUGHAN: That is correct. They would stop  
6 any intervening lead creditor from taking priority.

7 QUESTION: So --

8 QUESTION: My understanding of the old  
9 Bankruptcy Act was that the shorter time -- it was that  
10 the State law could shorten the Federal period but never  
11 extend it, and now you're arguing that it works just in  
12 reverse, that the State law can extend it but not shorten  
13 it, if that's --

14 MR. GAUGHAN: And I would agree, under section  
15 60, I believe it was, of the old act a creditor had 21  
16 days within which to perfect its lien unless the short --  
17 or the State period was shorter.

18 However, in 1978, when the Bankruptcy Code was  
19 overhauled, I believe it was recommended by the National  
20 Bankruptcy Commission that that 21-day period be left  
21 intact without regard to whether or not it was purchase  
22 money or not, without regard to whether or not States had  
23 longer or shorter periods, and Congress without comment  
24 simply changed it to 10 days.

25 Of course, they also put in the 90-day

1 presumption of solvency, et cetera, so there was an  
2 overhaul of the preference provisions, but without comment  
3 Congress said, at least in 1978, that the security  
4 interest had to be perfected within 10 days of attachment,  
5 and then in the '84 amendments they stated that it had to  
6 be perfected within 10 days of the debtor receiving  
7 possession of the property.

8 Then, finally, in the 1994 amendments Congress  
9 stated that the lien had to be perfected within 20 days of  
10 the debtor receiving possession of the property, so it's  
11 hard to tell by looking at the old act what significance  
12 that had on the current statute.

13 QUESTION: How long is the U.C.C. period, grace  
14 period?

15 MR. GAUGHAN: Well, I believe that the Uniform  
16 Commercial Code model is still 10 days, although I  
17 understand that's being revised.

18 Most States have adopted, I believe, a 20-day  
19 period of time, but I think the model -- it was the 1972  
20 model was what was used when Congress revamped the  
21 Bankruptcy Code in '78.

22 QUESTION: And if I think that what the U.C.C.  
23 does is indistinguishable from a relation-back provision,  
24 then the number of States that have such a relation-back  
25 provision is not just seven, but 49, I assume, is that

1 right?

2 MR. GAUGHAN: Correct, but the seven was the  
3 number of States that had a period of time beyond 20 days,  
4 greater than the 20-day period, so we have one with 21  
5 days, I think there's four with 30 --

6 QUESTION: Oh, beyond -- I see. I see. I see.  
7 So even if I consider all the U.C.C. States to be  
8 relation-back States, you're saying all of those except  
9 seven have a 20-day grace period.

10 MR. GAUGHAN: That --

11 QUESTION: 20 days or less.

12 MR. GAUGHAN: I would assume that is correct.

13 QUESTION: No, no, no, they have -- a lot of  
14 them, under the U.C.C. they have 10 days, all right, so  
15 there are a number of States apparently that give you 20  
16 days, is that right, and a large number of States that  
17 give you 10 days. Some give you 10 days with the U.C.C.,  
18 some give you 20 days. Is that right?

19 MR. GAUGHAN: I think certainly when the statute  
20 was reenacted in '78 --

21 QUESTION: Yeah.

22 MR. GAUGHAN: -- it was 10 days. I think most  
23 have gone to 20 days now, but I would not -- I don't know  
24 the number of States that have done so.

25 QUESTION: Well, in States, when a State comes



1 to adopt a Uniform Commercial Code, at least this was the  
2 experience in Arizona, it isn't adopted just verbatim from  
3 the U.C.C. draft. There are changes, so that there might  
4 be change -- different grace periods among States, all of  
5 which have adopted the Uniform Commercial Code. Isn't  
6 that true?

7 MR. GAUGHAN: That is true, but of course, back  
8 when the code was reenacted in '78, States all utilized  
9 the '72 model, which was 10 days, so it's certainly  
10 arguable that Congress intended to make the 10-day period  
11 harmonious with State law. It was at that time, at least.

12 QUESTION: May I ask you one other, just  
13 informative question -- before we granted cert, you  
14 pointed out there was a conflict, with two courts that  
15 joined your view of the reading. They had decided when  
16 the 10-day provision was in effect, as I remember.

17 MR. GAUGHAN: That's correct.

18 QUESTION: Hesser and the other case. Have  
19 there been any cases since the amendment that have adopted  
20 your view?

21 MR. GAUGHAN: The amendment, of course -- the  
22 '94 amendment, is that what you're referring to?

23 QUESTION: Yeah.

24 MR. GAUGHAN: There have been none that I'm  
25 aware of, Your Honor.

1 QUESTION: Thank you.

2 MR. GAUGHAN: In --

3 QUESTION: So if the language is somewhat  
4 ambiguous, allows it, and everything seems fairly mixed up  
5 State after State, why shouldn't we just say, well, a  
6 uniform rule is probably what they intended in order to  
7 avoid the kind of confusion that our questions suggest  
8 might arise?

9 MR. GAUGHAN: Well, the two courts of appeals  
10 that we relied on and are cited in our briefs, the  
11 Eleventh and Tenth Circuit opinions, note that in '78 the  
12 code was overhauled and the intention with respect to the  
13 preference provisions was to bring them more into  
14 conformity with commercial law and commercial practices.

15 Presumably, then, State law practices were to be  
16 adopted, at least under that general statement.

17 The fact that Congress then changed it to 10  
18 days from possession in '84 without comment doesn't tell  
19 us anything. The only snippet, of course, is in the '94  
20 amendments, where they state that they wanted to bring it  
21 more into conformity with most States' practices by  
22 increasing it to 20 days.

23 QUESTION: Well then, why -- why would Congress  
24 have made that expansion from 10 to 20 if Congress didn't  
25 think that they needed to do that in order to have the

1 States that had the 20-day period, to have that effected?  
2 Congress must have thought that otherwise it was going to  
3 be, for Bankruptcy Code purposes, only 10 days.

4 MR. GAUGHAN: Justice Ginsburg, I would concede  
5 that. Of course, vehicle perfection loans are not routine  
6 loans They would be outside the normal considerations for  
7 this kind of transaction, because in a normal loan -- and  
8 in fact I think Collier on Bankruptcy noted that after the  
9 1994 amendments, that's the end of the issue. If you file  
10 your financing statement within 20 days, you're perfected.  
11 If not, you're not.

12 But we're not talking about filing financing  
13 statements. Under the Uniform Commercial Code, perfection  
14 of liens on motor vehicles is handled under separate State  
15 vehicle perfection statutes. Each State has its own  
16 requirements.

17 In the Eleventh Circuit decision of Busenlehner,  
18 it had a statute much like the Missouri statute, the one  
19 we refer to as a relation-back statute, and that was a  
20 Georgia State law that allowed the lien to be deemed  
21 perfected as of the day of creation if certain steps were  
22 taken within 20 days.

23 In that case, the loan was obtained on March 31  
24 of 1988, the physical act of perfecting the lien occurred  
25 on March -- or April 13 of 1988, and a bankruptcy was

1 filed on April 26.

2 The court found, of course, that although it was  
3 beyond the 10-day period established in 547(c)(3)  
4 subsection (B), the -- (e)(1)(B) of the Bankruptcy Code  
5 incorporates State law, and under Georgia State law the  
6 lien was perfected as of the day of its creation.  
7 Therefore, there was no -- actually, they ruled that  
8 therefore they were entitled to the enabling loan  
9 exception, 547(c)(3).

10 The other case, the Hesser case, came out of  
11 Oklahoma. They had a 15-day period of time within which  
12 to perfect, and in that case I believe the loan originated  
13 on April 16 of 1990 and the physical act of perfection  
14 occurred on Ap -- or May 1, 1990, and then 18 days later  
15 the debtor filed bankruptcy.

16 That was beyond the 10-day grace period, but  
17 nonetheless, by interpreting Oklahoma law, the court noted  
18 that under State law it was perfected as of day 1.  
19 Therefore, that court held there was no transfer for or on  
20 account of an antecedent debt under 547(b)(2), and that  
21 they could claim the enabling loan exception under  
22 547(c)(3).

23 If we were to adopt further reasoning in this  
24 case, we could also say the transfer occurred outside the  
25 preference period under 547(b)(4), because it would have



1       been 93 days before the case was filed.

2               Both of those circuit court opinions, as I  
3       previously indicated, quoted the legislative history, and  
4       the intention was to bring the preference provisions more  
5       into conformity with commercial practices in the Uniform  
6       Commercial Code, and therefore creditors were encouraged  
7       to look to State law in order to perfect their liens.

8               There wasn't a lot of discussion in either of  
9       those cases. The language was accepted on its face. You  
10      perfect under (e)(1)(B) by utilizing State law. In both  
11      cases, the lien was perfected within State law  
12      ramifications. Therefore it related back to day 1. It  
13      was perfected under the Bankruptcy Code then under  
14      547(c)(3) subsection (B).

15              QUESTION: May I ask you one other question I  
16      don't --

17              MR. GAUGHAN: Yes, Justice Breyer.

18              QUESTION: Let me do it with an example.  
19      Imagine a State -- this is something I don't understand.  
20      Imagine a State has a statute. State 1 says, you have to  
21      perfect by sending the paper in to the Secretary of State  
22      within 30 days, or sending the paper wherever you're  
23      supposed to send it.

24              MR. GAUGHAN: Right.

25              QUESTION: State 2 says the same thing, but adds

1 the words, and perfection relates back to day 1. What I'm  
2 trying to figure out, what's the difference?

3 Imagine that on day 20 in either State a simple  
4 judgment creditor files a piece of paper and says, I'm  
5 entitled to the car. Isn't it true that in both States,  
6 if the right piece of paper is filed before day 30,  
7 between day 20 and day 30, that the secured creditor will  
8 prevail over the simple contract creditor?

9 MR. GAUGHAN: That is correct.

10 QUESTION: All right. So if in both States they  
11 would prevail, then adding the words, and it relates back  
12 to day 1, does nothing.

13 MR. GAUGHAN: It accomplishes the same  
14 objective. That is correct.

15 QUESTION: Well, if it does nothing, well then  
16 our question becomes one of whether Congress intended, by  
17 using the words 20 days, suddenly to permit any State,  
18 irrespective of whether it says relates back or not, that  
19 has 30 days or 60 days to perfect, to fall within the  
20 meaning of the 20 days. That's pretty hard to see.

21 MR. GAUGHAN: I would agree with that.

22 QUESTION: But that's your -- that's what we  
23 have to -- for you to win we have to agree with that.  
24 Isn't that --

25 MR. GAUGHAN: Well, absolutely, but under State

1 law, of course, whether it's 20 days or 30 days --

2 QUESTION: And even if it doesn't say, since we  
3 have a definition of what perfection means, even if a  
4 State says 60 days and says nothing about relating back,  
5 on your argument that State rule would still prevail.

6 MR. GAUGHAN: Vis-a-vis an inter-liening --

7 QUESTION: Yes.

8 MR. GAUGHAN: A lien creditor on a --

9 QUESTION: Yes, or the trustee in bankruptcy.

10 MR. GAUGHAN: Correct. That is correct.

11 QUESTION: Well then, I don't want to hammer the  
12 point too hard, but I take it you are conceding that  
13 nothing of any practical significance was accomplished  
14 when Congress amended the law to add the 20-day period.

15 MR. GAUGHAN: Well, that's true. Of course, the  
16 old act was amended five or six times, section 60, and  
17 there was amendment upon amendment that didn't accomplish  
18 any objective either.

19 When the code was amended in 1984 to make it 10  
20 days from date of possession, there was simply no comment  
21 on why Congress did it. The only -- the 20-day  
22 legislative history comment simply states that it was done  
23 in order to bring the preference provisions more into  
24 conformity with most States' practices.

25 If there are no further questions, I would like

1 to reserve some time for rebuttal.

2 QUESTION: Very well, Mr. Gaughan.

3 Mr. Fink, we'll hear from you.

4 ORAL ARGUMENT OF RICHARD V. FINK

5 ON BEHALF OF THE RESPONDENT

6 MR. FINK: Mr. Chief Justice, and may it please  
7 the Court:

8 Section 547(c)(3) establishes a defense for  
9 enabling loans. However, such loans are only perfected,  
10 or only protected if perfected on or before 20 days after  
11 the debtor receives possession of the property. the  
12 meaning of section 547(c) is clear: 20 days is 20 days is  
13 20 days. The 1994 amendment --

14 QUESTION: What's your authority for that,  
15 Gertrude Stein?

16 (Laughter.)

17 QUESTION: Anyway, I think the issue in the case  
18 is whether perfected is perfected is perfected, not --

19 MR. FINK: Well, I would agree that the  
20 definition is what -- what the court or the Congress was  
21 looking at in section 547 was the act of perfection, not  
22 the status of being perfected, and in order to have the --  
23 to be perfected under the statute, you must take that last  
24 step within 20 days of the transaction.

25 The Congress back in 1994 recognized that



1 several States had adopted enabling loan grace periods  
2 longer than the 10-day period allowed under the 1978  
3 Bankruptcy Code. Rather than incorporate the varying  
4 State law periods, the Congress instead expanded the 20-  
5 day period to a nationally uniform 20 days.

6 QUESTION: Before you leave the language, what  
7 you do with the language of the definition of when it's  
8 perfected? It says it is perfected when a creditor on a  
9 simple contract cannot acquire a judicial lien that is  
10 superior to the interest of the transferee.

11 So if we have a State that says it's perfected,  
12 you have 60 days in which to file, once you file on those  
13 60 days, a simple contract debtor that filed on day 15, or  
14 on day 20, or on day 30, or on day 40 cannot prevail and,  
15 therefore, under the language, they say it was the case,  
16 given their statute, that from day 1, provided that later  
17 filing took place, a simple contract creditor could not  
18 prevail.

19 MR. FINK: Justice Breyer, that's an excellent  
20 point, but the statute doesn't say could not prevail, it  
21 says cannot prevail. That requires looking forward  
22 prospectively, not looking backwards retroactively to what  
23 actually happened.

24 If Congress had intended that you look back, the  
25 actual happenstance, they would have said, could not have

1 perfected, but Congress didn't say that. Congress  
2 specifically said cannot.

3 QUESTION: Could not have prevailed.

4 MR. FINK: Could not have prevailed, yes, sir.  
5 Thank you.

6 QUESTION: As I understand it, you -- your  
7 position is that that section, 547(e)(1)(B), means simply,  
8 has -- have all the steps been taken to perfect the lien,  
9 so it tells us, yes, the lien has been perfected, but is  
10 uninformative on relation-back. That's the uniform 20-  
11 day period. Is that, in essence, your position?

12 MR. FINK: My position is that that defines the  
13 steps necessary, and you can look at State law to see what  
14 those steps would be to perfect, but as to whether you  
15 were actually perfected within the time frame that  
16 Congress envisioned, which was a uniform 20 days, you  
17 would look to Federal law, not the State.

18 QUESTION: And so in a State like Massachusetts,  
19 that has a shorter period, as long as all the necessary  
20 steps to perfect were taken within 20 days under your  
21 reading of the code, the security interest would be  
22 permissible.

23 MR. FINK: Justice Ginsburg, it's my  
24 interpretation of the code and it's the congressional  
25 intent that there be a uniform 20-day period. Under the

1 Bankruptcy Act, section 60(a)(7) said you have 21 days,  
2 but if a State provides for a shorter period, you're stuck  
3 with the State law. If the State provides for a longer  
4 period, you're -- you get to use the Federal statute.

5 The Congress looked at that, the Gilmore  
6 commission, which was trying to conform the U.C.C. and the  
7 Bankruptcy Act, told Congress in its report, lose the  
8 State law period. It recommended 21 days not because  
9 there was any logic to it, but because that's what people  
10 were used to.

11 The Congress chose to adopt the Gilmore  
12 committee recommendation with the exception of the 21-day  
13 period. It chose the 10-day period, which was then the  
14 prevailing U.C.C. period.

15 The plain meaning --

16 QUESTION: So under your theory the  
17 Massachusetts hypothesis, where the period is shorter than  
18 20 days, that person would have the -- be able to take  
19 advantage of the Federal 20-day period, so you have --  
20 you'd have a uniform period throughout.

21 MR. FINK: Yes, sir. The -- if the creditor had  
22 the misfortune of having their client file a bankruptcy,  
23 they would be better off as far as perfection is concerned  
24 than they would have been absent that bankruptcy, the  
25 intervening bankruptcy.

1           Prior to 1994, there was a problem. The problem  
2 was cases such as In re Burnette, that recognized the  
3 congressional intent of a uniform national time period,  
4 but instead chose a perceived public policy of favoring  
5 that one creditor who had done everything right under  
6 State law but had failed to perfect within the time frame  
7 allowed by the Bankruptcy Code.

8           One purpose of preference law is to avoid the  
9 pitfalls of secret liens. Any creditor who fails to  
10 disclose their lien in a timely and proper manner loses  
11 their ability to enforce that lien against the world.

12           If they take the proper steps to attach their  
13 security interest as between the debtor and themselves,  
14 they have some protection, but if they fail to take the  
15 steps in the time frame prescribed by the statute, whether  
16 it be State law if you're in the State realm or bankruptcy  
17 law, if you happen to be in a bankruptcy setting, because  
18 it's a uniform Federal policy, then they lose their  
19 ability to enforce that lien against the bankruptcy estate  
20 in the Chapter 7 or Chapter 13 or Chapter 11 if there's a  
21 preference proceeding filed.

22           The petitioner argues that its interpretation  
23 follows the plain language of the post 1994 amendment to  
24 the statute. I don't understand, if it's so plain, why  
25 every recorded case, all the commentators, all the



1 scholars reject their position. There's no support for  
2 their position that the 1994 amendment to section 547  
3 makes State law relation-back periods apply in a  
4 bankruptcy setting.

5 QUESTION: May I ask, Mr. Fink, has this issue  
6 arisen in any case in the Ninth or Tenth Circuit since the  
7 amendment?

8 MR. FINK: At the circuit level?

9 QUESTION: Well, just in the circuit. Do those  
10 circuits continue to follow the same rule, contrary to  
11 your position, that they followed before the 1994 --

12 MR. FINK: I don't know, Justice Stevens.

13 QUESTION: You don't know -- no cases you know  
14 of?

15 MR. FINK: I don't know if there are any. I'm  
16 just not familiar with that.

17 QUESTION: But the circuit hasn't had a chance  
18 to reconsider since the enlargement of the period from 10  
19 days to 20 days.

20 MR. FINK: I'm not familiar with any circuit  
21 court opinions in the Ninth and Tenth that have  
22 reconsidered that issue, Justice Ginsburg.

23 The circuits that have recon -- that have ruled  
24 on that issue since the '94 would be the Fifth, the  
25 Eighth, and the -- now it's escaped me. The Eleventh, I

1 believe.

2 QUESTION: What about the --

3 MR. FINK: I might have those twisted around.  
4 I'm sorry.

5 QUESTION: What about the colloquy in the  
6 legislative history? I -- in the Bankruptcy Act, unlike a  
7 lot of other acts, these colloquys were pretty carefully  
8 worked out by all the different parties who were involved  
9 in the legislation, so I might be tempted to pay more  
10 attention to Senators Sasser and Heflin in this kind of  
11 context than in a lot of others. How did that come about?

12 Normally what happens with these colloquys is  
13 the bankruptcy bar and all the different people interested  
14 go and write what they're supposed to say in order to  
15 clarify for the courts what they meant. There's quite a  
16 definite colloquy there.

17 MR. FINK: I may -- Justice Breyer --

18 QUESTION: How did that come about?

19 MR. FINK: That was an act that wasn't even --  
20 that didn't even get passed, although the language is  
21 similar to the act that eventually --

22 QUESTION: Yeah -- right.

23 MR. FINK: It was amended in '94. I think it  
24 shows that there is -- at best, it shows that they didn't  
25 understand each other's position.

1 QUESTION: No, no, there would be somebody who  
2 would have written that. They didn't sit and write it  
3 themselves.

4 QUESTION: You don't really think that they --  
5 that either one of them was that familiar with the  
6 particular little tiny --

7 QUESTION: Yeah.

8 QUESTION: -- piece of this statute that was at  
9 issue.

10 QUESTION: Right. But that's how the  
11 legislative process works. People who are interested go  
12 and write colloquys.

13 MR. FINK: Just --

14 QUESTION: It's done intentionally. So I want  
15 to know what the history of that was. Do you know it?

16 MR. FINK: The history of that I can't speak to,  
17 but I know that the committee report would have more  
18 bearing than their colloquy, and the hist -- and the  
19 committee report on the 1994 amendment states that they  
20 were going for a uniform 20 days.

21 QUESTION: Well, the colloquy may be a weak read  
22 to go on, but it didn't seem to me to be ambiguous. You  
23 suggested it was ambiguous. I thought those two Senators  
24 said flat out that they meant to adopt the Tenth and  
25 Eleventh Circuit position. Now, nobody voted on that

1 colloquy, but in what way is it ambiguous?

2 QUESTION: Maybe we could ask the law firm that  
3 drafted it.

4 MR. FINK: Can't speak to that, Your Honor.

5 QUESTION: Why don't you answer Justice  
6 Ginsburg's question?

7 QUESTION: Yeah. You said in your brief that  
8 the colloquy was ambiguous, and I understood the argument  
9 that it shouldn't count for much, but I didn't understand  
10 in what way it was ambiguous. How could they have been  
11 clearer than to say, we think this confirms the Tenth and  
12 Eleventh Circuit position?

13 MR. FINK: Oh, I don't think that that's what  
14 Mr. Heflin said, Senator Heflin. I think -- if I can find  
15 it here.

16 (Pause.)

17 MR. FINK: I think Senator Heflin, on page 27 of  
18 the brief it is quoted that he clarifies Senator Sasser's  
19 point and asserts that State law relation-back statutes do  
20 not affect the time of transfer pursuant to section 547,  
21 to which Senator Sasser replied, and I quote, Federal  
22 uniformity is key to the date on which the debtor receives  
23 possession of such property, which then activates the  
24 running of the 20-day period under section 547. I don't  
25 see that he was disagreeing.



1 QUESTION: Wasn't there a statement -- maybe I'm  
2 wrong about this, but I remembered a statement in which --

3 QUESTION: Sasser says -- Sasser cites the two  
4 cases, and say I would note for the chairman that In re  
5 Busenlehner, In re Hesser, and In re Howard came to these  
6 conclusions, and my purpose in this discussion is to  
7 establish that these court decisions are consistent with  
8 the Federal bankruptcy laws, and the chairman, Mr. Heflin,  
9 says, I would say to my colleague that it is appropriate  
10 at this time for the Senate to state its intent to confirm  
11 the interpretations of these circuits.

12 Unless you think he was inviting the Senate to  
13 adopt such a -- an intent, which it did not do.

14 MR. FINK: Well, that's the only explanation I  
15 can ascribe to that, Justice Scalia.

16 (Laughter.)

17 QUESTION: All right.

18 MR. FINK: Congress certainly knows how to  
19 incorporate State law when it wants to do so. Section  
20 546(b) provides that certain trustees' avoiding powers are  
21 subject to any general applicable law which would include  
22 State law.

23 Noticeably absent from that section is section  
24 547. They exclude -- they make general applicable law  
25 applicable to the strong arm powers under section 544, the

1 statutory lien powers under section 545, and the post-  
2 petition liens under section 549, but they exclude section  
3 547. I think that supports the intent, that they intended  
4 that there be a uniform 20 days, and that 20 days meant 20  
5 days.

6 If Congress had wanted to make State law  
7 applicable, as Fidelity asserts, then it should have  
8 simply inserted in section 546(b) section 547. They  
9 didn't do that. It's my --

10 QUESTION: Would you go through that again?

11 MR. FINK: Sure.

12 QUESTION: How could they have adopted it? How  
13 could they have --

14 MR. FINK: The simplest way to adopt applicable  
15 State law, in section 546(b)(1) there's a statement that  
16 says, general applicable law applies in these statutes,  
17 544, 545, and 549. It doesn't say anything about section  
18 547, and it's my understanding that the exclusion of one  
19 means that the other -- it means that they intended to  
20 exclude it. I had a fancy Latin phrase for that, and now  
21 it's escaping my memory.

22 QUESTION: Res ipsa loquitur.

23 (Laughter.)

24 MR. FINK: That wasn't it.

25 Fidelity has argued that automobile lenders need

1 additional time, that they're special. There's nothing in  
2 section 547 that says anything about motor vehicle lenders  
3 being special. The only differentiation is between the  
4 general rule for 10 days to perfect and have the grace  
5 period apply, or for enabling loans, the 20-day period, so  
6 it's the type of the loan, not the type of collateral  
7 that's critical.

8 QUESTION: A quick question about perfection.

9 MR. FINK: Yes, sir.

10 QUESTION: Imagine in a State that has a 60-day  
11 period, or a 30-day period --

12 MR. FINK: Yes, sir.

13 QUESTION: -- you take out a loan, but you don't  
14 perfect for a year.

15 MR. FINK: Yes, sir.

16 QUESTION: Am I correct in thinking the person  
17 who didn't perfect for a year, the secured creditor, still  
18 has perfected his interest, but only in respect to the  
19 future, not in respect to the past?

20 MR. FINK: That's correct, sir.

21 QUESTION: Thank you. Thank you.

22 MR. FINK: Which brings up --

23 QUESTION: If we adopt your position, are there  
24 going to be problems in some States where the motor  
25 vehicles registration period is just slow because of the

1 way the State officials work? I mean, are there some  
2 States where you just can't do this within 20 days?  
3 of State MR. FINK: I don't know. In Missouri, it's a  
4 simple form you fill out. You mail it in with the  
5 certificate of title attached. If you don't have the  
6 certificate of title, it's my reading of the State statute  
7 that it would be an illegal transaction to --

8 QUESTION: No, but if you do everything right,  
9 are there not some States where they take longer than 20  
10 days to validate the lien? is with the State law.

11 MR. FINK: Yes, sir, and under State law that  
12 certainly could happen. question. It's not an issue of

13 when the QUESTION: And the creditor, generally the when  
14 seller in these cases, what remedy does he have, simply  
15 not to transfer possession of the property until the  
16 paperwork is completed?

17 MR. FINK: I don't believe that that would be  
18 the appropriate manner of transferring title to a vehicle.  
19 I believe you have to transfer possession at the same time  
20 that you --MR. FINK: I'm not familiar with all the motor

21 vehicle s QUESTION: So they don't have any protection,  
22 then. QUESTION: But isn't --

23 MR. FINK: I think they're just going to be out  
24 of luck, and I think Congress looked at that and was  
25 trying to balance the State interests versus the Federal



1 interest.

2 QUESTION: If they're out of luck, it's because  
3 of State law and not Federal law, isn't it -- because if  
4 you send in the papers the day after you transfer  
5 possession, you've complied with the Federal law --

6 MR. FINK: Yes, sir.

7 QUESTION: -- have you not?

8 MR. FINK: Yes, sir.

9 QUESTION: And so if the State can't process it  
10 within 30 days, the problem is with the State law.

11 MR. FINK: I misunderstood the -- I wasn't  
12 thinking clearly on the question. It's not an issue of  
13 when the State processes the paperwork. The issue is when  
14 the paperwork gets to the State, so that should have no  
15 impact on the hypothetical that you described, Justice  
16 Kennedy.

17 QUESTION: So as long as the date stamp at the  
18 office that you send it to, that's what's going to  
19 prevail, whether it gets indexed properly or not.

20 MR. FINK: I'm not familiar with all the motor  
21 vehicle statutes --

22 QUESTION: But isn't --

23 MR. FINK: -- in the 50 States, but in  
24 Missouri --

25 QUESTION: That -- that's what you --

1 MR. FINK: -- that would be the critical date.

2 QUESTION: Well, it depends on State law. I  
3 mean, I'm not sure the stamping date is the date of  
4 perfection. Is the stamping date when it's received the  
5 date of perfection? I don't know. I --

6 MR. FINK: I believe in this case the bankruptcy  
7 judge ruled that the date that it was received was the  
8 effective date of transfer, and at worst -- that was 21  
9 days out. At worst it was 26 days out.

10 But the problem in this case --

11 QUESTION: I thought most State laws would make  
12 the date of perfection at least the date when there's some  
13 public ability to know of the existence of the lien. I --  
14 at least it works that way under the U.C.C., and just  
15 because the relevant agency -- well, I don't know. It  
16 seems strange to me.

17 QUESTION: May I go back for a minute, Mr. Fink,  
18 to the legislative history that's quoted at pages 24 and  
19 25 of the blue brief. Was Senator Heflin the chairman of  
20 the committee that -- and also was he the floor manager of  
21 the bill, just out of curio -- do you know?

22 MR. FINK: I don't know.

23 QUESTION: I think, isn't it -- that's what I've  
24 looked up on this, that these were amendments attached to  
25 a crime bill, and Senator Heflin was the floor manager of

1 the crime bill, and then therefore he had to answer  
2 whatever question came up.  
3 But it is significant to me what that situation  
4 was, because if these two were primary movers of the whole  
5 thing, then of course it doesn't reflect their views as  
6 much as it reflects an entire community of people trying  
7 to enact a comprehensive code.  
8 If, on the other hand, it's a particular Senator  
9 who happens to have a constituent, et cetera, that's quite  
10 different. But you don't know the answer to that.  
11 MR. FINK: No, sir.  
12 Fidelity has argued that there's a serious  
13 conflict between our interpretation of section 547 and  
14 State commercial law, especially as it relates to motor  
15 vehicles. That simply isn't true. Our interpretation  
16 affects only a handful of States.

17 There are seven with grace periods longer than  
18 20 days, and even in those States, the longer grace  
19 periods typically apply only to motor vehicles, so how do  
20 we read the plain language of section 547? Congress  
21 expanded the section 547(c)(3)(B) period from 10 days to  
22 20 days. It also added an express cross-reference to the  
23 general timing rule of section 547(e)(2)(A) to the new 20-  
24 day rule.  
25 Thus, all secured creditors have a 10-day grace

1 period to perfect their security interest and have the  
2 date of the transfer be deemed the date of perfection.  
3 Congress realized there was a problem, that sometimes  
4 there could be a delay with enabling loan creditors, so it  
5 gave them an extra 10 days, for a total of 20, and said,  
6 you know, in every circumstance this may not be enough,  
7 but this is the balance we're going to strike between the  
8 State interest and the Federal uniform interest in a  
9 uniform bankruptcy law and said, 20 days.

10 And it may be true that a 1-day delay in this  
11 case doesn't seriously threaten the antisecret lien  
12 policy. Even if you use the 30-day relation-back period  
13 in Missouri, maybe that doesn't seriously cause any  
14 serious harm. However, it's the interpretation that you  
15 must adopt in order to reach that result, which is  
16 dangerous.

17 There's nothing in Fidelity's argument to limit  
18 its theory. You could have a State that says you could  
19 have a year. You could have a State that says you don't  
20 even have to do it for an enabling loan.

21 QUESTION: But practically isn't that unlikely?  
22 I mean, most States have come to the 20-day period. We  
23 just have how many with 30 days, and one with 60, so most  
24 of them -- Congress tried to do what most States did,  
25 right --



1 MR. FINK: Yes, ma'am.

2 QUESTION: -- in setting the 20-day period.

3 MR. FINK: Yes, ma'am.

4 QUESTION: So why couldn't one look at that as  
5 Congress trying to stay in line with the States and say,  
6 in case of a State that doesn't say anything, we'll pick  
7 the State that most States -- the time that most States  
8 allow, 20 days, but we're not ruling out States that have  
9 a longer period. What -- why isn't that a proper  
10 interpretation?

11 MR. FINK: Oh, I don't think that's what they  
12 said, and they don't need to harmonize with the State law,  
13 because it's Federal bankruptcy law that's at issue.

14 QUESTION: They don't need to, but why can't one  
15 read these -- the statute putting the relation-back  
16 provision together with the provision about the  
17 lienholder's interest being perfected and come up with,  
18 well, Congress meant at least 20 days but more if a State  
19 allowed it?

20 MR. FINK: Well, Congress certainly could have  
21 done that. It's within their power to do that. But they  
22 didn't do that. They said, 20 days. They didn't make an  
23 exception in 546(b) to apply general applicable law to  
24 section 547. They said, 20 days. So we're not here today  
25 to determine what Congress could have done.

1           We're here to determine or interpret what  
2 Congress did do, and Congress established a uniform 20-  
3 day period to take that last step necessary to perfect  
4 your security interest. If you don't do it, you're just  
5 out of luck.

6           That happens every day in preference actions in  
7 bankruptcy. People -- preferences aren't about evil  
8 intent, or whether something bad or good happened.  
9 It's -- the transactions take place in the normal course  
10 of commercial practice, and if you're outside that time  
11 limit that Congress drew, and somebody's filed a  
12 bankruptcy, you're just going to be out of luck, whether  
13 it's 20 days, or 21 -- I'm sorry, if it's 21 days or a  
14 year.

15           And the position they're arguing doesn't  
16 accommodate Federal law to the State law. They're asking  
17 Congress, or this Court to interpret that statute to  
18 advocate to State law, because there would be nothing to  
19 prevent a State -- even though none of them have done it  
20 yet, there's nothing to prevent them from coming in and  
21 saying, you've got a year to perfect.

22           Idaho changed their statute precisely to try and  
23 defeat a bankruptcy trustee to say it impacted on not just  
24 enabling loans on motor vehicles, but nonenabling loans as  
25 well, so once you start down that slope, there's no

1 stopping it. It's just a snowball that just keeps getting  
2 bigger and bigger.

3 QUESTION: What's -- is an enabling loan --  
4 is -- that can mean the same thing as a purchase money  
5 mortgage?

6 MR. FINK: That's similar, and in a motor  
7 vehicles -- in a non-U.C.C. setting that would be what you  
8 would call a purchase money security interest.

9 QUESTION: Mr. Fink --

10 MR. FINK: Yes.

11 QUESTION: -- may I just ask one question? I'm  
12 just kind of curious. The vehicle here is worth about  
13 \$14,000, is it?

14 MR. FINK: Yes, sir.

15 QUESTION: And the lien was --

16 MR. FINK: Well --

17 QUESTION: -- about \$3,000?

18 MR. FINK: Well, actually the vehicle I think  
19 was worth around \$10,000, the debt was around 14.

20 QUESTION: I see, and that's what's at issue.  
21 The question is whether the creditors get that money or  
22 the secured credit -- the general creditors or the secured  
23 creditors?

24 MR. FINK: Yes, sir, because the lien didn't go  
25 away. They don't have the lien. I now have the lien on

1     behalf of the bankruptcy estate under section 551, and  
2     Ms. Beasley is paying that value out to all the creditors,  
3     including Fidelity, who are general unsecured --

4             QUESTION: May I ask -- it's really not  
5     relevant. I'm just curious. How big is the estate?

6             MR. FINK: It's a -- since it's a Chapter 13,  
7     you basically have two tests that have to be met for the  
8     general unsecured creditors. Disposable income, which is  
9     section 1325(b), that means that during the life of her  
10    plan all her disposable income, which is the income that's  
11    not necessary for support, has to be paid into the plan,  
12    and also that the liquidation test is met, which is  
13    1325(a)(4).

14            So she's basically -- she doesn't make a lot of  
15    money, so she's basically paying out the value of that  
16    vehicle to the general unsecured creditors, and that's  
17    going to take her more than 3 years with all her  
18    disposable income, and I don't recall off the top of my  
19    head what the total percentage to the general unsecured  
20    will be, but Fidelity is the largest unsecured creditor,  
21    so you're probably looking at less than a 50-percent  
22    distribution, but I don't know that.

23            QUESTION: I see, and that's the estate that's  
24    financing this litigation, of course.

25            MR. FINK: Well, actually, all the Chapter 13



1 debtors in the Western District of Missouri are financing  
2 this --

3 (Laughter.)

4 MR. FINK: -- side of it, because --

5 QUESTION: I'm a little worried about your  
6 posture here, frankly. I see.

7 MR. FINK: But a chapter --

8 QUESTION: Kind of a test case, in other words.

9 MR. FINK: A -- yes, sir. A Chapter -- this  
10 actually started as a Chapter 7, where the trustee said,  
11 give me the car, they're not perfected, and Ms. Beasley  
12 decided to convert to Chapter 13.

13 Are there any further questions from the Court?  
14 If not, I'll just summarize, and I would ask that the --  
15 respectfully request that you affirm the opinion of the  
16 Eighth Circuit Court of Appeals, because it's the only  
17 interpretation that gets force through the plain language  
18 of the statute. It's the only interpretation which  
19 advances the antisequest lien policy of the Congress. It's  
20 the only interpretation that's in accord with the  
21 legislative history of both the '78 code, the '94  
22 amendment, and with the pre-code bankruptcy law, and thank  
23 you for your time.

24 QUESTION: Thank you, Mr. Fink.

25 Mr. Gaughan, you have 4 minutes remaining.

1 REBUTTAL ARGUMENT OF MICHAEL P. GAUGHAN

2 ON BEHALF OF THE PETITIONER

3 MR. GAUGHAN: Thank you, Mr. Chief Justice. I  
4 just wanted to clarify a few points.

5 The facts in this particular case, the loan was  
6 obtained on August 17, 1994, and the loan was in the  
7 amount of \$14,300, I believe.

8 The debtor took possession of the car in this  
9 case the same day, but it is not unusual for a debtor to  
10 take a test drive, for instance, at a dealership, to take  
11 a car home, so the possession could start before the loan  
12 is even consummated. In this case, it occurred on the  
13 same day.

14 The paperwork was mailed to the Missouri  
15 Department of Revenue on September 7. However, the  
16 Department of Revenue's record showed that it wasn't  
17 validated until September 23, which was more than 30 days  
18 after the transaction.

19 We undertook discovery, and --

20 QUESTION: We don't ordinarily sit to review  
21 facts, Mr. Gaughan.

22 MR. GAUGHAN: I understand.

23 QUESTION: We've been presented with a set of  
24 facts that said that it was either 21 days or 26 days  
25 afterwards. I think we accept those.

1 MR. GAUGHAN: I was just trying to point out  
2 that there is an inherent delay built into vehicle  
3 perfections.

4 It's not like signing a financing statement.  
5 With the financing statement there is no notice to the  
6 world until it's recorded. You could file a financing  
7 statement three different times on the same collateral,  
8 but with a car there is a title that actually follows that  
9 particular item of collateral, so it's very difficult to  
10 pledge that three or four times over.

11 The notice, there's no problem with notice to  
12 the world because you can't falsify that information.

13 That's all I have. If there's any other  
14 questions --

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr Gaughan.  
16 The case is submitted.

17 (Whereupon, at 1:55 p.m., the case in the above-  
18 entitled matter was submitted.)  
19  
20  
21  
22  
23  
24  
25

## CERTIFICATION

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

FIDELITY FINANCIAL SERVICES, INC., Petitioner v. RICHARD V. FINK,  
TRUSTEE  
CASE NO: 96-1370

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

BY Don Mari Fedele  
(REPORTER)