

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: EDWARD S. COHEN, Petitioner v. HILDA DE LA
CRUZ, ET AL.

CASE NO: 96-1923

PLACE: Washington, D.C.

DATE: Tuesday, January 20, 1998

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IN THE SUPREME COURT OF THE UNITED STATES

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EDWARD S. COHEN, :

Petitioner :

v. : No. 96-1923

HILDA DE LA CRUZ, ET AL. :

- - - - -X

Washington, D.C.

Tuesday, January 20, 1998

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

DONALD B. AYER, ESQ., Washington, D.C. on behalf of the
Petitioner.

GREGORY G. DIEBOLD, ESQ., Jersey City, New Jersey; on behalf of the Respondents.

JEFFREY A. LAMKEN, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of the United States, as amicus curiae,
supporting the Respondents.

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

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 96-1923, Edward S. Cohen v. Hilda de la
5 Cruz.

6 Mr. Ayer.

7 ORAL ARGUMENT OF DONALD B. AYER

8 ON BEHALF OF THE PETITIONER

9 MR. AYER: Mr. Chief Justice, and may it please
10 the Court:

11 Section 523(a)(2) of the Bankruptcy Code creates
12 an exception to discharge for individual bankruptcies
13 applicable to, quote, debts for money, property, services,
14 or extensions of credit to the extent obtained by fraud.

15 The required fraud under that section includes
16 not only representations that are consciously false, but
17 also reckless false statements, and the issue in this case
18 is whether this exception reaches beyond the amounts
19 actually obtained by the debtor to except from discharge a
20 treble damage award ordered for reckless fraud. Where the
21 fraud involves intentional falsehoods and results in
22 wilful and malicious injury, the damages, punitive and
23 otherwise, are nondischargeable under a different section,
24 523(a)(6).

25 QUESTION: And you agree with that reading?

1 MR. AYER: We do.

2 QUESTION: So then you would have a lack of
3 parallelism between the section you're addressing here and
4 subsections (4) and subsection (6).

5 MR. AYER: We would Your Honor and, in fact, we
6 think that's quite clear from the language, that the
7 structure of the 523 sections as they work, given the
8 literal reading of 523(a)(2), works quite well. 523(a)(2)
9 is a provision which, by its terms, is directed to the
10 actual fruits of the fraud. It's a simple, clear
11 directive that tells people, if they commit fraud, what
12 they get by the fraud will not be discharged.

13 QUESTION: Would that include accounting -- if
14 the defrauding party, the wrongdoer, makes profits from
15 the property that he steals, are those profits
16 recoverable?

17 MR. AYER: I think they would not be, Your
18 Honor. I think that -- that the other provisions that
19 deal with --

20 QUESTION: That's property obtained by the
21 fraud.

22 MR. AYER: Well, it -- I think the most
23 reasonable interpretation is to focus upon the amounts
24 obtained by the act of the fraud, which I would think most
25 immediately would be the amounts obtained in the fraud.

1 What is very --

2 QUESTION: So you think it wouldn't even include
3 attorney's fees and costs in the very action in which the
4 recovery is made?

5 MR. AYER: I think it would not, Your Honor. I
6 think that the other provisions, the (a)(6) provision in
7 particular, which this Court will address tomorrow in the
8 Geiger case, is a provision which is generally applicable,
9 essentially, among other things, to all torts, and it sets
10 a standard which says wilful and -- a debt for wilful and
11 malicious injury.

12 That has been interpreted reasonably, we think,
13 to include punitive damages, to include other penalty
14 sums, to include consequential damages, to include
15 contractually arranged-for attorney's fees, and is a
16 reasonable and uniform way of dealing with what I'll call
17 damages and consequential payments that are owed.

18 Our --

19 QUESTION: Your answer to Justice O'Connor, it
20 seems to me, follows easily from the answer you gave me.
21 I think attorney's fees are even further removed --

22 MR. AYER: Right.

23 QUESTION: -- under your interpretation --

24 MR. AYER: Correct, Your Honor.

25 QUESTION: -- than profits that the tortfeasor

1 gains.

2 MR. AYER: Correct.

3 Now, one interesting result of our
4 interpretation, and it actually is played out in some
5 detail in a decision cited in the Solicitor General's
6 brief, a Tenth Circuit case, In re Gerlach, is that
7 actually the amount awarded under (a)(2), when you focus
8 on the act of fraud and what is obtained, may actually
9 exceed, in some cases, the damages that are otherwise
10 owing, and in that sense it seems it is a very rational
11 and sensible message to people who may commit fraud.

12 QUESTION: Say that again.

13 MR. AYER: Well, in the context -- specifically,
14 the context in Gerlach was a context where the operator of
15 a business selling heavy equipment, selling John Deere
16 tractors, initially got an extension of credit from John
17 Deere, legitimately, but later on they got an extension of
18 that credit by submitting false invoices to show they were
19 doing business that they weren't doing.

20 The Court in Gerlach said that the later
21 extensions of credit involved the obtaining of money by
22 fraud, and as a result the entire amount of the debt that
23 was owed was, in fact, covered by (a)(2), even though
24 there might in that case be no damages at all, so I -- the
25 only point I want to make is that our point is that in

1 (a)(2) you're dealing with what was obtained.

2 The other sections under the code, (a)(6) but
3 also others, also (a)(4), also (a)(11), other -- others
4 deal with money that is gained by fraud, and they set up a
5 different logic. The logic is, what did you -- what the
6 debt is for, the injury, and the injury is interpreted
7 broadly, and --

8 QUESTION: How does Gerlach work? In other
9 words, the Bankruptcy Code supersedes State tort law on
10 the measure of recovery for fraud, in the John Deere case
11 that you're describing.

12 MR. AYER: I think the net result is that -- is
13 that it -- to whatever extent there is a debt it would be
14 nondischargeable under (a)(2) if it is --

15 QUESTION: Ah, to the extent there is a debt.

16 MR. AYER: Well, there has to be a debt,
17 obviously, but it may, in fact, be a debt that is larger
18 than the amount that is damages as a result of the fraud.
19 I guess that's the point that I want to make.

20 Back briefly to the facts of this case, which I
21 think are important. The respondents here are some of the
22 tenants of an 18-unit apartment building that was owned by
23 the petitioner and his father between 1985 and 1989. When
24 their apartment rental business failed in the late
25 eighties as a result of falling real estate values,

1 petitioner filed bankruptcy under Chapter 7.

2 Thereafter, the rent control administrator
3 entered an order to the effect that there had been an
4 overcharge of these tenants which amounted to \$31,000 and
5 the bankruptcy court held that the overcharge was
6 nondischargeable under the (a)(2) provision.

7 The court found further that actual fraud
8 existed in that case on the ground that the act of
9 charging rents was itself an implicit representation of
10 their legality and, second, that petitioner's recklessness
11 in failing to determine what the correct rents were was
12 sufficient to establish an intent to deceive and, finally,
13 the bankruptcy court held that because the overcharges
14 amounted to fraud, treble damages were appropriate under
15 the New Jersey consumer fraud statute and then found that
16 that amount, indeed, also was nondischargeable.

17 Our view is, as is apparent already, I guess,
18 that that result is wrong. It's wrong essentially for
19 three reasons: 1) the plain language of the statute,
20 which talks about debts for money, property, services,
21 extensions of credit to the extent obtained by fraud
22 clearly doesn't include the amounts that are punitive in
23 nature --

24 QUESTION: Well, I don't know that it's all that
25 clear from the language. What does debt for mean? Does

1 it mean liability on a claim for?

2 MR. AYER: It does, Your Honor. That's -- it is
3 defined as liability on a claim for money, property,
4 services, et cetera.

5 QUESTION: Do you rely on the phrase, to the
6 extent?

7 MR. AYER: We do. We think that -- there's been
8 a discussion back and forth in this case about whether to
9 the extent modifies money, property, services, or whether
10 it modifies debt. I think everyone agrees -- in this
11 case, at least, agrees that it modifies money, property,
12 services.

13 Our difference, I think, is that -- how we
14 understand the word for. In the petitioner's view, a debt
15 for a house, or a debt for any particular thing, is a debt
16 for what you have to pay for that thing. It's not a debt
17 for the act of obtaining that thing. It's a debt for the
18 thing.

19 QUESTION: Well now, you indicate that before
20 the 1984 amendments to the statute courts generally
21 thought punitive damages were nondischargeable.

22 MR. AYER: Under (a)(2)?

23 QUESTION: Mm-hmm.

24 MR. AYER: Your Honor, what is very interesting
25 about --

1 QUESTION: Is that right? I mean, that was the
2 general holding of the courts.

3 MR. AYER: I would say that --

4 QUESTION: Well, at least that's what your brief
5 says.

6 MR. AYER: That they were nondischarge -- I
7 think --

8 QUESTION: Right.

9 MR. AYER: I think not, Your Honor. I think
10 that the interpret -- the language prior to 1984 was
11 language that said, debt for obtaining money, property, et
12 cetera, by fraud. Now, we think that's ambiguous
13 language.

14 There are a couple of cases, literally only a
15 couple, that held necessarily that that language does, in
16 fact, reach punitive amounts, and we don't think that it
17 is illogical to reach that result, but what is important
18 is that prior to 1984 and prior to 1978 even more so,
19 there was -- there were not occasions that came up that
20 made courts decide this issue.

21 The main reason is that with the presence of the
22 (a) (6) language that talks about debts for wilful and
23 malicious injury, with that language being there, any time
24 conduct results in wilful and malicious injury, it doesn't
25 matter what (a) (2) means, or what is now (a) (2) means.

1 It doesn't matter what it means to have a debt
2 for obtaining, and so courts in deciding these cases, as
3 we talk in some detail about in footnotes 13 and 14 of our
4 reply brief, of the yellow brief, the courts typically
5 didn't focus specifically on the meaning of that prior
6 language. They didn't have a reason to, and so it isn't
7 possible to say here, as the Court has said in a number of
8 cases, there was an important pre-1978, or pre-1984
9 bankruptcy practice that had been established. Indeed,
10 there was no clear practice that had been established.

11 It is not our mission here to tell you that the
12 meaning of those words, if it mattered what the pre-'78
13 words meant and you didn't have (a)(6) and you had to
14 decide, might a court decide that they in fact meant to
15 include punitive damages.

16 Maybe they did. It isn't clear. I would only
17 say that, when reviewing -- what you review Justice Breyer
18 for the Court's opinion in the O'Gilvie case, which talks
19 about, under the different statute, under the IRS statute,
20 whether damages on account of personal injury, whether
21 those include punitive damages, and the Court ruled that
22 they did not, if that is an admissible result, it seems to
23 me it's certainly admissible to conclude -- one could
24 conclude that -- that a debt for obtaining money by fraud
25 doesn't include it.

1 Our only point is that it was ambiguous. It
2 never got clearly resolved by the courts but in a single
3 case that we're aware of, a Ninth Circuit case called
4 Houtman.

5 QUESTION: Why isn't that function of (6) still
6 applicable? I mean, I don't understand why (6) would make
7 the question irrelevant then and not make it irrelevant
8 now.

9 MR. AYER: It is still applicable, Your Honor,
10 and I think that it is true that this case and this
11 Court's decision in this case is only going to be
12 determinative in the group of cases -- and I debated
13 whether to characterize it as the sliver of cases or a
14 larger group of cases, but the group of cases that
15 involves conduct that is fraudulent, meaning it's at least
16 reckless, but it falls short of being wilful and
17 malicious.

18 QUESTION: Then Mr. Ayer, you would concede that
19 your argument leads to the result that is suggested in the
20 Solicitor General's brief at page 21. That is, the bolts
21 that were sold with fraudulent representation for \$5,000
22 and then there's a crash of the plane --

23 MR. AYER: Justice Ginsburg, I know your
24 question, I think. It does lead to the result that that
25 conduct, like other kinds of tortious conduct, will

1 produce nondischargeability of punitive damages only where
2 the conduct is found wilful and malicious.

3 QUESTION: So that if it isn't wilful and
4 malicious, just reckless --

5 MR. AYER: Right.

6 QUESTION: -- then the result is \$5,000 and not
7 what it cost to rebuild the plane.

8 MR. AYER: That is correct.

9 QUESTION: It is clear to you that wilful and
10 malicious does not include reckless? Punitive damages I
11 had always thought were only given for intentional torts,
12 and yet they're given for recklessness.

13 MR. AYER: Well --

14 QUESTION: I assume they're given for
15 recklessness because it amounts to wilful and malicious,
16 as it does in the criminal law. You know --

17 MR. AYER: Well, that -- I mean, that --

18 QUESTION: -- firing the rifle into the empty
19 house. You don't know if somebody's there at all. You
20 really don't care.

21 MR. AYER: I mean, that I think is some part of
22 the question pending in the Geiger case which will be
23 argued tomorrow, and it has been our understanding from
24 reading the cases that we're aware of that two things are
25 clear under the law.

1 One is that reckless misrepresentations do come
2 within (a)(2), that it is fraud under the Restatement and,
3 as this Court incorporated in essence the Restatement into
4 that --

5 QUESTION: Sure they do.

6 MR. AYER: And secondly --

7 QUESTION: So do wilful ones, though.

8 MR. AYER: Correct, and secondly -- I mean, our
9 best reading of the cases is that wilful and malicious
10 requires a measure of intentionality and knowing conduct
11 vis-a-vis the harm that results.

12 Now, we could be wrong about that. It's not an
13 issue that has been raised in this case because thus far
14 no one has suggested that the conduct here was wilful and
15 malicious, and I guess I would submit that that's highly
16 unlikely, given the fact that we're dealing with implicit
17 representations based simply on the fact that he charged a
18 certain rent, and recklessness in failing to ascertain
19 what they thought the legal rent was.

20 I would think that would be hard to find wilful
21 and malicious, but I will not attempt to define, you know,
22 the case, the outcome of the case tomorrow.

23 QUESTION: I think you may have the better view
24 in a close question on the reading of (a)(2), but I'm
25 concerned about the lack of parallelism with (4) and (6),

1 which is what we've been addressing -- addressing here.

2 If you prevail, there are going to be cases that
3 might be classified under this section or section -- the
4 section on malicious conduct, and then we'd have to decide
5 whether it falls under this -- the --

6 MR. AYER: Well, I mean, our understanding of
7 the statute as it now reads is that there are several
8 provisions that make nondischargeable various damages. We
9 would submit that the (a)(2) provision is essentially not
10 a damages -- it doesn't deal with damages. It deals with
11 the specific act of obtaining something by fraud and it
12 says, no, you're going to be stuck with that if you got it
13 by fraud.

14 The other provisions, the (a)(4) provision
15 relates to fraud by a fiduciary, among other things. The
16 (a)(11) provision is a special provision enacted with
17 regard to fraud in the context of federally insured
18 institutions and (a)(6), dealing with wilful and
19 malicious, as the Court suggested in footnote 2 of the
20 Grogan decision, that might be, the Court said there --
21 didn't try to decide the issue, but suggested that that
22 might be a sensible place to focus the discussion of
23 whether or not fraudulent conduct is wilful.

24 So the lack of parallelism I would submit is the
25 product of the fact that (a)(2) is looking at something

1 else. (a)(2) is looking at the act, the obtaining, and
2 saying no, you can't keep that, and the rest of it
3 creates, you know, frankly I would say a uniform and
4 sensible system.

5 If the line that's to be drawn as a matter of
6 policy is that nondischargeability comes when conduct gets
7 bad enough that you can say it's wilful and malicious,
8 then why should fraudulent conduct be any different than
9 other kinds of tortious conduct? Why would you single
10 that out?

11 They've already singled out the act of obtaining
12 by fraud. That's important. That's a significant thing.
13 But why should we reach in and say -- why should the court
14 reach in and say, well, we know it only really matters
15 when you have reckless fraud, and we know that it's going
16 to make nondischargeable statutory treble damage awards
17 such as in this case where somebody acts by an implicit
18 representation based on reckless failure to determine
19 facts.

20 That's really -- the situation of reckless fraud
21 is the only one where this case -- I think it's the only
22 one where this case makes any difference, because when you
23 get beyond reckless fraud and you say wilful and
24 malicious, then you're dealing with it under (a)(6), and
25 I --

1 QUESTION: Mr. Ayer, your question presented in
2 this case is phrased in terms of punitive damages and yet,
3 as I read them, none of the statutory sections we're
4 talking about refer to punitive damages.

5 MR. AYER: That's correct, Your Honor. We use
6 that phrase, rightly or wrongly, as a generic reference to
7 include not only common law punitive awards and statutory
8 treble damage awards -- is that addressing your question?

9 We don't mean by punitives to focus only on the
10 amount of jury awards as a punitive damage award in the
11 conventional sense.

12 QUESTION: Then what do you mean by it?

13 MR. AYER: Well, we mean to encompass awards
14 that are in the nature of a penalty. The court below
15 specifically assumed for purposes of this case, without
16 deciding, that the treble damage penalty -- treble damage
17 award in this case, the trebling, was solely for punitive
18 purposes.

19 QUESTION: But now, supposing in an action, an
20 ordinary tort action for fraud, ordinary damages or
21 benefit-of-the-bargain damages are recovered. What would
22 be your view as to those?

23 MR. AYER: Well, our view would be that the
24 (a) (2) provision should be read in accordance with its
25 terms and that would mean that the amount that the debtor

1 got by fraud would, in fact, go back.

2 The benefit-of-the-bargain damages may or may
3 not equal that. You can conjure up all sorts of different
4 factual --

5 QUESTION: They might be greater.

6 MR. AYER: They might be greater. As I
7 indicated before, they might conceivably be less and I
8 guess the affirmative point vis-a-vis (a)(2) is that, in
9 doing what Congress said in this statute, they've created
10 a very clear statement, we think, and a clear statement
11 that is important as a -- essentially a wall against
12 fraudulent conduct. It's a directive that says, if you've
13 got it by fraud, you don't get to keep it.

14 QUESTION: But it turn -- the issue turns on
15 whether there's fraud, not where there are punitive
16 damages --

17 MR. AYER: Correct.

18 QUESTION: -- doesn't it?

19 MR. AYER: Correct, and nor on, indeed, whether
20 there are damages, whether there have been found to be
21 specific damages.

22 QUESTION: Mr. Ayer, it seems to me you somewhat
23 understate the consequence of the rule you're urging on
24 us. You say it really only makes a difference when
25 there's recklessness but not wilfulness and some kind of a

1 punitive award, but it seems to me it also makes a
2 difference when there isn't recklessness and the issue is
3 whether you only get back under (a)(2) the money that the
4 person -- or whether there is covered by (a)(2) only the
5 money that the person received, or also there is covered
6 whatever profits are made from that money, which often
7 happens.

8 MR. AYER: Well, I -- that --

9 QUESTION: And frankly that's the part of your
10 interpretation that troubles me more than the other one.

11 MR. AYER: Well, that is -- I mean, in all
12 honesty, Your Honor, that is a possible extension of
13 the -- of our reading of it that I will say in all honesty
14 had not occurred to me, but it's a possibility, that in
15 other words it is possible, perhaps, to say that you got
16 this money by fraud and then you got profits by fraud,
17 but -- you got profits from that money and therefore all
18 of that was obtained by fraud and I must say, I think
19 that's -- that is an interpretation which I do think could
20 be reasonable in the context --

21 QUESTION: And that's where the distinction
22 would be between the profits, which under this
23 interpretation would be recoverable, and attorney's fees
24 and costs incurred in recovering it, which is not
25 recoverable.

1 MR. AYER: Right. I mean, I think that -- I
2 think that punitive damages, I think that consequential
3 damages, I think that other damages which do not grow
4 directly from what was obtained clearly are not
5 encompassed within (a)(2), and that you deal with those
6 damage issues in the context of either (a)(6) or one of
7 the other special sort of egregious wrong provisions that
8 are in --

9 QUESTION: Okay. But you think that any funds
10 that are actually received by the defendant could be
11 regarded as obtained by the fraud.

12 MR. AYER: I think that's a reasonable reading,
13 Your Honor.

14 QUESTION: Is -- did -- am I right in thinking
15 you've looked through the legislative history of the 1984
16 amendments, you've read the reports, you've looked at the
17 floor statements, et cetera, and you couldn't find
18 anything as to any reason why Congress made the linguistic
19 change.

20 MR. AYER: There is a one-sentence reference
21 that talks about the change being stylistic.

22 QUESTION: All right.

23 MR. AYER: Words to that --

24 QUESTION: If there is no reason, then -- and if
25 the language permits, as Justice O'Connor pointed out

1 before, why shouldn't we read this exactly the same as
2 it's always been read in the history, i.e., liability on
3 the claim. They're talking about a claim. In other
4 words, they're talking about a judgment, i.e. they're
5 talking about what is normally in a bankruptcy proceeding
6 a piece of paper.

7 The bankruptcy judge sits there, he says, I've a
8 piece of paper it has a number on it. You go read the
9 number. You ask the question, is this piece of paper in
10 an action for fraud. It is or it isn't. If the answer's
11 yes, you write in the number. If the answer's no, you
12 don't.

13 Now, I take it, if there's no intent whatsoever
14 to make a change -- and we haven't found any. They said
15 it was stylistic -- then that's the simple way that
16 bankruptcy proceedings used to work, and what's the reason
17 for making it more complicated now?

18 MR. AYER: Okay.

19 QUESTION: In other words, we ignore the
20 language unless there's legislative history to indicate
21 that the language really means something.

22 MR. AYER: Thank you, Your Honor.

23 (Laughter.)

24 QUESTION: I -- go back to my question.

25 MR. AYER: Okay.

1 QUESTION: If the language, as you read it, says
2 liability on a claim, because debt is defined as liability
3 on a claim, then we look to see whether the changes that
4 were made in the lang -- well you've heard my question.

5 MR. AYER: Okay.

6 QUESTION: There's no --

7 MR. AYER: The language -- there are several
8 parts to the answer. The language says liability -- if
9 you put all the pieces together, the liability on a claim
10 as relevant here for money to the extent obtained by
11 fraud. That is not the same as saying liability for the
12 act of obtaining money by fraud. That's our first point.

13 Our second point is that

14 QUESTION: That's -- I understand. My question
15 is, is there any reason for treating the interpretation of
16 the present language differently from the interpretation
17 of the prior language and --

18 MR. AYER: Well, except for the fact --

19 QUESTION: All right. I -- now, the answer
20 might be yes, or it might be no, but I asked about the
21 history --

22 MR. AYER: Okay --

23 QUESTION: -- because they said it was just
24 stylistic.

25 MR. AYER: I guess I would make two points, one

1 which I made before and that is, the prior language never
2 needed to be and in fact I would submit, looking at our
3 footnotes 13 and 14, never was definitively interpreted
4 the way Your Honor has indicated, but the most important
5 reason is that -- well, I won't say the most im -- I think
6 the most important reason is the words of the statute.

7 Beyond the words of the statute and the
8 structure and the lack of a prior clear precedent, all of
9 which we submit is dispositive, there is the very
10 important fact that this whole set of provisions, 523(a),
11 is a set of exceptions to discharge that applies only in
12 the context of individual bankruptcies.

13 More than 90 percent of individual bankruptcies
14 are now consumer bankruptcies relating to consumer debts,
15 and what we know is that Congress in 1978 was
16 substantially concerned about the problems of the
17 ineffectiveness of the bankruptcy process vis-a-vis
18 consumer debtors, was concerned about overreaching
19 creditors, was concerned about creditors who were
20 aggressively asserting positions using the nondischarge
21 provision specifically referred to by this Court in *Field*
22 *v. Mans*, talking in terms of the financial statement
23 provisions and the abuses by such creditors.

24 A broad construction of these words -- the case
25 before the Court involves certain facts. It represents a

1 relatively tiny proportion of the bankruptcy -- individual
2 bankruptcy cases in this country to which it will apply.

3 QUESTION: Mr. Ayer, (a)(4) says in effect that
4 a discharge does not discharge a debtor from any debt for
5 fraud while acting in a fiduciary capacity. There, there
6 is no language about money, or property, or to the extent
7 obtained by.

8 MR. AYER: Correct, Your Honor.

9 QUESTION: So under (a)(4) would punitives be
10 recoverable and attorney's fees and so forth.

11 MR. AYER: They have been so held, Your Honor.
12 Correct, they have.

13 QUESTION: And in the petition for certiorari
14 filed on behalf of your client on page 9, footnote 4, it
15 says resort to legislative history is unnecessary, given
16 the plain language and, prior to 1984, (a)(2) barred
17 discharge of a debt for obtaining money by fraud, which
18 courts construed to bar discharge of both compensatory and
19 punitive damages in fraud cases, and that's language from
20 your petition.

21 I took it to mean that was what the
22 interpretation was before the amendment.

23 MR. AYER: Well, the --

24 QUESTION: And the amendment just added to the
25 extent.

1 MR. AYER: It is true -- it is true that the
2 Houtman case in the Ninth Circuit did so hold and we
3 discuss that in our brief. It did so hold in a case that
4 did involve reckless fraud. It did not discuss the issue,
5 however, in any detail. There is that case that held
6 that.

7 There are other cases that held punitives to be
8 nondischargeable in a situation where the court said
9 generally either 523(a), or we have (a)(2), (a)(4),
10 (a)(6) --

11 QUESTION: And under (a)(4) it would all be
12 nondischargeable and the only difference in language of
13 the two is the to extent --

14 MR. AYER: No, it's --

15 QUESTION: -- obtained by --

16 MR. AYER: The structure of (a)(2) says debt for
17 money, property, services. It's debt for a thing versus
18 debt for an act. (a)(4), (a)(6), (a)(9), others of the
19 provisions, use the construction debt for wilful and
20 malicious injury, debt for fraud by a fiduciary -- that
21 construction, and I think it's quite reasonable, has been
22 found to result in all of the damages for that act being
23 found nondischargeable.

24 The construction that says debt for money, or
25 debt for property, is a debt for the property, and that's

1 our position.

2 QUESTION: Mr. Ayer, following up on Justice
3 O'Connor's thought, is it not true -- you looked at the
4 issue much more carefully when you -- before you filed
5 your merits brief, of course, and are backing away from
6 the footnote, but doesn't the footnote express what the
7 treatise writers thought the law was?

8 MR. AYER: I think that the prior version of
9 Collier's took that position.

10 QUESTION: Yes.

11 MR. AYER: I think that that's true, but I also
12 think it's true that there was virtually no authority on
13 it.

14 May it please the Court, I'd like to reserve the
15 rest of my time for rebuttal.

16 QUESTION: Very well, Mr. Ayer.

17 Mr. Diebold, we'll hear from you.

18 ORAL ARGUMENT OF GREGORY G. DIEBOLD

19 ON BEHALF OF THE RESPONDENTS

20 MR. DIEBOLD: Mr. Chief Justice, and may it
21 please the Court:

22 When considered in light of the history and
23 structure of the code, the clear purpose of the phrase, to
24 the extent obtained by fraud, is to distinguish between
25 legally obtained property or money and fraudulently

1 obtained money or property.

2 In fact, the precise language that was used in
3 the amendment was taken from a case, *In re Danns*, a Second
4 Circuit case, which discussed that very issue, noted that
5 there was a conflict in authority, and held that in a
6 situation where a debtor obtains money through a legal
7 credit transaction and then subsequently commits an act of
8 fraud and then obtains additional money through a
9 refinancing, the amount of money that gives rise to the
10 debt is the amount obtained through fraud, but it's the
11 debt which is nondischargeable, and the debt has been
12 defined and is still defined by the code as the liability
13 on a claim.

14 The liability on a claim is the amount that you
15 become liable for as a result of the money that you
16 obtained by fraud.

17 QUESTION: It depends on how you use the word
18 claim. I mean, you can say you have a claim for money
19 that someone owes you, using the word, the object of the
20 claim is what you're entitled to.

21 But you can also say you have a claim for fraud,
22 or a claim for personal injury, and in that case you're
23 using it to refer to the cause of action rather than what
24 you're entitled to, and the point made by your colleague
25 here is that this statute uses the word in different

1 sections in different ways.

2 In (4) and in (6) and in (9) it's a claim for
3 death, for personal injury, a claim for wilful injury, and
4 so forth, whereas in this it says a claim for money.
5 That's quite different. And then it says, for money to
6 the extent that.

7 MR. DIEBOLD: Well, it's --

8 QUESTION: What's your response to that?

9 MR. DIEBOLD: My response, Justice Scalia, is
10 that it's a -- what's nondischargeable is the debt. The
11 debt is based on a claim for money to the extent that the
12 money was obtained by fraud.

13 QUESTION: Yes, but it's very difficult to say
14 that the punitive damages were obtained by fraud.

15 MR. DIEBOLD: It's difficult to say that if you
16 concede, which we don't, that obtained is used to limit
17 the amount of debt that you incur -- incur, but what
18 you're -- what we say obtained is limiting is to explain
19 that the fraud, that there must be fraud in connection
20 with the money you obtained and that gives rise to the
21 nondischargeable debt, which in this case, under New
22 Jersey law, is three times the amount of the overcharged
23 rents. Like in --

24 QUESTION: I just want to go back to that one
25 case you said. I mean, the odd -- I think the language

1 that gives me the most trouble from your point of view is
2 the words, to the extent. Why did they put that in if
3 they meant claim? You know, liability on a claim, a claim
4 for fraud, you just say the thing that's nondischargeable
5 is liability on a claim for a fraud. That's the end of
6 it. Why did they put this word, to the extent?

7 MR. DIEBOLD: I think they used to the extent as
8 a way of showing that the debt was limited to the extent
9 that you obtain money through fraud, but what is
10 nondischargeable is that debt which arises from the
11 obtaining --

12 QUESTION: Where -- is there such a thing as a
13 claim, and the claim --

14 MR. DIEBOLD: Well, the debt --

15 QUESTION: Was that the case that you just
16 mentioned that? You have a claim for money, or a claim
17 for property and the claim is for money, and part of the
18 claim is for money -- some of the money is obtained by
19 fraud and some of it's not obtained by fraud. I mean, is
20 there such an animal as that?

21 MR. DIEBOLD: I think that happens all the time
22 in the commercial world.

23 QUESTION: How does that work?

24 MR. DIEBOLD: Let me use an example in the
25 credit transaction.

1 It very often happens that in a credit card
2 situation you charge things, you incur bills, and then you
3 decide you're going to file for bankruptcy, and a month
4 before you go to the attorney and you file for bankruptcy
5 you run up \$10,000 worth of debt.

6 Courts have held that that money is obtained by
7 fraud, so to the extent that your credit card bill was
8 obtained by fraud, that debt is nondischargeable, but if
9 the State of New Jersey, as it has in this case, chooses
10 to impose a penalty for that --

11 QUESTION: But you don't usually think of one
12 obtaining a bill. I mean, you obtain property for which
13 you get a bill. Obtain sounds like it's -- you've
14 succeeded in doing something.

15 MR. DIEBOLD: That's correct, you don't
16 obtain -- you obtain money.

17 QUESTION: Yes.

18 MR. DIEBOLD: But you obtain a debt for
19 obtaining that money which is nondischargeable. The debt
20 here happened to be more than the money you actually
21 obtained, three times more.

22 QUESTION: Well, let me ask you another
23 question. Referring to this general section of (a),
24 subsection (a). Subsection (a)(7) says that it's not
25 dischargeable to the extent such debt is for a penalty

1 payable to a governmental unit and is not compensation for
2 actual pecuniary loss, other than a tax penalty.

3 There the Congress has specified certain
4 penalties that will be nondischargeable, those payable to
5 the Government. Does that mean that they thought about
6 penalties such as punitive damages that aren't payable to
7 the Government and didn't include them anywhere?

8 MR. DIEBOLD: No, Justice, I don't think it --

9 QUESTION: No?

10 MR. DIEBOLD: -- it does. I think that first of
11 all with (a)(7), the difference between (a)(7) and (a)(2)
12 is that it has to be a debt owed to, or penalty owed to
13 the Government, but there's nothing in the code itself
14 which restricts or makes each of those sections exclusive.
15 a non-Government --

16 QUESTION: Well, at least we know from (a)(7)
17 that Congress thought about penalties --

18 MR. DIEBOLD: Exactly, and we also know --

19 QUESTION: -- to the extent they're payable to
20 the Government. Sometimes punitive damages are payable to
21 a governmental unit. Maybe in that case it would go
22 under (7).

23 MR. DIEBOLD: That's correct. There's no
24 requirement of fraud in (a)(7), so that the Government can
25 recover those penalties regardless of what the reason for

1 their imposition was. In (a)(2), of course, there's a
2 requirement that the private party show fraud.

3 But (a)(7) also demonstrates that Congress knew
4 clearly how to distinguish between compensatory damages
5 and punitive damages if they wanted to.

6 QUESTION: Is this -- can I just -- are you
7 finished, because I want to get my -- are you finished
8 with that response?

9 MR. DIEBOLD: Yes.

10 QUESTION: All right. The -- I want to be sure
11 I understand this. The credit card company says Smith
12 went bankrupt, and Smith owes me \$50,000, so my claim as
13 the credit card company is, I have a claim -- I say Smith
14 is liable on my claim for \$50,000.

15 Now, \$20,000 of that he obtained by fraud, so I
16 have a claim for 50, and that claim for 50 is fraud -- is
17 for fraud to the extent of 20,000.

18 MR. DIEBOLD: That's correct.

19 QUESTION: And your position, your view is that
20 that claim is a claim for fraud to the extent of \$20,000,
21 and any liability on that claim for \$20,000 is liability
22 on a claim to the extent obtained by fraud. So if
23 liability on that portion of the claim \$20,000 is \$100,000
24 because of punitives, et cetera, the whole thing's
25 nondischargeable.

1 MR. DIEBOLD: The \$100,000 is nondischargeable.

2 QUESTION: And the case that said all that is?

3 MR. DIEBOLD: In re Danns made the distinction
4 between those.

5 Now, in addition to that we have the --

6 QUESTION: Well, I'm not sure how Danns helps
7 you, because in Danns it was just the first part of
8 Justice Breyer's hypothetical, as I recall the case, the
9 \$20,000 and the \$30,000, and they said that the \$20,000
10 that was obtained by fraud, that is nondischargeable, not
11 the 30, or am I misreading the case?

12 MR. DIEBOLD: No, Your Honor is misreading -- is
13 not misreading the case, but the -- Danns did not involve
14 the imposition of a trebling punitive factor, but the --
15 what Danns did hold is that the statutes permitted the
16 discharge of that portion of the debt which was not
17 obtained by fraud.

18 QUESTION: So that the debt is severable for
19 purpose of applying the dischargeability provisions, which
20 is what the petitioner is saying, or am I misstating?

21 MR. DIEBOLD: I respectfully think that Your
22 Honor is. We both agree that the statute -- I believe we
23 both agree that the statute permits a severing of that
24 obtained legally and that obtained by fraud. The question
25 is, does the statute in addition prohibit the imposition

1 of treble damages or other penalties or punitive damages
2 based on the amount obtained by fraud, which in Your
3 Honor's hypothetical would be the \$20,000.

4 QUESTION: Am I correct that in your answer to
5 Justice Breyer's question you were assuming that debt or
6 claim and money are synonymous, but it seems to me that
7 under the statute they're not synonymous. There are
8 certain debts or claims, and those debts or claims may to
9 some extent represent money obtained, so that if you
10 recognize the distinction between claim on the one hand
11 and the money that may or may not be represented by that
12 claim on the other hand, you would have to answer
13 differently, wouldn't you?

14 MR. DIEBOLD: Well, I'm not sure I'm
15 following --

16 QUESTION: You would have to -- you would have
17 to say that if you recognize the distinction you simply
18 cannot amalgamate money obtained by fraud and damages
19 assessed with respect to that money obtained by fraud and
20 that, it seems to me, is what you consistently do in your
21 argument. You do identify or amalgamate those two things
22 and yet the statute seems not to do that.

23 MR. DIEBOLD: Well, except that the statute
24 defines debt as a liability on a claim.

25 QUESTION: Mm-hmm.

1 MR. DIEBOLD: And in this case the liability on
2 the respondent's claim was, under New Jersey law, three
3 times the amount of the money obtained by fraud.

4 QUESTION: Which means that part of the claim
5 represents money obtained and part of the claim represents
6 something else.

7 MR. DIEBOLD: Well, if I can use an example to I
8 think answer what I believe to be Your Honor's question,
9 let's assume that in this case the legal rent is \$500 and
10 the landlord had a good faith reasonable belief that the
11 rent was \$600, but he decided to tack on another \$100
12 because he thought he could get away with it.

13 What we're saying is that the amount between
14 \$500 and \$600 would be fully dischargeable. The amount
15 between \$600 and \$700 is the amount that he obtained by
16 fraud but that -- but the debt that that obtaining would
17 create would be \$300 under New Jersey law.

18 QUESTION: But the statute does not, in terms,
19 speak in subsection (2)(A) of debts, it speaks of money.

20 MR. DIEBOLD: It speaks --

21 QUESTION: And the money is less, in your
22 example, than the debt.

23 MR. DIEBOLD: The statute, though, as a whole,
24 deals with the nondischargeability of debt.

25 QUESTION: Yes, but when you start talking about

1 statutes as a whole, that means this particular language
2 is against me, but I'm going to try to find a broader
3 purpose. Do you concede that as long as you make the
4 distinction between the debt or claim and the money on the
5 other hand, recognizing that the latter may be less than
6 the former, the language of the statute is against you?

7 MR. DIEBOLD: No, I don't concede that.

8 QUESTION: Then I --

9 QUESTION: Let me try it another way. I think
10 I'm asking the same question.

11 It seems to me perfectly reasonable to add on
12 the trebling in those sections that speak of any debt for
13 fraud, for wilful and malicious injury, when they talk
14 about a debt for the wrongful act. Anything that you get
15 by reason of the wrongful act, including the trebling,
16 belongs to you.

17 But when they're using claim in the other way,
18 or debt in the other way -- that is, a liability for a
19 claim -- and they're saying debt for money, money isn't a
20 wrongful debt. When it says debt for money to the extent
21 that, there it seems to me not proper to add on any
22 trebling that you get.

23 Now, what's the response for that? You have to
24 understand that (2) and maybe (7) are different from the
25 other sections in that they refer to debt for what you're

1 asking for, not for the wrongful act.

2 MR. DIEBOLD: I don't think it's possible to
3 define debt in different ways depending on the subsection
4 that you're using.

5 QUESTION: I'm not defining debt in different
6 ways. I'm just noting that the object of the debt is
7 phrased differently in these different subsections. In
8 some cases the object is the wrongful act. In other
9 cases, it is what you are asking for by reason of the
10 wrongful act.

11 MR. DIEBOLD: I think as a matter of grammar
12 that's a possible interpretation, but to reach that
13 conclusion, Your Honor would have to assume that in 1984
14 Congress intended to change what was I believe concededly
15 the -- at least the majority position that punitive
16 damages under (a)(2) were not dischargeable.

17 QUESTION: But wasn't the prior law in exactly
18 the form that Justice Scalia used as his contrast? Wasn't
19 the operative phrase in the prior law debt for obtaining,
20 as opposed to debt for money obtained by? Isn't that
21 correct?

22 MR. DIEBOLD: That's correct, but I think that
23 the danger of looking at just the phrase that we're
24 concerned about in this case is that it disregards the
25 complete absence of any legislative history to support the

1 position that the petitioner wishes you to adopt.

2 I don't think that it's reasonable to assume
3 that Congress would have decided to reduce the liability
4 of a debtor for fraudulent conduct without at least some
5 discussion or reference to it in the legislative history.

6 QUESTION: Did the pre-1984 language deal in
7 terms of punitive damages?

8 MR. DIEBOLD: It didn't deal in terms of
9 punitive damages specifically.

10 QUESTION: And this one doesn't either, does it?

11 MR. DIEBOLD: No.

12 QUESTION: Are you saying that the petitioner,
13 Mr. Ayer, is interpreting debt differently in (2) and in
14 (6)?

15 MR. DIEBOLD: Yes.

16 QUESTION: Because in (2) you look at it from
17 the standpoint of what the debtor owns and in (4) and (6)
18 you look at it from what the standpoint of what the
19 creditor is owed?

20 MR. DIEBOLD: That's correct. That would be my
21 position, and I think --

22 QUESTION: Well, but doesn't his argument use
23 debt in exactly the same way? Debt is used synonymously
24 with claim, but his argument simply depends upon the fact
25 that the statute recognizes that some debt is for money

1 obtained and other debt is for judgments rendered.

2 QUESTION: That is to say, and this is the same
3 question, that debt means claim as further defined
4 subsection by subsection by subsection?

5 MR. DIEBOLD: I don't think that the language,
6 the operative language in section (2) is attempting to
7 further define debt, though. I think that even the
8 petitioner concedes that the holding in the Levy case,
9 which held that the phrase modified debt, is correct. I
10 think that what Congress was intending to do, as was shown
11 by the 1978 legislative report that's quoted at page 19 of
12 the Solicitor General's brief, is to distinguish between
13 how that debt was obtained.

14 The entire structure of the -- of 523 is to
15 define or list certain types of conduct for which debts
16 will not be dischargeable. The conduct that is non --
17 that gives rise to a nondischargeable debt under (a)(2) is
18 that conduct which is fraudulent. If you obtain money
19 legally and fraudulently, then the statute allows you to
20 separate those two situations and only the debt based on
21 the fraudulently obtained money would be nondischargeable.

22 QUESTION: And that's what In re Danns was
23 about.

24 MR. DIEBOLD: Yes.

25 QUESTION: And so you're saying, if you want to

1 know why Congress used the language it did, read In re
2 Danns and at that point you'll see what the drafter had in
3 front of him, or whoever drafted it, and that's why they
4 chose that language.

5 MR. DIEBOLD: That's right, and the very
6 language to the extent by is in the In re Danns opinion.

7 Our position, if I may sum up, is that there
8 is -- there is really no question, if this case were
9 brought 20 years ago, that the punitive damages would not
10 be discharged.

11 Congress in 1984, throughout the little --

12 QUESTION: Of course, they dispute that. I
13 mean, you say there's no question, but he thinks there's a
14 question.

15 MR. DIEBOLD: Well, even this Court's opinions
16 have talked about liabilities for fraud.

17 QUESTION: There was no opinion of this Court.

18 MR. DIEBOLD: There was no opinion directly
19 deciding this issue prior to 1984 under the old language
20 of the code, but there are -- there were opinions of this
21 Court that used the term liabilities for fraud.

22 QUESTION: Judge Greenberg said, this statute
23 says money obtained by fraud. It doesn't say, monetary
24 relief imposed because of fraud.

25 MR. DIEBOLD: Well, that's correct, and perhaps

1 Congress could have written this a little better but the
2 fact is, I believe, that Congress would not have changed
3 this statute and how it operates significantly in the way
4 that the petitioner wishes you to read it without some
5 discussion of it.

6 The discussion, what little there was, about
7 consumer debt and bankruptcy show that Congress was
8 concerned about curtailing debtor abuse. You would have
9 to conclude, in order to rule in favor of the petitioner,
10 that what Congress did in 1984 was stop and say, okay, but
11 let's give a break to fraudulent debtors and reduce their
12 liability and I don't think that under the legislative
13 history of this statute that that's what Congress intended
14 to do.

15 QUESTION: Well, there isn't any legislative --
16 may I just ask this one question. We've talked about a
17 hypothetical in which the debt would be -- Justice
18 Breyer's \$50,000, the \$20,000 of it was obtained by fraud
19 and that you're only talking about the consequence of that
20 \$20,000. Are there any real live cases out there that you
21 can cite that present situations similar to that
22 hypothetical? This one doesn't.

23 MR. DIEBOLD: Well, I can't cite actually
24 reported cases, but I think it occurs all of the time that
25 credit card companies seek the nondischargeability of

1 debts which are run up, say, at the last minute, prior to
2 filing bankruptcy.

3 QUESTION: Oh, I understand, but they would not
4 have added onto them any penalty, as you do here. That's
5 the problem.

6 MR. DIEBOLD: Well, they may. Under New Jersey
7 law they would, if the court determined --

8 QUESTION: Theoretically, but I -- I'm just
9 concerned about the absence of any litigated case that
10 presents the hypothetical that you rely on.

11 MR. DIEBOLD: I'm not aware of any. Thank you.

12 QUESTION: Thank you, Mr. Diebold.

13 Mr. Lamken, we'll hear from you.

14 ORAL ARGUMENT OF JEFFREY A. LAMKEN

15 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

16 SUPPORTING THE RESPONDENTS

17 MR. LAMKEN: Mr. Chief Justice, and may it
18 please the Court:

19 For nearly a century, bankruptcy law has
20 excluded from discharge all liabilities arising from the
21 debtor's fraud, including consequential and, where
22 imposed, punitive damages. Nothing in section 523(a)(2)
23 alters that settled practice.

24 The code defines the term, debt, as liability on
25 a claim. Section 523(a)(2) thus exempts from discharge

1 liability on a claim for money or services to the extent
2 the money or services were obtained by fraud.

3 QUESTION: Well, you don't define punitive
4 damages as consequential damages, do you?

5 MR. LAMKEN: No, I would not define punitive
6 damages as consequential damages.

7 QUESTION: That's the colloquy we had with Mr.
8 Ayer, and I think he conceded that maybe some
9 consequential damages are within (a)(2), even under his
10 interpretation. We're talking about -- consequential and
11 punitive are quite different.

12 MR. LAMKEN: No, Your Honor, I don't think
13 Mr. Ayer would concede that consequential damages to the
14 creditor are within his interpretation. His
15 interpretation limits what is nondischargeable to the
16 amount actually obtained by the debtor.

17 Now, if the debtor also makes an additional
18 profit, he was considering the possibility of including
19 that, but the consequential damages are clearly
20 excluded --

21 QUESTION: Well, I think of consequential
22 damages in connection with contracts, in Hadley v.
23 Baxendale, not torts. What do you mean by consequential
24 damages?

25 MR. LAMKEN: Consequential damages do follow

1 from torts. I think the example on page 21 of our brief,
2 for example, where the defective bolts are sold to an
3 airline with a representation that they're aircraft
4 quality, the consequential damages would be the cost of
5 actually replacing those bolts. That would not represent
6 money obtained by the debtor, but it would represent
7 consequential damages and therefore a proper recovery
8 under --

9 QUESTION: Well, what's the difference between
10 consequential damages and actual damages in your view?

11 MR. LAMKEN: In this case -- well, consequential
12 damages I've used rather loosely. I should apologize.
13 Those are actual damages, but they are not restitutionary
14 damages. They are damages that are incurred by the
15 creditor but do not represent a gain to the debtor.

16 QUESTION: But don't you see a difference
17 between what you can get for a claim for fraud and what
18 you can get on a claim for money obtained by fraud?

19 MR. LAMKEN: Your Honor, I think the question
20 assumes that the phrase, a claim for money obtained by
21 fraud, means a claim to acquire or to obtain the money
22 which was obtained by fraud. I think it's clear that
23 Congress did not use the phrase, debt for, or claim for,
24 in that sense.

25 From section (a)(2)(A) itself, that refers to a

1 claim for services obtained by fraud. It's clear that the
2 creditor is not trying to acquire the services that were
3 obtained by fraud. What the creditor wants is the
4 liability that was imposed as a result and that liability
5 can include punitive and consequential damages.

6 QUESTION: That part, though, I don't think was
7 conceded by Mr. Ayers. I don't know that they concede
8 that even -- so we go back to Danms and we say, this is
9 all the same for the history of bankruptcy law. They've
10 always meant the same thing. But what is that same thing,
11 and at that point I think they have not conceded that even
12 if you go back to 1890, that there would be liability for
13 the punitives and --

14 MR. LAMKEN: I don't think if you go back to
15 1898 it could be disputed. The 1898 act excepted from
16 discharge judgments in actions for fraud. I don't think
17 that the phrase, judgments in --

18 QUESTION: But has it been clearly held that if
19 you go back, let's say, to the 1898 act or the 1978 code,
20 et cetera, that it does include punitives? I'm not --
21 have they conceded that? I'm not certain.

22 MR. LAMKEN: No. I think there's a concession
23 in the petition, but I think the concession has been
24 retracted.

25 However, the cases, first the language itself,

1 judgments in actions, is unmistakably clear. A judgment
2 includes the consequential damages and the punitive
3 damages.

4 In this case, the Court's case *Brown v. Felsen*
5 explains that when the change was made to -- from
6 judgments in actions to liabilities for obtaining --

7 QUESTION: But you might say, liabilities for
8 means liabilities to this person and a punitive damage
9 award, after all, is not in respect to a liability to this
10 person and represents a liability to the whole community
11 for bad action deterrent. You know, that kind of
12 argument. I'm not --

13 MR. LAMKEN: Right.

14 QUESTION: I'm trying to generate a little more
15 counterargument on your part.

16 MR. LAMKEN: I don't think that that
17 construction of the word liability could be used, because
18 the term debt, which is defined as liability unclaimed,
19 has been held by this Court to include punitive damages
20 where payable to private parties.

21 QUESTION: Well, the language of (a)(2) really
22 does favor the petitioner. A discharge doesn't include a
23 debt for, in this case, money to the extent obtained by
24 fraud. It favors the position taken by the petitioner,
25 and you ask us to look back at the older provisions for

1 guidance, I guess.

2 MR. LAMKEN: That's correct, Your Honor, but I
3 would disagree that the language favors petitioner,
4 because that is only true if you don't look at the
5 definition of the word debt. The word debt is liability
6 on a claim. I don't think you could be any clearer that a
7 claim for money or property or services obtained by fraud
8 under New Jersey law is three times the damages so imposed
9 and therefore the claim, the liability on the claim is the
10 full amount of the judgment that would be entered by a New
11 Jersey court in this context.

12 The structure of 523(a) I believe confirms this.
13 Section 523(a)(6) and (a)(9) make nondischargeable
14 liability on a claim for death or injury, or liability on
15 a claim for wilful or malicious injury.

16 QUESTION: One of the arguments made by the
17 respondent, and we didn't have time -- I didn't have time
18 to question him about it further, was that at the last
19 minute, before going bankrupt, people run up a lot of
20 bills, but that's covered by a separate section, is it
21 not, or would subsection (c) not permit the
22 nondischargeability under Mr. Ayer's theory for the --

23 MR. LAMKEN: Yes, I think the run-up --

24 QUESTION: -- person that runs up the debts?

25 MR. LAMKEN: The run-up of credit card bills at

1 the last minute has been specifically addressed. What has
2 not been addressed, Your Honor, however, is the trans --
3 repeated credit transactions in which some portion of
4 credit is obtained by fraud and some portion is not.

5 Before 1970 there was a split in the courts on
6 whether or not the full amount of credit was
7 nondischargeable simply because a small portion thereof
8 had been obtained by fraud, and that's the In re Danms
9 decision.

10 The legislative history in 1978 shows that
11 Congress was aware of this issue. I believe that the
12 language added in 1984 is most reasonably read as making
13 it unmistakably clear that there must be a parsing process
14 to determine how much was obtained by fraud, how much was
15 not obtained by fraud, and all of the liability on a claim
16 for the portion that was obtained by fraud is
17 nondischargeable, and that liability may include
18 consequential and punitive damages.

19 QUESTION: You're saying, in a word -- in a
20 short phrase, I guess, that debt for money means exactly
21 the same thing as the old statute meant when it said debt
22 for fraud, except that it defines the money with respect
23 to the fraudulent means of obtaining it, by a later
24 phrase. Is that -- in one sentence, is that your
25 argument?

1 MR. LAMKEN: That is absolutely correct.
2 Lawyers often refer to a claim by what caused the claim to
3 arise, and sometimes by the result. We might speak of a
4 claim for personal injury, the result, or we might speak
5 of a claim for battery, what caused the injury.

6 In the context of this statute, Congress has
7 used those two interchangeably, as lawyers often do.
8 Sometimes they spoke of a debt for fraud, the action that
9 produced the injury, or a debt for wilful and malicious
10 injury, the result.

11 In our portion, in (a)(2), it says a debt for
12 money, property, or services to the extent obtained by
13 fraud, the result, but that does not alter the amount of
14 liability, necessarily. The amount of liability is that
15 amount which would be imposed by a State court and that
16 amount, in this case, is three times the injury so
17 imposed.

18 If there are no further questions, I'll cede the
19 remainder of my time.

20 QUESTION: Thank you, Mr. Lamken.

21 Mr. Ayer, you have 2 minutes remaining. I'm
22 sure Mr. Lamken didn't mean to cede it to you.

23 (Laughter.)

24 REBUTTAL ARGUMENT OF DONALD B. AYER

25 ON BEHALF OF THE PETITIONER

1 MR. AYER: Thank you, Your Honor.

2 I just want to make one point, and it relates to
3 Justice Breyer's hypothetical about the credit card
4 situation.

5 I would submit that a broad reading of this
6 provision here so as to essentially use the prior
7 language, read broadly, as it's read in (a)(6), reading
8 debt for obtaining money by fraud creates -- that broad
9 reading to include all essentially consequential,
10 punitive, and other damages would create a situation where
11 a credit card company who could come in and argue reckless
12 fraud with regard to the \$20,000 that was spent, and then
13 can argue \$30,000 more in interest at 18 percent under
14 their contract and then can argue another \$10,000 in
15 attorney's fees, that in that circumstance they can come
16 in and make a credible, if not a winning argument that in
17 fact all of that is something that's entitled to
18 nondischarge.

19 Now, that is something that's a real life issue.
20 I would direct the Court, if it's interested, to the 1997
21 National Bankruptcy Review Commission report.

22 QUESTION: You don't want them to get the
23 interest. You mean, all they can get is the \$20,000 that
24 the person got, and he gets it interest-free, right?

25 MR. AYER: We would submit, Your Honor, that's

1 correct, that they get the -- well, they may get a market
2 interest. Whether they get a contractual interest rate I
3 would submit is --

4 QUESTION: Why even the market interest rate?

5 MR. AYER: Well, I'm sorry. The measure under
6 Justice Scalia's hypothetical earlier would be the benefit
7 that -- and I think it may be correct -- the benefit that
8 was obtained by the debtor, not the amount that's
9 contractually owed to the credit card company.

10 QUESTION: Could I get you to comment on one
11 question that came up in your opponent's argument? The
12 prior law is uncertain, you say, but what about the 1898
13 statute? That was perfectly clear, wasn't it?

14 MR. AYER: The 1898 statute talked about
15 judgments.

16 QUESTION: Right.

17 MR. AYER: It talked about judgments, and --

18 QUESTION: Which would necessarily include the
19 punitive --

20 MR. AYER: Well, if that language were
21 transported to today, when punitive damages is an issue,
22 which really only started in a big way in the 1970's, that
23 may well be where the Court would come out.

24 The fact is, no one has come up with a case
25 construing that language.

1 QUESTION: Of course, that language may be clear
2 enough that you didn't need a case.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ayer.
4 The case is submitted.

5 (Whereupon, at 11:01 a.m., the case in the
6 above-entitled matter was submitted.)
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CERTIFICATION

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

EDWARD S. COHEN, Petitioner v. HILDA DE LA CRUZ, ET AL.
CASE NO: 96-1923

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

BY Don Mari Federico-----

(REPORTER)