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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in Marrama versus Citizens Bank of Massachusetts. Mr. Baker?

ORAL ARGUMENT OF DAVID G. BAKER
ON BEHALF OF THE PETITIONER

MR. BAKER: Mr. Chief Justice, and may it please the Court:

Section 706(a) of the Bankruptcy Code provides that a debtor may convert a case under Chapter 7 to exclude any other chapter of the Bankruptcy Code at any time that the case has not been converted previously from another chapter, and that any waiver of the right to convert a case under the subsection is unenforceable. Other subsections of Section 706 give rules for the Court to decide about conversion in the case where some party other than the debtor requests conversion of the case and also provides that the conversion must lead to a chapter to which that debtor is qualified to be a debtor.

CHIEF JUSTICE ROBERTS: Mr. Baker, did I understand that subsequent to the grant of certiorari in this case, your client filed for relief under Chapter 13 and that relief was denied. You're now seeking under --

1 your petition seeks a conversion to Chapter 13 and I
2 guess I wonder what relief is still open to you.

3 MR. BAKER: In the present case or the other
4 case?

5 CHIEF JUSTICE ROBERTS: What relief is open
6 to you in this case? In other words, you're trying to
7 get a conversion to Chapter 13. Subsequently, you've
8 tried to apply for relief under Chapter 13 and that's
9 been denied. Why isn't the case moot in the sense that
10 that relief is not available to you now?

11 MR. BAKER: The circumstances of the new
12 case are entirely different. In fact, in that -- in the
13 present -- the new case, the court decided it is not
14 eligible because the debt limit exceeded the statutory
15 limitation for existing Section 109(e). There is a
16 three-year time span between the two, and we believe
17 that the existing case is not moot because he still has
18 remedies that he can obtain in Chapter 13.

19 JUSTICE GINSBURG: But if he isn't
20 eligible -- the new case determined that he was not
21 eligible because his debts were too high. He didn't
22 incur additional debts between the time of the
23 proceeding one and proceeding two?

24 MR. BAKER: Yes, Your Honor, he did.

25 JUSTICE GINSBURG: Or he didn't reduce the

1 debt. If we have a finding from the bankruptcy court
2 that he is ineligible, that is the number one condition
3 to convert into Chapter 13. If you don't meet that
4 condition, that's the end of the matter.

5 MR. BAKER: I wouldn't say it would be the
6 end of the matter in the present case because the
7 eligibility was never questioned below, was never a
8 factor below.

9 JUSTICE GINSBURG: But now there has been a
10 finding, and it's an essential finding, that there be
11 eligibility. And wouldn't the bankruptcy court's
12 findings in the later case have preclusive effect?

13 MR. BAKER: In the prior case? I would say
14 no, Your Honor. First, because as I mentioned, the
15 issue of eligibility within the monetary limits was
16 never raised below. And In fact, if you look at the
17 schedules in the supplemental joint appendix, it clearly
18 is within the statutory limits based -- just looking at
19 his schedules.

20 JUSTICE GINSBURG: But that's a question you
21 can argue on appeal in some of the recent decisions, but
22 for the moment you have a bankruptcy court making that
23 determination, which I think would be preclusive on
24 another bankruptcy court.

25 MR. BAKER: The -- well, the -- the

1 bankruptcy court made a decision in the current case,
2 the new case, but they haven't dismissed it. Dismissal
3 is in fact on appeal to the District Court for the
4 District of Massachusetts. The reason is, in our view
5 is that the bankruptcy court in the new case incorrectly
6 looked back to the claims that he had filed in the prior
7 case.

8 Now, it is a difficult issue in some
9 respects because there is case law at least in
10 Massachusetts or the First Circuit that says a debtor
11 does not have standing to object to claims in a Chapter
12 7 case. So the fact that there were a number of claims
13 filed and argued doesn't relate to, in a prior case,
14 does not have a preclusive effect in the new case.

15 Now we did, in fact, object to quite a
16 number of claims and the eligibility, and I think that
17 ultimately once the claim objections are resolved, we
18 will be within the statutory limits.

19 JUSTICE GINSBURG: If the decision is
20 affirmed on appeal to the First Circuit, do you think
21 you could still argue that there's qualification for
22 Chapter 13, after the Court of Appeals has affirmed a
23 determination that there isn't?

24 MR. BAKER: I'm -- I don't quite follow the
25 question. Would you mind restating it?

1 JUSTICE GINSBURG: We have a judgment that
2 this debtor is ineligible for Chapter 13. If that
3 judgment is affirmed on appeal to the Court of Appeals,
4 can you nonetheless argue that somehow there is no
5 preclusive effect?

6 MR. BAKER: Yes, Your Honor, because there's
7 a three-year difference between the two and
8 substantially different facts. The -- we have to go
9 back, I think, to the case that's at bar, because it is
10 those claims, those claims filed in the current case
11 that are at issue. As I say, we are in the process of
12 doing objections to those claims and I think that
13 ultimately we will come within them.

14 JUSTICE SCALIA: They're not at issue as far
15 as this mootness question goes. I mean, you're seeking
16 to have the right to file under 13.

17 And if, in fact, there's no eligibility to
18 file under 13, you're asking for the impossible. The
19 case is simply -- you know -- it's just air. So I
20 guess, perhaps you rely on the fact that the case is
21 still on appeal. Should we not take as a given that
22 there is a judgment that you don't qualify for 13, and
23 yet you're coming before us asking us to say that you
24 can apply under Chapter 13. It doesn't make any sense.

25 MR. BAKER: Well, I would respectfully say,

1 Your Honor, because once -- we don't really get to the
2 eligibility question until the court below considers it
3 in the context of the case that's at bar. We have to,
4 as I say, we are in the process of objecting to claims
5 and resolving them. Now the --

6 JUSTICE SCALIA: Well, didn't you make that
7 argument to the bankruptcy court that found that you
8 were not eligible?

9 MR. BAKER: No, Your Honor, because as I
10 mentioned before, the case law in the First Circuit up
11 to this point has held that a Chapter 7 debtor does not
12 have standing to object to claims. Now in the new case,
13 the bankruptcy court --

14 JUSTICE SCALIA: That's what I'm asking. A
15 Chapter 7 debtor doesn't, but a Chapter 13 debtor
16 presumably does. So didn't you make the same argument
17 to the bankruptcy court.

18 MR. BAKER: In the old case, yes.

19 JUSTICE SCALIA: And they rejected it?

20 MR. BAKER: No. I beg your pardon, Your
21 Honor. No, we did not address eligibility in the
22 present case.

23 JUSTICE SCALIA: I'm not talking about the
24 present case. I care about the Chapter 13 case in which
25 you have been found not to qualify for Chapter 13

1 treatment. Didn't you make before that court the same
2 argument you're making now that some of the debts
3 shouldn't be counted.

4 MR. BAKER: I did.

5 JUSTICE SCALIA: They rejected it, right?

6 MR. BAKER: Pardon?

7 JUSTICE SCALIA: And they rejected it?

8 MR. BAKER: The bankruptcy court did reject
9 it, yes. But they rejected it because, as I say, up to
10 that point the case law had held that we did not have
11 standing to object to the claims, so we were bound by
12 what was there.

13 JUSTICE SCALIA: But you said it was only a
14 Chapter 7 debtor who couldn't object.

15 MR. BAKER: Right.

16 JUSTICE SCALIA: But you applying under
17 Chapter 13.

18 MR. BAKER: Right. What I'm trying to say
19 is in the previous Chapter 7 case we lacked standing to
20 object to those claims and that in the new Chapter 13
21 case the court took the Chapter 7 case claims and said,
22 you're bound by these.

23 JUSTICE SCALIA: Didn't you object to that
24 and say you should look at these claims afresh?

25 MR. BAKER: Yes.

1 JUSTICE SCALIA: And what did the court say?
2 Did it say it had to or that it did so and still found
3 them over the limit.

4 MR. BAKER: It -- the bankruptcy court in
5 the new case said -- pardon? The bankruptcy court in
6 the new case said that there are circumstances under
7 which a debtor would have standing. This was in effect
8 a new rule of law for that, for this district. So
9 subsequent to that decision we did, in fact, object to
10 quite a number of claims and substantially reduced the
11 total of those claims, and I think that once --

12 JUSTICE SCALIA: What did the bankruptcy
13 court say?

14 MR. BAKER: The bankruptcy court sustained
15 our objections to those claims and in fact reduced the
16 total substantially.

17 JUSTICE SCALIA: I don't understand that.
18 But did it reduce it to a level that you qualified for
19 Chapter 13 treatment?

20 MR. BAKER: We are not finished with the
21 claims objection process. I believe that once we are --

22 JUSTICE SCALIA: Of course you are. They've
23 rendered a decision. How can you not be finished with
24 the claims objection process if the bankruptcy court has
25 rendered a final decision.

1 MR. BAKER: Because the bankruptcy court
2 rendered a final decision which is on appeal in the new
3 case. We are objecting to the Chapter 7 claims in the
4 old case. I apologize if this is confusing.

5 JUSTICE SCALIA: It is terribly confusing.
6 It seems to me that the Chapter 13 bankruptcy court had
7 the responsibility for determining whether you qualified
8 under the, you know, under the amount of debt.

9 MR. BAKER: And it did so by reference to
10 the claims that had been filed in the previous Chapter 7
11 case. We can't object to claims in a Chapter 13 case
12 that haven't been filed. So procedurally, we had to go
13 back to the Chapter 7 case and do the claims objections
14 within the context of the old Chapter 7 case.

15 Now, in the Chapter 13 case we used the --
16 the bankruptcy court used the total of those claims that
17 had been filed in the Chapter 7 case to determine
18 eligibility in the 13.

19 In doing so, the bankruptcy court basically
20 announced a new rule of law that the claims that had
21 been filed would be essentially res judicata in the
22 subsequent case, but that in some cases a Chapter 7
23 debtor --

24 JUSTICE SCALIA: You objected to that, I
25 gather?

1 MR. BAKER: Sorry?

2 JUSTICE SCALIA: You objected to that, to
3 that ruling?

4 MR. BAKER: Not necessarily, because it does
5 give you a vehicle to go back to the old Chapter 7 case
6 and do the procedural claims objections in that case,
7 which is what we did, and we substantially reduced the
8 total of the claims.

9 JUSTICE GINSBURG: What is the status of the
10 Chapter 7 case? I was under the impress that it had
11 been dismissed and a determination of no discharge had
12 been made.

13 MR. BAKER: A determination of no discharge
14 has been entered. However, it was an asset case, so it
15 remains open, it remains open at this point, until the
16 Chapter 7 trustee makes a distribution to creditors or
17 files his final report with the court. It has not been
18 dismissed.

19 JUSTICE GINSBURG: But there's a
20 determination that you're not entitled to a discharge?
21 That has been made.

22 MR. BAKER: That's correct.

23 JUSTICE BREYER: Let me just go to the
24 merits for a second here. You're saying this word,
25 where it says, the word is you "may convert," and that

1 means you can convert no matter what?

2 MR. BAKER: The plain language of the
3 statute says that, yes, Your Honor.

4 JUSTICE BREYER: No matter what? Okay,
5 suppose they repeal Chapter 13 before you convert. Then
6 can you convert?

7 MR. BAKER: I'm sorry. Would you repeat
8 that?

9 JUSTICE BREYER: I'm just producing examples
10 where it's clear you can't convert. Now, suppose
11 Congress -- there is no Chapter 13. Could you convert
12 then?

13 MR. BAKER: Not if there's no Chapter 13.

14 JUSTICE BREYER: No, okay. Suppose he dies.
15 Could you convert then?

16 MR. BAKER: If the debtor dies?

17 JUSTICE BREYER: Yes. No inheritance, no
18 nothing.

19 MR. BAKER: Well, there is a rule --

20 JUSTICE BREYER: Even though there's no such
21 person existing any more. He's gone and his whole
22 family is gone, and there's no inheritors, nothing.
23 Then can he convert? No.

24 MR. BAKER: I think the rule says, 2009
25 says, the Federal Rules of Bankruptcy --

1 JUSTICE BREYER: I'm trying to produce
2 ridiculous examples. Maybe -- all right, so you say
3 even if he's dead and there's no family he could still
4 convert. That's an extreme test of my hypothetical, but
5 okay. What about if, in fact, he goes insane? No.

6 MR. BAKER: Well, again, Your Honor, the
7 rule says --

8 JUSTICE BREYER: What about if, in fact, the
9 conversion is part of a scheme to defraud millions of
10 people in a foreign country because it will be viewed as
11 a signal that they should mail their life savings into a
12 particular account in Switzerland? Can he convert then?

13 MR. BAKER: The statute is plain, Your
14 Honor.

15 JUSTICE BREYER: You say yes on that?

16 MR. BAKER: Yes.

17 JUSTICE BREYER: Even though it's going to
18 bilk people out of millions of dollars?

19 MR. BAKER: I think that the statute is
20 plain and says that the debtor may convert.

21 JUSTICE BREYER: No matter what? Even if
22 he's dead, even if he's on insane?

23 MR. BAKER: Even if he's insane.

24 JUSTICE BREYER: Then I can't get anywhere
25 with my hypotheticals.

1 (Laughter.)

2 JUSTICE BREYER: I would have thought the
3 answer was no, but there we are.

4 JUSTICE GINSBURG: Mr. Baker, couldn't the
5 -- let's say the conversion goes through. The first
6 thing that the bankruptcy court does in the Chapter 7
7 converted to Chapter 13 is say: I'm going to dismiss
8 this suit, the -- the bad faith taint stays with the
9 case, it doesn't get -- you can't erase it; and so back
10 you go to the Chapter 7. Why couldn't the bankruptcy
11 court now sitting as a Chapter 13 court say: We're not
12 going to let a debtor who has conducted himself in bad
13 faith proceed in this court?

14 MR. BAKER: The bankruptcy court could
15 certainly do that. The procedural safeguards of due
16 process require, obviously, notice and hearing of the
17 court's reasons for wanting to say that.

18 JUSTICE SOUTER: Yes, but your claim doesn't
19 rest on a due process denial of hearing does it? That's
20 not, that's not the question you brought to us. So it
21 seems to me that Justice Ginsburg's question is not
22 answered by saying, well, he'd get a hearing in that
23 case. The fact remains that in that case, as I
24 understand it, the judge in Chapter 13 could immediately
25 deconvert to Chapter 7, couldn't he?

1 MR. BAKER: Well, I wouldn't say he could
2 immediately reconvert. Again, there is the due process
3 requirement that the debtor have an opportunity to be
4 heard on the issue.

5 JUSTICE SOUTER: But due process is not the
6 issue here. The fact is the bankruptcy court could
7 deconvert or reconvert to Chapter 7, in effect,
8 following the election that the debtor makes. That's
9 so, isn't it?

10 MR. BAKER: Yes.

11 JUSTICE SOUTER: Well then, why would we
12 have a system as ridiculous as to preclude the court
13 from looking at fraud or bad faith at the moment of
14 election, go through the paperwork and the folderol of
15 converting to 13, and immediately turn around,
16 admittedly having the power, to deconvert? That would
17 be a rather foolish system.

18 MR. BAKER: Well, perhaps, but it is the
19 system that Congress has given us. Congress has said
20 the debtor may convert at any time so long as it has not
21 been converted previously.

22 THE COURT: When cases are reconverted to
23 Chapter 7, is that typically done before or after the
24 filing of the Chapter 13 plan?

25 MR. BAKER: Most of the time, a plan is -- I

1 don't do it this way, but most practitioners will file a
2 plan at the same time as they file the notice, the
3 motion to convert.

4 JUSTICE SOUTER: But they don't have to.

5 MR. BAKER: They don't have to.

6 JUSTICE SOUTER: And the deconversion could
7 be done prior to the filing of the plan?

8 MR. BAKER: I suppose arguably it could. In
9 my view, the statutory provision in Section 1307 has to
10 be applied to the question of conversion. So I think --

11 CHIEF JUSTICE ROBERTS: Creditors -- under
12 Chapter 13 one of the prerequisites to approval of the
13 plan is that the creditors get as last as much as they
14 would have gotten under Chapter 7; is that right.

15 MR. BAKER: That's right.

16 CHIEF JUSTICE ROBERTS: So presumably the
17 creditors might want to see what the Chapter 13 plan
18 looks like themselves.

19 MR. BAKER: Exactly. Exactly. I think the
20 Tenth Circuit Bankruptcy Appellate Panel noted that
21 sometimes a problem debtor files a plan and gets it
22 confirmed, pays creditors, and everybody winds up better
23 off.

24 JUSTICE KENNEDY: Could the district
25 court -- pardon me. Could the bankruptcy court make

1 that same determination in deciding whether or not to
2 allow the Chapter 7 proceeding to be converted? He
3 could make this inquiry in a Chapter 7 proceeding? He
4 says: I don't think you should be able to convert
5 because there's a fraud, but I'll look at how the
6 creditors come out. Could he do that? And then you
7 don't have the specter that Justice Souter referred to
8 of this transfer back and then the transfer back, which
9 is a waste of time.

10 MR. BAKER: Well, again, the statute says
11 that the debtor may convert except in certain
12 circumstances. I think that the requirement of a motion
13 to convert a case gives the court the procedural
14 mechanism for looking at the case, making sure that the
15 debtor --

16 JUSTICE BREYER: But there is a difference,
17 and this is -- assume with me, which apparently you
18 don't agree, that everywhere in law there are implied
19 exceptions for unusual circumstances. I have never
20 found an instance where you couldn't think of some
21 exception that they didn't see. You could not bring a
22 thing if you were insane or dead or if a death would
23 ensue or a murder. Assume that, all right.

24 Then the question would be, well, what about
25 this instance? And I think the strongest instance --

1 the strongest argument for saying there's is no
2 exception here is the argument that the trustee
3 discovers that this individual is behaving dishonestly,
4 that he's hidden assets. Maybe he has a safe deposit
5 box and he has a key and the key -- the key will allow
6 him to get diamonds out of the safe deposit box and hide
7 them. Under 7, the trustee has the key. As soon as you
8 convert it to 13 the key is given back to the debtor,
9 who has been shown dishonest.

10 Now, assuming you're going to have some
11 exceptions, why isn't that a very, very powerful one?

12 MR. BAKER: Because ultimately the Chapter
13 13 trustee has the same powers of the Chapter 7 trustee
14 with the exception, as Your Honor is pointing out, of
15 possession of the property in the bankruptcy estate.
16 But that's how Congress wrote the statute. We should
17 not ignore Congress's command about the process of
18 converting and look for exceptions before we proceed to
19 go back to the appellate court --

20 JUSTICE ALITO: If I could come back to the
21 prior question. Unless there is some different
22 procedure required when -- between the two situations of
23 denial of conversion from 7 to 13 and allowing
24 conversion but with immediate reconversion back to 7,
25 unless there's some difference between that's required

1 by the code in those two situations, maybe it is because
2 you have to -- in the reconversion situation, you have
3 to wait until the plan is filed. Maybe it's because the
4 bad faith doesn't carry over.

5 Unless there's some difference, I don't see
6 what this case is about.

7 MR. BAKER: Well, ultimately the case is
8 about the language of the statute and whether the court
9 should apply it as written. I think --

10 JUSTICE ALITO: You can't provide any reason
11 why there's a difference between those two?

12 MR. BAKER: I'm sorry?

13 JUSTICE ALITO: You deny -- do you dispute
14 the fact that the bankruptcy court could simultaneously
15 convert on the motion of the debtor from 7 to 13 and
16 during the 20-day period that's required by the rule,
17 the rules, reconvert? Do you dispute that, for bad
18 faith?

19 MR. BAKER: I dispute that the court could
20 do it sua sponte and without notice and an opportunity
21 for a hearing.

22 JUSTICE ALITO: If it gives notice and
23 opportunity for a hearing during the 20 day period --
24 you have to give 20 days notice before the conversion
25 takes place; is that correct, from 7 to 13?

1 MR. BAKER: I believe that's correct. When
2 you file a motion, 20 day notice is required.

3 JUSTICE ALITO: If it has the hearing during
4 that period, you don't dispute that the court could do
5 that, or do you?

6 MR. BAKER: Well, again we come to the
7 question of when the plan gets filed. The plan isn't
8 filed until after it's converted, according to the
9 rules.

10 JUSTICE GINSBURG: But here there was a
11 hearing on the motion to convert, right? There was a
12 hearing?

13 MR. BAKER: Yes, Your Honor.

14 JUSTICE GINSBURG: And as I understand it,
15 there was no objection to the character of that hearing?
16 There was no request for an evidentiary hearing? So
17 there was a hearing. Now, does that get wiped out too,
18 just the way, the determination that you couldn't
19 convert?

20 MR. BAKER: The procedure I would, I would
21 expect to see is that if the court saw an issue of fact
22 with respect to whether the case had been converted or
23 whether the debtor was eligible for it to be a debtor in
24 the chapter to which he seeks conversion, then an
25 evidentiary hearing would be required.

1 If -- the fact that there was no evidentiary
2 hearing in the particular case here, I think, I think we
3 have to go back to recognize the fact that most issues
4 in bankruptcy court are decided summarily on motion
5 practice.

6 And it is my feeling that, is the
7 jurisprudence of rule 56 has to apply. If the court
8 sees that there are disputed issues of fact, the court
9 must schedule an evidentiary hearing. It cannot, it
10 cannot simply grant summary judgment without further
11 determining the facts. And so this is why I say that,
12 that on these two -- the two particular points -- and
13 very obviously, the question of whether it has been
14 previously converted is very easy to determine. But as
15 previously discussed, the issue of eligibility, whether
16 the claims and the debt is within the statutory
17 limitations, is an issue of fact that ultimately might
18 require an evidentiary hearing.

19 JUSTICE SOUTER: But your case as I
20 understand it, your case does not turn on the question
21 whether there was or was not, should or should not have
22 been a hearing in this case, an evidentiary hearing in
23 this case; is that correct?

24 MR. BAKER: That's correct. That's correct,
25 because in our view the schedules -- excuse me -- in our

1 view the schedules in this case clearly indicate that it
2 was within the statutory limitations, at least as far as
3 the schedules go.

4 JUSTICE SCALIA: MR., Mr. Baker, I have -- I
5 have a question on a matter that really just upsets me
6 and causes me to wonder how, you know, how much we can
7 rely upon your description here. You claimed in the
8 petition that the reason your client filed under Chapter
9 7 rather than 13 was that he was unemployed at the time.
10 And that he decided to go to 13 after he became
11 employed.

12 Yet, on -- as shown in the supplemental
13 appendix, when he filed under Chapter 7, under penalty
14 of perjury, he said that he was employed, and at
15 the meeting of the creditors, he confirmed under oath
16 that he was employed.

17 What was it? Was he employed or not
18 employed?

19 MR. BAKER: On the petition date itself, he
20 was not. But if you look at schedule I, which is at
21 page 30 of the supplemental joint appendix, at the
22 bottom line, bottom of the -- and it indicates that he
23 was in the process of having a second tenant in his
24 rental property and that he was beginning a job at about
25 the time that this --

1 JUSTICE SCALIA: It says employment,
2 occupation, name of employer: Carpeting Capital and
3 Flooring. How long employed, five months. Address of
4 employment: Woburn, Massachusetts. Its also says the
5 same thing on page 18 of the supplemental appendix. And
6 also with the meeting of creditors. If you look at the
7 joint appendix at 64-A, he says the same thing that he
8 was employed. Was he employed or not employed?

9 MR. BAKER: Right.

10 JUSTICE SCALIA: Does he go around swearing
11 he was when he wasn't?

12 MR. BAKER: No, he was, he was not employed
13 at the time. If you look at his page 18, as you've
14 pointed out, it says at the bottom the income given is
15 estimated based upon a new job which is about to start.
16 He had -- he had been the principal account at --
17 Flooring, which had been closed by Citizens Bank. So he
18 was, in fact, unemployed because Citizens Bank had taken
19 all of the assets of the corporation and shut it down.
20 And this put him of course behind on his mortgage so he
21 was very concerned about unemployment so -- to get his
22 credit back, to get his mortgage current and then retain
23 his home.

24 JUSTICE SCALIA: Look on page 64-A of the
25 appendix, the meeting of creditors. Trustee says okay,

1 and you now work for another entity, Capital Carpet and
2 Flooring, sir? And Mark Marrama says yes.

3 MR. BAKER: Right. And between the, between
4 the time of petitioner at the meeting of creditors which
5 was approximately six, six weeks later, he became
6 employed.

7 As I say, he had mortgage. He had children.
8 And he had to pay child support. At the time he had a
9 wife; he owed money to the credit union. He was
10 concerned about having employment so he could in fact
11 meet those obligations.

12 JUSTICE STEVENS: May I ask, I may have
13 missed some of the colloquy here -- is it correct that
14 he would not be eligible to file a-- to have a,
15 institute a Chapter 13 proceeding if he had unsecured
16 debts of over a certain amount?

17 MR. BAKER: Yes, Your Honor.

18 JUSTICE STEVENS: And what if at the time he
19 makes the motion to convert, which you say he has an
20 absolute right to make, what if the record then
21 disclosed that he had debts exceeding that amount? What
22 should the bankruptcy judge do in that case?

23 MR. BAKER: The bankruptcy judge should
24 examine the claims that have been filed, if any, and do
25 the arithmetic, and offer the debtor an opportunity --

1 JUSTICE STEVENS: And he concludes they're
2 over the amount? So it is clear under the record. What
3 should he do then?

4 MR. BAKER: He should deny conversion.

5 JUSTICE STEVENS: He should what?

6 MR. BAKER: He should deny conversion.

7 JUSTICE STEVENS: So he does not have an
8 absolute right in all cases to convert.

9 MR. BAKER: That's absolutely correct, with
10 the exception of the two cases stated in the statute.
11 One of which, is as Your Honor has pointed out,
12 eligibility, the other is it has been previously
13 converted he does not have that right.

14 If the Court has no further questions, I'll
15 reserve my remaining time.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 Mr. Baker.

18 MR. BAKER: Thank you.

19 CHIEF JUSTICE ROBERTS: Mr. Brunstad?

20 ORAL ARGUMENT OF G. ERIC BRUNSTAD,

21 ON BEHALF OF THE RESPONDENTS

22 MR. BRUNSTAD: Mr. Chief Justice, and may it
23 please the Court.

24 The bankruptcy court need not sit idly by
25 and grant a motion which is part of an abusive scheme.

1 The power of the court is there to deny such a motion.
2 It is there by statute under Section 105; it is there
3 because the courts have always had power.

4 CHIEF JUSTICE ROBERTS: Under -- you think
5 105 is an affirmative grant of power?

6 MR. BRUNSTAD: I think the second sentence
7 of 105(a) supports the traditional powers that courts
8 have had to grant relief, to prevent or to deny relief
9 to prevent abuse or to remedy bad faith conduct. The
10 fact the debtor has the authorization under Section 706
11 to convert a case cannot be construed to prevent the
12 court from sua sponte taking action to prevent abuse --

13 CHIEF JUSTICE ROBERTS: 105(a) is much more
14 limited than that. It is only if you take the second
15 clause of that out of context and quote it, as has been
16 done, that it looks like an affirmative grant. It says:
17 "No provision of this title providing for the raising of
18 an issue by a party in interest shall be construed to
19 preclude the court from taking sue sponte other action."
20 That's a much more limited, narrow provision telling you
21 not to imply a negative predicate from a requirement
22 that a particular party raise an issue. I -- as a
23 source of sweeping powers to, to basically act as a
24 roving commission in equity, I think that's a
25 mis-citation.

1 MR. BRUNSTAD: Well, Chief Justice Roberts,
2 I think that in order to understand 106(a), the second
3 sentence, completely, I think it is important to
4 understand it was added to 105 in 1986 in response to a
5 number of decisions that were holding that the courts
6 did not have the -- the bankruptcy courts did not have
7 the court to sua sponte take action to prevent abuse, to
8 monitor their own calendars, to make sure that
9 inappropriate things weren't happening, and that Senator
10 Hatch when he introduced this legislation which was
11 ultimately enacted, the goal was to overturn cases like
12 the Second Circuit's decision in Grissom to provide
13 expressly and perhaps not as clearly as perhaps they
14 intended, to give the courts this power. But I --

15 JUSTICE SCALIA: Was that Second Circuit's
16 decision a decision that said the court didn't have the
17 power because it had not been moved to take that action
18 by the party who had the responsibility for raising the
19 issue? Was that the basis for the Second Circuit's
20 decision?

21 MR. BRUNSTAD: In part, yes. The court also
22 --

23 JUSTICE SCALIA: Then -- then you haven't
24 contradicted what the Chief Justice suggested.

25 MR. BRUNSTAD: Well, I think, I think

1 105(a), the second sentence is worded the that way it
2 is. It doesn't say exactly that the courts may take any
3 action of sua sponte. It says shall not be construed;
4 the fact a party has the right to make an action shall
5 not be construed to deny the court the right sua sponte
6 to take an action. I think the application of the
7 statute is clear. There is a background principle which
8 applies not only in bankruptcy cases but trial court
9 cases in the district courts everywhere, that this Court
10 recognized in Chambers, that it has specific application
11 in this Court's jurisprudence in bankruptcy in Pepper
12 versus Litton and other cases, that the bankruptcy
13 courts may take action to prevent abuse. And in fact,
14 they must do so. Because by granting a motion, by
15 sitting back and allowing the court to grant relief that
16 furthers an abusive scheme in essence makes the court
17 complicit in the fraud or misdealing. -

18 CHIEF JUSTICE ROBERTS: What do you do about
19 the different structures, wording between 706(a) and
20 706(b)? I mean, this provision says debtor may. The
21 other provisions say that a debtor may ask a court to
22 order, and it suggests a difference in who has the
23 primary responsibility, whether it is a motion of the
24 Court or whether it is an independent action.

25 MR. BRUNSTAD: Mr. Chief Justice, I think

1 the drafting conventions between the two subsections is
2 key. 706(a) says the debtor may convert. Whereas other
3 sections of the code, like 1307(b), other provisions,
4 provide that upon request of the debtor, the court shall
5 take some particular action. Here the use of
6 the "May" -- I think the word "may" properly signals
7 discretion in the court.

8 CHIEF JUSTICE ROBERTS: So you think under
9 those other provisions the court doesn't have this
10 inherent power or the implicit power from 105(a) that
11 you're arguing for here?

12 MR. BRUNSTAD: Well, if you look at Section
13 1307(b), upon request of the debtor the court shall
14 dismiss the case, that is an absolute right. And for a
15 clear reason. Nobody can force a debtor to continue in
16 Chapter 13 against the debtor's will because Chapter 13
17 requires the debtor to work to pay off creditors. That
18 would violate the 13th Amendment. So there would be no
19 circumstance where someone could block a debtor from
20 getting out from Chapter 13, for constitutional reasons.
21 That's a special case. That is why Congress drafted
22 1307(b) the way they did.

23 Contrast that with Section 706 where the
24 court said the debtor may convert. Now, there are,
25 there are requirements that the debtor has to comply in

1 order to convert, statutory, but there is also, a debtor
2 cannot have an absolute right to convert as a part of
3 abusive scheme. I think the direct analogy is the
4 Court's decision in Pepper versus Litton. There a
5 fraudulent party wanted the Court to allow a claim as
6 part of a fraudulent scheme, and this Court unanimously
7 said no we're not going to allow that, even though there
8 was a subsequent remedy further on in the process.

9 CHIEF JUSTICE ROBERTS: If you, if given
10 that the court has express statutory authority to
11 reconvert from 13 back to 7, why should we take the leap
12 of conferring inherent equitable authority to do
13 something, when the statute addresses it in a much more
14 specific way?

15 MR. BRUNSTAD: Two primary reasons, Your
16 Honor. The first reason is that it would be just
17 pointless wheel spinning.

18 CHIEF JUSTICE ROBERTS: Well, maybe, maybe
19 not. I mean, they convert. He comes up with a plan
20 under 13 that looks better to creditors. I mean, just
21 because there's fraud that offends the court and prompts
22 it to take action prior to conversion doesn't mean that
23 that's going to be the same situation after conversion.

24 MR. BRUNSTAD: But the debtor could argue in
25 the context of the motion to convert, well, I would like

1 to propose a Chapter 13 plan, perhaps the misconduct
2 wasn't that severe, and the court can take that into
3 consideration allowing the debtor to proceed. But where
4 as here you have a clear case of abuse, the court should
5 be entitled to nip it in the bud at that particular
6 point in time. Allowing the court to senselessly say,
7 "Oh, go ahead and convert -- "

8 CHIEF JUSTICE ROBERTS: Even if it might
9 injure the creditors.

10 MR. BRUNSTAD: Well, the court can take that
11 into account. The court is not, is not shackled under
12 Section 706 to deny conversion, it can consider various
13 factors. If all the creditors were to come up and say:
14 "We know the debtor has been abusing the bankruptcy
15 system, but we think you should allow the conversion to
16 a Chapter 13 case because perhaps that will work for the
17 particular circumstances." But where, as here there was
18 no such thing, the creditors were saying don't allow
19 conversion, this is part of an abusive scheme. The
20 trustee was saying don' t allow conversion, this is part
21 of an abusive scheme, the bankruptcy court -- if the
22 court had signed the order, then that affects the
23 integrity of the court.

24 Is the court itself now not participating by
25 allowing it to happen, this sort of fraudulent scheme?

1 The court should be able to nip it in the bud. Debtors
2 --

3 CHIEF JUSTICE ROBERTS: What limitations
4 would you recognize on this inherent authority to take
5 action? Where do they come from?

6 MR. BRUNSTAD: Well I think that --
7 Mr. Chief Justice, I think that they're the same sorts
8 of limitations that require the district court, when it
9 is considering invocation of its inherent powers,
10 whether to exercise them or not, we have always sort of
11 recognized a special situation for bad faith conduct and
12 clearly abusive schemes. Where those occur as in this
13 case, the bankruptcy court looks at the circumstances,
14 holds a hearing as was held this case, considers the
15 views of the parties who are involved, and then decides.

16 Now it is a relatively high bar. You know,
17 bad faith -- it is a continuum. Where you have the
18 honest but unfortunate debtor, abides by all the rules
19 no, clearly no bad faith implication would apply. At
20 the other end of the spectrum where you have a debtor
21 who conceals assets, doesn't disclose, it's found out in
22 bankruptcy and then as soon as the trustee finds out and
23 is hot on the debtor's trail, then seeks to convert to
24 get out from bankruptcy, well, there you have a
25 clear-cut case of abuse that can't be tolerated.

1 Now I think that --

2 JUSTICE SCALIA: Mr. Brunstad, are you going
3 to address the mootness point? Do you think the case is
4 moot?

5 MR. BRUNSTAD: Yes, Justice Scalia. I think
6 candidly, the case is not moot. There is a good reason
7 why we do not allow in our system two separate
8 bankruptcy cases to be pending at the same time. Once a
9 first bankruptcy case has started, the court
10 jurisdiction attaches its exclusive jurisdiction, and I
11 think the second bankruptcy case that was filed while
12 the first bankruptcy case was still pending was filed
13 without jurisdiction and there was actually no
14 jurisdiction, because of the prior existing case.

15 Additionally, I think we have to recognize
16 that there were different debt levels at different
17 times. I don't know exactly what they were, but for the
18 first case there was debt level A. About three years
19 later, there was debt level B, which may well have been
20 higher. On remand if the debtor were to succeed, which
21 I hope the Court does not allow the debtor to proceed,
22 or succeed here, but on remand if it were determined
23 that with the first case the debt levels were properly
24 below the limits under 109(e), then the debtor would be
25 eligible to convert as far as that criteria is

1 concerned. We do not know absolutely that that would
2 not be able to be satisfied in the existing case.

3 JUSTICE SCALIA: Did you make the
4 jurisdictional objection before the second bankruptcy
5 court?

6 MR. BRUNSTAD: We did not participate in the
7 second case and make that objection, Your Honor.

8 JUSTICE SCALIA: How come? How so?

9 MR. BRUNSTAD: I think that it was
10 primarily, it was, the debtor was litigating and we did
11 not make the jurisdictional argument.

12 JUSTICE SCALIA: I find that extraordinary..

13 JUSTICE GINSBURG: Well, it wouldn't be
14 before the First Circuit.

15 MR. BRUNSTAD: That particular issue, I
16 think the appeal of the second case is pending before
17 the district court. I think that the bankruptcy judge
18 disposed of the case pretty summarily and decided that
19 while this particular debtor, just looking at the
20 schedules, does not have the eligibility requirements
21 for the second case, and therefore dismissed it.

22 That does not necessarily preclude a finding
23 upon the facts in the first case which is still pending,
24 that it could be converted. I think candidly, I need to
25 say that.

1 JUSTICE GINSBURG: It's hardly a summary
2 disposition. The opinion goes on for pages and pages.

3 MR. BRUNSTAD: Well, this particular
4 bankruptcy judge obviously had a lot of experience with
5 this particular debtor, having presided over the first
6 case as well, Justice Ginsburg. So I think the
7 bankruptcy court was very fully apprised of the facts
8 and circumstances surrounding the case, with the record
9 and having written several opinions already in the first
10 bankruptcy case which was still pending.

11 JUSTICE SCALIA: This case, your case?

12 MR. BRUNSTAD: The current case today, yes,
13 Justice Scalia.

14 JUSTICE STEVENS: Let me ask this question.
15 If the remedy of not allowing them to convert to Chapter
16 13 is denied, are there other remedies that the
17 bankruptcy court can impose against the debtor who
18 engages in misconduct of this kind?

19 MR. BRUNSTAD: Yes, Justice Stevens, but
20 they're not tailored to this particular problem or
21 abuse. They are remedies, for example, the denial of
22 the discharge for concealing assets under Section 727.
23 But that won't --

24 JUSTICE STEVENS: Are there any criminal
25 sanctions?

1 MR. BRUNSTAD: There might be criminal
2 sanctions for willful -- basically, in essence, it's
3 sort of an idea of theft, you know, by not disclosing
4 assets, but it's a relatively high bar for criminality.
5 But that won't protect the creditors in the Chapter 7
6 case.

7 JUSTICE STEVENS: How are the creditors hurt
8 by this series of events?

9 MR. BRUNSTAD: Well, the creditors are hurt
10 because in the chapter 7 case, once the bankruptcy case
11 is filed, the trustee takes possession of all the
12 debtor's property, which becomes property of the estate.
13 The trustee's role is to liquidate the property and
14 distribute the proceeds to creditors. When the case is
15 converted to Chapter 13, under 1306, the property
16 reverts in the debtor, including any concealed property.
17 At that point, under Section 348, upon conversion, the
18 Chapter 7 trustee is disenfranchised. His services
19 terminate. What debtors in bankruptcy who are
20 perpetuating this kind of concealment scheme want you to
21 do is say oh no, you can go ahead and convert, and then
22 maybe we'll deal with it later, because maybe later on
23 in the proceedings something will happen. The Chapter
24 13 trustee might not be apprised of it.

25 The case might go to a different bankruptcy

1 judge. In some jurisdictions, the Chapter 13 docket is
2 heard by an entirely separate bankruptcy judge. They
3 would like to get the benefit of delay in conversion,
4 because perhaps they can get away with it in the
5 subsequent Chapter 13 case. Or alternatively in the
6 Chapter 13 case, if a debtor doesn't file a plan, then
7 the Chapter 13 trustee, who pay have hundreds and
8 hundreds of Chapter 13 cases he or she is responsible
9 for, on a check list might simply check off no plan
10 filed, case dismissed, in which case the creditors don't
11 get the benefit of the liquidation, they don't get the
12 benefit of the assets being recovered, they don't get
13 equality of distribution under the Chapter 7 scheme, and
14 the debtor's fraud is in essence gotten away with. So
15 that is why, when a motion to convert comes up and the
16 bankruptcy court sees --

17 JUSTICE STEVENS: Wouldn't a Chapter 7 case
18 be refiled immediately?

19 MR. BRUNSTAD: Not necessarily, Your Honor.
20 Not necessarily. The debtor could move to another
21 jurisdiction.

22 JUSTICE STEVENS: But the creditors aren't
23 going to let him just run away with the assets, are
24 they?

25 MR. BRUNSTAD: Well, Justice Stevens, in

1 many many Chapter 7 cases, in many many bankruptcy
2 cases, you have creditors, most of the creditors may
3 hold claims of \$500, \$1,000, \$3,000. This case is
4 unique because there happened to be a creditor, Citizens
5 Bank, who was owed hundreds of thousands of dollars who
6 had an interest in pursuing the case. In many other
7 cases -- that's one of the reasons why we have a Chapter
8 7 trustee, to represent the interest of myriad small
9 claimants who have collectively no individual incentive
10 to really incur all the costs to monitor the system.

11 By converting the case from 7 to 13,
12 disenfranchising that representative of all the
13 creditors, the debtor who wants to play the game of
14 concealing the assets, and catch me if you can, can in
15 essence get away with it. This bankruptcy judge
16 understood this. This bankruptcy judge denied the
17 conversion so we would keep the case in Chapter 7, the
18 Chapter 7 trustee could do his job, collect the assets
19 --

20 JUSTICE GINSBURG: Could the Chapter 7
21 trustee be appointed the trustee in the Chapter 13, the
22 same trustee who has now been -- he's terminated because
23 the Chapter 7 has been converted. Could the court in
24 the Chapter 13 format appoint the same trustee?

25 MR. BRUNSTAD: No, Justice Ginsburg. There

1 is a standing Chapter 13 trustee in Chapter 13 cases
2 that handles all the Chapter 13 cases, unless for some
3 reason that Chapter 13 trustee must recuse him or
4 herself. Under Section 348, once the case is converted
5 from 7 to 13, the Chapter 7 trustee services are
6 terminated.

7 JUSTICE SCALIA: What does the trustee do?
8 He's not really a trustee under 13, is he?

9 MR. BRUNSTAD: The Chapter 13 trustee --

10 JUSTICE SCALIA: I mean, the property
11 doesn't vest in him, you've told it. It remains in the
12 ownership of the debtor?

13 MR. BRUNSTAD: Yes, Justice Scalia. The
14 Chapter 13 trustee is probably characterized mostly an
15 administrative person, who supervises to see that the
16 Chapter 13 procedures are complied with, has the debtor
17 filed a Chapter 13 plan. He's not --

18 JUSTICE SCALIA: He's not called a trustee,
19 though?

20 MR. BRUNSTAD: Correct, Justice Scalia.

21 JUSTICE SCALIA: So that's really not his
22 capacity.

23 MR. BRUNSTAD: In practical reality, that's
24 correct, Justice Scalia. What the Chapter 13 trustee
25 does, if a plan is not filed, moves to dismiss the case.

1 If a plan is filed, he may look at the plan. If the
2 plan is confirmed, act as a disbursing agent. The
3 debtor typically makes payments under the plan to the
4 Chapter 13 trustee. The Chapter 13 trustee then makes
5 distributions to creditors. And on Chapter 13 day in
6 many jurisdictions, one day a week or every other week,
7 the Chapter 13 trustee will come to court with hundreds
8 and hundreds and hundreds of files.

9 JUSTICE SCALIA: It's called Chapter 13 day?

10 MR. BRUNSTAD: In many places it is, Your
11 Honor, and they have a Chapter 13 bankruptcy judge.
12 Often it's assigned to the most junior bankruptcy judge
13 sitting in the particular jurisdiction. With hundreds
14 and hundreds of cases, the Chapter 13 trustee has
15 neither the incentive nor the resources to do the things
16 that a Chapter 7 trustee does every single day. And not
17 only that, the Chapter 13 trustee does not have the
18 power to go after collecting all of the property and
19 liquidating it. It's denied that power under the
20 statutory scheme.

21 So it makes no sense. It's pointless to say
22 we must -- the bankruptcy judge must idly sit by, grant
23 a motion that's part of this abusive scheme, allow the
24 case to be converted to Chapter 13, hold another
25 hearing, have a second set of papers perhaps, only to

1 send the case back to Chapter 7.

2 CHIEF JUSTICE ROBERTS: The sense it makes
3 is that that's what the statute provides, and rather
4 than relying on this alleged inherent power that
5 apparently is not boundless, and that the bounds of
6 which will have to be articulated in case after case
7 after case, the statute provides a very clear mechanism
8 to address the issue of fraud which allows him to
9 reconvert it back to Chapter 7 promptly.

10 MR. BRUNSTAD: Well, I think, Mr. Chief
11 Justice, in the Link case, the court rejected that
12 argument in construing Section 41(b), where the court
13 said, quote, "neither the permissive language of the
14 rule, which merely authorizes a motion by the defendant,
15 nor its policy requires us to conclude that it was the
16 purpose of the rule to be abrogate the power of courts
17 acting on their own initiative to clear their calendars
18 of cases that have remained dormant because of the
19 inaction or dilatoriness of the parties seeking relief."
20 Likewise in chambers, I think the same principle
21 applied. The court said, we don't need to wait and deal
22 with these subsequently occurring procedures to remedy
23 the problem. We should do it now.

24 And that is the -- that is the clear import
25 of this Court's unanimous decision in Pepper versus

1 Litton. There was a remedy of equitable subordination
2 for the fraudulent claim that could have been invoked
3 far later in the proceeding. And this Court unanimously
4 said no, you don't have to wait for that proceeding
5 later. Where it's clear that there has been fraud, the
6 creditor's scheme has been fraudulent, a fraudulent
7 claim, the court can act at the time of allowance of the
8 claim and simply deny the claim. The reason for it, I
9 think, is the reason articulated in chambers. The
10 integrity of the court itself is implicated if it has to
11 sit back idly by and watch the abusive process unfold.

12 CHIEF JUSTICE ROBERTS: Well, I still
13 haven't gotten an answer, I think, on what the prejudice
14 is. Who is prejudiced by the procedure as set forth in
15 the statute? The conversion takes place. The judge
16 then says, because of this fraud, I'm going to reconvert
17 it to Chapter 7. Who suffers under that? You say sit
18 idly by, but I don't see the long passage of time.

19 MR. BRUNSTAD: Well, the creditors suffer,
20 Mr. Chief Justice. And they suffer because there are
21 additional administrative costs that are incurred that
22 compete with their distribution. We're already talking
23 about dividing up an inadequate pie to satisfy all
24 claims in full. Having a second set of procedures
25 prejudices the creditors. It prejudices the court.

1 Bankruptcy judges can have thousands and thousands of
2 cases on their dockets. They have to have a second set
3 of procedures, a second hearing, it burdens the court
4 unnecessarily. And again, it also implicates, again,
5 and I think this is fundamental, the integrity of the
6 process.

7 JUSTICE BREYER: Is it true or not what I
8 said, because I don't know the area, that if in fact you
9 had a dishonest debtor, the present -- the proceeding is
10 dismissed on 7. He gets the papers back. The papers
11 permit him access to a hidden source of resources, and
12 he steals them basically. Is that possible or is that
13 fanciful?

14 MR. BRUNSTAD: Justice Breyer, that is
15 certainly possible, and I think that is why Congress has
16 said you don't have an absolute right as a debtor under
17 Section 707 to dismiss your Chapter 7 case.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 MR. BRUNSTAD: Thank you.

20 CHIEF JUSTICE ROBERTS: Ms. Blatt? We'll
21 hear from Ms. Blatt first.

22 ORAL ARGUMENT OF LISA S. BLATT

23 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

24 SUPPORTING RESPONDENTS

25 MS. BLATT: Thank you, Mr. Chief Justice,

1 and may it please the Court:

2 A bankruptcy court has the inherent
3 authority to sanction a debtor who has acted in bad
4 faith by denying his request to convert a Chapter 7 case
5 to Chapter 13. Courts have the inherent authority to
6 take appropriate action to prevent an abuse of process.
7 Nothing in the Bankruptcy Code or Section 706 purports
8 to impair or limit the bankruptcy court's power to
9 police the integrity of its own proceedings.

10 JUSTICE ALITO: Why isn't the power to
11 reconvert sufficient?

12 MS. BLATT: The power to reconvert under
13 Section 1307(c) is in this case, where the court is
14 already confronted with an adjudicated bad faith
15 litigator, it's indirect, it's inefficient, and it's
16 inadequate to protect the bankruptcy process. The
17 potential for abuse is very significant if the case
18 languishes in Chapter 13 for any period of time because
19 the bad faith debtor gets control over the very asset he
20 fraudulently sought to conceal.

21 CHIEF JUSTICE ROBERTS: Well, what are the
22 odds that that's going to happen if you have a judge
23 who's exercised enough by the fraud to exercise inherent
24 authority to deny relief? He's not going to let it
25 languish under Chapter 13.

1 MS. BLATT: Well, he may or may not.
2 Bankruptcy courts have thousands of cases, and if there
3 is an absolute automatic right to convert, a court with
4 thousands of cases may put off that Chapter 13
5 reconversion to another day. Moreover, there may be
6 individual creditors without a sufficient stake to raise
7 the issue, and the Chapter 7 trustee who typically will
8 uncover the fraud cannot oppose conversion if there's a
9 right to convert in bad faith, and the Chapter 13
10 trustee --

11 CHIEF JUSTICE ROBERTS: Well, why wouldn't
12 that trustee recommend to the bankruptcy judge that he
13 reconvert it to Chapter 7?

14 MS. BLATT: Well, the Chapter 7 trustee is,
15 he's terminated on conversion. It doesn't raise Chapter
16 13 issues. The much more likely scenario is the Chapter
17 7 trustee will tell the United States trustee or the
18 Chapter 13 trustee, but they may or may not learn about
19 it until after the case converts. In jurisdictions
20 where there is --

21 JUSTICE KENNEDY: Why can't there just be an
22 order to the bankrupt -- to disclose the asset in the
23 Chapter 13 proceeding?

24 MS. BLATT: An order to disclose the asset?

25 JUSTICE KENNEDY: In the Chapter 13

1 proceeding.

2 MS. BLATT: Well, we're talking about a case
3 where the court may or may not know about the fraud, and
4 the trustee may or may not tell someone in time. If
5 there's --

6 JUSTICE KENNEDY: Well, in this case they
7 knew about it, didn't they?

8 MS. BLATT: Yes, and there was a basis to
9 oppose conversion. In jurisdictions where there's an
10 absolute right, and bad faith is not a grounds for the
11 conversion --

12 JUSTICE STEVENS: Whenever he denies the
13 motion, he must know about it. He must have a reason to
14 deny.

15 MS. BLATT: We're by hypothesis talking
16 about an absolute right to convert, and what I'm trying
17 to say, in jurisdictions where there is an absolute
18 right, the practice of bankruptcy courts is not to
19 simultaneously convert. It does happen on occasion, but
20 the more likely scenario is that a significant period of
21 time passes. But the other point is that if there's a
22 simultaneous conversion it's a completely pointless and
23 burdensome process, and here's why: A conversion and
24 simultaneous conversion causes the termination and
25 reappointment of the Chapter 7 trustee, the appointment

1 and the immediate termination of the Chapter 13 trustee,
2 and to the extent there's already pending Chapter 7
3 proceedings for dismissal or denial of discharge, the
4 conversion would appear to us to moot those proceedings
5 and require their reinstatement. This is a completely
6 unnecessary waste of everyone's time and energy.

7 JUSTICE STEVENS: Let me just clear up one
8 detail that's confusing to me. The -- are there two
9 judges? Does the same judge rule on both the motion to
10 convert and the motion to reconvert?

11 MS. BLATT: Yes, in the majority of
12 jurisdictions. There are one or two jurisdictions where
13 there are different judges, but the vast majority it's
14 before the same judge. But a -- if a -- if there's a --
15 if there's a right to convert in bad faith, all you have
16 is a notice of conversion and, assuming the eligibility
17 is met and it hasn't previously converted, a court may,
18 well --

19 CHIEF JUSTICE ROBERTS: I wouldn't call it a
20 right to convert in bad faith. If it's a right, it's a
21 right to convert despite the allegation of bad faith.
22 It's not a right to convert in bad faith. No one is
23 arguing for that.

24 MS. BLATT: Well, I think that our point is
25 that the absence of bad fate is implicit in the statute

1 because there is this background rule. When a litigant
2 comes to a court that's already abused the court's
3 process or seeks relief in bad faith, it is a core
4 element of a court's inherent authority to simply deny
5 relief. You can toss out an entire complaint when a
6 litigant seeks it in bad faith. If there was an
7 apparent benefit to go to 13 first or deny it, the
8 United States trustee wouldn't be here. We see no
9 benefit to the debtor to require the court to convert
10 and then reconvert. All it is is an unnecessary waste
11 of everyone's time, and this is a core element of an
12 inherent authority.

13 CHIEF JUSTICE ROBERTS: What about the idea
14 that the debtor can come in and say under 13, look,
15 whether the facts bear this out in this case or not,
16 I've got a job now. I can pay off my debtors -- my
17 creditors according to this plan, and, as the statute
18 requires, the creditors get more under 13 than under
19 under 7. That's a benefit to everybody.

20 MS. BLATT: Here's why. I don't think
21 there's any dispute under --

22 CHIEF JUSTICE ROBERTS: And he says, I'm
23 sorry about that bad faith business.

24 MS. BLATT: Sure. Right. And there's
25 nothing to stop a debtor who truly converts and has

1 found religion and wants to come clean for arguing: Let
2 me convert, it's in the interest of everybody if I do
3 convert. This is a discretionary right to deny relief.
4 The court is free to allow conversion.

5 But under the plain terms of section
6 1370(c), the court has the power to dismiss or reconvert
7 a case to Chapter 7 without waiting for a plan to be
8 filed. There's no requirement that the court has to sit
9 there for 15 days and see if there's a plan. A Chapter
10 7 -- excuse me --

11 CHIEF JUSTICE ROBERTS: If the statute
12 didn't provide that a Chapter 13 plan could be
13 reconverted to a Chapter 7, would the court have the
14 inherent equitable authority to do that?

15 MS. BLATT: To reconvert to Chapter 7?

16 CHIEF JUSTICE ROBERTS: Sure.

17 MS. BLATT: I don't know if that would be an
18 appropriate remedy. It might be because you can have an
19 involuntary Chapter 7 case. But on this point about a
20 court sitting in Chapter 13, if on day one a Chapter 13
21 debtor files a plan in bad faith, the debtor can say:
22 Please wait, I've got a plan, I'm working on it, give me
23 a couple extra week, and the court can say: No, I have
24 the authority to throw it out. What's particularly odd
25 about this proposal is that in 2005 a court is

1 categorically prohibited from allowing a Chapter 13
2 debtor to proceed under Chapter 13 if the petition is
3 filed in bad faith. The court can't confirm a plan.

4 So Congress had no interest in protecting
5 bad faith debtors after 2005 and they didn't before
6 2005. There's no policy preference in the code for bad
7 faith debtors or allowing a debtor either proceeding in
8 Chapter 13 or moving from Chapter 7 to Chapter 13, and we
9 think this is a modest exercise of a court's inherent
10 authority simply to deny leave when the court is already
11 confronted with a clear case of abuse while the case is
12 in Chapter 7 or the debtor has otherwise abused the
13 bankruptcy process.

14 The last thing I'd like to say is --

15 CHIEF JUSTICE ROBERTS: Well, what about the
16 difference in in language under 706(a) and the other
17 provisions? 706(a) says the debtor may. The other
18 provisions call for action by the court, which suggests
19 at least that the authority to convert is greater under
20 706(a).

21 MS. BLATT: I think section 706(a) is fairly
22 read as granting a statutory right to convert absent the
23 two statutory exceptions or the court's proper exercise
24 of inherent authority. But the 706(b) and (c) just
25 explain that the court may do something or the court may

1 not, or the court shall do something. So we think our
2 position -- section 706(a) isn't even addressed to the
3 court at all. It just gives the debtor the right to
4 convert, and it doesn't purport to limit or speak to the
5 situation when the debtor seeks that relief in bad faith
6 or has otherwise abused the bankruptcy process. I'd
7 just like to end by saying that a debtor's bad faith
8 concealment of assets or misrepresentation of financial
9 affairs is really the most serious abuse you can have in
10 a chapter 7 case. It threatens the very structural
11 foundation of the code and its integrity.

12 JUSTICE SCALIA: Does the government have
13 any position on the mootness mootness question here?

14 MS. BLATT: Well, our position is that it's
15 not moot because it's on appeal. If that decision is
16 affirmed, it would in a sense practically be moot
17 because there would be an alternative grounds and the
18 debtor wouldn't be eligible under Chapter 13 in any
19 event. But we didn't see that as necessarily an Article
20 III mootness problem.

21 CHIEF JUSTICE ROBERTS: I guess I've been
22 assuming -- but the eligibility under Chapter 13 even
23 under the present case is a present day question, right?
24 In other words, we don't go back and see if he was
25 eligible for Chapter 13 when the conversion was denied?

1 The question would be whether he's eligible now?

2 MS. BLATT: We have not compared the two,
3 the two chapters -- well, there was never a Chapter 13
4 petition. We have not compared the Chapter 7 petition
5 with the -- after this case, this Court granted
6 certiorari, then the Chapter 13. But it is on appeal
7 to the district court, so it's not presently moot.

8 We would ask for those reasons that the
9 First Circuit's decision be affirmed.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 Ms. Blatt.

12 Now, Mr. Baker.

13 REBUTTAL ARGUMENT OF DAVID G. BAKER
14 ON BEHALF OF THE PETITIONER

15 MR. BAKER: Thank you, Your Honor and
16 Mr. Chief Justice.

17 CHIEF JUSTICE ROBERTS: I'm sorry. You have
18 two minutes remaining.

19 MR. BAKER: Thank you, Your Honor.

20 The first thing I would like to say is that,
21 having been counsel to a Chapter 13 trustee many years
22 ago, I can assure the Court the Chapter 13 trustees
23 exercise all of the powers and authority that a Chapter
24 7 trustee does, with the exception of, as was said, of
25 possession of property of the estate. The property of

1 the estate remains vested, however, in the Chapter 13
2 trustee throughout the length of the case. It does not
3 re-vest in the debtor until the case is either dismissed,
4 a discharge is issued, or the case is closed. So the
5 concerns about leaving a debtor to do anything it wants
6 to with property of the bankruptcy estate simply is not
7 a reality, and I think it does a disservice to the many
8 fine Chapter 13 trustees that there are around the
9 country.

10 JUSTICE SCALIA: I'm not sure I understood
11 what you just said. You said until the plan is filed
12 and approved the property remains in the possession of
13 the Chapter 13 trustee.

14 MR. BAKER: No, it does not remain in her
15 possession. The Chapter 13 trustee technically never
16 has possession. The title remains vested in the Chapter
17 13 trustee.

18 JUSTICE BREYER: So is it possible if it's
19 in 13 that then the debtor, let's say a dishonest
20 debtor, could get back pieces of paper which would admit
21 that debtor to the possession of certain property which
22 he could then take and hide in a way that that couldn't
23 happen in 7? Is that possible or not possible?

24 MR. BAKER: It's certainly possible. But
25 then again, there are statutory and rule-based remedies

1 for that sort of activity. Our position is that those
2 rules and those statutes are what should control in the
3 case.

4 Thank you very much, Your Honor.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Mr. Baker.

7 The case is submitted.

8 (Whereupon, at 11:04 a.m., the case in the
9 above-entitled matter was submitted.)

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