

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: HARTFORD UNDERWRITERS INSURANCE
COMPANY, Petitioner v. UNION PLANTERS BANK,
N.A.
CASE NO: 99-409 *c.2*
PLACE: Washington, D.C.
DATE: Monday, March 20, 2000
PAGES: 1-61

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 HARTFORD UNDERWRITERS INSURANCE :

4 COMPANY, :
5 Petitioner :
6 v. : No. 99-409
7 UNION PLANTERS BANK, N.A. :
8 - - - - - X

9 Washington, D.C.

10 Monday, March 20, 2000

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:50 a.m.

14 APPEARANCES:

15 G. ERIC BRUNSTAD, JR., ESQ., Hartford, Connecticut; on
16 behalf of the Petitioner.

17 ROBERT H. BROWNLEE, ESQ., St. Louis, Missouri; on behalf
18 of the Respondent.

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

2 (10:50 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 99-409, the Hartford Underwriters Insurance
5 Company v. the Union Planters Bank.

6 Mr. Brunstad.

7 ORAL ARGUMENT OF G. ERIC BRUNSTAD, JR.

8 ON BEHALF OF THE PETITIONER

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

11 In the century preceding the enactment of the
12 Bankruptcy Code in 196 -- 1978, this Court and other
13 Federal courts recognized and enforced the rule that an
14 unpaid administrative claimant in a bankruptcy case can
15 come to court and have his or her claim paid if the
16 expense benefited the secured party.

17 The Federal courts also recognized the rule that
18 a trustee who pays a claim may come and seek to charge the
19 secured party's collateral if there was a benefit to the
20 secured party.

21 In enacting section 506(c) of the Bankruptcy
22 Code, Congress recognized the right of the trustee, and
23 the issue before the Court today is whether Congress'
24 recognition of the right of the trustee was therefore
25 intended to abrogate the other pre-code practice, which is

1 that the administrative claimant could come to court and
2 have the claim paid.

3 QUESTION: So you're simply arguing that if the
4 code says nothing, the pre-code practice applies,
5 notwithstanding something like 506(c)?

6 MR. BRUNSTAD: Yes, Your Honor. As the Court
7 stated 2 years ago in the Cohen case, cited in our brief,
8 at 523 U.S. at 221, we will not read the Bankruptcy Code
9 to erode past bankruptcy practice absent a clear
10 indication that Congress intended such a departure.

11 QUESTION: Well, here, Congress said the
12 trustee --

13 MR. BRUNSTAD: That's correct, Your Honor.

14 QUESTION: -- can bring it, and it doesn't talk
15 about the creditor, so maybe that's a change. I mean,
16 it's pretty clear language.

17 MR. BRUNSTAD: Yes, it is, Your Honor, but I
18 think that the part that Congress recognized was the tip
19 of the iceberg. As this Court made clear in the Wilson
20 case, which we cite in our brief, the rule which this
21 Court recognized was that the unpaid administrative
22 claimant could come forward and have the claim paid.

23 Now, we know under the Bankruptcy Code that
24 Congress will codify some of the equitable doctrines that
25 preceded its enactment, and yet this Court has recognized

1 other equitable --

2 QUESTION: Well, I mean, this just looks like
3 pretty clear language. Did your client ask the trustee to
4 take action?

5 MR. BRUNSTAD: Actually, Your Honor, yes, my
6 client did.

7 QUESTION: Yes.

8 MR. BRUNSTAD: And the trustee's position was
9 that the trustee had no interest in this case and would
10 not pursue it.

11 QUESTION: Could you have asked the judge to
12 instruct the trustee to exercise his discretion to collect
13 the -- to impose the surcharge?

14 MR. BRUNSTAD: Yes, we could have asked the
15 Bankruptcy Court to do that, but we think that the -- it
16 would have been futile, because the trustee had no funds
17 whatsoever to engage in litigation with the secured party.

18 QUESTION: So that it would have been abuse, an
19 abuse of discretion for the trustee to go ahead and seek
20 the surcharge?

21 MR. BRUNSTAD: It would have been, Your Honor,
22 completely futile, plus I think Your Honor would have to
23 recognize in this case that the trustee having no interest
24 in recovery because the trustee had not paid the claim in
25 the first place, one could argue that the trustee having

1 no interest and no incentive and no ability, it simply
2 could not have happened.

3 QUESTION: Did the trustee in your view in this
4 case have the discretion either to seek the surcharge or
5 not to seek the surcharge?

6 MR. BRUNSTAD: Well, if the trustee had wanted
7 to do so for free, certainly the trustee could have
8 pursued the claim.

9 QUESTION: Do you think, if you were the counsel
10 for the trustee, you would have told the trustee that he
11 has discretion not to pursue the surcharge?

12 MR. BRUNSTAD: Yes, Your Honor, I would, because
13 the State of --

14 QUESTION: So now we're in the position where
15 the code says, with its -- within the trustee's discretion
16 not to pursue the surcharge, and yet the creditor can
17 force it. That seems a little odd to me.

18 MR. BRUNSTAD: Well, Your Honor, our position is
19 not that the creditor can force the trustee to do it. Our
20 position is that the creditor can pursue the claim
21 directly.

22 QUESTION: It still seems odd to me. If the
23 trustee has the discretion not to do so, for the creditor
24 to force it, it seems to me to be in effect controlling
25 the discretion of the trustee.

1 MR. BRUNSTAD: I think perhaps, Your Honor, the
2 question here is not whether the trustee has discretion.
3 It would be whether the trustee has the ability. In this
4 case, the trustee having no funds to litigate with the
5 secured party simply could not pursue the claim.

6 QUESTION: If you had had a prior arrangement
7 with the trustee -- I don't know whether you did or not --
8 could an action be brought in State court on the basis of
9 representations?

10 MR. BRUNSTAD: We think, Your Honor, that the
11 remedy here is a remedy under the bankruptcy laws.

12 QUESTION: Yes, I didn't -- that's not the
13 question I asked you.

14 MR. BRUNSTAD: Okay.

15 QUESTION: I thought maybe the Eighth Circuit
16 had reserved the question of whether there was some right
17 you had to go into Federal court on diversity or State
18 law.

19 MR. BRUNSTAD: I think, Your Honor, that the
20 Eighth Circuit, the en banc decision was merely saying
21 that the only question here is whether there is a question
22 under Federal law.

23 QUESTION: What did the panel opinion say?

24 MR. BRUNSTAD: The panel opinion, Your Honor,
25 said that we had the right under section 506(c). There

1 was no mention of any alternative right.

2 QUESTION: Had you brought any claims in the
3 district court, or any other court?

4 MR. BRUNSTAD: No, Your Honor, we had not. This
5 is the exclusive means of recovery which we are --

6 QUESTION: I'm curious about a prior question
7 about what 506(c) covers.

8 MR. BRUNSTAD: Yes, Your Honor.

9 QUESTION: The text of 506(c) says the trustee
10 may recover from property securing an allowed secured
11 claim the reasonable, necessary costs and expenses of
12 preserving or disposing of such property, and I think
13 we're dealing here with Workman's Comp --

14 MR. BRUNSTAD: Yes, Your Honor.

15 QUESTION: -- premiums that were incurred after
16 the original Chapter 11 proceeding was begun --

17 MR. BRUNSTAD: Correct.

18 QUESTION: -- in an attempt to keep the business
19 going. It didn't have anything to do with a cost and
20 expense of preserving the real property, did it?

21 MR. BRUNSTAD: It did, Your Honor. In this case
22 the assets in question were operating businesses -- gas
23 stations, restaurants -- and in order to operate those
24 businesses the debtor had to have Worker's Comp insurance
25 or it could not operate at all, so but for the provision

1 of the insurance there would have been no operation.

2 QUESTION: Mr. --

3 QUESTION: Yes, but if they operate at a loss,
4 that's not much of a benefit to the secured creditor.
5 That's the whole problem, is these people have been
6 operating.

7 MR. BRUNSTAD: Well, Your Honor, I think that
8 the difference is that between liquidation value and going
9 concern value of the gas station.

10 QUESTION: Well, put it this way. I'm not
11 sure -- I mean, if your client had been hired to go paint
12 the building, or to repair the plumbing, I can understand
13 how it would fit under 506(c), but to incur an expense for
14 paying these premiums for Workman's Comp to run the
15 business, as opposed to actually enhancing the real
16 property or the building, I'm not sure I see how it fits
17 under 506 at all --

18 MR. BRUNSTAD: Well, Your --

19 QUESTION: -- instead of 503(a).

20 MR. BRUNSTAD: Well, Your Honor, you never get
21 to 506 unless you go through 503. 503 allows the
22 administrative expense and creates a class of
23 administrative expense claimants.

24 QUESTION: Presumably your client is within that
25 general category.

1 MR. BRUNSTAD: There is no dispute, Your Honor,
2 that our claim was allowed as a proper administrative
3 expense.

4 QUESTION: But you just want to go now against
5 the real property because that's the only thing there is,
6 I guess.

7 MR. BRUNSTAD: Correct. 506(c) articulates --

8 QUESTION: Yes.

9 MR. BRUNSTAD: -- a priority for certain claims.

10 QUESTION: Okay, but why doesn't it -- isn't it
11 limited to something that actually enhances the property
12 as opposed to the broader 503 claim?

13 MR. BRUNSTAD: Your Honor, in this case it's
14 undisputed that our claim provided a benefit to the
15 secured party, and the reason that it did was because the
16 value which the bank realized from the sale of these
17 businesses as a going concern was actually much greater
18 than the value that they would have received if the gas
19 station had shut down.

20 Picture the storage tanks under a gas station
21 which is not operating or generating revenue. Typically,
22 those operations sell for very little money. If, however,
23 you have an operating store, and some of these stores are,
24 in fact, still operating, but with different owners, the
25 value is much more, so the bank got the benefit of the

1 difference in value because the debtor was able to operate
2 in a going concern value and those values were preserved.
3 That is, of course, one of the purposes of Chapter 11.

4 QUESTION: Mr. Brunstad, I have --

5 QUESTION: Who can speak to engage a client such
6 as yours to continue? Is it the trustee? Do you have to
7 have an arrangement with the trustee?

8 MR. BRUNSTAD: Well, I think Your Honor should
9 understand that the trustee and creditors are adversaries,
10 and that it would not be -- it would be unseemly in the
11 least for a creditor, who is adversary to a trustee, to
12 have to hire the adversary to pursue the creditor's
13 claims.

14 QUESTION: Yes, but in the first place, after
15 bankruptcy, who authorizes your client to continue paying
16 for Workman's Compensation?

17 MR. BRUNSTAD: Oh, I see. Well, in this case,
18 Your Honor, our client did not even know of the
19 bankruptcy. The debtor concealed that fact from us, so
20 we've continued to provide the services without knowledge
21 of the bankruptcy.

22 QUESTION: Without any authorization from the
23 trustee?

24 MR. BRUNSTAD: Well, it was authorized, Your
25 Honor, but in the Chapter 11 context it doesn't quite

1 work that way. What happens is that when the debtor, who
2 is in possession of all of the estate, the case is filed,
3 the debtor continues to operate as it had. Section 1108
4 of the Bankruptcy Code provides for the continued
5 operation of the businesses, and the ordinary expenses
6 which the debtor would incur in operating the businesses
7 continued to be paid.

8 QUESTION: Now, but is the debtor authorized to
9 incur expenses which will be ultimately classified as
10 administrative expenses?

11 MR. BRUNSTAD: Yes, Your Honor, and that --
12 expenses that are incurred in the ordinary course, the
13 debtor is authorized by statute to continue to incur those
14 expenses, and in this case what we have, Your Honor, is an
15 involuntary creditor. We have the insurance company who
16 provided insurance because the debtor could not get it in
17 the market, and it was an assignment through the assigned
18 risk pool, so as an involuntary creditor Hartford had to
19 continue to provide the insurance.

20 QUESTION: Even when the premiums were not paid?

21 QUESTION: Without --

22 MR. BRUNSTAD: Once the premiums were not paid,
23 the Hartford then went and issued a default notice to the
24 debtor --

25 QUESTION: No, my question is this.

1 MR. BRUNSTAD: Yes, Your Honor.

2 QUESTION: Let's assume the current premium has
3 not been paid.

4 MR. BRUNSTAD: Yes, Your Honor.

5 QUESTION: Does Hartford, under Missouri law,
6 have the requirement to continue to provide the coverage?

7 MR. BRUNSTAD: For a period of time, yes,
8 because --

9 QUESTION: How long?

10 MR. BRUNSTAD: -- contractually there is a 30-
11 day notice period before the policy can be cancelled.

12 QUESTION: For just 30 days?

13 MR. BRUNSTAD: That's what the contract
14 provides.

15 QUESTION: But you seek for some 6 or 7 months,
16 am I right?

17 MR. BRUNSTAD: Yes, Your Honor, but what
18 happened during that period of time was that initially a
19 part of the premium was paid when the application for the
20 insurance was submitted, so that was covered for a period
21 of time. The way these policies work --

22 QUESTION: -- up front.

23 MR. BRUNSTAD: I believe it was over \$25,000.

24 QUESTION: Could not the insurer have said in a
25 situation like this, the debtor is in Chapter 11, I'm not

1 going to be at risk, put up the whole thing in front?

2 MR. BRUNSTAD: If we had known about the Chapter
3 11, perhaps we could have done that, but we did not know,
4 Your Honor.

5 QUESTION: As soon as you found out about it,
6 couldn't you say, at this point we stop until you pay the
7 premium in advance?

8 MR. BRUNSTAD: We did not find out until after
9 the policy was terminated, Your Honor.

10 QUESTION: How does that relate to your argument
11 that you were required to provide insurance anyway because
12 this individual, or the company would have been within the
13 assigned risk pool?

14 MR. BRUNSTAD: Your Honor, what happened was
15 that they tendered their application with part of the
16 premium, and then the -- a period of time went by.
17 Premiums are calculated on an audit basis, meaning the
18 debtor has to submit their payroll reports to the insurer.
19 Then the insurer calculates the premiums based upon the
20 number of persons who are employed times a certain rate.

21 The debtor in this case neglected to send those
22 monthly reports, so Hartford sent an auditor in. The
23 auditor conducted the audit, went back to Hartford,
24 Hartford calculated the premium and then sent a demand to
25 the debtor. The debtor paid part of the premium.

1 Now, all of this took a lot of time to happen.
2 After the debtor paid a part of the premium, the second
3 installment, in addition to the one that was with the
4 initial application, it was not enough to carry through
5 the term, but by the time the Hartford went and said, you
6 haven't paid the full amount, we were 30 days away from
7 the termination of the policy, so it was too late to
8 cancel.

9 QUESTION: So all you're saying is, we had to
10 start insuring. When we could stop insuring was in fact a
11 complex function of the audit.

12 MR. BRUNSTAD: Correct, Your Honor.

13 QUESTION: Okay.

14 QUESTION: Could I ask you about section 506,
15 which is on page 2 of your brief?

16 MR. BRUNSTAD: Yes, Your Honor.

17 QUESTION: It says the trustee may recover
18 necessary costs and expenses of preserving or disposing.
19 Now, I assume that he can't recover them until they've
20 been expended.

21 MR. BRUNSTAD: That's correct, Your Honor.

22 QUESTION: Well --

23 MR. BRUNSTAD: When the trustee -- the
24 trustee --

25 QUESTION: That's a reasonable reading of it.

1 MR. BRUNSTAD: Correct, Your Honor.

2 QUESTION: Isn't it also a reasonable reading of
3 it that he can't recover them unless he has expended them?
4 I mean, I'm --

5 MR. BRUNSTAD: Correct, Your Honor. When the
6 trustee --

7 QUESTION: Well, but that's not the position
8 you're taking. In response to other questions here, you
9 have assumed that the trustee could sue to recover money
10 that he didn't expend but that you expended.

11 MR. BRUNSTAD: I think that the best reading of
12 the statute, Your Honor, on its plain meaning, is that the
13 trustee, when the trustee expends, then the trustee
14 recovers.

15 QUESTION: Right.

16 MR. BRUNSTAD: But under prior practice, that
17 was not necessarily the rule. Under prior practice,
18 trustees could recover whether they expended or not, and
19 individual claimants could recover whether they expended
20 or not, and the problem that the court faces --

21 QUESTION: So long as somebody else had
22 expended. I mean, somebody has to have expended. You
23 acknowledge --

24 MR. BRUNSTAD: Somebody has to be out some
25 dollars before they can recover, and it has to be an

1 administrative, allowable administrative expense before
2 you get to 506(c).

3 QUESTION: You agree that the most
4 straightforward reading of the statute is that the trustee
5 can recover any money that he's expended --

6 MR. BRUNSTAD: Correct.

7 QUESTION: -- in securing the --

8 MR. BRUNSTAD: That's correct, Your Honor, but
9 that doesn't, of course, tell us what to do when the
10 trustee has not expended and the individual claimant is
11 out --

12 QUESTION: You would agree, Mr. Brownlee, that
13 the standard situation in which 506 applies is where the
14 trustee has paid out cash, and --

15 MR. BRUNSTAD: Where the trustee has paid out
16 cash --

17 QUESTION: -- and then he gets back that cash
18 from the security, from the sale of the secured property.

19 MR. BRUNSTAD: Correct, Your Honor, and that has
20 always been the uniform rule in the Federal courts
21 including as articulated by this Court.

22 QUESTION: So how often has 506 applied to
23 credit transactions?

24 MR. BRUNSTAD: It applies in almost every single
25 case, Your Honor, in one way or another, where there is a

1 secured party.

2 The problem that we face, Your Honor, is that in
3 some cases --

4 QUESTION: No, I mean practically. You've just
5 said the standard instance in which 506 is used is, the
6 trustee pays out dollars, and then the property is sold,
7 and he gets those dollars back from the top of the price.

8 MR. BRUNSTAD: Correct, but that presupposes,
9 Your Honor, that the trustee paid the expense first, and
10 that presupposes the trustee had funds, unencumbered funds
11 to pay these --

12 QUESTION: All I'm suggesting is that that is
13 the core situation to which 506 applies.

14 MR. BRUNSTAD: It is the --

15 QUESTION: I thought you agreed with me.

16 MR. BRUNSTAD: It is the logical situation, the
17 paradigm which Congress seemed to have had in mind, and
18 now what we must do is fill in the gap for the part that
19 Congress didn't seem to have in mind, and so the question
20 becomes, do we follow the pre-code practice to fill the
21 gap?

22 QUESTION: Well, that's -- you know, you keep
23 talking about pre-code practice, and I looked at your
24 cases, and there isn't all that pre-code practice. I
25 mean, there's the one decision that you're relying on from

1 this Court before there was any bankruptcy legislation,
2 and then another one that's an admiralty case.

3 MR. BRUNSTAD: The Poznan case was an admiralty
4 case, that's correct, Your Honor.

5 QUESTION: That doesn't show a very solid pre-
6 code practice.

7 MR. BRUNSTAD: Well, Your Honor, the case which
8 we rely on from this Court, the Wilson case, I think quite
9 clearly addressed the specific problem and provided the
10 specific solution that we're seeking.

11 In the lower court decisions, as the bankruptcy
12 laws evolved up to the point of the Bankruptcy Code, those
13 courts relied on Wilson for the proposition that the
14 administrative claimant has the right to come to the court
15 and have its claim paid when it has not been paid, and one
16 of the cases that we cite in our brief is a case
17 involving -- bear with me for one minute, Your Honor.

18 It is the Louisville case, Louisville Storage
19 Company case, 21 F.Supp. at 897, where the Court, citing
20 Wilson, said, quote, it has always been the rule, inherent
21 in general principles of equity, that the lienholder must
22 bear the expense of bankruptcy administration, which is
23 solely for his benefit, or to which he consents, or to
24 which he causes, and there, and in those other cases
25 relying on Wilson, the courts would allow on occasion the

1 unpaid administrative claimant to come forward and have
2 their claim paid.

3 So Wilson is the lodestar, in a sense, and the
4 lower Federal courts followed it.

5 QUESTION: Yes, but you're relying on one rather
6 old Supreme Court decision and some lower court decisions
7 following it up. I'm just suggesting that that is not a
8 very strong peg for claiming this understood pre-code
9 practice.

10 MR. BRUNSTAD: Well, Your Honor, it was uniform.
11 There were no opinions to the contrary, and the -- this
12 practice, I would submit, Your Honor, is more established
13 than the pre-code practice which this Court was willing to
14 accept in Midlantic for the proposition that a trustee's
15 power to abandon carries with it the corollary that the
16 trustee cannot abandon in violation of certain health and
17 safety requirements under applicable State law.

18 QUESTION: Well, isn't it possible Congress
19 might have wanted to change this, figuring that what you
20 describe as pre-code practice would attract a certain
21 amount of leeches who wanted to get at the secured
22 property?

23 MR. BRUNSTAD: Well, Your Honor, the rule, I
24 think, is one which initially five courts of appeals, and
25 the Eighth Circuit changed its mind, had adopted and the

1 courts had no ability administering. I don't think
2 there's any evidence, Your Honor, that Congress intended
3 to change the practice.

4 In fact, the only evidence in the legislative
5 history is that Congress intended to maintain the status
6 quo, so there's no -- there being no evidence of an intent
7 to change, the presumption, I think, is that, and properly
8 so, given the nature of what we're talking about, the
9 bankruptcy laws, that the pre-code practice endures.

10 QUESTION: If the trustee chose to seek these
11 funds to surcharge the property and, either by an
12 accounting entry or by the actual receipt of cash,
13 received \$25,000, would that be paid 100 percent to you,
14 or could the trustee say, well now, I have my own
15 administrative expenses, too, and other, and there are
16 other administrative -- how does that work?

17 MR. BRUNSTAD: If the trustee has paid the claim
18 from unencumbered funds of the estate, and the trustee
19 then seeks to recover it from the secured party's
20 collateral, and the trustee is basically replenishing the
21 estate and then the funds would be distributed, but in
22 that situation, of course, the administrative claimant is
23 paid in full --

24 QUESTION: No, but in my hypothetical he's not
25 quite sure, and so he goes to court seeking authority to

1 pay. He gets it. Does that go just to you, or does it go
2 to other administrative claimants as well?

3 MR. BRUNSTAD: It would go to us if we were the
4 only section 506 --

5 QUESTION: No, there are other ones.

6 MR. BRUNSTAD: Well, those claimants' claims are
7 not entitled to the priority that section 506(c) provides.
8 If those claims did not provide a benefit to the secured
9 party --

10 QUESTION: They say they did.

11 MR. BRUNSTAD: Oh, if they did, and they were
12 properly also 506(c) claimants --

13 QUESTION: They claim that, but he just seeks
14 authority to recover the money for you, and then it's
15 there in the pot. Doesn't everybody get to share it?

16 MR. BRUNSTAD: If those other claimants' claims
17 were determined ultimately by the court to be entitled to
18 506(c), we would share with other 506(c) claimants.

19 QUESTION: Do you have to do that under your
20 theory of the case, where you yourself can sue?

21 MR. BRUNSTAD: Yes.

22 QUESTION: So once you get a surcharge you have
23 to share it with everybody else?

24 MR. BRUNSTAD: I think it's important to
25 understand, Your Honor, that in the bankruptcy case the

1 timing of when claims are presented is not what's
2 important. At the end of the case, after all claims have
3 been cut off by a bar date and then determined, those --
4 that is when the distributions can be made.

5 QUESTION: I know. Well, you help me with my
6 question. What happens if you prevail and you succeed in
7 a surcharge? Do you have to share with other
8 administrative claimants who have made a claim?

9 MR. BRUNSTAD: If they have 506(c) rights, yes.

10 QUESTION: Now, are there priorities within the
11 506(c) administrative claimants?

12 MR. BRUNSTAD: No. All 506(c) claimants are
13 equal.

14 QUESTION: Including those pre-conversion and
15 post conversion?

16 MR. BRUNSTAD: No. 506(c) only applies, Your
17 Honor, to post petition.

18 QUESTION: Ah. Okay.

19 QUESTION: What happens pre-petition if a debtor
20 has a huge claim against, say, General Motors that
21 requires a lawsuit, let's say, millions of dollars, and
22 the trustee, thinking it isn't that great a claim, won't
23 bring the lawsuit --

24 MR. BRUNSTAD: Yes.

25 QUESTION: -- but the creditor, who's a big

1 creditor --

2 MR. BRUNSTAD: Yes.

3 QUESTION: -- thinks I'd certainly like this
4 money in the estate --

5 MR. BRUNSTAD: Yes.

6 QUESTION: -- I want him to bring the lawsuit.
7 What happens? Can the creditor sue General Motors
8 directly?

9 MR. BRUNSTAD: Your Honor, we believe that the
10 Court answered that question in Meyer v. Flemming --

11 QUESTION: Yes, and what's the answer?

12 MR. BRUNSTAD: -- which is cited in our brief,
13 and the answer is that of course the lawsuit should not be
14 allowed to lapse. The creditor can come and bring the
15 cause of action.

16 QUESTION: So the creditor can bring his own
17 lawsuit in that case for the benefit of the estate because
18 the trustee wouldn't.

19 MR. BRUNSTAD: Correct, Your Honor.

20 QUESTION: And you say that's really the same
21 principle here.

22 MR. BRUNSTAD: Correct, Your Honor, and I
23 think --

24 QUESTION: What could Hartford have done here to
25 protect itself? I mean, what's conceivably --

1 MR. BRUNSTAD: Conceivably --

2 QUESTION: -- out there to protect Hartford?

3 MR. BRUNSTAD: Well --

4 QUESTION: Is no notice required to be given to
5 people post petition in a Chapter 11?

6 MR. BRUNSTAD: Notice is required, Your Honor.

7 It should have been done. It was not done in this case to
8 the Hartford, so the Hartford was without notice. But
9 let's -- assuming that Hartford had notice, what could
10 Hartford have done?

11 Well, being an involuntary creditor, and having
12 to provide insurance as long as the premium was paid, very
13 little, and Hartford's relief is section 506(c). Just
14 like when the United States comes in and cleans up an
15 environmental site post petition, and the cleanup of the
16 site benefits the secured party by increasing the value of
17 the collateral, the United States in that situation,
18 courts have recognized, can then come to court and say,
19 the trustee has not paid our administrative expense for
20 cleanup because the trustee has no unencumbered funds to
21 do so and the courts have said, well, you may surcharge
22 the collateral to the extent that it benefited the secured
23 party.

24 Now, if that were not the rule, and the trustee
25 had no funds to pay the United States' cleanup cost, then

1 essentially the United States would be subsidizing the
2 recovery of the secured party, who would walk away with
3 the full value of the collateral, having the benefit of
4 the cleanup cost, but not have to pay that cost from the
5 collateral, and this Court's principle, which is -- it's
6 articulated in Burnham v. Bowen, in Wilson, a whole line
7 of cases, is that that is not the bankruptcy rule.

8 QUESTION: Was this property -- was the business
9 ultimately sold as a going concern here?

10 MR. BRUNSTAD: Yes, Your Honor. During the
11 case -- the stores were sold during the course of the
12 Chapter 11 case. In fact, that was planned from the
13 beginning.

14 In our appendix there is, at one of the pull-
15 outs that we have, which shows the budget and what the
16 parties were to expend, listed at the top -- and this is
17 page 175a -- you will see at the top, stores to close, and
18 this was the exhibit that was attached to the order on the
19 first day of the bankruptcy, and it shows that there
20 were -- identifies a number of stores to be closed, and in
21 fact a number of the stores were closed and sold as going
22 concerns, and the bank realized the proceeds from those
23 sales, so the bank got the benefit of the going concern,
24 and our simple point is that --

25 QUESTION: But a number of them weren't. I

1 mean, the thing eventually ended up in Chapter 7, and it
2 was liquidated.

3 MR. BRUNSTAD: After the stores were sold --

4 QUESTION: All of them?

5 MR. BRUNSTAD: I believe all of them. There may
6 have been one or so, but --

7 QUESTION: Mr. Brunstad --

8 MR. BRUNSTAD: No, all of them were, Your Honor.
9 Yes, all of them were.

10 QUESTION: Mr. Brunstad, in Midlantic, which you
11 say is the case that stands for the proposition of
12 bringing forward pre-code practice if Congress doesn't --
13 we said in codifying the judicially developed rule of
14 abandonment, Congress also presumably included the
15 established corollary, et cetera.

16 MR. BRUNSTAD: Yes, Your Honor.

17 QUESTION: Now, what rule are you saying that
18 506(c) codified that should bring with it your position?

19 MR. BRUNSTAD: 506(c) codified the tip of the
20 iceberg of the --

21 QUESTION: Well, the tip of the iceberg really
22 isn't a very -- I mean --

23 MR. BRUNSTAD: Certainly, Your Honor.

24 QUESTION: It's certainly -- Midlantic is much
25 narrower than saying the statutory -- is just the tip of

1 the iceberg, that we bring all sorts of other things with
2 it.

3 MR. BRUNSTAD: Well, I think, Your Honor, in
4 this case, what should come with 506(c) is the undisputed
5 established pre-code practice. There is no contrary
6 precedent, contrary to Wilson.

7 QUESTION: Yes, but it's -- Midlantic is talking
8 about, they're codifying something and you can tell from
9 the language of the section that they're codifying it.
10 You can't tell from 506(c) that they're codifying anything
11 as broad as you say, it seems to me.

12 MR. BRUNSTAD: Well, Your Honor, the bankruptcy
13 codifies in section 553 rights of set-off. That says
14 nothing about rights of recoupment, yet in bankruptcy that
15 was an established right and this Court in Ritter v.
16 Cooper said it's well-settled that recoupment applies in
17 bankruptcy, so this Court in construing the bankruptcy
18 laws has not been shy about incorporating and recognizing
19 its --

20 QUESTION: Yes, but set-off and recoupment seem
21 much closer to one another than 506(c) and what you're
22 talking about.

23 MR. BRUNSTAD: Well, I think, Your Honor, that
24 actually the opposite is true, and what we're talking
25 about here is a rule that the administrative claimant can

1 come, which is inextricably intertwined with the right of
2 the trustee. The general principle is the same.

3 I think it's important to emphasize that
4 bankruptcy proceedings are in rem, and that the bankruptcy
5 court, as this Court made clear in the Adair case, that it
6 is the responsibility of the court, the bankruptcy court
7 to see to it that the in rem assets, which are in custodia
8 legis, are, in fact, distributed properly.

9 QUESTION: Yes, but that's a general statement
10 that really I don't see -- how does that aid you in this
11 particular case, when you're talking about 506(c)?

12 MR. BRUNSTAD: Because Adair is the case, Your
13 Honor, which articulated the rule which we're relying on
14 here, the general rule that the administrative expenses
15 must be paid out of the secured party's collateral to the
16 extent of the benefit and the court -- it would I think
17 be -- lead to an absurd result to say that if the trustee
18 doesn't come to court, that the bankruptcy court has no
19 authority to allocate the charges properly, and if the
20 bankruptcy court has authority to do so, any party in
21 interest in the case should be able to come to court to
22 say to the court, this is how it must be done.

23 QUESTION: Well, that would be all the more so
24 if you interpreted 506(c) as allowing the trustee to
25 recover only those expenses that he has paid.

1 MR. BRUNSTAD: Correct, Your Honor.

2 QUESTION: I think your case gets harder if you
3 read 506(c) to say that the trustee may also recover on
4 your behalf expenses that you've paid. I don't read it
5 that way, but you apparently do.

6 MR. BRUNSTAD: Well, Your Honor, I think Your
7 Honor's reading is the correct reading. In response to
8 Your Honor's prior question I think it was -- my response
9 was that pre-code practice allowed either way. I think
10 Your Honor's reading is the best reading, and that the
11 administrative claimant, following pre-code practice, can
12 come to court when the trustee has not paid the claim.

13 QUESTION: Under what section?

14 MR. BRUNSTAD: Under what section, Your Honor?

15 QUESTION: Yes.

16 MR. BRUNSTAD: Well, the bank -- under pre-code
17 practice, the lower courts often would invoke this rule as
18 a gloss on the court's power to allow administrative
19 claims in addition.

20 QUESTION: But to me that is the difficulty with
21 your position, and the cases where we've said pre-code
22 practice, you can point to a section and say, yes, this
23 brings -- this says (a), but it also means the corollary
24 to (a) under prior practice, but you don't have an
25 alternative section to point to. 506(c) doesn't help you.

1 MR. BRUNSTAD: Well, neither does the doctrine
2 of recoupment, Your Honor, or the doctrine of ear-marking
3 or substantive consolidation, and those are all equitable
4 doctrines which endure under the --

5 QUESTION: Mr. Brownlee, I'm not -- you made a
6 major shift from your brief in response to Justice
7 Scalia's question, and so I'd really like to know what
8 your position is. That is, you made a big thing about
9 50(c) -- it wasn't the trustee only. It was the trustee
10 and Carrot Mark -- your client, but now you say Justice
11 Scalia has the better reading and 506 has nothing to do
12 with this case, so which one is it?

13 MR. BRUNSTAD: It does, Your Honor, because
14 506(c) clearly recognizes that expenses of the kind which
15 we are talking about are chargeable against the secured
16 party's collateral, and the question in an in rem
17 bankruptcy proceeding where we're simply talking about
18 dividing up assets, who's going to get what, the question
19 is, can a party in interest come to court and say, this
20 expense should be put in this bucket, or moved here,
21 because the trustee has no incentive or ability to come to
22 court to say it should be so.

23 And where the -- because the bankruptcy court
24 has the power under 105, under its general equitable
25 powers, which this Court recognized recently in the energy

1 resources cases to be quite broad, to allocate --

2 QUESTION: Are you dropping your reliance on
3 506?

4 MR. BRUNSTAD: No, Your Honor. 506(c)
5 recognizes that the expense of the kind which we are
6 talking about here is chargeable. All we are saying is
7 simply, the Court should adopt the gloss which the courts
8 adopted pre-enactment of the bankruptcy code, that
9 individual claimants, parties at interest, unpaid
10 administrative claimants can come to court and say, the
11 trustee won't act, we get to have this particular
12 expense --

13 QUESTION: Come to court under 506(c)? Because
14 that's the question presented in your petition for
15 certiorari.

16 MR. BRUNSTAD: The Court, under 506(c),
17 following pre-code practice, could rule, and -- I think it
18 doesn't make any difference, Your Honor, whether you rely
19 on 506(c) directly or on pre-code practice, but I think
20 that you can rely on section 506(c).

21 QUESTION: Well, if you can't, you lose on the
22 question presented.

23 MR. BRUNSTAD: Well, our position, Your Honor,
24 is that you can.

25 QUESTION: Your time has expired.

1 MR. BRUNSTAD: Yes, Your Honor. Thank you.

2 QUESTION: We'll hear now from you, Mr.

3 Brownlee.

4 ORAL ARGUMENT OF ROBERT H. BROWNLEE

5 ON BEHALF OF THE RESPONDENT

6 MR. BROWNLEE: Good morning, Mr. Chief Justice,
7 may it please the Court:

8 I don't know if it would make any difference in
9 the Justices' rulings, but I'd like to -- my friend and
10 colleague Mr. Brunstad misspoke on a couple of questions,
11 one I believe by Justice Kennedy. I may be wrong about
12 that, because I think it was the first question in the
13 argument, where Hartford indicated it had asked the
14 trustee to proceed and the trustee had refused.

15 In the blue brief at page 5, note 4, it is
16 stated, Hartford did not request the trustee to pursue its
17 claim under section 506(c) because the law in the Eighth
18 Circuit as it existed at that time permitted
19 administrative claimants to pursue such claims on their
20 own behalf, citing the Boatmen's case, which was overruled
21 by the Eighth Circuit.

22 In fact, not even that is really so. When the
23 Boatmen's case was decided, the one that was overruled in
24 this case, the issue was at contest in the Hartford v.
25 Magna case, Magna being the predecessor of my client, so I

1 believe Mr. Brunstad misspoke in response to the answer to
2 that question.

3 QUESTION: Well, how could Hartford have avoided
4 losing its claim here, do you think, if there was
5 something that was obtained when the business was sold as
6 an ongoing business, and assuming that the Workman's Comp
7 insurance somehow benefited the property?

8 MR. BROWNLEE: Justice O'Connor, Hartford's
9 policies were such in this case -- you can look at the
10 record below -- that it did not know that it was insuring
11 a debtor for a period of some 15 months or so.

12 The one thing Hartford could have done, I
13 believe, although I don't intend to tell them how to run
14 their business in any -- and I don't mean this in any way
15 derogatorily or in a pejorative manner -- would have been
16 to have some procedures in place so that they would have
17 known, even though the debtor -- I have no evidence that
18 the debtor did notify them. Bankruptcy is and always has
19 been somewhat creditor emptor, and it is true in this case
20 that there's no evidence that Hartford was actually
21 notified.

22 There is evidence in this case on the record
23 below that Hartford knew that it had a series of quarterly
24 bills that were going unpaid, and so it couldn't have
25 found out. Had Hartford known earlier, before the case

1 was converted to a 7, and before the case was in a total
2 liquidation mode, Hartford could have come to court,
3 Hartford could have asked to terminate the policy based on
4 nonpayment, at least cut its losses, and also Hartford
5 could have tried to take steps to persuade the bankruptcy
6 court perhaps while there were still funds in the estate
7 to allow it within an administrative claim and force the
8 payment of that claim.

9 Bankruptcy has a lot to do with timing,
10 especially in a reorganization case that's going downhill.
11 Hartford in fact is correct that it did not know until
12 substantially later. If the Justice's question is, how
13 could Hartford have protected itself after the fact, once
14 we got to March of 1993, or whatever the record will show
15 the date was that it learned, Hartford cannot protect
16 itself under 506(c), I submit. 506(c) says the trustee
17 may recover.

18 QUESTION: Well, what happens in -- I don't know
19 that that Meyer case really answers the question, but what
20 happens in the case of a pre-petition, a pre-petition
21 debtor, the pre-petition debtor has a giant claim against
22 General Motors, a lawsuit --

23 MR. BROWNLEE: Okay.

24 QUESTION: -- and the trustee doesn't bring the
25 claim, and one of the creditors says, I'd like to bring

1 it.

2 Now, Meyer dealt with the case of the debtor
3 having filed the suit, not a creditor. It could be taken
4 as authority for the creditor. So what happens? Is it
5 the case that creditors in such circumstances simply go
6 and bring their own lawsuits in the name of the estate
7 instead of the trustee doing it?

8 MR. BROWNLEE: Well, Justice Breyer, if I could
9 just observe first of all in the Meyer case, it's my
10 reading of the Meyer case that while the Court allowed the
11 principle of the second debtor to proceed with the
12 prefilled proof of claim in the first bankruptcy, it was
13 clear that any recovery would be on behalf of the estate,
14 which is not something that Hartford seeks here. Hartford
15 seeks a nonshare.

16 QUESTION: I know, but what I'm trying to do for
17 my own purposes is to find an analogy, and I know it's a
18 rough analogy, but I would like to know just for my own
19 purposes what happens, and it must happen often, of when a
20 trustee doesn't bring a lawsuit to get some money for the
21 estate, that a big creditor thinks he ought to bring.
22 Does bankruptcy normally work -- this can't be unusual.

23 MR. BROWNLEE: It's not unusual.

24 QUESTION: And in such circumstances there are
25 two possibilities. One is that you bring a suit to sue

1 the trustee and make him do it. Another possibility is,
2 you bring your own lawsuit but it -- somehow you're
3 standing in the shoes of the trustee.

4 MR. BROWNLEE: Both exist.

5 QUESTION: Both exist. All right. If the --

6 MR. BROWNLEE: You can file a motion --

7 QUESTION: Fine.

8 MR. BROWNLEE: -- in the bankruptcy court to
9 compel the trustee to act --

10 QUESTION: Okay.

11 MR. BROWNLEE: -- or you can seek what is known
12 in many of the cases as derivative standing.

13 QUESTION: Fine. Now, if that's so in that
14 circumstance, why shouldn't that be so in this
15 circumstance?

16 MR. BROWNLEE: Because in this circumstance
17 Hartford didn't follow that procedure. Hartford didn't
18 ask the trustee to act. Hartford didn't ask the
19 bankruptcy court to force the trustee to act, and Hartford
20 didn't go to the bankruptcy court having made a record on
21 that subject and said, you know, somebody needs to sue
22 Union Planters because we think there's a pretty good
23 506(c) claim --

24 QUESTION: And now, in your view as a bankruptcy
25 lawyer, if they had, I mean, is that a good way to resolve

1 the problem? You say, look, you're a creditor. You're a
2 post petition creditor. You have a right to get your
3 money, but you'll have to go first to the trustee, because
4 otherwise there are going to be those leeches, you know,
5 or there are going to be all these people running around.
6 Is that a good resolution?

7 MR. BROWNLEE: Well, Justice, it's not the
8 leeches issue, it's the quality-of-distribution-among-
9 creditors-of-equal-rank issue.

10 If the trustee, who is clothed under 506(c) with
11 the responsibility to pursue this right, this action to
12 obtain funds that were otherwise the property of the
13 secured creditor, either doesn't proceed in her own
14 behalf, or there isn't a court order that allows whatever
15 surrogate, Hartford or whomever, to proceed in the name of
16 the estate and on behalf of the estate, then you're going
17 to have a circumstance where that recovery is going to be,
18 as Hartford seeks here, kept to itself and not shared with
19 other creditors of equal rank.

20 QUESTION: Where does --

21 QUESTION: Well, can't --

22 QUESTION: -- the court have the authority to
23 allow Hartford to proceed, under what section of the code?

24 MR. BROWNLEE: There is none.

25 QUESTION: Hartford --

1 MR. BROWNLEE: I'm not aware of a statutory
2 basis, Justice, for derivative standing.

3 QUESTION: All right, but --

4 QUESTION: I thought that in response to Justice
5 Breyer you said, now, you go to the trustee and the court,
6 and if the trustee doesn't want to do it, then you ask the
7 court for authority to do it on your own, but now you're
8 saying that a court doesn't have -- can't allow you to do
9 it.

10 MR. BROWNLEE: The bankruptcy courts have
11 developed a body of law wherein they will -- some will
12 grant what is called derivative standing, and the cases
13 are cited in the briefs.

14 As a matter of fact, the best example of them is
15 in the amici for the petitioner, when the AIA and the
16 National Union suggests that even under the preference
17 section and the fraudulent conveyance sections, which also
18 start with the words, the trustee may recover, that there
19 are cases which have allowed third parties --

20 QUESTION: Are those proper cases, and proper
21 holdings in your view?

22 MR. BROWNLEE: Justice, I don't think -- I know
23 that this Court doesn't need to decide whether derivative
24 standing is appropriate on a Nation-wide basis for us to
25 win this case, because I don't think this Court should

1 hold, and I hope it doesn't hold the 506(c), the word
2 trustee means anything other than trustee. I don't think
3 you should hold that it means -- because I don't think
4 there is any established pre-code practice and, if there
5 were, the statute is sufficiently clear. It shouldn't --

6 QUESTION: Well, then I'm not sure why your
7 answer to Justice Breyer isn't that the Hartford goes to
8 the Court, it asks to order the trustee, if the court and
9 the trustee give no relief, there's nothing Hartford can
10 do.

11 MR. BROWNLEE: Well, Justice Breyer --

12 QUESTION: I don't know why you didn't say it
13 that way.

14 MR. BROWNLEE: -- I understood asked me a
15 factual question, Justice Kennedy. I don't mean to argue
16 with you. In practice, and I'm in the trenches a heck of
17 a lot more than I'm in the appellate courts, in practice
18 bankruptcy courts will occasionally, if a trustee refuses
19 to act, call a creditor or another party with the right to
20 act in the estate's name on behalf of the estate to pursue
21 the claim if the court feels that it should --

22 QUESTION: Is that pursuit in the bankruptcy
23 court --

24 MR. BROWNLEE: In the bankruptcy --

25 QUESTION: -- or in the plenary action?

1 MR. BROWNLEE: In the bankruptcy court.

2 QUESTION: In the bankruptcy --

3 MR. BROWNLEE: Now, there is another --

4 QUESTION: If we assume that is correct, then,
5 if we assume that is a proper practice, then if Hartford
6 had done two things differently, Hartford would be
7 entitled to recover, I take it, on the assumption that
8 there may be a derivative action, and the two different
9 things are, number 1, Hartford would have to have gone to
10 the trustee, and the trustee would have had to indicate
11 refusal.

12 MR. BROWNLEE: Right.

13 QUESTION: And number 2, Hartford, in bringing
14 its suit, would have to have captioned it, Hartford ex
15 rel, or Trustee ex rel Hartford, rather than Hartford, and
16 if those two facts had been different, assuming derivative
17 actions are appropriate, Hartford could recover here. Am
18 I right, or am I missing something?

19 MR. BROWNLEE: I don't precisely disagree with
20 the way it's phrased, Justice Souter. You're basically
21 right. Hartford would have had to get a court order that
22 said, that established the trustee was not proceeding --

23 QUESTION: Okay. Now, why does it have to get
24 the court order if there's no statutory section on it?

25 MR. BROWNLEE: I'm not here to argue whether

1 derivative standing is the right approach. Every
2 bankruptcy court --

3 QUESTION: Right, but if we assume derivative
4 standing is -- I'm making that assumption -- what
5 difference does it make whether Hartford gets the court
6 order or doesn't get the court order?

7 MR. BROWNLEE: Because --

8 QUESTION: Is it merely orderly procedure?

9 MR. BROWNLEE: No, because if Hartford recovers
10 it has to share with all other creditors of equal rank.

11 QUESTION: Well, Hartford has indicated that
12 that's exactly what it will do, although that's I guess an
13 easy concession, because it says there aren't any.

14 MR. BROWNLEE: If you could hear me for a minute
15 on that.

16 QUESTION: Yes.

17 MR. BROWNLEE: I believe your question earlier
18 to Mr. Brunstad was pre-conversion or post conversion, and
19 his answer was pre-petition or post petition. Those are
20 big differences. There aren't any administrative
21 creditors pre-petition. Pre-conversion and post
22 conversion --

23 QUESTION: Ah. Ah, okay. You're right.

24 MR. BROWNLEE: -- in an 11 that goes to a 7,
25 there can be a bundle of administrative creditors on both

1 sides. In fact, under 726(b) of the Bankruptcy Code, the
2 post conversion administrative creditors in fact do have a
3 priority, so --

4 QUESTION: Well --

5 MR. BROWNLEE: -- while he says there wouldn't
6 be any others, that's not so --

7 QUESTION: Okay. Let's assume for the sake of
8 argument, then, that I misspoke or he misspoke on that.

9 MR. BROWNLEE: He did misspeak.

10 QUESTION: He's -- I will make the further
11 assumption that any recovery would be subject to the
12 claims of all others in the same class that Hartford is
13 in.

14 MR. BROWNLEE: Correct.

15 QUESTION: Now, if that would be the legal
16 effect of Hartford's recovery here, is the only thing,
17 then, that prevents Hartford from doing that the failure
18 of Hartford to have gone to the trustee in the first place
19 and said, let me bring a derivative action?

20 MR. BROWNLEE: If you are in a district where a
21 judge will allow derivative standing in the name of the
22 trustee, that's correct, because 506(c) talks about an
23 action to recover by the trustee. The bankruptcy court in
24 a number of districts will allow that. In a number of
25 districts, some bankruptcy courts are critical of that.

1 But in any event, Hartford came here, and there
2 has been I think a shift in the briefs, quite frankly, as
3 I understand the argument, or maybe I just misperceived
4 it. Hartford came here on the merits briefs to ask the
5 court assembled to rule that under 506(c)'s meaning,
6 506(c) could deemed to say, the trustee may recover, da-
7 da, da-da, comma, and any unpaid administrative creditor
8 may also recover under this section, and if that unpaid
9 administrative creditor does recover under this section,
10 it will have a super priority claim over all other
11 administrative creditors as described in section 507(a).

12 Now, that's a big mouthful, but from a little
13 section that says the trustee may recover, for Hartford to
14 win on the merits briefs, all those things I just said, I
15 respectfully submit, have to be engrafted onto a simple
16 statute that gives the trustee in bankruptcy under limited
17 circumstances as defined under the merits the right to --

18 QUESTION: Mr. --

19 QUESTION: Does the record tell us whether there
20 are other administrative creditors now competing for this
21 money?

22 MR. BROWNLEE: It does not, Justice Stevens, and
23 I did not have the case below --

24 QUESTION: I had understood the record to
25 indicate that this was the only administrative creditor,

1 and that in no event would there be money available for
2 any other, either general creditors or post petition
3 creditors.

4 MR. BROWNLEE: I can tell you this, Justice
5 Stevens -- I did not have the case below, so I'm not going
6 to tell you something I don't know, obviously. We called
7 up from the archives the final report. The final report
8 doesn't say, so I can't tell you that. I can tell you
9 that Union Planners' predecessor had a \$4 million loan, we
10 lost a million and a half in principal, all of our
11 interest, and all of our attorney's fees and costs. If
12 there was any other administrative creditor in the case,
13 they didn't get paid.

14 Now, whether, as a matter of fact, there was
15 another group there is unknown. Intuitively, I would
16 suggest to the court that Hartford went to a lot of
17 trouble to make this end run if it was the only unpaid
18 administrative creditor, because it could have made a
19 simple demand on the trustee and taken its shot for
20 derivative standing, and I would also like to suggest
21 something else --

22 QUESTION: Well, but let me just --

23 MR. BROWNLEE: Go ahead, Justice Stevens. I'm
24 sorry.

25 QUESTION: One other question. Am I correct in

1 assuming that they did satisfy the requirements of 503(a)
2 and (b)?

3 MR. BROWNLEE: They satisfied the requirements
4 of 503(a) in that they -- I'm trying to think which is
5 which. They made -- in the same motion that they sued
6 under 506(c), they made a request for payment of their
7 administrative claim, and I believe they made a --

8 QUESTION: The bankruptcy judge allowed it.

9 MR. BROWNLEE: Yes, and I made -- I believe they
10 made a request for allowance and payment.

11 QUESTION: Yes.

12 MR. BROWNLEE: So I -- it's my belief that they
13 did follow 503 at least.

14 QUESTION: You see, the thing that troubles me
15 about your position -- it's a very difficult case, but the
16 thing that troubles me about your position is, it seems to
17 me it makes 503(a) and (b) meaningless.

18 MR. BROWNLEE: Well, let me try to respond to
19 that. 503(a) says you can file a request for an
20 administrative claim or you can file a request for a
21 payment of it, and that's fine. I mean, any creditor
22 ought to be able to file a proof of claim. Unsecured
23 creditors can. Secured creditors can. I certainly
24 couldn't imagine why administrative creditors shouldn't be
25 allowed to.

1 Anybody can ask for payment from the estate, but
2 503 talks about a direction to the estate to seek payment.
3 Creditors can't typically sue secured creditors as if they
4 could sue outside under State law, to go back to a
5 question you previously asked, Justice.

6 Within the bankruptcy, the Bankruptcy Code's --
7 I believe the Court's language in some cases in looking at
8 plain meaning has been a consistent and coherent scheme,
9 has been that creditors deal with the estate, and the
10 estate deals with creditors.

11 Hartford wants to deal with us. They want to
12 call us outside, and they don't have any way to do that
13 except to make the argument that's made on the merits
14 briefs and partially made today, although there may have
15 been a shift in argument, that they can do it under
16 506(c).

17 Now, I would suggest to the Court that the
18 Congress was not totally unmindful when it adopted the
19 code of the possibility that inter -- that there might be
20 intercreditor fights under some circumstances, under some
21 hypotheticals. In fact, Congress enacted section 510, and
22 in 510(c), which is the equitable subordination section,
23 the Congress said that on application to a court, after
24 noticing a hearing, the court can subordinate all or part
25 of one creditor's claim to all or part of another

1 creditor's claim, or give the lien to the estate if it
2 wanted, under general principles of equitable
3 subordination.

4 Now, the rule isn't the same as the substantive
5 rule the trustee must meet to recover ordinary and
6 necessary expenses of preserving the estate and benefit of
7 the creditor under 506(c), but 510(c) does provide a
8 remedy, but Hartford wasn't willing to share.

9 QUESTION: Is it ever used in these
10 administrative expense areas, that section, 510?

11 MR. BROWNLEE: It's used a lot in winner
12 liability type claims, or any kind of claim where you've
13 got some sort of equitable misconduct, Justice O'Connor.

14 I have not personally, and I -- that doesn't
15 mean it's not used, and I have not researched the issue.

16 QUESTION: What about the --

17 MR. BROWNLEE: I do not know how often it is
18 used.

19 Yes, Justice Ginsburg.

20 QUESTION: Mr. Brownlee, what about the
21 suggestions that petitioner made of the clean-up costs, or
22 even the Government. It's an ongoing operation, and there
23 are tax liabilities. She said that your position means
24 that a Good Samaritan, or a Government agency who comes in
25 and cleans up the toxic junk gets nothing --

1 MR. BROWNLEE: Well --

2 QUESTION: -- and the Government would get no
3 tax. How do you deal with those cases?

4 MR. BROWNLEE: Well, in the first place, in
5 terms of -- and I gather your question is, a volunteer
6 comes along post petition and cleans up the property,
7 which directly benefits the property, or the secured
8 creditor.

9 QUESTION: Well, he -- I'm addressing -- I don't
10 remember precisely how he put it in his brief. I'm sure
11 you focused on it, so you remember better than I do. He
12 talked about --

13 MR. BROWNLEE: I'm not sure about that.

14 QUESTION: -- the clean-up costs that could be
15 incurred by a private contractor or by a Government agency
16 to decontaminate the property.

17 MR. BROWNLEE: Well, if the case is in a Chapter
18 7, the case is --

19 QUESTION: This -- it has to be --

20 MR. BROWNLEE: Okay.

21 QUESTION: -- when it was in 11, because that's
22 what made it possible for the thing to go on.

23 MR. BROWNLEE: If the case is in Chapter 11, and
24 the debtor hires a private contractor to come in and clean
25 up dirty property, and that contractor does it, and the

1 court finds that the reasonable and necessary, all of that
2 is met, which it obviously sounds like on those facts,
3 most bankruptcy courts would find that, and the estate
4 becomes insolvent, and the contractor has not protected
5 itself and gotten paid, then the contractor is his
6 administrative claimant in the bankruptcy and is treated
7 of equal rank with all others, and if that's unfortunate,
8 and that means the statute's broke, then the Congress
9 ought to fix the statute.

10 QUESTION: So you would -- that's a very candid
11 answer. It wouldn't make any difference whether a
12 Government agency came in to do the clean-up, having been
13 authorized by the debtor?

14 MR. BROWNLEE: I'm not aware, Justice Ginsburg,
15 of any super priority for administrative creditors inter-
16 se under the 507 priorities of the Bankruptcy Code, except
17 for the one that Hartford asks you today to judicially
18 engraft onto a statute which only provides for the trustee
19 to recover. I'm not aware of --

20 QUESTION: Is it the case that if the trustee --
21 the trustee himself goes and brings this lawsuit against
22 Justice -- she can do it. I mean, the trustee can do this
23 under 506(c).

24 MR. BROWNLEE: Absolutely.

25 QUESTION: And, say, collects \$10 million, which

1 happened to be the cost of the contracted-for clean-up.

2 MR. BROWNLEE: Okay.

3 QUESTION: All right. So now there's \$10
4 million in the trustee's hand. Now, there are another \$20
5 million of administrative expenses that were not related
6 to preserving the property. Now, does that \$10 million --
7 does the trustee give that \$10 million to the toxic waste
8 contractor that helped to preserve the property, or does
9 that toxic waste contractor get only one-third and two-
10 thirds has to go to these other administrative claimants
11 who had nothing to do with preserving the property?

12 MR. BROWNLEE: It's even worse, Justice Breyer.

13 First, the trustee takes the trustee's fees and expenses
14 and expenses of counsel off the top --

15 QUESTION: Well, that's all right. I don't
16 object to find --

17 MR. BROWNLEE: And then it goes two-thirds, one-
18 third.

19 QUESTION: It does.

20 MR. BROWNLEE: I am not aware of --

21 QUESTION: But then there's -- that --

22 MR. BROWNLEE: Unless there --

23 QUESTION: Yes.

24 MR. BROWNLEE: Make sure I don't misspeak as an
25 officer of the court.

1 QUESTION: Yes, mm-hmm.

2 MR. BROWNLEE: Unless there is some Federal
3 statute that grants a priority outside of bankruptcy to
4 clean up contractors because of the importance of the
5 environmental laws, where you'd have a clash between
6 Federal statutes.

7 QUESTION: So then this is a bigger --

8 MR. BROWNLEE: I'm not aware of a bankruptcy
9 priority.

10 QUESTION: All right, so the -- (c) has as its
11 purpose simply getting money from the secured creditor
12 into the estate. It doesn't have as its purpose giving
13 that money to the people who incurred the expense.

14 MR. BROWNLEE: Oh, no, Your Honor.

15 Distribution --

16 QUESTION: Is different.

17 MR. BROWNLEE: -- is governed by 726 --

18 QUESTION: Wow.

19 MR. BROWNLEE: -- in a liquidation.

20 QUESTION: And what was the prior practice? Was
21 the prior practice that when the -- our secured toxic
22 waste person -- nonsecured, sorry. The toxic waste person
23 sues against the collateral, and apparently can get the
24 money. Did that toxic waste person get to keep the whole
25 thing, or did the toxic waste person have to put it in the

1 estate and share it with the other nonrelated
2 administrative claimants?

3 MR. BROWNLEE: I am not sure that I'm aware of a
4 toxic waste case pre --

5 QUESTION: No, no, it wouldn't have been toxic
6 waste. What I mean is, a person --

7 MR. BROWNLEE: Certainly not in the 1800's.

8 QUESTION: A 506(c) -- a 506(c) creditor, and
9 then there are non-506(c)'s, but 503(a) creditors, and
10 when the 506(c) creditor brought the suit -- I know there
11 wasn't a 506(c) at that time --

12 MR. BROWNLEE: I didn't mean to be cute.

13 QUESTION: -- but I mean, that kind of a person
14 brings the suit, collects the \$10 million, did he get to
15 keep the whole \$10 million, or did he have to throw it in
16 the pool and he only got one-third and the non-506(c)
17 administrative creditors got two-thirds? What happened?

18 MR. BROWNLEE: My best answer, and I don't want
19 you to think this is a dodge, because I don't mean it to
20 be, is it's my understanding of the pre-code practice was
21 that it was all over the lot in terms of the equitable
22 rule --

23 QUESTION: So this is quite --

24 MR. BROWNLEE: -- what the judges decided to do.
25 We cited at page 44 of the red brief an article

1 by Toth which recounts some of the history to the -- the
2 article itself is in the West New England Law Review. It
3 recounts a lot of the history to the predecessor to
4 506(c), and in that article it concludes that, as
5 Collier's did in 1978, which we also cite on that page,
6 that there was no firmly established rule as --

7 QUESTION: Why would you want to allow such a
8 person, i.e., a 506(c) person, to get from the secured
9 creditor money that he isn't going to keep and he in fact
10 is going to give to two other people --

11 MR. BROWNLEE: Because --

12 QUESTION: -- who, vis-a-vis the secured
13 creditor, shouldn't get it?

14 MR. BROWNLEE: Because, Justice -- because of
15 the equality of distribution rules of the Bankruptcy Code.
16 There are administrative claim creditors, and there is not
17 a super priority that says you're a 506(c) creditor,
18 because creditors don't have the right to pursue the
19 action under 506(c).

20 Congress never intended 506(c) --

21 QUESTION: My question is --

22 MR. BROWNLEE: -- to be -- allow you to bring
23 that case. It was for the trustee only, so a fortiori it
24 was to be distributed to all the creditors of equal rank,
25 and that's what Congress decided in 1978.

1 QUESTION: Mr. Brownlee --

2 MR. BROWNLEE: Yes, Justice O'Connor.

3 QUESTION: -- my question is related, and it
4 seemed to me in reading the text of 506(c) and 503 that
5 not every administrative expense under 503(a) would fit
6 under 506.

7 MR. BROWNLEE: I agree with that.

8 QUESTION: 506 is limited to the reasonable,
9 necessary costs and expenses of preserving or disposing of
10 the secured property.

11 MR. BROWNLEE: I agree with Your Honor.

12 QUESTION: And presumably some wages and
13 salaries don't fit under that. Maybe some insurance
14 premiums don't fit under that. It would depend on what it
15 was. Am I right?

16 MR. BROWNLEE: Yes, you're absolutely right.

17 QUESTION: Mr. Brownlee, going --

18 QUESTION: I mean, I could see that 506(c) would
19 be related to things like painting the building, or paying
20 the real estate commission to sell it. Is that right?

21 MR. BROWNLEE: Your Honor, I know you're way
22 past this, but I wished at one point you'd been a
23 bankruptcy judge in our district. I couldn't agree with
24 you more.

25 QUESTION: Well, let me --

1 MR. BROWNLEE: But some courts will find an
2 implied benefit, or find some reason --

3 QUESTION: But wait a minute --

4 MR. BROWNLEE: -- to try to toss these things
5 into 506(c) on the merits. That's not the case here we're
6 talking about.

7 QUESTION: But let's clarify one thing here.

8 MR. BROWNLEE: Yes, Justice Stevens.

9 QUESTION: I thought you had agreed that if this
10 action had been brought by the trustee, because the
11 trustee had expended this very money, 506(c) would apply.

12 MR. BROWNLEE: If this action had been brought
13 by the trustee --

14 QUESTION: So the fact that it's insurance
15 premiums doesn't distinguish it from paint on the
16 buildings.

17 MR. BROWNLEE: We fought it below.

18 QUESTION: And you lost on it.

19 MR. BROWNLEE: And we lost.

20 QUESTION: Yes.

21 MR. BROWNLEE: I don't think we'd lose in every
22 court.

23 QUESTION: No, but for the purposes of our
24 decision --

25 MR. BROWNLEE: For the purpose of this case --

1 QUESTION: -- we assume that this is just like
2 paint on the buildings or something like that.

3 QUESTION: Mr. Brownlee --

4 MR. BROWNLEE: You're absolutely right.

5 Yes, Justice.

6 QUESTION: -- do you have this answer to Justice
7 Breyer's one-third, two-third hypothetical? I mean, it's
8 a problem for your case, and I thought the answer might be
9 this, but tell me if I'm wrong.

10 Assuming derivative standing -- the premise of
11 my other question. Assume it again. If the one
12 administrative creditor has administrative standing, what
13 he will do, I presume, is to bring an action on behalf of
14 all administrative creditors, so he will not nearly
15 collect his insurance premium. He will collect the
16 charges of all other administrative creditors, and
17 therefore he will get in a -- theoretically 100 percent of
18 what is owed, and so he will get his one-third, and they
19 will get their two-thirds, and everybody will be whole.

20 Is that the answer to the problem?

21 MR. BROWNLEE: Well, if every administrative
22 creditor qualified to be a surcharging creditor under the
23 standards of 506(c) --

24 QUESTION: Right. Right, yes.

25 MR. BROWNLEE: But you're assuming every

1 administrative creditor in the estate does so qualify, and
2 I suggest to you that that hypothetically is an
3 interesting question --

4 QUESTION: Okay, dumb assumption.

5 MR. BROWNLEE: -- but it doesn't happen in
6 practice.

7 QUESTION: But to the extent that that
8 assumption would be true, is that the way we avoid the
9 one-third, two-third problem?

10 MR. BROWNLEE: To the extent that that
11 assumption is true, if every administrative claim in a
12 case qualifies for a surcharge -- let me make sure I
13 understand your hypothetical.

14 QUESTION: Yes. Yes.

15 MR. BROWNLEE: And the trustee refuses to act,
16 which is -- I won't go into the inconceivability of that,
17 because it would be such a large claim that very few
18 trustees would not be highly incentivized, but if --

19 QUESTION: We'll assume the trustee is broke and
20 so on, but assume it anyway.

21 MR. BROWNLEE: If it was a large case the
22 trustee would be fixing to get unbroke very quickly when
23 she won, but I don't mean to argue.

24 QUESTION: No.

25 MR. BROWNLEE: Under that assumption, the

1 trustee refuses to act, the bankruptcy court refuses to
2 direct the trustee to act, the bankruptcy court refuses to
3 appoint a new trustee who will act, and the bankruptcy
4 decides, in the exercise of its discretion, without any
5 direct statutory authority, to grant derivative standing,
6 and the Hartford brings the claim in the name of the
7 estate on behalf of all the administrative claims in the
8 estate, and wins on the merits of the individual little
9 lawsuits it will have to prove reasonable, necessary,
10 direct benefit, secured creditor, if that's the
11 hypothetical, then yes, they'll recover and you'll avoid
12 the one-third, two-third problem.

13 QUESTION: Okay.

14 QUESTION: Suppose a pipe in the building is
15 leaking. They need a plumbing contractor immediately, or
16 the building's going to be wrecked. You represent the
17 plumbing contractor, and he comes to you and says, I want
18 to be sure I get paid. How -- what are the different ways
19 he can do it?

20 MR. BROWNLEE: In practice?

21 QUESTION: Yes.

22 MR. BROWNLEE: I'd call the bank. I'd bypass
23 the bankruptcy court entirely. I'd call the bank and
24 say --

25 QUESTION: And anything else --

1 MR. BROWNLEE: I'd call the bank and say, you're
2 building's --

3 QUESTION: -- you're at risk of --

4 MR. BROWNLEE: -- going to fall in and it's your
5 collateral. You want to give me the money, I'll fix it,
6 and if you don't, I'll stand by and take a picture of it
7 while it falls in.

8 QUESTION: And anything else you're --

9 (Laughter.)

10 QUESTION: Anything else you're at risk of
11 having to share with the other administrative creditors?

12 MR. BROWNLEE: Absolutely, Justice.

13 QUESTION: Do you -- on what basis does the
14 trustee have the right to sue for money that the trustee
15 hasn't expended?

16 MR. BROWNLEE: There is a line of authority,
17 Justice Scalia, and it may be the better one. It can be
18 traced to the statement in, I believe, the floor reports
19 in the legislative history that's in the briefs, where
20 there's a reference to the moneys that the trustee has
21 expended, or some phrase to that effect. It escapes me,
22 the precise phrasing.

23 It's that really 506(c) isn't intended to
24 collect unpaid administrative claims. It's intended only
25 for the trustee to bring an action to recover those

1 administrative claims that the trustee has paid out that
2 justify to tag the bank to bring it back in and --

3 QUESTION: Right.

4 MR. BROWNLEE: -- split up the deficiency.

5 That opinion was adopted in the plurality
6 opinion in K & L Lakeland in the Fourth Circuit, but as I
7 read that opinion there wasn't enough votes in the Fourth,
8 even though the Fourth is a JJK circuit, which was the
9 other circuit on our side, other than this case, which I
10 hope is affirmed at the end of this argument, to make that
11 part of circuit law.

12 This Court doesn't have to decide that today,
13 but I would agree with the Justice that that is a strong
14 read of the real congressional meaning of the words, but
15 the plain meaning of these words fit if you want to
16 include an attack on unpaid administrative claims. It
17 just makes it real complicated, and it makes for the kinds
18 of questions that we've discussed today.

19 If there are no further questions, Mr. Chief
20 Justice --

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
22 Brownlee. The case is submitted.

23 (Whereupon, at 11:51 a.m., the case in the
24 above-entitled matter was submitted.)

CERTIFICATION

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

HARTFORD UNDERWRITERS INSURANCE COMPANY, Petitioner v. UNION
PLANTERS BANK, N.A.

CASE NO: 99-409

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

BY Ann Marie Frederico

(REPORTER)