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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 a case under any other chapter of the Bankruptcy Code at any time if 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, as I understand it 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 new
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 that he was not
14 eligible because his debt limit exceeded the statutory
15 limitations that exist 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 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 his
17 schedules in the supplemental joint appendix, he is
18 clearly within the statutory limits based -- just
19 looking at his schedules.

20 JUSTICE GINSBURG: But that's a question you
21 can argue on appeal in -- from 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 had been 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 a number of claims were
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 now 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, the claims that were filed in the current
11 case that are the issue. As I say, we are in the process
12 of 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 suggest that it does, Your Honor, because once -- we don't
2 really get to the eligibility question until the court
3 below considers it in the context of the case that's at bar.
4 We have to, as I say, we are in the process of objecting to
5 claims 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 in fact, 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, once we
19 converted the chapter.

20 JUSTICE SCALIA: And they rejected it?

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

24 JUSTICE SCALIA: I don't care about the
25 present case. I care about the Chapter 13 case in which

1 you have been found not to qualify for Chapter 13
2 treatment. Didn't you make before that court the same
3 argument you're making now that some of the debts
4 shouldn't be counted.

5 MR. BAKER: I did.

6 JUSTICE SCALIA: They rejected it, right?

7 MR. BAKER: Pardon?

8 JUSTICE SCALIA: And they rejected it?

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

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

16 MR. BAKER: Right.

17 JUSTICE SCALIA: But you are applying under
18 Chapter 13.

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

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

1 MR. BAKER: Yes.

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

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

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

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

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

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

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

1 rendered a final decision.

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

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

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

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

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

25 JUSTICE SCALIA: And you objected to that, I

1 gather?

2 MR. BAKER: Sorry?

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

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

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

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

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

23 MR. BAKER: That's correct.

24 JUSTICE BREYER: If we just could go to the
25 merits for a second here. You're saying this word,

1 where it says, the word is you "may convert," and that
2 means you can convert no matter what?

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

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

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

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

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

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

17 MR. BAKER: If the debtor dies?

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

20 MR. BAKER: Well, there is a rule, I believe
21 it's --

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

1 MR. BAKER: Right. I think the rule 2009
2 says, the Federal Rules of Bankruptcy --

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

8 MR. BAKER: Well, again, Your Honor, the
9 rule says --

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

15 MR. BAKER: The statute is plain, Your
16 Honor.

17 JUSTICE BREYER: You say yes on that?

18 MR. BAKER: I would say yes.

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

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

23 JUSTICE BREYER: No matter what? Even if
24 he's dead, even if he's insane?

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

1 JUSTICE BREYER: Well alright, then I can't
2 get anywhere with my hypotheticals.

3 (Laughter.)

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

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

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

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

1 understand it, the judge in Chapter 13 could immediately
2 deconvert to Chapter 7, couldn't he?

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

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

12 MR. BAKER: Yes.

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

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

24 CHIEF JUSTICE ROBERTS: When cases are
25 reconverted to Chapter 7, is that typically done before

1 or after the filing of the Chapter 13 plan?

2 MR. BAKER: Most of the time, a plan is -- I
3 don't do it this way, but most practitioners will file a
4 plan at the same time as they file the notice, the
5 motion to convert.

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

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

8 JUSTICE SOUTER: And the deconversion could
9 be done prior to the filing of the plan?

10 MR. BAKER: I suppose arguably it could. In
11 my view, the statutory provisions of section 1307 have to
12 be applied to the question of conversion. So I think --

13 CHIEF JUSTICE ROBERTS: Creditors -- under
14 Chapter 13 one of the prerequisites to approval of the
15 plan is that the creditors get at least as much as they
16 would have gotten under Chapter 7, right?

17 MR. BAKER: That's correct.

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

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

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

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

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

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

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

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

22 JUSTICE ALITO: If I could come back to a
23 prior question. Unless there is some different
24 procedure required when -- between the two situations of
25 denial of conversion from 7 to 13 and allowing

1 conversion but with immediate reconversion back to 7,
2 unless there's some difference between that's required
3 by the code in those two situations, maybe it is because
4 you have to -- in the reconversion situation, you have
5 to wait until the plan is filed. Maybe it's because the
6 bad faith doesn't carry over.

7 But unless there's some difference, I don't see
8 what this case is about.

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

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

14 MR. BAKER: I'm sorry?

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

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

24 JUSTICE ALITO: If it gives notice and
25 an opportunity for a hearing during the 20 day period --

1 you have to give 20 days notice before the conversion
2 takes place; is that correct, from 7 to 13?

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

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

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

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

15 MR. BAKER: Yes, Your Honor.

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

22 MR. BAKER: The procedure I would, I would
23 expect to see is that if the court saw an issue of fact
24 with respect to whether the case had been converted or
25 whether the debtor was eligible for it to be a debtor in

1 the chapter to which he seeks conversion, then an
2 evidentiary hearing would be required.

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

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

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

1 MR. BAKER: That's correct. That's correct,
2 because in our view the schedules -- excuse me -- in our
3 view the schedules in this case clearly indicate that it
4 -- that he was within the statutory limitations, at
5 least as far as the schedules go.

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

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

19 What was it? Was he employed or not
20 employed?

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

1 rental property and that he was beginning a job at about
2 the time the petition --

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

11 MR. BAKER: Right.

12 JUSTICE SCALIA: Does he go around swearing
13 he was when he wasn't?

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

1 JUSTICE SCALIA: Look on page 64a of the
2 appendix, the meeting of creditors. Trustee says okay,
3 and you now work for another entity, Capital Carpet and
4 Flooring, sir? And Mark Marrama says yes.

5 MR. BAKER: Right. And between the -- between
6 the time of petition at the meeting of creditors which
7 was approximately six -- six weeks later, he became
8 employed.

9 As I say, he had a mortgage. He had children
10 to whom he has to pay child support. At the time he had
11 a wife he owed a lot of money to. He was concerned about
12 having employment so he could in fact meet those
13 obligations.

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

19 MR. BAKER: Yes, Your Honor.

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

25 MR. BAKER: The bankruptcy judge should

1 examine the claims that have been filed, if any, do
2 the arithmetic, offer the debtor an opportunity --

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

6 MR. BAKER: He should deny conversion.

7 JUSTICE STEVENS: He should what?

8 MR. BAKER: He should deny conversion. If in
9 fact --

10 JUSTICE STEVENS: So he does not have an
11 absolute right in all cases to convert, then.

12 MR. BAKER: It's absolute except in the
13 two circumstances stated in the statute.
14 One of which, is as Your Honor is pointing out, the
15 eligibility, the other is that if it has been previously
16 converted he does not have that right.

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

19 CHIEF JUSTICE ROBERTS: Thank you,
20 Mr. Baker.

21 MR. BAKER: Thank you.

22 CHIEF JUSTICE ROBERTS: Mr. Brunstad.

23 ORAL ARGUMENT OF G. ERIC BRUNSTAD,

24 ON BEHALF OF THE RESPONDENTS

25 MR. BRUNSTAD: Mr. Chief Justice, and may it

1 please the Court:

2 The bankruptcy court need not sit idly by
3 and grant a motion which is part of an abusive scheme.
4 The power of the court is there to deny such a motion.
5 It is there by statute under section 105; it is there
6 because the courts have always had power.

7 CHIEF JUSTICE ROBERTS: Under -- you think
8 105 is an affirmative grant of power?

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

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

1 source of sweeping powers to, to basically act as a
2 roving commission in equity, I think that's a
3 mis-citation.

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

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

24 MR. BRUNSTAD: In part, yes. The court also
25 --

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

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

21 CHIEF JUSTICE ROBERTS: What do you do about
22 the different structures, wording between 706(a) and
23 706(b)? I mean, this provision says debtor may. The
24 other provisions say that a debtor may ask a court to
25 order, and it suggests a difference in who has the

1 primary responsibility, whether it is a motion of the
2 Court or whether it is an independent action.

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

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

15 MR. BRUNSTAD: Well, if you look at section
16 1307(b), upon request of the debtor the court shall
17 dismiss the case, that is an absolute right. And for a
18 clear reason. Nobody can force a debtor to continue in
19 Chapter 13 against the debtor's will because Chapter 13
20 requires the debtor to work to pay off creditors. That
21 would violate the 13th Amendment. So there would be no
22 circumstance where someone could block a debtor from
23 getting out from Chapter 13, for constitutional reasons.
24 That's a special case. That is why Congress drafted
25 1307(b) the way that it did.

1 Contrast that with section 706 where the
2 court said the debtor may convert. Now, there are,
3 there are requirements that the debtor has to comply in
4 order to convert, statutory, but there is also, a debtor
5 cannot have an absolute right to convert if it would be
6 part of an abusive scheme. I think the direct analogy is
7 this Court's decision in Pepper versus Litton. There a
8 fraudulent party wanted the Court to allow a claim as
9 part of a fraudulent scheme, and this Court unanimously
10 said no we're not going to allow that, even though there
11 was a subsequent remedy further on in the process.

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

18 MR. BRUNSTAD: Two primary reasons, Your
19 Honor. The first reason is that it would be just
20 pointless wheel spinning.

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

1 that's going to be the same situation after conversion.

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

11 CHIEF JUSTICE ROBERTS: Even if it might
12 injure the creditors.

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

1 integrity of the court.

2 Is the court itself now not participating by
3 allowing it to happen, this sort of fraudulent scheme?
4 The court should be able to nip it in the bud. Debtors
5 who are --

6 CHIEF JUSTICE ROBERTS: What limitations
7 would you recognize on this inherent authority to take
8 action? Where do they come from?

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

19 Now it is a relatively high bar. You know,
20 bad faith -- it is a continuum. Where you have the
21 honest but unfortunate debtor, abides by all the rules,
22 clearly no bad faith implication would apply. At
23 the other end of the spectrum where you have a debtor
24 who conceals assets, doesn't disclose, it's found out in
25 bankruptcy and then as soon as the trustee finds out and

1 is hot on the debtor's trail, then seeks to convert to
2 get out from bankruptcy, well, there you have a
3 clear-cut case of abuse that can't be tolerated.

4 Now I think that --

5 JUSTICE SCALIA: Mr. Brunstad, are you going
6 to address the mootness point? Do you think the case is
7 moot?

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

18 Additionally, I think we have to recognize
19 that there were different debt levels at different
20 times. I don't know exactly what they were, but for the
21 first case there was debt level A. About three years
22 later, there was debt level B, which may well have been
23 higher. On remand if the debtor were to succeed, which
24 I hope the Court does not allow the debtor to proceed,
25 or succeed here, but on remand if it were determined

1 that with the first case the debt levels were properly
2 below the limits under 109(e), then the debtor would be
3 eligible to convert as far as that criteria is
4 concerned. We do not know absolutely that that would
5 not be able to be satisfied in the existing case.

6 JUSTICE SCALIA: Did you make the
7 jurisdictional objection before the second bankruptcy
8 court?

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

11 JUSTICE SCALIA: How so?

12 MR. BRUNSTAD: I think that it was
13 primarily, it was, the debtor was litigating and we did
14 not make the jurisdictional argument.

15 JUSTICE SCALIA: I find that extraordinary.

16 JUSTICE GINSBURG: So it wouldn't be
17 before the First Circuit.

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

25 That does not necessarily preclude a finding

1 upon the facts in the first case which is still pending,
2 that it could be converted. I think candidly, I need to
3 say that.

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

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

14 JUSTICE SCALIA: This case, your case?

15 MR. BRUNSTAD: The current case today, yes,
16 Justice Scalia.

17 JUSTICE STEVENS: May I ask this question.
18 If the remedy of not allowing them to convert to Chapter
19 13 is denied, are there other remedies that the
20 bankruptcy court can impose against the debtor who
21 engages in misconduct of this kind?

22 MR. BRUNSTAD: Yes, Justice Stevens, but
23 they're not tailored to this particular problem or
24 abuse. They are remedies, for example, the denial of
25 the discharge for concealing assets under section 727.

1 But that won't --

2 JUSTICE STEVENS: Are there any criminal
3 sanctions?

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

10 JUSTICE STEVENS: Then how are the creditors
11 hurt by this series of events?

12 MR. BRUNSTAD: Well, the creditors are hurt
13 because in the chapter 7 case, once the bankruptcy case
14 is filed, the trustee takes possession of all the
15 debtor's property, which becomes property of the estate.
16 The trustee's role is to liquidate the property and
17 distribute the proceeds to creditors. When the case is
18 converted to Chapter 13, under 1306, the property
19 reverts in the debtor, including any concealed property.
20 At that point, under section 348, upon conversion, the
21 Chapter 7 trustee is disenfranchised. His services
22 terminate. What debtors in bankruptcy who are
23 perpetuating this kind of concealment scheme want you to
24 do is say oh no, you can go ahead and convert, and then
25 maybe we'll deal with it later, because maybe later on

1 in the proceedings something will happen. The Chapter
2 13 trustee might not be apprised of it.

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

20 JUSTICE STEVENS: Wouldn't a Chapter 7 case
21 be refiled immediately?

22 MR. BRUNSTAD: Not necessarily, Your Honor.
23 Not necessarily. The debtor could move to another
24 jurisdiction.

25 JUSTICE STEVENS: But the creditors aren't

1 going to let him just run away with the assets, are
2 they?

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

14 By converting the case from 7 to 13,
15 disenfranchising that representative of all the
16 creditors, the debtor who wants to play the game of
17 concealing the assets, and catch me if you can, can in
18 essence get away with it. This bankruptcy judge
19 understood this. This bankruptcy judge denied the
20 conversion so we would keep the case in Chapter 7, the
21 Chapter 7 trustee could do his job, collect the assets
22 --

23 JUSTICE GINSBURG: Could the Chapter 7
24 trustee be appointed the trustee in the Chapter 13, the
25 same trustee who has now been -- he's terminated because

1 the Chapter 7 has been converted. Could the court in
2 the Chapter 13 format appoint the same trustee?

3 MR. BRUNSTAD: No, Justice Ginsburg. There
4 is a standing Chapter 13 trustee in Chapter 13 cases
5 that handles all the Chapter 13 cases, unless for some
6 reason that Chapter 13 trustee must recuse him or
7 herself. Under section 348, once the case is converted
8 from 7 to 13, the Chapter 7 trustee services are
9 terminated.

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

12 MR. BRUNSTAD: The Chapter 13 trustee --

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

16 MR. BRUNSTAD: Yes, Justice Scalia. The
17 Chapter 13 trustee is probably characterized mostly an
18 administrative person, who supervises to see that the
19 Chapter 13 procedures are complied with, has the debtor
20 filed the Chapter 13 plan. If not --

21 JUSTICE SCALIA: He's called a trustee,
22 though?

23 MR. BRUNSTAD: Correct, Justice Scalia.

24 JUSTICE SCALIA: Well that's really not his
25 capacity.

1 MR. BRUNSTAD: In practical reality, that's
2 correct, Justice Scalia. What the Chapter 13 trustee
3 does is, if a plan is not filed, moves to dismiss the case.
4 If a plan is filed, may look at the plan. If the
5 plan is confirmed, acts as the disbursing agent. The
6 debtor typically makes payments under the plan to the
7 Chapter 13 trustee. The Chapter 13 trustee then makes
8 distributions to creditors. And on Chapter 13 day in
9 many jurisdictions, one day a week or every other week,
10 the Chapter 13 trustee will come to court with hundreds
11 and hundreds and hundreds of files.

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

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

24 So it makes no sense. It's pointless to say
25 we must -- the bankruptcy judge must idly sit by, grant

1 a motion that's part of this abusive scheme, allow the
2 case to be converted to Chapter 13, hold another
3 hearing, have a second set of papers perhaps, only to
4 send the case back to Chapter 7.

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

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

1 the problem. We should do it now.

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

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

22 MR. BRUNSTAD: Well, the creditors suffer,
23 Mr. Chief Justice. And they suffer because there are
24 additional administrative costs that are incurred that
25 compete with their distributions. We're already talking

1 about dividing up an inadequate pie to satisfy all
2 claims in full. Having a second set of procedures
3 prejudices the creditors. It prejudices the court.
4 Bankruptcy judges can have thousands and thousands of
5 cases on their dockets. To have to have a second set
6 of procedures, a second hearing, it burdens the court
7 unnecessarily. And again, it also implicates, again,
8 and I think this is fundamental, the integrity of the
9 process.

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

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

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 MR. BRUNSTAD: Thank you.

23 CHIEF JUSTICE ROBERTS: We'll hear from
24 Ms. Blatt first.

25 Mr. BAKER: I beg your pardon.

1 CHIEF JUSTICE ROBERTS: Ms. Blatt.

2 ORAL ARGUMENT OF LISA S. BLATT

3 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

4 SUPPORTING RESPONDENTS

5 MS. BLATT: Thank you, Mr. Chief Justice,
6 and may it please the Court:

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

15 JUSTICE ALITO: Why isn't the power to
16 reconvert sufficient?

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

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

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

16 CHIEF JUSTICE ROBERTS: Well, why wouldn't
17 that trustee recommend to the bankruptcy judge that he
18 reconvert it to Chapter 7?

19 MS. BLATT: Well, the Chapter 7 trustee is,
20 he's terminated on conversion. It doesn't raise Chapter
21 13 issues. The much more likely scenario is the Chapter
22 7 trustee will tell the United States trustee or the
23 Chapter 13 trustee, but they may or may not learn about
24 it until after the case converts. In jurisdictions
25 where there is --

1 JUSTICE KENNEDY: Why can't they just have an
2 order to the bankrupt -- to disclose the asset in the
3 Chapter 13 proceeding?

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

5 JUSTICE KENNEDY: In the Chapter 13
6 proceeding.

7 MS. BLATT: Well, we're talking about a case
8 the court may or may not know about the fraud, and
9 the trustee may or may not tell someone in time. If
10 there's --

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

13 MS. BLATT: Yes, and there was a basis to
14 oppose conversion. In jurisdictions where there's an
15 absolute right, and bad faith is not a grounds for the
16 conversion --

17 JUSTICE STEVENS: Whenever he denies the
18 motion, he must know about it. He must have a reason to
19 deny.

20 MS. BLATT: We're by hypothesis talking
21 about an absolute right to convert, and what I'm trying
22 to say, in jurisdictions where there is an absolute
23 right, the practice of bankruptcy courts is not to
24 simultaneously convert. It does happen on occasion, but
25 the more likely scenario is that a significant period of

1 time passes. But the other point is that if there's a
2 simultaneous conversion it's a completely pointless and
3 burdensome process, and here's why: A conversion and
4 simultaneous conversion causes the termination and
5 reappointment of the Chapter 7 trustee, the appointment
6 and the immediate termination of the Chapter 13 trustee,
7 and to the extent there's already pending Chapter 7
8 proceedings for dismissal or denial of discharge, the
9 conversion would appear to us to moot those proceedings
10 and require their reinstatement. And this is a completely
11 unnecessary waste of everyone's time and energy.

12 JUSTICE STEVENS: May I just clear up one
13 detail that's confusing to me. The -- are there two
14 judges? Does the same judge rule on both the motion to
15 convert and the motion to reconvert?

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

24 CHIEF JUSTICE ROBERTS: I wouldn't call it a
25 right to convert in bad faith. If it's a right, it's a

1 right to convert despite the allegation of bad faith.
2 It's not a right to convert in bad faith. No one is
3 arguing for that.

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

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

25 MS. BLATT: Here's why. I don't think

1 there's any dispute under --

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

4 MS. BLATT: Sure. Right. And there's
5 nothing to stop a debtor who truly converts and has
6 found religion and wants to come clean for arguing: Let
7 me convert, it's in the interest of everybody if I do
8 convert. This is a discretionary right to deny relief.
9 The court is free to allow conversion.

10 But under the plain terms of section
11 1370(c), the court has the power to dismiss or reconvert
12 a case to Chapter 7 without waiting for a plan to be
13 filed. There's no requirement that the court has to sit
14 there for 15 days and see if there's a plan. A Chapter
15 7 -- excuse me --

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

20 MS. BLATT: To reconvert to Chapter 7?

21 CHIEF JUSTICE ROBERTS: Sure.

22 MS. BLATT: I don't know if that would be an
23 appropriate remedy. It might be because you can have an
24 involuntary Chapter 7 case. But on this point about a
25 court sitting in Chapter 13, if on day one a Chapter 13

1 debtor files a plan in bad faith, the debtor can say:
2 Please wait, I've got a plan, I'm working on it, give me
3 a couple extra weeks, and the court can say: No, I have
4 the authority to throw it out. And what's particularly
5 odd about this proposal is that in 2005 a court is
6 categorically prohibited from allowing a Chapter 13
7 debtor to proceed under Chapter 13 if the petition is
8 filed in bad faith. The court can't confirm a plan.

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

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

20 CHIEF JUSTICE ROBERTS: Well, what about the
21 difference in language under 706(a) and the other
22 provisions? 706(a) says the debtor may. The other
23 provisions call for action by the court, which suggests
24 at least that the authority to convert is greater under
25 706(a).

1 MS. BLATT: I think section 706(a) is fairly
2 read as granting a statutory right to convert absent the
3 two statutory exceptions or the court's proper exercise
4 of inherent authority. But the 706(b) and (c) just
5 explain that the court may do something or the court may
6 not, or the court shall do something. So we think our
7 position -- section 706(a) isn't even addressed to the
8 court at all. It just gives the debtor the right to
9 convert, and it doesn't purport to limit or speak to the
10 situation when the debtor seeks that relief in bad faith
11 or has otherwise abused the bankruptcy process. And I'd
12 just like to end by saying that a debtor's bad faith
13 concealment of assets or misrepresentation of financial
14 affairs is really the most serious abuse you can have in
15 a chapter 7 case. It threatens the very structural
16 foundation of the code and its integrity.

17 JUSTICE SCALIA: Does the government have
18 any position on the mootness question here?

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

1 CHIEF JUSTICE ROBERTS: I guess I've been
2 assuming -- but the eligibility under Chapter 13 even
3 under the present case is a present day question, right?
4 In other words, we don't go back and see if he was
5 eligible for Chapter 13 when the conversion was denied?
6 The question would be whether he's eligible now?

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

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

15 CHIEF JUSTICE ROBERTS: Thank you,
16 Ms. Blatt.

17 Now, Mr. Baker.

18 REBUTTAL ARGUMENT OF DAVID G. BAKER
19 ON BEHALF OF THE PETITIONER

20 MR. BAKER: Thank you, Your Honor and
21 Mr. Chief Justice.

22 CHIEF JUSTICE ROBERTS: I'm sorry. You have
23 two minutes remaining.

24 MR. BAKER: Thank you, Your Honor.

25 The first thing I would like to say is that,

1 having been counsel to a Chapter 13 trustee many years
2 ago, I can assure the Court the Chapter 13 trustees
3 exercise all of the powers and authority that a Chapter
4 7 trustee does, with the exception, as was said, of
5 possession of property of the estate. The property of
6 the estate remains vested, however, in the Chapter 13
7 trustee throughout the length of the case. It does not
8 re-vest in the debtor until the case is either dismissed,
9 a discharge is issued, and the case is closed. So the
10 concerns about leaving a debtor to do anything it wants
11 to with property of the bankruptcy estate simply is not
12 a reality, and I think it does a disservice to the many
13 fine Chapter 13 trustees that there are around the
14 country.

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

19 MR. BAKER: No, it does not remain in her
20 possession. The Chapter 13 trustee technically never
21 has possession. The title remains vested in the Chapter
22 13 trustee.

23 JUSTICE BREYER: So is it possible if it's
24 in 13 that then the debtor, let's say a dishonest
25 debtor, could get back pieces of paper which would admit

1 that debtor to the possession of certain property which
2 he could then take and hide in a way that that couldn't
3 happen in 7? Is that possible or not possible?

4 MR. BAKER: It's certainly possible. But
5 then again, there are statutory and rule-based remedies
6 for that sort of activity. And our position is that those
7 rules and those statutes are what should control in the
8 case.

9 Thank you very much, Your Honor.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 Mr. Baker.

12 The case is submitted.

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

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