

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 11-10676-B

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

vs.

SCOTT W. ROTHSTEIN,

Defendant,

and

HERBERT STETTIN, AS CHAPTER 11
TRUSTEE OF ROTHSTEIN ROSENFELDT
ADLER, P.A.,

Third-Party
Petitioner/Appellant.

HEARING HELD BEFORE:

JUDGE GERALD B. TJOFLAT
JUDGE BEVERLY B. MARTIN
JUDGE SUSAN BUCKLEW

United States Court of Appeals
99 NE 4th Street
Room 1212
Miami, FL 33132
December 6, 2012
9:00 a.m.

Transcribed from a CD By:
Cheryl L. Jenkins, RPR

APPEARANCES:

BERGER SINGERMANN, by
SHARON L. KEGERRIES, Esquire
On behalf of Herbert Stettin, Chapter 11 Trustee

MADELEINE R. SHIRLEY, Esquire
and
EVELYN SHEEHAN, Esquire
and
MICHELLE ALVAREZ, Esquire
and
ALLISON LARE, Esquire
On behalf of the United States of America

CARY A. LUBETSKY, Esquire
On behalf of Todd D. Snyder

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1 JUDGE TJOFLAT: United States versus
2 Rothstein and others.

3 Ms. Kegerreis, is it?

4 MS. KEGERREIS: Kegerreis.

5 JUDGE TJOFLAT: Kegerreis.

6 We sent you sort of a belated -- the
7 parties' notes yesterday.

8 MS. KEGERREIS: Yes, your Honor.

9 JUDGE TJOFLAT: Yes. You're familiar with
10 bankruptcy law?

11 MS. KEGERREIS: I've had a crash course,
12 your Honor.

13 JUDGE TJOFLAT: Okay. Well, before there
14 was ever any forfeiture hearing, it wouldn't have made any
15 difference anyway.

16 The Chapter 11 proceeding commenced, and
17 you're familiar with the case. Everything that that law
18 firm had -- in the name of the law firm, is part of the
19 bankrupt estate, and nobody can sue without leave of the
20 Bankruptcy Court.

21 MS. KEGERREIS: We agree with that
22 proposition --

23 JUDGE TJOFLAT: Okay.

24 MS. KEGERREIS: -- yes.

25 JUDGE TJOFLAT: Okay. So, and I speak for

1 myself, my original thought is that nothing, zero that the
2 District Judge did in the criminal case has any legal
3 effect on the disposition of any funds.

4 MS. KEGERREIS: We agree with that
5 proposition absolutely, your Honor.

6 JUDGE TJOFLAT: And I don't know why in the
7 world that wasn't brought to the District Court's
8 attention at the beginning.

9 MS. KEGERREIS: Your Honor, the trustee
10 presented to the District Court that the Bankruptcy Courts
11 determine in the first instance whether these assets
12 belong to the bankruptcy estate.

13 We filed a motion asking the District Court
14 to refer the matter to the Bankruptcy Court --

15 JUDGE TJOFLAT: Well --

16 MS. KEGERREIS: -- for resolution.

17 JUDGE TJOFLAT: -- as a matter of law they
18 all belong to the Bankruptcy Court. The Supreme Court and
19 11th Circuit case law, everything in the name of the law
20 firm, and even other things were assets of the estate.

21 MS. KEGERREIS: Yes, your Honor, under
22 541(a) it's all legal, equitable interest of the debtor.

23 JUDGE TJOFLAT: All right.

24 MS. KEGERREIS: And certainly RRA's
25 accounts, they were titled in the name of RRA.

1 JUDGE TJOFLAT: And there is a presumption
2 that everything in the name of the law firm is in the
3 estate.

4 MS. KEGERREIS: Yes.

5 JUDGE TJOFLAT: Yeah.

6 MS. KEGERREIS: And all the funds in the law
7 firm's account are presumed to belong to the RRA law firm.

8 JUDGE TJOFLAT: Right.

9 MS. KEGERREIS: So we agree completely that
10 these -- that these assets were property of the estate,
11 and that the automatic stay applied.

12 JUDGE TJOFLAT: I mean, I suppose the
13 District Court, this is a theoretical problem, they could
14 have entered an in personam order against Rothstein, and
15 that's the end of it.

16 MS. KEGERREIS: That's correct, it would
17 have only reached Rothstein's assets.

18 JUDGE TJOFLAT: His own -- no, no, his own
19 interest in whatever there is.

20 MS. KEGERREIS: Correct.

21 JUDGE TJOFLAT: Okay.

22 MS. KEGERREIS: Correct, but to answer the
23 two questions, the first question we would answer a
24 resounding yes, that these assets ---

25 JUDGE TJOFLAT: And the automatic stay has

1 never been lifted, has it?

2 MS. KEGERREIS: No, it has not, and what
3 should have happened here is that the automatic stay
4 should have applied. Should the government ---

5 JUDGE TJOFLAT: Well, it applies.

6 MS. KEGERREIS: It does apply.

7 JUDGE TJOFLAT: No question it applies.

8 MS. KEGERREIS: And the prior procedure
9 below would have been to the government ---

10 JUDGE TJOFLAT: The proper procedure would
11 be -- would be for the government, depending on what its
12 claim is, to file a claim.

13 MS. KEGERREIS: Or if they wanted relief
14 from the Bankruptcy Court, they should have moved for
15 relief --

16 JUDGE TJOFLAT: No.

17 MS. KEGERREIS: -- from the stay.

18 JUDGE TJOFLAT: Yea, but the Bankruptcy
19 Court wouldn't have granted it. That would have been
20 reversible error, in my view.

21 MS. KEGERREIS: Certainly in the first
22 instance the Bankruptcy Court --

23 JUDGE TJOFLAT: The reason ---

24 MS. KEGERREIS: -- would have had the right
25 to make that determination.

1 JUDGE TJOFLAT: The reason being, because
2 853(n) is no vehicle whatsoever for the settlement of a
3 bankrupt estate.

4 MS. KEGERREIS: Exactly.

5 JUDGE TJOFLAT: The procedures aren't there.

6 MS. KEGERREIS: Exactly. What happened,
7 your Honor, in this case Scott Rothstein was allowed to
8 make the determination of what property was going to be
9 available --

10 JUDGE TJOFLAT: But that's irrelevant, too.

11 MS. KEGERREIS: -- to RRA's creditors.

12 JUDGE TJOFLAT: He made a determination,
13 because that's part of the deal, he wanted a good
14 sentence, the best he could get. So he'd give the
15 government anything.

16 MS. KEGERREIS: He could only give the
17 government what --

18 JUDGE TJOFLAT: I understand.

19 MS. KEGERREIS: -- he had a legal interest
20 in.

21 JUDGE TJOFLAT: But it's all -- just a
22 unilateral statement on his part to the government.

23 MS. KEGERREIS: We agree com ---

24 JUDGE TJOFLAT: With no binding on the
25 Bankruptcy Court.

1 MS. KEGERREIS: Absolutely, and as a
2 consequence, your Honor, any orders entered by the
3 District Court, the effect -- that affected the property
4 of the estate are automatically void under the bankruptcy
5 law in this circuit.

6 JUDGE TJOFLAT: They were in violation of
7 the stay order.

8 MS. KEGERREIS: They were in violation of
9 the stay order.

10 JUDGE TJOFLAT: Okay.

11 MS. KEGERREIS: We tried -- we did
12 everything we could on the part --

13 JUDGE TJOFLAT: I understand.

14 MS. KEGERREIS: -- of the trustee to bring
15 that issue to the District Court's attention --

16 JUDGE TJOFLAT: The District Court --

17 MS. KEGERREIS: -- and it was rejected.

18 JUDGE TJOFLAT: -- didn't even want you in
19 the case.

20 MS. KEGERREIS: I'm sorry?

21 JUDGE TJOFLAT: At one point, I understand
22 it, the District Court -- the government was resisting the
23 trustee's appearance.

24 MS. KEGERREIS: That's true. That's true.

25 JUDGE TJOFLAT: Why don't we hear from the

1 government? Do you want to tell us anything else?

2 MS. KEGERREIS: Well, certainly on the issue
3 of the criminal forfeiture, it was misapplied in this case
4 to reach assets that had -- that did not belong to
5 Rothstein, and belonged to the estate, and that was
6 improper under every construction of forfeiture laws that
7 this circuit is recognized, and I know your Honor has
8 written the law of the circuit in terms of criminal
9 forfeiture.

10 JUDGE BUCKLEW: Is it your position that all
11 of -- that the properties are just the bank accounts that
12 were in the law firm's name?

13 MS. KEGERREIS: All of the properties,
14 because Section 541 of the Bankruptcy Code reaches all
15 legal or equitable interest of the debtor, and the
16 equitable interest of the debtor were the constructive
17 trust assets, those were all of those real properties,
18 vehicles, business interests and vessels that were
19 purchased with assets improperly diverted from RRA's
20 accounts, and the District Court found that the trustee
21 made -- had alleged all of the elements of a constructive
22 trust claim, and improperly refused to allow the District
23 Court to pursue that claim below.

24 So, the trustee clearly had an equitable
25 claim to those assets, and that equitable claim, as well

1 as the assets subject to the equitable claim, were
2 property of the estate.

3 JUDGE TJOFLAT: And our decision in In Re:
4 Pharmacy, there is a presumption that the government
5 couldn't overcome, probably.

6 MS. KEGERREIS: The ---

7 JUDGE TJOFLAT: The presumption that
8 everything, everything in the name of the law firm or its
9 nominees belongs to the estate.

10 MS. KEGERREIS: Yes, that's the same
11 conclusion that the Supreme Court in Whiting Pools reached
12 in adopting a -- saying that the property of the estate
13 should be given its broadest and most expensive meaning,
14 and certainly the RRA bank accounts, their contents, any
15 constructive assets claimed by the trustee all constituted
16 property of the estate. They should not have been subject
17 to a criminal forfeiture, which could only have reached
18 Rothstein's interests in the assets. Rothstein had no
19 interest in the RRA bank accounts, he was a shareholder
20 of --

21 JUDGE TJOFLAT: Well, that --

22 MS. KEGERREIS: -- the corporation.

23 JUDGE TJOFLAT: -- doesn't make any
24 difference.

25 MS. KEGERREIS: Well, certainly this

1 collision between the Bankruptcy Court and the government
2 should never have occurred if the law had been correctly
3 applied.

4 JUDGE TJOFLAT: Thank you.

5 JUDGE BUCKLEW: You've got your time for
6 rebuttal, and we'll give you what time you need.

7 MS. KEGERREIS: Thank you.

8 JUDGE TJOFLAT: Ms. Shirley.

9 MS. SHIRLEY: Your Honors, good morning.
10 Madeleine Shirley on behalf of the United States. With me
11 is the asset forfeiture team, Evelyn Sheehan, Michelle
12 Alvarez and Allison Lare.

13 Your Honors, we take obviously a little
14 different approach than ---

15 JUDGE TJOFLAT: I know I'm shocked at the
16 government's position in this case, but I know you have
17 to ---

18 MS. SHIRLEY: Well ---

19 JUDGE TJOFLAT: You have to take another
20 approach, because of all that's been done in the criminal
21 case.

22 MS. SHIRLEY: Well, your Honor, I think you
23 have to look at the actual facts of what went on in ---

24 JUDGE TJOFLAT: Well --

25 MS. SHIRLEY: Your Honor, if I may?

1 JUDGE TJOFLAT: -- when the Chapter 11
2 proceeding commenced, will you agree that everything
3 became an asset of the estate?

4 MS. SHIRLEY: No, because ---

5 JUDGE TJOFLAT: What's your best case? Your
6 best case, your best case that you have, when you have an
7 entity in bankruptcy with an automatic stay, and here
8 comes a criminal court, a federal criminal court and
9 issues a forfeiture order, which in effect adjudicates a
10 matter in the bankruptcy estate?

11 MS. SHIRLEY: I would say --

12 JUDGE TJOFLAT: Your best case.

13 MS. SHIRLEY: -- off the top of my head, and
14 from what notes I have, In Re: James would probably be,
15 which is a 4th Circuit case.

16 Also if I can cite to ---

17 JUDGE TJOFLAT: And what does In Re: James
18 say?

19 MS. SHIRLEY: In that I can it was a civil
20 forfeiture, state civil for ---

21 JUDGE TJOFLAT: No, no, we're talking about
22 a criminal forfeiture.

23 MS. SHIRLEY: Yes, your Honor.

24 JUDGE TJOFLAT: A criminal -- a civil
25 forfeiture is an in rem proceeding.

1 MS. SHIRLEY: Your Honor, if I may. This is
2 a little bit unusual, because you've got RRA, which is the
3 debtor, which is a law firm, which in 2009, the year that
4 all these actions took place, earned a mere \$12 million.

5 JUDGE TJOFLAT: I understand that.

6 MS. SHIRLEY: They brought into the bank
7 accounts --

8 JUDGE TJOFLAT: Wait, wait.

9 MS. SHIRLEY: -- from investors
10 \$724 million.

11 JUDGE TJOFLAT: Counsel, we understand that.

12 MS. SHIRLEY: That has nothing to do with
13 the law firm.

14 JUDGE TJOFLAT: No, your problem is, how in
15 the world does a criminal forfeiture proceeding adjudicate
16 rights of claimants in a bankruptcy estate?

17 MS. SHIRLEY: Because it's not
18 adjudicating -- it's not adjudicating claimants rights in
19 a bankruptcy proceeding.

20 JUDGE TJOFLAT: Or even the government's
21 rights.

22 MS. SHIRLEY: Because, your Honor, these are
23 proceeds of Rothstein's criminal offenses.

24 JUDGE TJOFLAT: Yes.

25 MS. SHIRLEY: The fact that he deposited

1 them in someone else's account is of no consequence.

2 JUDGE TJOFLAT: What ---

3 MS. SHIRLEY: They are proceeds that --

4 JUDGE TJOFLAT: Do you have ---

5 MS. SHIRLEY: -- became the government's
6 before they went ---

7 JUDGE TJOFLAT: Do you have a case that
8 holds that?

9 MS. SHIRLEY: Your Honor, I think the basic
10 forfeiture law that talks about --

11 JUDGE TJOFLAT: No, no.

12 MS. SHIRLEY: -- property vesting in the
13 government ---

14 JUDGE TJOFLAT: I speak for my -- I speak
15 for myself, and the answer is, no. Do you have a case?

16 MS. SHIRLEY: Your Honor, I would cite you
17 on a little bit different proposition.

18 JUDGE TJOFLAT: No, no, do you have a case
19 that holds that an in personam government forfeiture
20 adjudicates the claims of claimants in a bankrupt estate?

21 MS. SHIRLEY: They're dealing with apples
22 and oranges.

23 JUDGE TJOFLAT: Do you have a case?

24 MS. SHIRLEY: Off the top of my head, no,
25 your Honor.

1 JUDGE TJOFLAT: We'll give you leave to file
2 a case.

3 MS. SHIRLEY: Thank you.

4 JUDGE TJOFLAT: How much time would you
5 like?

6 MS. SHIRLEY: Seven days, please.

7 JUDGE TJOFLAT: Okay. Now go ahead.

8 MS. SHIRLEY: Your Honor, even assuming
9 under your proposition that the bank accounts in the name
10 of RRA were subject to the automatic stay, there is an
11 exemption under 362(b)(4).

12 JUDGE TJOFLAT: Yes, and that doesn't apply.

13 MS. SHIRLEY: We take the position that it
14 does apply under the police powers of the government to
15 remove assets ---

16 JUDGE TJOFLAT: The government -- the
17 government's police powers? The government is like a
18 state now and has police powers?

19 MS. SHIRLEY: Yes, it does.

20 JUDGE TJOFLAT: It does? Where, in the
21 Constitution?

22 MS. SHIRLEY: To enforce, to remove ---

23 JUDGE TJOFLAT: Where in the Constitution?

24 MS. SHIRLEY: To remove proceeds from
25 wrongdoers, yes. The United States has police powers.

1 JUDGE TJOFLAT: Give us a case for that,
2 too.

3 MS. SHIRLEY: I will try to find you ---

4 JUDGE TJOFLAT: Under the Constitution,
5 police power.

6 MS. SHIRLEY: Your Honor, if I may. Our
7 position is it falls under 362(b)(4), under the police and
8 regulatory powers.

9 JUDGE TJOFLAT: Is that your argument, that
10 the stay doesn't apply?

11 MS. SHIRLEY: The bankruptcy estate doesn't
12 apply.

13 JUDGE TJOFLAT: No, no, the stay doesn't
14 apply?

15 MS. SHIRLEY: Yes, the stay does not apply.

16 JUDGE TJOFLAT: The stay does not apply?

17 MS. SHIRLEY: Yes.

18 JUDGE TJOFLAT: That means that the trustee
19 and the government can litigate in a court in a civil
20 proceeding.

21 MS. SHIRLEY: In the ancillary proceeding.

22 JUDGE TJOFLAT: No, no, no, a civil
23 proceeding where there are due process rights.

24 MS. SHIRLEY: Your Honor, 853(n) is the due
25 process rights for any party claiming an interest in the

1 funds that the government has forfeited through the
2 defendant ---

3 JUDGE TJOFLAT: Give us a case that holds
4 that stay exception, the automatic stay exception is
5 triggered by a forfeiture proceeding in personam.

6 MS. SHIRLEY: That the stay provision -- the
7 exemption to the stay.

8 JUDGE TJOFLAT: No. You have an automatic
9 stay --

10 MS. SHIRLEY: Yes.

11 JUDGE TJOFLAT: -- and you're citing a
12 statute which relieves certain things from the automatic
13 stay. Give us a case which holds that a criminal
14 in personam forfeiture proceeding, which commences after
15 the automatic stay is in place, is not barred by the
16 automatic stay.

17 MS. SHIRLEY: Your Honor, just off the top
18 of my head I'm not -- I believe ---

19 JUDGE TJOFLAT: Well, you can put that in
20 your memorandum.

21 MS. SHIRLEY: I will, I will do that as
22 well.

23 But, your Honor, I think if I may just
24 address the issue that the Court's concern addresses in
25 our position only the bank accounts.

1 JUDGE TJOFLAT: The Court's concern, this
2 problem should have been front and center in the
3 government's office. You have a bankrupt lawyer in the
4 U.S. Attorney's Office?

5 MS. SHIRLEY: Yes, we do, your Honor.

6 JUDGE TJOFLAT: And probably not seated at
7 the table.

8 MS. SHIRLEY: No.

9 JUDGE TJOFLAT: That's the very first thing
10 that should have come to mind, is frustrating the
11 bankruptcy law, and when you frustrate the bankruptcy law,
12 you frustrate all of the creditors of the bankrupt
13 estate --

14 MS. SHIRLEY: Your Honor --

15 JUDGE TJOFLAT: -- their rights.

16 MS. SHIRLEY: -- if I may address that,
17 though. You have competing interests here that I'm not
18 sure how to properly explain this to you, but the
19 creditors of the bankruptcy --- the bankruptcy estate is
20 of the law firm, which was very small, compared to the
21 fraud, which was enormous. The ---

22 JUDGE TJOFLAT: I'm talking about everything
23 that was in the name of the law firm, is in the bankruptcy
24 estate. Do you have that?

25 MS. SHIRLEY: That's -- that would be ---

1 JUDGE TJOFLAT: I don't care where it came
2 from. Everything that was in the name of the law firm is
3 in the bankruptcy estate. All of those bank accounts that
4 are listed in the District Court's orders are in the
5 bankruptcy estate, all of them.

6 MS. SHIRLEY: Your Honor, under that
7 analysis, you would be ---

8 JUDGE TJOFLAT: No, no analysis. As a
9 matter of law, Counsel.

10 MS. SHIRLEY: Except for the exemptions.

11 JUDGE TJOFLAT: Counsel, as a matter of law.

12 MS. SHIRLEY: Your Honor, if I may. With
13 respect to, had this not been a forfeiture action against
14 Mr. Rothstein, and the debtor's action against the law
15 firm, the other exemption would have applied, which is
16 362(b)(1), which is a forfeiture -- any criminal action.

17 JUDGE BUCKLEW: But that's a sacronal
18 (phonetic) prosecution of the debtor, and ---

19 MS. SHIRLEY: Right, and that's the
20 distinction, that's why that one won't apply.

21 JUDGE BUCKLEW: Right.

22 MS. SHIRLEY: But in an ordinary
23 circumstance, where you have the debtor and the ---

24 JUDGE TJOFLAT: You can sue, the government
25 can sue Rothstein at all times individually --

1 MS. SHIRLEY: Yes.

2 JUDGE TJOFLAT: -- because he is not
3 individually in that bankruptcy estate. He's in the --
4 he's in the bankrupt estate, to the extent that he's a
5 partner.

6 MS. SHIRLEY: Right.

7 JUDGE TJOFLAT: The partnership is in the
8 estate.

9 MS. SHIRLEY: What I was trying to just
10 analogize, though is, your Honor, is that in the normal
11 circumstance, when you have a debtor who is also a
12 criminal defendant, the automatic stay does not apply
13 to ---

14 JUDGE TJOFLAT: You're going to give us --
15 you're going to give us a case which says that the
16 Bankruptcy Court, the Federal Court can proceed with an
17 in personam, in personam, listen carefully.

18 MS. SHIRLEY: In personam.

19 JUDGE TJOFLAT: An in personam decree
20 forfeiting the defendant's interest, you understand?

21 MS. SHIRLEY: Yes.

22 JUDGE TJOFLAT: And then adjudicate the
23 claims of the bankruptcy estate through 853(n).

24 MS. SHIRLEY: Your Honor, the ---

25 JUDGE TJOFLAT: And you're going to give us

1 a case that holds that.

2 MS. SHIRLEY: I will try.

3 JUDGE TJOFLAT: I mean, you don't have one,
4 so it's no sense us arguing about it.

5 MS. SHIRLEY: Yes, but I think that the ---

6 JUDGE TJOFLAT: I know you think you're
7 right.

8 MS. SHIRLEY: You ---

9 JUDGE TJOFLAT: You're going to give us a
10 case that holds that.

11 MS. SHIRLEY: Your Honor, the position is
12 the bankruptcy estate doesn't -- cannot adjudicate
13 interests ---

14 JUDGE TJOFLAT: That the bankruptcy estate
15 will adjudicate every interest that people have, including
16 the government, in anything that is in the bankruptcy
17 estate, which means all the bank accounts, and anything
18 else that's in bankruptcy.

19 MS. SHIRLEY: But our position is that's an
20 artificial fiction when the funds that went in there ---

21 JUDGE TJOFLAT: Then give us a case that
22 holds that it's an artificial fiction.

23 MS. SHIRLEY: With respect to proceeds of
24 crime, your Honor.

25 JUDGE TJOFLAT: An artificial fiction.

1 MS. SHIRLEY: Thank you.

2 JUDGE TJOFLAT: Okay.

3 MS. SHIRLEY: Your Honor, just, if I can
4 just clarify with respect to, our position is that the
5 Court's concern addresses only the things titled in the
6 name of RRA, not Rothstein's properties, the other things
7 at issue.

8 JUDGE TJOFLAT: You can go and get his house
9 or whatever it is against him individually. We're not
10 talking about that. The orders cover all those bank --
11 the bank accounts in Rothstein -- in the firm's account.

12 MS. SHIRLEY: Right.

13 JUDGE BUCKLEW: Okay. I'm puzzled, because
14 when I asked the question of her, opposing counsel, I
15 thought we were talking about all of the properties. Are
16 the issues that we're talking about just what is in the
17 law firm's name, the bank accounts, or are we talking
18 about the houses, the cars, the -- all sorts of things?

19 MS. SHIRLEY: The only thing listed in the
20 law firm's name that we included in the forfeiture were
21 the bank accounts. We did not take desks. We did not
22 take other things from the law firm. Nothing else was
23 removed from the law firm for forfeiture purposes.

24 JUDGE TJOFLAT: But all -- forget
25 forfeiture. Everything that the law firm -- is in the law

1 firm's name --

2 MS. SHIRLEY: Yes.

3 JUDGE TJOFLAT: -- and Judge Bucklew is
4 right, you can go after anything he owns individually.

5 MS. SHIRLEY: Right.

6 JUDGE TJOFLAT: Not that he owns in the law
7 firm.

8 MS. SHIRLEY: Ms. Kegerreis was arguing that
9 the -- tried to make a more expensive argument, that they
10 also have a constructive trust as to the other ---

11 JUDGE TJOFLAT: No, we're talking about --
12 Counsel, we're talking about all of the assets of the
13 estate. Judge Ray is administering an estate, and there
14 is an automatic stay, and you're going to find a case
15 which says that a United States District Judge, under
16 853(n), can unilaterally adjudicate the rights and
17 interests of claimants to the bankrupt estate, period.

18 MS. SHIRLEY: I hope.

19 JUDGE TJOFLAT: I hope somebody at that
20 table has written that down, just verbatim. Okay.

21 JUDGE BUCKLEW: Okay, but that's right,
22 that's what she was arguing is a --

23 MS. SHIRLEY: Right.

24 JUDGE BUCKLEW: -- constructive trust on
25 everything, and because there were a lot of things that

1 were not in either the bankruptcy -- I'm sorry, the law
2 firm's name or ---

3 MS. SHIRLEY: Or in Rothstein's name.

4 JUDGE BUCKLEW: Right.

5 MS. SHIRLEY: Correct.

6 JUDGE BUCKLEW: They were in all sorts of
7 names.

8 MS. SHIRLEY: Exactly, LLCs, all different
9 types of things, yes, and we would dispute the trustee's
10 position that they have a -- the bankruptcy estate has a
11 constructive trust, either through the automatic stay or
12 otherwise in those assets ---

13 JUDGE TJOFLAT: If the Bankruptcy Court says
14 it's a constructive trust, then we'll entertain that
15 appeal, or the District Judge will. Not this District
16 Judge in the criminal case, do you understand?

17 MS. SHIRLEY: Well ---

18 JUDGE TJOFLAT: If the Bankruptcy Judge
19 adjudicates a constructive trust in favor of the bankrupt
20 estate, then you go to the United States District Court
21 with an appeal from the Bankruptcy Judge's order.

22 MS. SHIRLEY: I don't believe the bankruptcy
23 Trust -- the Bankruptcy Judge ---

24 JUDGE TJOFLAT: We don't have that matter
25 before us.

1 MS. SHIRLEY: No, and I don't believe that
2 that's ever been entered.

3 JUDGE TJOFLAT: Yes.

4 MS. SHIRLEY: Because the bankruptcy trustee
5 came into the end proceeding under 853 to adjudicate his
6 interest with respect to everything. So -- and we have --
7 and we can stop a bankruptcy proceeding, if they were
8 trying to remove those assets as well, but those are
9 assets that clearly were not in the name of RRA, and were
10 not automatic -- under your theory, automatically part of
11 the estate.

12 We would argue there is no constructive
13 trust under the circumstances because RRA was the vehicle
14 and the enterprise that Rothstein used for furthering the
15 RICO violations and the Ponzi scheme in this case, and
16 should not stand in a higher position than anyone else who
17 would be trying to adjudicate their interest in the 853(n)
18 proceeding.

19 JUDGE BUCKLEW: So if we're talking about a
20 stay, and the stay stopping everything, we're talking --
21 and we're not considering the constructive trust, we're
22 talking about those bank accounts that were in the law
23 firm's -- or whatever was in the law firm's name?

24 MS. SHIRLEY: That's my understanding, is --

25 JUDGE TJOFLAT: That's right.

1 MS. SHIRLEY: -- I mean, we still take the
2 position ---

3 JUDGE TJOFLAT: You know, I think really you
4 ought to involve your bankruptcy lawyer in this case, I
5 really do.

6 MS. SHIRLEY: We will, we will certainly --

7 JUDGE TJOFLAT: I really do.

8 MS. SHIRLEY: -- consult with her after.

9 JUDGE TJOFLAT: You folks who do nothing but
10 criminal work ---

11 MS. SHIRLEY: This is another world to us,
12 it's true.

13 JUDGE TJOFLAT: It's another world that has
14 to do with contracts and all kinds of state law issues,
15 that the Bankruptcy Court is well equipment to handle.

16 MS. SHIRLEY: Yes, your Honor, there also is
17 under 853(k), no party can interfere in the criminal
18 proceeding.

19 JUDGE TJOFLAT: Oh, no question about it,
20 but the United States Circuit Court, reviewing something
21 the Bankruptcy Court decided surely can, will you agree
22 with that?

23 MS. SHIRLEY: Oh, yes, yes.

24 JUDGE TJOFLAT: Okay.

25 MS. SHIRLEY: Yes.

1 Unless the Court has no further questions,
2 we rely on ---

3 JUDGE MARTIN: I actually do, I do --

4 MS. SHIRLEY: Oh, I'm sorry, okay.

5 JUDGE MARTIN: -- have a question.

6 It's been a long time since I've -- at one
7 point I was in a U.S. Attorney's Office, and forfeiture
8 was very different, and I'm just interested, I mean, at
9 the end of the day, the government's position is, well, we
10 need this money to give it back to the victims, is that
11 right, or is that ---

12 MS. SHIRLEY: That's essentially what we've
13 -- what we had told Judge Cohn, yes, we're interested in
14 doing --

15 JUDGE MARTIN: And so ---

16 MS. SHIRLEY: -- is removing, removing the
17 proceeds of the crime from Rothstein and third parties,
18 who are holding it, who are not qualified as bona fide
19 purchasers for value, forfeiting them, and then through a
20 restoration process, through restitution, paying those
21 funds back to the victims.

22 In the Bankruptcy Court those victims fall
23 much later than any of the creditors of RRA which, again,
24 RRA generated very little money.

25 JUDGE MARTIN: So you're ---

1 MS. SHIRLEY: So the creditors would be a
2 higher position than the victims, whose funds are actually
3 sitting in those accounts.

4 JUDGE MARTIN: So you don't -- I mean, you
5 just disagree with the priority that would be given in the
6 Bankruptcy Court?

7 MS. SHIRLEY: Absolutely, because these are
8 not RRA's -- RRA did not earn these fees.

9 JUDGE TJOFLAT: Counsel --

10 MS. SHIRLEY: These are not fees.

11 JUDGE TJOFLAT: -- all those victims are
12 claimants in the Bankruptcy Court, every last victim.
13 Everybody ---

14 MS. SHIRLEY: They are not, your Honor.

15 JUDGE TJOFLAT: Everybody who gave a dime to
16 the law firm, and who was entitled to something in return
17 for the dime, is a claimant.

18 MS. SHIRLEY: And they take after ---

19 JUDGE TJOFLAT: And what you've done, I'm
20 going to tell you what you've done, you have created
21 statute of limitations problems for the victims.

22 Now, the law can avoid that problem by
23 interfering with the administration of a bankrupt estate.

24 MS. SHIRLEY: Well, your Honor, we still --
25 because ---

1 JUDGE TJOFLAT: If you're wrong, if you're
2 wrong, that's what you've done, will you agree? Will you
3 agree with that, that if you've done that, that's -- if
4 you're wrong, you've done that?

5 MS. SHIRLEY: I don't even know how to
6 answer that because I ---

7 JUDGE TJOFLAT: Well, you will when you
8 write --

9 MS. SHIRLEY: Yes.

10 JUDGE TJOFLAT: -- your memorandum --

11 MS. SHIRLEY: Yes, I will.

12 JUDGE TJOFLAT: -- and cite --

13 MS. SHIRLEY: Yes, I will.

14 JUDGE TJOFLAT: -- the cases that hold --

15 MS. SHIRLEY: Yes, I will, your Honor.

16 JUDGE TJOFLAT: -- what you say they hold?

17 MS. SHIRLEY: Yes, I will, your Honor.

18 JUDGE TJOFLAT: Okay.

19 MS. SHIRLEY: But I just want to impress
20 upon the Court that through the forfeiture process, the
21 victims whose funds are the proceeds of the crime, sitting
22 in those accounts, would recover without having to go
23 behind secured creditors of a law firm, where the law
24 firm's assets truly are very small.

25 The law firm did not earn these fees, and

1 the same thing with Mr. Lubetsky's client, who actually --
2 the law firm was holding the money in trust. The law firm
3 actually has no equitable interest in those -- in the
4 trust funds, and he should not be in Bankruptcy Court to
5 try to fight to get those back, after secured creditors of
6 a law firm, not Mr. Rothstein, who put the funds in.

7 JUDGE MARTIN: Are you talking about the
8 trust accounts now?

9 MS. SHIRLEY: Yes, yes. I know he'll
10 have ---

11 JUDGE TJOFLAT: I think we've got your case,
12 and you'll submit the memorandum --

13 MS. SHIRLEY: Yes.

14 JUDGE TJOFLAT: -- in seven days.

15 MS. SHIRLEY: Thank you, your Honor

16 JUDGE TJOFLAT: And --

17 MS. SHIRLEY: We'd ask that you ---

18 JUDGE TJOFLAT: -- the other side as well,
19 submit your memorandum.

20 MR. LUBETSKY: May it please the Court. My
21 name is Cary Lubetsky. I represent Todd Snyder, and I
22 wanted to address your Honor's questions.

23 The first one was whether the bank accounts
24 and other assets of RRA were part of the bankruptcy
25 estate, and the only bank account that I'd like to address

1 is the trust account that's at issue in our case.

2 JUDGE TJOFLAT: But it's in the law firm's
3 name.

4 MR. LUBETSKY: It is, your Honor, and
5 your Honor has issued an opinion on that.

6 JUDGE TJOFLAT: I understand.

7 MR. LUBETSKY: The Skanlion opinion
8 (phonetic), if I may quote you on it.

9 JUDGE TJOFLAT: I'm familiar with it.

10 MR. LUBETSKY: I know.

11 JUDGE TJOFLAT: Yes.

12 MR. LUBETSKY: I just want to make sure that
13 we are. Your opinion says, under Florida law legal title
14 to property placed in an escrow account remains with the
15 grantor until the occurrence of the condition ---

16 JUDGE TJOFLAT: You're absolutely right,
17 Counsel, but the problem is, is that the Bankruptcy Judge
18 will give it to you.

19 MR. LUBETSKY: But you said right after
20 that --

21 JUDGE TJOFLAT: Yes.

22 MR. LUBETSKY: -- nonetheless, funds that
23 are deposited into an escrow account by a debtor for the
24 benefit of others cannot be characterized as property of
25 the estate.

1 JUDGE TJOFLAT: I understand.

2 MR. LUBETSKY: So, if it's not property of
3 the estate ---

4 JUDGE TJOFLAT: That's right, it's not
5 property of the estate, but what happens is the Bankruptcy
6 Judge recognizes that --

7 MR. LUBETSKY: That's part two of the
8 question.

9 JUDGE TJOFLAT: -- and turns it over.

10 MR. LUBETSKY: I appreciate that.

11 JUDGE TJOFLAT: The Bankruptcy Judge.

12 MR. LUBETSKY: If I may?

13 JUDGE TJOFLAT: Yes.

14 MR. LUBETSKY: I agree with your Honor, I'm
15 glad that you agree with me that the trust accounts are
16 not --

17 JUDGE TJOFLAT: There is not --

18 MR. LUBETSKY: -- property of the estate.

19 JUDGE TJOFLAT: -- a shadow of a doubt about
20 it, Counsel, the matter of -- the problem is, it's not up
21 to the prosecutor's office to decide that.

22 MR. LUBETSKY: I understand.

23 JUDGE TJOFLAT: It's the Bankruptcy Judge's
24 province to decide that, who is reviewable by a District
25 Judge, his decisions, do you understand?

1 MR. LUBETSKY: I do. That brings us to --
2 once question one was answered in the negative for my
3 client's bank account, your position, and the Court's
4 position is, apparently you must go to the Bankruptcy
5 Court and seek leave of stay, or have the Bankruptcy Court
6 tell you to go back out and deal with it in ---

7 JUDGE TJOFLAT: Well, I don't have any doubt
8 in my mind that the Bankruptcy Judge in this case is
9 probably going to, without -- in a New York minute, do
10 what's right.

11 MR. LUBETSKY: And the Bankruptcy Court --
12 the Bankruptcy Court here -- I mean, the Bankruptcy Court
13 did make a decision on that very recently, it was part of
14 our supplement authority that we filed, and the Bankruptcy
15 Court stated in the August opinion we filed, this was In
16 Re: Rothstein Rosenfeldt Adler, this is 2012 WestLaw
17 432 --

18 JUDGE TJOFLAT: We ---

19 MR. LUBETSKY: -- 0479.

20 JUDGE TJOFLAT: We've read it.

21 MR. LUBETSKY: And the statement was ---

22 JUDGE TJOFLAT: We read the opinion.

23 MR. LUBETSKY: Right, the sole remedy of the
24 bankruptcy trustee to assert an alleged interest in the
25 property subject to forfeiture is to file a claim and

1 participate in the ancillary proceeding.

2 JUDGE TJOFLAT: I understand, but here
3 you've got a Bankruptcy Judge and a District Judge, and
4 the District Judge is running roughshod over the
5 bankruptcy estate, what would you do if you were the
6 Bankruptcy Judge? I'm dead serious now.

7 MR. LUBETSKY: It ---

8 JUDGE TJOFLAT: This is the Judge that's
9 going to review the decision.

10 MS. WEINER: Well, I thought your Honor just
11 said it's not going to be this Judge reviewing the
12 decision.

13 JUDGE TJOFLAT: No, no, we can straighten
14 matters out, and -- but the Bankruptcy Judge is a hopeless
15 situation.

16 MR. LUBETSKY: But the Bankruptcy Judge
17 didn't just rely on this District Judge's decision. The
18 Bankruptcy Judge in this case, in Rothstein Rosenfeldt
19 Adler --

20 JUDGE TJOFLAT: Yes.

21 MR. LUBETSKY: -- when it said, go to the
22 forfeiture, relied on U.S. versus Urbanback (phonetic), a
23 6th Circuit case, relied on Global Vending, another
24 Bankruptcy Court case, and a Northern District of
25 California case, the American ---

1 JUDGE TJOFLAT: But not on an 11th Circuit
2 case?

3 MR. LUBETSKY: No, just the 6th Circuit and
4 another Southern District of Bankruptcy, and a Northern
5 District of California bankruptcy case, but it doesn't
6 appear to me that this Bankruptcy Judge was worried about
7 being reversed by the District Court.

8 JUDGE TJOFLAT: Well, no, I just, I just
9 make that observation.

10 MR. LUBETSKY: I understand, and that's why
11 I said I think your Honor's observation ---

12 JUDGE TJOFLAT: I've seen a lot of
13 forfeiture cases, and I have to tell you this is at the
14 extreme.

15 MR. LUBETSKY: I ---

16 JUDGE TJOFLAT: Gilbert was bad enough, but
17 this makes Gilbert pale by comparison.

18 MR. LUBETSKY: I haven't, but my client was
19 -- had money in a trust account, and the trust account
20 gets -- is my client's interest, not the law firm's.

21 JUDGE TJOFLAT: We understand.

22 MR. LUBETSKY: In the bankruptcy estate, you
23 asked the question of, what happens, doesn't it get
24 administered in the bankruptcy estate? It does, it does
25 get administered, and unfortunately it gets subject to

1 \$10 million of attorney's fees in the bankruptcy estate,
2 rather than being dealt with efficiently by the
3 government.

4 JUDGE TJOFLAT: Well, not necessarily.

5 JUDGE MARTIN: Well, here is the other -- I
6 mean, I don't know whether it's still your position, but
7 at some point your client took the position that I'm going
8 to get everything I can in the criminal forfeiture
9 proceeding, and then I'm going to Bankruptcy Court and not
10 offset any of that, and get everything I can there. Is
11 that still your position?

12 MR. LUBETSKY: No, absolutely not. The
13 position was, we have a \$2.16 million claim. We get our
14 money that is in the Bankruptcy Court, the \$213,000 that
15 was awarded to us by the final order of forfeiture, which
16 offsets our claim. It offsets our claim because then we
17 will have only lost \$1.9 million, and our claim is not a
18 \$2.16 million claim, we're just the loser of \$1.9 million.
19 We did not ---

20 JUDGE MARTIN: But you're going to go to
21 Bankruptcy Court.

22 MR. LUBETSKY: We've still got to go to
23 Bankruptcy Court for the 1.9.

24 JUDGE MARTIN: Right.

25 MR. LUBETSKY: We did not take the position

1 that we have an offset on the distribution. If we had an
2 offset on the distribution, that's a different story, if
3 they pay 10 cents on the dollar, whether we got it in
4 Bankruptcy or District Court, we get zero. We don't know
5 what the distribution is, because it's been three years
6 and there has been none.

7 JUDGE MARTIN: That may be a good reason why
8 there ought to be one person distributing the assets.

9 MR. LUBETSKY: Or ---

10 JUDGE MARTIN: Right? Okay.

11 JUDGE TJOFLAT: I think we understand your
12 position.

13 MR. LUBETSKY: Thank you.

14 MS. KEGERREIS: Your Honor, I'd like to make
15 three very brief points.

16 First, with response to the -- whether or
17 not the exemption under the Bankruptcy Code 362(b)(4)
18 applies under the police powers ---

19 JUDGE TJOFLAT: They're going to cite a
20 case.

21 MS. KEGERREIS: Well, there is -- I can give
22 you a case, your Honor, if you'd like.

23 JUDGE TJOFLAT: I know. They have to have
24 an opportunity to go find one.

25 MS. KEGERREIS: Okay.

1 JUDGE TJOFLAT: Why don't you just give it
2 to them?

3 MS. KEGERREIS: Okay. The case --- I'm dead
4 serious, Counsel, just give it to your sister over there
5 and she'll put it in her memorandum.

6 MS. SHIRLEY: Can I ---

7 MS. KEGERREIS: I'm happy to. Police power
8 simply doesn't apply to this situation.

9 In terms of the -- what the government said
10 about the system, priorities in the Bankruptcy Court,
11 they're completely wrong. The ---

12 JUDGE TJOFLAT: We don't have a Bankruptcy
13 Court matter before us now.

14 MS. KEGERREIS: I just wanted to
15 correct ---

16 JUDGE TJOFLAT: Counsel, that's not going to
17 come into the decision.

18 MS. KEGERREIS: Very good. Very good and,
19 again, on the -- let me, on the constructive trust assets,
20 which Judge Bucklew addressed, we are making a claim under
21 541(a) to all of the constructive trust assets or assets
22 -- that were assets purchased with funds diverted from
23 RRA's accounts, those are assets which the District Court
24 found the trustee had made out a constructive trust claim,
25 we agree that the Bankruptcy Judge should have had the

1 opportunity to rule what was a constructive trust asset,
2 that's its core function under 157 of the Bankruptcy Code,
3 we agree completely with your Honor ---

4 JUDGE TJOFLAT: Counsel, we understand all
5 that power by the Bankruptcy Judge.

6 The question here has to do with a United
7 States District Judge litigating bankruptcy claims under
8 853(n) of Title 21.

9 MS. KEGERREIS: Our position is that that
10 should not have been done.

11 JUDGE TJOFLAT: Okay.

12 MS. KEGERREIS: That that violated the
13 automatic stay.

14 JUDGE TJOFLAT: Yes.

15 MS. KEGERREIS: And that all of these
16 matters should have been decided by the --

17 JUDGE TJOFLAT: We've thrown you
18 several --

19 MS. KEGERREIS: -- District Court.

20 JUDGE TJOFLAT: -- snowballs, so you might
21 as well --

22 MS. KEGERREIS: Thank you, your Honor.

23 JUDGE TJOFLAT: -- take one and just ---

24 MS. KEGERREIS: We'll rest on the briefs.
25 Thank you very much.

1 JUDGE TJOFLAT: Throw softballs, put it that
2 way.

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6 (Thereupon, the hearing was concluded.)
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CERTIFICATION

STATE OF FLORIDA :

COUNTY OF MIAMI-DADE :

I, Cheryl L. Jenkins, RPR, Shorthand
Reporter and Notary Public in and for the State of Florida
at Large, do hereby certify that the foregoing proceedings
were transcribed by me from the date and place as stated
in the caption hereto on Page 1; that the foregoing
computer-aided transcription is a true record of the
recording on the CD to the best of my knowledge of said
proceeding.

WITNESS my hand this 10th day of December,
2012.

CHERYL L. JENKINS, RPR,

Court Reporter and Notary Public
in and for the State of Florida at Large
Commission #DD 920461
December 27, 2013

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