OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-261

TITLE COMMODITY FUTURES TRADING COMMISSION, Petitioner
v. GARY WEINTRAUB, ET AL.

PLACE Washington, D. C.

DATE March 19, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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COMMODITY FUTURES TRADING :

COMMISSION, : No. 84-261

Petitioner :

v. :

GARY WEINTRAUB, ET AL. :

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Washington, D.C.

Tuesday, March 19, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:01 o'clock p.m.

APPEARANCES:

BRUCE N. KUHLIK, ESQ., Washington, D.C.;
on behalf of Petitioner.

DAVID A. EPSTEIN, ESQ., Chicago, Ill.;
on behalf of Respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Kuhlik, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF BRUCE N. KUHLIK, ESQ.

ON BEHALF OF THE PETITIONER

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

The question in this case is who is the proper party to control the attorney-client privilege of a corporation in bankruptcy. Our position is straightforward: Control over the privilege rests with the corporation's management. The bankruptcy trustee manages the debtor corporation and therefore the trustee must have the power to assert or waive the corporation's privilege.

This case arises out of the demise of a commodity brokerage firm, Chicago Discount Commodity Brokers. Over a period of time, the firm's President, Frank McGhee, who is one of the Respondents in this Court, had embezzled several million dollars in customer funds.

And by the fall of 1980 the firm's finances were in such disarray that the Commodities Futures Trading Commission filed a complaint in federal court alleging various violations of the Commodities Exchange

Act, and the same day that the complaint was filed the brokerage firm, through Frank McGhee, who was at that time its sole remaining officer and director, entered into a consent decree with the Commission that provided for the appointment of a receiver.

John Notz was appointed the receiver and he immediately took control of the firm's operations. It quickly became clear to him that really the best course for the firm was to file for bankruptcy and, pursuant to an express authorization in the consent decree, he filed a voluntary petition for liquidation under subchapter IV of chapter 7 of the bankruptcy code.

Now, subchapter IV of chapter 7 is the only bankruptcy avenue available to commodity brokers. They cannot go into reorganization. Congress had two concerns when it set forth that requirement. The first is with the customers of a commodity broker, whose funds are primarily at risk. They are the people that put up the margin payments and the deposits, and it's typically that money that is lost in a commodity brokerage bankruptcy.

Congress was also concerned that the bankruptcy of one commodity broker not have a ripple effect through the complex and interdependent commodity markets and thereby cause problems throughout the

futures markets.

So under these special provisions the trustee, who was Mr. Notz, came in and he operated the commodity brokerage business with a view toward liquidating it and closing out its contracts in an orderly fashion as quickly as possible.

Pursuant to Section 766 of the code, the trustee in a commodity broker bankruptcy must identify contracts that may be transferred to solvent commodity brokers, he must seek customer instructions, he must make and meet margin payments daily, he must be prepared to accept or to deliver commodities in contracts that cannot be closed out before their closing dates.

QUESTION: Mr. Kuhlik, I'm curious about how this process would work. Assuming that you are correct ultimately that a trustee in bankruptcy has the power to waive the privilege for the corporation, is that limited in any way? In other words, is that qualified by a power to waive it if it will somehow benefit the estate?

And if so, is it somehow necessary that the trustee would find out first what it is that's going to be waived before making that decision, and how would that be accomplished?

MR. KUHLIK: You ask a number of questions,

Justice O'Connor. The trustee in a bankruptcy is a fiduciary who has a responsibility to all of the parties in interest in the proceeding: the creditors, the shareholders, the debtor corporation. And it is open to any party at any time to challenge the actions of the trustee as not being in the best interests of the estate. In fact, it's a fairly common occurrence. People are doing it all the time.

So in a sense, the rule we are asking for is a presumptive one. We feel that the trustee is the best person in the first instance to make this cut. He is obviously in a better position in this case than Frank McGhee.

QUESTION: Well, wouldn't the trustee have to know what the communication was before deciding whether to waive it?

MR. KUHLIK: Well, not in all circumstances, and I would note in this particular case that the McGhee's have asserted the privilege or instructed their attorney to assert it with respect to the trustee as well.

In this particular case, the trustee had been pursuing a number of adversary actions and the CFTC had as well, and the trustee and the CFTC were both aware that the McGhee's were the people who had primarily

caused the problems with this brokerage firm. And it wase quite apparent to the trustee that waiver of the privilege in favor of the CFTC with respect to the questions that were asked of Mr. Weintraub in this deposition would be in everybody's best interest.

But I would emphasize here that this proceeding arises out of the subpoena enforcement actien.

QUESTION: Well, how does the trustee know that without knowing what the information was?

MR. KUHLIK: Well, he knows in this case from his experience in pursuing other actions against the McGhee's and other insiders, that information concerning access to the safe, loans to corporate officers and the like, very, very unlikely that they would redound to the detriment of the estate.

And what we're talking about here is a question of whether this will be in the best interest of the customers, the creditors, the shareholders. The questions that were asked of Mr. Weintraub with respect to which the privilege was asserted were questions that could not possibly have hurt those groups of people. The only people that could have been harmed were the insiders who engaged -- had engaged in fraudulent transactions.

I would emphasize here that the CFTC is statutorily authorized to seek disgorgement of ill-gotten gains in a proceeding such as this. So it was quite apparent to the trustee that the CFTC was seeking to go along the same lines that he himself was, which was to find the money.

The customers had put up these funds for margin payments, for deposits, and this money was supposed to be separated -- "segregated" is the word that's used in the statute -- and not used for any other sort of trading.

And what happened here was that Mr. McGhee and perhaps other insiders had used this money to trade on their own accounts, and it was quite apparent that the only way this money was going to be recovered was to determine where it had gone, what the insiders had done with it.

And I would emphasize, though, again that this is a subpoena enforcement action. If the McGhee's had wished to challenge the propriety of the trustee's waiver, there was a place for them to do it and that was in the bankruptcy court, not in the subpoena enforcement court.f

QUESTION: And what procedures are there in the bankruptcy court to do that?

MR. KUHLIK: Well, at any time, Justice O'Connor, anyone may file a motion with the bankruptcy judge alleging that the trustee has violated his fiduciary duty, has not acted in the best interest of the estate. The trustee, of course, has to file a bond at the beginning of the action and he is constantly subject to supervision. So that procedure would clearly be available here or would have been available had they chosen to --

QUESTION: But really, the subpoena enforcement proceeding and the bankruptcy challenge are two different kinds of challenge, aren't they? One is based on the fact that the trustee is not acting in the best interest of the estate, which I would presume to be the bankruptcy challenge.

The subpoena enforcement proceeding would be that of the person whose testimony is to be compelled, and I don't suppose that person is limited just to claims that the trustee is not acting in the best interest of the estate.

MR. KUHLIK: No. I would suggest, Justice Rehnquist, that he doesn't have that option available to him. He has the legal option of presenting the legal question here of whether the trustee has the power to act for the corporation the way that in a non-bankruptcy

proceeding, if the board of directors had waived the privilege, for example, it could be contended that they weren't really the board.

And of course, whether or not the information was in fact privileged would be a question for the subpoena enforcement court. But I would strongly suggest that the -- clearly, the question of whether the trustee acted here in the best interest of the estate is simply not before this Court.

QUESTION: On these particular facts.

MR. KUHLIK: On these particular facts.

QUESTION: That should have been raised in the bankruptcy court.

MR. KUHLIK: Yes. There may be circumstances, with procedural difficulties, where it may arise first in the subpoena enforcement court, but this is not -- that question simply is not before the Court.

QUESTION: Well, is the power of the trustee to waive the privilege limited to matters concerning the estate's claims and assets?

MR. KUHLIK: Well, it's difficult to imagine anything that would concern the corporation's causes of action that wouldn't in some way be related to its assets.

QUESTION: Well, I think it's conceivable that

there might be some that aren't related. And is there any limitation?

MR. KUHLIK: I don't see any limitation on the trustee's power, his absolute power, Justice O'Connor, to act for the corporation. That is clearly implicit in everything that the trustee is given the power to do in the bankruptcy code. And as I say, if the trustee in a particular case has not acted in the best interest of everybody, that action may be challenged.

The trustee in this case, like other liquidation trustees, has the duty to maximize the value of the estate for all of the parties in interest. The estate in a corporate bankruptcy is composed of all of the corporation's property. Unlike an individual, a corporation doesn't have any exempt property. Everything goes into the estate.

And most significantly perhaps, the estate includes the corporation's causes of action, its litigation. Under Section 541 of the code and under bankruptcy rule 6009, the trustee takes control of the corporation's litigation, both its causes of action and its defenses.

And it would be completely anomalous to suppose that the person who is in control of the corporation's litigation does not have the power to

obtain and to control its communications with counsel. It's simply impossible to see how his function in prosecuting causes of action could be carried out without access to that information.

And in this very case, I would note that the trustee has filed over time approximately 75 adversary actions seeking the recovery of approximately $6 million.

Because in bankruptcy proceedings the resources of the estate are often quite limited, it would not be unusual for a trustee to cooperate with the Government where, as here, it is apparent that the Government is looking for the same thing that the trustee is, which is the missing money. And just that sort of cooperation as we've been discussing was contemplated here.

And after the trustee, at the CFTC's request, waived the privilege, the district court ruled that he must answer the questions and the McGhee's, Frank McGhee who I've mentioned and his brother Andrew McGhee, who was a minority shareholder in the firm and a former officer, appealed to the Seventh Circuit, and the Court of Appeals reversed, holding that the trustee does not have the power, absolutely doesn't have the power, to waive the corporation's attorney-client privilege. This

conflicts with decisions of the Second, Eighth, and Ninth Circuits and virtually every district and bankruptcy court to consider the question.

Now, our position really can be summarized in a nutshell: The privilege of a corporation is controlled by its management, its board of directors or its officers if they're authorized to so act by the board.

When a new board of directors takes over in a non-bankruptcy case as a result of a takeover or a merger, shareholder dissatisfaction or the like, it takes control of the privilege. It has access to the privileged communications. It can waive the privilege. That much is settled corporate law and it's undisputed by the parties here.

So the question is who manages a debtor corporation in bankruptcy when a trustee has been appointed. There can really only be one answer: It's the trustee. As I've noted, the trustee has power to exercise -- can exercise power over all of the corporate property. He's under the direct supervision of the bankruptcy court in this regard. He operates the business in a commodity brokerage bankruptcy. He can operate the busines in other liquidations, with the approval of the court.

He has a specific duty to investigate former management to reveal causes of action, to set aside preferential transfers and fraudulent conveyances. As I've said, he stands in the shoes of the debtor corporation in prosecuting and defending its causes of action.

We don't think he could do any of these things without --

QUESTION: Mr. Kuhlik, do you think the same rule would apply in an individual bankruptcy?

MR. KUHLIK: An individual bankruptcy, Justice O'Connor, raises quite different concerns, as we noted in our reply brief. An individual's privilege is personal to himself. There isn't a management that controls the privilege for him.

QUESTION: So what's your answer?

MR. KUHLIK: My answer is that that is a question that does not have to be decided here.

QUESTION: Well, I would hope you'd respond a little more fully than that. Do you think the privilege is different?

MR. KUHLIK: Justice O'Connor, I do not think as a matter of course that in every circumstance a bankruptcy trustee should be able to waive an individual's privilege. There may be circumstances that

arise in an individual bankruptcy that require such a result.

But my main point is that whatever the Court does here will not require a result one way or the other in an individual case.

QUESTION: What if the third party asking for the information in a corporate liquidation is some tax commissioner, and suppose that the disclosure of the information would have the effect of revealing some taxes that might be due that would eliminate any hope of recovery by the creditors?

MR. KUHLIK: Justice O'Connor, that's exactly the situation where the trustee would not waive the privilege.

QUESTION: Well, how is the trustee going to know unless he finds out the answer first as to what the information is?

MR. KUHLIK: I would suggest the facts of this case may be somewhat unusual in that the trustee did not have the information before him when he made the waiver, and that in most circumstances one would hope that the trustee would have the information.

But even the nature of the request and the requesting party would probably give a fairly good clue as to what was being sought and what it might be used

for.

But the trustee's fiduciary duties and his responsibilities --

QUESTION: May I just ask one question.

MR. KUHLIK: Yes, Justice Stevens.

QUESTION: Following up on Justice O'Connor's question about individual, I gather then from your answer on individual you do not contend that the privilege is an asset of the estate?

MR. KUHLIK: We make that as an alternative argument.

QUESTION: If you make that as an alternative argument, that would apply to an individual.

MR. KUHLIK: That is correct. If the Court were to adopt that argument, we feel it would apply to the individual.

QUESTION: But since you said this case does not necessarily control individual situations, you must be saying it's not an asset of the estate.

MR. KUHLIK: If you decide this case on the ground that the --

QUESTION: Well, let me put it to you: Is it your position that the privilege is an asset of the estate?

MR. KUHLIK: That is an alternative position.

It is not my preferred position, Justice Stevens. My position --

QUESTION: In other words, you don't really have a position on whether it is or is not?

MR. KUHLIK: Many --

QUESTION: You want to win the lawsuit, is what you're saying.

MR. KUHLIK: We believe that the most reasoned approach to this and the one that makes the most sense is to find that the trustee is the management of the corporation and controls the privilege in that capacity. A number of lower courts have reasoned that the privilege is an asset of the estate and we present that for your consideration.

QUESTION: Does it follow under your management theory that if you have a reorganization and the reorganization trustee employs counsel and gets legal advice, that after the reorganization successor management could waive his privilege?

MR. KUHLIK: I believe that would follow.

QUESTION: In normal business when a man sells his business to another individual, the attorney-client privilege is part of it?

MR. KUHLIK: Justice Marshall, the answer to that question depends on whether the privilege is

necessary to realize the acquired interest. It's a form of property law.

QUESTION: I thought basically that attorney-client privilege was a "personal" privilege.

MR. KUHLIK: I believe the cases --

QUESTION: Well, how do you pass along a personal privilege?

MR. KUHLIK: I'm sorry, Justice Marshall?

QUESTION: How do you pass along a personal privilege?

MR. KUHLIK: If you pass along a property right that the privilege is necessary to --

QUESTION: Is that a property -- is attorney-client privilege a property right?

MR. KUHLIK: No. If you pass along, if you convey to someone an interest in property that itself requires control over the privilege to realize that interest, then the privilege goes as well.

QUESTION: My only point is, speaking for myself, the personal one, you're carrying a whole lot of baggage. If you didn't insist on it you wouldn't have that baggage. That's all.

MR. KUHLIK: I suggest I'm not trying to suggest here absolutely that the individual should control the privilege. We're far more interested in

what is presented in this case, which is the corporate privilege, and I simply suggest that our management theory, which does not depend on a conveyance of assets and is not directly applicable to the individual situation, does not apply -- if what it takes -- if the Court believes that it cannot distinguish between the corporation and the individual's privilege, we would do without the individual's privilege. But we believe that it is reconcilable and that there are situations perhaps, that the Court simply need not reach right now, with respect to the individual privilege.

The bankruptcy trustee's duty to maximize the value of the estate is precisely analogous to the duty of management outside of bankruptcy to maximize the profits of the corporation. And Respondents raise the possibility of conflict between creditors and shareholders, and I would like to put that to rest.

In a liquidation proceeding such as this one, everybody desires exactly the same thing, to maximize the value of the estate. The corporation's property is being sold off. It is not going to exist in the future in any meaningful sense. The only way anybody is going to get paid is to make that sum of money that the property is sold for as large as possible, and everybody wants that.

More fundamentally, though, the Respondents' argument relies more on form than the substance of the matter. The substance of the matter is that management's duties run to owners. In a bankruptcy proceeding, creditors are owners. They have an ownership interest in the property just like shareholders do.

QUESTION: Mr. Kuhlik, can I back up just a second.

MR. KUHLIK: Sure.

QUESTION: Take the situation right before bankruptcy, when a corporation is in desperate straits and feels it needs legal advice in a lot of difficult problems. Should the lawyer advise the corporate client that comes to him in that position, say: Remember, anything you tell me now is going to be fair game for the trustee to disclose?

MR. KUHLIK: It is absolutely a usual practice for corporate counsel in a situation like that to advise corporate officers that they are not the ones who control whether their communications will be disclosed. That's true with respect to bankruptcy proceedings, in contemplation of a takeover bid, any other sort of investigation.

That is what counsel do, as we point out in

footnote 52 in our brief. And it wouldn't be any different here.

Justice Stevens, I think you're raising perhaps --

QUESTION: Then your answer is yes, they should tell them that?

MR. KUHLIK: They should definitely tell them and they do.

I think what you're raising, though, is perhaps the possibility that attorney-client communications would be chilled, and I want to address that very briefly. All we are asking the Court to do is to apply the same rule in bankruptcy proceedings that's applied out of bankruptcy, and that is that management controls the privilege.

We are not concerned here with the existence of the privilege or its scope. All we ask is that you not upset the balance struck in non-bankruptcy corporate law, which is that current management controls the privilege.

In any event, the chilling effect that is suggested really disappears upon analysis. I would emphasize to the Court that in reorganization proceedings, which are the method of choice for bankruptcies for corporations, the presumption is

against having a trustee. The presumption is that the officers and directors will stay in as the debtor in possession and control the corporation even in bankruptcy.

When they are not in possession, when a trustee has been appointed, it is often because former management was fraudulent or grossly inadequate. So if counsel -- or if corporate employees were to consider the possibility of bankruptcy, I would suggest that that possibility itself might be remote. But equally importantly, the possibility of having a trustee is quite remote in most proceedings.

Moreover, the trustee won't necessarily waive the privilege. If the employee is concerned about corporate liability, he can rest assured that the trustee will act in the best interests of the estate, just as would management outside of bankruptcy.

And finally, as you suggested, Justice Stevens, corporate counsel could inform the employee of the possibility that the privilege might be lost, that he doesn't control it, and suggest that the employee seek his own counsel as well if that is necessary.

In sum, where a trustee is appointed in a bankruptcy proceeding the officers and directors have no managerial role to play, either in terms of their powers

or their duties. Their role is minimal and ministerial. They must turn over the property of the corporation to the trustee and, significantly, under Section 521 of the code, there's no provision made for assertion of a privilege against the trustee by the debtor corporation.

The officers and directors or one of their delegates must appear for examination by the creditors. But that's really it. Anything else they do in practical terms tends to further their own interests. If the shareholders wish to have their interests furthered, they can form a committee, just as creditors have committees, and seek to assert their interests that way.

But the former management itself has really been, as the House report says, "completely ousted" in favor of the trustee. They don't have any say in the corporation's liquidation -- or litigation, rather. They are likely to be the people most likely to have a conflict of interest with respect to the communications.

The trustee, by contrast, is a court-supervised fiduciary who has responsibilities to the entire community of interests in the estate. He is the person who can be relied upon to exercise it in --

QUESTION: Well, does he have any real fiduciary responsibility at all to the people in the position such as Mr. McGhee? You speak of him having fiduciary responsibilities to everybody, but that's much like a fiduciary responsibility to no one, it seems to me.

MR. KUHLIK: Justice Rehnquist, he has fiduciary responsibilities to everyone who has an interest in the estate. That is, the creditors, the customers, the shareholders. He does not have a fiduciary responsibility to act in the best interests of Mr. McGhee, which is all that Mr. McGhee is concerned with.

QUESTION: Or of prior management generally?

MR. KUHLIK: That's true. He must act in the best interests of everyone who currently has an interest in the property. It's a consequence of the corporation's own continuing existence. And as the management of the debtor corporation, the trustee is entitled in our view to control over its attorney-client privilege.

If there are no further questions, I'd like to reserve the balance of my time for rebuttal.

CHIEF JUSTICE BURGER: Mr. Epstein.

ORAL ARGUMENT OF DAVID A. EPSTEIN, ESQ.,

ON BEHALF OF RESPONDENTS

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

Our position in this case, both on the specifics of this case and perhaps more importantly on the general proposition being advocated by the Government, could not be more directly opposite the Government. We contend that upon the occurrence of bankruptcy, when a trustee in bankruptcy is appointed for either an individual debtor or a corporate debtor cr a partnership debtor or a trust debtor, that the power to ccntrol the attorney-client privilege of the bankrupt does not pass to the trustee.

It does not pass in the first instance because Congress has not given it the power, the power, to the trustee. Despite all the briefs which have been submitted on this point, we still find that nowhere in the bankruptcy code or in any other Congressional enactment has there been any transfer of anybody's attorney-client privilege to bankruptcy trustees in any circumstances.

The code does not say what the Government would like it to say and it does not say what the Government asks this Court to read into it.

QUESTION: Whose privilege is it?

MR. EPSTEIN: It is -- in this instance, it is the corporation's privilege.

QUESTION: Well, it was and it still is.

MR. EPSTEIN: That's our position, Your Honor.

QUESTION: Well, I know. But it's just a question of who can exercise it or who can give it away. Do you agree that your prior management could have waived it?

MR. EPSTEIN: I would agree with that upon the occurrence of bankruptcy. I would only disagree with --

QUESTION: Well, just forget bankruptcy for a minute. Before bankruptcy could then-current management waive the privilege?

MR. EPSTEIN: Yes, and they're the only ones who can.

QUESTION: Well, and suppose then they had a stockholders meeting and they voted out the old management, put in some new management. The new management could waive it?

MR. EPSTEIN: Absolutely.

QUESTION: Well, what's wrong with the trustee waiving it?

MR. EPSTEIN: He's not management.

QUESTION: Why isn't he?

MR. EPSTEIN: Because the board of directors, who is management, still exists.

QUESTION: What are the trustee's powers? Isn't it to operate the business?

MR. EPSTEIN: It is perhaps --

QUESTION: This isn't a debtor in possession, is it?

MR. EPSTEIN: No, but I don't think it matters.

QUESTION: Well, I know you don't. You must think that at least. But the trustee -- the old directors haven't any power to run the business. They are no longer managing the business.

MR. EPSTEIN: They are no longer operating the business. They are, however --

QUESTION: Well, operating, then.

MR. EPSTEIN: Well, let's talk about operating if that's the direction Your Honor wishes to pursue.

QUESTION: Well, that's your direction. I think the trustee is managing the business.

MR. EPSTEIN: In a chapter 7, such as is before the Court in this case, the operation of the business is nothing more than winding down its affairs. In a chapter 11, it seems to me the Government's

argument at least superficially is stronger because --

QUESTION: A reorganization.

MR. EPSTEIN: In a reorganization, whether it's a debtor in possession is a trustee, there is a genuine operation of the business. But in all of the powers which the bankruptcy code vests in trustees to manage, temporarily or on a longer term basis, the business of the debtor, control of privilege is not amongst the powers, nor is it reasonably implied.

If it were, then I think the Court should recognize that those powers, whatever they are, are identical for individuals, for corporations, and for other types of debtors which can file bankruptcy or be involuntarily put into bankruptcy. They're identical, whatever they are.

Now, the power which today in oral argument the Government focuses most strenuously upon is the power to control litigation. Examine that for a moment. The same is true for an individual. The same is true for litigation concerning the business and affairs.

Justice O'Connor's question to Mr. Kuhlik earlier hits the point right on the head. Insofar as we are talking about disclosure of confidential information relating to the business and the affairs and the

litigation of the debtor, the code is 100 percent symmetrical. There's no distinction between individuals, corporations, or anything else.

Ultimately this case, to the extent it is being argued, perhaps moreso than many other cases, on a theoretical level, the theoretical difference between a corporation and an individual ultimately devolves upon one connector --

QUESTION: May I interrupt. I didn't mean to interrupt you in the middle of the sentence. If you finished, what factor was it you were talking about?

MR. EPSTEIN: The only factor is that, unlike an individual who operates a business, a corporation who operates has divided the management from the ownership. But there is still management in either event.

QUESTION: The question I wanted to ask, I guess it applies equally to an individual or a corporation, is really the same one Justice O'Connor asked earlier. What about access to privileged information? Would you agree that the trustee would have access to corporate information that's in the mind of -- that had been imparted to counsel in a privileged communication?

MR. EPSTEIN: I would not agree, but I would suggest to the Court -- and frankly, the reason I would

not agree is because, having examined the law and the cases, and I must say somewhat to my surprise as I got into this, it's not there either.

And it seems to me that, while a good portion of the briefs in this case talk about the power of the trustee, not to waive the privilege, which is the issue in this case, but the power of the trustee to get inside the privilege, as it were, to obtain the information, which is your question, Justice --

QUESTION: I should think there'd be many cases in which information that had been imparted to counsel in a privileged communication might well be an important corporate asset.

MR. EPSTEIN: Well, I think --

QUESTION: For example, you might describe a trade secret or a customer list or something like that in the course of such a communication.

MR. EPSTEIN: As a practical matter, Your Honor, I might agree with you. The difficulty is that the cases over the years and the Congressional understanding and certainly the understanding of the commentators for 100 years at least is that the debtor's attorney-client privilege not only survived into bankruptcy, but applied as against the trustee.

Now, it's remarkable, if not astounding, Your

Honor, that for a hundred years this question has simply not been litigated until the waiver theory came up for the first time in the late 1970's, mid-1970's. For a hundred years we've had bankruptcy laws, we have not had a waiver theory, and we have not had litigation over the privilege either passing to the trustee or the trustee's invading it.

QUESTION: Give me an example of where it's held that the privilege is not to be waived? Give me a concrete case?

MR. EPSTEIN: I cannot give you any case before 1976, I believe. The Amjoe case was the first case ever to consider the possibility of a waiver by a trustee in bankruptcy. Nobody has found, not only a case, nobody has found academic discussion of this possibility.

QUESTION: Well, does the question come up when the trustee sues somebody?

MR. EPSTEIN: The question of waiver has never come up. It is simply there is a silence for a hundred years.

QUESTION: Well, give me an example of litigation where the privilege would be claimed, and by whom.

MR. EPSTEIN: The litigation, which are very

old cases, around the turn of the century mostly, are cases where the trustee sought to question the attorney of the debtor. Now, I want to make clear, the Government is right that two of the cases we have cited to the Court of those, that was discussed by the Court. But the actual fact before the Court was that it was a third party's lawyer.

The other two cases did involve the lawyer for the debtor himself, and these were individuals. These were not corporations.

QUESTION: And the lawyer claimed the privilege?

MR. EPSTEIN: The lawyer claimed the privilege, absolutely. And the courts were, to the extent they addressed it in those days in that context, were unanimous that -- everybody said, well, of course the privilege carries over and applies, and you can't, even the trustee can't, get inside the privilege as to pre-bankruptcy matters.

And we submit that what the Government is contending here through the theory of a waiver is not only the access of the trustee to the secrets, where there's at least a reasonable case -- and even that has not been previously held, but there's at least a claim to that.

Here the problem of the waiver is that when the privilege is waived it's waived for everybody. It's open, and if the corporation's privilege is waived then the privilege's attorney is an open book. Everybody can subpoena him. There's no longer a privilege to prevent his testimony.

Similarly with documents --

QUESTION: Well, what's the matter with that? If the one party whom the privilege is designed to protect, i.e. the client, chooses to waive it, the attorney should be an open book.

MR. EPSTEIN: If the board of directors of the company, who represent the ownership of the company, if they determine to waive the privilege for reasons that are good to them, I have no objection whatsoever. When the trustee comes in, he doesn't represent the owners of the corporation. He has very different interests.

QUESTION: Well, how did the interests of the shareholders and the creditors differ in the context of a liquidation? It seems to me both of them stand to be advantaged by anything that will maximize the value of the estate.

I don't see a conflict. The trustee is trying to produce the largest number of assets and defeat claims against the estate, and the shareholders and

creditors will all benefit by that action.

MR. EPSTEIN: Ordinarily, in the common case, I would assume that Your Honor's suggestion would be correct. However, it's not always the case. It depends on where there are liabilities from the corporation to, and that is the other side of the question which the Government does not address.

They talk about marshalling the assets. That's one-half of the ledger. The other side of the ledger is liabilities or potential liabilities. And if certain disclosures are made there may be liabilities which would not otherwise be asserted or proveable, which all of a sudden become asserted or proveable.

The principal example, which we cite in our brief -- it's not the only one. I think Your Honor in fact mentioned a very good one, which is the possibility of tax liabilities, perhaps unthought of previously, which can --

QUESTION: Yes, that's why I asked those questions. But assuming that the trustee knows what the communication is and has reason to believe that the waiver of it will benefit the estate, either by advancing the acquisition of assets or defeating some claim against the estate, why shouldn't the trustee be able to waive it?

MR. EPSTEIN: The trustee shouldn't be able to waive it because the trustee may or may not be doing it for that reason. If in that situation that's what he believes, he ought to go to the board of directors of the company, which still exists, and if your hypothetical is the case then the board of directors not only ought to waive it, but it seems to me that they would have to waive it or they in turn --

QUESTION: Well, but the trustee doesn't have to go to the directors for any other purpose in maximizing the value of the estate. There are a whole raft of things that the trustee can do without consultation with the board of directors. And I don't understand why the privilege should be any different from those other things.

QUESTION: Especially when he may have a suit pending against the board of directors.

MR. EPSTEIN: Well, I think the simple answer to that is that the importance of the attorney-client privilege and what it protects and the need for this Court to continue that protection and not abrogate it --

QUESTION: Is there any other privileged matter that needs the protection?

MR. EPSTEIN: Well, it doesn't arise in this

case, but I would say --

QUESTION: Is there any other?

MR. EPSTEIN: I would say the other privileges, certainly.

QUESTION: What privilege?

MR. EPSTEIN: The doctor-patient privilege. If the trustee can waive the attorney-client privilege, why can't he waive the doctor-patient privilege? What about the priest-penitent privilege?

QUESTION: Well, why can't he?

MR. EPSTEIN: Your Honor, all I can say --

QUESTION: As the law is now, what is privileged that the corporation only can waive, other than the lawyer-client privilege?

MR. EPSTEIN: The only one which comes readily to mind where it exists, in some states, is the attorney -- excuse me -- the accountant-client privilege. And that of course is variable. It doesn't exist in all states.

QUESTION: That's a variation of the attorney-client.

MR. EPSTEIN: Yes, it is.

QUESTION: What else?

MR. EPSTEIN: For the corporation --

QUESTION: Isn't it true, you just want to cut

this little niche out?

MR. EPSTEIN: Yes, but --

QUESTION: They can get all of the secrets they want, all of the secret formulas, everything else, but if a lawyer's attached to it you don't get it?

MR. EPSTEIN: Well, it's not a matter of the lawyer being attached to it.

QUESTION: What else is it?

MR. EPSTEIN: What this case --

QUESTION: What makes it so different because a lawyer's attached to it?

MR. EPSTEIN: Because if the corporate personnel, whether it be corporate officers or, as it was in the Upjohn case, lower echelon corporate employees, are not free to confide in the attorneys, knowing that only when it's in the company's best interests, not the creditors' best interests but the company's best interests, that that's going to be disclosed, you're not going to have that kind of disclosure.

You're going to have a chilling effect.

QUESTION: But I thought that once you took a chapter 7 or any of the others, the trustee was acting in the company's interest.

MR. EPSTEIN: No. I think as counsel put it

and indeed as the cases put it, the trustee acts in the best interests of everyone.

QUESTION: Including?

MR. EPSTEIN: Including people whom management does not act in the best interest of.

QUESTION: But it also includes the management.

MR. EPSTEIN: I would submit, Your Honor, if I may, that the principal driving force behind the trustee's decisionmaking, unlike pre-bankruptcy management's decisionmaking at all levels the trustee sides with the creditors. Pre- or non-bankruptcy management sides with, or ought to side with or they ought to be removed, the owners' interests, and that is a fundamental difference.

QUESTION: You can get as many people to agree with you on that as disagree.

MR. EPSTEIN: I only want nine of you to agree with me, Your Honor.

(Laughter.)

QUESTION: Five is enough.

QUESTION: Five. Won't five do?

MR. EPSTEIN: I'll settle for five. Thank you.

QUESTION: Well, isn't the normal result of a

corporate chapter 7 liquidation the extinction of the corporation?

MR. EPSTEIN: Normally, but not necessarily, yes.

QUESTION: Well, suppose that this was the normal case. The trustee gets title to all the assets? Does he still do that under the new bankruptcy code?

MR. EPSTEIN: No, I don't think so.

QUESTION: But he used to.

MR. EPSTEIN: He used to.

QUESTION: But he has the management of all of them, and his powers with respect to them are very much like under the old code?

MR. EPSTEIN: That's correct.

QUESTION: And the corporate management, the old corporate management, cannot interfere with those duties of the trustee. Well, what happens if the corporate -- when do corporations go out of business? Do they formally dissolve? What do they do?

MR. EPSTEIN: They may formally dissolve. I would submit --

QUESTION: They certainly don't have anything to do in chapter 7.

MR. EPSTEIN: Well, no. What normally happens, assuming they don't come out of chapter 7,

assuming that it goes through to completion, is that they ultimately are dissolved by the incorporating state.

QUESTION: What happens to the privilege then?

MR. EPSTEIN: That's an excellent question.

QUESTION: Well, I don't know why, if you know that the inevitable result in 99 percent of the cases is going to be liquidation and there's nothing that old management can do about it, or dissolution, what's so earth-shaking about saying the trustee can waive? I'm not sure he even has to waive.

There wouldn't have to be a waiver after dissolution, would there?

MR. EPSTEIN: Well, I don't know. I see nothing in the ethical guidelines that tell the lawyer that he's free to disclose just because of the death of the client. I say that quite seriously, Your Honor. In most states the privilege survives the death of the client, and I don't know that it's any different.

But I think there's a more interesting concern here. If --

QUESTION: Yes, but could the executor of an estate waive the privilege?

MR. EPSTEIN: In some states yes, in others

no. The cases are divided on that. However, Your Honor has a valid point. In some cases, yes.

But it's interesting, because that's only in the course of litigation. There are certain exceptions --

QUESTION: Well, that was going to be my next question: Who has the power to control litigation?

MR. EPSTEIN: The trustee, for most purposes.

QUESTION: Isn't the waiver decision almost invariably made as an incident to tactical decisions in litigation? Isn't it fair to say this is an incident of the power to control litigation?

MR. EPSTEIN: Well, I think this case demonstrates that that's not always the case at all. In this case you don't have that. In this case you have the Government coming to a trustee and saying: We are investigating your client; waive the privilege in our convenience, for our convenience, so we can get at the attorneys.

That's what happened here. That's all it was. And as indicated previously -- and I think in response to the Government's argument today, I should make at least one or two statements. this waiver was not only blind -- and by blind I mean not only did the trustee not know the information that was sought -- he

didn't even know the questions that were being asked.

It was also retroactive. It was an after the fact waiver, and that's the difficulty. If this Court says that after the fact waivers are okay, that trustees can come in and waive privilege of a corporation going back to the birth of the corporation, not just in the pericd right before bankruptcy but ever, then I submit as to the chilling effect, which the Government really has no response to except to say it's no different from future management, it is different, because in a corporation if management knows and if the workers of that corporation know that a stranger to the corporation elected by the creditors may some day open their secrets to the Government in making an investigation, they aren't going to talk.

QUESTION: How different is that from the takeover, new management type of thing? I mean, they're not necessarily friendly or buddy-buddy with the old people.

MR. EPSTEIN: Oh, not friendly or buddy-buddy at all, that's correct. But they presumably have a profit-making interest on behalf of the corporation in mind. And maybe that's the only security there is, but that's very different from a trustee, who is himself subject to at least some level of supervision by the law

enforcement authority of the United States himself, saying, as the Government says, we're going to cooperate in a Government investigation, with apparently no quid pro quo for the corporation, which in non-bankruptcy is at least what most of I think would --

QUESTION: Well, new management can sue old management and frequently does.

MR. EPSTEIN: Absolutely.

QUESTION: And they can waive, in connection with that they can waive the privilege.

MR. EPSTEIN: Well, they don't have to waive the privilege in connection with that. They have the information themselves.

QUESTION: Well, I know, but if the lawyer refuses to testify he's going to be in trouble if management says, the current management says, please talk.

MR. EPSTEIN: Absolutely.

QUESTION: Well --

MR. EPSTEIN: But Your Honor, the creditors can't do that, and that's the difference when the trustee comes in because, despite the paper fiduciary duty --

QUESTION: It depends on how delinquent the corporation might be to those creditors.

MR. EPSTEIN: Well, but the creditors are the ones who select the trustee. Corporate management nd corporate ownership are prohibited by Congress from participating in that election.

One other -- if I may get back to the question that Justice O'Connor asked my opponent earlier, in terms of where this attack, the attack we have made on the trustee's exercise of the privilege, ought to have been made procedurally, in this case I would remind the Court -- and I apologize; it may not be very clear in the briefs.

But what happened in this case is that when this waiver, such as it was, this one-line waiver, was submitted to the bankruptcy court there was no notice to anyone. There was no proceeding in the bankruptcy court surrounding the giving of this waiver.

The adversary action from which this appeal has been taken was already in progress. It was more than in progress. It was already being briefed on the question of privilege. And the first time that Respondents found out that there had been a so-called waiver was when a supplemental brief was filed by the Government in that proceeding informing us.

So there was never really an opportunity, even assuming there was a procedure to accommodate it, for

these issues to be raised in the bankruptcy proceeding.

QUESTION: Briefing, you mean briefing in the district court?

MR. EPSTEIN: In the district court on the subpcena enforcement action, absolutely, Justice Rehnquist. That's when it came -- that's when we found out about it, and we were off and running and briefing it at that point.

In fact, the only arguments -- the only opportunity that there really was to present arguments was at the oral argument, just because of the time constraints in the subpoena enforcement action. It was very much of a last minute idea, very much as the waiver theory, at least in terms of the history of bankruptcy law, is kind of a last minute idea to circumvent what appears to have been the law for a hundred years, that privilege applies.

And I would point out, in getting back to the importance of protecting privilege, whether it's individuals or corporations, that if -- and I think the Upjohn case -- I can't say it better than this Court did in Upjohn.

If you don't have the security of the privilege, if its sanctity is not protected, if it is waivable on a whim by a person who is a stranger, by a

person who does not even know the questions that are at issue, by a person who makes assumptions about who's benefited from disclosure, then the privilege isn't worth anything and the privilege is not going to do what the privilege is designed to do, which is to assure both sound advice from counsel and full information to counsel. And this case --

QUESTION: I don't assume that all corporations that have privilege with their lawyers are going bankrupt.

MR. EPSTEIN: Nor would I, Your Honor. But when that happens --

QUESTION: It sounded like it a minute ago.

MR. EPSTEIN: But when that happens, the knowledge that that can happen in the future is an insecurity. And today, when the largest corporations in the country are in danger of bankruptcy, when institutions who haven't gone bankrupt for 30 years are suddenly going bankrupt, it's a very immediate thought. And the rule contended for --

QUESTION: Does that also apply to countries that are going bankrupt?

MR. EPSTEIN: Apparently not, Your Honor.

The consequences of the rule contended by the Government are simply much broader than they submit. I

submit that if this Court, whatever it says, if it goes the other way, if it rules against us in this case and says that the privilege passes, it will pass for individuals too.

It will have to. The same statutes apply. The same justifications by the Government apply, to get at fraud. They're the same. Everything is the same. And the consequences are simply worse for individuals.

But what happened in this case -- and I think Your Honors should be aware of this -- is precisely what will be discouraged in the future. In this case, it was the bankrupt's attorneys who suggested to it that they turn themselves in. And on a Saturday the attorneys -- it was the attorneys who called, with the client's consent, called the CFTC and said: You better come in; there's problems here.

You wouldn't have that, and you wouldn't have the disclosures to the attorneys, without the privilege. What is at issue here is making the attorney a witness, nothing less. It will change the role of attorneys from that of advisors and confidants and maybe internal investigators to that of an aid in the Government's war to prosecute, to prosecute fraud, to prosecute misfeasance.

It's a fine goal, but the lawyers for private

companies have a different mission to fulfil, and we ask this Court to affirm and to keep that mission precisely what it has been.

QUESTION: It sounds like you're concerned about the lawyers more than the client whose privilege it is. And I thought it belonged to the client, and that the attorney just exercises on behalf of the client, not to protect himself.

MR. EPSTEIN: Absolutely. What this -- what the Government would do would be to take that role and take that choice from the client and give it to the Government, and that's why we object.

What lawyers do -- and I think I'm basically through. I should say, what lawyers do they do on behalf of their client. But they only do it if they're allowed to.

Thank you.

CHIEF JUSTICE BURGER: Very well.

Do you have anything further?

MR. KUHLIK: I have nothing further. I'd be pleased to answer any questions.

CHIEF JUSTICE BURGER: Very well. Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:55 p.m., oral argument in the above-entitled case was submitted.)

CERTIFICATION

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

#84-261 - COMMODITY FUTURFS TRADING COMMISSION, Petitioner v. GARY WEINTRAUB, ET AL.

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BY Paul A. Richardson

(REPORTER)