

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

# THE SUPREME COURT

## OF THE

## UNITED STATES

CAPTION: CELOTEX CORPORATION Petitioner v.

BENNIE EDWARDS, ET UX.

CASE NO: No. 93-1504

PLACE: Washington, D.C.

DATE: Tuesday, December 6, 1994

PAGES: 1-52

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE  
94 DEC 13 P3:38

1                   IN THE SUPREME COURT OF THE UNITED STATES

2       - - - - -X

3       CELOTEX CORPORATION                   :

4                   Petitioner                   :

5               v.                   :   No. 93-1504

6       BENNIE EDWARDS, ET UX.                   :

7       - - - - -X

8                                   Washington, D.C.

9                                   Tuesday, December 6, 1994

10                   The above-entitled matter came on for oral  
11       argument before the Supreme Court of the United States at  
12       10:07 a.m.

13       APPEARANCES:

14       JEFFREY W. WARREN, ESQ., Tampa, Florida; on behalf of  
15               the Petitioner.

16       BRENT M. ROSENTHAL, ESQ., Dallas, Texas; on behalf of the  
17               Respondents.

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
JEFFREY W. WARREN, ESQ.	
On behalf of the Petitioner	3
ORAL ARGUMENT OF	
BRENT M. ROSENTHAL, ESQ.	
On behalf of the Respondents	26
REBUTTAL ARGUMENT OF	
JEFFREY W. WARREN, ESQ.	
On behalf of the Petitioner	50

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

2 (10:07 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 this morning in Number 93-1504, the Celotex Corporation v.  
5 Bennie Edwards.

6 Mr. Warren.

7 ORAL ARGUMENT OF JEFFREY W. WARREN

8 ON BEHALF OF THE PETITIONER

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

11 At issue in this case is whether the bankruptcy  
12 court presiding over the Celotex Chapter 11 case had  
13 jurisdiction to enter an interim stay of execution on  
14 supersedeas bonds by judgment creditors of Celotex.

15 That stay restrained the Edwardses from  
16 collecting their judgment against Celotex, which was  
17 largely for punitive damages from Northbrook, the surety  
18 on the supersedeas bond posted for the benefit of Celotex,  
19 for the benefit of the Edwardses.

20 The case arises out of the Edwards' admitted  
21 collateral attack on the bankruptcy court stay order when  
22 they requested under Rule 65.1 that the district court in  
23 Texas which had originally presided over their personal  
24 injury claim against Celotex granted them permission to  
25 enforce the supersedeas bond against Northbrook



1 notwithstanding the bankruptcy court's stay order.

2 At the time Celotex filed its bankruptcy  
3 petition it had posted similar supersedeas bonds in over  
4 100 separate appeals using \$70 million of assets to secure  
5 its obligations to the sureties. Celotex was defending  
6 over 100,000 personal injury and wrongful death cases, all  
7 of which were the result of the same conduct by a  
8 predecessor that had merged into Celotex, which was the  
9 same basis for the claims of the Edwardses.

10 These cases arise from exposure to asbestos-  
11 containing products. They were manufactured by Philip  
12 Carey Corporation, a corporation that was merged into  
13 Celotex in the early 1970's.

14 Over the objections of Celotex and Northbrook,  
15 the Texas district court granted the Edwards' request for  
16 permission to ignore the bankruptcy court's stay order.  
17 The Fifth Circuit affirmed. A similar attempted  
18 collateral attack by the same plaintiffs' counsel was  
19 rejected by the Fourth Circuit when it reversed a Virginia  
20 district court order that had granted permission to ignore  
21 the bankruptcy court's stay order. The Fourth Circuit  
22 directed that the judgment creditor had to seek direct  
23 from the bankruptcy court.

24 In response to the improper collateral attack  
25 arguments raised by Celotex, the Edwardses concede that

1 the judgment of the Fifth Circuit must be reversed if the  
2 bankruptcy court had subject matter jurisdiction to issue  
3 its interim stay of the execution upon Celotex'  
4 supersedeas bonds. That's the issue in this case.

5 The statutory basis of the bankruptcy court's  
6 subject matter jurisdiction is 28 U.S.C. section 1334(b),  
7 which states that the district courts have jurisdiction of  
8 all civil proceedings arising under title 11 or arising in  
9 or related to cases under title 11.

10 QUESTION: Mr. Warren, would you explain how the  
11 proceeding on the bond will affect the bankruptcy estate?  
12 What are the ways in which it will? The money Northbrook  
13 has to pay is outside the bankruptcy estate, of course, so  
14 how will it affect the bankruptcy estate?

15 MR. WARREN: Justice O'Connor, the way it  
16 affects the estate is that Celotex has a contractual  
17 relationship with Northbrook that was entered into as part  
18 of the posting of the supersedeas bond.

19 To secure that contractual relationship,  
20 Celotex, under a settlement agreement that resolved  
21 certain insurance coverage disputes with Northbrook,  
22 pledged that if Northbrook had to pay a bond it could  
23 exercise rights of set-off against the funds that would  
24 otherwise be available to Celotex for payment to its  
25 creditors, so that although under the --

1 QUESTION: So what was pledged are funds that  
2 otherwise would be in the general bankruptcy estate.

3 MR. WARREN: That's correct, Your Honor. The  
4 money that Northbrook would pay to the Edwardses is not  
5 subject to the property of the estate. The property  
6 pledged by Celotex to Northbrook is property of the  
7 estate, and it's that interconnection that creates the  
8 effect.

9 This --

10 QUESTION: Mr. Warren, the estate would get back  
11 that property pledged, I assume, only if there's some  
12 invalidity in the pledge, is that --

13 MR. WARREN: That is absolutely correct, Justice  
14 Scalia.

15 QUESTION: Is there thought to be some  
16 invalidity in it?

17 MR. WARREN: Yes, Your Honor. There are two  
18 bases upon which Celotex for the benefit of its estate is  
19 presently prosecuting adversary proceedings in the  
20 bankruptcy court to bring back into, to recover for the  
21 benefit of all of its creditors, those funds.

22 The first premise is, is that the vast majority  
23 of the Edwards' claim is for punitive damages. \$245,000  
24 of their claim is for punitive damages. Under the  
25 principles of equitable subordination codified in section

1 510(c) of the Bankruptcy Code, Celotex is seeking, through  
2 the bankruptcy court, to subordinate those claims, which  
3 would then invalidate and bring back to the estate those  
4 funds that were transferred to Northbrook.

5 The second attack that's been made --

6 QUESTION: Those claims seeking to bring back  
7 those -- the judgment has already been rendered with  
8 regard to those claims.

9 MR. WARREN: That's correct, but it is a  
10 judgment for punitive awards which under normal bankruptcy  
11 practice would not be recoverable in lieu of the ability  
12 to compensate regular compensatory awards.

13 The invalidity of the claim -- the obligation of  
14 Northbrook on the judgment to the Edwardses is predicated  
15 upon the affirmance by the Fifth Circuit of that judgment.  
16 The Bankruptcy Code expressly permits a basis upon which  
17 equitable subordination can occur, so that one creditor  
18 cannot recover for its benefit claims to the detriment of  
19 other creditors if the bankruptcy court finds appropriate  
20 grounds for that to occur.

21 QUESTION: Mr. Warren, didn't you say what was  
22 infected was the collateral, not the judgment itself?

23 MR. WARREN: That's correct, Your Honor.

24 QUESTION: So what would be the basis for  
25 setting aside the transfer from Celotex to Northbrook to



1 secure the appeal bond?

2 MR. WARREN: Under the bankruptcy code, the  
3 transfer by Celotex to Northbrook was for the indirect  
4 benefit of the Edwardses. Northbrook would not stand as a  
5 surety for Celotex but for the existence of adequate  
6 collateral. The Bankruptcy Code contemplates that  
7 transfers both direct and indirect can be avoided, and  
8 so --

9 QUESTION: Are you attacking those as  
10 preferences, or fraudulent, or -- what's the basis for  
11 attacking that transfer?

12 MR. WARREN: Within the group of bonds there are  
13 preferences, there are fraudulent transfers. The area of  
14 fraudulent transfers is what is applicable in connection  
15 with the Edwards' claim because it is outside the 90-day  
16 preference period. You know, Celotex maintains that the  
17 transfer for the indirect benefit of the Edwardses to  
18 Northbrook constituted a fraudulent conveyance,  
19 constructively fraudulent.

20 QUESTION: Why is it for the indirect benefit of  
21 the Edwardses? If the bond had not been posted, the  
22 Edwardses would have executed --

23 MR. WARREN: That's correct, Your Honor, but --

24 QUESTION: -- and the money would have been  
25 gone. So how does it benefit the Edwardses? It seems to

1 me it was entirely for the benefit of Celotex, to enable  
2 it not to have to pay the judgment.

3 MR. WARREN: That is the issue, because the --  
4 in order to avoid the transfer, Celotex must establish  
5 insolvency at the time of the transfer, or insolvency as a  
6 result of the transfer, and a lack of reasonably  
7 equivalent value in exchange for the transfer.

8 Celotex' financial condition, as is evidenced by  
9 the record in the bankruptcy court, which is not before  
10 and never was brought to the record that's before this  
11 Court coming from the Fifth Circuit, demonstrates that the  
12 financial condition of Celotex at the time of these  
13 transfers of its assets to the surety was the same as at  
14 the time of the filing of its bankruptcy petition, so what  
15 the bankruptcy court has done in this case is, it has  
16 continued a stay and maintained the status quo using its  
17 powers under section 105 --

18 QUESTION: I'm not concerned with the insolvent  
19 status, I give you that, but what conceivable basis is  
20 there for arguing that it was not for the benefit of  
21 Celotex, which is a necessary condition to say that, you  
22 know, that somehow this thing could be called back?

23 MR. WARREN: Well, that would be the defense  
24 that is being raised to the fraudulent conveyance claim.  
25 However, constructively fraudulent conveyances where

1     there's a lack of reasonably equivalent value under the  
2     bankruptcy code can be called back.

3             And Celotex did not benefit. Remember, Your  
4     Honor, Celotex will never receive any of these funds. It  
5     will only -- this is a question of allocating limited  
6     resources among a few judgment creditors who had the  
7     benefit of supersedeas bonds, and hundreds of thousands of  
8     other judgment creditors whose claims arise from the exact  
9     same conduct.

10            QUESTION: Well, please help me. I really don't  
11     understand this. Isn't it the case that despite Celotex's  
12     insolvency the judgment could have been executed upon?

13            MR. WARREN: Yes, during -- absent the posting  
14     of the supersedeas bond.

15            QUESTION: Absent the posting of the bond.

16            MR. WARREN: And Your Honor, the issue that is  
17     being litigated now is whether the forbearance that is  
18     affected by the supersedeas bond is sufficient  
19     consideration to meet the reasonably equivalent  
20     consideration test in order to -- in order to avoid a  
21     constructively fraudulent transfer.

22            QUESTION: Mr. Warren, could you help me just  
23     with this one very preliminary question? It seems to me  
24     you're arguing the merits of the bankruptcy court's  
25     injunction, and I thought your basic position was that

1 even if the injunction was erroneously entered, you should  
2 still prevail.

3 MR. WARREN: Your Honor, that's absolutely  
4 correct. I'm merely responding to the inquiries from the  
5 Court. I have a zeal for the merits of the bankruptcy  
6 court, but whether the bankruptcy court was right or  
7 wrong, the Fifth Circuit should have recognized that --  
8 that injunction.

9 QUESTION: It seems to me the thrust of your  
10 argument is we shouldn't be deciding that, either.

11 MR. WARREN: That is correct, Your Honor. We do  
12 not think that it is appropriate at this time for this  
13 Court to deal with the merits, but only whether or not  
14 there was a relationship, a related two-jurisdiction  
15 issue. Did the bankruptcy court have some connection? Is  
16 there a nexus between what's occurring with these  
17 supersedeas bonds and the estate --

18 QUESTION: Your position is that if the  
19 Edwardses thought the bankruptcy court was wrong, they  
20 should appeal to the eleventh -- the district court in the  
21 Eleventh Circuit, not take it up in the Fifth Circuit.

22 MR. WARREN: That's correct, Your Honor. The  
23 actual stay called for the parties to come first to the  
24 bankruptcy court to seek modification. If it was denied  
25 they would have appellate rights to the Eleventh Circuit.



1 QUESTION: On that point, I want to ask, was  
2 Northbrook subject to the stay order? Did the stay order  
3 run against Northbrook --

4 MR. WARREN: Yes, Your Honor.

5 QUESTION: Specifically?

6 MR. WARREN: Well, in the mass tort context with  
7 100,000 the stay order doesn't name anybody specifically.  
8 You know, that's the problem that you have logistically,  
9 practically with that type of proceeding.

10 The bankruptcy court was confronted at the early  
11 stages of the Celotex reorganization with, you know,  
12 hundreds and hundreds of appeals, not only these types of  
13 appeals, but Celotex was involved in insurance coverage  
14 disputes that were rather complex throughout the country,  
15 ADR proceedings, all types of administrative and judicial  
16 proceedings, so that the court entered this broad stay as  
17 a case management mechanism.

18 Subsequently, the court has specified the  
19 applicability of the stay and has considered efforts to  
20 modify the stay on behalf of all of the bonded claimants.  
21 Counsel for the Edwardses came to the court shortly after  
22 the bankruptcy case was filed seeking to have the State  
23 modify it, and at that time the court clarified, you know,  
24 that -- its determination with respect to the status of  
25 the supersedeas bond and that it applied even when the

1 appeal had been resolved without effect.

2 QUESTION: So it comes down to which is the  
3 proper circuit, ultimately, to resolve this legal question  
4 of whether the appeal bond can be thrown back for the  
5 benefit of all the creditors. It's just that -- it's a  
6 question of whether it's the Eleventh Circuit or the Fifth  
7 Circuit that's going to make that ruling.

8 MR. WARREN: Yes, Your Honor. We maintain that  
9 Congress under the Bankruptcy Clause empowered the  
10 district court in the Middle District of Florida having  
11 jurisdiction over the bankruptcy case filed by the Celotex  
12 Corporation to consider all matters that are related to  
13 that case.

14 QUESTION: And would that bar another circuit  
15 from reexamining this order if there were -- because  
16 there's colorable jurisdiction to issue it? Suppose the  
17 assertion was that there was a patent jurisdictional  
18 defect. I don't think that assertion is made here, but  
19 suppose it were, would that bar the Fifth Circuit from  
20 making this inquiry?

21 MR. WARREN: No, Your Honor. We would agree  
22 that if there was a patent jurisdictional defect, then the  
23 collateral attack rule would have an exception that would  
24 permit the Fifth Circuit to -- or the district court in  
25 Texas to consider the matter.

1 QUESTION: So is your position here that there  
2 is no patent defect, that there is at least colorable  
3 jurisdiction, and that that's the end of the matter?

4 MR. WARREN: That's correct, Your Honor,  
5 although I think that it has -- I think it's appropriate  
6 that the court that issued -- I think it's good public  
7 policy that the court that issues an injunction, that has  
8 colorable jurisdiction to enter that injunction, should --  
9 you know, a party should respect and obey that injunction.

10 QUESTION: Mr. Warren, at this point, mustn't we  
11 decide more than colorable, because at least in the forum  
12 where the appeal bond was lodged, that's a mechanical  
13 procedure, ordinarily.

14 You called it - you said everyone agreed that in  
15 the Fifth Circuit there was a collateral attack on the  
16 bankruptcy court's stay order, but in fact what there was  
17 was a motion under the Federal rules to realize the  
18 judgment against the appeal bond.

19 It wasn't a separate proceeding collaterally  
20 attacking the stay in the bankruptcy court, so it's not  
21 like a little jurisdiction. The question is, does the  
22 bankruptcy court have subject matter jurisdiction? It  
23 either does or it doesn't.

24 MR. WARREN: I agree with that, Your Honor, that  
25 either the bankruptcy court had subject matter

1 jurisdiction, or the bankruptcy court did not have subject  
2 matter jurisdiction.

3 QUESTION: And you're relying on 105 for that?

4 MR. WARREN: No, Your Honor, we rely on 1334(b)  
5 for the subject matter jurisdiction of the bankruptcy  
6 court.

7 QUESTION: So we have to make a detailed  
8 inquiry, or the Fifth Circuit is entitled to make a  
9 detailed inquiry, into the jurisdiction under 1334?

10 MR. WARREN: Your Honor, I think that they were  
11 entitled to look at the jurisdiction that was asserted by  
12 the bankruptcy court, and finding that jurisdiction exists  
13 in the bankruptcy court, then they should have deferred to  
14 the stay that was entered by that court unless and until  
15 it was modified on direct appeal.

16 QUESTION: So you're saying that jurisdiction  
17 existed if there was a colorable claim that the property  
18 could come into the estate, and this is where I find I  
19 have difficulty. You're saying it is a colorable claim so  
20 long as the property used to belong to the bankrupt.

21 MR. WARREN: Your Honor, it's more than just  
22 property --

23 QUESTION: You're saying that even without --  
24 without any assertion of facts that would somehow  
25 demonstrate that there's a real possibility that the



1 property could be included within the bankruptcy estate,  
2 even without that, it is still related to --

3 MR. WARREN: Yes, Your Honor. The circuit court  
4 test with respect to related-to jurisdiction, which is a  
5 broad definition, and Congress intended it to be broadly  
6 construed as part of the uniformity associated with  
7 bankruptcy matters, intended that the bankruptcy court, or  
8 the district court exercising bankruptcy jurisdiction have  
9 broad jurisdiction.

10 QUESTION: It doesn't say, might be related to.  
11 It says, related to.

12 MR. WARREN: That's --

13 QUESTION: Isn't it reasonable to interpret that  
14 to mean that there must be some facts that would give rise  
15 to a colorable claim that the money can be recovered by  
16 the bankrupt estate?

17 MR. WARREN: Absolutely, Your Honor, but --

18 QUESTION: And what are they here?

19 MR. WARREN: Well, the facts are that the  
20 transfers made by the Celotex Corporation were made at a  
21 time when it was insolvent. The facts are that the -- at  
22 the time of these events, there was no consideration that  
23 was increased to the Celotex estate.

24 QUESTION: Mr. Warren, I don't understand why  
25 that claim would be affected one way or another by whether

1 the bonding company pays out on the bond.

2 MR. WARREN: Once -- well --

3 QUESTION: Isn't -- I guess I have the same  
4 question. Isn't your claim broader than that? Even if  
5 there were no attack on these bonds, isn't it your  
6 position that the bankruptcy court would still have  
7 jurisdiction to enter an injunction against realizing on  
8 the bond?

9 MR. WARREN: Absolutely, Your Honor, because it  
10 protects the reorganization process, and that is precisely  
11 why the collateral attack by the Fifth Circuit should not  
12 be condoned.

13 QUESTION: So that the only --

14 QUESTION: But how --

15 QUESTION: I'm sorry.

16 QUESTION: Go ahead.

17 QUESTION: No, I was going to say, the only  
18 jurisdictionally relevant fact that you have to establish  
19 is that, if in fact the Edwardses realized on the bond,  
20 there would be a consequence to the bankruptcy estate,  
21 i.e., the bonding company would then presumably realize on  
22 its collateral. That's all you have to show, isn't it?

23 MR. WARREN: That's correct.

24 QUESTION: Now, if the respondents had just  
25 executed on their judgment, that would not have been

1 anything that would be covered by the stay, I take it, of  
2 the bankruptcy court?

3 MR. WARREN: Well, Your Honor, in order for  
4 the -- in order for the respondents after the bankruptcy  
5 was in place to have executed against Northbrook, they  
6 would have had to have asserted some procedure to comply  
7 with due process, and Rule 65.1 provides that expedited  
8 summary-type procedure, and what the Edwardses sought here  
9 was permission from the district court to pursue their  
10 remedies against Northbrook, and of course that --

11 QUESTION: Well, what would have been the  
12 situation had there been no supersedeas bond?

13 MR. WARREN: Had there been no supersedeas bond,  
14 then the bankruptcy would have implemented a stay that  
15 would have precluded the Edwardses as all other  
16 creditors --

17 QUESTION: Would have  
18 precluded any execution of the judgment.

19 MR. WARREN: That's correct, Your Honor.

20 QUESTION: But the bond was put up --

21 QUESTION: And the bond --

22 QUESTION: -- before there was any bankruptcies.

23 MR. WARREN: That's correct.

24 QUESTION: The bond was then obtained prior to  
25 the filing of bankruptcy, to enable the respondents to go  
ahead and -- and obtain their money on the basis of the

1       supersedeas bond.

2               MR. WARREN: That's correct, Your Honor. One of  
3       the issues in this case is the purpose of a supersedeas  
4       bond. Is it to enhance the entitlement of the judgment  
5       creditor, or is it merely to preserve the judgment  
6       creditor's standpoint during the pendency of an appeal if  
7       that appeal is without effect?

8               QUESTION: Now, do you say the test for whether  
9       it is related to the bankruptcy proceeding is the test  
10      employed by the Third Circuit in Pacor v. Higgins?

11              MR. WARREN: Yes, Your Honor, whether it could  
12      have any conceivable --

13              QUESTION: Do all the courts of appeal apply  
14      that same test, or is there some diversity --

15              MR. WARREN: Your Honor --

16              QUESTION: -- among the circuits?

17              MR. WARREN: -- to the best of my knowledge,  
18      there's almost uniform following of that particular test,  
19      and you know, some circuits have adopted slightly  
20      different language, but all of them have recognized that  
21      if there could be any conceivable effect on the property  
22      of the debtor's estate or on the allocation of property  
23      among creditors, then there is related-to jurisdiction.

24              QUESTION: And the only conceivable effect here  
25      is if Celotex can establish that its transfer of the



1 collateral to Northbrook was a fraudulent transfer?

2 MR. WARREN: That would be one. The other would  
3 be if we can equitably subordinate the punitive award that  
4 the Edwardses have recovered, because the Edwardses are  
5 seeking to have collected a punitive award against  
6 Celotex, while other creditors similarly situated will not  
7 be in a position to recover in full any of their  
8 compensatory claims, and so those are issues that the  
9 bankruptcy court as part of its power to adjust debtor-  
10 creditor relationships --

11 QUESTION: How did the Edwardses get away from  
12 this, then? Supposing that they had actually been -- the  
13 bond had paid them off, paid off their judgment, could the  
14 bankruptcy court still come after them?

15 MR. WARREN: Well, there is a limit to the  
16 avoiding powers that a debtor in possession will be able  
17 to exercise. However, there are remedies up until such  
18 time as the statute of limitations has expired.

19 QUESTION: Mr. Warren, if the automatic stay in  
20 bankruptcy didn't occur until after that judgment was  
21 rendered, and is there any precedent for saying when  
22 somebody has a good judgment, and the judgment is paid  
23 before the bankruptcy petition is filed, but yet the  
24 bankruptcy estate can go back and get that court judgment,  
25 can set aside that court judgment? I don't know --

1 MR. WARREN: From a fraudulent transfer  
2 standpoint, no, Your Honor, because there would be a  
3 satisfaction of the judgment that would have occurred  
4 prior to the filing of the bankruptcy petition. From a  
5 preference standpoint, yes. The avoidance powers would  
6 enable a recovery with respect to a preferential transfer  
7 that was made within the 90-day period before bankruptcy.

8 QUESTION: Preferential transfer that consists  
9 of a payment of a judgment? Do you know any case where a  
10 payment of a judgment has been set aside?

11 MR. WARREN: As a preference, yes, Your Honor,  
12 because within the 90-day period, if the debtor is  
13 insolvent, if the payment effects a benefit to the  
14 judgment creditor on behalf of an antecedent debt, meaning  
15 that it has to be not a contemporaneous exchange of value,  
16 but for an antecedent debt, then the Bankruptcy Code does  
17 provide the remedy for purposes of bringing and  
18 recovering --

19 QUESTION: Mr. Warren, let me ask you this  
20 hypothetical. Suppose -- suppose there's a piece of  
21 property that Celotex sold 10 years ago, and it sold it  
22 with a condition subsequent, that if a certain event  
23 occurred, the property would revert to Celotex. There is  
24 now pending a lawsuit between two third parties who have  
25 nothing to do with Celotex or Northbrook or anybody else,

1 involving ownership of this property.

2 Could the bankruptcy court stay that proceeding  
3 on the theory that since there was this reversionary  
4 provision, although there's no reason whatever to believe  
5 that the event which would produce the reversion has  
6 occurred -- no reason whatever to believe that --  
7 nonetheless, it is related to the bankruptcy? Could that  
8 be stayed?

9 MR. WARREN: I believe so, Your Honor, because  
10 if there is a reversionary interest --

11 QUESTION: So related to just means, what, it  
12 means somehow the bankrupt's property is involved?

13 MR. WARREN: Could have a conceivable effect.

14 QUESTION: Conceivable regardless of reality? I  
15 mean, you can make up facts --

16 MR. WARREN: No, Your Honor. I think that --  
17 you know, I think that the Third Circuit in Pacor is a  
18 good example of a situation where the Court defined  
19 conceivable effect, but determined that there would be no  
20 enhancement of the estate, there was no harm to the  
21 estate, and therefore determined that the matter was not  
22 related to the bankruptcy proceeding.

23 QUESTION: Well, that's one reason it couldn't  
24 have any conceivable effect. Another reason it couldn't  
25 have conceivable effect is that there is no way in the

1 world that the claim which would bring it back into the  
2 State could be vindicated, so that if I feel that way  
3 about whether there was consideration given for the  
4 posting of this security, whether not having to pay it  
5 immediately is adequate consideration, I have brought this  
6 case parallel with the hypothetical I just gave you.

7 MR. WARREN: Even if you disagree with the  
8 merits of the remedies, or the available remedies, you  
9 know, courts should respect stays and injunctions entered  
10 by other courts.

11 QUESTION: Unless it is patently frivolous.

12 MR. WARREN: Unless it's patently frivolous,  
13 unless there's no subject matter jurisdiction, or unless  
14 there's no personal jurisdiction, which are not issues in  
15 this case.

16 QUESTION: Well, why isn't it patently frivolous  
17 here if there is -- was, indeed, equivalent value given  
18 for the posting of the security?

19 MR. WARREN: That is the issue, because  
20 forbearance is not quantifiable, and the evidence in the  
21 bankruptcy court, again not in the record before the Fifth  
22 Circuit, is that the financial condition of Celotex was  
23 the same on the petition date as it was at the time of the  
24 transfer for the indirect benefit of the Edwardses.

25 QUESTION: And you're saying that that

1 determination, or the determination of your position,  
2 simply cannot be made without a full trial on the merits,  
3 and therefore there's no opportunity to come under the  
4 frivolousness rule in this case.

5 MR. WARREN: That is correct, and the Fourth  
6 Circuit recognized this, so it would be hard to say that  
7 it was completely frivolous when the Fourth Circuit in  
8 Willis recognized the exact same Celotex, the exact same  
9 factual circumstance --

10 QUESTION: Does that position of yours turn in  
11 any respect on the fact that Northbrook was itself bound  
12 by the order of the bankruptcy court?

13 MR. WARREN: Yes, Your Honor. Northbrook's  
14 caught in the middle, because they're bound by --

15 QUESTION: If Northbrook had not been caught in  
16 the middle, would your position be different?

17 MR. WARREN: Your Honor, I don't -- I have a  
18 hard time --

19 QUESTION: That is to say --

20 MR. WARREN: -- thinking how they would not be.

21 QUESTION: That is to say, suppose Northbrook  
22 had not been bound by the order because there was no  
23 personal jurisdiction over it, or it had no knowledge of  
24 the order. I'm just trying to find out whether or not  
25 Northbrook's position before the bankruptcy court is the



1     linchpin of your argument.

2             MR. WARREN:  Yes, Your Honor.  Northbrook is  
3     like stakeholders.  Northbrook is happy to compensate the  
4     Edwardses.  Northbrook is happy to give the funds back to  
5     the --

6             QUESTION:  And it is bound --

7             MR. WARREN:  To the debtors.

8             QUESTION:  -- in its view, by the order that the  
9     bankruptcy court issued.

10            MR. WARREN:  That is correct, Your Honor.

11            QUESTION:  And it takes the position, and you  
12     take the position on its behalf, that if that order is to  
13     be revised or amended or suspended as to Northbrook, it  
14     has to be the issuing court that does that.

15            MR. WARREN:  That is correct, Your Honor.  That  
16     is precisely why this Court should reverse the Fifth  
17     Circuit.

18            Mr. Chief Justice, if there are no further  
19     questions, I'd like to --

20            QUESTION:  I do have one question about the  
21     status of what you call the avoidance action, where there  
22     were motions for summary judgment pending as of last  
23     March.  Have those been disposed of?

24            MR. WARREN:  No, Your Honor, they're still in  
25     litigation now.  There are 229 parties to that litigation,

1 and the bankruptcy court has under advisement summary  
2 judgments. The court just recently accepted new briefing  
3 based upon this Court's decision in BFP with respect to  
4 the fraudulent transfer issues.

5 QUESTION: Thank you, Mr. Warren. Mr.  
6 Rosenthal, we'll hear from you.

7 ORAL ARGUMENT OF BRENT M. ROSENTHAL

8 ON BEHALF OF THE RESPONDENTS

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

11 Our position in this case is that the Fifth  
12 Circuit properly declined to follow the bankruptcy court's  
13 stay order because the bankruptcy court lacked  
14 jurisdiction to stay proceedings by the Edwardses against  
15 Northbrook, and I would respond to a comment that Justice  
16 Kennedy made earlier, we are claiming a patent  
17 jurisdictional defect in the stay order, which was issued  
18 5 days after the bankruptcy.

19 We are claiming that the bankruptcy court had no  
20 jurisdiction, and it is patent that the court had no  
21 jurisdiction.

22 QUESTION: Mr. Rosenthal, did you ever file a  
23 motion in the Florida Bankruptcy Court seeking relief from  
24 the injunction?

25 MR. ROSENTHAL: I personally did on behalf of

1 other clients, not on behalf of the Edwards. Our firm  
2 represents numerous clients who have -- who had at the  
3 time of the bankruptcy appeals that were pending --

4 QUESTION: Well, why didn't you follow that  
5 procedure on behalf of these respondents?

6 MR. ROSENTHAL: Because it was our opinion, Your  
7 Honor, that the bankruptcy court had patently no  
8 jurisdiction to enjoin proceedings that did not involve  
9 the debtor at all, and that were not directed against the  
10 debtor, or against the debtor's property.

11 QUESTION: Did it have no jurisdiction to do  
12 that as to Northbrook?

13 MR. ROSENTHAL: It had no jurisdiction to do  
14 that as to Northbrook, yes, Your Honor.

15 QUESTION: Do you deny, Mr. Rosenthal, that the  
16 claim that your opponent has made that if, in fact, the  
17 Edwardses realize on the bond, the bonding company is  
18 going to go against the collateral, the collateral is  
19 going to affect the value of the bankruptcy estate. Do  
20 you -- is there a flaw in at least that sequence of  
21 reasoning?

22 MR. ROSENTHAL: I -- I can't dispute the fact  
23 that the bond has been collateralized, but I do believe  
24 that at the time of the affirmance of the judgment Celotex  
25 lost whatever interest it had in the bond itself.

1 QUESTION: Well, but that's not the argument. I  
2 mean, that's a different argument, but the argument that's  
3 being made here is that the proceeding against the bond,  
4 if allowed to run its course, and it's successful, as  
5 presumably it would be, would affect the value of the  
6 bankruptcy estate?

7 MR. ROSENTHAL: I do disagree with that  
8 assertion, Your Honor.

9 QUESTION: Well, why do you -- what's the  
10 misstep? You admit the bond is subject to collateral --

11 MR. ROSENTHAL: Yes.

12 QUESTION: -- and the collateral is in the  
13 bankruptcy estate.

14 MR. ROSENTHAL: Right.

15 QUESTION: Okay. What's wrong with his  
16 reasoning?

17 MR. ROSENTHAL: We're not seeking the  
18 collateral. We're only seeking to enforce the independent  
19 obligation of Northbrook to us.

20 QUESTION: Well, he isn't claiming that you are  
21 seeking the collateral. All he's claiming is that the  
22 proceedings against the collateral will affect the value  
23 of the bankruptcy estate, and he is saying that therefore  
24 the -- in effect the status of the collateral and any  
25 threat to it is a matter which is related to the

1 Chapter 11 proceeding, and that's all that's necessary for  
2 jurisdiction under 1334(b).

3 MR. ROSENTHAL: Well, that's all that's  
4 necessary for jurisdiction under the Pacor test, which  
5 says any proceeding whose outcome could conceivably affect  
6 the bankruptcy estate is --

7 QUESTION: Well, this is more than -- you're  
8 quite right about your statement of the test, but isn't  
9 this a little bit stronger than merely conceivable?

10 MR. ROSENTHAL: Well, I think the --

11 QUESTION: If you go against the collateral, the  
12 collateral isn't going to be there, and they have  
13 priority. The collateral isn't going to be there in the  
14 general bankruptcy estate.

15 MR. ROSENTHAL: Well, that's up to Northbrook,  
16 Your Honor. I think that if Northbrook enforces that, I  
17 think maybe --

18 QUESTION: Well, presumably Northbrook is not  
19 going to open its veins and bleed to death. I mean, it's  
20 reasonable to suppose that Northbrook is going to want to  
21 realize on its collateral, isn't it?

22 MR. ROSENTHAL: As between us --

23 QUESTION: There's nothing frivolous about that  
24 assumption, is there?

25 MR. ROSENTHAL: No, there's no, but as between



1 us bleeding to death and Northbrook bleeding to death, I  
2 think the bond, the obligation that Northbrook entered  
3 into to us, puts Northbrook in the shoes of bleeding --

4 QUESTION: Well, that may be a good argument in  
5 front of the court that decides what should be done, as to  
6 whether there should be an injunction or not, but I don't  
7 see that that goes to jurisdiction.

8 The question on jurisdiction is, is it related,  
9 and of course it's related, because it's going to affect  
10 the bankruptcy estate. At least, that's his argument.

11 MR. ROSENTHAL: Well, my argument is that there  
12 is a limit on that -- on the relationship, on the degree  
13 to which a bankruptcy court can exercise jurisdiction over  
14 proceedings which are tangentially related to a  
15 bankruptcy.

16 For example, in the Pacor case, the plaintiff  
17 sued a defendant, the defendant sued a codefendant for  
18 indemnity, that codefendant went into Chapter 11, Pacor  
19 argued, well, this proceeding -- the plaintiff's  
20 proceeding against us is a proceeding related to the  
21 bankruptcy of the codefendant because the -- if the  
22 plaintiff prevails, that will create a claim of indemnity  
23 from us against the codefendant, and therefore it's  
24 related to a bankruptcy, and under that --

25 QUESTION: Mr. Rosenthal --

1 MR. ROSENTHAL: -- broad test -- I'm sorry.

2 QUESTION: -- isn't it a little abstract to say  
3 these claims are not related to the bankruptcy? Isn't it  
4 in fact the case that these personal injury claims are  
5 what drove Celotex and companies similarly situated into  
6 bankruptcy, so it's quite -- I can understand the abstract  
7 categorization that you're making, and is it not possible  
8 that if Celotex didn't think it had a shot at defeating  
9 the punitive recoveries, it might have gone into  
10 bankruptcy earlier when faced with these hundreds of  
11 claims?

12 MR. ROSENTHAL: I think the question implicates  
13 two issues, one is the possible success of the avoidance  
14 action, and the other is just the effect on the  
15 bankruptcy, and I think that that basis for the judgment  
16 really has nothing to do with our claim against  
17 Northbrook. Our claim is on Northbrook's claim to us.

18 The very purpose of the bond is to ensure that  
19 that satisfaction of the judgment is unrelated to the  
20 financial condition of the debtor. That's built into the  
21 entire concept, so I think that --

22 QUESTION: Which is a good argument on the  
23 merits of whether there should be an injunction, but I  
24 don't see why it is significant with respect to  
25 jurisdiction.

1 MR. ROSENTHAL: Well, if the test for  
2 jurisdiction is related-to, then I think it does certainly  
3 apply.

4 QUESTION: It's not -- you don't take a  
5 merits -- I guess what I'm hearing from you is a kind of a  
6 merits first approach to jurisdiction. If you lose on the  
7 merits, there's no jurisdiction, but the words, related  
8 to, in a jurisdictional statute, have generally been given  
9 a very broad meaning.

10 MR. ROSENTHAL: I don't deny that, but I do  
11 believe there is a limit, and I do believe that that  
12 crosses that limit.

13 And I think that the underlying purpose of a  
14 supersedeas bond or transactions like it, like the letters  
15 of credit on which the New York Clearinghouse, the banks  
16 of New York, filed an amicus brief saying that the  
17 assertion, not just the exercise -- not just the wielding  
18 of power, but the action assertion of jurisdiction, that  
19 very ability, threatens the viability of those kinds of  
20 financial transactions.

21 And I think that to suggest, to define related-  
22 to as anything that could affect, however indirectly, a  
23 bankruptcy, would basically give the bankruptcy courts  
24 infinite jurisdiction. I don't think that's --

25 QUESTION: But you can argue in the bankruptcy

1 court that the stay shouldn't have issued. You can appeal  
2 to the district court or the court of appeals that  
3 supervises the bankruptcy court. I mean, it's not as if  
4 the bankruptcy court makes a wrong decision you're just  
5 permanently stuck with it.

6 MR. ROSENTHAL: Well, that's true, but I think,  
7 again, to require someone who has a right on an  
8 independent obligation to go and litigate in the  
9 bankruptcy court would undermine the very purpose of  
10 that --

11 QUESTION: Well then, Congress shouldn't have  
12 worded it as related to. I mean, you know, I think your  
13 argument is basically you don't like the breadth of  
14 jurisdiction conveyed -- conferred by Congress.

15 MR. ROSENTHAL: Well, I don't think that  
16 Congress' jurisdiction has been interpreted that broadly.  
17 I think that again, the Pacor case, there was a  
18 relationship with the bankruptcy, a tangential one, but  
19 the Court held there was no jurisdiction in that case, and  
20 that's under the broadest test that's been articulated.

21 In the Lemco case decided by this Court, one of  
22 the alternative grounds for the holding was that the  
23 bankruptcy court's attempt to stay administrative  
24 proceedings was unlikely to impair the bankruptcy court's  
25 exclusive jurisdiction over the property of the estate,

1 and I suggest that's exactly the same situation here.

2 Northbrook's actions may affect the property of  
3 the estate, although I even doubt that, because I think  
4 the likelihood of avoiding the transfer is infinitesimal,  
5 and I think that the avoidance claims were textual, but  
6 that's Northbrook v. Celotex. Our claim against  
7 Northbrook does not affect the debtor's estate any more  
8 than the plaintiff's claim against Pacor in the Pacor  
9 case.

10 QUESTION: But nonetheless, if Northbrook goes  
11 against Celotex as a result of your collecting on the bond  
12 because of the collateral that Celotex -- that could  
13 diminish the Celotex bankruptcy estate, could it not?

14 MR. ROSENTHAL: Yes, and that action could be  
15 stayed, as the bankruptcy court recognized in its own  
16 opinion.

17 Again, this -- the purpose of the supersedeas  
18 bond is risk allocation. It is -- and the court used  
19 language like this. We're shifting the battleground,  
20 taking the risk of Celotex's future insolvency off us and  
21 putting it onto Northbrook, and if --

22 QUESTION: Mr. Rosenthal, what would have  
23 happened if, after the district court judgment, an appeal  
24 bond is put up, and while the appeal is pending, the  
25 Chapter 11 had been filed, what would have been the



1 situation of the Edwardses then?

2 MR. ROSENTHAL: Well, the Edwardses would be  
3 stayed by the automatic stay. The circuit courts are  
4 uniform on that, and we have not challenged that, because  
5 the proceeding is against Celotex. As long as the matter  
6 is in appeal, the proceeding is against Celotex, not the  
7 bond company.

8 The difference in this case was, the appeal was  
9 decided, the case was over, and the Edwardses had a right  
10 to execution and had a -- had a, basically a retroactive  
11 right to collect on the judgment, retroactive to when they  
12 got the judgment, which was a year and a half before the  
13 bankruptcy, and a year and a half ago the bond was posted  
14 at that time as well.

15 QUESTION: May I ask a rather elementary  
16 question? I must confess my ignorance about some of this.  
17 Your clients are not parties to the injunction, is that  
18 right?

19 MR. ROSENTHAL: Not formal parties, no, Your  
20 Honor.

21 QUESTION: Is it arguable that they're in  
22 contempt of court in Tampa?

23 MR. ROSENTHAL: Yes.

24 QUESTION: Have any contempt proceedings been  
25 brought against them?

1 MR. ROSENTHAL: No.

2 QUESTION: How about contempt proceedings  
3 against the bonding company?

4 MR. ROSENTHAL: No. The bond company has  
5 resisted payment on the bond.

6 QUESTION: What is the procedure, proceeding  
7 there which is testing the validity of the injunction as  
8 applied to them?

9 MR. ROSENTHAL: Well --

10 QUESTION: If any.

11 MR. ROSENTHAL: -- several claimants who argue a  
12 right to their bonds have filed a motion to lift the stay  
13 to execute on their bonds, and they did this -- I can't  
14 say when. I believe sometime in 1992. The bankruptcy  
15 court denied the motions to lift the stay, which is  
16 reported in the Joint Appendix, and that, I believe an  
17 appeal has been taken from that order denying the motion  
18 or the stay, and it is still pending 2 years later in the  
19 district court.

20 QUESTION: Thank you.

21 MR. ROSENTHAL: And I think that illustrates,  
22 again, to embroil us, who should be guaranteed a right of  
23 immediate access and a right of immediate satisfaction of  
24 the bond and the right to the mechanisms provided in the  
25 Federal rules for enforcement of a bond will be denied if

1 the response is, go to the bankruptcy court and litigate  
2 in the bankruptcy court. That dishonors the transaction.

3 QUESTION: But again, you would agree that if  
4 the injunction is ultimately upheld -- say if the Fifth  
5 Circuit decision stands, too, don't you run some risk of  
6 being held in contempt of court ultimately and punished  
7 for that?

8 MR. ROSENTHAL: Yes, Your Honor, we do.

9 QUESTION: And you're willing to take that risk,  
10 in effect.

11 MR. ROSENTHAL: Yes, and again I think that fact  
12 illustrates, or refutes the claim that attacks such as  
13 these will proliferate, or affirmance of the Fifth  
14 Circuit's decision will encourage persons to make these  
15 kinds of attacks on bankruptcy court orders.

16 QUESTION: Mr. Rosenthal, isn't that unseemly in  
17 the Federal system this should go -- be settled in one  
18 place or another and then to have the risk of contempt  
19 because the Edwardses are resisting the authority of the  
20 courts within the Eleventh Circuit, to say that what has  
21 happened in Fifth Circuit is okay but that can be checked  
22 later on through contempt proceedings -- for the smooth  
23 functioning of a Federal system, shouldn't it be clear  
24 that either you're right or Mr. Warren is right about the  
25 authority of the courts within the Eleventh Circuit?

1 MR. ROSENTHAL: In most circumstances, yes, Your  
2 Honor, it would be.

3 In a case of what we believe to be patent  
4 excursion beyond jurisdictional limits, we say that this  
5 procedure is appropriate, that the checks on the ability,  
6 or -- and the restraints on the willingness of people to  
7 make, these kinds of parties to make these kinds of  
8 collateral attacks, are the availability of contempt  
9 proceedings, and the district court and Fifth Circuit that  
10 receives the challenge, they were fully aware of the  
11 bankruptcy court's stay order at the time that this issue  
12 was litigated, the district court and the Fifth Circuit  
13 both.

14 We didn't hide it. We said, the bankruptcy  
15 court has attempted to stay execution but we don't believe  
16 that it has jurisdiction to do this, and that was  
17 litigated, and both the district court and the Fifth  
18 Circuit said, you are entitled to proceed on the  
19 supersedeas bond. To do otherwise would undermine the  
20 very purpose of the transaction.

21 QUESTION: Would you agree that if the Fifth  
22 Circuit was wrong about the jurisdiction of the bankruptcy  
23 court, however wrong the bankruptcy court may have been on  
24 the merits of granting the stay, if they were wrong about  
25 the jurisdiction, the authority of the bankruptcy court to

1 issue its stay, that would include all the personal injury  
2 people who already had judgments, then this gets sorted  
3 out in the Eleventh Circuit and not in the Fifth Circuit?  
4 The question is, was there authority in the bankruptcy  
5 court in Florida, in the district court in Florida.

6 MR. ROSENTHAL: And my answer to that would be  
7 no, and again, I'm sure that if we thought that it was a  
8 close question, we wouldn't have pursued this challenge,  
9 but I don't believe it is a close question. I don't  
10 believe that there is a risk of the Eleventh Circuit  
11 finding jurisdiction of any kind in the bankruptcy court  
12 to stay these kinds of unrelated proceedings.

13 QUESTION: Mr. Warren, if I hear you correctly,  
14 you are not arguing that there is no possibility -- no  
15 realistic possibility, no argument, that Northbrook cannot  
16 be prevented from executing a bond collateral. You  
17 acknowledge that there may be a basis, after you collect  
18 from Northbrook, for saying that Northbrook has no right  
19 to --

20 MR. ROSENTHAL: I think that claim could be  
21 made. I think that --

22 QUESTION: But you haven't made it.

23 MR. ROSENTHAL: No. I have not, as, again, our  
24 position is we're unrelated to that issue, that --

25 QUESTION: You just argue on the basis of lack



1 of relationship, not the fact that there may not be some  
2 plausible basis for thinking that Northbrook can't use the  
3 collateral.

4 MR. ROSENTHAL: Yes. I think that at the time  
5 of -- I actually don't think that Celotex has a right to  
6 the collateral.

7 QUESTION: But would you not agree, at least as  
8 a matter of jurisdiction, the bankruptcy court would at  
9 least have jurisdiction to enjoin Northbrook from trying  
10 to realize on the collateral?

11 MR. ROSENTHAL: Yes.

12 QUESTION: Yes.

13 MR. ROSENTHAL: Yes, I do.

14 QUESTION: So then Northbrook would be under  
15 conflicting obligations --

16 QUESTION: No, because they can --

17 QUESTION: -- if the Fifth Circuit standpoint --

18 QUESTION: They can pay the judgment without --  
19 and lose on both cause.

20 MR. ROSENTHAL: Northbrook -- that's true.

21 QUESTION: Yes.

22 MR. ROSENTHAL: Northbrook -- Northbrook issued  
23 the bond. They assumed that obligation to us. They took  
24 the risk, and --

25 QUESTION: You can pay -- am I wrong in thinking

1     that the Edwardses have realized on the appeal bond, that  
2     you've gotten paid, or you haven't?

3             MR. ROSENTHAL: We have not, Your Honor. We  
4     have not received the funds on that.

5             QUESTION: But under the Fifth Circuit judgment,  
6     you could.

7             MR. ROSENTHAL: Yes. We're entitled to.

8             QUESTION: So you -- what -- why are you not --  
9     this is some voluntary understanding?

10            MR. ROSENTHAL: Yes, it is a voluntary  
11     understanding on our part. Celotex has agreed to not  
12     pursue contempt proceedings against us --

13            QUESTION: If you don't collect.

14            MR. ROSENTHAL: If we don't collect, yes, Your  
15     Honor.

16            QUESTION: Mr. Rosenthal, on rehearing, the  
17     Court of Appeals for the Fifth Circuit, in its amendment  
18     to the opinion, its last couple of sentences say, "Thus,  
19     we have not held that the bankruptcy court in Florida was  
20     necessarily wrong, we have only concluded that the  
21     district court, over which we do have appellate  
22     jurisdiction, was right."

23            Do you defend that analysis of the matter?

24            MR. ROSENTHAL: No, I don't, Your Honor. That  
25     language, I think, to give my own interpretation to it, it

1 is, we're not reversing an order of a court in another  
2 circuit over which we don't have jurisdiction, we're just  
3 affirming a decision below, because I think that language  
4 is in response to statements made in the petition for  
5 rehearing that you're effectively reversing an order in  
6 another circuit, and I think that was to respond to that.

7 But I do think that the bankruptcy court's  
8 order, to the extent that it assumed that there was  
9 jurisdiction to do this, was necessarily wrong. If the  
10 bankruptcy court was right in assuming jurisdiction over  
11 the bond, then I don't think that the Fifth Circuit could  
12 have ruled the way it did.

13 QUESTION: It's accurate enough to say that the  
14 Fifth Circuit is not saying that the bankruptcy court was  
15 wrong.

16 MR. ROSENTHAL: I agree with that, Your Honor.

17 QUESTION: It is only saying that the Texas  
18 court was right.

19 MR. ROSENTHAL: Yes, and I don't think that  
20 language really adds to the analysis --

21 QUESTION: Let him who can read conclude that  
22 therefore the other court was wrong.

23 MR. ROSENTHAL: Yes, that's correct, and I think  
24 that again the Fifth Circuit was well aware of the effect  
25 of its order, effect of the bankruptcy -- aware that its

1 order did conflict with the bankruptcy court's order, and  
2 was delicate in its language saying, no, you don't have  
3 the power to do this.

4 I do want to emphasize that, to the extent that  
5 the order could be connected in any way with the adversary  
6 proceedings, to the extent that Celotex has a -- or claims  
7 an interest in the property because of the adversary  
8 proceeding, we've said in our brief that we think that  
9 would be patently frivolous.

10 I would reiterate that, and add that the  
11 bankruptcy -- to the extent that the order staying  
12 enforcement on bonds generally is an injunctive order, it  
13 did not comply with the requirements of Rule 65, there's  
14 no showing of a likelihood of success in the avoidance  
15 action and Celotex did not even attempt to show a  
16 likelihood of success.

17 QUESTION: Does that court have jurisdiction? I  
18 mean, supposing a court with conceded jurisdiction, say a  
19 Federal court with diversity jurisdiction under the  
20 statute, issues an injunction which does not comply with  
21 Rule 65, and that judgment simply becomes final without  
22 any appeal, could the object of the -- the person who is  
23 constrained by the injunction challenge that collaterally  
24 because it violated Rule 65?

25 MR. ROSENTHAL: I think that the person could

1 challenge it if it makes no pretense to obey Rule 65, and  
2 this does not.

3 QUESTION: Well, in other words, you're saying  
4 that if a court does not comply with Rule 65, that  
5 deprives it of jurisdiction?

6 MR. ROSENTHAL: It -- the -- no, no, Your Honor.

7 QUESTION: That would be an extraordinary  
8 departure from our cases.

9 MR. ROSENTHAL: No, I'm not saying that. I'm  
10 saying that if an order that -- that -- I think there are  
11 two different concepts.

12 QUESTION: Well, why don't you answer my  
13 question.

14 MR. ROSENTHAL: I think that no, an order under  
15 Rule 65, that's not properly entered under Rule 65,  
16 doesn't defeat the court's own jurisdiction, but to the --  
17 but that it does make the order unenforceable for another  
18 reason, and that is that it's patently frivolous with no  
19 pretense to validity, another exception to the collateral  
20 attack.

21 QUESTION: Well, but supposing the bankruptcy  
22 court has before it a controversy that is not at all  
23 patently frivolous -- that is, it concededly relates to  
24 the bankruptcy -- and issues an injunction which doesn't  
25 comply with Rule 65, does that mean it can't rely on the



1 subject matter of the controversy before it to sustain  
2 jurisdiction, just because the injunction didn't comply  
3 with Rule 65?

4 MR. ROSENTHAL: No. That -- it's a different  
5 issue than the jurisdictional issue. It's a different  
6 defect with the order, and that's all I'm saying. There  
7 are two defects with the order.

8 To the extent that it's issued under the  
9 bankruptcy court's general jurisdiction to supervise a  
10 bankruptcy, and deal with product problems related to  
11 however tangential the bankrupt's estate, there's no  
12 jurisdiction to do that.

13 To the extent that it's related, or attempted to  
14 be related, and I'm not even sure if it's argued to be  
15 related specifically to the adversary proceeding, then it  
16 is -- to not comply with the injunction rule is patently  
17 frivolous and has no pretense to validity.

18 QUESTION: Well, but don't our cases say that if  
19 an injunction's issued in violation of Rule 65 you don't  
20 collaterally attack it, you go back to the court that  
21 issued the injunction and say, this was wrong because you  
22 didn't comply with Rule 65?

23 MR. ROSENTHAL: Yes, that's true, with the  
24 exceptions listed -- that is, lack of jurisdiction, or no  
25 conceivable -- patently frivolous with no pretense to

1 validity.

2 QUESTION: Well, you're splitting those apart?  
3 You're saying one is no jurisdiction, the other is, I  
4 would say patently frivolous?

5 MR. ROSENTHAL: Yes. They are distinct bases  
6 for attacking orders of any kind, injunctive or otherwise.

7 QUESTION: Well, in other words, an order that  
8 is patently frivolous, in your view, and whatever -- you  
9 haven't defined that -- could be collaterally attacked  
10 even though the court which entered that order  
11 unquestionably had jurisdiction. That's an extraordinary  
12 doctrine.

13 MR. ROSENTHAL: But it is a doctrine of this  
14 Court.

15 QUESTION: What case is it based on?

16 MR. ROSENTHAL: Walker v. City of Birmingham  
17 recognizes that as an exception to the effective  
18 injunctive orders.

19 QUESTION: You're saying, I take it, that a  
20 bankruptcy court that unquestionably has jurisdiction over  
21 the parties before it does not have to be obeyed by the  
22 district court who is entertaining the case of United  
23 States v. Nixon should that court happen to issue an  
24 injunction relating to that case, which has no conceivable  
25 relationship, even though the court has jurisdiction over

1 the parties?

2 MR. ROSENTHAL: Yes. If I understand the  
3 hypothetical, I think, yes.

4 QUESTION: I'm not trying to trick you.

5 (Laughter.)

6 QUESTION: What I don't understand, though,  
7 about your position, is this. If it had been your  
8 contention that there's no way in which Northbrook would  
9 not be entitled to retain the collateral after it pays the  
10 bond, then -- then I might go along with you, but you are  
11 not making that argument.

12 You are perfectly willing to entertain the  
13 possibility that Northbrook will pay the bond and then get  
14 left high and dry at the other end of the transaction by  
15 not being able to retain its collateral.

16 It seems to me that the whole purpose of this  
17 provision that enables the bankruptcy court to have  
18 jurisdiction over all proceedings related to cases is to  
19 prevent just that kind of thing from happening, to prevent  
20 inconsistent determinations by courts with respect to the  
21 same matter.

22 MR. ROSENTHAL: Perhaps I didn't understand your  
23 earlier hypothetical as well as I should have.

24 The -- if you were asking, does Northbrook have  
25 a right to retain the collateral, I think the answer to

1 that is clearly yes, Celotex has lost its property  
2 interest in that.

3 If your question is, does the retention of the  
4 collateral that Celotex posted affect Celotex's estate, I  
5 think yes, this is property that --

6 QUESTION: Why is the answer clearly yes? It's  
7 a transfer. The collateral was transferred within the  
8 preference period, or it could be attacked as fraudulent  
9 of other creditors. I don't understand why that's so  
10 clear.

11 The transfer of the collateral, which I take it  
12 was -- these are claims that Celotex had against its own  
13 insurer?

14 MR. ROSENTHAL: Yes.

15 QUESTION: That was what the collateral was, and  
16 if the transfer occurred within the preference period or  
17 could otherwise be -- could be characterized as  
18 fraudulent, then why isn't that a valid claim?

19 MR. ROSENTHAL: That -- that is true. That  
20 certainly isn't the situation here, and that's why I  
21 think --

22 QUESTION: I thought Mr. Warren said that's  
23 exactly what the situation was, that they were attacking  
24 the transfer from Celotex to the insurer as either  
25 preferential or fraudulent.

1 MR. ROSENTHAL: Oh, I'm sorry, yes. That is --  
2 they are attacking that. That attack has no validity  
3 whatsoever. This bond was posted well in excess of the  
4 fraudulent -- I mean, I'm sorry, the preference period,  
5 well in excess of the statutory period for avoiding  
6 constructively fraudulent transfers under section 548, and  
7 was done for purposes of satisfying or securing an  
8 antecedent debt which is expressly said to be not a  
9 fraudulent transfer.

10 QUESTION: But I asked you earlier whether you  
11 were making any of those arguments that in fact there's no  
12 colorable basis for saying that Northbrook doesn't own  
13 this collateral, and you said no, that's not the argument  
14 you're making.

15 MR. ROSENTHAL: No, Your Honor, I think that  
16 I -- as I understood your question, it was, does the  
17 retention of collateral affect Celotex, because we were  
18 dealing with the broad jurisdictional question under  
19 1334(b), and I said yes, I think the retention of  
20 collateral affects Celotex certainly more directly than  
21 our claim against Northbrook, but no, I do not think the  
22 transfer could colorably be attacked. I think it  
23 defies --

24 QUESTION: Does Northbrook agree with you? This  
25 is a stakeholder that says, I don't care who gets paid, I



1 don't want to have to pay twice. So we're hearing from  
2 you to say that they don't have any problem, Northbrook --

3 MR. ROSENTHAL: My understanding of Northbrook's  
4 position is they've opposed the -- they've defended the  
5 avoidance action in Florida and in fact characterized the  
6 bankruptcy court's injunction or stay order in this case  
7 as novel, which I think is strong language from an  
8 insurance --

9 QUESTION: That's quite different from saying  
10 they haven't got a colorable basis for the claim, that  
11 there is no -- in the bankruptcy court there's no  
12 colorable basis to set aside the transfer to the insurer.

13 MR. ROSENTHAL: Yes, but I would, Your Honor. I  
14 say that there is no colorable basis. To say that a party  
15 a year before, or more than a year before a bankruptcy,  
16 that pays a debt, pays a judgment, or secures a judgment  
17 through a supersedeas bond, has committed or performed a  
18 fraudulent transfer, is an Alice-in-Wonderland concept,  
19 and I submit that it's absolutely not colorable.

20 Thank you, Your Honor.

21 QUESTION: Thank you, Mr. Rosenthal.

22 Mr. Warren, you have 2 minutes remaining.

23 REBUTTAL ARGUMENT OF JEFFREY W. WARREN

24 ON BEHALF OF THE PETITIONER

25 MR. WARREN: As this Court has recognized,

1 bankruptcies do strange things. This case does not  
2 present an Alice in Wonderland. It is involving a  
3 substantial amount of money, a substantial amount of  
4 issues.

5 What the bankruptcy court has done has preserved  
6 the status quo. The heart of our appeal, and the reason  
7 why the Fifth Circuit's decision should be reversed, is it  
8 impairs the orderly judicial administration.

9 Justice Stevens --

10 QUESTION: It hasn't preserved the status quo.  
11 The status quo is that every -- that this money was gone.  
12 The status quo is that once the security was posted, the  
13 case was lost on appeal, that money was gone, and it seems  
14 to me it's saying no, the money isn't gone. I don't call  
15 that retaining the status quo.

16 MR. WARREN: Well, Your Honor, it maintains the  
17 status quo in the sense that the funds are still  
18 available, the obligation of Northbrook as a surety is  
19 still available, the right and entitlements and the  
20 avoidance powers as they exist are still available with  
21 respect to the estate, and the passage of time that has  
22 occurred, the bankruptcy court has provided adequate  
23 protection to ensure that segregated funds exist for the  
24 benefit of any impairment that occurs as a result of the  
25 delays.

1 QUESTION: And the collateral has not gone.

2 MR. WARREN: And the collateral has not gone,  
3 because the bankruptcy court has ordered the sureties to  
4 deposit those funds, so consequently, we have issues --

5 QUESTION: It is gone unless there's some  
6 colorable basis for getting it back.

7 MR. WARREN: That is correct, Your Honor, and  
8 there's two colorable bases that are being litigated now  
9 that exist, the constructively fraudulent transfer, which  
10 is a 4-year statute of limitations under Florida law,  
11 which has been established as being the law controlling  
12 this transfer, so it's within the statute of limitations,  
13 no question that Celotex was insolvent at the time it  
14 transferred the assets to Northbrook, there's no question  
15 that the transfer was for the indirect benefit of the  
16 Edwardses, no question about that, the only issue is  
17 whether or not there was a reasonably equivalent exchange  
18 of value, meaning that the forbearance --

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
20 Warren --

21 MR. WARREN: Thank you, Your Honor.

22 CHIEF JUSTICE REHNQUIST: -- your time has  
23 expired. The case is submitted.

24 (Whereupon, at 11:06 a.m., the case in the  
25 above-entitled matter was submitted.)

## CERTIFICATION

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

*CELOTEX CORPORATION Petitioner v. BENNIE EDWARDS, ET UX.*

*CASE NO.: 93-1504*

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

BY *Ann Marie Federico*

(REPORTER)