

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: CITIZENS BANK OF MARYLAND, Petitioner v.
DAVID STRUMPF.
CASE NO: No. 94-1340
PLACE: Washington, D.C.
DATE: Tuesday, October 3, 1995
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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CITIZENS BANK OF MARYLAND, :

4 Petitioner :

5 v. : No. 94-1340

6 DAVID STRUMPF. :

7 - - - - -X

8 Washington, D.C.

9 Tuesday, October 3, 1995

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:03 a.m.

13 APPEARANCES:

14 IRVING E. WALKER, ESQ., Baltimore, Maryland; on behalf of
15 the Petitioner.

16 MIGUEL A. ESTRADA, ESQ., Assistant to the Solicitor
17 General, Department of Justice, Washington, D.C.; on
18 behalf of the United States, as amicus curiae,
19 supporting the Petitioner.

20 ROGER SCHLOSSBERG, ESQ., Hagerstown, Maryland; on behalf
21 of the Respondent.

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1 PROCEEDINGS

2 (11:03 a.m.)

3 JUSTICE STEVENS: We'll hear argument in Case
4 Number 94-1340, Citizens Bank of Maryland v. Strumpf.

5 Mr. Walker, you can proceed when you're ready.

6 ORAL ARGUMENT OF IRVING E. WALKER

7 ON BEHALF OF THE PETITIONER

8 MR. WALKER: Thank you, Justice Stevens, and may
9 it please the Court:

10 This case presents a single issue involving the
11 interpretation of the Bankruptcy Code, and that issue is
12 whether a bank creditor may refuse a debtor depositor's
13 request to withdraw funds pending a Bankruptcy Court's
14 determination of the bank's right of setoff without
15 violating the automatic stay.

16 The Court's answer to this question should
17 govern the conduct of nonbank and bank creditors alike,
18 including the United States Government.

19 The Fourth Circuit held that the bank's refusal
20 to allow the debtor to withdraw funds to the extent of the
21 bank's setoff right, what is referred to commonly as an
22 administrative hold, is tantamount to a setoff.

23 QUESTION: Mr. Walker, would you mind telling me
24 what your definition is of a setoff?

25 MR. WALKER: Yes, Your Honor. Justice O'Connor,

1 a setoff occurs when there is an intention to effect a
2 settlement of mutual debts. It has several attributes.
3 One is that the creditor intends to do it.

4 Two, there is an affirmative action which
5 results in a bank account balance actually being reduced
6 in a corresponding amount. The bank's claim is reduced,
7 and there is invariably a record evidencing that the
8 setoff occurred.

9 QUESTION: Is this a matter of Federal law or
10 State law for purposes of this case?

11 MR. WALKER: Your Honor, I believe it is a
12 matter of Fed -- excuse me. I believe it is a matter of
13 State law consistent with Justice Breyer's view when he
14 was with the First Circuit in the Saugus General Hospital
15 case, that in determining when a setoff occurs,
16 consistent --

17 QUESTION: We look to State law.

18 MR. WALKER: Yes, Your Honor, and there is --

19 QUESTION: There's no overall Federal meaning of
20 that term for purposes of the Bankruptcy Code.

21 MR. WALKER: I do not believe there is, Your
22 Honor.

23 The Federal Bankruptcy Code, of course,
24 determines what conduct is permissible under the code, and
25 our view is that administrative hold is expressly

1 permitted under section 542(b).

2 QUESTION: And as a matter of State law in this
3 instance, you think that it depends on the bank's
4 intention?

5 MR. WALKER: More than that, Your Honor.
6 Intention would be one factor.

7 First, I should point out there is no Maryland
8 reported case expressly telling any of us exactly when a
9 setoff occurs, and therefore we look to the general common
10 law and the Federal cases considering nonbankruptcy and
11 State law have generally agreed, at least at the circuit
12 court level and below, with our view of the case, namely
13 that there needs to be an intent, there needs to be an
14 affirmative act to change the status quo, and that's a key
15 point in our case, Your Honors.

16 An administrative hold, consistent with the
17 purpose behind the automatic stay, accomplishes a
18 preservation of the status quo, and that's quite --

19 QUESTION: Well, the status quo was changed
20 here. The bankrupt was able to withdraw funds before the
21 bank's action in freezing the account. Thereafter, the
22 account was frozen. Isn't that a change in the status
23 quo?

24 MR. WALKER: Yes, Your Honor. It's a change
25 from the moment before the hold is placed, but the status

1 quo which is most important, Your Honor, is the status quo
2 immediately prior to bankruptcy and the status quo
3 immediately after bankruptcy, and the answer to that
4 question is determined by looking at the depositor's right
5 to withdraw funds under its contract with the bank.

6 QUESTION: Well, wait. I thought you said that
7 whether a setoff has occurred depends upon whether there
8 has been a change in the status quo, that there has to be
9 some change in the status quo.

10 MR. WALKER: That is certainly a factor, yes.

11 QUESTION: Okay.

12 MR. WALKER: Where you would --

13 QUESTION: All I'm saying is that that factor
14 existed here, didn't it?

15 MR. WALKER: No, Your Honor, because the way I
16 would measure the change is looking at the debtor's rights
17 prior to bankruptcy to withdraw funds. That right was
18 conditioned by contract in Maryland law by the bank's
19 right to set off the account upon default.

20 QUESTION: Yes, but the bank has still gone one
21 step beyond that, because the bank has exercised the
22 right. That is a change in the status quo. The bank has
23 said, you can't take the money out, and it hadn't said
24 that beforehand.

25 Don't you -- I mean, it seems to me, I think you

1 have a perfectly reasonable position.

2 I don't know whether I'm going to ultimately
3 agree with it or not, but it seems to me that you've got
4 to say that the bank's -- or concede that the bank's act
5 in instituting the freeze is, in fact, an act that goes
6 beyond mere status quo. It's an act which on a literal
7 reading offends some of these statutes.

8 And it seems to me that your best argument is to
9 say, well, it just offends them a little bit, and it
10 offends them only to the extent necessary to make sense of
11 this equally valid statutory recognition of the right to
12 set off, that if you don't allow this, the right to set
13 off recognized in the code is nonsense, and try to
14 reconcile, rather than to say, well, the bank is
15 absolutely Simon-pure at all times, and it never literally
16 violates a thing.

17 It seems to me that that is a more plausible
18 position than to say that, here, for example, the freeze
19 does not affect the status quo.

20 MR. WALKER: Justice Souter, I agree with your
21 view of it. You have well and succinctly stated the
22 strength of our case, and namely that section 3 --

23 QUESTION: Well, I didn't mean to be getting
24 into your shoes, but --

25 (Laughter.)

1 MR. WALKER: I welcome it. Section 3 --

2 QUESTION: Mr. Walker, would it be fair to say
3 in comparing what this freeze is to what a setoff is that
4 a freeze, a temporary hold, is to a setoff what a TRO is
5 to a permanent injunction?

6 MR. WALKER: No, Your Honor. I would strongly
7 disagree with that.

8 There is a temporal aspect to it, because an
9 administrative hold is a temporary preservation of the
10 amount of the bank balance, the amount of the bank claim
11 pending bankruptcy court review.

12 QUESTION: But if there is such a thing as an
13 administrative hold or freeze, as you say that there is
14 under the statute, wouldn't one expect to find some
15 auxiliary rules governing it?

16 It is -- it does have the drastic consequence of
17 preventing the accountholder from cashing checks. Since
18 it does have that consequence, wouldn't one expect the
19 statute to say, but bank, if you do this, you've got to
20 give the debtor immediate notice that you're doing it so
21 he won't write checks that won't be cashed, you have to
22 tell the court that you're doing it, and get the
23 confirmation of the setoff as soon as possible?

24 But there's nothing. There's nothing that tells
25 us what conditions govern this hold.

1 QUESTION: Your Honor, I believe there's very
2 clear language in the Bankruptcy Code itself which tells
3 the Court what governs.

4 If I may refer the Court to page A7 of our
5 original brief, where the Court will find the statute
6 section 542(b), the language I would specifically refer to
7 is where the creditor is directed to pay such debt to or
8 on the order of the trustee except to the extent that such
9 debt may be offset under section 553.

10 The phrase "may be offset" clearly indicates it
11 is permissible to withhold payment short of a setoff.

12 QUESTION: Well, tell me --

13 QUESTION: I thought that was part of a turnover
14 proceeding. That's just when there's a turnover -- or am
15 I incorrect about that?

16 MR. WALKER: I would disagree with that, Your
17 Honor. It could come up in the context of a turnover
18 proceeding. We recognize that as a proper way for a
19 debtor who wishes to bring the issue to a head to address
20 the point.

21 QUESTION: Yes, but Justice Ginsburg's point was
22 you're asking us to establish a mechanism that does not
23 have specific grounding in the statute.

24 I assume under your freeze theory that you would
25 say the bank has to notify the trustee within a reasonable

1 time, he has to notify the bankrupt, I suppose it can
2 freeze no more than is necessary to cover what it
3 reasonably thinks is the setoff -- this is a very sensible
4 theory, but I think Justice Ginsburg's question was
5 directed to, where is its grounding in the code?

6 And you refer to 542, but I thought that was
7 when there was a turnover proceeding. Maybe I -- correct
8 me if I'm wrong.

9 MR. WALKER: Justice Kennedy, let me address
10 that, and I'll try to give a more complete answer to
11 Justice Ginsburg.

12 First, this is really respondent's point, that a
13 court order is required before an administrative hold can
14 be placed.

15 If there is one point this Court should know the
16 Bankruptcy Code is perfectly clear about, that is when a
17 court order is required. The Code is replete with
18 instances when an order is required.

19 In fact, section 542 itself, in subpart (e),
20 refers to a court order. Payment of professionals,
21 employment of professionals, the code says when a court
22 order is required. 542(b) does not contain any reference
23 to a court order.

24 QUESTION: Well, can we go back to these -- tell
25 me when the bank has a hold, or a freeze, must it

1 immediately notify the debtor and the bankruptcy court?

2 MR. WALKER: I believe it should Your Honor, and
3 I recognize --

4 QUESTION: Well, should. Isn't it must it? Is
5 there an obligation to -- how do we know anything about
6 the notice requirement? Where do we get it from?

7 MR. WALKER: I believe there are requirements,
8 Your Honor. There could well be requirements under State
9 law.

10 QUESTION: Suppose there are none because this
11 animal of a freeze or a hold is not part of State law?

12 MR. WALKER: Then a bank who fails to act
13 reasonably will be vulnerable to the bankruptcy court
14 determining that it violated --

15 QUESTION: Well, so you can't answer my
16 question, other than to say yes, it should notify the
17 debtor. In what period of time, immediately, the next
18 day, the day after?

19 MR. WALKER: I would say promptly, and I
20 recognize, Your Honor, your point that the code doesn't
21 spell out these details, but this is consistent with many,
22 many aspects of bankruptcy practice in the code and the
23 rules.

24 QUESTION: How about how much could be frozen?
25 It was a dispute about whether too much was frozen here.

1 MR. WALKER: The amount permitted to be held is
2 to the extent of the right of setoff. If a bank holds too
3 much, then it violates the stay expressly.

4 Let me also point --

5 QUESTION: It did in this case, then, it
6 violated the stay in this case?

7 MR. WALKER: No, Your Honor.

8 QUESTION: It held -- withheld -- it put a hold
9 on more than the amount of the offset, didn't it?

10 MR. WALKER: Your Honor, at the time of the hold
11 the amount owed was approximately \$3,250.

12 QUESTION: And the hold was \$3,500.

13 MR. WALKER: Yes, Your Honor, but given the
14 history of this case, I would submit that the bank didn't
15 hold enough, given its right to attorney's fees as well,
16 and the bank held not enough to cover the attorney's fees
17 and accruing interest.

18 QUESTION: Was the attorney's fees part of the
19 setoff? Is that a liquidated debt?

20 MR. WALKER: Yes, Your Honor. It was part of
21 the proof of claim filed by the bank, it was in the
22 computation of the amount of setoff, and the bankruptcy
23 court ironically authorized the setoff in that amount. Of
24 course, it came too late for the bank because the funds
25 had been removed.

1 QUESTION: But I take it the ultimate point is,
2 if the bank purports to -- if the bank freezes too much,
3 if -- in aid of its claimed setoff, it's simply going to
4 be found in violation to that extent of the stay, and it
5 takes its chances.

6 MR. WALKER: Yes, Justice Souter.

7 QUESTION: If it asks for too much, it's going
8 to get in trouble. It may have a lesser setoff than it
9 thought, and it may be in contempt with respect to the
10 difference. Isn't that --

11 MR. WALKER: Yes, Justice Souter, that's
12 absolutely correct.

13 QUESTION: Let me --

14 QUESTION: Why are you willing to assume that
15 the bank has to notify? What would happen if the bank
16 didn't notify?

17 MR. WALKER: Absent --

18 QUESTION: What if the burden were all -- you
19 know, if you think the debt is owing, you demand it, and
20 at that point you find out whether there's a claimed
21 setoff or not.

22 MR. WALKER: Absent notice, Justice Scalia,
23 there could be an issue as to what exactly the bank did,
24 what was it's intention, what was the act.

25 By notifying the debtor promptly that a hold is

1 in place pursuant to section 542(b) pending the outcome of
2 a pending motion for leave from stay, there should be no
3 question that the automatic stay has not been violated.

4 QUESTION: But Mr. Walker, there's nothing in
5 the code that requires notification, and I assume that
6 under the scheme as you envision it, the bankruptcy code
7 creates a sort of temporary stalemate in order to enable a
8 creditor having a right of setoff, a potential right of
9 setoff, to take the action to effectuate it, and maybe the
10 burden is on the debtor to file for a turnover order with
11 the bank to get the bank to turn over any moneys being
12 held, and maybe that's how the issue comes up.

13 MR. WALKER: That is correct, Justice O'Connor.
14 The Bankruptcy Code does not place the onus of initiating
15 the proceedings on either the debtor or the --

16 QUESTION: So in other words the debtor just
17 writes a check, and when it bounces he should come in. He
18 doesn't find out until the check bounces. Is that your
19 view?

20 MR. WALKER: That were possible, but I --

21 QUESTION: Wouldn't that be normally what would
22 happen, if you didn't tell him there was a hold on the
23 account?

24 MR. WALKER: Yes, and that's why I think --

25 QUESTION: That's why you think a bank ought to

1 give him notice.

2 MR. WALKER: That's why I think the bank --

3 QUESTION: I understood you in effect to say
4 that although the hold itself is not a contempt of court
5 or a violation, if he just -- if the bank puts a hold on
6 and then keeps its mouth closed for 30 days or more, it
7 might well ripen into a contempt.

8 MR. WALKER: That's -- that's --

9 QUESTION: That's what I thought was your
10 position.

11 MR. WALKER: That's possible, Justice Stevens.

12 I think I can clarify the issues the Court has
13 identified by, let's take this out of the bank-depositor
14 relationship.

15 Consider the bank as a purchaser of an automated
16 teller machine, and owes money to the debtor but has a
17 breach of warranty claim. No one would suggest that the
18 automatic stay mandates that the bank pay the disputed
19 claim even though it has a complete defense, and
20 consistent with that, a setoff right is a complete defense
21 under section 542(b).

22 If the Court were not to agree with our
23 position, some results would occur which I trust almost
24 all would agree are wrong results. For example, take a
25 landlord with a security deposit. When a tenant files

1 bankruptcy and is delinquent, is the landlord holding an
2 interest of the debtor's? Yes. It's funds in which the
3 debtor has an interest, but no one I hope would suggest
4 that the landlord upon bankruptcy has to give up the very
5 right he bargained for, which is the security deposit.

6 QUESTION: Mr. Walker, there's something in the
7 background of this case I don't understand, and maybe you
8 can explain it to me.

9 What is the standard operating procedure for
10 banks in these situations? They get notice of the
11 bankruptcy filing. The debtor, as I understood it, listed
12 the bank as an unsecured creditor. The bank apparently
13 did nothing until after there was a confirmed plan.

14 Is that how it usually occurs, that for, what
15 was it, 8 months here, the bank says absolutely nothing?

16 MR. WALKER: I think, Your Honor, it would be an
17 exaggeration to say what usually occurs because bankruptcy
18 sees it many ways.

19 Many times, secured creditors will act with
20 great vigilance and speed, and oppose confirmation. Many
21 times, creditors with security interests don't care about
22 a Chapter 13 plan, and will rely on their lien rights
23 consistent with a long body of case law which says those
24 liens are unaffected, so I would not --

25 QUESTION: So it didn't matter that the bank was

1 listed as an unsecured creditor. Since that was not, in
2 fact, the case, the bank could safely ignore it, that
3 characterization.

4 MR. WALKER: That's correct, Your Honor.

5 The only thing it affected is whether the bank
6 was going to be treated under the plan, and there was no
7 requirement that the bank seek to have itself treated
8 under the plan.

9 If the Court would --

10 QUESTION: I have one question that, it's --
11 probably you can answer it easily. 542(b) that you refer
12 us to says that an entity that owes a debt must pay the
13 debt to the trustee.

14 The bank didn't have the obligation to pay the
15 balance of this account to the trustee right away, did it?

16 MR. WALKER: No.

17 QUESTION: Well then, why does this -- I don't
18 see how this section enters in.

19 MR. WALKER: In Chapter 13, Your Honor, there's
20 a section which provides that the debtor is substituted
21 for the trustee in certain rights, and this would be one
22 of them.

23 QUESTION: All right.

24 MR. WALKER: With the Court's position, I'll
25 reserve my remaining time for rebuttal.

1 QUESTION: Mr. Estrada.

2 ORAL ARGUMENT OF MIGUEL A. ESTRADA

3 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

4 SUPPORTING THE PETITIONER

5 MR. ESTRADA: Thank you, Justice Stevens, and
6 may it please the Court:

7 The Bankruptcy Code expressly preserves a
8 creditor's right of setoff, but section 362 of the code
9 stays its exercise pending an orderly determination of the
10 debtor's and creditor's rights.

11 In our view, the court of appeals was wrong in
12 this case to conclude that the bank exercised its right of
13 setoff and thereby violated section 362 when it froze
14 respondent's bank account pending a judicial determination
15 of its rights.

16 That freeze was simply a refusal to pay a
17 contract debt that was consistent with the language and
18 the purpose of the automatic stay, and in our view, any
19 other conclusion in this case would render the right of a
20 setoff meaningless.

21 Let me start with the language of 362(a)(7) on
22 which the court of appeals relied. A freeze is not a
23 setoff under that provision, because subsection (a)(7)
24 stays the setoff of a prepetition debt. By using the word
25 setoff without further definition, Congress must have

1 intended to use the word in its ordinary common law
2 meaning, which is -- which is one that requires an overt
3 act in order to cancel the competing balances, and that
4 results in the record of that event.

5 QUESTION: Mr. Estrada, what would your view be
6 if Maryland passed a statute that said, an administrative
7 hold shall be a "setoff" as a matter of Maryland law?

8 MR. ESTRADA: Our view in this case would be
9 entirely identical, Justice Stevens, because in our view
10 for purposes --

11 QUESTION: You think setoff is defined as a
12 matter of Federal law.

13 MR. ESTRADA: Yes. For purposes of section 362
14 at least, we think it should and is a matter of Federal
15 law, and let me sort of get into that a little bit.

16 There is no question that the right that is
17 reserved by the code as a substantive matter under section
18 553 is one that is not conferred by bankruptcy law but it
19 is dependent in some underlying sorts of law that may be
20 Federal or State. In the cases in which we deal, it will
21 usually be a Federal right, either because of a statute or
22 because of Federal common law.

23 But for purposes of the stay, the language that
24 Congress chose indicates that Congress was intending to
25 cover certain classes of conduct that were pretty much to

1 be covered uniformly, and it cannot be, for example, that
2 a State that has a quirky law like the -- like
3 Pennsylvania had in one of the reported cases, for
4 example, saying that there was an automatic setoff, that
5 that would result in the violation of a stay without any
6 action on the part of the creditor as a matter of law.

7 As used in section 362, it seems to me more
8 sensible to read the language in its ordinary legal sense,
9 and therefore, until and unless a creditor takes some
10 affirmative act to credit and debit the offsetting
11 balances and to make a record of that event, a setoff has
12 not occurred.

13 By contrast, a freeze, like the stay itself,
14 merely maintains the status quo by conserving the
15 offsetting balances in the same State until there is a
16 judicial determination of the party's rights.

17 So it may well be that in some sense the freeze
18 itself is an affirmative act, but it's not one that is an
19 affirmative act in the sense that is relevant here.

20 QUESTION: But from the point of view of the
21 debtor, the effect is the same. You're describing
22 differences in accounting, in bookkeeping, for how you
23 mark the setoff as a permanent one, but from the debtor's
24 point of view it means, I have no access to this account.

25 MR. ESTRADA: That may well be, but we don't

1 think that that controls the interpretation of section
2 362, Justice Ginsburg, because --

3 QUESTION: With reference to 362, what does 362
4 conceivably achieve, then? I mean --

5 MR. ESTRADA: Oh, what it does is to try to keep
6 creditors from taking affirmative acts to improve their
7 status vis-a-vis the other creditors, and --

8 QUESTION: It seems to me the only affirmative
9 act that they care about is not paying the money. Isn't
10 that -- and that's achieved this way as effectively as by
11 doing what you call a full dress setoff.

12 MR. ESTRADA: Well, no, because what 362 does
13 not do, Justice Scalia, is that it is not a section for
14 the turnover or payover of -- for the turnover of property
15 or the payover of debts. If that were the case, then a
16 different section of the statute would have no point,
17 because section 542 deals specifically with the
18 circumstances under which a creditor must turn over
19 property to the debtor, or to pay over debts.

20 QUESTION: Under your theory, before you get to
21 that section, why wouldn't the bank be violating the
22 automatic stay provisions of (4), which is any act to
23 create or perfect or enforce a lien, or (6), any act to
24 collect, assess, or recover a claim? These are also just
25 incipient, inchoate, incomplete acts, and so they don't --

1 they're not prohibited by those particular sections.

2 MR. ESTRADA: Well, as to (4), it is not really
3 an act in the chain of enforcement of a lien as such. It
4 is not like the bank purporting to have a judicial sale of
5 any sort of property claimed by the debtor.

6 QUESTION: It's not creating -- it's not
7 creating the lien by the freeze?

8 MR. ESTRADA: No, because the lien was created
9 as a matter of law by section 506(a) of the Bankruptcy
10 Code, which gives --

11 QUESTION: And now that's (6), any act to
12 collect or assess --

13 MR. ESTRADA: Under section (a)(6), our answer
14 would be that as a matter of the structure of the code,
15 Justice Kennedy, it cannot be that where the act simply is
16 one of refusal to capitulate to a debtor's assertion of
17 rights and property that that's covered by the State,
18 because it would be entirely alien to our system for
19 Congress to have intended that anyone who's faced with a
20 demand by a debtor to property that is disputed most fold
21 his tents and go home, and that --

22 QUESTION: No, but in a literal sense, it is any
23 act, isn't it?

24 MR. ESTRADA: It is any act.

25 QUESTION: Sure. In a literal -- and you're

1 saying, you've got to recognize a literal infraction to
2 the extent necessary to preserve what is obviously
3 intended elsewhere to be a recognition of the setoff
4 right.

5 MR. ESTRADA: I agree with the first part of
6 your statement, Justice Souter, but not the second. It is
7 true that it is any act. However, the relevant question
8 is whether it is an act that violates the automatic stay,
9 and that --

10 QUESTION: Oh, I grant you. In other words, it
11 can literally fall within the term, and still not be a
12 violation.

13 MR. ESTRADA: It can literally fall within a
14 clause of the automatic stay, but that does not resolve
15 the question whether the rest of that section, read in
16 light of the other applicable sections of the code,
17 indicate that that isolated act was meant to be covered by
18 the language.

19 QUESTION: Mr. Estrada, I think it's even --
20 your argument is even stronger with respect to
21 subparagraph (3), to exercise control over property of the
22 estate, because the debt is property of the estate, isn't
23 it?

24 MR. ESTRADA: As the case comes to the Court, it
25 is conceded by the parties that the debt is property of

1 the estate.

2 QUESTION: And would you not agree that the
3 freeze is an exercise of control over that property?

4 MR. ESTRADA: Not within the intended meaning of
5 that section, Justice Stevens.

6 QUESTION: Saying --

7 MR. ESTRADA: And the answer --

8 QUESTION: We have to depart somewhat from the
9 plain language, I guess.

10 MR. ESTRADA: No, you do not, because as the
11 Court pointed out in *Timbers of Inward Forest*, the
12 question is not whether one of the lines or subsections in
13 the Bankruptcy Code, read in isolation, might lend
14 credence to a claim under the code, but whether that is a
15 reading that makes sense in light of the code as a whole.

16 And the plain meaning rule is not a rule of
17 reading isolated sentences in a statute, it is a rule of
18 reading the code in its entirety, and our submission here
19 is that on the facts of this case, where all a creditor
20 has done is to refuse to capitulate to a debtor's
21 assertion of rights and property so that he may present a
22 defense to a proper legal forum, the other provisions of
23 the code, the entire structure of the law makes the
24 reading that respondent suggests implausible.

25 QUESTION: Can I ask you a side issue, the side

1 issue being the State or Federal law. I'd worry about
2 having Federal law here simply because you start defining
3 the word setoff in this provision under Federal law, it
4 will have a spillover to other provisions, where surely it
5 should be State.

6 All the other things like liens are State, the
7 Bankruptcy Code's property definitions are primarily
8 State, and so why should we start saying it's Federal when
9 it sort of mucks up the Code, particularly when you don't
10 need to?

11 MR. ESTRADA: As I said, because in the context
12 of 362, that would make sense.

13 QUESTION: Yes, but you'd be parsing one thing
14 out of 362, where all of the other property definitions
15 are State, suddenly call this one Federal, and the word
16 setoff appears throughout the rest of the code, and you'd
17 say, oh, those are -- I mean, those are State, too, and we
18 don't need to do it.

19 MR. ESTRADA: Except that as used in section
20 362, the word setoff is not used to describe property but
21 to describe conduct, and in that context it makes sense to
22 deal with a uniform Federal definition, Justice Breyer.

23 Thank you.

24 QUESTION: Mr. Schlossberg.

25 ORAL ARGUMENT OF ROGER SCHLOSSBERG

1 ON BEHALF OF THE RESPONDENT

2 MR. SCHLOSSBERG: Justice Stevens, may it please
3 the Court:

4 In hearing the argument of counsel just now, I'm
5 struck that I think what's being argued for is a different
6 construct of a Bankruptcy Code than what Congress
7 intended.

8 It seems like I'm hearing that we're supposed to
9 have a creditor in possession, not a debtor in possession,
10 not a Chapter 13 debtor in possession, but that Congress
11 intended that the creditor is supposed to make the
12 determination as to when he may have a lien right and as
13 to when that lien right might well be satisfied by some
14 claim of setoff in some amount that they think is
15 satisfactory to satisfy their claim.

16 QUESTION: This claim is basically that banks
17 and other people like landlords have to be able to keep
18 the property temporarily, not pay the debt temporarily,
19 until they can run in and get the automatic stay lifted,
20 otherwise, as happened here, the person will run to the
21 bank and he'll withdraw all the money, and that's the last
22 they'll ever see of it. That's basically their argument.

23 They say if the word setoff means anything, they
24 have to have at least a temporary freeze, otherwise it's
25 meaningless.

1 MR. SCHLOSSBERG: Your Honor, two answers to
2 that. The one is with respect to the way that the bank
3 comes into the bankruptcy court. The bank can come into
4 the bankruptcy court under a provision crafted by
5 Congress.

6 Section 362(f) of the Bankruptcy Code says they
7 can come in and get ex parte relief from the order --

8 QUESTION: But that takes more than an hour,
9 doesn't it?

10 MR. SCHLOSSBERG: Yes, Your Honor.

11 QUESTION: I mean, and so during that hour, the
12 guy runs in and takes all the money out.

13 MR. SCHLOSSBERG: Your Honor, perhaps that's a
14 possibility. I would suggest, though, that the bank has
15 until its midnight deadline to respond. The midnight
16 deadline is the day after presentment of the check.

17 It does put a burden on the bank, there's no
18 question about that. I don't suggest for a moment that it
19 doesn't put a burden on the bank.

20 QUESTION: Well, what do you do with section
21 542(b)? You talk about the intent of Congress. Doesn't
22 Congress seem to want to preserve the ability of
23 individuals to use setoff rights?

24 MR. SCHLOSSBERG: Yes, Your Honor.

25 QUESTION: That ability is totally eliminated if

1 you don't allow this temporary freeze.

2 MR. SCHLOSSBERG: By no means, Your Honor. With
3 all due respect, what Congress has done in section 542(b),
4 it has said, to the extent that this may be set off under
5 section 553. This is a tip that we're supposed to go to
6 553, and 553 starts off and says, except as otherwise
7 provided in this section and in sections 362, nothing in
8 this title affects the right of setoff.

9 Section 362 when we go through it says, you
10 can't take any right to offset.

11 QUESTION: You give me an explanation that, I
12 mean, it makes sense, what should I say, physically, but
13 you might as well not have 542(b) if you're going to
14 follow that track. What good does 542(b) do you? You
15 tell me, essentially, none.

16 MR. SCHLOSSBERG: With all due respect, Your
17 Honor, I believe, Justice Scalia, that it does still give
18 protection to the bank, because it tells the bank there's
19 a way to protect your right of setoff but you have to be
20 vigilant.

21 Congress made a decision that there's two
22 parties here, there's the debtor, there's the creditor,
23 and somebody's got to be vigilant in here. Someone has to
24 come into court and ask their permission.

25 The creditor cannot arrogate to itself the right

1 to decide to be its own judge and jury as to the validity
2 of its claim or the validity of its setoff.

3 QUESTION: Well, it's not doing so. I mean, it
4 is putting itself in a position in which validity will be
5 determined when the time comes to adjudicate a request to
6 lift the stay. That's when validity is determined.

7 MR. SCHLOSSBERG: But in the meantime, Your
8 Honor, the bank in this case, the bank has denied to the
9 debtor the right to the use of his deposits, and that --

10 QUESTION: That's right, yes, but it is not a
11 final determination of validity. It is not the equivalent
12 of the final effectuation of the setoff by any means.

13 MR. SCHLOSSBERG: No, Your Honor, it's not the
14 final effectuation of the right of the setoff, but it's
15 certainly an interference with the debtor's right to use
16 his property --

17 QUESTION: Absolutely.

18 MR. SCHLOSSBERG: -- during the bankruptcy.

19 QUESTION: Absolutely.

20 MR. SCHLOSSBERG: And in fact, that's what
21 section 362 says that the court cannot -- excuse me, that
22 the creditor cannot do.

23 Section 362 gets pretty broad in its phrasing.
24 It operates as a stay applicable to all entities of, under
25 subsection (3), any act to exercise control over property

1 of the estate, under subsection (6), any act to collect,
2 assess or recover a claim, or (7), or the setoff of any
3 debt.

4 QUESTION: It's curious, isn't it, that the
5 setoff under (7) doesn't have the any act provision, does
6 it?

7 MR. SCHLOSSBERG: I was looking at that last
8 night, Your Honor, trying to reconcile it for myself, and
9 I think it's just in the drafting, because it says, the
10 setoff of any debt --

11 QUESTION: Well, it is in the drafting, but the
12 drafting occurs in a series in which it presents a
13 definite contrast, and it would suggest that perhaps any
14 act to effectuate the setoff is not meant to be prohibited
15 in the same sense that any act in these other contexts are
16 meant to be prohibited. That's a reading of the text,
17 isn't it?

18 MR. SCHLOSSBERG: That certainly is a reading of
19 the text, Your Honor, but it can't ignore the reading of
20 section (3), subsection (3), which says that also
21 proscribed is any act to exercise control over property of
22 the estate.

23 QUESTION: Absolutely. Absolutely, but if
24 you're going to read the sections together, which is what
25 we have to do in construing statutes, there's a pretty

1 darn good argument to say there that any act necessary but
2 not conclusive of effectuating the setoff is not
3 necessarily prohibited.

4 MR. SCHLOSSBERG: I understand Your Honor's
5 argument. I would suggest that the Court in Norton looked
6 to exactly this point, and suggested that there's a --
7 there's a trap in the setoff argument that until the third
8 step is taken, that is, that you actually note the books
9 to mark it off, it's not really a setoff.

10 Now, Norton was decided under Pennsylvania law,
11 but the court in Norton also said it's ridiculous to say
12 that we should wait around and that a creditor can make
13 you wait until they mark off the books, otherwise they
14 could hold their freeze in place forever, exclusively
15 within their control.

16 QUESTION: Well, not if you can get into court.
17 Of course they can't hold the freeze in place forever.

18 MR. SCHLOSSBERG: Well, until someone comes into
19 court.

20 QUESTION: Yes.

21 MR. SCHLOSSBERG: Should the debtor have to
22 come --

23 QUESTION: Yes. You can go into court and say,
24 I want the dough.

25 MR. SCHLOSSBERG: I want the dough because they

1 have taken the dough from me beforehand and said, I can't
2 use my property.

3 QUESTION: Absolutely, but I'm simply responding
4 to your statement that in fact the bank's autonomous act
5 could endure, in effect, indefinitely. It can't endure
6 indefinitely. There is a way of reconciling these two
7 competing kinds of claims.

8 MR. SCHLOSSBERG: My apologies. Of course, the
9 debtor can certainly bring this issue to the fore. The
10 question is, did Congress intend for the debtor to have to
11 bring this to the fore to use his very own property?

12 QUESTION: Right, and that is the serious
13 question to me, anyway, in this case, is it's not just
14 banks, or even just landlords.

15 Anybody, anybody might owe money to a bankrupt
16 company. You might, I might, we get bills every month,
17 and I refuse to believe, at least so far, that if the
18 company goes bankrupt I have to pay my bill no matter
19 what, even if I think they didn't deliver the merchandise.

20 I mean, I refuse to believe that the ordinary
21 person who owes somebody some money but has a claim
22 against that same person suddenly has to write out the
23 check and pay it just because the debtor went bankrupt.
24 That's why they put the word offset in here. That's why
25 you have an offset.

1 So we're trying to reconcile these provisions,
2 and it would help me if you'd explain why they just can't
3 be reconciled.

4 MR. SCHLOSSBERG: Your Honor --

5 QUESTION: Or -- yes.

6 MR. SCHLOSSBERG: I would like to explain why
7 these can be reconciled in the following context.

8 In the case we have presented here today, we
9 have a bank on the one hand, we have the Government on the
10 other. Let's just take what's special about their
11 particular debtor-creditor relationship, as opposed to the
12 garden variety contractor you were just talking about a
13 moment ago.

14 In the context of the bank, the bank has a
15 special debtor-creditor relationship. This Court
16 determined what that debtor-creditor relationship was back
17 in 1904 in the New York County Bank case cited in
18 petitioner's brief, interestingly, New York County Bank v.
19 Massey.

20 In that case, this Court held that the
21 relationship between the bank and its depositor is as
22 follows. The deposit of money by a customer with his
23 banker is one of loan, with the superadded obligation that
24 the money is to be paid when demanded by a check. It's
25 not just your ordinary variety contract. You pay me when

1 it's done, we do what we have to do. You have to pay me
2 when I draw a check.

3 QUESTION: Well, do you think the rule that
4 you're advocating is somehow different if the creditor
5 asserting some potential setoff is not a bank?

6 MR. SCHLOSSBERG: Your --

7 QUESTION: Is there a different rule?

8 MR. SCHLOSSBERG: If the creditor has a special
9 obliga --

10 QUESTION: I would think it would have to be the
11 same rule.

12 MR. SCHLOSSBERG: What I believe, Your Honor, is
13 that if there is a special obligation, an obligation by
14 contract, an obligation implied by court, or provided by
15 statute, as in the case of the Federal Government, then in
16 that event you can't, you the creditor can't unilaterally
17 deny the performance of that obligation.

18 QUESTION: But why isn't the goal of the
19 Bankruptcy Code here best achieved by creating a stalemate
20 until this issue of right to setoff is properly before the
21 bankruptcy court? You have to be able to create a
22 temporary stalemate so that the bankruptcy court gets to
23 decide it, otherwise it's too late.

24 MR. SCHLOSSBERG: Your Honor, it is a very
25 difficult situation that is presented, and it's presented

1 in all the cases. I don't suggest for a moment that
2 Congress wasn't presented with a difficult task when they
3 had to decide who's going to make this decision.

4 QUESTION: Well, they made a decision. They
5 tried to protect the right of setoff. I don't think it's
6 that difficult.

7 MR. SCHLOSSBERG: They in fact did, but they
8 said that you have to get relief from the stay before you
9 can set off, and to the extent that you need it in a
10 particular case, you can get ex parte relief.

11 QUESTION: Well, there wasn't a setoff, as yet.

12 Who provides the definition of setoff here, the
13 State or the Federal Government?

14 MR. SCHLOSSBERG: I believe it's a matter of
15 State law, Your Honor. I agree with Mr. Walker.

16 QUESTION: Getting back to Justice Breyer's
17 question, and it's the same thing Justice O'Connor's
18 touching on, suppose you have this wholesaler and
19 retailer, and they present -- they have accounts going
20 back and forth all the time for returned goods and so
21 forth, I take it from your earlier answer that if the
22 wholesaler owes, that has an offset and the retailer goes
23 bankrupt, the wholesaler can -- need not need to pay the
24 retailer's bill for returned merchandise.

25 MR. SCHLOSSBERG: I think that's correct, Your

1 Honor. I think that's consistent with the whole history
2 of setoff and bankruptcy.

3 QUESTION: All right. Now, the bank is
4 different, because it has a superadded obligation --

5 MR. SCHLOSSBERG: This Court's words.

6 QUESTION: -- to pay, but does -- that
7 superadded obligation is also defined by reference to the
8 bank's right to assert its secured claim, is it not?

9 MR. SCHLOSSBERG: Yes, Your Honor, but for the
10 fact that the bank's right to assert its secured claim by
11 way of setoff is conditioned by section 362(a)(7), and
12 their right to administratively freeze beforehand is
13 similarly conditioned by section 362(a)(3), certainly, and
14 section 362(a)(6).

15 QUESTION: Well, I guess we're right back where
16 we're started. I'm not sure what in the code gives the
17 bank -- puts the bank in any worse position, and then you
18 cite the Supreme Court case, and then I say, well, of
19 course there's -- that's subject to the setoff, and you
20 say, well, the setoff is controlled by 362, but it seems
21 to me that that puts the bank just on a par with any other
22 creditor.

23 MR. SCHLOSSBERG: Well, no, the bank's not on a
24 par with any other creditor, because the bank, remembering
25 also that any setting off creditor -- any setting off

1 creditor has got a stepped up, a jumped up status over any
2 other unsecured creditor.

3 Remembering that a setoff claim is, at its very
4 basis, nothing more than an unsecured claim, this is the
5 only unsecured claim that gets paid 100 cents on the
6 dollar in a bankruptcy case, because it gets offset
7 against the claim that the debtor has against that
8 creditor.

9 It gets paid 100 cents, and Congress has decided
10 that there's a little bit of an obligation, a little
11 conditioning, excuse me, that goes with that right to get
12 100 cents on the dollar instead of dimes on the dollar,
13 and that is, you've got to come into court first and ask
14 the court for permission to take your 100 cents.

15 QUESTION: But the other side is telling us
16 Congress didn't decide that. They're saying Congress
17 decided a different thing, which is quite simple, that
18 reconciles it.

19 They say if the bank or the landlord or you or I
20 are simply not offsetting, which requires an intent to
21 deprive the person permanently of the money, but rather
22 are simply holding it administratively until such a
23 determination can be made, that does not fit within State
24 law setoff, and that's what this code is after, and they
25 say that reconciles it. You give notice to show that your

1 intent is not to deprive the person permanently of the
2 money, your intent is simply to see that the
3 administrative determination is made, and that's how
4 they've come in and argued this.

5 Now, that's -- I'm trying to get you to focus on
6 that more than on, you know, the general language here,
7 which I think is ambiguous.

8 QUESTION: I will concede, Your Honor, that the
9 general -- the language in all these statutes we're
10 talking about are difficult to reconcile.

11 If I may just address one part of your question
12 there, you mentioned again the security deposits, and I
13 think I'd be remiss if I didn't point out why this is
14 particularly a red herring.

15 A security deposit is a deposit in which the
16 debtor does not have immediate rights. The debtor doesn't
17 have the immediate right to get back his security deposit.
18 It's held as security. It's locked up. It's just like
19 the secured credit card that's argued in the brief of one
20 of the amicus counsel, one of the bank counsel who have
21 argued that they have a secured credit card, and that if
22 you rule in favor of David Strumpf in this case, you will
23 somehow undermine their ability to give secured credit
24 cards.

25 The difference is, again, that security deposit

1 put up to the landlord, put up to the bank for the secured
2 credit card, does not have in it any right of the debtor
3 to take the money out at any time to draw on it by a
4 check. That's why that is not the same kind of situation
5 as is presented where, with Citizens Bank, they have a
6 superadded obligation to honor my checks when drawn, or,
7 in the instance of the Federal Government, when it has a
8 statutory obligation to refund overpayments made back to
9 the taxpayer.

10 Now, your garden variety creditor, the guy on a
11 contract, the two -- manufacturer you just talked about
12 and his vendee, do not have that same situation. There is
13 not a superadded obligation. There is not a statutory
14 imposition of an obligation to make a payment on a date
15 certain.

16 Now, that I see as a very important distinction
17 and difference between the two situations.

18 Your Honor, I submit that what we have in this
19 case is something of an Alice-in-Wonderland scenario. The
20 suggestion is made here, sentence first, verdict
21 afterwards. We'll seize the property first, then we'll
22 figure out if we have an entitlement to it. That's not
23 what Congress intended.

24 Congress set up a scheme for taking this theory
25 of setoff under consideration. It's a careful scheme.

1 It's one which requires a creditor to come into the
2 bankruptcy court and seek relief from the stay, ex parte
3 if necessary, get that relief, and then take the action
4 that they're entitled to take.

5 QUESTION: Could you tell me what -- how the
6 bankruptcy act would have a different effect from the
7 effect that you say it now has if section 542(b), the last
8 portion of it, were eliminated, except to the extent that
9 such debt may be offset under section 553 of this title.
10 Suppose that were just totally eliminated. Would not the
11 bankruptcy act do, without that, exactly what you say it
12 does with it?

13 MR. SCHLOSSBERG: With -- without that clause
14 involved, Your Honor --

15 QUESTION: What is the function, in other words,
16 that you assert that clause has?

17 MR. SCHLOSSBERG: That clause has a function
18 when brought before the court in the context of, let's
19 take the ex parte motion as suggested in Patterson. If
20 the ex parte motion is made, the bank can say, I bring
21 this money in, I'm paying it into court because I want to
22 offset it. I don't want to have to give it to the debtor
23 under section 542.

24 QUESTION: 553 would achieve that purpose,
25 wouldn't it?

1 MR. SCHLOSSBERG: That they have the right of
2 setoff?

3 QUESTION: Yes.

4 MR. SCHLOSSBERG: Yes, Your Honor, I think that
5 it would --

6 QUESTION: I think it would, too.

7 MR. SCHLOSSBERG: -- provide that to them as
8 well.

9 QUESTION: And therefore, I don't see anything
10 that this except clause does unless it does what the
11 petitioner here says.

12 MR. SCHLOSSBERG: Well, I think what it does,
13 Your Honor -- what section 542 says is, you've got to give
14 a debtor the property he needs to operate his estate from
15 day one. We're trying to keep businesses going. We're
16 trying to keep individual consumer debtors, such as David
17 Strumpf, able to make his mortgage payment and buy food,
18 so you've got to give him his property for this purpose.

19 You've got to turn it over to him, except to the
20 extent that you may have some other rights. Go over here
21 and look at section 553. Do you have some rights under
22 section 553? Yes, I do have some rights, but I can't get
23 those rights unless I go and get permission to exercise
24 them first.

25 QUESTION: But this is a turnover provision. It

1 says, you don't have to turn over except -- it has that
2 except clause, and you're saying, even with the except
3 clause, you have to turn over. Your only protection is,
4 at the end of the day, if you've brought it before the
5 bankruptcy court in the proper fashion, you will be
6 allowed your setoff.

7 MR. SCHLOSSBERG: Justice --

8 QUESTION: But to achieve that, all you need is
9 section 553. You do not need this special protection in
10 the except clause of 542(b).

11 MR. SCHLOSSBERG: Well, section 553 does not set
12 out any affirmative obligation on the bank to turn over
13 property. Section 553 sets out the bank's right to
14 protect its property.

15 QUESTION: Yes.

16 MR. SCHLOSSBERG: Section 542 without the clause
17 would say, you must turn over property -- all property
18 must be turned over to the debtor.

19 Now, what Congress is saying, reconcile these
20 two clauses together. That's why that it's included, 542
21 and 553 must be reconciled together.

22 And then again, Congress has said, but you can't
23 read section 553 in a vacuum. You have to read it and
24 reconcile it with section 362.

25 By including the last clause in section 542(b),

1 I believe Congress is directing that there is a
2 reconciliation to be made between 542 and 553, even though
3 they seem to be reconcilable if you take the clause out.

4 QUESTION: There would be no need for
5 reconciliation, because once you've gone in and had the
6 automatic stay to the extent that it operates against the
7 setoff eliminated, there's nothing more to be done. You
8 don't -- it seems to me you don't need 542(b), because
9 then the provision of 543 that has a prologue, except as
10 otherwise provided in 362, it would no longer apply. 362
11 would be no longer applicable.

12 You've gotten the stay eliminated insofar as
13 your ability to set off is concerned. 362 has no
14 application, and therefore you're entitled to assert your
15 setoff. All of that is achieved by section 553 alone.

16 MR. SCHLOSSBERG: Section 553 alone, with the
17 inclusion of the introductory clause --

18 QUESTION: Yes.

19 MR. SCHLOSSBERG: -- does, in fact, provide that
20 protection, but the question then becomes, what was the
21 obligation of the bank to turn over property? That is
22 then set out in section 542. I believe, Your Honor, that
23 we could resolve this issue without the inclusion of the
24 final clause in section 542(b). I concede that. However,
25 the difficulty in reconciling these provisions makes clear

1 that Congress intended that 542 -- read it with 553, not
2 just, take this one and we'll go see what it conflicts
3 with.

4 We've thought about this, they're telling to the
5 courts. Congress is saying, we have thought about this,
6 and you should bring these two together and reconcile them
7 in making a decision as to whether or not to permit a
8 setoff in any particular setting.

9 If Your Honors have no further questions, I'll
10 complete. Thank you, Your Honor.

11 QUESTION: Thank you.

12 Mr. Walker, you have about 2 or 3 minutes
13 remaining, about 3 minutes.

14 REBUTTAL ARGUMENT OF IRVING E. WALKER
15 ON BEHALF OF THE PETITIONER

16 MR. WALKER: Thank you, Justice Stevens.

17 Respondents liken an administrative hold to
18 seizing property. That is absolutely incorrect. This
19 Court recognized in Bank of Marin v. England that the
20 funds in the bank account belong to the bank, not the
21 depositor.

22 When the bank places an administrative hold on
23 the account, all it is doing is simply refusing to pay its
24 debt to the depositor to the extent of the right of
25 setoff.

1 There is no basis in the code, contrary to
2 respondent's position, to treat financial institutions
3 worse than every other class of creditors. Maryland law
4 certainly doesn't, and the respondent's answers to this
5 Court's questions today have been inconsistent, depending
6 on the question, and the only reconciliation of those
7 positions is that financial institutions are not entitled
8 to be treated, under the code, like other creditors, but
9 that is not the case.

10 The legislative history indicates that the
11 Congress thought about financial institutions and the
12 right of setoff, and they wanted to preserve it for a
13 policy reason. They didn't want banks to act
14 precipitously in anticipation of a possible bankruptcy and
15 by a setoff actually cause more bankruptcies to occur. If
16 the lower court's decision is upheld, it would have that
17 effect of encouraging precipitous action by banks.

18 This Court recognized in *Studley v. Boylston*
19 *National Bank*, that the doctrine of setoff is based on the
20 absurdity of making A pay B when B owes A. The Bankruptcy
21 Code does not require this Court to make that absurdity
22 the law of this land.

23 QUESTION: Mr. Walker, do you distinguish the
24 position of the bank in any way from the position that
25 Mr. Estrada was representing? That is, the position of

1 the IRS that has -- where the taxpayer is due a refund,
2 but on the other hand is alleged to owe the Government
3 money?

4 MR. WALKER: No, Your Honor. I believe they are
5 the same. Where there are mutual debts, assuming there
6 are mutual debts, both the Internal Revenue Service and
7 the bank would have a right under 542(b) to withhold
8 payment.

9 QUESTION: Under your theory of the case and the
10 interpretation, what happens if the bank is wrong about
11 its setoff?

12 MR. WALKER: They will be held liable under
13 section 362(h) in an appropriate case.

14 QUESTION: Would they be in contempt?

15 MR. WALKER: Yes, Your Honor. They would be in
16 contempt, subject to damages and attorney's fees. In
17 fact, the irony in this case is, after the bankruptcy
18 court granted my client, Citizens Bank, the right to
19 exercise its setoff, it was too late, because the bank had
20 already been sanctioned, and that's how we got here.

21 QUESTION: Would they be in contempt if they
22 acted in good faith, I mean, they just happened to be
23 wrong?

24 MR. WALKER: That is an interesting question.
25 In my own view, I would say that if the bank acted in good

1 faith, the bankruptcy court would have the discretion not
2 to hold them in contempt of court, but that would be up to
3 the bankruptcy court on a case-by-case basis.

4 If I have any time remaining, I would just
5 respectfully point out that section 363(a)(3), which does
6 have, indeed, broad language about exercising property of
7 the estate, does not prohibit a creditor from refusing to
8 pay a debt under section 542(b).

9 If there are no further questions, thank you
10 very much.

11 JUSTICE STEVENS: Thank you, Mr. Walker. The
12 case is submitted.

13 (Whereupon, at 11:55 a.m., the case in the
14 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:

CITIZENS BANK OF MARYLAND, Petitioner v. DAVID STRUMPF.

CASE NO: 94-1340

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

BY *Ann Marie Federico*

(REPORTER)