The Florida Bar v. F. Lee Bailey

MR. CHIEF JUSTICE: THE FIRST CASE ON THE COURT'S ORAL ARGUMENT CALENDAR FOR THIS THURSDAY IS THE FLORIDA BAR VERSUS BAILEY. MR. RISTOFF.

GOOD MORNING, YOUR HONOR.

MR. ROGOW, I THINK YOU ARE GOING TO PROCEED FIRST.

YES.

THANK YOU. IT IS NOT LISTED THAT WAY ON MY SHEET.

BRUCE ROGOW, DON BEVERLY AND BEVERLY POHL.

THE UNITED STATES, WHEN IT CONVEYED ITS TRUST --

LET ME START OFF, WHAT WAS THE AGREED-UPON FEE IN THIS, FOR THIS REPRESENTATION?

THERE WAS NO AGREED-UPON FEE.

THE MILLION DOLLARS THAT IS MENTIONED THAT WAS TAKEN IN THE, IN THIS MATTER THAT WAS PRESENTED TO JUDGE PAUL, THAT NEVER WAS AGREED-UPON FEE.

THAT IS NOT THE ISSUE IN THIS CASE, AND THAT WAS NOT THE AGREED-UPON FEE, AND AT PAGE 307 OF THE RECORD, MR. MILLER EXPLAINS WHAT THE ARRANGEMENT WAS. THE OFFER TO MR. BAILEY WAS EITHER TAKE, AND I AM READING FROM PAGE 307. "THERE WAS A CASH ACCOUNT THAT MR. BAILEY COULD HAVE. IT WAS EITHER 3.5 MILLION OR $6 MILLION, BUT AN ACCOUNT THAT WOULD BE MADE AVAILABLE IN LIEU OF THE STOCK, WHICH MR. BAILEY COULD USE, THAT ACCOUNT, TO GO AHEAD AND MANAGE THE PROPERTIES, AND ULTIMATELY, AT THE CONCLUSION OF THE CASE, JUDGE PAUL WOULD DECIDE ON THE FEES." AND SO THERE WAS A CHOICE, HERE THAT, THE GOVERNMENT CREATED. TAKE $3.5 MILLION OR $6 MILLION.

WHAT I AM TRYING TO UNDERSTAND FROM THIS IS THE BASIS FOR A CLAIM BY YOUR CLIENT THAT HE HAD A FEE INTEREST IN THIS STOCK, BECAUSE THAT --

BECAUSE THAT STOCK WAS GIVEN TO HIM, IN EXHIBIT G OF OUR BRIEF, THE TRANSFER LETTER, THAT STOCK WAS GIVEN TO HIM IN FEE SIMPLE AT THAT POINT, FOR TWO SIMPLE PURPOSES. ONE PURPOSE WAS TO MAINTAIN THE PROPERTIES THAT DID YOU BOCK HAD IN FRANCE -- THAT DUBOC HAD IN FRANCE, AND TO USE THAT IN ANY FASHION THAT HE -- IT WAS A GIFT.

I WOULDN'T CALL IT A GIFT. MR. BAILEY HAS RECOGNIZED AND ACKNOWLEDGED THAT THE PURPOSE OF THAT WAS TO MAINTAIN THE PROPERTIES, AND HE WAS TAKING THE RISK AS TO WHETHER OR NOT THERE WOULD BE MONEY LEFT. HE HAD A CHOICE. HE COULD HAVE TAKEN $3.5 MILLION OR $6 MILLION IN CASH, OR HE COULD HAVE TAKEN THAT STOCK, AND THE STOCK WAS GIVEN TO HIM BY THE GOVERNMENT, AND THEN HE WOULD MAINTAIN THE PROPERTIES IN FRANCE, AND THEN, AT THE END OF THAT, IF THERE WAS MONEY LEFT, HE WOULD REPORT, OF COURSE, HIS EXPENDITURES, AND JUDGE PAUL WOULD HAVE SET THE FEES, AND THERE MIGHT NOT HAVE BEEN ANY FEES, BECAUSE IF THE STOCK HAD DECREASED IN VALUE, HE SEND THE RISK. MR. MILLER CALLED IT, IN HIS OWN WORDS, A GAMBLE, AND HE ACKNOWLEDGED THAT MR.

BAILEY SEND THE RISK. IF THE VALUE OF THE STOCK WENT DOWN, BAILEY TOOK A LINE OF CREDIT WHICH HE PERSONALLY GUARANTEED, USING THE STOCK AS COLLATERAL, BUT HE WAS ON THE LINE FOR THAT MONEY.

DID HE REPORT THIS FOR INCOME PURPOSES?

HE DID AMEND HIS TAX RETURN LATER ON, WHEN IT WAS BROUGHT TO HIS ATTENTION THAT THAT WOULD BE TREATED, IN THE TAX CONSEQUENCE FORM, AS INCOME TO HIM. HE NEVER --

HOW MUCH LATER ON?

I DON'T REMEMBER THE EXACT DATE. IT WAS PROBABLY IN 1996. WHEN THE GOVERNMENT BEGAN TO CLAIM SOMETHING ABOUT THIS, THAT THIS WAS NOT GIVEN TO HIM THAT WAY. HE THOUGHT HE HAD THIS PROPERTY, IN ORDER TO USE IT FOR THE BENEFIT OF THE, THE MAINTENANCE OF THE PROPERTIES, AND THEN HE WOULD REPORT BACK TO JUDGE PAUL WHAT THOSE EXPENSES WERE, AND JUDGE PAUL WOULD SET A FEE.

THAT IS -- LET'S GO BACK TO WHERE YOU AND THE GOVERNMENT DIVERGE. YOU AGREE THAT THE $6 MILLION IN STOCK WAS GIVEN, AND THERE WAS AT LEAST TWO USES TO THAT STOCK. ONE WAS TO MAINTAIN THE PROPERTY AND THAT IS WHAT THE GOVERNMENT SAYS, AND THE SECOND IS THAT A FEE WOULD BE PAID OUT OF THAT STOCK.

IF THERE WAS ANYTHING LEFT, IN TERMS OF THE VALUE.

ONLY ON APPLICATION TO JUDGE PAUL AND HIS APPROVAL, CORRECT?

YES.

THE THIRD PART, WHICH IS WHERE WE GET INTO THE STICKY QUESTION HERE, IS THAT YOUR POSITION, AS I AM UNDERSTANDING, IS OR MR. BAILEY'S, IS THAT HE WAS STILL ACCOUNTABLE FOR THE ORIGINAL 6 MILLION, AND HE COULD HAVE BEEN REQUIRED TO PAY SOME OF IT BACK, SO IS THERE AT LEAST AT CONCESSION THAT THE $6 MILLION IN STOCK WAS, IF THERE WAS ANYTHING LEFT OF THAT 6 MILLION, THAT IS AFTER FEES, THE FEES AND AFTER THE LETTER?

THE FEE, JUSTICE PARIENTE --

SO THE FEE TO ME, AT LEAST WHERE I AM HAVING A PROBLEM, HOW IS THE SAME AS SAYING IT WAS GIVEN TO ME IN FEE SIMPLE, AND I COULD HAVE DONE WHATEVER I WANTED WITH THE STOCK, AFTER I MAINTAINED THE PROPERTY. IN OTHER WORDS ISN'T THERE AN AGREEMENT, IN THE NATURE OF A TRUST, WHICH, THEN, PUTS INTO PLAY, BECAUSE WE ARE HERE ON GRIEVANCE PROCEEDINGS, MANY OF THE RULES REGARDING THE FLORIDA BAR TRUST ACCOUNTS AND ACCOUNTING FOR TRUST ACCOUNTS.

HE HAD TWO DUTIES. MAINTAIN THE PROPERTY. REPORT THE EXPENSES. GO BACK TO JUDGE PAUL FOR A FEE. OTHER THAN THAT, THAT STOCK WAS TRANSFERRED TO HIM WITHOUT ANY RESTRICTIONS. HE TOOK ALL OF THE RISK, WITH REGARD TO THAT STOCK. IF IT WENT DOWN TO NOTHING, THERE WAS NO FEE. HE TOOK A PERSONAL LINE OF CREDIT THAT HE WAS LIABLE FOR, AND HE FINANCED, THEN, THE MAINTENANCE OF THE PROPERTIES THROUGH THAT. HE COULD DO WHATEVER HE WANTED WITH THAT STOCK, BECAUSE THAT WAS THE NATURE OF THE TRANSFER.

SO THERE ARE THREE WAYS THAT SOMEONE CAN COME INTO POSSESSION OF SOMEONE ELSE'S PROPERTY, AND THAT IS IT CAN EITHER BE EARNED AS A FEE OR IT COULD BE A GIFT OR IT COULD BE IN TRUST. NOW, IF FEES ARE NOT EARNED, THEN, UNDER OUR RULES, HOW CAN IT BE, AS IN FEE SIMPLE, IT WOULD HAVE TO EITHER BE A GIFT OR IN TRUST, OR IS THERE SOME OTHER FORM THAT A LAWYER CAN COME INTO POSSESSION OF SOMEBODY ELSE'S PROPERTY?

JUSTICE WELLS, I THINK THE QUESTION IN THIS CASE IS, IS THERE CLEAR AND CONVINCING EVIDENCE THAT BAILEY KNEW THAT THERE WAS A TRUST AGREEMENT AND THAT BAILEY WILLFULLY VIOLATED THE TERMS OF THAT TRUST AGREEMENT. I MEAN, THE RECORD IS CLEAR ABOUT WHAT HAPPENED HERE, THAT THE ONLY WRITTEN EVIDENCE IS THE TRANSFER, WITHOUT RESTRICTION, OF THAT MONEY TO BAIL'S ACCOUNT, AT CREDIT SUISSE IN GENEVE A THAT IS CLEAR AND DOESN'T SAY ANYTHING AT ALL ABOUT TRUST, AND IT IS INTERESTING THE GOVERNMENT KNEW HOW TO SAY "TRUST", BECAUSE IN THE TRANSCRIPT AT PAGE 414, YOU WILL SEE THAT THE GOVERNMENT ACKNOWLEDGES THAT, IN OTHER STOCK TRANSFERS FROM HONG KONG CORPORATIONS, THEY PUT IN MR. BAILEY AS TRUSTEE, AND WHAT I AM COMING TO IS, IN ORDER TO TAKE THE BAR'S POSITION, THE BAR HAS TO ESTABLISH, BY CLEAR AND CONVINCING EVIDENCE, THAT, A, THERE WAS A TRUST OF SOME SORT, AND, B, THAT BAILEY KNEW THAT THERE WAS A TRUST AND CLEARLY AND CONVINCING TLI ESTABLISHED TO THIS COURT -- AND CLEARLY AND CONVINCINGLY ESTABLISHED TO THIS COURT AND VIOLATED THE TERMS OF THAT, AND ON THIS RECORD THERE IS NO CLEAR AND CONVINCING EVIDENCE. AND WHAT WE ARE LOOKING AT IS THEY WANT TO DISBAR F. LEE BAILEY. WHAT WE ARE LOOKING AT IS WHAT IS THE EVIDENCE THAT WOULD JUSTIFY THIS ULTIMATE SANCTION, AND IT ALL STEMS FROM THE TRUST THAT THEY HAVE ALLEGED OCCURRED.

HAVEN'T YOU, THOUGH, IN EFFECT, OUTLINED WHAT IS DE FACTO A TRUST, IN TERMS OF THE WAY THAT YOU ESTABLISHED THE CONDITIONS OF THE FUNDS OF THE TRUST.

HE COMPLIED.

LET'S AGREE. YOU HAVE ESTABLISHED THAT THOSE FUNDS WERE NOT GIVEN THOMAS A FEE. IS THAT CORRECT?

THEY WERE NOT GIVEN TO HIM AS A FEE, BECAUSE HE SAID JUDGE PAUL WOULD ULTIMATELY HAVE TO APPROVE THE FEE.

REGARDLESS OF WHAT HE SAID, YOU AGREE THAT THIS RECORD SUPPORTS A CONCLUSION THAT THOSE FUNDS WERE NOT GIVEN TO HIM AS A FEE. IS THAT -- THAT IS A CONCESSION, IS IT NOT?

IT WAS NOT A FEE.

SO HE DIDN'T RECEIVE A FEE THAT HE COULD, THEN, JUST FREE USE AS HIS OWN, IN ANY, IN A WILLY-NILLY, IN ANY WAY. IS THAT CORRECT?

NO.

YOU AGREE WITH THAT?

I DO NOT, JUSTICE ANSTEAD. HE RECEIVED 296,000 SHARES OF BIO CHEM STOCK, TO USE FOR PURPOSES OF MAINTAINING THE PROPERTY.

THAT IS WHY I SAY AREN'T YOU DESCRIBING A TRUST? EVEN UNDER YOUR VERSION OF WHAT THIS MONEY WAS GIVEN TO HIM, THERE WERE CONDITIONS ON IT, AND ONE, AND WE START WITH THE PROPOSITION THAT IT WAS NOT HIS FEE. IS THAT RIGHT?

IT --

IF IT WASN'T HIS FEE, OKAY, IN TERMS OF HIS INTEREST IN THESE FUNDS, DO YOU AGREE HE HAD NO INTEREST IN THOSE FUNDS, THEN OTHER THAN MAINTAINING THE PROPERTIES, EVEN UNDER YOUR VERSION OF THE FACTS?

NO. I DO NOT AGREE.

WHAT OTHER -- IN OTHER WORDS CONDITIONS OR RESPONSIBILITIES DID HE HAVE. IT IS NOT HIS MONEY AS A FEE. YOU SAY IT IS NOT A GIFT MADE TO HIM. OKAY. IT WAS GIVEN TO HIM CONDITION CONDITIONALLY, AND THAT IS THAT HE COULD ONLY USE IT FOR CERTAIN THINGS. REPEAT, AGAIN, YOUR POSITION OR HIS POSITION AS TO WHAT THE CERTAIN THINGS WERE THAT HE COULD DO WITH THE FUNDS.

AND THIS IS WHAT THE CLEAR AND CONVINCING EVIDENCE IS. THAT THEY GAVE HIM THE 600,000 SHARES OF THE STOCK, THAT HIS DUTY WAS TO MANAGE AND MAINTAIN THE PROPERTIES, TO REPORT THE COST OF DOING THAT ULTIMATELY, AND, IF ANYTHING WAS LEFT, IF ANYTHING WAS LEFT FROM THE VALUE OF THE SHARES, JUDGE PAUL WOULD ARRIVE AT THE FEES, BUT THERE MIGHT HAVE BEEN NOTHING LEFT. IF THERE WAS NOTHING LEFT, THEN BAILEY WAS OUT EVERYTHING. SO HE HAD THIS MONEY, AND HE HAS SAID IT. I MEAN HIS OWN LANGUAGE IN THE LETTERS TO JUDGE PAUL MAKE IT CLEAR THAT HE RECOGNIZED HE HAD A REPORTING RESPONSIBILITY, BUT HE DID NOT USE THAT MONEY. HE TOOK A PERSONAL LINE OF CREDIT. THE STOCK WAS THERE. THE STOCK WAS SECURE, IN TERMS OF THE $5.8 MILLION THAT HE WAS GOING TO BE ULTIMATELY REPORTING BACK TO JUDGE PAUL ABOUT, IF, INDEED, THERE WAS ANYTHING LEFT.

SEE, YOUR POSITION IS THAT THIS STOCK WAS SO RISKY THAT, REALLY, THE IDEA THAT IT COULD GO UP TO THE 20 MILLION, 18 MILLION, THAT IT WAS NOT CONTEMPLATED AT THE TIME THE PARTIES TRANSFERRED IT TO HIM?

THE GOVERNMENT SAID TAKE THE CASH. YOU CAN HAVE THE CASH. BAILEY SAID "I WILL TAKE THE RISK"!

I THOUGHT THAT BOTH THE CLIENT AND JUDGE PAUL SAID THAT THE REASON THAT THE STOCK WAS KEPT WAS TO SELL THIS LARGE AMOUNT AT THIS TIME, WITH THE VALUE OF THE STOCK, AND THIS WAS TO HIS CLIENT'S INTEREST TO MAINTAIN THE STOCK, SO THAT IT WOULD APPRECIATE IN VALUE, SO THAT HIS CLIENT HAD PAYMENT BENEFIT OF APPRECIATEED ASSET, WHICH WAS THE WHOLE IDEA OF TRYING TO GIVE THE GOVERNMENT AS MUCH IN THE WAY OF ASSETS. WHAT ABOUT THE CLIENT IN ALL OF THIS? ISN'T THERE AT LEAST A SELF-DEALING CONFLICT OF INTEREST THAT IS CREATED BY THIS WHOLE ARRANGEMENT, THAT THERE IS NO EVIDENCE THAT THE CLIENT KNEW ABOUT IT?

THE CLIENT DID KNOW ABOUT T THE CLIENT WAS THE ONE THAT SIGNED THE LETTER THAT WAS PREPARED BY THE GOVERNMENT AND TYPED BY THE GOVERNMENT, TO TURN THIS STOCK OVER TO MR. BAILEY'S CREDIT SWISS ACCOUNT WITHOUT ANY RESERVATION. THE GOVERNMENT HAD A CHOICE. IT WAS ULTIMATE LOU BAILEY'S. -- WAS ULTIMATELY BAILEY'S. THE -- BAILEY HAD THE CHOICE TO TAKE THE STOCK OR TAKE THE CASH. IF HE HAD SOLD THE STOCK THE NEXT DAY, AND HE COULD HAVE SOLD THE STOCK THE NEXT DAY. THERE IS NO QUESTION THAT, PIE VIRTUE OF THAT TRANSFER, THAT STOCK WAS -- THAT, BY VIRTUE OF THAT TRANSFER, THE STOCK WAS SOLD THE NEXT DAY.

YOU ARE INTO YOUR REBUTTAL.

MAY IT PLEASE THE COURT. FOR JOINT COUNSEL AND COME COUNSEL IN THE CASE, YOUR HONORS IN THIS CASE THE BAR REPORTED A DETAILED REPORT OF THE REFEREE, WHO, IN GREAT DETAIL, SET FORTH THAT HE WAS GUILTY OF MISAPPROPRIATION, CONFLICT OF INTREST, MISREPRESENTATION TO THE COURT, MISREPRESENTATION TO HIS CLIENT, CONFLICT OF INTEREST WRITING EXPARTE LETTERS AND COMMINGLING. THE REFEREE SIMPLY DID NOT BELIEVE MR. BAILEY'S POSITION. IT IS CLEARLY SET FORTH IN THE REPORT OF THE REFEREE. SHE DETAILED IT WITH REFERENCES TO THE EXHIBITS, AS WELL AS THE TESTIMONY IN THIS CASE.

COULD YOU, IN TERMS OF LOOKING AT THE FACTS FOR US, SO THAT WE DON'T GET DOWN TO THIS

BEING A SWEARING MATCH BETWEEN PEOPLE WHERE THERE IS NOT ANYTHING IN WRITING, DO YOU HAVE CAN YOU GIVE US THE SAILIENT DOCUMENTARY FACTS THAT SHOW THAT EVEN IF IT IS TRUE, MR. BAILEY'S OWN WORDS, THAT THERE WAS, IN FACT, A TRUST CREATED WITH THE AGREEMENT WITH THE GOVERNMENT?

I WILL ATTEMPT TO DO THAT, BUT IT IS CRITICAL, IN TERMS OF THE SWEARING CONTEST, IF YOU WILL, BECAUSE THE JUDGE IN THAT CASE, THE REFEREE, OBVIOUSLY HAS TO DETERMINE THE CREDIBILITY OF THE PARTIES. IN THIS CASE THERE WERE FIVE U.S. ATTORNEYS WHO HAVE TAKEN A POSITION. MR. BAILEY'S CO-COUNSEL IN THE CASE, MR. SHOW HAT AND MR. -- MR. SHOHAT AND MR. BOB SHAPIRO ALL SHOWED CRITICAL EVIDENCE OF THE TRUST. THIS IS CRITICAL TO THE PARTIES, BECAUSE THE TRANSACTION WAS AN ORAL TRANSACTION. ALSO IN THIS CASE, IT IS SIGNIFICANT THAT MR. DUBOC, HIS CLIENT, ALSO THOUGHT THERE WAS A TRUST. THESE TRANSACTIONS AND THESE CONVERSATIONS EMANATED DURING A DEBRIEFING, ON APRIL 25 AND 26 OF '94, TO THESE CONVERSATIONS AND THE TESTIMONY OF THE PARTIES THAT ARE EXTREMELY RELEVANT TO WHETHER OR NOT THERE IS A TRUST AND THE TERMS OF THIS TRUST. VERY PERSUASIVELY, AT A PRE-PLEA ON MAY 17 OF '94, THE PARTIES GO IN BEFORE JUDGE PAUL AND BASICALLY TELL JUDGE PAUL WHAT THE DEAL IS GOING TO BE. JUDGE PAUL IS ADVISED OF THE TERMS OF THIS TRUST AND RATIFIES THE AGREEMENT. SO THAT THE TESTIMONY OF THE WITNESSES CAN'T BE DISCOUNTED. IT IS EXTREMELY IMPORTANT. THERE IS A NUMBER OF DIFFERENT THINGS, IN TERMS OF WHY MR. BAILEY'S TESTIMONY IS NOT BELIEVABLE, AGAIN, COMING FROM MR. BAILEY'S OWN TESTIMONY.

YOU CAN SEE, FROM OUR QUESTIONS, THAT WE OBVIOUSLY HAVE GREAT CONCERN THAT A LAWYER WOULD ALLOW A TRANSACTION LIKE THIS TO GO DOWN, WITHOUT A MORE PRECISE ARRANGEMENT, AND THAT OBVIOUSLY IS ONE OF THE CLOUDS OVER THIS CASE. CAN YOU GIVE US SUCCINCTLY, WHAT THE BEST EXPLANATION IN THE RECORD IS, OF WHY THE FEDERAL GOVERNMENT, ACTING THROUGH A NUMBER OF LAWYERS HERE, WOULD ALLOW A TRANSACTION TO GO DOWN LIKE THIS. WITHOUT MORE EXPRESS AGREEMENTS IN WRITING OR EVIDENCE OF WHAT THE ACTUAL TRANSACTION WAS.

I THINK --

WHAT IS THE BEST EXPLANATION IN THE RECORD?

I THINK THE BEST EXPLANATION, IT WAS PURPOSEFUL. I THINK ALL OF THE PARTIES DID NOT WANT TO HAVE A PAPER TRAIL. MR. ATCHISON'S TESTIMONY WAS THAT, WHEN THEY WERE PREPARING THESE TRANSFERS, THEY WERE ACTUALLY CONCERNED THAT, BECAUSE THERE WAS CODEFENDANTS STILL AT LARGE, THAT THESE CODEFENDANTS MIGHT LEARN OF THESE TRANSACTIONS, AND THAT THESE TRANSFERS WERE BEING MADE AND BLOW THE WHOLE DEAL. THEY PURPOSE USFULLY DID. IN FACT, MR. BAILEY WAS PROUD OF THE FACT THAT IT WASN'T COMMEMORATED IN WRITING, SO I THINK IT WAS A PURPOSEFUL SITUATION. MR. MILLER'S TESTIMONY AT THE TRIAL WAS HE DIDN'T EVEN THINK TO PUT IT IN WRITING FOR THE SAKE OF COMMEMORATING IT, BECAUSE HE DID NOT THINK, IN A MILLION YEARS, MR. BAILEY WOULD GO INTO JUDGE PAUL AND TELL HIM HE WAS GOING TO HOLD THE PROPERTY IN TRUST AND TURN AROUND AND PUT IT IN HIS OWN POCKET, SO THE QUESTION, IF IT WAS PURPOSEFUL, TO A GREAT EXTENT, BUT BASICALLY THEY DIDN'T THINK JUDGE PAUL WOULD BE TOLD THAT BY MR. BAILEY AND THEN HE WOULD GO AHEAD AND PUT IT IN HIS POCKET, SO I THINK THERE IS REFERENCE TO THAT.

WOULD YOU GO ON WITH THE BAR LITIGATION AND THE CONTINUING LITIGATION AND -- WITH THE BAR ACTION AND THE CONTINUING LITIGATION AND THE COURT PROCEEDINGS AND WHAT IS GOING TO HAPPEN HERE AND WHAT MAY MAY HAPIN THE FUTURE AFTER TODAY?

JUDGE, I DON'T THINK THE CLAIMS IS CONTROLLING FOR THIS COURT. IF THERE ARE SIMILAR

FACTS, OBVIOUSLY BECAUSE OF THE TRANSACTIONS BEING SIMILAR, THE ISSUES IN THAT CASE ARE DIFFERENT. MR. BAILEY IS ARGUING A BREACH OF CONTRACT IN THAT CASE. IN FACT, THE COURT CLAIMS THERE WAS A MOTION TO DISMISS, AS PART OF THE RECORD IN THIS CASE, IN WHICH THE MOTION TO DISMISS BY THE GOVERNMENT WAS DENIED. THE COURT OF FEDERAL CLAIMS JUDGE SAID THAT SHE WASN'T GOING TO DETERMINE QUESTIONS OF REASONABLENESS OF ATTORNEYS FEES. IT SIMPLY IS ON A BREACH OF CONTRACT. AND THAT IS NOT THE CASE HERE. WE ARE NOT TALKING ABOUT A BREACH OF CONTRACT. WE ARE TALKING ABOUT A LAWYER WHO HAS MISAPPROPRIATED MONIES AND VIOLATED BAR RULES, SO THE BAR RULES ARE WHAT IS SIGNIFICANT IN THIS CASE.

HAS THAT COURT ACTION CONCLUDED?

THERE HAS BEEN A TRIAL BUT IT HASN'T CONCLUDED. NO DETERMINATION.

THE JUDGE HAS NOT ISSUED A ORDER YET BUT IT HAS CONCLUDED, INSOFAR AS PRESENTATION OF EVIDENCE AND ARGUMENTS?

THAT IS MY UNDERSTANDING. SEVERAL WEEKS AGO.

LET ME ASK YOU WHAT THE BAR'S POSITION IS ON, LET'S TREAT IT HYPOTHETICAL. SOMEBODY IS EITHER CHARGED OR KNOWS THEY ARE TO BE CHARGED WITH A CRIME, GOING TO BE CHARGED WITH A CRIME. THEY GO INTO A LAWYER'S OFFICE, AND SAY HERE IS A CHECK FOR $100,000. NOW, WE DON'T KNOW, AND THE LAWYER SAYS, WELL, I DON'T KNOW EXACTLY HOW MUCH THIS FEE IS GOING TO BE, AND IT WILL BE DETERMINED LATER. NOW, WHAT IS THE BAR'S POSITION ON WHAT THE LAWYER IS TO DO WITH $100,000.

JUSTICE WELLS, AS YOU SUSSINKTLY SAID WHAT THE BAR'S POSITION WAS, WHEN YOU WERE ASKING MS. ROGOW WHAT YOU DO WITH THOSE FUNDS. IF A LAWYER TAKES FUNDS, AND IT IS A NONREFUNDABLE FEE WHERE IT IS PAID TO HIM IN CASH, THOSE MONIES BELONG TO THE LAWYER. IF THE LAWYER TAKES A RETAINER TO BE DRAWN OFF THAT RETAINER, THOSE MONIES ARE TO BE HELD IN TRUST.

IS THERE A RULE THAT DISCUSSES THAT?

YES, SIR. 4-1.15 AND 511. MONIES ENTRUSTED TO A LAWYER FOR A SPECIFIC PURPOSE ARE TO BE USED FOR THAT PURPOSE. THE OPINIONS ACTUALLY SPEAK MORE IN TERMS OF WHAT THE COURT HAS ASKED. THERE IS AN EPICS OPINION THAT TALKS ABOUT REFUNDABLE FEES AND NONREFUNDABLE FEES. THOSE ARE THE APPLICABLE BAR RULES, IF IN TERMS OF TRUST FUNDS.

IN TERMS OF THIS OTHER ACTION THAT IS GOING ON, I GUESS THE CONCERN THAT WE WOULD HAVE IS THAT WE UNDERSTAND THAT WE DON'T REWEIGH THE CREDIBILITY OF THE WITNESSES, BUT WE ARE HERE TO DECIDE A VERY SERIOUS MATTER. THAT IS WHAT THE APPROPRIATE DISCIPLINE IS FOR A LAWYER, AND THE BAR IS NOT ONLY ASKING FOR DISBARMENT BUT PERMANENT DISBARMENT, SO IN DECIDING WHAT THE APPROPRIATE PENALTY IS, THAT IS WHY I WAS ASKING YOU DETERMINE IS, IF MR. BAILEY WAS GIVEN THIS $6 MILLION AND NOT ALL OF IT FOR FEES, IS IT THE BAR'S POSITION THAT THAT WOULD BE A SERIOUS TRUST ACCOUNT VIOLATION, IF PART OF THAT MONEY EVEN IF THE REST OF IT MAY HAVE BEEN IN SOME WAY FOR SOME OTHER REASON THAT, IT WAS GOING TO BE, I GUESS, A CONTINGENCY FEE OR SOMETHING FOR THE APPRECIATED VALUE. IS THAT IN VIOLATION OR ARE THERE OTHER VIOLATIONS? THE EXPARTE LETTER? ARE THOSE SERIOUS ENOUGH TO WARRANT THE PUNISHMENT THAT THE BAR SEEKS, IF ANOTHER FACT FINDER, FOR EXAMPLE, WERE TO FIND THAT PROPERLY?

I WOULD SUBMIT TO YOU THAT THE CONFLICT OF INTEREST IS EQUALLY AS EGREGIOUS AS THE MISS APPROPRIATION. WHAT MR. BAILEY, DID WHEN HE PUT THAT MONEY IN HIS POCKET, HE DEPRIVED MR. DUBOC OF WHAT THEY HAD SET FORTH IN THAT TRUST AGREEMENT TO DO.

MR. RISTOFF, IF YOU ARE GOING TO DIVIDE YOUR TIME, I THINK YOU BETTER BE MINEDFUL OF IT.

I WILL CONTINUE ON, THEN, AND I WILL SIT DOWN. WHAT MR. DUBOC UNDERSTOOD AND THE GOVERNMENT UNDERSTOOD IS THAT ANY APPRECIATION IN THAT STOCK WOULD IN YOU ARE TO MR. -- WOULD IN YOUR TO MR. DUBOC -- WOULD INURE TO MR. DUBOC'S BENEFIT. THAT WOULD BE AT THE TIME OF SENTENCING, BUT WHEN MR. BAILEY DECIDED TO PUT THAT MONEY IN HIS OWN POCKET, HE WAS IN ABSOLUTE CONFLICT WITH THE CLIENT. THAT IS CLEARLY AS BAD AS THE MISAPPROPRIATION. THANK YOU FOR YOUR TIME.

MR. SCHMIDT.

MAY IT PLEASE THE COURT. WHAT WOULD HAVE HAPPENED, IF, ON JANUARY 1, 1996, THE BIO CHEM-PHARMA STOCK HAD GONE TO ZERO, AS MR. BAILEY POSITS IN HIS BRIEF, HE WOULD HAVE BEEN BEREFT OF FEES, AS HE HE SAYS, BUT HE WOULD HAVE ALREADY TAKEN $3.5 MILLION OUT OF THAT STOCK FUND. THERE WOULD HAVE BEEN NO MONEY LEFT. THE FRENCH PROPERTIES WOULD STILL HAVE TO BE MAINTAINED AND LIQUIDATED, AND MR. BAILEY WOULD HAVE BEEN BROKE. BECAUSE THAT IS WHERE HE WAS, IN JANUARY 1996, WHEN HE WAS ORDERED TO RETURN THE STOCK. IT DOESN'T MATTER TO ME WHETHER THE COURT ACCEPTS HIS VERSION OR THE BAR'S. HE HAD A DUTY TO SEGREGATE AND PROTECT $5.9 MILLION IN WHAT HE CALLED VALUE, WHICH HE ADMITS WAS ENTRUSTED TO HIM. HE ADMITS HE HAD IT IN THE NATURE OF A TRUST. AND HE ADMITS HE HAD A DUTY TO ACCOUNT FOR IT. NOW, IN TERMS OF WHAT THE CONTEMPORANEOUS EVIDENCE IS, MR. RISTOFF HAS TOLD YOU, IT WAS IN FACT, THE TESTIMONY IN THE RECORD IS THAT IT WAS MR. BAILEY'S% SWAINGS ABOUT THE CANADIAN -- PERSUASION ABOUT THE CANADIAN'S AUTHORITIES'ABILITY TO GET INTO -- ABOUT THE CANADIAN AUTHORITIES' ABILITY TO GET INTO THE RECORDS, COUNT ONE IN THIS CASE INVOLVES THE JAPANESE STOCK, AND IF THE COURT WOULD LOOK AT EXHIBITS EIGHT AND PAGE 5 OF EXHIBIT 9, YOU WILL SEE THAT MR. DUBOC, WHO IS THE ONE THAT PREPARED THESE TRANSFER DOCUMENTS, USED SUBSTANTIVELY IDENTICAL LANGUAGE TO TRANSFER THE SQLAP KNEES STOCK TO -- -- TRANSFER THE JAPANESE STOCK AND THE STOCK IN SWITZERLAND. MR. BAILEY ADMITS THAT THE JAPANESE STOCK WAS TRANSFERRED TO HIM FOR ONE PURPOSE AND ONE PURPOSE ONLY, TO LIQUIDATE IT, HOLD THE MONEY TRUST FOR THE GOVERNMENT AND SEND THE PROCEEDS TO THE GOVERNMENT, SO THE IDEA THAT THE BIO CHEM-PHARMA STOCK DOESN'T REFER TO MR. BAILEY AS A TRUSTEE OR DOESN'T SAY HE IS HOLDING IT IN TRUST, AND THAT IS PROOF THAT IT WAS NOT TO BE HELD IN TRUST, IS TOTALLY INCONSISTENT WITH THE WAY MR. DUBOC, MR. BAILEY, AND THE GOVERNMENT HANDLED THE JAPANESE STOCK, WHICH MR. BAILEY ADMITS HE HELD IN TRUST.

WHEN WAS JUDGE PAUL FIRST MADE AWARE OF THESE ARRANGEMENTS OR WHAT WAS HIS KNOWLEDGE OF THESE ARRANGEMENTS?

I BELIEVE THE DATE -- I AM TERRIBLE ON DATES, YOUR HONOR, BUT I BELIEVE THE DATE WAS MAY 17, 1994, AND I DON'T BELIEVE THAT THERE IS A JUDGE OR A LAWYER IN THIS COURTROOM THAT WOULD BELIEVE THAT MR. BAILEY COULD HAVE GONE TO JUDGE PAUL ON THAT DATE AND EXPLAINED THIS CONCEPT, BY WHICH HE WAS TO RECEIVE $5.9 MILLION OF STOCK, IN FEE SIMPLE, BUT SUBJECT TO AN ENTRUSTMENT AS TO THE VALUE OF THAT STOCK, WITH A DUTY TO ACCOUNT FOR IT BUT A RIGHT TO APPRECIATION THAT HE COULD TAKE ANYWHERE ALONG THE WAY, EVEN THOUGH ANY FEES HE TOOK WOULD BE SUBJECT TO COURT APPROVAL. THAT IS A PREPOSTEROUS PROPOSITION. AND NO FEDERAL JUDGE WOULD ACCEPT IT IN A CASE LIKE THIS, AND JUDGE PAUL DID NOT ACCEPT IT WHICH IS WHY, WHEN WE ARE TALKING ABOUT DOCUMENTATION OF THIS AGREEMENT OF THIS RELATIVELY UNDOCUMENTED AGREEMENT, I CAN TELL YOU THERE IS A LETTER IN THE RECORD, AND IF I COULD FIND MY NOTE, I WOULD GIVE YOU THE DATE OF IT. IT IS IN THE FIRST 100 PAGES. IT IS A REFERENCE TO A LETTER FROM ED SHOHAT TO TOM CURL I KNOW, THE ASSIST -- TO TOM CURLIN, THE ASSISTANT U.S. ATTORNEY, IN 1994, IN

WHICH MR. SHOHAT REFERS TO THE FACT THAT THEY HAVE TO WAIT TO GET SOME MONEY, UNTIL MR. BAILEY COMPLETES THE ARRANGEMENTS TO BORROW THE MONEY FROM THE TRUST ACCOUNT IN SWITZERLAND, IN WHICH THE BIO CHEM-PHARMA STOCK WAS --

WHAT CONTEXT WAS THIS BROUGHT TO JUDGE PAUL'S ATTENTION? HOW WAS IT BROUGHT TO HIS ATTENTION? IN WHAT CONTEXT?

THE AGREEMENT, ITSELF, YOUR HONOR, MY UNDERSTANDING IS THAT, BEFORE MR. DUBOC PLED, ON MAY 17 THEY HAD A CONFERENCE IN CHAMBERS, WITH JUDGE PAUL, ATTENDED BY MR. BAILEY, MR. PATTERSON, THE U.S. ATTORNEY MR. KERWIN, MR. MILLER AND OTHERS, AND MR. SHOHAT, AT WHICH THE PARTIES, MR. MILLER PRIMARILY, EXPLAINED TO JUDGE PAUL THE NATURE OF THIS FAIRLY UNUSUALLY ARRANGEMENT. -- FACIAL UNUSUAL ARRANGEMENT. THERE IS A -- OF THE FAIRLY UNUSUAL ARRANGEMENT. THERE IS A DISAGREEMENT THAT MR. BAILEY TRIES TO TAKE ADVANTAGE OF, I SUPPOSE, ABOUT WHETHER THE WORD "TRUST" WAS USED OR NOT. I THINK THAT IS IMMATERIAL. I SETTLED A CONTENTION FEE CASE YESTERDAY. THE MONEY IS GOING TO COME IN. IT IS GOING TO GO INTO MY TRUST ACCOUNT. I AM NOT GOING TO TELL MY CLIENT I AM A TRUSTEE. I WILL NEVER PROBABLY USE THE WORD "TRUST". IT IS PLAUSIBLE TO ME THAT THE EXPLANATION WAS THIS MONEY HAS BEEN GIVEN TO MR. BAILEY FOR THIS PURPOSE, AND THIS IS WHAT IS GOING TO HAPPEN. HE IS GOING TO USE IT TO MAINTAIN AND LIQUIDATE THE FRENCH PROPERTIES. IF THERE IS THIS STOCK, HE WILL THEN, IF THERE IS ANY LEFT, ANY MONEY LEFT AT THE END THAT, CAN BE USED FOR FEES, AND THE BALANCE WILL RETURN TO THE GOVERNMENT. THAT IS THE NATURE OF THE AGREEMENT.

JUSTICE SHAW HAS ONE MORE QUESTION.

DID THE JUDGE EXPRESS ANY DISAPPROVAL OF THE ARRANGEMENT, WHEN IT WAS FIRST BROUGHT TO HIS ATTENTION?

WHEN IT WAS FIRST BROUGHT TO HIS ATTENTION IN 1994, HE DID NOT. WHEN IT WAS BROUGHT TO HIS ATTENTION OR MR. BAILEY'S VERSION WAS BROUGHT TO HIS ATTENTION IN 1996, HE HELD MR. BAIL ANY CONTEMPT AND INCARCERATED HIM.

THANK YOU.

THANK YOU, MR. SMITH. MR. ROGOW.

I THINK, FROM HEARING THIS DISCUSSION, THERE IS A GREAT DEAL OF CONFUSION, WHICH COMES ACROSS QUITE CLEARLY, AS TO WHAT THERE WAS, AND THE QUESTION IS CAN YOU DISBAR A PERSON WHEN YOU HAVE THAT KIND OF CONFUSION, CONFUSION CAUSED BY THE GOVERNMENT, WHEN THE GOVERNMENT AUTHORIZES THIS TRANSFER. MR. RISTOFF HAS SAID QUITE CLEARLY AND TALKED CONTINUALLY ABOUT THE TRUST. THE REFEREE'S RULING IS INCORPORATED UPON HER FINDING THAT THERE WAS A TRUST, AND THERE IS NOT CLEAR AND CON STRINSING EVIDENCE OF ANY SORT THAT -- CLEAR AND CONVINCING EVIDENCE OF ANY SORT THAT THERE WAS A TRUST. WAS THERE CONFUSION? WAS THERE MISUNDERSTANDING? PERHAPS THERE WAS. MR. KERWIN, WHO HAS BEEN MENTIONED AND IS NOW THE U.S. ATTORNEY HERE, HIS TESTIMONY WAS THAT HE NEVER HEARD THE WORD "TRUST" MENTIONED, AND THAT TESTIMONY CAME COME OUT OUGHT IN THE SUPPORT OF CLAIMS THAT CAME OUT IN THIS RECORD.

YOU MENTION THAT THE ABSENCE OF THE WORD "TRUST", NEGATES THE POSSIBILITY OR THE ABILITY TO CREATE A TRUST RELATIONSHIP. IS THAT BECAUSE ARE SUGGEST SOMETHING.

NO, I AM NOT. I AM SUGGESTING --

WHAT IS THE IMPORTANCE, THEN, OF THE ABSENCE OF THE USE OF THE WORD "TRUST", IF YOU DESCRIBE ALL OF THE FACTS THAT DESCRIBE A TRUST RELATIONSHIP. I AM MISSING SOMETHING.

IT NEGATES THE KIND OF SANCTION THAT THE BAR IS SEEKING BECAUSE THERE IS NOT CLEAR AND CONVINCING EVIDENCE THAT MR. BAILEY KNOWINGLY ABUSED A TRUST AGREEMENT THAT THE GOVERNMENT SAYS OR THE BAR SAYS HE HAD. IT WAS NOT THERE. THAT IS WHAT THIS IS ABOUT.

HOW ABOUT THE SITUATION THAT COUNSEL JUST MENTIONED. YOU SETTLE A CASE. YOU NEVER MENTION THE WORD "TRUST", AND YOU JUST GO ABOUT USING ALL THE MONEY FOR YOURSELF YOURSELF. THE WORD "TRUST" IS NEVER MENTIONED, BUT THE CIRCUMSTANCES AND FACTS CREATES THAT. WOULD THAT BE SUFFICIENT FOR THE FLORIDA BAR TO TAKE ACTION AGAINST A LAWYER USING THOSE AND CLAIMING IT IS FEE SIMPSNELL.

THAT WOULD BE, JUSTICE LEWIS, BUT THAT IS NOT THIS CASE. THIS CASE HAS THIS UNIQUE, EXTRAORDNARY FACTS OF THE GOVERNMENT TURNING OVER 6200 SHARES OF STOCK, WITHOUT RESERVATION, TO MR. BAILEY WITHOUT OTHER ARRANGEMENTS OR AGREEMENTS, AND THIS IS NOT A CREDIBILITY ISSUE, AND WHICH THE PARTIES HAVE SOME DISAGREEMENT ABOUT WHAT THE NATURE OF THE ARRANGEMENT WAS.

YOUR TIME IS UP. WE THANK YOU VERY MUCH AND APPRECIATE COUNSELS' ASSISTANCE IN THIS CASE.