

# Exhibit A

IN THE UNITED STATES COURT OF APPEALS  
ELEVENTH CIRCUIT

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USCA Case No. 16-10942-GG  
United States District Court, Middle District of Florida  
Case No: 8:09-cv-00087-RAL-TBM

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff/Appellee

v.

WELLS FARGO BANK, N.A., Creditor,

Non-Party Creditor/Appellant.

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Transcript from Oral Argument on December 6, 2016

Before:                   Honorable Adalberto Jordan  
                              U.S. Court of Appeals  
                              11th Circuit  
  
                              Honorable Jill A. Prior  
                              U.S. Court of Appeals  
                              11th Circuit  
  
                              Honorable R. David Proctor  
                              U.S. District Court Judge  
                              Northern District of Alabama  
                              Sitting by designation

Transcribed By:        Suzanne M. Peterson  
                              Court Reporter and Notary Public  
                              State of Florida at Large

A-P-P-E-A-R-A-N-C-E-S

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

1  
2 MS. GIDDINGS: Good morning, your Honors. May  
3 it please the Court, I'm Katherine Giddings. I'm  
4 here today with Steve Wirth on behalf of Wells  
5 Fargo.

6 Your Honors, the primary issue in this case is  
7 whether an administrative claims order in a  
8 receivership action can trump long-established  
9 substantive law governing vested, secured property  
10 rights.

11 Importantly, the Receiver in this case does not  
12 dispute that Wells Fargo had vested perfected  
13 secured property rights.

14 The Receiver also doesn't dispute that he knew  
15 about these rights because he had to, given the  
16 perfected recorded security interest.

17 He just says because Wells Fargo didn't file a  
18 claim, he wins.

19 Your Honors, until the District Court's ruling  
20 in this case, not one court in the entire country  
21 has ever found that the failure to file a claim in  
22 either a bankruptcy or a receivership proceeding  
23 eviscerates a secured creditor's interest in the  
24 property.

25 JUDGE JORDAN: Can I ask you one procedural

1 question before you get into the rest of your merits  
2 argument?

3 MS. GIDDINGS: Yes, sir, your Honor.

4 JUDGE JORDAN: It appears that one of the --  
5 we're dealing with two properties because with  
6 regard to the third, whether you were required to or  
7 not, filed a --

8 MS. GIDDINGS: Correct.

9 JUDGE JORDAN: Right?

10 So we're only dealing with the remaining two.

11 MS. GIDDINGS: Yes. The Sarasota and Laurel  
12 Mountain.

13 JUDGE JORDAN: One of those -- and I forget  
14 which one -- there was one that was sold --

15 MS. GIDDINGS: Correct.

16 JUDGE JORDAN: -- before the District Court  
17 extinguished your interest in liens in the property.  
18 Right?

19 MS. GIDDINGS: Yes, sir, your Honor.

20 JUDGE JORDAN: Procedurally, tell me when that  
21 occurred, along the timeline, and whether or not you  
22 had notice of that action by the Receiver.

23 MS. GIDDINGS: Your Honors, the claims bar  
24 order was issued on April 21, 2010, setting a claims  
25 bar date of September 2nd.

1           The Sarasota property was sold in -- just one  
2           second.

3           JUDGE JORDAN: If you don't have the date, you  
4           can get it for us when you come back.

5           MS. GIDDINGS: Okay. The Sarasota property was  
6           not sold until April 29, 2015. So this happened --

7           JUDGE JORDAN: Was there any -- at that time,  
8           had you already filed your motion for a  
9           determination that you were not required --

10          MS. GIDDINGS: Yes, sir, your Honor.

11          JUDGE JORDAN: -- a Proof of Claim?

12          MS. GIDDINGS: We filed that motion in February  
13          of 2012.

14          Because see, remember --

15          JUDGE JORDAN: After the bar date.

16          MS. GIDDINGS: After the bar date.

17          But remember, the Receiver originally did not  
18          take the position that secured claims were included  
19          in this order.

20          The claims bar date was September 2, 2010.

21          In October of 2010, only two months later, the  
22          Receiver was communicating with Wells Fargo, asking  
23          the payoff amounts of the loans.

24          And so the Receiver did not start taking the  
25          position the secured claims were required to be

1 filed until late in 2011.

2 Shortly after Wells Fargo became aware that the  
3 Receiver was taking that position, it filed its  
4 motion to determine its interest.

5 JUDGE JORDAN: That motion was pending and your  
6 interests had not been extinguished at the time of  
7 that sale.

8 MS. GIDDINGS: That's my understanding, your  
9 Honor.

10 JUDGE JORDAN: Go ahead.

11 MS. GIDDINGS: Your Honor, requiring secured  
12 creditors to file a claim is inconsistent with this  
13 Court's precedent.

14 In In Re Thomas and in In Re Bateman, this  
15 Court held that a secured creditor does not need to  
16 file a claim or proceedings and look to its lien for  
17 satisfaction of a debt.

18 This Court noted that this concept, although  
19 now codified in the bankruptcy code, arose from  
20 judge-made law from the United States Supreme Court  
21 pre-bankruptcy law in Long versus Bullard.

22 This is because a state lien priority law is  
23 not an equitable remedy. It is a legal status.

24 Those are bankruptcy cases. But this Court has  
25 held that it looks to bankruptcy cases to resolve



1 issues in receivership proceedings when there is not  
2 applicable authority in a receivership context.

3 JUDGE PRIOR: It looks to me like you only  
4 cited two District of Utah cases, one of which was  
5 unpublished, for the proposition that this motion  
6 apply on the receivership context.

7 What are we going to make of the fact that  
8 there's so little authority?

9 MS. GIDDINGS: Your Honor, I think the fact  
10 that there is so little authority is because no  
11 Receiver has ever taken the position that a secured  
12 creditor has to file a claim.

13 There is a litany of United States Supreme  
14 Court precedent that we have cited in a brief in the  
15 bankruptcy context from Long versus Bullard,  
16 Louisville; Butner versus U.S.

17 But in 1920, in the Marshall versus New York  
18 case, the United States Supreme Court in a  
19 receivership case reached these exact conclusions  
20 that a Receiver appointed by a Federal Court takes  
21 property subject to all liens and that those liens  
22 take priority as governed by state law.

23 And I would state that this Court has said we  
24 will look to bankruptcy law when there is nothing in  
25 the receivership context. There is simply no found

1 policy reason to deviate from those cases in this  
2 case.

3 The Receiver's only argument is that the sky is  
4 going to fall if the District Court's order is  
5 reversed because Receivers have to know what claims  
6 are out there.

7 But then he can see if he knew about the claim,  
8 and he actually cites as prejudice that fact he  
9 couldn't sell the property because there were liens  
10 on the property.

11 And also, he cites this Court in writing --

12 JUDGE JORDAN: One of the reasons why I asked  
13 that question at the beginning is if you had a lien  
14 on the Sarasota property and that lien had not yet  
15 been extinguished by Court order, how was the  
16 Sarasota property sold?

17 How did anybody provide title?

18 MS. GIDDINGS: Your Honor, that -- I'm not sure  
19 the answer to that question, other than the Court  
20 took those proceeds and put them in escrow to --

21 JUDGE JORDAN: I know. But that's what the  
22 Court did afterwards, which I think was the right  
23 thing to do, given the uncertainty of what was  
24 happening.

25 But who goes to a closing for a million dollar

1 real estate property, sees a lien that hasn't been  
2 extinguished by Court order and writes a title  
3 polity?

4 MS. GIDDINGS: I do not know the answer to your  
5 question, your Honor.

6 And I would be happy to supplement the --

7 JUDGE JORDAN: That's okay.

8 MS. GIDDINGS: But what I believe happened was  
9 that the Court said we're going to take this money  
10 and put it aside, so that will take care of any  
11 issues regarding the lien.

12 And the money has been held in escrow, and the  
13 Court -- in fact, I think that's one of the problems  
14 that the District Court had in this.

15 The District Court saw that once the property  
16 was sold, the District Court believe that was part  
17 of the receivership at stake.

18 And the claims process -- if you look at the  
19 claims order and the notice, it says that you have  
20 to file a claim if you want to participate in the  
21 receivership distributions.

22 But we're not seeking anything from the  
23 distributions.

24 We're only seeking to satisfy the liens.

25 JUDGE JORDAN: You recognize that -- let's

1 assume you got proper notice --

2 MS. GIDDINGS: Yes, sir.

3 JUDGE JORDAN: -- for purposes of this  
4 question.

5 MS. GIDDINGS: Which we don't believe we did.  
6 But yes.

7 JUDGE JORDAN: I know. But I'm asking you to  
8 assume it.

9 MS. GIDDINGS: Okay.

10 JUDGE JORDAN: If you got proper notice, then  
11 by not filing a Proof of Claim, then you basically  
12 forfeited any rights to participate in the  
13 receivership proceeding in court and get anything  
14 out of that proceeding --

15 MS. GIDDINGS: Yes. That's correct.

16 JUDGE JORDAN: -- anything that was collected  
17 by the receiver in that proceeding.

18 MS. GIDDINGS: Right.

19 And your Honor, the classic example of that is  
20 the deficiency claim. Because if the property -- if  
21 the loan was for two million and the property was  
22 sold for 1.5 million, we would only get that  
23 1.5 million.

24 And if we had not filed a claim, then we would  
25 not be entitled to get that half a million.

1           JUDGE JORDAN: So you're stuck with whatever  
2 you realize on the sale of the property.

3           MS. GIDDINGS: Right. Because at that point in  
4 time, that's unsecured.

5           But at this point, the property sold for less  
6 than what our entire loan is, so we should get that  
7 entire amount.

8           And I think that there are many reasons -- if  
9 you look at the claims order and the claims notice,  
10 if you do file a notice -- I mean you do file a  
11 claim, then you give up a lot of rights. You do  
12 subject yourself the receivership. You give up the  
13 right to a jury trial.

14           And if a Receiver seeks -- just like a  
15 bankruptcy proceeding. If a Receiver seems to  
16 divest an entity of their interest in the property,  
17 then the proper way for that Receiver to do it is to  
18 institute a separate action.

19           And they actually did that in the Wiand case  
20 that is pending before this Court on appeal on a  
21 different issue.

22           I think it's really important, your Honor, to  
23 the In Re -- and I'm hoping I'm saying this right --  
24 the In Re Nguyen case that the receiver relies on to  
25 show harm. He says that a Receiver needs to know

1           what claims are out there and talks about the harm  
2           that was going to be caused. And that's a  
3           bankruptcy case, by the way, that he's relying on.

4           JUDGE PRIOR: If you were to agree with your  
5           position on the first point of the argument you are  
6           making now, there's no reason to reach the clause  
7           issue --

8           MS. GIDDINGS: Correct, your Honor.

9           If you decide for restoration 1, then it moots  
10          all the other issues.

11          But I just want to point out to the Nguyen Woo  
12          case goes on to discuss in detail that that harm --  
13          that concepts do not apply to secured creditors  
14          because they pass outside of the proceedings, and it  
15          says that secured claims are different.

16          And I would say that harm is going to be caused  
17          if you do not reverse the order, because the Supreme  
18          Court said in *Butner versus United States*: The  
19          uniform treatment of proper interest by both State  
20          and Federal Court serves to review uncertainty and  
21          discourage forum shopping.

22          And so I will save the rest of my time for  
23          rebuttal, your Honors.

24          JUDGE JORDAN: All right. Thank you very much.

25          MR. KEEFE: May it please the Court, Sean Keefe

1 on behalf of the Receiver, Burton W. Wiand.

2 Your Honors, I have to disagree with my  
3 respective colleague regarding what she described as  
4 the primary issue here before the Court.

5 The primary issue here before the Court is  
6 whether or not a District Court supervising a  
7 federal equity receivership, all the broad powers  
8 that they had in that capacity, whether or not it  
9 had the right to require any and all potential  
10 claimants, secured or unsecured, to file a claim  
11 before the claims bar.

12 JUDGE PRIOR: Would a bankruptcy court have  
13 such a power in the bankruptcy context?

14 MR. KEITH: A bankruptcy court does have that  
15 power. Yes, sir.

16 JUDGE PRIOR: It can terminate security  
17 interests for failure to comply with an  
18 administrative order that preexisted the bankruptcy  
19 estate?

20 MR. KEEFE: We believe it does and we believe  
21 we cite to a case that shows an example.

22 JUDGE JORDAN: If you have a case to that  
23 extent, that is against all authority in the United  
24 States. I think you misapprehended the issue.

25 The issue is not whether the District Court can

1 set an order requiring people and creditors secured  
2 and otherwise to file Proofs of Claim. I'll accept  
3 that it does have that right.

4 The question is: What can the District Court  
5 do to a secured creditor and its in rem lien if it  
6 fails to proceed. And it seems to me --

7 I'm flabbergasted by this case. I really am.  
8 I can't believe that this happened.

9 But it seems to me that what the secured  
10 creditor loses by not filing a Proof of Claim is the  
11 ability to participate in any distributions from the  
12 receivership proceeding.

13 So if there's excess money that the Receiver is  
14 able to marshal from third parties, fraudulent  
15 transfers, et cetera, et cetera, and it's in a  
16 deficient position, it's stuck. It can only go  
17 after its real estate and enforce that lien through  
18 a foreclosure or some other real estate remedy.

19 You said -- I'm talking a lot, but I am really,  
20 really troubled by this case.

21 You told the District Court when you filed your  
22 motion, when the SEC filed its motion to appoint a  
23 Receiver, that the appointment of a Receiver was  
24 based in equity.

25 Is that correct?



1 MR. KEEFE: That is correct.

2 JUDGE JORDAN: And you are telling me that what  
3 happened here is equitable?

4 MR. KEEFE: Yes.

5 JUDGE JORDAN: You sold a property before the  
6 District Court had extinguished, rightfully or  
7 wrongly, Wells Fargo's interest.

8 By Court order, you, as a Receiver, did not  
9 have the right to extinguish any rights that Wells  
10 Fargo had in the Sarasota property. Right?

11 MR. KEEFE: Okay, your Honor. I understand  
12 where you're --

13 JUDGE JORDAN: No, no, no. Let's talk to the  
14 questions one by one.

15 MR. KEEFE: Okay.

16 JUDGE JORDAN: You, as the Receiver -- Mr.  
17 Wiand as the Receiver -- I don't mean to personalize  
18 this -- did not have the ability to personally  
19 extinguish the liens of Wells Fargo for failure to  
20 file a Proof of Claim. Correct?

21 MR. KEEFE: Correct. He did not.

22 JUDGE JORDAN: Okay. Perfect.

23 At the time that Mr. Wiand sold the Sarasota  
24 property, the District Court had not extinguished  
25 Wells Fargo's lien. Correct?

1 MR. KEEFE: No, it did.

2 JUDGE JORDAN: When had --

3 MR. KEEFE: I believe April of 2015.

4 I understand what your Honor is getting at in  
5 referencing the previous questions to opposing  
6 counsel, and I may suggest we may want to do some  
7 supplemental briefing on this issue --

8 JUDGE JORDAN: No. Give me what you think the  
9 timeline was.

10 MR. KEEFE: -- because the bank did not object.  
11 Because it was -- the --

12 JUDGE JORDAN: That's not the point.

13 MR. KEEFE: It is.

14 JUDGE JORDAN: Was there a Court order  
15 extinguishing Wells Fargo's lien for failure to file  
16 a Proof of Claim before you sold the Sarasota  
17 property?

18 MR. KEEFE: Before, no.

19 JUDGE JORDAN: That's what I'm saying.

20 MR. KEEFE: May I direct --

21 JUDGE JORDAN: How could you sell a property --  
22 the order appointing Receiver said that you held  
23 property and were able to marshal property subject  
24 to whatever orders the District Court was going to  
25 issue.

1           There was no order extinguishing that lien.

2           How could you sell it?

3           MR. KEEFE: No. Your Honor, that's why I think  
4           we'll need to do additional briefing on this  
5           because --

6           JUDGE JORDAN: I don't want briefing. I just  
7           want you to tell me how that happens.

8           MR. KEEFE: Because both the -- regarding the  
9           Sarasota property, there were additional financial  
10          institutions involved in, I believe.

11          JUDGE JORDAN: It doesn't matter.

12          MR. KEEFE: It does. If I may answer the  
13          question.

14          The parties had agreed, including the title  
15          company, to present this in a motion to the District  
16          Court to the receivership court to sell the property  
17          free and clear of all liens and that the parties  
18          would reserve their rights to challenge whether or  
19          not any of the vested interests were extinguished.

20          JUDGE JORDAN: Did Wells Fargo expressly agree  
21          to that?

22          MR. KEEFE: I believe they did but --

23          JUDGE JORDAN: If they did, that's a whole  
24          different ball game.

25          You're telling me that after telling the

1 District Court that they weren't required to file a  
2 Proof of Claim that all of this was just wrong.  
3 They agreed to have their property sold free and  
4 clear subject to later litigation?

5 MR. KEEFE: I want to be clear on this, your  
6 Honor.

7 My recollection of that is they did, but they  
8 were reserving all of their arguments -- all the  
9 arguments that they're presenting today.

10 I'm not trying --

11 JUDGE JORDAN: If you are right about that --  
12 if you are correct that Wells Fargo expressly  
13 allowed that to happen, then I take back everything  
14 I said about the sale of the property. Because  
15 that's a different ball game.

16 I didn't see that in the record, but it may be  
17 there somewhere.

18 MR. KEEFE: I want to be completely candid with  
19 the Court regarding that. I'm going off of my  
20 memory from back in April, 2015. I have to be very  
21 careful. I don't want to mislead the Court.

22 I know that opposing counsel -- excuse me --  
23 co-counsel at opposing counsel's table assisted in  
24 that, and he might be able to assist lead counsel on  
25 that matter.

1 I have to be very careful about my language  
2 because I don't remember exactly the procedural  
3 posture of how that happened.

4 JUDGE JORDAN: That's okay. We'll figure it  
5 out.

6 JUDGE PROCTOR: Following up on that, then that  
7 would be a waiver, not the Receiver's authority  
8 through the District Court to affect the preexisting  
9 security interests of an entity that was brought  
10 into the receivership. Correct?

11 MR. KEEFE: I -- I --

12 JUDGE PROCTOR: If it occurs after the  
13 receivership, it doesn't go to your authority as the  
14 Receiver to affect security interests that  
15 preexisted your receivership.

16 MR. KEEFE: It's not the Receiver who has the  
17 authority. It's the District Court supervising --

18 JUDGE PROCTOR: Fine. And I understand.

19 It seems to me you're wanting to have it both  
20 ways in that respect. In some areas, you say in  
21 that argument we stand behind the District Court.

22 And on the takings clause, you say we're not a  
23 state actor even though the only authorities we have  
24 were provided to us by the District Court.

25 Different issue. I don't want to take you off track

1           there.

2                   But what I'm suggesting you do is this: Your  
3 argument now is different than the arguments you  
4 presented in your brief, it seems.

5           MR. KEEFE: In what way, your Honor? I  
6 disagree.

7           JUDGE PROCTOR: The waiver argument essentially  
8 that -- you're saying that there was conduct after  
9 the receivership in which they have surrendered some  
10 rights to their security interests. Is that what  
11 I'm hearing?

12          MR. KEEFE: No.

13                   What we're saying is that when they failed to  
14 comply with the claims administration process and  
15 file a timely claim, their rights were extinguished,  
16 their rights of property. That's all we're saying.

17          JUDGE PROCTOR: That's where we're parting  
18 company. I'm not sure you're right on that.

19          MR. KEEFE: Well, if we examine what the  
20 District Court looked at though -- if we look at the  
21 order where the Court examined the claims  
22 administration process and the order that  
23 established the process, the order that established  
24 the way notice had to be provided and the same order  
25 which established the claimant's bar deadline, it

1 was clear and unambiguous.

2 JUDGE JORDAN: What substantive law gave the  
3 District Court the right to extinguish state law  
4 secured interest?

5 MR. KEEFE: The power that many circuits --  
6 it's been including this circuit with SEC versus  
7 Elliott, the Bender versus Lancer Management that  
8 Judge Prior was on the panel for in 2013 -- give  
9 wide discretion and wide latitude --

10 JUDGE JORDAN: What substantive law gave the  
11 District Court the right to do this with regards to  
12 the preexisting secured interest of Wells Fargo?

13 MR. KEEFE: The inherent right of a District  
14 Court in a federal equity receivership to issue its  
15 own case management order and case and claims  
16 administration procedure.

17 JUDGE JORDAN: That inherent right under the  
18 supremacy clause trumps a preexisting state law  
19 property interest?

20 MR. KEEFE: It does to the extent that if the  
21 bank fails to comply with the process after giving  
22 fair notice, it is within the broad discretion of  
23 the receivership court to then state my order was  
24 clear.

25 It said that any and all entities that wish to

1 preserve any claim whatsoever against any  
2 receivership entity must file a timely claim so long  
3 as notice has been provided.

4 JUDGE JORDAN: You knew that they had an  
5 interest. Why did you have to file a Proof of  
6 Claim?

7 MR. KEEFE: Because that's what the Court  
8 required.

9 JUDGE JORDAN: That's a ridiculous answer.

10 MR. KEEFE: No, it's --

11 JUDGE JORDAN: Because if you are saying you  
12 need to know to manage the estates and figure out  
13 who claims what, who owes what, who demands what,  
14 and you know to a legal and moral certainty that  
15 Wells Fargo has the lien secured property interest  
16 under state law, how is their not filing a claim  
17 making it more difficult for you as a Receiver to  
18 marshal and pay assets?

19 MR. KEEFE: Well, because the claims  
20 administration process -- the Proof of Claims form  
21 solicits information from the potential claimant and  
22 allows the Receiver to know exactly how much  
23 liability he may be assessed against the entities.

24 And in addition to that --

25 JUDGE JORDAN: What about that didn't you



1 already know at the time the claims order was put in  
2 place as to Wells Fargo?

3 MR. KEEFE: We don't know. Because they never  
4 filed a claim with all the relevant information  
5 that's asked for in the --

6 JUDGE JORDAN: What information did you need in  
7 order to administer this receivership that you  
8 didn't already have at the time that you were aware  
9 that they had a secured interest in this property?

10 MR. KEEFE: There are questions that are part  
11 of the Proof of Claim form that went specifically to  
12 how -- whether the bank had certain contacts with  
13 certain individuals that were running underlying  
14 hedge funds and submitted to underlying fraud that  
15 led to all of this.

16 There's questions about what --

17 JUDGE JORDAN: That would not have affected the  
18 interest. I could have allowed you to file another  
19 lawsuit to do something to the interest, but it  
20 wouldn't have affected the amount due and owing.

21 MR. KEEFE: But it affects the claims  
22 determination motion which the receiver then filed  
23 in April of 2011.

24 JUDGE JORDAN: But you are assuming that you  
25 can -- that that process lets you dive into and the

1 Supreme Court has made clear time and again that,  
2 except for very limited exceptions, property  
3 interests are creatures of state law.

4 Is that not right?

5 MR. KEEFE: They are.

6 JUDGE JORDAN: And what federal law gives you  
7 the right under the supremacy clause to trump state  
8 law?

9 MR. KEEFE: The law I just -- I've already  
10 cited.

11 JUDGE JORDAN: The inherent power of  
12 receivership court --

13 MR. KEEFE: That's correct. And I --

14 JUDGE JORDAN: -- with no limit.

15 MR. KEEFE: Of course there's limits, your  
16 Honor.

17 JUDGE JORDAN: What are the limits to that  
18 substantive power?

19 MR. KEEFE: The limits to that substantive  
20 power is that the Court must ensure that there has  
21 been a claims administration process that has been  
22 fair and equitable, which include --

23 JUDGE JORDAN: That's all procedural. You're  
24 not giving me any substantive limit.

25 So you're telling me that a District Court that

1           obtained subject matter jurisdiction over an SEC  
2           equity receivership has no substantive bounds over  
3           its power to pierce and extinguish state law  
4           security interests, as long as everything is  
5           procedurally correct?

6           MR. KEEFE: As long as it satisfies due  
7           process.

8           JUDGE JORDAN: And you can reach anything.

9           MR. KEEFE: Yes. As long as it satisfied due  
10          process.

11          JUDGE JORDAN: No substantive limit.

12          MR. KEEFE: That's correct.

13          JUDGE JORDAN: Tell me one case, one treatise,  
14          one secondary source, one dissenting opinion that  
15          has ever said that in either a bankruptcy or a  
16          receivership context.

17          MR. KEEFE: Other than the cases I've already  
18          cited, I cannot.

19          But you just mentioned --

20          JUDGE JORDAN: How many cases have you cited  
21          that say that?

22          MR. KEEFE: It doesn't say specifically that,  
23          no.

24          JUDGE JORDAN: This is the first case in the  
25          country that does that?

1 MR. KEEFE: That does what?

2 JUDGE JORDAN: That allows a Federal District  
3 Court administering an SEC equity -- and I repeat  
4 that word, "equity receivership" -- to pierce and  
5 extinguish a state law secured property interest for  
6 failure to file a Proof of Claim.

7 This is the first one in the entire history of  
8 the country that I've been able -- I went to Westlaw  
9 and searched Westlaw old -- Supreme Court old -- so  
10 I went back into the 1800s in the Courts of Appeal  
11 -- and they weren't even called Courts of Appeal.

12 I couldn't find a single case that allows a  
13 Federal District Court to do this, whether it's  
14 under the supremacy clause, under broad equity  
15 principles or some other power, whether inherent or  
16 otherwise.

17 Am I wrong about that?

18 MR. KEEFE: I don't disagree with you.

19 I don't want to come across as being  
20 disrespectful or glib in my response.

21 JUDGE JORDAN: You're not. We're just  
22 discussing an issue.

23 MR. KEEFE: So I apologize if my tone has been  
24 inappropriate.

25 JUDGE JORDAN: It has not.

1           MR. KEEFE: The converse is equally true, your  
2 Honor. And I think this is important to determine  
3 whether or not the abuse of discretion burden has  
4 been satisfied here.

5           There is no case that says that a federal  
6 Receiver cannot issue a claims administration  
7 process that requires all the creditors, secured or  
8 unsecured --

9           JUDGE PROCTOR: Let me ask you on the standard  
10 review whether it's de novo abuse of discretion if  
11 we determine that the Receiver and the District  
12 Court were required to accept the state interests  
13 that were in place at the time the receivership was  
14 created and that there was no effect on the status  
15 of the creditors underlying lien with respect to the  
16 creation or administration of the receivership.

17           Then doing what happened in this case would be  
18 de novo wrong and an abuse of discretion.

19           Would you disagree with that?

20           MR. KEEFE: I do disagree with that.

21           And if I could cite what this Court has  
22 previously held regarding what constitutes an abuse  
23 of discretion -- and this is related to what I was  
24 just mentioning in regards to --

25           JUDGE PROCTOR: Anytime there's an incorrect

1 application of law, that's an abuse of discretion.

2 Correct?

3 MR. KEEFE: That's correct.

4 JUDGE PROCTOR: If there was an incorrect  
5 application of law here, the District Court asserted  
6 more authority than it actually had and extinguished  
7 a state law right that it had no right to  
8 extinguish, that would be an abuse of discretion.  
9 Right?

10 MR. KEEFE: If -- presuming that the first part  
11 of your question is correct --

12 JUDGE PROCTOR: Of course.

13 MR. KEEFE: -- and we don't believe that it is.

14 JUDGE PROCTOR: That's why I'm saying depending  
15 upon how we come out with respect to the substantive  
16 question here, the standard review doesn't really  
17 make a difference if we were to hold that there was  
18 an incorrect assertion of jurisdiction here to  
19 extinguish that state security interest.

20 Would you agree with that?

21 MR. KEEFE: I don't agree with that, your  
22 Honor.

23 JUDGE PROCTOR: Tell me where you disagree with  
24 that.

25 MR. KEEFE: Because -- and this is related to

1 what Judge Jordan had mentioned a couple moments ago  
2 that he couldn't find a case saying that there was  
3 authority.

4 Conversely, there's no case that says  
5 otherwise.

6 JUDGE JORDAN: Sure there is. The Supreme  
7 Court said over and over and over again, in  
8 different context, eminent domain, bankruptcy, that  
9 a secured creditor's claim is not affected by the  
10 status -- or the lien is not affected by the bar  
11 date order entered in a case.

12 MR. KEEFE: That's in a bankruptcy case.

13 JUDGE JORDAN: Why are -- yes. Okay.

14 Why are those cases inapplicable to the  
15 receivership context when bankruptcy courts and  
16 receivership courts borrow from each other when  
17 there are unsettled questions?

18 Why should there be -- a bankruptcy trustee is  
19 doing the exact same thing that a Receiver is doing.  
20 It's marshaling assets. It's suing people. It's  
21 finding stuff. It gets Court orders to let it do  
22 certain things. It sells assets. It compromises  
23 claims. The Receiver and the Trustee are very, very  
24 similar.

25 And at the end of the day what a receivership

1 court does is very tantamount to what a bankruptcy  
2 court does in allowing a discharge or not allowing a  
3 discharge or having a plan that's approved or  
4 confirmed.

5 Why are the bankruptcy cases not appropriate to  
6 consider here?

7 MR. KEEFE: Because -- the bankruptcy cases can  
8 be relevant. They're not necessarily binding, first  
9 of all. But they could be relevant if you have an  
10 issue that is -- for which there's no receivership  
11 authority.

12 JUDGE JORDAN: There is no receivership  
13 authority on this.

14 MR. KEEFE: Not on the precise issue but --

15 JUDGE JORDAN: I know. And there is bankruptcy  
16 authority for the precise issue.

17 There are no cases. You've told me that  
18 they're not binding, but the bankruptcy cases can be  
19 persuaded. Right?

20 MR. KEEFE: Yeah.

21 JUDGE JORDAN: Okay. There are no cases  
22 directly on point on the receivership context here  
23 about being able to extinguish a prior existing  
24 state law secured interest. Right?

25 MR. KEEFE: Right. Which is why it can't be an



1 abuse of discretion.

2 JUDGE JORDAN: I understand that argument.

3 In the bankruptcy context, there are plenty of  
4 cases from the Supreme Court on down that say that  
5 can't happen.

6 So if there's an absence of case law on the  
7 receivership side, why shouldn't we borrow from the  
8 bankruptcy side?

9 MR. KEEFE: Because even -- and we cite this in  
10 our brief. Even within the bankruptcy context,  
11 there are issues where secured creditors still need  
12 to file some sort of a claim. And even --

13 JUDGE JORDAN: Yes. The question is not  
14 whether they need to file. The question is the  
15 consequences of failure to file.

16 No one disputes that you could have -- I don't  
17 dispute, certainly. I don't speak for my  
18 colleagues -- that the District Court could have  
19 made them file a Proof of Claim. I understand that.

20 And by choosing -- assuming they got notice --  
21 by choosing not to file one, they forfeited any  
22 right they had to participate in the pool of assets  
23 that you marshaled, to their detriment.

24 But it doesn't mean they lost a property that  
25 they had made a loan on and that they stood first in

1 line to foreclose on.

2 So the issue is not whether you could have made  
3 them file a Proof of Claim.

4 The question is: Substantively, under federal  
5 supremacy law, can the effective failure to file  
6 extinguish a state law interest?

7 That's the question, it seems to me.

8 MR. KEEFE: And I understand your question,  
9 your Honor. And I don't want to sound like a broken  
10 record, and I apologize.

11 But as long as the due process concerns have  
12 been satisfied, an entity cannot just sit on its  
13 hands and decide to wait and wait and wait.

14 JUDGE PROCTOR: That's the issue, though.

15 Let me read you a sentence from Clark on  
16 receivers.

17 "The appointment of a Receiver does not  
18 invalidate liens existing at the time the Receiver  
19 is appointed."

20 That's Judge Jordan's point and my point.

21 "Although it may affect or change the remedy or  
22 remedies which the lienholder may use to enforce the  
23 lien."

24 That's your point, but the limitation of your  
25 point is this: That doesn't extinguish the lien.

1           It just means that there may be -- the lienholder  
2           may be cut off in using the offices of the Receiver  
3           to gain remedies to enforce the lien.

4           Your argument takes that principle and blows it  
5           up into exponentially larger proportion by saying  
6           that failure to file a claim by the bar date  
7           extinguishes the lien. It doesn't merely affect the  
8           creditors right to enforce the lien with certain  
9           remedies within the receivership governed by the  
10          Court.

11          And I think that's what this whole case comes  
12          down to, isn't it?

13          MR. KEEFE: No. I believe -- and I apologize  
14          for having to keep disagreeing with the Court like  
15          this.

16          What it comes down to is whether or not the  
17          District Court had the inherent authority to have to  
18          issue equitable relief -- I didn't mean to cut you  
19          off.

20          JUDGE PROCTOR: Look, the District Court  
21          obviously had the inherent authority to establish  
22          authority.

23          The question becomes: What could the District  
24          Court do if the bar date was not complied with?

25          Clark on Receivers says here that it doesn't --

1 any point of Receiver or action of Receiver -- I  
2 think would be the logical extension -- cannot  
3 invalidate a preexisting lien.

4 It can affect the way that the lienholder may  
5 use certain remedy or remedies within the  
6 receivership to enforce the lien.

7 MR. KEEFE: The appointment of the Receiver  
8 does not invalidate the lien. That part is not in  
9 dispute.

10 What invalidated the lien that would extinguish  
11 the bank's interest was the failure to comply with  
12 the process.

13 JUDGE JORDAN: You can wrap up. This is taking  
14 you way beyond your time.

15 MR. KEEFE: I would just close with: If the  
16 Court would -- we invite the Court to look at the  
17 SEC versus Hardee matter out of the Ninth Circuit  
18 which in detail goes over the importance of a claims  
19 administration process in the federal receivership,  
20 and it looks at the factors to determine whether or  
21 not the process was fair, whether or not the  
22 dateline was fair, and whether or not a Court has a  
23 right to deny or reject claims.

24 And lastly, I could point the Court to the  
25 Bender versus Lancer Management opinion, as well.

1           Your Honor, I appreciate your time.

2           And again, if the Court would like a brief  
3 regarding the property matter, the Receiver would  
4 have no objection.

5           JUDGE JORDAN: We may not. We'll take a look  
6 at the record ourselves.

7           MR. KEEFE: Thank you, your Honor.

8           JUDGE JORDAN: Ms. Giddings, you've got your  
9 rebuttal time left.

10          MS. GIDDINGS: Your Honors, Mr. Wirth, who was  
11 trial counsel, was able to shed some light on your  
12 question. Let me just go through a brief timeline  
13 and explain exactly what happened.

14          In December 2011, a year and several months  
15 past the claims bar date, the Receiver filed a plan  
16 of distribution, and that was when it became obvious  
17 that the Receiver was saying the secured interest  
18 were eviscerated by failing to file a claim.

19          And on February 8, 2012, Wells Fargo filed its  
20 motion saying -- at that point in time, the  
21 properties had not been sold.

22          Wells Fargo filed its motion asking that it  
23 either be able to late file the claims and stating  
24 that the Court could not eviscerate secured  
25 interest.

1           The Court -- because there were other  
2 proceedings, the Court deferred ruling on this  
3 because there were some disqualification motions.  
4 There was this outside proceeding that the Receiver  
5 had brought against the Laurel Preserve that's  
6 pending here.

7           On April 15, 2015, the District Court denied  
8 another entity, BB&T, who made the same claim that  
9 Wells Fargo is making here, saying that its secured  
10 interest fell outside the receivership, and the  
11 Court denied that.

12           Then the Sarasota property came up for sale.  
13 And so the Receiver and Wells Fargo entered into an  
14 agreement that said, This is a good sales price. We  
15 will allow you to sell the property with the  
16 understanding that this money is going to be held  
17 over here until this issue is decided and that our  
18 lien effectively transfers to this collateral that  
19 you're holding while the Court resolves the issue of  
20 whether we had to file a claim to preserve our  
21 property interest.

22           JUDGE JORDAN: Mr. Keefe was correct that,  
23 although you weren't giving up any claims you had --

24           MS. GIDDINGS: Right.

25           JUDGE JORDAN: -- it was an agreement between

1 the parties that, given the situation, you were  
2 going to sell the property --

3 MS. GIDDINGS: Right.

4 JUDGE JORDAN: -- and put the money in escrow.

5 MS. GIDDINGS: But there was no waiver.

6 This was an agreement that was reached so that  
7 our lien attached to that collateral --

8 JUDGE JORDAN: Right, right. But there was no  
9 dispute over the actual sale taking place --

10 MS. GIDDINGS: Correct.

11 JUDGE JORDAN: -- as long as the proceeds were  
12 held.

13 MS. GIDDINGS: So that's how it was able --  
14 that's how it was able to be sold.

15 Now, the Laurel --

16 JUDGE JORDAN: Everybody's on the same page.

17 MS. GIDDINGS: The Laurel Mountain Preserve  
18 property has not been sold.

19 The SEC versus Hardee case, your Honor, it says  
20 everything that opposing counsel says it says except  
21 it's not dealing with secured claims.

22 This Court, based on your questions, I believe  
23 that the Court agrees that -- or I hope it agrees --  
24 that secured interests cannot be eviscerated by a  
25 Court order.

1           And I would call the Court's attention to this  
2 Court's case in FDIC versus LaCentra Trucking. It  
3 says it defies common sense that a Receiver has  
4 never been presented with a claim when the Receiver  
5 has known about the claim all along and is arguing a  
6 "gotcha" based on a procedural nuance.

7           And again, I would refer this Court to the  
8 Marshall versus New York case, which is a case in  
9 the United States Supreme Court in which -- in the  
10 receivership context, it says that a Receiver  
11 appointed by a Federal Court takes property subject  
12 to all liens and those liens take priority as  
13 governed by state law.

14           So we would ask that you reverse the District  
15 Court's order.

16           JUDGE JORDAN: All right. Thank you both very  
17 much. It's been helpful.

18           We're at recess until tomorrow morning.

19           (Proceedings adjourned.)  
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## CERTIFICATE OF TRANSCRIPTION

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STATE OF FLORIDA            )  
COUNTY OF PINELLAS        )

I, Suzanne M. Peterson, certify that I was authorized to and did transcribe the audio that was provided to me and that the foregoing pages 4 through 39, inclusive, are a true and complete record of said audio to the best of my ability.

I further certify that I am not a relative or employee of any of the parties, nor am I a relative or Counsel connected with the parties' attorneys or counsel connected with the action, nor am I financially interested in the outcome of the action.

DATED this 19th day of December, 2017.

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Suzanne M. Peterson  
Stenograph Shorthand Reporter  
Notary Public State Of Florida

My Commission Expires March 8, 2018  
Commission # FF 087147