Supreme Court Year in Review (and in Prospect): Judges' Roundtable

Hon. Eugene R. Wedoff – Moderator
U.S. Bankruptcy Court; Chicago

Hon. Dennis R. Dow
U.S. Bankruptcy Court; Kansas City, Mo.

Hon. Joan N. Feeney
U.S. Bankruptcy Court; Boston

Hon. Judith K. Fitzgerald
U.S. Bankruptcy Court; Pittsburgh

Hon. Jim D. Pappas
U.S. Bankruptcy Court; Boise, Id.

American Bankruptcy Institute
19th Annual Winter Leadership Conference
Supreme Court Year in Review (and in Prospect):
Judges' Roundtable

I. Supreme Court Opinions

Bell Atlantic Corp. v. Twombley, 127 S.Ct. 1955 (2007)

Background Facts:

The Telecommunications Act of 1996 restructured local telephone markets in an attempt to eliminate the local monopolies held by certain Incumbent Local Exchange Carriers (ILECS) by imposing on them certain conditions and duties designed to introduce competitive local exchange carriers (CLECS).

Thereafter, plaintiffs filed a complaint on behalf of all subscribers of telephone and high speed internet services since 1996 in district court seeking treble damages and declaratory and injunctive relief from ILECS for alleged violations of § 1 of the Sherman Act which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 127 S.Ct. at 1962; 15 U.S.C. § 1.

Specifically, the plaintiffs alleged that the ILECS "have entered into a contract, combination or conspiracy to prevent entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another." Id. at 1963. Plaintiffs further alleged that the ILECS had entered into agreements precluding competition amongst themselves and that such contracts could be inferred from, *inter alia*, the ILEC's parallel conduct as well as their "common failure 'meaningfully [to] pursu[e] attractive business opportunit[ies]' in contiguous markets where they possessed 'substantial competitive advantages.'" Id. at 1962.

Procedural Background:

The district court dismissed the complaint, holding that "allegations of parallel business conduct, taken alone, do not state a claim under § 1; plaintiffs must allege additional facts that 'ten[d] to exclude independent self-interested conduct as an explanation for defendants' parallel behavior.'" 127 S.Ct. at 1963 (*quoting* 313 S.Supp.2d 174, 179 (2003)). On appeal, the United States Court of Appeals for the Second Circuit held that "plus factors are not *required* to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal" and proceeded to reverse the district court. 127 S.Ct. at 1963 (*quoting* 425 F.3d 99, 114 (2005)).

Issue:

The issue was whether allegations of parallel anticompetitive conduct in a complaint seeking relief under § 1 of the Sherman Act (15 U.S.C. § 1) are, without more, sufficient to satisfy the notice pleading requirements of Fed.R.Civ.P. 8(a)(2).

Holding:

Justice Souter, writing for the majority, began the Court's analysis by reviewing precedent establishing the insufficiency of parallel conduct at the directed verdict and summary judgment stages of a case. The Court then held that the application of general standards of notice pleading to § 1 of the Sherman Act require "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." 127 S.Ct. at 1965. Lawful parallel conduct does not, in itself, suggest conspiracy and is insufficient to establish illegality.

Notwithstanding this holding, the Court explicitly rejected any notion that this standard requires heightened pleading of specific facts. 127 S.Ct. at 1974. Rather, a 15 U.S.C. § 1 claim must merely plead "enough facts to state a claim for relief that is plausible on its face." Id. Finally, the Court further held that a motion to dismiss for failure to state a claim need not, to be successful, establish that a plaintiff can prove no set of facts in support of his/her claim. Id. at 1968. In doing so, it overruled all opinions and authority construing Conley v. Gibson, 355 U.S. 41 (1957) to hold otherwise.

Analysis:

The Court noted that, in this case, the complaint merely alleged the absence of meaningful competition among the ILECS and a parallel course of conduct with regard to CLECs. Based on these observations, the plaintiffs drew the conclusory legal conclusion that the ILECS had entered into a contract, combination or conspiracy in violation of § 1 of the Sherman Act. However, the Court found that these actions could easily be viewed as naturally independent and unilateral reactions to the same stimulus. "The economic incentive to resist [the 1996 Act] was powerful, but resisting competition is routine market conduct, and even if the ILECs flouted the 1996 Act in all the ways plaintiffs allege [citation omitted] there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway; so natural, in fact, that if alleging parallel decisions to resist competition were enough to imply and antitrust conspiracy, pleading a § 1 violation against almost any group of competing businesses would be a sure thing." 127 S.Ct. at 1971. Likewise, the lack of competition among the ILECs could easily be attributed to an inclination on the part of each of the formerly government-sanctioned monopolies to "sit tight" and enjoy their well-established territory. Id. at 1972.

The Dissent:

The dissent states that, just as the ILECs' activities could be construed as natural, independent reactions to the 1996 Act, they could just as easily constitute evidence of a conspiracy. 127 S.Ct. at 1975. Accordingly, the requirements of notice pleading have been met. The dissent takes issue with the majority's characterization of Conley as "an incomplete, negative gloss on an accepted pleading standard," arguing instead that it "captures the policy choice embodied in the Federal Rules" and is consistent with prior holdings by this Court. Id. at 1981. Moreover, the majority's plausibility standard Congress' intent to encourage, rather than discourage, enforcement of the Sherman Act. Id. at 1983.

The dissent views the majority's opinion as establishing a heightened pleading standard, arguing that the majority's distinction between factual allegations and mere legal conclusions is the "stuff of a bygone era." 127 S.Ct. at 1984-1985. The substitution of notice pleading for code pleading eliminated this distinction.

Travelers Casualty & Surety Co. of America v. Pacific Gas & Elec. Co., __ U.S. __, 127 S.Ct. 1199 (2007)

Background Facts:

Petitioner, Travelers Casualty & Surety Company ("Travelers") issued a $100 million surety bond on behalf of Pacific Gas and Electric Company ("PG & E" or the "Debtor") to the California Department of Industrial Relations, guaranteeing PG & E's payment of state workers' compensation benefits to injured employees. In connection with this undertaking, PG &E executed indemnity agreements in favor of Travelers which provided that it would be responsible for Travelers' losses in connection with the bonds, including any attorneys' fees incurred in pursing, protecting, or litigating its rights in connection with the bonds.

Following the commencement of PG & E's Chapter 11 case, Travelers asserted a claim, presumably an unliquidated, contingent claim, as no default had occurred. With the approval of the bankruptcy court, the Debtor and Travelers agreed to the inclusion of language in the Debtor's disclosure statement and plan designed to protect Travelers' right to indemnity and subrogation in the event of a default by the Debtor. Travelers then claimed that the Debtor subsequently altered the negotiated language without its consent, a circumstance which resulted in additional litigation. The litigation eventually was resolved by way of a stipulation which was approved by the bankruptcy court. The stipulation provided that Travelers "'may assert its claim for attorneys' fees under the [i]ndemnity [a]greements' (subject to PG &E's right to object) as a general unsecured claim against PG & E." 127 S.Ct. at 1203-1204.

After Travelers filed an amended proof of claim seeking recovery of its attorneys' fees in connection with the bankruptcy case, the Debtor objected, asserting that Travelers could not recover attorneys' fees while litigating issues of bankruptcy law.

Procedural History:

The bankruptcy court sustained the Debtor's objection to Traveler's amended proof of claim. The District Court affirmed on the basis of the decision in In re Fobian, 951 F.2d 1149 (9th Cir. 1991), in which the United States Court of Appeals for the Ninth Circuit held that "'where the litigated issues involve not basic contract enforcement questions, but issues peculiar to federal bankruptcy law, attorney's fees will not be awarded absent bad faith or harassment by the losing party.'" 127 S.Ct. at 1204 (citing 951 F2d. at 1153).

Travelers appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed the District Court. Relying on Fobian, the Ninth Circuit held that attorneys' fees are not recoverable in bankruptcy cases for litigating issues peculiar to federal bankruptcy law.

Issue:

The Supreme Court framed the issue as "whether the Bankruptcy Code disallows contract-based claims for attorneys' fees based solely on the fact that the fees at issue were incurred litigating issues of bankruptcy law. The Court granted certiorari to address a conflict among the circuits regarding the Fobian rule.

Holding:

Writing for a unanimous court, Judge Alito held that the Bankruptcy Code does not clearly and expressly compel courts to follow the Fobian rule. The Court stated that "the Code say *nothing* about unsecured claims for contractual attorney's fees incurred while litigating issues of bankruptcy law," 127 S.Ct. at 1206, adding that "[i]n light of the broad, permissive scope of § 502(b)(1), and our prior recognition that 'the character of [a contractual] obligation to pay attorney's fees presents no obstacle to enforcing it in bankruptcy,' it necessarily follows that the Fobian rule cannot stand."

Analysis:

The Supreme Court began its analysis with a review of what constitutes a proof of claim, namely a right to payment under 11 U.S.C. § 101(5)(A) against the bankruptcy estate. Once a proof of claim is filed, the court must determine whether it is "allowed" under § 502(a). When a party in interest objects, the Bankruptcy Code directs that the court "shall allow" the claim unless it implicates one of the nine exceptions set forth in § 502(b). Because none of the exceptions pertained to Travelers' claim except § 502(b)(1), the Court determined that its claim must be allowed under § 502(b), unless it was unenforceable within the meaning of § 502(b)(1).

Section 502(b)(1) disallows a claim that is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because the claim is contingent or unmatured. According the Court, § 502(b)(1) "is

most naturally understood to provide that, with limited exceptions, any defense to a claim that is available outside of the bankruptcy context is also available in bankruptcy." 127 S.Ct. at 1204. Noting that this view is consistent with the basic federal rule that state law governs the substance of claims, the Court turned to the Fobian rule, which the District Court and Ninth Circuit used to reject Travelers' claim. The Court stated that "the Fobian rule finds no support in the Bankruptcy Code, either in § 502 or elsewhere," id. at 1205, adding that [t]he absence of textual support is fatal for the Fobian rule. " Id.

Based upon these considerations, as well the rejection of the Debtor's arguments based upon § 506(b), which it failed to raise below, the Court vacated the judgment of the Ninth Circuit and remanded the case for further proceedings, while expressing "no opinion with regard to whether, following the demise of the Fobian rule, other principles of bankruptcy law might provide an independent basis for disallowing Travelers' claim for attorneys' fees." Id. at 1207-08.

Marrama v. Citizens Bank of Massachusetts, __ U.S. __, 127 S.Ct. 1105 (2007)

Background Facts:

Petitioner, Robert Marrama ("Marrama" or the "Debtor"), filed a voluntary Chapter 7 petition, and made misrepresentations on his schedules and statement of financial affairs. In particular, he represented that real property located in Maine, which he owned as the sole beneficiary of a trust, had no value. When the Chapter 7 trustee advised Debtor's counsel that he intended to recover the property as an asset of the bankruptcy estate, the Debtor filed a "Verified Notice of Conversion to Chapter 13," which pursuant to Fed. R. Bankr. P. 1017(c)(2)[sic],1 the bankruptcy court treated as a motion. The Respondents, the Chapter 7 Trustee and the Debtor's largest creditor, Citizens Bank of Massachusetts ("Citizens"), objected to conversion asserting that the request to convert was made in bad faith and, if allowed, would constitute an abuse of the bankruptcy process.

Procedural History:

The bankruptcy court held a hearing on the Debtor's request to convert his Chapter 7 case to a case under Chapter 13. The bankruptcy court rejected the Debtor's explanations for the misstatements about his real property and other errors in the schedules, "ruling that there is no 'Oops' defense to the concealment of assets and that the facts established a 'bad faith case." 127 S.Ct. at 1109. The bankruptcy court denied the conversion request, and, on appeal, the United States Bankruptcy Appellate Panel

[1]The reference should have been to Fed. R. Bankr. P. 1017(f)(2).

for the First Circuit affirmed, rejecting the Debtor's argument that he had an absolute right to convert his Chapter 7 case to a case under Chapter 13 under the plain language of 11 U.S.C. § 706(a) of the Bankruptcy Code. The Panel construed § 706(a) in conjunction with other provisions of the Code and the Bankruptcy Rules "as creating a right to convert a case from Chapter 7 to Chapter 13 that is 'absolute only in the absence of extreme circumstances,'" 127 S.Ct. at 1109 (citing In re Marrama, 313 B.R. 525, 531 (1st Cir. B.A.P. 2004), and concluded that the Debtor's failure to describe the transfer of the Maine property into a trust, his attempt to obtain a homestead exemption on rental property, and his nondisclosure of a tax refund constituted extreme circumstances.

The United States Court of Appeals for the First Circuit also rejected the Debtor's arguments. It emphasized that the § 706(a) uses the word "may" rather than "shall," that the bankruptcy court has authority to dismiss a Chapter 13 petition upon a showing of "bad faith," and that it could discern no theoretical or practical reason why Congress would have chosen to treat a first-time motion to convert a Chapter 7 case to Chapter 13 under § 706(a) differently from the filing of a Chapter 13 petition in the first instance. 127 S.Ct. at 1109 (citing In re Marrama, 430 F.3d 474, 479 (1st Cir. 2005).

Issue:

The question presented was whether a Chapter 7 debtor has an absolute right to convert to chapter 13 or whether a debtor who acts in bad faith prior to filing a motion to convert to Chapter 13 forfeits his right to Chapter 13 relief.

Holding:

The Court in a 5-4 decision held that the lower courts correctly determined that Marrama forfeited his right to proceed under Chapter 13, noting a procedural anomaly arising from virtually unanimous decisions providing that prepetition bad faith may cause a forfeiture of any right to proceed with a Chapter 13 case, and the split of authority existing with respect to a bad faith exception to a debtor's right to convert at least one Chapter 7 case to a case under Chapter 13, even though the case will thereafter be dismissed or immediately converted to Chapter 7.

Analysis:

The majority began its discussion with reference to applicable Code sections: § 706(a), which provides that a "debtor may convert a case under this chapter to a case under chapter . . .13 . . . at any time, if the case has not been converted under section . . . 1307 of this title," and § 706(d), which provides that "[n]otwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter." The Court, in rejecting the Debtor's argument that the language of the House and Senate Committee Reports supports his argument that he had an absolute right to convert, stated that the Committee Reports' reference to an "absolute right" of conversion was "more equivocal

that petitioner suggests." 127 S.Ct. at 1110. The Court noted two reasons why Marrama might not qualify as a Chapter 13 debtor: 1) the regular income requirement and debt ceilings set forth at 11 U.S.C. § 109(e); and 2) the construction of the word "cause" in § 1307(c), which provides that a Chapter 13 case may be either dismissed or converted "for cause."

The Court recognized that bankruptcy courts "routinely treat dismissal for prepetition bad-faith conduct as implicitly authorized by the words 'for cause,'" 127 S.Ct. at 1111, adding that such rulings are tantamount to determinations that the debtor is not a member of the class of honest but unfortunate debtors that bankruptcy laws were designed to protect. Id.

The Court referenced the provision in § 706(a) which provides that any waiver of a right to convert is unenforceable. It concluded that "[a] statutory provision protecting a borrower from waiver is not a shield against forfeiture." Id. Citing 11 U.S.C. § 105(a), it concluded that bankruptcy judges have broad authority to take any action necessary or appropriate to prevent an abuse of process and that such authority was "surely adequate to authorize an immediate denial of a motion to convert filed under § 706(a) in lieu of a conversion order that merely postpones the allowance of equivalent relief and may provide a debtor with an opportunity to take action prejudicial to creditors." Id. at 1112.

The Dissent:

The dissent rejected the Court's reasoning, which it described as conditioning a debtor's conversion rights on a bankruptcy judge's finding of good faith, a prerequisite inconsistent with the Bankruptcy Code. In the view of the dissent, the Code unambiguously provides a broad right to convert from Chapter 7 to Chapter 13, expressly restricting that right only if the debtor has previously converted his case, or if the debtor is ineligible for relief under the new chapter. It concluded that nothing in the Code suggests that a bankruptcy judge has the discretion to override a debtor's right to convert provided that those two statutory conditions are satisfied, adding that Congress knew how to limit conversion authority when requested by parties in interest under 11 U.S.C. §§ 1112(b), 1208(b), (d), and 1307(c), but did not do so in § 706(a).

The dissent recognized that Congress did not directly address the consequences of behavior such as Marrama's, which could have resulted in the denial of his discharge under 11 U.S.C. § 727, noting that it could have expressly deemed such conduct to bar conversion to another chapter. The dissent noted that the remedies available for conduct such as Marrama's included 1) reconversion to Chapter 7 pursuant to 11 U.S.C. § 1307(c); 2) denial of confirmation of a proposed plan due to the absence of good faith pursuant to 11 U.S.C. §§ 1325(a)(3), (4), 1328(b)(2); 3) criminal liability for perjury because schedules and statements are filed under penalty of perjury pursuant to 28 U.S.C. § 1746; and 4) the Chapter 13 trustee's ability to oppose discharge pursuant to 11

U.S.C. § 1302(b) (incorporating 11 U.S.C. § 704(4), (6) and (9)).

The dissent criticized the majority for failing to read §§ 109(e) and 706(d) together and treating § 706(d) as a "separate repository of additional requirements (namely, the absence of the grounds for dismissal or reconversion under § 1307(c) that a Chapter 7 debtor must satisfy *before* conversion to Chapter 13." 127 S.Ct. at 1115 (emphasis in original). The dissent concluded that the Court's holding is unsupported by the terms of the Bankruptcy Code, pointing out that conversion under § 706(a) followed by reconversion under § 1307(c) might not be an empty exercise and that the Court's holding circumvents the process set forth in Bankruptcy Rules 9014 and 1017(e)(1) because it "forecloses the right a Chapter 13 debtor would otherwise possess to file a Chapter 13 repayment and reorganization plan. . . ." Id. The dissent added that the Court's holding also foreclosed consideration of questions such as whether the plan in some sense could cure prior bad faith.

The dissent also rejected the majority's reliance on 11 U.S.C.§ 105(a) as a source for denial of conversion under § 706(a), but observed that it could be used to fashion various remedies to address the real problem posed by Marrama's conduct and the conduct of debtors like him. The dissent identified the following other remedies for redressing bad faith: "requiring accountings or reporting of assets; enjoining debtors from alienating estate property; penalizing counsel; assessing costs and fees; or holding the debtor in contempt ." Id. at 1116. Nevertheless, it concluded that "whatever steps a bankruptcy court may take pursuant to § 105(a) or its general equitable powers, a bankruptcy court cannot contravene the provisions of the Code." Id. at 1117.

Howard Delivery Service, Inc. v. Zurich American Insurance Co., __ U.S.__, 126 S.Ct. 2105 (2006).

Background Facts:

Petitioner, Howard Delivery Service, Inc. ("Howard"), owned and operated a multi-state, freight trucking business, employing as many as 480 workers. The states in which it operated required it to maintain workers' compensation coverage. Howard contracted with Zurich American Insurance Company ("Zurich") to provide workers' compensation insurance for its operations. When it filed a bankruptcy petition, Zurich filed an unsecured claim, seeking priority status for approximately $400,000 in unpaid premiums. In an amended proof of claim, Zurich asserted that its claim was entitled to priority under 11 U.S.C. § 507(a)(5), which Howard and Zurich agreed "covers fringe benefits that complete a pay package-typically pension plans, and group health, life, and disability insurance-whether unilaterally provided by an employer or the result of collective bargaining." 126 S.Ct. at 2108.

Procedural History:

The bankruptcy court denied priority status to Zurich's claim holding that the overdue premiums did not qualify under § 507(a)(5) as bargained-for benefits furnished in lieu of increased wages. The District Court affirmed, but a divided United States Court of Appeals for the Fourth Circuit concluded that § 507(a)(5) accorded priority status to claims for unpaid workers' compensation premiums.

Issue:

The question presented was whether § 507(a)(5) priority encompasses claims for unpaid premiums on a policy purchased by an employer to cover its workers' compensation liability.

Holding:

The Court, split 6-3, held that premiums owed by an employer to a workers' compensation carrier do not fit within § 507(a)(5). The Court found that "workers' compensation does not compensate employees for work performed, but instead for on-the-job injuries incurred; workers' compensation regimes substitute not for wage payments, but for tort liability." 126 S.Ct. at 2116.

Analysis:

The Court began its analysis by noting 1) that § 507(a)(4) which provides priority treatment for wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual, and § 507(a)(5) are joined together by a common cap and their linkage was central to resolution of the issue; and 2) that two of its decisions, United States v. Embassy Restaurant, Inc., 359 U.S. 29 (1959), and Joint Industry Bd. of Elec. Industry v. United States, 391 U.S. 224 (1968), prompted enactment of § 507(a)(5) to deal with fringe benefits. The Court observed that Congress did not expand the priority available for wages, salaries, and commissions to include fringe benefits, but rather created a new, one-step lower priority, for those types of benefits in recognition that fringe benefits "generally, complement, or 'substitute' for, hourly pay." 126 S.Ct. at 2111. The Court recognized, however, that Congress did not define the terms employed in § 507(a)(5), namely "*contributions* to an *employee benefit plan* . . . arising from *services rendered* within 180 days before the date of the filing of the [bankruptcy] petition." 126 S.Ct. at 2112(emphasis in original).

The Court rejected Zurich's invitation to borrow definitions from ERISA, the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, an invitation accepted by the dissent. Instead, it held that the case turned "not on a definition borrowed from a statute designed without bankruptcy in mind, but on the essential character of workers' compensation regimes," 126 S.Ct. at 2113, which the Court stated "have a dominant employer-oriented thrust: They modify, or substitute for, the common-law tort liability to which employers were exposed for work-related accidents." Id. The Court noted that workers' compensation programs provide benefits

to employees in the form of assurance of fixed payments for on-the-job injuries, and benefits for employers in the form of reduced risk from large judgments and heavy costs associated with tort litigation - - a tradeoff which is not involved in fringe benefit plans that augment each covered worker's hourly pay. The Court added that in contrast to employer sponsored pension plans which characteristically insure the employee or his survivor only, workers' compensation insurance, like fire, theft, and motor vehicle insurance, shields the enterprise. Moreover, an employee affected by an employer's failure to secure workers' compensation insurance would not have a suit for premiums that should have been paid, but recourse to a state-maintained fund. Finally, the Court emphasized that nearly all states mandate workers' compensation coverage but not bargained-for or voluntarily accorded fringe benefits.

The Court considered but was not persuaded by Zurich's policy arguments, concluding that it was guided by "the equal distribution objective underlying the Bankruptcy Code, and the corollary principle that provisions allowing preferences must be tightly construed.

The Dissent (Justice Kennedy, joined by Justices Souter and Alito).

The three dissenting Justices expressed the opinion that in denying priority status to an insurance company for unpaid workers' compensation premiums, the majority view conflicted with the text and the purpose of the § 507(a)(5) priority for contributions to an employee benefit plan arising from services rendered within 180 days before the filing. The dissent prefaced its analysis with a discussion of those rules of statutory construction applicable to cases involving an interpretation of the Bankruptcy Code: 1) provisions allowing preferences must be tightly construed; 2) a Code provision must indicate a clear purpose to prefer one claim over another; 3) bankruptcy priorities should not be read to give priorities to as few creditors as possible, but should be interpreted in accordance with the principle of equal treatment of like claims; and 4) bankruptcy priorities should not be read so narrowly as to conflict with their plain meaning. According to the dissent, under either the "artful" or "plain meaning" approach to statutory construction, the payment for workers' compensation insurance at issue should be afforded a priority for contributions to employee benefit plan. In their view, the payments at issue undoubtedly were contributions because of the mandatory nature of the payments and arose from services rendered by employees, even though the premiums were paid to the insurance company. Most importantly, according to the dissent, the workers' compensation scheme was a plan providing benefits to employees, who gave up their tort rights in exchange for insurance coverage, was a wage substitute, and was mandatory for employers. Finally, the dissenters noted that even if the statute were ambiguous, the majority view was not supported because there was no indication in the statute that Congress intended to depart from the ordinary definition of the term "employee benefit plan."

Watters, Commissioner, Michigan Office of Insurance and Financial Services v. Wachovia Bank N.A., et al., 550 U.S.___, 127 S.Ct. 1559 (April 17, 2007).

Background Facts:

Petitioner, Linda A. Watters was the Commissioner of the Office of Insurance and Financial Services (OIFS) for the State of Michigan. Under applicable Michigan law, she exercises "'general supervision and control' over registered lenders[;] has authority to conduct examinations and investigations and to enforce requirements against registrants[;] and also has authority to investigate consumer complaints and take enforcement actions if she finds that a complaint is not 'being adequately pursued by the appropriate federal regulatory authority.'" (Slip Op. at 3). Her authority extends only to the subsidiaries of state and national banks that have to register with OIFS. Recognizing that the regulation of national banks is the province of federal law, the Michigan statute "harmoniously" exempted national banks from its scope and from the regulations promulgated by OIFS. (Slip Op. at 8). Respondent Wachovia Bank is a national banking association chartered by the Office of the Comptroller of the Currency (OCC). Respondent Wachovia Mortgage Corporation is a North Carolina corporation engaged in real estate lending in many states, including Michigan. Prior to 2003, Wachovia Mortgage was apparently owned by a non-bank holding company, and was duly registered with OIFS to conduct mortgage lending in Michigan. On January 1, 2003, Wachovia Mortgage became a wholly-owned subsidiary of Wachovia Bank.

Procedural History:

Three months after its acquisition by Wachovia Bank, Wachovia Mortgage informed Michigan's OIFS that it was surrendering its OIFS registration. It claimed that its new status as an operating subsidiary of a national bank meant that federal statutes and regulations preempted Michigan's registration requirements. Commissioner Watters disagreed, and in her official capacity issued a letter in which she said that Wachovia Mortgage would no longer be authorized to conduct mortgage lending activity in Michigan. Wachovia Bank and Wachovia Mortgage sued Commissioner Watters for declaratory relief, and to enjoin her from enforcing Michigan registration prescriptions against them. They challenged the provisions of Michigan law that require all mortgage lenders that are not national banks to (1) register and pay fees to the State before conducting banking activities in Michigan; (2) submit annual financial statements to the Commissioner, and retain certain documents in a particular OIFS-imposed format; (3) allow the Commissioner inspection and enforcement authority over them; and (4) submit to other regulatory or enforcement actions by the Commissioner. Wachovia Mortgage argued that federal statutes and regulations preempted all of these requirements. Commissioner Watters, in response, argued that the requirements applied to Wachovia Mortgage because it was an operating subsidiary of a national bank, not a national bank itself, and thus still subject to OIFS regulation. She also

argued that the Tenth Amendment preserved her ability to regulate state chartered companies conducting mortgage lending business in Michigan, even if they are operating subsidiaries of national banks.

The District Court (334 F. Supp.2d 957, W.D. Mich. 2004) granted summary judgment to the Petitioners. It gave deference to the OCC's determination that an operating subsidiary of a national bank is only subject to state regulation to the extent that the parent bank would be if it performed the same function, under the two-part deference analysis of Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). Since Wachovia Bank was not subject to OIFS mortgage lending regulation, neither was Wachovia Mortgage. The Sixth Circuit affirmed (431 F.3d 556).

Issue:

Whether federal agency regulations promulgated under and interpreting federal statutes preempt state statutes and regulations directly affecting wholly-owned operating subsidiaries of national banks.

Holding:

The Supreme Court (J. Ginsburg joined by JJ. Kennedy, Souter, Breyer, and Alito) held that federal law preempted state regulation of wholly-owned operating subsidiaries of national banks when those subsidiaries exercised powers that the national bank could have exercised. The National Bank Act preempted state regulation of national banks, except to the extent that state laws of general applicability did not interfere with the "business of banking" or the core operations of the banks, including mortgage lending. Congress included the express command in Section 484(a) of the NBA that "'No national bank shall be subject to any visitorial powers except as authorized by Federal law . . . .'"(Slip op. at 6). The Court recalled its earlier articulation of "visitation" in a 1905 opinion as "'the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations.'" However, the Court also determined that federal preemption depended on the type of power exercised by an entity, and not the necessarily upon the identity of the corporate entity exercising that power. Therefore, because 12 U.S.C. §24a(g)(3)(A) restricts operating subsidiaries to the same services and operations that national banks themselves perform, the law also preempts wholly-owned operating subsidiaries from any state visitorial regulation; a conclusion supported by the fact that the OCC has the general authority to regulate all national banks and operating subsidiaries. Because Wachovia Mortgage was the operating subsidiary of a national bank and was engaged in the "business of banking," the law exempted it from state visitorial regulation. The Court noted that when Congress amended the NBA in 1999 to "confirm" that operating subsidiaries could only engage in activities that their parent national banks could engage in, it provided that other national bank subsidiaries who engaged in "'nonbanking financial activities, e.g.

securities and insurance, are subject to state regulation in connection with those activities.'" (Slip Op. at 15). For the majority, that was a sufficient demonstration of Congressional intent to reject Commissioner Watters' argument that if Congress had meant to exempt non-bank operating subsidiaries from state visitorial regulation, it would have done so in clearer terms.

Finally, the Court appeared to sidestep the question of whether OCC's regulations determining the scope of the NBA preemption should be entitled to Chevron deference. Commissioner Watters argued that the scope of federal preemption is a legal determination that only the judiciary could make. The Court called this question "academic." It held that because the statute, not the regulations, allow a national bank to write mortgage loans through an operating subsidiary the OCC regulation "merely clarifies and confirms what the NBA already conveys . . . ." (Slip Op. at 16). The Court thereby at least implied that the OCC properly read the NBA to grant it the power to prevent state interference in a national bank's engagement in the business of banking through a subsidiary, presumably entitling the OCC's regulations to Chevron deference. The Court also found Commissioner Watters' 10th amendment argument unavailing, holding that the Commerce Clause and the Necessary and Proper Clause gave Congress the power to regulate national banks, thereby disclaiming any reservation of that power to the states. (Slip Op. at 17).

Justice Thomas took no part in the decision.

Dissent:

Justice Stevens, joined by Chief Justice Roberts and Justice Scalia, wrote a dissenting opinion that traces the history of the dual (federal and state) banking system in the United States. He asserts that the majority exceeded the permissible bounds of federal preemption in that system's regulation. Finding a sufficiently clear expression of Congressional preemptive intent lacking, he writes that "[n]otwithstanding the absence of relevant statutory authority, the Court today endorses an agency's incorrect determination that the laws of a Sovereign state must yield to federal power." (Dissent at 1). For the dissent, this case is not a simple matter of Congressional preemption of state law: "Whatever the Court says, this is a case about an administrative agency's power to preempt state laws." (Dissent at 23).

According to the dissent, the NBA never created the field or industry preemption that the majority said it did. Instead, the NBA only exempted national banks from state regulation "'so far as that [state] legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve the government. . . ." (Dissent at 3). The NBA created a dual banking system where state law usually governs the activities of both national and state banks even though they were treated divergently at federal law. Furthermore Congress never delegated the power to the OCC to modify this system of "competitive equality."

Justice Stevens also challenged the Court's idea that Congress implicitly endorsed the extension of any exemptions to operating subsidiaries because Congress, in 1999, implicitly overruled OCC regulations that extended power to operating subsidiaries to engage in activities that their parent national banks could not. Congress never authorized national banks to use state law incorporated subsidiaries to perform traditional banking functions, nor has it authorized the OCC to license state chartered entities. "The purpose of Congress is the ultimate touchstone of pre-emption analysis'" (Dissent at 10), and Congress showed no intent to extend preemption to the affiliates of national banks. Instead, when Congress expanded the power of the OCC to supervisory power over affiliates of national banks, it did not extend the scope of 12 U.S.C. §484(a), the provision exempting national banks from state visitorial power. Thus, because the underlying presumption is that states are allowed to regulate, there is insufficient evidence of Congressional intent to find that the NBA preempts all state visitorial regulation of operating subsidiaries. If such preemptive intent is not expressed by statute, the OCC cannot exercise preemptive powers never granted to it.

For that reason, even if OCC had determined that its regulations should preempt state laws by predicting that its interpretation of the scope of the NBA would be supported by a federal court, such a determination was not entitled to Chevron deference. When an agency attempts to decide the scope of federal preemption, the need to respect state sovereignty calls for less then Chevron deference. In this case the OCC delves into whether "a state corporation can avoid complying with state regulations and yet take advantage of state laws insulating its owners from liability." (Dissent at 23). In so doing, it threatens the principle of competitive equality that is the cornerstone of the dual banking system, and should be overruled.

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Supplement to
Supreme Court Year in Review (and in Prospect):
Judge's Roundtable

Watson v. Philip Morris Cos., --- S.Ct. ---, 2007 WL 1660910 (June 11, 2007).

Background Facts:

Petitioners, Lisa Watson and Loretta Lawson filed suit in an Arkansas state court claiming that Philip Morris violated Arkansas' unfair business practice laws by advertising certain cigarette brands as "light" when, in fact, Philip Morris had

manipulated testing results to register lower levels of tar and nicotine in the advertised cigarettes than would be delivered to consumers.

The tobacco industry is responsible for its own testing, but the tests are run according to Federal Trade Commission specifications, and the FTC closely monitors the process. The FTC then publishes the testing results and sends them to Congress. The tobacco industry has followed the FTC's requirement that cigarette manufacturers disclose tar and nicotine content based exclusively on the results of this testing.

Procedural History:

Philip Morris successfully removed the suit to federal district court under the federal officer removal statute, which permits removal of an action against "any officer (or any person acting under that officer) of the United States or of any agency thereof." 28 U.S.C. § 1442(a)(1). The District Court ruled that the complaint attacked Philip Morris' use of the government's method of testing cigarettes, and thus Philip Morris was sued in its capacity as "acting under" the FTC, permitting removal under the statute.

The Eighth Circuit affirmed, emphasizing the FTC's detailed supervision of the cigarette testing process and likening the case to others in which lower courts permitted removal by heavily supervised government contractors.

Issue:

Whether the fact that a regulatory agency directs, supervises, and monitors a company's activities in considerable detail brings that company within the scope of the "acting under an officer of the United States" standard for purposes of federal removal jurisdiction.

Holding:

No. For a unanimous Court, Justice Breyer wrote that even a liberal construction of the language "acting under" any "agency" or "officer" of the United States cannot include a litigant's mere compliance with the law. The Supreme Court reversed the Eight Circuit's decision and remanded the case for further proceedings.

Analysis:

The Court began its analysis with a brief history of the federal removal statutes. Their initial intent was to protect federal officers from interference by hostile state courts. The current statute has expanded to include all federal officers and any person acting under or by authority of such officers. Because Philip Morris was not acting under the authority of a federal officer, even under the most liberal construction of the statutory language, it would be inconsistent with the intent of 28 U.S.C. § 1442(a)(1) to allow removal.

With history and precedent in mind, the Court examined the relationship of a private party "acting under" a federal "officer" or "agency." 28 U.S.C. § 1442(a)(1). The Court found that such a relationship typically involves "subjection, guidance, or control." Webster's New International Dictionary 2765 (2d ed. 1953). In addition, precedent and statutory purpose make clear that the private person's "acting under" must involve an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior. See e.g., Davis v. South Carolina, 107 U.S. 597, 600 (1883). The help or assistance necessary to bring a private person within the scope of the statute does *not* include simply *complying* with the law. The Court contrasted government contractors, who are "helping the Government produce something it needs," from Phillip Morris, who did not help or assist the duties or tasks of the FTC and merely complied with the law. As such, Philip Morris did not have a sufficient relationship with a federal officer or agency as required under 28 U.S.C. § 1442(a)(1).

The Court also looked at the purpose of the statute, and found that when a company subject to a federal regulatory order complies with the order, the company does not face a significant risk of prejudice if its compliance with that order is adjudicated in a state court. Cf. Maryland v. Soper, 270 U.S. 9, 32 (1926); Arizona v. Mannypenny, 451 U.S. 232, 241-42 (1981). The Court likewise found that a state court lawsuit brought against such a company is not likely to disable federal officials from taking necessary action designed to enforce federal law. Cf. Tennessee v. Davis, 100 U.S. 257, 262-63 (1880).

Ultimately, the Court was not persuaded by Philip Morris' argument that by conducting cigarette tests, it was acting on behalf of the FTC. There was no evidence of any delegation of legal authority from the FTC to the industry association to undertake testing on the Government agency's behalf---other than several former FTC officials stating in an *amicus* brief that they believed that the FTC had "delegated testing responsibility" to the industry.

Beck v. Pace Int'l Union, --- S.Ct. ---, 2007 WL 1660910 (June 11, 2007).

Background Facts:

Petitioner, Jeffrey Beck is the liquidating trustee of the Estates of Crown Vantage, Inc. and Crown Paper Company (hereinafter, collectively, Crown). Crown employed 2,600 people in seven paper mills. In March 2000, Crown filed a chapter 11 case and proceeded to liquidate its assets. A few months later, Crown began to consider a "standard termination" of its pension plans, which requires that the terminated plans have sufficient assets to pay their benefit liabilities. Crown believed this could occur through a purchase of annuities.

Respondent PACE International Union represented employees covered by seventeen separate single-employer defined-benefit pension plans sponsored and

administered by Crown. PACE opposed Crown's standard termination proposal, preferring instead that Crown merge the Crown plans into PACE's own multi-employer plan ("PIUMPF"), whereupon Crown's plans' assets would be conveyed to PIUMPF, which would assume all of the Crown plans' liabilities. While Crown was considering PACE's proposal, it discovered that some of the plan liabilities were actually overfunded, so that by purchasing annuities to fund the standard terminations, it could retain an approximately $5 million plan surplus, which would be available for distribution to Crown's creditors. Under PACE's merger proposal, the $5 entire million surplus would go to PIUMPF instead. Moreover, the PBGC told Crown that it would withdraw its proof of claim if Crown used the annuity purchase termination method, since a fully funded standard termination releases the PBGC from any guaranty obligations to plan participants. Crown rejected PACE's proposal, and purchased the annuities to fund its standard termination.

Procedural History:

PACE and two plan participants sued Crown's directors in the Bankruptcy Court, alleging that they breached their fiduciary duties under ERISA by failing to diligently consider PACE's merger proposal. The Bankruptcy Court ruled for PACE, deciding that the decision to merge or annuitize was a fiduciary decision, which the directors gave "insufficient study." Crown appealed to the District Court, which affirmed in relevant part. The Ninth Circuit also affirmed, ruling that while the decision to terminate a pension plan is a business decision not subject to ERISA's fiduciary obligations, the *implementation* of a termination decision is fiduciary in nature. Since the Ninth Circuit viewed the proposed merger as a permissible method of terminating a pension plan under ERISA, it held that the directors failed to fulfill their fiduciary obligations by more seriously considering the proposal. Crown sought a rehearing *en banc*, with the support of the PBGC and the Department of Labor. The Ninth Circuit did not change its decision, leading to the Supreme Court granting *certiorari*.

Issue:

Whether an employer that sponsors and administers a single-employer defined-benefit pension plan has a fiduciary obligation under ERISA to consider a merger with a multiemployer plan as a method of terminating the plan.

Holding:

No. Writing for a unanimous court, Justice Scalia held that merger is not a permissible method of termination because merger is an alternative to, and not an example of, plan termination. Because merger is not a permissible method of termination under ERISA, Crown did not have a fiduciary obligation to consider it.

Analysis:

The dispositive issue for the Court was whether merger is a permissible form of plan termination under ERISA. The Court began its analysis with a review of plan termination options available under ERISA. Section 1341(b)(3)(A) provides: "In . . . any final distribution of assets pursuant to . . . standard termination . . ., the plan administrator shall . . . (i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or . . . (ii) in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan." Both Crown and Pace agree that § 1341(b)(3)(A)(i) refers to the purchase of annuities, and that § 1341(b)(3)(A)(ii) allows lump-sum distributions at present discounted value. Merger does not fit into the former category, which deals solely with annuities. Thus, only if merger fits into the latter category, is it a permissible form of plan termination.

The Court gave deference to the PBGC's interpretation of ERISA as not permitting merger as a method of termination. PBGC argued, and the Court agreed, that merger is an alternative to plan termination, not an example of it. The Court held that merger does not "fully provide all benefit liabilities under the plan," and thus is not a valid termination offer under § 1341(b)(3)(A)(ii).

PACE argued that § 1341(b)(3)(A)(ii)'s residual provision referring to an asset distribution that "*otherwise*" fully provide[s] all benefit liabilities under the plan" covers merger because annuities are an example of a permissible means of providing benefit liabilities and merger is the legal equivalent of annuitization.

The Court rejected this argument for three reasons. First, terminating a plan through purchase of annuities formally severs ERISA's applicability to plan assets and employer obligations, whereas merging the Crown plans into PACE's multiemployer plan would result in the former plans' assets remaining *within* ERISA's purview, where they could be used to satisfy the benefit liabilities of the multi-employer plan's other participants and beneficiaries. Second, although § 1344(d)(1), (3) of ERISA expressly allows an employer to (under certain circumstances) recoup surplus funds in a standard termination---as Crown sought to do here---merger would preclude the receipt of such funds by reason of § 1103(c), which prohibits employers from "misappropriating" plan assets for their own benefit. Third, merger is nowhere mentioned in the termination provisions of § 1341, but is instead dealt with in an entirely different set of statutory sections setting forth entirely different rules and procedures (§§ 1058, 1411, and 1412).

Safeco Ins. Co. of America v. Burr, 127 S.Ct. 2201 (2007).

Background Facts:

The Fair Credit Reporting Act (the "FCRA") requires written notice to a consumer who is subjected to "adverse action ... based in whole or in part on any

information contained in a consumer [credit] report." 15 U.S.C. § 1681m(a). As applied to insurance companies, "adverse action" is "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for." § 1681a(k)(1)(B)(i). Anyone who "willfully" fails to provide such notice is civilly liable to the consumer. § 1681n(a).

Petitioners, Safeco Insurance Company of America and GEICO General Insurance Company, use credit reports in the process of evaluating applications for automobile insurance.

GEICO's practice was to send an adverse action notice to an applicant only if a neutral credit score would have put the applicant in a lower priced tier or insurance premiums. GEICO received an application from Ajene Edo, who was not then a GECIO customer. GEICO took Edo's credit score into account when it offered him a policy, but did not send Edo an adverse action notice, because his tier pricing placement would have been the same even if Edo had a neutral credit score. Edo accepted policy at the offered terms. He later filed a proposed class action. Although he did not allege any actual harm, he did allege a willful violation of § 1681n(a), and sought statutory and punitive damages under § 1681n(a).

Safeco offered respondents Charles Burr and Shannon Massey insurance at higher than its best possible rates. It did not send adverse action notices to either of them because it did not believe that a single, initial rate offered to a new customer could be an "increase" or "change" in insurance rates within the scope of the FCRA. Burr and Massey joined a proposed class action against Safeco, alleging a willful violation of § 1681m(a) and seeking statutory and punitive damages under § 1681n(a).

Procedural History:

The District Court granted GEICO summary judgment, finding no adverse action because Edo's premium would have been the same had his credit history not been considered. The District Court granted Safeco summary judgment, on the ground that a single initial rate for new insurance for a customer with whom the insurer had no prior dealing cannot be "adverse action."

The Ninth Circuit reversed both judgments, holding that an adverse action occurs whenever a consumer would have received a lower offer had his consumer report contained more favorable information. The court also held that an insurer "willfully" fails to comply with FCRA if it acts in reckless disregard of a consumer's FCRA rights. The Supreme Court granted *certiorari* and consolidated both cases.

Issue:

Whether "willful" failure covers a violation committed in reckless disregard of the adverse action notice requirement; if so, whether Safeco's and GEICO's conduct amounted to reckless violation of that requirement.

Holding:

Reckless disregard of the statute does fall within the "willful" standard. GEICO's conduct did not violate the statute. And while Safeco might have might have violated the statute, its conduct was not reckless, and therefore not willful. The Supreme Court reversed and remanded the Ninth Circuit's decisions.

Analysis:

The Supreme Court's opinion focuses on statutory construction, beginning with its analysis of the meaning of the modifier "willfully" in the context of civil statutory liability. The Court cited its own opinions construing numerous federal statutes, including the Fair Labor Standards Act and the Age Discrimination in Employment Act, as including recklessness within the parameters of willfulness. It also cited a popular treatise on tort law for the proposition that while efforts to distinguish the terms "willful," "wanton" and "reckless" have been made, "such distinctions have consistently been ignored, and the three terms have been treated as meaning the same thing, or at least as coming out of the same legal exit." It did not, however, refer to 11 U.S.C. §523(a)(6)'s "willful and malicious" standard, nor did it mention its own opinion in Kawaauhua v. Geiger, 523 U.S. 57 (1998)(recklessness insufficient to except debt for "willful and malicious injury" from discharge). The Court further distinguished the use of "willfully" in criminal law, in which it customarily requires a "knowing" violation. By comparison, it described civil "recklessness" as an objective standard, involving "an unjustifiably high risk of harm that is either known or so obvious that it should be known." The Court ultimately concluded that liability for "willfully" failing to comply with FCRA extends not only to acts known to violate FCRA, but also to reckless disregard of a duty under the statute.

GEICO did consider Edo's credit report in setting his premium at a high rate, bringing GEICO's conduct generally within 15 U.S.C. § 1681m(a). The Court also held that offering an initial rate for a new insurance policy could constitute an "increase" as required under 15 U.S.C. § 1681a(k)(1)(B)(i) in order for the insurer to have taken adverse action. An "increase" can exist even on a first time rate if a credit report has an adverse effect on what would otherwise be a lower rate.

But the Court also declared that "if the credit report had no identifiable effect on the rate, the consumer has no immediately practical reason to worry about it." Thus, because Edo received the same rate that he would have if his credit score had not been taken into account, the FCRA's adverse notice provision was inapplicable, and GEICO was not required to send him a statutory notice.

As for Safeco, the Court held that Safeco had misinterpreted 15 U.S.C. § 1681m(a) as not apply to initial insurance applications. However, the Court found that such an interpretation was not unreasonable and, therefore, not reckless. Because the statute

required a least a reckless failure to comply with the FCRA, there was no willful violation.

Concurrence (Justice Stevens, joined by Justice Ginsburg)

In his concurring opinion, Justice Stevens stated that nothing in the statute making the examination of a credit report a "necessary condition" of any resulting increase. Justice Stevens believes the comparison to a neutral score will lead to under-reporting if an artificially low neutral score is adopted. Such action could keep many consumers from ever hearing that their credit reports are costing them money, contrary to at least the spirit, if not the letter, of the FCRA.

Bowles v. Russell, 127 S.Ct. 2360 (2007)

Background Facts:

Petitioner, Keith Bowles, was convicted of murder in the state of Ohio in 1999. Bowles' sentence was affirmed on direct appeal. In 2002, Bowles filed a federal *habeas corpus* petition, which was denied. Pursuant to the Federal Rules of Appellate Procedure 4(a)(1)(A) and 28 U.S.C. § 2107(a), Bowles had 30 days to file a notice of appeal, which he failed to do. Bowles then moved to reopen the appeal period pursuant to Rule 4(a)(6), which allows district courts to extend the filing period for 14 days, measured from the day that the district court enters the order to reopen.

On February 10, 2004, the District Court granted Bowles' motion to reopen the appeal period, but "inexplicably" gave him 17 days in which to file his appeal, not the maximum 14 days that Rule 4(a)(6) and § 2107(c) allow. Bowles filed on February 26---within the 17 days allowed by the District Court's order, but outside the 14-day period allowed by Rule 4(a)(6) [1] and § 2107(c).

Procedural History:

On appeal, the United States Court of Appeals for the Sixth Circuit held that it lacked jurisdiction to hear the case because Bowles' appeal was untimely. The Court of Appeals found that the requirement of filing a timely notice of appeal is "mandatory and jurisdictional." The Supreme Court granted *certiorari* on this issue.

Issue:

[1] *Editor's note:* F. R. App. P. 26(c) adds the familiar "3 calendar days" to some periods under the rules if the applicable paper was not served on a party on the date stated in the proof of service. From the majority opinion, it does not appear that Rule 26(c) accounts for the three additional days afforded by the District Court.

Whether the Court of Appeals lacked jurisdiction to entertain an appeal filed outside the 14-day window allowed by Rule 4(a)(6) and § 2107(c), but within the longer period permitted by the District Court's reopening order.

Holding:

The Court of Appeals lacked jurisdiction over the appeal. Taking an appeal within the time prescribed by statute and rule is "mandatory and jurisdictional." In a sharply worded 5-4 opinion authored by Justice Thomas, the Supreme Court affirmed the Court of Appeals' decision.

Analysis:

Justice Thomas distinguished between "claims-processing" rules and "jurisdictional" rules. While claims-processing rules are procedural and can be altered by the court, jurisdictional rules are set by Congress, and can only be changed by Congress. Citing Article III, Section 2 of the Constitution, Justice Thomas wrote that "because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them." Bowles' failure to file his notice of appeal within the time permitted by statute therefore deprived the Court of Appeals of jurisdiction. Because Bowles' error was jurisdictional, he cannot rely on forfeiture or waiver to excuse his lack of compliance with the statute's time limitations.

The majority cites Kontrick v. Ryan, 540 U.S. 443 (2004), which held that failure to file a complaint objecting to discharge within the time requirement in Bankruptcy Rule 4004 did not deprive a federal court of subject matter jurisdiction. The majority recalled Kontrick's characterization of the filing deadlines in the Bankruptcy Rules as "procedural rules adopted by the Court for the orderly transaction of business, and not jurisdictional, " particularly where "no statute . . . specifies a time limit for filing a complaint objecting to a debtor's discharge." Kontrick, 540 U.S. at 448. Had Bowles' filing deadline been merely procedural, the Court of Appeals would have been able (though not obligated) to make an exception.

Bowles' argument that his untimely filing should be excused because he satisfies the "unique circumstances" doctrine under Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962), and Thompson v. INS, 375 U.S. 384 (1964), was also rejected because the Court has no authority to create equitable exceptions to jurisdictional requirements. In declaring the "unique circumstances" doctrine to be illegitimate, the majority overruled Harris and Thompson to the extent that they purported to authorize an exception to a jurisdictional rule. The majority held that if exceptions are to be made, Congress must either make them itself, or expressly authorize the courts to make them.

Dissent:

Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, would have heard Bowles' appeal because equity required such a hearing. Bowles reasonably relied on the District Court's order that his notice appeal was to be filed no later than February 27, 2004. Bowles complied with this order by filing on February 26. According to Justice Souter, "It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch." The dissenters argue that a filing deadline is the paradigm of a claim-processing rule, and only falls in the class of limitations subject matter jurisdiction if Congress says so, which in this case it did not. Because Bowles' error was a claim-processing one, the exception laid out in Kontrick should be available to him. According to Justice Souter, the exception was designed just for such occurrences, when such a rigid application of the rules would lead to a perversion of justice.

II. Deepening Insolvency: Is "DI" now "DOA" ("Dead on Appeal")? Related Issues of Standing and *In Pari Delicto*

Baena v. KPMG LLP, 453 F.3d 1 (1st Cir. 2006)(holding that litigation trustee has standing to prosecute claims on a debtor's behalf where the plan explicitly grants such authority and holding that debtor's claims against an accounting firm were barred by *in pari delicto* under Massachusetts law where the litigation trustee conceded that the debtor's management were the primary wrongdoers).

Nisselson v. Lernout, 469 F.3d 143 (1st Cir. 2006)(holding that *in pari delicto* barred claims against officers, directors, attorneys, and other third-parties brought by litigation trustee on debtor's behalf where the debtor was merged into a special purpose entity controlled by a parent corporation and where the parent corporation's culpability was at least as great as that of the defendants).

Adelphia Communications Corp. v. Bank of America, N.A. (In re Adelphia Communications Corp.), 2007 WL 1673928 (Bankr. S.D.N.Y. 2007)(concluding that state law determines the existence and elements of a claim for aiding and abetting breaches of fiduciary duty by the insiders of a chapter 11 debtor, predicting that the Pennsylvania Supreme Court would recognize such a claim, and refusing to dismiss such claims pursuant to Rule 12(b)(6) on the basis of *in pari delicto* where state law requires a careful analysis of the facts and circumstances and the fairness of applying the defense to a particular claim).

North American Catholic Educational Programming Foundation, Inc. v. Gheewalla, 2007 WL 1453705 (Del. 2007)(holding that creditors of Delaware corporation that is either insolvent or in the zone of insolvency have no right to assert direct claims for breach of fiduciary duty against the corporation's officers and directors; dicta noting that creditors may "nonetheless protect their interest by bringing derivative claims on behalf of the insolvent corporation or any *other* direct nonfiduciary claim . . . that may be available for individual creditors.").

Boles v. Filipowski (In re Enivid, Inc.), 345 B.R. 426 (Bankr. D. Mass. 2006)(dismissing a claim for deepening insolvency pursuant to Rule 12(b)(6) where the claim was subsumed within claims for breaches of fiduciary duties of care, good faith, and loyalty).

In re Applied Theory Corp., 2007 WL 1965012 (2d Cir. Jul. 9, 2007)(affirming creditors' committee's derivative standing under STN Enterprises to bring equitable subordination claims affecting creditors/estate as a whole where trustee did not elect to pursue such claims.

Official Committee of Unsecured Creditors v. Foss, et al., (In re Felt Manufacturing Co., Inc.), ___ B.R.___, 2007 WL 2177690, 2007 BNH 027 (Bankr. D. N.H. 2007)(Granting in part and denying in part motions to dismiss complaint brought by Creditors Committee against officers and directors of corporate debtor, the court held:

(a) Modern standard for granting motion to dismiss is whether complaint pleads facts showing a "plausible entitlement to relief," as opposed to the formerly widely used standard that "plaintiff can prove no set of facts" supporting claimed entitlement to relief." *See Bell Atl. Corp. v. Twombly,* ___ U.S.___, 127 S.Ct. 1955 (2007); *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957).

(b) New Hampshire would not likely recognize a separate cause of action for "deepening insolvency" as alleged;

(c) New Hampshire would likely recognize a cause of action for aiding and abetting a breach of fiduciary duty;

(d) *In pari delicto* defense did not bar claims against officers and directors for alleged injury to corporation (as opposed to injuries against third party creditors);

  (1) Defendants' alleged wrongful conduct not imputed to plaintiff where cause of action is for breach of fiduciary duty to corporation;

  (2) "Wrongful acts on behalf of a corporation are not the same thing as wrongful acts against it." (2007 WL 2177690 at *7).

(e) Committee has both direct and derivative legal standing to bring claims against officers and directors.)