

In the Supreme Court of the United States

—•••••—
KIRKLAND TOWNSEND,

Petitioner,

—v—

HSBC BANK USA, N.A., as Trustee for NOMURA
HOME EQUITY LOAN, INC., ASSET-BACKED
CERTIFICATES, SERIES 2006-FM1,

Respondent.

On Petition for Writ of Certiorari to the United
States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

| | Page |
|-------------------------------------|------|
| TABLE OF AUTHORITIES | ii |
| REPLY BRIEF FOR THE PETITIONER..... | 1 |

TABLE OF AUTHORITIES

Page

CASES

| | |
|--|---------|
| <i>Budinich v. Becton Dickinson & Co.</i> , 486 U.S. 196 (1988) | 2, 3, 4 |
| <i>Catlin v. United States</i> , 324 U.S. 229 (1945) | 6 |
| <i>Ray Haluch Gravel Co. v. Central Pension Fund</i> , 134 S. Ct. 773 (2014) | 2, 3 |
| <i>Republic Nat. Gas Co. v. Oklahoma</i> , 334 U.S. 62 (1948) | 4 |
| <i>Star Ins. Co. v. Risk Mktg. Group, Inc.</i> , 561 F.3d 656 (7th Cir. 2009) | 6 |

FEDERAL STATUTES

| | |
|-----------------------|--------|
| 28 U.S.C. § 1291..... | passim |
|-----------------------|--------|

STATE STATUTES

| | |
|-------------------------------------|---------|
| 735 Ill. Comp. Stat. 5/15-1501..... | 1, 4, 5 |
|-------------------------------------|---------|

JUDICIAL RULES

| | |
|-----------------------------|---|
| Supreme Court Rule 10 | 7 |
|-----------------------------|---|



REPLY BRIEF FOR THE PETITIONER

The dispute over whether the Court should grant Kirkland Townsend’s Petition for Writ of Certiorari hinges on the way the litigants frame the “Question Presented.”

Townsend’s petition asks the Court to examine the Judgment of Foreclosure entered below and to evaluate the characteristics essential to determining whether it is a final decision under 28 U.S.C. § 1291. (Pet.i).¹ By focusing on these essential characteristics, Townsend presents for review an important issue of finality under Section 1291 that will promote a predictable, uniform rule to guide courts and litigants in a range of different cases.

The opposition brief submitted by HSBC Bank USA, N.A., however, jettisons this approach. HSBC inverts finality to incorporate certain statutory provisions related to the execution and satisfaction of a judgment under Illinois law. (Opp.Br.i) Though HSBC’s claims against Townsend arise under the Illinois Mortgage Foreclosure Law, 735 ILCS 5/15-1501, *et seq.* (“IMFL”), finality for purposes of federal law does not depend on any post-judgment execution procedures available under state law.

HSBC’s framing of the finality issue permeates its entire argument for why the Court should not review the Seventh Circuit’s judgment dismissing

¹ Guide to page numbering abbreviations: “Pet.” refers to the petition. “Pet.App.” refers to the petition’s appendix. “Opp.Br.” refers to the opposition brief.

Townsend's appeal for lack of jurisdiction. Despite acknowledging that finality for appeal is "clearly a question of federal law," HSBC's argument that "the answer to this question turns on the particularities of Illinois law" runs counter to the Court's view of Section 1291 finality. (Opp.Br.5).

In *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988), and *Ray Haluch Gravel Co. v. Central Pension Fund*, 134 S. Ct. 773 (2014), the Court stressed that Section 1291 finality determinations must promote "operational consistency and predictability." *Budinich*, 486 U.S. at 202; *Ray Haluch Gravel*, 134 S. Ct. at 780. Those two cases together held that a decision on the merits is a "final decision" under Section 1291 even if the district court still must determine an award of attorneys' fees for the litigation. The same rationale for finality applied, regardless of whether a state statute authorized the fee award or whether those fees were available under a contract provision. *See Budinich*, 486 U.S. at 202 (Colorado state statute authorized fee award for claim arising from unpaid employment compensation); *Ray Haluch Gravel*, 134 S. Ct. at 780 (collective bargaining agreement contained fee-shifting clause).

In neither case was the Court "inclined to adopt a disposition that requires the merits or nonmerits status of each attorneys' fee provision to be clearly established before the time to appeal can be clearly known." *Ray Haluch Gravel*, 134 S. Ct. at 780 (quoting *Budinich*, 486 U.S. at 202). HSBC's brief in opposition looks past this principle. Instead, through its "Question Presented," HSBC endorses a subjective

rule that calls upon courts and litigants to determine whether post-judgment execution and satisfaction procedures are significant enough to achieve merits status sufficient to thwart finality. *Budinich* and *Ray Haluch Gravel* disapproved of such an unpredictable, unworkable, and unwieldy approach.

HSBC's description of the "Question Presented" illustrates how important the finality issue actually is. In practice, the Seventh Circuit's judgment as to finality, adopted wholesale here by HSBC, does not work and does not heed the call that jurisdictional rules "should above all be clear." *Budinich*, 486 U.S. at 202. A perfect illustration comes from HSBC's brief in opposition. HSBC correctly notes the prevalence of "widespread procedural differences" in state foreclosure law and the post-sale protections afforded to homeowners. (Opp.Br.15-16). If finality depends on these post-sale protections, then these "widespread procedural differences" will result in widespread confusion when applying Section 1291.

By way of example, how important to finality is a state law that provides only narrow statutory grounds to set aside a judicial sale, such as for fraud or collusion? Is finality dependent on whether a state statute precludes a homeowner's redemption of a mortgage? Would a state's decision to adopt an anti-deficiency law, precluding a lender from seeking a deficiency judgment within a foreclosure suit, impact finality? Do these post-judgment questions achieve "merits or nonmerits status" for purposes of Section 1291 finality? *Budinich*, 486 U.S. at 202. HSBC does not say, nor could it.

Carrying HSBC's reasoning to its logical conclusion, these same ancillary, post-judgment concerns could impact finality in other cases too—not just those arising under foreclosure statutes. No party is qualified to make a subjective call as to how important a post-judgment enforcement measure is in advance, for the best jurisdictional rules are bright-line ones. The finality framework the Seventh Circuit used below, and adopted by HSBC in its brief, undermines the “operational consistency and predictability” at the heart of Section 1291. *Id.*

All of the matters HSBC cites that pertain to the execution of the underlying Judgment of Foreclosure are “consequentially incident to and dependent upon the determination of the core of the litigation.” *Republic Nat. Gas Co. v. Oklahoma*, 334 U.S. 62, 80 (1948)(Rutledge, J., dissenting). That “core” is the merits judgment itself, which decided that Townsend was liable to HSBC, told Townsend what he owed, and said his home must be sold. (Pet.App.59a-60a, 66a). Townsend seeks review over whether a judgment with these essential features is a “final decision” under Section 1291. (Pet.i). He does not believe that finality depends on one court's value-judgment over the importance of execution procedures—or the foreseeability that any of those procedures might actually arise during a lawsuit.

At bottom, the state-law protections available to parties under the IMFL, upon which HSBC relies in framing its “Question Presented,” may play a role in the post-judgment collection, execution, or satisfaction process. But they are subordinate to the case and do not impact finality under Section 1291. If Townsend

redeems his home from foreclosure (an option afforded him under the IMFL), he merely has satisfied the merits judgment. (Opp.Br.2-3). This unique act of satisfaction is akin to a judgment debtor's election to pay an unsecured creditor voluntarily instead of having his wages garnished. A judgment does not become "non-final" simply because a debtor can satisfy a judgment without being subject to court process.

Townsend's ability to challenge a judicial sale acts similarly. (Opp.Br.3). A successfully contested confirmation hearing does not alter or moot the underlying merits judgment; it merely results in a new sale. If a court officer conducts a new sale that is later confirmed, a higher sale price only reduces any deficiency Townsend otherwise would owe. Nor does finality depend on whether a homeowner remains in his home for thirty days after a court confirms a sale order. (Opp.Br.3). A statutory protection like this has no impact on the underlying merits judgment in any respect; in fact, it does nothing but ease a homeowner's transition away from a foreclosed property.

The Seventh Circuit found that these post-judgment procedures undermined finality over the Judgment of Foreclosure. (Pet.App.5a-11a). In calling upon the Court to decline review of the underlying judgment, HSBC views finality as entirely dependent on contingent, collateral matters that arise after entry of a merits judgment. This rationale undermines the general rule that a final decision "generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233

(1945) (emphasis added). The Court’s review over the finality questions presented in Townsend’s petition is essential to ensuring that litigants have clear guidance over when to appeal merits judgments.

Execution procedures may be more complicated in some cases. In ones like this, state legislatures may determine that home ownership is an important policy to promote and may decide to grant consumers added protection before eviction. This, however, does not change the fact that—for finality purposes—the merits phase of a lawsuit is fundamentally different than the execution phase. *See Star Ins. Co. v. Risk Mktg. Group, Inc.*, 561 F.3d 656, 659 (7th Cir. 2009) (stating that “[s]upplementary proceedings to enforce a judgment are treated, for the purposes of appeal, as separate, free-standing lawsuits.”). The Seventh Circuit’s opinion below, and HSBC’s approach in opposing the petition here, blurs the line between the merits of the case and the execution of a judgment. Not only is the opinion at odds with this Court’s finality precedents and other circuit court decisions, but it also creates an uncertain rule for future litigants who may end up forfeiting substantive issues on appeal.



When viewed within this analytical framework, this case meets the criteria for review under Supreme Court Rule 10. For these reasons and those stated in the Petition for Writ of Certiorari, the Court should grant the petition.

Respectfully submitted,

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