Supreme Court, U.S.
FILED
APR 19 2010
OFFICE OF THE CLERK

No. 09-945

IN THE
Supreme Court of the United States

LOUISIANA SAFETY ASSOCIATION OF TIMBERMEN – SELF INSURERS FUND,

Petitioner,

v.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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April 19, 2010

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REPLY BRIEF FOR PETITIONER

Faced with a clear circuit conflict on an important federal issue, Respondents offer a grab-bag of reasons why this Court should not resolve the conflict in a case where both sides of the issue are set forth in fully-reasoned majority and dissenting opinions of an *en banc* court of appeals. Respondents' arguments are flawed and unpersuasive.

First, Respondents assert (Opp. 6-14) that there is no actual conflict between the decision below and the Second Circuit's decision in *Stephens v. American International Insurance Co.*, 66 F.3d 41 (2d Cir. 1995). No matter how Respondents try to re-frame the issue, those decisions are fundamentally incompatible. The *en banc* majority acknowledged the conflict (App. 34a), and the dissent criticized the majority opinion for "leav[ing] the state of the law in [Supremacy] Clause purgatory" (App. 84a). *Second*, Respondents' contention (Opp. 15-19) that concerns about waiver could interfere with this Court's determination of the question presented is incorrect and ignores the serious impediments to appellate review of this issue that make this case a particularly appropriate vehicle. *Finally*, Respondents' contention (Opp. 20-35) that review is not warranted because the decision below is correct is belied by the convoluted nature of the *en banc* majority's statutory interpretation, and is a merits

argument that should not affect whether certiorari is granted.[1]

1. Respondents assert (Opp. 6-9) that there is no conflict between the decision below and the Second Circuit's decision in *Stephens* because the Second Circuit "did not address the ground on which the Fifth Circuit *en banc* majority relied" – that the implementing legislation for the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention") "directs courts to apply the treaty as a treaty and does not thereby convert the treaty to an Act of Congress." Opp. 6-7. The possibility that the Second Circuit might have considered an additional argument does not in any way change the facts that the Second Circuit squarely addressed the question presented and held that the Convention is subject to the McCarran-Ferguson Act's anti-preemption provision. *See* 15 U.S.C. § 1012(b).

The Second Circuit reached this conclusion because it concluded that the Convention had no effect as a matter of domestic law apart from Chapter 2 of the Federal Arbitration Act ("FAA"), which is undoubtedly an "Act of Congress." *Stephens*, 66 F.3d at 45. In contrast, the Fifth Circuit recognized that the Convention had no domestic effect without Chapter 2 of the FAA (App. 35a), but concluded that Congress could not have intended to bring implemented treaties within the McCarran-Ferguson Act's anti-preemption provision

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[1] Pursuant to Rule 29.6, Petitioner states that the corporate disclosure statement in its Petition (Pet. ii) remains current.

(App. 15a-18a, 27a-30a). The result is that foreign insurers selling policies covering local risks within the United States can circumvent state insurance laws designed to protect policyholders in the Fifth Circuit, but not in the Second Circuit. The existing conflict could not be more clear.

Respondents' additional contention (Opp. 9-11) that there is an intra-circuit conflict in the Second Circuit is specious. Neither of the Second Circuit decisions that Respondents identify conflicts with *Stephens*.

Stephens v. National Distillers & Chemical Corp., 69 F.3d 1226 (2d Cir. 1995), held that a different statute – the Foreign Soveriegn Immunities Act ("FSIA") – is not subject to the McCarran-Ferguson Act's anti-preemption provision, and that foreign insurers who were entitled to sovereign immunity were therefore excused from posting security to pay for any potential judgment. *Id.* at 1228. The court based its holding in *National Distillers* on the fact that, unlike the Convention, the FSIA itself "provid[es] the exclusive means for suing a foreign state" and "preempt[s] all other [federal] laws purporting to set forth rules for suits against foreign sovereigns." *Id.* at 1232. The FSIA therefore "clearly intends to displace all state laws to the contrary," *id.* at 1233, which satisfies the McCarran-Ferguson Act's clear statement rule. *See U.S. Dep't of the Treasury v. Fabe*, 508 U.S. 491, 507 (1993).

The court alternatively held that because the FSIA simply codified federal common law immunity doctrine, it was really pre-existing federal common law, not an "act of Congress," that superseded the state's insurance law. 69 F.3d at 1234; *see also*

Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 488 (1983) ("[FSIA] codifies, as a matter of federal law, the restrictive theory of sovereign immunity."). No such unique circumstances exist here.

The Second Circuit's decision in *Smith/Enron Cogeneration Limited Partnership, Inc. v. Smith Cogeneration International, Inc.*, 198 F.3d 88, 96 (2d Cir. 1999) (*see* Opp. 11 n.3), is similarly inapposite. The court in that case held that federal law controlled the question of whether an arbitration agreement is enforceable in a case involving Chapter 2 of the FAA. But that case had nothing to do with the McCarran-Ferguson Act, which expressly places state laws above contrary federal laws when they relate to insurance. *See* 15 U.S.C. § 1012(b).

Finally, Respondents' argument (Opp. 12-14) that the conflict should not be resolved because the Second Circuit's decision in *Stephens* predates this Court's decision in *Medellin v. Texas*, 552 U.S. 491 (2008), does not withstand scrutiny. The Court in *Medellin* recognized that the Convention was not meant to "ha[ve] automatic domestic effect as federal law upon ratification," because it *expressly identified the Convention as an example of a non-self-executing treaty*. *Id.* at 491, 505 n.2. That conclusion finds clear support in the contemporaneous statements of the President and Congress on the treaty's domestic effect, which *Medellin* said are "entitled to great weight." *Id.* at 513. President Johnson stated unambiguously when he submitted the Convention to the Senate for ratification that the United States would not become a party to the Convention until Congress amended the FAA, and that the United

States' instrument of accession to the Convention "[would] be executed only after the necessary legislation is enacted." 114 Cong. Rec. S10488 (1968). Thus, by the time the treaty was enacted, its requirements already existed under domestic law in the form of an "act of Congress," which contained no clear statement that it was meant to apply to the business of insurance.

2. Responents argue (Opp. 15-16) that this Court's resolution of the case could be complicated by a concern that *they* waived an argument in the court of appeals that the Convention is self-executing. This concern is unfounded. Respondents dispute that they waived the self-execution issue (Opp. 15, 32-35), and any concern about waiver in the concurring and dissenting opinions below (App. 39a-40a n.2, 81a-83a n.31) is limited to whether Respondents failed to argue that the Convention was self-executing in their *en banc* briefs, despite having made the argument to the panel. Respondents have identified no barrier to this Court considering arguments about self-execution, which is tied to the issue of whether the Convention is an "Act of Congress." *See O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 783 n.14 (1980) (stating that party may argue "any ground urged in th[e] court [of appeals]"); *Ryerson v. United States*, 312 U.S. 405, 408 (1941) (stating that respondent "is free to [defend the judgment below] upon any legal ground which will support it").

Respondents assert (Opp. 17-19) that the issue will continue to be decided by appellate courts in future cases. But this is not a reason to deny certiorari in a case that creates a circuit split and is

presented to the Court through carefully considered majority and dissenting opinions of an *en banc* court of appeals. In any event, the creativity Respondents must use to manufacture scenarios in which a better case might arise only serves to highlight the limitions imposed on appellate review in cases involving this preemption issue.

Respondents' assertion that the issue could be reviewed after arbitration is complete on appeal from a final judgment enforcing an arbitration award (Opp. 18) reinforces LSAT's argument that the procedural posture of *this case* is ideal for this Court's review. The standard under which final judgments enforcing arbitral awards are reviewed has been described as "among the narrowest [standards of review] known to law," which would counsel against meaningful review in that posture. *See Hollern v. Wachovia Sec., Inc.*, 458 F.3d 1169, 1172 (10th Cir. 2006) (quotation marks and citation omitted).

Citing 9 U.S.C. §§ 16(a)(1) and 16(c), Respondents note (Opp. 18) that if a motion to compel arbitration is denied, or if a motion to compel is granted in a "final judgment" that "leav[es] the court nothing to do but execute the judgment," *see Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 86 (2000), those decisions may also be appealed under the FAA. Although there may be some one-sided routes for *insurance companies* seeking to compel arbitration to appeal under § 16, that section was clearly meant to *preclude* appellate review of orders directing arbitration. *See* 9 U.S.C. § 16(b) (stating that apart from interlocutory appeals under 28 U.S.C. § 1292(b), "*an appeal may not be taken* from an

interlocutory order" directing, compelling, or refusing to enjoin arbitration, or from an order granting a stay in favor of arbitration) (emphasis added); *see also* David D. Siegel, *Practice Commentary* (2010), *noted in* 9 U.S.C. § 16 ("The mission of § 16 is to assure that if the district court ... determine[s] that arbitration is called for, the court system's interference with the arbitral process will terminate then and there."); *Green Tree Financial Corp.*, 531 U.S. at 86 (stating that § 16 "bars appeal of interlocutory orders favorable to arbitration").

Respondents also assert (Opp. 19) that review eventually could be had in a case where a federal court remands to state court for lack of federal question jurisdiction after concluding that the Convention is preempted by a state insurance arbitration provision.[2] Respondents theorize that the state court might then reconsider the preemption issue and, notwithstanding any applicable "law of the case" doctrine, reach the opposite conclusion, thus reinserting a federal question into the case. Respondents assert that in this scenario, the Supreme Court could grant certiorari to review the preemption issue after the state supreme court issues a final judgment on the merits. The many improbabilities in this hypothetical method of review only support LSAT's argument that where, as here, a court of appeals accepts certification under 28 U.S.C. § 1292(b) of an issue that confounded the district court and lays out the best arguments on both sides

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[2] Respondents do not dispute that the remand order would be unreviewable. *See* 28 U.S.C. § 1447(d); Pet. 28-29.

of the issue, the Court should take the opportunity to grant certiorari.

Respondents also contend (Opp. 17) that the issue arises only infrequently, and that resolving the circuit split is therefore unimportant. The fact that there are not dozens of published cases readily available in searchable public databases like Lexis and Westlaw reflects only that, as LSAT has explained (Pet. 24-29), the issue typically arises in the context of nonfinal decisions on motions to compel arbitration, virtually none of which are decided in reported opinions. The vast majority of district court decisions addressing the issue cited by *both* parties are unpublished orders on nondispositive motions (*see* Pet. 25; Opp. 17), and the parties have ready access only to the unpublished interlocutory orders that appear in searchable databases.[3] In any event, Respondents do not contest the sources LSAT cites (Pet. 23-24) demonstrating that arbitration clauses in insurance contracts, often containing preprinted conditions developed by foreign-domiciled insurance companies, are being presented to policyholders with increasing frequency to evade the substantive federal policy, codified in the McCarran-Ferguson Act, of fostering local state regulation of insurance transactions.

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[3] The orders issued by the magistrate judge and the district court in this case do not appear in Westlaw or Lexis, and they could only be located by a person who knew that the issue arose in this case, retrieved the district court docket, and located the relevant orders.

3. Finally, Respondents argue that review is not warranted because the Fifth Circuit's decision is "straightforward" and "follows directly from [the] statutory language" (Opp. 20-23), is supported by the "history and purpose" of the McCarran-Ferguson Act (Opp. 23-28), and will not have a widespread effect (Opp. 28-32). These are merits arguments that should not affect whether the Court grants certiorari to resolve a clear circuit split. Moreover, each of Respondents' arguments is demonstrably incorrect.

Respondents' argument that review is not warranted because the majority's decision is "straightforward" and "follows from the statutory langauge" is belied by the majority's own description of the task before it, which was "to determine if, in enacting the McCarran-Ferguson Act, Congress intended for state law to reverse-preempt federal law that has as its source an implemented non-self-executing treaty." App. 26a. The majority speculated that Congress must have intended to exclude "Acts of Congress" that implement treaties from the term "Acts of Congress" that is used in the McCarran-Ferguson Act's anti-preemption provision, and it concluded that its interpretation futhered the federal policy favoring arbitration. App. 16a-17a, 30a-33a. As the dissent noted, this "fruitless search for Congress's true intent" ultimately "supplant[ed] the plain meaning of the unambiguous term 'Act of Congress' with a strained interpretation aimed at protecting important federal policies." App. 76a. It also disparaged the competing federal policies underlying the McCarran-Ferguson Act.

Citing *American Insurers Ass'n v. Garamendi*, 539 U.S. 396 (2003), Respondents also defend the

Fifth Circuit's decision on the ground that the McCarran-Ferguson Act was only concerned with domestic commerce legislation. Opp. 26. The text of the McCarran-Ferguson Act reflects no such limitation. *See Sun Life Assurance Co. of Can. v. Manna*, 879 N.E.2d 320, 330 (Ill. 2007) (applying "plain language of the McCarran-Ferguson Act" to conclude that "alien insurers are within the ambit of the McCarran-Ferguson Act"). Moreover, the Court's decision in *Garamendi* is wholly inapplicable.

Garamendi held that California could not, based on the pretext of regulating the insurance business within California, force foreign insurers to disclose information about policies issued in Europe to foreign citizens during the Holocaust. The Court found that the state statute conflicted with executive agreements addressing reparations for Holocaust vitims that the President had negotiated with Germany. The Court found it "doubtful" that a California statute singling out policies issued six decades ago to European residents had any valid nexus to the proffered state regulatory objective of giving California consumers information about "which insurers had failed to pay insurance claims." 539 U.S. at 425-26.

The court concluded that such transparently extra-territorial legislation, in sharp contrast to the Louisiana arbitration statute, is not the type of statute that enjoys protection from federal preemption under the McCarran-Ferguson Act as a state statute that "regulat[es] the business of insurance." *Id.* at 428 (internal quotation marks and citation omitted); *see* 15 U.S.C. § 1012(b). Nor were the executive agreements in *Garemendi* "acts of

Congress" that could be subject to the McCarran-Ferguson Act's anti-preemption provision. 539 U.S. at 429.[4]

Finally, Respondents' argument (Opp. 28-32) that LSAT overstates the detrimental effect that the Fifth Circuit's decision will have on policyholders because some of the state insurance arbitration statutes LSAT identified (Pet. 21 n.6, 22 n.7) do not cover contracts between insurance companies is not a sufficient basis to deny certiorari. Sixteen states have enacted laws that prohibit arbitration clauses in some or all insurance contracts. *Id.* Respondents acknowledge (Opp. 29) that the Louisiana insurance arbitration statute covers the insurance policies at issue here.[5] Respondents collected premiums

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[4] Moreover, the Court's statement in *Garamendi* that the McCarran-Ferguson Act is "a federal statute directed to implied preemption by domestic commerce legislation" (539 U.S. at 128) does not affect this case. President Johnson and the Senate that ratified the Convention both made clear that they would not commit the United States to obligations under the treaty until "domestic commerce legislation" of the sort contemplated by the McCarran-Ferguson Act was enacted. Pet 18-19 n.4.

[5] Respondents' attempt (Opp. 28-29) to characterize LSAT as a sophisticated insurance company, and the policies purchased by LSAT as facultative reinsurance contracts, strains credulity. LSAT is a collection of local Louisiana logging companies that self-insure the distinctly local exposure of workers' compensation liabilities. Self-insurance is not typically considered insurance, because it lacks the crucial element of risk transfer underlying any form of insurance. *See, e.g., U.S. Fid. & Guar. Ins. Co. v. Commercial Union Midwest Ins. Co.*, 430 F.3d 929, 938 (8th Cir. 2005) ("A majority of jurisdictions" hold that self-insurance is "not insurance") (quotation marks and citation omitted); *N. Ind. Pub. Serv. Co. v. Bloom*, 847 N.E.2d 175, 184 (Ind. 2006) ("self-insurance is not actually insurance at all but is the antithesis of insurance"). (...continued)

derived from a Louisiana policyholder and agreed to insure risks located in Louisiana. The Louisiana arbitration statute is designed to force insurers to handle claims of Louisiana residents in good faith by subjecting them to jury trials in local state courts if they refuse to pay covered claims.

The Fifth Circuit's decision throws into doubt the validity of these state laws in all cases in which a policyholder contracts with a foreign insurance company. The invalidation of these state laws undermines the States' important interests, which the McCarran-Ferguson Act advances even at the expense of important federal interests.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 19, 2010

Respondents' self-characterization (Opp. 28) as "surplus lines" insurers rather than "admitted" insurers is another distinction not found in the McCarran-Ferguson Act.