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HIGH COURT FINDS DAMAGE TO S.& L.'S FROM RULE CHANGE

The New York Times
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Linda Greenhouse

In a case that could cost the Federal Government billions of dollars in breach-of-contract damages to the savings and loan industry, the Supreme Court ruled today that the Government knowingly went back on its word through accounting changes that plunged three savings and loans into insolvency.

The lending institutions were trapped during the savings and loan bailout of the 1980's after regulators had induced them to assume huge liabilities to salvage other savings and loans.

While the case involved only three savings and loans -- only one of which, Glendale Federal Bank of Glendale, Calif., is still in operation -- the 7-to-2 ruling applies to more than 90 others that have similar breach-of-contract cases pending against the Government. The actual amount of damages will be decided in the lower courts. In January, the Government used the figure of $10 billion when it persuaded the Court to hear its appeal of a Federal appeals court ruling that found it liable for breach of contract.

After years of on-again, off-again rulings in the case, fleet-footed investors in savings and loans enjoyed a windfall on Wall Street in their most profitable day of the decade.

The decision was the final ruling of the Court's 1995-96 term. The 75 cases the Justices decided since they convened last Oct. 2 made this the lightest term since 1953-54, although it was the first term in seven years to go into July.

The three savings and loans took over failed institutions at the Government's behest and in return were given favorable accounting treatment. The decision today interpreted the three contracts as promising that the Government rather than the savings and loans would assume the financial risk of any regulatory changes that might deprive the savings and loans of those advantages.

Congress eventually made such changes in 1989 when it passed the Financial Institutions Reform, Recovery and Enforcement Act, which authorized what turned out to be a $120 billion taxpayer bailout of the industry. Today's decision will add to the ultimate cost of that fiasco.

The 1989 law, among other things, converted paper assets into liabilities, leaving many of the savings and loans without the ability to meet minimum capital requirements.

Two of the three savings and loans in the case today failed, as did many others. Glendale Federal, which had been thriving before it accepted the Government's invitation to take over the First Federal Savings and Loan Association of Broward County, Fla., was able to raise enough cash to stay afloat. It now seeks more than $1.5 billion in damages.

The Government's interpretation of the contracts as not providing insurance against a legislative change was "fundamentally implausible," Justice David H. Souter said in a plurality opinion. He said "it would, indeed, have been madness" for the savings and loans to have entered into contracts without that guarantee, "for the very existence of their institutions would then have been in jeopardy from the moment their agreements were signed."

Three other Justices -- John Paul Stevens, Stephen G. Breyer and Sandra Day O'Connor -- joined Justice Souter's opinion, while Justices Antonin Scalia, Anthony M. Kennedy and Clarence Thomas concurred separately in an opinion by Justice Scalia. The dissenters were Chief Justice William H. Rehnquist and Justice Ruth Bader Ginsburg.

The Court ruled that the principles of ordinary contract law should apply to the contracts, and not the special doctrines that the Government invoked to try to shield it from liability. In fact, the bulk of Justice Souter's 72-page opinion was a detailed dismantling of the Government's arguments, which he said would actually have been "at odds with the Government's own long-run interest as a reliable contracting partner" had the Court accepted them.

The case, *United States v. Winstar Corp.*, No. 95-865, stemmed from a period during the early 1980's when the health of the nation's savings and loans was deteriorating rapidly and the obligations of the Federal Savings and Loan Insurance Corporation to pay the depositors of failing institutions far exceeded the insurance fund's assets.

To postpone the cost, Federal regulators persuaded healthy savings and loans to acquire failing ones under an accounting method permitting the liabilities to be carried on the books as "good will," an asset that could be amortized over 35 or 40 years. Such deals were attractive because the paper asset allowed the acquiring savings and loans to make more loans than otherwise would have been permitted.

The 1989 law removed intangible assets,

including good will, from those that could be counted toward a savings and loan's minimum capital requirements. As Justice Souter's opinion noted, the consequences of that change were "swift and severe," as many savings and loans fell out of compliance.

Many savings institutions sued the Government in the Court of Federal Claims here. The two other plaintiffs in the case today were the Statesman Savings Holding Corporation, based in Iowa, which had acquired failed institutions in Florida and Iowa, and an investment partnership known as the Winstar Corporation that was formed in 1984 to acquire a Minnesota institution, Windom Federal Savings and Loan. Their cases, along with Glendale Federal's, were successful in the claims court in 1992 and, last year, in the United States Court of Appeals for the Federal Circuit here, a specialized court that hears Government financial claims.

The Government argued that its contracts should never be interpreted to bind it to a promise to exercise regulatory authority in a particular way unless such a promise was unmistakable on the face of the contract. But Justice Souter said today that this argument was inapplicable. He said the savings and loans had never argued against Congress's right to change the law, but rather that the Government had assumed the risk of paying damages for any financial injury the savings institutions might suffer from any changes that took place.

The Court also rejected another of the Government's defenses, a rule known as the "sovereign acts defense" under which a "public and general" law can never be regarded as causing a breach of a particular Government contract.

The 1989 law was not a "public and general" act, Justice Souter said. Instead, it was "tainted by a governmental object of self-relief," he said.

In his dissenting opinion, Chief Justice Rehnquist objected that the Court had drastically reduced the Government's available defenses in contract cases. The decision "limits the sovereign acts doctrine so that it will have virtually no future application," he said.

Stephen Trafton, the chairman and chief executive of Glendale Federal, said in a telephone interview today that the Government had "shown only arrogance" in rejecting two recent settlement proposals. "It's a tragedy for the taxpayers," he added, "because they didn't breach these contracts, the Government did."

EXCERPTS FROM RULING
AGAINST THE GOVERNMENT ON S.& L. TAKEOVERS

The New York Times

Tuesday, July 2, 1996

Following are excerpts from the Supreme Court's decision today in *United States v. the Winstar Corporation*, holding that the Federal Government breached its contracts with three savings and loan institutions and is liable to them for damages as a result of accounting changes made by the Financial Institutions Reform, Recovery and Enforcement Act of 1989.

Justice David H. Souter wrote a plurality opinion joined by Justices John Paul Stevens, Stephen G. Breyer, and in most respects by Justice Sandra Day O'Connor. Justices Antonin Scalia, Anthony M. Kennedy and Clarence Thomas concurred in a separate opinion. Chief Justice William H. Rehnquist and Justice Ruth Bader Ginsburg dissented.

FROM THE DECISION

By Justice Souter

... We took this case to consider the extent to which special rules, not generally applicable to private contracts, govern enforcement of the governmental contracts at issue here. We decide whether the Government may assert four special defenses to respondents' claims for breach: the canon of contract construction that surrenders of sovereign authority must appear in unmistakable terms; the rule that an agent's authority to make such surrenders must be delegated in express terms; the doctrine that a government may not, in any event, contract to surrender certain reserved powers, and, finally, the principle that a Government's sovereign acts do not give rise to a claim for breach of contract . . . . In September 1981, Glendale was approached about a possible merger by the First Federal Savings and Loan Association of Broward County, which then had liabilities exceeding the fair value of its assets by over $734 million. At the time, Glendale's accountants estimated that F.S.L.I.C. [the Federal Savings and Loan Insurance Corporation] would have needed approximately $1.8 billion to liquidate Broward, only about $1 billion of which could be recouped through the sale of Broward's assets. Glendale, on the other hand, was both profitable and well capitalized, with a net worth of $277 million. After some preliminary negotiations with the regulators, Glendale submitted a merger proposal to the [Federal Home Loan] Bank Board, which had to approve all mergers involving savings and loan associations; that proposal assumed the use of the purchase method of accounting to record supervisory good will arising from the transaction, with an amortization period of 40 years. The Bank Board ratified the merger, or "Supervisory Action Agreement" (S.A.A.), on Nov. 19, 1981.

The S.A.A. itself said nothing about supervisory good will, but did contain the following integration clause: "This agreement ... constitutes the entire agreement between the parties thereto and supersedes all prior agreements and understandings of the parties in connection herewith, excepting only the Agreement of Merger and any resolutions or letters issued contemporaneously herewith."

The S.A.A. thereby incorporated Bank Board Resolution No. 81-710, by which the board had ratified the S.A.A. That resolution referred to two additional documents: a letter to be furnished by Glendale's independent accountant identifying and supporting the use of any good will to be recorded on Glendale's books, as well as the resulting amortization periods, and "a stipulation that any good will arising from this transaction shall be determined and amortized in accordance with (Bank Board) Memorandum R 31b." Memorandum R 31b, finally, permitted Glendale to use the purchase method of accounting and to recognize good will as an asset subject to amortization.

The Government does not seriously contest this evidence that the parties understood that good will arising from these transactions would be treated as satisfying regulatory requirements; it insists, however, that these documents simply reflect statements of then current Federal regulatory policy rather than contractual undertakings. Neither the Court of Federal Claims nor the Federal Circuit so reads the record, however, and we agree with those courts that the Government's interpretation of the relevant documents is fundamentally implausible. The integration clause in Glendale's Supervisory Action Agreement with F.S.L.I.C., which is similar in all relevant respects to the analogous provisions in the Winstar and Statesman contracts, provides that the S.A.A. supersedes "all prior agreements and understandings ... excepting only . . . any resolutions or letters issued contemporaneously" by the board; in other words, the S.A.A. characterizes the board's resolutions and letters not as statements of background rules, but as part of the "agreements and understandings" between the parties.

To the extent that the integration clause leaves any ambiguity, the other courts that construed the documents found that the realities of the transaction favored reading those documents as contractual commitments, not mere statements of policy, . . . and we see no reason to disagree. As the Federal Circuit noted, "(i)t is not disputed that if supervisory good will had not been available for purposes of meeting regulatory capital requirements, the merged thrift would have been subject to regulatory noncompliance and penalties from the moment of its creation." Indeed, the assumption of Broward's liabilities would have rendered Glendale immediately insolvent by approximately $460 million, but for Glendale's right to count good will as regulatory capital. Although one can imagine cases in which the potential gain might induce a party to assume a substantial risk that the gain might be wiped out by a change in the law, it would have been irrational in this case for Glendale to stake its very existence upon continuation of current policies without seeking to embody those policies in some sort of contractual commitment. This conclusion is obvious from both the dollar amounts at stake and the regulators' proven propensity to make changes in the relevant requirements . . . . Under the circumstances, we have no doubt that the parties intended to settle regulatory treatment of these transactions as a condition of their agreement.

FROM THE DISSENT By Chief Justice Rehnquist

The plurality's opinion works sweeping changes in two related areas of the law dealing with Government contracts. It drastically reduces the scope of the unmistakability doctrine, shrouding the residue with clouds of uncertainty, and it limits the sovereign acts doctrine so that it will have virtually no future application. I respectfully dissent . . . .

. . . Seventy-five years ago, Justice Holmes, speaking for the Court in *Rock Island Company v. United States* (1920), said that "men must turn square corners when they deal with the Government." The statement was repeated in *Federal Crop Ins. Corporation v. Merrill* (1947). The wisdom of this principle arises not from any ancient privileges of the sovereign but from the necessity of protecting the Federal fisc -- and the taxpayers who foot the bills -- from possible improvidence on the part of the countless Government officials who must be authorized to enter into contracts for the Government.

AGENT ORANGE PRODUCERS LOSE COURT APPEAL
Firms Sought Federal Reimbursement after Settling with Injured Soldiers

The Washington Post
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Joan Biskupic

The federal government need not reimburse manufacturers of Agent Orange for their costs of settling a class-action lawsuit brought by soldiers exposed to the defoliant in Vietnam, the Supreme Court ruled yesterday.

Although the government forced contractors to make the chemical in the 1960s under the Defense Production Act, the court in a 6 to 2 vote found that the government did not promise to reimburse the companies for claims paid to veterans alleging personal injuries.

Veterans alleged in lawsuits beginning in the 1970s that exposure to the dioxin-laden Agent Orange caused cancer and other illnesses. After protracted litigation, the chemical makers agreed in 1984 to settle the case and create a $180 million fund to compensate the veterans and their families.

The two companies involved in yesterday's Supreme Court conflict, Hercules Inc. and Wm. T. Thompson Co., paid $19 million and $3 million, respectively, into the fund. Their combined legal fees, according to the court, were $9 million.

The companies sought federal reimbursement of settlement costs and legal fees, arguing that the manufacturing contract implicitly protected and indemnified them.

Rejecting the appeal yesterday, Chief Justice William H. Rehnquist acknowledged that federal law says contractors are not responsible for the consequences of following government orders. But, he said, "By expressly providing a defense to liability, Congress does not implicitly agree that, if liability is imposed [by a court or through a settlement] . . . the government will reimburse the unlucky defendant."

Rehnquist continued, "Perhaps recognizing the weakness of their legal position, petitioners plead 'simple fairness,' and ask us to 'redress the unmistakable inequities.' Fairness, of course, is in many respects a comparative concept, and the fact that the veterans who claimed physical injury from the use of Agent Orange could not recover against the government considerably weakens petitioners' equitable appeal." Federal law bars military personnel from bringing personal injury claims directly against the government.

Rehnquist was joined by Justices Antonin Scalia, Anthony M. Kennedy, David H. Souter, Clarence Thomas and Ruth Bader Ginsburg.

Justices Stephen G. Breyer and Sandra Day O'Connor dissented, saying the case should be returned to a lower court for further review. Justice John Paul Stevens did not participate in the case of *Hercules v. United States*.

HERCULES INCORPORATED, et al., Petitioners,

v.

UNITED STATES

Supreme Court of the United States
116 S.Ct. 981
March 4, 1996

. . . Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioners in this case incurred substantial costs defending and then settling third-party tort claims arising out of their performance of Government contracts. In this action under the Tucker Act, they sought to recover these costs from the Government on alternate theories of contractual indemnification or warranty of specifications provided by the Government. We hold that they may not do so.

When the United States had armed forces stationed in Southeast Asia in the 1960's, it asked several chemical manufacturers, including petitioners Hercules Incorporated (Hercules) and Wm. T. Thompson Company (Thompson), to manufacture and sell it a specific phenoxy herbicide, code-named Agent Orange. The Department of Defense wanted to spray the defoliant in high concentrations on tree and plant life in order to both eliminate the enemy's hiding places and destroy its food supplies. From 1964 to 1968, the Government, pursuant to the Defense Production Act of 1950 (DPA), entered into a series of fixed-price production contracts with petitioners. The military prescribed the formula and detailed specifications for manufacture. The contracts also instructed the suppliers to mark the drums containing the herbicide with a 3- inch orange band with "[n]o further identification as to content." Petitioners fully complied.

In the late 1970's, Vietnam veterans and their families began filing lawsuits against nine manufacturers of Agent Orange, including petitioners. The plaintiffs alleged that the veterans' exposure to dioxin, a toxic by-product found in Agent Orange and believed by many to be hazardous, had caused various health problems. The lawsuits were consolidated in the Eastern District of New York and a class action was certified.

District Judge Pratt awarded petitioners summary judgment on the basis of the Government contractor defense in May 1983. Before the judgment was entered, however, the case was transferred to Chief Judge Weinstein, who withdrew Judge Pratt's opinion, ruled that the viability of the Government contractor defense could not be determined before trial, and reinstated petitioners as defendants.

In May 1984, hours before the start of trial, the parties settled. The defendants agreed to create a $180 million settlement fund with each manufacturer contributing on a market-share basis. Hercules' share was $18,772,568, Thompson's was $3,096,597. Petitioners also incurred costs defending these suits exceeding $9 million combined. . . .

We begin by noting the limits of federal jurisdiction. "[T]he United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.' " Congress created the Claims Court to permit "a special and limited class of cases" to proceed against the United States, and the court "can take cognizance only of those [claims] which by the terms of some act of Congress are committed to it." The Tucker Act confers upon the court jurisdiction to hear and determine, inter alia, claims against the United States founded upon any "express or implied" contract with the United States.

We have repeatedly held that this jurisdiction extends only to contracts either express or implied in fact, and not to claims on contracts implied in law. Each material term or contractual obligation, as well as the contract as a whole, is subject to this jurisdictional limitation.

The distinction between "implied in fact" and "implied in law," and the consequent limitation, is well established in our cases. An agreement implied in fact is "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding."By contrast, an agreement implied in law is a "fiction of law" where "a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress."

Petitioners do not contend that their contracts contain express warranty or indemnification provisions. Therefore, for them to prevail, they must establish that, based on the circumstances at the time of contracting, there was an implied agreement between the parties to provide the undertakings that petitioners allege. We consider petitioners' warranty-of-specifications and contractual-indemnification claims in turn.

. . . . When the Government provides specifications directing how a contract is to be performed, the Government warrants that the contractor will be able to perform the contract satisfactorily if it follows the specifications. The specifications will not frustrate performance or make it impossible. It is quite logical to infer from the circumstance of one party providing specifications for performance that that party warrants the capability of performance. But this circumstance alone does not support a further inference that would extend the warranty beyond performance to third-party claims against the contractor. In this case, for example, it would be strange to conclude that the United States, understanding the herbicide's military use, actually contemplated a warranty that would extend to sums a manufacturer paid to a third party to settle claims such as are involved in the present action. It seems more likely that the Government would avoid such an obligation, because reimbursement through contract would provide a contractor with what is denied to it through tort law.

The circumstances surrounding the contracting are only relevant to the extent that they help us deduce what the parties to the contract agreed to in fact. These conditions here do not, we think, give rise to an implied- in-fact indemnity agreement. There is also reason to think that a contracting officer would not agree to the open-ended indemnification alleged here. The Anti-Deficiency Act bars a federal employee or agency from entering into a contract for future payment of money in advance of, or in excess of, an existing appropriation. Ordinarily no federal appropriation covers contractors' payments to third-party tort claimants in these circumstances, and the Comptroller General has repeatedly ruled that Government procurement agencies may not enter into the type of open-ended indemnity for third-party liability that petitioner Thompson claims to have implicitly received under the Agent Orange contracts. We view the Anti-Deficiency Act, and the contracting officer's presumed knowledge of its prohibition, as strong evidence that the officer would not have provided, in fact, the contractual indemnification Thompson claims. In an effort to avoid the Act's reach, Thompson argues that the Anti-Deficiency Act is not applicable to an implied-in-fact indemnity because such an indemnification is "judicially fashioned" and is "not an express contractual provision." However, "[t]he limitation upon the authority to impose contract obligations upon the United States is as applicable to contracts by implication as it is to those expressly made."

When Thompson contracted with the United States, statutory mechanisms existed under which a Government contracting officer could provide an indemnity agreement to specified classes of contractors under specified conditions. These statutes, set out in meticulous detail and each supported by a panoply of implementing regulations, would be entirely unnecessary if an implied agreement to indemnify could arise from the circumstances of contracting. We will not interpret the DPA contracts so as to render these statutes and regulations superfluous.

We find unpersuasive Thompson's argument that § 707 of the DPA reveals Congress' intent to hold harmless manufacturers for any liabilities which flow from compliance with an order issued under the DPA. Petitioner reads the provision too broadly. The statute plainly provides immunity, not indemnity. By expressly providing a defense to liability, Congress does not implicitly agree that, if liability is imposed notwithstanding that defense, the Government will reimburse the unlucky defendant. We think petitioner's reliance on *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.* is likewise misplaced; there, in an action between private parties, we held that the stevedore was liable to the shipowner for the amount the latter paid in damages to an injured employee of the former. Here petitioner claims a breach of warranty by its customer, not by its seller and supplier.

Perhaps recognizing the weakness of their legal position, petitioners plead "simple fairness," and ask us to "redress the unmistakable inequities." Fairness, of course, is in many respects a comparative concept, and the fact that the veterans who claimed physical injury from the use of Agent Orange could not recover against the Government considerably weakens petitioners' equitable appeal. But in any event we are constrained by our limited jurisdiction and may not entertain claims "based merely on equitable considerations."

For the foregoing reasons, the judgment of the Court of Appeals is

Affirmed.

Justice STEVENS took no part in the consideration or decision of this case.

Justice BREYER, with whom Justice O'CONNOR joins, dissenting.

The petitioners, two chemical companies, have brought this breach of contract action seeking reimbursement from the Government for their contribution to the settlement of lawsuits brought by Vietnam veterans exposed to their product Agent Orange. The companies argue that their contracts with the Government to produce Agent Orange contain certain promises or warranties that, in effect, hold them harmless. To win this case, as in the most elementary breach of contract case, the companies must show that the Government in fact made the warranties or promises, that the Government breached them, and that the

Agent Orange settlement contribution was a consequent foreseeable harm.

The companies concede that the promises, or warranties, are not written explicitly in their contracts; but, the companies intend to prove certain background facts and legal circumstances, which, they say, will show that these promises, or warranties, are an implicit part of the bargain that the parties struck. See 3 id., §§ 538, 551 (common and trade usage, course of dealings, and existing statutes and rules of law are always probative as to the meaning of the parties). . . .

The Federal Circuit affirmed a grant of summary judgment against the companies. But, in doing so, it did not decide against the companies in respect to their claimed promises. Instead the Federal Circuit assumed (reluctantly and for argument's sake) that the companies would be able to prove the existence of the promises, but it went on to hold against them regardless. Even assuming the promises, the Circuit wrote, the companies will not be able to prove causation between promises and damages. The Circuit believed that, had the companies litigated the Agent Orange tort suits instead of settling them, they would have asserted a "government contractor defense," and thereby won the lawsuits. It concluded that, since the companies could readily have won the suits, the settlement amounts to a "voluntary payment" that cuts any causal link between a broken promise, or warranty, and resulting harm.

The companies, in their petition for certiorari and initial brief on the merits, primarily asked us to review, and to reverse, this "no causation" holding. The Court, in today's opinion, does not discuss that holding. Instead it holds that the companies will not be able to prove the existence of the implicit promises. In my view, however, the record before us now does not permit this latter holding. Rather, this Court should reverse the Court of Appeals' "no causation" holding and then remand this case for further proceedings.

I need mention only one fatal flaw in the Court of Appeals' "no causation" holding, that of hindsight. The Court of Appeals, in essence, found the companies' Agent Orange settlement so obviously unnecessary, so abnormal, so far removed from ordinary litigation behavior, that it could not have been "foreseeable," or (if I recast the same point in the Court's tort-like "causation" language) that it cut the causal link between promise-breach and harm. But, viewed without the benefit of legal hindsight, the settlement was neither unforeseeable nor was it an intervening "cause" of the loss.

In 1984, when the companies settled, the settlement was not notably different in terms of reasonableness or motivation from other settlements that terminate major litigation, for at that time the law that might have provided the companies with a defense was far less clear than it is today. I concede that even then some Circuits already had found in the law a "government contractor defense" that, in effect, immunized defense contractors from most suits by servicemen claiming injury from defective products. But, most of these Circuits had held that the existence of such a defense was a matter of state law, which might differ among the States. The Second Circuit, the home of the Agent Orange litigation, had not decided the issue. And, the two Agent Orange Second Circuit trial judges who (due to certain here irrelevant procedural considerations) both considered the companies' "government contractor" defense, decided the issue in opposite ways.

In light of this contemporaneous legal uncertainty, the settlement, viewed from the companies' perspective and without benefit of hindsight, seems a reasonable litigation strategy, through which the companies avoided added litigation costs and the threat of significant additional liability while helping to provide the veterans with at least some compensation. Nothing in the record here suggests the contrary. And, if reasonable at the time, the settlement must have been a "foreseeable" potential consequence of litigation and therefore within the scope of what the companies claim were implicit promises or warranties protecting them against the harms of litigation. For that reason, this Court simply should set aside the Court of Appeals' determination on the point.

The Court instead decides this case on an alternative basis, namely, that the companies cannot prove the existence of the implicit promises or warranties that they claim. But the existence of a contractual promise implied in fact is very much a creature of particular circumstance--the particular terms, the negotiating circumstances, and the background understandings of law or industry practice. Unlike the majority, which compartmentalizes the companies' claims into several separate doctrinal categories (a "*Spearin*" claim, an implied indemnification claim)--each rejected separately for doctrine-specific reasons--I believe the companies' submissions, fairly read, also set forth a much more general fact-based claim. In essence, the companies say that the parties, when specifying the details of this compulsory defense order, implicitly agreed to allocate to the Government certain risks of defective-government-specification-caused harm--namely those risks for which each company, because of its inferior knowledge, could not seek compensation in the contract price. And, the companies allege background facts that, if true and complete (as we must assume at this stage of the proceedings), make that implication plausible.

The legal considerations to which the majority points do not answer the companies' basic implied-in-fact contentions. To do so, the majority would have to argue that the five sets of legal circumstances to which it points, taken separately or together, show that no Government contracting officer would have agreed to a promise or warranty (of the sort claimed); hence, one cannot possibly imply the existence of such a promise "in fact." The majority cannot argue that, because those five sets of circumstances suggest the contrary.

First, the majority implies that a contracting officer, in all likelihood, would not have agreed to an implicit promise of indemnity, for doing so would amount to a bypass of, and "render . . . superfluous," the statutes and "panoply of implementing regulations" that set forth specific procedures that contractors must follow to obtain a promise of indemnity. My problem with this argument lies in the fact that, in 1964 the relevant statute, Executive Order, and regulations read very differently. At that time, their language was nonspecific or ambiguous on the procedures required for indemnification. The statute has always been phrased in general language, making no explicit reference to indemnification. The portion of the Executive Order that today treats indemnification as special, and sets out procedures for indemnification, did not exist in 1964, and the relevant regulations were also either silent or much more ambiguous than they are today.

Second, the majority points to Comptroller General opinions that say that an "open-ended" agreement to indemnify would violate the Anti-Deficiency Act. The problem with this argument is that other Comptroller General opinions say that an agreement to indemnify that is not open-ended, but is capped at an amount that a private insurer might have provided, is not improper. A capped agreement, which, if reflected in the contract price, makes the Government a kind of self-insurer, is in effect within the appropriation (because the expenditure of assuming the risk of liability will roughly equal the cost of premiums that the Government saves by self-insuring), and may well prove sufficient for the plaintiffs' purposes. After all, on plaintiffs' factual allegations, a contractor who was as aware of the plaintiffs' alleged risks as was the Government, would have sensed trouble, wanted insurance, and likely have obtained a premium payment sufficient to buy it. The companies need argue only for a capped implicit warranty that would treat the unknowing contractor similarly. Whether an agreement to spend money beyond that which was appropriated is in writing or not is irrelevant to the Anti-Deficiency Act.

Third, the majority distinguishes *United States v. Spearin* on the ground that the implied warranty that Justice Brandeis there discussed protects a contractor from "specifications" that, in the majority's words, will "frustrate performance or make it impossible," but does not "extend . . . beyond performance to third-party claims against the contractor." *Spearin* itself does not make this distinction. Nor have subsequent cases. If the Government must pay, say, for the contractor's own machinery destroyed by a (defective-specification-caused) explosion when that destruction frustrates performance, why should the Government not also have to pay when the explosion takes place just after performance is complete? And, why should it not have to reimburse the contractor's payment for identical damage caused his next-door neighbor in the same explosion? In any event, whether or not there are good answers to these questions, they are unlikely to answer plaintiffs' further argument, namely that, even if *Spearin* does not compel a decision in their favor, it offers indirect support, as background, for implying a promise that would provide (in the particular circumstances) *Spearin*-like protection.

Fourth, the majority says that the Defense Production Act's "hold harmless" provision ("no person shall be held liable for damages . . . for any act or failure to act resulting directly or indirectly from compliance with an order") does not provide for indemnification. The petitioners, however, do not claim the contrary. They state explicitly that they "do not attempt to interpret the DPA's hold harmless language as an affirmative indemnity." They add that "an indemnity should be implied from all the circumstances of this case, including the circumstance that petitioners and the Government contracted against the backdrop of the sweeping hold harmless language contained in the DPA." They argue simply that the DPA's stated objective--to relieve them of involuntarily created liability--would have led contracting officers in the 1960's (given the parties' uncertainty about future statutory interpretation) to have believed that a contractual "hold harmless" warranty was reasonable in the circumstances, not the contrary. The relevant point is not whether Congress intended to indemnify, but the likely effect of the DPA's language (before judicial interpretation limited it to an immunity provision) on what risks contracting officers at the time might have thought the Government was assuming in a forced production contract under the Act.

Fifth, both the Federal Circuit and the majority imply that a 1960's contracting officer would not have accepted an indemnification provision because of *Stencel Aero Engineering Corp. v. United States*. That case held (in light of the Feres doctrine providing the Government with immunity from armed services personnel tort suits) that Government contractors, whom armed services personnel had sued in tort, could not, in turn, sue the Government for indemnification. Otherwise a soldier, unable (given *Feres*) to sue the Government for injury caused, say, by a defective rifle, would sue the rifle manufacturer instead, and the rifle manufacturer would then sue the Government for indemnity, thereby, in a sense, circumventing the immunity that *Feres* promised the Government.

One problem with this argument is that *Stencel* postdates the formation of the contracts here at issue by about a decade. More importantly *Stencel* does not involve contractual promises to indemnify a contractor. Rather it concerns an indemnification provided by state tort law. And, it nowhere says, or directly implies, that the law prohibits the Government from agreeing, explicitly or implicitly, to indemnify a contractor. Indeed, this Court has explicitly written that it "fail[s] to see how the *Stencel* holding . . . supports the conclusion that if the Tort Claims Act bars a tort remedy, neither is there a contractual remedy. The absence of Government tort liability has not been thought to bar contractual remedies on implied-in-fact contracts, even in those cases also having elements of a tort."

I agree with the majority insofar as it warns against a court's too easily reading an implicit promise to indemnify a contractor's armed-services-related tort liability; but, then, its words would represent simply a wise caution and not an absolute prohibition.

In sum, the companies argue factual circumstances--compelled production, superior knowledge, detailed specifications, and significant defect--which, if true, suggest that a government, dealing in good faith with its contractors, would have agreed to the "implied" promise, particularly in light of legal authorities, known at the time, that offered somewhat similar guarantees to contractors in somewhat similar circumstances. The validity of their claim is likely to turn on the strength of the companies' factual case, as supported by evidence, and upon the details of Government contracting practices in the 1960's--matters not now before us and with which the lower courts are more familiar than are we.

The Court today unnecessarily restricts *Spearin* warranties, and, lacking particular facts at this stage of the proceeding, it relies on statutory circumstances that are common to many Government contracts. I fear that the practical effect of disposing of the companies' claim at this stage of the proceeding will be to make it more difficult, in other cases even if not here, for courts to interpret Government contracts with an eye towards achieving the fair allocation of risks that the parties likely intended.

For these reasons, I would remand this case for further proceedings.

JUSTICES ASSAIL "EXCESSIVE" JURY AWARDS

High Court Rejects $2 Million to BMW Owner for Flawed Paint Job

The Washington Post
Tuesday, May 21, 1996
Joan Biskupic

In its clearest action in recent years against excessive jury awards, the Supreme Court yesterday rejected a BMW owner's $2 million award for a flawed paint job and said "grossly excessive" monetary damages violate the Constitution.

The 5-4 ruling in an Alabama case that had become a symbol of American litigiousness emphasized that punitive damages may not be "grossly out of proportion to the severity of the offense."

Justice John Paul Stevens, writing for the majority, noted that the $2 million in punitive damages in yesterday's case was 500 times the amount of actual harm to the BMW in question.

Ira Gore Jr., a Birmingham physician, sued BMW of North America Inc. when he discovered that his new black 535i four-door had been partly repainted before it was sold to him in January 1990. Gore discovered this nine months later when he took the car to a detailing shop for a "snazzier" look. A jury awarded Gore $4 million as punishment to BMW for fraud and breach of contract for failing to disclose the refinishing job; the amount was lowered to $2 million on appeal.

Civil jury awards have been Topic A for more than a decade in state legislatures and in Congress, and the high court reluctantly entered the fray in the late 1980s.

At stake are the competing interests of consumers and product manufacturers in personal injury lawsuits. For injured people, a big court award might be their only chance for relief and compensation. But for businesses, state juries can be arbitrary and financially devastating. While yesterday's decision was a victory for business in its efforts to limit punitive damages, it is far from the end of the politically charged debate over what some say are escalating jury awards.

"The decision will be a spark plug for national legislation," asserted Victor Schwartz, counsel to the American Tort Reform Association, which had urged the court to rule for BMW. "The court has now said you have a constitutional barrier [to excessive jury awards], but they didn't say what the limit is." He said proponents of congressional limits will renew their efforts.

But Joan Claybrook, president of the consumer-advocacy group Public Citizen, countered that the ruling "should end the debate over any need for federal legislation to limit punitive damages" because it showed that "courts have the power and obligation to ensure fairness." She added that the case should "not be construed as a 'get out of jail free' card for business and should certainly not be seen as a green light for corporate misconduct."

Earlier this month, President Clinton vetoed a bill that would have limited money damages against the makers of defective products. Proponents of the legislation said lawsuits cost consumers billions of dollars a year in higher prices. But Clinton said "the legitimate problems of ordinary people" should not be sacrificed to get rid of frivolous lawsuits."

The Supreme Court has generally given juries broad discretion on punitive damages. But since the late 1980s, it has expressed concern about the need for lawmakers to ensure that awards are not arbitrary and that fair procedures are in place.

In yesterday's decision in *BMW v. Gore,* Justice Stevens cited three factors to be used in determining whether an award violates the constitutional due process of law: the reprehensibility of the conduct; the harm suffered by the victim; and a comparison between the jury award and the civil penalties authorized for such conduct through state legislation or imposed in comparable cases.

"Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice" of the penalties, Stevens wrote. He said nothing in BMW's conduct met the test for reprehensibility and that the harm to Gore was "purely economic," having no effect on the car's performance, safety or appearance.

Stevens said a court should give substantial deference to legislation concerning appropriate sanctions and noted that in this case, the $2 million was substantially greater than statutory fines in Alabama and elsewhere for similar conduct.

Gore's car had been damaged by acid rain on its way from the German manufacturer to the U.S. distributor, and BMW's policy at the time had been not to reveal repairs worth 3 percent or less of a car's retail price.

Stevens said courts should look at the ratio between the actual damages and the punitive damages and called Gore's $2 million award "breathtaking."

"We are not prepared to draw a bright line marking the limits of a constitutionally acceptable punitive damages award," he wrote. "However, we are fully convinced that the grossly excessive award imposed in this case transcends the constitutional limit."

The jury award represented $4,000 for each of the 1,000 refinished cars BMW had sold in the United States over a 10-year period.

The Alabama Supreme Court said the jury was wrong to consider conduct in other states and reduced the award to $2 million.

Stevens was joined in the ruling by Justices Sandra Day O'Connor, Anthony M. Kennedy, David H. Souter and Stephen G. Breyer.

Dissenting were Chief Justice William H. Rehnquist and Justices Antonin Scalia, Clarence Thomas and Ruth Bader Ginsburg.

Scalia, who wrote for himself and Thomas, said, "One might understand the court's eagerness to enter this field, rather than leave it with the state legislatures, if it had something useful to say. In fact, however, its opinion provides virtually no guidance to legislatures."

Ginsburg, who wrote for herself and Rehnquist, said, "The court, I am convinced, unnecessarily and unwisely ventures into territory traditionally within the states' domain, and does so in the face of reform measures recently adopted or currently under consideration in legislative arenas."

BMW v. GORE

Excerpts from the Supreme Court 5-4 decision that struck down a $2 million punitive-damages award in a case from Alabama.

THE MAJORITY

From Justice John Paul Stevens's opinion:

"Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a state may impose. Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose . . . lead us to the conclusion that the $2 million award against BMW is grossly excessive: the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases."

THE DISSENT

From Justice Antonin Scalia's opinion:

"Today we see the latest manifestation of this court's recent and increasingly insistent concern about punitive damages that 'run wild.' Since the Constitution does not make that concern any of our business, the court's activities in this area are an unjustified incursion into the province of state governments. "

From Justice Ruth Bader Ginsburg's opinion:

"The court, I am convinced, unnecessarily and unwisely ventures into territory traditionally within the states' domain, and does so in the face of reform measures recently adopted or currently under consideration in legislative arenas. "

BMW OF NORTH AMERICA, INC., Petitioner,

v.

Ira GORE, Jr.

Supreme Court of the United States

116 S.Ct. 1589

Decided May 20, 1996

... Justice STEVENS delivered the opinion of the Court.

The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a " 'grossly excessive' " punishment on a tortfeasor. The wrongdoing involved in this case was the decision by a national distributor of automobiles not to advise its dealers, and hence their customers, of predelivery damage to new cars when the cost of repair amounted to less than 3 percent of the car's suggested retail price. The question presented is whether a $2 million punitive damages award to the purchaser of one of these cars exceeds the constitutional limit....

Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition. In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case. Most States that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence. Only when an award can fairly be categorized as "grossly excessive" in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment. For that reason, the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve. We therefore focus our attention first on the scope of Alabama's legitimate interests in punishing BMW and deterring it from future misconduct.

No one doubts that a State may protect its citizens by prohibiting deceptive trade practices and by requiring automobile distributors to disclose presale repairs that affect the value of a new car. But the States need not, and in fact do not, provide such protection in a uniform manner. Some States rely on the judicial process to formulate and enforce an appropriate disclosure requirement by applying principles of contract and tort law. Other States have enacted various forms of legislation that define the disclosure obligations of automobile manufacturers, distributors, and dealers. The result is a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States....

We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States.... [B]y attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States.... Alabama may insist that BMW adhere to a particular disclosure policy in that State....

In this case, we accept the Alabama Supreme Court's interpretation of the jury verdict as reflecting a computation of the amount of punitive damages "based in large part on conduct that happened in other jurisdictions." As the Alabama Supreme Court noted, neither the jury nor the trial court was presented with evidence that any of BMW's out-of-state conduct was unlawful.... The Alabama Supreme Court therefore properly eschewed reliance on BMW's out-of-state conduct and based its remitted award solely on conduct that occurred within Alabama. The award must be analyzed in the light of the same conduct, with consideration given only to the interests of Alabama consumers, rather than those of the entire Nation. When the scope of the interest in punishment and deterrence that an Alabama court may appropriately consider is properly limited, it is apparent--for reasons that we shall now address--that this award is grossly excessive.

III

Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose. Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose for adhering to the nondisclosure policy adopted in 1983, lead us to the conclusion that the $2 million award against BMW is grossly excessive: the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases. We discuss these considerations in turn.

DEGREE OF REPREHENSIBILITY

Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect "the enormity of his offense." This principle reflects the accepted view that some wrongs are more blameworthy than others . . . . Similarly, "trickery and deceit" are more reprehensible than negligence . . . .

In this case, none of the aggravating factors associated with particularly reprehensible conduct is present. The harm BMW inflicted on Dr. Gore was purely economic in nature . . . .To be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty. But this observation does not convert all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages.

Dr. Gore contends that BMW's conduct was particularly reprehensible because nondisclosure of the repairs to his car formed part of a nationwide pattern of tortious conduct. Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law. Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance.

In support of his thesis, Dr. Gore advances two arguments. First, he asserts that the state disclosure statutes supplement, rather than supplant, existing remedies for breach of contract and common-law fraud. Thus, according to Dr. Gore, the statutes may not properly be viewed as immunizing from liability the nondisclosure of repairs costing less than the applicable statutory threshold. Second, Dr. Gore maintains that BMW should have anticipated that its failure to disclose similar repair work could expose it to liability for fraud.

We recognize, of course, that only state courts may authoritatively construe state statutes. As far as we are aware, at the time this action was commenced no state court had explicitly addressed whether its State's disclosure statute provides a safe harbor for nondisclosure of presumptively minor repairs or should be construed instead as supplementing common-law duties. A review of the text of the statutes, however, persuades us that in the absence of a state-court determination to the contrary, a corporate executive could reasonably interpret the disclosure requirements as establishing safe harbors. In California, for example, the disclosure statute defines "material" damage to a motor vehicle as damage requiring repairs costing in excess of 3 percent of the suggested retail price or $500, whichever is greater. The Illinois statute states that in cases in which disclosure is not required, "nondisclosure does not constitute a misrepresentation or omission of fact." Perhaps the statutes may also be interpreted in another way. We simply emphasize that the record contains no evidence that BMW's decision to follow a disclosure policy that coincided with the strictest extant state statute was sufficiently reprehensible to justify a $2 million award of punitive damages.

Dr. Gore's second argument for treating BMW as a recidivist is that the company should have anticipated that its actions would be considered fraudulent in some, if not all, jurisdictions. This contention overlooks the fact that actionable fraud requires a material misrepresentation or omission. This qualifier invites line drawing of just the sort engaged in by States with disclosure statutes and by BMW . . . .There is no evidence that BMW acted in bad faith when it sought to establish the appropriate line between presumptively minor damage and damage requiring disclosure to purchasers. For this purpose, BMW could reasonably rely on state disclosure statutes for guidance. In this regard, it is also significant that there is no evidence that BMW persisted in a course of conduct after it had been adjudged unlawful on even one occasion, let alone repeated occasions.

Finally, the record in this case discloses no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive, such as were present in *Haslip* and *TXO*. We accept, of course, the jury's finding that BMW suppressed a material fact which Alabama law obligated it to communicate to prospective purchasers of repainted cars in that State. But the omission of a material fact may be less reprehensible than a deliberate false statement, particularly when there is a good-faith basis for believing that no duty to disclose exists.

That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages, does not establish the high degree of culpability that warrants a substantial punitive damages award. Because this case exhibits none of the circumstances ordinarily associated with egregiously improper conduct, we are persuaded that BMW's conduct was not sufficiently reprehensible to warrant imposition of a $2 million exemplary damages award.

RATIO

The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff. The principle that exemplary damages must bear a "reasonable relationship" to compensatory damages has a long pedigree.... Our decisions in both *Haslip* and *TXO* endorsed the proposition that a comparison between the compensatory award and the punitive award is significant....

The $2 million in punitive damages awarded to Dr. Gore by the Alabama Supreme Court is 500 times the amount of his actual harm as determined by the jury. Moreover, there is no suggestion that Dr. Gore or any other BMW purchaser was threatened with any additional potential harm by BMW's nondisclosure policy. The disparity in this case is thus dramatically greater than those considered in *Haslip* and *TXO*.

Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award. Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach. Once again, "we return to what we said ... in *Haslip*: 'We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness ... properly enter[s] into the constitutional calculus.' " In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis. When the ratio is a breathtaking 500 to 1, however, the award must surely "raise a suspicious judicial eyebrow."

SANCTIONS FOR COMPARABLE MISCONDUCT

Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness. As Justice O'CONNOR has correctly observed, a reviewing court engaged in determining whether an award of punitive damages is excessive should "accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue." In *Haslip*, the Court noted that although the exemplary award was "much in excess of the fine that could be imposed," imprisonment was also authorized in the criminal context. In this case the $2 million economic sanction imposed on BMW is substantially greater than the statutory fines available in Alabama and elsewhere for similar malfeasance.

The maximum civil penalty authorized by the Alabama Legislature for a violation of its Deceptive Trade Practices Act is $2,000; other States authorize more severe sanctions, with the maxima ranging from $5,000 to $10,000. Significantly, some statutes draw a distinction between first offenders and recidivists; thus, in New York the penalty is $50 for a first offense and $250 for subsequent offenses. None of these statutes would provide an out-of-state distributor with fair notice that the first violation--or, indeed the first 14 violations--of its provisions might subject an offender to a multimillion dollar penalty. Moreover, at the time BMW's policy was first challenged, there does not appear to have been any judicial decision in Alabama or elsewhere indicating that application of that policy might give rise to such severe punishment.

The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal. The fact that a multimillion dollar penalty prompted a change in policy sheds no light on the question whether a lesser deterrent would have adequately protected the interests of Alabama consumers. In the absence of a history of noncompliance with known statutory requirements, there is no basis for assuming that a more modest sanction would not have been sufficient to motivate full compliance with the disclosure requirement imposed by the Alabama Supreme Court in this case.

IV

We assume, as the juries in this case and in the *Yates* case found, that the undisclosed damage to the new BMW's affected their actual value. Notwithstanding the evidence adduced by BMW in an effort to prove that the repainted cars conformed to the same quality standards as its other cars, we also assume that it knew, or should have known, that as time passed the repainted cars would lose their attractive appearance more rapidly than other BMW's. Moreover, we of course accept the Alabama courts' view that the state interest in protecting its citizens from deceptive trade practices justifies a sanction in addition to the recovery of compensatory damages. We cannot, however, accept the conclusion of the Alabama Supreme Court that BMW's conduct was sufficiently egregious to justify a punitive sanction that is tantamount to a severe criminal penalty.

The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, its status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce. While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation.

As in *Haslip*, we are not prepared to draw a bright line marking the limits of a constitutionally acceptable punitive damages award. Unlike that case, however, we are fully convinced that the grossly excessive award imposed in this case transcends the constitutional limit. Whether the appropriate remedy requires a new trial or merely an independent determination by the Alabama Supreme Court of the award necessary to vindicate the economic interests of Alabama consumers is a matter that should be addressed by the state court in the first instance.

The judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice BREYER, with whom Justice O'CONNOR and Justice SOUTER join, concurring. [OMMITTED]

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

Today we see the latest manifestation of this Court's recent and increasingly insistent "concern about punitive damages that 'run wild.' " Since the Constitution does not make that concern any of our business, the Court's activities in this area are an unjustified incursion into the province of state governments. . : .

This view, which adheres to the text of the Due Process Clause, has not prevailed in our punitive-damages cases. When, however, a constitutional doctrine adopted by the Court is not only mistaken but also insusceptible of principled application, I do not feel bound to give it stare decisis effect--indeed, I do not feel justified in doing so . . . .

I

. . . Today's decision, though dressed up as a legal opinion, is really no more than a disagreement with the community's sense of indignation or outrage expressed in the punitive award of the Alabama jury, as reduced by the State Supreme Court. It reflects not merely, as the concurrence candidly acknowledges, "a judgment about a matter of degree"; but a judgment about the appropriate degree of indignation or outrage, which is hardly an analytical determination.

There is no precedential warrant for giving our judgment priority over the judgment of state courts and juries on this matter. The only support for the Court's position is to be found in a handful of errant federal cases, bunched within a few years of one other, which invented the notion that an unfairly severe civil sanction amounts to a violation of constitutional liberties . . . .

. . . [T]he only authority for the Court's position is simply not authoritative. These cases fall far short of what is needed to supplant this country's longstanding practice regarding exemplary awards.

II

One might understand the Court's eagerness to enter this field, rather than leave it with the state legislatures, if it had something useful to say. In fact, however, its opinion provides virtually no guidance to legislatures, and to state and federal courts, as to what a "constitutionally proper" level of punitive damages might be. . . .

Of course it will not be easy for the States to comply with this new federal law of damages, no matter how willing they are to do so. In truth, the "guideposts" mark a road to nowhere; they provide no real guidance at all. As to "degree of reprehensibility" of the defendant's conduct, we learn that " 'nonviolent crimes are less serious than crimes marked by violence or the threat of violence,' " and that " 'trickery and deceit' " are "more reprehensible than negligence". As to the ratio of punitive to compensatory damages, we are told that a " 'general concer[n] of reasonableness . . . enter[s] into the constitutional calculus' "--though even "a breathtaking 500 to 1" will not necessarily do anything more than " 'raise a suspicious judicial eyebrow,' " an opinion which, when confronted with that "breathtaking" ratio, approved it. And as to legislative sanctions provided for comparable misconduct, they should be accorded " 'substantial deference.' " One expects the Court to conclude: "To thine own self be true."

These criss-crossing platitudes yield no real answers in no real cases. And it must be noted that the Court nowhere says that these three "guideposts" are the only guideposts; indeed, it makes very clear that they are not--explaining away the earlier opinions that do not really follow these "guideposts" on the basis of additional factors, thereby "reiterat[ing] our rejection of a categorical approach." In other words, even these utter platitudes, if they should ever happen to produce an answer, may be overridden by other unnamed considerations. The Court has constructed a framework that does not genuinely constrain, that does not inform state legislatures and lower courts--that does nothing at all except confer an artificial air of doctrinal analysis upon its essentially ad hoc determination that this particular award of punitive damages was not "fair." . . .

The relationship between judicial application of the new "guideposts" and jury findings poses a real problem for the Court, since as a matter of logic there is no more justification for ignoring the jury's determination as to how reprehensible petitioner's conduct was (i.e., how much it deserves to be punished), than there is for ignoring its determination that it was reprehensible at all (i.e., that the wrong was willful and punitive damages are therefore recoverable). That the issue has been framed in terms of a constitutional right against unreasonably excessive awards should not obscure the fact that the logical and necessary consequence of the Court's approach is the recognition of a constitutional right against unreasonably imposed awards as well. The elevation of "fairness" in punishment to a principle of "substantive due process" means that every punitive award unreasonably imposed is unconstitutional; such an award is by definition excessive, since it attaches a penalty to conduct undeserving of punishment. Indeed, if the Court is correct, it must be that every claim that a state jury's award of compensatory damages is "unreasonable" (because not supported by the evidence) amounts to an assertion of constitutional injury. And the same would be true for determinations of liability. By today's logic, every dispute as to evidentiary sufficiency in a state civil suit poses a question of constitutional moment, subject to review in this Court. That is a stupefying proposition.

For the foregoing reasons, I respectfully dissent.

Justice GINSBURG, with whom THE CHIEF JUSTICE joins, dissenting.

The Court, I am convinced, unnecessarily and unwisely ventures into territory traditionally within the States' domain, and does so in the face of reform measures recently adopted or currently under consideration in legislative arenas. The Alabama Supreme Court, in this case, endeavored to follow this Court's prior instructions; and, more recently, Alabama's highest court has installed further controls on awards of punitive damages. I would therefore leave the state court's judgment undisturbed, and resist unnecessary intrusion into an area dominantly of state concern. . . .

Alabama's Supreme Court reports that it "thoroughly and painstakingly" reviewed the jury's award according to principles set out in its own pathmarking decisions and in this Court's opinions in *TXO* and *Pacific Mut. Life Ins. Co. v. Haslip*. The Alabama court said it gave weight to several factors, including BMW's deliberate ("reprehensible") presentation of refinished cars as new and undamaged, without disclosing that the value of those cars had been reduced by an estimated 10%, the financial position of the defendant, and the costs of litigation. These standards, we previously held, "impos[e] a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages." Alabama's highest court could have displayed its labor pains more visibly, but its judgment is nonetheless entitled to a presumption of legitimacy.

We accept, of course, that Alabama's Supreme Court applied the State's own law correctly. Under that law, the State's objectives--"punishment and deterrence"--guide punitive damages awards. Nor should we be quick to find a constitutional infirmity when the highest state court endeavored a corrective for one counsel's slip and the other's oversight--counsel for plaintiff's excess in summation, unobjected to by counsel for defendant, see supra, at 1593--and when the state court did so intending to follow the process approved in our *Haslip* and *TXO* decisions.

B

The Court finds Alabama's $2 million award not simply excessive, but grossly so, and therefore unconstitutional. The decision leads us further into territory traditionally within the States' domain, and commits the Court, now and again, to correct "misapplication of a properly stated rule of law." The Court is not well equipped for this mission. Tellingly, the Court repeats that it brings to the task no "mathematical formula," no "categorical approach," no "bright line". It has only a vague concept of substantive due process, a "raised eyebrow" test, as its ultimate guide.

In contrast to habeas corpus review under 28 U.S.C. § 2254, the Court will work at this business alone. It will not be aided by the federal district courts and courts of appeals. It will be the only federal court policing the area. The Court's readiness to superintend state court punitive damages awards is all the more puzzling in view of the Court's longstanding reluctance to countenance review, even by courts of appeals, of the size of verdicts returned by juries in federal district court proceedings. And the reexamination prominent in state courts and in legislative arenas, serves to underscore why the Court's enterprise is undue.

For the reasons stated, I dissent from this Court's disturbance of the judgment the Alabama Supreme Court has made.

95-1225 U.S. v. BROCKAMP

Claim for refund—Limitations—Equitable tolling.

Ruling below (CA 9, 67 F.3d 260, 64 LW 2221):

Equitable tolling principles apply to statute of limitations in Section 6511 of Internal Revenue Code for tax refund suits.

Question presented: May doctrine of equitable tolling be applied to enlarge or suspend statutory periods that limit (i) time in which claim for refund of income taxes may be filed (26 USC 6511(a)) and (ii) amount of any recovery upon timely filed claim (26 USC 6511(b))?

Petition for certiorari filed 1/31/96, by Drew S. Days III, Sol. Gen., Loretta C. Argrett, Asst. Att. Gen, Lawrence G. Wallace, Dpty. Sol Gen., Kent L. Jones, Asst. to Sol. Gen., and Gilbert S. Rothenberg and Bridget M. Rowan, Justice Dept. Attys.

IRS REFUSAL TO PAY REFUND APPEALED TO HIGH COURT

Los Angeles Times
Friday, February 16, 1996
Leslie Berger, Times Staff Writer

A daughter's five-year campaign to force the Internal Revenue Service to return a $7,000 check mistakenly written by her late father when he was 93 and senile may reach the U.S. Supreme Court in a case with broad implications for many taxpayers.

Although the IRS admits that the late Granada Hills man never owed such a sum, the agency has steadfastly refused to return his money, saying he missed the deadline to apply for a refund. Now, after a federal appeals court ruled against the tax agency, the IRS and its lawyers have appealed to the Supreme Court.

The woman pursuing the case on behalf of her father's estate, a 70-year-old retired schoolteacher named Marian Brockamp, said the issue is more a matter of principle than cold cash.

"I just felt that this was not justice," said Brockamp, who taught for years in the Los Angeles Unified School District, cared for her widowed father, Stanley McGill, until his death, and recently moved to Prescott, Ariz.

"My father was older, senile, he had been ill, he didn't know what he was doing," Brockamp said Thursday. "I just thought there must be a lot of other cases like this. You know, you have to stand up for what you believe in."

In fact, there are a lot of other cases like Brockamp's--so many, according to a lawyer with the Justice Department, that the IRS fears it could be awash in demands for refunds from taxpayers claiming they were too disabled to meet the deadline if Brockamp prevails.

It's not that the federal government begrudges McGill his $7,000, said attorney Bridget Rowan; it's just loath to carve out exceptions to tax laws that ought to be evenly applied.

"We have such a diverse group of taxpayers in this country suffering from a host of problems . . . ," Rowan said. "It could open the floodgates."

But the seeming absurdity of Brockamp's plight has drawn the attention of even President Clinton, who last month directed the Treasury secretary to review the pertinent tax law and determine whether it "should be changed to avoid such unfair results in the future."

In an apparent reference to the Brockamp case, Clinton noted in a brief, Jan. 31 statement that "the law at times may produce harsh results. This is particularly so when taxpayers fail to seek a refund because of a well-documented disability, or similar compelling circumstance . . . "

The president's statement was issued the same day that the solicitor general's office filed its petition for review with the Supreme Court, continuing the defense of the IRS stand. Both sides expect the Supreme Court to agree to hear the matter, which has been percolating for several years and has spawned at least two conflicting decisions by federal appeals courts.

The Brockamp case began in 1984 when McGill, a retired civil engineer living off Social Security and modest returns from investments, sent the IRS a check for $7,000 even though his recent tax bills had amounted to no more than $500 to $800, according to his daughter.

Described as a once-brilliant mathematician who helped develop mortgage amortization tables that are still in use, McGill had clearly lost his mental capacities. He couldn't recognize old friends, lost his train of thought in conversations after a few minutes, and would "stare blankly when you tried to explain things he knew very well," Brockamp recalled.

He also had a disturbing habit of writing checks for far more than he owed--often adding a zero to the end of a sum. Brockamp believes that's what happened with the IRS check--that it probably should have been around $700 instead of $7,000.

Months after McGill's death in 1988, when he was 98, Brockamp discovered the cashed IRS check among his collection of disorderly paperwork.

At first she thought it was a simple matter that her accountant might clear up by deducting the payment from the modest estate's taxes. But after both her elderly accountant (who has since died) and his daughter failed to settle it, Brockamp hired Encino tax lawyer Robert F. Klueger, who filed suit against the IRS in U.S. District Court in Los Angeles in 1993.

"I told them two years ago, don't make a federal case out of this, cut us a check," said the plain-spoken Klueger. "They wouldn't do it."

The IRS had denied Brockamp a refund, saying her father missed a two-year statute of limitations for claims. If he sent the money in April 1984, he should have sought its return no later than April 1986, the agency said. (In some cases, the deadline is three years later.)

But Klueger has been challenging the IRS' position, using a legal principle called "equitable tolling," which provides that deadlines for claims of all sorts can be extended when the applicant is disabled. Clearly, he says, McGill was disabled.

Traditionally, government agencies were exempt from the provisions of equitable tolling, which had always applied to private defendants in lawsuits. But in 1990, while reviewing the case of a Veteran's Administration worker who was late in suing for employment discrimination, the U.S. Supreme Court held that equitable tolling principles could indeed apply to the federal government.

Although the Supreme Court did not specify whether equitable tolling should apply to the IRS, its 1990 ruling nonetheless triggered an unknown number of lawsuits by taxpayers who claim that they're entitled to refunds but were too disabled to meet the deadline for applications.

Rowan, the Justice Department lawyer who argued against Brockamp's case last year before the federal 9th Circuit Court of Appeals in San Francisco, said she has received "scores" of calls from attorneys around the country who are pressing such cases.

In one recent equitable tolling case against the IRS, a Hawaii lawyer successfully argued that his alcoholism was enough of a disability to prevent him from filing a timely refund request. The 9th Circuit Court of Appeals also ruled in his favor at the same time that it ruled for Brockamp, said Rowan, who cited the Hawaii case as an example of how equitable tolling could be sorely overused if applied to the IRS.

"How many different variations on this theme can you do?" Rowan asked. "I think there are probably as many disabilities as there are taxpayers."

Yet within days of last October's decision favoring Brockamp, a federal appeals court in Richmond, Va.--the 4th Circuit Court of Appeals--sided with the IRS in yet another equitable tolling case. Similarly, the 1st Circuit Court of Appeals in Boston ruled in the IRS' favor in a 1993 case. That court included Judge Stephen G. Breyer, who is now on the U.S. Supreme Court.

Because of the flurry of recent cases and the conflicting opinions by federal appeals courts, it is likely that the Supreme Court will hear the Brockamp case to resolve the issue, said both Rowan and Klueger.

Klueger said he never set out to fight a Supreme Court case, but understood the IRS' fear of an unfavorable precedent that might unleash untold numbers of refunds.

"Believe me," he said, laughing, "this is not a $7,000 issue to the United States [government]."

TREASURY ANNOUNCES EQUITABLE TOLLING PROPOSAL TO EXTEND REFUND PERIOD FOR INCAPACITATED TAXPAYERS

West's Legal News, Federal Tax: Tax Refunds

April 1, 1996

James J. Hall, Tax Editor of West's Legal News

Treasury Secretary Robert Rubin, at the request of President Clinton, has proposed extending the time limit within which claims for tax refunds must be made in situations involving incapacitated taxpayers.

"The president and I believe that we should have a tax system that is responsive to the personal hardships faced by incapacitated taxpayers," Rubin said in a prepared statement.

The proposal responds to the recent well publicized case involving a 93-year- old senile man whose daughter discovered long after his death that he overpaid his taxes. Her claim for refund was denied by the IRS and the U.S. district court. The 9th U.S. Circuit Court of Appeals, however, ruled in favor of the daughter. The Justice Department has now appealed the case to the U.S. Supreme Court, apparently because it fears that the IRS could be exposed to a flood of claims if its is forced to extend refund deadlines.

PROPOSAL RESPONDS TO NEGATIVE PUBLICITY CASE

In 1984, Stanley McGill sent the IRS a $7,000 check. He had been losing a battle with senile dementia, and according to his daughter, Marian Brockamp, was known to send checks to his doctors far in excess of the amounts owed.

McGill died in 1988, at the age of 98. Shortly thereafter, Brockamp went through his room and discovered the $7,000 check, which had been negotiated by the IRS. She wrote the IRS and asked the agency to return the money, since McGill did not have a tax liability approaching $7,000.

The IRS refused Brockamp's refund claim. The agency acknowledged that McGill did not owe the tax, but rejected the claim on the grounds that the statute of limitations on refund claims had long since run out. Generally, a taxpayer must file a refund claim three years from the date an income tax return is filed, or two years from the date the tax is paid, whichever expires last.

Brockamp argued that the doctrine of equitable tolling should apply to tax refund cases. However, the U.S. District Court rejected the argument. "The doctrine of equitable tolling is inapplicable and summary judgment in favor of Defendant is appropriate," ruled the Court in 1993.

Brockamp appealed the case to the 9th U.S. Circuit Court of Appeals. A three- judge panel heard the case in June 1995. The 9th Circuit ruled that equitable tolling principles do apply to tax refund cases and that mental incompetence can be grounds for tolling the statute.

"We think that the facts as alleged by Mrs. Brockamp demonstrate why equitable tolling should apply in some tax cases, the Court said. "In this instance, it would be unconscionable to allow the government to retain money that it concedes it was not owed, and may have only received due to a 93-year- old man's senility."

TREASURY PROPOSAL DESIGNED TO AVOID UNFAIR RESULTS

Although the Justice Department asked the Supreme Court to review the case in January 1996, it apparently recognized the political and public relations problems associated with the case. On the same day the Department asked the Supreme Court to hear the case, President Clinton issued a statement. According to Deputy Press Secretary Mary Ellen Glynn, the president was touched by the case and ordered the administration to seek ways to amend the law to allow strict time limits against tax refunds to be eased in extraordinary cases.

Under Treasury's proposal, the limitations period in the case of individual taxpayers would be extended for the period of time a taxpayer was subject to disability, in effect extending the statutory time by the period of the disability.

"Disability" would be defined to include judicial determinations of incompetency, commitment to mental institutions or hospitals, or other debilitating physical, mental or psychological conditions that would prevent the taxpayer from managing his or her financial affairs.

Marian BROCKAMP, administrator and sole residuary beneficiary of the Estate of Stanley B. McGill, Deceased, Plaintiff-Appellant, v. UNITED STATES of America, Defendant-Appellee.

United States Court of Appeals, Ninth Circuit.

67 F.3d 260

Decided Oct. 5, 1995.

... WIGGINS, Circuit Judge:

Marian Brockamp, the administrator and sole beneficiary of the estate of her father, Stanley B. McGill, brought an action for a refund of his April 1984 income tax overpayment. The district court granted summary judgment in favor of the United States, holding that the suit was precluded by the statute of limitations. We reverse and remand for further proceedings on Mr. McGill's mental incompetence.

BACKGROUND

In April 1984, Mr. McGill, who was 93 years old at the time, mailed a check to the Internal Revenue Service ("IRS") for $7,000, along with an application for an automatic extension of time to file his 1983 income tax return. He made no indication of his reason for sending the $7,000. Despite his extension request, Mr. McGill never filed an income tax return for 1983. More than two years later, on July 15, 1986, the IRS transferred the $7,000 from Mr. McGill's account into an "Excess Collection Account."

Mr. McGill died intestate on November 7, 1988 at the age of 98. During the administration of his estate, Mrs. Brockamp discovered the $7,000 payment and requested a refund. In a letter to the IRS, Mrs. Brockamp characterized her father as "senile" and stated that he had mistakenly sent the check for $7,000 rather than $700. On March 27, 1991, Mrs. Brockamp filed a tax return for Mr. McGill's 1983 tax liability. The IRS assessed $427 in taxes, and refused Mrs. Brockamp's refund request, based on the statute of limitations provided in I.R.C. § 6511.

On August 3, 1993, Mrs. Brockamp filed suit against the United States seeking the return of the money paid by Mr. McGill. She argued that (1) the $7,000 check was a "deposit," rather than a payment, and therefore was not subject to the time limitations of § 6511, and (2) even if the $7,000 was a payment, her refund claim was not barred because the statute of limitations imposed by § 6511 was equitably tolled due to Mr. McGill's mental incompetence. The district court rejected both arguments. It concluded that the $7,000 was a payment, that equitable tolling never applies to tax refund cases, and, therefore, that the claim was barred by the statute of limitations. We conclude that equitable tolling can apply to tax refund cases, and we therefore reverse. We remand to the district court for a determination of Mr. McGill's mental capacity during the relevant time frame.

DISCUSSION

... MERITS

A. Tax Refund Claims are Subject to Equitable Tolling

I.R.C. § 6511(a) provides that a claim for refund of an overpayment must be filed within three years from the time the return was filed, or, if no return was filed, within two years from the date the tax was paid. The court lacks jurisdiction over a claim that does not satisfy § 6511. Mrs. Brockamp obviously cannot meet the two year deadline, as the tax was paid in April 1984, and she did not file her refund claim until March 1991. Nor can she meet the three year deadline, because taxpayers who file returns more than two years after their taxes are paid cannot take advantage of the three year period following the filing of a return. Therefore, § 6511 bars Mrs. Brockamp's claim unless equitable tolling applies to lift that bar.

The government relies on *United States v. Dalm* to support its position that the principles of equitable tolling cannot be applied to § 6511. In *Dalm,* the Supreme Court considered whether equitable recoupment could serve as an independent basis for federal jurisdiction where the statutory requirements of § 6511 were not satisfied. The Court held that the doctrine could not be applied to toll § 6511.

Nine months later, however, in *Irwin v. Department of Veterans Affairs,* the Supreme Court declared a new, general rule holding that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so." In *Irwin,* the court changed its method of evaluating the availability of equitable tolling. Specifically, the court stated: The continuing effort on our part to decide each case on an ad hoc basis, as we appear to have done in the past, would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress. We think that this case affords us an opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the government. We believe that this language effectively limited the *Dalm* decision described above. *Irwin* requires that, in the absence of congressional action, statutes of limitations are, as a general rule, presumed to be subject to equitable tolling in suits against the United States.

Congress has never expressed any intention that equitable tolling should not apply to § 6511. The specific language of the statute does not speak to the application of equitable tolling principles. Additionally, since the Supreme Court decided *Irwin* four years ago, Congress has done nothing to indicate that equitable tolling does not apply to § 6511. Furthermore, as the court in *Johnsen v. United States* noted, the legislative history of § 6511 "is absolutely devoid of any indication that Congress intended to preclude such equitable tolling in tax refund actions." We hold that in the absence of congressional action that indicates to the contrary, the statute of limitations provided in § 6511 may be equitably tolled.

We think that the facts as alleged by Mrs. Brockamp demonstrate why equitable tolling should apply in some tax cases. In this instance, it would be unconscionable to allow the government to retain money that it concedes it was not owed, and may have only received due to a 93 year-old man's senility. We find *Irwin* to be controlling and hold that, in the absence of congressional action, the principle of equitable tolling applies to tax refund claims.

B. Mental Incompetence Tolls the Statute of Limitations

In a prior case, we expressly left open the question of whether mental incompetence can toll a statute of limitations. We have held, however, that where "extraordinary circumstances beyond plaintiffs' control [make] it impossible to file the claims on time," equitable tolling applies. Recently, several post-Irwin courts have held that mental incompetence will toll statutes of limitation in suits against the government. We now join those courts and hold that mental incompetence constitutes a ground for equitable tolling. Principles of equity mandate that when mental incompetence precludes a person from asserting his rights during the proper time period, he should not be precluded from later seeking redress for his injuries.

Viewing the facts of this case in the light most favorable to Mrs. Brockamp, there is a triable issue of fact as to Mr. McGill's mental incompetence. If Mr. McGill is found to have been mentally incompetent when he made the overpayment, tolling will allow Mrs. Brockamp to satisfy the statute of limitations provided in § 6511.

CONCLUSION

We hold that equitable tolling principles apply to tax refund cases. Further, we hold that mental incompetence can be a ground for tolling a statute of limitations. Accordingly, we reverse the district court's grant of summary judgment in favor of the government, and remand for further proceedings regarding Mr. McGill's mental competency.

FERNANDEZ, Circuit Judge, dissenting:

Under 26 U.S.C. § 6511(a), Brockamp's claim for a refund of her father's 1983 taxes was untimely. Brockamp argues that even so the doctrine of equitable tolling should operate to relieve her from the time limitations of § 6511.

The Supreme Court has held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." At the same time, the Court has recognized that equitable tolling is traditionally extended only "sparingly," in two limited circumstances not at issue here.

Sparing or not, the principles of equitable tolling cannot be applied to § 6511. In *United States v. Dalm,* decided nine months before *Irwin,* the Supreme Court held that the doctrine of equitable recoupment could not be applied to toll § 6511. The Court was not willing to allow that equitable doctrine to, in effect, extend the time that a taxpayer would have to apply for a refund of taxes. It approvingly pointed out that in the earlier case of *Bull v. United States,* it had made it clear that even reliance on an inconsistent assessment by the Commissioner would not serve to "toll the statute of limitations." If the equitable recoupment principle was to apply at all, it had to be on a ground other than tolling.

The Court's holding applies with equal force to the present attempt to toll the statute of limitations on equitable grounds. Here, as there, the jurisdictional bar of § 6511 would have to be lifted. As the Court said, "unless a claim for refund of a tax has been filed within the time limits imposed by § 6511(a), a suit for refund, regardless of whether the tax is alleged to have been 'erroneously,' 'illegally,' or 'wrongfully collected,' may not be maintained in any court." Moreover, Dalm was an appealing taxpayer. She had not failed to pay her taxes or to file a return. But she was going to be required to pay twice. That was after the government had even assessed penalties and interest with respect to the gift taxes that it nearly conceded need not have been paid at all because what it really wanted was income taxes for the transaction. As the dissent said, the Court, in effect, held that the statute of limitations could not be tolled "by Government conduct that [the] Court [had] censured as 'immoral' and tantamount to 'a fraud on the taxpayer's rights.' "

Thus, although *Irwin* creates a rebuttable presumption of equitable tolling in most areas, Dalm effectively rebuts that presumption because in it the Supreme Court determined that principles of equity would not be applied to toll § 6511. Other courts have recognized that. . . .

Finally, when Congress has included specific exceptions in a statute of limitations, we should not readily read additional ones into it. Section 6511(c) contains an exception to the limitations period for those who negotiate an agreement for an extension of time with the IRS. Moreover, §§ 1311-1314 contain certain narrow "mitigation provisions" that extend the limitations period in some circumstances. Because Congress has specifically provided exceptions to the time requirements of subsections 6511(a) and (b), we should be chary of reading others into them, including equitable tolling.

In short, because, as recognized by the Supreme Court in *Dalm*, equitable principles are inconsistent with the statutory scheme of the Internal Revenue Code, I need not resort to a *Lampf*-style analysis in order to conclude that the district court should be affirmed. Nonetheless, *Oropallo*'s elucidation of § 6511 compared with the statutes at issue in *Lampf* does provide further support for my conclusion. . . .

Brockamp argues, however, that equitable tolling should also be applied to § 6511(b), which would then allow her to collect the full amount of the refund that she claims she is owed. *Oropallo* likened the interaction of subsections 6511(a) and (b) to the "1-and-3-year-structure" of the provisions at issue in *Lampf*, which required that an action under the Securities Exchange Act be brought within one year after the discovery of facts constituting the cause of action and in no event later than three years after the accrual of the cause of action. The three-year provision in *Lampf* was found by the Court to be "a period of repose inconsistent with tolling." As *Oropallo* recognized, the provisions of § 6511(b) also operate as a period of repose and impose an outside limit on recovery. The provisions of § 6511(b) were intended by Congress "to prevent a taxpayer from extending the time for filing a claim for the entire tax by making small payments from time to time." In other words, even though the subsection "clearly operates like a statute of limitations," it more clearly imposes a period of repose so that the government may finally have closure as to particular tax returns. I cannot say it better than the Court did in *Rothensies v. Electric Battery Co.*:

> It probably would be all but intolerable, at least Congress has regarded it as ill-advised, to have an income tax system under which there would never come a day of final settlement and which required both the taxpayer and the Government to stand ready forever and a day to produce vouchers, prove events, establish values and recall details of all that goes into an income tax contest. Hence a statute of limitation is an almost indispensable element of fairness as well as of practical administration of an income tax policy.

Brockamp presents the appealing argument that her aged father mistakenly remitted way too much money when he applied for an extension of time to file his income tax return for 1983. Basically, she argues that it is unfair to apply the statute of limitations to her. It is true that every statute of limitations has at least a tinge of unfairness because it can preclude the collection of past debts and the assertion of just claims against a person who should give the plaintiff recompense. That is why in a somewhat gentler era than ours Hoffman wrote, "I will never plead the Statute of Limitations when based on the mere efflux of time; for if my client is conscious that he owes the debt, and has no other defense than the legal bar, he shall never make me a partner in his knavery." Thus, I am not unsympathetic.

However, in the Internal Revenue Code Congress has attempted to create a tesselated scheme which assures that the government will receive needed revenues and that those receipts can, after a time, be counted upon as it supplies services to the nation. Considering the complexity of the design, perfection cannot be expected. Considering the vast extent of the design and the numbers of people affected by it, the special thoughts, intentions, needs, and circumstances of each taxpayer cannot always be accommodated. So it is here.

Therefore, I respectfully dissent.

94-1988 CAMPS NEWFOUND/OWATONNA INC. v. HARRISON, MAINE

Property tax exemption for non-profit charitable institution—Denial if operated principally for benefit of out-of-state residents.

Ruling below (Maine SupJudCt, 655 A.2d 876):

Maine statute that denies real property tax exemptions to non-profit institutions that are "in fact conducted or operated principally for persons who are not residents of Maine and [make] charges that result in an average weekly rate per person ... in excess of $30" does not violate Commerce Clause.

Question presented: Does Maine statute violate Commerce Clause because it deprives "benevolent and charitable" non-profit institutions of otherwise available property tax exemptions if they are "conducted or operated principally for the benefit of persons who are not residents of Maine"?

Petition for certiorari filed 6/2/95, by William H. Dempsey, and Shea and Gardner, both of Washington, D.C., and William H. Dale, Emily A. Bloch, Sally J. Daggett, and Jensen Baird Gardner & Henry, all of Portland, Maine.

NONPROFIT GROUPS WARY AS HIGH COURT WEIGHS TOWN, CAMP TAX FEUD

Two Church-Run Camps in Harrison Are Challenging a Maine Law That Disallows Their Tax-Exempt Status.

Portland Press Herald
Sunday, June 2, 1996
Jason Wolfe, Staff Writer

A property-tax dispute pitting a Harrison summer camp against the town has reached the U.S. Supreme Court and is raising concern among nonprofit organizations across the country.

At issue is a 39-year-old Maine law that denies tax-exempt status to summer camps run by charities if most of the campers come from out of state. Lawyers for Camps Newfound/Owatonna say the law discriminates and is unconstitutional.

If the justices uphold the unusual law, officials at other nonprofit institutions fear a ripple effect as lawmakers across the country scramble to pass similar prohibitions. Nonprofit tax exemptions already are under scrutiny by local governments in search of new revenue sources.

If other states follow Maine's lead, hundreds of schools, churches and social service agencies - such as the Boy Scouts of America or YMCA - could be exposed to taxation.

The potential for greater taxation facing nonprofits comes at a time when government funding has grown so scarce that tax exemptions are considered crucial.

Erosion of nonprofits' tax-exempt status could translate into increased costs to customers, or fewer goods and services being provided, officials with nonprofit watchdog groups warn.

"This (Maine) law is a foot in the door," said Alan Reed-Erickson, a management consultant with the Maine Association of Nonprofits. "It's setting a precedent. Who knows how far this will go?"

The Supreme Court is scheduled to hear the case this fall. Sixteen nonprofit associations from across the nation have joined forces with the camp to urge the court to strike down the law.

CAMP ON LONG LAKE SHORE

Camps Newfound/Owatonna Inc. runs a 180-acre summer camp for Christian Science children on picturesque Long Lake in Harrison.

The 80-year-old camp is one of the town's biggest taxpayers. A revaluation in the late 1980s spurred the dispute with the town. The camp decided to look at ways to relieve a tax bill - about $22,000 annually - that had become burdensome.

The camp, the only Christian Science camp in New England, did not qualify for a Maine tax exemption because the vast majority of the more than 250 campers who enroll each year were out-of-state residents.

The camp sued in 1992 to challenge the legality of the state tax law. It demanded a refund for the three preceding years, contending it had been denied an exemption unfairly.

A state trial judge agreed and struck down the tax law as a violation of the dormant interstate commerce clause of the U.S. Constitution. The Maine Supreme Judicial Court, acting on an appeal by the Town of Harrison, reversed that ruling last year.

The U.S. Supreme Court in March granted the camps' request to review the ruling from Maine's highest court. The Supreme Court accepts only about one in 75 cases. A Maine case reaches the nine justices about once every five years.

The camps' attorney, William H. Dale of Portland, speculated that the Supreme Court decided to review the case because the regulation of business between states is an ongoing, hot issue in the courts.

William L. Plouffe, a Portland attorney representing Harrison, said the legal issues raised in the area of interstate commerce give the case a certain prominence in legal circles.

Most nonprofit organizations in Maine and elsewhere are exempt from paying taxes.

The central question is the legality of a Maine law that denies a tax exemption to a "benevolent and charitable" institution that "is in fact conducted or operated principally for persons who are not residents of Maine."

MICHIGAN HAS SIMILAR LAW

Maine's law is grounded in the belief that the state should get something in return for granting a charity a tax exemption. If a nonprofit primarily serves Mainers, the reasoning goes, a tax exemption is appropriate. But if a nonprofit primarily serves nonstate residents, taxes should be paid.

Only Michigan has a law similar to Maine's, according to advocates for nonprofit organizations.

Dale, the camps' attorney, argues that the law violates the Constitution's commerce clause by discriminatorily excluding nonprofit organizations that provide benefits across state lines.

Plouffe disagrees, concurring with the Maine Supreme Court's conclusion that such a tax scheme does not discriminate against interstate commerce.

Maine's highest court drew a fine distinction from the case.

"The exemption statute does not favor in-state camps over out-of-state competitors," the state court said. "Rather, it favors, among in-state camps, those that serve a majority of in-state campers."

Dale submitted his written arguments to the Supreme Court last month. Plouffe's brief is due in a few weeks. While attorneys tangle over legal issues, representatives of nonprofit organizations are left to worry about the long-term implications.

Any nonprofit organization based in one state and providing services to people outside that state is at risk, said Bob Smucker of Independent Sector, the largest umbrella association of charitable organizations.

For example, the state where an organization such as the Girl Scouts or United Way is headquartered may be able to deny a tax exemption since most of the services are provided out of state, he said.

Also, Smucker added, private colleges and universities in which most students come from outside the state could come under attack.

Nonprofit organizations perform a broader array of services than many people realize. They provide educational, research, health, social, religious, artistic and cultural services often not provided by for-profit institutions and governments.

In 1990, U.S. tax-exempt organizations' total assets exceeded $1 trillion, with gross revenues reaching $560 billion, or 10.5 percent of the gross national product, said Dale, the camps' attorney. Tax-exempt organizations employed about 8 million Americans in 1990. There are 1,100 nonprofit organizations in Maine.

LOCAL PROPERTY-TAX RELIEF

Historically, tax-exempt status has been viewed as a tradeoff for the services that nonprofit organizations provide.

Smucker and others are concerned that the Maine case will add ammunition to an ongoing effort nationwide to focus on tax exemptions.

Janne Gallagher, a Washington, D.C., attorney and a national expert in state tax issues affecting charities, said nonprofits have become targets for local officials looking to relieve the tax burden on property owners.

"At this point, we're seeing a situation where a lot of local governments are actively looking at ways to raise revenue," she said. "It's another symptom of the crisis mentality of local governments."

At the same time, public funds are drying up, making nonprofit organizations more dependent on tax exemptions and donations. Losing tax-exempt status could cripple an organization financially, Gallagher said.

Plouffe, the town's attorney, said the nonprofit organizations are overstating the potential negative impact of the case.

Maine's law doesn't even include educational institutions, he said.

Also, the Maine Supreme Court upheld the law 30 years ago, Plouffe pointed out. "Where was this stampede to enact similar laws in other states back then?" he asked. "There wasn't one."

Plouffe said the camp could avoid the controversy and perhaps qualify for a tax exemption if it decided to open the facility to local children for a portion of the year.

CAMPS NEWFOUND/OWATONNA, INC.
v.
TOWN OF HARRISON et al.

Supreme Judicial Court of Maine.
655 A.2d 876
Decided March 7, 1995.

. . . DANA, Justice.

The Town of Harrison appeals from a summary judgment (Cumberland County, Lipez, J.) in favor of Camps Newfound/Owatonna, Inc., a Maine nonprofit corporation, declaring that Maine's property tax exemption statute violates the Commerce Clause of the United States Constitution. Camps cross appeals the court's denial of its constitutional challenge based upon the Privileges and Immunities Clause of the United States Constitution and the Equal Protection Clauses of the United States and Maine Constitutions. Because we find the statute constitutional, we vacate the judgment and remand for entry of a summary judgment for the Town.

Camps operates a summer camp in Harrison for children of the Christian Science faith. In April 1992, by a letter to the Harrison Board of Assessors, Camps demanded a tax refund for 1989 through 1991 and a continuing tax exemption pursuant to Maine's charitable tax exemption statute. The statute denies property tax exemptions, otherwise available, to nonprofit institutions that are "in fact conducted or operated principally for persons who are not residents of Maine and [make] charges that result in an average weekly rate per person . . . in excess of $30." Between 1989 and 1992, approximately 95% of the campers were out- of-state residents, most of whom paid weekly fees ranging from $370 to $445. Following the refusal of the Board of Assessors to grant the exemption in June 1992, Camps filed its complaint in the Superior Court challenging the board's decision and in April 1993 moved for a summary judgment on its constitutional claims.

Standards

Summary judgment is appropriate if "there is no genuine issue as to any material fact" and the moving party "is entitled to a judgment as a matter of law." We review the evidence before the Court in the light most favorable to the party against whom the judgment was granted to determine if the trial court committed an error of law. "All legislative enactments are presumed constitutional, and the party challenging the constitutionality of a statute bears the burden of proof. This presumption, however, is not absolute; legislation which violates an express mandate of the constitution is invalid even though it is expedient or is otherwise in the public interest." A statute's unconstitutionality "must be established to such a degree of certainty as to leave no room for reasonable doubt."

Commerce Clause

The Commerce Clause by its terms grants authority to Congress to "regulate Commerce . . . among the several States." It has long been interpreted to forbid the States from discriminating against interstate trade. This prohibition is often referred to as the "dormant" or "negative" Commerce Clause. The Superior Court found that the exemption statute violates this dormant Commerce Clause. We disagree.

Tax exemptions are characterized in Maine's tax statutes as "tax expenditures." The exemption statute does not impose a tax; it exempts nonprofit corporations that choose to meet certain standards from a tax that all other taxpayers must pay. In effect, the Legislature has decided to expend tax dollars, via an exemption, to "purchase" charitable services from nonprofit organizations.

The United States Supreme Court has adopted a "two-tiered approach to analyzing state economic regulation under the Commerce Clause." The first tier is a "per se rule of invalidity" and the second is a "flexible approach." Under the "per se rule of invalidity" approach, "[w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [courts] have generally struck down the statute without further inquiry." This approach "applies 'not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade.' "

The Court has adopted a "flexible approach" when the statute "has only indirect effects on interstate commerce and regulates evenhandedly." In those circumstances, the Court examines "whether the state's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." The

Supreme Court has recently stated that "this lesser scrutiny is only available 'where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade.' "

Our first step is to determine whether to apply the rule of per se invalidity or to adopt the flexible approach. In order to do so we must decide whether the exemption statute regulates evenhandedly with only incidental effects on interstate commerce or whether, in fact, it does discriminate against interstate commerce. "Discrimination" refers to different treatment of in- state and out-of-state economic interests that benefits the former and burdens the latter.

The exemption statute does not favor in-state camps over out-of-state competitors. Rather, it favors, among in-state camps, those that serve a majority of in-state campers. The case before us demonstrates this point. Camps is a Maine corporation, and no out-of-state competitor complains that the statute favors in-state camps at its expense. Moreover, the exemption statute is not directed at taxes on the persons served by the charity but, rather, on real property taxes for which the charity would otherwise be liable. The exemption statute treats all Maine charities alike. They all have the opportunity to qualify for an exemption by choosing to dispense the majority of their charity locally. If there is any impact on interstate commerce it is incidental; it is not the purpose of the exemption statute to affect the number of out-of-state campers attending summer camps within Maine. Because the exemption statute regulates evenhandedly with only incidental effects on interstate commerce, we apply the flexible approach, examining whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

The purpose of any tax exemption for charitable institutions is to relieve the charity from the burden of taxes on their limited budgets and thereby to recognize and promote the public benefits that they provide. This is a legitimate state interest. Furthermore, the burden on interstate commerce does not clearly exceed the local benefits. The exemption statute bears no resemblance to the types of economic regulation that "excite those jealousies and retaliatory measures the Constitution was designed to prevent." The statute neither increases costs to out-of- state firms nor forces them to leave the market.

Indeed, in the case before us nothing in the record suggests that Camps competes with other summer camps outside of or within Maine or that Camps has lost business to competitors. Camps is unique, serving a very limited segment of the population who choose to attend Camps because of the religious affiliation and the desirability of the location and the services. Furthermore, Camps delivers its services only within Maine. Camps does not claim that the exemption statute places it at a competitive disadvantage in attracting campers. Rather, it suggests that paying the taxes precludes it to a certain extent from providing supplemental services for its campers, such as outside art and music consultants. Finally, although the record suggests that the denial of a tax exemption results in increased costs that are passed along "to some extent" to the campers in the form of increased tuition, there is no evidence that the exemption statute impedes interstate travel or that Camps provides services that are necessary for interstate travel. Camps has not met its heavy burden of persuasion that the exemption statute is unconstitutional.

Equal Protection Clauses

In *Green Acre Baha'i Inst. v. Town of Eliot*, we upheld Maine's charitable tax exemption statute under the equal protection clauses of the Maine and United States Constitutions. The case before us and *Green Acre II* are virtually identical. Neither has the statute materially changed since we decided *Green Acre II*, nor has the equal protection analysis under federal or Maine law so changed as to justify our deviation from Green Acre II. Assuming without deciding that Camps has standing to argue the constitutional rights of the campers, we find that the exemption statute does not violate the equal protection clause of either the United States or Maine Constitutions.

Privileges and Immunities Clause

Camps also argues that the exemption statute violates the Privileges and Immunities Clause of Article IV, section 2 of the United States Constitution which provides that "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Camps argues that the campers' rights to travel and to be free from discriminatory taxation are protected by the Privileges and Immunities Clause.

We find that the exemption statute does not violate the Privileges and Immunities Clause. The campers may pay a slightly higher tuition if they choose to attend Camps, but they are not directly subject to state taxation. Additionally, the exemption statute does not burden any fundamental rights of the campers. In *Baldwin v. Montana Fish and Game Comm'n*, the Supreme Court rejected a privileges and immunities attack on a Montana scheme for issuing elk-hunting licenses and held that the Privileges and Immunities Clause only applies to distinctions between nonresidents and residents with respect to "basic and essential activities, interference with which would frustrate the purposes of the formation of the Union." An activity must bear "upon the vitality of the Nation as a single entity" before discrimination with respect to it will trigger the Clause. The right to attend a recreational summer camp is not a fundamental right, and therefore the exemption statute does not violate the Privileges and Immunities Clause.

Because we find that the exemption statute is not unconstitutional, it is not necessary to discuss the other issues raised by the parties on appeal.

The entry is:

Judgment vacated with respect to count I, and remanded to the Superior Court for entry of a summary judgment for the Town of Harrison. Judgment affirmed with respect to count II.

All concurring.

95-1181 DUNN v. COMMODITY FUTURES TRADING COMMISSION

Commodities futures and options—Dealing outside regulated exchange.

Ruling below (CA 2, 58 F.3d 50, 64 LW 2064):

Treasury Amendment of 1974 to Commodity Exchange Act, which exempts from Commodity Futures Trading Commission jurisdiction "transactions in foreign currency . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade," does not include options even when traded off-exchange, because option is simply right to engage in transaction in future, and until that right matures, there is no exempt "transaction."

Question presented: Does "Treasury Amendment," 7 USC 2(ii), to Commodity Exchange Act exempt from CFTC jurisdiction off-exchange foreign currency options?

HIGH COURT TO RULE ON CURRENCY TRADING

Should CFTC Have a Regulatory Role?

Chicago Tribune

Wednesday, May 29, 1996

John Schmeltzer, Tribune Staff Writer.

For more than 50 years the U.S. Federal Reserve System, the German Bundesbank and other world banks have used the currency markets unencumbered. The world's businesses now attempt to offset currency fluctuations by trading currency contracts.

Although options and contracts worth billions of dollars are traded on a daily basis, this market is operated essentially without regulation.

On Tuesday, the U.S. Supreme Court agreed to decide whether that should continue.

For the Chicago Mercantile Exchange and its members, millions of dollars in potential commissions are at stake. For bankers and multinational corporations, the stakes are even higher.

"This conflict is for the Supreme Court, not us, to decide," wrote the 2nd Circuit Court of Appeals last year in urging the nation's highest court to sort out conflicting rulings by the 2nd Circuit and the 4th Circuit Court of Appeals.

The 2nd Circuit had ruled that the U.S. Commodity Futures Trading Commission should regulate currency instruments trading.

But the 4th Circuit had ruled that currency instrument trading was exempt from the law that gave the CFTC authority to regulate other types of commodities, such as grain.

Currency options give a purchaser the right to buy foreign money at a specific exchange rate on a future date. They are used by banks and businesses to safeguard against foreign exchange fluctuations. It was the tool used in 1994 by the Federal Reserve when it stepped in to support the Mexican peso.

"The Merc has long had the view that currency futures and currency options that are sold and marketed to retail customers ought to be regulated by the CFTC," said Carl Royal, senior vice president and special counsel of the exchange. "There is a distinct possibility that we will attempt to intervene."

For Merc members, it's simply a case of leveling the playing field.

"The contracts are virtually identical to contracts at the Merc, except they are traded by dealers over the telephone," said Royal. Because telephone traders don't have to pay commissions, the costs of trading are lower than if the same options or contracts were traded on the Merc.

However, five of the nation's largest industry associations argued Tuesday that CFTC intervention in the markets is unnecessary.

Uncertainty about the enforceability of option contracts "could drive the United States portion of these activities overseas," they said in a brief filed with the court.

About $40 billion in currency options are traded each day, about half of them on over-the-counter markets.

The CFTC regulates some foreign-currency options sold on the Merc and other commodity exchanges. Those options involve pre-set amounts of money and expiration dates.

On the over-the-counter market, however, the world's biggest banks and finance companies negotiate the sale or purchase of options for any amount of money and in any time frame.

The dispute that landed in the Supreme Court Tuesday began two years ago, when the CFTC filed a complaint against William C. Dunn and New Jersey-based Delta Consultants Inc., charging that they had defrauded investors in foreign-exchange options. The CFTC alleged that Dunn and Delta ran a "Ponzi scheme," using money from new investors to pay earlier customers. More than $180 million in customers' funds apparently disappeared, government officials said in court papers.

Dunn and Delta said the CFTC didn't have jurisdiction over the options they offered, which were sold on over-the-counter markets.

Now it's up to the court to decide.

COMMODITY FUTURES TRADING COMMISSION, Plaintiff-Appellee,

v.

William C. DUNN and Delta Consultants, Inc., Defendants-Appellants,

Delta Options, Ltd. and Nopkine Co., Ltd., Defendants.

United States Court of Appeals, Second Circuit.

58 F.3d 50

June 23, 1995

. . . WINTER, Circuit Judge:

This is an interlocutory appeal from the appointment of a temporary receiver. The principal legal issue is whether the Commodity Futures Trading Commission ("CFTC") has power to regulate off-exchange options involving foreign currencies. Based on a prior decision of this court binding on this panel, we hold that it does and affirm.

BACKGROUND

This is an action by the Commodity Futures Trading Commission against four defendants: (i) William C. Dunn, an individual and the president and sole shareholder of Delta Consultants; (ii) Delta Consultants, a New Jersey corporation formed by Dunn in 1974; (iii) Delta Options, Ltd., an investment company incorporated in the Bahamas in 1991, to which Dunn is an advisor and of which he was managing director; and (iv) Nopkine Co., Ltd., an investment company incorporated in the British Virgin Islands in 1993, to which Dunn is an advisor.

Beginning in 1992, some of the defendants solicited investments from a number of individuals, partnerships, and companies. These investors understood that Delta Options would use the money to execute investment strategies involving the purchase and sale of call and put options on various foreign currencies. Through these trades, various combinations of sales and purchases of different forms of options created relatively exotic positions in foreign currencies, including "strangles" and "boxes." These trades were done in the name of defendants, and no participations or options were sold directly to investors.

The defendants' trading took place in the so-called off-exchange market. Such trading is over-the-counter and not conducted on any kind of organized exchange. Rather, the market consists of myriad and interlocking contracts struck over the telephone between dealers and through brokers.

According to affidavits submitted by the CFTC, Dunn and his agents, including A.P. Black Limited, an English firm, disseminated false information concerning the risks and rewards of currency trading in general and of investing with defendants in particular. Investors were also deceived as to the success of defendants' trading and the status of the investors' accounts.

Investors in Delta Options received weekly print-outs summarizing the putative current market value of their particular positions. Until late 1993, these print-outs apparently showed impressive returns on the investments. When options expire, the positions are said to "mature." Prior to the maturity of an investor's position, Delta Options would ask the investor whether the investor wanted to "roll over" the positions or to cash out. By "rolling over" the positions, the investor would reinvest those funds with defendants. Some investors--including those constituting the partnership of Nobad Investment Currency ("Nobad")--claim that misleading print-outs caused them to "roll over" their investments instead of withdrawing them.

The scheme began to unravel in the second half of 1993, and investors began to receive curious communications from defendants. For instance, in early July 1993, investors received a letter from Delta Options to the effect that the "Investment Management Regulatory Organisation Limited," a British regulatory organization, was investigating A.P. Black Limited. In late July 1993, one investor--an English ship repair agency business named Carlden Marine and Industrial Agencies Limited ("Carlden Marine")--was informed by a letter from Delta Options that it would be repaid in full at the next contract maturity dates. Carlden Marine was thus assured that it would be "cashed out" as its positions matured. Over the next two months, however, the monies were not released as anticipated. Funds representing the positions that supposedly matured on August 27, 1993 were sent to Carlden Marine in the middle of October.

Notwithstanding communications from Delta Options and Dunn that alternated between vague and placating, Carlden Marine never received funds corresponding to positions maturing on September 27, 1993. On November 26, Carlden Marine received a letter from Delta Consultants stating that Delta Options had suffered trading losses of $85 million. On November 28, Carlden Marine received a similar communication from Delta Options, except that the losses were set at $95 million. Finally, on December 3, 1993, Carlden Marine received a letter from Delta Options that stated that Delta Consultants could not compensate investors for the losses.

Other investors experienced similar difficulties. The Nobad partnership was informed in July through the "Summary Report of Foreign Exchange Option Positions" sent by Delta Consultants that the maturity of some of its currency positions had been extended to late September. They were then informed in late September that the funds representing such matured positions would not be paid out until November. In late November, the Nobad partners, like Carlden Marine, received communications from Delta Options indicating massive losses and an inability to repay their money.

On the present record, it would appear that, whatever their original intent, defendants became engaged in an old-fashioned "Ponzi" scheme, accompanied by exotic financial vocabulary. The weekly print-outs suggested large returns, which convinced most investors to "roll over" their funds. So long as these funds and money from new investors exceeded losses, any investor who wished to "cash out" could be paid off. The losses, however, were too great to be offset by "roll-overs" or new money, and much of the investors' money has disappeared.

At least some money has been transferred to Switzerland. For example, transfer documents from Credit Lyonnais indicate that Delta Options wired $16.5 million from an account in New York to an account in Zurich, Switzerland in July 1993, while documents from Bank Julius Baer reflect a $3 million transfer from a New York account to a Zurich account.

The present lawsuit was commenced by the CFTC on April 5, 1994. On the same date, the CFTC also applied, ex parte, for a restraining order, which was promptly entered by the district court, freezing the defendants' assets. On May 4, 1994, the CFTC requested the appointment of a temporary equity receiver. On May 6, the district court held a hearing on this request. Defendants' sole argument at this hearing was that there was no subject matter jurisdiction because the CFTC has no power to regulate options in foreign currency. After a second hearing on June 23, the district court appointed a temporary equity receiver. Appellants brought this interlocutory appeal, along with a motion to stay the order pending appeal. We denied the stay and expedited this appeal.

DISCUSSION

The CFTC's evidentiary proffer sufficiently demonstrated that defendants deceived investors and caused investors to receive false reports. Such behavior, when undertaken in the course of conduct over which the CFTC has jurisdiction, is unlawful under 7 U.S.C. § 6c(b). The CFTC also has alleged facts sufficient to find Dunn (i) liable for aiding and abetting such violations and (ii) liable for being a controlling person with respect to such violations.

The principal question to be addressed, therefore, is whether the CFTC has the power to regulate options in foreign currency. This turns on whether trading in off-exchange options on foreign currencies is excluded from the CFTC's jurisdiction by the language of the 1974 amendments to the Commodities Exchange Act ("CEA"). The Commodity Futures Trading Commission Act of 1974 created the CFTC and gave it extensive power to regulate futures and options. However, this authority was circumscribed with respect to foreign currency by the "Treasury Amendment" of 1974, which reads: Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade. The issue is whether or not the phrase "transactions in foreign currency" includes options on foreign currency. If such options are included, then the exemption applies, and the options do not fall within the CFTC's jurisdiction.

This issue is foreclosed by clear precedent in this circuit that holds that the term "transactions in foreign currency" does not include options, even those options traded off-exchange. We addressed this question in *Commodity Futures Trading Commission v. American Board of Trade* and interpreted "transactions in foreign currency" to exclude options. Our reasoning was that an option was simply the right to engage in a transaction in the future, and, until this right matured, there was no exempt "transaction." The exercise of an option would constitute a "transaction in foreign currency," but the purchase or sale of the option itself would not be such a "transaction" under the Treasury Amendment.

Appellants and amici urge that this interpretation was dicta because *American Board of Trade* involved transactions that were non-exempt because they had occurred on an exchange. Therefore, it was not necessary to hold that all options were outside the Treasury Amendment exemption to reach the conclusion that the transactions at issue in *American Board of Trade* fell within the CFTC's jurisdiction.

Appellants and amici are correct that we could have altered our reasoning and reached the same result by stating that because the instruments at issue in *American Board of Trade* were traded on an exchange they fell outside the Treasury Amendment. Nevertheless, that was not the path we chose. The fact that a quite different line of reasoning leading to the same result might have been adopted by a prior panel does not give a later panel in this circuit free rein to disregard an earlier decision. When a prior decision makes statements in a line of reasoning that are broader than necessary to the affirmance or reversal of a judgment, a later panel may confine the precedential effect to a narrower ground within the line of reasoning. However, a later panel may not disregard the reasoning of a decision because an entirely different line of reasoning was available. Whatever doubts this panel may have about the interpretation given the Treasury Amendment in *American Board of Trade*, therefore, are not grounds for our declining to follow it. We acknowledge that our interpretation of the phrase "transactions in foreign currency" in *American Board of Trade* conflicts with that of the Fourth Circuit in *Salomon Forex, Inc. v. Tauber*. This conflict is for the Supreme Court, not us, to resolve.

Amici warn of a number of potentially dire effects that could result from a holding that off-exchange currency options fall within the subject matter jurisdiction of the CFTC. These dire effects are to a degree deflected by the CFTC's trade option exemption. At oral argument, for example, the CFTC represented that the trade option exemption would apply to options in foreign currency traded among banks. In any event, we are bound by precedent.

We have examined appellants' claim that the district court abused its discretion by appointing a temporary receiver. We hold that Judge Griesa's actions were proper and responsible under the circumstances, and appellants' contentions to the contrary are without merit.

Affirmed.

95-813 BENNETT v. SPEARS

Endangered Species Act—Citizen suit provision—Standing.

Ruling below (CA 9, 63 F.3d 915, 64 LW 2139, 41 ERC 1129):

Plaintiffs who assert no interest in preserving endangered species lack standing to maintain citizen suit against government for violating procedures established under Endangered Species Act.

Questions presented: (1) Is broad standing mandated by Congress in citizen suit provision of Endangered Species Act subject to zone of interest test as further, judicially imposed, prudential limitation on standing? (2) If standing to sue under Endangered Species Act is subject to prudential limitations, do those limitations permit only environmental plaintiffs to challenge government conduct alleged to violate terms of act, or are claims of economic injury raised by public water suppliers and water users also within zone of interests protected or regulated by act?

Petition for certiorari filed 11/21/95, by Gregory K. Wilkinson, Zachary R. Walton, and Best, Best & Krieger, all of Riverside, Calif., and William F. Schroeder and Carol DeHaven Skerjanec, both of Vale, Ore.

SUPREME COURT TO TACKLE SPECIES ACT

Justices to Rule Whether Scope Allows Cases Seeking Less Protection

Austin American-Statesman

Tuesday, March 26, 1996

Richard Carelli

WASHINGTON -- The Supreme Court will decide whether people may use the Endangered Species Act to seek less, not more, governmental protection for a species.

The justices said Monday they will use an Oregon case to consider allowing such lawsuits.

Lower courts have said the federal law can be invoked only if someone is seeking more, not less, governmental protection.

The Oregon dispute centers on efforts to protect two endangered fish species, the Lost River sucker and the shortnose sucker.

Federal officials determined in 1992 that Bureau of Reclamation operations at Klamath project reservoirs in southern Oregon and northern California might jeopardize the two species' continued existence.

As a result, the federal Fish and Wildlife Service proposed that the flow of water be cut so Upper Klamath Lake and the Clear Lake and Gerber reservoirs could be kept at higher levels.

That would mean less water available for irrigation, so two Oregon ranchers and two state irrigation districts sued, alleging a violation of the Endangered Species Act. The law requires regulators to consider economic impact before designating an area a critical habitat for an endangered species.

A federal judge threw out the lawsuit in 1993, ruling that the two ranchers and the two irrigation districts lacked legal standing to sue under the environmental act. The 9th U.S. Circuit Court of Appeals upheld the dismissal in August.

"This case requires us to determine whether plaintiffs who assert no interest in preserving endangered species may sue the government for violating the procedures established in the Endangered Species Act," the appeals court said. "We conclude that they may not."

The act's language authorizes private lawsuits by "any person" to sue the government over an alleged violation. But the lower courts said the ranchers and irrigation districts failed to show that their concerns fell "within the zone of interests to be protected or regulated" by the law.

In seeking Supreme Court help, lawyers for the ranchers and irrigation districts argued that Congress did not intend to have the broad "any person" language "subject to a zone-of-interest test."

The appeal was supported in a friend-of-the-court brief submitted in behalf of nine states -- Alaska, Arizona, California, Colorado, Kansas, Montana, South Carolina, Texas and Utah.

The Clinton administration had urged the justices to reject the appeal. The case likely will be argued next fall and decided in 1997.

Brad BENNETT; Mario Giordano; Langell Valley Irrigation District; Horsefly Irrigation District, Plaintiffs-Appellants,

v.

Marvin L. PLENERT, as Regional Director, Region One, Fish and Wildlife Service, U.S. Department of the Interior; John F. Turner, as Director, Fish and Wildlife Service, U.S. Department of the Interior; Bruce Babbitt, as Secretary, U.S. Department of the Interior, Defendants-Appellees.

United States Court of Appeals, Ninth Circuit.

63 F.3d 915

Aug. 24, 1995

. . . REINHARDT, Circuit Judge:

This case requires us to determine whether plaintiffs who assert no interest in preserving endangered species may sue the government for violating the procedures established in the Endangered Species Act. We conclude that they may not.

I.

The plaintiffs are two Oregon ranch operators and two irrigation districts located in that state. They challenge the government's preparation of a biological opinion which concludes that the water level in two reservoirs should be maintained at a particular minimum level in order to preserve two species of fish. The plaintiffs, who make use of the reservoir water for commercial (and recreational) purposes, bring this action under the Endangered Species Act (ESA), the Administrative Procedure Act (APA), and the National Environmental Policy Act (NEPA).

The two reservoirs in question are part of the federal government's Klamath Project, which the Bureau of Reclamation administers. The Bureau concluded that the long term operation of the Klamath Project might adversely affect two species of fish: the Lost River and shortnose suckers. Pursuant to the requirements of the ESA, the Bureau consulted with the United States Fish and Wildlife Service in order to assess the impact of the Klamath Project on the fish.

As a result of the consultation, the Service prepared a biological opinion. The opinion concluded that unless mitigating actions were taken the "long-term operation of the Klamath Project was likely to jeopardize the continued existence of the Lost River and shortnose suckers." The opinion "recommended a number of measures the [Bureau] could take to avoid jeopardy to the suckers . . . including the recommendations regarding maintaining minimum lake level at issue in this case." The Bureau informed the Service that it accepted the opinion's recommendations and intended to comply with them.

The plaintiffs filed suit for declaratory and injunctive relief in an effort to compel the government to withdraw portions of the biological opinion. Their complaint alleges that there is no evidence to support the opinion's conclusion that the long-term operation of the Klamath project will adversely affect suckers. In fact, the complaint alleges that the evidence shows that the fish are "reproducing successfully" and are not in need of special protection. The complaint then explains that the plaintiffs' objective in seeking to prevent the government from raising the minimum reservoir levels is to ensure that more water will be available for their own commercial (and recreational) use. In short, they wish to use for their own purposes some of the water that the government maintains is needed to ensure the survival of the suckers.

The complaint alleges that in preparing the opinion, the government violated the consultation provisions set forth in 16 U.S.C. § 1536(a) of the ESA. It also alleges that the government violated 16 U.S.C. § 1533(b)(2) of the ESA by failing to consider the economic impact of its determination that the reservoirs constituted critical habitats for the suckers. They bring related claims pursuant to the APA and NEPA.

The government moved to dismiss the complaint for lack of standing. The district court concluded that the plaintiffs' interest in utilizing the Klamath water for commercial and recreational purposes "conflict[s] with the Lost River and shortnose suckers' interest in using water for habitat." Accordingly, it concluded that the plaintiffs lacked standing because their claims were premised on "an interest which conflicts with the interests sought to be protected by the Act."

II.

The issue before us is not whether the plaintiffs have satisfied the constitutional standing requirements but whether their action is precluded by the zone of interests test, the prudential standing limitation that the district court deemed dispositive.

The zone of interests test first appeared as a standing requirement in *Association of Data Processing Service Organizations, Inc. v. Camp*. There, the Court held that a plaintiff seeking judicial review under the Administrative Procedure Act (APA) must show that "the interest sought to be protected by [him was] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." In the decade that followed, the test appeared to be on the verge of being abandoned. However, in 1987, the Court resuscitated it, offering an "exegesis" regarding when the test applies and how a court should determine whether it has been met.

In a lengthy footnote, the Clarke Court made it clear that some form of the zone test applies even in cases which are not brought under the Administrative Procedure Act. However, it cautioned that "[w]hile inquiries into reviewability or prudential standing in other contexts may bear some resemblance to a 'zone of interest' inquiry under the APA, it is not a test of universal application." Perhaps because the Court did not proceed to explain how the test might differ when applied to non-APA actions, our court, like most others, has continued to apply the traditional zone of interests test to such actions, as well as to APA cases. We follow that practice here.

Clarke 's principal relevance to the case before us is its holding regarding when a plaintiff who is not directly subject to the regulatory action that he seeks to challenge falls within the zone of interests. As to such plaintiffs, Clarke holds that "the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be reasonably assumed that Congress intended to permit the suit."

Clarke explains that the zone of interests test simply provides a method of determining whether Congress intended to permit a particular plaintiff to bring an action. As the Clarke Court made clear, "at bottom the reviewability question turns on congressional intent, and all indicators helpful in discerning that intent must be weighed." Thus, Clarke concludes that the statutory purposes should be divined by considering the particular statutory provision that underlies the complaint within "the overall context" of the act itself.

III.

We have previously applied the zone of interests test to claims brought directly under the ESA. However, the plaintiffs contend that these cases do not conclusively demonstrate that the zone of interests test applies here. They argue that the question of the test's application is an open one because our past cases did not consider whether the ESA's citizen-suit provision overrides the limitation on standing that the test imposes. The provision in question authorizes "any person [to] commence a civil suit on his own behalf--a) to enjoin any person, including the United States [and its agencies], who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof . . . ."

We need not rely on our decisions in Mt. Graham and Pacific Northwest. Rather, notwithstanding the broad language of the citizen-suit provision, we directly reject the plaintiffs' contention that it renders the zone of interests test inapplicable to claims brought under the ESA. Our conclusion follows from the fact that our court, and others, have regularly employed the zone of interests test in determining standing despite Congress' enactment of expansive citizen-suit provisions.

For example, in *Gonzales v. Gorsuch*, we considered whether a plaintiff had standing under the Clean Water Act's citizen-suit provision to complain that the EPA was unlawfully expending funds for purposes other than the improvement of water quality. In answering the question, we considered not only the provision of the statute which permitted "any citizen" to sue for a violation of the Act, but also the legislative history. We concluded that the plaintiff had standing because the citizen-suit provision was "intended to grant standing to a nationwide class, comprised of citizens who alleged an interest in clean water."

Subsequent to *Gonzales*, we concluded that the Clean Water Act's citizen- suit provision did not confer standing on a plaintiff who claimed that the government's failure to comply with the statute deprived him of grant funds. We based our holding on the fact that the plaintiff's injury did not "arise from an interest in the environment," and the fact that he did "not seek to vindicate environmental concerns."

We applied a similar analysis in construing a different statute. In *Alvarez v. Longboy* we considered whether a provision of the Farm Laborer Contractor Registration Act (FLCRA) that permitted suit by "[a]ny person claiming to be aggrieved" by a violation of the act conferred standing on migrant workers to sue farm labor contractors with whom they had no contract. We concluded that it did, but only after carefully considering the overall purposes of the act to determine whether the particular plaintiff fell within the zone of interests that the statute protected.

The Eleventh Circuit employed the same approach in construing the FLCRA. After analyzing the purposes of the act, the court concluded that the provision authorizing suits under the FLCRA did not confer standing on competitors of farm labor contractors to bring an action for a violation of the statute. It explained that their claimed injury fell outside "the zone of interests sought to be protected" by the statute. In so concluding, the court explained that: The FLCRA was designed to alleviate a parade of horribles being inflicted upon farm laborers (primarily migrant farm workers). While "any person" may be read to include many possibilities, we do not find any basis for extending it to [the plaintiff] for the type of claim alleged here.

In sum, the fact that a statute contains a citizen-suit provision does not necessarily establish that Congress intended that any particular plaintiff have standing to assert a violation. In light of our consistent use of the zone of interests test in determining the standing of plaintiffs who have sued under citizen-suit provisions, we hold that the ESA does not automatically confer standing on every plaintiff who satisfies constitutional requirements and claims a violation of the Act's procedures. A contrary ruling would permit plaintiffs to sue even though their purposes were plainly inconsistent with, or only "marginally related" to, those of the Act. Thus, we apply the zone of interests test here.

IV.

Having concluded that the zone of interests test applies, we must next determine whether the ESA protects plaintiffs who assert an interest of the type asserted here. We answer that question in the negative, holding that only plaintiffs who allege an interest in the preservation of endangered species fall within the zone of interests protected by the ESA. Because the plaintiffs have not alleged such an interest in their complaint, they do not have standing.

In reaching our conclusion, we follow the approach that we have adopted in applying the zone of interests test to claims brought pursuant to other environmental statutes. In those cases, we declined to confer standing on plaintiffs who asserted interests similar to those that underlie the claims in this case; we concluded that the asserted interests were not tied to the environmental purposes served by the respective statutes. For example, as we have explained supra at page 10656, we denied standing under the Clean Water Act to a plaintiff who sought grant funds but did not assert an interest that "ar[o]se from an interest in the environment" or "environmental concerns." Similarly, we held that plaintiffs do not have standing under NEPA to protect "purely" economic interests, because the environmental purposes of the Act would not be furthered by permitting suits premised on such interests.

We see no reason why the ESA should be construed in a different manner from either NEPA or the Clean Water Act. The overall purposes of the ESA are singularly devoted to the goal of ensuring species preservation; they do not embrace the economic and recreational interests that underlie the plaintiffs' challenge. Our conclusion is based in part on the Supreme Court's own exhaustive review of the purposes of the ESA in *Tennessee Valley Authority v. Hill.* There, the Court concluded that:

> [t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.

That is reflected not only in the stated policies of the Act, but in literally every section of the statute. The Court went on to point out that even the citizen- suit provision, on which the plaintiffs rely, was designed to serve the goal of species protection by permitting "interested persons " to sue to enforce the Act.

Moreover, a review of the section of the ESA that sets forth the Act's purposes bears out the Court's analysis. That section provides no basis for concluding that the plaintiffs' interest in obtaining water that the government deems critical to the survival of endangered fish is a protected one. Rather, the statute declares that its purposes are: to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section. It was a similar declaration of purpose that we relied upon in concluding that a plaintiff's economic interest fell outside the zone of interests protected by NEPA. Given that the clear purpose of the ESA is to ensure the protection of endangered species, we conclude that suits by plaintiffs who are interested only in avoiding the burdens of that preservation effort "are more likely to frustrate than to further statutory objectives."

Our conclusion echoes some of the views that we recently expressed in *Pacific Northwest.* In *Pacific Northwest*, hydropower purchasers challenged the government's preparation of a biological opinion that recommended regulating water flow in order to protect endangered salmon. In one of their claims, the hydropower purchasers contended that the opinion's recommendations would yield only "dubious benefit to the listed species" and did not adequately consider the impact that the proposed regulations would have on their industry. We explained that such a claim went beyond the bounds of the standing that the ESA confers. On analysis, a portion of this claim goes beyond the basis for the plaintiffs' standing because it focuses on the increases in cost to hydropower operations. The plaintiffs are entitled to standing because preservation of the salmon will, in the long run, reduce their cost. But the plaintiffs are not entitled to standing simply to complain about the additional cost imposed on hydropower. Nothing in the Endangered Species Act confers a cause of action for that purpose. *Pacific Northwest* said, in effect, that as to a portion of their claim, the plaintiffs were not entitled to standing because they failed to assert an interest in preserving a threatened or endangered species.

Here, the plaintiffs make no allegation that the government's recommendations will harm the Lost River or shortnose suckers. Instead, they argue that the actions proposed in the biological opinion are not necessary to preserve the fish. In their claims regarding consultation and designation of critical habitat, they seek only to obtain a greater share of the water and do not contend that compliance with the Act will improve the fish's lot. Indeed, they tell us that the suckers are doing just fine. Thus, their complaint belies any assumption that they seek compliance with the statute in order to further the goal of species preservation. The complaint instead is premised on the contrary position that the fish are "reproducing successfully" and will not be adversely affected by the long-term operation of the Klamath project.

In short, the plaintiffs do not seek to further the statutory purpose. Nor do they allege any community of interest of any kind between themselves and the suckers. To the contrary, they claim a competing interest--an interest in using the very water that the government believes is necessary for the preservation of the species. Because the plaintiffs' interests consist solely of an economic (and recreational) interest in the use of water, because their claims are at best "marginally related" to the purposes that underlie the Act and because, as the district court determined, their interests are inconsistent with the Act's purposes, we conclude that they lack standing.

Finally, we are aware that the ESA specifically provides that the government should consider a variety of factors--including economic ones--in designating critical habitat for a species. The Act's inclusion of such directives does not alter our analysis. We do not believe that in setting forth the factors to be weighed in formulating a plan for protecting species, Congress intended to do more than ensure a rational decision-making process by providing guidance for government officials. Certainly, it did not intend impliedly to confer standing on every plaintiff who could conceivably claim that the failure to consider one of those factors adversely affected him. To interpret the statute in the manner suggested by plaintiffs would be to transform provisions designed to further species protection into the means to frustrate that very goal. Accordingly, we hold that the plaintiffs have no standing under the ESA.

V.

Because the plaintiffs have failed to assert an interest protected by the ESA, they necessarily have no standing under the APA. We also need not consider whether the plaintiffs have standing under the National Environmental Policy Act. Under the doctrine of hypothetical jurisdiction, we may dismiss a claim on the merits, if they are clear, in order to avoid a difficult jurisdictional inquiry. Here, as the plaintiffs concede, Douglas County squarely holds that no NEPA claim lies for a violation of the ESA's provisions for determining critical habitat. Accordingly, even if we assume that the plaintiffs have standing under NEPA, they have failed to state a claim under that Act.

VI.

Because the plaintiffs lack standing to sue under either the ESA or the APA, and because they have failed to state a claim under NEPA, we affirm the district court.

AFFIRMED.

95-1232 GENERAL MOTORS CORP. v. TRACY

Use tax—Natural gas purchased out-of-state—Commerce Clause—Standing.

Ruling below (Ohio SupCt, 652 N.E.2d 188):

Ohio use tax statute that, as administered by Ohio tax commissioner, exempts sales of natural gas by natural gas company only if selling companies own or operate transportation and distribution equipment and deliver natural gas to consumers in Ohio, thereby treats in-state and out-of-state purchases from independent marketers of natural gas identically, denying exemption of either one's sales if it does not own transportation and distribution equipment, and thus does not discriminate between in-state and out-of-state purchases in violation of Commerce or Equal Protection Clauses; plaintiff auto manufacturer is not out-of-state vendor of natural gas, and thus lacks standing to challenge constitutionality of statute's alleged unequal burden upon such vendors.

Questions presented: (1) Does Ohio's use tax, which exempts gas purchased from local public utilities while taxing gas purchased out-of-state, discriminate against interstate commerce in violation of Commerce Clause? (2) Does purchaser of natural gas—which pays use tax—have standing under Commerce Clause to challenge such use tax either in its own right or as representative of vendors? (3) Does Ohio's discriminatory use tax violate Equal Protection Clause?

Petition for certiorari filed 2/1/96, by Timothy B. Dyk, Gregory A. Castanias, and Jones, Day, Reavis & Pogue, all of Washington, D.C., and John C. Duffy Jr., and Jones, Day, Reavis & Pogue, both of Cleveland, Ohio

SUPREME COURT TO HEAR OHIO NATURAL GAS CASE

The Columbus Dispatch

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Jonathan Riskind, Dispatch Washington Bureau

WASHINGTON - The Supreme Court will decide whether an Ohio sales tax exemption violates interstate commerce and illegally costs Ohio companies as much as $25 million a year.

The case accepted by the court yesterday - *General Motors Corp. vs. Ohio Tax Commissioner Roger W. Tracy* - challenges the charging of sales taxes on natural gas sold by largely out-of-state producers while exempting sales by in-state public utilities, such as Columbia Gas.

General Motors contends the exemption amounts to an illegal tariff on companies or other consumers buying gas from an out-of-state gas producer or marketer instead of an in-state utility.

"The Ohio scheme appears to be little more than a tariff on all gas not sold by a local public utility," the General Motors brief said. "The favorable tax exemption . . . discriminates in favor of local commerce and against the lower-priced gas available in interstate commerce."

Ohio officials contend the exemption isn't based on wherea gas utility or producer is located, but on the type of business.

Utilities already pay state gross receipts taxes before they sell their product, so not exempting them from sales taxes would be double taxation, said Jeff Sutton, Ohio's state solicitor. Independent producers or marketers don't pay gross receipts taxes, he said.

"What this really comes down to is a double taxation issue and not any form of discrimination," Sutton said. "What the Ohio statute tries to do is avoid double taxes at different levels of the economic chain."

The Ohio Supreme Court last year upheld the exemption, ruling it was legal because gas sold by in-state independent producers is subject to sales taxes.

The state does not tax natural gas sales based on whether it comes from inside Ohio or from outside the state, the Ohio brief filed by Attorney General Betty D. Montgomery's office asserted. Rather, the state law draws a distinction between "unregulated marketers" and "purchases from the regulated naturalgas utility itself."

Such a "tax distinction based upon the nature of a business rather than the location of business activity passes constitutional muster," the Ohio brief said.

Gas sales to businesses, including GM, generate about $25 million annually, according to the Ohio Attorney General's office. If the state loses the case, it could mean extending the exemption to all natural gas sales; a less likely result would be striking the exemption entirely.

The state could be liable for four years of back taxes, or $100 million, if the court rules against Ohio, but state officials don't expect a ruling will be made retroactive.

General Motors says the Ohio case could reverberate nationally. Other states have or are contemplating similar laws favoring in-state utilities, its brief alleges.

If Ohio wins the case, "The door would be open to state taxation schemes which broadly favor in-state commerce and discriminate against interstate commerce," General Motors' brief states.