SUPREME COURT OF FLORIDA

CITIZENS NATIONAL BANK AND TRUST COMPANY, HENRY W. HANFF, MELVIN C. DRAFT, AUSTIN L. FILLMON, PANDURANG Z. KAMAT, LESTER MALLET, JAMES M. MARLOWE, DENNIS L. MURPHY, RALPH W. SHANNON, THOMAS D. STELNICKI, in their individual capacities and as directors,

Petitioners,

v.

LOUE E. STOCKWELL, JR., and CAMILLE L. LAROSE,

Respondents.
_____/

Case No. 85,923

District Court of Appeal, 2nd District - No. 94-03217

Discretionary Proceeding to Review a Decision of the Second District Court of Appeal

Petitioners' Brief on the Merits

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STATEMENT OF CASE AND FACTS

Petitioners, Citizens National Bank and Trust Company ("Citizens National Bank" or "the Bank") and certain directors of the Bank [1] (collectively, "Defendants") have brought this appeal to challenge a limited, but significant ruling by the Second District Court of Appeal that was certified to be in conflict with a decision of the Third District and that runs afoul of provisions of the National Bank Act precluding actions arising out of the termination of bank officers.

Respondents Loue E. Stockwell, Jr. and Camille L. LaRose ("Stockwell" and "LaRose," or "Plaintiffs") are former officers of Citizens National Bank. [R 55, 56, 59; App. 3, 4, 7].[2] Citizens National Bank is a national bank organized and existing under the laws of the United States of America. [R 54; A 2]. Stockwell and LaRose brought this action in the circuit court to challenge both their termination as officers of the Bank and the Bank's refusal to pay severance benefits under Plaintiffs' employment contracts.

Plaintiffs' employment agreements provided for employment terms of ten (10) years, commencing on February 25, 1988, and

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[1] Henry W. Hanff, Melvin C. Draft, Austin L. Fillmon, Pandurang Z. Kamat, Lester Mallett, James M. Marlowe, Dennis L. Murphy, Ralph W. Shannon, and Thomas D. Stelnicki, who have been sued in their individual capacities and as directors of the Bank.

[2] Citations to the Record on Appeal are designated "R ___." Citations to appellants' appendix are designated "App. ___." Citations to briefs, motions, memorandums and court orders refer to those filed with or entered by the Second District in this case.

further provided for the payment of severance benefits in the event of early termination. [R 55, 56, 74, 77, 78, 83, 86, 87; App. 2, 3]. Specifically, the agreements provided that in the event the Bank terminated Plaintiffs without cause prior to the expiration of the ten-year term of the agreements, the Bank would be obliged nonetheless to pay Plaintiffs the compensation that they would have received had they remained employed for the balance of the term of their agreements. [R 55, 56, 74, 77, 78, 83, 86, 87; App. 2, 3]. Stockwell and LaRose obtained these lucrative contracts from the Bank after they had organized the Bank and while they were already operating the Bank as its managing officers. [R 54, 55].

On September 2, 1993, the Board of Directors of the Bank terminated Plaintiffs' employment. [R 59; App. 3]. Plaintiffs allege that the Bank terminated Plaintiffs without cause.[3/] [R 59; App. 3]. The Bank declined to pay severance benefits to Plaintiffs or other benefits associated with continuing employment. [R 59; App. 3]. Within days of that action, Plaintiffs filed their Complaint in the circuit court challenging under state law the Bank's termination of their employment as officers of the Bank and refusal to honor the "golden parachute" provisions of those agreements.

[3/] If this case were to proceed beyond Defendants' motion to dismiss, Defendants would prove that Plaintiffs were fired for cause, contrary to the allegations of the Amended Complaint. For purposes of resolving Defendants' motion to dismiss, however, Defendants are obliged, of course, to assume for the sake of argument that the allegations of the Amended Complaint are true.

Defendants moved to dismiss Plaintiffs' Complaint on the ground that Plaintiffs' state law claims were preempted by the National Bank Act, 12 U.S.C.A. § 24 (Fifth) (1989 & Supp. 1995). [R 32-36; App. 3]. On the eve of the hearing on Defendants' motion to dismiss, Plaintiffs amended their Complaint. Plaintiffs filed a seven-count Amended Complaint challenging Defendants' actions in terminating, refusing to honor, or interfering with Plaintiffs' employment agreements with the Bank. Six of those counts asserted claims under state law. One count purported to state a claim under a federal statute that prohibits retaliation against federal jurors. [R 53-93; App. 3, 4].

On motion by the Defendants, the circuit court dismissed the Amended Complaint with leave to amend. The trial court specifically held that all counts, other than the one federal count for retaliation, were preempted by Section 24 (Fifth) of the National Bank Act. [R 329-30; App. 6]. In reaching this result, the circuit court followed the decision of the Third District Court of Appeal in International Bank of Miami v. Bennett, 513 So. 2d 1294 (Fla. 3d DCA 1987), cert. denied, 485 U.S. 988, 108 S.Ct. 1291, 99 L.Ed. 2d 501 (1980), which held that the National Bank Act preempts state law claims challenging the termination of officers of a national bank and renders void any contractual promise to pay severance benefits upon early termination of such officers. [R 329-30, App. 6]. The circuit court dismissed Plaintiffs' federal retaliation claim on other grounds.

Stockwell and LaRose declined to amend the Amended Complaint and instead stipulated to the entry of a final order of dismissal with prejudice. [R 326]. Subsequently, they filed an appeal in the Second District Court of Appeal of the trial court's dismissal of all of Plaintiffs' state law counts. Plaintiffs did not appeal the circuit court's dismissal of their federal retaliation count.

On appeal, the Second District affirmed the trial court's dismissal of all of the counts of the Amended Complaint except one -- namely, Count I for "Breach of Contract." This count alleged that Defendants breached Plaintiffs' employment agreements with the Bank by refusing to pay Plaintiffs severance benefits specified in the contracts. In reaching this result, the Second District explicitly disagreed with the Third District's decision in Bennett and certified conflict on this point. [App. 2].

On June 16, 1995, Defendants filed a timely notice to invoke the discretionary jurisdiction of this Court to review the Second District's ruling concerning Count I of Plaintiffs' Amended Complaint. As we now show, this Court should approve the approach taken by the Third District in Bennett and accordingly reverse the Second District's decision insofar as it pertains to Count I of Plaintiffs' Amended Complaint.

SUMMARY OF ARGUMENT

It is well settled and not disputed in this case that the corporate affairs of national banks, such as Citizens National Bank, are governed exclusively by the National Bank Act. Section 24 (Fifth) of that Act confers upon the directors of national banks the unfettered discretion to dismiss or replace officers at the "pleasure" of the directors.

The courts have uniformly held that Section 24 (Fifth) precludes the enforcement of contracts that purport to assure officers employment for a term of years. Likewise, the courts have uniformly held that terminated officers may not sue national banks to recover unpaid compensation or other damages arising out of early termination of their employment. Otherwise, the prerogative of national banks to fire officers at will would be rendered illusory.

In this case, Plaintiffs seek to enforce severance provisions of their employment contracts that provide for the recovery, inter alia, of the compensation that would have been paid to Plaintiffs had they served out the remainder of their contract terms. The wages and benefits Plaintiffs seek in their action for "severance" benefits are the same or virtually the same sums that Plaintiffs are concededly precluded from recovering as "damages" for wrongful discharge. The Third District in Bennett, following a line of other decisions like it, held that a terminated officer may not accomplish indirectly what

he could not achieve directly by bringing suit to recover monies as "severance" benefits that he is precluded from recovering as "damages" for wrongful discharge. The Second District has now held to the contrary.

Although the Second District held that Plaintiffs are precluded under Section 24 (Fifth) of the National Bank Act from suing to recover damages arising out of the early termination of their employment -- including contract damages -- the Second District nonetheless permitted Plaintiffs to enforce their claims for "severance" benefits and thus to obtain through the back door what they could not get through the front door. The Second District's decision on this point disregards well-settled canons of statutory construction and frustrates the legislative intent of the National Bank Act.

The Second District reached this extraordinary result by relying upon an informal ruling (contemplating "reasonable" employment agreements) that was promulgated by the Office of the Comptroller of the Currency ("OCC") some sixteen years before Bennett was decided and by relying upon a small number of cases from other jurisdictions that likewise relied upon that OCC ruling. The OCC, however, has recently announced its intention to withdraw that ruling. In any event, the OCC ruling has no application to severance benefits.

Accordingly, this Court should reverse the Second District's ruling on Count I of the Amended Complaint and approve the Third District's decision in Bennett.

ARGUMENT

Because Citizens National Bank is a national bank, its corporate affairs -- and, in particular, the Bank's authority to terminate Bank officers -- are regulated under the National Bank Act, not state law. In this regard, the National Bank Act, 12 U.S.C.A. § 24 (Fifth) (1989 & Supp. 1995) provides that a national bank shall be empowered "[t]o elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier and other officers, define their duties, require bonds of them, and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places." (Emphasis added). As the courts have recognized, "[t]he purpose of [Section 24 (Fifth)] was to give [national banks] the greatest latitude possible to hire and fire their Chief Operating Officers, in order to maintain the public trust." Mackey v. Pioneer National Bank, 867 F. 2d 520, 526 (9th Cir. 1989) (emphasis added), quoting Copeland v. Melrose National Bank, 241 N.Y.S. 429, 430 (N.Y. App. Div. 1930), aff'd, 173 N.E. 898 (1930).

The courts have also recognized that "[i]t is idle to say that the statute merely gives the power to discharge the official, without the right to do so." Id. Thus, "[t]he grant of the power carries with it the untrammelled right to its exercise, free from penalty." Id. (emphasis added).

In view of the fact that Section 24 (Fifth) expressly declares that national bank officers serve at the "pleasure" of

the bank's directors, the courts have consistently held that contracts that purport to guarantee national bank officers employment rights for a term of years violate the National Bank Act and are thus void as against public policy. E.g., International Bank v. Bennett, supra; Mackey v. Pioneer National Bank, supra; Kemper v. First National Bank, 418 N.E. 2d 819, 821 (Ill. App. Ct. 1981).

By the same token, the courts have consistently held that national bank officers cannot sue for damages arising out of early termination under an employment agreement because this would violate the express directive of Section 24 (Fifth) that officers serve at the "pleasure" of the directors. E.g., Mackey v. Pioneer National Bank, supra; Kemper v First National Bank, supra; City National Bank v. Brown, 599 So. 2d 787 (La. Ct. App. 1992), writ denied, 604 So. 2d 999 (La. 1992); Ambro v. American National Bank & Trust Co., 394 N.W. 2d 46 (Mich. Ct. App. 1986). As the court in Copeland explained, "[i]t is idle to say that the statute merely gives the power to discharge the official, without the right to do so." 241 N.Y.S. at 430 (emphasis added).

It follows that directors can freely terminate a national bank officer without incurring liability for compensation or benefits for the remainder of the bank officer's contract term, or other damages associated with the early termination of employment. Again, the courts have consistently so held. E.g., authorities cited supra, at pp. 7 - 8. Indeed, Plaintiffs conceded before the Second District that "[t]he intent of the

National Bank Act of 1874 was to give national banks the discretion to terminate an officer without fear of liability for wrongful termination or breach of contract based on the termination." (Appellants' [Plaintiffs'] Initial Brief, p. 6) (emphasis added).

That being the case, the Third District in Bennett and other courts have correctly concluded that national bank officers may not obtain indirectly -- through the guise of suing for "severance" benefits -- the unpaid compensation that they could not obtain directly through a suit for "damages" for early termination. International Bank of Miami v. Bennett, supra; Copeland v. Melrose National Bank, supra; Rohde v. First Deposit National Bank, 497 A. 2d 1214 (N.H. 1985); Kemper v. First National Bank, supra. Suits for "damages" and suits for "severance" benefits amount to "six of one, or half a dozen of another" in terms of their impact on national banks and the policies of the National Bank Act. In either case, the bank is saddled with the liability to pay substantial sums of money as a condition of exercising the bank's conceded discretion to terminate officers at "pleasure." To acknowledge the ostensible existence of the power to fire officers, without ensuring the right to do so free from liability would be to permit a frontal assault on the directive of the National Bank Act that directors have the "untrammeled right" to discharge directors at will, "free from penalty." Mackey, supra, 867 F. 2d at 526.

The seminal decision on this point is Copeland v. Melrose National Bank. In that case, as here, the plaintiff officer's employment agreement provided that in the event of the officer's termination prior to the expiration of the full term of his employment contract, he would be paid a sum equal to the total compensation that he would receive thereunder for its unexpired period. The New York Supreme Court held (in a decision later affirmed by the state's highest court, the New York Court of Appeals), that a dismissed national bank officer cannot recover severance benefits under an employment agreement with the bank.

The court held that enforcing the severance provision would amount to the same thing as affording the discharged officer the right to sue for damages for wrongful discharge. If the officer were to prosecute successfully a suit for such damages, he would be entitled to recover, among other things, the compensation that he would have been paid if he had served out the full term of his employment contract. The court recognized that, as a practical matter, enforcing the severance provision calling for payment of compensation due for the remainder of the contract term would accomplish the same result as permitting a damages suit for wrongful discharge, thus discouraging and deterring the bank's board of directors from firing the bank officer as they saw fit.

Thus, the court held:

> Plaintiff's engagement was merely a hiring, terminable at the will of the directors. The intent of the statute [Section 24 (Fifth)] was to place the fullest responsibility upon the directors by giving them the right to discharge such officers at pleasure. A contract for a definite term which forbids such discharge except under penalty of paying

> compensation for the full term violates the statute, and is unenforceable.

Copeland, supra, 241 N.Y.S. at 430 (emphasis added). The court explicitly admonished that to enforce the severance provision "would be to countenance a patent subterfuge designed to circumvent the law." Id. (emphasis added). "It is idle to say that the statute merely gives the power to discharge the official, without the right to do so. The grant of the power carries with it the untrammeled right to its exercise, free from penalty." Id. (emphasis added).

Finally, the court in Copeland explained that the National Bank Act was the "enabling" act for national banks and that the charter of a national bank must be deemed restricted by the limitations of the National Bank Act. Id. at 429-31. Accordingly, regardless of the reason a bank might enter into an agreement eroding its prerogative to dismiss officers at "pleasure," such an agreement was void as ultra vires and against public policy:

> The doctrine that no recovery can be had upon the contract is based upon the theory that it is for the interest of the public that corporations should not transcend the limits of their charters; that the property of stockholders should not be put to the risk of engagements which they did not undertake; that if the contract be prohibited by statute everyone dealing with the corporation is bound to take notice of the restrictions in its charter, whether such charter be a private act or a general law under which corporations of this class are organized.

Id. at 431.

In the present case, as in Copeland, the Plaintiffs seek to enforce severance provisions of their employment agreement that

provide, inter alia, that in the event of early termination, "the Bank shall pay to Executive an amount equal to Executive's base salary (based on Executive's base salary in effect on the date of termination) for the remainder of the term of the Employment Agreement payable in equal monthly installments over the balance of the term of this Agreement, or in lump sum, in the discretion of Executive." [R 74, 77, 78, 83, 86, 87; App. 2] (Emphasis added). Here, as in Copeland, permitting Plaintiffs to sue to enforce the severance provisions of Plaintiffs' contracts is tantamount to allowing Plaintiffs to sue to recover damages for termination of their employment prior to the expiration of their contract term. As far as the Bank is concerned, it makes no difference whether the Bank must pay a money judgment for "severance" benefits or as "damages" for breach of Plaintiffs' contracts for employment. The dollars awarded will have the same impact on the Bank; and, in either case, the Bank's statutory right to terminate bank officers as they see fit, without incurring monetary liability as a result of that termination, will be thwarted.

Indeed, it is well settled that, in interpreting a statute, the courts must take pains to avoid a construction that will undermine the legislative purpose. McKibben v. Mallory, 293 So. 2d 48, 51 (Fla. 1974) ("It is a fundamental rule of construction that a statute be construed in such a way so as to effectuate legislative intent."); Wassenaar v. Office of Personnel Management, 21 F.2d 1090, 1096 (Fed. Cir. 1994) ("All statutes

must be construed in light of their purpose.") (quoting Best Power Technology Sales Corp. v. Austin, 984 F.2d 1172, 1175 (Fed. Cir. 1993)). Indeed, it is fundamental that a federal statute will operate to preempt state law that interferes with the accomplishment of the objectives of that statute, even in the absence of express preemption. Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941); Stephen v. American Brands, Inc., 825 F.2d 312, 313 (11th Cir. 1987).

It is equally well established that the courts must eschew a construction that will produce absurd results and that courts thus will not permit persons to accomplish indirectly what statutes directly prohibit. E.g., McKibben, 293 So. 2d at 51 ("[c]onstruction of a statute which would lead to an absurd result should be avoided"); Wassenaar, 21 F.3d at 1094 ("we recognize that 'an absurd construction of a statutory provision should be avoided'") (quoting Witco Chem. Corp. v. United States, 742 F.2d 615, 619 (Fed. Cir. 1984)); Jackson v. First National Bank of Gainsesville, 430 F.2d 1200, 1201 (5th Cir. 1970), cert. denied, 401 U.S. 947, 91 S.Ct 933, 28 L.Ed 2d 230 (1971) (Bank's attempt to circumvent statutes by assigning otherwise prohibited tasks to a subsidiary of its holding company "is of no avail as this contractual arrangement merely accomplishes indirectly what the bank is prohibited from doing directly"). In construing Section 24 (Fifth) to preclude enforcement of the severance benefits provision in Copeland, the court properly followed these fundamental precepts.

Sensitive to these concerns, the Supreme Court of New Hampshire similarly refused to permit a claim for severance benefits by a terminated national bank officer in Rohde v. First Deposit National Bank, 497 A. 2d 1214 (N.H. 1985). In Rohde, the defendant bank had asked the plaintiff officer to come to work and had "offered as an inducement . . . a three-year employment contract under which, should the bank elect to discharge him, he would be paid compensation for a thirty-six month period unless dismissal was due to fraud, forgery, or other breach of trust on his part." Id. at 1215. The plaintiff relied on the offered terms of the contract and relocated to accept the employment. Thereafter, the bank terminated the plaintiff's employment without notice or cause and refused to pay the agreed upon severance benefits. As in this case, the trial court in Rohde dismissed the plaintiff's claims to enforce his contract.

On appeal, the New Hampshire Supreme Court affirmed. In refusing to enforce the severance pay provision of the contract, the court stated:

> To hold on the one hand that contracts for employment of national bank officers cannot provide for guaranteed salaries for fixed periods of time in contravention of the bank's right to immediately discharge the officer, and on the other hand that such contracts can provide as a condition precedent to discharge that an officer is entitled to 36 months' salary would be to elevate form over substance and render the language of 12 U.S.C. § 24, para. Fifth meaningless.

Id. at 1216.

In this case, the Second District properly embraced the basic tenets of these decisions, but then proceeded to reject the

conclusion that follows naturally therefrom. Thus, in affirming the circuit court's dismissal of all counts of the Amended Complaint except the claim for severance benefits, the Second District explicitly recognized that national bank officers may not sue under state law for damages arising out of the termination of employment. Yet, the Second District held that Plaintiffs should be permitted to accomplish indirectly what they could not accomplish directly -- namely, receive full compensation from the Bank for the remainder of the Plaintiffs' contract term -- in the guise of exacting "severance" benefits.

As the decisions in Copeland and Rohde make clear, this approach "elevate[s] form over substance and render[s] the language of 12 U.S.C. § 24, para. Fifth meaningless." Id. See also, e.g., Kemper v. First National Bank, 418 N.E. 2d 819 (Ill. App. 1981) (relying on Section 24 (Fifth) to reject contract claim by terminated bank officer for salary for remainder of contract term, vested pension benefits, and lost life insurance coverage).

In contrast to the Second District's decision in this case, in Bennett the Third District appropriately refused to enforce a contract providing for payment to a national bank officer of a sum of money upon early termination. In Bennett, a national bank in Miami, Florida recruited the plaintiff to be its new president. At the time, the plaintiff was president of a bank in New Jersey. The plaintiff bargained with the bank to obtain contractual assurances in accepting the new position because the

new position required relocating his family from New Jersey and resigning his current lucrative post.

The bank gave the plaintiff a contract appointing him as president for a three-year term and entered into a separate escrow agreement providing for the payment of one year's salary as liquidated damages and severance pay in the event of premature termination. In the trial court, the bank stipulated that the sums in controversy were "reasonable," and it was uncontroverted that the Office of the Comptroller of the Currency ("OCC") had reviewed during a regular audit both the employment contract and the escrow agreement.

The bank was sold, a new board of directors summarily dismissed the plaintiff without cause, and the bank declined to pay the bargained-for benefits. The Third District held that the plaintiff's claim was preempted by Section 24 (Fifth) of the National Bank Act. The court held that "the arrangement under which the [bank] was required to pay Bennett, at the termination of his employment, a year's salary for unrendered services is directly contrary to the untrammeled right to dismiss officers 'at pleasure' conferred by paragraph fifth of the National Bank Act . . . . [T]he bank's purported obligation is therefore unenforceable as a matter of law." Id. at 1295 (emphasis added; citations omitted). The court observed:

> [W]e certainly agree that to deny Bennett the fruits of the severance clause is to deprive him of a benefit, and relieve the bank of a burden for which they both freely bargained. But that is in the very nature of a ruling declaring a contract invalid and unenforceable as contrary to the public policy established by Congress or the legislature.

Id. (citations omitted).

The Third District specifically rejected the contention that decisions like Rohde and Copeland were inapplicable because in Bennett the parties had established a special escrow fund for the payment of post-employment benefits. The court reasoned that "[t]o uphold Bennett's [trial court] judgment as 'really' stemming from the escrow, rather than the employment contract, 'would be' -- as was said in Copeland in an only slightly different context -- 'to countenance a patent subterfuge designed to circumvent the law.'" 513 So. 2d at 1295 (citation omitted). Here, too, to uphold Plaintiffs' claim for severance benefits under their contracts for employment would be to countenance a patent subterfuge of the legislative mandate of Section 24 (Fifth).

The Second District, nonetheless, reversed the circuit court's order dismissing Count I of Plaintiffs' Amended Complaint and remanded the case to afford the Plaintiffs the opportunity to enforce their contractual claim for severance benefits. The Second District reached this result by (1) relying on an informal ruling that was promulgated by the OCC in 1971 (sixteen years before Bennett was decided) without following the rulemaking procedures of the federal Administrative Procedures Act, and on cases from other jurisdictions that likewise relied upon this OCC ruling, and (2) by drawing upon the court's own view of what makes good banking policy. Neither of these grounds withstands close scrutiny.

The OCC ruling on which the Second District relied is published at 12 C.F.R. § 7.5220. As a threshold matter, this OCC ruling is entitled to no weight in this proceeding whatsoever. On March 3, 1995 -- after the briefing before the Second District was closed and apparently unbeknownst to that court -- the OCC announced in the Federal Register that it intends to withdraw this ruling. 60 Fed. Reg. 11924, 11930, 11933 (March 3, 1995).

The OCC issued this notice pursuant to its "Regulation Review Program," whereby the OCC has undertaken to "eliminate regulatory requirements that impose ineffective, inefficient and costly regulatory burdens on national banks" and to "eliminate[] rulings that are obsolete." Id. at 11924. Specifically, with regard to its elimination of various interpretive rulings, including the ruling on which the Second District relied, the OCC pointed out that most of its "interpretive rulings are unchanged since their initial publication, while the banking statutes and interpretive positions of the OCC have continued to evolve." Id. at 11925. "As a result," the OCC continued, "many of the interpretive rulings in part 7 [containing the 1971 ruling upon which the Second District relied] need revision, and some are so outdated that they no longer serve any useful purpose." Id.

Further, the OCC ruling on which the Second District relied was never adopted as a regulation having the force or effect of law in the first place. It was announced by the OCC in 1971 as an interpretive ruling without following notice and comment procedures or other formalities required by the federal Administrative Procedures Act as a prerequisite to formal

rulemaking. See 5 U.S.C.A. §§ 553, et seq. This 1971 ruling was part of a group of previously unpublished interpretive rulings that had been collected in an OCC manual. The OCC simply took it upon itself to "publish" these informal rulings in the Federal Register; it did not undertake to adopt these rules as formal regulations. 36 Fed. Reg. 17000 (Aug. 26, 1971).

Although duly promulgated federal regulations are entitled to deference by the courts in interpreting the agency's enabling statutes, interpretive rulings are given much less weight by the courts. Frank Diehl Farms v. Secretary of Labor, 696 F. 2d 1325, 1329 (11th Cir. 1983) (rejecting agency's interpretation of federal legislation). Indeed, courts are even "more reluctant" to defer to such a ruling where, as here, the ruling "was not contemporaneous with the legislation," id. at 1330, and does "not involve a technical matter, but rather involve[s] a statutory construction well within the courts' expertise," id.

Moreover, it is critical to recognize that, notwithstanding the existence of agency interpretations of disputed statutory provisions, "[t]he court remains the final authority on issues of statutory construction . . . and cannot abdicate its ultimate responsibility to construe the language employed by Congress." Id. at 1331 (emphasis added). Because the Second District placed dispositive reliance upon the OCC's "obsolete" 1971 informal ruling (and upon other cases likewise relying on that ruling) in reversing the circuit court's order concerning Count I of the Amended Complaint, the Second District's decision must be reversed.

Even if the 1971 OCC ruling had any current vitality or legal force or effect -- which it does not -- the ruling still would provide no support for the Second District's conclusion because the ruling does not apply to severance benefits. The OCC ruling simply authorizes banks to enter into "employment contracts with [their] officers and employees upon reasonable terms and conditions."[4/] 12 C.F.R. § 7.5220. Read most naturally, this ruling contemplates that national banks may establish "reasonable" terms and conditions that will apply to an officer's employment during the period of that officer's employment by the bank (e.g., a reasonable salary for services actually rendered). The ruling offers no solace to officers who have been terminated by a national bank. This interpretation permits the OCC's ruling to be read in harmony with the requirement of the National Bank Act that the directors of the bank retain unfettered discretion to terminate or replace bank officers as they see fit, for the good of the bank.

Indeed, lest there be any doubt about the OCC's own understanding of its ruling, the OCC clarified in its notice proposing the elimination of the ruling that the ruling was not intended to be permissive of particular employment agreements or practices that Section 24 (Fifth) was thought to prohibit, but, to the contrary, it was intended to be restrictive:

[4/] This ruling applies, in terms, to both "officers" and "employees" although, as even Plaintiffs acknowledge, Section 24 (Fifth) places special restrictions on the rights of "officers." What is "reasonable" with respect to an "employee" may not be "reasonable" with respect to an "officer" in view of the purposes and directives of Section 24 (Fifth).

> Any employment contract that is excessive or unreasonable is unsafe and unsound. Therefore, the current "reasonable" standard is necessarily in effect, so it is unnecessary to reiterate the standard in this interpretive ruling.

60 Fed. Reg. at 11930. Thus, the OCC understands its ruling as limiting a bank's prerogatives in entering into employment contracts, not as extending those prerogatives beyond those understood to be precluded by Section 24 (Fifth), as Plaintiffs and the Second District have suggested. As the OCC has explained, it is proposing to eliminate this ruling because the OCC has concluded that the restrictive purpose of this ruling -- effectively prohibiting national banks from entering into "excessive" or "unreasonable" employment agreements -- is handled or will be handled by banking regulations that otherwise prohibit unsafe or unsound banking practices.

Further, it is well settled that administrative agencies, like the OCC, derive their authority from the statutes they are empowered to implement. Lyng v. Payne, 476 U.S. 926, 937, 106 S.Ct. 2333, 2341, 9 L.Ed.2d 921 (1986) ("an agency's power is no greater than that delegated to it by Congress"). Accordingly, administrative agencies may not override statutory directives or contravene legislative intent when promulgating the agencies' own interpretive rulings or regulations. Zarr v. Barlow, 800 F.2d 1484, 1486 (9th Cir. 1986) ("an administrative regulation must fall within the authority conferred by Congress on the administrative agency.... [and] it must remain consistent with congressional purpose").

By the same token, in interpreting and applying a statute, a court's obligation is first to ascertain the legislative purpose that underlay that statute and then to effectuate that purpose. City of Tampa v. Thatcher Glass Corp., 445 So. 2d 578, 579 (Fla. 1984) ("[t]he cardinal rule of statutory construction is 'that a statute should be construed so as to ascertain and give effect to the intention of the Legislature as expressed in the statute'") (quoting Deltona Corp. v. Florida Public Service Comm., 220 So.2d 905, 907 (Fla. 1969)). When this principle is followed here, the error of the Second District's decision becomes manifest.

The principal concern of the National Bank Act is to ensure the soundness of national banks, not the financial aspirations of terminated bank officers. E.g., Russell v. Continental Ill. Nat'l Bank & Trust Co. of Chicago, 479 F.2d 131, 133 (7th Cir. 1973), cert. denied 414 U.S. 1040, 94 S.Ct. 541, 38 L.Ed.2d 331 ("the legislation... reflects a desire to minimize the risks of loss or insolvency to the bank itself"); Golar v. Daniels & Bell, Inc., 533 F.Supp. 1021, 1026 (S.D.N.Y. 1982) ("Section 24 was enacted to minimize the risk of loss or insolvency to the bank itself"). Nothing about the obsolete OCC interpretive ruling on which the Second District relied suggests a retreat from this essential legislative purpose.

In fact, the OCC itself made clear in a subsequent interpretive statement that "pursuant to 12 U.S.C. § 24 (Fifth), the Board of Directors of [a] Bank may dismiss officers employed under employment agreements at will any time during the contract term without liability for damages." OCC Unpublished

Interpretive Letter, ¶ 22, Dec. 23, 1988. The Plaintiffs themselves acknowledged before the Second District that "[t]he intent of the National Bank Act of 1874 was to give national banks the discretion to terminate an officer without fear of liability for wrongful termination or breach of contract based on the termination." (Appellants' [Plaintiffs'] Initial Brief, p. 6) (emphasis added). As the courts in Rohde, Copeland, and Bennett have demonstrated, this legislative mandate cannot logically and effectively be enforced if terminated officers are permitted to obtain indirectly through actions to enforce "severance" provisions -- whatever they may be called and however they may be structured -- what they cannot obtain directly through actions for "damages."

In relying upon the 1971 OCC ruling, the Second District insisted that "[t]he statute . . . does not address whether a national bank must pay a discharged officer termination benefits for which the parties contracted." [App. 6]. As we have discussed, however, the well-reasoned decisions rejecting claims for severance benefits demonstrate that a contrary construction will lead to absurd results that contravene the legislative purpose of Section 24 (Fifth).

To reiterate, it is fundamental that courts must accept an interpretation of a statute that will further its evident purpose and reject an interpretation that will lead to absurd results or that will frustrate the legislative will. See pp. 12-13, supra. And it is equally well settled that a federal statute will operate to preempt state law that interferes with the

accomplishment of the objectives of that statute, even in the absence of express preemption. See authorities cited at p. 13, supra. Construing Section 24 (Fifth) to permit Plaintiffs to obtain indirectly through a claim for severance benefits the compensation and benefits that they could not obtain directly as damages for termination plainly would thwart the objectives of Section 24 (Fifth). Indeed, as the court in Rohde held, this would "render the language of 12 U.S.C. § 24, para. Fifth meaningless." 497 A. 2d at 1216.

The Second District went on to state that the OCC "regulation [sic] clarifies this point and allows a national bank and its officers to enter into employment contracts with reasonable terms and conditions. It is logical and just that the bank officer may enforce any and all reasonable terms and conditions contained in the employment agreement." [App. 6, 7] (emphasis added). With all respect, however, saying that something is "logical and just" does not make it so, and the Second District provided no reasoning whatsoever to support its conclusion that the OCC ruling clarifies anything or has any application whatsoever to payments or benefits that come into play only upon the termination of the employment relationship to which the ruling relates. Moreover, it is conclusory at best to assert that severance payments that have been judicially determined to undermine the purposes of Section 24 (Fifth) may be enforced as "reasonable terms and conditions" of employment.

The fact of the matter is that the obsolete OCC ruling on which Plaintiffs and the Second District rely clarifies nothing

and merely begs the question that must be answered by analysis of the legislative purpose of Section 24 (Fifth).

The court in Kemper, supra, so concluded in rejecting the plaintiff's reliance in that case on the 1971 OCC informal ruling in an action brought by a terminated officer to recover salary for the remainder of his contract term, vested pension benefits, and lost insurance benefits. The court reasoned that "although a national bank may contract to employ an officer for a definite period of time, it may not bargain away its right, granted by statute, to discharge those officers 'at pleasure.'" 418 N.E. 2d at 821. An appointment of a national bank officer for a certain term must be deemed subject to "the power to recall" under the National Bank Act. Id. (emphasis added). "Once the board's approval of [such an] appointment [is] withdrawn, [the officer's] contractual status as an employee vanishe[s], and he ha[s] no legal right upon which to base his claim." Id. Thus, the court concluded in Kemper that "the provisions of the National Bank Act may be harmonized with the common law of employment contracts as well as with the ruling of the Comptroller [i.e., the OCC]." Id.

Likewise, although the OCC ruling on which Plaintiffs rely was briefed by the parties in Bennett,[5/] the court did not

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[5/] Before the Second District, Defendants moved for leave to file pertinent excerpts of the parties' briefs before the Third District in Bennett to demonstrate that the OCC ruling had indeed been brought to the court's attention. [Appellees' Req. For Ct. to Take Judicial Notice, (Case No. 94-03217)]. Defendants' motion was prompted by statements made in briefing by the Plaintiffs that the "Bennett court . . . did not consider the (continued...)

hesitate to hold that Section 24 (Fifth) must be construed to preempt claims for severance benefits, lest the statutory directive be rendered meaningless. The Third District reached this result despite the fact that the bank in that case had stipulated that the amount of severance pay at issue was "reasonable."

The Second District chose to reject Bennett, however, and to follow three decisions from other jurisdictions that likewise placed dispositive reliance upon the 1971 OCC ruling to uphold claims for severance payments. But two of these decisions did

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[5/](...continued)
impact of 12 C.F.R. § 7.5220"; that there was an "apparent oversight of this relevant regulation" by the Third District; that the Bennett court "did not have the benefit of examining all of the applicable law" [Appellants' Initial Brief at 10, (Case No. 94-03217)]; and that "the Bennett court did not have the benefit of considering 12 C.F.R. § 7.5220, a crucial regulation on the issue in question" [Appellants' Reply Brief at 7,8, (Case No. 94-03217)]. In view of Plaintiffs' argument on this matter, it seemed only fair to the Second District to clarify what the actual facts were. Nonetheless, the Plaintiffs opposed Defendants' motion to take judicial notice, and the Clerk of the Second District disposed of Defendants' motion in Plaintiffs' favor. [Order on Appelles' Req. For Ct. to Take Judicial Notice, (Case No. 94-03217)]. In their memorandum opposing judicial notice, the Plaintiffs declared that they did not intend to "represent to the court that the issue [concerning the OCC regulation] had not been raised by counsel" during the presentation of the Bennett case before the Third District. [Appellant's Mem. in Opp'n to Appellees' Req. For Ct. to Take Judicial Notice at 2, (Case No. 94-03217)]. Rather, Plaintiffs asserted that they intended to argue merely that the Bennett court did not cite the OCC ruling. We would suggest that courts decide everyday not to cite authorities argued to them for many reasons, including the fact that a court does not find a particular authority to be persuasive or helpful. This hardly undermines the persuasiveness of the court's decision, as Plaintiffs contend. For the reasons we provide in text, the OCC ruling on which plaintiffs rely has no apparent application to the issue whether a terminated officer can recover severance benefits. We may safely presume that the court in Bennett so concluded.

not involve the prerogative of a national bank to dismiss an officer, and the third decision mistakenly relied on those two decisions without any independent analysis.

Thus, in First National Bank of Danville v. Reynolds, 491 N.E. 2d 218, 219 (Ind. App. 1986), the bank officer resigned (as the Second District acknowledged). The court in Reynolds made a point of stating that "[b]ecause resignation with cause, not dismissal, is at issue here, [the] cases [applying Section 24 (Fifth)] are not on point." Id. at 221 (emphasis added). Likewise, in Schmidt v. Park Ave. Bank, N.A., 558 N.Y.S. 2d 779 (N.Y. Sup. Ct. 1990), the bank officer resigned with cause, and the officer -- not the bank -- called his resignation a "termination." As in Reynolds, the bank directors in Schmidt had taken no affirmative steps to dismiss the disgruntled officer.[6/] Thus, neither of these cases directly involved the policy underlying Section 24 (Fifth), namely, the need to ensure that the directors of a national bank will act freely to terminate officers when they deem it to be necessary. By the same token, neither of these decisions challenge the force of the Third District's decision in Bennett or of the other decisions cited above that are directly on point here.

[6/] Further, the court that decided Schmidt was a New York trial court that took it upon itself to decline to follow Copeland, which was decided by a New York intermediate appellate court and affirmed by the state's highest court. In reaching this extraordinary result, the trial court made no effort to address the reasoning of Copeland, but merely deferred to the "clarifying regulation" of the OCC, which, as we have explained, actually clarified nothing. Thus, the decision in Schmidt does not authoritatively establish the law for even its own jurisdiction.

The third decision cited by the Second District is Ewert v. Drexel National Bank, 649 N.E. 2d 487 (App. Ct. Ill. 1995), which the Second District described as involving "a situation very similar to the instant case." [App. 5]. The bank in Ewert entered into an employment agreement with the plaintiff officer appointing the officer to a three-year term and providing for payment of salary for the remainder of the term in the event of early termination. The bank fired the officer and subsequently declined to make severance payments.

The court in Ewert relied on Schmidt and Reynolds, with no independent analysis, to conclude that the National Bank Act did not preempt the plaintiff's claim for severance benefits. The court discussed at length the court's analysis in Reynolds of the public policy and contract law of the state of Indiana and asserted that "the reasoning of Reynolds is persuasive." Id. at 492. The "reasoning" of Ewert plainly is not. In interpreting and applying Section 24 (Fifth) it is the court's task to ascertain and effectuate the policy of the United States Congress, not the policy of the state of Indiana or of any other state. Indeed, Section 24 (Fifth) preempts state law. Further, the decision in Ewert is in conflict with the decision in Kemper, supra, which was handed down by another district of the Appellate Court of Illinois.

In short, the decisions that have relied upon the OCC ruling cited by the Second District in the course of upholding claims for severance benefits either involve facts that do not implicate the legislative purpose of Section 24 (Fifth) or make no effort

to ascertain and effectuate that purpose. Accordingly, the Second District's reliance on the OCC ruling and on the decisions "applying" it was misplaced.

Second, in concluding that Plaintiffs must be afforded the right to enforce their claims for severance benefits, the Second District erroneously relied upon its own view of what makes good banking policy. Specifically, the court conjectured that "[a] talented individual with banking expertise would not want to leave a solid employment position for another position at a national bank if that individual knew that the national bank could ignore the termination benefits in an employment contract." [App. 7]. Of course, it has been 65 years since Copeland was decided and ten years since Bennett was decided, and national banks have not ground to a halt. Be that as it may, the Second District misapprehended the judicial function in engaging in its own analysis of what makes good banking policy in lieu of attempting to discern and apply the legislative purpose of Section 24 (Fifth).

In Kemper, the plaintiff officer argued, as Plaintiffs do here, that "even if [the bank's interpretation of the law] is an accurate interpretation of the law, it should be changed[;] [that] the Act, designed to protect bank customers in the days before federal deposit insurance, has no place in the modern banking industry, which needs to be able to offer certain employment prospects in order to attract management personnel of high quality." 418 N.E. 2d at 821. The court in Kemper, however, appropriately declined this invitation to legislate. As

the court observed, "[g]iven the many signs in favor of the present interpretation of that Act," "[w]e do not believe that we need enter the dispute over the preference for stability in bank management." Id. "That task is for Congress." Id.

When one focuses on congressional intent, it is evident that Section 24 (Fifth) nowhere bespeaks a purpose to afford employment security to national bank officers or to ensure appropriate employment protection or incentives to such officers. To the contrary, as numerous courts have recognized,[7] including the courts that decided Copeland, Rohde, and Bennett, Section 24 (Fifth) expressly subordinates the employment security of bank officers to the overriding policy of ensuring that bank directors have untrammeled discretion to replace bank officers whenever they see fit. The national banking laws place awesome responsibility upon the directors of national banks, and Section 24 (Fifth) ensures that these directors will have the tools they need to run banks to maintain the public trust.

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[7] E.g., Mackey v. Pioneer National Bank, 867 F.2d 520, 524, 526 (9th Cir. 1989) ("An agreement which attempts to circumvent the complete discretion of a national bank's board of directors to terminate an officer at will is void as against public policy." (citations omitted)); City National Bank v. Brown, 599 So. 2d 787, 790 (La. Ct. App. 1992), writ denied, 604 So. 2d 999 (La. 1992) ("An agreement which attempts to circumvent the complete discretion of a national bank's board of directors to terminate an officer at will is void as against public policy." (citations omitted)); McGeehan v. Bank of New Hampshire, Nat'l Ass'n, 455 A. 2d 1054, 1055 (N.H. 1983) ("The case law uniformly interprets this section [12 U.S.C.A § 24 (Fifth)] and substantially similar provisions as rendering unenforceable, as against public policy, all contractual provisions which do not allow a national banking association to discharge its officers at will without incurring liability for breach of contract.")

Nonetheless, Plaintiffs argued before the Second District that Defendants' interpretation of the National Bank Act was unduly harsh or "mean," and, responsive to these arguments, the panel demonstrated concern during argument about the equity of Defendants' position. It may often be said by one side or the other in litigation that a particular result is unduly harsh or "mean" from that party's perspective. Indeed, there are numerous examples where federal law is invoked to preempt state law in circumstances where private parties may be "harshly" affected. E.g., O'Neal v. Gonzalez, 839 F.2d 1437, 1440 (11th Cir. 1988) ("[w]hile the result [preemption of state contract claim] may be harsh, the language and intent of the [federal] statute are clear"); Harduvel v. General Dynamics Corp., 878 F.2d 1311, 1322 (11th Cir. 1989), cert. denied, 894 U.S. 1030, 110 S.Ct 1479, 108 L.Ed. 2d 615 (1990) (federal preemption of tort claims brought by widow and estate of deceased Air Force pilot "may sometimes seem harsh in its operation, [but] it is a necessary consequence of the incompatibility of modern products liability law and the exigencies of national defense"). Standing alone, this is scarcely a proper basis on which to decide cases.

Further, although we are obliged to accept the self-serving allegations of Plaintiffs' Amended Complaint as true for purposes of this appeal, the Amended Complaint acknowledges on its face that Plaintiffs obtained their lucrative employment contracts months after they had established the Bank and commenced managing its affairs. [R 54, 55]. Far from the circumstances in Bennett and Rohde where the plaintiff bank officers had been induced to

accept employment in the first place by the banks' offering contracts with severance benefits -- which the courts nonetheless refused to enforce -- Plaintiffs in this case obtained their contracts from a position of influence as insiders at the Bank.

In any event, this case provides eloquent testimony to the wisdom of the policies of Section 24 (Fifth) for even more fundamental reasons. Congress saw fit to afford the directors of national banks with unfettered discretion to dismiss bank officers at their pleasure precisely to avoid any specter of the courts' second-guessing the equities, harshness, or legality of such actions, and to ensure that claims arising out of such dismissals would be shut down at their inception.

Absent such assurance, what board of directors is bold enough to take decisive action to dismiss officers even when compelling cause exists, knowing that all the plaintiff has to do is to plead a "sympathetic" case -- whether true or not -- and then embroil the bank in years of disruptive and expensive litigation? Where is the equity in exposing national banks and their directors to efforts by disgruntled former officers to coerce settlements by credibly threatening or prosecuting such protracted litigation? And how will national banking policy be furthered if directors are made to shrink from the task of replacing officers that the directors see fit to replace? Congress resolved these issues by enacting Section 24 (Fifth) to foreclose suits such as this as a matter of law.

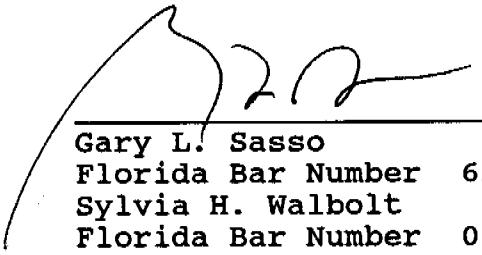
It is for this reason that the courts in such cases as Bennett, Rohde, Kemper, and others have enforced the legislative policies of Section 24 (Fifth), despite protestations by the plaintiffs in those cases about the harsh or inequitable results. That is the proper office of the courts. With all due respect, in disregarding this principle, the Second District in this case committed reversible error.

CONCLUSION

For the foregoing reasons, this Court should reverse the Second District's ruling on Count I of the Amended Complaint and

remand this case for reinstatement of the circuit court's order dismissing all counts with prejudice.

Respectfully submitted,



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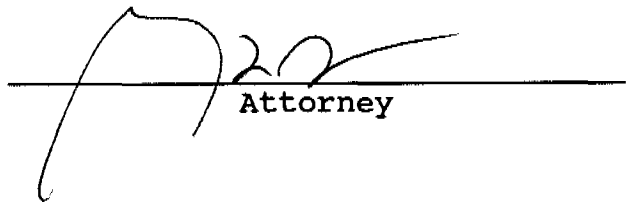
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court has been furnished by U.S. Mail to F. Wallace Pope, Jr., Esquire and Duane A. Daiker, Esquire of Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A., P.O. Box 1368, Clearwater, Florida 34617, this 18th day of July, 1995.



Attorney

Appendix

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

LOUE E. STOCKWELL, JR., and CAMILLE L. LAROSE,

Appellants,

v.

CITIZENS NATIONAL BANK AND TRUST COMPANY, HENRY W. HANFF, MELVIN C. DRAFT, AUSTIN L. FILLMON, PANDURANG Z. KAMAT, LESTER MALLET, JAMES M. MARLOWE, DENNIS L. MURPHY, RALPH W. SHANNON, THOMAS D. STELNICKI, in their individual capacities and as directors,

Appellees.

Case No. 94-03217

Opinion filed May 24, 1995.

Appeal from the Circuit Court for Pasco County; Wayne L. Cobb, Judge.

F. Wallace Pope, Jr., and Duane A. Daiker of Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A., Clearwater, for Appellants.

Gary L. Sasso and Victor D. Berg of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Tampa, for Appellees.

PARKER, Judge.

Appellants, Loue E. Stockwell, Jr., and Camille L. Larose seek review of the trial court's dismissal of their amended

complaint.[1] We affirm the trial court's dismissal of Counts II-IV, VI, and VII but reverse the trial court's dismissal of Count I and certify conflict with the Third District Court of Appeal.

The facts set out in this opinion are alleged in the amended complaint. In February 1988 the Office of the Comptroller of the Currency (OCC) gave Citizens National Bank and Trust Company (Citizens) authority to operate as a national bank. Later that year Appellants began contract negotiations with Citizens for employment as executive officers and entered into employment contracts with Citizens. The parties amended these contracts in 1990. Both agreements provided for a ten-year term of employment, commencing in February 1988. Appellants were aware of the National Bank Act and agreed to a clause in their contracts which permitted termination without cause. Paragraph eight of the contracts state:

> This Agreement shall terminate upon the first to occur of the following:
>
> . . . .
>
> (e) Termination by the Bank without cause, including termination in the event of merger, acquisition or consolidation of the Bank, provided that in such event the Bank shall pay to Executive an amount equal to Executive's base salary (based on Executive's base salary in effect on the date of termination) for the remainder of the term of the Employment Agreement payable in equal monthly installments over the balance of the term of this Agreement, or in a lump sum, in the discretion of the Executive.

The contract also contained provisions for stock options and

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[1] Appellants did not appeal the dismissal of Count V which was for retaliation.

other benefits which would accrue to Appellants even if their employment was terminated before the end of the ten-year period. The Board of Directors of Citizens acknowledged the employment contracts. The OCC reviewed the contracts in August 1993 and approved their form, including the severance provisions. Appellants fully performed their duties as executive officers of Citizens.

During the time of Appellants' employment with Citizens, Southtrust Corporation and Southtrust Bank of Pinellas County and Citizens were engaged in merger negotiations. Southtrust offered Citizens a higher price per share if the bank stock could be purchased without the assumption of Citizens' existing employment contracts. At a special meeting of the Board of Directors in September 1993, Citizens notified Appellants that their employment was terminated without cause. Citizens requested that Appellants execute releases in exchange for stock options and deferred compensation payments, which Appellants refused to do. Citizens did not pay Appellants the wages, severance pay, and benefits which the employment contracts required.

In September 1993 Appellants filed a six-count action against Citizens and its directors. Citizens filed a motion to dismiss on the ground that a provision of the National Bank Act[2] precluded the claims. In December 1993 Appellants filed a seven-count amended complaint. The counts pertinent to this appeal are: Count I--breach of contract; Count II--breach of implied

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[2] 12 U.S.C. § 24, para. 5 (1988).

covenant of good faith; Count III--tortious interference; Count IV--conspiracy; Count VI--breach of fiduciary duty; and Count VII--failure to comply with corporate requirements and material omissions.

This case boils down to a single issue: Whether federal statutes and regulations permit a national bank to enter into a contract with an employee and thereafter ignore the terms of the contract which provided for termination benefits. The National Bank Act provides that national banks "have power . . . [t]o elect or appoint . . . officers, define their duties, require bonds on them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places." 12 U.S.C. § 24, para. 5 (1988). In 1971 the OCC promulgated 12 C.F.R. § 7.5220, which states: "The board of directors of a national bank, pursuant to paragraph Fifth of 12 U.S.C. § 24, may enter into employment contracts with its officers and employees upon reasonable terms and conditions."

Only three reported cases have cited to 12 C.F.R. § 7.5220, First National Bank of Danville v. Reynolds, 491 N.E.2d 218 (Ind. Ct. App. 1986), Schmidt v. Park Avenue Bank, N.A., 147 Misc. 2d 1043, 558 N.Y.S.2d 779 (N.Y. Sup. Ct. 1990), and Ewert v. Drexel National Bank, No. 1-93-4585 (Ill. App. Ct. Apr. 13, 1995). Because Reynolds involved a bank president who resigned, we conclude that it cannot be applied to the facts of this case. In Schmidt a bank entered into a written employment contract with Schmidt as an officer of the bank. The contract provided for severance pay upon termination. Schmidt argued that the bank

constructively terminated him. The bank refused to pay any severance benefits, and Schmidt filed suit. The bank filed a motion to dismiss for failure to state a cause of action pursuant to the National Bank Act. The bank argued that the National Bank Act allowed the bank to dismiss officers without incurring any liability and that the liquidated damages clause in the employment contract impermissibly limited the bank's ability to terminate its officers. Schmidt relied on 12 C.F.R. § 7.5220, which expressly permitted reasonable employment contracts. The court agreed with Schmidt and held that the bank could not avoid its contractual liability for severance pay even though the bank was free to terminate Schmidt without fear of liability for wrongful termination.

An Illinois appellate court recently addressed a situation very similar to the instant case. In Ewert the plaintiff was the president and chief operating officer of the defendant national bank. The parties had executed an employment agreement for a three-year term. The bank could discharge the plaintiff without cause at any time but would be required to pay the plaintiff's salary for the remaining period of the agreement. The bank terminated the plaintiff's employment and failed to pay him all of the severance benefits due under the agreement. The plaintiff filed an action against the bank for recovery of the severance benefits under the alternative theories of breach of contract and promissory estoppel. The Ewert court recognized that the National Bank Act precluded a bank officer's suit for wrongful termination but held that the regulation supported the view that

a bank officer may enforce a provision in an employment agreement which provides for severance benefits. The court affirmed a summary judgment in favor of the plaintiff.

The trial court in the instant case dismissed the amended complaint, correctly believing that it was bound to follow the Third District's decision in International Bank of Miami v. Bennett, 513 So. 2d 1294 (Fla. 3d DCA 1987), cert. denied, 485 U.S. 988, 108 S. Ct. 1291, 99 L. Ed. 2d 501 (1988). The Bennett court relied upon 12 U.S.C. § 24, para. 5 (1982) and held that a bank could ignore an employment contract it had executed with its bank president and not honor the contract to pay the president a year's salary at termination. Bennett and the case upon which it relied, Rohde v. First Deposit Nat'l Bank, 127 N.H. 107, 497 A.2d 1214 (1985), never discussed the effect of 12 C.F.R. § 7.5220. We disagree with Bennett and certify conflict.

Appellants are entitled to have their employment contracts have meaning. The statute clearly provides that a bank officer serves at the pleasure of the board; therefore, a discharged bank officer cannot sue for wrongful termination.[3] The statute, however, does not address whether a national bank must pay a discharged officer termination benefits for which the parties contracted. The regulation clarifies this point and allows a national bank and its officers to enter into employment contracts with reasonable terms and conditions. It is logical and just

[3] We recognize that a dismissed bank officer may be allowed to sue for violation of the Age Discrimination in Employment Act and the Employee Retirement Income and Security Act. See Mueller v. First Nat'l Bank, 797 F. Supp. 656 (C.D. Ill. 1992).

that the bank officer may enforce any and all reasonable terms and conditions contained in the employment agreement.

Appellees argue that the regulation allows employment contracts which cover only the period in which the employee remains employed at the bank and not any severance benefits. We hold that this interpretation is an unreasonable limitation upon the language of the regulation. Appellees also argue that based upon the numerous banking scandals in the recent past, public policy demands that a national bank must have the right to replace bank officers "at pleasure." We conclude the policy would encourage just the opposite effect. A talented individual with banking expertise would not want to leave a solid employment position for another position at a national bank if that individual knew that the national bank could ignore the termination benefits in an employment contract.

We conclude that Counts II-IV, VI, and VII challenge the decision to terminate the Appellants' employment or are based on facts which surround that decision. We, therefore, affirm the trial court's dismissal of these counts. We, however, hold that Count I seeks to enforce the severance benefits provided for in the employment contracts; therefore, the trial court erred in dismissing Count I. We reverse the order as it relates to Count I and remand this case to the trial court. In doing so, we certify conflict with Bennett.

Affirmed in part; reversed in part.

DANAHY, A.C.J., and QUINCE, J., Concur.