SUPREME COURT OF FLORIDA
CASE NO. SC10-974

140 ASSOCIATES, LTD., etc., et al.,

Appellants,

v.

SEACOAST NATIONAL BANK,
etc., et al.,

Appellees.
_____/

APPELLANTS' CONSOLIDATED REPLY BRIEF

_____

On Appeal from the Fourth District Court of Appeals
Case Nos. 4D08-4796 and 4D08-4797

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ARGUMENT

I. THE SUPREME COURT HAS MANDATORY JURISDICTION BECAUSE THE DECISION BELOW, APPROVING PRE-EMPTION OF SECTION 607.1501(1), FLORIDA STATUTES, AS APPLIED TO NATIONAL BANKS, IS THE INVALIDATION OF A FLORIDA STATUTE AS UNCONSTITUTIONAL UNDER THE SUPREMACY CLAUSE, REGARDLESS OF THE LANGUAGE OF THE DISTRICT COURT'S OPINION.

The District Court held that section 607.1501(1), Florida Statutes was "expressly pre-empted" by the National Bank Act. A state statute is pre-empted because it violates the Supremacy Clause of the United States Constitution. The pre-empted state statute is unconstitutional and invalid. The District Court did not use the words "unconstitutional" or "invalid" in its Opinion. Nonetheless the substance of the Opinion is that section 607.1501(1) Florida Statutes as applied to national banks violates the Supremacy Clause, is unconstitutional, is invalid and is therefore pre-empted. Substance prevails over form. State v. Saufley, 574 So. 2d 1207 (Fla. 5th DCA 1991). The Supreme Court has mandatory jurisdiction. Rule 9.030(a)(1)(A)(ii), Florida Rules of Appellate Procedure.

II. SEACOAST'S FAILURE TO HOLD A CERTIFICATE OF AUTHORITY TO TRANSACT BUSINESS IN FLORIDA AT ALL TIMES DURING THE PROCEEDING BELOW IS AN ISSUE OF SUBJECT MATTER JURISDICTION RATHER THAN CAPACITY TO SUE.

If Seacoast's failure to comply with section 607.1501(1), Florida Statutes is an issue of capacity to sue then Appellants did not timely raise before the Circuit

Court Seacoast's absence of the capacity to sue. If, on the other hand, Seacoast's failure to comply with section 607.1501(1), Florida Statutes is a failure of subject matter jurisdiction then Appellants did timely raise the failure of subject matter jurisdiction. Failure of subject matter jurisdiction may be raised at any time.

The most common definition of subject matter jurisdiction is the power of the trial court to deal with the class of cases to which a particular case belongs. Cunningham v. Standard Guaranty Ins. Co., 630 So. 2d 179 (Fla. 1994). The class of cases at issue here are cases brought by foreign corporations which do not hold Certificates of Authority to transact business in Florida. As to this class of litigants there is a statutory grant of jurisdiction to the Circuit Court (section 26.012, Florida Statutes) and a statutory limitation (section 607.1502(1), Florida Statutes). These two statutes are of equal dignity. Rules of statutory construction require each statute to be given effect. Accordingly, as to this class of litigants, subject matter jurisdiction requires Seacoast to comply with both statutes – that is, to have a case within the jurisdictional range of Circuit Court and to hold a Certificate of Authority.

Capacity to sue concerns whether the litigant is the real party in interest. Capacity to sue is not determined on the basis of the class of the litigant. Capacity to sue is determined on the basis of the individual peculiarities of the litigant. For

example, the capacity of a personal representative or trustee; the capacity of a minor; the capacity of an incompetent person.

Whether subject matter jurisdiction or capacity to sue applies was argued by TJVC Land Trust and the Appellants in their briefs before the District Court. The District Court rejected the characterization of Seacoast's failure to comply with section 607.1501(1), Florida Statutes, as a capacity to sue issue.

III. COMPLIANCE WITH SECTION 607.1501(1), FLORIDA STATUTES, DOES NOT SIGNIFICANTLY IMPAIR THE ABILITY OF SEACOAST TO TRANSACT ITS NATIONAL BANKING BUSINESS IN FLORIDA AND THEREFORE SECTION 607.1501(1) FLORIDA STATUES IS NOT PRE-EMPTED BY THE NATIONAL BANK ACT.

A. Cox v. ReconTrust Co. N.A.

At pages 9-11 of its Answer Brief, Seacoast quotes extensively from the recent Federal District Court Memorandum Decision in Cox v. ReconTrust Co. N.A., 2010 WL 2519716 (D. Utah 2010). The Utah foreign corporation registration statute (section 16-10a-1501 et. seq. Utah Code) is based on the Model Business Corporation Act. As to the statutory provisions of significance here the Utah statute is identical to the section 607.1501 et. seq., Florida Statutes.

The Federal District Court in Cox v. ReconTrust, relying on the same line of federal and state decisions as did the District Court in its Opinion, concludes that the National Bank Act pre-empts the Utah foreign corporation registration statute. Cox v. ReconTrust reaches its conclusion of pre-emption somewhat differently

than the District Court did in its Opinion. However, Cox v. ReconTrust shares with the District Court Opinion the same dual infirmities – the failure to employ the kind of pre-emption analysis currently common in pre-emption jurisprudence and reliance on precedent which is either incorrect or not germane.

Real estate foreclosures in Utah are not judicial proceedings. The promissory note is secured by a Deed of Trust encumbering the real property. Upon the borrower's default, the trustee named in the Deed of Trust files a notice of default, election of trustee's sale, and other information with the Office of the Recorder of the county where the real property is located. The filing sets into motion a process which ends with a public trustee's sale of the real property conducted by the trustee. Sections 57-1-23 to 57-1-32, Utah Code.

ReconTrust is a national bank and was the trustee named in a Deed of Trust encumbering a residence owned by Cox. After Cox's default, but before the trustee's sale, Cox sued ReconTrust in state court, asserting among other claims, that ReconTrust was not authorized to conduct trustee's sales in Utah because it did not hold a Certificate of Authority to transact business in Utah. The state court agreed with Cox and issued a Temporary Restraining Order ("TRO") preventing the scheduled trustee's sale of the Cox's residence. A few days later, the state court issued a Preliminary Injunction prohibiting ReconTrust from conducting any trustee's sales in Utah. ReconTrust then removed the state court action to the

Federal District Court. The Federal District Court took jurisdiction and dissolved the TRO and the Preliminary Injunction.

In the absence of diversity and a federal question, the Federal District Court determined it had jurisdiction under the "complete pre-emption doctrine" of Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 123 S.Ct. 2058, 156 L.Ed. 2d 1 (2003). The Federal District Court does not state whether the "complete pre-emption" of the Utah foreign corporation registration statute by the National Bank Act is express or implied and, if implied, whether it is conflict pre-emption, preclusion pre-emption, or obstacle pre-emption.

In support of its determination of pre-emption, the Federal District Court states: "There is little question that by imposing additional burdens not found in federal law, these statutes "significantly impair" a national bank's ability to do business in Utah." Cox v. ReconTrust, at 11. The only impairment mentioned by the Federal District Court is the possibility that Utah might not grant a Certificate of Authority. Both the Utah and Florida foreign corporation registration statutes require an application setting forth basic information regarding the incorporation of the applicant, the officers and directors of the applicant and the designation of an in-state office and agent for service of process. Neither the Secretary of State of Utah nor the Secretary of State of Florida has any discretion to reject an application containing all the required information.

Beyond the possibility that Utah might not grant a Certificate of Authority, the Federal District Court did not articulate just how the submission of a simple application "significantly impairs" the ability of ReconTrust to conduct its national banking business in Utah. In its Answer Brief at page 21, Seacoast weighs in on this finding critical to pre-emption stating: "This would subject the truly 'national' national banks to registration, etc., in multiple states, and would clearly be a substantial obstacle to the national banks' fulfilling their mission and eroding the exclusive control and supervision of the U. S. Comptroller of the Currency."

Seacoast's characterization of state statutes requiring foreign corporation registration as eroding the control and supervision of the Comptroller of the Currency is fatuous. Both the Utah and Florida statutes provide: "This Act does not authorize this state to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this state." Section 607.1505(3), Florida Statutes. Section 16-10a-1505(3), Utah Code.

Seacoast's characterization of the process of registering in multiple states constituting a substantial obstacle to national banking is beyond fatuous. Statutory compliance and the required paper work may be the bane of a regulated business such as a national bank but it is certainly not an obstacle. Statutory compliance and the required paper work for multiple state foreign corporation registrations are

but a pebble on the mountain of compliance paperwork otherwise required of a national bank.

The Federal District Court finding that ReconTrust's compliance with the Utah foreign corporation registration statute would "significantly impair" its national bank operations is an "improbable fiction"[1] used by the Federal District Court to reach its desired result. The Federal District Court alludes to the "destructive powers [of the States] over national banks." Cox v. ReconTrust at 7. Since 1864, the rivalry between state and national banks has been a factor in pre-emption litigation under the National Bank Act.[2]

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[1] *If this were play'd upon a stage now, I could condemn it as an improbable fiction* – Twelfth Night Act III, Scene 4

[2] Sometimes the illogic of the law can best be explained by a little history. The National Bank Act was initially titled in 1864 as 'An Act to provide a National Currency, secured by a Pledge of United States Bonds, and to provide for the Circulation and Redemption thereof' ("National Currency Act"). The currency in circulation in 1864 was coins, bank notes issued by state banks and *greenbacks*. Coinage depended upon the mining of gold and silver. State bank notes were paper currency issued by state banks in convenient denominations that could be redeemed for coinage at the state bank but it was hard to discern a good state bank note from a bad state bank note particularly if the state bank was located some distance away. The greenbacks issued by the Treasury Department during the Civil War were of questionable constitutionality.

The objective of the National Currency Act was to create a system of national banks that would issue national bank notes as a circulating currency. The National Currency Act strictly limited each national bank's issuance of national bank notes to the U.S. Treasury Bonds held by the national bank. The National Currency Act established visitation and supervision of national banks by the Treasury Department.

It was thought at the time that national banks would supplant state banks. That did not happen. Instead after the Civil War and continuing into the early Twentieth Century an intense rivalry between state and national banks developed. True to the era, states, from time to time, enacted legislation to impede national banks and foster their state banks. The legislation was often attached to state statutes requiring registration of foreign corporations to transact business. The legislation imposed real and unacceptable burdens on national banking. In the context of the time, the decisions pre-empting such state statutes were correct.

The District Court reached its conclusion of pre-emption in its Opinion via the fallacious 'sue and be sued . . . as fully as natural persons' logic. See, Appellants Initial Brief at pages 25-30. The 'sue and be sued . . . as fully as natural persons' logic is likewise an "improbable fiction" used by the District Court to reach its desired result.

Congress could have made national banking autonomous from the states. It could have given jurisdiction of national bank litigation to the federal courts. It could have enacted a federal law of deposits, promissory notes, real estate, mortgages and foreclosures. Congress did not do that. Instead, since 1864, Congress has left the day to day operations of national banks to the courts and the laws of the state within which the national bank operates.

Completely absent from Cox v. ReconTrust and the District Court Opinion is acknowledgment of the line of United States Supreme Court and Circuit Court of Appeal cases holding that as to pre-emption national banking is a duality: – pre-emption as to visitation and supervision by the Office of the Controller of the Currency or other areas of vital federal concern; and, application of state laws as to day to day operations. Watters v. Wachovia Bank, NA, 550 U.S.1, 127 S. Ct. 1559

With the passage of time, this rivalry ebbed and our current banking system of dual and harmonious state and national banking emerged. With the same passage of time state statutes requiring foreign corporations to register to transact business became benign, with their scope limited solely to the simple filings, the collection of small fees and the information repositories. However, the stigma of state foreign corporation registration statutes as agents of state interference with national banking remained.

167 L.Ed. 2d 389 (2007); National State Bank v. Long, 630 F. 2d 981 (3d Cir. 1980).

Congress relegated the day to day operations of national banks to state law. Despite this manifest Congressional intent, Cox v. ReconTrust and the District Court below hold that Congress intended that state foreign corporation registration statutes are pre-empted as applied to national banks. The irony of these holdings is breathtaking. The day to day operations of national banks are subject to state law but these holdings pre-empt the only act, foreign corporation registration, that permits a national bank to transact business in the state.

B. Surrebuttal

The federal and state decisions pre-empting the foreign corporation registration statutes of various states that are discussed by the Appellees are all based on the "improbable fictions" articulated in Cox v. ReconTrust, or the District Court Opinion. Cox v. ReconTrust, the District Court Opinion and all their precedents are either correct for the reasons argued by Appellees or are incorrect for the reasons argued by Appellants. The number of times an application of law is repeated does not make it correct or incorrect. What makes it correct or incorrect is the merit of the reasoning argued before this Court.

Office of the Comptroller of the Currency ("OCC") Corporate Decision 95-34 (1995 WL 553188) is 16 pages long and Corporate Decision 96-17 (1996 UL

226070) is 33 pages long. Both deal with the interplay between Federal and Connecticut law regarding national banks with branches in multiple states. In two identical boiler plate paragraphs in each Corporate Decision, the OCC does state that the Connecticut foreign corporation registration statute is pre-empted. The OCC has most likely inserted the same boiler plate in hundreds of Corporate Decisions. The two Corporate Decisions cited by Seacoast are not particularly insightful or informative of the pre-emption issues argued herein.

The Florida definition of a foreign corporation is simple, clear and unambiguous. A national bank being a creature of federal law is a foreign corporation in Florida.

The presumption to be applied in this case is the usual and standard presumption against pre-emption of state laws. The only area under the National Bank Act that has such a significant federal presence to shift the presumption in favor of pre-emption is the visitation and supervision of national banks by the OCC. Section 607.1501(1), Florida Statutes, does not in any way conflict with or impair the visitation and supervision of national banks by the OCC because section 607.1505(3), Florida Statutes, prohibits any Florida regulation of registered foreign corporations.

To make its case for the shift in the presumption, Seacoast cites to Bank of America v. City and County of San Francisco, 309 F. 3d 551 (9th Cir. 2002). In

that case the Federal Circuit Court of Appeal invoked the shift in the presumption because the topic of the city and county legislation was fees charged at ATMs, which was part of the existing OCC visitation and supervision of national banks.

Seacoast's frequent use of Congressional intent and case law relating to state intrusion into visitation and supervision of national banks as a basis for pre-emption of state foreign corporation registration is misplaced. State intrusion into visitation and supervision of national banks is expressly pre-empted by the National Bank Act. State foreign corporation registration statutes do not grant any state visitation and supervision over national banks. The sole issue regarding pre-emption of state foreign corporation registration statutes is obstacle pre-emption – whether the state law stands as an obstacle to objectives of the National Bank Act.

First Nat'l Bank v. Dickinson, 396 U.S. 122, 90 S.Ct. 337, 24 L.Ed. 2d 312 (1969); Blackfeet Nat'l Bank v. Bill Nelson, 171 F. 3d 1237 (11th Cir. 1999); Video Trax, Inc. v. Nations Bank, N.A., 33 F. Supp. 2d 1041 (S.D. Fla. 1998) are all directly on point because they demonstrate proper modern day pre-emption analysis and jurisprudence. They all show how a court must carefully analyze in National Bank Act pre-emption cases whether a state law goes to the prohibited area of state visitation and supervision or some other vital area of federal concern or whether the state law stands as an obstacle to the objectives of the National Bank Act. If the District Court in its Opinion or if the Federal District Court in

Cox v. RenconTrust employed the analytical techniques of Dickinson, Blackfeet and Video Trac, as they should have, their conclusions would have been quite different.

Seacoast dismisses National Park Bank v. Gunst, 1 Abb. N. Cas. 292 (N.Y. S.Ct. 1876); Manufacturers' Nat'l Bank v. Baack, 2 Abb. U.S. 232, 16 F. Cas. 671 (D.C. New York 1871) as "two truly ancient lower court cases" that have "nothing to do with either pre-emption or the state laws relating to the authorization of foreign corporations to do business." These cases, decided shortly after the 1864 enactment of the National Bank Act, demonstrate that Congress never intended national banks to be considered as anything but foreign corporation in the states where they operate.

IV. AT THIS LATE POINT IN THE PROCEEDINGS THE ONLY REMEDY IS TO REVERSE WITH INSTRUCTIONS TO THE CIRCUIT COURT TO DISMISS THE VERIFIED COMPLAINT WITHOUT PREJUDICE.

Seacoast argues that should this Court reverse, and require Seacoast to comply with section 607.1501(1), Florida Statutes, all national banks will be subject to civil fines and penalties for all the years they have "illegally" done business in Florida. Seacoast Answer Brief at 20. As is typical in statutory interpretation cases, such an opinion of this Court would apply to Seacoast alone. As to all other national banks, such an opinion of this Court would be prospective. National banks which do not register to do business in Florida are not acting

illegally. Section 607.1502 (5) Florida Statutes, provides that failure to register does not impair the validity of the foreign corporation's acts. The only penalty is not having access to Florida Courts.

Seacoast suggests that this Court should just let it, after the fact, obtain a Certificate of Authority, and let the Judgments stand. Seacoast cites no authority or policy for this accommodation other than, ". . . it would make no sense for Seacoast to be in a worse position because it prevailed on the issue before the trial court than had Seacoast not prevailed." That is beside the point.

At bottom, this is a case of jurisdiction. Section 607.1502(1), Florida Statutes is clear – no Certificate of Authority, no access to Florida courts. In jurisdictional matters a court must draw a bright line. The bright line sometimes leads to a harsh result – for example, the dismissal of an otherwise meritorious appeal inadvertently filed a day late. The harsh result is not punitive. The harsh result is necessary to maintain the integrity of jurisdictional requirements.

Prior to the record on appeal closing Seacoast had the opportunity to protect itself from the dilemma at which it now rails. Seacoast could have, in an abundance of caution, registered, thereby making the issue moot. Absent that Seacoast should have initiated a request to the Circuit Court for a stay and opportunity to cure under section 607.1502(3), Florida Statutes, coupled with a request that the Circuit Court reserve jurisdiction to implement the stay and cure

subsequent to appellate review. Seacoast did nothing but bring the litigation to final judgment. 140 and Talbott appealed and the record closed.

At pages 21 and 22 of its Answer Brief Seacoast argues:

> In addition, the facts in Sheedy are very different. There, the foreign corporation's case was dismissed by the trial court because it did not have a certificate of authority. However, the plaintiff made the mistake of filing its notice of appeal before becoming authorized to do business, so the authorization was outside the trial court record and therefore could not be considered on appeal.

Seacoast is correct that Sheedy is factually different from its dilemma. Seacoast's analysis nonetheless serves to underscore the importance of attention to detail and forethought in matters of jurisdiction and appellate review. Seacoast, like the plaintiff in Sheedy, made a mistake. Seacoast did nothing to protect itself from the downside. This Court takes this case as it finds it on the record on appeal. This Court cannot save Seacoast from Seacoast's own lack of foresight.

The case is over. There is nothing for this Court or the Circuit Court on remand to stay. There is nothing that an after-the-fact Certificate of Authority can cure. The Judgments must be vacated and the Verified Complaint must be dismissed because at no time embraced by the record on appeal did Seacoast hold a Certificate of Authority. At no time embraced by the record on appeal did the Circuit Court have subject matter jurisdiction. Any other result makes the laws of jurisdiction and the rules of appellate practice meaningless.

CONCLUSION

Pre-emption jurisprudence has but one imperative – to determine the intent of Congress. Clearly, there is no express pre-emption of state foreign corporation registration statues such as section 607.1501(1), Florida Statutes, in the National Bank Act. As to implied pre-emption there is no outright or actual operational conflict. Seacoast can comply with both the National Bank Act and section 607.1501(1), Florida Statutes. Congress has not legislated so comprehensively in the area that there is no room for state law. To the contrary, Congress intended that national banks comply with state law in all areas but visitation and supervision. Section 607.1501(1), Florida Statutes, does not impair in any whatsoever the ability of national banks to operate in Florida and fulfill the objectives of the National Bank Act.

The Opinion of the District Court should be reversed. The Foreclosure Judgment and the Talbott Guaranty Judgment should be vacated and the Circuit Court, on remand, instructed to dismiss the Verified Complaint without prejudice.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY this Consolidated Reply Brief has been prepared using Times New Roman 14 point font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished via U.S. Mail to **Eric C. Christu, Esq**., Shutts & Bowen LLP, 525 Okeechobee Blvd., Ste 1100, West Palm Beach, Florida 33401-6351; **John H. Pelzer, Esq**., Ruden McClosky, P.A., P.O. Box 1900 , Fort Lauderdale, FL 33302-1900; **Morris G. Miller, Esq.**, Ruden McClosky, P.A., 222 Lakeview Avenue, Ste. 800, West Palm Beach, FL 33401-6148, *Attorneys for Appellee Seacoast National Bank*; **Richard A. Kupfer, Esq.**, 833 Eastview Avenue, Delray Beach, FL 33483-5968; and **Harvey R. Schneider, Esq.,** 1300 N. Federal Hwy., Ste. 106, Boca Raton, FL 33432-2848, *Attorneys for Appellee 777 PRP, LLC*, this 1st day of April, 2011.

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