12-1640-cv

IN THE

United States Court Of Appeals

FOR THE SECOND CIRCUIT

AMERICAN INTERNATIONAL GROUP, INC., AIG SECURITIES LENDING CORPORATION,
(Caption Continued on the Reverse)

On Appeal from the United States District Court
for the Southern District of New York (New York City)

BRIEF OF SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, NEW YORK BANKERS ASSOCIATION, AND CALIFORNIA BANKERS ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND IN SUPPORT OF AFFIRMANCE

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Plaintiffs-Appellants,

v.

BANK OF AMERICA CORPORATION, BANC OF AMERICA SECURITIES LLC, BANK OF AMERICA, NATIONAL ASSOCIATION, BANC OF AMERICA FUNDING CORPORATION, BANC OF AMERICAMORTGAGE SECURITIES, INC., ASSET BACKED FUNDING CORPORATION, NB HOLDINGS CORPORATION, MERRILL LYNCH & CO., INC., MERRILL LYNCH MORTGAGE LENDING, INC., FIRST FRANKLIN FINANCIAL CORPORATION, MERRILL LYNCH MORTGAGE CAPITAL INC., MERRILL LYNCH CREDIT CORPORATION, MERRILL LYNCH, PIERCE, FENNER & SMITH INC., MERRILL LYNCH MORTGAGE INVESTORS, INC., COUNTRYWIDE FINANCIAL CORPORATION, COUNTRYWIDE HOME LOANS, INC., COUNTRYWIDE SECURITIES CORPORATION, CWABS, INC., COUNTRYWIDE CAPITAL MARKETS LLC, CWALT, INC., CWHEQ, INC., CWMBS, INC.

Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

None of the Amici, Securities Industry and Financial Markets Association, New York Bankers Association and California Bankers Association, have a parent company, nor have they issued any stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Regulations

Other Authorities

INTEREST OF AMICI CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry, while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA has offices in New York and Washington, D.C., and is the United States regional member of the Global Financial Markets Association.

The New York Bankers Association is comprised of the community, regional and money-center commercial banks and thrift institutions that engage in the banking business in New York, have aggregate assets in excess of $11 trillion and employ more than 250,000 people. The Association's mission includes working to enhance the profitability and stature of New York's banking industry, and support the communities, consumers and businesses they serve.

The California Bankers Association is one of the largest state banking trade associations in the United States. Its mission is to ensure a free and competitive

* This Amici brief is submitted pursuant to the Motion of Amici filed contemporaneously herewith pursuant to Fed. R. App. P. 29. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), Amici state that no one besides SIFMA, New York Bankers Association, California Bankers Association, or their counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief.

market, and assist its members, regardless of their size or specifications, to succeed in the dynamic and innovative market place.

Amici regularly file amicus curiae briefs in cases that raise matters of vital concern to participants in the banking and financial services industries. Amici's members include national banks that regularly engage in international banking transactions, as well as financial institutions that are affiliated with or do business with these national banks. As such, they have a strong interest in the issue presented by the appeal of the District Court's Order of October 20, 2011 (the "District Court Order").

The plain language of Section 632 provides federal court jurisdiction to Appellees in the instant case, and also may be the basis for federal jurisdiction in other potential actions involving Amici's members. Yet, Appellants seek to deny federal jurisdiction to Appellees, and potentially Amici's members in other actions, by advancing an unsupported and narrow reading of the statute. However, such a narrow reading of the statute, which is inconsistent with the statute's express language, would harm Amici.

The availability of federal court jurisdiction plays an important role in promoting Amici's members' competitiveness in international financial markets. Modern banking frequently is global in nature and, accordingly, the availability of a federal forum for litigation involving "foreign banking transactions" pursuant to

the Edge Act, is a significant issue for Amici's members. Ensuring that such litigation proceeds in federal courts, pursuant to a clear and consistently applied jurisdictional test, rather than in multiple state courts or federal and state courts simultaneously, as often is the case in complex financial litigation not subject to federal jurisdiction, reduces the costs and inefficiencies arising out of such cases. In federal courts, unlike in state courts, consistent procedural rules, including pleading standards, apply and multidistrict litigation procedures are available to consolidate pre-trial proceedings in numerous federal actions, reducing discovery costs and the risk of inconsistent pre-trial rulings. No such consistent rules and procedures are available in state courts.

Further, enforcing the plain language of Section 632's grant of federal jurisdiction pursuant to a clear jurisdictional test provides Amici's members with more consistent and predictable standards and procedures by which they can measure their future conduct when engaging in business. The undefined jurisdictional test advanced by Appellants would leave parties to future litigation unable to predict, with any certainty, whether a dispute belongs in federal or state court. This will only further hamper the ability of both plaintiffs and defendants to evaluate the risks and costs of potential litigation involving foreign banking transactions.

The Edge Act, by its grant of federal jurisdiction, thereby provides more consistent and predictable procedures, reduces the costs of litigation, and thus helps facilitate the conduct of business by Amici's members. Allowing Amici's members to operate more efficiently permits them to better serve their shareholders, customers, including consumers and small businesses, and local economies, and more effectively compete for business in global markets.

SUMMARY OF ARGUMENT

The court below properly held that the instant action is removable pursuant to Section 632 of the Edge Act. The action clearly meets the Act's three-prong requirements: it is civil in nature, a national bank is a party and it arises out of transactions involving banking in United States territories. However, Appellants assert that more than satisfaction of the Act's plain language is required, and seek to superimpose additional, judicially-created hurdles to removal.

The additional barriers to federal jurisdiction that Appellants advance not only are without support in the plain language of the Act, but would inject uncertainties and inefficiencies into the determination of Edge Act jurisdiction. Acceptance of Appellants' position would result in more costly and protracted motion practice relating to the determination of Edge Act jurisdiction, burdening both the parties and trial courts. Further, the uncertain standard advanced by

Appellants would be burdensome for the trial courts to administer and would lead to less consistent rulings for Amici's members.

The Edge Act sought to facilitate the competitiveness of national banks in international commerce. When Section 632 was added to the Edge Act, it provided a federal forum for federally chartered entities in broad and clear language. The purposes of the Edge Act and Section 632 would be thwarted were this Court to accept Appellants' narrow and novel interpretation of Section 632's requirements, which would lead to unpredictable and inconsistent rulings on this key issue of federal jurisdiction. This Court should reject Appellants' efforts to rewrite Section 632 of the Edge Act, and affirm the District Court Order.

ARGUMENT

THE DISTRICT COURT ORDER UPHOLDING FEDERAL JURISDICTION IN THE INSTANT CASE SHOULD BE AFFIRMED.

I. The Edge Act and Plain Language of Section 632 Support A Broad Grant of Federal Jurisdiction

Section 632 of the Edge Act provides for federal jurisdiction in:

> all suits of a civil nature at common law or in equity to which any corporation organized under the laws of the United States shall be a party, arising out of transactions involving international or foreign banking, or banking in a dependency or insular possession of the United States, or out of other international or foreign financial operations, either directly or through the agency, ownership, or control of branches or local institutions in dependencies or insular possessions of the United States or in foreign countries.

12 U.S.C. § 632.

Appellants' complaint is removable under the plain language of the statute as it is undisputed that the action is civil in nature and that a corporation organized under the laws of the United States, Bank of America, N.A., is a party. The final prong, that the suit must arise out of transactions "involving … banking in a dependency or insular possession of the United States,"[1] also is easily satisfied here. Appellants acknowledge that mortgage loans secured by properties in United States territories were included in certain of the residential mortgage-backed securities ("RMBS") transactions at issue in this case. Appellants' Brief in Support ("App. Br. in Supp."), at 9-10. Further, Appellants' claims of fraud are premised on alleged defects in the mortgages backing these RMBS transactions. *See* Joint Appendix at 63 (alleging fraud involving "the actual credit quality of the mortgages by providing false quantitative data about the loans [in the Offering Materials], thus masking the true credit risk of AIG's investments."). It is well recognized that mortgage lending and the securitization of mortgage loans are traditional banking activities. *See, e.g.*, *Chase Manhattan Bank (N.A.) v. Corporacion Hotelera de Puerto Rico*, 516 F.2d 1047, 1048 n.1 (1st Cir. 1975) (Section 632 satisfied by suit involving mortgage on a Puerto Rican property);

[1] The District Court Order did not address the issue of the scope of the "arising out of transactions involving other international or foreign financed operations" prong of Section 632 and, accordingly, it is not discussed here.

Nicola Cetorelli & Stravros Peristiani, *The Role of Banks in Asset Securitization*, Fed. Res. Bank of N.Y, ECON. POL'Y REV. 47, 58 (July 2012), *available at* http://www.newyorkfed.org/research/epr/12v18n2/1207peri.pdf ("[B]anks are by far the predominant force in the securitization market…. Throughout the entire 1990-2008 period, banks' market share [for the principal functions of securitization] remained well over 90 percent."). The territorial mortgages in the RMBS at issue satisfy the third requirement of Section 632. The plain language of Section 632, therefore, confers federal jurisdiction.

One of Congress' purposes for enacting the Edge Act of 1919 was to give these financial institutions "powers sufficiently broad to enable them to compete effectively with similar foreign-owned institutions in the United States and abroad." 12 U.S.C. § 611a. The Edge Act amended a regulatory framework that had put Edge Act corporations "at competitive disadvantages relative to foreign owned banking institutions."[2]

Thereafter, Section 632 was incorporated into the Edge Act pursuant to the Banking Act of 1933.[3] The Banking Act, aimed at restoring confidence in the

[2] S. Rep. No. 95-1073, at 1424 (1978).

[3] 12 U.S.C. § 632; *see also* Steven M. Davidoff, *Section 632: An Expanded Basis of Federal Jurisdiction for National Banks*, 123 BANKING L.J. 687, 689 (2006) (citing 48 Stat. 162, 184, 73rd Cong., 1st Sess. § 15 (June 16, 1933)).

national banking system following the Great Depression,[4] developed a federal system of banking regulation and fostered the development of a uniform body of law for national banks.[5] Giving effect to Section 632's broad grant of federal jurisdiction pursuant to its plain language coincides with the Edge Act's general purpose to increase these institutions' international competitiveness, and the Banking Act's general purpose to provide more consistent federal guidelines for national banks.

II. Second Circuit Authority Gives Effect to Section 632's Clear Language.

In the Second Circuit's landmark Edge Act decision, *Corporacion Venezola de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 792 (2d Cir. 1980) ("*CVF*"), the Court held that a nationally chartered bank alleged to have been only tangentially involved in the international transactions there at issue was "entitled to the protection offered by 12 U.S.C. § 632." Even though the bank had settled, and was no longer a party to the action, "jurisdiction was not defeated," but "inhered in the district court under 12 U.S.C. § 632." *Id*. at 792-93.

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[4] *See id*., n.10; *see also* Robert M. Brill & James J. Bjorkman, *Federal Court Jurisdiction Over International Banking Transactions*, 110 BANKING L.J. 118, 119 (1993) (*citing* H.R. Rep. No. 150, 73rd Cong., 1st Sess., at 2 (May 15, 1933)).

[5] *See, e.g.*, Thomas J. McCormack, et al., *Edge Act Enables National Banks to Invoke Federal Jurisdiction Over Suits Involving International Banking or Financial Operations*, 124 BANKING L.J. 907, 908 (2007).

Subsequent decisions in the Second Circuit have recognized that *CVF* holds that Section 632 provides a broad grant of federal jurisdiction, consistent with its language. *See, e.g.*, *In re Lloyds of Am. Trust Fund Litig.*, 928 F. Supp. 333, 338 (S.D.N.Y. 1996) (citing *CVF*: "A suit satisfies the jurisdictional requisites of Section 632 if any part of it arises out of transactions involving international or foreign banking."); *Bank of America v. Lemgruber*, 385 F. Supp. 2d 200, 214 (S.D.N.Y. 2005) ("federal courts in this Circuit have consistently interpreted the Edge Act's jurisdiction provision broadly"); *Pinto v. Bank One Corp.*, No. 02-CV-8477, 2003 WL 21297300 at *3 (S.D.N.Y. Jun. 4, 2003) (finding that Edge Act jurisdiction applied even though foreign or territorial transactions comprised only a "small portion" of the challenged transactions).

The district court properly applied Second Circuit Edge Act jurisprudence. The court recognized that "the Edge Act does not require 'a perfect match' between the particular entity involved in the territorial transaction and the party against whom the claim is brought," Special Appendix for Plaintiffs-Appellants ("SPA") at 7-8 (citing *CVF*), and that jurisdiction can inhere where, as here, "the foreign or territorial transactions comprise only a 'small portion' of the challenged transactions." SPA at 6 (citing *Pinto*, 2003 WL 21297300 at *3). Thus, under *CVF* and its progeny, the present case satisfies the requirements of Section 632 and the District Court Order should be affirmed.

Appellants cite cases in support of their interpretation of Section 632 that represent a minority view and were wrongly decided. For example, in *Lazard Freres & Co. v. First Nat'l Bank of Maryland*, No. 91-CV-0628, 1991 WL 221087 at *2 (S.D.N.Y. Oct. 15, 1991), the court remanded a case involving a "transaction that was international in character" because it found the connection of the transaction to the claim was "indirect." In *Racepoint Partners, LLC v. JPMorgan Chase Bank*, No. 06-CV-2500, 2006 WL 3044416 at *2-*3 (S.D.N.Y. Oct. 26, 2006), the court ruled on jurisdiction in two related cases involving two separate lines of defaulted notes issued by Enron, both of which were affected by the defendant's underlying international transaction. The court analyzed each note transaction separately, and remanded one of the cases to state court, and retained the other, *almost identical*, suit in federal court pursuant to Section 632. *Id*. Finally, in *Bank of New York v. Bank of America*, 861 F. Supp. 225, 233 (S.D.N.Y. 1994), the court held that Section 632 requires that "the banking aspect of the jurisdictional transaction must be legally significant in the case" despite the court itself acknowledging that "on its face, the statute only requires that a case arise out of a transaction involving foreign banking." These decisions carry no precedential value because they conflict with both controlling Second Circuit authority and the plain language of Section 632. *See*, *e.g.*, *Highland Crusader Offshore Partners, L.P. v. LifeCare Holdings, Inc.*, 627 F. Supp. 2d 730, 736 (N.D. Tex. 2008)

(decisions looking beyond the plain language of Section 632 for Edge Act jurisdiction "represent the minority view which has been criticized").

For the same reasons, this Court should reject Appellants' attempt to append judicially-created, unclear standards to Section 632, including, (i) whether "the number of territorial mortgage loans is so miniscule that AIG's suit cannot be said to 'arise out of transactions involving… [territorial] banking,'" App. Br. in Supp., at 44, and (ii) whether the international transaction is antecedent to the claim. *See* App. Br. in Supp., at 29-36. *Cf. Jacobs v. New York Foundling Hosp.*, 577 F.3d 93, 100 (2d Cir. 2009) (quoting *Greene v. United States*, 79 F.3d. 1348, 1355 (2d. Cir. 1996): "The ancient maxim *expressio unius est exclusio alterius* (mention of one impliedly excludes others) cautions us against engrafting an additional exception to what is an already complex [statute].").

III. A Narrow Construction of Section 632 Would Harm Amici's Members' Ability to Effectively Compete for Business.

A. Edge Act Jurisdiction Provides Efficiencies and Reduces Risks for Banks and Institutions Engaged in Foreign and Territorial Banking

The Edge Act fosters judicial economy and efficiencies for parties such as those in the instant case by directing all civil cases arising out of foreign or territorial banking to the federal courts. This grant of federal jurisdiction is very important to Amici's members, as it reduces the risks and costs associated with such litigation. For example, it is only in the federal courts where numerous and

overlapping actions can be consolidated before a single judge for coordinated pretrial purposes pursuant to the multidistrict litigation process, thereby preventing expensive, wasteful, and duplicative discovery and inconsistent rulings. 28 U.S.C. § 1407.

Further, federal courts all apply the same procedural rules. For example, Federal Rule of Civil Procedure 12(b)(6), as interpreted by the Supreme Court of the United States, is uniformly applied in determining the sufficiency of complaints filed in federal courts. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). These consistent procedural and coordination rules are not available for litigation conducted in various state courts, or in proceedings filed in both state and federal courts. A narrow interpretation of Section 632 likely would result in related lawsuits proceeding in different state courts, or federal and state courts simultaneously, and cause conflicting outcomes, increased litigation costs,[6] and decreased economic efficiencies.[7] The ad hoc tests advanced by Appellants, and

[6] *See* Lawyers for Civil Justice et al., *Litigation Cost Survey of Major Companies*, 2010 CONFERENCE ON CIVIL LITIGATION at 2, 4 (May 2010) (finding that litigation "constitute[s] a significant economic cost of doing business in the United States," and noting that Fortune 200 companies are "concerned about the impact of litigation on their ability to compete in a global economy.").

[7] *Cf.* U.S. CHAMBER OF COMMERCE, COMMISSION ON THE REGULATION OF US CAPITAL MARKETS IN THE 21ST CENTURY: REPORT AND RECOMMENDATIONS, at 1 (2007), *available at* http://www.uschamber.com/sites/default/files/reports/0703capmarkets_full.pdf

applied in the criticized minority court opinions, demonstrate the burdens, costs and risks of inconsistent decisions that would result from a narrow interpretation of Section 632.

In contrast, application of the plain language of the Edge Act will enable a clearer and less costly determination of the preliminary question of federal jurisdiction, lead to lower litigation costs for national banks and those institutions that engage in foreign and territorial banking with national banks, and ultimately translate to lowering their costs of doing business.[8] An affirmance of the District Court Order will reduce the risks of uncertainty as to Edge Act jurisdiction, foster administrative simplicity, and promote judicial economy.

B. A Clear Jurisdictional Test for Edge Act Jurisdiction Allows Banks and Financial Institutions to Better Manage Their Businesses and Compete

Avoiding Appellants' narrow interpretation of the Edge Act also enables parties to better manage, and provide for, the risks and costs associated with prospective litigation, without the added complexity of anticipating whether

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(determining that an inefficient legal system makes U.S. capital markets increasingly less attractive to both foreign and domestic companies).

[8] *See, e.g.*, Luc Laeven & Giovanni Majoni, *Does Judicial Efficiency Lower the Cost of Credit*, WORLD BANK POLICY RESEARCH WORKING PAPER NO. 3159, at 2, 21 (2003) (noting that "an efficient judiciary…is generally thought to enhance a country's investment climate, lead to lower interest rates, and thereby improve the performance of a country's economy" and concluding that improvements in judicial enforcement of contracts are critical to reduce costs to financial market participants).

jurisdiction will vest in state or federal court. Adopting Appellants' argument would strip away this benefit to the detriment of Amici's members, and the institutions with which they transact business. They would be unable to predict which test a court will apply when narrowly interpreting the statute. The clear jurisdictional test advanced by Appellees provides them with predictable standards for determining Edge Act jurisdiction.

The Supreme Court has cautioned against applying unclear tests to determine jurisdiction. When the Supreme Court adopted a clearer and relatively easier to apply "nerve center" test for the determination of a corporation's principal place of business for diversity jurisdiction purposes, it called "administrative simplicity… a major virtue in a jurisdictional statute." *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193 (2010) (citing *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in judgment)). The Court then explained that "complex jurisdictional tests" are disfavored because they:

> complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims. Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits. Judicial resources too are at stake. Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it. So courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case.

Id. (internal citations omitted). Further, like Amici, the Supreme Court has recognized the importance of predictability for the growth of businesses: "Simple jurisdictional rules also promote greater predictability. Predictability is valuable to corporations making business and investment decisions. Predictability also benefits plaintiffs deciding whether to file suit in a state or federal court." *Id.* (internal citations omitted).

Predictable legal rules help corporations minimize risk, manage liabilities, raise capital and enter new businesses. It has been recognized that an efficient judicial process allows national banks to maximize their opportunities to operate efficiently and profitably, which is critical to ensure their safety and soundness.[9] Affirming the District Court Order therefore preserves the crucial ability of these institutions to predict, with greater clarity, the course of prospective litigation in matters involving foreign or territorial banking, thereby allowing them to better serve their shareholders, customers, including consumers and small businesses, and local economies, and more effectively compete for business in global markets.

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[9] *See generally* Office of the Comptroller of the Currency, *The OCC's Strategic Plan, Fiscal Years 2012-2016* at 8 (Sept. 2011), *available at* http://www.occ.gov/-publications/publications-by-type/other-publicationsreports/-stratplan.pdf (describing the OCC's strategic goals to include among, other things, maintaining a legal and regulatory framework that enables a competitive system of national banks).

CONCLUSION

For the foregoing reasons, and the reasons stated in Appellees' brief, the Court should affirm the District Court Order.

Dated: New York, New York
September 7, 2012

Respectfully Submitted,

By: */s/ Hannah Berkowitz*

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel for Amici Curiae SIFMA, New York Bankers Association and California Bankers Association, hereby certifies that this brief complies with the type-volume limitations of Rule 32(a)(7)(B). As measured by the word-processing system used to prepare this brief, there are 3,570 words in the brief.

By: */s/ Jonathan Bashi*
Jonathan Bashi