

Banking and Finance Law Daily Wrap

Up, TOP STORY—Court hears arguments on Fannie Mae’s ‘sue and be sued’ powers,(Nov. 8, 2016)

By [John M. Pachkowski, J.D.](#)

In Nov. 8, 2016, oral arguments, the U.S. Supreme Court questioned the parties to a case that may well set the boundaries for subject matter jurisdiction for lawsuits to which Fannie Mae is a party.

The case in question, *Lightfoot v. Cendant Mortgage Corp.*, involved a lawsuit by homeowners against Fannie Mae after a home mortgage foreclosure. The homeowners had unsuccessfully sued in federal court and in California state court, raising only claims under state law. However, Fannie Mae removed the suit to federal district court, asserting that the "sue and be sued" language in 12 U.S.C. §1723a(a) established federal jurisdiction. The district court judge agreed with Fannie Mae’s jurisdictional argument, and she later dismissed the homeowners’ suit. The homeowners appealed, claiming that the federal district court could not dismiss their suit because it had no jurisdiction.

Subject matter jurisdiction. The U.S. Court of Appeals for the Ninth Circuit [ruled](#) that Congress conferred jurisdiction on the federal courts when it provided that Fannie Mae had the power "to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal." According to the Ninth Circuit, a "sue and be sued" clause in a federal statute confers federal jurisdiction if it specifically mentions federal court, as decided in [American National Red Cross v. S.G.](#), 505 U.S. 247 (1992). The law creating Fannie Mae specifically says "State or Federal." The appellate court rejected the position of a dissenting opinion in *Red Cross* that argued a "sue and be sued" clause creates only a corporate capacity to litigate. Under that reasoning, subject matter jurisdiction would have to be derived from another provision of federal law (see *Banking and Finance Law Daily*, [Oct. 3, 2014](#)).

"Court of competent jurisdiction." During [oral arguments](#) before the Court, E. Joshua Rosenkranz, representing the petitioners/homeowners stated, "There is only one natural way to read the language at issue here. A ‘court of competent jurisdiction’ is a court that has an independent source of subject-matter jurisdiction. That is what this Court has held five times those words mean." He added, "And the only way to find out whether a court is a ‘court of competent jurisdiction’ is to examine the statutes creating that court and granting it jurisdiction."

Justice Breyer noted that of the five cases cited as precedent, three were against the petitioners’ position; two supported their position; and the fifth case was "weaker" for the petitioners. He added that one page of legislative history cited by the petitioners "explicitly [says], you’re right."

Ann O’Connell, Assistant to the Solicitor General, argued as *amicus curiae*, in support of the petitioners. O’Connell stated, "The government’s view is that the rule of Red Cross should not be extended to a statute that authorizes a federally chartered corporation to sue or be sued in a ‘court of competent jurisdiction.’" She added, "The best reading of that phrase in Fannie Mae’s charter is that it authorizes the corporation to sue and be sued in a Federal or State court that is vested with jurisdiction through some other provision of law."

Representing the respondent mortgage company, Brian P. Brooks stated, "The *Red Cross* decision reaffirmed a strong and long-standing rule . . . which sets a baseline for Congress to follow when it chooses to pursue Federal policy through the corporate form." He added, "But adding the words "competent jurisdiction" is pretty weak tea as a solution for abolishing jurisdiction that otherwise existed, particularly given the history of what was going on."

Justice Ginsberg questioned Brooks asking, "Well, your—your position then is competent jurisdiction—as long as you have the word ‘Federal’—‘State’ or ‘Federal,’ you’re home free. So it doesn’t the words ‘of competent jurisdiction’ doesn’t mean anything. They don’t—it’s the use of the word ‘Federal’ that gets you into Federal court. And ‘of competent jurisdiction,’ they just tagged along those words, and they don’t mean anything."

During Brooks’ argument, Chief Justice John Roberts expressed concern that 60,000 state-law foreclosure actions were headed to the federal courts. Brooks, using Freddie Mac’s federal subject jurisdiction as an analogy, noted that "Freddie Mac has almost as many foreclosures as Fannie Mae has" and "[t]here has been no race to the Federal courthouse."

The case is [Dkt. No. 14-1055](#).

Supreme Court docket. For details about this and other petitions and cases pending before the Supreme Court, please consult this [list](#) of selected banking and finance law cases awaiting action in the 2016 term. Issued opinions, granted petitions, pending petitions, and denied petitions are listed separately, along with a summary of the questions presented and the current status of each case.

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Companies: Cendant Mortgage Corp. d/b/a PHH Mortgage; Fannie Mae; Freddie Mac