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T R O U B L E D C O M P A N Y R E P O R T E R

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FREDDIE MAC: Fed. Cir. Requests More Briefing in Pizsel v. U.S.

The United States government has no liability when it directs a company to fire an employee and refuse to pay contractual severance benefits. That's what government lawyers told Judges Dyk, Schall and Hughes in Pizsel v. U.S., No. 15-5100 (Fed. Cir.), last week.

The short story is that Freddie Mac hired Anthony S. Pizsel as its CFO in 2006, and entered into a written employment agreement with him. That agreement said that if his employment were terminated without cause Freddie would make a lump-sum severance payment. Two weeks after placing Freddie into conservatorship in Sept. 2008, the Federal Housing Finance Agency directed Freddie's CEO to terminate Mr. Pizsel's employment without cause and make no severance payment to Mr. Pizsel. Freddie did as it was instructed.

In 2014, Mr. Pizsel sued the government. The complaint initiating Pizsel v. U.S., Case No. 14-cv-00691 (Ct. Fed. Cl.), argues that FHFA's actions constitute a taking of Mr. Pizsel's private property rights without just compensation in violation of the Fifth Amendment. The government says it took nothing from Mr. Pizsel, he should have filed a breach of contract suit against Freddie, and, moreover, because he worked for a highly regulated business he should have known the terms of his employment the government could change at any time.

Suing Freddie, of course, would have been an exercise in futility for Mr. Pizsel and his lawyers. As it does in every lawsuit brought against Fannie Mae and Freddie Mac, FHFA steps in as conservator and substitutes itself for the GSE. Then, pointing to section 4617(f) of HERA, asserts that it is fully insulated from all litigation. So, Mr. Pizsel and his lawyers turned to the Court of Federal Claims. In a Memorandum Opinion and Order dated June 12, 2015, the Honorable Lydia Kay Griggsby bought the argument that the government was free to change its mind and dismissed Mr. Pizsel's suit. Mr. Pizsel appealed.

At last week's hearing -- a recording of which is available at <http://goo.gl/gcBBWR> from the Federal Circuit's Web site -- the three-judge panel struggled to understand how a takings claim arises if Mr. Pizsel retained his breach of contract claim against Freddie. Judge Dyk tried to analogize the conservator's repudiation of Mr. Pizsel's employment contract to a trustee's rejection of a contract in bankruptcy, which would give rise to a claim for damages, but since FHFA has no process for asserting, disputing, resolving and paying

claims, the analogy doesn't work so well. Bankruptcy trustees and chapter 11 debtors-in-possession are, of course, subject to bankruptcy court oversight. FHFA takes the position all of its actions are exempt from judicial review.

The three-judge panel questioned how similar Mr. Pizsel's case may be to *A&D Auto Sales, Inc., et al. v. U.S.*, No. 13-5019 (Fed. Cir.) -- slip op. at <http://goo.gl/yFYnH8> (and written by Judge Dyk) -- where the government directed General Motors and Chrysler to reject a number of automobile dealer franchise contracts in exchange for financial support for the automakers' restructurings.

Left with unanswered questions, Judges Dyk, Schall and Hughes want Mr. Pizsel and the government to submit supplemental briefs by Apr. 29, 2016, addressing these three questions:

(A) Does the fact that the golden parachute provision, 12 U.S.C. sec. 4518(e), did not eliminate breach of contract claims preclude a takings action against the government?

(B) Would recovery for such a breach of contract claim be limited by the doctrine of impossibility or the sovereign acts doctrine and would the limitations on damages for breach of contract claims in HERA, 12 U.S.C. sec. 4617(d)(3)(A), preclude or limit recovery of breach of contract damages? Compare *Office & Prof'l Employees Int'l Union, Local 2 v. FDIC*, 27 F.3d 598 (D.C. Cir. 1994), with *Howell v. FDIC*, 986 F.2d 569 (1st Cir. 1993).

(C) If these doctrines or statutory provisions would limit recovery, what impact would that have on the existence of a takings claim?

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and the government is represented by David A. Harrington, Esq., at the U.S. Department of Justice.

The Federal Circuit received an Amicus Brief from Pershing Square Capital Management, L.P., and other GSE shareholders in support of neither party. Pershing Square urges the Federal Circuit to avoid relying on Judge Lamberth's decision in *Perry v. Lew* (on appeal to the D.C. Circuit and set for oral argument on Fri., Apr. 15) that dismissed shareholder complaints filed in the District Court challenging the Net Worth Sweep. Judge Lamberth's "extraordinary conclusion that the Government has blanket authority to confiscate the assets of regulated private corporations and their shareholders in federal conservatorship . . . cannot stand," Pershing Square says.

No federal conservatorship regime and nothing in the history of federal conservatorships suggests a grant to the U.S. government of an option

it can exercise whenever it wishes to nullify the property interests of stakeholders like Mr. Pizel and Fannie and Freddie preferred and common shareholders and seize all enterprise value for itself.

Monday's edition of the TCR delivers a list of indicative prices for bond issues that reportedly trade well below par. Prices are obtained by TCR editors from a variety of outside sources during the prior week we think are reliable. Those sources may not, however, be complete or accurate. The Monday Bond Pricing table is compiled on the Friday prior to publication. Prices reported are not intended to reflect actual trades. Prices for actual trades are probably different. Our objective is to share information, not make markets in publicly traded securities. Nothing in the TCR constitutes an offer or solicitation to buy or sell any security of any kind. It is likely that some entity affiliated with a TCR editor holds some position in the issuers public debt and equity securities about which we report.

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The Sunday TCR delivers securitization rating news from the week then-ending.

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