No. 02 – 392

IN THE

Supreme Court of the United States

EMIL NOTTI, ET AL.,

Petitioners,

v.

COOK INLET REGION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR JIMMIE D. HARTLEY, CIRI SHAREHOLDER, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does incorporation of a federal law by state law allow the removal under 28 U.S.C. § 1331 to federal court for state corporate law claims of breach of the corporate contract?

2. Should the Court resolve the issues presented and left unresolved in *Merrell Dow*?

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* and STATEMENT OF CONSENT [1]

Jimmie D. Hartley, a shareholder of respondent Cook Inlet Region, Inc., moves for leave to file the attached brief *amicus curiae* that is set out below. This brief *amicus curiae* in support of the petition is submitted pursuant to Rule 37 of the Rules of this Court.

Counsel for petitioner has consented to the filing of this brief and his consent letter will be lodged with the Clerk of the Court. However, counsel for *amicus* has not been able to confer with counsel for the respondent as of the date this brief is being sent to the printer. (In a recent exchange of phone calls with the respondent's attorney, he was only able to agree to forward the amicus' request for consent to the respondent's management.)

If the respondent does grant its consent to the filing of this *amicus* brief, then a letter expressing the consent of the respondent also will be lodged with the Clerk. If the respondent's consent is withheld, then the *amicus* moves pursuant to Rule 37.2(b) for leave to file this *amicus curiae* brief.

The interest of the amicus arises from his status as a shareholder of respondent Cook Inlet Region, Inc. and as a member of the putative class on whose behalf this suit was filed in the state court of Alaska.

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[1] Pursuant to Rule 37.6, amicus states that no counsel for a party authored this brief in whole or part, and no person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

INTEREST OF THE *AMICUS CURIAE*

Jimmy D. Hartley is a Cook Inlet Region, Inc. shareholder[2] who resides in Anchorage, Alaska. Mr. Hartley has an interest in having shareholder claims adjudicated in his local state court and in having any appeal decided by the Supreme Court of Alaska, which is the ultimate judicial authority in matters of Alaska corporate law. Amicus sees a clear case where the conflicts among the circuits over the issue of what is a federal question are now affecting Alaska Natives in their relationship as shareholders of Alaska native corporations. The conflicts in the circuits should now be resolved.

INTRODUCTION

Amicus supports petitioners' argument that the court of appeals denied the petitioners' appeal in error and that a Writ of Certiorari should be granted.

SUMMARY OF ARGUMENT

Cook Inlet Region, Inc. (CIRI) is an Alaska domestic business-for-profit corporation. The majority of its Alaska Native shareholders live in Alaska. The cause of action arose under Alaska state law and the

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[2] Cook Inlet Region, Inc. (CIRI) has more than 7,000 shareholders, at least half of whom reside within Alaska and many of whom reside in the Lower 48 and elsewhere.

remedy is an Alaskan remedy. The district court erred in denying remand to the Alaska Superior Court. The court of appeals for the Ninth Circuit erred in affirming the district court's decision. The facts of this case highlight the confusion in the circuits over the issue of federal question jurisdiction.

ARGUMENT

This case involves an Alaska Native Corporation incorporated under Alaska state law. The majority of stockholders live in Alaska. Because the corporation's stock is not publicly traded, there is no Securities and Exchange Commission oversight. Also, there are no exchange rules like New York Stock Exchange rules to comply with. There is no Federal Trade Commission oversight. There are no market forces to regulate corporate behavior. Equity analysts do not analyze the stock and report corporate financial results or future prospects to stockholders or to the press. The point is that one of the few remedies for an aggrieved stockholder is the Alaska Corporations Code.

The cause of action in the complaint was discriminatory dividends paid by CIRI. The cause of action arose under the Alaska corporations code for which there is a remedy. Because federal law is incorporated into the Alaska corporations code under A.S. 10.06.960(f), federal and state law come into contact. Such laws have been termed hybrid laws. The pertinent federal law incorporated into the Alaska corporations code is ANCSA § 7(r) [43 U.S.C. § 1606(r)]. Aggrieved stockholders

must look to either state or federal law for help and not to regulatory agencies like the SEC. Cook Inlet Region, Inc. is one of the largest Alaska Native corporations, but there are over 200 Alaska Native corporations in Alaska organized under ANCSA. This issue of federal question jurisdiction is important to all of these native corporations and their shareholders, because their practical choices to adjudicate disputes is limited to either federal or state law.

ANCSA § 7(r) is vague and does not provide for a separate federal cause of action or a federal remedy. First, the statute refers to the authority of the "Native Corporation to provide benefits to its shareholders . . . to promote the health, education, or welfare of such shareholders". (underline added) No guidance in the statute is given on the payment of dividends. Benefits are not necessarily based on stock ownership and dividends are. A judge in his or her discretion may find that the term benefits encompasses the payment of dividends, but that is a malleable person exercising discretion. Secondly, the statute permits certain behavior like the payments of benefits, but it does not create an express right in the shareholders to these benefits. One sees this permissive character in such sentences as "Eligibility for such benefits need not be based on share ownership in the Native Corporation and such benefits may be provided on a basis other than pro rata based on share ownership." This permissive, passive language is quite different from language creating express rights. This is an important point when considering the ambiguous and conflicting law on when federal question jurisdiction is appropriate.

A judge when confronted with such vague federal law incorporated into a state statute will be familiar with *Merrell Dow Pharmaceuticals v. Thompson,* 478 U.S. 804 (1986). *Merrell Dow* held that when a private right of action was not provided for by Congress to enforce the relevant provision of federal law, federal jurisdiction was inappropriate. Because Congress did not provide a separate federal private right of action based on ANCSA § 7(r), then federal jurisdiction in this case would be inappropriate. This bright-line rule was not the end of the Court's reasoning. The *Merrell Dow* Court also preserved the holding in *Smith v. Kansas City Title & Trust Co.,* 255 U.S. 180 (1921) which held that "right to relief depends on construction or application of the Constitution or laws of the United States". *Id.* at 199. The *Smith* Court emphasized the discretionary nature of federal jurisdiction questions. The *Merrell Dow* Court introduced the discretionary concept of "contextualized inquiry" into the nature of the federal right involved. "Contextualized inquiry" suggests that even if no federal private right of action existed, federal jurisdiction could be found in the presence of a substantial federal interests.

Such "contextualized" inquiries are made by judges of nebulous and abstract concepts such as congressional intent, judicial power, and the federal system. Interpretations by judges of federal statutes are subjective and fallible. Such invitations by the *Merrell Dow* Court to use discretion in defining the scope of federal jurisdiction leads to lack of clarity in the circuits.

There is one case that is helpful in an attempt to define some standards when a judge uses discretion.

Soon after *Merrell Dow* was decided, the Second Circuit in *West 14th Street Commercial Corp. v. 5 West 14th Owners Corp.*, 815 F.2d 188 (2d Cir. 1987), *cert. denied*, 484 U.S. 850 and 484 U.S. 871 (1987), found that a federal law that determines the "rights and definition of relationships *created by federal law*" was appropriate for federal jurisdiction, despite the non-existence of a federal private right of action. *Id.*, 815 F.2d at 196 (italics in the original). Such positive, proactive language should be contrasted with the permissive, passive language of ANCSA § 7(r) which "authorizes" benefits, and where such "benefits may be provided", but no rights are created. There is no shareholder right to these benefits, and Congress provided for no cause of action or remedy if a shareholder did not receive these benefits.

Federal interests are not as strong under the permissive, passive language of ANCSA § 7(r) as would be under a federal statute that proactively creates rights. The district court judge and the United States District Court of Appeals for the Ninth Circuit overestimated the federal interests implied in ANCSA § 7(r). They should have remanded the case back to the Alaska Superior Court.

Such mistakes are easy to make when discretion is the foundation for justice. 28 U.S.C. §1331 has been a troublesome statute ever since it was enacted in 1875. Leaving the question of federal jurisdiction open to such discretionary concepts as "contextualized inquiry" is an open invitation for confusion in the circuits. Due to the importance of federal question jurisdiction to the Alaska native community, amicus urges the Court to resolve the

confusion in the circuits in favor of easy to understand bright-line rules.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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