

**Moylan v. Camacho (06-116)***Appealed from the Supreme Court of Guam (July 23, 2003)***Oral argument: Jan. 8, 2007**

Many governments struggle with the issue of public debt, attempting to strike a delicate balance between securing adequate funding and ensuring that their citizens need not pay huge public debts through taxes. This case deals with such a dilemma and the differing views of two government officials in Guam on how this issue should be resolved. Under the Organic Act of Guam, the amount of debt that the government of Guam can incur is limited to 10 percent of the “aggregate tax valuation” of property in the territory. The governor of Guam interpreted this to mean the full value of Guam’s property. The attorney general disagreed, stating that public debt cannot exceed the assessed value of the property. In addition, this case addresses a procedural issue, namely whether the time frame for applying for Supreme Court review is tolled when the case is already under review in a different court. The Supreme Court’s decision in this case will determine the limit to which Guam can push its public indebtedness and whether the appeal to the Court was made in a timely fashion.

**Facts**

In order to generate funds, the governor of Guam, Felix Camacho, proposed the issuance of approximately \$393 million in bonds. However, Guam’s attorney general, Douglas Moylan, refused to endorse the governor’s proposal because, in his view, the amount of the issuance exceeded the cap on public debt set by the Organic Act of Guam. According to Moylan, the Organic Act does not permit the amount of public debt to exceed 10 percent of the assessed (that is, for tax purposes) value of the property on Guam. If this is true, Camacho’s proposed bonds are quite excessive. However, Camacho interprets the Organic Act to allow indebtedness up to 10 percent of the appraised (that is, full) value of property in Guam.

Under this reading of the Organic Act, Camacho’s bond proposal falls within the acceptable range of debt.

The Supreme Court of Guam ruled in favor of Camacho. At the time of the decision by the Guam Supreme Court, the U.S. Court of Appeals for the Ninth Circuit had exclusive discretionary jurisdiction to review its cases. Following Attorney General Moylan’s timely filing, the Ninth Circuit granted certiorari. But while the case was pending, Congress passed an amendment to the Guam Organic Act moving jurisdiction for Guam Supreme Court appeals to the U.S. Supreme Court. After full briefing and argument, the Ninth Circuit dismissed the case based on lack of jurisdiction. At this point, Moylan had not appealed to the Supreme Court within the required statutory time frame, because he had initially planned to take his case to the court of appeals. Thus, the Supreme Court must also determine when the statute tolled and could bar a decision on the merits altogether.

**Jurisdiction and the U.S. Supreme Court Statute of Limitations**

The U.S. Supreme Court requires applicants to file petitions for certiorari within 90 days of the previous disposition. The requirement includes the caveat that any pending action that could change the ruling suspends the commencement of the 90-day period until that action has been concluded.

Moylan points out that at the time of the initial decision, the act granted the Ninth Circuit sole jurisdiction over discretionary review of all decisions made by the Guam Supreme Court. As a result, Moylan argues that the U.S. Supreme Court was not an available forum at the time he filed his suit in the Ninth Circuit. Moylan acknowledges that there is a 90-day time limit for filing petitions of certiorari with the Court under 28 U.S.C. § 2101(c), but argues that the 90 days only begin to run when a final judgment has been reached by a lower court. Moylan contends that, as soon as the Ninth Circuit granted certiorari, the effect of the Guam Supreme Court’s decision was suspended

and the 90-day limitation period was “tolled,” or halted, because the “parties’ rights [became] subject to alteration.”

In addition, Moylan claims that, when a higher state court exercises its discretion in reviewing a lower state court’s decision, the underlying judgment is considered “suspended” for purposes of U.S. Supreme Court review. Thus, the same rule should apply in this case, because the relationship between the Guam Supreme Court and the Ninth Circuit at the time of the initial decision is analogous to the state court context.

Finally, because the act changed the jurisdictional rules while the case was pending in the Ninth Circuit, Moylan contends that review by the U.S. Supreme Court became proper only after the Ninth Circuit dismissed the case. Moreover, if the Court were to find Moylan’s filing untimely, it would lead to “unnecessary protective filings” that would decrease the Court’s efficiency and consume valuable time for potential litigants.

Nonetheless, Camacho argues that the 90-day statute of limitations had already run by the time Moylan filed his petition with the U.S. Supreme Court; therefore, the Court should not have granted certiorari. Moreover, even if the time limit was “tolled” during the Ninth Circuit’s review of the case, because the implications of the case affect only Guam, it is solely a local concern in which the U.S. Supreme Court should not be involved.

Clearly, the Supreme Court’s decision will determine whether Moylan exceeded the time limit for appeal and will provide a clearer picture of the Court’s interpretation of which actions toll the 90-day time frame. The decision may also shed some light on the direction of the Roberts Court. Justice Roberts has been criticized by his fellow justices as taking a narrow approach to issues—and occasionally deciding cases on technicalities—in order to arrive at greater consensus among the justices. The question regarding the

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tolling of the 90-day filing period is just such a technicality on which this entire case could turn.

### Interpretation of Guam's Organic Act

The substantive issue that the Court will consider is the interpretation of a phrase in Guam's Organic Act. Because the act functions as Guam's Constitution, lawmakers cannot pass legislation contradicting it. What is important is that the act contains a provision limiting the debt incurred by the government of Guam to "10 per centum of the aggregate tax valuation of the property in Guam." Another Guam law states that, if the debt of Guam exceeds the amount of money that is available in Guam's General Fund, the Governor of Guam can issue bonds to raise extra funds, provided that the amount of these bonds does not exceed approximately \$420 million.

In recent years, Guam has experienced a reduction in tourism revenues, and the United States has invested less money in military projects on the island. Because military spending and tourism dollars are two of Guam's primary sources of income, the decline in these revenues has had a significant effect on the island's economy. In addition, Guam's economy has suffered because of several natural disasters, including an earthquake and typhoons. Finally, the economic crisis that Asia experienced in 1997 hurt Guam financially, as did the downturn of Japan's economy, because Japan traditionally invested large amounts in Guam's markets. In response to the need for extra money to pay off Guam's debts and in accordance with the law authorizing bond issuance, Gov. Camacho decided to issue nearly \$400 million in bonds. However, this decision raised the question of whether Camacho's actions had violated the act.

Attorney General Moylan first argues that, under Guam law, Camacho cannot authorize the bond issuance without the attorney general's approval. More important, Moylan states that the act's reference to "aggregate tax valuation" refers to the value of the property on Guam as determined through assessment for taxation purposes. Moylan

reasons that the Guam Supreme Court failed to take into account either the plain language or the purpose behind the act's debt limitation provision in determining that the "aggregate tax valuation" means the full value of all property on Guam. Furthermore, the debt limitation provision is designed to ensure that the legislature takes on only as much debt as the government might reasonably expect to recover through tax revenue. By fixing the limitation at the "aggregate tax valuation" of all property on Guam, Congress meant to ensure that the level of allowable debt be correlated to some uniform fraction of the full market value of property. Because the assessed value of property on Guam is only 35 percent of its full value, Camacho's proposed bonds violate the debt cap provision.

Moylan points to the Virgin Islands and Puerto Rico as examples of other territories with these limitations and says that using the full market value to determine the government's appropriate level of borrowing, but relying on another test for determining the valuation of property for tax purposes, vastly increases the amount of permissible borrowing while simultaneously limiting tax liability for individual citizens. This situation, Moylan argues, subverts Congress' basic purpose in enacting the debt limitation provision and increases the likelihood that "future generations of taxpayers [will be] saddled" with debts incurred irresponsibly through manipulation by the government.

After making several procedural arguments, including the accusation that by appealing this case to the U.S. Supreme Court, Moylan impermissibly attempted to determine the meaning of a federal law (§ 11) by reference to a local law (11 G.C.A. § 24102(f)), Camacho argued primarily that a plain language interpretation of the phrase "aggregate tax valuation" shows that Congress was referring to the appraised value, because the term "valuation" refers to an item's total worth. Camacho also contends that a holistic reading of the act supports his interpretation. If the Court rules in favor of Camacho on this issue, the bonds can be authorized and Guam's government will have greater

leeway in terms of public indebtedness.

Furthermore, Camacho proposes that a straightforward reading of the language in § 11 suggests that the Guam Supreme Court's interpretation of the provision was correct. He concedes that the term "tax" was meant to modify "valuation," but he stated that the most logical meaning of the phrase is simply that "the debt limit must be based on the value of property being taxed." Furthermore, Camacho cited the broad powers that Congress granted to Guam in establishing the territory's own debt ceilings and contrasted the language used in the Guam Organic Act with that found in the Organic Act of the Virgin Islands, which refers specifically to the "aggregate assessed valuation of taxable real property" in fixing that territory's debt ceiling. Thus, if Congress wanted Guam to have the same valuation scheme, it would have used the same language in both acts.

The outcome of this case will determine how Guam's debt load must be calculated. In addition, it will establish a uniform rule regarding how and when actions taken by lower courts toll the statutory time limit on petitions for certiorari to the U.S. Supreme Court.

### TFL

*Prepared by Molly Curren Rowles and Jill Diamond.*

### **Zuni Public School Dist. No. 89 v. Department of Education (05-1508)**

*Appealed from the U.S. Court of Appeals for the Tenth Circuit (Dec. 30, 2004)*

**Oral argument: Jan. 10, 2007**

The Federal Impact Aid Act provides federal funding to school districts located on Indian reservations, military bases, or land that has a federal presence. Under the act, the secretary of education can divert federal aid from the district back to the state if the secretary determines that the operational funding of the state's school district is "equalized." After determining that New Mexico's funding for the year 1999–2000 was equalized, the secretary

allowed the state to withhold federal subsidies from certain districts. The Zuni Public School District claims that the secretary's formula for determining whether a school district receives federal subsidies conflicts with the plain meaning of the act. In resolving this issue, the Supreme Court will clarify the scope of *Chevron v. NRDC*, the seminal case governing agency interpretations of enabling legislation.

## Facts

The Zuni Public School District is located almost entirely within Zuni and Navajo Reservation lands in New Mexico. The Federal Impact Aid Act provides subsidies to Zuni school districts as well as other school districts located on Indian reservations, military bases, or land that has other types of federal presence. The act permits a state to offset its operational funding to school districts by the amount of the federal aid if it can prove that the districts are "equalized." The rationale behind the act is that, if all districts are receiving the same amount of funds, "federally impacted" districts are no worse off because of their special status than other districts are. Pursuant to statutory authorization, the secretary of education initially determined equalization according to a standard contained in a 1976 regulation that held that a state is equalized if there is no more than a 25 percent difference in per pupil revenue between the district with the highest per pupil revenue and the district with the lowest per pupil revenue. To ensure accuracy and fairness, the formula excludes outliers: districts are ranked according to per pupil expenditure, with districts that have pupil attendance at or above the 95th percentile and at or below the 5th percentile excluded.

The secretary of education used this standard for almost 20 years, until 1994, when Congress altered the statutory language. The new language proposed a different method for excluding outliers: it focused on per pupil expenditure, not pupil attendance, and instructed the secretary to disregard districts "with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues."

In 1995, the secretary promulgated a rule that used the 1976 enabling statutory language but revived the pupil-attendance method of determining disparity in the appendix. Using the pupil-attendance method for the 1999–2000 fiscal year, the secretary found that New Mexico was equalized and allowed the state to reduce operational funding by \$50 million, or approximately 2.7 percent of the state's expenditures on public education. If the per-pupil expenditure formula had been applied, the state would not have been deemed equalized, and districts like the Zuni Public School District would have continued to receive the \$50 million subsidy.

Zuni Public School District objected to the use of the pupil-attendance formula and sought relief from an administrative law judge in the Department of Education. When that judge determined that he lacked jurisdiction to question the secretary's method and the secretary refused to hear an appeal, the Zuni district successfully appealed to the U.S. Federal Court of Appeals for the Tenth District, and the three-judge panel upheld the secretary's method. On review, an en banc panel of the Court of Appeals was evenly divided and, therefore, let the decision stand. On Sept. 26, 2006, the U.S. Supreme Court granted certiorari.

## Discussion and Analysis

The battle lines for the confrontation between the three branches of government were sharply drawn with the Court's ruling in *Chevron v. NRDC*, which established the now well-settled formula for determining the appropriate judicial stance in reviewing an agency's interpretation of its enabling statute. As a threshold matter, a court must determine whether the statute clearly expresses Congress' intent. If Congress has spoken directly to the matter at hand, then the court's inquiry ends. But if the statute is silent or ambiguous as to congressional intent, then the agency interpretation will stand if it is a permissible construction of the statute.

Lower courts promptly adopted the *Chevron* two-step analysis, also known as "*Chevron* deference," in reviewing agency constructions of the statute.

In the last few years, however, the Supreme Court has begun to whittle down *Chevron* deference.

## The Competing Standards

The dispute at issue involves the formula used to remove school districts from the top and bottom of the initial ranking to determine equalization. The secretary of education's formula would disregard the districts at the top and bottom of the list until 5 percent of the student population is removed from both ends. Zuni's standard would determine where the 95th and 5th percentiles of money per student fall on the ranked list of districts and disregard districts above and below those numbers. Zuni's standard looks only at the list, not at the overall student population of the state.

## The Statutory and Regulatory Language

The debate between these standards focuses on 20 U.S.C. § 7709 (b)(2)(B)(i), which states that, in making the redacted list, one should "disregard [school districts] with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State[.]" The secretary of education's regulation, 34 C.F.R. pt. 222, subpt. K, app (2006), implements the statute. The appendix of the regulation dictates that the list should be redacted in a way that "[identifies] those [school districts] in each ranking that fall at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of those [districts]."

Under *Chevron*, a regulation created by an administrative agency should be given deference if the statute that authorized the regulation was ambiguous and the interpretation in the regulation is a permissible one. Therefore, the first step in the analysis is to determine whether the statute is ambiguous.

## Ambiguity in the Statute

The secretary of education argued that the Court should defer to the agency's interpretation of the Federal Impact Aid Act because it is ambiguous. Even if the act is unambiguous, the secretary continued, the Court should

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let the agency construction stand because it results in a sensible outcome. An exclusion method that is sensitive to pupil attendance is more evenhanded between states than a method that does not take pupil attendance into account. Using the secretary's method, the remaining field in every state will include 90 percent of all students, whereas using the method preferred by the school district will create differences among states. For example, in states with few large districts, the remaining field might only be, say, 70 percent of students, and in states with many small districts, the remaining field could be 95 percent of students. It is interesting to note that arguments for the secretary's method all emphasize that the history and purpose of the statute is integral to the question of ambiguity, injecting intent into what is normally a textual exercise.

The Zuni Public School District, however, urged the Court to refrain from according *Chevron* deference to the secretary's formula. According to Zuni, Congress did not give the secretary express or implied authority to override its formula. Furthermore, because the secretary's formula conflicts with the explicitly stated statutory method, it cannot be a permissible rendition of the statute. Moreover, the procedure for eliminating districts is specific and requires determining the 95th and 5th percentiles based on the expenditure figures only. In particular, the placement of the phrase "of such expenditures" after "5th percentile" appears to eliminate ambiguity by specifying how the percentiles are to be determined. The Zuni school district argues that, if the plain meaning of percentiles is applied to the statute, the method is obvious.

#### **Congressional Intent**

Assuming that ambiguity exists, either party can offer proof of a clear congressional intent to settle the dispute. Here, both sides argue that Congress' intent is clear, but each side argues that the intent supports its interpretation. In the secretary's view, Congress clearly wished to adopt the formula that the secretary used from 1976 onward, because Congress never explicitly stated that it wished to diverge from that for-

mula when it crafted the 1994 statute. In opposition, the Zuni Public School District argues that the language of the 1994 statute clearly indicates Congress' intent to modify the standard. Zuni observes that the 1974 statute specifically directed the secretary of education to create a test for determining whether a state had equalized its funding of school districts. In contrast, the 1994 statute removed the language authorizing the secretary to create a standard and included a "computation" section, which specifies the 25 percent disparity standard and the basis for determining which school districts should be included on the list that determines the disparity. Most important, the 1994 statute does not have any language indicating that the percentiles should be based on pupil attendance.

The Zuni Public School District appears to have the stronger position, because *Chevron* and its progeny point to the text of the relevant statute as the starting point. The secretary's argument encourages the Court to either ignore the statutory language or interpret it with reference to the history of the secretary's prior regulation.

#### **Application of Chevron Deference**

In essence, the secretary's interpretation may be impermissible because there is insufficient ambiguity in the statute. Nonetheless, the Court may agree with the secretary or rule that the regulation falls outside the scope of *Chevron* deference, because the regulation was not meant to be a substantive change to the statute and did not go through the rulemaking procedures required by *Chevron* and *U.S. v. Mead Corp.*

More significantly, a finding for the secretary of education could signal that the Supreme Court is re-affirming *Chevron* deference after *Mead* and *Brown & Williamson*. Conversely, an outcome for the Zuni Public School District will continue the erosion of *Chevron*. Given that the decision falls squarely within *Chevron*'s structure, because it involves an agency's interpretation of a legislative directive, and given that the secretary's interpretation arguably leads to a sensible result, finding for Zuni would

strike a serious blow to *Chevron* deference.

#### **Additional Implications**

A decision either way has potential political implications. Conservatives on the Court have been the unlikely champions of *Chevron* deference. With Justices Roberts and Alito on the Court, there might be a movement to resuscitate *Chevron*.

Fundamentally, an outcome for the secretary of education will have an almost immediate impact on all districts that currently receive funding under the Federal Impact Aid Act. School districts like Zuni's that serve children on Native American reservations would be subject to a formula that might rob them of substantial funding. Furthermore, this change in policy would affect not only school districts located on Indian reservations but also others on any federally impacted land. A finding for the Zuni Public School District, however, would maintain the status quo. **TFL**

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*Prepared by Ferve Ozturk and Dylan Letrich (with thanks to Professor Jonathan Siegel for his insight into this case).*

#### **United Haulers Assn. Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth. (05-1345)**

*Appealed from the U.S. Court of Appeals for the Second Circuit (Feb. 16, 2006)*

**Oral argument: Jan. 8, 2007**

**S**olid waste processing has been a contentious issue since the 1980s, when local governments were implicated in environmental lawsuits. Local governments tried to take control of these facilities but found that they faced Commerce Clause issues when they tried to protect their local facilities with flow control ordinances designed to ensure adequate tipping fees. This case represents the latest attempt by local governments to protect local waste processing facilities by requiring that local solid waste be directed to the publicly owned facility. In this case, the Second Circuit ruled that, because the ordinance favored a public rather than

a private facility, it was not unfairly discriminatory. In addition, the ordinance passed a balancing test whereby the court balances the local interest with the burden on interstate commerce. At stake in this case are local governments' interests in sustaining environmentally sound local processing plants that represent significant sunk cost versus interstate waste hauling and out-of-state processing plants hoping to sustain their businesses. Full text is available at [www.law.cornell.edu/supct/cert/05-1345.html](http://www.law.cornell.edu/supct/cert/05-1345.html). **TFL**

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*Prepared by Elizabeth Cusack and John Schultz.*

### **Schiro v. Landrigan (05-1575)**

*Appealed from the U.S. Court of Appeals for the Ninth Circuit (March 8, 2006)*

**Oral argument: Jan. 9, 2007**

What must a defense attorney do when faced with a client who, after having been found guilty of murder, refuses to allow family members to testify prior to sentencing, even though those family members would introduce evidence that might result in a reduced sentence? In this case, the Supreme Court will address the extent to which a criminal defendant may claim that his defense attorney acted incompetently by not introducing mitigating evidence during his trial, even when the defense attorney directly followed his client's orders not to do so. Furthermore, the Court will determine the extent to which a federal court may review and overturn a defendant's state court sentence if he claims that his attorney acted incompetently. Full text is available at [www.law.cornell.edu/supct/cert/05-1575.html](http://www.law.cornell.edu/supct/cert/05-1575.html).

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*Prepared by Tim Birnbaum and Peter Milligan.*

### **Sinochem Int'l v. Malaysia Int'l Shipping (06-102)**

*Appealed from the U.S. Court of Appeals for the Third Circuit (Feb. 7, 2006)*

**Oral argument: Jan. 9, 2007**

The forum non conveniens motion asks a court to dismiss a pending

case so that the dispute may be pursued in a more appropriate forum. In this case, a shipment from the United States to China went awry, and the parties pursued actions in both Chinese and American courts. In one of the suits, a federal district court granted a forum non conveniens motion, although it had not conclusively established that it had jurisdiction over the parties. If the Supreme Court reasons that a forum non conveniens motion may be resolved before jurisdiction is determined, then litigants will benefit from expedient court decisions in appropriate forums. If the Supreme Court finds that a lower court may not dismiss the case on the ground of forum non conveniens before conclusively establishing jurisdiction, then litigants will be faced with the potential of lengthy proceedings in inappropriate forums. Full text is available at [www.law.cornell.edu/supct/cert/06-102.html](http://www.law.cornell.edu/supct/cert/06-102.html). **TFL**

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*Prepared by Khara Ashlynn Tusa and Robin M. Davis.*

### **Davenport v. Washington Education Association (05-1589); Washington v. Washington Education Association (05-1657)**

*Appealed from the Washington Supreme Court (March 16, 2006)*

**Oral argument: Jan. 10, 2007**

The state of Washington and several Washington educational employees brought suit against the Washington Education Association alleging that the union impermissibly used nonunion member "shop fees" to finance political activities in violation of Wash. Rev. Code § 42.17.760, which requires the union to receive affirmative authorization from nonmembers before using their fees for political purposes. The Washington Supreme Court sided with the union and struck down § 760 as unconstitutional. Washington argued that the union does not have a First Amendment right to use shop fees for political purposes. The union responded that § 760 essentially blocks its ability to assert a collective political voice and must survive strict scrutiny in order to pass constitution-

al muster. The Supreme Court's decision will determine the balance of First Amendment protection granted to a labor union relative to the protection afforded to dissenting nonmembers who pay shop fees. Full text is available at [www.law.cornell.edu/supct/cert/05-1589.html](http://www.law.cornell.edu/supct/cert/05-1589.html). **TFL**

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*Prepared by Clinton Becker and Samantha Kim.*

### **Travelers Casualty & Surety Co. v. Pacific Gas & Electric Co. (05-1429)**

*Appealed from the U.S. Court of Appeals for the Ninth Circuit (Feb. 7, 2006)*

**Oral argument: Jan. 16, 2007**

Travelers is appealing a decision made by the Ninth Circuit Court denying the company attorneys' fees for claims governed entirely by federal bankruptcy law. Travelers maintains that it is entitled to the indemnity rights it negotiated under its private contract with Pacific Gas and Electric Co. Travelers relies on precedent to conclude that the substantive rights under a private contract are governed by state law and therefore the Ninth Circuit's decision was wrongly decided and should be reversed. Pacific Gas argues that the Ninth Circuit correctly concluded in prior cases that attorneys' fees pursuant to a private contract may be granted in cases where the rights are governed by state law, but not when they are peculiar to federal bankruptcy law. The Ninth Circuit reasoned that state law cannot govern federal issues such as indemnity of attorneys' fees for claims resulting from objections to debt-restructuring plans and disclosure statements implemented by a company under Chapter 11 bankruptcy. The Ninth Circuit was concerned that a decision in support of nonprevailing creditors whose conditional rights have not been triggered or impaired in cases where the debtor has not defaulted in bankruptcy cases would flood the court dockets with these premature claims. The Supreme Court's decision will resolve whether private parties can contract for rights that have not been ex-

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explicitly granted by federal bankruptcy law. The decision will affect the legal protective strategies that creditors use to shield their investments from debtors who have filed for bankruptcy. Full text is available at [www.law.cornell.edu/supct/cert/05-1429.html](http://www.law.cornell.edu/supct/cert/05-1429.html). **TFL**

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*Prepared by Heidi Abreu and Miguel Loza.*

**Safeco Ins. Co. v. Burr (06-84);  
GEICO Gen. Ins. Co. v. Edo (06-100)**

*Appealed from the U.S. Court of Appeals for the Ninth Circuit (Aug. 4, 2005/Jan. 25, 2006)*

**Oral argument: Jan. 16, 2007**

The Fair Credit Reporting Act requires a lender to send an “adverse action” notice to a consumer when his or her credit score has negatively affected the terms and rates of the credit given. *Safeco* and *Geico*, two separate cases consolidated for oral argument, are class action suits against two insurance companies that allegedly failed to provide such notice. The issue in these cases is the Ninth Circuit’s expanded definition of “willful” under 15 U.S.C. § 1681n, which if upheld will expose every company that extends consumer credit to greatly increased liability and administrative costs. The Supreme Court’s decision will resolve a split among the circuit courts and determine the ultimate definition of “willfulness” under the act. Full text is available at [www.law.cornell.edu/supct/cert/06-84.html](http://www.law.cornell.edu/supct/cert/06-84.html). **TFL**

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*Prepared by Kiernan Joliat and Emily Green.*

**Brewer v. Quarterman (05-11287); Abdul-Kabir, fka Cole v. Quarterman (05-11284)**

*Appealed from the U.S. Court of Appeals for the Fifth Circuit (March 1, 2006/July 22, 2005)*

**Oral argument: Jan. 17, 2007**

Brent Ray Brewer and Jalil Abdul-Kabir, the petitioners in these cases, are two inmates on death row

in Texas. They are seeking writs of habeas corpus from the federal courts to overturn their death sentences. During the sentencing phase of their trials, the jury was asked to determine whether the defendant killed “deliberately,” and whether he would constitute a “continuing threat to society.” The juries in both cases returned two “yes” answers, which dictated a sentence of death under state law. The inmates argue that these questions did not give the jury a meaningful basis on which to consider mitigating evidence of childhood abuse and mental illness. The U.S. District Court for the Northern District of Texas denied the habeas corpus petition for Abdul-Kabir but granted it for Brewer. The Fifth Circuit, in ruling for the state on both petitions on appeal, held that the jury instruction enabled the jury to consider mitigating evidence in its deliberations on the question of future danger to society. Therefore, the Fifth Circuit held that the state court did not misapply federal law, and the writ of habeas corpus could not be granted. The inmates disagree with this conclusion and are now making an as-applied challenge to the Texas statute before the U.S. Supreme Court. These cases could have a significant impact on the ongoing national debate about the appropriateness of enforcing the death penalty against people who are mentally ill. Full text is available at [www.law.cornell.edu/supct/cert/05-11287.html](http://www.law.cornell.edu/supct/cert/05-11287.html). **TFL**

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*Prepared by Cecelia Sander and Breanne Atzert.*

**Smith v. Texas (05-11304)**

*Appealed from the Court of Criminal Appeals of Texas (March 1, 2006)*

**Oral argument: Jan. 17, 2007**

LaRoyce Lathair Smith, who was sentenced to death in 1991, appeared before the Supreme Court for the second time. Smith argued that the Texas Criminal Court of Appeals denied his petition for state habeas corpus relief in contravention of the analysis standards handed down in the Supreme Court’s first opinion. In ad-

dition, Smith argued that the Criminal Court of Appeals applied a heightened egregious harm standard to a procedural issue that it failed to consider on direct appeal. Texas, on the other hand, contended that the Criminal Court of Appeals was justified in reconsidering issues not addressed by the Supreme Court and asserted that the standards applied were the prevailing state standards for evaluating Smith’s claim. The Supreme Court’s decision in this case should clarify the proper way for state courts to evaluate defendants’ claims that attack the constitutionality of jury instructions regarding mitigating evidence during the sentencing phase of capital cases. Full text is available at [www.law.cornell.edu/supct/cert/05-11304.html](http://www.law.cornell.edu/supct/cert/05-11304.html). **TFL**

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*Prepared by Angela Winfield and Richard Beaulieu.*