No. 98-186

In the Supreme Court of the United States

OCTOBER TERM, 1997

UMIC, INC., AND ALEX CHARLES DENNEY, PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS MANAGER OF THE FSLIC RESOLUTION FUND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that because prior settlements were for separate and distinct injuries, the jury's damage awards against petitioners for breach of fiduciary duty should not be reduced by the amounts of the settlements.

2. Whether federal law entitled petitioners to a credit for the settlement amounts against the jury's damage award on the Federal Deposit Insurance Corporation's claims under the Commodity Exchange Act, 7 U.S.C. 1 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals is reported at 136 F.3d 1375. Pet. App. 1-30. The district court's order denying petitioners' motion to reduce the judgment against them is unreported. Pet. App. 31-44.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1998. A petition for rehearing was denied on April 28, 1998. Pet. App. 45-46. The petition for a

writ of certiorari was filed on July 27, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Universal Savings Association, F.A. (Universal), a federally-insured thrift located in Oklahoma, invested heavily in Treasury bonds. Rising interest rates led the value of the bonds to decline. Petitioner Alex Charles Denney (Denney) was a sales representative for UMIC, a full service brokerage firm. In 1984, Denney made a presentation to Universal's Board of Directors, explaining that the thrift could use financial options and futures to hedge against the risk of rising interest rates. Pet. App. 3. After the presentation, Universal opened a commodities account with Geldermann, the firm executing the trades, and with UMIC, the introducing broker. *Id.* at 4. Although Denney and UMIC knew that Universal was subject to federal thrift regulations limiting speculative commodities trading—and despite UMIC's written policy restricting its account to low risk hedging—only one-fifth of the 73,000 trades in Universal's account were hedges. The rest of the trades increased, rather than decreased, Universal's exposure to interest rate fluctuation risk. When the account was finally closed in early 1986, the risky and highly speculative trading Denney recommended resulted in losses of $6.2 million, more than $3.4 million of which constituted commissions to Denney, UMIC, and Geldermann. *Id.* at 4-5. In early 1987, Universal closed and FSLIC was appointed its receiver. *Id.* at 3.

2. FSLIC sued UMIC, Denney, Geldermann and others to recover Universal's losses. Pet. App. 2. The FDIC, as Manager of the FSLIC Resolution Fund, succeeded FSLIC as plaintiff. *Id.* at 3. The FDIC alleged that Geldermann, UMIC and Denney violated the Com-

modity Exchange Act (CEA), 7 U.S.C. 1 *et seq.*, and that UMIC, Denney and other defendants breached their fiduciary duties to Universal and engaged in common law fraud. Pet. App. 2. The FDIC subsequently dismissed all of its state law claims against Geldermann, leaving only the CEA claim; before trial, the FDIC and Geldermann settled the CEA claim for $600,000. *Id.* at 5. At trial, the jury awarded the FDIC $288,000 against Denney and $624,000 against UMIC specifically for breaching their fiduciary duties under state law, and an additional $288,000 against Denney specifically for CEA violations. *Ibid.*

3. After trial, Denney and UMIC sought to reduce those awards by $600,000 (the amount of the Geldermann settlement) and by $725,000 (the amount the FDIC received for settling unrelated litigation against Universal's board of directors for mismanaging Universal in connection with other investments (the Sevier Settlement)), pursuant to the rule requiring pro tanto reductions for settlements. Pet. App. 5. The district court held that the damage awards against petitioners should not be reduced, finding the settlements and the judgment were based on separate injuries. *Id.* at 40-44.

4. The court of appeals affirmed the district court's denial of a credit against the jury awards for the prior settlements. Pet. App. 1-30. The court of appeals found that UMIC and Denney were not entitled to the credits because the prior settlements and the judgment "do not represent common damages for a single injury." *Id.* at 7-8. To support its conclusion, the court of appeals cited record evidence that the jury awarded damages against UMIC and Denney only for the specific injuries that each defendant had caused individually, and not for the total losses sustained by Universal. The court of appeals found no basis for concluding "that the prior

settlements with Geldermann and the Universal directors cover any portion of the damages assessed against Denney and UMIC." *Id.* at 8.

ARGUMENT

The Tenth Circuit correctly held that the "one satisfaction rule" did not entitle petitioners to a credit for the FDIC's prior settlements, because neither the Sevier settlement (involving different defendants and different claims) nor the Geldermann settlement represented damages common with those covered by the jury award. The Tenth Circuit applied settled law to the facts of this case. Its decision creates no conflict with the decisions of this Court or other courts of appeals that requires further review.

1. Petitioners contend that the decision below conflicts with this Court's holding in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994). They argue that, "by refusing to follow *O'Melveny & Myers* and apply controlling Oklahoma case law, the Tenth Circuit altered the outcome of the case[.]" Pet. 16. Petitioners are correct that state, not federal law, governs the right to set off prior settlement amounts against a judgment in a state law cause of action; no one contends otherwise. All parties before the court of appeals agreed that the FDIC's breach of fiduciary duty claims are generally governed by state law. See Brief of Defendants-Appellants UMIC, Inc. and Charles Alex Denney filed in Appeal Nos. 96-6089 and 96-6123 (First Brief) at 17 and Appellee/Cross-Appellant FDIC's Second Brief on Cross-Appeal at 23 n.7. The Tenth Circuit proceeded on that assumption. See Pet. App. 16-17, 27. In fact, petitioners concede that the Tenth Circuit correctly held that the case is governed by the "one satisfaction" pro tanto rule which Oklahoma follows. Pet. 8-9.

Nonetheless, petitioners argue that the court of appeals misapplied the Oklahoma rule by "look[ing] to federal common law for the application of this rule." Pet. 9. Specifically, they contend that the Tenth Circuit improperly relied on federal rather than state case law to determine which party had the burden of proof on the offset issue. The decision below itself never analyzed the burden of proof question, instead quoting *U.S. Industries, Inc.* v. *Touche Ross & Co.*, 854 F.2d 1223, 1261 (10th Cir. 1988), in a parenthetical without discussion. Presumably, petitioners' entire challenge to the Tenth Circuit's decision rests on that one citation. But petitioners themselves cited *Touche Ross* extensively to the court of appeals as being in "accord" with Oklahoma law. See First Brief at 17-18, 21.

Significantly, petitioners fail to show how Oklahoma's "one satisfaction" judgment reduction rule differs substantially from the analogous federal rule.[1] Both rules are designed to prevent double recovery by a plaintiff for the same injuries. See *Carris* v. *John R. Thomas & Assocs.*, 896 P.2d 522, 530 n.21 (Okla. 1995) (no double recovery permitted under Oklahoma law, which "allows only one recovery to make a plaintiff whole"); *Touche Ross*, 854 F.2d at 1261 ("[T]he one satisfaction rule provides that, under ordinary circumstances, an injured party may recover only once for an injury he has incurred."). Petitioners assert a material difference between Oklahoma and federal rules regarding the burden of proof in judgment-reduction claims; accord-

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[1] Petitioners tacitly conceded as much below by citing federal and state law interchangeably in their appellate briefs. See First Brief at 17-23; Third Brief on Cross Appeal of Defendants-Appellants UMIC, Inc. and Charles Alex Denney/ Cross Appellees at 5, 7, 10.

ing to petitioners, federal law places the burden on defendants, while state law places the burden on plaintiffs.[2] Pet. 9. Relying only on a footnote of *dicta* from *Carris* (a case that only tangentially addressed the judgment reduction rules and the burden of proof issue), petitioners insist that Oklahoma law always places the burden of proof on the plaintiff—here, the FDIC. *Ibid*. However, another Oklahoma case, *American National Bank of Enid* v. *Crews*, 126 P.2d 733, 745 (Okla. 1942), squarely held that the defendant claiming offset bears the burden of proof. Indeed, petitioners acknowledge that "in *American National* the court found defendants' proof had failed, and therefore, defendants were not entitled to any offset." Pet. 8. They seemingly do not realize that this case flatly contradicts their central argument. Moreover, even if (contrary to *American National*) petitioners had established that Oklahoma law requires the plaintiff to bear the burden of proof, they have not shown that federal law necessarily differs. Indeed, under *Touche Ross*, the burden of proving that a settlement represents common damages with the jury award may shift to the party opposing judgment reduction (*i.e.*, the plaintiff) in certain circumstances. Pet. 16 n. 15 (citing *Touche Ross*, 854 F.2d at 1262).

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[2] In any event, it is unlikely that the threshold question of whether joint tortfeasors caused identical injuries turned on which party bore the burden of proof. The courts below were familiar with the complex facts concerning the two prior settlements and this lengthy litigation, yet neither hesitated to conclude that the injuries compensated by the damages award and the settlement were not identical and that denial of the credit would not constitute double recovery for the same injury. Pet. App. 35-36; see also *id.* at 6-8.

As required by *O'Melveny & Myers*, the Tenth Circuit properly applied Oklahoma state law to the facts of this case. At heart, as demonstrated by the extensive fact-based discussions in their petition for a writ of certiorari, petitioners would have this Court decide whether the necessary predicate for judgment reduction, that joint tortfeasors caused a single injury, has been established. See Pet. 10-16. But every judge to consider the question has concluded that it has not; there is no reason for this Court to revisit that factual dispute. See *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987) (where both courts below resolve factual issue against petitioner, further review is not warranted). Petitioners have demonstrated no conflict with this Court's precedent, no conflict among the courts of appeals, and no question of recurring national importance. Therefore, the Tenth Circuit's decision does not merit further review.

2. Petitioners also argue that the Court should grant certiorari to resolve an alleged conflict between the Tenth Circuit's decision below regarding credit for the CEA settlement and the 1976 decision of the Fourth Circuit in *MacKethan* v. *Burrus, Cootes and Burrus*, 545 F.2d 1388 (1976), cert. denied, 434 U.S. 826 (1977).[3] Pet. 18. In *MacKethan*, the court of appeals credited the entire amount of a $6 million prior settlement to offset a $1.1 million jury award against a non-settling

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[3] Although they now argue that setoff rights to the CEA settlement are governed by federal law (see Pet. i), petitioners argued before the Tenth Circuit that state law applied, and they did not distinguish among the settlements. See First Brief at 16-23. Thus, petitioners appear to have waived this claim by failing to assert it below. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (issue not raised in or discussed by court of appeals is not properly before Supreme Court).

defendant in a federal securities case. Like the challenged Tenth Circuit ruling, the Fourth Circuit's decision turned on the particular facts and circumstances of the case; there is no conflict between them. Indeed, the Fourth Circuit went out of its way to emphasize "that there are often subtleties, both substantive * * * and procedural * * * [,] involved in cases where credit is sought by one joint tortfeasor for amounts paid to the injured party by another joint tortfeasor." 545 F.2d at 1391 (citations omitted). The court concluded that it did not need to address the subtleties of federal judgment reduction jurisprudence because the facts before it were clear; the prior settlement was six times as large as the jury verdict, so the "Receiver has no grievance if we attribute a little more than one-sixth of the $6,000,000 which he received [from the] settlement, to damages [resulting from the transactions covered by the jury's award]." *Ibid.* By contrast, in this case, where the settlements received by the FDIC and the jury award combined were substantially less than the brokers' commissions, the court looked to the facts and particular jury findings to determine that the settlement and the jury damage awards were for separate, not common, damages. Differences in the facts and circumstances of each case, not disagreements over the proper legal standard, explain the differing outcomes in this case and the earlier Fourth Circuit decision. Accordingly, review by this Court is not warranted.

Even if there were a true conflict between the Tenth and Fourth Circuits, as petitioners' reliance on one 22-year old case in an effort to show a circuit conflict demonstrates, federal jurisprudence regarding judgment reduction is not frequently litigated, and the operation of the rule is not ripe for review by this Court. Neither *MacKethan* nor the state authorities cited by petition-

ers, Pet. 18-19, that apply state law, fully examine all of the nuances of the federal judgment reduction rule. This Court's consideration of judgment reduction rules should await more thorough consideration of the issue in the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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