United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 14, 2024
Lyle W. Cayce
Clerk

No. 23-40125

LAW OFFICE OF ROGELIO SOLIS PLLC; ANA GOMEZ,

Appellants,

versus

CATHERINE STONE CURTIS,

Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:21-AP-7002
USDC No. 7:22-CV-418

ON PETITION FOR REHEARING EN BANC

Before GRAVES, HIGGINSON, and HO, *Circuit Judges*.

Per Curiam:[*]

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. The petition for rehearing en banc is DENIED because, at the

[*] JUDGE WILLETT did not participate in the consideration of the rehearing en banc.

request of one of its members, the court was polled, and a majority did not vote in favor of rehearing (FED. R. APP. P. 35 and 5TH CIR. R. 35).

In the en banc poll, seven judges voted in favor of rehearing (JONES, SMITH, ELROD, HO, DUNCAN, ENGELHARDT, and OLDHAM), and nine voted against rehearing (RICHMAN, STEWART, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, WILSON, DOUGLAS, and RAMIREZ).

ANDREW S. OLDHAM, *Circuit Judge*, joined by JONES, SMITH, ELROD, HO, DUNCAN, and ENGELHARDT, *Circuit Judges*, dissenting from denial of rehearing en banc.

This case implicates federalism, bankruptcy, the rule of orderliness, and the party-presentation principle. Today our en banc court chooses to follow circuit precedent over a controlling, unanimous Supreme Court decision. And it apparently does not matter that our circuit precedent embraces a form of federal-common-law property that has no basis in our post-*Erie* federal system. I respectfully dissent.

*

Our decision in this case recognizes a form of property—an equitable interest in insurance proceeds—that Texas state law does not. *See L. Off. of Rogelio Solis PLLC v. Curtis*, 83 F.4th 409, 413 n.4 (5th Cir. 2023) ("Appellants' arguments that Texas law, not federal bankruptcy law, controls are incorrect."). This is erroneous for at least three reasons. *First*, the Supreme Court recently and unanimously held that "the determination of property rights in the assets of a bankrupt's estate" has been left "to state law." *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 718 (2020) (quoting *Butner v. United States*, 440 U.S. 48, 54 (1979)). *Second*, it has long been settled that insurance—and the property rights it creates—are questions of state law. *See, e.g.*, McCarran–Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*; *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491 (1993). *Third*, after *Erie Railroad Co. v. Tompkins*, "there is no general federal common law." 304 U.S. 64, 78 (1938). And that whatever limited remaining role there might be for federal common lawmaking in this situation, it must be justified as "necessary to protect uniquely federal interests." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). And as we all know, these principles do not derive just from bankruptcy law, insurance law, and *Erie*; in our federal system, virtually all property law is a creature of state sovereignty.

*

True, the parties did not cite *Rodriguez* in their briefing before this court. But it is untrue that the party-presentation principle somehow limits federal judges to reading only those cases cited in a Table of Authorities. Our en banc conclusion to the contrary is insupportable.

The Supreme Court has repeatedly emphasized that parties present *issues* or *claims* for decision; they do not present *arguments*, *theories*, or *precedents*. For example, in *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991), the Court said: "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *See also Elder v. Holloway*, 510 U.S. 510, 515–16 (1994) (holding that an appellate court should take notice of relevant legal precedent overlooked by the parties). And more recently in *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1581–82 (2020), the Court reminded us that we are not bound by the precise arguments of counsel. *Accord Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014) (holding plaintiffs must plead facts, not theories); *Rodgers v. Lancaster Police & Fire Dep't*, 819 F.3d 205, 207 n.2 (5th Cir. 2016) ("A complaint need not cite a specific statutory provision or articulate a perfect 'statement of the legal theory supporting the claim asserted.'" (citation omitted)).

Here, the parties squarely presented the issue: whether the property rights at issue are governed by state law or federal common law. Argument C in the Blue Brief was "**Texas Law Controls – Whether a debtor owns property is a question of applicable state law**." Blue Br. 12–15. The panel reply brief reiterated this point. *See* Grey Br. 2–3. And argument I.A in the petition for rehearing was "**Whether a debtor has an interest in property is determined under state law**." EB Pet. 5–7. The parties thus presented

that issue for our decision. We should roundly reject the idea that, in exercising the judicial power vested in us by Article III, we're somehow *prohibited* from considering a unanimous 2020 Supreme Court decision that answers the issue presented because the appellant failed to cite it.[*]

Instead of following *Rodriguez* and *Butner*, our circuit precedent does the one thing *Erie* prohibits: It embraces federal common law without identifying a valid fount of it. *See Kamen*, 500 U.S. at 99 ("Having undertaken to decide this [federal common law] claim, the Court of Appeals was not free to promulgate a federal common law . . . rule without identifying the proper *source* of federal common law in this area.") (emphasis in original); *cf. Lamar v. Micou*, 114 U.S. 218, 223 (1885) ("The law of any State of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof." (citations omitted)); *Bowen v. Johnston*, 306 U.S. 19, 23 (1939) (same).

---

[*] Our "limited to cases in the TOA" view of party presentation is particularly indefensible here because the appellants *did* cite *Butner*, which held "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law." *Butner*, 440 U.S. at 54; *see* EB Pet. 5 (citing *Butner*). So even if we're somehow precluded from rejecting the panel's decision under the uncited *Rodriguez* decision, which we plainly are not, we still could and should reject the panel's decision under the cited *Butner* decision. Of course, none of this matters to the party-presentation principle properly understood. *Cf.* Kevin Bennardo & Alexa Z. Chew, *Citation Stickiness*, 20 J. APP. PRAC. & PROC. 61, 84 (2019) (finding 51% of cases cited in 325-opinion dataset "were endogenous—they originated from somewhere else [*i.e.*, *not* the parties' briefs], most likely the courts' own research"); *id.* at 115 (finding our circuit's endogeneity percentage was 52%).

*

The business of insurance, the contours of property rights, and the policy choices inherent in developing common law belong to Texas—not us. I respectfully dissent.