1-1-2002

Can a State Waive Its Immunity by Removing a Case from State to Federal Court?

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Publication Information
Jay E. Grenig, Can a State Waive Its Immunity by Removing a Case from State to Federal Court?, 2001-02 Term Preview U.S. Sup. Ct. Cas. 246 (2002).

Case at a Glance

Although it is not expressly stated in the Constitution, the Supreme Court has held that, with some exceptions, the Eleventh Amendment protects a state from being sued by its own citizens. This case presents the issue of whether a state that voluntarily "removes" a case to federal court and then seeks to have the case dismissed should be deemed to have waived its Eleventh Amendment immunity, even if state law does not expressly authorize the removing official to consent to suit.

Can a State Waive Its Immunity by Removing a Case from State to Federal Court?

by Jay E. Grenig

PREVIEW of United States Supreme Court Cases, pages 246–248.

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Editor's Note: The respondent's brief in this case was not available by *PREVIEW*'s deadline.

ISSUE

When a state voluntarily removes a case from state to federal court, does it waive its Eleventh Amendment forum immunity if state law does not expressly authorize the removing official to consent to suit?

FACTS

Paul Lapides is a tenured assistant professor of management and entrepreneurship and director of the Corporate Governance Center at Kennesaw State University (KSU) in Kennesaw, Ga. KSU is a unit of the State University System of Georgia under its Board of Regents (Regents).

In 1997, KSU began an investigation of Lapides after a student accused him of sexual harassment. The university's investigation produced no corroborating evidence to support the student's allegation and no action was taken against Lapides. He claims that as a result of the incident, he became aware of letters fabricated by fellow faculty members containing defamatory statements about him and the sexual harassment accusations. Lapides asserts that those letters, which were circulated to others on the faculty, are now part of his personnel file and have interfered with his eligibility for various faculty positions and promotional opportunities.

Lapides sued the Regents and individual defendants under 42 U.S.C. § 1983 and the Georgia Tort Claims Act in the Superior Court of Cobb County, Ga. Lapides alleged that the actions of university officials deprived him of his right to due process of law as well as his liberty and property interests in practicing his professions as guaranteed to him by the Fourteenth Amendment to the United States Constitution.

The Georgia Attorney General filed a notice of removal and removed

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DOCKET NO. 01-298

ARGUMENT DATE:
FEBRUARY 25, 2002
FROM: THE ELEVENTH CIRCUIT

the case to federal court. At the same time, he filed a motion to dismiss the Section 1983 claims, stating among other reasons that the board was immune from suit under the Eleventh Amendment. The district court denied the motion and held that the state, through its attorney general, had waived its Eleventh Amendment immunity by removing the case to federal court and invoking the jurisdiction of the federal court.

The Regents appealed to the U.S. Court of Appeals for the Eleventh Circuit. Reversing the district court, the Eleventh Circuit held that the Regents' removal of the suit to federal court did not constitute a waiver of the state's Eleventh Amendment immunity. *Lapides v. Board of Regents of Univ. System of Georgia,* 251 F.3d 1372 (11th Cir. 2001). The court reasoned that a state will be deemed to have waived its Eleventh Amendment immunity from suit only when it is stated by the most express language or by such overwhelming implication from the text as would leave no room for any other reasonable construction. According to the Eleventh Circuit, waiver of a state's Eleventh Amendment immunity by state officials must be explicitly authorized by the state in its constitution, statutes, and decisions; such authority is not to be presumed in the absence of clear language to the contrary.

The court concluded that the Regents' removal of the suit that was brought against it to federal court did not constitute a waiver of the state's Eleventh Amendment immunity. It explained that the state attorney general lacked statutory authority to waive the state's immunity and that the filing of a removal petition would not be construed as consent to federal jurisdiction.

The Eleventh Circuit instructed the district court to hear only those nonbarred claims over which it had jurisdiction and to remand the others to state court. If the district court concluded that no nonbarred federal questions existed, the whole case was to be remanded to state court.

The Supreme Court thereafter granted Lapides' petition requesting review of the Eleventh Circuit's decision. 122 S.Ct. 456 (2001).

Case Analysis

The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Although it is not expressly stated in the Constitution, the Supreme Court has held that the Eleventh Amendment also prohibits a state from being sued by its own citizens. *Hans v. Louisiana,* 134 U.S. 1, 20-21 (1890).

The Supreme Court has recognized exceptions to Eleventh Amendment sovereign immunity. First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment—an amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance. *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 670 (1999). Second, a state may consent to suit. *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 239-40 (1985). A state is deemed to have waived its immunity only when the law uses the most express language or when there is such an overwhelming implication from its text as to leave no room for any other reasonable construction. *Id.*

In addition, the Supreme Court has held that the Eleventh Amendment "is a personal privilege which [a state] may waive at pleasure; so that in a suit otherwise well brought, in which a state had a sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction." *Clark v. Barnard,* 108 U.S. 436, 447 (1883). See also *Gunter v. Atlantic Coast Line R.R.,* 200 U.S. 273, 284 (1906) ("[W]here a state voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby, and cannot escape the result of its own voluntary act by invoking the prohibitions of the 11th Amendment.")

The Supreme Court has held that a waiver of Eleventh Amendment immunity by state officials must be explicitly authorized by the state in its constitution, statutes, and decisions. *Ford Motor Co. v. Dept. of Treasury of Indiana,* 323 U.S. 459, 467 (1945). Such authority is not to be presumed in the absence of clear language to the contrary. *Wisconsin Dept. of Corrections v. Schacht,* 524 U.S. 381, 393-98 (1998).

Lapides argues that the Georgia attorney general waived Georgia's Eleventh Amendment immunity when he removed the case to federal court and invoked federal court jurisdiction. He explains that forfeitures of Eleventh Amendment immunity by a state's litigation conduct are distinct from other types of waivers. According to Lapides, removal unambiguously evinces a state's voluntary consent to federal court jurisdiction. Lapides points out that removal always requires a state defendant's consent, even

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when it stands amongst a number of defendants. In such cases, Lapides claims that *Ford Motor*'s authorization requirement is inapplicable and suggests that the proper analysis is whether the particular state official had the authority to invoke federal jurisdiction. See *Gunter v. Atlantic Coast R.R.,* 200 U.S. 273, 285-86 (1906). If the rule of *Ford Motor* is to be applied at all, Lapides says it must necessarily be tempered by federal law considerations of judicial estoppel and other equitable concerns that arise when a state purports to assert federal jurisdiction and then later disavows that choice.

The Regents argue that under *Ford Motor,* litigation conduct does not waive or forfeit immunity because the state attorney general was not authorized by state law to waive immunity. Relying on *Edelman v. Jordan,* 415 U.S. 651 (1974), the Regents also argue that they were entitled to raise the immunity issue late in the proceeding because a state entity may raise Eleventh Amendment immunity at any time in the course of the proceedings.

SIGNIFICANCE

Several circuits have addressed the issue of the authority of a state's attorney general to waive the state's immunity. See, e.g., *Santee Sioux Tribe of Nebraska v. Nebraska,* 121 F.3d 427, 431-32 (8th Cir. 1997) (holding there was no showing that waiver was within the authority of Nebraska's attorney general); *Dagnall v. Gegenheimer,* 645 F.2d 2, 3 (5th Cir. 1981) (holding that the attorney general of Louisiana had no authority to waive the state's immunity). But see *McLaughlin v. Board of Trustees of State Colleges of Colorado,* 215 F.3d 1168, 1171 (10th Cir. 2000) (holding that the Colorado attorney general waived the state's immunity).

In *Wisconsin Dept. of Corrections v. Schacht,* 524 U.S. 381, 393 (1998), Justice Kennedy, in a concurring opinion, urged reconsideration of the perceived *Ford* rule that immunity may be raised at any time in a proceeding. Specifically, he urged the Court to consider either that it is proper to "infer ... waiver from the failure to raise the [Eleventh Amendment] objection at the outset of the proceedings," or that a state entity waives immunity when, "under no compulsion," it voluntarily invokes [federal court] jurisdiction," such as by removing a case to federal court." 524 U.S. at 395.

In addition to *Lapides,* the Supreme Court has granted certiorari in another case involving Eleventh Amendment immunity. That case (analyzed elsewhere in this issue of *PREVIEW*) involves the question of whether a state's sovereign immunity protects it from being brought before a federal administrative tribunal by a private party. *South Carolina State Ports Auth. v. Federal Maritime Comm'n,* 243 F.3d 165 (4th Cir.), cert. granted, 122 S.Ct. 392 (2001).

The Supreme Court has the opportunity in this case to resolve the disagreement among the circuits regarding Eleventh Amendment immunity. Additionally, the Court may address the issues raised by Justice Kennedy in *Schacht.* The Court may reexamine the holding in *Ford Motor* and *Edelman* permitting the immunity defense to be raised at any time in the proceedings. The Court also can clarify whether it is irrelevant that the state entity itself, as distinguished from the state attorney general, is authorized to waive immunity as a matter of state law. Lastly, the Court may determine whether a state entity invoking federal court jurisdiction over a matter waives any Eleventh Amendment immunity against suit in federal court.

ATTORNEYS FOR THE PARTIES

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AMICUS BRIEFS

In Support of Paul D. Lapides

Ceres Marine Terminals, Inc. (John Townsend Rich (202) 828-2000)

In Support of Neither Party

United States (Theodore B. Olson, Solicitor General, U.S. Department of Justice (202) 514-2217)