

Q&A on the Supreme Court's *Frew v Hawkins* Decision February 2004¹

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Q: What is the significance of the recent *Frew v. Hawkins* decision issued by the U.S. Supreme Court?

A: In a unanimous decision, the U.S. Supreme Court found the consent decree entered into in a Medicaid case by the state of Texas was enforceable by the federal court. According to the court, enforcement of the consent decree did not violate the Eleventh Amendment.

Background

Frew v. Hawkins, 540 U.S. ___, No. 02-628 (Jan. 14, 2003), began in 1993 when mothers of children eligible for Medicaid Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) services filed suit against two state agencies and some agency officials. The plaintiffs sought injunctive relief against the Texas Department of Health and the Texas Health and Human Services Commission as well as the Commissioners of both agencies, the Texas State Medicaid Director and certain staff members at the Department of Health, all in Governor George W. Bush's administration. According to the plaintiffs, the Texas Medicaid program 1) failed to satisfy federal requirements that eligible children receive health, dental, vision and hearing screens, 2) provided inadequate notice of available services to recipients, 3) failed to meet annual participation goals, 4) lacked proper case management procedures and 5) did not provide uniform services throughout the state. The state agencies sought to dismiss the claims against them on Eleventh Amendment sovereign immunity grounds. The U.S. District Court dismissed the claims against the state agencies; however, state officials remained in the suit and the Court certified a class of more than one million children who were entitled to EPSDT services. After intense negotiations, the parties entered into a consent decree which outlined a comprehensive plan for implementing the federal EPSDT statute.

Two years after the consent decree was entered, the plaintiffs filed a motion to enforce the decree in U.S. District Court. They claimed that state officials failed to comply with various parts of the consent decree. State officials denied the allegations and responded that the consent decree was unenforceable under sovereign immunity principles of the Eleventh Amendment.

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Following an evidentiary hearing, the District Court held that certain provisions of the consent decree had been violated and rejected the Eleventh Amendment arguments.

State officials appealed and the Court of Appeals for the Fifth Circuit reversed the lower court's decision. The Appeals Court found that the Eleventh Amendment barred enforcement of the decree. Unless the violation of the consent decree was also a statutory violation of the Medicaid Act that imposed a clear and binding obligation on the State, the consent decree could not be enforced by the federal court. According to the Fifth Circuit, the EPSDT program in Texas was fine as long as it complied with the general mandates of federal law. Without an established violation of federal law, the District Court lacked jurisdiction to remedy violations of the consent decree.

Supreme Court's Decision

To resolve a conflict between the Fifth Circuit and other circuits which held that the Eleventh Amendment did not bar enforcement of consent decrees in similar circumstances, the U.S. Supreme Court granted certiorari. In a unanimous decision, the Court overturned the Fifth Circuit. It held that federal court enforcement of the consent decree did not violate the Eleventh Amendment. The opinion was written by Justice Anthony Kennedy.

Petitioners asserted that the consent decree could be enforced without violating the Eleventh Amendment for two reasons: 1) the State of Texas waived its Eleventh Amendment immunity in the course of litigation, and 2) enforcement was permitted under the principles of *Ex parte Young*. *Ex parte Young*, 209 U.S. 123 (1908), provided an exception to Eleventh Amendment sovereign immunity, allowing federal courts to enjoin state actors from engaging in ongoing violations of federal law. Because the Court found that the consent decree was enforceable under *Ex parte Young*, it did not address the argument regarding waiver.

According to the Court, *Frew* involved the intersection of the Eleventh Amendment and the rules governing consent decrees. While the Eleventh Amendment shielded states from law suits brought by individuals without their consent, suits for prospective injunctive relief against state officials who violate federal law were permitted. The issue to be resolved was whether violations of consent decrees constituted violations of federal law for the purposes of the *Ex parte Young* exception.

The Court acknowledged that consent decrees must be directed at protecting federal interests. In *Firefighters v. Cleveland*, 478 U.S. 502, 525 (1986), the court found that a consent decree "must spring from, and serve to resolve, a dispute within a court's subject matter jurisdiction; must come within the general scope of the case made by the pleadings; and must further the objectives of the law upon which the complaint was based." Texas state officials did not claim that the entry of the consent decree violated the Eleventh Amendment, but rather that the Amendment narrowed the circumstances in which federal consent decrees involving state officials could be enforced.

The Respondents further argued that consent decrees involving state representatives threatened to broaden the narrow exception to Eleventh Amendment immunity because they could bind state governments to greater commitments than required by federal law. To avoid this, Respondents contended, federal courts should only be allowed to enforce a consent decree arising from an *Ex parte Young* suit if the court found a violation of federal law at the enforcement stage. They based this theory on the Court's 1984 decision in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984), in which the Supreme Court held that *Ex parte Young* did not apply to suits brought against state officials for violating state law. The Court was not persuaded, distinguishing *Pennhurst* on the basis that the consent decree in question sought to implement a federal statute, not state law, as in *Pennhurst*.

The Court found *Hutto v. Finney*, 437 U.S. 678 (1978), to be more instructive. In that case, the Supreme Court upheld the District Court's award of attorney's fees to lawyers of state prisoners after state officials refused to comply with the District Court's injunctive order to improve prison conditions. While the Eleventh Amendment immunized states from retroactive monetary relief, it did not require federal courts to jail state officials in order to enforce their decrees, the Court said. An attorney's fees award provided a permissible means of "vindicat[ing] the District Court's authority over a recalcitrant litigant." Similarly, in *Frew*, the Court maintained that injunctive relief was not prohibited by the Eleventh Amendment and could be used to enforce a consent decree entered into by the parties and approved by the District Court. It stated, "[f]ederal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced."

While finding the consent decree enforceable, the Court conceded that state officials' concerns that enforcement of the consent decree would undermine the sovereign interests and accountability of state governments were legitimate. It stated, however, that a response to these concerns came from Rule 60(b)(5) of the Federal Rules of Civil Procedure, and not the Eleventh Amendment. In an oddly detailed discussion, the Court explained that Rule 60(b)(5) permits parties to seek relief if the prospective application of the judgment is no longer equitable. According to the Court, state officials charged with the responsibility of complying with a consent decree as a result of a *Ex parte Young* suit should be allowed "latitude and substantial discretion" in satisfying the Court's order. Courts should be flexible and agree to alter the decree if a state can establish a reason for modification; where a state cannot provide such a reason, the terms of the decree should be enforced.

Significance of *Frew* for Advocates

Frew is a significant case for advocates for a number of reasons. First, it maintains private enforcement of Medicaid and EPSDT. Before the case was decided, advocates were concerned that the case might negatively affect EPSDT enforceability. In the first sentence of the opinion, however, the Court cites *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), which holds that Medicaid is a cooperative federal-state program. In the same paragraph, it explains that states are required by Medicaid to have an EPSDT program, through which children can obtain health care services. Nothing in that paragraph or later in the opinion suggests that EPSDT is not enforceable.

Second, *Frew* reaffirms and arguably expands *Ex parte Young*, permitting enforcement of a consent decree, the provisions of which go beyond federal EPSDT requirements. Some advocates suggest that this is part of a recent trend by the Supreme Court to back away from *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), which holds that the Eleventh Amendment immunized the state of Florida from a lawsuit in federal court and that Congress could not abrogate this immunity in a statute passed under Article I of the Constitution despite the exception under *Ex parte Young*. The trend toward reaffirming the *Ex parte Young* doctrine includes *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002), which permitted Verizon's suit against the state commissioners to go forward on the basis that it involved an ongoing violation of federal law and sought prospective relief.

Third, while the *Frew* decision, overall, seems to be positive, advocates worry that the Court's discussion of Rule 60(b)(5) provides a road map directing state officials how to bypass enforcement of a consent decree. Armed with the language "latitude and substantial discretion," state officials may now try to seek the Court's flexibility rather than argue Eleventh Amendment immunity. In attempting to enforce consent decrees similar to the one in *Frew*, advocates should be aware of such tactics by state officials, as they may be entertained by the courts in the future.