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The Standing and Removal Decisions from the Supreme Court's 2006 Term

by Steven H. Steinglass*

This article reviews some of the more important jurisdictional decisions of the U.S. Supreme Court during the court's 2006-07 term, the first full term that included both of the court's newest justices—Chief Justice John G. Roberts Jr. and Associate Samuel A. Alito Jr. The term begins an era that will likely become known as the Roberts Court, but this term surely belonged to Associate Justice Anthony M. Kennedy, who cast the deciding vote in all 24 of the court's 5-4 decisions.

For this article, I identified six jurisdictional decisions in two areas—standing and removal. I do not discuss *Bell Atlantic Corp. v. Twombly*, the court's most important pleading decision in 50 years, or its three other pleading decisions. Nor do I discuss other important jurisdictional and procedural decisions limiting the availability of *Bivens* actions, limiting the availability of punitive damages, imposing strict appellate time limits and permitting threshold determinations of *forum non conveniens*.

STANDING

Federal courts are courts of limited jurisdiction, and the case or controversy requirement of Article III limits the business of the federal courts. The most important of the limitations imposed directly and indirectly by Article III is the standing requirement, and this term included three cases on standing.

Massachusetts v. Environmental Protection Agency

The biggest surprise of the term was the 5-4 decision in *Massachusetts v. Environmental Protection Agency*, 127 S.Ct. 1438 (2007), holding that Massachusetts had standing to challenge the refusal of the Environmental Protection Agency to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act. The decision was written by Justice Stevens, who was joined by Justice Kennedy in his most significant break with his conservative allies. Relying on the relaxed standards of redressability and immediacy when Congress extends procedural rights in the rule-making process and the "special solicitude" to which states are entitled, the court concluded that global warming (for which gas emissions were a contributing factor) created a risk of injury to Massachusetts that was both actual and imminent. That injury—the loss of coastal land

(much of which was owned by the state)—met the initial standing inquiry, and the court further found that the allegation that the regulation of gas emissions would contribute to the alleviation of the injury met the redressability standard.

Hein v. Freedom From Religion Foundation, Inc.

Not surprising was the Court's 5-4 decision in *Hein v. Freedom From Religion Foundation, Inc.*, 127 S.Ct. 2553 (2007), rejecting the availability of federal taxpayer standing to challenge discretionary expenditures made by the executive branch to support faith-based community groups. The result of the decision was clear, but the majority could not produce a clear holding. The plurality opinion written by Justice Alito (on behalf of Chief Justice Roberts and Justice Kennedy) limited *Flast v. Cohen*, 392 U.S. 83 (1968), to specific congressional appropriations but stated unequivocally that it was neither extending nor overruling *Flast*. Justice Scalia (concurring only in the judgment and joined by Justice Thomas) agreed with the dissenting justices that there was no meaningful distinction between specific congressional appropriations and general or discretionary allocations to the executive branch, but that led him to conclude that *Flast* should be repudiated.

MedImmune, Inc. v. Genentech, Inc.

In *MedImmune, Inc. v. Genentech, Inc.*, 127 S.Ct. 764 (2007), the most important of the standing cases for commercial litigators, the court, in a 8-1 decision written by Justice Scalia, held that the Article III case or controversy requirement (which is reflected in the "actual controversy" requirement of the Declaratory Judgment Act) does not require a patent licensee to terminate or be in breach of its license agreement before it can seek a declaratory judgment that the underlying patent is invalid, unenforceable, or not infringed. Relying on a line of declaratory judgment actions involving issues of public law, the court, with only Justice Thomas dissenting, applied these principles to voluntarily accepted contractual obligations between private parties.

REMOVAL

Removal jurisdiction is a hot topic. Though not mentioned in the Constitution, this basis of federal court jurisdiction has been authorized by Congress

since the Judiciary Act of 1789 and was the subject of three Supreme Court decisions during the 2006 term (after having been the subject of three decisions in the prior term).

Removal jurisdiction is designed to protect federal interests by giving state court defendants the ability to remove certain civil actions to federal courts, and they are doing so with increasing frequency. Typically, state court defendants (other than citizens of the forum state in diversity cases) may remove cases that could have originally been filed in federal court, but special removal provisions also permit federal officers and agencies as well as foreign sovereigns to remove. Federal courts to which cases are removed may remand the cases to the state courts for defects in the removal procedures (i.e., non-timely removals, violations of the forum defendant rule, or violations of the rule of unanimity), for various post-removal events (i.e., remands based on the discretionary refusal to exercise supplemental jurisdiction or on the various abstention doctrines), or for the lack of subject matter jurisdiction. Finally, to avoid protracted disputes about jurisdiction, Congress (with some limited express exceptions) has barred the appeal of remand orders. See 28 U.S.C. §1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . .").

Osborn v. Haley

Federal employees have absolute immunity from tort actions arising out of acts undertaken in the course of their official duties. When they are sued in state court, the Westfall Act provides that a certification by the attorney general that the employee was acting within the scope of his or her employment is the basis for the removal and the substitution of the United States as the defendant. In such actions, the attorney general's certification is "conclusiv[e] . . . for purposes of removal." The Westfall Act, however, does not address the availability of appellate review of remand orders, but in a 5-4 decision written early in the term by Justice Ginsburg the court in *Osborn v. Haley*, 127 S.Ct. 881 (2007), construed the competing "ant-shuttling" commands of § 1447(d) and the later-enacted Westfall Act and held that the statutory bar on appellate review of remand orders did not apply to suits removed under the Westfall Act.

Powerex Corp. v. Reliant Energy Services, Inc.
Powerex Corp. v. Reliant Energy Services, Inc., 127 S.Ct. 2411 (2007), a 7-2 decision written by Justice Scalia, was the court's most important removal decision of the term for reasons independent of its holding distinguishing *Osborn* and ruling that the Foreign Sovereign Immunities Act of 1976 was not an implied exception to the bar on appellate review of remand orders in cases against putative foreign sovereigns.

Powerex began as a complex multi-party state court action alleging a conspiracy to fix prices in the energy market in violation of California law. The *Powerex* Corporation, a wholly owned subsidiary of a British Columbia crown corporation (that in turn was wholly owned by the Province), was brought into the suit on an indemnification theory. The subsidiary removed the case to federal court, but the district court held that it was not a foreign sovereign and remanded the case and the Ninth Circuit affirmed.

The Supreme Court granted certiorari to determine if the subsidiary was an "organ of a foreign state or political division thereof" under the FSIA. If so, the subsidiary would have been able to remove under the special removal authority of 28 U.S.C. § 1441(d). The court, however, also asked the parties to address whether the Ninth Circuit had jurisdiction over the appeal notwithstanding § 1447(d).

In addition to rejecting the argument that the FSIA was an implied exception to the statutory bar on appellate review of remand orders in § 1447(d), the court reviewed the application of the bar to the remand order at issue. And in the course of its opinion, the court provided several insights about the availability of appellate review of remand orders.

To fully understand these issues, one must go back to the court's path-breaking 1976 decision in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), in which it held for the first time that remand orders are sometimes subject to appellate review. The district court had remanded a removed diversity case because of its backlog. In permitting appellate review, the *Thermtron* Court found that the reason given for the remand was not within 28 U.S.C. §1447(c), which, at the time, permitted the remand of cases "removed improvidently and without jurisdiction." Reading §1447(c) and § 1447(d) "in pari materia," the court limited the bar on appellate review to remands based on § 1447(c). And because a remand based on a crowded docket was not authorized by § 1447(c), the court held that the remand order was appealable. Subsequently, the court read *Thermtron* broadly to permit appellate review of remand orders in cases involving the discretionary remand of pendent (now supplemental) state law claims, see *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988), and the remand of cases based on abstention. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996).

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There are five insights suggested by the *Powerex* Court's interpretation of § 1447(d).

First, the court clearly held that the bar on appellate review of remand orders based on the lack of subject matter jurisdiction is not conditioned on an absence of jurisdiction at the time of the removal. Construing literally the text of § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."), the court held that remands were proper anytime the lack of subject matter jurisdiction became apparent.

Second, to avoid the bar on appellate review, the subsidiary argued that a decision on the merits by the district court preceded the remand and was reviewable under *City of Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934), but the court (as it had done last year in *Kircher v. Putnam Funds Trust*, 126 S.Ct. 2145 (2006)) construed *Waco* narrowly, perhaps in an effort to curtail what appears to be an emerging collateral order exception to § 1447(d).

Third, to treat the remand order as appealable, the
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supreme court

subsidiary sought to characterize it as a discretionary remand of a supplemental state law claim. The court, however, ruled that the only "plausible" explanation of the district court's remand was that it was jurisdictional. In so ruling, the court noted that it had never passed on whether the discretionary remand of supplemental claims was jurisdictional, thus suggesting that the appealability of so-called *Cohill* remands of supplemental claims was an open issue and casting doubt on an unbroken line of lower court decisions permitting appellate review of such discretionary remands.

Fourth, the court made clear that courts of appeals do not have free rein to determine the true basis of remand orders. The author of the court's opinion, Justice Scalia, noted that he (along with Justice Thomas) would treat any remand purporting to rest on jurisdictional grounds as not subject to appellate review under § 1447(d), but the full court would not go that far. Thus, the court held that any remand resting upon a ground "that is colorably characterized as subject-matter jurisdictional" is insulated from appellate review.

Finally, the case suggests the basis for a possible re-examination of the holding in *Thermtron* permitting the appeal of remand orders not based on § 1447(c). Though not addressed by the court, the argument was made that *Thermtron* should be overruled or narrowly construed because it was either wrongly decided or because intervening statutory changes in §1447(c) deprived the case of its continuing viability.

Watson v. Philip Morris Companies, Inc.

In a 5-4 decision written by Justice Breyer, the court in *Watson v. Philip Morris Companies, Inc.*, 127 S.Ct. 2301 (2007), construed the federal officer removal statute, 28 U.S.C. §1442(a)(1), to prevent removal by a cigarette manufacturer that tested and advertised the tar and nicotine levels in its cigarettes pursuant to standards required by the federal government. In so ruling, the court found that the manufacturer was not acting as a federal officer under the terms of the statute and thus could not remove a state court deceptive advertising claim. *Watson* does not change the law, but a contrary decision had the potential of broadly opening the federal courts to removal by regulated industries that cannot make effective complete preemption arguments. ■



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