

COURTS: U.S. SUPREME COURT HEARS *HYATT V. FTB* ... AGAIN

The U.S. Supreme Court held oral arguments December 7 in [*Franchise Tax Board v. Gilbert Hyatt*](#), focusing on whether the court should undo Mr. Hyatt's victory in a tort case decided by the Nevada courts and, in the process, overturn a decades-old precedent that permits a sovereign state to be sued in the courts of another state without its consent.

Questions asked by the high court justices left the impression that the decision – expected by the end of June – may be a close one.

The oral arguments made little mention of the facts of the underlying tax dispute, a Nevada jury's decision that the FTB committed fraud against Mr. Hyatt and intentionally inflicted emotional distress upon him, or the Nevada Supreme Court's upholding of that ruling (after significantly decreasing the amount of damages that the FTB must pay Mr. Hyatt).

Instead, the hour-long session focused on the sovereignty of states, the 11th Amendment to the U.S. Constitution, the intentions of the founding fathers in relation to debt from the Revolutionary War, and two specific questions:

- Whether Nevada may refuse to extend to sister states haled into Nevada courts the same immunities Nevada enjoys in those courts.
- Whether *Nevada v. Hall* (1979) 440 U.S. 410, which permits a sovereign state to be haled into the courts of another state without its consent, should be overruled.

The latter case involved California residents who sued in a California court for damages against the Nevada state government for injuries sustained when a Nevada-owned vehicle on official business, driven by a University of Nevada employee, collided on a California highway with the California residents' vehicle. The California Supreme Court ruled that Nevada could be sued in California's courts, and Nevada asked the U.S. Supreme Court to review the case. Nevada said the damages should be limited to \$25,000 – the amount a Nevada resident would be able to collect if the case were tried in Nevada – but the U.S. Supreme Court rejected that argument and allowed the case to go to trial in California, where a jury found the Nevada driver negligent and awarded damages of \$1.15 million.

"There is a certain irony" in California asking the court to overturn a precedent that it argued for in 1979, and that its residents benefited from in the *Hall* case, Justice Ruth Bader Ginsburg said. "Is California now saying they were wrong in the argument that they made?" she asked.

The FTB's attorney, Paul Clement, a former U.S. solicitor general now serving as a partner with Bancroft PLLC, responded: "I think it is fair to say that there is some

buyer's remorse on the principle of *Nevada against Hall* by the sovereign State of California."

"You have a whole set of arguments, but they require us, for the most part, to overrule several cases," Justice Stephen Breyer commented.

Addressing the FTB's attorney, Justice Sonia Sotomayor said: "The system that you're advocating – just so I get it right – you're saying constitutionally ... every state is immune from any acts that they commit ... against a noncitizen even if they've waived sovereign immunity within their own state. ... There's no noncitizen of a state ... who could ever sue a state for whatever bad acts they've had?"

Questioning the suggestion that states could negotiate with each other over comity and sovereignty, Justice Anthony Kennedy said: "Do you say we're just going to throw the states back on themselves? All the states negotiate with each other? That's not part of our constitutional tradition at all."

Justice Breyer appeared to support allowing California to be sued in Nevada courts, but with the same cap on damages (now \$50,000) that would be in place if Nevada's tax agency was found guilty of the torts.

"What is bothering me is I really don't see how Nevada can say, 'We're going to give immunity to our own state but we won't accept California's similar immunity,'" Justice Breyer said. He said Nevada's argument "runs out of steam at the very point that they try to give officials more immunity than California is giving."

H. Bartow Farr III, representing Mr. Hyatt, said: "When you're talking about a situation with the officials of another state, ... we have an element of protection, trying to protect our citizens. We don't need the same protection from our own government. We hire these people, we train them, we supervise them. We can keep things from getting out of hand like they did here, where somebody just sets out on a vendetta against a particular taxpayer. We can stop that, but not when it's another state. So the idea of having more compensatory damages in order to discourage that kind of behavior, it actually seems to me quite reasonable."

This is not the first trip to the U.S. Supreme Court for this case. In April 2003, the court ruled unanimously that Mr. Hyatt could sue the FTB in Nevada, rejecting the FTB's argument that its auditors were immune from being sued for on-the-job conduct. Writing the decision for the court, Justice Sandra Day O'Connor noted that Nevada does not provide immunity to government employees who commit intentional torts, and said California was trying to elevate its sovereign interests above those of Nevada.

In last year's ruling, the Nevada Supreme Court wrote: "Hyatt suffered extreme treatment from FTB. ... FTB disclosed personal information that it promised to keep confidential and delayed resolution of Hyatt's protests for 11 years, resulting in a daily interest charge of \$8,000. Further, Hyatt presented testimony that the auditor who conducted the majority of his two audits made disparaging remarks about Hyatt and

his religion, was determined to impose tax assessments against him, and that FTB fostered an environment in which the imposition of tax assessments was the objective whenever an audit was undertaken. These facts support the conclusion that this case is at the more extreme end of the scale, and therefore less in the way of proof as to emotional distress suffered by Hyatt is necessary.”