

## States Can't Be Sued In Other States' Courts, Justices Say

By **Maria Koklanaris**

Law360 (May 13, 2019, 10:16 AM EDT) -- The U.S. Supreme Court on Monday said the California Franchise Tax Board can't be sued in another state's court, handing a victory to the agency that had sought for years to end the practice on sovereign immunity grounds.



The case has been at the U.S. Supreme Court three times.

In a 5-4 decision from Justice Clarence Thomas, the justices overturned their 1979 precedent in *Nevada v. Hall* allowing such suits and handed a victory to the FTB in its final, long-standing battle with inventor Gilbert P. Hyatt that has gone on since 1993. The case has come before the nation's highest court three times as it evolved from a jurisdictional income tax dispute to a much broader constitutional concern about state sovereignty.

"Hall's determination misreads the historical record and misapprehends the constitutional design created by the framers," Justice Thomas wrote. "Although the Constitution assumes that the states retain their sovereign immunity except as otherwise provided, it also fundamentally adjusts the states' relationship with each other and curtails the states' ability, as sovereigns, to decline to recognize each other's immunity in their own courts."

In a dissent, Justice Stephen Breyer, joined by fellow liberal Justices Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan, wondered why the majority felt compelled to part with the court's precedent.

The court in *Hall* held that the Constitution took the permissive approach, leaving it up to each state to decide whether to grant or deny its sister states sovereign immunity. Today, the majority takes the contrary approach — the absolute approach — and overrules *Hall*," Justice Breyer wrote. "I can find no good reason to overrule *Hall*, however."

Hyatt, who had moved to Nevada from California, complained the FTB had committed torts while

auditing him. In the first case, he won hundreds of millions of dollars in Nevada state courts, but the FTB appealed.

In 2016, the second time the parties appeared at the Supreme Court, Hyatt's award was greatly reduced, but on the constitutional matter of whether Hall should be overturned, the court **split 4-4** in the wake of Justice Antonin Scalia's death, spurring the FTB to come back in another attempt to overturn Hall.

While there was little remaining at stake for 80-year-old Hyatt, for California and more than 40 states **that joined as amici**, the decision is significant as a resident of one state will no longer be able to sue another state, except in its own courts.

In a **January interview** with Law360, Hyatt said the long-winded case had caused decades of professional and personal distress.

At Jan. 9 **oral arguments**, Seth Waxman, who represents the FTB, argued the court should overrule the Hall decision, which said a state could not claim the benefits of sovereign immunity when a case was brought against it in another state and only protected it from being sued in its own courts without consent. The framers, Waxman said then, "were unanimous in their understanding that states could not be sued in the courts of other states," but the justices expressed skepticism about that contention.

The problem, the justices said at the time, is there is nothing in the Constitution to support an argument that the framers were offended by the idea of one state hauling another into its courts and hinted strongly they would not rule based on what the framers might have felt as Waxman tried to persuade them to do.

"Counsel, it's nice that they felt that way," Justice Sotomayor said at the time. "But what we know is they didn't put it in the Constitution. And so we talk a lot now about not relying on legislative history but relying on the plain text of the Constitution."

Waxman said repeatedly that the very act of ratifying the Constitution meant that the states agreed to give up the power to treat each other as legal strangers, but Justices Kagan, Samuel Alito and Brett Kavanaugh stepped in to seemingly chide him for skirting around Justice Sotomayor's concerns.

"I'm waiting for the answer to Justice Sotomayor's question about what provisions of the Constitution you would point to," Justice Alito said.

But in the end, the justices saw merit in the arguments of California and other states that Hall insults them and is particularly harmful in a tax context. At oral arguments, they seemed concerned about what could protect states as long as Hall remained in place but ultimately rejected the contentions of Erwin Chemerinsky, counsel for Hyatt, that comity was enough.

Hyatt and the Franchise Tax Board did not immediately return requests for comment.

The Franchise Tax Board of California is represented by Seth P. Waxman, Paul R.Q. Wolfson, Daniel Winik and Joshua M. Koppel of WilmerHale, in-house attorneys William C. Hilson Jr., Scott W. DePeel and Ann Hodges, and Pat Lundvall and Debbie Leonard of McDonald Carano LLP.

Gilbert P. Hyatt is represented by Erwin Chemerinsky of the University of California, Berkeley School of Law.

The case is the Franchise Tax Board of the State of California v. Gilbert P. Hyatt, case number 17-1299, in the U.S. Supreme Court.

--Editing by Christine Chun.

*Update: This story has been updated with more details of the case.*

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