1986 WL 13931
United States District Court, E.D. New York.

SOCIETY FOR GOOD WILL TO RETARDED CHILDREN, et al., Plaintiffs,
v.
Mario M. CUOMO, as Governor of the State of New York, et al. Defendants.

No. 78–CV–1847(JBW). | Dec. 11, 1986.

Attorneys and Law Firms

Scheinberg, Schneps, DePetris & DePetris, Riverhead, N.Y. by Michael S. Lottman, Murray B. Schneps, for plaintiffs.

Robert Abrams, Attorney General of the State of New York, New York City by Caren Brutten, for defendants.

Alan M. Adler, Albany, N.Y., for the Office of Mental Retardation & Developmental Disabilities.

Opinion

WEINSTEIN, Chief Judge.

I. HISTORY OF PROCEEDINGS

***1** A class action was commenced in 1978 by the Society for Good Will to Retarded Children, Inc., the parents' organization at Suffolk Developmental Center (the Center), and thirteen mentally retarded individuals on behalf of themselves and more than 1,500 other persons then in residence at, or on the rolls of, the Center. Plaintiffs sought, on various federal constitutional and state and federal statutory grounds, (1) the improvement of conditions at the Center, (2) the expansion of community resources and support services in Nassau and Suffolk counties for the mentally retarded and for their families and (3) transfer of most of the clients at the Center to small community residences.

Defendants, sued in their official capacity, are the Governor of the State of New York and the personnel of the New York State Office of Mental Retardation and Developmental Disabilities. Jurisdiction is not disputed. 28 U.S.C. §§ 1331, 1343.

The Center is a state-run residential institution for the mentally retarded on 465 acres in Melville, Long Island, New York. The history of the Center and its problems are fully described in published opinions. *See, e.g., Society for Good Will to Retarded Children, Inc. v. Cuomo,* 572 F.Supp. 1298, 572 F.Supp. 1300 (E.D.N.Y.1983), *vacated and remanded,* 737 F.2d 1239 (2d Cir.1984). While the census at the Center has been reduced by a variety of means, including setting up small community residences, it remains one of the largest in the nation.

In February of 1983 the Court, after an extensive trial and repeated visits to the institution, issued an interim memorandum finding that conditions and treatment at the Center failed to meet the minimum standards required by the Constitution and statutes. As modified that plan was embodied in this court's decree of August 3, 1983. *Society for Good Will to Retarded Children v. Cuomo,* 572 F.Supp. 1300 (E.D.N.Y.1983), *vacated and remanded,* 737 F.2d 1239 (2d Cir.1984).

While the case was on appeal, the Supreme Court sharply curtailed the power of federal courts to require changes in state institutions based upon the enforcement of state law. *See Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 104 S.Ct. 900 (1984); *Society for Good Will to Retarded Children v. Cuomo,* 737 F.2d at 1252. Accordingly, the Court of Appeals remanded the case for further consideration and, more particularly, for findings on the particular federal—not state—statutes and constitutional violations were present. *See Society for Good Will to Retarded Children v. Cuomo,* 737 F.2d 1239 (2d Cir.1984).

Such findings proved unnecessary since after remand the state voluntarily agreed to enforce the plan already approved by the court. The case was therefore dismissed as moot. The court noted, however, that "[i]f the defendants substantially depart from the implementation of the plan and conditions at the facility violate federal law, this Court will reinstate the case since the issues remanded by the Circuit would no longer be moot." *Society for Good Will to Retarded Children v. Cuomo,* 103 F.R.D. 168, 169 (E.D.N.Y.1984). Annual reports by the institution to the court were required.

***2** In 1985, the court visited the institution. Being satisfied of reasonable efforts to carry out the plan, the court terminated the obligation for further reports.

Plaintiffs now move to reinstate the case. They allege continuing serious violations of federal constitutional and statutory rights. More particularly, they point to an order of the New York Department of Social Services imposing sanctions on the institution for what plaintiffs characterize as "extensive and continuing violations of the Federal requirements for participation in the Medicaid program as an intermediate case facility for the mentally retarded...." *See* 42 U.S.C. §§ 1396, 1396d(c), 1396(d), 42 C.F.R. §§ 442.400 *et seq.* Plaintiffs also move for the appointment

of a monitor or master to oversee implementation of the plan.

Upon argument of the motions the court orally expressed the view that the motions should be denied. It was the court's then view that the decision in *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 104 S.Ct. 900 (1984), required that it either bifurcate the case, or that it abstain from exercising jurisdiction over the federal claims in order that a single action on both state and federal claims might be brought in state court. Since complex issues of fact underly both the state and federal issues, bifurcating the case would, the court then believed, result in wasteful duplication of scarce federal and state judicial resources and unnecessarily burden the administrators of the Center with the defense of possible multiple lawsuits, thereby draining their time and energies away from the urgent task of implementing the plan.

Further reflection suggests that while abstention has substantial benefits in meeting the dilemmas posed by *Pennhurst,* the dangers of this approach may be too great. The most important of these dangers is posed by the closing of federal courthouses to those in state institutions who claim a violation of both federal and state rights. If federal courts have any overriding reason for being, it is as a source of protection to any person who believes there is a serious violation of his federal constitutional rights—particularly by government officials. Those institutions, particularly the mentally disabled, are especially prone to abuse unless they can turn to the courts for protection. It is doubtful whether the New York State courts, overburdened as they are, can operate with sufficient speed and efficiency to protect federal rights simultaneously with their protection of state rights. The choice by plaintiffs of the federal court—even though the state courts could in one suit enforce both state and federal rights—suggests that they believe federal courts provide them with some advantages over state courts. Finally, in this case, the long relationship of this court to the litigation and to the institution provides some hope for a reduction of the fact and law finding burdens of this new phase of the litigation.

***3** To understand the difficult jurisdictional choices posed by a litigation of this kind, it is necessary to briefly review the pre- and post-*Pennhurst* situation. It is to this history that we now turn.

II. *PENDENT JURISDICTION AND ABSTENTION DOCTRINES*

Effect and Background of Pennhurst

In *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 104 S.Ct. 900 (1984), the Court held that the Eleventh Amendment was a bar to federal courts hearing cases against state officials based upon state law. "[A] federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when—as here—the relief sought and ordered has an impact directly on the State itself." *Pennhurst,* 465 U.S. at 117, 104 S.Ct. at 917. Accepting federal funds to run the institution does not constitute a waiver of this constitutional bar. *Atascadero v. Scanlon,* 473 U.S. 234, 105 S.Ct. 3142, 3149–50 (1985).

Pendent Jurisdiction

When this case was tried in 1983 it was appropriate, based upon the doctrine of pendent jurisdiction, for this court to hear both state and federal claims. Since the state and federal claims were intertwined and based upon the same factual issues, taking jurisdiction was appropriate. In *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130 (1966), the Supreme Court defined the limits of pendent jurisdiction: The federal court has the power to exercise jurisdiction over state claims when they are close enough to a substantial federal question claim so that the court "would ordinarily be expected to try them all in one judicial proceeding." 383 U.S. at 725, 86 S.Ct. at 1138.

The doctrine of pendent jurisdiction flows from *Osborn v. Bank of United States,* 22 U.S. (9 Wheat.) 738 (1824). Relying on Article III of the Constitution, the Court there held that federal courts have authority to determine all questions of fact or law which arise in a suit, even those that go beyond the particular issue which gave rise to federal jurisdiction. *See also Greene v. Louisville & Interurban Railroad Co.,* 244 U.S. 499, 508, 37 S.Ct. 673, 677 (1917) (suit against state officials; federal court exercising federal questions jurisdiction has the power to decide the additional state law questions regardless of its determination of the federal questions). Essentially this line of cases is based upon the need for judicial efficiency and the avoidance of multiple litigation.

Exercise of pendent jurisdiction is, however, restricted by the Eleventh Amendment, which prohibits suits against states. The Supreme Court has found exceptions to the Eleventh Amendment bar where a state has either explicitly waived its immunity, *see Edelman v. Jordan,* 415 U.S. 651, 673, 94 S.Ct. 1347, 1361 (1974), or has been deemed to have waived its immunity, *see Parden v. Terminal Railway of Alabama State Docks Dep't,* 377 U.S. 184, 190–91, 84 S.Ct. 1207, 1212 (1964) (waiver by implication from the commerce clause), and where Congress has enacted legislation pursuant to the enforcement clause of the fourteenth amendment

abrogating the states' immunity. *See Fitzpatrick v. Bitzer,* 427 U.S. 448, 96 S.Ct. 2666, 2671 (1976). Before *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 104 S.Ct. 900 (1984), this stated bar was limited to a claim against a state as the named defendant, *Missouri v. Fiske,* 290 U.S. 18, 26, 54 S.Ct. 18, 20–21 (1933), *Osborn v. United States Bank,* 22 U.S. (9 Wheat.) 738 (1824), or where "the state is the real, substantial party in interest." *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459, 464, 65 S.Ct. 347, 350 (1945).

***4** The Supreme Court marked out a major exception to these limits in *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441 (1908), holding that the district court had jurisdiction to hear an action against a state official where the official acted *ultra vires.* The Eleventh Amendment issue was thus eroded to the vanishing point in institutional reform litigation. Invariably it would be alleged that the state official was not acting within his statutory authority.

The federalism balance began to swing back to the state courts in *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347 (1974). There the *Young* doctrine was restricted to prospective actions for injunctive relief against state officials. *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 104 S.Ct. (1984), further restricted *Young,* calling it a "fiction," needed only when it is necessary to promote the vindication of federal rights. 465 U.S. at 105, 104 S.Ct. at 911. The Court concluded that

> [a] federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.

465 U.S. at 106, 104 S.Ct. at 911. Since *Pennhurst,* it has been clear that this court does not have jurisdiction to hear the state claims in the instant case.

This ruling represented a sharp break with the prior practice in federal courts. In a case where federal constitutional and state statutory issues were intertwined, pre-*Pennhurst* it was usual to rely upon state law rather than upon the federal constitution in order to avoid the constitutional issue. As Justice Brandeis stated the Supreme Court's policy,

> The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.
>
> *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 347, 56 S.Ct. 466, 483 (1936) (Brandeis, J., concurring) (citations omitted).

Choices for the District Court

As a result of *Pennhurst,* federal trial courts are left with the choice either to bifurcate the federal and state claims, hearing only the federal claims in federal court, or to abstain. The plaintiff, then, would have the choice in state court of relying only on the state claims or of seeking to have all claims—both state and federal—heard together. Under the supremacy clause the state courts would have to enforce both the state and federal claims. The *Pennhurst* Court recognized that "[i]t may be that applying the Eleventh Amendment to pendent claims results in federal claims being brought in state court, or in bifurcation of claims." 465 U.S. at 122, 104 S.Ct. at 919–20.

Abstention

***5** An alternative to bifurcation is abstention. The federal court could refuse to hear the federal claim leaving the matter for the state court. A possible option of plaintiff would then be to ask the state court to adjudicate only the state claims. Following rejection of the state claims—and subject to res judicata and collateral estoppel bars discussed below—the plaintiff could conceivably return to the federal courts for adjudication of the federal claim. There are difficulties with these approaches.

The federal courts have a "virtually unflagging obligation ... to exercise jurisdiction given to them." *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 96 S.Ct. 1236 (1976). As Chief Justice Marshall put it:

> It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution.... With whatever doubts,

with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, then to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment and conscientiously to perform our duty.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1824).

Pragmatic considerations of judicial efficiency as well as reasons of comity between court systems and federalism principles led to erosion of the *Cohens* rule and an expanding abstention doctrine. *See Railroad Commission v. Pullman,* 61 S.Ct. 643, 312 U.S. (1941). Abstention is a "judge-made doctrine." *Zwickler v. Koota,* 389 U.S. 241, 148, 88 S.Ct. 391 (1967). "The doctrine of abstention, under which the District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Allegheny v. Frank Mashuda Company,* 360 U.S. 185, 188–89, 79 S.Ct. 1060 (1959).

The Court of Appeals for this circuit has synthesized the Supreme Court's abstention adjudications as delineating "four relatively well-defined circumstances" where abstention is appropriate. *Texaco v. Pennzoil,* 784 F.2d 1133, 1147 (2d Cir.), *probable jurisdiction noted,* 106 S.Ct. 3270 (1986). *See also, e.g.,* C.A. Wright, Law of the Federal Courts 303 (4th ed. 1983) (absention "recognized: (1) to avoid decision of a federal constitutional question where the case may be disposed of on a question of state law; (2) to avoid needless conflict with the administration by a state of its own affairs; (3) to leave to the states the resolution of unsettled questions of state law; and (4) to ease the congestion of the federal court docket" when a similar action is pending in a state court).

1. *Pullman Abstention*

***6** In *Railroad Commission of Texas v. Pullman Company,* 312 U.S. 496, 61 S.Ct. 643 (1941), the plaintiff sued to enjoin an order of the Texas Railroad Commissioner. The Supreme Court affirmed the district court's abstention, stating:

[The complaint] touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open. Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy.

312 U.S. at 498, 61 S.Ct. at 644.

The *Pullman* doctrine rests on the desirability of avoiding unnecessary decisions of constitutional issues where there is present an unclear issue of state law that, once decided, may make it unnecessary to decide a federal constitutional question. *See Harris County Commrs. Court v. Moore,* 420 U.S. 77, 83, 95 S.Ct. 870, 875 (1975); *Harman v. Forssenius,* 380 U.S. 528, 534, 85 S.Ct. 1177, 1182 (1965). The three essential conditions for *Pullman* abstention are:

that the state law be unclear or the issue of state law be uncertain, that resolution of the federal issue depend upon the interpretation to be given to the state law, and that the state law be susceptible of an interpretation that would avoid or modify the constitutional issue.

McRedmond v. Wilson, 533 F.2d 757, 761 (2d Cir.1976) (citations omitted). *See also Weiser v. Koch,* 632 F.Supp. 1369, 1383 (S.D.N.Y.1986) (abstention in a suit involving shelters for the homeless where federal court would have had to rely upon state law currently undergoing development).

None of the essential elements for *Pullman* abstention are met in the case at bar. First, the state law is not unsettled. Second, resolution of the federal issues is not logically dependent on resolution of the state law issues. Whether plaintiffs are being denied their due process rights, as well as whether conditions at the Long Island Developmental Center violate federal statutes are questions that may be decided independently of any decision as to plaintiffs' rights under state law. It is not logically necessary to decide the state law issues first, before reaching the constitutional claim; the constitutional claim is alternative to, rather than dependent upon, the state law claims.

Canaday v. Koch, 608 F.Supp. 1460, 1467 (S.D.N.Y.), *aff'd sub. nom. Canaday v. Valentin,* 768 F.2d 501 (2d Cir.1985). In this very litigation the Court of Appeals on its remand ordered the trial court to separate the state and federal issues and to decide the federal question without regard to state law. *See Society for Good Will to Retarded Children v. Cuomo,* 737 F.2d 1239, 1292 (2d Cir.1984). Since the state law issues are not logically preliminary to the federal constitutional issue, the second requirement of the test for abstention is missing.

The third essential element is also not present: Resolution of the state claims will not necessarily preclude the necessity to decide the federal issues. It is possible that no state laws are violated, but that the federal constitution or statutes are.

2. *Burford Abstention*

***7** In *Burford v. Sun Oil Company,* 319 U.S. 315, 63 S.Ct. 1098 (1943), a federal court suit attacked an order of the Texas Railroad Commission which granted the right to

drill on its land for oil. The Court held that abstention was appropriate in these circumstances: The federal government has left the responsibility for regulating the industry to the states; there is an effective state administrative system; the legislature "has established a system of thorough judicial review by its own State courts"; 319 U.S. at 325, 63 S.Ct. at 1103, and the state law is unsettled. Under the circumstances of the complex state administrative scheme then in place, the "federal courts can make small contribution to the well organized system of regulation and review which the Texas statutes provide." 63 S.Ct. at 1104.

Burford abstention enables courts to refrain from becoming involved with state policymaking and enforcement procedures in complex areas which are primarily the state's concern out of respect for federalism and comity. In *Louisiana Power & Light Co. v. City of Thibodaux,* 360 U.S. 25, 79 S.Ct. 1070 (1959), the Court held abstention by the district court proper in a case concerning the scope of the eminent domain power of municipalities under state law since the state law was unsettled. *See also Kaiser Steel Corp. v. W.S. Ranch Co.,* 391 U.S. 593, 88 S.Ct. 1753 (1968); *Hawks v. Hamill,* 288 U.S. 52, 53 S.Ct. 240 (1933); *but see County of Allegheny v. Frank Mashuda Co.,* 360 U.S. 185, 79 S.Ct. 1060 (1959) (abstention inappropriate in case involving question of eminent domain power where state law settled). These cases involve primarily financial concerns, not life and liberty. *Burford* abstention is not useful in the case at bar.

Even the broad view of *Burford* abstention in *Levy v. Lewis,* 635 F.2d 960 (2d Cir.1985), cannot override the clear duty of federal district courts to protect the federal constitutional rights of incompetents held in a state institution. *See Quinn v. Aetna Life and Casualty Co.,* 616 F.2d 38, 41 (2d Cir.1980) ("abstention cannot be ordered simply to give state courts the first opportunity to vindicate" a claim); *cf. Naylor v. Case and McGrath, Inc.,* 585 F.2d 517, 565 (2d Cir.1978) (abstention not proper where rendering federal decision will not "be disruptive of the even development of state law"). In *Levy* plaintiff filed a claim in federal court against the state superintendent of insurance alleging misfeasance in the state's handling of an employee welfare benefit plan. The federal court had jurisdiction under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001–1381. Affirming the district court's dismissal of the case, the Second Circuit held that rather than dismiss for failure to state a claim, the court should have invoked abstention. The court stated that *Burford* applies even when complex issues of state law are not present:

Appellant argues, however, that this case is not governed by those decisions in which abstention was ordered under *Burford* because most decisions applying *Burford* have involved complex issues of state law. We disagree. In *Burford* itself, violations of federal law were alleged. The claims there amounted to an attack on the reasonableness of the state administrative action. Thus federal review, while involving decision of a federal question, would have entailed a reconsideration of the state administrative decision, carrying with it the potential for creating inequities in the administration of the state acheme. *Burford* thus suggests that proper respect for the expertise of state officials and the exeditious and evenhanded administration of state programs counsels restraint on the part of the federal courts.

***8** *Levy,* 635 F.2d at 964.

In the instant case where the lives and welfare of incompetents are involved, the *Levy* case is not controlling. We are not, as in *Levy,* concerned with "the proper respect for the expertise of state officials and the expeditious and evenhanded administration of state programs." *Id.* at 964. We are here concerned with the futures of people incapable of caring for themselves.

Levy is also distinguishable from the instant case because there both federal and state jurisdiction were invoked. Here only federal jurisdiction is relied upon.

3. *Younger Abstention*

In *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746 (1971), the Court held that, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction should not be invoked for the purpose of restraining state criminal proceedings. This form of abstention also has been applied to cases involving state nuisance prosecutions which are directed at obtaining the closure of places exhibiting obscene films, *see Huffman v. Pursue, Ltd.,* 420 U.S. 592, 95 S.Ct. 1200 (1975) and to cases involving the collection of state taxes. *See Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293, 63 S.Ct. 1070 (1943). Abstention under *Younger* is inappropriate in the instant case.

4. *Colorado River Abstention*

Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236 (1976) involved the concurrent exercise of jurisdiction by both federal and state courts. The United States brought an action in federal court against water users for a declaration of the government's rights to waters in certain Colorado rivers. The suit was brought under both federal and state law. After the federal suit had commenced, one of the defendants filed another suit in Colorado state court on the same claims. Thereafter, defendants filed a motion in federal court to dismiss on the ground of the McCarran

Amendment. The Supreme Court found that although this case did not fall within previously enumerated abstention doctrines, the district court's refraining from hearing the case was appropriate. However, the Court warned:

[T]here are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdiction, either by federal courts or by state and federal courts. These principles rest on considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.

Colorado River Water Conservation District v. United States, 424 U.S. 800, 817, 96 S.Ct. 1236, 1246 (1976) (citations omitted).

While declining to prescribe a hard and fast rule for dismissals in cases involving the exercise of concurrent jurisdiction, the Court described the factors relevant to its decision:

[T]he court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts.... [A] federal court may also consider ... the inconvenience of the federal forum; the desirability of avoiding piecemeal litigation; and the order in which jurisdiction was obtained by the concurrent forums. No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required.

***9** 424 U.S. at 818–19, 96 S.Ct. at 1246–47 (citations omitted). In *Moses H. Cone Memorial Hospital v. Mercury Construction,* 460 U.S. 6, 103 S.Ct. 927 (1983), the Supreme Court noted that its primary concern in *Colorado River* was the narrow circumstance in which there is congressional intent that the federal and state issues be tried jointly by one court. *See Moses H. Cone Memorial Hospital v. Mercury Construction,* 460 U.S. 6, 16, 103 S.Ct. 927, 937 (1983).

Abstention in the instant case does not come within the *Colorado River* abstention doctrine. There is neither a *res,* nor is there the concurrent exercise of federal and state jurisdictions.

Each of the four abstention doctrines outlined above has been carefully circumscribed. None seriously erodes the clear policy that a federal court should not decline to accept cases within its jurisdiction.

While not decisive we note that abstention in the instant case might cause serious issue preclusion and claim preclusion problems.

Claim and Issue Preclusion

On the same day that *Pennhurst* was handed down, the Supreme Court ruled on a claim of the preclusive effect of a state-court judgment in the context of a subsequent federal suit under 42 U.S.C. §§ 1983 and 1985. In *Migra v. Warren City School District Board of Education,* 465 U.S. 75, 104 S.Ct. 898 (1984), the plaintiff brought suit in the Ohio Court of Common Pleas. She did not litigate her federal claim in state court. The Supreme Court affirmed the district court's holding that her suit in federal court was precluded by the state court judgment since her federal claim could have been litigated in the state court proceeding. It held: "petitioner's state-court judgment in this litigation has the same preclusive effect in federal court that the judgment would have in the Ohio state courts." 104 S.Ct. at 898, 465 U.S. at 85.

After *Pennhurst* a litigant who wishes to join state law claims against a state official with federal claims must file in state court. Procedurally, the litigant who wishes to preserve his federal claims for hearing in federal court must first file in federal court and, after that court abstains,

inform the state courts that he is exposing his federal claims there only for the purpose of complying with [the requirement to inform the state court of his federal claims, so that the state law can be construed in light of the federal claims], and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions. Such an explicit reservation is not indispensable; the litigant is in no event to be denied his right to return to the District Court unless it clearly appears that he voluntarily did more than [inform the court] and fully litigated his federal claims in the state courts. When the reservation has been made, however, his right to return will in all events be preserved.

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 421–22, 84 S.Ct. 461, 468 (1964). Unless this procedure is followed the litigant would be precluded from bringing action in federal court. *See* Shapiro, Wrong Turns: The Eleventh Amendment and the *Pennhurst* case, 98 Harv.L.Rev. 61, 80 n. 115 and 81 (1984). In effect, this procedural necessity results in delays and additional use of court time.

***10** Issue preclusion occurs when an issue of fact or law was actually litigated and determined by a valid and final judgment. The determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. In *Allen v. McCurry,* 449 U.S.

90, 101 S.Ct. 411 (1980), the Court held that issue preclusion applied to bar a federal court in a damage action brought under 42 U.S.C. § 1983 from reconsidering a state court's determination of the constitutionality of a search and seizure. Similarly, when a federal court abstains, forcing the case to be litigated first in state court, should the federal claims thereafter come before a federal court, that court may be barred from relitigating some factual issues already heard in the state court.

Power of Bifurcation

Bifurcation of claims between the federal and state courts is within the district court's discretionary power. As the Court of Appeals for the Second Circuit has put the matter:

In exercising its discretion [to bifurcate a case between federal and state courts], the district court will undoubtedly keep in mind that a portion of [the] action must be brought in the federal court, that the district court and the parties have already devoted considerable time and effort to the other incidents of alleged wrongdoing, that bifurcation of the claims may be wasteful and that success on the pendent claims may afford plaintiffs substantially complete relief.

Morrissey v. Curran, 567 F.2d 546, 549 (2d Cir.1977).

The court has considered the importance of the federal claims to members of the plaintiff class; the fact that the Court of Appeals has already held, in effect, that bifurcation here is practical when it remanded for a decision on federal issues only; and the extensive experience of the court with the institution. Weighing these and other relevant considerations, it is clear that bifurcation rather than abstention is desirable.

III. *Conclusion*

Plaintiffs' claims cannot be precluded. The federal courts are open to them.

The case should be conducted as a litigation independent from the case already in effect long closed. Accordingly, the clerk is directed to open a new file temporarily entitled "In re Long Island Developmental Center"—the new name of the former Suffolk Developmental Center. No payment of fees shall be required since the court takes judicial notice that the individual plaintiffs are substantially without funds.

Plaintiffs shall have sixty days to serve a complaint. Defendants shall be deemed served with a summons and complaint in this new action by service of plaintiff's motion in 78 C 1847 returnable October 29, 1986. All papers filed in 78 C 1847 on and after September 29, 1986 shall be transferred to the new file.

So ordered.

Parallel Citations

55 USLW 2348