

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

STATE FARM FIRE AND CASUALTY
COMPANY and STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY

PLAINTIFFS

v.

CIVIL ACTION NO. 2:07cv188-DCB-MTP

JIM HOOD, IN HIS OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF THE STATE
OF MISSISSIPPI

DEFENDANT

**STATE FARM'S TRIAL BRIEF ON RIGHT
TO HAVE FULL EVIDENTIARY HEARING**

Plaintiffs State Farm Fire and Casualty Company and State Farm Mutual Automobile Insurance Company (collectively "State Farm"), submit this their Trial Brief on Right to Have Full Evidentiary Hearing. State Farm submits this brief to address Attorney General Hood's request that the Court cut-off the presentation of any further evidence; even though State Farm has not even completed the examination of its first witness. Specifically, Attorney General Hood now argues that he is not challenging the subject matter jurisdiction of this Court and, therefore, *Montez v. Department of the Navy*, 392 F.3d 147 (5th Cir. 2004), is inapplicable. As discussed below, none of Attorney General Hood's arguments support his conclusion that this Court should terminate the evidentiary proceedings in this case.

ARGUMENT

In a 180-degree reversal of his prior arguments to this Court, Attorney General Hood now amazingly argues that he is not challenging the subject matter jurisdiction of this Court and, therefore, that *Montez v. Department of the Navy*, 392 F.3d 147 (5th Cir. 2004), is inapplicable. This is a substantial departure from Attorney General Hood's prior position.

For example, on the first day of the hearing, counsel for Attorney General Hood stated: "[W]e are prepared to proceed in the event that the Court were to deny our motion to dismiss on the merits of both the anti-injunction statute, the abstention issues, *as well as subject matter jurisdiction.*" (Nov. 1, 2007 Tr. [Dkt. 72-2], at 18:8-11 (emphasis added).) Likewise, defense counsel argued: "[T]hat issue actually segues fairly well into our motion to dismiss, which is

based in part upon abstention. Because what we are essentially coming to the Court to do on our motion to dismiss is to ask the Court *to refrain from exercising any subject matter jurisdiction* over this matter because it substantially would interfere with ongoing State Court proceedings.” (*Id.* at 44:7-9 (emphasis added).)

He further stated: “Moving specifically to the motion to dismiss – and that ripeness issue I think would go to the subject matter jurisdiction of the Court as a whole.” (*Id.* at 47:17-19.) Defense counsel concluded his argument on the Attorney General’s motion to dismiss by stating: “[W]e respectfully submit all of those matters addressing both the existence of subject matter jurisdiction or nonexistence thereof, as well as limitations on the exercise of that jurisdiction, would in equity and in good conscience appropriately require and we respectfully submit the application and declination of jurisdiction or the exercise thereof either under abstention or under the anti-injunction statute.” (*Id.* at 62:14-19.)

In his most recent submission to this Court, Attorney General Hood now argues that “[t]he current case is distinguishable from *Montez*” because “the Attorney General is not arguing that this court lacks subject matter jurisdiction over State Farm’s claims. Rather, it is the Attorney General’s position that this Court should exercise its discretionary authority to decline to jurisdiction over the matter pursuant to the *Younger* abstention doctrine.” (Rebuttal Mem. [Dkt. 94] at 3.) The Attorney General’s argument misconstrues the Fifth Circuit’s reasoning in *Montez*, as well as the scope of a court’s discretion under *Younger*.

Initially, the Attorney General’s argument assumes that *Montez* is limited to cases where the challenge is to the district court’s subject matter jurisdiction *ab initio* and does not apply where the jurisdictional challenge is based on abstention. The Attorney General’s argument defies logic. In *Montez*, the Fifth Circuit made clear that a district court can conduct evidentiary hearings to resolve challenges to its jurisdiction. *See Montez*, 392 F.3d at 149. Where the jurisdictional issue and the merits both depend on resolution of the same disputed factual issues, the court *must* assume jurisdiction and proceed to the merits. *See id.* at 150.

Attorney General Hood argues that the rule in *Montez* should not apply where the

jurisdictional challenge is one of abstention, but offers no reason why this would be true.¹ In fact, a jurisdictional challenge based on abstention presents an even better case for application of *Montez*. *Montez* was intended to address the situation where a plaintiff would be deprived of an opportunity to present evidence on the merits of its claim based upon a premature dismissal for lack of subject matter jurisdiction, which would both prejudice the plaintiff and undermine judicial economy. *See id.* at 150. These concerns are even more compelling where the defendant concedes - (as Attorney General Hood has now done) - that the court has subject matter jurisdiction *ab initio*. In such a case, there is even less of a barrier to the Court considering the intertwined factual issues upon which the defendant's motion to dismiss and the plaintiff's motion for preliminary injunction depend.

Attorney General Hood also tries to invoke an exception recognized by the Fifth Circuit in *Montez* for cases arising under the Federal Sovereign Immunities Act in *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169 (5th Cir. 1994). Initially, in *Montez*, the Fifth Circuit made clear that the *Moran* exception was narrow and specifically limited to cases implicating the Federal Sovereign Immunities Act. *See Montez*, 392 F.3d at 150 (“[W]e took pains to explain why [the *Moran*] exception applies *only to cases brought under the FSIA*, inasmuch as FSIA claims involve immunity from suit.”) (emphasis added); *see also id.* at 151 (“[I]nformation provided to us by our sister Circuits indicates that *Moran* is best viewed as a limited exception to the general rule.”); *see also In re Katrina Canal Breaches Consol. Litig.*, 471 F. Supp. 2d 684, 689 (E.D. La. 2007) (following *Montez* and holding that *Moran* exception did not apply to federal government's claim of immunity under the Federal Tort Claims Act).

¹ In support of his argument, Attorney General Hood relies upon *Weekly v. Morrow*, 204 F.3d 613 (5th Cir. 2000), where the court observed, in passing, that “[f]ederal courts do not abstain on *Younger* grounds because they lack jurisdiction; rather, *Younger* abstention ‘reflects a court’s prudential decision not to exercise [equity] jurisdiction which it in fact possesses.’” *Id.* at 614-15. *Weekly* stands only for the proposition that a court must determine that it has subject matter jurisdiction *ab initio*, before it reaches the issue of abstention. *See id.* at 615 (holding that the district court did not have jurisdiction to hear the plaintiff's claims, even before reaching the *Younger* question). *Weekly* does not stand for the proposition that *Montez* does not apply to a jurisdictional challenge based upon abstention.

Indeed, Attorney General Hood cites no case extending the *Moran* exception to any other context. Further, Attorney General Hood has never asserted immunity as a grounds for dismissal – nor could he. The Supreme Court’s decision in *Ex parte Young*, 209 U.S. 123 (1908) makes clear the state officers enjoy no immunity to be free from a federal suit to enjoin violation of federal law.

The Attorney General also overstates the extent of a district court’s discretion when ruling on a motion to abstain. As the Supreme Court has made clear, a federal court has **no discretion** to abstain where the requirements for *Younger* abstention are not met. Instead, federal courts must “fulfill their duty to adjudicate federal questions properly brought before them.” *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 238 (1984); *see also Wilson v. Valley Elec. Membership Corp.*, 8 F.3d 311, 313 (5th Cir. 1993) (observing that “the federal courts have a ‘virtually unflagging obligation . . . to exercise the jurisdiction given them.’”) (citation omitted, ellipses in original). Thus, in abstention cases, the Fifth Circuit does *not* employ an abuse of discretion standard; rather, it employs a hybrid standard of review:

This court applies a two-tiered standard of review in abstention cases. “Although we review a district court’s abstention ruling for abuse of discretion, ***we review de novo whether the requirements of a particular abstention doctrine are satisfied.***” “The exercise of discretion must fit within the narrow and specific limits prescribed by the particular abstention doctrines involved.” “A court necessarily abuses its discretion when it abstains outside of the doctrines strictures.” Thus, we review a district court’s decision to abstain for abuse of discretion, provided that the elements for *Younger* abstention are present.”

Community Care Bossier Inc. v. Foti, 228 Fed. App’x 444, 445 (5th Cir. 2007) (citations omitted, emphasis added);² *see also Wilson*, 8 F.3d at 313 (“[T]he allowable discretion is quite narrow, because it ‘must be exercised within the narrow and specific limits prescribed by the particular abstention doctrine involve.’”) (citation omitted).³

² Attorney General Hood also relies upon an Eighth Circuit case, *Fuller v. Ulland*, 76 F.3d 957 (8th Cir. 1996), which does not reflect the law in the Fifth Circuit.

³ *See also Lipscomb v. Columbus Municipal Separate School District*, 145 F.3d 238, 242 (5th Cir. 1998) (even though the court uses a nominal abuse of discretion standard in abstention cases, “[i]n practice, however, our scrutiny is stricter”); *Alexander v. Ieyoub*, 62 F.3d 709, 712 (5th Cir. 1995) (“Our
(cont’d)

Attorney General Hood also argues that this Court should not hear any further evidence in this case based upon the Ninth Circuit's decision in *Kenneally v. Lungren*, 967 F.2d 329 (9th Cir. 1982). *Kenneally* is inapposite for several reasons. *Kenneally* stands only for the proposition that there is no presumption (in the Ninth Circuit) in favor of evidentiary hearing. *See id.* at 335. Initially, that is not the law in the Fifth Circuit. To the contrary, the Fifth Circuit has stated:

There can be no doubt that where the facts are clear that a court, in the exercise of its discretion, may grant or deny an injunction on the basis of *ex parte* affidavits. However, where as here the affidavits relate to controverted factual issues, we feel the District Court should have required the facts to be tested in the crucible of oral and cross-examination. Accordingly, the case is remanded to the District Court for further findings of fact after a full hearing consistent with the views herein expressed.

Scott v. Davis, 404 F.2d 1373, 1375 (5th Cir. 1968)(emphasis added); *see also Sierra Club v. FDIC*, 992 F.2d 545 (5th Cir. 1993) (observing that a “a district court may issue a preliminary injunction without an evidentiary hearing *when the facts are not disputed*”) (emphasis added); *Landmark Land Co. v. Office of Thrift Supervision*, 990 F.2d 807, 812 (5th Cir. 1993) (holding that evidentiary hearing was required on preliminary injunction to resolve disputed issues of fact).⁴

Moreover, while the *Kenneally* Court did not accept *live* testimony *from either side*, the court did allow the parties to take the depositions of seven witnesses. Approximately 765 pages

(*cont'd from previous page*)

application of the abuse-of-discretion standard in reviewing a district court's decision to abstain, however, is more stringent than in reviewing a district court's evidentiary ruling. To abstain properly, the district court must exercise its discretion strictly within the limits imposed by the particular doctrine of abstention on which the court relies.”).

Other circuits have recognized that *Younger* does not truly involve any discretion. *See Green v. City of Tucson*, 255 F.3d 1086, 1093 (9th Cir. 2001) (“In addressing *Younger* abstention issues, district courts must exercise jurisdiction except when specific legal standards are met, and may not exercise jurisdiction when those standards are not met; there is no discretion vested in the district courts to do otherwise.”).

⁴ *United States v. Oregon*, 913 F.2d 576 (9th Cir. 1990), which concerns approval of a class action settlement, is even further a field.

of witness testimony and 83 exhibits were filed with the court. *See id.* at 335. Thus, while the court did not hear live testimony, it certainly allowed the parties an opportunity to make a substantial evidentiary submission. In stark contrast, in the instant case, the Court has not allowed discovery or deposition (with the exception of the trial deposition of Richard Scruggs), but has ordered that the parties may subpoena live witnesses to the hearing.

Other courts have recognized that a court should consider evidence on the issue of bad faith when *Younger* abstention is sought. Significantly, one of the leading Fifth Circuit cases on *Younger* abstention, specifically contemplates a simultaneous evidentiary hearing on the issues of abstention and preliminary injunction. *See Wilson v. Thompson*, 593 F.2d 1375, 1386-89 (5th Cir. 1979); *see also Kern v. Clark*, 331 F.3d 9, 10 (2d Cir. 2003) (“We conclude that the district court erred by dismissing Kern’s complaint as barred by *Younger* abstention without holding an evidentiary hearing to resolve factual disputes related to Kern’s claim that he was being prosecuted in bad faith.”); *Sica v. Connecticut*, 331 F. Supp. 2d 82, 87 (D. Conn. 2004)(citations omitted) (“[W]hen a plaintiff seeks to avail herself of the *Younger* exceptions, a district court ordinarily should hold an evidentiary hearing. This is because issues such as subjective bad faith and bias . . . are questions of fact that are often difficult to resolve without an evidentiary hearing.”)

CONCLUSION

State Farm acknowledges that it has the burden to show bad faith, both to support its request for a preliminary injunction and to establish an exception to *Younger*. The Attorney General asks this Court create a monumental Catch-22 by denying State Farm the opportunity to present the evidence allowing it to meet its burden. Moreover, it should be noted that while his original motion was filed under Rule 12(b)(6), the Attorney General is no longer asking the Court to decide the abstention issue solely based upon the pleadings, in which case the Court would have to assume the truth of the allegations in the complaint. Rather, the Attorney General asks this Court to decide the issue only upon evidence submitted by the Attorney General *ex parte* and in chambers – and to deny State Farm the opportunity to present any further evidence

beyond its one, as-of-yet-uncompleted witness. The Attorney General's proposal is repulsive to all notions of due process that are at the heart of this country's judicial system.

Respectfully submitted, this the 4th day of February, 2008.

STATE FARM FIRE AND CASUALTY COMPANY and STATE
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CERTIFICATE OF SERVICE

I, E. Barney Robinson III, one of the attorneys for Plaintiffs, do hereby certify that I have this day caused a true and correct copy of the foregoing instrument to be delivered to the following, via the means directed by the Court's Electronic Filing System to:

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THIS the 4th day of February, 2008.

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