

## Supreme Court Denies GOP Request to Bar N.J. Candidate Switch

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**American Lawyer Media**

**10-08-2002**

The U.S. Supreme Court announced Monday it would not intervene in the dispute over New Jersey's U.S. Senate ballot, thereby sparing itself an election controversy with echoes of *Bush v. Gore*.

Acting on the afternoon of the first day of its fall term, the Court denied the request of the New Jersey Republican Party to prevent Democrats from replacing incumbent Sen. Robert Torricelli's name on the ballot with that of former Sen. Frank Lautenberg. Torricelli, plagued by ethics problems, dropped out of the race a week ago.

State Republicans had protested the switch, but the New Jersey Supreme Court unanimously approved it last week.

That sent Republicans to the U.S. Supreme Court, arguing that the state supreme court usurped the constitutionally mandated role of the state legislature in regulating elections -- an argument that carried the day when it related to the Florida Supreme Court's ruling on the presidential election dispute that led to *Bush v. Gore* nearly two years ago.

But invoking that case did not succeed in getting the high court to become involved again.

David Norcross, a Washington, D.C., partner at Blank Rome Comisky & McCauley who is working on the Republican legal team in the case, says he was "not shocked" by the Court's unwillingness to get involved.

But Norcross says he doesn't think the Court is in any way foreclosing future use of *Bush v. Gore*. "I think people fail to read *Bush v. Gore* seriously at their peril."

An election law expert not involved in the case said the Court's action Monday was typical of its approach to election disputes. "I think that either people were expecting *Bush v. Gore* to have broader applications, or what is more likely is that this case just isn't similar to *Bush v. Gore*," said Jan Baran, an election lawyer and partner at Wiley Rein & Fielding.

Until word came down on the New Jersey case around 2 p.m., it looked like the Supreme Court's first day would be anticlimactic. When it opened at 10 a.m., not only was the Court silent on the New Jersey case, but also it granted review in no new cases and denied review in more than 1,000 others.

And in the one significant case on the oral argument docket, most justices made it clear they doubted they had jurisdiction to rule on it. There was one moment of excitement at the beginning of the session, however.

Chief Justice William Rehnquist took note of the retirement of the Court's chief deputy clerk, Francis Lorson. But as Rehnquist began to recite Lorson's title, it came out as "chief justice," rather than "chief deputy clerk."

For a heart-stopping moment, it seemed that Rehnquist was announcing his own retirement in third-person style. But he laughed at his mistake and continued speaking.

The major case argued Monday, *Ford Motor Co. and Citibank v. McCauley*, No. 01-896, was billed as a dispute that could settle one of the fundamental questions of civil litigation in federal courts: What costs can be included in reaching the \$75,000 threshold necessary for the diversity jurisdiction of federal courts? Defendants in class actions generally want the cases tried in federal court, while plaintiffs often want them played out in state courts, so the answer is crucial -- especially in cases with hundreds or thousands of plaintiffs whose individual losses are low.

The case before the Supreme Court involves a credit card rebate program that gave users credit toward the purchase of a car. When the program was canceled in 1998, cardholders in six states sued.

Ford and Citibank got the cases removed to federal court, where a consolidated complaint superseded the six original state actions. But then the federal court dismissed the complaint and returned the cases to the states, on the grounds that the \$75,000 threshold for federal court jurisdiction had not been met.

The dismissal was a win, in one sense, for Ford and Citibank. Still, the companies appealed, claiming that the costs of reinstating the rebate program would far exceed the threshold.

That was the argument that Ford and Citibank's lawyer, former Solicitor General Seth Waxman of Wilmer, Cutler & Pickering, rose to make on Monday.

But for roughly 28 of his 30 minutes before the Court, Waxman was peppered with questions about whether the Supreme Court had jurisdiction to rule in the case in the first place.

The main concern of the justices, it appeared, is that ordinarily, when a district judge remands a case based on a lack of subject matter jurisdiction, the remand order cannot be appealed. If that is the case, then neither the 9th U.S. Circuit Court of Appeals, which ruled against the companies, nor the Supreme Court would have jurisdiction in the case.

So the justices debated, often among themselves, whether that is what happened in the case before them or whether, as Waxman argued, they had a new case on which they could rule. Most of the justices appeared doubtful they have jurisdiction, which led some Court-watchers to speculate that the case will be dismissed and the 9th Circuit ruling vacated.

It was literally not until the final two minutes of Waxman's argument time that he was able to talk about the actual issue relating to the \$75,000 threshold.

His adversary, Steve Berman of Seattle's Hagens Berman, faced similar questioning for 20 minutes, but then he had an opening to discuss the merits of the diversity issue. He hesitated, however, noting that

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Waxman had not been able to discuss the merits of the case. Rehnquist encouraged him to proceed. "I originally came to talk about an important issue," said Berman. "Us too," said Justice Antonin Scalia.

Legal Times reporter Deirdre Davidson contributed to this report.