

1993

Monetary Damages against States - Arbitrators Have Power to Award, but Federal Courts Cannot Enforce - Tennessee Department of Human Services v. United States Department of Education

R. Scott Reid

Follow this and additional works at: <https://scholarship.law.missouri.edu/jdr>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

R. Scott Reid, *Monetary Damages against States - Arbitrators Have Power to Award, but Federal Courts Cannot Enforce - Tennessee Department of Human Services v. United States Department of Education*, 1993 J. Disp. Resol. (1993)

Available at: <https://scholarship.law.missouri.edu/jdr/vol1993/iss2/9>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

MONETARY DAMAGES AGAINST STATES - ARBITRATORS HAVE POWER TO AWARD, BUT FEDERAL COURTS CANNOT ENFORCE

*Tennessee Department of Human Services v. United States
Department of Education*¹

I. INTRODUCTION

Legislation is usually interpreted by examining statutory language and legislative history.² However, the United States Supreme Court has considered strict guidelines for interpreting statutes that potentially interfere with Eleventh Amendment immunity rights.³ Application of these guidelines can lead to peculiar court decisions, an example of which is provided in *Tennessee Department of Human Services v. United States Department of Education*.⁴

II. FACTS AND HOLDING

Wayne Hinton was licensed as a blind vendor by the Tennessee Department of Human Services [hereinafter TDHS] pursuant to the Randolph-Sheppard Vending Stand Act.⁵ Hinton obtained two permits to operate vending machines at two different sites at a federal nuclear power facility located in Tennessee.⁶ The dispute in the case arose when sighted vendors began operating at one of the

1. 979 F.2d 1162 (6th Cir. 1992).

2. See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 253 (1985) (Brennan, J., dissenting).

3. *Id.*

4. 979 F.2d 1162 [hereinafter *Tenn. Human Servs.*].

5. *Tenn. Human Servs.*, 929 F.2d at 1164. The purpose of the Randolph-Sheppard Vending Stand Act, 20 U.S.C. §§ 107 - 107f (1988) [hereinafter Randolph-Sheppard Act], is to provide employment opportunities for the blind. 20 U.S.C. § 107(a). Under the Act, priority is given to blind persons seeking employment as vendors on federal property. 20 U.S.C. § 107(b). The Secretary of Education designates state licensing agencies and is responsible for interpreting and enforcing the Act. 20 U.S.C. §§ 107a(a)(5), 107b; 34 C.F.R. §§ 395.5, 395.8 (1988).

6. *Tenn. Human Servs.*, 979 F.2d at 1164.

sites.⁷ Hinton claimed that the sighted vendors' stands were in direct competition with his stand.⁸ The TDHS asserted that the sighted vendors' stands were not on either of Hinton's permitted sites.⁹ Hinton sought to recover past and future income from the vending machines on the site as provided in the Randolph-Sheppard Act.¹⁰

After exhausting state recovery procedures, Hinton requested an arbitration panel from the United States Secretary of Education.¹¹ This request was refused by the Secretary on the basis of sovereign immunity.¹² Thereafter, Hinton obtained an order from the United States District Court for the Eastern District of Tennessee compelling the Secretary to convene the arbitration panel.¹³

The arbitration panel found in favor of Hinton and ordered the TDHS to pay past income, interest, and attorney's fees.¹⁴ The TDHS challenged the panel's factual findings and decision in the United States District Court for the Eastern District of Tennessee on the basis that the Eleventh Amendment barred the award.¹⁵ Hinton and the United States Department of Education were named as defendants in the case.¹⁶

The district court found in favor of the TDHS on the basis that the Randolph-Sheppard Act does not contain unambiguous language of congressional intent to abrogate the states' Eleventh Amendment sovereign immunity.¹⁷ Hinton appealed the district court's decision to the United States Court of Appeals for the Sixth

7. *Id.*

8. *Id.* Section 107d-3(b)(1) of the Randolph-Sheppard Act defines "direct competition" as: [T]he existence of any vending machines or facilities operated on the same premises as a blind vending facility except that vending machines or facilities operated in areas serving employees the majority of whom normally do not have access to the blind vending facility shall not be considered in direct competition with the blind vending facility.

20 U.S.C. § 107d-3(b)(1) (1988).

9. *Tenn. Human Servs.*, 979 F.2d at 1164.

10. *Id.* See *infra* notes 24-27 and accompanying text for discussion of the Act's enforcement provisions.

11. *Tenn. Human Servs.*, 979 F.2d at 1164. Hinton first sought an evidentiary hearing from the TDHS. *Id.* The state hearing officer found in favor of Hinton and awarded past and future income from the site. *Id.* The Commissioner of the TDHS reversed the state hearing officer's decision on the basis that the two properties were separate. *Id.*

12. *Id.*

13. *Hinton v. United States Dep't of Educ.*, 700 F. Supp. 21, 23 (E.D. Tenn. 1988).

14. *Tenn. Human Servs.*, 979 F.2d at 1164.

15. *Id.* at 1165.

16. *Id.* However, the Department filed a memorandum supporting the TDHS's position. *Id.*

17. *Id.* The Eleventh Amendment provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI

Circuit.¹⁸ The Sixth Circuit held that the Randolph-Sheppard Act authorized arbitration panels to award retroactive damages against state agencies, but that the Eleventh Amendment bars subsequent enforcement in federal court since Congress has not abrogated state immunity and participating states have not waived their immunity.¹⁹

III. LEGAL BACKGROUND

A. *The Randolph-Sheppard Vending Stand Act*

The Randolph-Sheppard Vending Stand Act was enacted in 1936.²⁰ The purpose of the Act is to provide employment for the blind and to provide a means to economic self-reliance.²¹ The Act attempts to attain these goals by giving blind persons priority in obtaining licenses to operate vending facilities on federal property.²² The Act requires state agencies participating in the program to agree to several terms expressly listed in the Act.²³ Among the terms is a requirement that the participating state agency agree to provide dissatisfied licensees "an opportunity for a fair hearing."²⁴ Furthermore, if the licensees' complaints are not thereby resolved, the state agency must "agree to submit the grievances . . . to arbitration as provided in section 107d-1 of this title."²⁵ Section 107d-1 of the Act provides that any blind licensee who is dissatisfied with the state agency's hearing may file a complaint with the Secretary.²⁶ The Secretary, in turn, "shall convene a panel to arbitrate the dispute . . . and the decision of such panel shall

18. *Tenn. Human Servs.*, 979 F.2d at 1165.

19. *Id.* at 1165, 1170.

20. Pub. L. No. 74-732, ch. 638, 49 Stat. 1559 (1936) (codified as amended at 20 U.S.C. §§ 107-107f (1974)).

21. 20 U.S.C. § 107.

22. 20 U.S.C. § 107(b). The Act sets up a licensing system for the operation of vending facilities on federal property. 20 U.S.C. §§ 107a-107b(1). "Vending facilities" is defined as "automatic vending machines, cafeterias, snack bars, cart services, shelters, counters, and such other appropriate auxiliary equipment." 20 U.S.C. § 107e. State agencies are responsible for issuing vending permits. 20 U.S.C. § 107a(b). The state agencies must give preference in granting licenses to those persons meeting the statute's definition of "blind." 20 U.S.C. § 107a(b). Income from vending machines without licensed vendors goes to the state agency in charge of the licensing to be used for pension plans, health insurance, paid sick leaves, and vacation time. 20 U.S.C. § 107d-3 (a), (c). Income from vending machines in direct competition is given to the blind licensee located at the premises. 20 U.S.C. § 107d-3(b). If a non-licensed vending machine is not in direct competition with a blind licensee, then 50% of the income goes to the state agency. 20 U.S.C. § 107d-3(b).

23. 20 U.S.C. § 107b.

24. 20 U.S.C. § 107b(6).

25. *Id.*

26. 20 U.S.C. § 107d-1(a).

be final and binding on the parties except as otherwise provided in this chapter."²⁷

B. The Eleventh Amendment

In *Chisholm v. Georgia*,²⁸ the United States Supreme Court accepted jurisdiction in a debt collection suit brought by two citizens of South Carolina against the State of Georgia. The suit was maintained under the constitutional grant of judicial authority under Article III of the Constitution.²⁹ The Supreme Court held that Article III abrogated any sovereign immunity defense.³⁰ The Eleventh Amendment was soon passed to change the result reached in *Chisholm*.³¹

In *Hans v. Louisiana*,³² the United States Supreme Court held that a citizen of Louisiana could not sue the State of Louisiana in federal court for failing to repay state bonds.³³ The Court reasoned that since the Eleventh Amendment barred suits by out-of-state citizens, suits by in-state citizens must also be barred.³⁴

The United States Supreme Court limited the reach of the Eleventh Amendment in *Ex Parte Young*.³⁵ In this case, the Court allowed a federal court to enjoin a state official from engaging in an illegal act.³⁶ The Supreme Court reasoned that the official was acting as an individual, and not as a state official,

27. *Id.* The district court in *Hinton* held that the statutory language of this section does not give the Secretary discretion to convene the arbitration panel. *Hinton*, 700 F. Supp. at 23. The court issued an order directing the Secretary to convene an arbitration panel to hear *Hinton's* case. *Id.*

Section 107d-2(b)(1) establishes that the panel is to be made up of one individual designated by the state, one individual designated by the blind licensee, and one individual jointly designated by the two other appointees to serve as chairman.

Section 107d-2(a) requires the panel to issue notice, conduct the hearing, and render its decision in accordance with the Administrative Procedure Act. 20 U.S.C. § 107d-2(a). (*See* Administrative Procedure Act, 5 U.S.C. §§ 704-706 (1988)).

28. 2 U.S. (2 Dall.) 419 (1793).

29. U.S. CONST. art. III, § 2, cl. 1. This clause grants the federal judicial system jurisdiction of "Controversies . . . between a State and Citizens of another State." *Id.*

30. *Chisholm*, 2 U.S. (2 Dall.) at 432.

31. U.S. CONST. amend. XI. The Eleventh Amendment was ratified in 1798. *Id.* *See supra* note 17 for text of the Eleventh Amendment.

32. 134 U.S. 1 (1890).

33. *Id.* at 2.

34. *Id.* at 14-15. William A. Fletcher points out that although courts cite this case for the proposition that the Eleventh Amendment bars suits in federal courts brought by in-state citizens against their resident state, the Court in *Hans* stated that the Amendment did not require this result. William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1039-40 (1983).

35. 209 U.S. 123 (1908).

36. *Id.* at 156.

since the illegal act was not authorized by the state.³⁷ As a result of *Ex Parte Young*, citizens are allowed to bring suits for prospective injunctive relief, but cannot bring suits for damages against states in federal courts.³⁸

Two doctrines have been developed by the Court to provide citizens access to federal courts in suits for damages against states.³⁹ First, a state may waive its Eleventh Amendment protection.⁴⁰ Second, Congress may abrogate a state's Eleventh Amendment immunity if acting pursuant to certain enumerated powers.⁴¹

In *Clark v. Barnard*,⁴² the Court held that a state may waive its Eleventh Amendment immunity.⁴³ In that case, the assignees of a railroad company demanded payment of \$100,000 plus interest from a bond held by the City of Boston payable to the State of Rhode Island.⁴⁴ The action was brought in federal court.⁴⁵ Rhode Island voluntarily intervened to claim the fund.⁴⁶ The state also sought to have the action removed on the grounds that the Eleventh Amendment prohibited bringing the suit in federal court.⁴⁷ The *Clark* Court held that the state's voluntary intervention into the suit amounted to a waiver of its Eleventh Amendment immunity.⁴⁸ Furthermore, Eleventh Amendment immunity "is a personal privilege which [the states] may waive at pleasure . . ." ⁴⁹

The requirements needed to constitute a valid waiver were further defined in *Edelman v. Jordan*.⁵⁰ This case involved a class action suit brought against Illinois officials responsible for administering a federal and state program to aid the aged, blind, and disabled.⁵¹ An action seeking both retroactive benefit payments and prospective relief was brought in federal court.⁵² The Supreme Court refused to follow the Court of Appeals for the Seventh Circuit, which held that the state had "constructively consented" to federal suit by agreeing to participate and administer federal and state funds in accordance with federal

37. *Id.* at 157-58. This concept is known as "[t]he *Ex Parte Young* fiction." See Fletcher, *supra* note 34, at 1041.

38. See *Tenn. Human Servs.*, 979 F.2d at 1166 (citing 1 RONALD D. ROTUNDA ET AL., CONSTITUTIONAL LAW 85 (1986)).

39. See *Atascadero*, 473 U.S. at 241-42.

40. See *id.*; *Edelman v. Jordan*, 415 U.S. 651 (1974); *Clark v. Barnard*, 108 U.S. 436 (1883).

41. See *Atascadero*, 473 U.S. at 242; *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

42. 108 U.S. 436 (1883).

43. *Id.* at 447.

44. *Id.* at 445-46.

45. *Id.* at 447.

46. *Id.*

47. *Id.*

48. *Id.* Although the state entered the suit to claim the funds, the Court noted that it also became a defendant in the action. *Id.*

49. *Id.*

50. 415 U.S. 651 (1974).

51. *Id.* at 653.

52. *Id.*

law.⁵³ The Court stated that "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here."⁵⁴ Furthermore, the *Edelman* Court held that in determining whether a state has waived its Eleventh Amendment rights, "we will find waiver only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."⁵⁵ The Court stated that state participation in a federal public aid program alone is not enough to constitute waiver.⁵⁶

The second way that a state may be sued in federal court by private citizens is if Congress has abrogated the state's Eleventh Amendment immunity through use of its Congressional powers.⁵⁷ In *Fitzpatrick v. Bitzer*,⁵⁸ the United States Supreme Court held that Congress may abrogate a state's Eleventh Amendment immunity when acting pursuant to the enforcement provision of the Fourteenth Amendment.⁵⁹ The Court stressed that the substantive provisions of the Fourteenth Amendment "embody significant limitations on state authority."⁶⁰ The Court stated that when Congress acts pursuant to Section 5 of the Fourteenth Amendment, it is exercising a plenary grant of authority given in an amendment which includes other sections limiting state authority.⁶¹ Accordingly, Congress may abrogate a state's Eleventh Amendment immunity when it acts to enforce the provisions of the Fourteenth Amendment.⁶²

53. *Id.* at 673.

54. *Id.*

55. *Id.* (citing *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)).

56. *Id.* The Court noted that there was nothing in the statute to authorize an action against an individual. *Id.* at 674. Accordingly, the Court held that the state's participation in the program was "far short" of amounting to a waiver. *Id.* The Court distinguished other cases which involved statutes that authorized suits by designated plaintiffs. *Id.* at 671-72 (citing *Parden v. Terminal Ry. of Ala. State Docks Dep't*, 377 U.S. 184 (1964); *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959); *Employees v. Department of Pub. Health and Welfare*, 452 F.2d 820, 827 (8th Cir. 1971) (Bright, J., dissenting)). The Court noted that in these cases, the issue of waiver revolved around whether the participating state was within the designated class of defendants. *Id.*

57. *See Dellmuth v. Muth*, 491 U.S. 223 (1989); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89 (1984); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

58. 427 U.S. 445 (1976).

59. *Id.* at 456. Section 5 of the Fourteenth Amendment provides: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. The dispute involved a claim by retired male state employees that the state's retirement benefit plan discriminated against them on the basis of sex, in violation of Title VII of the Civil Rights Act of 1964. *Fitzpatrick*, 427 U.S. at 448. (*See* 42 U.S.C § 2000e-2(a) (1988)). The employees sought retroactive retirement benefits, attorney's fees, and prospective injunctive relief. *Fitzpatrick*, 427 U.S. at 448.

60. *Fitzpatrick*, 427 U.S. at 456.

61. *Id.*

62. *Id.*

Guidance in determining whether Congress has abrogated a state's Eleventh Amendment immunity was given in *Atascadero State Hospital v. Scanlon*.⁶³ In that case, California argued that Congress did not abrogate its Eleventh Amendment immunity in adopting the Rehabilitation Act of 1973.⁶⁴ The plaintiff's abrogation argument was based on the Act's legislative history and general statutory language.⁶⁵ The *Atascadero* Court held that "Congress may abrogate the States' constitutionally secured immunity . . . only by making its intention unmistakably clear in the language of the statute."⁶⁶ The Court stated that this requirement was based on the importance of the balance of power between the states and federal government.⁶⁷ The requirement was therefore established to ensure with certainty that Congress intended to alter the usual balance between the states and the federal government.⁶⁸

C. *The Split of Authorities:* *The Randolph-Sheppard Act*

In *Delaware Department of Health and Social Services v. United States Department of Education*,⁶⁹ the Third Circuit held that Delaware had waived its Eleventh Amendment immunity when it agreed to participate in the Vending Stand Act program.⁷⁰ The court emphasized the contractual nature of the statute that requires participating states to agree to binding arbitration.⁷¹ The court noted that "the term arbitration had a well-recognized meaning" at the time the binding arbitration provision was added to the Act.⁷² The Third Circuit further noted that arbitrators awarded retroactive damages "as a matter of course" under the Federal Arbitration Act and the Uniform Arbitration Act.⁷³ Since arbitration was a well-settled legal concept when it was added to the Act, and since there was no legislative history suggesting limitations on arbitrators' awards, there was no ambiguity in choice of the term.⁷⁴

63. 473 U.S. 234 (1985). The suit alleged that the Atascadero State Hospital had denied the plaintiff employment because of his physical handicaps in violation of the Rehabilitation Act of 1973. *Id.* (See 29 U.S.C. § 794 (1988)). The plaintiff sought compensatory damages and injunctive and declaratory relief. *Atascadero*, 427 U.S. at 234.

64. *Atascadero*, 473 U.S. at 236.

65. *Id.* at 242.

66. *Id.*

67. *Id.*

68. *Id.*

69. 772 F.2d 1123 (3rd Cir. 1985).

70. *Id.* at 1138.

71. *Id.* at 1126-33. See *supra* notes 23-25 and accompanying text.

72. *Delaware*, 772 F.2d at 1136.

73. *Id.*

74. *Id.*

The Third Circuit stated that the Eleventh Amendment did not allow Delaware to avoid its contractual agreement.⁷⁵ The court held that Delaware had clearly waived its Eleventh Amendment protection by agreeing to participate in the blind vendor program.⁷⁶

The Eighth Circuit reached a different conclusion in *McNabb v. United States Department of Education*.⁷⁷ Separate opinions were written by each judge on the three-person panel.⁷⁸ Judge Fagg and Judge Doty stated that the Vending Stand Act did not authorize arbitrators to award money damages against states.⁷⁹ Chief Judge Lay found that the Act authorized retroactive damages against states and that the Act abrogated states' Eleventh Amendment immunity.⁸⁰

Judge Fagg maintained that states were not "adequately alert[ed]" that arbitration panels could award monetary damages against a state due to a state's agreement to participate in the program.⁸¹ Judge Fagg noted that the Act lacked express language regarding monetary damages, and further, that the legislative history was silent with regard to monetary damages.⁸² Judge Fagg disagreed with the *Delaware* court's conclusion that the term "arbitration" was unambiguous.⁸³

Judge Doty concluded that Congress did not intend to abrogate the states' Eleventh Amendment immunity by enacting the Vending Stand Act.⁸⁴ Judge Doty asserted that Congress did not make a state's participation in the Act's program unambiguously conditioned upon waiving its Eleventh Amendment immunity.⁸⁵

Chief Judge Lay maintained that the Act authorized arbitration panels to award monetary damages and that Congress abrogated participating states' immunity.⁸⁶ Judge Lay agreed with the *Delaware* court's determination that the act clearly authorized arbitration panels to award monetary damages against states.⁸⁷

However, Judge Lay's conclusion that the Eleventh Amendment did not bar monetary damage awards was based upon reasoning different from the *Delaware*

75. *Id.* at 1137-38.

76. *Id.* The court stated that "[t]he waiver of sovereign immunity with respect to arbitration could hardly have been made more clearly." *Id.* at 1138.

77. 862 F.2d 681 (8th Cir. 1988). It should be noted that the only issue addressed by the Eighth Circuit was the range of damages that an arbitration panel is allowed to award under the Vending Stand Act. *Id.* at 683. The court did not address whether a monetary award would be enforceable in federal court. *Id.* However, Judge Lay, the author of the minority opinion, assumed that a monetary enforcement action in federal court would violate the Eleventh Amendment. *Id.* at 685 n.2.

78. *Id.* at 685.

79. *Id.* at 683.

80. *Id.* at 684.

81. *Id.* at 686.

82. *Id.*

83. *Id.* (citing *Delaware*, *supra* note 69).

84. *Id.* at 687 (Doty, J., concurring and dissenting).

85. *Id.*

86. *Id.* at 684 (Lay, J., concurring and dissenting).

87. *Id.*

court's reasoning.⁸⁸ Judge Lay maintained that Congress had abrogated the Eleventh Amendment rights of the states participating in the blind vendor program.⁸⁹ Judge Lay concluded that Congress intended to abrogate the immunity of participating states since the program required aggrieved vendors to submit complaints to arbitration panels, and since "[t]he only parties with whom blind vendors can have disputes . . . are states."⁹⁰

IV. THE INSTANT DECISION

In *Tenn. Human Servs.*, the Sixth Circuit addressed (1) whether an arbitration panel is authorized to award monetary damages under the Vending Stand Act; (2) whether the Eleventh Amendment bars the arbitration panel from awarding monetary damages; and (3) whether the Eleventh Amendment bars enforcement of monetary damages awarded by an arbitration panel.⁹¹ Judge Norris, writing for the three-judge panel, noted statutory language of the Act that provided for mandatory binding arbitration of vendor disputes and that required participating states to submit unresolved vendor disputes to arbitration.⁹² The court stated that a plain reading of the statute indicates that monetary disputes would be subject to arbitration.⁹³ Furthermore, the court stressed that Congress was "surely . . . aware that arbitration panels routinely awarded retroactive relief."⁹⁴ The court therefore concluded that arbitration panels had statutory authority under the Vending Stand Act to award monetary damages.⁹⁵

The court rejected the argument of the state agency and the Department of Education that "the Eleventh Amendment . . . appl[ies] to executive branch adjudicatory bodies."⁹⁶ The court stated that the amendment only limits the federal judicial branch and does not limit executive branch enforcement.⁹⁷ Since the arbitration panel was convened by an executive branch agency, the Eleventh Amendment does not place limitations on the arbitration panel.⁹⁸

However, the court emphasized that a separate issue arises when an attempt is made to collect a monetary award in federal court.⁹⁹ The court stated that the Eleventh Amendment would not prohibit the federal government from collecting

88. *Id.* at 685.

89. *Id.* Waiver of Eleventh Amendment rights was not discussed in the opinion since Judge Lay found Congress had abrogated the participating states' Eleventh Amendment immunity. *Id.*

90. *Id.*

91. *Tenn. Human Servs.*, 979 F.2d at 1165-67.

92. *Id.* at 1165.

93. *Id.*

94. *Id.* (citing *Delaware*, *supra* note 69).

95. *Id.*

96. *Id.* at 1166-67.

97. *Id.* at 1167.

98. *Id.*

99. *Id.*

damages from a state, even if the money "ultimately will pass to a private person."¹⁰⁰ The basis of this rule is that "a state implicitly surrenders its immunity to such suits when it joins the Union."¹⁰¹ However, the court stated that this rule was not applicable since the vendor, rather than the federal agency, was seeking damages.¹⁰² Accordingly, the Sixth Circuit held that the Eleventh Amendment was implicated by the vendor's attempt to collect the arbitration panel's monetary damages award.¹⁰³

The court next addressed the issues of waiver and abrogation of the state's Eleventh Amendment rights.¹⁰⁴ The court stated that its search for Congressional intent was limited to the text of the statute.¹⁰⁵ The court distinguished *Pennsylvania v. Union Gas Co.*¹⁰⁶ on the basis that the statute involved in *Union Gas* explicitly established liability and explicitly excluded states as potentially liable parties in some circumstances.¹⁰⁷ The court maintained that "the mere reference to binding arbitration . . . does not unmistakably suggest that . . . a state will surrender its sovereign immunity. . . . [M]uch more explicit language is required to abrogate or waive a state's sovereign immunity."¹⁰⁸ Accordingly, the court held that the Eleventh Amendment prohibited a private party from enforcing an arbitration panel's award of monetary damages against a state in federal court.¹⁰⁹

V. COMMENT

The *Tenn. Human Servs.* court should have held that Tennessee waived its Eleventh Amendment immunity by choosing to participate in the blind vendor program. A finding of waiver would have avoided several problems inherent in the court's decision; namely, the decision's inconsistent holding, the decision's practical problems, and the decision's frustration of legislative policy.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 1167-68.

105. *Id.* at 1168.

106. 491 U.S. 1 (1989).

107. *Tenn. Human Servs.*, 979 F.2d at 1168.

108. *Id.*

109. *Id.* The court claimed that the result was not inconsistent with its holding allowing arbitration panels to award retroactive damages. *Id.* at 1168 n.3. The court stated that "[b]oth holdings would be consistent with a congressional view that states should submit willingly to arbitration panel decisions or that the Department of Education should sue to enforce the rights of blind vendors." *Id.* The court further noted that the vendor could "collect the award if the state agency agrees to pay it or if the federal government enforces the award on his behalf." *Id.* at 1169 n.4. Additionally, a suit in state court was also pointed out as being a possible alternative, notwithstanding state immunity doctrines. *Id.*

The rules governing waiver of Eleventh Amendment immunity were announced by the United States Supreme Court in *Edelman*.¹¹⁰ First, a state's waiver can be found in the express language of a statutory program in which a state participates.¹¹¹ Second, a state's waiver can be found when the "overwhelming implication [of] the text . . . leave[s] no room for any other reasonable construction."¹¹² It is the second part of the *Edelman* test that is satisfied by the Randolph-Sheppard Act.

The statute's "overwhelming implication" is that participation in the program entails being subject to potential monetary damages awards. Before participating in the blind vendor program, states must agree to submit to binding arbitration for disputes with vendors.¹¹³ As noted by the *Tenn. Human Servs.* court, "arbitration panels routinely award retroactive relief."¹¹⁴ When a state participates in the blind vendor program and accepts the program's terms, including binding arbitration, it consents to a dispute resolution procedure that allows awards of monetary damages. The panel's decision is, in turn, subject to review by federal courts.¹¹⁵ The "overwhelming implication" of the binding arbitration provision is that by accepting the provision's terms, the state consents to monetary damage exposure and subsequent enforcement actions in federal court. Accordingly, participating states should be found to have waived their Eleventh Amendment immunity.

The court's holding in *Tenn. Human Servs.* is internally inconsistent in that it allows arbitrators to award monetary damages to aggrieved vendors, but does not allow them to enforce the award in federal court. The court held that the Act's arbitration provision is clear enough to give arbitration panels the authority to award monetary damages, but acceptance of this same provision by participating states is not clear enough to constitute a valid Eleventh Amendment waiver.

The court's contention that its holding is not inconsistent overlooks practical considerations. First, it is unlikely that a state involved in a dispute with a vendor will voluntarily agree to pay an unenforceable arbitration award. If a state treasurer did this, there could be a breach of fiduciary duty claim against the officer. Furthermore, if a state believed in its position strongly enough to take the dispute to the arbitration process, it is not likely that it would give up and abide by an arbitration panel's unenforceable decision.

Second, bringing a suit in state court raises additional concerns; namely, the impartiality of the reviewing state court, non-uniform application of federal law, and state sovereign immunity. As Justice Brennan states, the essential function of the federal courts is "to provide a fair and impartial forum for the uniform

110. 415 U.S. at 673. See *supra* notes 50-56 and accompanying text.

111. *Edelman*, 415 U.S. at 673.

112. *Id.*

113. See *supra* notes 20-27 and accompanying text.

114. *Tenn. Human Servs.*, 979 F.2d at 1165 (citing *Delaware*, 772 F.2d at 1136-37).

115. 20 U.S.C. § 107d-2(a) (1988).

interpretation and enforcement of the supreme law of the land."¹¹⁶ Although it is unlikely that a state court would intentionally be partial to a state agency, the potential does exist. The potential for non-uniformity of federal law also exists since the separate states will be deciding the cases arising under the Act. Notwithstanding these concerns, the existence of state sovereign immunity could leave an aggrieved vendor without an adequate remedy. The remedies existing for an aggrieved vendor would be limited to prospective injunctive relief and an unenforceable arbitration decision.

VI. CONCLUSION

The holding in *Tenn. Human Servs.* is contrary to the policy behind the Randolph-Sheppard Act. The Act was written to increase the independence of blind persons. However, aggrieved vendors, under the *Tenn. Human Servs.* holding, are left without a means of enforcing the Act's provisions. Collection of wrongfully withheld income is left to federal officials. As is evident from the *Tenn. Human Servs.* case, federal officials will not always be able (or willing) to enforce aggrieved vendors' rights. As a result, aggrieved vendors are left without a means of achieving the financial independence envisioned by the Act.

R. SCOTT REID

116. *Atascadero*, 473 U.S. at 257 (Brennan, J., dissenting).

