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The bar to appellate review of 'matters in abatement'

Courts have mostly interpreted provision's terms to preserve their power of review, but that's changing, at least a little.

BY AARON S. BAYER

Since 1789, federal appellate courts have been statutorily precluded from reviewing certain "matters in abatement." The current provision, 28 U.S.C. 2105, provides: "There shall be no reversal in the

THE PRACTICE
Commentary and advice on developments in the law

Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction." Few appellate lawyers have heard of this provision—"one of the most commonly ignored provisions of the Judicial Code." 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3903 at 141 (1992). While § 2105 could be read as a significant limit on federal appellate jurisdiction, the courts have generally interpreted its terms—"matters in abatement," "no reversal" and "not involv[ing] jurisdiction"—so as to preserve their power of review. But recent developments suggest that may change, at least a little.

• *What is a "matter in abatement"?* Section 2105's predecessor provision in the Judiciary Act of 1789 referred to a "plea in abatement," an objection not to the plaintiff's claims, but rather to the form, time or place in which they were brought. (The most infamous example of a plea in abatement—though not one involving the bar on appellate review—arose in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), in which the defendant pleaded that Scott's suit should abate because a black man was a non-citizen and therefore unable to bring suit under the diversity clause.) After the Federal Rules of Civil Procedure were adopted in 1938, "pleas" were eliminated in favor of motions, and the Judicial Code provision was amended to refer instead to "matters in abatement."

DEFINING THE TERM

Courts have struggled to define that term. The U.S. Court of Appeals for the 7th Circuit cited hornbook definitions of abatement as the "overthrow or destruction" of a pending action apart from the merits that the plaintiff could correct and refile. *Bowles v. Wilke*, 175 F.2d 35, 38 (7th Cir.), cert. denied, 338 U.S. 861 (1949). The 3d Circuit "suppose[d]" that § 2105 encompassed "non-jurisdictional motions which, if granted, would result in the dismissal of an action without prejudice to its reconsideration when refiled in another forum or in another pleading." *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 196 (3d Cir.), cert. denied, 464 U.S. 938 (1983). In one of the only recent cases actually dismissing an appeal under § 2105, the 4th Circuit described abatement as the suspension or defeat of a pending action for reasons unrelated to the merits of the claim, such as prematurity in filing suit, death of one of the parties or the situation it faced in that case—the presence of a separate but identical lawsuit pending in another court. *Hyman v. City of Gastonia*, 466 F.3d 284, 287 (4th Cir. 2006).

Rather than tightly defining abatement, courts instead have turned to the other provisions of § 2105 to preserve appellate review—narrowly construing the phrase "there shall be no reversal" and broadly construing § 2105's exception permitting review of matters in abatement that "involve jurisdiction."

• *Limiting § 2105 to barring reversal only.* In *U.S. v. Alcon Labs.*, 636 F.2d 876 (1st Cir. 1981), for example, the 1st Circuit reversed and remanded a district court decision that had remanded a case to the U.S. Food and Drug Administration to determine whether a medication was a "new drug." Addressing § 2105 in a footnote, the 1st Circuit simply "pass[ed] by" the question of whether the decision involved a "matter in abatement" and held that the statute

AARON S. BAYER *is a member of the appellate and complex legal issues group at Wiggin and Dana in Hartford, Conn. He can be reached at abayer@wiggin.com.*

barred only "reversal" and its decision was "not, technically a 'reversal.' " Id. at 885 n.2. Similarly, in *Southeastern Fed'l Power Customers Inc. v. Geren*, 514 F.3d 1316, 1321 n.1 (D.C. Cir. 2008), the D.C. Circuit affirmed a district court order that denied a motion to abate in favor of similar pending action in federal court in Alabama, and held that § 2105 therefore did not apply because there was no reversal.

> One definition of abatement: 'overthrow' of an action apart from merits the plaintiff could correct.

This approach makes little sense—reading the statute as precluding a court from reversing but not from affirming would require the court to reach the merits in order to determine whether it has jurisdiction to decide the merits. It also raises a constitutional issue, by providing jurisdiction only if the court reaches a particular result. The better reading is that § 2105 does not merely bar reversal but eliminates "an appellate court's authority to review abatement rulings." *Hyman*, 466 F.3d at 291. See also Aaron R. Petty, "Matters in Abatement," 11 J. App. Prac. & Process 137, 143-44 (2010).

• *Expanding the exception for jurisdictional rulings. Alcon Laboratories* offered an alternative basis for circumventing § 2105—that the district court's remand to the FDA could "be understood as involving jurisdiction" and therefore was outside of § 2105's reach. 636 F.2d at 885 n.2. Similarly, the 7th Circuit assumed, without deciding, that abatement in favor of a parallel state court suit involved jurisdiction because the district court "was abstaining from the exercise of jurisdiction." See *Aetna State Bank v. Altheimer*, 430 F.2d 750, 753 (7th Cir. 1970).

Reading the jurisdictional exception under § 2105 so broadly would nearly swallow the rule, as the 4th Circuit recognized in *Hyman*. There, the court held that a dismissal based on the pendency of an identical suit in another court did not "involve jurisdiction" and was an unreviewable abatement ruling. 466 F.3d at 289. That makes sense. Jurisdiction has to do with the court's power to hear a case, not whether some other prerequisite to suit has been met or the court has abstained from exercising its jurisdiction.

One U.S. Supreme Court precedent, however, provides some support for a broad reading of § 2105's jurisdictional carve-out. In *Snyder v. Buck*, 340 U.S. 15, 21-22 (1950), the Court held that abatement for failure to substitute a necessary party was jurisdictional, and therefore § 2105 did not bar review. But today, the Supreme Court might not follow that reasoning. In recent years, the Court has distinguished between truly jurisdictional issues, which go to the power of a court to hear a matter, and other issues related to the substantive reach of a statute or rules establishing preconditions to filing suit. E.g., *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011); see Howard Wasserman, "The Demise of 'Drive-By Jurisdictional Rulings,' " 105 Northwestern U. L. Rev. 184 (2010). If this trend is applied to § 2105, the jurisdictional carve-out could be more narrowly construed as well.

• *Redefining "matter in abatement."* One author suggests that properly limiting the concept of what is jurisdictional and what is a reversal would force courts instead to define more carefully a "matter in abatement." See Petty, 11 J. App. Prac. & Process at 142. He proposes reframing "matters in abatement" to cover only nonjurisdictional, mandatory rules. Unlike a jurisdictional rule, a mandatory rule can be waived, forfeited or avoided through consent or estoppel, but once properly raised, a court must apply it. "A dismissal without prejudice is a matter in abatement only when it is the result of a non-jurisdictional condition precedent to suit or to a decision on the merits that is not fulfilled." Id. at 160-61. Applying this definition could breathe a bit of life back into § 2105 but would still limit its scope to rulings such as dismissals (but not stays) under *Younger* abstention, failure to pay a filing fee, failure to substitute a party and other rules that do not go to the court's jurisdiction but must be enforced by a court if properly raised. It would also encompass the ruling in *Hyman*, in which dismissal was required under state law because of the pendency of an identical suit in another court, but it might not cover discretionary dismissal under the *Colorado River* doctrine. See id. at 163.

Whether courts will re-evaluate the scope of § 2105 remains to be seen. Given the Supreme Court's renewed interest in policing the scope of what counts as jurisdictional, courts may begin to look more carefully at § 2105's limitations on appellate review.