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LITIGATION INSIGHTS

MOORE'S FEDERAL PRACTICE—TOP THREE HIGHLIGHTS

The following three summaries are this month's Editor's Top Picks from the dozens of decisions added to Moore's Federal Practice and Procedure.

ELEVENTH AMENDMENT

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Daniel v. Univ. of Tex. Sw. Med. Ctr.

960 F.3d 253, 2020 U.S. App. LEXIS 17327 (5th Cir. June 2, 2020)

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Amendment of Final Pretrial Order

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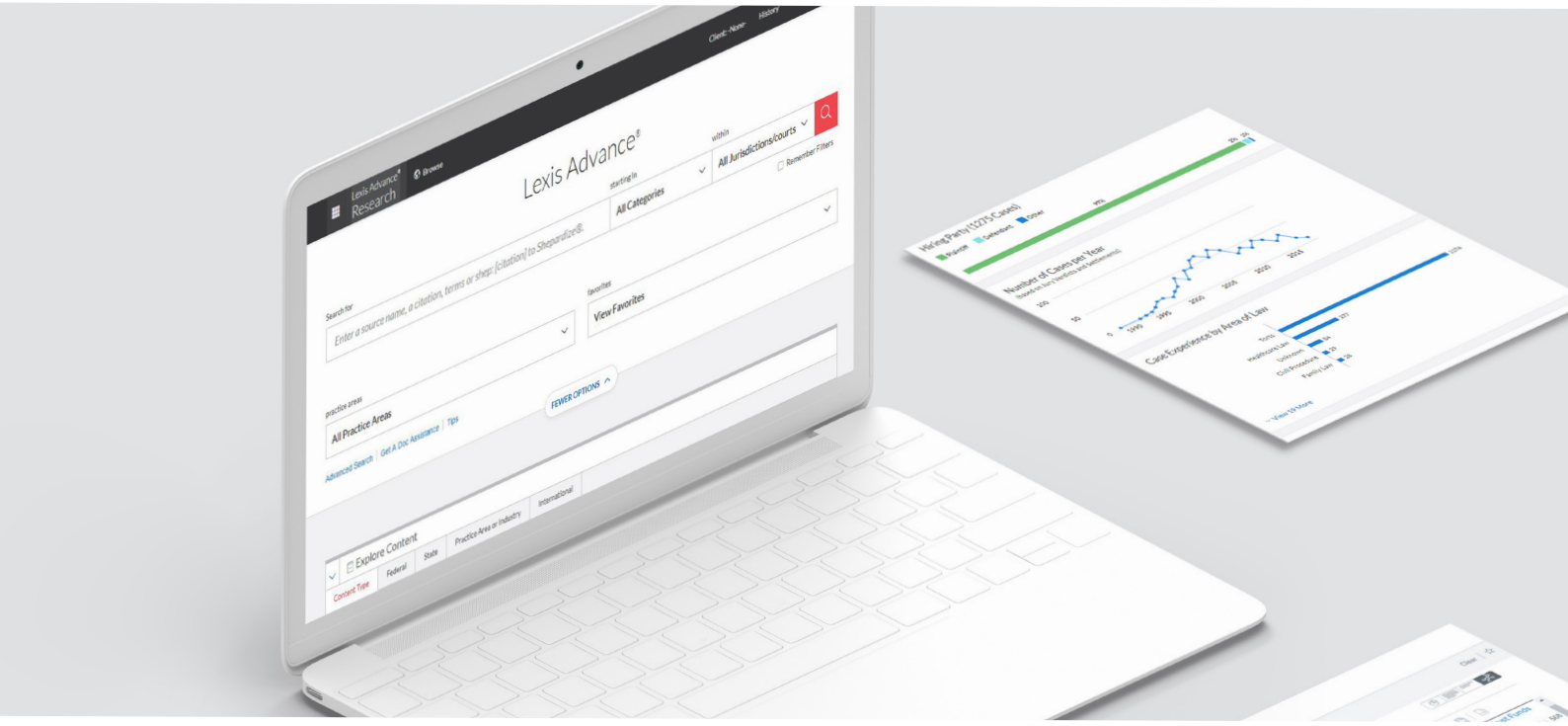

Secondary Immigration Law Sources on Lexis Advance

(by Chet Lexvold, August 2020)

Immigration law is one of the most complex areas of law to research and comprehend. Regulatory action can take place at multiple levels and among multiple agencies and sub-agencies, including: the Department of Homeland Security (which includes USCIS, CBP, and ICE); Department of State; Department of Labor; Department of Justice; and Department of Health and Human Services. Furthermore, there are myriad paths to review lower level decisions, including the Board of Immigration Appeals (BIA), Administrative Appeals Office (AAO), Executive Office for Immigration Review (EOIR), Office of the Chief Administrative Officer (OCAHO), Board of Alien Labor Certification Appeals (BALCA), and federal courts. Finally, there's the recent blizzard of Executive Orders, and states and municipalities produce their own laws and ordinances regarding noncitizens, as well.

Talk about information overload. That's where the following secondary Immigration Law sources on Lexis Advance (published by Matthew Bender & Company) come to the rescue.

Immigration Law and Procedure is a comprehensive treatise (updated 4 times per year) providing expert and time-saving analysis, context and insight. It is the most-cited immigration treatise by U.S. courts with citations in over 480 U.S. court decisions, including 20 Supreme Court cases.

Immigration Law Practice Expediter provides practical guidance that leads the user through immigration procedures in a step-by-step manner, while providing links to Immigration Law and Procedure, statutes, regulations, forms, and other source materials.

Bender's Immigration Bulletin is an immigration law news resource that comes out twice a month. By going to the **Immigration Law Practice Center**, opening "All Secondary Sources," and selecting the drop-down menu for Bender's Immigration Bulletin, users can "Create a publication alert" for the latest in immigration news, case digests, regulations, and government documents. For more immigration law news from LexisNexis, check out www.bibdaily.com.

ACCESSING IMMIGRATION LAW SECONDARY CONTENT ON LEXIS ADVANCE

On Lexis Advance, the fastest way to access a source is by typing the title in the main search box, causing the word wheel to open:

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You can also find all sources mentioned here in the "Immigration Law Practice Center," or by searching the "Sources" tab on the Lexis Advance homepage.

Clicking on the title of *Immigration Law and Procedure* brings the user to the Table of Contents, where they can browse using the "+" symbols next to each chapter, or search across the treatise to access the wealth of knowledge and guidance therein.

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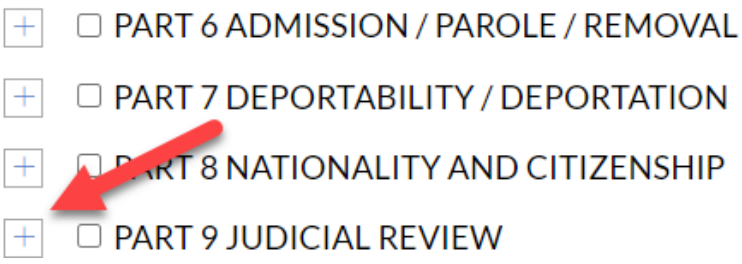

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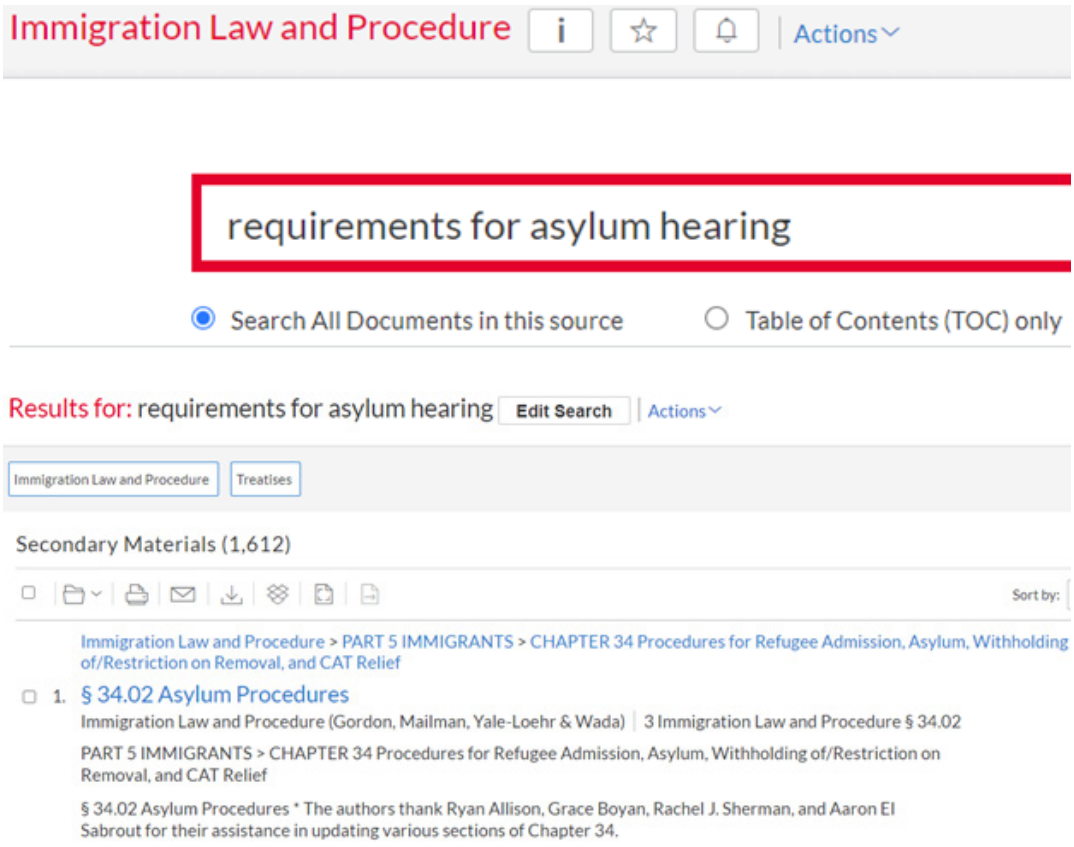

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Legal Topic Summaries

Candace Kelly, Regional Solutions Consultant

Did you know that Lexis Advance can help you find seminal cases, define legal terms, and pinpoint standards of review? Legal Topic Summaries provide you with all of that and more. Access Legal Topic Summaries to find:

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Legal Topic Summaries are in the headnotes of a case, in the "About This Document" box in a case, and also can be searched as a standalone source!

Topic Summary: Scope of Protection

Practice Area: Constitutional Law
Jurisdiction: U.S. Federal
Context:
Constitutional Law > ... > Fundamental Rights > Procedural Due Process > **Scope of Protection**

Definitions (1)

1. Due process . . . is not a technical conception with a fixed content unrelated to time, place and circumstances. [D]ue process is flexible and calls for such procedural protections as the particular situation demands. Mathews v. Eldridge, 424 U.S. 319

Seminal Cases (10)

1. Mathews v. Eldridge, 424 U.S. 319
2. Davidson v. New Orleans, 96 U.S. 97
3. Bd. of Regents v. Roth, 408 U.S. 564
4. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306
5. In re Winship, 397 U.S. 358
6. Hurtado v. California, 110 U.S. 516
7. Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886
8. McDonald v. City of Chicago, 561 U.S. 742
9. Skilling v. United States, 561 U.S. 358
10. Holder v. Humanitarian Law Project, 561 U.S. 1

View fewer

Elements of (1)

1. A successful procedural due process claim requires a plaintiff to show (1) the deprivation of a liberty or property interest and (2) the absence of due process. Mecca v. United States, 389 Fed. Appx. 775

Statutes and Rules (3)

Standards of Review (1)

1. An appellate court reviews claims of due process violations de novo. Estephan Gibran Sarkis v. Holder, 403 Fed. Appx. 184

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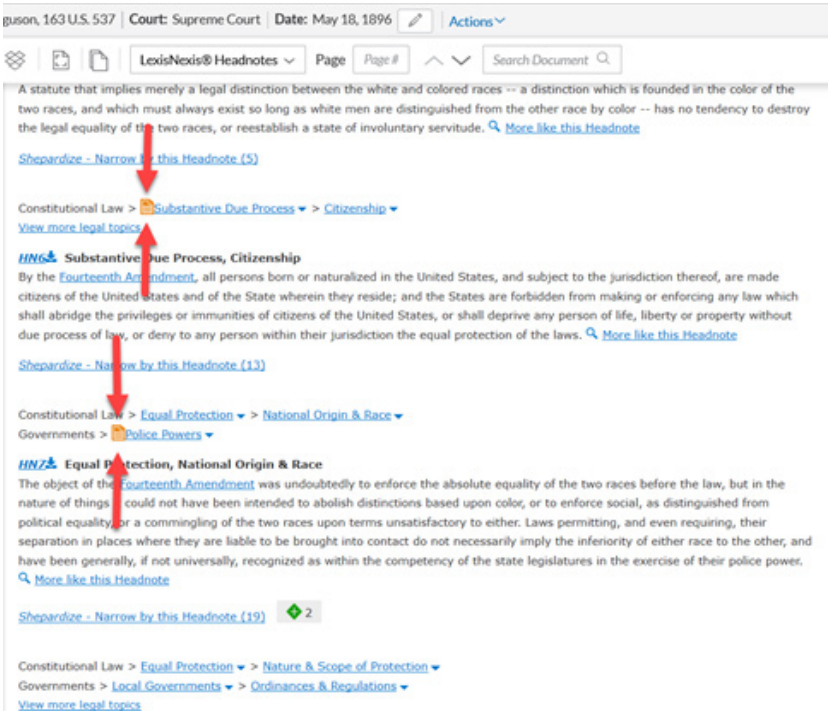
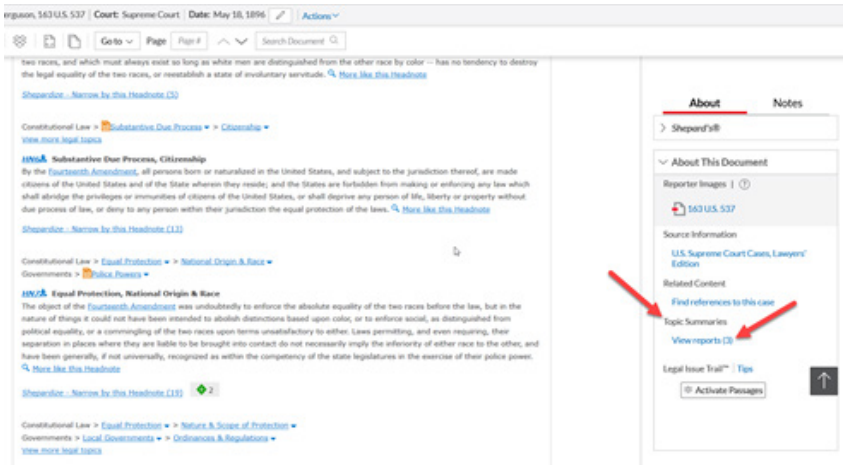
Within Headnotes:

Legal Topic Summaries are within the topics laid out for each headnote. How do you know the topic has a Legal Topic Summary? Simply look for the orange piece of paper next to that topic! If there is one, click on the orange piece of paper and Lexis Advance will take you directly to the Legal Topic Summary for that topic.



Within About This Document:

"About This Document" is on the right-hand side of a case. You will see a section for "Topic Summaries." Click on "View Reports" to see the Legal Topic Summaries within that case.



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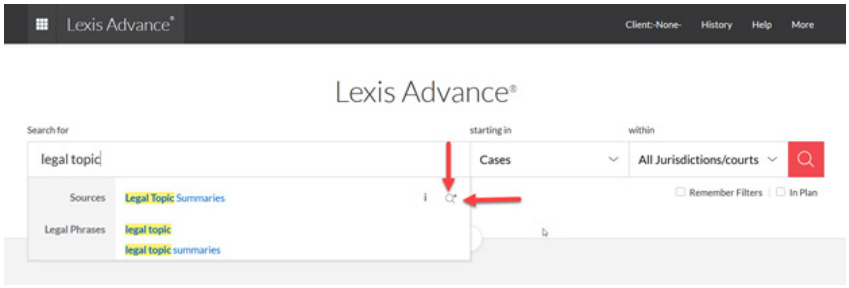

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ELEVENTH AMENDMENT

Public University as Arm of State

Daniel v. Univ. of Tex. Sw. Med. Ctr.

960 F.3d 253, 2020 U.S. App. LEXIS 17327 (5th Cir. June 2, 2020)

The Fifth Circuit has held that the University of Texas Southwestern Medical Center is an instrumentality of the State entitled to Eleventh Amendment protection.

Background. The defendant, the University of Texas Southwestern Medical Center (UTSMC), is a public medical institution within the University of Texas (UT) system, and it is the largest medical center in the Dallas metropolitan area. It comprises a medical school, a graduate school of biomedical sciences, and a school of health professions. It is also affiliated with several hospitals.

The plaintiff was employed as a registered nurse at one of the affiliate hospitals, Saint Paul University Hospital. She claimed that the defendant subjected her to continual harassment, discipline, discrimination, retaliation, and constructive discharge due to her disability.

She filed an action against UTSMC seeking economic and equitable relief for retaliation and discrimination under the Americans with Disabilities Act.

The district court granted the defendant's motion to dismiss on the ground that it "is well settled" that UTSMC is an arm of the State of Texas and therefore entitled to Eleventh Amendment immunity.

Not All Units of State Government Are Immunized From Federal Action. The Fifth Circuit set out the governing proposition that instrumentalities of a state enjoy sovereign immunity. To determine whether an entity qualifies as an instrumentality of a state subject to sovereign immunity, the Fifth Circuit employs a six-factor test: (1) whether the state statutes and case law view the agency as an arm of the state, (2) the source of the entity's funding, (3) the entity's degree of local autonomy, (4) whether the entity is concerned primarily with local as opposed to statewide problems, (5) whether the entity has the authority to sue and be sued in its own name, and (6) whether the entity has the right to hold and use property [see Clark v. Tarrant County, Tex., 798 F.2d 736 (5th Cir. 1986)].

The court opined that the second factor is the most important because an underlying goal of the test is to protect state funding.

First Factor: Statutes and Legal Authorities Favor Treating UTSMC as Arm of Texas. Texas statutes show that the defendant is part of the UT System, and a "state agency" is defined to include "a university system or an institution of higher education," which includes the UTSMC. The Fifth Circuit has held that public universities are entitled to sovereign immunity as arms of the State, and in several unpublished opinions has held the UT system, including UTSMC, to be instrumentalities of the State of Texas.

Second Factor: Judgment Against Defendant Would Interfere With Texas's Fiscal Autonomy. The Fifth Circuit evaluated this second "and most significant" factor (the source of the entity's funding) by analyzing whether a judgment against the defendant would be paid with state funds. The court ruled that the plaintiff did not satisfy her burden to demonstrate that UTSMC and not the State will be responsible for its judgment and debts.

The plaintiff maintained that her employer hospital predominantly relied on private funding, and that UTSMC did not depend on state funding. She urged the court to infer from this that public funds would not be used to pay a resulting judgment.

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The court rejected this inference, relying on an earlier case in which the court extended sovereign immunity to a university that had "substantial unappropriated, separately held, locally generated funds." The court in that case stated that the key is whether the use of unappropriated segregated funds to pay a damage award would "interfere with the fiscal autonomy and political sovereignty of Texas."

The court concluded that a subsequent judgment against UTSMC would interfere with Texas's fiscal autonomy.

- **Third Factor: Defendant Does Not Operate With Level of Local Autonomy To Consider It Independent From State.** The court determined that UTSMC was not independent of the State. It rejected the plaintiff's assertion that the State had minimal involvement in the day-to-day operations of the defendant. The plaintiff cited the personnel page on UTSMC's website as showing that it was led by physicians and scientists, with no mention of the Board of Regents, but the court countered by citing statutes that mandate state oversight and financial regulation.

- **Fourth Factor: University's Statewide Presence Negates Claim That UTSMC Is Concerned Primarily With Local Problems.** The Fifth Circuit was not persuaded by the plaintiff's position that the defendant's concerns were only local because all of its facilities are in Dallas. Citing prior precedent, it found that the UT System's education and research concerns were statewide, and UTSMC, as a part of the UT System, was not solely concerned with local problems.

- **Fifth Factor: One Factor That Weighs Against Finding That Defendant is Arm of State.** Although the UT System has the statutory authority to sue on behalf of the UTSMC, a number of cases have found that the UTSMC could be sued on its own behalf. Therefore the Fifth Circuit found this factor to be the one factor that weighed against a finding of UTSMC to be an arm of the State.

- **Sixth Factor: Defendant Does Not Exclusively Manage Use of its Property.** The court also rejected the plaintiff's assertion that the defendant operated its two hospitals without state control over its property management. The UT System has statutory authority to utilize eminent domain to acquire or condemn land on behalf of its components, which the court found to be enough to support a finding under this factor in favor of sovereign immunity.

- **Holding.** The Fifth Circuit held that UTSMC is entitled to Eleventh Amendment protection because five of the six Clark factors, including the most important source-of-funding factor, supported a finding that it is an instrumentality of the State of Texas. The court affirmed the district court's dismissal for lack of subject matter jurisdiction.

FOREIGN SOVEREIGN IMMUNITIES ACT

Commercial-Activity Exception

Pablo Star Ltd. v. Welsh Gov't

961 F.3d 555, 2020 U.S. App. LEXIS 17936 (2d Cir. June 8, 2020)

The Second Circuit holds that the commercial-activity exception to the Foreign Sovereign Immunities Act applies to promotion in the United States of tourism to Wales.

- **Background.** The widow of a photographer who took two photographs of the poet Dylan Thomas assigned the copyrights to the plaintiff, which registered them with the United States Copyright Office.

Before registration of the copyright by the plaintiff, the Welsh Government began using the two photographs to promote tourism to Wales. One use was in a map and brochure for a "Dylan Thomas Walking Tour of Greenwich Village, New York." Another use was on the Welsh Government's website.

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Following registration of the copyrights, the plaintiff discovered that the Welsh Government was using one of the photographs without permission and notified it of the unauthorized use, demanding in writing that it cease and desist from using the photograph. The plaintiff alleged that, despite giving assurances that it would comply, the Welsh Government continued to use the photograph, providing copies to U.S. media companies for use in articles about Dylan Thomas that promoted tourism to Wales.

The plaintiff filed a complaint alleging copyright infringement by the Welsh Government. After several years of "procedural skirmishing not relevant here," the defendant moved to dismiss, asserting sovereign immunity under the Foreign Sovereign Immunities Act (FSIA). The district court denied the motion and the defendant filed an interlocutory appeal.

FSIA Provides Sole Basis for Obtaining Jurisdiction Over Foreign State in Federal Court. The Second Circuit began by setting out the general rule that a federal court lacks subject matter jurisdiction over a claim against a foreign state unless a specified exception to the FSIA applies.

It was undisputed that the Welsh Government, as a subdivision of the United Kingdom, is a foreign state within the meaning of the Act, so the defendant met its burden of showing that it was presumptively entitled to immunity.

The burden then shifted to the plaintiff to show that an enumerated exception to sovereign immunity applied. If the plaintiff meets its initial burden, the defendant bears the burden of proving by a preponderance of the evidence that the exception does not apply. "In other words, the ultimate burden of persuasion remains on the party seeking sovereign immunity."

The question in this case was whether the commercial-activity exception to the FSIA was applicable. Under the first clause of the exception (the only clause at issue), sovereign immunity is abrogated in cases in which the action is based on a commercial activity carried on in the United States by the foreign state.

The court indicated that the term "commercial" is largely undefined, but the activity's commercial character is to be determined by the nature of the conduct rather than by its purpose.

Welsh Government Engaged in Commercial Activity. The court began citing Supreme Court authority underscoring the distinction between the nature and the purpose of an activity in order to determine whether it is commercial. The question is not whether the foreign government is acting with a profit motive, but whether the actions are the type of actions that a private party would engage in "trade and traffic or commerce." A foreign state engages in commercial activity "where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns."

Here, the Welsh Government asserted that it was acting to promote Welsh culture and tourism pursuant to its statutory mandate and thus acting as a sovereign government. But the court determined that "those are the purposes or reasons for the Welsh Government's actions, and not what it did to accomplish its goals. The means by which it pursued its goals was the publication, on-line and in print, of what are essentially advertising materials." The court agreed with the plaintiff and the district court that that is an activity that regularly is performed by private-sector businesses.

The court went on to say that the broader characterization "promoting tourism" is also a function regularly undertaken by private entities such as airlines, travel agents, hotels, sponsors of arts festivals, and the like. The only thing that distinguished the Welsh Government's actions was the lack of a profit motive, but the court opined that "the lack of a profit motive is irrelevant to the determination of whether the activity is 'commercial' for purposes of the FSIA."

The court distinguished two cases relied on by the defendant because the plaintiffs' injuries in those cases were not based on the purported commercial activity. In this case, the unauthorized use of photographs in promotional websites and printed materials advertising tourism related to Wales showed that the plaintiff's alleged injuries were based directly on the defendant government's allegedly commercial conduct.

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The court went on to find that "[e]very aspect of the Welsh Government's conduct that forms the basis of [the plaintiff's] claim could have been done by a private party for commercial gain. . . . [T]here is nothing quintessentially governmental about using a photograph in a printed brochure or on a web page or distributing the photograph to newspaper outlets to advertise or promote travel and tourism . . . ."

Welsh Government's Conduct Had Substantial Contact With United States. The court moved on to the second step of the inquiry: whether the commercial activity had substantial contact with the United States, and determined that the evidence clearly demonstrated that it did.

The district court held that the requirement was satisfied in this case because the Welsh Government played an active role in New York in developing and distributing promotional materials that included the plaintiff's photographs, including contracting with private New York businesses to publish, print, display, and distribute the materials.

The defendant argued that all of its offices in the United States were located in the United Kingdom's embassies and consulates, but the court found that this was beside the point, because the "Welsh Government's conduct in New York reached beyond the confines of its consular office." The court gave several examples: (1) the title of its New York campaign was "the Welsh in America"; (2) the Government provided a 14-panel exhibition on the history of Welsh in America for display in American venues; (3) the Government distributed the photograph to American media companies that printed stories containing one or both photographs in local newspapers in several cities; and (4) "most persuasively, the Dylan Thomas Walking Tour of Greenwich Village was organized by New York Fun Tours in cooperation with the Welsh Government, and the Welsh Government provided a map and brochure for the tour . . . that could have been useful only if distributed for use in New York. . . . Some or all of those materials were printed by New York companies under contract with the Welsh Government."

Holding. The Second Circuit concluded that the lawsuit was based on a commercial activity carried on in the United States, and it therefore affirmed the district court's denial of the Welsh Government's motion to dismiss on the ground of sovereign immunity.

PRETRIAL CONFERENCES

Amendment of Final Pretrial Order

United States ex rel. Concilio De Salud Integral De Loíza, Inc. v. J.C. Remodeling, Inc.

962 F.3d 34, 2020 U.S. App. LEXIS 18748 (1st Cir. June 15, 2020)

The First Circuit holds that, in the damages context, an amendment to a final pretrial order may be permitted when the amendment would result in no surprise and is supported by evidence already in the record, but not when it is requested close to trial and without support in the already-existing record.

Concilio De Salud Integral De Loíza, Inc. (CSILO), a nonprofit organization in Puerto Rico, provided a wide range of primary healthcare services for the uninsured through the use of federal funds. CSILO received funds from the American Recovery and Reinvestment Act, to upgrade and maintain its building. CSILO used some of the funds to repair the roof on its main building. It entered into a contract with defendant J.C. Remodeling (JCR), which offered a 15-year warranty on its roof waterproofing product called Wetsuit. Under the Construction Contract, CSILO agreed to pay JCR $135,000 for the waterproofing project.

JCR completed its waterproofing work during the summer of 2010. But by June 2011, the CSILO facilities began to suffer damage from newly discovered water infiltration. Over the next two to three years, CSILO complained, orally and in writing, of these leaks to JCR numerous times, but was met with no response. Finally, CSILO filed a civil action in the First Instance Court of Puerto Rico. That suit prompted JCR to attempt to fix the roof with a non-Wetsuit product. CSILO later alleged that not only did JCR negligently repair the roof the second time, but it intentionally substituted another product of inferior quality for the Wetsuit product.

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CSILO had no knowledge of the product substitution until after 2013. According to CSILO, because of the misrepresentation, JCR defrauded CSILO and illegally appropriated federal funding, thereby violating the False Claims Act (FCA). CSILO filed a qui tam action in federal court under the FCA. The United States, as it is entitled under 31 U.S.C. § 3730(b)(2)-(c), declined to intervene. Thereafter, CSILO filed its First Amended Complaint, requesting damages "in an amount equal to three times the amount of damages that the United States ha[d] sustained because of [JCR's] actions, plus a civil penalty of not less than $5,500 and not more than $11,000 for each violation" of the FCA. JCR denied all allegations.

In its Initial Disclosures, CSILO stated that "computation of damages was not available as of [that] date," and the Joint Pretrial Conference Report contained no mention of anything specific to requested damages, such as a description, computation, or relevant evidence. More than three years later, and one month before trial, the district court held its Pretrial Conference, during which the district judge asked CSILO whether it would present any evidence on damages at trial, given that such relief was not included in the proposed Joint Pretrial Conference Report. It was then that CSILO moved the court for leave to amend the Pretrial Order to include a discussion of damages. JCR objected, claiming delay and prejudice, especially in light of the impending trial. The court denied CSILO's request, stating:

[JCR] points out that [CSILO] did not include a computation of damages in its Initial Disclosures; and did not produce any evidence and/or computation of damages during discovery. Moreover, it omitted from the Pretrial Report any specific request for discrete fraud damages as well as a discussion on the subject. [CSILO] has provided no compelling reason to justify the omissions. Discovery is no longer available here, to [JCR]'s detriment. Accordingly, the motion is DENIED.

After a seven-day trial at which CSILO was barred from submitting evidence on damages, the jury found that JCR had in fact violated the FCA, and the court therefore entered judgment against JCR and imposed on it a $5,500 civil penalty, as required by statute. CSILO appealed, arguing that the district court abused its discretion when it rejected its request to amend the Pretrial Order to include a discussion of damages. CSILO asserted that JCR would not have been prejudiced or surprised by the damages amendment because JCR was always aware of the full contract price, which formed the nucleus of its damages claim: CSILO's federal complaint requested damages equal to $405,000 (three times the contract price of $135,000), and the contract itself as well as the contract price was necessarily discussed multiple times during trial. Therefore, according to CSILO, JCR's claim of prejudice and surprise was disingenuous because JCR never objected to the admission of the contract and its price tag at any point.

JCR responded that CSILO incorrectly assumed the contract price automatically constituted the baseline damages due under the FCA, even though the FCA does no such thing. Because the parties could not rely on the contract price for damages, without the benefit of discovery on damages, CSILO's requested amendment to the Pretrial Order on the eve of trial would have severely prejudiced and burdened JCR, and therefore the district court was right to deny CSILO's request.

CSILO Failed to Meet High Standard for Amendment of Final Pretrial Order.

The First Circuit explained that a final pretrial order is intended to control the subsequent course of the action, and can be modified only to prevent manifest injustice. Issues not included in the final pretrial order are generally waived. Although the standard for modifying a final pretrial order is high, a court may allow modification of a pretrial order when there will be little to no "surprise" or prejudice to the opposing party and when it is warranted to prevent substantial injustice to the moving party. On the flipside, if the party seeking to modify had knowledge of the reason for modification prior to the pretrial conference, or if the modification would prejudice the opposing party, then it may not be allowed.

In the damages context, courts have permitted changes to pretrial orders when the amendment would result in no surprise and it is supported by evidence already in the record. By contrast, when an amendment to a pretrial order related to damages raises issues too close to trial and without support in the already-existing record, courts have declined to allow such amendments.

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Examining the substantive law, the First Circuit noted that the FCA does not specify how damages are to be calculated. The government need only have suffered the damage "because of" the violation of the Act, but no single rule governs the determination of damages under the Act. Instead, courts should fashion the measure of damages on a case-by-case basis. In most FCA cases, damages are measured as they would be in any breach-of-contract case, using a "benefit-of-the-bargain" calculation in which a determination is made of the difference between the value that the government received and the amount that it paid. Generally, the government's actual damages are equal to the difference between the market value of what it received and retained and the market value of what it would have had if the goods or services had been of the specified quality.

The court explained that FCA cases in which the entire contract price is awarded as damages relate to contracts that provided no tangible benefit to the government and the intangible benefit is impossible to calculate. In this case, JCR fixed the roof—the activity for which funding was approved—albeit in a shoddy manner requiring subsequent repairs. Thus, this was not a case in which the government received nothing for its funds. Nor was it clear that the government received something "valueless": a defectively patched roof on a government-funded facility, may, nonetheless, have been an improvement over its initial state and further remediated by a method not yet explored during trial. Without the benefit of evidence of damages in the record, the court could not determine what value, if any, to ascribe to the work already done on CSILO's roof. Thus, it was far from clear that CSILO would be entitled to recover the full price it paid out, particularly since some work was in fact done.

Conclusion. Considering the high bar set to amend a final pretrial order, and the lack of record evidence as to the damages CSILO would have been entitled to under the FCA, the First Circuit found that the district court did not abuse its discretion when it denied the request to amend the pretrial order. Therefore, the First Circuit affirmed the district court's decision.