

In this session, we will return to this topic, visited during the on-line portion of the training, to provide an opportunity to address lingering questions and confusion in this extremely complex and confusing area of the law. What follows in these materials is a brief Q&A summary of the concepts and the relevant portions of the Federal Practice Manual covering this area. The Federal Practice Manual materials here provide a great reference, but beware as you use these materials in the future. The law in this area is evolving (or devolving) particularly quickly.

Questions and Answers on Sovereign Immunity and the 11th Amendment

Why are these concepts important in our practice?

The 11th Amendment and the doctrine of Sovereign immunity are significant in our practice because they impose barriers to our ability to sue states (NOT local governments) and state officials in federal courts and obtain full relief for our clients. As a result of the impact of these doctrines we must make complex choices about where our cases should be brought, what claims we should advance, what relief we should seek and who we should make defendants. All of these considerations will be briefly discussed below.

What does the 11th amendment actually say?

Not nearly what you would think it says after learning how it has been construed. The actual text of the 11th Amendment is quite simple: “The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” By its terms the amendment seems to exclude instances where citizens sue their own state in Federal Court but in *Hans v. Louisiana*, 134 U.S. 1 (1890) the Supreme Court ruled that the amendment applied in those situations as well.

What is the basis for sovereign immunity and how does it differ from the 11th Amendment?

Sovereign immunity is a common law doctrine that derives from prior British common law that a subject could not sue the sovereign, absent its consent. It was deemed to exist before the ratification of the Constitution. With *Hans*, the Court essentially interpreted the 11th Amendment as reinstating the common law doctrine so as to apply both to suits against states by citizens of other states and also suits by the state’s own “subjects.” Ratification by the states of the Constitution was deemed to constitute a decision to waive immunity with respect to suits by other states and by the federal government, but not by private citizens.

Can Congress abrogate State Sovereign Immunity?

Yes, under very narrow circumstances. When Congress is deemed to have abrogated Sovereign Immunity the state can be sued in its own name in Federal Court and damages can be awarded if the underlying statute permits this remedy. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) sharply limited the reach of Congress’ abrogation authority, interpreting Congress’

powers to only cover legislation enacted under the legislative enabling clause of the Fourteenth Amendment and further held that Congress must clearly and explicitly express its intent to abrogate. The Court has since also sharply narrowed Congress' authority to legislate under this clause, further eroding the abrogation doctrine. This area is exceedingly complex and should be approached with extreme caution.

Can a state waive its immunity?

Yes. A state can waive its immunity either by statute or by the "state's legal representative." *Clark v. Barnard*, 2 S.Ct. 878 (1883), but the waiver must be clear. Simply receiving federal funding to run a program does not suffice unless Congress has clearly made waiver a condition of receipt of the funds, but this Congressional intent doesn't have to be explicitly expressed in the language of a waiver. *See, e.g., Illinois Bell Telephone Co. v. WorldCom Technologies, Inc.*, 179 F.3d 566 (7th Cir. 1999) (subsequent history omitted) A general waiver of sovereign immunity in a statute or state constitutional amendment doesn't suffice unless there is language specifically mentioning the 11th Amendment or a willingness to be sued in federal court. *Atascadero v. State Hospital*, 105 S.Ct. 3142 (1985). Ambiguity in a statutory or constitutional waiver can be cured by a ruling from the state's own highest court. *Della Grotta v. State of Rhode Island*, 781 F.2d 343 (1st Cir. 1986). If a state removes a case from state to federal court, its removal does constitute a waiver. *Lapides v. Board of Regents*, 122 S.Ct. 1640 (2002).

Are there ways to avoid the consequences of these doctrines?

Yes, but these tactics are being increasingly called into question. The principle means utilized to mitigate the impact of the doctrines is to make a state official rather than the state itself or a state agency, the defendant in the litigation. This approach derives from the case of *Ex Parte Young*, 28 S. Ct. 441 (1908). In *Ex Parte Young* the Court reasoned that the illegality of an official's conduct effectively stripped them of state authority and thus removed their conduct from the protections of the sovereign. This "fiction" extended only so far as excluding claims against the official for prospective injunctive relief from immunity protections. It was reasoned that damages should remain unavailable because in reality those claims would be paid from the state treasury.

After nearly a hundred years of use of this doctrine to secure prospective injunctive relief against state officials, it has recently come under sharp attack. In *Seminole Tribe v. Florida*, 116 S.Ct. 1114 (1996), the *Ex Parte Young* fiction that suit can be brought against a state official (in this case, the governor) for prospective injunctive relief was held inappropriate because, by providing a remedial scheme in the Indian Gaming Regulatory Act, Congress must have intended that to be an exclusive remedy. In recent years the court has come within one vote of fundamentally changing the doctrine, with 4 justices agreeing that it should be nothing more than a discretionary tool for the courts to decide to use or ignore based in part on the seriousness and outrageousness of the official's conduct.

How do these doctrines effect the Federal Courts' treatment of supplemental state law claims?

The Eleventh Amendment bars even prospective injunctive relief in federal court on state law grounds against state officials. *Pennhurst State School and Hospital v. Halderman*, 101 S.Ct. 1531 (1981). The theory advanced by the court was that the Ex Parte Young fiction was necessary to prevent state officials from being insulated from repercussions associated with continuing illegal conduct under federal law and that it has no application to pendent state law claims. In a subsequent case (*Pennhurst II*) this doctrine was extended to insulate local officials as well when as a practical matter state officials conduct would also be necessarily curtailed to extend full relief to the plaintiffs.

Are there any exceptions to the prohibition against monetary damage awards against the state or state officials?

Only exceedingly limited ones. The basic rule is that monetary damages are not recoverable. The *Ex Parte Young* fiction explicitly does NOT extend to claims for monetary damages for past acts. This result cannot be avoided by couching what will practically result in an expenditure from the state treasury in equitable relief terms, i.e., an injunction to prevent the state from failing to pay past due welfare benefits is in reality a demand that the state pay money from the state treasury and is barred by the 11th Amendment. *Edelman v. Jordan*, 94 S.Ct. 1347 (1974). These doctrines do NOT, however, prevent courts from providing prospective equitable relief that has the effect of causing the state to expend money prospectively to carry the relief out. A court can, for example, order future remedial programs that will cost the state substantial amounts of money to remedy past discrimination. Likewise, it is permissible for a federal court to award attorneys fees to counsel for prospective enforcement of an equitable decree.

Another seeming exception is the rule that courts can ordinarily order a state or state official to issue notices about the outcome of the litigation and the relief ordered even though the provision of this notice will unquestionably place a demand on the state treasury. *Quern v. Jordan*, 99 S.Ct. 1139 (1979). This doctrine means that under some circumstances the state can be forced to notify potential beneficiaries of the means to use internal state process to seek past due benefits that the state could not be directly ordered to pay through the litigation as a result of the 11th amendment. This doctrine is also being increasingly narrowed. It is now the case that this sort of notice can only be issued as ancillary to prospective injunctive relief. Thus, if the state has already ceased the offending practice prospectively, Quern notice is not available.

Does any of this have any application to suits in state court?

Yes. In *Will v. Michigan Dept of State Police*, 109 S. Ct. 2304 (1989) (5-4 decision) the Supreme Court ruled that you cannot avoid the reach of the 11th Amendment by suing state officials under §1983 in state court. Even though the case is in state court, the same prohibitions against the award of monetary relief against state officials for deprivations of federal rights apply.

Are there any benefit programs that this doesn't apply to?

Yes. Food Stamps, because the program is fully federally funded and so does not implicate the state treasury. *Foggs v. Block*, 722 F.2d 933(1st Cir. 1985), reversed on other grounds sub nom. *Atkins v. Parker*, 105 S.Ct. 2520 (1985). There is a split on whether Unemployment benefits are barred with the 4th Circuit holding they are not, while the 7th and 10th have held that they are. Welfare benefits provided from county funds rather than state funds are not barred. *Holly v. Levine*, 605 F.2d 638 (2nd. Cir. 1979) cert. denied, 446 U.S. 913 (1980).