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Circumventing the Eleventh Amendment in the Third Circuit: College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board and Related Case Law

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Issues in the Third Circuit

CIRCUMVENTING THE ELEVENTH AMENDMENT IN THE THIRD CIRCUIT: COLLEGE SAVINGS BANK v. FLORIDA PREPAID POSTSECONDARY EDUCATION EXPENSE BOARD AND RELATED CASE LAW

I. INTRODUCTION

At first blush, the plain language of the Eleventh Amendment to the United States Constitution appears clear. The Amendment provides that “[t]he 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.” Despite this relatively simple language, the interpretation of the Eleventh Amendment has been neither clear nor consistent. Justice Brennan noted in his dissenting opinion in Welch v. Texas Department of Highways and Public Transportation:


2. U.S. Const. amend. XI.


“[B]y the late twentieth century the law of the Eleventh Amendment exhibited a baffling complexity. . . . The case law of the
eleventh amendment is replete with historical anomalies, internal inconsistencies, and senseless distinctions. Marked by its his-
tory as were few other branches of constitutional law, interpretation of the Amendment has become an arcane specialty of lawyers and federal judges.”5

Despite the Amendment’s clear language, courts have interpreted it to prohibit suits in federal court against an unconsenting state not only by “Citizens or Subjects of any Foreign State[s]” and by “Citizens of another State,” but also by a state’s own citizens.6 The Amendment does not, however, apply to suits against states by the federal government.7 The protections afforded to the states against suits in federal court have also been extended to “arms of the state,” such as some state agencies.8 These protections that the states and their arms enjoy, however, are not absolute. In certain situations, Congress can abrogate a state’s Eleventh Amendment immunity,9 or the states themselves may waive this immunity.10

This Casebrief summarizes the United States Court of Appeals for the Third Circuit’s current interpretation of the abrogation and waiver theo-
ries of Eleventh Amendment immunity in light of its recent decision in College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board.11 Part II discusses when Congress may constitutionally abrogate a state’s Eleventh Amendment immunity and summarizes the Third Cir-

5. Id. at 520 n.20 (Brennan, J., dissenting) (quoting J. ORTH, THE JUDICIAL
POWER OF THE UNITED STATES 11 (1987) (internal quotation marks omitted)).

(noteing that unconsenting state is immune from suit in federal court by its own
citizens); Hans v. Louisiana, 134 U.S. 1, 21 (1890) (holding that states are immune
under Eleventh Amendment from suits in federal court by their own citizens).

7. See, e.g., United States v. Texas, 143 U.S. 621, 646 (1892) (determining that
states consented to suit in federal court by United States upon entering into
Union); see also Carlos Manuel Vazquez, What is Eleventh Amendment Immunity?, 106
YALE L.J. 1683, 1706 (1996) (noting that states are not immune from suit in federal
court by United States); Andrew S. Williamson, Note, Policing the States After Semi-

8. For a discussion of the “arm of the state” doctrine, see infra notes 74-85, 114-22 and accompanying text.

9. For a discussion of the abrogation doctrine, see infra notes 74-85, 114-22 and accompanying text.

10. For a discussion of how a state may waive its Eleventh Amendment immunity, see infra notes 46-73 and accompanying text.

(Note 98-149). This Casebrief does not address suits against state officials in
federal court to enforce federal law through prospective injunctive and declaratory
relief under the Ex parte Young exception. See Ex parte Young, 299 U.S. 123, 127
(1908) (establishing exception to states’ Eleventh Amendment immunity to suit in
federal court).
circuit's current abrogation analysis in *College Savings Bank.* Part II also analyzes the Third Circuit's current approach to the doctrine of constructive waiver, which the court solidified in *College Savings Bank.* In addition, Part II summarizes the Third Circuit's approach to determining which arms of the state are entitled to assert a state's Eleventh Amendment immunity. Part III analyzes what arguments and approaches are most likely to succeed in the Third Circuit when Eleventh Amendment abrogation, waiver and arm of the state issues arise. Finally, Part IV notes that the Eleventh Amendment can pose a significant obstacle to bringing suit in federal court, but concludes that the Third Circuit has left open ample means by which litigants can circumvent this Eleventh Amendment bar.

## II. BACKGROUND

### A. Congress' Power to Abrogate the States' Eleventh Amendment Immunity

Prior to 1996, the United States Supreme Court recognized that Congress could validly abrogate the states' Eleventh Amendment immunity when it legislated pursuant to either the Fourteenth Amendment or the Interstate Commerce Clause. In 1996, the Supreme Court redefined Congress' power to abrogate the states' Eleventh Amendment immunity in *Seminole Tribe v. Florida.* "This hotly contested five-to-four ruling was immediately viewed as a drastic curtailment of congressional authority over state action . . . ."  

12. For a discussion of Congress' abrogation power with respect to the states' Eleventh Amendment immunity, see *infra* notes 17-45 and accompanying text.  
13. For a discussion of how a state may waive its Eleventh Amendment immunity, see *infra* notes 46-73 and accompanying text.  
14. For a discussion of the Third Circuit's approach to the arm of the state doctrine, see *infra* notes 78-85 and accompanying text. Although the arm of the state doctrine is more like a factually intensive ad hoc analysis rather than the dynamic and changing doctrinal area covering waiver and abrogation, it is worth summarizing the Third Circuit's approach to the analysis because neither waiver nor abrogation analyses are necessary unless a state entity can claim the state's Eleventh Amendment protection. See L. Pahl Zinn, Note, Hess v. Port Authority Trans-Hudson Corporation: *Erosion of the Eleventh Amendment,* 1995 DET. C.L. Rxx. 1417, 1456 ("[A]rm-of-the-state doctrine determines whether immunity exists, whereas waiver and abrogation are only relevant if immunity exists.").  
15. For a discussion of these arguments and approaches, see *infra* notes 86-122 and accompanying text.  
16. For a discussion of the conclusions of this Casebrief, see *infra* notes 123-25 and accompanying text.  
Under the Indian Gaming Regulatory Act,\(^{20}\) the statute at issue in *Seminole Tribe*, Congress granted Indian tribes the right to sue the states in federal court.\(^{21}\) The Supreme Court, however, held that the Eleventh Amendment barred these congressionally authorized suits.\(^{22}\) In so holding, the Court reiterated the basic constitutional principle that "Congress may abrogate the states' sovereign immunity if it has 'unequivocally expressed its intent to abrogate the immunity' and has acted 'pursuant to a valid exercise of power.'"\(^{23}\)

The Court in *Seminole Tribe* prefaced its ruling by noting that "no principled distinction could be drawn between" the Indian Commerce Clause and the Interstate Commerce Clause.\(^{24}\) Although the Court found that the language in the Indian Gaming Regulatory Act "unequivocally" demonstrated Congress' intent to abrogate the states' Eleventh Amendment immunity, it also found that Congress had not acted "pursuant to a valid exercise of power."\(^{25}\) The Court rejected its prior holding that Congress could abrogate the states' Eleventh Amendment immunity pursuant to Commerce Clause legislation.\(^{26}\) Thus, following *Seminole Tribe*, section Five of the Fourteenth Amendment provided the sole means by which Congress could abrogate the states' Eleventh Amendment immunity.\(^{27}\)

\(^{21}\) See id. (affording Indian tribes right to sue individual states in federal court). Under the act, the states were required to negotiate in good faith with a tribe towards forming a gaming compact. See id. § 2710(d)(3)(A). The act required this compact before an Indian tribe could conduct certain gaming activities. See id. § 2710(d)(1)(C). Section (d)(7) granted the United States district courts jurisdiction over causes of actions that arose "from the failure of a State to enter into negotiations with the Indian tribe." Id. § 2710(d)(7)(A)(i).
\(^{22}\) See *Seminole Tribe*, 517 U.S. at 72 (holding that Eleventh Amendment prevents Congress from authorizing suits by Indian tribes against unconsenting states to enforce legislation enacted pursuant to Indian Commerce Clause).
\(^{23}\) Id. at 55 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)).
\(^{24}\) See id. at 62 (noting that Indian Commerce Clause transferred at least as much authority to federal government from states as Interstate Commerce Clause).
\(^{25}\) See id. at 57, 66 (overruling *Union Gas* and redefining abrogation doctrine).
\(^{26}\) See id. at 66 (noting that *Union Gas* decision was "solitary departure from established law").
\(^{27}\) See id. at 65-66 (stating that before *Union Gas*, Court had not recognized any means other than Fourteenth Amendment through which Congress could abrogate states' Eleventh Amendment immunity).
Therefore, Congress can now only validly abrogate the states' Eleventh Amendment immunity when (1) Congress unequivocally expresses its intent to abrogate and (2) Congress legislates pursuant to its Fourteenth Amendment power.\(^{28}\)

Recently, the Third Circuit has had several opportunities to interpret the abrogation precedent of *Seminole Tribe*.\(^{29}\) One such case analyzing the abrogation doctrine was *College Savings Bank*.\(^{30}\) *College Savings Bank* was the first case in which the Third Circuit analyzed in any great depth the

\(^{28}\) See id. at 57-66 (determining when Congress can constitutionally abrogate states' Eleventh Amendment immunity).


Most of the other courts of appeals have also applied the *Seminole Tribe* abrogation test. See, e.g., *CSX Transp., Inc. v. Board of Pub. Works*, 138 F.3d 537, 539-40 (4th Cir. 1998) (applying *Seminole Tribe* abrogation analysis); *Doe v. University of Illinois*, 138 F.3d 655, 657-60 (7th Cir. 1998) (same); *Powell v. Florida*, 132 F.3d 677, 678 (11th Cir. 1998) (same); *Fernandez v. PNL Asset Management Co.*, 130 F.3d 1138, 1139 (5th Cir. 1997) (same); *Close v. New York*, 125 F.3d 31, 36-39 (2d Cir. 1997) (same); *Clark v. California*, 123 F.3d 1267, 1269-71 (9th Cir. 1997) (same), cert. denied, 120 S. Ct. 2540 (1998); *Mills v. Maine*, 118 F.3d 37, 41-49 (1st Cir. 1997) (same); *Aaron v. Kansas*, 115 F.3d 813, 814-17 (10th Cir. 1997) (same); *Moad v. Arkansas State Police Dep't*, 111 F.3d 585, 586-87 (8th Cir. 1997) (same); *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833, 837-42 (6th Cir. 1997) (same).

\(^{30}\) See *College Sav. Bank*, 131 F.3d at 355.
abrogation doctrine in light of Seminole Tribe, and as a result, the court solidified a means of approaching the abrogation issue.\textsuperscript{31}

In College Savings Bank, College Savings Bank sued the State of Florida, through Florida Prepaid, under the Lanham Act\textsuperscript{32}—the federal trademark, copyright and unfair competition act.\textsuperscript{33} The State of Florida created Florida Prepaid as an entity to “market and sell tuition prepayment programs designed to provide sufficient funds to cover future college expenses.”\textsuperscript{34} Florida Prepaid and College Savings Bank competed directly in this tuition prepayment market.\textsuperscript{35} In its suit against Florida Prepaid, College Savings Bank alleged that Florida Prepaid had made misstatements about College Savings Bank’s tuition plans and that these misstatements constituted unfair competition in contravention of the Lanham Act.\textsuperscript{36}

The Third Circuit began its abrogation analysis with the language of the Trademark Remedy Clarification Act (TRCA).\textsuperscript{37} The court, after analyzing the language of the TRCA, concluded that it met the first requirement of the Seminole Tribe test by “manifest[ing] Congress’ unambiguous intent to abrogate the states’ immunity.”\textsuperscript{38}

Next, the College Savings Bank court analyzed whether the TRCA could satisfy the second prong of the Seminole Tribe constitutional abrogation test—whether the TRCA was enacted pursuant to the Fourteenth Amendment.\textsuperscript{39} Specifically, the Third Circuit addressed whether the TRCA could

\begin{footnotesize}
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\item[] 31. See id. at 357-62 (finding no valid abrogation by Congress after meticulous analysis of precedent, statute and relevant doctrines).
\item[] 33. See College Sav. Bank, 131 F.3d at 355.
\item[] 34. Id.
\item[] 35. See id.
\item[] 36. See id.
\item[] 37. 15 U.S.C. § 1122 (1994); see College Sav. Bank, 131 F.3d at 357 (addressing first prong of Seminole Tribe two-part abrogation test). The TRCA abrogates the states’ Eleventh Amendment immunity under the Lanham Act. See id. at 357. The TRCA “Waiver of sovereign immunity” provision provides:
\begin{itemize}
\item Any State, instrumentality of a State or any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or non-governmental entity for any violation under this chapter.
\end{itemize}


The pre-Seminole Tribe district court case of Unix System Laboratories v. Berkeley Software, 832 F. Supp. 790 (D.N.J. 1993), had previously determined that the TRCA was a valid abrogation of the states’ Eleventh Amendment immunity without the aid of the Court’s ruling in Seminole Tribe. See id. at 799 (noting that Congress had eliminated states’ immunity from suit under copyright and trademark laws).

38. College Sav. Bank, 131 F.3d at 357.
\item[] 39. See id. at 358-62 (applying second prong of Seminole Tribe test to TRCA). The court began its analysis with the congressional history of the statute, finding it inconclusive. See id. at 358-59 (noting that legislative history did not establish that TRCA was constitutional). The legislative history of the TRCA mentioned the
\end{itemize}
\end{footnotesize}
be construed to protect a right recognized by the Fourteenth Amendment's Due Process Clause. The court determined that the Lanham Act did protect some intangible property rights, but no such right was involved in *College Savings Bank*. The Third Circuit framed the property right at issue as "the right to be free of false advertising." The court concluded that this intangible property right was not protected by the Fourteenth Amendment. As a result, the court concluded that "in this case" the TRCA could not be construed as being enacted pursuant to the Fourteenth Amendment. Thus, the court held that the TRCA, having failed the second prong of the *Seminole Tribe* test, did not constitutionally abrogate Florida Prepaid's Eleventh Amendment immunity.

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40. See *College Sav. Bank*, 131 F.3d at 359-61 (analyzing whether case involved property right). The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONSTR. amend. XIV, § 1. The court noted that the clause itself "sets out the boundaries of what rights it protects." *College Sav. Bank*, 131 F.3d at 359. First, "the conduct must involve action by a state." *Id.* Second, "it must deprive an individual of life, liberty or property." *Id.* Third and finally, "the deprivation must occur without due process of law." *Id.*

41. See *College Sav. Bank*, 131 F.3d at 361 (finding no property right protected "in this case").

42. *Id.* at 360.

43. See *id.* (determining that case does not involve property interest protected by Fourteenth Amendment).

44. See *id.* at 361 (determining that TRCA was unconstitutional exercise of Congress' power). The court specifically limited its holding to the facts in the case and declined to determine whether the TRCA could "be applied constitutionally in a case involving a trademark infringement or involving a misrepresentation about a competitor's goods or services." *Id.* at 362.

45. See *id.* at 361 (finding TRCA to be "unconstitutional exercise of Congress' powers" in this case).
B. Constructive Waiver of the States' Eleventh Amendment Immunity

1. The Parden Doctrine: Constructive Waiver Through Participation in an Area Regulated by Congressional Legislation

The doctrine of constructive consent by states to suit in federal court has developed through a line of cases over the past three decades. The high point of Supreme Court jurisprudence concerning the doctrine was *Parden v. Terminal Railway*. In *Parden*, the Supreme Court found that Alabama had voluntarily waived its Eleventh Amendment immunity by operating a railroad after the enactment of the Federal Employer's Liability Act (FELA). Thus, the Court concluded that a state could voluntarily waive its Eleventh Amendment immunity by participating in an area regulated by Congress under an act that Congress intended to apply to the states.

The Supreme Court modified and partially overruled *Parden* in the years to follow. The first limitation on *Parden* was made in *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*. In *Employees of the Department of Public Health*, the Court formulated the important government function exception to *Parden*. This exception mandates that "a state cannot be deemed to have waived its immunity if it is engaged in an important or core government function." The *Parden* ruling was further limited in *Welch v. Texas Department of Highways & Public Transportation*. The Court in *Welch* determined that a *Parden*-type con-


48. 45 U.S.C. §§ 51-60 (1994); see *Parden*, 377 U.S. at 192 (finding that "Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA necessarily consented to such suit as was authorized by that Act").

49. See *Parden*, 377 U.S. at 191-93 (finding that Alabama had constructively waived its Eleventh Amendment immunity to suit).

50. See *College Sav. Bank*, 131 F.3d at 362 (noting departure from *Parden* holding in subsequent Supreme Court decisions).


52. See *College Sav. Bank*, 131 F.3d at 362-63 (commenting on *Employees of the Department of Public Health*, which held that state cannot be held to have waived Eleventh Amendment immunity where case involves operations of integral concern to state).

53. *Id.* In *Employees of the Department of Public Health*, the Court distinguished *Parden* by finding that state mental hospitals, state cancer hospitals and training schools for delinquent girls were not run for profit, and thus were not proprietary like the railroad in *Parden*. See *Employees of the Dep't of Pub. Health*, 411 U.S. at 284 (distinguishing *Parden*).

54. 483 U.S. 468 (1987). Prior to *Welch*, but after the *Employees of the Department of Public Health* decision, the Court clarified its position taken in *Parden* by stating that "[t]he mere fact that a State participates in a program through which
sent to suit requires "an unequivocal expression that Congress intended to override [the states'] Eleventh Amendment immunity." 55

The Third Circuit synthesized Parden and its progeny into what it calls the "Parden doctrine." 56 In College Savings Bank, the Third Circuit determined that a state's Eleventh Amendment immunity can be constructively waived if the following factors are present:

1. Congress enacts a law providing that a state will be deemed to have waived its Eleventh Amendment immunity if it engages in the activity covered by the federal legislation;
2. the law does so through a clear statement that gives notice to the states;
3. a state then engages in that activity covered by the federal legislation; and
4. the activity in question is not an important or core government function. 57

In applying its test, the Third Circuit conceded that the first three prongs of the test had already been satisfied. 58 The court, however, determined that Florida Prepaid's activities failed to satisfy prong four of the test because Florida Prepaid was involved in an important governmental function. 59

the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts." Edelman v. Jordan, 415 U.S. 651, 673 (1974).

55. Welch, 483 U.S. at 478.
56. See College Sav. Bank, 131 F.3d at 363 (formulating Parden doctrine test for cases where state's Eleventh Amendment immunity can be constructively waived). College Savings Bank is the only contemporary Third Circuit case discussing the Parden doctrine since the significant changes to the Supreme Court's approach to constructive waiver of a state's Eleventh Amendment immunity. For a discussion of this Supreme Court precedent, see supra notes 46-55 and accompanying text.

The only other relatively contemporary discussion of the Parden doctrine by the Third Circuit is the dissenting opinion of Circuit Judge Rosenn in Fitchik v. New Jersey Transit Rail Operations, 873 F.2d 655, 671 (3d Cir. 1989) (Rosenn, J., dissenting). In Fitchik, the majority did not have the opportunity to address the Parden argument because it determined that the New Jersey Transit Rail Operation was not an arm of the state that was entitled to assert Eleventh Amendment immunity. See id. at 664 (finding that New Jersey Transit Rail Operation was not arm of state and was not entitled to Eleventh Amendment immunity). For a discussion of the arm of the state doctrine, see infra notes 74-85, 114-22 and accompanying text. In his dissent, Judge Rosenn rejected the argument that New Jersey "constructively waived its immunity when it chose to operate a railroad while Parden was the law of the land." Fitchik, 873 F.2d at 672 (Rosenn, J., dissenting).

57. College Sav. Bank, 131 F.3d at 363. In formulating the test, the court specifically declined to follow the district court's ruling that Seminole Tribe had "implicitly overruled" Parden. See id. at 356 (declining to follow district court holding and expressing "no opinion" on whether Seminole Tribe overruled Parden). The court determined that "a court of appeals should be reluctant to hold that the Supreme Court implicitly has overruled its own decision when the Court had an opportunity to overrule the decision explicitly and did not do so." Id. at 365. But see Kish v. Verniero, 212 B.R. 808, 814-15 (D.N.J. 1997) (relying on district court opinion in College Savings Bank to dismiss implied, Parden-type waiver).

58. See College Sav. Bank, 131 F.3d at 363 (finding that if College Savings Bank could establish elements of its case, first three requirements of Parden doctrine test would be satisfied).
The court found that the important governmental function that Florida Prepaid was involved in was education, a core function of state government according to the Third Circuit. In reaching its conclusion, the court took a very expansive view of "education" to include within its function "the provision of education-related services."

2. Waiver of Immunity by Conduct in Litigation

The Supreme Court long ago held in Clark v. Barnard that a state may also waive its Eleventh Amendment immunity by its conduct in federal litigation. In Clark, the Court held that Rhode Island had voluntarily waived its Eleventh Amendment immunity by intervening in a suit in federal court and asserting a claim against the fund in controversy. Through the years, the Supreme Court has further elaborated on its holding in Clark. The Supreme Court has held that because the Eleventh Amendment immunity issue "sufficiently partakes of the nature of a jurisdictional bar," a party can raise the issue at any time during the pendency of a case. Accordingly, the Court has also found that "[t]he fact that

59. See id. at 364 (agreeing with district court that Florida Prepaid was engaged in important governmental function).

60. See id. (noting that education is perhaps most important function of state and local governments) (citing Brown v. Board of Educ., 347 U.S. 483, 493 (1954)).

61. Id. In finding that the service provided by Florida Prepaid was an important governmental function, the court rejected College Savings Bank's argument that distinguished between the goal of education and the function that Florida Prepaid performs. See id. (rejecting appellant's argument). The court refused to distinguish between the means of providing for an education and providing education directly. See id.


63. See id. at 447-48 (finding that Rhode Island waived its Eleventh Amendment immunity by intervening as claimant in federal court); see also Gunter v. Atlantic Coast Line R.R., 200 U.S. 273, 284 (1905) ("[W]here a state voluntarily become[s] a party to a cause, and submits its rights for judicial determination, it will be bound thereby, and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment.").

64. See Clark, 108 U.S. at 447-48 (differentiating Clark from Georgia v. Jessup, 106 U.S. 458 (1882), where state "expressly declined to become a party to the suit").

65. See Edelman v. Jordan, 415 U.S. 651, 678 (1996) (noting that Eleventh Amendment immunity could be raised at any time during pendency of case); Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 683 n.18 (1982) (same); College Sav. Bank, 131 F.3d at 365 (citing Florida Department of State and Edelman). Consistent with this statement, the Court in Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945), heard Indiana's Eleventh Amendment argument that was made for the first time before the Supreme Court. See id. at 467 ("The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court.").
State appeared and offered defenses on the merits does not foreclose consideration of the Eleventh Amendment issue.\textsuperscript{66}

The Third Circuit interpreted this Supreme Court precedent in \textit{College Savings Bank}.\textsuperscript{67} There, the Third Circuit concluded that Florida Prepaid, as an arm of the State of Florida, had not waived its Eleventh Amendment immunity "through its appearance in the litigation" or "by failing initially to raise its Eleventh Amendment immunity defense."\textsuperscript{68} Additionally, the court found that Florida Prepaid did not waive its Eleventh Amendment immunity by filing a counterclaim in the suit.\textsuperscript{69}

The Third Circuit’s holding in \textit{College Savings Bank}—that Florida Prepaid had not waived its Eleventh Amendment immunity through its conduct in the litigation—typifies the Third Circuit approach.\textsuperscript{70} Generally, courts in the Third Circuit have not found a waiver as a result of a state’s participation in litigation absent some evidence that the "state acted as an affirmative participant rather than as a beleaguered defendant."\textsuperscript{71}

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  \item \textsuperscript{66} Florida Dep’t of State, 458 U.S. at 683 n.18.
  \item \textsuperscript{68} \textit{College Sav. Bank}, 131 F.3d at 365. The Third Circuit similarly permitted a belated claim of Eleventh Amendment immunity in \textit{Alessi v. Pennsylvania Department of Public Welfare}, 893 F.2d 1444, 1453-54 (3d Cir. 1990). In \textit{Alessi}, the Department of Public Welfare ("DPW") asserted an Eleventh Amendment defense at the preliminary hearing in the district court. See id. at 1454. The district court, however, rejected the assertion. See id. The Department of Public Welfare then failed to reassert the immunity claim in its brief on appeal, but the Third Circuit nonetheless considered the issue. See id. The court concluded that "we cannot deem [DPW] to have waived its Eleventh Amendment defense simply by failing to include it in its brief at this stage of the proceeding." \textit{Id.}
  \item \textsuperscript{69} See \textit{College Sav. Bank}, 131 F.3d at 365 (affirming district court ruling on waiver through conduct in litigation). The court found that Florida Prepaid's conduct in the litigation as to both its assertion of a counterclaim and participation in the litigation, as well as delaying an assertion of immunity, was warranted in light of the \textit{pre-Florida Seminole} Supreme Court precedent. See \textit{id}. at 365-66 (noting that \textit{Union Gas} controlled at beginning of litigation).
  \item \textsuperscript{70} For a general discussion of the Third Circuit approach to waiver through conduct in litigation, see \textit{infra} notes 71-73 and accompanying text.
  \item \textsuperscript{71} Unix Sys. Lab., Inc. v. Berkeley Software Design, Inc., 832 F. Supp. 790, 801 (D.N.J. 1993). In \textit{Unix System}, the district court declined to find that California had waived its Eleventh Amendment immunity because it had not "acted as an affirmative participant" when it had not counterclaimed, filed a third-party complaint, removed the case to federal court or even answered the complaint. See \textit{id}. (noting that state had not acted as affirmative participant in litigation). Accordingly, the court found that California "entered the action involuntarily, and it has sought only to exit as quickly as possible for reasons unrelated to the merits" through its motion to dismiss for lack of personal jurisdiction and motions to dismiss or transfer for inconvenient or improper venue. See \textit{id}. at 801 & n.5 (discussing reasons why California had not waived its Eleventh Amendment immunity).
  \item Other cases have also found waiver to be conditioned on an affirmative action by the state. See \textit{Kish v. Verniero}, 212 B.R. 808, 814 (D.N.J. 1997) (holding that filing motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is...
amples of such affirmative actions that the Third Circuit courts have found to constitute waivers include entering into consent decrees and allowing a judgment to become final without appealing the decision.\(^{72}\) Also, the courts have found that the Eleventh Amendment assertion is waived by such affirmative actions as the filing of a proof of claim against a debtor's estate in federal court.\(^{73}\)

\(^{72}\) See Mitchell v. Commission of Adult Entertainment Establishments, 12 F.3d 406, 408-09 (3d Cir. 1993) (concluding that failure to appeal rejection of Eleventh Amendment immunity assertion constituted waiver of immunity); Delaware Valley Citizens' Council for Clean Air v. Pennsylvania, 678 F.2d 470, 475 (3d Cir. 1982) (finding that entry of consent judgment waived any Eleventh Amendment immunity state may have previously desired to claim); Vecchione v. Wohlgemuth, 558 F.2d 150, 159 (3d Cir. 1977) (recognizing that Eleventh Amendment defense could be asserted for first time on appeal, but finding that immunity could not be asserted when contention was not made until almost one year after final judgment at contempt proceeding); Halderman v. Pennhurst State Sch. & Hosp., 834 F. Supp. 757, 763 (E.D. Pa. 1993) (noting that entering into court decree "waived any entitlement to raise Eleventh Amendment immunity to enforcement of that [d]ecree").

The Third Circuit has taken the view that a waiver of Eleventh Amendment immunity becomes final "at the latest" when a judgment has become final. See Mitchell, 12 F.3d at 408 (examining when waivers of Eleventh Amendment immunity become final) (citing Vecchione, 558 F.2d at 159). The court has appropriately concluded that any other policy would relegate the court's decisions to the status of "mere advisory opinions." See id. (discussing when Eleventh Amendment waiver must become final) (citing Vecchione, 558 F.2d at 159).

\(^{73}\) See In re Fennelly, 212 B.R. 61, 63-64 (D.N.J. 1997) (following majority view that filing proof of claim constitutes waiver of state's sovereign immunity). The court in Fennelly explicitly declined to follow the dicta of New Jersey v. Mocco, 206 B.R. 691 (D.N.J. 1997). See Fennelly, 212 B.R. at 64 (denying to follow Mocco dicta in "face of substantial persuasive authority to the contrary"). The court in Mocco stated in dicta that a state "would have retained its sovereign immunity if it had appropriately filed a proof of claim." Mocco, 206 B.R. at 693. The Fennelly court, however, concluded that it could not follow this dicta in light of the contrary majority view. See Fennelly, 212 B.R. at 64 (following majority view that filing proof of claim constitutes waiver of state's sovereign immunity).

Further, the Third Circuit has established that a state's "general or voluntary appearance in federal court" may waive that state's Eleventh Amendment immunity. See Skehan v. Board of Trustees of Bloomsburg State College, 669 F.2d 142,
C. Arm of the State Doctrine: Which State Entities Can Assert the States’ Eleventh Amendment Immunity

Often, the state is not the named party in an action. 74 Nonetheless, the Eleventh Amendment may bar the suit. 75 The Supreme Court has recognized that “[t]he Eleventh Amendment bars suits not only against the state itself, but also against a subdivision of the state if the state remains ‘the real party in interest.’” 76 The Court has found that a state is the “real party in interest” whenever “the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,” or if the effect of the judgment would be “to restrain the Government from acting, or to compel it to act.” 77

The Third Circuit’s approach to the arm of the state doctrine must be addressed here because the previously discussed waiver and abrogation doctrines have no relevance in a suit against a state entity unless a state’s Eleventh Amendment immunity attaches to that entity. 78 In applying Supreme Court precedent, the Third Circuit has developed two basic principles. First, federal law determines whether a government entity is an arm of the state entitled to assert Eleventh Amendment immunity. 79

148 (3d Cir. 1989).

Thus, the District Court of New Jersey, applying this precedent in New Jersey Department of Environmental Protection v. Gloucester Environmental Management Services, Inc., 923 F. Supp. 651 (D.N.J. 1995), concluded that New Jersey had waived the Eleventh Amendment immunity of four of its state agencies that were made third-party defendants in a suit brought by New Jersey that was removed to federal court. See id. at 661 (noting that state’s “voluntary invocation of the federal court’s power to adjudicate its rights may give rise to a waiver of Eleventh Amendment immunity”).

Finally, nothing precludes a state from explicitly waiving its immunity to suit in federal court through its constitution or by statute. See Atascadero State Hosp. v. Scanlon, 475 U.S. 234, 241 (1985) (noting that state statute or constitutional provision may waive state’s Eleventh Amendment immunity). This waiver, however, must be an “unequivocal waiver specifically applicable to federal-court jurisdiction.” Id.

74. See Edelman v. Jordan, 415 U.S. 651, 663 (1974) (noting that suit may still be against state even though state is not named party).

75. See id. (finding that Eleventh Amendment may still apply if state is not named party).


For the sake of clarity, it is worth noting at this point that counties and municipalities can not assert the Eleventh Amendment immunity defense enjoyed by the states. See Urbano v. Board of Managers, 415 F.2d 247, 251 (3d Cir. 1969) (limiting scope of Eleventh Amendment protection in cases involving public entities).


78. See Zinn, supra note 14, at 1455 (noting that “[a]rm-of-the-state doctrine determines whether immunity exists, whereas waiver and abrogation are only relevant if immunity exists”).

79. See Christy v. Pennsylvania Turnpike Comm’n, 54 F.3d 1140, 1144 (3d Cir. 1995) (noting that question of whether commission is arm of state is one of federal
ond, the Third Circuit has recognized that the entity asserting the Eleventh Amendment immunity has the burden of proving its existence.\textsuperscript{80}

In determining whether a state instrumentality qualifies as an arm of the state, the Third Circuit initially adopted a multiple question balancing test known as the Urbano factors.\textsuperscript{81} For clarity's sake, the Third Circuit eventually condensed these varied questions into a three-question balancing test in Fitchik v. New Jersey Transit Rail Operations.\textsuperscript{82} The three questions explored in the Third Circuit test are:

(1) Whether the money that would pay the judgment would come from the state (this includes three of the Urbano factors—whether payment will come from the state's treasury, whether the agency has the money to satisfy the judgment, and whether the sovereign has immunized itself from responsibility for the agency's debts);

(2) The status of the agency under state law (this includes four factors—how state law treats the agency generally, whether the entity is separately incorporated, whether the agency can sue or be sued in its own right, and whether it is immune from state taxation); and

\textsuperscript{80} See Christy, 54 F.3d at 1144 (finding that party asserting Eleventh Amendment immunity bears "burden of production and persuasion with respect to factual questions" proving applicability of Eleventh Amendment immunity). The Christy court decided to treat the Eleventh Amendment assertion like an affirmative defense. See id. (adopting United States Court of Appeals for Ninth Circuit's approach). Thus, the party that would benefit from the assertion bears the burden of proving its existence. See id. (comparing Eleventh Amendment to affirmative defense). Further, the court found that the Eleventh Amendment claim will "occasion serious dispute only where a relatively complex institutional arrangement makes it unclear whether a given entity ought to be treated as an arm of the state." Id. Appropriately, the court found that in these "complex" situations, the particulars of the arrangement will lie within the knowledge of the entity claiming the immunity. See id. (justifying factually why court should treat Eleventh Amendment assertion like affirmative defense).

\textsuperscript{81} See Urbano, 415 F.2d at 250-51 (adopting factors to determine whether entity is arm of state). The original factors, none of which were dispositive of the arm of the state issue, were: (1) "perhaps the most important is whether, in the event plaintiff prevails, the payment of the judgment will have to be made out of the state treasury"; (2) "whether the agency has the funds or the power to satisfy the judgment"; (3) "whether the agency is performing a governmental or proprietary function"; (4) "whether it has been separately incorporated"; (5) "the degree of autonomy over its operations"; (6) "whether it has the power to sue and be sued and to enter into contracts"; (7) "whether its property is immune from state taxation"; and (8) "whether the sovereign has immunized itself from responsibility for the agency's operations." Id.

\textsuperscript{82} 873 F.2d 655 (3d Cir. 1989).
(3) What degree of autonomy the agency has.\textsuperscript{83}

The Third Circuit has applied this test in cases since \textit{Fitchik}, but the factors have not been weighed evenly.\textsuperscript{84} In the vast majority of the cases, the first factor—funding—has controlled the courts’ analyses.\textsuperscript{85}


84. See \textit{Fitchik}, 873 F.2d at 659 (noting that “these factors are not weighed evenly” and most significant factor is whether any judgment would be paid from state treasury).

85. See \textit{College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.}, 131 F.3d 353, 363 (3d Cir. 1997), \textit{cert. granted}, 67 U.S.L.W. 3084 (U.S. Jan. 8, 1999) (No. 98-149) (adopting district court holding that Florida Prepaid was arm of State of Florida); \textit{Christy}, 54 F.3d at 1145, 1150 (finding that Pennsylvania Turnpike Commission was not arm or alter ego of state after placing “special emphasis” on funding factors on which commission failed to meet its burden of proof); Peters v. Delaware River Port Auth., 16 F.3d 1346, 1351 (3d Cir. 1995) (“Since two of the three factors weigh heavily against a finding that the [Delaware River Port Authority (“DRPA”)] is an arm of a state, including the first and most important factor of funding, the balance is clearly struck against a finding that the DRPA is an alter ego of . . . New Jersey or Pennsylvania.”); \textit{Bolden v. Southeastern Pennsylvania Transp. Auth.}, 953 F.2d 807, 821 (3d Cir. 1991) (affording funding factor most weight in determining that Eleventh Amendment did not protect Southeastern Pennsylvania Transportation Authority (“SEPTA”)); \textit{Fitchik}, 873 F.2d at 664 (finding that New Jersey Transit Corporation (“NJT”), and thus its subsidiary New Jersey
A. Congressional Abrogation: Searching for a Fourteenth Amendment Source for Legislation

The *Seminole Tribe* decision clearly limited the means by which Congress could constitutionally abrogate the states' Eleventh Amendment immunity: Congress' intent to abrogate must be unequivocally clear and Congress must have legislated pursuant to its Fourteenth Amendment powers. The first prong of the test severely limits practitioners attempt-
ing to circumvent the Eleventh Amendment. The language of the statute must unequivocally abrogate; otherwise, abrogation is not possible. The Third Circuit has already recognized that in applying the first prong of the test, the court's analysis cannot encompass any analogy or policy considerations. Thus, a proponent of abrogation must rely solely on the bare language of the statute.

Assuming that Congress has expressed its unequivocal intent to abrogate the states' Eleventh Amendment immunity, the proponent of abrogation will likely be confronted with a statute enacted pursuant to Congress' Article I powers. Further, many federal statutes give exclusive jurisdiction over causes of action to federal courts. Thus, access to the courts often depends upon a finding that the statute somehow implicates an interest protected by the Fourteenth Amendment. The Third Circuit has concluded that a mere mention of the Fourteenth Amendment in the legislative history, although entitled to some deference, does not conclusively show that the legislation was, at least in part, enacted pursuant to the Fourteenth Amendment. The court in College Savings Bank, however, showed a willingness to search for potential interests protected by the Fourteenth Amendment. The proponent of

87. See College Sav. Bank, 131 F.3d at 357 (noting that Congress must express unequivocal intent to abrogate to satisfy first prong of abrogation test).

88. See Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690, 696 (3d Cir. 1996) (finding that analysis cannot "expand to encompass the analogy and policy considerations that plaintiffs now urge"); see also Cloherty, supra note 3, at 1305-06 (noting that any evidence contained in legislative history of federal statute favoring abrogation is irrelevant). The court also noted that it could not act as a "super legislature" and read any language that Congress did not enact into a statute at issue. See Blanciak, 77 F.3d at 696 (limiting statute to its explicit language).

89. See, e.g., Blanciak, 77 F.3d at 696 (limiting analysis to explicit language of statute).

90. See Beckham, supra note 83, at 159-60 (noting that Supreme Court's decision in Seminole Tribe will have little impact on federal laws extending to civil rights and prohibiting discrimination). Federal laws such as bankruptcy, copyrights, antitrust, patent and CERCLA were all enacted pursuant to Congress' Article I powers, and thus their abrogation clauses are all affected by the Seminole Tribe decision. See id. at 160 (noting effect of decision on broad range of federal laws); Williamson, supra note 7, at 1740 (stating that federal bankruptcy, intellectual property and environmental statutes are repeatedly mentioned as "likely victims" of Seminole Tribe).

91. See Beckham, supra note 83, at 160 (noting that federal bankruptcy, copyright, antitrust and CERCLA laws grant federal courts exclusive jurisdiction).

92. See id. (requiring that courts may still find that Article I statutes "embrac[e] enforcement powers under the Fourteenth Amendment").

93. See College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 131 F.3d 353, 358-59 (3d Cir. 1997) (finding that although brief statement of constitutional foundation for TRCA in Senate Report is entitled to deference, it does not establish that TRCA was enacted pursuant to Fourteenth Amendment), cert. granted, 67 U.S.L.W. 3084 (U.S. Jan. 8, 1999) (No. 98-149).

94. See id. at 358-62 (examining whether right to be free from false advertising was protected by Fourteenth Amendment).
abrogation must seize upon these interests to argue abrogation successfully.95

Although the court in College Savings Bank determined that the Fourteenth Amendment did not protect the right to be free from false advertising, and thus that the TRCA did not constitutionally abrogate Florida’s Eleventh Amendment immunity under the particular facts, the court recognized that trademark infringement claims or other false advertising claims may implicate intangible property rights protected by the Fourteenth Amendment.96 Various commentators have recognized the merits of attempting to circumvent the harsh effects of Seminole Tribe through attempts at identifying affected property rights and interests protected by the Fourteenth Amendment to argue that a valid abrogation has occurred.97 This approach affords the only opportunity to gain access to the federal courts by means of an abrogation argument.98

B. Constructive Waiver Under the Parden Doctrine: Still a Viable Argument in the Third Circuit

In College Savings Bank, the Third Circuit declined to follow the United States District Court for the District of New Jersey’s finding that

95. See id. (noting that whether legislation was enacted under Fourteenth Amendment turned on whether specific interest is protected by Fourteenth Amendment).

96. See id. at 362 (limiting holding to particular facts of case).

97. See Beckham, supra note 83, at 160 (stating that courts could construe Article I legislation to embrace enforcement powers of Fourteenth Amendment); Schwartz, supra note 3, at 5 (noting that Fourteenth Amendment is likely to be used as means of abrogation of Eleventh Amendment immunity in patent infringement suits); Vasquez, supra note 7, at 1691 (noting that litigants must search for property rights protected by Fourteenth Amendment in form of mandatory obligations placed on states by Congress under its Article I powers); see also College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 948 F. Supp. 400, 425-26 (D.N.J. 1996) (finding that patent is property for purposes of Fourteenth Amendment and that Congress can accordingly abrogate Eleventh Amendment immunity of states for claims under Patent Act, 35 U.S.C. §§ 101-376 (1994)), aff’d, 131 F.3d 353 (3d Cir. 1997), cert. granted, 67 U.S.L.W. 3084 (U.S. Jan. 8, 1999) (No. 98-149).

For instance, one can argue that Congress relied on its Fourteenth Amendment powers when it abrogated the states’ Eleventh Amendment immunity under the Patent Act. See Schwartz, supra note 3, at 4-5 (summarizing abrogation argument under Patent Act after Seminole Tribe decision). The argument is:

(1) [P]atents are property; (2) the Fourteenth Amendment prevents states from depriving people of property without due process of law; and (3) section five of the Fourteenth Amendment gives Congress the powers to enact legislation enforcing the Amendment. Therefore, the argument continues, Congress drew on its Fourteenth Amendment powers when it abrogated state sovereign immunity to protect individuals’ intellectual property from state infringement, so abrogation was properly effected.

Id.

98. For a discussion of the Supreme Court’s limitation of Congress’ abrogation powers to legislation enacted under Congress’ Fourteenth Amendment powers, see supra notes 17-28 and accompanying text.
the Supreme Court had overruled the Parden constructive waiver doctrine through the Seminole Tribe decision. Despite the Third Circuit's recognition of the current validity of the Parden doctrine, the reality still remains that the Supreme Court has only once found a constructive waiver of a state's Eleventh Amendment immunity through participation in an area regulated by Congress—in Parden. Indeed, many commentators believe that the constructive waiver doctrine articulated in Parden and its progeny is dead.

Despite this less than glowing endorsement by commentators of the vitality of Parden constructive waiver, the Third Circuit has nevertheless fashioned a Parden doctrine test that remains good law. Thus, although it appears that it will be difficult to advocate that Parden constructive waiver has occurred, the Third Circuit has left room for developing concrete arguments under the test.

In College Savings Bank, the court conceded the satisfaction of the first three elements of the test. In practice, an abrogation argument will determine the existence of the first two elements of the Parden doctrine test—the existence of a clear congressional statement of intent to make

99. Compare College Sav. Bank, 131 F.3d at 365 (stating that courts of appeal should not find that Supreme Court implicitly overruled its own decision), with College Sav. Bank, 948 F. Supp. at 416 (finding that after Seminole Tribe, "Congress may no longer utilize its Article I powers to elicit a waiver of sovereign immunity as a condition for participating in a field subject to congressional regulation").

100. See College Sav. Bank, 948 F. Supp. at 416 (stating that no other Supreme Court decision has found waiver under Parden theory); Wolf, supra note 47, at 93 (noting that Supreme Court has never cited to Parden theory in any subsequent case); Brad Jolly, Comment, The Indian Gaming Regulatory Act: The Unwavering Policy of Termination Continues, 29 Am. St. L.J. 273, 317 n.348 (1997) (noting that Supreme Court has only found Parden type waiver once).

101. See Chemerinsky, supra note 46, at 410 (noting that constructive waiver of Eleventh Amendment immunity is virtually nonexistent); Ann Althouse, When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment, 40 Hastings L.J. 1123, 1167 (1989) (finding Parden constructive waiver to be "virtual nullity"); Ron S. Chun, Avoiding a Jurassic Dinosaur Run Amok: Circumventing Eleventh Amendment Sovereign Immunity to Remedy Violations of the Automatic Stay, 98 Com. L.J. 179, 202 (1999) (finding constructive waiver to be "effectively dead"); Christopher Johnsen, Immunity Law in Higher Education: A Review of the 1995 Judicial Decisions, 25 J.C. & U.L. 333, 339 (1997) (determining that it is doubtful that constructive waiver survived Seminole Tribe decision); Wolf, supra note 47, at 89 (concluding that constructive Parden-type waiver is "without bite"); Wastewin, supra note 3, at 529 (concluding that only express consent to suit by states will constitute waiver of Eleventh Amendment immunity); see also Schwartz, supra note 3, at 4 (noting uncertainty over whether Parden constructive waiver survived Seminole Tribe); Jolly, supra note 100, at 316-18 (finding slight possibility of constructive waiver through Indian Gaming Regulatory Act).

102. See College Sav. Bank, 131 F.3d at 363 (formulating Parden doctrine test for constructive waiver in Third Circuit).

103. For a discussion of the Third Circuit's approach to Parden constructive waiver, see supra notes 46-61 and accompanying text.

104. See College Sav. Bank, 131 F.3d at 363 (finding that first three prongs of test already have or will be met).
the states subject to suit.\(^{105}\) Thus, it seems that in the typical situation, the proponents of abrogation in the Third Circuit by means of the *Parden* doctrine will have to win their arguments by establishing the nonexistence of the fourth prong—the important or core government function.\(^{106}\) Even though the Third Circuit has taken a very broad approach to this important or core government function, as evidenced by its incorporation of education-related services into its interpretation of "education" in *College Savings Bank*, the fourth prong has left sufficient room for a party proponent to advocate the nonexistence of an important or core government function.\(^{107}\)

C. Constructive Waiver Through Conduct in Litigation: A Means of Arguing Eleventh Amendment Immunity Has Been Lost

The Third Circuit has recognized in a number of cases that a state can waive its Eleventh Amendment immunity through its conduct in litigation.\(^{108}\) A proponent could use this type of waiver if abrogation and constructive waiver arguments fail or if the state has not expressly consented to suit.\(^{109}\)

The key to winning a waiver by conduct argument in the Third Circuit lies in identifying an affirmative action on the part of the state, or state entity entitled to claim Eleventh Amendment immunity, suggesting that a waiver has occurred.\(^{110}\) The most obvious signal that a state has waived its immunity, and thus that a waiver argument should be made, occurs when the state or its entities actually take advantage of a federal court's power to adjudicate rights by filing suit in federal court.\(^{111}\) The

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\(^{105}\) For a discussion of the elements of an abrogation argument, see *supra* note 28 and accompanying text.

\(^{106}\) See *College Sav. Bank*, 131 F.3d at 363 (addressing application of fourth prong of *Parden* doctrine test).

\(^{107}\) See id. at 364-65 (rejecting narrow application of "important or core government function" prong of *Parden* doctrine test).

\(^{108}\) For a discussion of cases in which the Third Circuit has found a waiver through a state's conduct in litigation, see *supra* notes 67-73 and accompanying text.


\(^{110}\) See, e.g., Unix Sys. Lab., Inc. v. Berkeley Software Design, Inc., 832 F. Supp. 790, 801 (D.N.J. 1993) (declining to find California had waived its Eleventh Amendment immunity without first finding state "acted as an affirmative participant" in litigation); see also Gibson, *supra* note 109, at 209 (finding that affirmative action on part of state is required to find waiver by conduct in litigation).

\(^{111}\) See, e.g., *In re Fennelly*, 212 B.R. 61, 63-64 (D.N.J. 1997) (following majority view that filing proof of claim in federal bankruptcy court constitutes waiver of state's sovereign immunity); see also Patricia L. Barsalou, *Defining the Limits of Federal Court Jurisdiction Over States in Bankruptcy Court*, 28 St. Mary's L.J. 575, 615 (1997)
Third Circuit has, however, identified less conspicuous actions as affirmative actions signifying a waiver.\(^{112}\) Thus, the key to demonstrating waiver by conduct lies in establishing an arguable affirmative state action in conformity with the policy justifications of waiver by conduct, and in arguing that the state can no longer play the role of the "beleaguered defendant" in a federal forum because of its affirmative action.\(^{113}\)

D. Arm of the State Doctrine: Avoiding the Complex Doctrines of Abrogation and Constructive Waiver

The arm of the state analysis can be a very powerful tool for a practitioner who maintains that the Eleventh Amendment should not bar a suit against a state entity.\(^{114}\) Practitioners need not rely on abstract "pigeon holed" doctrines such as abrogation and waiver if they can successfully argue that Eleventh Amendment immunity does not attach to the defendant entity.\(^{115}\)

In the Third Circuit, a party must emphasize two aspects of the arm of the state analysis in asserting that Eleventh Amendment immunity does not attach to a state entity. First, the Third Circuit has held that the entity asserting its entitlement to the state's Eleventh Amendment immunity has the burden of proof on the issue.\(^{116}\) This burden requirement is very important.
portant because in the absence of clear evidence relevant to an arm of the state factor, that factor is not deemed "irrelevant" for purposes of the inquiry, but rather signifies that the proponent has failed to satisfy its burden. This burden placed on the proponent affords the other party ample room to attack the proponent's evidence. For example, when analyzing the funding factor, the Third Circuit has been reluctant to draw inferences from raw data offered by the proponent. Thus, in various cases, the Third Circuit has not afforded any weight to figures offered by the proponent representing large amounts of funds received from the state when the entity has not shown what percentage of the entity's total funds came from the state.

Second, it is evident that the Third Circuit has placed the greatest emphasis on the funding factor when considering whether an entity has a right to Eleventh Amendment immunity. Accordingly, in many arm of the state analyses, the funding factor analysis determined the outcome. Thus, when coupled with a state entity's burden of proving that Eleventh Amendment immunity attaches, a strong funding factor analysis or an attack on the adequacy of an entity's proof seems like the clearest means of avoiding an Eleventh Amendment bar to suit in federal court.

117. See id. at 1146 (finding that lack of evidence bearing on how much money commission had available to satisfy potential judgment meant that commission had failed to meet its burden on issue).

118. See id. at 1145 & n.6 (declining to draw conclusion from evidence that commission received over $112 million in tax revenue from state).

119. See id. (refusing to draw conclusion from evidence that commission had received over $112 million from state because commission failed to provide evidence regarding percentage of annual revenues received from state); Bolden v. Southeastern Pennsylvania Transp. Auth., 953 F.2d 807, 819-20 (3d Cir. 1991) (finding that impact of new law affording state funds to SEPTA was too uncertain to be given significant weight in funding analysis without knowing what percentage of SEPTA's total revenue came from state funds).

120. For a discussion of the funding factor and its importance, see supra note 85 and accompanying text. Many commentators have also recognized that the funding factor is often the most important factor in the arm of the state analysis. See Chemerinsky, supra note 46, at 388 (finding that whether "a judgment against the entity [will] be satisfied with funds in the state treasury" is "especially" important); Johnsen, supra note 101, at 342 (noting "special emphasis" in Third Circuit on potential state liability for judgments against state entities); Buchholtz, supra note 114, at 2299 (finding funding factor preeminent in arm of state analysis); James A. Rogers et al., CERCLA Claims Under Section 103 Versus 113: The State Lawyers Perspective in an Uncertain Field, NAAG NAT'L ENVTL. ENFORCEMENT J., Dec. 1996-Jan. 1997, at 3, 11 (recognizing that most important factor is whether judgment would be paid by state); Rogers, supra note 83, at 1292 (noting that many courts have recognized importance of funding factor).

121. For a discussion of cases that involve the arm-of-the-state analysis and rely heavily on the funding factor, see supra note 85 and accompanying text.

122. See Beckham, supra note 83, at 147 (noting that "[s]tate entities cannot always be placed squarely in the arm of the state" category, necessitating "fact-intensive inquiry"); Rogers, supra note 83, at 1273 (explaining that arm of state doctrine is dependent on "highly factual inquiry").
IV. CONCLUSION

Application of the Eleventh Amendment is often complex and inconsistent. The successful assertion of an Eleventh Amendment defense by a party defendant, however, can have dramatic results on the litigation. Such results may include the closing of federal courthouse doors on those seeking relief against a state or even a complete bar to suit if the federal courts have exclusive jurisdiction over the action. The Third Circuit thus affords litigants various methods by which they can avoid the often harsh consequences of an Eleventh Amendment immunity assertion. These methods include the abrogation, waiver and arm of the state doctrines. Although these doctrines can be used equally by state defendants to shield themselves from liability, they afford an opportunity for litigants to obtain successfully the relief sought for injuries incurred at the hands of a state or state entity.

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123. For a discussion of commentators' reactions to the complexity of the Eleventh Amendment, see supra note 3 and accompanying text.

124. See Beckham, supra note 83, at 160 (noting that federal bankruptcy, copyright, antitrust and CERCLA laws grant federal courts exclusive jurisdiction).

125. For a discussion of the Third Circuit's approach to the abrogation doctrine, see supra notes 29-45 and accompanying text. For a discussion of the Third Circuit's approach to waiver of Eleventh Amendment immunity, see supra notes 46-73 and accompanying text. For a discussion of the Third Circuit's approach to the arm of the state doctrine, see supra notes 74-85 and accompanying text.