ILLINOIS STATE BAR ASSOCIATION

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The Globe

The newsletter of the Illinois State Bar Association's Section on International & Immigration Law

Editor's comments

BY LEWIS F. MATUSZEWICH

This issue of *The Globe* leads off with "Message from the chair" from Shama K. Patari, who is the new chair of the International and Immigration Law Section Council. Thank you to three members of the International and Immigration Law Section Council for providing the material for this second issue of *The Globe* for the 2018-19 bar year. David Aubrey is currently vice chair of the section council and he practices law in Edwardsville. His article, "Litigating jurisdictional issues in post-*Daimler* America" is the seventh article he has provided for publication in *The Globe.*

Professor Cindy G. Buys, past chair of the International and Immigration Law Section Council has been recently appointed as interim dean and continues as a professor of law at Southern Illinois University School of Law in Carbondale. Her article, "*Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co., Ltd.* and the supreme court's doctrine of 'respectful consideration'" is the 52nd article she has provided to ISBA publications since her first article appeared in 2005. In addition to *The Globe*, her articles have appeared in newsletters such as *The Catalyst*, the newsletter of the Women and the Law Section of the ISBA, and *Employee*

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Message from the chair

BY SHAMA K. PATARI

It is my honor and privilege to serve as the chair of the Illinois State Bar Association's 2018-19 International and Immigration Law Section Council. I look forward to building upon the contributions that my immediate predecessor, Michelle Rozovics and the 2017-18 section council has made to the ISBA community.

It is a very interesting and exciting time in both international and immigration law. A host of executive orders in international trade and immigration law have been issued and their enforcement by the federal government is underway.

Now, more than ever before, our section council bears the significant responsibility of explaining these executive orders and the changing laws to the ISBA community and the general public. We plan to do so through CLE events, quarterly newsletter (*The Globe*), and our council's participation in ISBA public service programming.

I am excited to be working with a most talented group of individuals that have worked tirelessly in areas including customs and international trade, immigration, and civil rights. We are pleased to welcome new member Meaghan Vander Schsaf, who will be this year's secretary. I am also very honored to welcome back David Aubrey, our vice chair; Judie Smith, our CLE coordinator; Natalie Pesin, our diversity chair, and Lewis Matuszewich, our newsletter editor. Martha Delgado, Ralph Guderian, Thomas Howard and John Kerley. I am also excited

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Benefits. Her material for *The Globe* has included three messages from the chair in the year she served as chair of the section council.

Patrick M. Kinnally of Aurora, Illinois is one of the major contributors across all ISBA publications. His article in the issue, "Making the government provide actual notice in removal proceedings: *Pereira v. Sessions*" will be his 97th article in ISBA newsletters since 2000. The current ISBA website list does not reflect material prior to that date. His articles have appeared in *Labor and Employment Law*, *YLD News*, *Trial Briefs*, *Trusts and Estates*, *Bench and Bar*, *Diversity Matters*, *General Practice, Solo & Small Firm*, *Human Rights* and *Traffic Laws and Court*, in addition to *The Globe*.

Authors with offices in Edwardsville, Carbondale, and Aurora shows the geographically widespread interests in international and immigration matters.

This issue also includes an article, "Other resources to consider" written by Lewis F. Matuszewich, editor of *The Globe,* and a write-up of recent cases that have appeared recently in E-Clips.

As always, thank you to our authors. ■

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Message from the chair

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to continue working with Mark Wojcik, Cindy Buys, Juliet Boyd, Pat Kinnally, Philip Hablutzel and Michelle Rozovics; whose contributions to the section council and ISBA in general have been invaluable.

This year's section council will focus on several objectives including:

Continuing to educate and disseminate new legal developments to our fellow lawyers through CLEs and publications.

Engaging with law students through panels about "careers in international and immigration law."

Continuing to educate attorneys and judges concerning consular notifications.

Commenting and proposing legislation related to bills concerning immigration and international law.

These activities are very significant to the public and to the legal community in Illinois as the law continues to evolve and change. We encourage you to read *The Globe* to keep current on international and immigration law issues that develop this year. Please also consider submitting articles for publication. Finally, please also consider watching our archived studio programs, which are intended as a resource for ISBA members.

We thank you for your involvement in the section council and look forward to an exciting year! ■

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The Globe

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Litigating jurisdictional issues in post-*Daimler* America

BY DAVID W. AUBREY

Two recent denials of the writ of certiorari by the United States Supreme Court hint at what might be left of the doctrine of specific jurisdiction following the watershed ruling in *Daimler AG v. Bauman*.[1] Reading too much into these denials of the writ is ill advised, nevertheless, taken together they hint that specific jurisdiction of states over foreign defendants is still intact after *Daimler*. This article will summarize these rulings and then briefly attempt to lay out the tools available for Illinois lawyers attempting to defend the jurisdiction of Illinois courts.

In 2014, the United States Supreme Court drastically constricted the ability of states to adjudicate cases in the landmark ruling *Daimler*. As a result of *Daimler*, litigants crossing borders, whether national or international, should expect to either defend against or present, a motion to dismiss a case based on lack of personal jurisdiction. This is certainly true in products liability litigation, where defective products often are manufactured overseas, but is also likely going to be an issue for litigants in disputes related to international contracts, business, or intellectual property.

First, a ruling denying a motion to dismiss based on personal jurisdiction, by the First District Court of Appeals of Illinois, held out-of-state plaintiffs injured by pharmaceuticals had established a prima facie burden that jurisdiction existed by showing that some testing of the drugs occurred in Illinois.[2] In *Meyers v. GlaxoSmithKline LLC*, the plaintiffs alleged, and offered uncontroverted evidence, that the testing of the pharmaceuticals in Illinois was negligent resulting in their injuries. Thus, even though the plaintiffs were not residents of Illinois or injured in Illinois, the defendant's conduct in the forum created specific jurisdiction over the defendant via the Illinois long arm statute.

Second, a ruling denying a motion to dismiss based on personal jurisdiction, by the Colorado Supreme Court, held a Colorado plaintiff established a prima facie burden that jurisdiction existed over a Taiwanese helicopter component manufacturer, who knowingly placed its product into the steam of commerce. Thus, the Colorado Supreme Court applied the stream of commerce test previously created by the United States Supreme Court prior to the *Daimler* case.[4]

An interesting wrinkle on these cases could be to read them as procedural and not substantive findings of personal jurisdiction. In both cases, the courts described the initial burden of the plaintiffs to present prima facie evidence of jurisdiction to the court to avoid a motion to dismiss. Likewise, in both instances, the courts explained that the defendant must offer uncontroverted evidence that no jurisdiction existed.

In Illinois, this is the standard for avoiding an adverse ruling to dismiss based upon the pleadings.[5] Thus, at the pleading stage, plaintiff must plead sufficient facts, on information and belief, to meet this burden. In response, a defendant must present uncontroverted evidence to rebut jurisdiction.

This opens an entirely different can of worms. Presumably a ruling on a motion to dismiss based on the pleadings would be a separate hearing from an evidentiary hearing on the defendant's uncontroverted evidence. Before such a hearing, plaintiff would be entitled to discovery defendant's evidence pursuant to Illinois Supreme Court Rule 201(l), request documents under Rule 214, and depose defendant or its representative pursuant to Rule 206(a)(1). Likewise, at the evidentiary hearing, plaintiffs ought to be allowed to cross examine the witness according to Rule 237(b). All of this procedure seems necessary to protect the rights of the plaintiffs prior to a ruling on the substance of the motions. When this evidentiary hearing occurs is not mentioned. It could be taken with the whole case at trial, however, this lacks common sense given the point of determining jurisdiction at the beginning of a case is to avoid unnecessary costs.

Accordingly, two recent denials of the writ of certiorari by the United States Supreme Court hint at what might be left of the doctrine of specific jurisdiction following the watershed ruling in *Daimler.* For Illinois practitioners, the Supreme Court Rules offer ample tools for defending against motions to dismiss when litigating against foreign defendants. ■

David W. Aubrey primarily represents clients diagnosed with mesothelioma and their families. In addition, David represents those injured in commercial trucking accidents, whistle blowers in qui-tam actions, and prisoners in civil rights cases. His contact information follows.
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1. See *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014); see also *Jeffs v. Ford Motor Co.*, 2018 WL 3466965 (Ill. App. Ct., 2018).
2. See *Meyers v. GlaxoSmithKline LLC*, 61 N.E.3d 1026 (Ill. App Ct. 2016).
3. See *Align Corp. LTD v. Boustred*, 421 P.3d 163 (Co. Sup. Ct. 2017).
4. See e.g.,*World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (U.S. 1980).
5. See 735 ILCS 5/2-619 (2018).

Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co., Ltd. and the Supreme Court's doctrine of "respectful consideration"

BY CINDY G. BUYS

The U.S. Supreme Court has occasionally stated that U.S. courts should give "respectful consideration" to decisions of international tribunals and has suggested such consideration may be applicable to statements or decisions of foreign government entities interpreting their own law as well. However, the Supreme Court has never clearly defined what "respectful consideration" means. Unfortunately, the Court's recent decision in *Animal Science Products*[1] does not provide much more clarity.

Animal Science Products involved a complaint of price-fixing by Chinese manufacturers and exporters of Vitamin C allegedly in violation of U.S. antitrust laws. The Chinese defendants claimed that Chinese law required them to fix the prices and quantity of vitamin C exports. The Chinese Ministry of Commerce submitted an amicus brief in support of the Chinese sellers in which it stated that the offending behavior resulted from "a regulatory pricing regime mandated by the government of China."[2] The U.S. plaintiffs disputed this claim, and provided some contrary evidence, including a statement by the Chinese government to the World Trade Organization (WTO) in which the Chinese government represented to the WTO that it "gave up export administration of . . . vitamin C" in 2002.[3]

After hearing the evidence, a jury returned a verdict in favor of the U.S. plaintiffs, finding that the Chinese sellers were not "actually compelled" to engage in price fixing.[4] Accordingly, the U.S. District Court entered a judgment against the Chinese sellers in the amount of $147 million in treble damages and enjoined the Chinese sellers from further violations of U.S. antitrust law. The Chinese defendants appealed to the U.S. Court of Appeals for the Second Circuit, which reversed the district court. While acknowledging competing authority on the issue, it held that a U.S. court is bound to defer to a foreign government's statements regarding the construction and effect of its own laws and regulations, as long as such statements are reasonable.[5]

On appeal, the U.S. Supreme Court reversed the second circuit, holding that the lower court erred in concluding that it was bound to defer to the Chinese Ministry of Commerce's statements. The Supreme Court found instead that in determining foreign law under Federal Rule of Civil Procedure 44.1, a U.S. "court should accord respectful consideration to a foreign government's submission, but is not bound to accord conclusive effect to the foreign government's statements."[6] When a foreign government makes conflicting statements or offers its interpretation of its law in the context of litigation, U.S. courts may need to exercise more caution in evaluating the foreign government's submission.[7] The Supreme Court offered a laundry list of considerations to take into account when evaluating a foreign government's view of its own law, including "the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions."[8] The Court distinguished prior cases in which more deference was given to the statements of foreign governments because there was no inconsistency in the foreign government's statements in those earlier cases. The Court also pointed to two international treaties (to which the United States is not a party), the European Convention on Information on Foreign Law and the Inter-American Convention on Proof of and Information on Foreign Law, as evidence of international practice treating information provided by foreign governments as nonbinding.[9] The Court remanded the case for reconsideration in accordance with its opinion.

Attorneys and judges have long struggled with the issue of what weight to give statements of foreign governments, including foreign courts, regarding the interpretation of their own laws. In *United States v. Pink*, the U.S. Supreme Court treated as "conclusive" a statement of the Russian government as to effect of its 1918 decree nationalizing property.[10] In *Animal Science Products*, the Supreme Court largely distinguished *Pink* on the ground that there were not competing government statements in the *Pink* case. In *Abbott v. Abbott*, the U.S. Supreme Court found an affidavit submitted by the Chilean government in an international custody dispute "notable" and adopted an interpretation consistent with that expressed by the Chilean government.[11]

U.S. courts of appeals likewise have differed as to the standard to be used. In *In re Oil Spill of the Amoco Cadiz*, the Seventh Circuit ruled that the French government's construction of its own law was entitled

to "substantial deference" in the face of competing interpretations.[12] Similarly, the Second Circuit found it appropriate to give "preponderant consideration" to the Mexican government's interpretation of its own law in *Curley v. AMR Corp*.[13] On the other hand, the Fifth Circuit stated in *Access Telecom* that while U.S. courts routinely give deference to statements by foreign governments, they are not required to give deference to all determinations made by foreign agencies.[14]

In *Animal Science Products*, the Supreme Court offers yet another standard—that of respectful consideration. This language has been used by the Supreme Court before in discussing the weight to be given to judgments of international tribunals, such as the International Court of Justice.[15] However, in the cases referring to that standard, the Court has never actually deferred to an international court's interpretation. In addition, the Supreme Court has never really defined what it means to give respectful consideration. The best it offers in *Animal Science Products* is a case-by-case analysis of when it may be appropriate to defer (or not) to a foreign agency's interpretation of its own law, using the five factors listed above. While this standard certainly gives lawyers more to argue about, it does little to clarify the law. One can only hope that the standard will be further elucidated through future case law.

Cindy G. Buys is the interim dean and a professor of law at Southern Illinois University School of Law. She serves on the International and Immigration Law Section Council of the ISBA, as well as serving as the secretary of the ISBA's Women and the Law Committee.

1. *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co., Ltd.*, 585 U.S. ___ (June 14, 2018), https://www.supremecourt.gov/opinions/17pdf/16-1220_3e04.pdf.
2. *Id.* at 3.
3. *Id.* at 5.
4. *Id.*
5. *Id.* at 6.
6. *Id.* at 1.
7. *Id.* at 9.
8. *Id.*
9. *Id.* at 12.
10. *U.S. v. Pink*, 315 U.S. 203, 220 (1942).
11. *Abbott v. Abbott*, 560 U.S. 1, 10-11 (2010).
12. I*n re Oil Spill of the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992).
13. *Curley v. AMR Corp.*, 53 F.3d 5, 14-15 (2d Cir. 1998).
14. *Access Telecom, Inc. v. MCI Telecommunications Corp.*, 197 F.3d 694, 714 (5th Cir. 1999).
15. See e.g., *Breard v. Greene*, 523 U.S. 371 (1998); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 333 (2006); *Medellin v. Texas*, 552 U.S. 491, 513 n.9 (2008).

Making the government provide actual notice in removal proceedings: *Pereira v. Sessions*

BY PATRICK M. KINNALLY

In 1997, under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress, among other seminal immigration changes, abolished suspension of deportation and replaced it with a new regime called cancellation of removal. IIRIRA was a sea change. Cancellation of removal has two prongs. The attorney general may cancel the removal of a lawful permanent resident (LPR) where the LPR has been lawfully admitted for permanent resident for five years; has been physically present in the United States for seven years continuously after having been admitted in any status; has not been convicted of an aggravated felony; and, warrants the favorable exercise of discretion.[1]

For persons who are not LPRs, the criteria are more daunting. The attorney general may cancel the removal and adjust the status on a non-LPR if: the alien has been physically present in the Untied States for a continuous period of not less than 10 years immediately preceding the date of the application; has been a person of good moral character for 10 years; has not been convicted of certain crimes; and can establish that his/her removal would result in an exceptional and extremely unusual hardship to a United States citizen, or LPR spouse, parent or child. This latter standard requires exacting proof.[2]

Under the Immigration & Nationality Act (INA), Congress authorized what is called the stop-time rule as applied to cancellation of removal cases. It said that under this statute "any period...of continuous physical presence in the United States shall be deemed to end... when the alien is served with a Notice to Appear." Under this statute, the continuous physical presence requirements of seven years for LPRS and 10 years for non-LPRS ends when the government serves a notice to appear (NTA) in a removal proceeding. The NTA in a removal proceeding is the government's charging document as to why the respondent should be removed from the United States. Obviously, is critical since the accrual of continuous physical presence terminates based on the efficacy of the NTA.

The statutory rights of a non-citizen in a removal hearing include but are not limited to, being informed about: the time and place where the hearing will occur; the acts or conduct alleged to be in violation of law; that the person may be represented by counsel and period of time to obtain counsel; and the nature of the proceedings.[3] It seems elementary that a NTA must state a date, time, and location of where and when the respondent non-citizen needs to appear. If it were otherwise, what is the purpose of the supposed notice? Where removal may result-a substantial deprivation, it seems plain that an NTA must say not only why a non-citizen must appear but also a time and place where they must show up.

For most of us who represent non-citizens in removal proceedings, the NTA our clients have received indicate the date and the time of the hearing will be scheduled in the future. This is so even though the government's statute states unequivocally the NTA shall include the time and place where the removal proceeding will be held 8USC 1229 a(g)(1). Notwithstanding, this clear mandate, the Board of Immigration Appeals (BIA), an administrative appellate tribunal appointed by government actors, approved of NTAs that did not contain such information.[4]

In a recent decision, the United States Supreme Court has declared this historical government practice of not providing a non-citizen in a removal hearing a specific time and place where to appear to answer charges in the NTA to be invalid. If the NTA does not have that information, then the stop-time rule does not apply.[5]

In 2000 Wescley Fonseca Pereira (Wescley), a Brazilian citizen entered the Untied States as a tourist. He was 19. He overstayed his visa, married, and fathered two United States citizen daughters. In 2006 he was arrested for a DUI and on May 31, 2006, the Department of Homeland Security (DHS) served him with a NTA. That document charging him with being removable did not specify the date and time of his removal hearing. The NTA was not filed with the immigration court until August 9, 2007. Wescley never received it because DHS sent it to the wrong address. On October 31, 2007, Wescley was ordered removed since he did not appear.

Six years later, Wescley was arrested for operating a motor vehicle without operative headlights. His removal hearing was reopened. Wescley, who now had been physically present in the United States continuously for 10 years, applied for cancellation of removal. He argued the stop-time rule was not operable since the DHS 2006 NTA had no information about the date and time of his removal hearing. The BIA and the 1st Circuit Court of Appeals both agreed the stop-time rule was triggered by the 2006 NTA.[6] Wescley was ordered removed.

In *Matter of Camarillo* the immigration judge held the stop-time rule did not apply until the respondent was sent an NTA specifying the date and time of the hearing.[7] The BIA, in reversing held:

> ***It is often not practical to include the date and time of the initial removing hearing on the notice to appear (*Camarillo*, at 648) The Supreme Court found this argument meritless. It held: *** given today's advanced software capabilities it is hard to imagine why DHS and immigration courts could not again work together to schedule hearings before, sending notices to appear (*Pereira*, sl.op at 19)

In *Pereira*, the court posed the appellate question as follows:

> *** If the Government serves a non citizen with a document that is labeled "notice to appear" but the document fails to specify either the time or place of the removal proceedings, does it trigger the stop-time rule? The answer is as obvious as it seems: No... The plain text, the statutory context and common sense all lead inescapably and unambiguously to that conclusion***[8]

The Supreme Court further found:

> Finally, common sense compels the conclusion that a notice that does not specify when and where to appear for a removal proceeding is not a "notice to appear" that triggers the stop-time rule. If the three words "notice to appear" mean anything in this context, they must mean that, at a minimum, the Government has to provide noncitizens "notice" of the information, i.e., the "time" and "place," that would enable them "to appear" at the removal hearing in the first place. Conveying such time-and-place information to a noncitizen is an essential function of a notice to appear, for without it, the Government cannot reasonably expect the noncitizen to appear for his removal proceedings. To hold otherwise would empower the Government to trigger the stop-time rule merely by sending noncitizens a barebones document labeled "Notice to Appear," with no mention of the time and place of the removal proceedings, even though such documents would do little if anything to facilitate appearance at those proceedings.[9]

The take away from *Pereira* is two-fold. First, many non citizens who received common place NTAs that did not include the time and place requirement for removal hearings may be eligible for cancellation of removal. More importantly, as Justice Kennedy opines in his concurrence, the deference Circuit Courts of Appeal have accorded administrative tribunals, such as the BIA in *Camarillo*, in the interpretation of *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, is of questionable validity. He makes clear the judicial branch not administrative judges get to make that decision.[10]

Justice Kennedy's concern as well as others on the court is that administrative tribunals are engaging in statutory construction where they should not be doing so. Determining agency jurisdiction and substantive agency powers are decisions for the judiciary, not administrative judges appointed by the Executive Branch of the federal government. In essence, adherence to the separation of powers of our constitution must be the primary undertaking. *Pereira* demonstrates that our circuit courts of appeal may have misconstrued this tenet. ■

Patrick Kinnally concentrates in general and commercial litigation, immigration and citizenship and administrative, environmental and local government law. Pat, immediate past Chair of the International and Immigration Law Section Council, can be reached at Kinnally Flaherty Krentz Loran Hodge & Masur PC by phone at (630) 907-0909 or by email to pkinnally@kfkllaw.com.

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1. See *Matter of Koloamantangi*, 23 I&N Dec. 549 (BIA 2003); 8 U.S.C. §1229 (a), Immigration and Nationality Act (INA) 240A(a).
2. *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002); 8 U.S.C. §1229(b) INA 240A(b).
3. 8 U.S.C. §1229(a).
4. *Matter of Camarillo*, 25 I&N Dec. 644 (BIA 2011).
5. *Pereira v. Sessions*, 585 U.S. ___ (2018).
6. *Matter of Camarillo*, 25 I&N Dec. 644 (BIA 2011).
7. *Camarillo*, supra note 4 at 647.
8. *Pereira*, supra note 5 at 8.
9. *Id*. at 12
10. *Id*. at 2-3.

Other resources to consider

BY LEWIS F. MATUSZEWICH

The United States Commercial Service within the United States of America Department of Commerce offers frequent seminars and webinars on different aspects of international trade.

When your client asks a question related to their export or import business, do you know enough about such activity to have the proper framework to begin to answer their question? According to the U.S. Department of Commerce, U.S. companies export over two trillion dollars of goods and services. The U.S. Department of Commerce, through their website (www.export.gov), has a series of videos related to learning about the mechanics of exporting. Their "Get Ready to Export" videos include: "The Export Process Overview," "Are you Export Ready?," and 3 "My Export Plan." Through their website you can register for email updates and notifications that would tie into your client's international trade work.

A recent webinar series at the beginning of September was called, "Exploring European E-Commerce" which is specifically geared towards small and medium sized businesses looking to increase exports to the European Union through e-commerce. They state that in 2015 the European Commission announced the details of the Digital Single Market making the growth of digital economy a priority for them within Europe. In 2016 internet sales in Europe reached 628 billion U.S. dollars with 261 million consumers within the European Union shopping online.

The U.S. Department of Commerce Commercial Service offers advice as well as educational programs on how U.S.-based companies can explore and develop this market. The first of the series, "Finding Europe's Best E-Commerce Markets" included speakers on regional market segmentation, using data to target and e-commerce European entry strategies.

The second webinar dealing with "E-Commerce Distribution for Europe" including logistics and distribution challenges, service expectation of the European Customers and cost structures.

The third in the series, "VAT Fulfillment for E-Commerce" described what the VAT is and how it is paid and how to properly invoice customers on business to consumer shipments.

Often the programs or seminars or tours are announced with two or three weeks' notice, so therefore visiting the U.S. Department of Commerce website and signing up for newsletters and announcements is the best way to be informed of programs for which you might benefit and might strengthen your relationship with your clients. ■