

# FUND FINANCE FRIDAY

## FFF Sovereign Immunity Series – Part II

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Today we release the second installment of our Sovereign Immunity Series. In this installment, continuing with our alphabetical order format, we provide a high-level overview of the sovereign immunity laws of Colorado, Connecticut, Delaware, Florida and Georgia.

As we have mentioned previously, this is a complicated legal issue. [Here](#) is a link to the first installment of this series, which gives a good background on sovereign immunity and provides links to previous *Fund Finance Friday* articles on the subject. As a reminder, sovereign immunity refers to the doctrine that renders a sovereign or state immune from civil suits or criminal prosecution. In short, the government cannot be sued without its consent. Although sovereign immunity was adopted in the United States Constitution pursuant to the Eleventh Amendment, the extent to which it has been codified into law – and the exceptions to those laws – varies from state to state, which is why our coverage of the issue is broken down by state.

Issues with sovereign immunity most commonly arise in fund finance deals in the context of limited partners that are government entities, such as state pension funds. These investors often reserve their sovereign immunity in a side letter, but there is further nuance because applicable laws and certain principles of equity must be analyzed to determine whether the particular entity is actually immune from suit.

Again, we want to stress that these issues can be quite nuanced and vary deal to deal. It is therefore important to consult counsel when these issues arise in a deal because the information herein is only a summary. A deeper analysis is warranted when evaluating a particular investor.

## COLORADO

Colorado has generally waived its contractual sovereign immunity, except in contract claims for “injury which lie in tort or could lie in tort.” In such claims, the Colorado Government Immunity Act (the “CGIA”) bars plaintiffs from bringing contract claims against state entities. Colorado courts consider contract claims to “lie in tort” if: (i) the alleged injury arises out of tortious conduct or a breach of a duty recognized in tort, and (ii) the requested relief compensates that injury. For example, if a state pension fund induced contract formation via fraud or the negligent misrepresentation of a material fact, then the contract claim would “lie in tort.” In these examples, (i) the plaintiff’s injury was caused by the fund’s tortious conduct (*i.e.*, fraud or negligent misrepresentation) and (ii) the remedy (likely contract rescission) would compensate the plaintiff for that tort-based injury. In these cases, the CGIA would bar a plaintiff from bringing a contract claim against a state entity.

Alternatively, if a claim arises solely from the contract itself, then the CGIA will not apply. For example, Colorado courts have determined that claims for promissory estoppel – claims requesting performance of an invalid contract – are not covered by the CGIA. The distinction here is that promissory estoppel claims arise from injuries caused by invalid contract formation (*e.g.*, absent consideration), not tortious conduct. Without satisfying the first prong of the test, the CGIA does not apply, and courts consider the state to have waived sovereign immunity.

In cases where the nature of the injury and the requested relief implicate both contract law and tort law, Colorado courts employ the “economic loss rule.” Pursuant to this rule, a claimant suffering purely economic loss (*i.e.*, damages other than physical harm to persons or property) from a breach of contract cannot assert a claim that “lies in tort” unless the defendant owed an independent duty of care implicated by tort law. If the contract expressly states the duty of care owed by the defendant, then the CGIA does not bar a contract claim against a state entity because the duty is not independent of the contract.

## CONNECTICUT

Connecticut has not waived contractual sovereign immunity. Article 11, Section 4 of the Connecticut Constitution states that “[c]laims against the state shall be resolved in such manner as provided by law.” Similar to the sovereign immunity laws of Alabama and Arkansas, which were previously covered [here](#), Sections 4-141 through 4-165(c) of the Connecticut General Statutes provide an administrative mechanism through which a claimant may bring a contract claim against the state.

First, a claimant must file a notice with the Office of the Claims Commissioner, a quasi-judicial agency tasked with hearing and determining most claims levied against state entities. The notice must be filed within one year of the alleged injury, and it must include a short statement explaining the basis of the claim, the recovery amount requested and a request for permission to sue the state. Second, the Claims Commissioner will hold a hearing to determine whether to dismiss or deny the claim, to order immediate payment of a claim requesting \$35,000 or less in damages, to recommend to the General Assembly that payment be made for damages in excess of \$35,000 or to authorize the claimant to sue the state. Authorization to sue the state is granted when the Claims Commissioner “deems it just and equitable” and finds, in his or her opinion, that the claim “presents an issue of law or fact under which the state, were it a private

citizen, could be liable.” Lastly, the Connecticut General Assembly will ratify or vacate the Claims Commissioner’s ruling.

## **DELAWARE**

Delaware waives sovereign immunity when the contract is authorized by the state’s General Assembly. Case law in Delaware indicates that when the legislature authorizes the state to enter into a contract, the state implicitly waives sovereign immunity for a breach of that contract.

In the context of a fund finance transaction as it relates to sovereign immunity in Delaware, when it comes to a state pension fund, Delaware statute authorizes the Board of Pension Trustees to maintain and invest these funds. To that end, the statute permits the Board to enter into contracts in furtherance of these duties, which would relate to investing or advising as to the investments. Given this authorization, it would be expected that an action to enforce one of these contracts may be maintained.

## **FLORIDA**

Florida has waived its contractual sovereign immunity in certain situations. Article X, Section 13 of the Florida Constitution provides that there are circumstances where parties may bring suits against the state. To that end, case law in Florida has clarified that this sovereign immunity waiver applies to contracts that the state is authorized to enter into. Specifically, one court noted that “[w]here the legislature has, by general law, authorized entities of the state to enter into contract or to undertake those activities which, as a matter of practicality, require entering into a contract, the legislature has clearly intended that such contracts be valid and binding on both parties.” Where the state has properly entered into a contract authorized by the powers granted by general statutory law, the defense of sovereign immunity will not protect the state from action arising from the state’s breach of that contract.

In terms of fund finance transactions, Florida’s statute tasks the State Board of Administration with investing funds of state agencies, state colleges and universities and units of local governments. Provided that investments meet certain parameters, the contract pertaining to such investments will be expected to be one that can be enforced against the state.

## **GEORGIA**

Georgia has waived its contractual sovereign immunity through statute. Pursuant to Article I, Section 2 of the Georgia Constitution, the state waives its defense of sovereign immunity for claims constituting a breach of a written contract. We note that there is case law that puts the burden of proof on the party seeking to benefit from the waiver.

## **Conclusion**

In the next installment of our Sovereign Immunity Series, we will discuss the sovereign immunity status of Hawaii, Idaho, Illinois, Indiana and Iowa.