

# FUND FINANCE FRIDAY

## FFF Sovereign Immunity Series – Part III

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We continue our alphabetical 50-state survey of sovereign immunity with our third installment in the series. Today we have something for everyone (tropical beaches, rugged mountains, big cities and wide-open spaces): Hawaii, Idaho, Illinois, Indiana and Iowa!

If you are new to the area of sovereign immunity, we recommend beginning with our first installment of the series, which contains links to an overview of the topic by Cadwalader attorneys. The link to that first installment may be found [here](#) (covering Alabama through California) and the link to our second installment may be found [here](#) (covering Colorado through Georgia).

As we mentioned in our previous coverage, sovereign immunity is a complex topic. Because the United States is a federal system, each state has, to some extent, sovereign status within that system as codified by the Eleventh Amendment. As a result of its sovereign constitutional status, a state may raise a defense that it may not be sued under the long-standing doctrine of sovereign immunity. Over time, as states have engaged in more commercial activity, most states have recognized the unfairness of this doctrine when applied to a commercial context, such as a breach of contract when the state is a party to such contract. As a result, most states, via statute or case law, have adopted or recognized waivers to the doctrine of sovereign immunity in a commercial context.

For most states, therefore, the fund agreements signed by a state entity will be subject to some explicit or implicit waiver of its sovereign status. When such a waiver is present and there are no other issues in any applicable side letter, both funds and lenders can be comfortable that a state entity may be sued for breaches of its subscription agreement and limited partnership agreement.

## **HAWAII**

Hawaii has waived contractual sovereign immunity by statute. Although the action must be brought in a Hawaiian state court, such courts are authorized to hear “[a]ll claims against the State founded upon any statute of the State ... or upon any contract, expressed or implied, with the State....” This general authorization to sue the state is codified in Hawaiian statutory law and has some exceptions, but none of these exceptions apply to ordinary course fund finance transactions.

The statutory waiver only applies if the state officer’s power to enter into the contract is authorized by state law. In fund finance transactions, such actions are clearly authorized with respect to the state pension system. Section 88-22 of the Hawaii Revised Statutes expressly vests the Employees’ Retirement System of the State of Hawaii with authority to invest state pension funds. The statute also explicitly authorizes the Retirement System to sue or be sued in its own name.

## **IDAHO**

Idaho waives contractual sovereign immunity via case law when the state enters into an explicit commercial contract pursuant to express statutory authority. Idaho courts find that the state cannot be sued without its consent, but where “the legislature has by statute authorized the state to enter into certain contracts, the state ... consents to be sued if it breaches the contract to the damage of the contracting party.”

Idaho statutory law creates the Public Employee Retirement System of Idaho and authorizes its investment of state pension funds. Pursuant to statute, the Public Employee Retirement System of Idaho has the powers and privileges of a corporation. Therefore, the Retirement System can sue and be sued in its own name pursuant to state law and falls squarely into the contractual exception to sovereign immunity created by Idaho case law.

## **ILLINOIS**

Illinois has waived contractual sovereign immunity through statute. Although the State Lawsuit Immunity Act bars the state from being made a defendant or party in any court, it provides exceptions for claims permitted by the Court of Claims Act and other specified statutes. The Court of Claims Act expressly provides a mechanism for filing contract claims against the state.

Pursuant to the Act, the Court of Claims has exclusive jurisdiction to adjudicate “[a]ll claims against the state founded upon any contract entered into with the State of Illinois.” Thus, a plaintiff seeking contractual remedies against the state pension fund, for example, must file its suit in the Court of Claims. Notably, the Act requires any person filing a claim with the Court of Claims to first “exhaust all other remedies and sources of recovery” prior to filing notice with the court. Additionally, the court, by statute, must dismiss any claim that fails to comply with the Act’s notice requirements. Finally, a claim must be filed within five years of the damages first accruing.

## **INDIANA**

Indiana has an express statutory waiver of contractual sovereign immunity. Section 34-13-1-1 of the Indiana Code requires any person with a claim against the state pursuant to an express or implied contract to bring such claim within 10 years of the alleged damages. The claims are tried by a court, not a jury.

When the state enters into contracts with private citizens, Indiana courts consider the state to lay “aside its attributes as a sovereign” and bind itself “as one of its citizens does when [such citizen] enters into a contract.” When a contractual party sues the state for breach of contract, Indiana courts adjudicate the state’s rights and obligations to be equivalent to a private citizen. Therefore, sovereign immunity does not insulate the state from contractual liability from a breach of a subscription agreement or other fund document.

## **IOWA**

Iowa has waived contractual sovereign immunity through case law. The Iowa Supreme Court has found that “the State, by entering into a contract, agrees to be answerable for its breach and waives its immunity from suit to that extent.” In the fund finance context, Chapter 97B of the Iowa Code establishes the Investment Board of the Iowa Public Employees’ Retirement System, which has the power to invest the Iowa Public Employees’ Retirement Fund.

Provided that the Investment Board enters into a valid subscription agreement and limited partnership agreement (with no other side letter issues), it will be held legally responsible for any contractual obligations necessary to enforce such agreements.

## **CONCLUSION**

This summary is meant to be a high-level overview of the states covered. If you are a fund or a lender and an investor is an instrumentality of a state, such as a public pension fund, this series may be helpful as a quick reference guide to assess sovereign immunity risk, but it is not intended to be legal advice. As always, we recommend reaching out to counsel on a case-by-case basis to determine sovereign immunity risk inherent to an investor’s status as well as any language in an investor’s side letter that may affect that status.

Up next in our series, Cadwalader will take you through granaries, bourbon, blues, lobster and crab as we present the ins and outs of sovereign immunity in Kansas, Kentucky, Louisiana, Maine and Maryland.