

# FUND FINANCE FRIDAY

## FFF Sovereign Immunity Series – Part VI

February 24, 2023 | Issue No. 212



**By Thomas Wilson**  
Staff Attorney | Fund Finance



**By Joe Zeidner**  
Special Counsel | Fund Finance

Today's article marks the halfway point in our alphabetical 50-state survey of sovereign immunity, as this installment covers Montana, Nebraska, Nevada, New Hampshire and New Jersey.

For those who haven't yet had the chance to read our previous articles on the subject, our installments covering the first 25 states (Alabama through Missouri) can be found in the links below.

[PART I \(AL, AK, AR, AZ and CA\)](#)

[PART II \(CO, CT, DE, FL and GA\)](#)

[PART III \(HI, ID, IL, IN and IA\)](#)

[PART IV \(KS, KY, LA, ME and MD\)](#)

[PART V \(MA, MI, MN, MS and MO\)](#)

For readers who have read our previous installments, it should come as no surprise that we are quick to remind you that sovereign immunity is a complex, evolving, and highly nuanced area of law. In short, the purpose of sovereign immunity is to protect the government (and its relevant entities) from civil liability. In other words, without an express waiver, the assumption is that the government simply cannot be sued. The United States' federalist system means that each state has some sort of sovereign immunity protection that is afforded by the 11th Amendment of the U.S. Constitution. Protection is often bolstered by similar provisions in state constitutions, and as a result, each state has its own unique protections.

In recent decades, a number of state entities have begun to engage in commercial transactions with private actors. Clearly, if these government entities could simply renege on any contract to which they agreed with complete impunity, there would be little appetite for other parties to enter into such contracts. The result is that a complex system of waivers, carveouts, and even special courts have been created to provide protection to the parties that have entered into a commercial agreement with government entities.

In the fund finance context, this is most often seen with “sovereign investors,” such as state pension funds. We frequently see sovereign immunity provisions in these investors’ side letters in which they reserve their rights as a sovereign entity. Having an overview of how sovereign immunity is treated in the applicable state can be a useful guide in determining the appropriate treatment of that investor.

## **MONTANA**

Via statute, Montana expressly waives sovereign immunity as a defense to contract claims.<sup>[i]</sup> Section 18-1-404 of the Montana Code Annotated provides that “[t]he state of Montana is liable in respect to any contract entered into in the same manner and to the same extent as a private individual under like circumstances...”

Montana Code Annotated § 18-1-401 requires that Montana state district courts have exclusive jurisdiction to hear, determine and render judgments on a dispute that arises out of an express contract with the state of Montana or any board, agency, or officer of the state of Montana. A Montana sovereign entity will also not be subject to punitive damages in the event that it is held liable in a contractual dispute.

## **NEBRASKA**

Nebraska, the only state with a unicameral legislature, has waived its sovereign immunity in the commercial context. Article V, § 22 of the Nebraska Constitution allows for the state to sue and be sued, but the Nebraska legislature sets by law the manner and the courts in which such suits can be brought.<sup>[ii]</sup> Under Nebraska Revised Statutes § 25-21,206, the legislature provided that the state may be sued in matters arising out of an express or implied contract.<sup>[iii]</sup> That statute also dictates the Nebraska courts in which such suit may be brought and other procedural requirements for doing so.

## **NEVADA**

Nevada has statutorily waived its contractual sovereign immunity. The legislature passed Nev. Rev. Stat. Ann. § 41.031, which says that the state’s contractual liability will be determined by the same rules of law as are applied to “civil actions against natural persons and corporations.”<sup>[iv]</sup> As such, any legitimate contractual claim against a Nevada state entity will be permitted to be brought by the Nevada court system.

## **NEW HAMPSHIRE**

The Granite State has statutorily waived its immunity for breach of contract claims, meaning the relevant court will have the jurisdiction to enter judgment against a state entity if such entity is found liable in a contract dispute. Such judgment, however, will be limited to money damages, rather than other remedies such as specific performance.<sup>[v]</sup>

Further, any such action brought under the statutory waiver shall be instituted by a bill of complaint to the superior court and be tried without a jury – that is, it will be tried as a bench trial in which the judge acts as the fact finder, rather than a jury.<sup>[vi]</sup>

## **NEW JERSEY**

New Jersey has waived contractual sovereign immunity by statute via the New Jersey Contractual Liability Act for any express or implied-in-fact contract.<sup>[vii]</sup> Like Montana, it also prohibits punitive damages, but otherwise the Contractual Liability Act is intended to treat the state in a similar manner to that of a person or corporate entity for contractual disputes.

<sup>[i]</sup> Mont. Code Ann. § 18-1-404 (2023).

<sup>[ii]</sup> Neb. Const. art. V, § 22.

<sup>[iii]</sup> Neb. Rev. Stat. Ann. § 25-21,206 (2022).

<sup>[iv]</sup> Nev. Rev. Stat. Ann. § 41.031 (2023).

<sup>[v]</sup> N.H. Rev. Stat. Ann. § 491:8 (2022).

<sup>[vi]</sup> *Id.*

<sup>[vii]</sup> N.J. Rev. Stat. § 59:13-3 (2023).