

# FUND FINANCE FRIDAY

## FFF Sovereign Immunity Series – Part IX

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### Fund Finance Friday: U.S. States Sovereign Immunity Series



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Today we release the ninth installment of our Sovereign Immunity Series. In this installment we cover Oklahoma, Oregon, Pennsylvania, Rhode Island and South Carolina to give you a high-level overview of sovereign immunity in each of these states.

As we have mentioned before, 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 a doctrine that renders a sovereign or state immune from civil suits or criminal prosecution and basically means that the government cannot be sued without its consent. Although sovereign immunity has been 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 – hence, our coverage of the issue broken down by state.

This issue most commonly arises in fund finance deals in the context of limited partners that are government entities, such as state pension funds. These investors will often reserve their sovereign immunity in a side letter. However, there is further nuance, as applicable laws and certain principles of equity are applied to determine whether a particular entity is actually immune from suit.

Again, we want to stress that these issues can be quite nuanced and vary deal to deal, so it is important to consult counsel when these issues arise in a transaction. Additionally, please note that the information herein is only summary in nature and a deeper analysis is warranted when evaluating a particular investor.

## **OKLAHOMA**

Oklahoma has waived its sovereign immunity with respect to contract claims. This means that in the presence of a valid contract, a party may bring an action against the state to enforce the terms of that contract. Case law in Oklahoma confirms that “sovereign immunity is not a shield to actions based upon the contractual obligations of a state entity.”<sup>[1]</sup>

## **OREGON**

Oregon has also waived its sovereign immunity, but it is more limited, as sovereign immunity is only waived when the state agency is acting “within the scope of its authority.” Therefore, if a contract exceeds the scope of the agency’s authority, a party will not have any right to damages under that contract.<sup>[2]</sup> State law puts the burden on those having dealings with the state to ascertain the extent of the state’s authority. In other words, a court will only enforce a contract against the state of Oregon if the state agency was authorized to enter into the contract in the first place.

From a fund finance perspective, most relevant to this discussion are dealings with a state pension fund. In Oregon, the power to invest the funds in the Public Employees Retirement Fund is granted to the Oregon Investment Council (the “Council”).<sup>[3]</sup> Likely, contracts in the fund finance context will be entered into by the Council itself. We note that the state statute expressly lists the kind of investments the Council is permitted to make under Oregon law. Further, certain types of investments have been approved by the Attorney General by Opinion. To add another layer, prior to a contract becoming binding on the state, the Attorney General of Oregon must approve all contracts entered into by a state agency that would provide for payment of over \$100,000 unless the Attorney General has exempted that particular type of contract.<sup>[4]</sup>

Thus, assuming conformity with state law, the Council can be sued like any other party if the Attorney General has approved the contract.

Thinking about the state as an investor, in order to determine whether a court would enforce a contract against the state, one would need to know (i) whether the investment was of a type approved by statute, (ii) whether it was approved by the Attorney General if it was in excess of

\$100,000 (which one would expect it to be) and (iii) if it was approved by opinion. Only once all three elements have been analyzed can one understand whether sovereign immunity has been waived and the state can be sued in a contract claim.

## **PENNSYLVANIA**

Pennsylvania has statutorily waived contractual sovereign immunity, but there are certain rules that must be followed ... and there's a catch!

Any suit must be initially heard by the Board of Claims, which has exclusive jurisdiction to hear claims brought against the State.<sup>[5]</sup> Actions must be brought quickly, as state statute requires that claims be filed within six months of the date on which the claim accrues.<sup>[6]</sup> The Board of Claims will determine whether to dismiss the claim or order an award in favor of the claimant. Parties have the right to appeal any orders made by Pennsylvania's Board of Claims by making a filing with the state court within thirty days of the Board of Claims' final order.<sup>[7]</sup>

Once parties obtain a judgment, however, it may be challenging to enforce the judgment and collect the proceeds. None of the Pennsylvania Rules of Civil Practice regarding the enforcement of money judgments are applicable to a judgment against the Commonwealth.<sup>[8]</sup> Instead, payment of awards and costs against the Commonwealth are paid from funds appropriated to the involved agency, which could potentially limit recovery.<sup>[9]</sup>

## **RHODE ISLAND**

Rhode Island has waived contractual sovereign immunity through the State Purchases Act, but state law limits the amount of damages a party may recover against the state.<sup>[10]</sup> Decisions issued by Rhode Island state court confirm that "the State Purchases Act provides that any person, firm, or corporation having a lawfully authorized written contract with the state ... may bring an action against the state on the contract, including, but not limited to, actions either for breach of contract, enforcement of contract, or both."<sup>[11]</sup>

A party may bring an action against the state to enforce a contract so long as the contract was entered into on or after January 1, 1990 and the action is brought within "three (3) years from the date of completion specified in the contract." Once the claim is brought, the parties are limited to a trial without a jury. Such a cause of action is given priority on the court's calendar, but the amount of damages a party can recover is capped. If the court awards damages in excess of the original contract amount, such excess amount will be limited to an amount equal to the original contract amount.<sup>[12]</sup>

## **SOUTH CAROLINA**

South Carolina has retained certain sovereign immunity, but the law does not provide for a defense to the enforcement of the state's contractual obligations. There are certain ambiguities in the state statute, but case law has indicated that sovereign immunity does not insulate the state from contractual liabilities. In a key decision on the matter, the court found that "wherever the State of South Carolina pursuant to statutory authority enters into a valid contract, the State implicitly consents to be sued and waives its sovereign immunity to the extent of its contractual obligations."<sup>[13]</sup> Courts have found that such statutory authority can generally be found in the legislation creating the government entity.

Note that, if the contract at issue is with respect to services provided under a contract solicited and awarded pursuant to the South Carolina Consolidated Procurement Code, the adjudication of contractual disputes is limited to the procedure which requires administrative review by a chief procurement officer.<sup>[14]</sup>

## Conclusion

In the next installment of our Sovereign Immunity Series, we will discuss the sovereign immunity status of South Dakota, Tennessee and Texas.

[1] *State ex rel. State Ins. Fund v. JOA, Inc.*, 78 P.3d 534, 537 (Okla. 2003).

[2] *Harsh Invest. Corp. v. Oregon*, 744 P.2d 588, 590 (Or. 1988).

[3] Or. Rev. Stat. § 293.701 et seq.

[4] Or. Rev. Stat. § 291.047.

[5] 62 Pa.C.S. § 1721-1726.

[6] 62 Pa.C.S.A. § 1712.1.

[7] 42 Pa.C.S.A. § 763.

[8] Pa.R.C.P. No. 3101.

[9] 62 Pa.C.S.A. § 1726.

[10] R.I. Gen. Laws § 37-2-1 et seq.

[11] *Tidewater Realty, LLC v. State*, 2010 R.I. Super. LEXIS 25, \*10-11 (R.I. Super. Ct. 2010).

[12] R.I. Gen. Laws § 37-2-49.

[13] 249 S.E.2d 900, 903 (S.C. 1978) *overruled on other grounds by McCall v. Batson*, 385 S.E.2d 741, 743 (1985); see also *Hodges v. Rainey*, 533 S.E.2d 578, 585 (S.C. 2000) (“We eliminated the State’s immunity from suit based upon its contractual obligation in 1978 in *Kinsey* . . . .”)

[14] See Section 11-35-4230 of the Procurement Code.