

FUND FINANCE FRIDAY

FFF Sovereign Immunity Series – Part X: South Dakota and Tennessee Memorial Day Edition

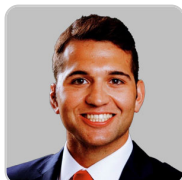
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Fund Finance Friday: U.S. States Sovereign Immunity Series



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It's the Friday before Memorial Day Weekend here in the United States. Given the holiday weekend, this installment of our Sovereign Immunity Series will be light, as we will cover just two states: South Dakota and Tennessee. However, next week we will have an installment dedicated to Texas sovereign immunity, which is a complex and popular topic as many market participants know. And while Tennessee and South Dakota have less population than Texas, they still get an equal number of votes in the U.S. Senate. (Legal trivia for the weekend: the number of Senators allowed to each state is the only part of the Constitution that cannot be

amended). Most importantly for our purposes, each of these states is an equal sovereign in the eyes of the Eleventh Amendment to the Constitution and so each is worthy of our analysis when it comes to sovereign immunity issues.

If you are looking for a general overview of sovereign immunity, we recommend beginning with our first installment of the series, which also links to in-depth articles on the topic by many of my colleagues. The link to that first installment is [here](#).

In brief, as anyone who has been to law school (and has taken a federal courts class) knows, sovereign immunity is a complex topic. As we have written before, 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 that sovereign immunity should not apply in a commercial context, such as a breach of contract when the state is a party to such contract. Most states have statutes or case law that have adopted or recognized waivers to the doctrine of sovereign immunity in a commercial context. The subscription agreement signed by a state sovereign entity will therefore likely be subject to some explicit or implicit waiver of its sovereign status under applicable state law. However, this is only a general rule, and any application will depend on the actual state in question.

It seems like it was only yesterday that we left South Carolina on our virtual sovereign immunity road trip. (See the excellent write-up of Oklahoma, Oregon, Pennsylvania, Rhode Island and South Carolina by my colleagues Leah Edelboim and Spencer Davies [here](#)). Fortunately, it's no longer winter, which makes it a great time to visit the rolling plains and black hills of...

SOUTH DAKOTA

South Dakota has the appropriate waiver in its case law. "Immunity is waived to the extent that the State enters a contract and a party or third-party beneficiary sues to enforce that contract." *Masad v. Weber*, 2009 S.D. 80, 772 N.W.2d 144, 153 (citing *Sisney v. Reisch*, 2008 SD 72, 754 N.W.2d 813, 819). In addition, like many other states, South Dakota law specifies certain procedures to sue the state. The power of the legislature to do so is provided in the Constitution of South Dakota, specifically that "[t]he Legislature shall direct by law in what manner and in what courts suits may be brought against the state." S.D. Const., art. III, § 27. The South Dakota legislature has in turn provided that contractual suits against the state shall be brought in the Office of the Commissioner of Claims, where "[t]he presiding circuit judge for the county . . . shall appoint a circuit judge from the circuit for the county in which the action arose lies to act ex officio as the commissioner." Lenders and funds therefore have an appropriate commercial contract waiver in case law and a specified mechanism of enforcement under state law.

If Dolly Parton had a contract to perform with her home state, and that state breached its contract, would she be able to sue the great State of...

TENNESSEE

Tennessee has waived contractual sovereign immunity via statute. The Tennessee Constitution provides for the authority to waive sovereign immunity to the state legislature: "Suits may be

brought against the state in such manner and in such courts as the Legislature may by law direct.” Tenn. Const. art. I, § 17. The legislature has provided that actions against the state may be brought in the Tennessee Claims Commission for “breach of a written contract between the claimant and the state which was executed by one (1) or more state officers or employees with authority to execute the contract.” Tenn. Code Ann. § 9-8-307(a)(1)(L). Each commissioner has authority to “[h]ear and determine claims against the state falling within the categories enumerated in § 9-8-307[.]” Tenn. Code Ann. § 9-8-305(1). In sum, lenders and funds likewise can expect a commercial contractual waiver of sovereign immunity and a clear path to suing the state entity in the event of enforcement.

CONCLUSION

Thanks for reading this modest contribution to our 50-state series. South Dakota and Tennessee were both happy stories in the commercial context, as both states contained the appropriate commercial contract waivers (case law in South Dakota and state statute in Tennessee) with clear mechanisms to bring suit in a state court of claims for contractual damages. In our next installment, we will have a special article dedicated to a more complex topic: the sovereign immunity issues of the great State of Texas.