CADWALADER

We Pay Tribute

May 26, 2023

Table of Contents:

- We Remember, with Gratitude
- FFF Sovereign Immunity Series – Part X: South Dakota and Tennessee Memorial Day Edition
- Are Loans Securities? A Kirschner Case Update
- Exploring the Current State of Private Credit Markets
- Fund Finance Tidbits – On the Move

We Remember, with Gratitude

May 26, 2023

It is a moving and powerful image: 260,000 headstones at Arlington National Cemetery in Virginia marked with American flags in honor of Memorial Day – an assignment of honor accepted by soldiers of the 3rd U.S. Infantry Regiment, the oldest active-duty infantry unit in the Army, dating back to 1784.

Before turning to our Memorial Day Weekend activities marking the unofficial start of summer (and our friends in the UK enjoying a Monday off for late May bank holiday), we in the U.S. need to remember that our freedoms and our ability to enjoy life's pleasures came at the expense of the heroic men and women of the U.S. Armed Forces who made the ultimate sacrifice. As it is said, we owe it to their memory, and to the families they left behind, to hold this day sacred, to honor them and to remember them.

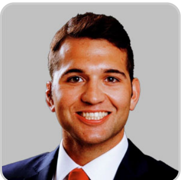
We remember them this weekend ... and offer our gratitude.

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

May 26, 2023

By Chris Montgomery
Special Counsel | Fund Finance

By Evan Hays
Associate | Fund Finance



By Kamal Qteishat
Associate | Fund Finance

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.

Are Loans Securities? A Kirschner Case Update

May 26, 2023

By Leah Edelboim
Partner | Fund Finance

We continue to follow the litigation over the question of whether certain syndicated loans are securities. *Kirschner v. JPMorgan Chase Bank, N.A.*, which has been before New York federal courts for years, is now before the United States Court of Appeals for the Second Circuit. In our **last update**, we noted that this case has been described by players in the syndicated loan market as everything from "a potential game changer" to an "existential threat" to the syndicated loan market.

As a reminder, in this case, the Court will consider an appeal of a 2020 decision by the U.S. District Court for the Southern District of New York which held that the syndicated term loan in question was not a security and therefore not subject to state and federal securities laws and regulations.

The Court is working to get to the bottom of this question and, recently, following a hearing, the Second Circuit entered an order asking the U.S. Securities and Exchange Commission ("SEC") to submit "any views it wishes to share" on whether the loans in the Kirschner case are securities. While the SEC has previously weighed in on the subject and has indicated that in certain situations and under certain factual scenarios, loans could be securities, many experts are worried about the effect it would have if the SEC made a statement that loans actually are securities. The Court set a deadline for the submission by the SEC of April 13, 2023, which was extended to June 27, 2023 when the SEC filed a motion requesting extension of time to respond to the Court's request. Parties watching the case are trying to read the tea leaves of the SEC's motion for extension of time to see if they can tell what the response will be.

The consequence of a determination that syndicated loans are securities would be significant. It would mean, among other things, that the syndicated loan market would have to comply with various state and federal securities laws, which would significantly change the cost of these transactions as well as the means by which syndication and loan trading take place. The Loan Syndications and Trading Association ("LSTA") weighed in on the potential consequences of such a statement and indicated that it would be "destabilizing" to the institutional loan market, the size of which the LSTA estimates to be about $1.4 trillion and which is an essential source of capital to many types of borrowers, including the fund borrowers in the fund finance market.

The LSTA has said that the very features that distinguish loans from securities are what make them so attractive to both borrowers and lenders – and why the market should be preserved just how it is. These features include efficient execution, the ability of borrowers to choose their agent and lenders (including the members of the syndicate), the ability to easily amend loan documents, and the ability of lenders to obtain confidential information about the borrowers. This rings true for many types of financing transactions and definitely for fund finance deals that

come across our desks here at Cadwalader. The transactions are quick-moving and relationship-based, and the papers have high touch in terms of amendments and other maintenance for deals.

In the event the SEC were to make a statement that loans are securities and therefore subject to securities laws, the potential disruption would have a one-two punch of both short- and long-term consequences. Short-term, more immediate consequences include a fundamental question by lenders and borrowers – and their lawyers – as to whether the parties could continue to perform under their existing deals. Loan origination and borrowing would be completely halted until there was guidance as to compliance with the relevant securities laws. In the lending space, deals would be frozen. In the private credit and other fund lending space, there may be additional destabilization in the form of redemption requests by investors in open-end funds. Other markets like the CLO market would also likely grind to a halt. While this may be the immediate impact, the determination that loans are securities would additionally have a number of longer term effects to the market as transaction parties grapple with the complexities of compliance with securities laws.

Keep in mind that even if the SEC does not express a view that loans are securities, the Second Circuit still needs to rule in the case. So, even if the SEC determines that loans are not securities, the Court could still do so. The suspense continues!

We continue to monitor this case and will update you here as it develops.

Exploring the Current State of Private Credit Markets

May 26, 2023

FFA's US NextGen will host a June 6 panel discussion on the latest trends in private credit. The discussion will take place at the offices of Reed Smith in New York at 599 Lexington Avenue.

Panelists will include the following: Christina Bohm, Principal, PJT Partners; Aleem Naqvi, Vice President, Wilshire; Gopal Narsimhamurthy, Managing Director, KBRA; Jorge Grafal, Vice President, Goldman Sachs Asset Management; and Filip Malaric, Senior Vice President, Aksia.

The panel will focus on the fundraising and deployment trends across different private credit asset classes. The panelists will also be discussing the impacts of the imbalance of demand and supply in fund finance and hot topics among private credit LPs, deal participants and GPs.

You can register **here**.

Fund Finance Tidbits – On the Move

May 19, 2023

Congratulations to Matt Finn, who has been recently promoted to Director in the Global Fund Banking group in the New York office of Silicon Valley Bank. Matt joined Silicon Valley Bank in 2015 and has extensive banking experience in subscription finance, working closely with onshore and offshore sponsors.

Congratulations to Matt Doyle, who has recently joined Apple Bank in New York as Vice President − Subscription Finance. Matt was previously in Silicon Valley Bank's New York office, focusing on subscription fund banking.