

FFF Sovereign Immunity Series – Part XII

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Today we release the twelfth – and penultimate – installment of our Sovereign Immunity Series. In this part, we discuss and provide a high-level overview of how sovereign immunity is viewed specifically through the lens of fund finance transactions in the states of Utah, Vermont, Virginia, Washington and West Virginia.

As a quick recap, a state's immunity arises from its status under the 11th Amendment of the Constitution. While there are many types of claims a state might be immune from – i.e., tort, criminal, contractual, etc. – we focus on the contractual, given that it is a contractual relationship that arises from a state entity's investment in a fund. As we have shown in previous weeks' discussion, each state's approach to sovereign immunity is nuanced and can vary greatly from state to state.

While many states have, in some form or another, waived their immunity through case law or legislative action, we must also review any applicable side letter. An investor's side letter is often critical when making the determinations regarding sovereign immunity – or lack thereof.

UTAH

Utah has preemptively waived its sovereign immunity with regard to any contractual claims. Traditionally, there are notice requirements and steps a claimant must take in order to bring a suit against a government entity; however, in Utah, if such claim is contractual, those notice requirements are waived.

While the notice requirement has been waived, under Utah's Rules of Civil Procedure, to bring a claim, a plaintiff is required to submit to the Court: (i) a short statement showing that such plaintiff is entitled to relief and (ii) demand for judgment for specified relief (including the amount demanded). In addition, a plaintiff has to give notice of the "nature and basis or grounds of the claim" and the type of claim generally to the state entity that action is being brought against.

VERMONT

Vermont, unlike Utah, has not waived or eliminated sovereign immunity as a defense against any

contractual claims. Specifically, the Supreme Court of Vermont has laid out that the state may waive immunity, and any waiver of the state's immunity must be expressly accomplished by state statute – something the Legislature has not expressly done (at least not for contractual claims). As such, the investor documents for any Vermont public entity should be carefully reviewed by counsel to ensure that sovereign immunity can be, and has been, properly waived prior to inclusion in a borrowing base. There are some positive signs that this might change in the future. Further, the legislature has already waived immunity in the case of tort claims and in the event a municipal corporation purchases insurance.

VIRGINIA

You've probably heard that Virginia is for Lovers (of enforceable contractual commitments). Virginia courts have maintained that sovereign immunity is not applicable in suits that are based on valid contracts "entered into by duly authorized agents of the government." In so holding, courts have recognized that the Commonwealth and its agents may not use sovereign immunity as a shield against liability in an action which is based on a validly executed contract. The qualifier here, that a contract must be validly executed, demonstrates the importance of careful due diligence to confirm, among other things, all applicable documents are validly executed by all parties.

Notwithstanding the noted waiver, there are a few steps that have to be taken before a claim can be brought in court. Namely, the claim must first be presented "to the head of the department, division, institution or agency of the Commonwealth responsible for the alleged act or omission which, if proved, gives rise to the claim." Only once the claim is presented to the applicable department or agency, and such department refuses to allow the claim, can the claim proceed in a circuit court in Virginia.

WASHINGTON

Washington, like many of its cohorts we've discussed here, has expressly waived its contractual sovereign immunity. In doing so, they have delegated the authority to waive any immunities to the State Legislature. The State Constitution lays out that "Any person or corporation having any claim against the state of Washington shall have a right of action against the state in the superior court." While immunity has been expressly waived, there are a few limitations on where the action must be brought. Specifically, the action must be brought in the superior court in:

1. the county of the residence or principal place of business of the plaintiff;
2. the county where the cause of action arose;
3. the county in which the real property that is the subject of the action is situated;
4. the county where the action may be properly commenced by reason of the joinder of an additional defendant; or
5. Thurston County, Washington.

WEST VIRGINIA

West Virginia has gone a step further than its similarly-named eastern neighbor (Virginia) and created a specific court to handle all claims against the state. In creating the Court of Claims, West Virginia has waived its contractual sovereign immunity for claims in which the state should in equity and good conscience discharge and pay. The legislature stated: “[a]ny monetary claims against an agency of the State which is immune from suit is within the jurisdiction of the Court of Claims.”

Similar to other states, the West Virginia State Code lays out the steps that must be followed in order to bring a claim: “The claimant shall give notice to the clerk that he or she desires to maintain a claim. Notice shall be in writing and shall be in sufficient detail to identify the claimant, the circumstances giving rise to the claim, and the state agency concerned, if any. The claimant shall not otherwise be held to any formal requirement of notice and after the close of the hearing the court shall consider the claim and shall conclude its determination, if possible, within sixty days.”

Conclusion

In our next and final installment of our Sovereign Immunity Series, we will round out our discussion of the status of sovereign immunity in two states (Wisconsin and Wyoming) and provide closing thoughts to complete this series.

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