

FUND FINANCE FRIDAY

FFF Sovereign Immunity Series – Part IV

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We continue our alphabetical 50-state survey of sovereign immunity with our fourth installment in the series – this week summarizing sovereign immunity in Kansas, Kentucky, Louisiana, Maine and Maryland.

We start with a quick refresher. While sovereign immunity can be a complex area of the law, at a high level, it's a rather simple principle: the government cannot be sued unless it first consents. As we have noted in prior articles and further detail below, many state governments do in fact voluntarily waive their Eleventh Amendment rights to sovereign immunity in particular situations. Courts and lawmakers have recognized and created exceptions to the principle of sovereign immunity in part because of the perceived injustice such immunity would otherwise inject into commercial transactions.

While this series is intended to provide a high-level overview of the issue of sovereign immunity, the issues involved can be quite nuanced; the potential impact of sovereign immunity is significant and warrants the careful consideration of counsel when government entities (such as state pension funds) are invested in a fund seeking a credit facility. In addition to understanding the sovereign immunity issues for the applicable state, a careful review of any applicable side letter is also critical to properly assessing the risk and mitigating factors of lending against the capital commitment of a government entity.

Links to the prior three installments in this series may be found [here](#), [here](#) and [here](#).

KANSAS

A state entity in Kansas cannot claim a defense of sovereign immunity in business transactions. The Kansas Supreme Court has consistently held that government entities should be held to the same standards and have the “same responsibilities and liabilities” as a private entity when engaged in business transactions. Effectively, sovereign immunity shall not apply when assessing a breach of express contract.

The Kansas Supreme Court has elsewhere held that where “the state legislature has consented that one of its agencies may be sued on its express contracts, the waiver of sovereign immunity should extend to every aspect of its contractual liability.”

In addition to court-recognized waivers of sovereign immunity, the legislature has also created a statutory right to sue the Kansas Public Employees Retirement System. However the system can only be sued in Shawnee County.

KENTUCKY

Kentucky has legislatively waived its immunity for contract claims. However, in so waiving its immunity, the Kentucky lawmakers also specified a set of special rules applicable to actions for breach or enforcement of a contract against the Commonwealth. The following list contains the highlights of those rules:

- The waiver of immunity only applies to *written contracts*.
- The action will be tried by the court sitting without a jury.
- Generally, the contract claim must be brought within one year from the date of completion specified in the contract.
- Damages are capped at twice the amount of the original contract.
- The suit must be brought in the Franklin Circuit Court.

LOUISIANA

In Louisiana, there is no sovereign immunity defense available against a breach of contract claim. Louisiana is one of a handful of states that waives sovereign immunity in its Constitution. The wording of such waiver does provide that the Legislature may limit the extent of the waiver by statute, and further subjects the waiver to the appropriation of funds by the Legislature to cover any judgment obligations.

The legislature has exercised this constitutional authority by enacting certain limitations on the general immunity waiver; notably, none of these limitations inhibit breach of contract claims. The only substantive limits imposed by the applicable statute apply to personal injury and wrongful death claims, bond issuance challenges, and workers compensation claims or tax refund claims – none of which are likely to be implicated when enforcing a capital commitment to a fund.

For example, all claims brought against the state must be brought only in Louisiana state court.

MAINE

Maine has waived contractual sovereign immunity in some instances. The state can be sued on contract claims when there is “(A) an explicit waiver of sovereign immunity or (B) a general statutory scheme permits the [State] to enter into contracts and which abrogates immunity for a breach.” This case law underscores the importance of a side letter provision waiving sovereign immunity in mitigating risk when contracting with a Maine state entity – meaning the safest bet is to have express language waiving sovereign immunity.

However, courts have also held that the requirement for waivers of immunity to be explicit has exceptions. A 2005 case expresses this consistently upheld principle, stating “a general statute allowing the State to enter into contracts implies a waiver of sovereign immunity by the Legislature when the State is sued for breach of that contract.”

MARYLAND

The State of Maryland expressly waives sovereign immunity as a defense to contract claims by statute. The relevant statute provides that “the State... may not raise the defense of sovereign immunity in a contract action, in a court of the State, based on a written contract that an official or employee executed for the State or one of its units while the official or employee was acting within the scope of the authority of the official or employee.”

In order to bring such a claim against the state, the claim must be filed within a year after the later of: (1) the date of the claim; or (2) the completion of the contract on which the claim is being based.

CONCLUSION

In the next installment of our Sovereign Immunity Series, we will discuss the sovereign immunity status of Massachusetts, Michigan, Minnesota, Mississippi and Missouri.