CADWALADER

Fund Finance Friday

FFF Sovereign Immunity Series – Part V

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We are back today to continue along with our tasting menu of state sovereign immunity. In our fifth installment in the series, we will visit Massachusetts, Michigan, Minnesota, Mississippi and Missouri. If you are new to the *FFF* Sovereign Immunity Series, the **first installment** in this series provides helpful background as well as links to additional *Fund Finance Friday* articles that cover sovereign immunity in general.

We are now in the thick of things, having analyzed sovereign immunity statutes and case law for roughly half of the states. As we mentioned in our previous installments **here**, **here**, **here** and **here**, sovereign immunity is a complex topic warranting thorough examination on a state-by-state basis.

Let's dive in...

MASSACHUSETTS

Massachusetts has abolished contractual sovereign immunity by statute. M.G.L.A. 258 § 12 states, in relevant part, that claims against the Commonwealth may be enforced in the superior court. Relevant case law has interpreted the waiver of sovereign immunity as primarily applicable in action of contracts against the Commonwealth of Massachusetts.**[1]**

MICHIGAN

Michigan does not have immunity from suit in actions arising out of contracts to which it is a party. In fact, the courts of Michigan have stated (somewhat emphatically) that "[Michigan] never had and does not have immunity from suit in actions arising out of contracts to which it is a party."**[2]** Plus one for the home team.

While the State of Michigan does not create a sovereign immunity issue per se, Michigan governmental investors and certain public investors have recently been receiving increased attention by our team and clients alike. Article IX, Section 18 of the Constitution of the State of Michigan provides that "[t]he credit of the state shall not be granted to, nor in aid of any person, association or corporation, public or private, except as authorized in this constitution."**[3]** Certain Michigan public and governmental investors tend to include a provision in their side letters relating to the Michigan Attorney General's interpretation of this Section. The side letter may provide that such investor cannot agree with the fund or the fund's lender to directly honor any request from such lender, including any requirement to fund capital contributions.

These side letter provisions can vary a great degree, while seemingly looking quite similar on their face. It is important for lenders and their lawyers alike to pay close attention to the particular language included in each side letter for these investors on a deal-by-deal basis to ensure the facility documentation adequately addresses any risks posed by such side letters.

MINNESOTA

Minnesota has waived sovereign immunity for certain contracts via statute.[4] The statute makes specific reference to controversies arising out of a contract for work, services, the delivery of goods, debt obligations of the state incurred under article XI of the Minnesota Constitution, or revenue obligations of a retirement fund incurred under section 356B.10 entered into by a state agency through established procedure.

Even though fund finance facilities do not fall explicitly into any of the specifically enumerated categories above, Minnesota case law provides "Generally, sovereign immunity does not apply to contractual obligations."[5]

MISSISSIPPI

Mississippi has waived sovereign immunity for express contracts, though not for implied terms of a contract. The courts in Mississippi have held that, "Sovereign immunity does not bar actions against the state or its political subdivisions brought on a breach of contract theory."[6]

MISSOURI

Missouri does not recognize contractual sovereign immunity. Courts in Missouri have consistently held that sovereign immunity does not apply to breach of contract claims.[7]

CONCLUSION

Since sovereign immunity and related issues can be nuanced and vary by investor, it is extremely important to consult counsel when sovereign immunity issues may be present in your deal. The Cadwalader team stands ready to assist. In our next installment, we will visit Montana, Nebraska, Nevada, New Hampshire and New Jersey. Please stay tuned.

[1] *Mass Elec. Co. v. Athol One, Inc.*, 462 N.E.2d 1370, 1371 (Mass. 1984)

[2] *See Davidson v. State*, 201 N.W.2d 296, 298 (Mich. Ct. App. 1972) (citing *Zynda v. Aeronautics Comm'n*, 125 N.W.2d 858 (Mich. 1964)

[3] Const 1963, art 9, Sec 18

[4] Minn. Stat. § 3.751.

[5] *McDonough v. City of Rosemount*, 503 N.W.2d 493, 497; *City of Minneapolis v. Ames & Fischer Co. II*, *LLP*, 724 N.W.2d 749, 756 (Minn. App. 2006).

[6]*Churchill vs. Pearl River Basin Dev. Dist.*, 619 So.2d 900, 903 (Miss. 1993). *See also Cig Contractors v. Miss. State. Bldg. Comm'n*, 399 So.2d 1352 (Miss. 1981) stating "[W]here the state has lawfully entered into a business contract with an individual, the obligations and duties of the contract should be mutually binding an reciprocal."

[7] *Kunzie v. Olivette*, 184 S.W.3d 570 (Mo. 2006); *See also Kubley v. Brooks*, 141 S.W.3d 21 (Mo. 2004); *see also Dicarlo Construction v. State*, 485 S.W.2d 52 (Mo. 1972).