State Pension Fund Sovereign Immunity—Implications for Real Estate Private Equity Funds

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Several state pension funds have been held to be entitled to sovereign immunity and several have not. In this article, the authors discuss the implications of a state pension fund's immune status for real estate private equity funds.

In recent years, the real estate private equity fund market has experienced an explosion in popularity, fueled in significant part by increased investment by state pension funds[1] eager to diversify their portfolios and seeking higher-yielding alternative investments.[2] In investing in private equity funds, state pension funds typically behave as private institutional investors, making it easy to ignore the fact that they may be entitled to claim the privileges of sovereign immunity in subsequent litigation. To date, the implications of this privilege to real estate private equity fund sponsors have not been widely explored.[3]

This article will first generally explore the doctrine of sovereign immunity, what it is and the advantages it confers. It will then consider whether state pension funds are entitled to claim sovereign immunity as ''arms of the state''[4]—a complicated issue to which there are no certain answers. As shall be seen, although not widely litigated to date, several state pension funds have been held to be entitled to sovereign immunity and several have not. The article will conclude by discussing the implications of a state pension fund's immune status. Briefly stated, pension funds that are entitled to sovereign immunity have a clear advantage in future litigation brought against the pension fund in federal court and, provided that the pension fund enjoys special privileges and immunities under its native law, in a court of the pension fund's home state or in the court of a sister state willing to recognize those special privileges and immunities.[5] The chart at the end of this article depicts this conclusion and the steps that lead to it.

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State Sovereign Immunity Generally

As a matter of constitutional law, it is well-established that each state of the United States is a sovereign entity and as such is entitled to sovereign immunity, *i.e.*, immunity from suit in the absence of waiver.[6] A state can waive its sovereign immunity expressly or impliedly. Such waiver may be absolute or subject to whatever limitations, if any, the waiving state chooses to impose (*e.g.*, notice of claim requirements, venue restrictions or special statutes of limitation). Such immunity applies not only to the state itself, but also to its instrumentalities, or ''arms,'' which, as limbs of the state itself, partake of its immunity.

As a result of our federal system of government and principles of choice of law and constitutional law, the consequences of state sovereign immunity vary depending on whether a state is sued in one of its own courts, the courts of a sister state or in a federal court.[7] When sued in its own courts, a state's immunity is defined by its own laws prescribing the terms and conditions of waivers of immunity, if any.[8] However, when sued in a sister state court, a state only enjoys

those immunities that the forum court chooses to recognize (*i.e.*, to which it chooses to accord comity).[9] In federal court, the Eleventh Amendment immunizes states against suits brought by anyone other than the federal government or another state.[10] Thus, as shall be seen, a litigant suing a state pension fund with sovereign immunity will find that the consequences are dependent upon four factors: the forum, the law of the forum, the law of the fund's home state and the existence of waiver.

As used herein, ''sovereign immunity'' shall mean the body of special privileges to which state litigants may be entitled under federal constitutional or state law. Use of the word ''immunity'' may be deceptive, for these privileges do not necessarily entail absolute ''immunity'' from suits; they range from absolute immunity (as under the Eleventh Amendment) to privileges under state law, such as special notice and pleading requirements, court of claims acts, restrictive venue provisions, damages caps and abbreviated statutes of limitation.

State Pension Funds As Arms Of The State

Only states and their instrumentalities, or ''arms,'' are entitled to the benefits of sovereign immunity. The courts that have considered the status of state pension funds as arms of the state have come to divergent results due to differences among the legislative regimes for the state pension funds themselves and due to the application of different legal tests. The Supreme Court, in a non-pension fund Eleventh Amendment case, has indicated only that a balancing test should be applied to determine whether a particular entity is an ''instrumentality'' of the state,[11] leaving it to the circuit courts to establish their own balancing tests (which tests now consider anywhere from two to nine factors[12]) and to the district courts to implement their own applications of the circuit courts' tests.[13] Federal courts have found the New York State Employees' Retirement System,[14] the New York State and Local Employees Retirement System,[15] and the Connecticut State Employees' Retirement System[16] to be arms of the state (the ''pro cases,'' all of which were decided by the Second Circuit) and the Michigan Judge's Retirement System,[17] Teacher Retirement Systems of Texas,[18] the Rhode Island Employees' Retirement System,[19] the Kansas Public Employees Retirement System (''KPERS'')[20] and the North Carolina Teachers' and State Employees' Retirement System[21] not to be arms of the state (the ''con cases,'' decided by the Sixth Circuit and various district courts). Outside the Second Circuit, where the law of immunity seems well-settled as to the three state pension funds mentioned above, the law of state pension fund immunity, to the extent it exists, is confused.[22]

Despite the confused state of arm of the state jurisprudence, it is possible to distill a group of factors that courts frequently find persuasive in instrumentality of the state cases.[23] However, while courts frequently cite the factors in this section, their application of these factors to the facts of individual cases fails to provide a consistent analysis. Therefore, in the absence of a prior decision on a particular pension fund, it may be quite difficult to predict that pension fund's arm of the state status. The factors are:

The potential impact of an adverse judgment on the state fisc

The circuit courts have considered this to be the most important element in determining an entity's status as an arm of the state.[24] When an action essentially seeks to seize funds out of the state purse, ''the state is the real, substantial party in interest and is entitled to invoke its immunity from suit.''[25] Unfortunately, no clear standards have emerged for determining whether a judgment would be paid for out of ''state coffers,'' or rather out of the state pension fund's ''own funds.'' The courts have, however, deemed several factors to be informative in this connection: the nature of the state's obligation to the state pension fund, the substantiality of state funding of the state pension fund and the source of payments of a potential adverse judgment. These will be considered in turn.

According to some courts, the ''nature'' of the state's obligation to pay an adverse judgment may be more important than the size of the state's contribution to the fund. Does the state make contributions to the pension fund in a sovereign or private capacity?[26] If the pension fund is supported by the state and is necessary to provide for the welfare of state employees, this indicates that the contributing state is acting in a sovereign capacity. If, on the other hand, the state acts merely as another employer in contributing to a fund that benefits both state and municipal employees, this would suggest that the state is acting in a private capacity.[27] Also considered is whether the state is under a legal obligation (versus merely a moral obligation) to ''pledge the general revenue of the state'' to pay an adverse judgment.[28]

The substantiality of state funding of an agency has also been considered persuasive, particularly in conjunction with other factors.[29] Substantiality is important because ''if the state substantially funds the entity, those funds would be a probable source to satisfy any judgment against the entity.''[30] However, other courts have emphasized that the existence of substantial state funding is not dispositive,[31] and still others have held that, if the fund is ''substantially'' funded by both the state *and* the private sector, this could indicate that the fund is *not* an arm of the state.[32]

Whether an adverse judgment would be paid out of state funds is extremely important. In fact, some courts consider the potential payment of a judgment from state funds to the exclusion of the other two sub-factors outlined herein.[33] In the context of a typical state pension fund, however, the actual ''source'' of judgment payments is elusive, for pension funds are typically

comprised of intermingled funds from a variety of sources, usually employee contributions, state appropriations, investment income and (sometimes) employer contributions.[34] Determining the source of payments from such a fund is tantamount to unscrambling an egg. Nevertheless, courts employ a variety of different standards in determining the ''source'' of potential judgment payments. Some courts require a showing that the requested relief would ''inevitably lead to . . . additional appropriation[s] of state funds [and not be satisfied out of] investment income or a slight decrease in the amount of benefits paid to other beneficiaries of the . . . fund,''[35] or would ''impact the state treasury so directly'' as to ''interfere with the fiscal autonomy and political sovereignty'' of the state.[36] The authors' research has not uncovered a single case in which a defendant state pension fund has met such draconian standards.

Other courts have developed rationales to justify the conclusion that state or non-state funds would be used to pay an adverse judgment. Where annual pension fund appropriations by the state are based directly upon actuarial evaluations of the fund's balance sheet (which balance sheet would reflect any judgments paid), it has been held that a judgment against the pension fund would ''automatically increase the obligations of the general state treasury and amount to a judgment against the state.''[37] Other courts have concluded that an adverse judgment would be ''paid out of the state purse'' simply because the state, as the pension fund's funder of last resort, would be bound to answer a judgment large enough to sink the pension fund.[38] A state law provision that the state pension fund finances be segregated from general state finances[39] tends to alleviate the risk to the public fisc posed by an adverse judgment and mitigates against a finding that an adverse judgment would be paid out of state funds.[40] Title to the pension fund's funds has also been considered informative: if the state holds title to the pension funds, this may illustrate that state funds would satisfy a potential judgment;[41] while, if the funds are held in trust or by another non-state entity, this indicates the opposite.[42]

How the state pension fund is referred to by local law and court decisions

In determining the status of a pension fund as an arm of the state, courts frequently consult the state pension fund's formative statutes.[43] Such statutes typically endow state pension funds with the ''powers and privileges of corporations.''[44] A formative statute that bespeaks a public purpose, defining the fund's purpose as ''effecting economy and efficiency in the administration of governmental affairs,''[45] or providing that fund benefits are exempt from state tax,[46] for example, would weigh in favor of the fund's status as an arm of-the-state. On the other hand, if state statutes grant the pension fund the right to sue and be sued, to acquire and hold property in its own name or to contract with the state or third parties, these factors would indicate independence from the state.[47] In addition to statutory law, courts also examine how the defendant pension fund is treated by its native courts, including how these courts interpret the fund's formative statutes and whether they accord to the fund the privileges and immunities of the state. However, the pension fund's status under the decisional law of its own state is not dispositive.[48]

Whether the state pension fund fulfills a governmental function

While ''[a]n entity will not be treated as a state agency merely because [it] exercises a 'slice of state power',''[49] if state statutes and decisional law indicate a broad public purpose, *e.g.*, ''effecting economy and efficiency in the administration of governmental affairs,''[50] this may indicate a governmental purpose and favor arm of the state recognition. If, on the other hand, the state's actions with respect to the pension fund resemble the actions of a ''private employer purchasing benefits from a private pension plan,'' this mitigates against such recognition.[51]

Also considered relevant in determining whether an entity ''fulfills a governmental function'' is whether the entity ''is involved in local [or] statewide concerns.''[52] As discussed above, only states (and not municipalities) generally enjoy sovereign immunity; thus, if the ''state'' pension plan provides for municipal and other non-state governmental employees as well as state employees, this militates against arm of the state recognition.

The state pension fund's autonomy

If a state pension fund is subject to state controls or administrative regulations similar to those that would encumber a state agency (e.g. special recordkeeping or reporting requirements, proceeding transparency requirements, requirements that the pension fund receive legal services from the state attorney general, or personnel requirements), this indicates that the fund is intertwined with the state.[53] If, however, the fund is subject to the same laws and regulations which govern private-sector entities, this indicates autonomy from the fund's state sponsor and argues against arm of the state treatment.

Governance structure, while frequently cited by the courts as an important determinant of pension fund autonomy, is of questionable importance in practice. In concept, if a pension fund's governing body is comprised mostly or exclusively of governmental appointees, this indicates state control over the pension fund's actions, *i.e.*, an ability to ''direct[], guide[], or veto[] the entity's activities,'' and ''tends to show that the entity exercises state power.''[54] Courts have stated that, if a pension fund's board is predominantly comprised of state employees or if its members can be fired by the governor, this favors arm of the state treatment.[55] However, the importance of this factor in practice is questionable, for all of the ''con case'' pension funds

cited above have boards comprised entirely or predominantly of governmental employees.[56]

Although the cases cited in this section provide an outline of the essential factors for determining the status of a state pension fund, it is clear that the courts' applications of the relevant facts of the cases before them to the facts do not provide a consistent analysis. Thus, without having a prior decision on a particular state pension fund, it may be quite difficult to predict whether the fund will be held to be an arm of the state or not.

Sovereign Immunity In Federal Court

If a state pension fund having sovereign immunity is sued in federal court, it would be entitled to raise as a defense the Eleventh Amendment, unless the suit were brought by the federal government or another state or if the pension fund has waived its Eleventh Amendment immunity.[57] It is important to note that, as a matter of constitutional law, ''the sovereign immunity of the states neither derives from nor is limited by the terms of the Eleventh Amendment'';[58] the Full Faith and Credit Clause and the Tenth Amendment, among other provisions, provide additional constitutional bases for sovereign immunity.[59] Nevertheless, in federal court the Eleventh Amendment provides the state with the *legal power* to assert the sovereign immunity defense should it choose to do so.[60] The Eleventh Amendment does not apply in state court.

Waiver by a state of its Eleventh Amendment immunity is hard to demonstrate. A state ''is deemed to have waived its immunity only where stated by the most express language or by such overwhelming implication as will leave no room for any other reasonable construction.''[61] Even a general waiver of immunity (*e.g.*, ''the state pension fund agrees to waive its immunity'') is insufficient to waive immunity; an express statement mentioning the Eleventh Amendment would be required.[62] It should be noted that the exacting standards governing waiver of Eleventh Amendment immunity do not apply to waivers of immunity in the general sovereign immunity context, which are discussed below.

Sovereign Immunity In State Court

Each state may establish for itself and its instrumentalities a variety of privileges and immunities under its own law, such as special statutes of limitations, restrictions on venue, special notice or pleading requirements and tort damage caps. Thus, if a pension fund is an arm of the state and its state has special privileges and immunities, that pension fund may be on a completely different legal footing than other investors in the private equity fund. Thus, the fund sponsor and counsel must take care to analyze the particular privileges and immunities to which a pension fund may be entitled in order to determine how they might impact upon the sponsor's enforcement of the pension fund's obligations.

While the privileges and immunities established by a state will obviously be recognized in its own state courts, sister state courts are not constitutionally obligated to give other states the protection of their privileges and immunities laws. Sister states can, however, decide to recognize such laws *voluntarily* under the doctrine of comity.[63] Thus, the implications of sovereign immunity are completely different in state court than in federal court. While in federal court Eleventh Amendment immunity acts as an absolute bar to suit, in state court the broader concept of sovereign immunity can have any number of effects, ranging from a cap on damages to an outright bar on suit.

This discussion will emphasize the Delaware law of comity because, as the most common state of formation of private equity fund vehicles, Delaware is frequently the chosen forum, and Delaware law the choice of law, under funds' governing documents. Unfortunately, the authors' research has uncovered no Delaware case deciding the application of comity to sister state sovereign privileges and immunities in the context of a contract suit (though there are several cases dealing with the context of a tort suit). Therefore, this discussion will set forth not only those factors that have been considered important by Delaware courts in the decided tort cases, but also those factors which, in the authors' opinion, would likely be considered by a Delaware court in context of a contract suit.

In considering whether to accord comity to sister state sovereign privileges and immunities laws, the courts of Delaware and other states consider the public policies[64] of their own states and how these internal policies are advanced or hindered by application of the sister state's law.[65] In general, a state court *will* accord comity to another state's laws ''when such enforcement will not violate their own laws or inflict an injury on some one of their own citizens.''[66] Notice of claim statutes, for example, have frequently been accorded comity based on the fact that they do not contravene the public policy of the forum state.[67] On the other hand, where ''the foreign law is contrary to a state's policy or prejudicial to its interests,''[68] comity is generally not applied. For example, a Delaware court denied comity to tort damage caps on the ground that they contravene Delaware policy.[69]

While there is little Delaware caselaw on the issue, one Delaware Supreme Court case to consider the application of comity to state sovereign privileges and immunities gave special weight to Delaware state statutes as manifestations of the policy of compensatory justice. In that case, the court declined to accord comity to the Maryland Tort Claims Act raised by the defendant state because of the ''coherent and comprehensive public policy'' of compensatory justice manifested in the Delaware Long Arm Statute and Tort Claims Act.[70] Indeed, in the courts of other states, the policy of compensatory justice, *i.e.*, of providing

citizens with remedies against injuries and wrongs, regardless of the identity of the perpetrator, frequently weighs heavily against comity,[71] especially where the suit in question arises out of actions by the defendant state that are commercial (as opposed to governmental) in nature.[72]

Courts have found that the presence of forum law that affords the forum state privileges similar to those claimed by the defendant state undermines the policy of compensatory justice,[73] while the presence of forum law that affords the forum state a *lesser* degree of immunity than that claimed by the defendant state strengthens the importance of such policy.[74] The avoidance of forum shopping,[75] the interest of expeditiously adjudicating multiparty actions[76] and the doctrine of reciprocity[77] have also been weighed in the policy analysis by non-Delaware courts.

While Delaware courts have not directly considered the issue, some courts have considered the interests of the foreign state in addition to the forum's own interests. In this connection, courts have considered the extent to which the actions of, and privileges claimed by, the foreign state implicate its sovereign dignity. If the sister state's activities that gave rise to the suit were commercial, as opposed to governmental, in nature (as would be the case when the state is acting as an investor in a private equity fund), this may alleviate the risk to the sister state's sovereign dignity.[78] If the privilege claimed by the defendant state is a ''mere restrictive venue provision'' and not an attempt to safeguard the public fisc, this too may militate against comity.[79] Courts have also considered the extent to which the defendant state's own courts have conferred upon state litigants privileges and immunities similar to those now being claimed by the defendant state; a defendant state cannot expect to step into a sister state's courts clothed with an immunity it refuses to accord to other states.[80]

A final interest that, in a contract suit, a Delaware court would likely weigh in the interest analysis is Delaware's interest, as a center of corporate governance, in providing an effective and fair forum for the adjudication of commercial disputes. The importance of this interest may be magnified when, in the adjudicated events, the state pension fund defendant acted as would a typical private institutional equity fund investor.[81] New York courts, for example, are reluctant, in light of New York's status as a commercial center, to accord comity to sister state sovereign immunity laws when to do so would interfere with essentially commercial transactions.[82]

Waiver

Even if a state pension fund is entitled to sovereign immunity, the further issue of waiver of immunity may arise. Courts have recognized three principal ways in which sovereign immunity can be waived:

(i) by statute or resolution, such as a constitutional provision, court of claims act or tort claims act;

(ii) by conduct, such as voluntarily prosecuting a suit[83]; or

(iii) by contract.[84]

It should be noted that the exacting standards applicable to the waiver of Eleventh Amendment immunity[85] are not applicable to the broader sovereign immunity context; in the broader context, a general waiver (*e.g.*, ''the state pension fund agrees to waive its immunity'') would likely suffice.[86]

Waiver by way of contract is the most relevant to this article because a suit between parties to a private equity fund based upon the fund's governing documents would almost certainly sound in contract.[87] While most states do not have statutes expressly permitting suits against the state arising out of contracts entered into by the state or its agents,[88] statutes authorizing state instrumentalities to sue or be sued[89] or to enter into contracts[90] have been considered waivers of immunity by the courts of Delaware and other states. ''Implicit consent''—the concept that the state ''implicitly consents'' to be sued for breach of any and all contracts entered into by its officers or agencies—is another basis for waiver of immunity based upon contract. There is no indication, however, that it is accepted by the courts of Delaware.[91]

In the absence of clear Delaware precedent, a Delaware court ruling on whether a foreign state pension fund defendant is entitled to privileges and immunities under its native state law in the context of a pure commercial dispute would most likely decline to afford the pension fund defendant any sovereign privileges or immunities. Under Delaware law, an entity's statutory authority to enter into contracts or to sue and be sued function as waivers of immunity in relation to the acts authorized.[92] Therefore, a state pension fund investing in a private equity fund pursuant to statutory authorization would most likely be held by a Delaware court to possess no sovereign immunity in regard to suits arising out of the private equity fund's organic documents. More broadly, in light of the fact that state pension funds, in investing in private equity funds, act not in a ''sovereign'' capacity, but rather as private investors, a refusal by a Delaware court to accord sovereign privileges and immunities to a state pension fund defendant would effectuate the policy of compensatory justice which Delaware courts hold dear without threatening a sister state's sovereign dignity.[93]

Special Privileges

Notably, even if a state pension fund is found not to be entitled to sovereign immunity under the arm of the state tests discussed above, the pension fund may still be entitled to special privileges under state law that are applicable to non-state entities, or to the pension fund specifically. For example, at least one state statute limits suit against the state pension plan to a specified venue.[94] Thus, private equity fund counsel searching

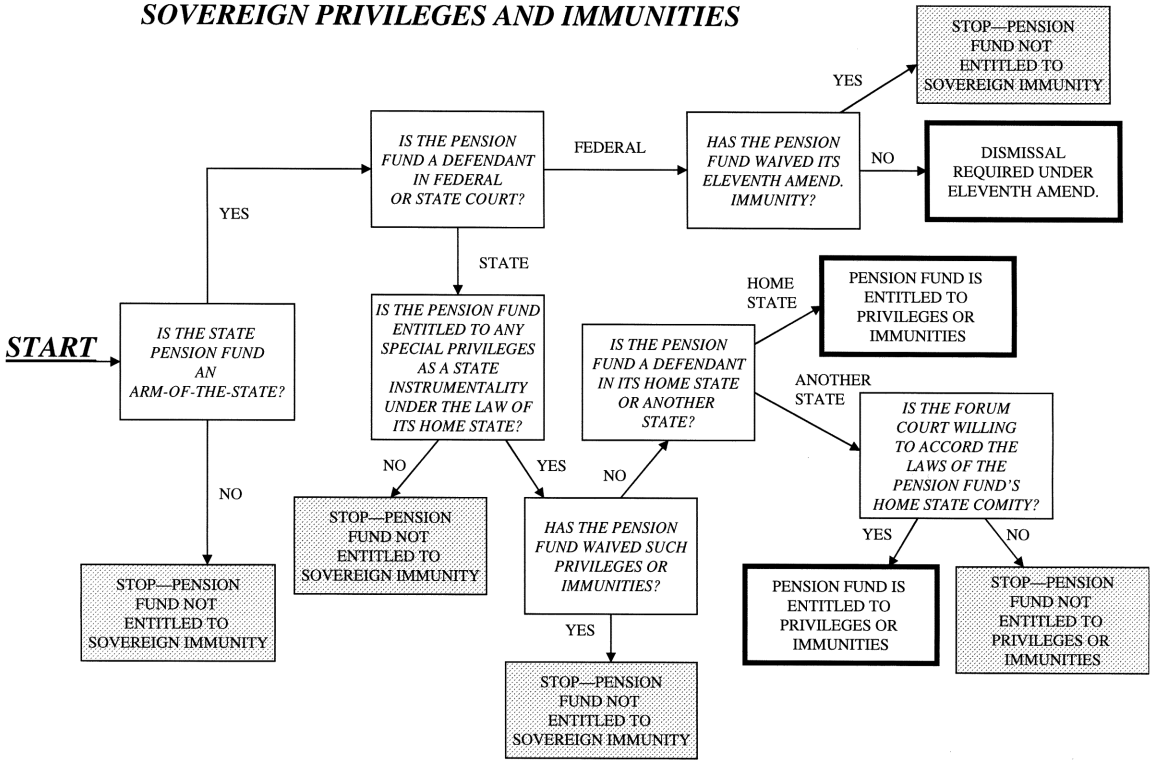
for special privileges and immunities to which a state pension fund may be entitled under its native law should not limit the search to statutes conferring special privileges and immunities on the ''state'' alone. As with laws related to state sovereign immunity discussed above, sister state courts hearing suits against out-of-state entities benefited by such special privileges and immunities could, under the doctrine of comity, choose to recognize or disregard such privileges and immunities.

Conclusion

Based upon the decided cases to date, some of the major state pension funds may be entitled to sovereign immunity, and thus a private equity fund sponsor's ability to enforce subscription and other obligations of the pension fund may be limited. In such circumstances, without a specific waiver, the obligations could not be enforced in federal court by reason of the Eleventh Amendment. An enforcement action in the pension fund's home state would be subject to whatever privileges and immunities were accorded it under the home state's law. Application of the privileges and immunities in a sister state depends upon principles of comity and waiver, and thus may be less than clear. An enforcement action brought in Delaware state court against an out-of-state pension fund, however, would probably not be barred by sovereign privileges or immunities because of Delaware's law of comity (the primacy of the internal policies of compensatory justice and providing a fair forum for resolution of commercial grievances) and Delaware's courts' view of implied waiver (the statutory authority to enter into contracts or to sue and be sued function as waivers of immunity).

From a planning perspective, real estate private equity fund sponsors and their counsel could consider expressly discussing sovereign immunity questions with state pension fund investors. However, in the authors' experience, state pension funds are reluctant, if not unwilling, to clarify their status and provide clear waivers. Thus, sponsors and their counsel may wish to review the applicable home state law and federal law to ascertain whether: (i) there are relevant decisions on the pension fund investor's status as an arm of the state, (ii) the statutory base for the pension fund is clear as to governmental status, (iii) there are home state privileges and immunities and, if so, their nature and extent and (iv) the comity and waiver principles of the choice-of-forum/choice-of-law state under the real estate private equity fund's subscription agreement and organic documents would favor recognition of such privileges and immunities. Sponsors and their counsel should also seek to have clear choice of law and choice-of-venue (exclusive venue if possible) provisions in the subscription agreements and organic documents.

STATE PENSION FUND ENTITLEMENT TO SOVEREIGN PRIVILEGES AND IMMUNITIES



[1] While there are also local (*i.e.*, city, county or other political subdivision) pension funds, these funds will not be discussed in this article because political subdivisions, while they may be entitled to certain special privileges under state law, are usually not entitled to sovereign immunity. See, e.g., *Alden v. Maine*, 527 U.S. 706, 756 (1999); *Muzquiz v. City of San Antonio*, 520 F.2d 993, 996 (5th Cir. 1975). Political subdivisions of states, as opposed to the states themselves, are not considered to be sovereigns in their own right. Nine of the top 50 public pension funds based on real estate holdings are held by political subdivisions. See *Top Fifty Pension Funds Based on Real Estate Holdings*, Real Estate Alert, Mar. 24, 2004, at 8 (listing Los Angeles County Employees, San Francisco City & County Employees, Los Angeles Fire & Police, Chicago Public School Teachers, Sacramento County Employees, Los Angeles City Employees, Orange County Employees and San Bernardino County Employees as among the top 50).

[2] See, e.g., *Public Pension Funds Poised to Step Up Activity*, Real Estate Alert, Mar. 24, 2004, at 1; *Pension System to Invest in Three Funds*, Real Estate Alert, Nov. 26, 2003, at 1; *Public Pension Funds Seen as Big Buyers*, Real Estate Alert, Mar. 6, 2000, at 1; Elizabeth Hayes, *Pension Funds Get More Active in Real Estate Investment*, Los Angeles Bus. J., Feb. 14, 2000.

[3] The authors' research has found no published article considering this issue.

[4] Herein, ''arm of the state'' and ''instrumentality of the state'' are used interchangeably.

[5] A state instrumentality may also enjoy an advantage when appearing as a plaintiff in state court in that it will most likely be able to defeat a removal motion by the defendant based on diversity jurisdiction. See *infra* note 17.

[6] 72 Am. Jur. 2d States § 37 (2001) (''A state is generally regarded as immune from liability and suit in its own courts or in any other court without its consent and permission.'').

[7] See, e.g., *Alden*, 527 U.S. at 738-739 (acknowledging the differences in immunity accorded to states in federal courts, home state courts, and sister state courts).

[8] See *Nevada v. Hall*, 440 U.S. 410, 414 (1979) (''[T]he immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries. Only the sovereign's own consent could qualify the absolute character of that immunity.'')

[9] See *Hall*, 440 U.S. at 416 (explaining that states enjoy a lesser level of immunity in sister state courts than they do in their own courts because in sister state courts, ''the power and authority of a second sovereign'' is implicated).

[10] See generally, Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law—Substance and Procedure § 2.12 (3d ed. 2002).

[11] In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 394-405 (1979), the Supreme Court suggested that the factors balanced should include: (1) whether state funds would be used to pay a judgment against the entity; (2) how the entity is defined by state law; (3) whether state intended to confer Eleventh Amendment immunity on the entity; (4) whether the entity exercises state power or performs governmental functions; (5) whether the entity is under state control; and (6) whether the entity has the power to sue or hold property in its own name.

Each of the circuits has developed its own unique version

of the *Lake Country* balancing test, leading to what one commentator has labeled ''balancing without a scale.'' See Alex E. Rogers, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm of the State Doctrine*, 92 Colum. L. Rev. 1243, 1268-1269 (1992).

[12] See *Rogers*, *supra* note 11, at 1268-70.

[13] There are even splits within certain circuits. See id.

[14] See *Russell v. Dunston*, 896 F.2d 664 (2d Cir. 1990) (dicta).

[15] See *McGinty v. New York*, 251 F.3d 84 (2d Cir. 2000).

[16] See *Fitzpatrick v. Bitzer*, 519 F.2d 559 (2d Cir. 1975). Years later, the Connecticut Retirement Plans and Trust Fund was also, in the context of a diversity jurisdiction analysis, found to be an arm of the state. *Treasurer of the State of Connecticut v. Forstmann Little & Co., Equity Partnership-VI, L.P.*, 2002 WL 31455245 (D. Conn. 2002).

[17] See *Ernst v. Roberts*, 379 F.3d 373 (6th Cir. 2004), rehearing en banc granted November 17, 2004.

[18] See *Travelers Insurance Co. v. Teacher Retirement Systs. of Texas*, 1993 WL 34757 (N.D. Ill. 1993).

[19] See *Bowen v. Hackett*, 387 F. Supp. 1212 (D.R.I. 1975).

[20] See *Boatmen's First Nat'l Bank v. Kansas Public Employees Retirement Syst.*, 915 F. Supp. 131 (W.D. Mo. 1996).

[21] See *Almond v. Boyles*, 612 F. Supp. 223 (E.D.N.C. 1985). The North Carolina Court of Appeals came to a different conclusion. See *Stanley v. North Carolina*, 310 S.E.2d 637, 638-40 (N.C. Ct. App. 1984).

[22] The arm of the state doctrine as a whole-not merely that dealing with state pension funds-is also confused. Without clear guidance from the Supreme Court, lower courts have ''struggled, variously adding factors . . . distilling factors . . . and deeming certain factors dispositive.'' *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 59 (1994) (O'Connor, J., dissenting).

Interestingly, arm of the state jurisprudence is not limited to the sovereign immunity context. Federal courts also have occasion to decide this issue in connection with issues of diversity jurisdiction because an arm of the state is not a ''citizen'' of a state. The District Court of Connecticut, for example, has decided that the Treasurer of the State of Connecticut, suing various investment partnerships on behalf of the Connecticut Retirement Plans and Trust Funds on several state law causes of action, was an arm of the State of Connecticut, and was thus entitled to have the federal action remanded for lack of diversity jurisdiction. See *Forstmann Little & Co.*, 2002 WL 31455245 at *5.

[23] While these factors are largely taken from Eleventh Amendment jurisprudence, they should also be relevant in determining the status of a state pension fund in the general sovereign immunity context (i.e., under state law). Cf. 72 Am. Jur. 2d States § 101 (2001) (''[T]he exceptions applicable to Eleventh Amendment sovereign immunity should also be generally applicable in state court . . . Eleventh Amendment immunity is incorporated by reference into the general sovereign immunity context.'')

[24] All of the circuits with the exception of the D.C. Circuit have indicated that the potential impact of an adverse judgment on the state fisc is the most important factor. See 17 Moore's Federal Practice § 123.23 (listing cases from all circuits save the D.C. Circuit).

[25] *Ford Motor Co. v. Dep't of the Treasury*, 323 U.S. 459, 464 (1945), overruled on other grounds by, *Lapides v. Bd. of Regents*, 535 U.S. 613 (2002).

[26] See *Blake v. Kline*, 612 F.2d 718, 723 (3d Cir. 1979).

[27] See *Boatmen's*, 915 F. Supp. at 134. The Kansas Public Employees Retirement System includes both state and municipal employees. The court found that ''[t]he State's only obligation to KPERS is that of a participating employer required to make contributions on behalf of its employees.'' Id.

[28] See *Boatmen's*, 915 F. Supp. at 137-38.

[29] See *McGinty*, 251 F.3d at 97 (''Even with the payroll deductions of member employees, the state makes significant payments each year to the [pension fund] for the payment of benefits and expenses.'')

[30] 17 Moore's Federal Practice § 123.

[31] See *Travelers*, 1993 WL 34757 at *3.

[32] See *Almond*, 612 F. Supp. at 228.

[33] See *Boatmen's*, 915 F. Supp. at 138.

[34] See, e.g., *Blake*, 612 F.2d at 723.

[35] *Almond*, 612 F. Supp. at 228.

[36] *Lewis v. Midwestern State Univ.*, 837 F.2d 197, 199 (5th Cir. 1988) (state university context).

[37] *Fitzpatrick v. Bitzer*, 519 F.2d 559, 565 (2d Cir. 1975).

[38] *Jacobs v. State Teacher's Retirement Syst. of Vermont*, 174 Vt. 404, 409 (2002).

[39] See, e.g., N.C. Const., article v.

[40] See *Blake*, 612 F.2d at 723. Nevertheless, one state court concluded that ''simply requiring the [pension] funds to be kept separate from general state funds is not sufficient to remove the [pension fund] from the umbrella of the state.'' See *Stanley*, 310 S.E.2d at 638-40.

[41] See *Aerojet-General Corp. v. Askew*, 453 F.2d 819 (5th Cir. 1971). But see Pa. Atty. Gen'l Opn. No. 77-1 (1977) (stating that once the state meets its obligation and money appropriated is deposited into the fund it loses its identity as state funds and becomes funds in trust for a particular purpose).

[42] Kansas, for example, maintains KPERS funds in a trustee capacity for KPERS' members and beneficiaries. See *Boatmen's*, 915 F. Supp. at 133.

[43] See, e.g., *McGinty*, 251 F.3d at 96.

[44] See, e.g., N.Y. Retire. & Soc. Sec. Law § 2-119 (McKinney 1999 & Supp. 2004); Kan. Stat. Ann. § 74-4903 (2004) (''[T]he Kansas Public Employees Retirement System is a body corporate and an instrumentality of the State of Kansas.''). Corporate status does not necessarily affect a pension fund's status as an arm of the state. See *McGinty*, 251 F.3d at 96.

[45] Kan. Stat. Ann. § 74-4901 (2004) (nevertheless, Boatmen's found this public purpose to be ''secondary'' to the primary proprietary purpose).

[46] See *Boatmen's*, 915 F. Supp. at 139. But see *Travelers*, 1993 WL 34757 at *5 (''tax exemption given to [pension fund funds disbursed] merely puts [the pension fund] on equal footing with private pension funds, which [the State] immunizes from property taxes and franchise taxes'').

[47] See *Boatmen's*, 915 F. Supp. at 138-139; *Fitzpatrick*,

519 F.2d at 564-565; *Callahan v. City of Philadelphia*, 207 F.3d 668, 670 (3d Cir. 2000); *Travelers*, 1993 WL 34757.

[48] See *Almond*, 612 F. Supp. at 228 (concluding that a North Carolina pension fund is not an arm of the state despite North Carolina decisional law to the contrary).

[49] 17 Moore's Federal Practice § 123.

[50] See *supra* note 45 and accompanying text.

[51] As a federal court found in considering the status of KPERS:

> KPERS serves a function similar to a retirement system operating in the private sector. It routinely makes investments that are commercial in nature and it exists for the benefit of its participants. When the State of Kansas makes employer contributions to KPERS it purchases benefits for state employees similar to a private employer purchasing benefits from a private pension plan. Unlike providing public education or maintaining roads and bridges, the provision of retirement benefits is not a role traditionally undertaken by the state . . . When KPERS makes investments, no matter what the motive, it is investing money in a manner no different from a private entity. *Boatmen's*, 915 F. Supp. at 138-139.

[52] *Ram Ditta v. Maryland Nat'l Capital Park & Planning Comm'n*, 822 F.2d 456, 457-58 (4th Cir. 1987).

[53] See, e.g., *Boatmen's*, 915 F. Supp. at 139-140 (finding that numerous state constraints weighing in favor of arm of the state treatment not sufficient to overcome other factors weighing against such treatment).

[54] 17 Moore's Federal Practice § 123.

[55] See *Travelers*, 1993 WL 34757 at *5 (if board members can be fired by the governor, this indicates that pension fund is arm of the state (dicta)).

[56] The following state pension funds have been held to be not arms of the state despite having boards comprised predominantly or entirely of governmental employees: (1) the Rhode Island Employees' Retirement System (controlled by the State Treasurer), see *Bowen*, 387 F. Supp. at 722; (2) the Teacher Retirement Systems of Texas (all nine board members appointed by state officials), see Texas Govt. Code Ann. §§ 825.002-825.003; *Travelers*, 1993 WL 34757 at *5; (3) the Teacher's and State Employee's Retirement System of North Carolina (board comprised predominantly of gubernatorial appointees), see N.C. Gen. Stat. § 135-6 (2004); *Stanley*, 310 S.E.2d at 638-40; and (4) KPERS (seven of nine board members public employees), see *Boatmen's*, 915 F. Supp. at 139.

[57] Rotunda & Nowak, *supra* note 10 and accompanying text.

[58] 72 Am. Jur. 2d States § 101 (2001).

[59] See *Alden v. Maine*, 527 U.S. at 706.

[60] 72 Am. Jur. 2d States § 101 (2001).

[61] *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-40 (1985).

[62] See *Santee Sioux Tribe of Nebraska v. Nebraska*, 121 F.3d 427, 431 (8th Cir. 1997) (''A state's general waiver of sovereign immunity is insufficient to waive Eleventh Amendment immunity; the state must specify an intent to subject itself to federal court jurisdiction.'')

[63] *Ehrlich-Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574, 582 (N.Y. 1980). See *Hall*, 440 U.S. 410. In *Nevada v. Hall*, the Supreme Court held, inter alia, that California (i) could properly exercise jurisdiction over the State of Nevada in an action arising out of an automobile accident in California involving a vehicle owned by the State of Nevada, and (ii) was constitutionally free to disregard a Nevada statute purporting to set a maximum limit on recovery against the State of Nevada.

[64] Courts have found evidence of public policy in (i) the state constitution; (ii) state statutes, such as tort claims acts, long arm statutes, and other jurisdictional provisions; (iii) legislative materials; and (iv) in general principals of equity or morality.

[65] See, e.g., *Maryland v. Shepherd*, 713 A.2d 290 (Del. Sup. Ct. 1998) (court refuses to recognize Maryland's damage caps for tort actions against the State of Maryland, holding that to do so would contravene the public policy enunciated in the Delaware Tort Claims Act); *Ehrlich-Bober*, 49 N.Y.2d at 580 (''The determination of whether effect is to be given to foreign legislation is made by comparing it to our own public policy; and our policy prevails in the case of conflict.'')

[66] See *Tyson v. Scartine*, 1955 Del. Super. LEXIS 102, 2-3 (Del. Sup. Ct. of New Castle 1955); 15A C.J.S. Conflict of Laws § 7 (2002).

[67] See *Crair v. Univ. of Virginia*, 94 N.Y.2d 524 (N.Y. 2000) (dismissing appellant's tort claims against the Universities of Virginia and Maryland on the grounds that appellant failed to comply with notice of claim statutes barring suits against those states).

[68] Id.

[69] See, e.g., *Shepherd*, 713 A.2d 290 at 300-301. But see, *Knapp v. Knapp*, 1995 WL 656842 (Del. Sup. Ct. New Castle 1995) (court accords comity to same tort damage cap on the grounds that it is similar to Delaware tort damage caps).

[70] See, e.g., *Shepherd*, 713 A.2d 290 at 301.

[71] See, e.g., *Shepherd*, 713 A.2d 290 at 299 (''The State of Delaware has a legitimate interest in having its residents, who are victims of auto accidents on its highways, compensated for their injuries to the extent permitted by law. Conversely, the sister sovereign State of Maryland has asked the State of Delaware, as a matter of comity, to either completely deny or limit the monetary damages awarded to [plaintiff] on the basis of the Maryland Tort Claims Act.'').

[72] See *Faulkner v. Univ. of Tennesee*, 627 So. 2d 362, 366 (Ala. 1992) (where suit arose out of defendant State's ''essentially commercial'' activities in Alabama, policy of compensatory justice applied with plenary importance).

[73] In this case, according comity to the defendant state law would have the positive effect of (i) preserving uniformity of decision, (ii) avoiding unfair advantage to the plaintiff and (iii) ensuring that the defendant state is treated similarly to the forum state in its own courts.

See, e.g., *Knapp*, 1995 WL 656842 (grants comity to Maryland tort damage cap based on its similarity to Delaware damage cap); *Schoeberlein*, 544 N.E.2d at 288 (Illinois court accorded comity to the Indiana Court of Claims Act in part because the Act similar to the forum's own Court of Claims Act).

[74] See, e.g., *Shepherd*, 713 A.2d 290 at 299 (quoting with approval language of Kansas Supreme Court to the effect

that sister states should not be granted greater immunity in forum courts than the forum state itself); *Faulkner*, 627 So. 2d at 366. But see *Peterson v. State*, 635 P.2d 241 (Colo. App. 1981) (even where forum law afforded the forum state privileges similar to those claimed by the defendant state under its law, court declines to accord comity to defendant state's law).

[75] See *Newberry v. Ga. Dep't of Indus. & Trade*, 336 S.E.2d 464 (S.C. 1985).

[76] See *Wendt v. County of Osceola*, 289 N.W.2d 67 (Minn. 1979).

[77] If, in the forum court's estimation, courts of the defendant's home state would accord the forum state comity in circumstances similar to those under consideration, the spirit of reciprocity will likely weigh heavily in the public interest calculus.

[78] See note 72 and accompanying text.

[79] For example, Texas' law permitting suit against its state universities only in certain Texas counties was found by a New York court to be ''a mere restrictive venue provision'' put in place for ''administrative convenience'' and not ''an attempt to safeguard the public fisc, a limitation which, conceivably, might be found to be essential to the government function.'' See *Ehrlich-Bober*, 49 N.Y.2d at 581.

[80] See *Morrison v. Budget Rent-A-Car Systs., Inc.*, 657 N.Y.S.2d 721, 731 (N.Y. App. Div. 2d Dep't 1997).

[81] See *supra* note 72 and accompanying text.

[82] See *Ehrlich-Bober*, 404 N.E.2d at 581-582 (in suit based on New York commercial transaction, court declines to accord comity to Texas' sovereign immunity laws because ''New York's interest naturally embraces a very strong policy of assuring access to a forum for redress of injuries arising out of transactions spawned [in New York]'').

[83] Waiver through conduct through, for example, voluntary prosecution of suit or failure to raise the defense of immunity, is one of the least established bases of waiver. See 72 Am. Jur. 2d States § 120 (2001); See also *Richardson v. Fajardo Sugar Co.*, 241 U.S. 44 (1916) (voluntarily entering a suit constitutes waiver by conduct); *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381 (1998) (failure to raise the immunity defense constitutes waiver by conduct). There is competing authority for the view that a state cannot be sued without the express consent of the state's legislature.

[84] See generally, 72 Am. Jur. 2d States § 121 (2001).

[85] See *supra* note 62 and accompanying text.

[86] It is not clear whether an express reservation of immunity by a state pension fund in relation to its investment in a private equity fund would overcome any of the statutes or doctrines providing for waiver discussed herein. For example, a side letter could provide that the state pension fund ''expressly reserves its sovereign immunity, including, without limitation, its Eleventh Amendment immunity.''

[87] Even if the state pension fund is not found to have waived its immunity in entering into a contract, the fact that a commercial relationship is at issue may argue against the application of comity. See *supra* note 72 and accompanying text.

[88] Maryland, Nebraska, North Dakota and Utah are among the handful of states which have such statutes. See 72 Am. Jur. 2d States § 116 (2001). It should be noted that whenever a state gives statutory consent to be sued, it may impose limitations on that consent, for example requiring that suit be brought in its certain courts, be limited to certain specified causes of action or be limited in recovery.

[89] See 72 Am. Jur. 2d States § 116 (2001); *Masten v. State*, 626 A.2d 838 (Del. Super. Ct. 1991).

[90] See id; *Shively v. State of Delaware*, 1998 WL 960719 (Sup. Ct. New Castle County 1998); *Smith v. New Castle County Vocational-Technical School Dist.*, 574 F. Supp. 813 (Dist. Del. 1983); *Na-Ja Construction Corp. v. Roberts*, 259 F. Supp. 895 (D. Del. 1966).

[91] See *Whitfield v. North Carolina*, 497 S.E.2d 412, 414 (N.C. 1997); See also *Ace Flying Svces., Inc. v. Colorado Dep't of Agric.*, 314 P.2d 278 (Colo. 1957). Other states, such as Texas, refuse to recognize waiver through contract. See *Gen. Svces. Comm'n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591 (Tex. 2001).

[92] See *supra* note 90 and accompanying text.

[93] See *supra* note 71 and accompanying text.

[94] A Kansas state statute purports to allow KPERS to be sued only in Shawnee County, Kansas. Kan. Stat. Ann. § 74-4904(a) (2004).