NOTES

How to Assert State Sovereign Immunity Under the Federal Rules of Civil Procedure

INTRODUCTION

Twenty years have passed since the Supreme Court announced dramatic changes to the doctrine of state sovereign immunity in *Seminole Tribe of Florida v. Florida*.[1] This doctrine prevents "suits by private parties against unconsenting States"[2] in recognition of the state's power to govern itself and its citizens freely, as well as the financial impact lawsuits have on the state's treasury.[3] Since *Seminole Tribe*, the Supreme Court has—in a series of contentious 5-4 decisions—increasingly allowed this doctrine to immunize states and their officers from suits arising under the federal laws and sometimes even the Constitution.[4] But while the Court has expanded state sovereign immunity's substantive doctrine, it has neglected how state sovereign immunity should operate under the Federal Rules of Civil Procedure.

Without guidance from the Supreme Court, federal courts inconsistently apply state sovereign immunity claims to the Federal Rules, each of which can negatively impact the parties' substantive and procedural rights. Some courts dismiss disputes because they lack jurisdiction (some say subject-matter jurisdiction over the dispute, others say personal jurisdiction over the state) without ever

1. 517 U.S. 44 (1996).

2. *Id.* at 72.

3. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1430–32 (1987).

4. *See* Travis Gunn, *The Fourteenth Amendment: A Structural Waiver of State Sovereign Immunity from Constitutional Tort Suits*, 35 N. ILL. U. L. REV. 71, 73–74 (2014) (citing cases); *infra* Sections I.C, II.A.

considering the underlying merits of the plaintiff's claim.[5] Other courts acquire jurisdiction over the state defendant, thereby compelling the state to appear before a different sovereign's tribunal and defend itself.[6] Yet more courts will issue a judgment against a state defendant but cannot enforce that judgment because the state belatedly raises its immunity after the litigation's conclusion.[7] And many courts raise the state sovereign immunity question *sua sponte*, which denies both parties their right to determine how their litigation proceeds.[8] But all courts diverge in their treatment of the parties' rights because they inconsistently apply state sovereign immunity claims to the Federal Rules, not because of the specific facts at issue in any one case.

If the assertion of state sovereign immunity remains a series of ad hoc procedural determinations, then it threatens the very reason for having a unified set of procedural rules—"to secure the just, speedy, and inexpensive determination of every action."[9] Clear procedural rules promote accurate dispute resolution on the merits, respect the parties' rights, and ultimately support a just judicial system.[10] Unclear procedural rules, by contrast, prejudice the parties because unclear rules are inherently unpredictable, produce erroneous decisions, and undermine the public's faith in the justness of the judicial system.[11] State sovereign immunity is currently classified as the latter, which is a problem for individual litigants and states alike. The judicial system should not require plaintiffs to guess when state sovereign immunity can be raised or whether it is the defendant or the court that raises the defense. And the judicial system should decide if

5. *E.g.*, Hutto v. S.C. Ret. Sys., 899 F. Supp. 2d 457, 475–76 (D.S.C. 2012) (granting defendant's motion to dismiss for lack of subject-matter jurisdiction); *In re* PEAKSolutions Corp., 168 B.R. 918, 922 n.10 (Bankr. D. Minn. 1994) ("[C]haracterization of the defense of sovereign immunity as going to subject-matter jurisdiction is not accurate. . . . [I]ts proper rubric, however, is under Rule 12(b)(2)—'lack of jurisdiction over the person.' "); *see* FED. R. CIV. P. 12(b)(1)–(2).

6. *E.g.*, Seminole Tribe of Fla. v. Florida, 801 F. Supp. 655, 663 (S.D. Fla. 1992) (denying defendant's motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6)); *see* FED. R. CIV. P. 12(b)(6).

7. *E.g.*, Searcy v. Strange, No. 14–0208–CG–N, 2014 WL 4322396, at *6 (S.D. Ala. Aug. 28, 2014) (dismissing multiple state defendants after considering nonjoinder of parties through Rule 12(b)(7)); Memorandum from Chief Justice Roy S. Moore to Ala. Prob. Judges 23 (Feb. 3, 2015), http://media.al.com/news_impact/other/Letter%20from%20Chief%20Justice%20Moore%20to%20probate%20judges.pdf [perma.cc/G2QH-3XVU] (ordering state judges to disobey a federal court judgment because of sovereign immunity); *see also* FED. R. CIV. P. 12(b)(7).

8. *E.g.*, Nail v. Michigan, No. 1:12–cv–403, 2012 WL 2052109, at *1 n.1 (W.D. Mich. May 9, 2012) (raising issue of state sovereign immunity *sua sponte*); *see* FED. R. CIV. P. 12(h)(1).

9. FED. R. CIV. P. 1.

10. *See* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 919 (1999).

11. *See id.* at 933–34.

states enjoy the procedural rights of sovereigns or of individual litigants, rather than oscillate between the two.

The Supreme Court continuously punts on questions that could clarify state sovereign immunity's relationship to the Federal Rules and how that relationship affects parties' procedural and substantive rights.[12] These questions divide along three lines: foundational questions—whether state sovereign immunity is or is not jurisdictional; procedural questions—how and when to raise state sovereign immunity claims; and practical questions—how to reconcile state sovereign immunity with multiparty lawsuits.

First, the foundational questions ask whether state sovereign immunity affects subject-matter jurisdiction, personal jurisdiction, or acts as a quasi-jurisdictional immunity from suit. The Court has acknowledged that "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar,"[13] but it has also equivocated that the doctrine is neither "consistent with . . . practice[s] regarding personal jurisdiction,"[14] nor definitively a matter of subject-matter jurisdiction.[15] Indeed, the Court has also said the exact opposite: "[t]he Amendment, in other words, enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction."[16] With such flimsy guidance, it is unsurprising that lower courts diverge as to whether state sovereign immunity is or is not jurisdictional.[17]

Second, the procedural questions ask at what point in proceedings states must raise their sovereign immunity, and whether the court can raise the issue. Were sovereign immunity a matter of Article III jurisdiction, courts would not just be allowed, but compelled, to raise it *sua sponte*.[18] But the Supreme Court has expressly disclaimed such a requirement, stating that "we have never held that it is jurisdictional in the sense that it *must* be raised and

12. *See, e.g.*, Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 391–92 (1998) ("Even making the assumption that Eleventh Amendment immunity is a matter of subject-matter jurisdiction—a question we have not decided . . . ."); Patsy v. Bd. of Regents of Fla., 457 U.S. 496, 515 n.19 (1982).

13. Edelman v. Jordan, 415 U.S. 651, 678 (1974).

14. *Schacht*, 524 U.S. at 395 (Kennedy, J., concurring).

15. *Patsy*, 457 U.S. at 515 n.19.

16. Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267 (1997).

17. *Compare* United States v. Virgin Islands, 363 F.3d 276, 284 (3d Cir. 2004) ("Eleventh Amendment immunity is relevant to jurisdiction . . . ."), *with* Hill v. Blind Indus. & Servs. of Md., 179 F.3d 754, 760 (9th Cir. 1999) ("We conclude[ ] that Eleventh Amendment immunity 'should be treated as an affirmative defense.' ").

18. *See* FED. R. CIV. P. 12(h)(1).

decided by this Court on its own motion."[19] Conversely, were sovereign immunity an affirmative defense, it would need to be asserted at some point before a decision on the merits.[20] The Supreme Court has evaded this question as well, as it allows state sovereign immunity to "be raised at any stage of the proceedings," including for the first time on appeal.[21] The Court's approach has bred inconsistent practices among federal courts, which consider state sovereign immunity at any and all points of the litigation, whether raised by defendants or on the court's own motion.[22]

Third, the practical questions ask how federal courts should manage multiparty lawsuits that include both sovereign and non-sovereign entities. Here, the Supreme Court has provided some guidance in the foreign sovereign immunity context.[23] "[W]here sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign."[24] But federal courts arrive at strikingly varied results when applying this principle because they do not weigh state sovereign immunity equally in all cases: some dismiss the entire action, while others dismiss only the sovereign and allow the litigation to proceed despite possible injury to the absent sovereign.[25]

This Note addresses these three lines of questions: the foundational aspects of state sovereign immunity, its procedural aspects within litigation, and practical questions of multiparty lawsuits. Upon answering these questions, this Note offers an approach for how state sovereign immunity should operate procedurally in federal courts.

Part I demonstrates the volatile history of the state sovereign immunity doctrine, from its importation into United States legal jurisprudence, to the impetus for passing the Eleventh Amendment, to the broadening of that Amendment's text, and the doctrine as a whole,

19. *Patsy*, 457 U.S. at 515 n.19 (emphasis added).

20. *See* Wood v. Milyard, 132 S. Ct. 1826, 1832 (2012).

21. *E.g.*, Calderon v. Ashmus, 523 U.S. 740, 745 n.2 (1998).

22. *Compare* Nail v. Michigan, No. 1:12–CV–403, 2012 WL 2052109, at *1 n.1 (W.D. Mich. May 9, 2012) ("[I]t is appropriate for the court to raise the issue of Eleventh Amendment *sua sponte*."), *with* Katz v. Regents of Univ. of Cal., 229 F.3d 831, 834 (9th Cir. 2000) (stating that "[u]nless the State raises the matter, a court can ignore" state sovereign immunity issues).

23. Republic of the Philippines v. Pimentel, 553 U.S. 851, 867 (2008).

24. *Id.* at 867; *see* FED. R. CIV. P. 12(b)(7), 19.

25. *Compare* Diaz v. Glen Plaid, LLC, No. 7:13–cv–853–TMP, 2013 WL 5603944, at *8–9 (N.D. Ala. Oct. 11, 2013) (dismissing entire action in light of state sovereign immunity), *with* Searcy v. Strange, No. 14–0208–CG–N, 2014 WL 4322396, at *6 (S.D. Ala. Aug. 28, 2014) (continuing action after dismissal of state sovereign).

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