

Historical Context Important in Defense of Clients Under the MTCA

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Introduction

Attorneys practice law with constant deadlines and the ever present need to move cases forward in an effective and efficient manner and sometimes forget that the historical and procedural background of a legal defense can itself provide a potent argument. Those who spend a significant amount of time representing state entities or political subdivisions have almost certainly committed certain provisions of the Mississippi Tort Claims Act (hereinafter referred to as "MTCA") and the critical case law interpreting those provisions to memory. When a new case is filed against a governmental client, the attorney will review the MTCA, review the relevant case law, and check for amendments or updates. The first issue will often be whether the client is immune from liability in the particular lawsuit.

In most MTCA cases where the issue of immunity is contested, the specific wording of the applicable statute is dissected and the two sides argue over whether certain cases are analogous or whether they should be distinguished. It is easy to focus in on the few words that are being interpreted and forget the background that frames each debate over immunity for governmental entities and political subdivisions. The background can be a helpful tool for the defense bar. It is not realistic to expect a busy court

to tolerate lengthy history lessons from the bar each time a question of immunity arises; however, an understanding of the historic importance of sovereign immunity will help the practitioner frame the argument over the MTCA in a favorable way.

Alden v. Maine and Historical Background to Sovereign Immunity

In *Alden v. Maine*, 527 U.S. 706, 733 (1999), the United States Supreme Court thoroughly examined sovereign immunity. A summary and examination of that history is set forth in this article.

Each state has the right to sovereign immunity, including immunity from suits against that state in its own courts. *Alden*, 527 U.S. at 733. "[A]lthough the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design." *Id.* According to our nation's highest court, the U.S. Constitution "specifically recognizes the states as sovereign entities." *Id.* at 713 (citing *Seminole Tribe v. Florida*, 517 U.S. 44 (1996)). The 11th Amendment to the U.S. Constitution addresses state sovereign immunity from suit and has been interpreted expansively in that respect. However, the U.S. Supreme Court has held that immunity is even more deeply rooted in the laws of our

nation than its inclusion in the 11th Amendment:

Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other states). . . .

Id. at 713.

In addition, the Court has cited the 10th Amendment to bolster its recognition of Mississippi and other states as sovereigns:

Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power. The Amendment confirms the promise implicit in the original document: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.'

Id. at 713-714 (quoting U.S. CONST. AMEND. X). The sovereignty which the Court addresses has been described as "residuary and inviolable." *The Federalist*, No. 39 at 245. Mississippi, as one of the states privy to the compact of the Constitution, is considered a sovereign for purposes of this analysis.

The U.S. Supreme Court likewise recognizes the constitutional and common law rule that a sovereign is entitled to immunity in its own courts. *Id.* at 733. The Court explained, “The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity. When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its own courts.” *Id.* at 715. The fact that many of our founding generation believed that the states, as sovereigns, were entitled to immunity under the new constitutional system is clearly stated by Alexander Hamilton in *The Federalist*, No. 81:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual. . . without its consent. . . This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union.

The Federalist, No. 81 at 487.

In 1793, the U.S. Supreme Court handed down *Chisholm v. Georgia*, whereby it held that Article III of the Constitution authorized a private suit against the State of Georgia without its consent. *Alden*, 527 U.S. at 719 (citing *Chisholm v. Georgia*, 2 U.S. 419 (1793)). The fallout which resulted was profound and swept from the state houses to the halls of Congress. *Id.* at 720-721. The Supreme Court describes it in this way:

The States, in particular, responded with outrage to the decision. The Massachusetts Legislature, for example, denounced the decision as ‘repugnant to the first principles of a federal government,’ and called upon the Commonwealth’s Senators

and Representatives to take all necessary steps to ‘remove any clause or article of the... Constitution, which can be construed to imply or justify a decision, that, a state is compellable to answer in any suit by an individual or individuals in any court of the United States.’

Id. at 720 (quoting *Fifteen Papers of Alexander Hamilton*, 314; H. Syrett and J. Cooke, Eds. 1969). It is rare to see a blanket call from a state legislature to work to alter all federal laws upon which a court decision was based. However, the reaction from Massachusetts calling for an effective reversal of the decision was mild in comparison to that of the State of Georgia: “[Georgia’s] House of Representatives passed a Bill providing that anyone attempting to enforce the *Chisholm* decision would be ‘guilty of felony and shall suffer death, without benefit of clergy, by being hanged.’” *Id.* at 720-721 (quoting *D. Currie, The Constitution in Congress: The Federalist*, 1789-1801, p. 196 (1997)). These severe reactions from the states, while certainly indicative of the opposition to this interpretation, are not as telling as the swift reaction in opposition by the national government - the presumed beneficiary of the ruling. Approximately two months following the issuance of *Chisholm*, an Amendment to the U.S. Constitution protecting state sovereign immunity had been proposed and adopted by the U.S. Congress. *Id.* at 721 (citing *Four Annals of Congress*, 25, 30, 477, 499 (1794)). Following the Senate’s 23-2 vote to adopt the Amendment and the House’s 81-9 vote in favor of it, the proposed Amendment was sent to the states and promptly ratified as the 11th Amendment to the Constitution. *Id.* The rapid and nearly unanimous reaction in opposition to *Chisholm*, along with the subsequent adoption of the 11th Amendment, was summarized by the U.S. Supreme Court as follows in pertinent part:

Not only do the ratification debates and the events leading to the adoption of the Eleventh Amendment reveal the original understanding of the States’ constitutional immunity from suit; they also underscore the importance of sovereign immunity to the founding generation. Simply put, ‘the Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority....’

Id. at 726-727 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239, n.2 (1985)).

The 11th Amendment affirmed, rather than created, the law of sovereign immunity. *Id.* at 728-279. The original U.S. Constitution, the 10th and 11th Amendments, and the English common law are all in one accord in recognizing Mississippi’s sovereign immunity from suit. The Court has outlined the Constitutional authority for state sovereign immunity as follows: “That presupposition, first observed over a century ago in *Hans v. Louisiana*, has two parts: first, that each state is a sovereign entity in our federal system; and second, that ‘[i]t is inherent in the nature of the sovereignty not to be amenable to the suit of an individual without its consent. . . .’” *Id.* at 729 (quoting *The Federalist*, No. 81 at 487). The great weight of law adopted from the English common law and affirmed since the beginning of the American system provides an anchor for a judicial view of the MTCA that favors immunity.

Mississippi’s Limited Waiver of Sovereign Immunity

Because of its sovereign status, the State of Mississippi and its entities are immune from suits in Mississippi courts. Immunity was partially waived pursuant

(Continued on Page 16)

(Continued from Page 10)

to the explicit terms of the MTCA. “The MTCA was enacted in 1993 to create a **limited waiver** of sovereign immunity of the state and its political subdivisions.” *UMMC v. Robinson*, 876 So. 2d 337, 339 (Miss. 2004) (citing *Marcum v. Hancock Co. School Dist.*, 741 So. 2d 234, 236 (Miss. 1999)) (emphasis added). If immunity is not specifically waived for a certain area in the statutes comprising the MTCA, then it is retained and is applicable. The Mississippi Supreme Court has further stated:

The Mississippi Tort Claims Act provides the **exclusive** civil remedy against a governmental entity or its employee for acts or omissions

which give rise to a suit.... Any tort claim filed against a governmental entity or its employee shall be brought only under the MTCA.

L.W. v. McComb Separate Mun. Sch. Dist., 754 So. 2d 1136, 1138 (Miss. 1999) (citing Miss. Code Ann. § 11-46-7(1); *Moore v. Carroll Co.*, 960 F.Supp. 1084, 1088 (N.D. Miss. 1997)) (emphasis added). Mississippi has not completely waived its immunity. In fact, that immunity is firmly intact except for the specific exceptions carved out by statute.

Conclusion

Immunity is still a valid and important concept in our legal system. In asserting

immunity for governmental entities and political subdivisions, the government’s attorneys may be able to place the debate over a particular word or provision into a larger context. Given the legal significance of state sovereign immunity, the courts should lean toward finding that immunity exists in a close case. Although most cases of immunity under the MTCA will center on statutory language or analogous case law, it would be helpful to mention the underlying importance of the larger legal picture. Those defending governmental immunity will be well advised to keep the historical reality of immunity clear and the stringent limitations of waiver clearly specified. ■