

Eighth Circuit Rejects Sovereign Immunity Defense to FCA Qui Tam Action

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Last month the Eighth Circuit considered and rejected an Eleventh Amendment sovereign immunity defense to a *qui tam* action under the False Claims Act. In *United States ex rel. Fields v. Bi-State Development Agency*, No. 16-3783, 2017 U.S. App. LEXIS 13925 (8th Cir. August 1, 2017), a former employee of Bi-State alleged that the defendant interstate compact entity raised funds and required its employees to volunteer for a county executive's reelection campaign, in violation of the Hatch Act. The Government did not intervene. Bi-State, an entity formed by Illinois and Missouri and ratified by Congress, and which owns and operates public transportation services, argued on summary judgment that it should be immune from suit under the Eleventh Amendment. The federal district court for the Eastern District of Missouri disagreed, Bi-State brought an interlocutory appeal, and the Eighth Circuit affirmed.

The Eighth Circuit had previously considered whether Eleventh Amendment sovereign immunity protected Bi-State from suit, holding in *Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy*, 945 F.2d 1084 (8th Cir. 1991) that it did not. An entity asserting an Eleventh Amendment defense must establish it is an arm of the state. It must show "good reason to believe that the [compacting] [s]tates structured the new agency to enable it to enjoy the special constitutional protection of the [s]tates themselves." *Id.* at 1086 (alterations in the original).

Bi-State argued that a change in law affecting the first of six factors the Eighth Circuit weighs in analyzing Eleventh Amendment immunity—whether the compacting states characterize the entity as an arm of the state—should lead to a different conclusion than the holding in *Barket*. Since *Barket*, Missouri deleted a statutory section that had provided an exception to sovereign immunity for multistate compact entities. Because both Illinois law and the language of the compact still weighed in favor of treating Bi-State more as a municipality than as an arm of the state, however, the Eighth Circuit explained the change in Missouri law did not necessitate a different outcome. The court went on to consider each of the other factors, finding that they pointed in different directions.

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Instead, the court looked to the “Eleventh Amendment’s twin reasons for being” to decide whether to extend its protections in this case: “respect for dignity of the states as sovereigns,” and “prevention of federal-court judgments that must be paid out of a [s]tate’s treasury.” *Fields*, 2017 U.S. App. LEXIS at 18. The Court reasoned that suing an agency that is the creation of multiple states and the federal government did not present the same affront to dignity as suing a state. Most importantly, though, neither Illinois nor Missouri would be financially obligated to satisfy a judgment against Bi-State. Bi-State, then, had failed to show good reason to believe Illinois and Missouri structured it to enjoy immunity from suit, and the Eighth Circuit remanded the case for further proceedings.