Banking and Finance Law Daily Wrap Up, FAIR CREDIT REPORTING—U.S.: Missouri student loan servicing entity seeks certiorari on "arm-of-the-state" questions, (Mar. 19, 2025)

Banking and Finance Law Daily Wrap Up

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By Justin Marcus Smith, J.D.

MOHELA mainly argued that a proper arm-of-the-state test "should respect, not punish" sovereign choice.

MOHELA, the Higher Education Loan Authority of the State of Missouri, filed a petition for a writ of *certiorari* challenging a Tenth Circuit holding that it was not an arm-of-the-state for Eleventh Amendment purposes. MOHELA, citing circuit splits, emphasized that an arm-of-the-state analysis that focuses on normal corporate incidents will fail to respect the purpose of the Eleventh Amendment in preserving state sovereignty to create public entities that serve public purposes. MOHELA urged the high court to take the case in light of the number and wide variety of different kinds of public entities which the states have intended to serve public purposes (*The Higher Education Loan Authority of the State of Missouri v. Good*, No. 24-992 (U.S. Mar. 18, 2025)).

Background. Good, a student loan borrower, sued the United States Department of Education and loan servicer MOHELA under the Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681-1681x, for alleged errors on a credit report. The district court dismissed the complaint to the extent the FCRA did not waive sovereign immunity. The district court also granted MOHELA's motion for judgment on the pleadings because it concluded MOHELA was an arm-of-the State of Missouri and entitled to share in Missouri's Eleventh Amendment immunity. Good appealed to the United States Court of Appeals for the Tenth Circuit.

On appeal, the Tenth Circuit reversed dismissal and remanded. The Tenth Circuit applied an arm-of-the state analysis, emphasizing MOHELA's autonomy and financial independence, to conclude that MOHELA was not an arm-of-the-state for Eleventh Amendment purposes (see *Banking and Finance Law Daily*, Nov. 13, 2024).

Questions posed. The MOHELA petition poses two questions: 1) whether state treasury liability for judgment against an entity is the most important factor for determining whether such entity is an arm of the state; and, 2) whether incidents of corporate status, such as the capacity to sue and be sued, are relevant to determining whether a public corporation established for a state-wide public purpose, and governed by a Board of state officials and individuals appointed by the governor and confirmed by the legislature, is an arm of the state.

Divided circuits. MOHELA's petition argues the circuits are split over whether normal incidents of corporate status bear on whether a public corporation is an arm of the state. It said the Tenth and Fifth Circuit weigh incidents of corporate status against immunity for public corporations, while the Ninth and D.C. Circuits do not.

MOHELA suggested the split comes down first to whether treasury impact, the so-called "treasury factor," should be dispositive. Three circuits that do not find it so, the D.C., Third, and Ninth Circuits, recognize that protecting states from money judgments was not the driving concern in adoption of the Eleventh Amendment. Those three circuits recognize instead that the Eleventh Amendment is about according states dignity consistent with their sovereign entity status.

Second, the circuits also disagree whether normal incidents of corporate status, like the capacity to sue and be sued, bear on arm-of-the-state status. MOHELA said the Tenth and Fifth Circuits give these factors substantial weight against public corporation immunity, while the Ninth and D.C. Circuits instead respect the states' "prerogatives to structure their governments as they see fit" by looking primarily for indicia of control by the governor and legislature.

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State sovereignty. MOHELA continued that the Tenth Circuit's reversal of dismissal erred in deeming it irrelevant that judgments against MOHELA could fiscally harm the State of Missouri by impairing MOHELA's purpose and ability to support Missouri higher education. MOHELA said the decision also failed to respect Missouri sovereignty over how it performs sovereign functions. MOHELA argued the question of whether a state would be liable for a money judgment against a public entity is not important as an end in itself but rather because it is an indicator of the relationship between the State and its creation. Lawsuits against entities created and controlled by a state to perform a public function can impair sovereignty by causing financial harm to the state even if the state is not directly liable for the entity's debts.

MOHELA said it is a prime example of that because Missouri empowered it to issue bonds and to buy, finance, and service student loans, all fee- and revenue- generating activities that Missouri partly uses to defray state treasury expenditures on public education. Just as the federal loan forgiveness plan in *Biden* harmed Missouri by reducing MOHELA loan servicing fees, so, too, do lawsuits against MOHELA harm Missouri by reducing MOHELA's assets. *See Biden v. Nebraska*, 143 S. Ct. 2355 (2023).

Recurring question. MOHELA additionally urged the Supreme Court to grant certiorari because determining whether entities are an arm of the state is an important and recurring question. Many types of entities can be public corporations, including public universities, hospitals, transportation and ports authorities, water and sewer authorities, energy authorities, and even bar associations. MOHELA said its non-exhaustive list was sufficiently broad to show the "scope of the confusion generated by the circuit splits and the corresponding need" for Supreme Court intervention.

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Companies: Higher Education Loan Authority of the State of Missouri

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