

# 11th Circ. Says Fla. Sovereign Immunity Doesn't Block Trial

By **Nathan Hale**

Law360, Miami -- The Eleventh Circuit ruled Wednesday that because it has held sovereign immunity does not protect Florida municipalities and state agencies from being sued, they cannot immediately appeal rulings that reject sovereign immunity as a defense, paving the way for more municipalities to have to face court in federal cases.

The published opinion came in an appeal by several municipalities after a trial court denied their motion to dismiss a class action over red light cameras on the grounds of sovereign immunity.

**“That levels the playing field some for individuals and businesses in suing governments,” said class counsel Stephen F. Rosenthal of Podhurst Orseck. “If they are able to defeat the sovereign immunity defense at the outset, they may be able to get their proverbial day in court. That may change the balance of power a bit.”**

The Eleventh Circuit cited the its own 1998 case *CSX Transportation Inc. v. Kissimmee Utility Authority* in deciding that Florida sovereign immunity law provides a defense to liability but not immunity from suit.

That finding means that orders denying Florida sovereign immunity cannot be immediately appealed under the collateral order doctrine, the court said.

“CSX decided the jurisdictional issue presented by this case, and it is controlling as to that issue unless it has been 'undermined to the point of abrogation' by an intervening change in Florida sovereign immunity law,” the appeals court said. “Contrary to defendants' argument, there is no clear authority to suggest such a change has occurred in Florida law.”

The Eleventh Circuit said that its ruling in the CSX case stemmed from a discussion on the Florida sovereign immunity law in the Florida Supreme Court's decision in the 1996 case *Department of Education v. Roe*.

In that ruling, Florida's highest court noted a distinction in sovereign immunity claims raised by governmental entities, such as state agencies or local governments, as in the traffic cameras case, and federal qualified immunity asserted by public officials who are sued as individuals.

Qualified immunity is in place to protect public officials from undue influence. Concerns that having to mount a defense will have a “chilling effect” on officials is not felt the same way by a governmental entity, the high court explained.

The Eleventh Circuit cited a statement from the Florida Supreme Court ruling in *Roe* that it said is key to its position: “Although the state will have to bear the expense of continuing the litigation, the benefit of immunity from liability, should the state ultimately prevail on the sovereign immunity issue, will not be lost simply because review must wait until after final judgment.”

Later rulings by the Florida Supreme Court have not greatly altered Roe, and several recent decisions have cited it favorably, the Eleventh Circuit said.

The municipalities' argument that the Roe ruling should be narrowly interpreted to apply only to immunity from tort claims and not other types of claims, such as the unjust enrichment claim raised in the camera case, suggests that the CSX ruling was wrong, and the appeals court is not authorized to make such a determination, it said.

A 2014 change to the Florida Rules of Appellate Procedure authorized the state appeals courts to review nonfinal orders denying individual or sovereign immunity, but the Eleventh Circuit refused to budge, saying there was no basis to suggest the change was made to change the sovereign immunity law, so its CSX interpretation stands.

In their February 2015 master complaint, which consolidated several state and federal cases, the plaintiffs accused more than 80 municipalities and counties and vendors American Traffic Solutions Consolidated LLC, Xerox State & Local Solutions Inc. and Gatso USA Inc. of unlawfully charging drivers with red light traffic violations.

The matter has been stayed pending the outcome of the municipalities' appeal. U.S. District Judge Federico Moreno could choose to lift the stay, or he may choose to wait to see what plays out if the Florida Supreme Court chooses to take up an apparent conflict between state appeals courts over the legality of the red light systems, Rosenthal said.

Judge Moreno in August 2015 granted the local governments' motion to dismiss plaintiffs' due process claims, but he allowed plaintiffs to move forward with their claims for unjust enrichment — the subject of the instant appeal — as well as claims for declaratory and injunctive relief.

Raising sovereign immunity in their attempt to dismiss the unjust enrichment claim, the municipalities argued it was a “quasi-contract” claim, but Judge Moreno viewed the issue as an attempt to recover from an “unlawful monetary extraction,” which sovereign immunity does not cover under Florida law.

Edward Guedes of Weiss Serota Helfman Cole & Bierman, who is representing the municipalities, said that although he understood the Eleventh Circuit's reluctance to revisit its interpretation of the Florida Supreme Court's precedent in Roe, he thinks the end result is “extremely unfortunate and inefficient.”

“Local governments in state court are able to obtain immediate interlocutory review of a denial of a sovereign immunity defense, but if that same state law claim is asserted against the local government in federal court and the defense is denied, immediate review is unavailable. Effectively, the immunity is vitiated in federal court,” he told Law360. “I believe Florida jurisprudence has sufficiently clarified that local governmental immunity is immunity from suit, and not merely immunity from liability.”

The plaintiffs are represented by Cohen Milstein Sellers & Toll PLLC, Podhurst Orseck PA, Colson Hicks Eidson, Wites & Kapetan PA, Cohen Milstein Sellers & Toll PLLC, Eaton & Wolk PL, Estrella Ticket Defense Law Firm PA and Friedman Rosenwasser & Goldbaum PA, among others.

American Traffic Solutions is represented by Carlton Fields Jordan Burt PA and by Weil Gotshal & Manges.

Xerox is represented by Baker & Hostetler LLP and by Hamilton Miller & Birthisel LLP.

Gatso is represented by Cole Scott & Kissane PA.

The local governments are represented by Weiss Serota Helfman Cole and Bierman, Johnson Anselmo Murdoch Burke Piper & Hochman PA and Goren Cherof Doody & Ezrol PA, among others.

The case is Parker et al. v. American Traffic Solutions Inc. et al., case number 1:14-cv-24010, in the U.S. District Court for the Southern District of Florida.

--Additional reporting by Caroline Simson. Editing by Jill Coffey.