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Interstate Agencies, Their Tort Dilemmas and a Federal Solution

Miri am M. Reimel*

INTRODUCTION

The interstate compact, a hybrid between state and federal regulation, has now become a staple of government. With increased regional problems and interstate dependencies, the compact's structure and uses have expanded. The development, however, has been accompanied by some legal growing pains, not the least of which is resolving how control should be balanced between the state and federal government and shared among the participating states. The question arises most strikingly when a law of one state differs from laws of other states involved in the compact, or when a federal law conflicts with a statute of any of the participating states. Resolving these dilemmas in ways that recognize the sovereignty of each state, while maintaining the unity of the participants for their joint purpose, poses complex problems. This article will examine one such problem—the situation where all but one state in the compact have abolished the doctrine of sovereign immunity.

BACKGROUND

Formal interstate compacts are formed with congressional consent pursuant to article I of the United States Constitution which states in relevant part: "No state shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . ." This federalist check, first upheld in Virginia v. Tennessee, is designed to prevent "the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." The utility of the provision is

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1. U.S. Const. art. I, § 10, cl. 3.
2. 148 U.S. 503 (1893).
3. Id. at 519.
evident where the activity of the compact impinges on interstate commerce or on the distribution of political power among the states.\(^4\) It affords Congress a measure of control over agreements that yield consequences beyond state lines, yet do not have a national impact.\(^5\) Although there are other methods of achieving multi-state cooperation,\(^6\) interstate compacts are the most common and their number continues to increase.\(^7\) Today there are over 160 such compacts.\(^8\)

Over the years, the interstate compact has been enthusiastically acclaimed\(^9\) because its unique multi-state structure allows a balancing of conflicting interests on regional problems. Since the scope of problems addressed by compacts extends beyond the jurisdictional reach of a single state, state regulation is clearly inadequate. Federal control is often unavailable and inappropriate since the issues involved are not of national concern. A regional solution is called for, and the interstate compact—embodying regional interests, regional wisdom and regional pride—is the handy remedy.\(^10\)

Interstate compacts were initially used for one-dimensional issues such as boundary disputes, for which they were quite satisfactory since land settlement obviated the need for any administration by the compact agency.\(^11\) Compacts proliferated and later became more

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5. Frankfurter & Landis, supra note 4, at 695.

6. Other means of achieving multi-state cooperation include uniform laws, reciprocal legislation, and informal agreements. See Characterization of Interstate Arrangements, supra note 4.

7. Thirty-six compacts were instituted between 1783 and 1920; between 1921 and 1955, 65 were added; between 1955 and 1965, 29 more compacts were created. W. BARTON, INTERSTATE COMPACTS IN THE POLITICAL PROCESS 3 (1967) [hereinafter cited as Barton].


9. For one of the most enthusiastic endorsements of interstate compacts see Frankfurter & Landis, supra note 4.

10. Id. at 708. Although the article by Frankfurter and Landis was written over 50 years ago, the use of the interstate compact as a means of solving regional problems is, in today's world, just as appropriate. Two current authorities have described the use of the compact as "a means of getting the existing federal and state apparatus to address itself to intergovernmental problems in concert, with the intergovernmental agency as a specialized staff resource for the purpose." Zimmermann & Wendell, Interstate Compacts, in THE BOOK OF THE STATES 1976-77, at 575 (1976) [hereinafter cited as Zimmermann & Wendell].

11. For a detailed summary of the early uses of compacts see Frankfurter & Landis, supra note 4, at 695-708.
complex in response to rapidly changing lifestyles. Waste problems, industrial development, and other matters associated with population growth required a degree of cooperation which would have been practically impossible without regional administration through interstate compacts. The development of compacts advanced dramatically with the passage of the Port of New York Authority Compact of 1921 and the Colorado River Compact of 1928. These were among the first interstate compacts to establish ongoing commissions or agencies to administer, regulate, and execute the terms of a regional compact.

At first, the federal government's only involvement with interstate compacts was simply to provide its stamp of approval. With the formation of the Potomac, Upper Colorado River Basin, and Ohio River compacts, the federal government assumed a role similar to that of a respected limited partner—a passive participatory member who added prestige and clout to the compact. Federal involvement increased markedly with the passage of the Delaware River Basin Compact (DRBC) in 1961. The commission formed by

12. Modern developments have increased the potential for heightened use of interstate compacts since "in many instances the most appropriate geographic areas for administration of some of the programs may be somewhere between State and Nation." Zimmermann & Wendell, supra note 10, at 575. See Grad, Federal-State Compact: A New Experiment in Co-Operative Federalism, 63 Colum. L. Rev. 825, 850-55 (1963) [hereinafter cited as Grad].


that compact was the first in which the federal government was an active voting partner with rights equal to the participating states. This new federal participation marked a turning point in the development of the compacts.\textsuperscript{19}

Interstate compacts have often had to face thorny problems of administration. If a member state violates a compact or fails in its responsibilities, how and where is suit brought, and if participant states have irreconcilable laws, which state's laws prevail?\textsuperscript{20} The legal complexities become critical when a plaintiff alleges that an agency created by an interstate compact has been negligent. If the compact includes a state such as Pennsylvania, which retains the doctrine of sovereign immunity, it must be determined whether sovereign immunity can be raised by the agency as a complete defense to the suit, even if no other member state recognizes that defense. Exploration of this troublesome problem will provide the nucleus for the remainder of this article. As the factual setting for the discussion is unveiled, it should be remembered that the sovereign immunity issue being examined is only illustrative of the kinds of complex litigation with which state and federal courts must grapple as the number of interstate compacts increases.

\textsuperscript{19} See Grad, supra note 12. While federal participation does not resolve problems which occur when participants in a compact fail to agree on an issue, it provides an impetus towards compelling cooperation. When, for example, a forty-six month drought causing critical water shortages materialized in 1965 along the Delaware River Basin, chaos and selfishness prevailed until the federal government interceded. Pennsylvania, New Jersey, New York, and Delaware had formed the Delaware River Basin Commission (DRBC) for the purpose of amicably resolving water basin problems, a source of previous litigation. See New Jersey v. New York, 347 U.S. 995 (1954); New Jersey v. New York, 283 U.S. 336 (1931); F. Bird, The Port of New York Authority 7-8 (1949) (asserting that disputes over water regulation led to the formation of the Port Authority). In 1965, emergency plans were formulated to deal with the water scarcity caused by the drought. New York City, in defiance of a court order enjoining diversions, New Jersey v. New York, 347 U.S. 995, 996-1000 (1954), appropriated water for its own use. Prohibitory orders from the court-appointed "river master" were in vain. Public DRBC hearings were called, emergency meetings of the DRBC participants were held, and a modification of the ordered diversions was attempted. See Minutes of the Meeting of DRBC, July 7, 1965 (Trenton, N.J.). Nevertheless, the crisis continued.

The federal government stayed in the background until President Johnson promised federal aid. After federal intervention and promise of aid, the states began to cooperate. It is doubtful that the practical force behind the compact language, or its moral suasion, would have resolved the crisis. The economic clout of the federal government provided the needed impetus for solution of the drought emergency.

\textsuperscript{20} For criticism of the limitations of interstate compacts, see F. Zimmermann & M. Wendell, The Interstate Compact Since 1925, at 110-11 (1951); Barton, supra note 7, at 4.
A FACTUAL SETTING

The Delaware River forms part of Pennsylvania's border with New Jersey. The agencies which control the river are the Delaware River Port Authority (DRPA) and the Delaware River Joint Toll Bridge Commission (DRJTBC).\footnote{21} Each of these agencies was established by congressionally approved interstate compacts\footnote{22} and each includes as members Pennsylvania and New Jersey.\footnote{23} Each compact contains the statement that the agency is a "public corporate instrumentality" of the two states\footnote{24} which has the power "to sue and be sued."\footnote{25} Both agencies operate and maintain bridges without reference to either state's legislative approval.\footnote{26} The bridges are largely self-sustaining; tolls and bond issues provide the revenues.\footnote{27} Neither agency can pledge a state's credit or create any debt against either state.\footnote{28} Indeed, the only significant financial dependence occurs in the operation of the Bridge Commission's free bridges which are funded by equal shares from New Jersey and Pennsylvania.\footnote{29} Yet, both of these agencies have, when sued in tort, successfully raised the defense of sovereign immunity as a complete bar to recovery for damages by an injured party.\footnote{30}

STATE LAW

The ubiquitous "sue and be sued" clause has often not been ac-
cepted at face value. Many state agencies whose empowering instruments provide that they can "sue and be sued" have been shielded from suit in tort, but not from contract liability. Thus, the mere existence of a "sue and be sued" clause does not necessarily guarantee the ability to bring a suit against an interstate agency. The clause's interpretation may depend on the jurisdiction in which the action is brought. In some cases—such as where the plaintiff, the agency, and the accident are all located in the same state—there may be no choice of forum for the suit. Where, on the other hand, a case involves contacts with more than one state, the plaintiff might have the option of choosing a forum that will look favorably upon his case.

If one of the Delaware River commissions were being sued in tort and the plaintiff brought his suit in a New Jersey state court, his cause of action could be presented; the New Jersey Tort Claims Act allows all "public entities," including the two Delaware River agencies, to be sued under limited conditions. If the plaintiff were to bring his cause of action in a Pennsylvania court, however, he faces a variety of potential impediments. He initially encounters the problem of which Pennsylvania court will hear his case. Under the Pennsylvania Constitution, suits against "the Commonwealth" can only be brought "in such courts and in such cases as the legislature may by law direct." The state's Appellate Court Jurisdiction Act

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31. The Pennsylvania Supreme Court has asserted that the "sue and be sued" clause was not instituted as a "general waiver of immunity" in negligence suits, and has supported its decision by citing similar holdings in several other states. Rader v. Pennsylvania Turnpike Comm'n, 407 Pa. 609, 615, 182 A.2d 199, 201 (1962).

32. See, e.g., Central Contracting Co. v. C.E. Youngdahl & Co., 418 Pa. 122, 128-29, 209 A.2d 810, 814 (1965); R.G. Packard Co. v. Palisades Interstate Park, 240 F. 543 (S.D.N.Y. 1916). While the legal reason for the distinction is not clear, the practical rationale is obvious: if recovery were barred in a contract action, many suppliers and contractors would be unwilling to deal with the agency. See Note, The Applicability of Sovereign Immunity to Independent Public Authorities, 74 Harv. L. Rev. 714 (1961) [hereinafter cited as Harv. Note].

33. Ordinarily, a court will accept jurisdiction of a case; the general forum non conveniens rule is that a state will refuse to exercise jurisdiction only "if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff." Restatement (Second) of Conflict of Laws § 84 (1971). The general policy is that a court usually should not disturb a plaintiff's choice of forum "except for weighty reasons." Id., Comment c. Moreover, the general rule is not jurisdictional except in a few specialized cases. Id., Comment g; see id., Comment i.


35. Id. §§ 59:1-2 to 2-10.


declares that "the Commonwealth" can be sued only in commonwealth court.\textsuperscript{38} Thus, for jurisdictional purposes there must be a threshold consideration of whether the agency is "the Commonwealth." The Act's definition of "Commonwealth" does not readily answer the question; "Commonwealth" is defined to include "departments, departmental administrative boards and commissions, officers, independent boards or commissions, authorities and other agencies of this Commonwealth."\textsuperscript{39} Explicitly excluded from the definition are "any political subdivision, municipal or other local authority, or any officer or agency of any such political subdivision, municipal or local authority."\textsuperscript{40}

Since neither the Pennsylvania Constitution nor the Appellate Court Jurisdiction Act explicitly determines whether a multi-state body is an agency "of this Commonwealth," the courts are immediately plunged into the problem of ascertaining the interstate entity's status. More importantly, if a court decides that the interstate agency is an agency "of this Commonwealth," then it seems to have also decided the core issue of whether the agency will be protected from suit by sovereign immunity. Arguably, suit could be allowed to proceed initially in the commonwealth court by interpreting the "sue and be sued" compact language without determining whether the agency is protected by sovereign immunity, on the rationale that an agency can be considered an agency of the state for one purpose but not for another.\textsuperscript{41} The Pennsylvania Supreme Court, however, has not followed this metaphysical bisection of closely related questions, and has chosen to combine the question of "which court" with the issue of sovereign immunity and decide them both as matters of procedure.\textsuperscript{42}

The very act of labeling these questions "procedural," however, causes certain pivotal arguments to be foreclosed. The "procedural" label mandates that, under traditional conflict of laws principles, Pennsylvania law is to be applied without any analysis of the facts.\textsuperscript{43}

\textsuperscript{38} Id. § 211.401(a).
\textsuperscript{39} Id. § 211.102(a)(2).
\textsuperscript{40} Id.
\textsuperscript{41} See, e.g., Levine v. Redevelopment Auth., 17 Pa. Commw. Ct. 382, 385, 333 A.2d 190, 192 (1975) (municipal authorities may be state agencies in some cases and local agencies in other situations).
\textsuperscript{43} "Procedurally, the rules of procedure of the forum are controlling. The party who
If the court were to treat sovereign immunity as a separate substantive issue, the forum state, Pennsylvania, could use a conflicts analysis to determine which state's law should apply. In effect, by labeling both matters procedural, the suability of an interstate agency may be decided against the plaintiff without being squarely addressed by the court. It seems inequitable for a choice of laws analysis, which allows for a much broader appraisal of the factual setting involved in the suit, to be foreclosed at the outset by labeling.

Yet, even if the issue could be addressed from the perspective of a conflicts analysis, a plaintiff's problems would not subside. A court balancing the relative "policies and interests" or "contacts" of the participating states, could find the policies and interests shifting from case to case, and the sovereign immunity question would be no more certain than it is now. Or, relying solely on a territorial approach, the court could decide a case favorably to one party if the accident occurs on one side of the bridge, and against that party if the accident occurs on the other side of the bridge. Thus, even a conflicts approach leaves us with an uncertain, shifting body of law.

Regardless of the approach taken, in order to proceed, the court is left with the question of making a determination whether a multi-state public corporation, of which Pennsylvania is a member, is "the Commonwealth" or its agent. Language that states that the agency is a "public corporate instrumentality of the Commonwealth of Pennsylvania and the State of New Jersey," found in both the DRPA and DRJTBC compacts, could be read to indicate that the interstate agency is the agency of each state. Alternatively, the language could be read to identify a separate entity—a Pennsylvania-New Jersey agency—removed from either state. Certainly,
a distinction can be drawn between "an agency of the Commonwealth," the language contained in the Commonwealth's Appellate Court Jurisdiction Act, and words which would explicitly indicate a multi-state agency. To hold that such interstate bodies are "the Commonwealth" would mean that every agency of which Pennsylvania is a member might be considered an agency of the Commonwealth. This interpretation is not logical; the result would be that every state member of the compact could characterize the interstate agency as an agency of its state when it would serve the state's purpose to do so.7 States whose treasuries are guarded by the doctrine of sovereign immunity may be quite reluctant to categorize a multi-state agency as something other than an entity which is protected by sovereign immunity.7 Thus, they may be enticed to look past the logic of the characterization and decide that "agency of the Commonwealth" includes multi-state agencies.

SOVEREIGN IMMUNITY

A "sue and be sued" clause in a compact does not automatically permit a lawsuit to proceed;48 the Pennsylvania courts have ruled

46. A number of arguments can be raised both for and against asserting that an agency formed by an interstate compact is an agency of the state. It can be asserted that a Pennsylvania "agency" must operate purely within state lines and under the control of the Pennsylvania legislature alone; since a multi-state public corporation neither operates within Pennsylvania alone nor under the sole control of the legislature, it is not an agency "of the Commonwealth." Other arguments to differentiate interstate compact agencies from one-state Pennsylvania agencies include: (1) a multi-state public corporation must adhere to the constitutions of each membership state—not merely Pennsylvania's alone; (2) suits involving the corporation can be brought in any membership state—not just in Pennsylvania; and, (3) citizens from all membership states control its activities—not just Pennsylvania citizens.

On the other hand, there are several arguments in favor of concluding that multi-state public corporations are "the Commonwealth." It could be asserted that the entity has been delegated authority to perform certain functions by the Commonwealth and that the body therefore is answerable to the Commonwealth for these tasks; that the agency is an arm of the state, and that the compact language does refer to the agency as "a public corporation instrumentality" of Pennsylvania and other state participants. See note 43 and accompanying text supra. Furthermore, in regard to the DRJTBC, there is a certain financial link between Pennsylvania and the interstate agency: its free bridges are funded equally by Pennsylvania and New Jersey. Funding is authorized by Pa. Stat. Ann. tit. 36, § 3278 (Purdon 1961).

47. The philosophical rationale for sovereign immunity dates back nearly two centuries to the English case of Russell v. Men of Devon, 100 Eng. Rep. 359 (K.B. 1788), in which it was decided that "it is better an individual should sustain an injury than that the public should suffer an inconvenience." Id. at 362.

48. See notes 31-42 and accompanying text supra.
that such a clause does not by itself waive a defense of sovereign immunity. Resolution of this issue is entwined in the vast and controversial body of law which was spawned when sovereign immunity was adopted in Pennsylvania in 1788. Since then, a variety of formulas, standards, and policy arguments have evolved to determine whether the entity being sued stands in the shoes of the state and is therefore immune from suit. Despite strong and frequent criticism, the standard of whether an agency’s function is governmental or proprietary remained an analytic touchstone through the years. Frequently, this imprecise standard was coupled with an inquiry of whether the body was an “instrumentality” of the state, a query whose determination was generally made through the use of agency principles.

Some courts have refused to unthinkingly denominate multi-state compact commissions “agencies of the Commonwealth.” A landmark case dealing with the identity of a compact agency was Souder v. Philadelphia Police Pension Fund Association, where the plaintiff’s decedent, a Philadelphia policeman, quit the force to enter employment with the DRJTBC. For ten years subsequent to his departure from the police force, he received his police pension. Later, he was notified that he would no longer be eligible for the

50. Respublica v. Sparhawk, 1 Dall. 357 (Pa. 1788).
51. See generally Harv. Note, supra note 32.
53. The distinction between proprietary and governmental functions is one between acts which are done in a business or ownership role, such as supplying water, furnishing gas, providing licenses and grants, operating a public playground or maintaining and managing a park, and those which are performed as functions of government delegated by the state. The latter category would include furnishing police and fire protection and refuse collection.
pension because of a pension fund bylaw which stipulated that a policeman's pension would be forfeited if he became employed by the Commonwealth of Pennsylvania. The Pennsylvania Supreme Court held that the DRJTBC was not "the state" for purposes of the police pension fund and that a multi-state public corporation formed pursuant to a compact was distinct from either of its state members. In *Carver v. Delaware River Joint Toll Bridge Commission*, a trial court followed the rationale of *Souder* and held that the DRJTBC was an entity distinct from the Commonwealth and therefore could be sued only as a public corporation. The Pennsylvania Supreme Court accepted the lower court's characterization of the Commission.

These cases were not the final word on determining whether a multi-state agency was an agency of the Commonwealth since their impact was diminished by a series of public utility cases. The *Delaware River Joint Commission Case* dealt with the right of the Commission to force relocation of telephone lines without compensation. The Pennsylvania Supreme Court held that the "Commission, in this Commonwealth, acts as the agent of the Commonwealth" since portions of the bridge administered by the agency are part of the Pennsylvania highway system. A similar case, *Delaware River Port Authority v. Pennsylvania Public Utility Commission*, discussed the powers exerted by the Commonwealth's Public Utility Commission over the DRPA, then, without analysis or regard for the structure of the DRPA, relied simply on the *Delaware River Joint Commission Case*. The Pennsylvania Superior Court stated: "In exercising the powers conferred upon it by the Commonwealth, the Authority acts as the agent of the Commonwealth." The court reasoned that the Authority stands in the place of the Commonwealth since it was chosen by the state to

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57. *Id.* at 291, 25 A.2d at 194: "Upon the execution of the agreement of July 1, 1931, the Commission became a distinct entity, separate and apart from either State." The *Souder* court made this statement despite a finding that the Commission performed a state function and acted as an agent of the Commonwealth. *Id.*

58. 70 Dauph. 114 (Pa. C.P. 1957).

59. *Id.* at 116.


61. 342 Pa. 119, 19 A.2d 278 (1941).

62. *Id.* at 122, 19 A.2d at 279.

construct bridge approaches to Pennsylvania.  

The Pennsylvania courts have subsequently followed the rationale of the utility cases rather than the holdings of Souder and Carver in determining the applicability of sovereign immunity in suits against the interstate compact agencies. In Anderson Appeal, the Pennsylvania Supreme Court held that the DRPA was immune from liability in an action for consequential damages where the plaintiff alleged an unauthorized taking of property. In the court's view, the DRPA was an agency carrying out an executive function of the state. The court totally ignored Carver, disapproved statements in Souder, cited the utility cases, and concluded that the Port Authority exercised "an essential governmental function." Although it acknowledged that the Authority is controlled by and responsible to the legislatures and the governors of the two states, the court failed to find any difference between the Authority and the Pennsylvania Turnpike Commission, a wholly internal state agency which it had previously held was "the Commonwealth."

The viability of Anderson Appeal as precedent has been rendered less certain by two subsequent developments. First, since the decision the legislature has passed the Appellate Court Jurisdiction Act, arguably an important indicator of the legislative intent not to include multi-state corporations in the definition of "Commonwealth"; certainly, by 1970, interstate agencies were common enough to have been considered and included in the definition had the legislature desired to do so. That the commissions were not included, therefore, seems noteworthy. A second development since Anderson Appeal has been the nationwide movement toward abandonment of the sovereign immunity doctrine. Many states have recognized its archaic rationale and its inapplicability to modern government.

The Pennsylvania Supreme Court, however, has been loath to

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64. Id. at 322, 119 A.2d at 858.
66. Id. at 182, 182 A.2d 515.
67. Id. at 184, 182 A.2d 517.
68. Id.
shed the doctrine of sovereign immunity. The court's position has been that sovereign immunity is legislatively established by the Pennsylvania Constitution, and, hence, is not a common law theory which can be judicially abrogated. The supreme court has, however, chipped away at aspects of sovereign immunity. It abolished governmental immunity in Ayala v. Philadelphia Board of Public Education with language that took cognizance of the changing politics and times. The court stated that "until the present action, we have retained the archaic and artificial distinction between tortious conduct arising out of the exercise of a proprietary function and tortious conduct arising out of exercise of a governmental function." The court then declared that there are "no reasons whatsoever [that] exist for continuing to adhere to the doctrine of governmental immunity. Whatever may have been the basis for the inception of the doctrine, it is clear that no public policy considerations presently justify its retention." Although the Ayala court dismissed as impotent many of the same policies that underlie the sovereign immunity doctrine, the court implied that sovereign immunity was still a viable Pennsylvania doctrine.

Two years later, after upholding the applicability of sovereign immunity to the Pennsylvania Liquor Control Board and the Pennsylvania National Guard, the supreme court held that the Pennsylvania Turnpike Commission was no longer protected by sovereign immunity. In Specter v. Commonwealth, the court admitted that it had erred in ruling that the Turnpike Commission was identical to the Commonwealth. The Specter court analogized the

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74. Id. at 592, 305 A.2d at 881.
75. Id.
80. Id. at 493, 341 A.2d at 490.
Turnpike Commission to a political subdivision, comparable to the governmental entities which were held vulnerable to suit under the *Ayala* decision. Moreover, the court indicated that two factors would be important in determining whether an agency is so closely aligned with the Commonwealth that it is cloaked with immunity: whether the interstate body is financially dependent on the Commonwealth, and whether the agency can make the Commonwealth liable for its debts. It is this analysis enunciated in *Specter* which, presumably, will be the future touchstone for determining immunity of Pennsylvania intrastate agencies and multi-state public corporations.

The implications of *Specter* on the sovereign immunity of interstate agencies, however, must be assessed with caution since the decision might well be result-oriented, dictated more by impatience with an old doctrine than by thoughtful analysis of its ramifications on intrastate and multi-state agencies. If the Pennsylvania Turnpike Commission, a one-state entity operating exclusively within the geographic confines of the state and controlled ultimately by the Pennsylvania legislature alone, is not considered "the Commonwealth" or its agency, then a multi-state agency, affected by the constitutions and legislatures of more than one state and operating without the boundaries of Pennsylvania, could hardly be considered "the Commonwealth" or its agency for purposes of applying sovereign immunity. Yet this is precisely what the commonwealth court decided in a 1976 case, *Kennedy v. Delaware River Joint Toll Bridge Commission*. The court had to consider whether the Bridge Commission was covered by Pennsylvania's sovereign immunity doctrine and whether it was the "Commonwealth" within the meaning of the Appellate Court Jurisdiction Act. The commonwealth court held that the DRJTC did fall under the Commonwealth's umbrella of sovereign immunity. It based its decision on *Anderson Appeal* and distinguished *Specter* on the grounds that the *Specter* decision was

81. *Id.* at 482-83, 341 A.2d at 485.
82. *Id.* at 493, 341 A.2d at 490.
83. Indeed, the *Specter* court made it clear that it remained of the opinion that only the legislature could abolish sovereign immunity. Its decision was made in light of its "abrogation of governmental immunity in *Ayala* and the trend in recent years to do away with immunities from suit which are neither constitutionally nor statutorily compelled . . . ." *Id.* at 479, 341 A.2d at 483.
85. *Id.* at 666, 354 A.2d at 54.
based on the financial independence of the Turnpike Commission. The court reasoned: "Although the legislature has chosen to give a measure of independence to the defendant, its financial ties to the Commonwealth make Specter inapposite and dictate our holding that the defendant is the 'Commonwealth' and is surrounded by the cloak of sovereign immunity." By determining that the DRJTBC was a commission of the Commonwealth for purposes of the Appellate Court Jurisdiction Act, the commonwealth court concluded that it had original jurisdiction.

**FEDERAL LAW**

A plaintiff may feel that a more satisfactory means of resolving issues involving multi-state public corporations may be obtained in federal court. Before this is possible, however, he must pass several hurdles. First, a jurisdictional basis must be asserted. He might allege that a federal question is involved when his case's central issue concerns a federally approved compact; thus federal subject matter jurisdiction should lie. But it has been generally held that there is only federal question jurisdiction if the construction of a clause in the compact is an issue raised by the plaintiff's complaint. It is not enough if the issue is merely one of interpreting the

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86. The court pointed out that the DRJTBC received support from the Commonwealth in maintaining bridges. It further distinguished Specter on the basis that the DRJTBC "operates bridges owned by the two states, while the Turnpike Commission acquires and maintains real property in its own name." *Id.* at 668, 354 A.2d at 55.

87. *Id.*

88. *Id.*

89. It is possible that a state court will be more concerned with its state interests than with protecting the national interests upon which the compact is founded. Comment, *Federal Question Jurisdiction to Interpret Interstate Compacts*, 64 Geo. L.J. 87 (1975) [hereinafter cited as Comment].


91. For an analysis of case law indicating that interstate compact issues are federal questions see Comment, *supra* note 89, at 88-101. Federal question jurisdiction is provided for by 28 U.S.C. § 1331 (1970): "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

“sue and be sued” clause when immunity is raised as a defense.\textsuperscript{3} Moreover, mere congressional approval of a compact does not raise it to the level of a federal statute.\textsuperscript{4} Courts have also been reluctant to find subject matter jurisdiction on the ground that the interstate agency involves interstate commerce,\textsuperscript{5} and the only remaining jurisdictional basis, diversity of citizenship,\textsuperscript{6} presents the additional problem that a multi-state corporation must be considered a citizen of each member state.\textsuperscript{7} Thus it may often be impossible to demonstrate the requisite diversity of parties.\textsuperscript{8}

Even if it is determined that the federal court has jurisdiction, it must be resolved whether the agency is “the state” or its “alter ego.” If it is decided that the interstate agency is “the state,” the eleventh amendment\textsuperscript{9} may bar a federal court from entertaining a

\textsuperscript{5} Mere construction of an interstate bridge or the agency’s involvement in interstate commerce is not enough to confer jurisdiction where the impingement of federal law is not a part of the plaintiff’s case, notwithstanding 28 U.S.C. § 1337 (1970), which reads: “The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.” The Court of Appeals for the Third Circuit held in Yancoskie v. Delaware River Port Auth., 528 F.2d 722, 724-25 (3d Cir. 1975), that the “arising under” requirement of § 1337 had not been met when the issue involved construction of an interstate compact.
\textsuperscript{6} 28 U.S.C. § 1332 (1970) provides that “district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—(1) citizens of different States; (2) citizens of a State, and foreign states or citizens or subjects thereof; and (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.”
\textsuperscript{7} Under 28 U.S.C. § 1332(c) (1970), a corporation, for purposes of determining diversity of citizenship, must be considered a citizen of “any State by which it has been incorporated and of the State where it has its principal place of business . . . .” \textit{See} Yancoskie v. Delaware River Port Auth., 528 F.2d 722, 726-27 (3d Cir. 1975); 1 \textsc{Moore’s Federal Practice} ¶ 0.78(2), at 723.50 (2d ed. 1976); \textsc{Wright}, \textit{supra} note 90, at 101-07.
\textsuperscript{8} An immediate impediment raised by the multiple citizenship of a corporation is that in many cases it will not be able to meet the test of complete diversity between plaintiffs and defendants required by the rule of Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). Another “potential impediment to diversity jurisdiction” is “that neither a state nor ‘an arm or alter ego’ of the state is a ‘citizen’ for purposes of diversity.” \textit{Comment}, \textit{supra} note 89, at 88 n.4, \textit{citing} Moor v. County of Alameda, 411 U.S. 693, 717-18 (1973). This latter impediment might be side-stepped if the agency has the power to sue and be sued. \textit{Comment}, \textit{supra} note 89, at 88 n.4.
\textsuperscript{9} U.S. CONST. amend. XI provides that “The judicial power of the United States shall
suit against the agency. Eleventh amendment immunity is distinct from a state's sovereign immunity; under federal law it is clear that even if a state has waived its sovereign immunity, eleventh amendment immunity may still apply: express language or a clear indication from a state that it has waived the eleventh amendment's bar would be necessary. In *Intracoastal Transportation, Inc. v. Decatur County,* the court noted that a waiver could be found if: (1) a state enters a field regulated by federal statute; (2) Congress has specifically conferred the remedy to private parties for violations of the applicable federal regulatory statute; and (3) Congress has expressly provided that a private remedy was applicable to the states. In *Red Star Towing & Transportation Co. v. Department of Transportation,* the court found that the state had not waived its immunity from suit under the eleventh amendment merely by operating bridges spanning a navigable body of water and by engaging in interstate commerce. The court held that since Congress created no private cause of action for violations of the safety provisions of the Rivers and Harbors Act, there was no waiver.

An analysis like that enunciated in *Intracoastal* has not, however, always been relied upon by the courts in resolving eleventh amendment immunity questions in the context of interstate compacts. In *Petty v. Tennessee-Missouri Bridge Commission,* a 1959 case, a waiver was found without any consideration even resembling such an analysis. In *Petty,* however, Congress had included a special condition in the interstate compact before approving it that "nothing herein contained shall be construed to affect, impair, or

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not . . . extend to any suit . . . commenced or prosecuted against one of the United States by Citizens of another State . . . ."  

101. 482 F.2d 361 (5th Cir. 1973).  
102. *Id.* at 365. *But see id.* at 368 (Wisdom, J., dissenting).  
103. 423 F.2d 104 (3d Cir. 1970).  
105. 423 F.2d at 105.  
106. *Id.*  
108. *Id.* at 278-79. The Petty case involved a suit under the Jones Act, 46 U.S.C. § 688 (1970), against a bi-state corporation established pursuant to a congressionally approved compact which contained the standard "sue and be sued" clause.
diminish any right, power, or jurisdiction of . . . any court . . . of
the United States over or in regard to any navigable water or any
commerce between the States . . . .”\textsuperscript{109} The case involved a suit
against a bi-state corporation established pursuant to the congres-
sonally approved compact which contained the standard “sue and
be sued” clause. Although \textit{Petty} generally speaks in terms of the
eleventh amendment, there is other wording in the case which
leaves in doubt whether the decision also refers to sovereign immu-
nity. The Court stated that Congress “approved a sue-and-be-sued
clause in a compact under conditions that make it clear that the
States accepting it waived \textit{any} immunity from suit which they oth-
erwise might have.”\textsuperscript{110} Pointing out that a navigable river and inter-
state commerce were involved, the United States Supreme Court
said that this proviso, combined with the “sue and be sued” clause
in the compact, amounted to a waiver of the state’s immunity.\textsuperscript{111}
Taken together, \textit{Petty} and \textit{Intracoastal} suggest that the actual lan-
guage of an interstate compact should be closely examined to deter-
mine whether eleventh amendment immunity has been waived. Of
course, there is no eleventh amendment immunity problem if it is
determined that the agency is not “the state” or an agent of any of
the participating states.\textsuperscript{112} Thus, determining whether the agency is
“the state” or its “alter ego” leads back to the analytical factors
encountered in the sovereign immunity discussion.\textsuperscript{113} A particularly
important factor when the immunity issue is being decided for elev-
enth amendment purposes concerns the source of possible payment
for claims against the agency. In \textit{Urbano v. Board of Managers,}\textsuperscript{114}
the test used by the court was whether a damage payment would
come from the state treasury. Since it would not, the court con-
cluded that the agency was not the state or its “alter ego” to be
shielded by the eleventh amendment.\textsuperscript{115}

\textsuperscript{109} Id. at 281.
\textsuperscript{110} Id. at 280 (emphasis added).
\textsuperscript{111} Id. at 279-80.
\textsuperscript{112} In Bartron v. Delaware River Joint Toll Bridge Comm’n, 216 F.2d 717 (3d Cir. 1954),
a federal court in New Jersey held that the DRJTBC was not the state for jurisdictional
purposes, but merely a public corporation.
\textsuperscript{113} See notes 48-70 and accompanying text supra.
If there is diversity jurisdiction and no eleventh amendment immunity, the federal court, under the *Erie* doctrine,\(^{116}\) sits as a diversity court and refers to the law of the forum state to resolve substantive issues.\(^{117}\) Thus, once again the complicated question of how the state courts will treat the agency with regard to state sovereign immunity is faced. If the suit were to involve Pennsylvania, the trend away from sovereign immunity might influence the federal court's decision. In *Kennedy v. Delaware River Joint Toll Bridge Commission*,\(^{118}\) a federal district court reviewed the reasoning of *Specter* and stated that "the Supreme Court of Pennsylvania would conclude that the Delaware River Joint Toll Bridge Commission may be sued for negligent maintenance and operation."\(^{119}\) Yet, the state supreme court has not yet spoken on the issue and presupposing its future treatment of the multi-state public corporation may be unreliable. Indeed, a commonwealth court decision involving the same parties\(^{120}\) lobbies for treatment contrary to the federal court's conclusion.

**CONCLUSION**

The resolution of issues—procedural and substantive—involving interstate public corporations is a complicated, overlapping affair that has produced a twisted, shifting body of uncertain law. A predominant issue in that confusion is the question of whether the agency is "the state" and, if so, which state. A more comprehensible, consistent body of law might develop if the courts were to begin regarding multi-state public corporations in light of their historical bases, organizational structures, and purposes. Agencies formed by interstate compacts are distinct entities, created to solve regional problems of a diverse nature, and etiologically removed from any of the participating states. Once created, they become totally separate entities which should be neither controlled by nor subject to the

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116. *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938) (federal district court judges are obliged in diversity cases to apply the law of the forum state).
119. *Id*. at 4.
120. *See* notes 84-88 and accompanying text *supra*. 
A comprehensible body of federal common law would seem the better way to maintain logical and consistent case analysis, uniformity and measured national progression.121 Divergent state court results would be avoided by applying the federal law.122 In federal court, the initial jurisdictional dilemmas could be solved by simply deciding that an interstate compact is a law of the United States and by finding subject matter jurisdiction pursuant to a federal question.123 The need for court interpretation of the "sue and be sued" clause could fulfill the "arising under" requirement.124 This approach, however, might not always be applicable where the action is not found to directly "arise under" the interstate compact. Therefore, the surest way to prevent dismissal of the cases by federal courts would be the enactment of a new United States Code provision, allowing for federal court jurisdiction whenever a multi-state public corporation is a party to a suit. This might be accomplished by an amendment to the federal question statute already in effect,125 or by promulgation of an entirely separate statutory section.

A significant effect of such an amendment would be the avoidance of the problems of unclear state law, competing states' interests, and, possibly, eleventh amendment immunity. It would allow for the development of the law of interstate compacts outside of the parochialism of any one state. As a result, interstate compact law would reflect the regional thrust which is the central basis of these multi-state corporations.

123. See notes 90-94 and accompanying text supra. See also League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 507 F.2d 517 (9th Cir. 1974), cert denied, 420 U.S. 974 (1975).