

AUBURN UNIVERSITY
MEMORANDUM ON GOVERNING LAW, JURISDICTION, AND VENUE

As an instrumentality of the State of Alabama, Auburn University is granted sovereign immunity under Article I, Section 14 of the Alabama Constitution, which reads that “[t]he State of Alabama shall never be made a defendant in any court of law or equity.” See *Gulf State Park Auth. v. Gulf Beach Hotel, Inc.*, 22 So. 3d 432, 435 (Ala. 2009). The wall of immunity erected by Section 14 has been described as “nearly impregnable.” *Sanders Lead Co. v. Levine*, 370 F.Supp. 1115, 1117 (M.D.Ala.1973). Further, actions against officers, trustees, and employees of state universities in their official capacities are likewise barred by Section 14. *Hutchinson v. Bd. of Trustees of Univ. of Ala.*, 288 Ala. 20, 256 So.2d 281 (1971).

Sovereign immunity is also conferred on the federal level by the 11th Amendment to the United States Constitution and, absent a valid waiver or abrogation, Auburn may not be sued in federal court for either money damages or injunctive relief. See *McCray v. Auburn Univ. Montgomery*, 2012 U.S. Dist. LEXIS 32388, at *5 (M.D. Ala. 2012).

With regard to a waiver of sovereign immunity, “it appears that no consent could be given under Art. 1, Section 14, of the Alabama Constitution.” *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (emphasis added). See also *Ex parte Franklin Cty. Dep’t of Human Res.*, 674 So. 2d 1277, 1279 (Ala. 1996) (holding the State of Alabama shall **never** be made a defendant in **any** court of law or equity and the State and its agencies have absolute immunity from **any** suit in **any** court) (emphasis added). An action against an instrumentality of the state “presents a question of subject matter jurisdiction, which cannot be waived or conferred by consent.” *Ex parte Bessemer Bd. of Educ. and Davis Middle Sch.*, 2013 Ala. LEXIS 162, at *3 (Ala. Nov. 15, 2013). Furthermore, the negligent performance of a statutory duty does not operate to remove the Section 14 shield of immunity. See *Oliver v. Townsend*, 534 So. 2d 1038, 1044 (1988). Those dealing with the state are charged with knowledge of its immunity. See *Williams v. John C. Calhoun Cmty. Coll.*, 646 So. 2d 1, 4 (Ala. 1994). It does not appear Auburn can voluntarily waive its immunity in an agreement.

Further, Alabama Code makes it clear that the exclusive venue for any claim for damages against Auburn must be the Alabama State Board of Adjustment, which exists to resolve all claims against the State or any of its institutions, arising out of any contract to which its institutions are parties, where there is claimed a legal or moral obligation resting on the state.” See Ala. Code § 41-9-60, *et seq.*

In *Castellanos v. Board of Trustees of Univ. of Alabama School of Medicine*, 264 So.3d 850 (2018), the Supreme Court of Alabama held that a party could not compel arbitration against a state university, given § 14 immunity, even where the agreement between the parties contained an arbitration provision. As such, Auburn is unable to accept an arbitration clause in any agreement, and the university’s binding dispute resolution must comply with the statutory requirements of Alabama Code Section 41-9-60 *et seq.*, setting the exclusive forum for most claims as the Alabama Board of Adjustment. Additionally, Alabama Code 1-1-41(3) makes contractual arbitration clauses unenforceable under state law.

Due to its status as a state government entity, Auburn University is prohibited from agreeing to indemnify, defend, or hold harmless another party, and we will not enter into any contract which requires the university to do so, whether by specific terms or through indicia.

Alabama's Attorney General has instructed that almost any agreement to indemnify or hold harmless another party violates the sovereign immunity conferred on Auburn by Article 1 Section 14. *See Ala. Attorney Gen. Opinion No.85-00460 and 85-00413.* By entering into an indemnification/hold harmless provision, Auburn University would, as a practical effect, be agreeing to become a defendant in violation of Section 14 in the event that such a provision was invoked. As such, the University has no discretionary ability to execute a contract that would require Auburn to indemnify another party.