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U.S. Supreme Court Holds Tribal Sovereign Immunity Expressly Abrogated by U.S. Bankruptcy Code

By Barbra R. Parlin and Lynne B. Xerras*

In this article, the authors take a close look at the U.S. Supreme Court's decision in Lac du Flambeau Band of Lake Superior Chippewa Indians, et al. v. Coughlin*, holding that the Bankruptcy Code evinces Congress' clear intent to abrogate the sovereign immunity of any and every type of government, including Native American tribes.*

The U.S. Supreme Court recently issued a decision of great importance to Native American tribes and their attorneys in the otherwise innocuous case of *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*.[1] In the 8-1 opinion delivered by Justice Ketanji Jackson, the Supreme Court found that the U.S. Bankruptcy Code[2] "unambiguously abrogates tribal immunity," thereby affirming the decision of the U.S. Court of Appeals for the First Circuit in the underlying case of *In re Coughlin*, discussed below.[3] In doing so, the Supreme Court adopted the reasoning of *Krystal Energy Co. v. Navajo Nation*[4] and rejected the holding of *In re Greektown Holdings, LLC*.[5]

As with the circuit courts, the Supreme Court's analysis and holding involved interpretation of two separate, but interrelated, provisions of the Bankruptcy Code: (1) Section 101(27), defining the term "governmental unit,"[6] and (2) Section 106,[7] abrogating the sovereign immunity of those governmental units in a wide variety of proceedings invoking various Bankruptcy Code provisions.

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[1] 599 U.S. 382 (2023) (Opinion).

[2] Codified at 11 U.S.C. §§ 101, et seq. (Bankruptcy Code).

[3] In re Coughlin, 33 F.4th 600 (1st Cir. 2022), cert. granted sub nom. Lac du Flambeau Band v. Coughlin, 2023 WL 178401 (U.S. Jan. 13, 2023).

[4] Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1057 (9th Cir. 2004).

[5] In re Greektown Holdings, LLC, 917 F.3d 451 (6th Cir. 2019), cert. dismissed sub nom.

[6] The definition of "governmental unit" is contained within Bankruptcy Code, Section 101(27) as follows: "United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government." See 11 U.S.C. § 101(27).

[7] Section 106(a) of the Bankruptcy Code provides in relevant part:

While the full impact of this decision has yet to be determined, the Supreme Court has, at a minimum, eliminated the uncertainty regarding whether Native American tribes will be considered "governmental units" for purposes of the Bankruptcy Code regardless of the jurisdiction involved; the Supreme Court has answered this question in the affirmative.

THE PATH TO THE SUPREME COURT

As a contrast to the significance of the ruling, the financial value at stake when the parties were litigating before the U.S. Bankruptcy Court for the District of Massachusetts (Bankruptcy Court) in 2019 was relatively nominal. Petitioners are the Lac du Flambeau Band of Lake Superior Chippewa Indians, a federally recognized Indian tribe (Lac du Flambeau Band), together with several directly and indirectly owned corporate entities (collectively, Petitioners).[8]

One of those entities, Niiwin LLC (Niiwin), conducted business as an internet "payday" lender by the name of "Lendgreen," providing small, high-interest loans to individuals online. In July 2019, Brian W. Coughlin, a resident of the Commonwealth of Massachusetts, obtained a $1,100 "payday" loan from Lendgreen. He subsequently filed a Chapter 13 bankruptcy case before the Bankruptcy Court.

After that filing, Lendgreen continued to contact Coughlin to demand repayment of his debt despite the "automatic stay" of collection efforts imposed by Section 362 of the Bankruptcy Code upon filing of his case. Lendgreen's actions were alleged by Coughlin to have caused him severe emotional distress, and he filed a motion with the Bankruptcy Court seeking entry of an order pursuant to Sections 362(a)(6) and 362(k)(1) of the Bankruptcy Code (Stay Motion) enforcing the automatic stay as Lendgreen, as well as its parent entities, including the Band itself. Coughlin further requested an award of attorneys' fees and expenses as well as potential punitive damages for any violations of the automatic stay that the Bankruptcy Court found willful.

In response, the Lac du Flambeau Band and its subsidiaries elected to appear before the Bankruptcy Court and filed a "motion to dismiss" the Stay Motion for failure to "state a claim upon which relief can be granted" pursuant to Fed. R. Civ. P. 12(b)(6), and for lack of subject matter jurisdiction under Fed. R.

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
(1) Sections . . . 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, . . . of this title.
See 11 U.S.C. § 106(a).

[8] L.D.F. Business Development Corp., L.D.F. Holdings LLC, and Niiwin LLC.

Civ. P. 12(b)(1). The latter argument was premised on the well-settled principle that tribes enjoy common-law immunity from suit as sovereign nations, as the Supreme Court explained in *Michigan v. Bay Mills Indian Community*[9] and as supported by numerous other state and federal decisions. In addition, the Lac du Flambeau Band urged that it could not be held responsible for the actions of a separately incorporated subsidiary, Lendgreen, under principles of corporate law.

Coughlin countered by asserting that tribes and tribal entities are subject to suit since Congress abrogated the sovereign immunity of all "governmental units" as defined at Section 101(27) when it enacted Section 106(a) of the Bankruptcy Code. After extensive briefing and a virtual hearing, the Bankruptcy Court (Bailey, J.), issued a decision denying Coughlin's Stay Motion on the sole basis that the court lacked subject matter jurisdiction to issue an order since the Petitioners, as part of a sovereign nation, are "immune from suit in [the Bankruptcy Court]."[10] The Bankruptcy Court did not, therefore, address the merits of the dispute raised by the parties.

Coughlin appealed the Bankruptcy Court Decision directly to the U.S. Court of Appeals for the First Circuit pursuant to 28 U.S.C. §158(d). After further briefing and argument, in May 2022, the First Circuit reversed, siding with the U.S. Court of Appeals for the Ninth Circuit in *Krystal Energy* in holding that Section 106(a) of the Bankruptcy Code abrogated the sovereign immunity of Native American tribes, among other governmental units.[11]

THE SUPREME COURT'S DECISION

On January 13, 2023, the Supreme Court granted the Petitioners' Petition for Writ of Certiorari to resolve the split among the circuit courts of appeals, discussed briefly above, regarding whether Congress had expressly abrogated the sovereign immunity of Native American tribes and their businesses[12] when it indisputably did so for other "governmental units" through Section 106(a) enacted in 1978, as modified in 1994.[13] Oral argument was held on April 24,

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[9] Michigan v. Bay Mills Indian Community, 572 U.S. 782 (2014).

[10] In re Coughlin, 622 B.R. 491 (U.S.B.C. D. Mass. 2020) (Bankruptcy Court Decision).

[11] See Opinion, 599 U.S. at 386.

[12] It was undisputed that the Band's subsidiaries enjoyed whatever immunity enjoyed by the Band, as "arms of the Tribe." See Opinion, n. 1.

[13] It is well-settled that when Congress undertook to amend the Bankruptcy Code in 1994, it made its intention to abrogate the sovereign immunity of certain "governmental units" in Section 106 of the Bankruptcy Code in the clear and unequivocal manner required, in response

2023. At that hearing, the solicitor general, on behalf of the United States, participated in the oral argument as amicus curiae supporting Coughlin, as Respondent.[14]

The core issue before the Supreme Court in *Coughlin* was whether Congress unambiguously included Native American tribes within the Code's definition of "governmental unit" when the sovereign immunity of a varied form of governments was expressly abrogated through Section 106 of the Bankruptcy Code.

Writing for the majority, Justice Jackson determined that the only plausible interpretation of Section 101(27) is that Congress intended to include tribes within the "catch-all" phrase "or other foreign or domestic government," bringing tribes and their business enterprises within the scope of the term "governmental unit" for purposes of the Bankruptcy Code. This pairing by Congress of the "two extremes" of "foreign or domestic," Justice Jackson indicated, expressed "all-inclusiveness" in the scope of Section 101(27) and the defined term, and likewise, Section 106.[15] Justice Jackson's opinion recognizes that, under applicable Supreme Court precedent, federally recognized tribes have "common-law immunity from suit traditionally enjoyed by sovereign powers" and that for any sovereign's immunity to be abrogated by statute, Congress' intent to do so must be "unmistakably clear in the language of the statute."

In this case, the court found that Congress' abrogation of tribal sovereign immunity was "clearly discernable," since Section 106(a) was drafted to encompass all governments, a group that tribes indisputably belong to as sovereigns.[16] This broad interpretation, the Supreme Court held, was also

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to Supreme Court holding on two separate occasions that a prior version of that section was insufficiently clear to abrogate state and federal sovereign immunity. See 140 Cong. Rec. 27693 (Oct. 4, 1994) (citing Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96, 109 S.Ct. 2818, 106 L.Ed.2d 76 (1989) and United States v. Nordic Vill., Inc., 503 U.S. 30, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992)).

[14] Briefs amicus curiae were also filed by the National Association of Consumer Bankruptcy Attorney (NACBA), Separation of Powers Clinic, Citizens Equal Rights Foundation (CERF), Navajo Nation (et al.), Indian law professors and public citizens, and National Consumer Law Center (NCLC).

[15] Justice Jackson provided the example of "rain or shine" as an example of how the pairing of two extremes express all-inclusiveness, ultimately convinced that the pairing of opposite terms at the end of an extensive list supports an interpretation that includes "all" governmental units. Opinion, 599 U.S. at 389.

[16] In this regard, the Opinion likely has implications to sovereigns beyond Native American tribes.

supported by other "aspects of the Bankruptcy Code," in particular, that all "creditors" were required to abide by, for instance, the Bankruptcy Code's discharge provisions such that preserving only tribal sovereign immunity would render Native American tribes "immune from key enforcement proceedings while others would face penalties for noncompliance." As Justice Jackson noted, this unfair disparity in treatment would create an anomaly in the Bankruptcy Code.

In his concurring opinion, Justice Clarence Thomas was quick to express his belief that "to the extent that tribes possess sovereign immunity at all," immunity should not extend to suits involving a tribe's commercial activities conducted beyond its territories. He stated his concern that tribal immunity "creates a pathway to circumvent vast swaths of both state and federal laws," a trend that Justice Thomas described as getting "worse over the years" following the Supreme Court's decision in *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*[17] Rather than accepting the "flawed premise of tribal immunity and deciding the abrogation question beyond the looking glass," Justice Thomas suggested that the court should simply abandon its "judicially created tribal sovereign immunity doctrine," since Congress has yet to act.

Justice Neil Gorsuch was the lone dissent, interpreting the phrase, "other foreign or domestic government," to exclude Native American tribes as neither exclusively foreign or exclusively domestic forms of governments, but more of a "hybrid" under well-established Supreme Court precedent. He was troubled by Congress' failure to include a reference to "Indian," "Native American" or "tribes" within Section 106 as Congress had done in every other instance of express abrogation of tribal immunity. Rather than attempting to "construe" Section 106 in light of the "policies underlying the Bankruptcy Code," Justice Gorsuch suggested that it was the court's task to employ a methodical interpretation of the provisions at issue, regardless of the impact of that interpretation on other creditor classes.

That task, he held, did not support the majority's holding. "Respectfully, I do not think the language here does the trick. The phrase 'other foreign or domestic government' could mean what the Court suggests: every government, everywhere," Justice Gorsuch wrote, continuing, "it could also mean what it says: every 'other foreign . . . government'; every 'other . . . domestic

[17] Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 756 (1998). In this case, the Supreme Court considered whether Indian tribes may be sued in state courts for breaches of contract involving off-reservation commercial conduct. Justice Anthony Kennedy, writing for the majority, held that the subject and legality of tribal immunity should be considered by Congress, not by courts, and that Congress had not abrogated tribes' immunity from civil suit on contracts.

government.'" Since Justice Gorsuch was convinced that there was another plausible reading of the salient provisions of the Bankruptcy Code that did not support a finding that Congress had unequivocally abrogated the sovereign immunity traditionally held by tribes, he dissented from the Opinion and the majority holding.

SUMMARY

- Section 106(a) expressly abrogates the sovereign immunity of "governmental units" for purposes of certain bankruptcy-related litigation. A split of authority concerning whether that abrogation applies to Native American tribes as sovereigns widened in 2022 when the First Circuit held that tribes are "governmental units" that lack sovereign immunity from suit in proceedings initiated under the Bankruptcy Code.
- The Supreme Court agreed with the First Circuit, as well as the Ninth Circuit, in holding that the Bankruptcy Code evinces Congress' clear intent to abrogate the sovereign immunity of any and every type of government, including tribes.
- As a result of the Supreme Court's holding, Native American tribes and their business units are subject to suit before the U.S. bankruptcy courts, although the holding supports the presumption that tribes and their businesses are ineligible to file for relief as debtors and likely has broader implications.

KEY TAKEAWAYS FOR TRIBES AND THEIR COUNSEL

Again, the primary and most immediate impact of the Supreme Court's decision in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin* is to eliminate all uncertainty regarding whether Native American tribes and their related business ventures are "governmental units" for purposes of the Bankruptcy Code. Their sovereign immunity having been expressly abrogated through Section 106, Native American tribes are now subject to suit before the U.S. bankruptcy courts in connection with their commercial enterprises, including, for instance, in litigation initiated to recover allegedly preferential or fraudulent transfers received by tribes and for alleged violations of the automatic stay. As a corollary, no longer will filing of a claim serve as a waiver of the tribe's sovereign immunity, since Section 106(a) accomplished that in the first instance; when filing proofs of claim in pending bankruptcy cases, tribes will likely benefit from the extended deadline for filing proofs of claim available to "governmental units."

What remains unclear, though, is whether business entities formed by Native American tribes qualify for relief as "debtors" under the Bankruptcy Code, since

Section 109 of the Bankruptcy Code only provides eligibility to a "person" or "municipality"; a "governmental unit" is neither. That issue, though, is left for another day. In the meantime, tribes should consult with their bankruptcy counsel to determine how the Opinion and its holding will impact the way tribal businesses conduct their operations off-property going forward.