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Feature

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Tribal Sovereign Immunity from Preference Claims

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At first glance, § 106(a) of the U.S. Bankruptcy Code[1] seems clear-cut and without controversy. Its provisions serve to abrogate the sovereign immunity held by a "governmental unit" for various aspects of a bankruptcy case, including with regard to "avoidance action" litigation.[2] In turn, § 101(27) defines "governmental unit" as "United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, instrumentality of the United States (but not a United States [T]rustee 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."[3] The interpretation of these provisions, though, and their impact on the tribal sovereign immunity, has been less than clear. A recent decision of the U.S. Bankruptcy Court for the District of Delaware could provide much-needed guidance as to the appropriate statutory interpretation of § 106(a) based on historical concepts and ample U.S. Supreme Court precedent.

Unlike with regard to states whose sovereignty is embedded in the U.S. Constitution,[4] tribal immunity derives instead from federal common law — a law that continues to evolve. The foundation of this doctrine is the designation by our highest court of Native American tribes as "'domestic dependent nations' that exercise inherent sovereign authority over their members and territories."[5] Nonetheless, tribes' status as "dependents" renders them subject to Congress's plenary control, with Congress holding "the express power to legislate in respect to Indian tribes."[6] Despite this, the Supreme Court has made it clear that until Congress acts, Native American tribes retain their historic sovereign authority, including the "common-law immunity from suit [that is] traditionally enjoyed by sovereign powers."[7] These principles were recently reaffirmed by the Supreme Court in *Michigan v. Bay Mills Indian Comm.*, with the Court recognizing that it has consistently "treated the doctrine of tribal immunity [a]s settled law," dismissing the suit against a tribe absent a congressional authorization or waiver.[8] This waiver or abrogation must be "clear" and "unequivocally expressed"[9] by Congress in "explicit legislation."[10] "[C]ourts will not lightly assume that Congress in fact intends to undermine Indian self-governance."[11]

Against this backdrop, a divergence of case law has developed regarding whether § 106(a) contains such an express abrogation of tribal immunity. The Ninth Circuit Court of Appeals has answered this in the affirmative, holding that §§ 106(a) and 101(27) clearly evidence Congress' intent "to abrogate the sovereign immunity of *all* 'foreign and domestic governments'" given the inclusion within § 101(27)

1 11 U.S.C. § 101, *et seq.*
2 Section 106(a) of the Bankruptcy Code provides, in relevant part:
(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.
3 11 U.S.C. § 101(27).
4 The Eleventh Amendment to the Constitution provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const., Amend. XI.
5 *See Okla. Tax Comm'n v. Citizen Bank Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991) ("*Potawatomi*") (quoting *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L. Ed. 25 (1831)).
6 The Supreme Court has traditionally identified the Indian Commerce Clause, U.S. Const. (Art. I, § 8, cl. 3) and the Treaty Clause (Art. II, § 2, cl. 2) as sources of that power. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 552, 94 S. Ct. 2474, (1974); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172, n.7, 93 S. Ct. 1257 (1973); *see also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192, 109 S. Ct. 1698 (1989).
7 *Mich. v. Bay Mills Indian Cmty.*, __ U.S. __, 134 S. Ct. 2024, 2030 (2014) ("*Bay Mills*") (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("*Santa Clara*")).
8 *Id.* at 2030-31 (*Bay Mills*, 134 S. Ct. at 2030 (quoting *Kiowa Tribe of Okla. v. Mfg. Techs. Inc.*, 523 U.S. 751, 756 (1998) ("*Kiowa Tribe*"))).
9 *Santa Clara*, 436 U.S. at 58.
10 *See Bay Mills*, 134 S. Ct. at 2031 (quotation omitted); *see also Kiowa Tribe* at 754 (explaining that "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity"); *Santa Clara*, 436 U.S. at 58 ("Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers.").
11 *Bay Mills*, 134 S. Ct. at 2032 (citations omitted).

of the language "other foreign or domestic governments."[12] Relying on the Supreme Court's reference to Indian tribes as "domestic dependent nations,"[13] the *Krystal Energy* court made the following conclusion: "Congress explicitly abrogated the immunity of *any* 'foreign or domestic government.' Indian tribes are domestic governments. Therefore, Congress expressly abrogated the immunity of Indian tribes."[14]

As explained by the Ninth Circuit, just as Congress was not required to list each of the 50 states individually in order to abrogate sovereign immunity for all states, it was not required to explicitly reference Indian tribes in abrogating sovereign immunity for all domestic governments.[15] Lower courts in the Second, Ninth and Tenth Circuits have agreed with this interpretation of § 106(a).[16]

In 2012, the Eighth Circuit Bankruptcy Appellate Panel (BAP) in *In re Whitaker* expressly rejected *Krystal Energy*, explaining that "the several steps needed to justify the holding … is far from an unequivocal expression of Congressional intent to abrogate the tribes' immunity, stated in explicit legislation."[17] Instead, the *Whitaker* court was convinced that due to the absence of the language referencing Indian tribes or Native Americans in § 106(a), as was a typical practice of Congress to evidence its intent to abrogate tribal sovereign immunity, the enactment of § 106(a) did not impact tribal immunity.[18]

Three years later, the U.S. District Court for the Eastern District of Michigan in *In re Greektown Holdings* expressly adopted the reasoning of *In re Whitaker* and rejected the *Krystal Energy* line of decisions, explaining that "these decisions do not recognize that there is not one example in all of history where the Supreme Court has found that Congress intended to abrogate tribal sovereign immunity *without* expressly mentioning Indian tribes somewhere in the statute."[19] The *Greektown* court was convinced that Congress must utter words that "beyond equivocation or the slightest shred of doubt mean 'Indian tribes,'" and that the language of § 101(27) could not be interpreted to abrogate tribal sovereign immunity based on Supreme Court precedent and guidance.[20] Lower courts in the Third and Sixth Circuits have similarly interpreted § 106(a).[21]

Most recently, these principles converged on the Delaware Bankruptcy Court in connection with the jointly administered chapter 11 cases of Money Center of America Inc. (MCA) and its subsidiary, Check Holdings Inc. (CHI) (together with MCA, the "debtors").[22] Before their bankruptcy filings,[23] the debtors provided check-cashing, ATM and other cash-access services to gaming operators in exchange for a fee. CHI also offered debt-collection services to its casino customers. During the cases, a group of casino operators that had contracted with the debtors to receive cash-access services filed an action with the Delaware Bankruptcy Court alleging that CHI was holding their cash assets (the "initial suit"). Quapaw Casino Authority of the Quapaw Tribe of Oklahoma, the owner and operator of a casino in Miami, obtained an order permitting it to intervene in the initial suit and sought a declaration that funds collected by CHI on Quapaw's behalf were not property of CHI's estates. Quapaw also filed a proof of claim to recover those funds. In response, the chapter 11 trustee appointed in the cases filed an answer and asserted a counterclaim against Quapaw, seeking to recover preferential transfers paid to Quapaw prior to CHI's bankruptcy filing (the "Quapaw suit").[24] Separately, the chapter 11 trustee initiated a suit against Thunderbird Entertainment Center Inc. (with Quapaw, the "casinos"), an Oklahoma casino owned by the Absentee Shawnee Tribe (with Quapaw, the "tribes"), to recover preferential transfers paid to Thunderbird.[25]

Each casino moved for dismissal of the chapter 11 trustee's claims against it (the "motions to dismiss"), arguing that (1) the suit against Native American tribes is barred by the doctrine of tribal immunity; (2) Congress has not abrogated that immunity through the Bankruptcy Code; and (3) tribal sovereign immunity extended to the casinos as subdivisions of the tribes. In opposition, the chapter 11 trustee urged that Congress abrogate tribal sovereign immunity in connection with preference litigation through § 106(a). As support for his interpretation of § 106(a) and position, the trustee referred the Delaware Bankruptcy Court to the "leading case" on this issue, *Krystal Energy*, through which the Ninth Circuit Court of Appeals concluded that Indian tribes fall within the catch-all phrase "domestic governments" contained in § 101(27).

Upon consideration of the corresponding briefs and argument, the Delaware Bankruptcy Court issued an opinion on Feb. 28, 2017 (the "decision"), holding that Congress *did not unequivocally abrogate Native American sovereign immunity* when it enacted § 106(a) and waived sovereign immunity with regard to "governmental units."[26] Declining to follow *Krystal Energy*, Judge Sontchi instead agreed with *In re Whitaker* and *In re Greektown Holdings* that since the Bankruptcy Code's definition of "governmental unit" *does not explicitly refer to Indian tribes* and it certainly could have, § 106 did not abrogate tribal immunity. In so holding, Judge Sontchi stated that:

> Although the Supreme Court has noted that Congress need not state its intent in a particular way (*i.e.*, use "magic words"), the abrogation of immunity needs to be clearly discernible from the statutory text; however, the *Greektown* court noted that there is not a single example in which the Supreme Court has found that Congress intended to abrogate a tribe's sovereign immunity without specifically using the words "Indians" or "Indian tribes."[27]

Without the reference to "Indian tribes" in § 101(27), the Delaware Bankruptcy Court was not convinced that Congress unequivocally expressed an intent to abrogate the sovereign

12 *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1057 (9th Cir. 2004) (emphasis in original).
13 *Id.* at 1057 (quoting *Potawatomi*, 498 U.S. at 509).
14 *Id.* at 1058.
15 *Id.* at 1059.
16 *See In re Vianese*, 195 B.R. 572, 575-76 (Bankr. N.D.N.Y. 1995); *In re Platinum Oil Props. LLC*, 465 B.R. 621, 643-44 (Bankr. D.N.M. 2011); *In re Russell*, 293 B.R. 34, 44 (Bankr. D. Ariz. 2003).
17 *In re Whitaker*, 474 B.R. 687, 693 (B.A.P. 8th Cir. 2012).
18 *Id.* at 695.
19 *In re Greektown Holdings LLC*, 532 B.R. 680, 693 (E.D. Mich. 2015) (emphasis in original).
20 *Id.* at 701.
21 *In re Nat'l Cattle Cong.*, 247 B.R. 259, 267 (Bankr. N.D. Iowa 2000); *Subranni v. Navajo Times Publ'g Co. Inc.*, Adv. Pro. No. 15-02497-ABA (Bankr. D.N.J. April 29, 2016).
22 Captioned as *In re Money Center of America Inc.*, Case No. 14-10603 (CSS), and *In re Check Holdings LLC*, Case No. 14-11304 (CSS).
23 MCA's case was filed on March 21, 2014; CHI's case was filed on May 23, 2014.
24 The Quapaw suit is Adv. Proc. No. 14-50437 (CSS).
25 Several other casinos were also sued under 11 U.S.C. § 547 but either defaulted or settled with the chapter 11 trustee.
26 *Baxter v. Thunderbird Entm't Ctr. Inc. (In re Money Ctrs. of Am. Inc.)*, Adv. Pro. No. 16-50410-CSS (Bankr. D. Del. Feb. 28, 2017), Docket No. 10.
27 Decision at p. 27 (citing *Greektown Holdings*, 532 B.R. at 699).

immunity of Indian tribes through § 106(a) in accordance with Supreme Court guidance.[28]

As a corollary, the Delaware Bankruptcy Court also held that the tribes' sovereign immunity extended to the casinos under the Ninth Circuit's holding of *Allen v. Gold Country Casino*,[29] and that the purpose of the Indian Gaming Regulatory Act is to "promote tribal economic development, self-sufficiency, and strong tribal governments."[30] Judge Sontchi determined that each casino was established by its respective tribe through tribal ordinances and interstate gaming contracts in order to generate revenue for the tribes, such that it functioned as an "arm of the Tribe" enjoying the tribe's sovereign immunity.[31]

Issuance of the decision resulted in a dismissal of the suit against Thunderbird in its entirety. The Delaware Bankruptcy Court refused to dismiss the suit against Quapaw in order for it to subsequently determine whether the chapter 11 trustee holds an affirmative defense of recoupment to Quapaw's affirmative claim against Quapaw. Such a ruling will result in a waiver of Quapaw's sovereign immunity on a limited basis; affirmative recovery above the amount of Quapaw's claim amount will be precluded. The trustee has since appealed the decision in each suit, and his motion for leave in order to appeal the decision with regard to Quapaw (docketed on March 13, 2017) is pending.

Conclusion

With issuance of the decision, a significant number of courts have now held that a Native American tribe is not a "governmental unit" as that term is defined in § 101(27). While offering clarity as to § 106(a), the decision and the *Whitaker* line of cases arguably and unintentionally create uncertainty in other provisions of the Bankruptcy Code, such as § 109, indicating who might be a debtor, the corresponding definition of "person," and in calculating the applicable deadline for Native American tribes to file proofs of claim. Judge Sontchi has provided guidance with regard to §§ 502(d) and 106(b), holding those sections inapplicable to Quapaw as not being a "governmental unit,"[32] but there are additional ramifications flowing from the Delaware Bankruptcy Court's judicial interpretation of § 101(27) that have yet to manifest. It remains to be seen whether Congress will act to rectify the inconsistencies seemingly apparent on the face of the Bankruptcy Code, and if not, how tribes and their counsel adopt their practices in light of this uncertainty. abi

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28 The decision follows closely on the heels of oral argument before the Supreme Court in *Lewis v. Clarke*, Supreme Court Case No. 15-500, a case involving consideration of whether a tribe's sovereign immunity protects a casino employee from tort claims following an automobile accident that occurred on nontribal land.

29 464 F.3d 1044, 1046-47 (9th Cir. 2006).

30 25 U.S.C. § 2701, *et seq.*

31 Decision at pp. 16-21.

32 Section 106(b) results in abrogation of sovereign immunity when a governmental unit files a proof of claim; § 502(d) prevents a creditor from recovering on his/her/its claim until it repays preferential transfers to a debtor's estate.