TRENDS IN TRIBAL BUSINESS-RELATED LITIGATION

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The years 2009 and 2010 featured fairly dramatic litigation over American Indian business interests as the national economic downturn of late 2008 hit Indian Country particularly hard. This summary will discuss four principle topic areas: sovereign debt, labor relations, taxation and sovereign immunity. An update of the litigation case-by-case follows.

The fate of sovereign debt was the biggest story. The largest Indian gaming operation, Foxwoods Resort Casino owned by the Mashantucket Pequot Nation, defaulted on hundreds of millions of dollars of loans in mid-2010. And several other Indian gaming and resort operations, most notably those owned by the Pojoaque Pueblo and the Little Traverse Bay Bands of Odawa Indians, also defaulted or threatened to default on major loans, dropping credit ratings to junk bond levels. No Indian gaming operation has entered into bankruptcy so far, with the limited exception of the Greektown Casino Hotel, owned and operated under state law by the Sault Ste. Marie Tribe of Chippewa Indians. The Sault Tribe took Greektown into a surgical bankruptcy, only to have the strategy blow up in their faces, largely as a result of the opposition to continued tribal ownership by the Michigan Gaming Control Board. In July, the Sault Tribe lost all ownership stake in the casino.

The biggest Indian tribe sovereign debt story by far, however, came in *Wells Fargo Bank, N.A. v. Lake of the Torches Economic Development Corp.*, pending now in the Seventh Circuit. There, the federal district court held that a trust indenture agreement guaranteeing an investment in an off-reservation gaming operation by the Lac du Flambeau Band of Lake Superior Chippewa Indians actually constituted a gaming management contract under the Indian Gaming Regulatory Act. As such, since neither party sought or received the approval by the National Indian Gaming Commission required to validate the agreement under federal law, the efforts by the Band's creditors to enforce the trust indenture failed. Few Indian gaming lending agreements utilize this kind of trust indenture, limiting the reach of the decision (assuming it is upheld on

appeal), but the symbolic impact of the decision could be huge. The possibility that Indian tribes could utilize federal Indian law to opt out of debt obligations most certainly frightens some investors.

A second big story for Indian Country businesses was the continued successful efforts by the federal government to apply federal employment laws to tribally-owned businesses. A second big story for Indian Country businesses is the continued successful efforts by the federal government to apply federal employment laws to tribally-owned businesses. The reverberations from the *San Manuel* case continue to be felt throughout Indian Country.

In *NLRB v. Fortune Bay Resort Casino*, the Bois Forte Band of Chippewa Indians was unsuccessful in preventing the National Labor Relations Board from exercising subpoena power over the casino. The Board was looking for information relating to the role of the casino in interstate commerce, the role of federal jurisdiction in the case, various attributes of tribal sovereignty and the role of the casino as an employer under the National Labor Relations Act. This decision has made clear that as tribal business enterprises become increasingly "serious competitors with non-Indian owned businesses," to quote San Manuel, the federal courts seem more and more willing to apply NLRA jurisdiction over them. The Court identified a number of federal employment statutes, now applying to tribes, at least in the 9th Circuit. These include the NLRA, Occupational Safety and Health Act, Employee Retirement Income Security Act and the Contraband Cigarette Trafficking Act, which had a number of cases applying it this year.

Beyond *Fortune Bay*¸ federal Indian Labor law has had mixed results for tribes. Tribes were protected by sovereign immunity against certain hostile work environment claims, and in *Geroux v. Assurant*, out of Michigan's Western District, a dispute over a tribal benefits plan was remanded back to tribal court. On the other hand, Alaska Native Corporations found themselves increasingly subject to federal laws, including EEOC (*Blasic v. Chugach Support Services)*, ADA and FMLA (*Pearson v. Chugach Government Services)*. Finally, the Department of Labor was successful in asserting jurisdiction over a tribal business under the Occupational Safety and Health Act in *Menominee Tribal Enters. v. Solis*.

Tribal interests continued to suffer defeats in the area of Indian taxation, as federal courts held that local governments may tax on-reservation businesses owned largely by non-Indians, as in *Confederated Chehalis Tribes v. Thurston County*. In *Muscogee (Creek) Nation v. Oklahoma Tax Commission*, the Tenth Circuit held that tribes may not sue states to recover impounded

business assets (in that case, tobacco products). That decision, along with *White Earth Band of Chippewa Indians v. County of Mahnomen*, where a tribe tried to seek money damages from the county, was also made on Eleventh Amendment grounds. In addition, a series of cases involving Native Wholesale Supply demonstrated the limits of inter-tribal trade claims and tribal incorporation to avoid state cigarette tax schemes. Specifically, in *Muscogee (Creek) Nation v. Henry*, the tribe was unable to receive an injunction to prevent the state from seizing cigarettes traveling across state land, even if the cigarettes were coming from a Native manufacturer, as, among other reasons, tribal immunities from state taxes only extend to commerce within a tribe, not intertribal commerce

Finally, as Congress was passing legislation designed to eliminate internet sales of on-reservation smokes to individual buyers, state and federal courts were generally going along with efforts of state governments to force tribal interests to comply with the Master Settlement Agreement between 46 states and the major tobacco producers. A specific example includes *Grand River Enterprises Six Nations v. Beebe*, where all claims against participating in the Master Settlement Agreement were denied, including Commerce Clause, Equal Protection, substantive and procedural due process and free speech claims.

On the plus side for tribal interests, federal and state courts largely affirmed the immunity of tribal owned businesses from suit. The Sixth Circuit held that a tribally-chartered corporation is immune from suit in *Memphis Biofuels, LLC v. Chicksaw Nation Industries, Inc*. Lower courts followed suit in similar cases, such as *Somerlott v. Cherokee Nation Distributors*, where tribal commercial activities enjoyed sovereign immunity regardless of where the commercial activities take place or the number of non-Indians employed by the business, and *Madewell v. Harrah's Cherokee Smokey Mountains Casino*, though the Court there did remand to determine if the LLC running the casino would also enjoy immunity. The Eighth Circuit even found the opportunity to apply a Montana exception and subject a private party to tribal court jurisdiction in *Attorney's Process and Investigative Services v. Sac and Fox Tribe of Mississippi in Iowa*. In *Swanda Brothers v. Chasco Constructors*, the federal court found that a tribal constitution question regarding waiving tribal immunity properly belongs in tribal court. However, an agreement with an arbitration clause in it was read as a limited waiver of sovereign immunity in *Alltel v. Oglala Sioux Tribe*, forcing the tribe to arbitrate rather than forcing Alltel to exhaust tribal remedies.

Most interestingly, a federal district court in Oklahoma affirmed an arbitration judgment and ended some long litigation between the Choctaw and Chickasaw Nations against the State of Oklahoma. In this case, the Nations had signed model Class III gaming compacts approved by the voters of the state. In the compacts, the tribes and state agreed to arbitration to settle disagreements in the compact. However, the Oklahoma Supreme Court refused to stay the proceedings in three casino tort claims while the state and tribe arbitrated the question of proper jurisdiction for the cases. The Oklahoma Supreme Court found that the state courts had jurisdiction over the casino tort claims. However, after arbitration ended in favor of tribal jurisdiction, the tribes went to federal court to have the arbitration award enforced and to enjoin the state from asserting jurisdiction. The tribes won in federal court, and the state courts of Oklahoma were enjoined from exercising jurisdiction over these cases.

This was not the only case where arbitration clauses worked for the benefit of tribal interests. It is clear that arbitration clauses in contracts should be approached cautiously, as demonstrated in the *Oglala Sioux* case mentioned earlier where the court read an arbitration clause as a partial waiver of sovereign immunity; however, both the arbitration clause in the Choctaw and Chickasaw cases and in *Elem Indian Colony of Pomo Indians v. Pacific Development Partners*, ended up assisting tribal interests. In *Elem Indian Colony*, the tribe was able to get attorney's fees paid by the opposing party after the arbitrator found that the contract between Elem Indian Colony and Pacific Development Partners was void as an unapproved management contract. The arbitrator's findings that the tribe was also due costs and attorneys fees was upheld by the federal district court.

Litigation Update

Sovereign Debt

Wells Fargo Bank, N.A. v. Lake of the Torches Economic Development Corp., 677 F. Supp. 2d 1056 (E.D. Wis., 2010)(contract between bank and tribe was an unapproved management contract, and as such, the tribe was protected by sovereign immunity).

IGRA Negotiations & Contracts

Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger, 602 F.3d 1019 (9th Cir., 2010)(the state negotiated in bad faith when, in tribal-state compact negotiations, the state demanded 10-15% of tribe's profits and did not make meaningful concessions).

City of Duluth v. Fond du Lac Band of Lake Superior Chippewa, __ F.Supp.2d__, 2010 WL 1626912 (D. Minn., 2010)(res judicata applied to bar reconsideration of issues resolved in a consent decree and factual issues precluded summary judgment for the city on the issue of damages arising from a reduction in payments made to the city based on clarification of governing accounting principles).

Elem Indian Colony of Pomo Indians v. Pacific Development Partners X, LLC, 2010 WL 2035331 (N.D. Cal., 2010) (when a MOA or contract is void under both IGRA, as a management contract, and tribal law, due to failure to get approval of the council, and the parties submit to arbitration, the arbiter may award attorney's fees to the winning party if she has statutory or contractual authority to do so).

Federal Jurisdiction

CTGW, LLC v. GSBS, Pc., 2010 WL 2739963 (W.D. Wis., 2010) (the presence of an Indian tribe as a party in a case premised on federal diversity jurisdiction automatically destroys diversity as a tribe is a "stateless" entity).

Employment-Related Claims

Menominee Tribal Enters. v. Solis, 601 F.3d 669 (7th Cir., 2010)(tribe was not exempt from OSHA regulations either through treaty or management plan).

Dobbs v. Anthem Blue Cross and Blue Shield, 600 F.3d 1275 (10th Cir., 2010)(the amendment to ERISA's exception for government plans to include tribal governments applied retrospectively, though remand was warranted to determine whether the plan was a government plan under the amended definition).

Stewart v. Coffey, 2010 WL 774984 (10th Cir., Mar. 9, 2010) (unpublished)(petitioner failed to state a claim under §1983 or ICRA regarding termination from the gaming enterprise of the Comanche Nation).

Blasic v. Chugach Support Services, Inc., 673 F. Supp. 2d 389 (D. Md., 2009)(employee can bring an EEOC claim against an Alaska Native Corporation and its subsidiary, and summary judgment will be denied when there is a question of fact to be decided).

Bolt v. Iowa Enters., 2010 WL 1875667 (W.D. Okla., May 10, 2010)(petitioner failed to overcome sovereign immunity in a hostile work environment claim).

Geroux v. Assurant, Inc., 2010 WL 1032648 (W.D. Mich., 2010)(when lacking specific evidence that ERISA applied to a tribal benefits plan run by Assurant and Union Security, the district court remanded the case back to tribal court where the plaintiff originally brought the claim).

NLRB v. Fortune Bay Resort Casino, 688 F. Supp. 2d 858 (D. Minn., Feb. 25, 2010)(the National Labor Relations Board was not barred by sovereign immunity to issue a subpoena to the Fortune Bay Resort Casino regarding the Casino's effect on interstate commerce, attributes of tribal sovereignty and the Casino's status as an "employer" under the NLRA).

Pearson v. Chugach Government Services, Inc., 669 F. Supp. 2d 467 (D. Del., 2009)(an Alaska Native Corporation is exempt from Title VII claims, but not from ADA or FMLA claims).

Senator v. United States, No.2:05-cv-03105-RHW (E.D.Wa., 2010)(available at http://www.narf.org/nill/bulletins/dct/documents/senator-v-us-dct-order.pdf)(subpoena duces tecum was reasonable in scope and was brought for a legitimate purpose; NLRB issued subpoena pursuant to lawful authority; and sovereign immunity did not bar NLRB's issuance of subpoena).

Sober v. Soaring Eagle Casino and Resort, 2009 WL 3254355 (E.D.Mich., 2009)(plaintiff must exhaust tribal court remedies before bringing a claim to federal court, including tribal court appeals).

Stopp v. Mutual of Omaha Life Ins. Co., 2010 WL 1994899 (E.D. Okla., 2010)(ERISA applies to a tribe's Employee Welfare Benefit Plan when 1,900 of the 1,998 employees covered by the plan worked in commercial and business enterprises owned by the tribe).

Sovereign Immunity

Oneida Indian Nation of New York v. Madison County, 605 F.3d 149 (2nd Cir., 2010)(tribe is immune from suit under tribal sovereign immunity and as such the counties cannot bring foreclosure actions against the tribe).

Memphis Biofuels, LLC v. Chicksaw Nation Industries, Inc., 585 F.3d 917 (6th Cir., 2009)(a tribe's incorporation under the IRA does not waive sovereign immunity, nor does a tribal corporation charter without an express waiver, nor does the specific contractual provision purporting to waiver sovereign immunity without board approval as required by the charter).

Attorney's Process and Investigative Services, Inc. v. Sac & Fox Tribe of Mississippi in Iowa, __ F.3d __, 2010 WL 2671283 (8th Cir., 2010)(the invasion of a tribal court casino by a private party fulfills the Montana II exception and the resulting torts are subject to tribal court

jurisdiction; however, the question of whether the conversion of tribal funds claim falls under Montana I for tribal court jurisdiction is unclear).

High Desert Recreation, Inc. v. Pyramid Lake Paiute Tribe of Indians, 341 Fed. Appx. 325, 2009 WL 2371883 (9th Cir., Aug. 4, 2009)(unpublished)(an attorney's fee provision does not constitute an unambiguous waiver of tribal sovereign immunity, and the business transacted via the lease is an activity of the tribe for purposes of sovereign immunity).

Alltel Communications, LLC v. Oglala Sioux Tribe, 2010 WL 1999315 (D.S.D., 2010)(under the Federal Arbitration Act, a party is not required to exhaust tribal resources before seeking an order compelling the tribe to arbitrate; and a limited waiver of sovereign immunity in the form of an arbitration clause can be used by a third party non-signatory when the third party is closely related to the signing party and the Tribe is relying on the entirety of the contract to bring the claims).

Bales v. Chickasaw Nation Industries, 606 F. Supp. 2d 1299 (D. N.M., 2009)(a tribal commercial entity enjoys sovereign immunity from employee race and age discrimination claims).

Choctaw Nation of Oklahoma v. Oklahoma, __ F.Supp.2d __, 2010 WL 2802159 (W.D.Okla., 2010)(when an arbitration award agrees that the jurisdiction over all tribal-state gaming Compact based tort claims is properly in tribal forums, the state must honor the arbitration award and is subject to an injunction to prevent the state from trying to exercise jurisdiction over these claims in the future).

Gristede's Foods, Inc. v. Unkechuage Nation, 660 F. Supp. 2d 442 (E.D.N.Y., 2009)(the Unkechuage Nation meets a federal common law definition of Indian tribe as determined by a federal court, and as such, enjoys tribal sovereign immunity).

Ingrassia v. Chicken Ranch Bingo and Casino, 676 F.Supp.2d 953 (E.D.Cal., 2009)(tribal sovereign immunity is not waived by the Copyright Act, a tribal-state compact vis a vis a private

party, the contract between the tribe and the private party, nor the act of removal from state to federal court).

Madewell v. Harrah's Cherokee Smokey Mountains Casino, 2010 WL 2574079 (W.D.N.C., 2010)(tribe could not be sued in federal court on a tort occurring in its casino because it did not waive sovereign immunity outside of tribal court; however, the LLC which runs the casino must explain why it would enjoy sovereign immunity).

Rovinsky v. Choctaw Mfg. and Development Corp., 2009 WL 3763989 (D.N.J., Nov. 10, 2009)(unpublished)(the question of tribal sovereign immunity for a tribal commercial entity is one of first impression in the New Jersey federal district court).

Swanda Bros. Inc. v. Chasco Constructors, Ltd., L.L.P, 2010 WL 1372523 (W.D.Okla., 2010)(when a tribal constitution states that tribal sovereign immunity can only be waived by the tribal council, and the contested contract waiving sovereign immunity does not appear to have approval of the tribal council, questions as to whether immunity was waived or not properly belong in tribal court).

Somerlott v. Cherokee Nation Distributors, Inc., 2010 WL 1541574 (W.D.Okla., 2010)(tribal commercial entities are entitled to tribal sovereign immunity regardless of where the commercial activities take place or the degree of the entities removal from tribal self-governance, and the employment of non-Indians by that entity does not affect the analysis).

Hoffman v. Sandia Resort and Casino, 232 P.3d 901 (N.M. App., Jan. 26, 2010)(a waiver of sovereign immunity in a tribal-state gaming compact does not waive immunity vis a vis casino patrons suing the tribal casino).

Tribal Court Jurisdiction

Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc., 569 F.3d 932 (9th Cir., 2009)(tribal court lacks jurisdiction over nonmember company's claims of trademark infringement off the reservation).

Miccosukee Tribe of Indians of Florida v. Kraus-Anderson Const. Co., 607 F.3d 1268 (11th Cir., 2010)(bringing a suit in federal court for the enforcement of a tribal court judgment is not a federal question, and as such, there is no federal jurisdiction to hear the case).

New Gaming Systems, Inc. v. National Indian Gaming Com'n, 2009 WL 736667 (W.D.Okla, 2009)(company must exhaust tribal remedies, including appeals, before bringing a contract dispute to federal court).

Jaramillo v. Harrah's Entertainment, Inc. 2010 WL 653733 (S.D.Cal, 2010)(tort claims against a tribal casino are properly brought in tribal court).

Trust Land Acquisition

Iowa Tribe of Nebraska and Kansas v. Salazar, 607 F.3d 1225 (10th Cir., 2010)(claims against land held in trust for a tribe by the federal government fell under the Quiet Title Act, and as Congress has not waived sovereign immunity to QTA claims, the court lacked subject matter jurisdiction).

Butte County v. Hogen, No. 09-5179, __ F.3d __, 2010 WL 2735666 (D.C. Cir., July 13, 2010)(the Secretary's decision to take land into trust for the Mechoopda Indian Tribe was arbitrary and capricious because he did not provide a statement to the County opposing the decision with a satisfactory explanation and refused to consider opposing evidence submitted by the County).

Upstate Citizens for Equality v. Salazar, __ F. Supp. 2d __, 2010 WL 827090 (N.D. N.Y., Mar. 4, 2010)(the Secretary's ability to take lands into trust for Indian tribes is not an unconstitutional delegation of legislative authority; citizen plaintiffs have no standing to contest a letter from Interior approving a tribal-state gaming compact; IGRA provides no private right of action, and citizen challenges must arise under the APA; plaintiffs lack standing to contest the transfer of federal lands from one agency to another to be held in trust for a tribe and are also barred by federal sovereign immunity from bringing the claim).

Tax

City of New York v. Golden Feather Smoke Shop, Inc. 597 F.3d 115 (2nd Cir. 2010)(city could obtain a preliminary injunction under the CCTA without showing irreparable harm, but questions needed to be certified to the New York Court of Appeals to resolve the issue of whether the provisions of the tax code imposing a tax on cigarettes and setting up a tax-exempt coupon program for cigarette sales on reservation land imposed a tax on cigarettes sold on reservations when some or all of the cigarettes might be sold to nonmembers).

Keweenaw Bay Indian Community v. Rising, 569 F.3d 589 (6th Cir., 2009)(a tribe's attempt to bring a claim seeking injunctive and declaratory relief against a state tax collection scheme was not justiciable as to the tribe's tax immunity, unripe as to a declaration the state tax policy was invalid, and warranted remand to determine if the tribe was a person under §1983).

Grand River Enterprises Six Nations, Ltd. v. Beebe, 574 F.3d 929 (8th Cir. 2009)(tobacco distributor's attempt to claim an Arkansas statute dealing with tobacco companies who choose not to participate in the master settlement agreement was preempted by the Sherman Act, violated the Commerce Clause, Equal Protection clause, substantive or procedural due process and burdened the company's free speech rights failed on all counts).

Muscogee (Creek) Nation v. Oklahoma Tax Commission, __ F.3d __, 2010 WL 2700535 (10th Cir. 2010)(the Eleventh amendment bars claims to a state tax commission, though not necessarily certain claims against individual tax commissioners; an Indian tribe cannot bring

claims under §1983 since they are not considered a "person" and the Indian Commerce Clause does not bar a state from enforcing cigarette tax laws outside of Indian Country).

Blue Lake Rancheria v. United States, __ F.Supp. 2d __, 2010 WL 144989 (N.D. Cal., Jan.8, 2010)(a tribe's attempt to be refunded for FUTA taxes paid by an unincorporated enterprise of the tribe failed because the FUTA exception for tribes only applies when the tribe is the common law employer of the employees, and the enterprise—a temp agency—was not a common law employer).

Confederated Tribes and Bands of the Yakima Nation v. Gregoire, 680 F.Supp. 2d 1258 (E.D. Wash, 2010)(a change in the way a state requires stamps to be applied to cigarette packs must be substantial to overcome the *Colville* holding that the incident of the tax does not fall on tribal retailers, and a state's opinion or belief that it can enforce state law on reservation land is not enough in and of itself to justify a summary judgment for the tribe; however, a tribe cannot be barred by the state from issuing its own tax stamp and collecting tribal tax on the cigarettes).

Confederated Tribes of the Chehalis Reservation v. Thurston County Bd. of Equalization, __ F. Supp. 2d __, 2010 WL 1406524 (W.D. Wash., Apr. 2, 2010)(even though a resort was built on trust land by a consortium including the tribe, the tribal and federal interests were weak while the state's was strong, and thus the state could collect state taxes on the property).

Fox v. Portico Reality Services Office, __ F.Supp.2d __, 2010 WL 2680290 (E.D.Va., 2010)(the Native corporations exception under Title VII applies only where the Native Corporation directly owns the subsidiary).

Lil' Brown Smoke Shack v. Wasden, 2010 WL 427388 (D.Idaho, 2010)(a preliminary injunction was not granted as a convenience store's likelihood of prevailing on its claim that the dormant Commerce Clause prohibited the State of Idaho from dictating what it must do at its physical place of business located on a tribal reservation was uncertain).

Muscogee (Creek) Nation v. Henry, 2010 WL 1078438 (E.D.Okla., 2010)(tribe cannot receive an injunction against the state seizing cigarettes as they travel across state land, even if the cigarettes are coming from a Native Manufacturer to a tribe, as, among other reasons, tribal immunities from state taxes only extend to commerce within a tribe, not intertribal commerce)

Oklahoma, ex rel Edmondson v. Larkin, 2010 WL 1542573 (N.D.Okla., 2010)(an attempt by tobacco wholesalers to remove a case from state court to federal court failed since the wholesaler was not cloaked in tribal sovereign immunity and the case did not present a federal question).

U.S. v. Montour, 2010 WL 2293143 (W.D.Wash., 2010)(defendants argument that cigarettes did not need a tax stamp under a pass through provision in the CCTA fails because a tribe located in Washington is not a separate state).

White Earth Band of Chippewa Indians v. County of Mahnomen, Minn., 605 F.Supp.2d 1034 (D.Minn., 2009)(the collection of property taxes on tribal casino property was unlawful, but money damages against the county were barred by the Eleventh amendment).

State ex. rel. Edmundson v. Native Wholesale Supply, __ P.3d __, 2010 WL 2674999 (Okla., 2010)(a cigarette importer and distributor from outside the state has enough contacts with the state through the sale of cigarettes to retailers on tribal lands within the state to justify personal jurisdiction; the importer and distributor, incorporated under tribal law, doing business on another tribe's lands and managed by a tribal citizen does not enjoy tribal sovereign immunity; and the Indian Commerce Clause does not protect inter-tribal commerce from the state master settlement agreement complementary act)