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Casino Creditors, **Heads Up**

American Indian tribes may be ineligible for bankruptcy.

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THE FEDERAL LAW establishing the jurisdictional framework governing Indian gaming, the Indian Gaming Regulatory Act (IGRA),[1] has greatly increased the amount of gaming operations operated by Indian tribes. Currently, there are over 360 tribal gaming operations within the United States.

The casino bankruptcy filings of Fontainebleau Las Vegas LLC, Station Casinos Inc., Tropicana Entertainment LLC, and Trump Entertainment Resorts illustrate that the gaming industry is not immune from economic downturn. Additionally, gaming revenues for Indian casinos have declined, as highlighted by payment and covenant defaults by many Indian tribes, including the Mashantucket Pequot Tribal Nation, owner of Foxwoods Resort Casino. The tribe failed to pay approximately $7 million of interest on $500 million of bonds and missed a deadline to repay a $700 million line of credit, and as a result, is seeking to restructure at least $1.45 billion of debt.

Generally, distressed entities can look to the Bankruptcy Code for relief. With respect to Indian tribes, however, there is serious doubt whether the Code is an available avenue, as federally recognized Indian tribes may not qualify as a "debtor" under §109 of the Bankruptcy Code. Additionally, even if Indian tribes qualify as a debtor, IGRA limits the effectiveness of the bankruptcy process.

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Indian Sovereignty

Indian nations have been considered sovereign since the founding of the United States. For example, the U.S. Constitution specifically addresses Indian tribes: "The Congress shall have the power to regulate commerce with foreign nations and among the several states and with Indian tribes."[2] The U.S. Supreme Court affirmed the sovereignty of Indian tribes in a series of rulings known as the "Marshall Trilogy."[3]

• In *Johnson*, the Court ruled that Indian tribes cannot convey land to private parties without federal government consent.

• In *Cherokee Nation*, the Court decided that Indians were not foreign sovereigns but were "domestic dependent nations." As such, the federal government protects Indian tribes from interference by state governments and citizens.

• In *Worcester*, the Court held that state laws do not have effect in Indian territories.

Through the application of the Marshall Trilogy and the Constitution, states have no control or authority over tribes unless specifically authorized by Congress. As a result, a tribe cannot be sued unless sovereign immunity is waived by the tribe or eliminated by Congress.[4]

Once an Indian tribe is recognized by the federal government, a government-to-government relationship is formally established and tribal sovereignty allows Indian tribes to self-govern. Among other things, Indian tribes can establish their own form of government, adopt laws, establish law enforcement and define their membership.

In *California v. Cabazon Band of Mission Indians*,[5] the Court confirmed the right of Indian tribes to conduct gaming activities, acknowledging federal interests in Indian self-government, including the goal of encouraging tribal self-sufficiency and economic development. The Court concluded that as sovereign political entities, tribes can operate gaming activities free of state regulation.

Gaming Regulation and Financing

In 1988, Congress passed IGRA to establish a federal gaming structure in order to, among other things, provide a legislative basis for the operation/regulation of Indian gaming and protect gaming as a means of generating revenue for Indian tribes. Congress vested

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the National Indian Gaming Commission (NIGC) with broad authority to issue regulations to further the purposes of IGRA. In order to operate a gaming facility, the NIGC must review and approve the tribe's gaming ordinance.

IGRA requires that Indian gaming occur on Indian lands, which includes land within the boundaries of a reservation as well as land held in trust by the United States on behalf of a tribe or individual over which the tribe has jurisdiction and exercises power.

IGRA also requires that an Indian tribe have the sole propriety interest and responsibility for the conduct of any gaming activity. Thus, if any entity other than an Indian tribe possesses an ownership interest in the gaming activity, that interest would be a violation of IGRA. Moreover, if an Indian tribe wishes to outsource management operations, the contract must be approved by the NIGC; without approval the contract is void.[6]

Generally, the primary collateral for many lending transactions is real estate, its improvements and the assets of the borrower. It is difficult, however, for Indian tribes to encumber tribal real estate to secure financing.[7] Typically, tribes will secure financing with personal property, including pledges of gaming revenue streams, slot machines and gaming tables.

In extending financing, lenders must be aware of IGRA, as demonstrated by the recent *Lake of the Torches* decision.[8] In that case, Wells Fargo, as the indenture trustee for notes issued by the defendant, a tribal corporation wholly owned by an Indian tribe, sought to enforce the remedies provided for in the indenture governing the notes. The court held that those various remedies turn the indenture into a management contract. Since the indenture was not approved by the NIGC, it was held void.

Moreover, since the sovereign immunity waiver was contained in the now void indenture, the court had no jurisdiction over the suit brought by Wells Fargo and the action was dismissed. If upheld on appeal, the decision essentially excuses the tribal corporation from repaying the principal and interest on $46 million in issued notes.

Ineligibility to File Bankruptcy

It does not appear that federally recognized Indian tribes are eligible for relief under the Bankruptcy Code.[9]

There is no specific Code section addressing an Indian tribe's ability to be a debtor. Rather, §109 of the Code addresses who may be a debtor. Under this section, only a "person" or a "municipality" may be a debtor. As discussed below, an Indian tribe is likely neither a "person" nor a "municipality;" thus, cannot be a debtor in bankruptcy.[10]

There are no reported decisions where an Indian tribe has been found to be a "person" for purposes of §109. Section 101(41) of the Bankruptcy Code expansively defines the term "person" to include individuals, partnerships and corporation, but excludes "governmental unit(s)."

Generally, **distressed** entities can look to the Bankruptcy Code for relief. With respect to Indian tribes, however, there is **serious doubt** whether the Code is an available avenue.

The term individual is not defined in the Bankruptcy Code. Throughout the Code, when the term individual is used, it is in the context of an individual human being.[11] The logical, legal and textual conclusion is that Indian tribes do not qualify as individuals.

Likewise, they are not partnerships. While the term partnership is also not defined, it is a concept borrowed from state law, typically requiring an association of co-owners who carry a business for profit, which does not fit Indian tribes.[12]

The term "corporation" is defined in §101(9) of the Bankruptcy Code to include all types of business associations, generally in reference to state law concepts. Indian tribes do not fit the common sense meaning of corporation, and even they did, they are likely excluded by virtue of their governmental unit status, as discussed below.

If an Indian tribe qualifies as a "governmental unit," it is specifically excluded from the definition of "person." Section 101(27) of the Bankruptcy Code defines the term "governmental unit" as: United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States, a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government. There are no reported decisions examining whether an Indian tribe is a "governmental unit" under §109 of the Code.

In reviewing the entities that qualify as a "governmental unit" for purposes of the Bankruptcy Code, an Indian tribe probably falls under the "other foreign or domestic government" category.[13] The use of the catch-all phrase "other foreign or domestic government" has been interpreted to mean "all foreign and domestic governments, including but not limited to those particularly enumerated in the first part of the definition."[14] Support that Indian tribes should be considered "governmental units," is highlighted by the legislative history of the definition, which states that the definition is to be interpreted broadly.[15]

Tribes Likely Are Governmental Units

Indian tribes are likely governments, whether foreign or domestic.

As discussed above, the Supreme Court has stated in *Cherokee Nation* that Indians were "domestic dependent nations." Additionally, the Court has held that, for purposes of determining whether the Constitution's Double Jeopardy Clause is violated, Indian tribes act as a "separate sovereign" from the federal government.[16]

A "domestic dependent nation" and a "separate sovereign" fall squarely within the meaning of "other foreign and domestic governments." Furthermore, the Court has compared Indian tribes to foreign countries for purposes of analyzing tribal immunity.[17]

The seminal case considering whether an Indian tribe is a "governmental unit" under the Bankruptcy Code was decided in the context of §106,[18] and held that an Indian tribe is a "governmental unit."[19] In *Krystal Energy Co. v. Navajo Nation*, the Ninth Circuit examined whether dismissal of an adversary action against the Navajo Nation based on abrogation of sovereign immunity under Code §106 was appropriate. The court noted that neither the Supreme Court nor any other circuit has determined whether §106 of the Bankruptcy Code applies to Indian tribes.

The Ninth Circuit found that the language of §§106(a) and 101(27) of the Code makes clear that Congress intended to abrogate the sovereign immunity of all "foreign and domestic governments." The court reasoned that Indian tribes are governments based on

the Supreme Court's recognition that Indian tribes are "domestic dependent nations." The Ninth Circuit thus concluded that Indian tribes are "simply a specific member of the group of domestic governments, the immunity of which Congress intended to abrogate."[20]

For further support, the court reasoned that when the Bankruptcy Code was enacted, Congress legislated with the backdrop of the Supreme Court precedent defining Indian tribes as domestic nations and chose not to exclude Indian tribes from the catch-all provisions of the "governmental unit" definition.

There is, however, a minority line of cases. The Tenth Circuit Bankruptcy Appellate Panel stated in a footnote that Indian tribes are probably not "governmental units."[21] In *Mayes v. Cherokee Nation*, the issues were whether a motion to avoid an Indian nation's lien constituted a suit, subject to the common law doctrine of tribal sovereign immunity and if the motion was a suit, whether §106(a) of the Bankruptcy Code applied.

The bankruptcy court found the motion was a "suit" for purposes of tribal sovereign immunity but held that §106(a) was an unconstitutional abrogation of sovereign immunity. The B.A.P. did not overturn the bankruptcy court's §106(a) holding because the appellant failed to challenge that conclusion. In the footnote, however, the majority of the panel stated that even if §106(a) of the Bankruptcy Code is a constitutional abrogation of sovereign immunity, it most likely does not apply to Indian tribes because they are probably not "governmental units."

In the *Mayes* dissent, Chief Judge McFeeley found that Congress explicitly abrogated the sovereign immunity of Indian tribes in Code §106(a) as a result of them being a "governmental unit."[22] He found that in giving operative effect to every word in the definition, Indian tribes fall within the definition of "governmental unit." Additionally, he relied on Supreme Court precedent finding Indian tribes to be "domestic dependent nations."

Additionally, an Iowa district court held that Congress did not abrogate an Indian tribe's sovereign immunity to suit,[23] because the definition of "governmental unit" does not specifically include the phrase "Indian tribe."

Section 101(40) of the Bankruptcy Code defines the term "municipality" as meaning "political subdivision or public agency or instrumentality of a State." As recognized by the Marshall Trilogy and *Cabazon Band of Mission Indians*, among other cases, Indian tribes are not subdivisions, public agencies, or instrumentalities of a state. Consequently, Indian tribes do not meet the debtor requirements under the "municipality" definition.

Even as Debtor, Major Hurdles Remain

Even if an Indian tribe was eligible to be a debtor, there are many issues that could substantially limit the effectiveness of the bankruptcy process.

Section 1129(a)(6) of the Bankruptcy Code requires that a Chapter 11 plan comply with all regulatory provisions, presumably including IGRA. As a result, even if a bankruptcy filing was possible, among other things:

- Appointment of a trustee under §1104 of the Code would be prohibited since IGRA imposes limitations on management of outsiders (a limitation that would hinder conversion of the case to a liquidation under Chapter 7);
- The sole proprietary-interest requirement of IGRA[24] requiring that the Indian tribe have the sole interest in gaming activity would not permit any alteration in the Indian interest in gaming activity, thus preventing debt to equity restructurings; and
- Similarly, the priority structure of the Bankruptcy Code, requiring that all classes of creditors be repaid in full before the Indian tribe can retain its interest in the gaming business appears to violate the sole proprietary interest requirement of IGRA.

Conclusion

As currently drafted and following the majority case law, it appears that Indian tribes qualify as "governmental units" and thus, ineligible to be debtors in a case under the Bankruptcy Code, voluntary or involuntary.

Interestingly, the power to file for bankruptcy is generally perceived to be one that is used for leverage by financially distressed entities to the chagrin of their creditors; creditors' ability to commence an involuntary case against a distressed entity, influence management of the entity and impose financial discipline through such a filing are powerful arrows in the creditors' quiver. When the borrower is an Indian tribe, however, that quiver could be half empty.

1. 25 U.S.C. §§2701, et. seq.
2. U.S. CONST. art. I, §8, clause 3.
3. See *Johnson v. McIntosh*, 21 U.S. 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), *Worcester v. Georgia*, 31 U.S. 515 (1832).
4. See *Kiowa Tribe of Oklahoma v. Manufacturing Tech. Inc.*, 523 U.S. 751 (1998).
5. 380 U.S. 202 (1987).
6. *First Am. Kickapoo Operations, LLC v. Multimedia Games Inc.*, 412 F.2d 1166, 1176 (10th Cir. 2005).
7. Indian land is either restricted or trust land. "Trust land" is where the title is held in trust by the United States for the Indian tribe. 25 C.F.R. §151.2(d). Trust lands may be leased in accordance with federal law, but may not be mortgaged or sold. "Restricted land" is land where the title is held by an Indian tribe, but can only be alienated or encumbered with approval of the federal government. 25 C.F.R. §151.2(e).
8. *Wells Fargo Bank, N.A. v. Lake of the Torches Economic Dev. Corp.*, 2010 U.S. Dist. LEXIS 40149 (W.D. Wis. 2010), aff'g, 2010 U.S. Dist. LEXIS 839 (W.D. Wis. 2010) (appeal pending).
9. Section 303 of the Bankruptcy Code outlines against whom an involuntary case may be commenced. Similarly to voluntary cases, involuntary cases may only be commenced against a "person."
10. Note that the Cabazon Indian Casino (the "Casino") filed a Chapter 11 bankruptcy case. *In re Cabazon Indian Casino*, 57 B.R. 398 (9th Cir. B.A.P. 1986). The debtor in the case, the Casino, was formed as an unincorporated company by a federally recognized Indian tribe. The Casino argued for exemption from federal taxation by virtue of it being an Indian tribe. The court analyzed the issue as if it was dealing with an Indian tribe. The question of the Casino's eligibility for bankruptcy protection, to the extent it qualified as an Indian tribe, was never raised.
11. For example, Chapter 13 of the Bankruptcy Code addresses bankruptcy filings of individual human beings.
12. See, e.g., NY Partnership Law, §10(1). A tribe is not owned by its members, nor does it carry a business for profit. Its commercial activities are designed to generate revenues to finance its governmental functions.
13. See Collier on Bankruptcy, ¶101.27 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).
14. *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1057 (9th Cir. 2004).
15. H.R. Rep. No. 595, 95th Cong., 1st Sess. 311 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 24 (1978); see also *T I Federal Credit Union v. DelBonis*, 72 F.3d 921, 930 (1st Cir. 1995).
16. *United States v. Lara*, 541 U.S. 193 (2004); *United States v. Wheeler*, 435 U.S. 313 (1978); see also *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991) (concluding that both states and Indian tribes are "domestic" sovereigns).
17. *Kiowa Tribe of Oklahoma*, 523 U.S. at 759; *Schooner Exchange v. M'Faddon*, 11 U.S. 116 (1812).
18. Section 106 of the Bankruptcy Code waives governmental units' sovereign immunity with respect of specified sections of the Bankruptcy Code
19. Accord *In re Russell*, 293 B.R. 34, 44 (D. Ariz. 2003) ("Sovereign immunity is abrogated as to all domestic governments. Indian tribes are domestic governments. Hence sovereign immunity is abrogated as to Indian tribes"); *In re Greene*, 980 F.2d 590, 597 (9th Cir. 1992) (assuming Indian tribes are "governmental units" for the purposes of §106(a) of the Bankruptcy Code); *In re Davis Chevrolet Inc.*, 282 B.R. 674, 683 n.5 (Bankr. D. Ariz. 2002) (mentioning §106 of the Bankruptcy Code abrogates sovereign immunity as to Indian tribes as "domestic governments"); *In re Vianese*, 195 B.R. 572, 576 (Bankr. N.D.N.Y 1995) (holding §106(a) of the Bankruptcy Code abrogates any sovereign immunity the Indian tribe may have); *In re Sandmar Corp.*, 12 B.R. 910, 916 (Bankr. D.N.M. 1981) (accepting Indian tribe's status is that of a "governmental entity" under the Bankruptcy Code).
20. *Krystal Energy Co.*, 357 F.3d at 1058.
21. *Mayes v. Cherokee Nation*, 294 B.R. 145, 147 n.10 (B.A.P. 10th Cir. 2003).
22. 294 B.R. at 157-160.
23. *In re National Cattle Congress*, 247 B.R. 259, 266-67 (N.D. Iowa 2000)
24. 25 U.S.C. §2710(b)(2)(A).