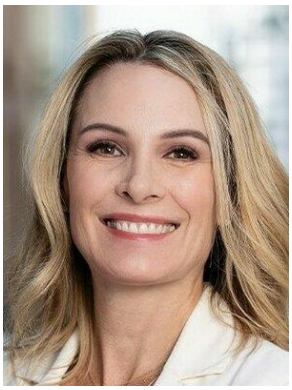
Takeaways From 1st Circ.'s Tribal Sovereign Immunity Ruling

Law360 (June 14, 2022)



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On May 6, the U.S. Court of Appeals for the First Circuit ruled that the U.S. Bankruptcy Code unequivocally strips tribes of their sovereign immunity, despite the fact that the provision at issue does not explicitly reference tribes.

In Coughlin v. Lac du Flambeau Band of Lake Superior Chippewa Indians, the court determined that a tribally owned lending entity, Niiwan LLC dba Lendgreen, was subject to the automatic stay under Chapter 13 of the Bankruptcy Code and therefore could not continue collection activities while the bankruptcy matter remained pending.[1]

In finding unequivocal abrogation, however, the Coughlin court disregarded extensive case law that has consistently refused to abrogate tribal sovereign immunity without an explicit mention of tribes in the relevant statute.

A Native American tribe — and by extension any tribal lenders who may be considered an arm of the tribe — generally enjoy immunity from suit. However, the U.S. Supreme Court in Michigan v. Bay Mills Indian Community in 2014 held that Congress may abrogate that sovereign immunity only if it unequivocally expresses its intent to do so.

Although the court in Bay Mills acknowledged that this does not require Congress to use any sort of magic words, courts have, across the board, refused to find such unequivocal intent where no provision of a statute at issue explicitly mentions tribes.

The First Circuit's opinion hinged on a broad interpretation of the phrase "governmental unit" as used in Section 106(a) of the Bankruptcy Code, which sets forth the many provisions of the code that abrogate sovereign immunity (including the automatic stay provisions in Section 362(b)). Section 101(27) of the code defines "governmental unit" comprehensively to mean:

> United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or 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 governments.

Despite the fact that this extensive definition fails to specifically mention tribes, the First Circuit in Coughlin nevertheless determined that tribes fall under the catchall category of "other foreign or domestic governments." As a result, the sovereign lender, Lendgreen, was subject to the automatic stay provisions in Section 362(b) of the code.

The First Circuit is not the first court to consider the issue of whether or not tribes can properly be considered governmental units under Sections 106(a) and 101(27). Two other circuit courts have faced similar questions and reached different conclusions.

In Krystal Energy Co. v. Navajo Nation in 2004, the U.S. Court of Appeals for the Ninth Circuit held that tribes are included within the term "domestic government."

But in 2019, the U.S. Court of Appeals for the Sixth Circuit, in In re: Greektown Holdings LLC, determined that without referring specifically to "Indian tribes," there could be no congressional intent to abrogate sovereign immunity. Several other bankruptcy courts have reached the same conclusion as the Sixth Circuit.[2]

As the Sixth Circuit opined, the use of the general term "other domestic government" was not sufficient to satisfy the requirement that, "to abrogate tribal sovereign immunity, Congress must leave no doubt about its intent."[3]

In fact, it observed that "no provision of the Bankruptcy Code mentions Indian tribes," and "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."[4]

A dissent in the Coughlin opinion also casts doubt on whether the abrogation was unequivocal. The dissent, issued by Chief Judge David Barron, sided with the views of the Sixth Circuit. Chief Judge Barron opined that Section 101(27) of the Bankruptcy Code did not include tribes within the definition of "governmental unit" because Congress did not specifically call out tribes.

In part, he wrote that "Congress, for some reason, did not use the surest means of clearly and unequivocally demonstrating that" tribes are governmental units — by specifically including them in the list.

On the other hand, the implication of Chief Judge Barron's dissenting opinion in Coughlin and the Sixth Circuit's opinion in Greektown Holdings is there may arise situations in which a tribe is considered a "governmental unit" under some provisions of the Bankruptcy Code, but not for Section 106(a).

As the Sixth Circuit astutely pointed out, there is an important distinction between being subject to a statute and being able to be sued for violating it — namely, the latter context requires more strict scrutiny because in order to abrogate tribal immunity, Congress must unequivocally express that purpose.[5]

Nevertheless, the First Circuit's interpretation of the Bankruptcy Code is contrary to many of the other statutes tribal lending entities rely on in operating their business.

For example, Title X of the Dodd-Frank Wall Street Reform Act explicitly includes tribes within the definition of "state"; the title further sets forth the ability of states to regulate consumer protection affairs and cooperate with the Consumer Financial Protection Bureau in the regulation of "covered persons."

Additionally, the First Circuit's opinion in Coughlin may open the door for other courts to more easily find that tribal sovereign immunity has been abrogated.

For example, some courts look to the Bankruptcy Code when interpreting other statutes for

similar issues.[6] If courts no longer need to find an explicit reference to tribes in order to determine that Congress intended to abrogate sovereign immunity, it may be easier for litigants to successfully pursue claims against tribes under laws with similar sovereign immunity waivers.

At least one commentator, Bill Rochelle, has suggested that "the likelihood of a petition for certiorari is high" and it is likely that certiorari would be granted, given the existing circuit split.[7]

In the interim, tribal lending entities should ensure that there are processes and procedures to receive notices of bankruptcy petitions. If any consumer who notifies the tribal lending entity of an ongoing bankruptcy petition is located in either the First or Ninth Circuits, the entity should immediately cease collections efforts pending the outcome of the bankruptcy proceeding.

Tribes located in those circuits should also consider the other sections of the Bankruptcy Code for which sovereign immunity is abrogated as to a governmental unit under Section 106(a),[8] subject to the other limitations set forth in that section of the Bankruptcy Code.

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[1] Appellant Brian W. Coughlin obtained a $1,100 loan from Lendgreen in July 2019. Later that year, he voluntarily filed a Chapter 13 bankruptcy petition in the District of Massachusetts. In his petition, Mr. Coughlin listed a $1,600 debt from Lendgreen as a nonpriority unsecured claim. Debtors that file for bankruptcy protection under the U.S. Bankruptcy Code generally receive the benefit of an automatic stay enjoining any debt-collection efforts outside the umbrella of the bankruptcy case. Though "governmental unit[s]" may continue certain functions despite the stay, all entities are prohibited from engaging in efforts to collect on debts owed by the debtor. See 11 U.S.C. § 362(b). In this case, despite the automatic stay, Lendgreen continued to contact Coughlin to seek repayment of his debt. Coughlin ultimately sought to enforce the automatic stay against Lendgreen and its corporate parents, including the Tribe. The Bankruptcy Court granted the Tribe's motion to dismiss on the basis of tribal sovereign immunity, but the Circuit Court reversed.

[2] See, e.g., Casino Caribbean, LLC v. Money Ctrs. of Am., Inc. (In re Money Ctrs. of Am., Inc.), 565 B.R. 87 (Bankr. D. Del. 2017); Subranni v. Navajo Tribe Pub'g Co. (In re Star Group Commc'ns, Inc.), 568 B.R. 616 (Bankr. D.N.J. 2016).

[3] In re Greektown Holdings, 917 F.3d at 457.

[4] Id. at 460–61.

[5] In re Greektown Holdings, 917 F.3d at 461–62.

[6] Meyers v. Oneida Tribe of Indians of Wis., 836 F.3d 818, 826 (7th Cir. 2016), cert. denied, 137 S. Ct. 1331, 197 L. Ed. 2d 518 (2017) (holding that Congress did not unequivocally abrogate tribal sovereign immunity in the Fair and Accurate Credit Transaction Act and, while looking to bankruptcy caselaw for guidance, stating that it need "not weigh in on the conflict between these courts on how to interpret the breadth of the term 'other domestic governments' under the Bankruptcy Code").

[7] See Bill Rochelle, Rochelle's Daily Wire (May 10, 2022) (quoting Professor Jack F. Williams of Georgia State University College of Law), https://www.abi.org/newsroom/daily-wire/circuits-more-deeply-split-on-waiver-of-sovereign-immunity-for-native-american.

[8] Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327.