Supreme Court May Consider Whether Tribal Sovereign Immunity Is Abrogated by Bankruptcy Code

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A petition for *certiorari* is presently pending with respect to the Sixth Circuit's decision in *In re Greektown Holdings LLC*. [1] If granted, the U.S. Supreme Court will consider whether the Bankruptcy Code abrogates the sovereign immunity of Indian tribes. [2]

Factual Background

This case arises from the bankruptcy of Greektown Casino, Greektown Holdings, LLC ("Holdings") and certain affiliates (collectively, the "debtors"). The casino opened in November 2000 and was owned and managed by the Sault Ste. Marie Tribe of Chippewa Indians and its political subdivision defendant, Kewadin Casinos Gaming Authority (collectively, the "tribe"). After years of financial difficulties, in 2005 the tribe restructured the casino's ownership and created Holdings, which became the owner of the casino. On Dec. 2, 2005, Holdings transferred approximately $177 million to various parties, including the tribe.

In 2008, the debtors filed for bankruptcy. Under the debtors' plan of reorganization, the Greektown Litigation Trust (the "Trust") was created to pursue claims belonging to the debtors' estate for the benefit of unsecured creditors, and Buchwald Capital Advisors, LLC was appointed as trustee. In 2010, the trustee commenced an action against various defendants, including the tribe, alleging, *inter alia*, that on Dec. 2, 2005, Holdings fraudulently transferred $177 million for the benefit of the tribe with no or inadequate consideration. The trustee seeks the avoidance and recovery of the transfers under §§ 544 and 550 of the Bankruptcy Code.

Procedural History

The tribe moved to dismiss the action, arguing that §§ 106 and 101(27) of the Bankruptcy Code do not expressly abrogate the tribe's sovereign immunity. The bankruptcy court denied the tribe's motion to dismiss, holding that Congress had expressed its "clear, unequivocal, and unambiguous intent to abrogate tribal sovereign immunity." [3] The district court reversed, holding that Congress had not "clearly, unequivocally, unmistakably, and without ambiguity abrogated[d] tribal sovereign immunity." [4] The trustee appealed.

Sixth Circuit Decision

Indian tribes have long been recognized as "separate sovereigns pre-existing the Constitution" that possess "common-law immunity from suit traditionally enjoyed by sovereign powers." [5] However, Congress can abrogate tribal sovereign immunity "as and to the extent it wishes." [6] Therefore, Indian tribes possess tribal sovereign immunity unless and until Congress unequivocally expresses a contrary intent. [7] Courts

have required that it must be said with "perfect confidence" that Congress intended to abrogate sovereign immunity, and abrogation of tribal sovereign immunity may not be implied. [8]

Bankruptcy Code § 106(a) provides that "[n]otwithstanding 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 … [and] 550…." In turn, § 101(27) defines "governmental unit" as follows:

> The term "governmental unit" means 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 government.

The Sixth Circuit determined that it could not find that Congress unequivocally intended to abrogate tribal sovereignty in §§ 106 and 101(27) of the Bankruptcy Code, and affirmed the district court's decision to dismiss the suit. Noting that Congress must leave "no doubt" [9] about its intent to abrogate tribal sovereign immunity, the court found that §§ 106 and 101(27) of the Bankruptcy Code lack the requisite clarity of intent to abrogate tribal sovereign immunity. In its analysis, the Sixth Circuit held that "[w]hile it is true that Congress need not use 'magic words' to abrogate tribal sovereign immunity, it still must unequivocally express that purpose." [10]

The Sixth Circuit relied on the recent decision of *Meyers v. Oneida Tribe of Indians of Wisconsin*, in which the Seventh Circuit Court of Appeals analyzed whether the Fair and Accurate Credit Transactions Act of 2003 (FACTA), which authorizes suits against "any … government," authorizes suits against Indian tribes. [11] The Seventh Circuit held that FACTA does not abrogate tribal sovereign immunity because "Congress … knows how to unequivocally [express that intent]. It did not do so in FACTA." [12] Importantly, in *Greektown Holdings LLC*, the Sixth Circuit observed 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." [13] Conversely, there are numerous examples of circuit courts finding that tribal sovereign immunity was abrogated where the statute specifically referred to an "Indian tribe." [14]

Conclusion

On March 18, 2019, the trustee filed a petition for a *writ of certiorari* requesting that the Supreme Court consider whether the Bankruptcy Code abrogates the sovereign immunity of Indian tribes. In its petition, the trustee asserts that a tribal government fits within the phrase "foreign or domestic government" that is in § 101(27). The trustee is relying on the Ninth Circuit's decision in *Krystal Energy Co. v. Navajo Nation,* which held that Congress *did* unequivocally express an intent to abrogate tribal sovereign immunity in Bankruptcy Code §§ 106 and 101(27). [15] The Ninth Circuit concluded that by using the phrase "other foreign or domestic government" in § 101(27), Congress effected a "generic abrogation" of sovereign immunity that unequivocally encompassed tribal sovereign immunity. [16]

If the parties proceed with the petition for *certiorari*, and the Supreme Court grants *certiorari*, the Supreme Court will likely resolve the current circuit split regarding whether the language of the Bankruptcy Code clearly and unambiguously abrogates tribal sovereign immunity. Its decision will have significant implications for tribes seeking to claim sovereign immunity, as well as entities pursing actions against tribes under the Bankruptcy Code.

[1] *Buchwald Capital Advisors LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings LLC)*, 917 F.3d 451 (6th Cir. 2019).

[2] At the time this article was written, the tribe had obtained an extension to file a response to the petition. The tribe indicated that a settlement was reached, and the parties are seeking bankruptcy court approval. The hearing on the motion to approve the settlement is presently scheduled for Nov. 21, 2019.

[3] *Buchwald Capital Advisors LLC v. Papas, et al. (In re Greektown Holdings LLC)*, 516 B.R. 462 (Bankr. E.D. Mich. 2014).

[4] *Buchwald Capital Advisors LLC v. Papas, et al. (In re Greektown Holdings LLC)*, 532 B.R. 680 (E.D. Mich. 2015).

[5] *In re Greektown Holdings*, 917 F.3d at 456 (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014)).

[6] *Bay Mills Indian Cmty.*, 572 U.S. at 803-04.

[7] *Id.* at 788.

[8] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

[9] *Addington v. Texas*, 441 U.S. 418, 432 (1979).

[10] *In re Greektown Holdings*, 917 F.3d at 461 (citing *F.A.A. v. Cooper*, 566 U.S. 284, 290-91 (2012)).

[11] *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818, 827 (7th Cir. 2016).

[12] *Id.* at 827.

[13] *Greektown Holdings LLC*, 917 F.3d at 460 (quoting *Meyers*, 836 F.3d at 824).

[14] *Id.* (internal citations omitted).

[15] *See Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1061 (9th Cir. 2004). The Sixth Circuit considered the Ninth Circuit's decision in *Krystal Energy Co.*, but found *Meyers* more persuasive.

[16] *Id.* at 1059.

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