What's At Stake In High Court's Tribal Bankruptcy Ruling

By **Wilda Wahpepah** (January 19, 2023)

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Tribal sovereign immunity is a core principle of federal Native American law and, from the tribal perspective, a cherished attribute of sovereignty. While Congress may abrogate tribal immunity, under long-standing precedent of the U.S. Supreme Court it must do so expressly and unequivocally.[1]

A newly accepted petition for certiorari, however, may provide the Supreme Court with an opportunity to revisit the principle by way of interpreting the U.S. Bankruptcy Code.

The case, Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, concerns the question of whether a tribe as creditor is bound by the automatic stay available to debtors in a bankruptcy proceeding or whether it is shielded by its sovereign immunity to suit.

Under Title 11 of the Bankruptcy Code, Section 106(a), Congress abrogated the sovereign immunity of governmental units to a dozen code provisions, including the automatic stay intended to stop debt collection while a bankruptcy case proceeds. The term "governmental unit" is defined in Section 101(27) of the code as the:

> 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 circuit courts and lower courts within several circuits have split on the question of whether Sections 106 and 101 of the code abrogate tribal immunity.

The U.S. Court of Appeals for the Ninth Circuit has interpreted the statute as including tribes in the definition of governmental units as an "other … domestic government," in Krystal Energy Co. v. Navajo Nation in 2004.[2]

Bankruptcy and other courts within the U.S. Courts of Appeals for the Second and Tenth Circuits have reached the same determination.[3]

The U.S. Court of Appeals for the First Circuit agreed with the Ninth Circuit in the newly accepted Coughlin case.[4]

Conversely, bankruptcy and other courts in the U.S. Courts of Appeals for the Third, Sixth and Eighth Circuits have found that the code does not waive tribal sovereign immunity.[5]

Further, no court has expressly decided if tribes are eligible debtors under the code. Governmental units, other than municipalities, may not be debtors eligible for bankruptcy protections because they are excluded from the definition of "person" under the code, except under a handful of limited exceptions.[6]

The question of statutory interpretation at issue in the Coughlin case intersects with the

established tenet of federal Native American law that waivers of sovereign immunity cannot be implied but must be express and unequivocal.[7]

The First Circuit's decision acknowledged this standard, citing the Supreme Court's 2000 decision in C & L Enterprises Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma and 2014 decision in Michigan v. Bay Mills Indian Community, while at the same time relying on its 2012 decision in Federal Aviation Administration v. Cooper, a case not involving tribes, for the proposition that no magic words are required to find a waiver.[8]

Moreover, the First Circuit also found that it need not consider the so-called Native American canons of construction, a principle of federal Native American law holding that statutes regulating tribes should be construed in favor of tribes, because the code was not ambiguous.[9]

The Coughlin case has implications for tribes in bankruptcy proceedings, as governments providing for their membership and as entities engaged in commercial enterprises.

First, a decision that Section 106 and Section 101 of the code work in tandem to abrogate the sovereign immunity of tribes could subject a tribe to various provisions of the code.

For example, a tribe could be compelled to appear and participate in bankruptcy proceedings as a third party, be targeted by a trustee seeking to recover money paid to the tribe by a debtor, be prohibited from evicting a lessee of tribal lands under an automatic stay, or be subject to a debtor's confirmed bankruptcy plan, including terms of a plan that might negatively impact a tribe's rights under a lease.

As governments subject to budgetary limitations and restraints, the possibility that a bankruptcy trustee can compel a tribe to return money or assets to a bankruptcy estate can have far-reaching financial implications for a tribe.

Second, if the Supreme Court were to affirm Coughlin's holding that tribes are governmental units under Section 106 of the code, such a decision could perpetuate — without actually deciding — the uncertainty that already exists as to whether tribes and tribal entities are eligible debtors under the code.

Currently, practitioners in the First and Ninth Circuits might presume that tribes likely are governmental units for purposes of debtor eligibility under Section 109 and therefore are not eligible to file for relief as debtors under the code.

Such a presumption limits the ability of tribes to reorganize their commercial operations through an established path that is open to other commercial enterprises and affords nontribal commercial entities in a Chapter 11 reorganization the ability to obtain some level of debt relief and certainty.

Instead, financially distressed tribes and their creditors often have to engage in complicated, costly and time-consuming debt restructurings, without any of the protections afforded debtors under the code. If the court were to decide in Coughlin that tribes are governmental units, the presumption that tribes might not be eligible debtors would have national application.

Additionally, if the court were to affirm Coughlin, such a decision might not address the status of separately organized business entities owned by tribes, such as corporations or limited liability companies. Tribes, tribal entities and their business partners might, even

after a Coughlin decision, operate with uncertainty as to whether tribes or their business entities are eligible debtors under the code.

Third, if the Supreme Court were to affirm Coughlin's holding that Congress need not be express, unequivocal nor even use the word "tribe" when abrogating tribal sovereign immunity, such a decision would impact all tribes, commercial disputes involving tribes and the interpretation of other federal statutes involving tribes.

For example, many commercial agreements involving tribes and nontribal parties include an express waiver of tribal sovereign immunity. Waivers of sovereign immunity are highly negotiated terms and are intended to provide both parties with a clear means to resolve disputes.

When the existence, applicability or scope of a tribe's waiver of sovereign immunity is contested in a commercial dispute, circuit courts have long applied the same principle and required the tribe's waiver to be express and unequivocal.[10]

A decision that Congress may abrogate tribal sovereign immunity without expressly stating its intent to do so might be subsequently applied in commercial disputes involving tribal waivers of sovereign immunity or to the interpretation of, for example, federal laws underlying disputes between states and tribes.

While the Coughlin case progresses, practitioners who represent tribes and parties doing business with tribes should be aware that the case has the potential to

- Expand the circumstances under which tribes can be compelled to participate in third-party bankruptcy proceedings and be bound by bankruptcy court proceedings and decisions;

- Influence the question of whether tribes may be eligible to file as a debtor under the code;

- Broaden the circumstances under which a federal statute may be found to abrogate tribal sovereign immunity; and

- Provide new precedent for determining the existence or validity of a tribe's waiver of sovereign immunity in a commercial context.

For the most immediate concern, tribes should invest time analyzing the code to fully understand the nearly five dozen sections of the code to which Section 106 waives the sovereign immunity of governmental units.

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[1] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1979).

[2] See Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1061 (9th Cir. 2004) (finding Navajo Nation subject to adversary proceeding following tribe's ejection of debtor from tribal property).

[3] See, e.g. Turning Stone v. Vianese (In re Vianese), 195 B.R. 572 (Bankr. N.D.N.Y 1995); In re Platinum Oil Properties, LLC, 465 B.R. 621 (Bankr. D.N.M. 2011); c.f. Mayes v. Cherokee Nation (In re Mayes), 294 B.R. 145 (B.A.P. 10th Cir. 2003) (suggesting in n.10 that tribes "probably are not" domestic governments under Section 101(27)).

[4] 33 F.3d 600, 605 (1st Cir. 2022) (principles of statutory interpretation and "historical context" show Congress abrogated tribal immunity); cert. granted Lac du Flambeau Band of Lake Superior Chippewa Indians, et al., v. Coughlin, Case No. 22-227 (Jan. 13, 2022).

[5] See e.g. Subranni v. Navajo Times Publ'g Co. (In re Star Group Commuc'ns., Inc.), 568 B.R. 616 (Bankr. D.N.J. 2016); In re Greektown Holdings, LLC, 917 F.3d 451 (6th Cir. 2019); Bucher v. Dakota Finance Corp. (In re Whitaker), 474 B.R. 687 (B.A.P. 8th Cir. 2012).

[6] 11 U.S.C. § 109 (only a "person" or "municipality" may be a debtor under the Code); 11 U.S.C. § 101(41).

[7] Santa Clara Pueblo, 436 U.S. at 59 (interpreting the federal Indian Civil Rights Act); C&L Enters., Inc. v. Citizen Band of Potawatomi Tribe of Okla., 532 U.S. 411, 418 (2001) (tribe retains sovereign immunity unless it has been unequivocally abrogated by Congress or clearly waived by the tribe); Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 790 (2014).

[8] 33 F.4th at 605 (Cooper "forbids us from adopting a magic-words test").

[9] 33 F.4th at 608.

[10] See, e.g. Ramey Construction Co. v. Apache Tribe of Mescalero Reservation, 673 F.2d 315, 320 (10th Cir. 1982).