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Tribal Troubles—Without Bankruptcy Relief

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The current economic downturn has impacted gaming establishments, including those operated by Indian tribes, resulting in loan and bond defaults. Since the passage of the Indian Gaming Regulatory Act (IGRA)[2] in 1988, tribal gaming has grown across the United States. The National Indian Gaming Commission (NIGC), created by the IGRA, regulates tribal gaming. NIGC reports show that more than 400 tribal gaming operations are now operated by more than 220 different tribes.[3] Its reports reflect that since 1995, tribal gaming revenues have grown about five-fold from $5.4 billion to $26.7 billion in 2008.[4] Although 2008 gaming revenues posted a 2.3 percent increase over 2007,[5] preliminary reports of 2009 projections do not reflect a continuing positive trend and will be the first drop in overall tribal gaming revenues. Recent news articles have highlighted tribal defaults, both payment and covenant, due to those depressed revenues.


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With revenues exceeding $25 billion, tribal gaming is significant to the economies of more than 220 tribes. In addition, tribal gaming has been the catalyst for many of the legal developments in Indian law in the past 15 years. Typically, tribal gaming is a tribal function or operation with a variety of financings, including traditional banks, private equity, syndications and public debt. Over the past 15 years tribal gaming has been profitable for the tribes and the risks of default for creditors appeared low.

About the Author

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Collateral for Indian Gaming Financings

The primary collateral for many commercial-lending transactions outside of tribal gaming is real estate and its improvements. Tribes are not able to encumber tribal property to secure financings. Indian gaming financings are typically secured by personal property (*e.g.,* slot machines and gaming tables, and pledges of gaming revenue streams, with the latter being the primary source for repayment).[6] Pledged future revenues as collateral are a red-flag alert to bankruptcy attorneys because of the possibility of termination under §552 of the Bankruptcy Code, assuming the availability of bankruptcy relief.

Sovereign Immunity

Indian tribes, including tribal instrumentalities, agencies and some tribal corporations enjoy sovereign immunity from suit. Accordingly, unless a tribe or tribal entity expressly consents to be sued or waives its sovereign immunity, it cannot be sued in any court.[7] The U.S. Supreme Court has held that the sovereign immunity of tribes may be waived or eliminated by Congress or can be waived by the Indian tribe or tribal entity, provided that the waiver is clear, explicit and unambiguous.[8] The waiver of sovereign immunity must be properly authorized in accordance with the governing and organizational documents of the tribe or tribal entity. Tribal gaming financings usually include waivers of sovereign immunity.

A complete analysis of tribal sovereign immunity is beyond the scope of this article, but Indian sovereign immunity is distinct from federal or state sovereign immunity and more limited.[9] Although Indian sovereign immunity exists, it is not equivalent to the sovereign immunity of independent nations. Indian nations are either incorporated into or dependent on the federal sovereign.[10] The Supreme Court's theory on Indian sovereign immunity is inconsistent; it recently questioned the origin and extent of tribal sovereign immunity.[11]

Sovereign immunity only provides a defense to suit. Thus, absent a waiver of sovereign immunity, judicial action may not be taken against a tribe. Sovereign immunity does not void contracts, nor does it prevent a lender from enforcing nonjudicial remedies (*e.g.,* offset or recoupment). Consequently, lenders generally do not extend loans to Indian tribes without obtaining waivers of tribal sovereign immunity.

Feature

1 This article does not constitute a legal opinion of Dorsey & Whitney LLP. Nothing in this article refers to the specific facts of any transaction or case.
2 25 U.S.C. §§2701, *et seq.*
3 Available at www.nigc.com.
4 *Id.*
5 *Id.*
6 Disposition of gambling devices as collateral presents issues of compliance with the Gambling Devices Act of 1962 (also known as the Johnson Act), 15 U.S.C. §§1171 *et seq.,* which is beyond the scope of this article.
7 *See, e.g., Kiowa Tribe of Oklahoma v. Manufacturing Tech. Inc.,* 523 U.S. 751 (1998).
8 *C & L Enters. Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.,* 532 U.S. 411 (2001).
9 *See Kiowa Tribe of Oklahoma v. Manufacturing Tech. Inc.,* 523 U.S. at 755-56.
10 *United States v. Wheeler,* 435 U.S. 313, 326 (1978) (describing implicit divestiture of sovereign immunity as "sovereignty which the Indians lost by virtue of their dependent status").
11 *See United States v. Lara,* 451 U.S. 193 (2004) (J. Thomas in concurring opinion states that "[f]ederal Indian policy is, to say the least, schizophrenic." *Id.* at 219. "The tribes either are or are not separate sovereigns." *Id.* at 215.).

IGRA Limitations

As noted, Indian gaming is federally regulated by the IGRA. Provisions of the IGRA mandate that the tribe has the "sole proprietary interest and responsibility for the conduct of any gaming activity."[12] Ownership and control of an Indian gaming operation must remain with the tribe. Management contracts for a tribal gaming operation must be approved by the NIGC in advance.[13] The NIGC broadly interprets those activities that fall within the scope of management of an Indian gaming facility.[14] Thus, the IGRA limits the ability of creditors to require management change or to assume control of an Indian gaming facility through common avenues (*e.g.,* receivership).

Eligibility to File for Bankruptcy Relief

To restructuring professionals, the Bankruptcy Code is the first thought when considering entities distressed by overwhelming debt. However, under the Code and the limited number of available decisions with respect to Indian tribes, it does not appear that federally-recognized Indian tribes are eligible for relief, either voluntarily or involuntarily. This is because a federally-recognized Indian tribe does not qualify as a "debtor" eligible for relief under the Code. A review of the applicable Code sections is necessary. Section 109 is the exclusive authority on who may be a debtor to obtain relief under the Code. Only a "municipality" or a "person" (each as defined) is eligible to be a debtor under §109. Indian tribes are not specifically identified in any of the bankruptcy definitions.[15]

Is a Tribe a "Municipality"?

The first type of entity to consider that may be a debtor under the Bankruptcy Code is a "municipality," even though the scope of relief is limited. Under §101(40) of the Code, a "municipality' is defined as a "political subdivision or public agency or instrumentality of a State." Clearly, tribes are not a subdivision of a state. Therefore, tribes do not qualify for bankruptcy relief as a "municipality" under the definition.

Is a Tribe a "Person"?

The second type of eligible debtor to consider under the Code is a "person." "Person" is expansively defined in §101(41) of the Code to include "individual, partnership and corporation," but specifically excludes a "governmental unit."[16] Each of these included terms must be examined for purposes of determining eligibility.

"Corporation" is defined in §101(9) of the Code, and although broadly defined to include all types of limited liability entities or associations, it is specifically distinguished from both an individual and a partnership. "Individual" and "partnership" are not uniquely defined in the Code. It appears clear that the term "individual" is an individual human being when considering other definitions in the Code, specifically the definition of an "individual with regular income."[17] Many of the Code definitions have their roots in the Bankruptcy Act of 1898, including "person."[18] A tribe is not an individual human being. A federally-recognized Indian tribe is not an individual, partnership or corporation. Tribes do not fit within the Code definitions or common-sense definitions of "individual," "partnership" or "corporation."

There is no reported decision in which a federally recognized Indian tribe has been explicitly found to be a "person" as defined in the Bankruptcy Code. There is one Indian gaming debtor, the Cabazon Indian Casino, in early Code-reported decisions, but the issue of eligibility was not discussed or challenged, although the bankruptcy appellate panel (BAP) did discuss the status of the debtor entity.[19] The bankruptcy court opinions are not reported, and the two appellate decisions indicate a lack of a sufficient factual record as to the debtor entity. The facts that may be gleaned from combining the two appellate decisions reflect that a factual dispute may have existed as to whether the debtor was a "co-partnership" or an "unincorporated corporation."[20] The panel's first opinion includes the curious *dicta* that "[i]f [the casino] were merely one enterprise of the [tribe], as its counsel argues, the filing should have been on behalf of the entire tribe."[21] Due to the factual issues and inconsistencies, and the lack of discussion as to eligibility, the *Cabazon* decisions are not apt. There appears to be no basis to support a finding that a tribe is a person, as defined.

Is a Tribe a "Governmental Unit"?

Is a tribe ineligible for bankruptcy relief because it is a "governmental unit"? A person under the Bankruptcy Code specifically excludes a governmental unit, meaning that if a tribe is a governmental unit, then it is not eligible for bankruptcy relief. In addition to a lengthy listing of types of governmental entities, the Code definition states that the "term 'governmental unit' means...other foreign or domestic government."[22] There is no reported decision examining whether a federally-recognized Indian tribe is a "governmental unit" for purposes of eligibility for relief. However, a number of courts have examined whether an Indian tribe is a "governmental unit" for purposes of applying the sovereign-immunity provisions of §106.

The majority of cases examining waiver of sovereign immunity have found that an Indian tribe is a "governmental unit" within the meaning of §101(27).[23] Additionally, there are decisions spanning nearly two centuries as to the "inherent sovereign authority" of tribes and describing tribes as "domestic dependent nations."[24] Further, the legislative history of the bankruptcy definition of "governmental unit" states that it is to have the "broadest sense."[25]

Contrary to the Ninth Circuit, an earlier a split decision of the Tenth Circuit BAP stated in *dicta* that tribes "probably are not" "domestic governments" as referenced in the definition of "governmental unit." The issue was not raised and briefed by the Indian tribe, and the panel proceeded to hold that sovereign immunity was not abrogated by §106.[26] The well-reasoned dissenting opinion reached the same conclusion as the Ninth Circuit in the *Krystal Energy* decision.[27] The majority opinion addressed the issue of whether the §106 waiver of sovereign immunity applied to the tribe but did not address eligibility for relief as a debtor under the Bankruptcy Code.

12 25 U.S.C. §2710(b)(2)(A).
13 25 U.S.C. §2711.
14 *See* the NIGC Bulletin, No. 1994-5.
15 For purposes of this article, a tribe is not considered an association with corporate powers, unincorporated company or association, business trust, farmer, fisherman, railroad, insurance company or bank, all of which are considered in other provisions of the Code. Although an argument might be fashioned by a creative practitioner as to an unincorporated company or association, it would not appear to have solid theoretical underpinnings in light of the sovereign immunity accorded to tribes and the exclusion of governmental units discussed infra. *See also* H.R. Rep. No. 595, 95th Cong., 1st Sess. 309 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 22 (1978). Decisions under the prior Bankruptcy Act support this interpretation. *See In re Schatz Federal Bearings Co. Inc.,* 5 B.R. 543 (Bankr. S.D.N.Y. 1980), and *In re The Miracle Church of God in Christ,* 119 B.R. 308 (Bankr. M.D. Fla. 1990).
16 *See* 11 U.S.C. §101(41).
17 *See* 11 U.S.C. §101(30).
18 Under the 1898 Act definition "'[p]ersons' shall include corporations, except where otherwise specified, and officers, partnerships, and women." 11 U.S.C. §1(23) (repealed). The Code definition uses the term "individual," apparently intended to refer to human beings.
19 *Cabazon Indian Casino v. Internal Revenue Serv. (In re Cabazon Indian Casino),* 57 B.R. 398, 399 n. 1 (9th Cir. B.A.P. 1986) (deciding federal tax obligation of debtor). *See also Zangari v. Cabazon Indian Casino (In re Cabazon Indian Casino),* 35 B.R. 124 (9th Cir. B.A.P. 1983) (reversing summary judgment due to factual issues as debtor relationship to tribe).
20 Compare *Cabazon Indian Casino v. Internal Revenue Serv. (In re Cabazon Indian Casino),* 57 B.R. at 399 n.1 (casino is unincorporated company or unincorporated corporation), with *Zangari v. Cabazon Indian Casino (In re Cabazon Indian Casino),* 35 B.R. at 126 (case filed as co-partnership).
21 *Zangari v. Cabazon Indian Casino (In re Cabazon Indian Casino),* 35 B.R. at 126.
22 11 U.S.C. §101(27).
23 *See, e.g., Krystal Energy Co. v. Navajo Nation,* 357 F.3d 1055 (9th Cir. 2004), *cert. denied,* 543 U.S. 871 (2004) (holding that Indian tribes are domestic governments).
24 Chief Justice Marshall described tribes as "domestic dependent nations" in *Cherokee Nation v. Georgia,* 30 U.S. 1, 17 (1831).
25 H.R. Rep. No. 595, 95th Cong., 1st Sess. 311 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 24 (1978).
26 *See Mayes v. Cherokee Nation (In re Mayes),* 294 B.R. 145, 148, n.10 (10th Cir. B.A.P. 2003) (in *dicta*).

Is It Practical and Fair to Exclude Tribes from Bankruptcy Relief?

Ineligibility for relief under the Bankruptcy Code is not unique to tribes. The definitions exclude other categories of potential entities. "Person" is defined to exclude railroads, domestic-insurance companies, banks and financial institutions (with some exceptions), and various enumerated government-funded entities. In general, these excluded entities are regulated industries that are subject to other regulatory control or insolvency legislation.

Similarly, tribes are unique in terms of their structure, governmental interrelationship and federal dependence. The trust ownership of tribal lands and the gaming regulation make tribes regulated in ways similar to regulated industries. The limitations on management imposed by the IGRA conflict with specific provisions of the Code. Appointment of a trustee under §1104 would be prohibited under the IGRA. Nevertheless, confirmation of a chapter 11 plan of reorganization requires compliance with all regulatory provisions, which would include the IGRA.[28] The sole proprietary-interest requirement of the IGRA would not permit a restructuring that converts debt into equity. Similarly, the subjugation provisions of §1129 could not be satisfied without a 100 percent repayment plan if the tribe retains the "sole proprietary interest." On the flip side, creditors may obtain judgments but have little recourse in the event the gaming revenue stream ceases.

Conclusion

Indian tribes are sovereign domestic governments ineligible to file petitions for relief under the Bankruptcy Code. Restructuring professionals for both tribes and creditors will need to address the surge of tribal gaming financial problems outside of the Code and the bankruptcy courts. Alternatively, in light of the popularity of bailouts, Congress could consider a bailout for financially ailing tribal gaming operations. ■

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27 *See Mayes v. Cherokee Nation (In re Mayes),* 294 B.R. at 157-64.
28 11 U.S.C. §1129(a)(6).