By Peter Barrett and Brittany Habbart[1]

# Circuit Split May Force Tribal Nations into Bankruptcy Courts

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Federal Indian law is rapidly transforming in a multitude of legal areas, and bankruptcy is no exception. Three circuit courts are currently split on whether the Bankruptcy Code strips tribal nations[2] of their tribal sovereign immunity in bankruptcy proceedings. The First Circuit Court of Appeals's decision in *In re Coughlin*[3] has joined the Ninth Circuit's decision in *Krystal Energy Co. v. Navajo Nation* in holding that the Code abrogates tribal sovereign immunity.[4] These decisions run counter to the Sixth Circuit's decision that upheld tribal sovereign immunity in *In re Greektown Holdings LLC*.[5]

Tribal nations have a unique status as "domestic-dependent nations" with inherent sovereignty over their members and territories.[6] With this sovereignty comes sovereign immunity, unless there is explicit abrogation of that immunity by Congress.[7] The abrogation might not be implied, so it must be "unequivocally expressed."[8] In order for tribal nations to be compelled to participate in bankruptcy proceedings, courts will need to determine whether tribal sovereign immunity is abrogated in the Code. This important circuit split, if not addressed by clarifying legislation, could be decided by the U.S. Supreme Court.

## Tribal Sovereign Immunity in the Bankruptcy Code

The Supreme Court has held that there do not need to be "magic words" unequivocally abrogating sovereign immunity. However, tribal nations are not mentioned in the 11 U.S.C. §§ 106(a) and 101(27). Section 106(a) provides that "[n]otwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit" to the extent of certain provisions, including the automatic stay. Section 101(27) defines a "governmental unit" 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 text of the applicable statute does not mention "Indian tribes" or other terms that are utilized in federal Indian law and jurisprudence to indicate a reference to tribal governments or similar entities. Since tribal nations are not explicitly stated in the Bankruptcy Code's definition of "governmental unit," the few courts that have analyzed this issue have resorted to trying to determine whether Congress intended to include tribal nations by its reference to "domestic government" in § 101(27).

## A Tribe Is a "Governmental Unit" in the Ninth Circuit

The Ninth Circuit's decision in *Krystal Energy* maintains that tribal nations are governmental units. This decision presented a new view of abrogation of tribal sovereign immunity in bankruptcy matters.

In this case, Krystal Energy Co. attempted to lease two oil and gas well sites valued at $4 million on the Navajo Indian Reservation from a lessee.[9] During the approval process, where the Navajo Nation and the Bureau of Indian Affairs both have to approve proposed assignments of leases, Krystal Energy took over operation of the well sites. When the proposed assignments were denied, Krystal Energy was ejected, and the Navajo Nation refused to allow Krystal Energy to return to retrieve its equipment from the leaseholds.

Krystal Energy filed for chapter 11 and brought an adversary proceeding against the Navajo Nation seeking damages. The district court dismissed the adversary proceeding based on the Navajo Nation's sovereign immunity, and the issue of whether Congress intended to abrogate tribal sovereign immunity in the Bankruptcy Code was appealed.

The court broke down the issue with syllogistic reasoning. First, Congress intended to abrogate sovereign immunity of all "foreign and domestic governments." With that established, the court looked at tribal nations and determined that they were govern-

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2 This article uses the terms "tribal nations," "Indian" and "tribe" interchangeably.

3 *Coughlin v. Lac Du Flambeau Band of Lake Superior Chippewa Indians (In re Coughlin)*, No. 21-1153, 2 (1st Cir. May 6, 2022).

4 *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056 (9th Cir. 2004).

5 *Buchwald Capital Advisors LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings LLC)*, 917 F.3d 451, 461 (6th Cir. 2019).

6 *Cherokee Nation v. Georgia*, 30 U.S. 1, 5 Pet. 1, 17, 8 L. Ed. 25 (1831).

7 *Okla. Tax Comm. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991).

8 *See Kiowa Tribe of Okla. v. Mfg. Techs. Inc.*, 523 U.S. 751, 759, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998); *C & L Enter. Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001).

9 *See* Case No. 2:12-cv-00079-FJM, 95, 7 (April 17, 2012), *available at* turtletalk.files.wordpress.com/2012/05/navajo-objections.pdf (unless otherwise specified, all links in this article were last visited on June 28, 2022).

ments. Whether they were "foreign" or "domestic" did not matter to the court because it reasoned that there is "no other form of government outside of a foreign/domestic dichotomy."[10] Since tribal nations are "domestic dependent nations," it was a short leap for the court to find that tribal nations are "domestic governments" for purposes of the Bankruptcy Code. Therefore, the Ninth Circuit found, tribal sovereign immunity was abrogated. A petition for *certiorari* was submitted to and denied by the Supreme Court in 2004.[11]

## Tribal Sovereign Immunity Upheld in the Sixth Circuit

*Krystal Energy* was rejected by the U.S. Court of Appeals for the Sixth Circuit in *In re Greektown Holdings*. The Sixth Circuit could not say with "perfect confidence" that the phrase "domestic government" refers to tribal nations,[12] and held that "§§ 106, 101(27) lack the requisite clarity of intent to abrogate tribal sovereign immunity."[13]

Greektown Holdings LLC, an entity owned by the Sault Ste. Marie Tribe of Chippewa Indians, owned the Greektown Casino in Michigan. A series of financial setbacks and compliance issues led to Greektown Holdings and other related corporate entities filing for chapter 11.[14] A litigation trust was ultimately formed and initiated suit against the tribe. The tribe raised its tribal sovereign immunity and moved to dismiss. The bankruptcy court found that the Bankruptcy Code abrogated sovereign immunity, but the district court found that it did not.[15]

On appeal, the Sixth Circuit held that the tribe's sovereign immunity was not abrogated.[16] Looking at legislative history, the court could not locate one example where the Supreme Court found that Congress intended to abrogate tribal sovereign immunity without expressly listing tribal nations in the statute.[17] With the lack of history or intent, the court deferred "to Congress and the Supreme Court to exercise their judgment in this important area."[18] The Supreme Court dismissed a petition for *certiorari* in 2020.[19]

## Benefits to a Tribe Being a "Governmental Unit" in the First Circuit

In *In re Coughlin*, the First Circuit recently went a step further than the Ninth Circuit. The debtor had a $1,100 payday loan with the Lac Du Flambeau Band of Lake Superior Chippewa Indians' lending subsidiary, LendGreen, when he filed his chapter 13 case.[20] Despite the automatic stay, LendGreen continued debt-collection efforts and asserted tribal sovereign immunity from all enforcement proceedings related to the automatic stay. The bankruptcy court agreed with the tribe and dismissed the enforcement proceedings against the tribe based on its sovereign immunity. However, the U.S. Court of Appeals for the First Circuit took the matter on direct appeal and reversed.

The Sixth Circuit held that the Bankruptcy Code "unequivocally strips tribes of their immunity."[21] Since tribal nations have self-determination and are physically within the "boundaries" of the U.S., the court reasoned that tribal nations were domestic governments. Also, the phrasing of "domestic dependent nations" when referring to tribal nations was used to indicate that Congress understood and had the intent to include tribal nations as domestic governments, since the terms are "functionally equivalent."[22]

> **The circuit court split highlights the ongoing uncertainty on whether §§ 106 and 101(27) intended to abrogate tribal sovereign immunity. As a result of the different interpretations of §§ 106 and 101(27), it is not clear when a tribal nation will be forced into bankruptcy courts.**

In addition, going further than a brief mention in *Krystal Energy*, the court found that abrogation was in the best interest of tribal nations because it would provide them with certain benefits. The Sixth Circuit noted that despite the abrogation of their sovereign immunity, tribal nations would actually benefit from being considered a "governmental unit" for purposes of the Bankruptcy Code, including priority treatment of certain claims, exceptions to discharge and the ability to collect tax revenue.[23] Therefore, the court wrote, "in practice, tribes benefit from their status as governmental units."[24]

The best arguments against abrogation are included in the dissent by Hon. David Barron in *In re Coughlin*.[25] First, the dissent argued that Congress referenced "Indian Territory" in the Bankruptcy Act of July 1, 1898, in an attempt to set the federal rules for bankruptcy,[26] yet Congress chose not to make any mention of tribal nations in the Bankruptcy Code. Second, if it was clear that "domestic governments" included tribal nations, then Congress would not have had to list the other forms of domestic governments, including states, the U.S., commonwealths, etc. Third, the definition of what is "domestic" was cherry-picked so that it would match the majority in *In re Coughlin*'s decision instead of a list of other definitions that did not match the holding. Fourth, the foreign/domestic dichotomy should not be a catch-all for all types of governments when Congress could have stated "any" or "every government" or the simplest option of direct-

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10 *Krystal Energy* at 1057.
11 *See* Case Nos. 02-17047, Supreme Court of the United States, *available at* supremecourt.gov/Search.aspx?FileName=/docketfiles/04-45.htm.
12 Francis J. Lawall & Veronica A. Torrejón, "Tribal Sovereign Immunity Defeats Bankruptcy Jurisdiction," Troutman Pepper (March 22, 2017), *available at* troutman.com/insights/tribal-sovereign-immunity-defeats-bankruptcy-jurisdiction.html.
13 *In re Greektown Holdings* at 461.
14 *Id.* at 454.
15 "*In re Greektown Holdings, LLC v. Papas*," Nat'l Indian Law Library, *available at* narf.org/nill/bulletins/federal/documents/in_re_greektown.html.
16 *In re Greektown Holdings* at 463.
17 *Id.* at 460.
18 *Id.* at 467.
19 Case No (18-1165, 18-1166) (Feb. 26, 2019), *cert denied*.
20 *In re Coughlin* at 2-3.
21 *Id.* at 2.
22 *Id.* at 10.
23 *Id.* at 11.
24 *Id.*
25 *Id.*
26 Bankruptcy Act of July 1, 1898, 30 Stat. 544, 544 (1898).

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ly stating "Indian tribes" in § 101(27). Finally, "domestic governments" should only be reserved for governments that originate in the Constitution. Tribal nations' governments are inherent and pre-date the Constitution.

## Did *Krystal Energy* and *Coughlin* Go Too Far?

Tribal sovereign immunity is abrogated under the Bankruptcy Code in two circuits and protected in one circuit, but the question remains open in all other jurisdictions. It is difficult to discern how Congress's intent to abrogate tribal sovereign immunity is "unequivocally expressed" in the statute as required by Supreme Court precedent, yet sophisticated parties and diligent judges across the nation so starkly disagree on the issue.

## Conclusion

The circuit court split highlights the ongoing uncertainty over whether §§ 106 and 101(27) intended to abrogate tribal sovereign immunity. As a result of the different interpretations of §§ 106 and 101(27), it is not clear when a tribal nation will be forced into bankruptcy courts. An eventual decision by Congress or the Supreme Court may provide clarity. Until then, it appears that the Ninth, Sixth and First Circuits will be split and the other circuit courts will continue to litigate this matter for the foreseeable future. abi

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