TFA Monthly Newsletter

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Supreme Court Ruling – should you be concerned?

By David Howard

The U.S. Supreme Court handed down some landmark rulings this past month. Tribes are very excited about the 7-2 ruling upholding the Indian Child Welfare Act (*Brackeen v. Haaland*). The victory reaffirms tribal sovereignty and protection of tribal culture. Also making headlines was the overwhelmingly negative reaction to the 5-4 ruling against the Navajo Nation in their water rights case.

The third case involving Indian Law which is not getting as much attention as it deserves, is the Lac du Flambeau tribal ruling decided on June 15th (*Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*). Tribes should be concerned about the implications of this case.

Facts of the Case - In July 2019, Brian W. Coughlin took out a $1,100 payday loan from Lendgreen, a wholly owned subsidiary of the Lac Du Flambeau Band ("Band"). Later that year, he filed a Chapter 13 bankruptcy petition in Massachusetts and listed his debt to Lendgreen as a nonpriority unsecured claim. When he filed his petition, the Bankruptcy Code imposed an automatic stay enjoining "debt-collection efforts outside the umbrella of the bankruptcy case." Despite the stay, Coughlin alleged that Lendgreen repeatedly contacted Coughlin seeking repayment of his debt. Coughlin moved to enforce the automatic stay against Lendgreen, and in response, the Band asserted tribal sovereign immunity and moved to dismiss the enforcement proceeding. The bankruptcy court granted the motion to dismiss, and the U.S. Court of Appeals for the First Circuit reversed. (source: Oyez.org)

In an 8-1 decision, SCOTUS ruled that the US Bankruptcy Code unequivocally abrogates (repeals or does away with) the sovereign immunity of all governments,

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IN THE NEWS

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Supreme Court Decides Lac du Flambeau Band of Lake Superior Chippewa Indians et al. v. Coughlin
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Supreme Court rules against Navajo Nation in water rights dispute
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Federal Court Sides With Seminoles Over Mobile Sports Betting, Could Alter US Gaming Landscape
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including tribal governments, despite the fact the Bankruptcy Code does not specifically mention tribes at all. In reaching its decision, the Court interpreted the Bankruptcy Code's definition of "governmental unit" to refer to any government, including a tribal government.

We aren't talking about the ability of a tribe to declare bankruptcy or to use a bankruptcy court as a defense against creditors and a tool to restructure and right-size a balance sheet. We are talking about *the ability of a bankruptcy court to pull a tribe into bankruptcy court proceedings as a third party*. The Bankruptcy Code abrogates the sovereign immunity of governments to over 50 different types of bankruptcy court proceedings. For example, with this ruling, tribal governments can now be prohibited from evicting a lessee of tribal lands due to the 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. Perhaps most significantly, a tribe can now be hauled into bankruptcy court by a U.S. bankruptcy trustee seeking to recover money paid to a tribe by a debtor in the form of alleged fraudulent transfers.

Our colleague at **Odinbrook Advisors**, Steven Strom said, "From this ruling, Tribes doing off-reservation businesses are required to comply with US bankruptcy rules when they are creditors. There may be broader implications for off-reservation businesses with meaningful debt. Tribes should consult business advisors on how their off-reservation businesses are financed and may be affected."

We also find this ruling to be concerning to us on many levels.

First, and most significantly, the bankruptcy ***court could decide to claw back tribal distributions from an off-reservation enterprise***. Depending on the amount of time that has passed between taking the transfers and a bankruptcy proceeding – Tribes may not have the cash left.

Second, ***it will be a challenge to reconstruct the situation at hand*** to determine whether the entity in bankruptcy was indeed insolvent at the time of the transfer. In order to prove (or disprove) a claim against the Tribe, Tribes may need to spend significant resources to detail the financial situation of an entity many years ago.

These conditions, among many others, can pose threats to a tribal operation, and there are many questions that rise to the surface now that we try to dissect these challenges.

- Is there a time limitation governing the claw back?
- What recourse is there to other tribal assets?
- How costly will the fight be to defend the transfers?
- Will there be an extension of this SCOTUS ruling to threaten sovereign immunity generally?

We know that there will be further situations where an entity in bankruptcy will now go after a tribal party. Over the past few years, together with Odinbrook Advisors, TFA has been working with tribes in cases that involve restructuring their debt and protecting their assets. We are very willing to discuss your tribe's unique circumstances to help you better understand the possible importance of this ruling from a practical, business perspective – we stand ready to help.

Note: we would like to thank Christine Swanick of Sheppard, Mullin, Richter and Hampton, LLC for her input as we developed this article.

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