The Great Debate – The Intersection between Indian Law and Bankruptcy

Eligibility to File for Bankruptcy

- Tribes cannot file under Chapters 7 or 11. As set forth in 11 U.S.C. § 109, a debtor must be a "person" under the Bankruptcy Code to be eligible to file under these chapters. The term "person" includes individuals, partnerships, and corporations, but does not include governmental units. 11 U.S.C. § 101(41). Several courts, including the Ninth Circuit and the Bankruptcy Court for the District of Arizona have held that tribes are governmental units. *See* Laura N. Coordes, Be*yond the Bankruptcy Code: A New Statutory Bankruptcy Regime for Tribal Debtors*, 35 Emory Bankr. Devs. J. 364, 375 n.68 (2019) (collecting cases).
- Tribes cannot file under Chapter 9. Only municipalities are eligible to file under Chapter 9. 11 U.S.C. § 109(c). Tribes are sovereigns, rather than a subpart of a particular state, and therefore do not qualify under this chapter. *See* Alexander Hogan, *Protecting Native American Communities By Preserving Sovereign immunity and Determining the Place of Tribal Businesses in the Federal Bankruptcy Code*, 43 Colum. Human Rights L. Rev. 569, 597 (2012).
- However, corporations that are wholly owned by Tribes can file. *See In re 'Sa' Nyu Wa Inc.*

Sovereign Immunity

- Tribes are afforded sovereign immunity afforded to protect their ability to self-govern. *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004). But the Circuits are split on whether Tribes are afforded sovereign immunity in bankruptcy court.
- 11 U.S.C. § 106(a) provides that "notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit" with respect to several Bankruptcy Code sections.
- The Ninth Circuit has held that Tribes are "governmental units" because the definition of governmental units in 11 U.S.C. § 101(27) includes the term "other domestic governments." *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004); *In re Russell*, 293 B.R. 34 (Bankr. D. Ariz. 2003). In *Krystal Energy*, the Court found that the words "other domestic governments" must mean Indian tribes because all other domestic governments (States, municipalities, or their instrumentalities) were also defined within Section 101(27), and U.S. Supreme Court jurisprudence has held that Indian Tribes are "domestic dependent nations."
- However, the Ninth Circuit's *Krystal Energy* decision is an outlier, with the other Circuits ruling that Tribal sovereign immunity is not abrogated by Section 106. *See In re Whitaker*, 474 B.R. 687 (B.A.P. 8th Cir. 2012); *In re Greektown Holdings*, 917 F.3d 451 (6th Cir. 2019); *In re Star Grp. Communs., Inc.*, 568 B.R. 616 (Bankr. D.N.J. 2016); *In re Money Ctr. of Am., Inc.*, 565 B.R. 87 (Bankr. D. Del. 2017).

Waiver of Sovereign Immunity

- Tribes can also waive their sovereign immunity by their conduct—for example, by filing a proof of claim, *see In re Lazar*, 237 F.3d 967, 977 (9th Cir. 2001) (quoting *Gardner v. New Jersey*, 329 U.S. 565 (1947)), or by commencing an adversary proceeding, thereby exposing themselves to counterclaims, *see In re Vianese*, 195 B.R. 572, 576 (Bankr. N.D.N.Y. 1995).
- This waiver is limited to adjudication of matters arising out of the same transaction and occurrence as the claim. *In re Lazar*, 237 F.3d 967, 977 (9th Cir. 2001).
- However, participation in the claims allowance process does not constitute a waiver with respect to potential Chapter 5 avoidance actions unless the action arises out of the same transaction or occurrence as the proof of claim filed by the Tribe. *See In re Greektown Holdings, LLC*, 559 B.R. 842, 850 (Bankr. E.D. Mich. 2016).
- A Tribe's attempt to file a proof of claim with a reservation of rights with respect to sovereign immunity would likely be ineffective. *See In re Barrett Ref. Corp.*, 221 B.R. 795, 812 n.28 (Bankr. W.D. Okla. 1998) (finding Mississippi Commission on Environmental Quality waived sovereign immunity despite its reservation of rights where it filed a proof of claim.); *In re Nat'l Cattle Cong.*, 247 B.R. 259, 269 (Bankr. N.D. Iowa 2000) (holding that Tribe must either withdraw its proof of claim or remove its reservation of rights from the proof of claim).

BEYOND THE BANKRUPTCY CODE: A NEW STATUTORY BANKRUPTCY REGIME FOR TRIBAL DEBTORS

Laura N. Coordes[*]

ABSTRACT

Native American tribes and tribal businesses play an important role in U.S. commerce, but many of these entities are effectively prohibited from filing for bankruptcy relief when financial distress occurs. This Article demonstrates how and why the Bankruptcy Code is a poor fit for these "tribal debtors" and suggests that Congress enact a new statutory regime to provide structured debt relief for these entities rather than modify the Bankruptcy Code.

Although this proposal is novel with respect to tribal debtors, Congress has looked beyond the Bankruptcy Code to provide debt relief when use of the Code would be inapt on two other recent occasions: the passage of the Dodd-Frank Act and PROMESA. Using tribal debtors as an example, this Article investigates whether and how this practice might continue and what it might mean for the bankruptcy system writ large.

[*] Associate Professor, Arizona State University Sandra Day O'Connor College of Law. I thank Matthew Bruckner, Vincent Buccola, Anthony Casey, Patricia Ferguson, Melissa Jacoby, Rhett Larson, Kaiponanea Matsumura, Robert Miller, Erin Scharff, Joshua Sellers, Bijal Shah, and David Skeel for their advice and comments. I also benefitted from discussions of this Article at the University of North Carolina's junior faculty exchange presentation and ASU's junior scholars' workshop.

INTRODUCTION

In a crisis, uncertainty is dangerous and terrifying. Financial crises are no different. The events leading to the 2008 recession caused banks—and regulators—to panic,[1] and U.S. economic policy became unsteady as the Federal Reserve and lawmakers struggled to respond.[2] In particular, the "shocking" collapse of Lehman Brothers set off a "financial tsunami," which in turn nearly "triggered a global financial meltdown."[3]

Similarly, after the Supreme Court in 2016 rejected Puerto Rico's attempt to enact its own form of bankruptcy legislation,[4] Puerto Rico teetered on the brink of financial collapse. Congress rushed to devise a solution[5] in the face of the commonwealth's declaration that it intended to default on significant payment obligations, which threatened to trigger "a cycle of hospital closures, electric-grid instability, infrastructural collapse, and emergency-service breakdowns."[6] When the next crisis strikes, which entities will be left to face the devastating consequences of uncertainty?

Native American tribes and tribal-affiliated businesses[7] (collectively referred to as "tribal entities" or "tribal debtors")[8] are playing an increasingly

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[1] Kimberly Amadeo, *The 2008 Financial Crisis*, THE BALANCE (July 1, 2017), https://www.thebalance.com/2008-financial-crisis-3305679 ("The mistrust within the banking community was the primary cause of the 2008 financial crisis.").

[2] *See* John H. Makin, *Financial Crises and the Dangers of Economic Policy Uncertainty*, AMERICAN ENTERPRISE INST. (2012), https://www.aei.org/publication/financial-crises-and-the-dangers-of-economic-policy-uncertainty/.

[3] Adam Shell, *Lehman Bros. Collapse Triggered Economic Turmoil*, ABC NEWS, https://abcnews.go.com/Business/lehman-bros-collapse-triggered-economic-turmoil/story?id=8543352.

[4] Puerto Rico v. Franklin California Tax-Free Trust, 136 S. Ct. 1938, 1942 (2016).

[5] Stephen A. Nuno, *Congress Passes PROMESA Act for Puerto Rico Debt Crisis*, NBC NEWS (June 29, 2016), https://www.nbcnews.com/news/latino/congress-passes-promesa-act-puerto-rico-debt-crisis-n601291 (noting that the vote to pass the bill came two days before Puerto Rico faced a $2 billion debt payment).

[6] Ed Morales, *Who is Responsible for Puerto Rico's Debt?*, THE NATION (June 7, 2016), https://www.thenation.com/article/who-is-responsible-for-puerto-ricos-debt/.

[7] Although this Article primarily discusses tribes and tribal-affiliated businesses together, there are distinctions between the two. Tribes or Indian nations are "self-governing sovereigns" that "generally exercise powers of self-government." Karen J. Atkinson & Kathleen M. Nilles, *Tribal Business Structure Handbook*, OFFICE OF INDIAN ENERGY & ECONOMIC DEVELOPMENT, II-1 (2008), https://www.irs.gov/pub/irs-tege/tribal_business_structure_handbook.pdf. By contrast, a tribally chartered corporation is "a corporation that is organized under a tribal statute or code or pursuant to a resolution of an authorized tribal legislative body." *Id.* at III-1, III-3. This Article does not address individual Native Americans, who are eligible to file for debt relief under chapters 7 or 13 of the Bankruptcy Code. This Article similarly does not address businesses created under state law that may have connections to tribes or tribal members, as these businesses are likely able to use chapter 11 of the Code.

[8] Although tribes and tribal businesses are distinct, many of the same problems apply to both in the bankruptcy context, in part because tribal businesses are often conflated with tribes themselves, as discussed in

significant role in U.S. commerce,[9] yet the U.S Bankruptcy Code makes it difficult, if not outright impossible, for these entities to use the bankruptcy system as debtors. Lack of guidance from the Bankruptcy Code in this area creates uncertainty for tribal entities and those that engage in business with them. Because tribal entities are increasingly important players in U.S. commerce and business, uncertainty as to these entities' treatment in bankruptcy may make them the next victims of an unexpected financial crisis, with consequences that could destabilize a significant portion of the American economy.

Although various observers have expressed concern over a tribal debtor's lack of eligibility for bankruptcy,[10] eligibility is only the first hurdle a tribal debtor will encounter if it seeks to restructure its debts using the U.S. Bankruptcy Code. Even if a tribal entity were deemed eligible to file for bankruptcy, the Bankruptcy Code conflicts with other federal statutes and policies governing Indian nations and their businesses, such as the Indian Gaming Regulatory Act ("IGRA"). The federal government's trust relationship with tribes, tribal sovereignty, the federal regulatory environment, and other tribal laws and customs pose further challenges for prospective tribal debtors.

These under-explored challenges raise the question of whether tribal entities should be eligible for bankruptcy or some sort of structured debt relief in the first place. While acknowledging that exclusion of tribal entities from the Bankruptcy Code may have been intentional, this Article nevertheless illustrates that tribal entities can experience debt overhang and holdout creditors in the

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Part I.A. Therefore, this Article refers to both entity types collectively as "tribal entities" or "tribal debtors" except when the distinctions between these entities become important.

[9] Atkinson & Nilles, *supra* note 7, at I-1 (noting that "[t]ribal governments and tribal businesses engage in a wide range of business and financial transactions," including "tourism, gaming, energy, agriculture, forestry, manufacturing, federal contracting, and telecommunications").

[10] *See, e.g.*, R. Spencer Clift, III, *The Historical Development of American Indian Tribes; Their Recent Dramatic Commercial Advancement; and a Discussion of the Eligibility of Indian Tribes Under the Bankruptcy Code and Related Matters*, 27 AM. INDIAN L. REV. 177, 181 (2002) (arguing for clarification of a tribe's status under the Bankruptcy Code); Amanda L. Cartwright, *Can Native American-Owned Casinos File for Chapter 11?*, AM. BANKR. INST. J., Oct. 2012, at 50, 50 (noting the lack of a "clear insolvency regime" for tribes); Ji Hun Kim & Christopher S. Koenig, *Rolling the Dice on Debtor Eligibility*, AM. BANKR. INST. J., June 2015, at 18, 19 (noting that "[I]t is not clear whether Congress would be able to easily amend the Code to provide Native American tribes with a source of relief under federal bankruptcy laws"); Stephan A. Hoover, Comment, *Forcing the Tribe to Bet on the House the Limited Options and Risks to the Tribe when Indian Gaming Operations Seek Bankruptcy Relief*, 49 CAL. W.L. REV. 269 (2013) (arguing that Indian gaming operations should be able to file for bankruptcy); Alexander Hogan, Note, *Protecting Native American Communities by Preserving Sovereign Immunity and Determining the Place of Tribal Businesses in the Federal Bankruptcy Code*, 43 COLUM. HUM. RTS. L. REV. 569 (2012) (discussing the "uncertainty concerning the place of Indian tribes in the federal bankruptcy system"); Blake F. Quackenbush, *Cross-Border Insolvency & The Eligibility of Indian Tribes to Use Chapter 15 of the Bankruptcy Code*, 29 T.M. COOLEY L. REV. 61 (2012) (proposing that tribes use chapter 15 of the Code to file for bankruptcy).

same way other bankruptcy-eligible entities can. When tribal entities have a need for bankruptcy's unique debt restructuring tools,[11] this Article advocates for those entities to be deemed eligible to restructure their debt.

If getting into bankruptcy is the first step, the next step involves determining how bankruptcy relief can be fashioned for tribal debtors. Rather than use the Code's ill-fitting law and procedures, this Article proposes an alternative: Congress should enact a new statutory regime for tribal debt relief.

Although special debt relief legislation is a novel proposal with respect to tribal entities, it is not unprecedented. In 2010, Congress passed the Dodd-Frank Act, which provides for an orderly liquidation process for distressed financial firms.[12] These firms were ineligible to file for relief under the Bankruptcy Code.[13] And in 2016, Congress enacted special debt restructuring legislation for Puerto Rico, another entity that was deemed ineligible for traditional, Code-based bankruptcy relief.[14]

With respect to both banks and Puerto Rico, Congress looked beyond the Bankruptcy Code to create laws specifically tailored to these entities and their unique attributes.[15] Indeed, as this Article will discuss, specialized legislation may become a new norm in bankruptcy law, as entities previously not contemplated by the Bankruptcy Code pursue options for debt restructuring. This Article contends that, like financial firms and U.S. territories, tribal entities are differently situated from other debtors covered by the U.S. Bankruptcy Code. Therefore, if Congress were to consider structured debt relief for tribal entities, these entities deserve a distinct form of relief, one that allows these entities to concretely address the threat that creditors may destroy ongoing operations.

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[11] *See* Laura N. Coordes, *Gatekeepers Gone Wrong: Reforming the Chapter 9 Eligibility Rules*, 94 WASH. U. L. REV. 1191, 1206–07 (2017) (describing these tools); *see also* Matthew A. Bruckner, *Bankrupting Higher Education*, 91 AM. BANKR. L.J. 697 (2017) (describing bankruptcy tools and applying a framework to evaluate whether colleges should be bankruptcy-eligible).

[12] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010).

[13] *See generally* Richard M. Hynes & Steven D. Walt, *Why Banks Are Not Allowed in Bankruptcy*, 67 WASH. & LEE L. REV. 985 (2010).

[14] Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. § 2101 et seq. (2016).

[15] In addition to these examples, Congress also passed the Regional Rail Reorganization Act, which created a special court and distinct processes for certain U.S. railroads. Pub. L. No. 93-236, 87 Stat. 986 (1974). The Act functioned as a "supplement" to the Bankruptcy Act, which predated the U.S. Bankruptcy Code. Blanchette v. Conn. Gen. Ins. Corps., 419 U.S. 102, 109 (1974). As a pre-Code law, a full discussion of the Act and its impact on bankruptcy at the time is beyond this Article's scope; for a fuller discussion, *see* Stephen J. Lubben, *PROMESA and the Bankruptcy Clause: A Reminder About Uniformity*, 12 BROOK. J. CORP. FIN. & COM. L. 53, 56–58 (2017).

The Article proceeds as follows. Part I examines the question of whether tribal entities should be eligible for structured debt relief. After probing the nature of the problem of excluding tribal debtors from Code-based bankruptcy relief, Part I discusses the merits and drawbacks of granting tribal entities access to relief before concluding that access to structured debt relief is warranted in distinct cases. Part II then explores possible avenues of relief for tribal debtors. After surveying existing proposals for granting tribal debtors eligibility for bankruptcy under the Bankruptcy Code, Part II introduces on an alternative path: the creation of specialized bankruptcy legislation.

Part III then explains the process for developing specialized legislation for tribes and provides guidance on key features of this proposed bankruptcy relief. Significant features include an automatic stay; a voluntary, orderly process for debt adjustment and liquidation; exclusivity for tribal debtors to propose a plan; use of collective action clauses and other sovereign debt restructuring tools, when appropriate; a property distribution scheme that allows for some equity retention; strict scrutiny of debtor-in-possession ("DIP") lending; limited interference into the debtor's internal affairs; and an adjudicator to run the process and settle disputes. This Part also analyzes some of the benefits and drawbacks of the proposed legislation. Part IV concludes by briefly explaining how specialized law may represent a broader shift for the bankruptcy system as a whole.

I. ELIGIBILITY FOR STRUCTURED DEBT RELIEF

Tribal entities are playing an increasingly significant role in U.S. commerce, yet these entities face uncertainty when it comes to addressing financial difficulties. It is at best unclear, and at worst outright prohibited, for tribal entities to use the U.S. Bankruptcy Code as debtors. This Part describes the current treatment of tribal entities under relevant U.S. laws and highlights some of the arguments for and against their eligibility for bankruptcy relief. Ultimately, this Part concludes that tribal entities should be eligible for structured debt relief in appropriate circumstances.

A. The Status Quo: Confusion and Uncertainty

Tribes and tribal businesses are increasingly involved in commerce—with the blessing and encouragement of the U.S. government.[16] But what happens if

[16] *See* Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OREGON L. REV. 757, 760–63 (2001) (contrasting federal control over economic activity and jobs

a tribal entity experiences financial distress? The answer is unclear for several reasons. The status of a tribal entity itself is often ambiguous. Is the entity sovereign? Can it be sued? How much does it resemble a non-tribal business entity? It does not seem possible for tribes themselves to file for bankruptcy, and there is no clear answer as to whether a tribal business could use the Bankruptcy Code. In particular, the Bankruptcy Code conflicts with other laws and policies pertaining to tribes and tribal businesses. These uncertainties cloud business relations with Indian nations and may have the effect of closing off access to lenders and other opportunities.

1. Tribal Entities in Commerce

To date, a handful of tribal-affiliated corporations have sought access to the U.S. bankruptcy system as debtors.[17] Nevertheless, many more tribal entities experienced financial difficulties during the 2008 financial crisis[18] and may have explored bankruptcy or other debt restructuring options without actually filing.[19] In addition, the threat of fiscal distress for tribal entities is significant due to these entities' engagement in nearly all areas of commerce.

The 2008 recession was difficult on nearly all businesses, and many tribal casinos become overleveraged during this time.[20] At least six casinos sought to restructure their debt out of court between 2010 and 2013.[21] These restructurings were largely consensual, as both sides had incentives to negotiate: creditors wanted the gaming operation to remain in business, produce revenue, and allow the tribal entity to service its debt, while tribes wanted their gaming assets to operate because these operations often funded basic public services for tribal

in Indian country with the relatively hands-off policy the federal government takes with respect to non-Indian businesses).

[17] Ji Hun Kim & Christopher S. Koenig, *Rolling the Dice on Debtor Eligibility: Native American Tribes and the Bankruptcy Code*, AM. BANKR. INST. J., June 2015, at 18, 18–19.

[18] For example, the La Posta Casino near San Diego shut down due to "lack of business and mounting debt" in 2012. J. Harry Jones, *Santa Ysabel Casino Goes Out of Business*, THE SAN DIEGO UNION-TRIBUNE (Feb. 3, 2014), http://www.sandiegouniontribune.com/business/sdut-santa-ysabel-casino-debt-2014feb03-htmlstory.html; *see* Jonathan Martin, *Elizabeth Warren, Addressing Claims of Native Ancestry, Vows to Press for Tribes*, N.Y. TIMES: POLITICS, (Feb. 14, 2018), https://www.nytimes.com/2018/02/14/us/politics/elizabeth-warren-trump.html (noting that some tribes "account for the most impoverished communities in the country").

[19] John Froonjian, *Indian Casinos Not Immune to Troubles During Recession*, THE PRESS OF ATLANTIC CITY (Nov. 1, 2009), http://www.pressofatlanticcity.com/web_specials/indian-casinos-not-immune-to-troubles-during-recession/article_ea6131b2-9a82-11de-8f64-001cc4c03286.html.

[20] Adam Moses, *Drowning in Debt? A Look at Recent Debt Restructurings in the Tribal Gaming Industry*, GLOBAL GAMING BUSINESS, (2013), https://www.milbank.com/images/content/1/2/12269/Drowning-in-Debt-By-Adam-Moses-March-2013.pdf.

[21] *Id.* (listing ongoing and recently completed restructurings).

members.[22] Despite these incentives, when disagreements occurred, the lack of a neutral third party, such as a judge or arbitrator, to resolve these disagreements sometimes dragged out the process.[23] Indeed, tribal restructurings from this period have been characterized as "rather protracted affairs, with some taking years to complete."[24]

Casinos are popular businesses for tribes, in part because Congress has supported the development of tribal gaming operations. In 1988, Congress passed the Indian Gaming Regulatory Act ("IGRA"),[25] which establishes a jurisdictional framework governing Indian gaming.[26] The Act was designed to encouraging tribal entities to engage in commerce.[27] By 2001, so-called "gaming tribes" had made a significant impact on the U.S. economy, contributing $32 billion in revenue, $12.4 billion in wages, and creating 490,000 jobs.[28] "The benefits from Indian gaming also spill over to non-Indian communities and to federal and state tax revenues."[29]

Importantly, casinos represent just one component of tribal business. Significant incentives exist for enterprises that do business with Native American-owned companies, including access to cash rebates, discounted leasing rates, and tax-exempt financing.[30] For their part, tribal businesses, and particularly tribally chartered corporations, also enjoy advantages, including avoidance of state regulation and taxation, as well as ease of formation.[31] Tribes and tribal corporations regularly engage in real estate development,[32] banking

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[22] Moses, *supra* note 20.

[23] *Id.*

[24] *Id.* (citing the restructuring of the Foxwoods Resort Casino).

[25] Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. § 2701 et seq.).

[26] 25 U.S.C. § 2702.

[27] *Id.* ("The purpose of this chapter is to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.").

[28] Gabriel S. Galanda, *Getting Commercial in Indian Country*, 12 ABA BUS. L. SECT. NO. 6 (July/August 2003).

[29] ROBERT J. MILLER, RESERVATION "CAPITALISM": ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 71 (Univ. Neb. Press 2013) (2012).

[30] *See generally Advantages of Doing Business With Native Americans*, ABA SECTION OF STATE AND LOCAL GOVERNMENT, Spring 2016 Meeting, *available at* https://www.americanbar.org/content/dam/aba/administrative/state_local_government/NavigatingTribalWatersRobSaunooke41116.authcheckdam.pdf (discussing these and other advantages conferred by federal and state law).

[31] *Choosing a Tribal Business Structure*, U.S. DEPT. INTERIOR, Dec. 10, 2015, https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/bia/pdf/idc1-032915.pdf.

[32] Terry Pristin, *Commercial Real Estate; Arizona Indians Turn to Real Estate Development*, N.Y. TIMES: BUSINESS DAY (Dec. 24, 2003), http://www.nytimes.com/2003/12/24/business/commercial-real-estate-arizona-indians-turn-to-real-estate-development.html (describing "a $600 million commercial development on 209 acres owned by . . . Salt River Pima-Maricopa families").

and finance,[33] telecommunications,[34] wholesale and retail trade,[35] and tourism,[36] to name a few examples. Indian nations are even getting involved in recreational marijuana sales: in October of 2017, the Las Vegas Paiute Tribe opened a 10,000-square foot retail store in downtown Las Vegas.[37]

Notably, tribes are also involved in payday lending and until recently, were the subject of much attention and focus by the Consumer Financial Protection Bureau ("CFPB").[38] In January of 2018, the CFPB dropped a lawsuit against a group of lenders associated with a tribe. The suit alleged that the lenders had deceived consumers and failed to "disclose the true cost of the loans."[39] In addition, tribal businesses, particularly in the Southwestern United States, are heavily involved in the provision of energy and water to surrounding regions, in addition to employing hundreds of individuals.[40] Financial distress for a tribal

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[33] Jennifer H. Weddle, *Nothing Nefarious: The Federal Legal and Historical Predicate for Tribal Sovereign Lending*, 61 FED. LAW. 58, 59 (2014) ("Over the past decade, approximately two dozen tribes have established online consumer lending enterprises.").

[34] *See* National Tribal Telecom Ass'n, http://www.nationaltribaltelecom.org/ (describing the Association's purpose as "to provide a forum for tribally owned companies and those who work in the telecommunications industry").

[35] Galanda, *supra* note 28.

[36] *Id.*

[37] Jay Jones, *Native American Tribe Opens Huge Pot Store Near Fremont Street in Las Vegas*, LOS ANGELES TIMES: TRAVEL (Oct. 31, 2017, 6:00 AM), http://www.latimes.com/travel/deals/la-tr-las-vegas-paiute-tribe-pot-store-20171030-story.html (last visited Jan. 31, 2018) (noting that the store, an "economic driver," employs roughly 35% of the tribe). Several tribes have recently opened marijuana-related businesses. *See* J. Harry Jones, *Gaming Gone Bust, Tribe Turns to Marijuana Farming*, SAN DIEGO UNION-TRIBUNE (May 2, 2017, 6:50 PM), http://www.sandiegouniontribune.com/communities/north-county/sd-no-ysabel-marijuana-20170502-story.html (discussing how the Iipay Nation of Santa Ysabel has turned to marijuana cultivation). Struggling marijuana-related businesses have also had difficulty using the Bankruptcy Code. *See* Steven J. Boyajian, *Just Say No to Drugs? Creditors Not Getting a Fair Shake When Marijuana-Related Cases are Dismissed*, 36 AM. BANKR. INST. J. 9 (2017) (discussing cases where marijuana-related businesses debtors cannot get relief).

[38] Zeke Faux, *CFPB Signals Shift by Dropping Payday Lender Lawsuit*, BLOOMBERG (Jan. 18, 2018), https://www.bloomberg.com/news/articles/2018-01-18/trump-led-cfpb-signals-shift-by-dropping-payday-lender-lawsuit (explaining that online payday lenders associated with tribes are "surprisingly big" businesses that arose because tribes can argue that regulations pertaining to payday loans do not apply to them since these regulations are promulgated by state law).

[39] *Id.* (suggesting that the decision to drop the suit came due to the new direction the Trump administration took with respect to the CFPB).

[40] James Rainey, *Biggest Coal-Burning Power Plant in the West is Most Likely Shutting Down*, NBC NEWS, (Apr. 11, 2018, 11:23 AM), https://www.nbcnews.com/news/us-news/biggest-coal-burning-power-plant-west-most-likely-shutting-down-n864981 (describing the Navajo Generating Station in Arizona as "a centerpiece of the [reservation's] economy," which provides "hundreds of jobs" and "helps light the Southwest and powers the pumps that send Colorado River water to Tucson and Phoenix"); Noah Silber-Coats & Susanna Eden, *Arizona Water Banking, Recharge, and Recovery*, THE ARROYO (2017), https://wrrc.arizona.edu/sites/wrrc.arizona.edu/files/attachment/Arroyo-2017.pdf (describing "Gila River Water Storage [. . .], a company that markets stored water credits primarily to developers").

business could therefore have devastating consequences, possibly affecting the supply of critical resources to entire regions of the country.

Participating in all of these activities brings risks as well as rewards. Tribes and their affiliate entities might face litigation connected to their activities,[41] such as the CFPB lawsuit, or they may incur unsustainable amounts of debt.[42] As tribal entities continue to engage in U.S. commerce and to interact with non-tribal individuals and organizations, it will become increasingly important for bankruptcy law to provide guidance on how these entities should be treated when they are subject to financial distress. Although, as noted, some casinos have been able to restructure their debts out of court, an out-of-court workout may not be feasible if a tribal entity is faced with a significant legal judgment,[43] persistent holdout creditors,[44] or several creditors clamoring for the same assets.

Cohen's Handbook of Federal Indian Law, commonly called the "bible" of federal Indian law,[45] has very little on the subject of tribal bankruptcy. As tribal businesses become increasingly entrenched in the broader commercial sphere, it is critical that these businesses—and those who interact with them—know what to expect in the event of a financial setback. Scholars have long recognized the importance of establishing functioning economies in Indian communities by developing tribal- and Indian-owned economic activities.[46] A necessary, but understudied, component of this process is ensuring that a system is in place to restructure or dissolve these economies if and when they fail.

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[41] *Federal Indian Law—Tribal Sovereign Immunity*—Michigan v. Bay Mills Indian Community, 128 HARV. L. REV. 301 (2014) ("Subsequent economic development by some Indian tribes has resulted in an increasing number of legal disputes that have run up against tribal immunity."); Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024 (2014) (holding that a tribe is immune from suit for commercial activities on nontribal land as long as federal law has not expressly waived immunity, but noting in dicta that a state may use its own enforcement measures against individuals affiliated with the commercial activity).

[42] Alan N. Resnick & Henry J. Sommer, COLLIER GUIDE TO CHAPTER 11 ¶ 25.01 (LexisNexis 2012) (noting that "many casino operators incurred unsustainable debt levels" in the 1990s and 2000s and discussing tribal ownership of casinos). Professor David Skeel lists "whether unsustainable debt is a potential problem" as a factor to consider for determining when bankruptcy relief should be available. David A. Skeel, Jr., *When Should Bankruptcy Be An Option (For People, Places, or Things)?*, 55 WM. & MARY L. REV. 2217 (2014).

[43] *See, e.g.*, the 'Sa' Nyu Wa bankruptcy, discussed *infra* (Part I.A.3), which was filed due to a large arbitration award.

[44] *See, e.g.*, Omnibus Statement of Facts and Omnibus Declaration of David Chelette in Support Thereof, *In re* Santa Ysabel Resort and Casino, Case No. 12-09415-PB11 at 4 (July 3, 2012) (describing debtor's failed attempt to pursue an out-of-court restructuring and creditors' persistence in pursuing debtor's assets).

[45] "Cohen's Handbook of Federal Indian Law," LEXISNEXIS STORE, https://store.lexisnexis.com/products/cohens-handbook-of-federal-indian-law-skuusSku57318.

[46] ROBERT J. MILLER, RESERVATION "CAPITALISM": ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 3 (Univ. Neb. Press 2013) (2012).

2. Tribes' Uncertain Status

The U.S. legal system is not always clear with respect to its treatment of tribal entities. If a tribe or tribal corporation is conducting business solely with other tribal entities or individuals, "Indian law," a "body of tribal, state and federal law," governs.[47] Indian nations have the authority to govern themselves under the Indian Reorganization Act ("IRA"),[48] and many tribes organized under the IRA have chosen to adopt commercial laws modeled after U.S. laws like the Uniform Commercial Code.[49] Tribes also have the authority to regulate and adjudicate insolvency matters arising *within* the tribe.[50]

Complications arise, however, when entities outside of the tribe enter the picture. Although Indian nations are commonly referred to as "sovereign," tribal sovereignty is not absolute.[51] Native American tribes are said to have sovereign immunity from all federal laws of general application—unless Congress makes an "unequivocal expression" to abrogate such immunity.[52] In the bankruptcy context, sovereign immunity can prevent creditors from exercising certain remedies against tribes and can prevent Indian nations from being made subject to federal and state court jurisdiction.[53] Although tribes have the power to

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[47] Galanda, *supra* note 28.

[48] 25 U.S.C. § 461 (1934) (current version at 25 U.S.C. § 5101 (2018)).

[49] Galanda, *supra* note 28.

[50] Blake F. Quackenbush, *Cross-Border Insolvency & The Eligibility of Indian Tribes to Use Chapter 15 of the Bankruptcy Code*, 25 T.M. COOLEY L. REV. 61 (2012).

[51] *See* David D. Haddock & Robert J. Miller, *Can a Sovereign Protect Investors from Itself? Tribal Institutions to Spur Reservation Investment*, 8 LEWIS & CLARK L. REV. 173, 186 (2004) ("If being sovereign means to be superior in position to all others, or at least independent of and unlimited by any other, tribes are not in fact sovereign, nor have they recaptured any substantial sovereignty from the national government."); *see also* Stephen J. Lubben, *Sovereign Bankruptcy Hydraulics*, N.Y.U. ANN. SURV. OF AMER. L. (forthcoming), *available at SSRN*: https://ssrn.com/abstract=2923407 ("[S]overeignty and sovereign immunity occur along a continuum."); Corina Rocha Pandeli, Note, *When the Chips are Down: Do Indian Tribes with Insolvent Gaming Operations have the Ability to File for Bankruptcy Under the Federal Bankruptcy Code?*, 2 U.N.L.V. GAMING L.J. 255, 259 (2011) (describing tribes as enjoying a "relatively sovereign relationship with the federal government").

[52] Cartwright, *supra* note 10; Florida Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Florida, 166 F.3d 1126 (11th Cir. 1999) (holding that, although Title III of the Americans with Disabilities Act can apply to public accommodations run by tribes, Congress did not unequivocally abrogate the tribe's sovereign immunity to a cause of action under the Act). For a discussion of the tension between tribal sovereignty and Congress's plenary power over tribes, *see* Robert Laurence, *Learning to Live with the Pleanry Power of Congress over the Indian Nations: An Essay in Reaction to Professor Williams' Algebra*, 30 ARIZ. L. REV. 413, 422 (1988). For an argument that this tension is problematic, *see* Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence's Learning to Live with the Plenary Power of Congress over the Indian Nations*, 30 ARIZ. L. REV. 439, 443 (1988) ("The effects . . . of a diminished, unequal status for any racial minority in United States law cannot begin to be attacked and erased until the *contradictions* in the legal status of that minority group are recognized and rejected.") (emphasis in original).

[53] Moses, *supra* note 20.

regulate their own "internal and social relations," because another authority (Congress) can abrogate their immunity, they do not possess "the full attributes of sovereignty."[54] Thus, although tribes are free to "make their own laws and be ruled by them," tribal sovereignty is more attenuated when Indian nations engage in commerce with non-tribal entities, and Congress may use its plenary power to abrogate tribal sovereign immunity in certain circumstances.[55]

As a general matter, many courts extend comity[56] or full faith and credit[57] to tribal court orders. Tribal sovereign immunity from suit also generally extends to tribal casinos, businesses, and some tribal-affiliated corporations.[58] In general, tribes are only subject to suit in contract if the tribe and contract counterparty expressly negotiate a sovereign immunity waiver.[59] In practice, these waivers are quite common, and some tribes have even agreed to waive immunity on a blanket basis for all tribal businesses incorporated under the IRA.[60] But despite the use of sovereign immunity waivers in practice, Indian nations have successfully challenged these waivers in court and sometimes had them invalidated.[61] Thus, a sovereign immunity waiver is not a guarantee that a creditor or contract counterparty will be able to subject a tribe to suit outside of tribal court. Furthermore, application of sovereign immunity to tribal businesses and commercial activities (rather than to the tribe itself) has been called into question in recent years.[62]

When tribal entities engage in commerce, the implications of their sovereign status can be disputed, whether due to an explicit immunity waiver or the entity's

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[54] United States v. Kagama, 118 U.S. 375, 381 (1886) (holding that Congress possesses the power to extend federal criminal jurisdiction to Indians on reservations).

[55] Williams v. Lee, 358 U.S. 217, 220 (1959).

[56] *See, e.g.*, Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997) (determining that principles of comity govern whether a court should recognize and enforce a tribal court judgment).

[57] *See, e.g.,* Jim v. CIT Fin. Servs. Corp., 533 P.2d 751 (N.M. 1975) (holding that tribal laws are entitled to full faith and credit in New Mexico courts).

[58] *See* Galanda, *supra* note 28; *see also* Bales v. Chickasaw Nation Indus., 606 F. Supp. 2d 1299 (D.N.M. 2009) (holding that tribal corporation was entitled to sovereign immunity with respect to non-Native American employee's claims of race and age discrimination).

[59] Galanda, *supra* note 28.

[60] Galanda, *supra* note 28; Haddock & Miller, *supra* note 51, at 194 ("[M]ost, if not all, Indian tribes have prospectively waived, and will prospectively waive, their immunity in specific contracts to facilitate business deals.").

[61] Moses, *supra* note 20.

[62] Padraic I. McCoy, *Sovereign Immunity and Tribal Commercial Activity: A Legal Summary and Policy Check*, 57 FED. LAW. 41, 42 (2010); Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2045 (2014) (Thomas, J., dissenting) (arguing that expanding tribal immunity to a tribe's off-reservation commercial activities is "unsupported by any rationale for [sovereign immunity] doctrine, inconsistent with the limits on tribal sovereignty, and an affront to state sovereignty").

more attenuated sovereign status due to abrogation or the nature of the commercial engagement. The resulting uncertainty with respect to tribal status impacts tribes' treatment under the Bankruptcy Code.[63]

3. Eligibility for Bankruptcy

Section 109 of the Bankruptcy Code governs debtor eligibility. There is no "uniform treatment or definitive classification of a tribe" in § 109 or, indeed, anywhere in the Code.[64] According to § 109, only a "person" or a "municipality" may be a debtor under the Code.[65] "Person" is defined broadly in the Code and includes individuals, partnerships, and corporations; however, a "governmental unit" is not a person.[66] Instead, a "governmental unit" is defined in the Code as "United States; State; Commonwealth; District; Territory; foreign state; department, agency or instrumentality of [each of the foregoing]; or other foreign or domestic government."[67] Although tribes are not explicitly listed in either definition, courts have determined that Native American tribes fall within the category of a "governmental unit."[68] For Code purposes, this suggests both that Congress may have abrogated tribal immunity with respect to the Code[69] and that Indian nations cannot access the Code for bankruptcy protection.[70]

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[63] *See* Lubben, *supra* note 51 ("[P]ushing against sovereignty increases the need for a governmental entity to have access to sovereign bankruptcy.").

[64] R. Spencer Clift III, *The Historical Development of American Indian Tribes; Their Recent Dramatic Commercial Advancement; and a Discussion of the Eligibility of Indian Tribes Under the Bankruptcy Code and Related Matters*, 27 AM. INDIAN L. REV. 177, 211 (2002) (claiming a lack of clarity in the Code with respect to tribes and arguing that "Congress must clearly and plainly authorize the use of tribal property or enact legislation that insures, guarantees, and safeguards tribes from financial stress").

[65] 11 U.S.C. § 109(a).

[66] 11 U.S.C. § 101(41).

[67] 11 U.S.C. § 101(27).

[68] *See, e.g.,* Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1058 (9th Cir. 2004) ("[T]he category 'Indian Tribes' is simply a specific member of the group of domestic governments."); *In re* Platinum Oil Props. LLC, 465 B.R. 621, 643 (Bankr. D.N.M. 2011) ("The language 'or other foreign or domestic government found in [§ 101(27)] includes Indian tribes."); Russell v. Fort McDowell Yavapai Nation (*In re* Russell), 293 B.R. 34, 44 (Bankr. D. Ariz. 2003) ("[O]ther foreign or domestic governments in § 101(27) unequivocally, and without implication, includes Indian tribes as 'governmental units.'").

[69] In 1994, Congress amended § 106 to demonstrate its intent to abrogate the sovereign immunity of governmental units. Although the impact on tribal immunity is disputed, there is at least an implication that the sovereign immunity of tribes classified as "governmental units" is abrogated. *See*, Clift, *supra* note 10; 1-7 Cohen's Handbook of Federal Indian Law, §7.05 (LexisNexis 2017) (noting division in the courts as to whether the Code waives tribal immunity); American Indian Law Deskbook §7:2 (May 2017) (noting that, while the Ninth Circuit has held that Congress has expressly abrogated sovereign immunity in this context, other courts disagree); Cartwright, *supra* note 10 (noting that "an overwhelming majority of courts have held that tribes are governmental units" under the Bankruptcy Code).

[70] Cartwright, *supra* note 10.

To understand why tribes do not qualify as debtors eligible under the Bankruptcy Code, it is useful to know each of the possible chapters available for prospective debtors.[71] Chapters 7, 9, 11, 12, 13, and 15 of the Code each outline a different process for prospective debtors to take. Chapter 7 of the Code governs the process of liquidation,[72] while chapters 11[73] and 13[74] address reorganization and individual debt adjustment, respectively. Chapter 9 of the Code provides for the adjustment of municipal debt,[75] while chapter 12 deals with family farmers and family fishermen.[76] Finally, chapter 15 of the Code provides a way for foreign representatives in bankruptcy proceedings outside of the United States to access U.S. courts.[77]

As "governmental units," tribes do not qualify to file for bankruptcy under either chapters 7 or 11 of the Code, because both of these chapters require a debtor to be a "person."[78] Furthermore, only individuals (i.e. individual human beings) may use chapter 13 to reorganize their debts.[79] Although chapter 9 of the Code addresses the adjustment of debts of municipal governments, a tribe does not qualify under this chapter either because chapter 9 debtors must be "municipalities," which must be governed by a U.S. State.[80] Indian nations are not subject to or instrumentalities of U.S. States and so would not qualify as a "municipality" under the Code either.[81] Tribes also are unlikely to meet the very

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[71] For an in-depth discussion as to why tribes themselves are ineligible for bankruptcy relief under the Code, *see* Pandeli, *supra* note 51, at 269–73.

[72] "Chapter 7 – Liquidation," 11 U.S.C. § 701 et seq.

[73] "Chapter 11 – Reorganization," 11 U.S.C. § 1101 et seq.

[74] "Chapter 13 – Adjustment of Debts of an Individual with Regular Income," 11 U.S.C. § 1301 et seq.

[75] "Chapter 9 – Adjustment of Debts of a Municipality," 11 U.S.C. § 901 et seq.

[76] "Chapter 12 – Adjustment of Debts of a Family Farmer or Fisherman with Regular Annual Income," 11 U.S.C. § 1201 et seq.

[77] "Chapter 15 – Ancillary and Other Cross-Border Cases," 11 U.S.C. § 1501 et seq.

[78] 11 U.S.C. § 109(b), (d). Section 109(d) contains other categories of debtors eligible to file for chapter 11, but none of them would encompass tribes. 11 U.S.C. § 109(d) (referencing a "railroad," "an uninsured State member bank, or a corporation organized under Section 25A of the Federal Reserve Act . . . ." as eligible for chapter 11).

[79] 11 U.S.C. § 109(e) ("Only an individual with regular income . . . may be a debtor under chapter 13 of this title.").

[80] 11 U.S.C. § 101(40) ("The term 'municipality' means political subdivision or public agency or instrumentality of a State.").

[81] Even if chapter 9 were modified so that a tribal debtor could be considered a qualifying "municipality," chapter 9 may be inapt for other reasons. For example, chapter 9 is not designed to deal with complex debt structures, which tribal debtors, thanks to their intertwined relationships with tribes, may have. Vincent S.J. Buccola, *The Logic and Limits of Municipal Bankruptcy Law*, 86 U. CHI. L. REV. at 40 (forthcoming 2019) (noting that chapter 9 was designed to address the debt of special purpose municipalities with "simple capital structures"). The overall purpose of a tribal debt restructuring is more akin to that of a chapter 11 case than a chapter 9 case; in particular, liquidation is not an option for chapter 9 debtors. *In re* Mount Carbon Metro. Dist., 242 B.R. 18, 41 (Bankr. D. Colo. 1999) ("[T]he legislative purpose underlying [chapter 9] . . . is to allow an

specific definitions of "family farmer" or "family fisherman" to qualify for debt adjustment under chapter 12.[82] Finally, although some have proposed to allow tribes access to bankruptcy court via chapter 15, Indian nations are markedly different from the foreign representatives contemplated by chapter 15[83] and, for reasons explained below, likely would not be able to successfully use chapter 15 of the Bankruptcy Code either.

Tribal corporations and other business entities owned by tribes are arguably distinct from the tribe itself.[84] Thus, if a tribal corporation met the Code's definition of a "person," it could be eligible to file under chapters 7 or 11.[85] However, the sparse case law, discussed below, suggests that tribal corporations and other tribal business entities may be barred from bankruptcy relief under the Code if they are too closely affiliated with the tribe itself.[86]

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insolvent municipality to restructure its debts in order to continue to provide *public* services.") (emphasis added); Andrew B. Dawson, *Pensioners, Bondholders, and Unfair Discrimination in Municipal Bankruptcy*, 17 U. PA. J. BUS. L. 1, 5 (2014) (noting that chapter 11 serves the "purposes of promoting reorganization and of maximizing returns to creditors"). Chapter 9 also presupposes a relationship between the municipality and the state in which the municipality is located, a feature that is not present in the tribal business context. *See, e.g.*, 11 U.S.C. § 109(c)(2) (requiring state authorization to enter bankruptcy); Fed. R. Bankr. P. 2018(c) ("Representatives of the state in which the debtor is located may intervene in a chapter 9 case."). Finally, the amount of control a municipality loses in a chapter 9 may by itself make a modified chapter 9 an unpalatable option, for reasons discussed *infra*.

[82] 11 U.S.C. § 101(18), (19), (19A), (19B), (20) (defining the terms "family farmer," "family farmer with regular annual income," "family fisherman," "family fisherman with regular annual income," and "farmer," respectively).

[83] 11 U.S.C. § 101(24) ("The term 'foreign representative means a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding.").

[84] Kim & Koenig, *supra* note 17.

[85] *See* 11 U.S.C. § 109 (defining "corporation" as an "association having a power of privilege that a private corporation, but not an individual or a partnership possesses" and as an "unincorporated company or association").

[86] These entities include corporations organized under section 17 of the Indian Reorganization Act, which provides that the Secretary of the Interior may issue a charter of incorporation to tribes. Indian Reorganization Act, 25 U.S.C. § 461 et seq. (1934) (current version at 25 U.S.C. § 5101 (2018)). The Department of the Interior has determined that Section 17 only allows such charters to be issued to tribes (as opposed to tribal members). For a critical discussion of this issue, *see* Post of Gabriel Galanda, *Amend IRA Section 17 to Allow Federal Incorporation For Tribal Members*, GALANDA BROADMAN, (Jan. 8, 2012), http://galandabroadman.com/blog/2012/01/amend-ira-section-17-to-allow-federal-incorporation-for-tribal-members (last visited Mar. 22, 2018). In the context of whether tribal corporations can have sovereign immunity, several courts have articulated various tests to determine whether the tribally-created entity is an "arm of the tribe" and thus enjoys sovereign immunity. *See, e.g.,* Matter of Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, 86 N.Y.2d 553 (N.Y. Ct. App. 1995) (multi-factor test); People ex rel. Owen v. Miami Nation Enterprises, 386 P.3d 357 (Cal. Super. Ct. 2016) (five-factor test). For further discussion of the development of tribal corporations formed under the Indian Reorganization Act and their sometimes complex relationship with tribal governments, *see* Miller, *supra* note 46, at 44–46.

To date, two tribal-affiliated entities (aside from the Alaska Native Corporations discussed below)[87] have sought to be debtors in U.S. bankruptcy proceedings. In the first case, *In re Santa Ysabel Resort and Casino*, a casino owned and operated by the Iipay Nation filed for bankruptcy[88] after "struggling financially for years" with "debts of more than $50 million."[89] In its initial filings with the bankruptcy court, the debtor casino argued that it was a separate legal entity from the Iipay tribe and thus eligible to file for chapter 11 as an "unincorporated company."[90] Three parties in interest, including another Native American tribe (incidentally, also the debtor's largest creditor) and the United States Trustee, filed motions to dismiss the case, arguing that the debtor was ineligible because the casino was merely an arm of the tribe itself.[91] The parties moving for dismissal contended that there was no legal distinction between the tribe and the entity that ran the casino.[92] As evidence, the objecting parties pointed to the loan documents, which provided that the tribe was the obligor that owned and operated the casino and which did not distinguish between the tribe and the casino entity.[93] The bankruptcy court granted the parties' motions to dismiss by summary order and did not write an opinion.[94] Without access to bankruptcy relief, the casino was unable to negotiate with its creditors, including the County of San Diego, which the tribal chairman characterized as "unwilling

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[87] As discussed in Part I.C, *infra*, Alaska Native Corporations have also filed under the Bankruptcy Code. As Part I.C explains, these corporations are distinct from other tribal corporations. For this reason, they are discussed separately.

[88] *In re* Santa Ysabel Resort and Casino, Case No. 12-09415-PB11 (Bankr. S.D. Cal. 2012).

[89] J. Harry Jones, *Santa Ysabel Casino Goes Out of Business*, THE SAN DIEGO UNION-TRIBUNE (Feb. 3, 2014), http://www.sandiegouniontribune.com/business/sdut-santa-ysabel-casino-debt-2014feb03-htmlstory.html.

[90] Omnibus Statement of Facts and Omnibus Declaration of David Chelette in Support Thereof, *In re* Santa Ysabel Resort and Casino, Case No. 12-09415-PB11 (S.D. Cal. July 3, 2012), *available at* https://turtletalk.files.wordpress.com/2012/07/omnibus-statement-of-facts-and-events.pdf ("The Debtor is an unincorporated company.").

[91] County of San Diego's Motion to Dismiss Debtor's Bankruptcy Case; Memorandum of Points and Authorities in Support Thereof, *In re* Santa Ysabel Resort and Casino, Case No. 12-09415-PB11 (S.D. Cal. Aug. 7, 2012), *available at* https://turtletalk.files.wordpress.com/2012/08/san-diego-county-motion-to-dismiss.pdf; Memorandum of Points and Authorities in Support of Motion to Dismiss Bankruptcy Case for Lack of Eligibility and Authority, *In re* Santa Ysabel Resort and Casino, Case No. 12-09415-PB11 (S.D. Cal. Aug. 2, 2012), *available at* https://turtletalk.files.wordpress.com/2012/08/yavapai-apache-motion-to-dismiss.pdf; Acting United States Trustee's Motion to Dismiss Case, *In re* Santa Ysabel Resort and Casino, Case No. 12-09415-PB11 (S.D. Cal. Aug. 7, 2012), *available at* https://turtletalk.files.wordpress.com/2012/09/us-motion-to-dismiss.pdf.

[92] *See, e.g.*, Acting United States Trustee's Motion to Dismiss Case, *supra* note 91, at 1 ("The Debtor's structure, purpose, and authorization to conduct business activities by a tribal ordinance make it clear that it is an inclusive part of the Iipay Nation of Santa Ysabel and is not a separate legal entity.").

[93] *See, e.g.*, *id.* at 8.

[94] Minute Order, *In re* Santa Ysabel Resort and Casino, Case No. 12-09415-PB11 (S.D. Cal. Sept. 4, 2012), *available at* https://turtletalk.files.wordpress.com/2012/09/dct-minute-order.pdf.

to renegotiate its financial agreement with the tribe in the face of economic hardship."[95] Faced with mounting debt, holdout creditors, and no access to bankruptcy court, the casino shut its doors in early 2014, and 115 employees lost their jobs.[96]

In the second proceeding, a tribally chartered corporation wholly owned by a tribe filed for bankruptcy relief in Arizona. The debtor, 'Sa' Nyu Wa Inc., owned and operated the Skywalk at the Grand Canyon and filed for bankruptcy after a $28 million arbitration award was entered against it after a dispute over a development agreement.[97] In its initial filings with the court, the debtor claimed to be "a tribal corporation that is separate from the [Hualapai] Nation and from other corporations or instrumentalities of the Nation."[98] Perhaps seeking to distinguish its situation from that of the Santa Ysabel Resort and Casino, the tribal corporation presented evidence that it had its own board of directors and that the corporation, rather than the tribe, was the party to the development agreement in dispute.[99] The debtor also argued that the arbitration award was enforceable only against the corporation and was not collectible from the tribe.[100]

No one challenged the debtor's eligibility for bankruptcy in the *'Sa' Nyu Wa* case.[101] Ultimately, however, "the debtor and developer settled their dispute and consensually dismissed the case."[102] Thus, the *'Sa' Nyu Wa* case does not provide much clarity with respect to how a tribal corporation might proceed in bankruptcy.

The dearth of legal precedent, combined with ambiguities in applying the Bankruptcy Code to tribal entities, make it impossible to be certain whether a tribal entity will be eligible for bankruptcy relief. The cases to date shed little light on the issue due to the lack of published legal opinions. Although the

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95 Jones, *supra* note 89, at 1.

96 *Id.*

97 *See* Christine L. Swanick et al., *Tribal Court Bankruptcy Petition Raises Issues of First Impression for Bankruptcy Court*, SHEPPARD MULLIN RICHTER & HAMPTON LLP (Mar. 7, 2013), *available at* https://www.lexology.com/library/detail.aspx?g=c5097886-3631-438b-b774-d4a992fc65b4.

98 *Id.*

99 *Id.*

100 *Id.*

101 Kim & Koenig, *supra* note 10, at 19 ("While several contemporaneous articles questioned whether the debtor was an eligible filer, no parties-in-interest challenged the debtor's eligibility . . . .").

102 *Id.*; *see 'Sa' Nyu Wa, Inc. Bankruptcy New Filing Alert: Motion for Order Dismissing the Bankruptcy Case and/or Converting the Case to Chapter 7*, CHAPTER 11 CASES (May 21, 2014), *available at* http://chapter11cases.com/2014/05/21/sa-nyu-wa-inc-bankruptcy-new-filing-alert-motion-for-order-dismissing-the-bankruptcy-case-andor-converting-the-case-to-chapter-7/.

question of a tribal corporation's eligibility for bankruptcy may be fact-dependent, the state of the law is unclear as to whether and under what circumstances tribal entities will be eligible to be debtors in bankruptcy. Tribal corporations may thus find themselves in a catch-22: they may experience the same debt problems as an ordinary business established under state law, but they may be deemed too closely affiliated with an Indian nation to qualify for bankruptcy protection.

Even if a tribe—or, more likely, a tribal business—were deemed eligible to file for bankruptcy, however, tribal entities are likely to encounter distinct difficulties when proceeding under the Bankruptcy Code. As explained in more detail below, fundamental inconsistencies in law and policy relating to tribal entities make relief improbable, if not outright impossible, for tribal debtors to attain, even if eligibility-related problems could be overcome.

B. Obstacles to Tribal Bankruptcy

Given tribal entities' significant role in U.S. commerce and the uncertainties present in U.S. bankruptcy law with respect to tribal debtors, it makes sense to provide a clear path allowing tribal entities to access structured debt relief. Nevertheless, tribal entities and others may find such access objectionable on several grounds. In particular, applying laws created without tribal input, such as the Bankruptcy Code, may be seen as the imposition of Western norms and legal traditions onto tribes. Some Indian law scholars have criticized this imposition in other contexts, arguing that it is tantamount to colonization and "a diminution of tribes' inherent right to govern themselves."[103] They point out that the United States' own theory of Indian sovereignty supports the perpetuation of Indian nations' autonomous existence, even if tribal decisions conflict with Western ideals.[104] Thus, if the Bankruptcy Code were adapted such that it clearly applied to tribal debtors, its application may still be considered an undesirable infringement on tribal autonomy.

In some respects, all debtors trade the loss of some autonomy in exchange for bankruptcy's benefits. By consenting to the jurisdiction of the bankruptcy court (and, in some cases, to a trustee's handling of their assets), debtors in bankruptcy necessarily give up some of their abilities to manage their own affairs and make their own decisions in exchange for the benefit of a discharge of debt. Yet, sovereign debtors arguably pay a higher price for a fresh start than

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[103] Trevor Reed, *Who Owns Our Ancestors' Voices? Tribal Claims to Pre-1972 Sound Recordings*, 40 COLUM. J.L. & ARTS 275, 300 (2016).

[104] Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 800 (2007).

non-sovereign debtors by giving up their full sovereign rights to enter bankruptcy. Perhaps recognizing this significant sacrifice, Congress has not made bankruptcy a remedy for U.S. states.[105] Even if Congress has abrogated tribal sovereign immunity for bankruptcy purposes, a bankruptcy judge's (or trustee's, or creditor's) ability to divest tribes of property or dictate how that property is to be used represents a significant loss of independence that tribes and tribal scholars may not consider to be a fair trade-off, particularly given the current Bankruptcy Code's limited usefulness to tribal entities, explained further below.

A related concern about allowing tribal entities access to structured debt relief comes from possible incompatibilities between tribal and Western notions of property.[106] Bankruptcy law is based, in part, on the notion that non-bankruptcy law governing property rights should generally be respected in the bankruptcy system.[107] But if a tribal debtor were to file for bankruptcy, and if its creditors were non-tribal entities, would tribal law or state property law apply in the bankruptcy case?[108] And if tribal law concerning property applied, how would a bankruptcy court, which likely lacks expertise in tribal property law, interpret it? In other contexts, scholars have noted that federal courts may feel uncomfortable enforcing property interests arising under tribal law, particularly when the type of property at issue lies outside of those courts' general expertise.[109] Uncertainties surrounding application of property law principles

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[105] Jennifer Burnett, *3 Questions on State Bankruptcy*, THE COUNCIL OF STATE GOVERNMENTS, http://www.csg.org/pubs/capitolideas/enews/issue65_3.aspx (quoting Prof. Kenneth Katkin: "The federal bankruptcy code does not allow—and has never allowed—state governments to declare bankruptcy"). Some scholars, however, believe bankruptcy should be made available to the states. *See, e.g.*, David A. Skeel Jr., *States of Bankruptcy*, 79 U. CHI. L. REV. 677 (2012) (arguing for state bankruptcy).

[106] *See* Reed, *supra* note 103, at 285 (noting that the Supreme Court has expressed beliefs that indigenous property rules are "based on incomprehensible customs"); Miller, *supra* note 16, at 764–75 (describing Indian conceptions of private property and noting conflicting views on private ownership of land, as well as a demonstrated understanding of private property principles on the part of native peoples); *but see* ROBERT J. MILLER, RESERVATION CAPITALISM: ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 11–12 (Univ. Neb. Press 2012) (summarizing Indian private property rights and noting that "the only major difference between Indigenous principles of property and Euro-American concepts was in how those societies viewed the private ownership of land").

[107] *See generally* Butner v. United States, 440 U.S. 48 (1979) (holding that a property issue arising in bankruptcy should be resolved by reference to state law).

[108] Existing cases may provide some guidance on this issue. *See* American Indian Law Deskbook § 5:19 (May 2017) (collecting cases and noting that "a state's interests will justify regulation of a tribe or its members only 'in exceptional circumstances'"); *In re* DeCora, 396 B.R. 222, 225 (W.D. Wis. 2008) (finding that tribal law was determinative of lien-holder priority in a bankruptcy proceeding because the tribe's "interest in controlling the distribution of its revenue far outweighs [the State's] interest in enforcing its commercial code").

[109] *See* Reed, *supra* note 103, at 306 ("It is clear that Congress and the courts believe indigenous groups are entitled to control their lands, culture, and membership by means of sovereign governments operating under distinct ontological frameworks, but they are also uncomfortable with enforcing indigenous entitlements that

may make it difficult for contract counterparties and lenders to price the risk of lending to tribal entities on a secured basis.

Other key differences between the Bankruptcy Code and federal laws governing Indian nations suggest that Congress was not contemplating bankruptcy as a possibility for tribal debtors when it created the Bankruptcy Code. In particular, if a tribal gaming operation, such as a casino, were to file for bankruptcy, conflicts between the Code and the IGRA would need to be resolved. For example, the IGRA requires a tribe to hold the sole proprietary interest in any gaming operation.[110] The IGRA would thus be violated if a tribal gaming operation filed for bankruptcy and a trustee began operating the debtor's business pursuant to § 1108 of the Bankruptcy Code.[111] But even if the debtor remained in control of the business, as is common in a chapter 11 bankruptcy case, the Code-prescribed duty of the debtor-in-possession to preserve estate assets for the benefit of creditors would conflict with the IGRA's limitations on creditors' ability to force a change in management or to assume control of a tribal gaming facility.[112]

Perhaps most critically, bankruptcy law's absolute priority rule conflicts with the IGRA's requirement that only the tribe itself can control and possess an Indian gaming operation.[113] The IGRA would thus mandate that equity interests remain in the organization even if the debtor's more senior creditors were not fully repaid.[114] This presents a direct conflict with the absolute priority rule, which stipulates, effectively, that creditors must be paid in full before equity can receive anything in a bankruptcy.[115] The absolute priority rule is at the heart of the chapter 11 distributional system, and the Supreme Court recently reinforced the importance of complying with the rule in the context of a plan or structured

arise from these ontological formations that cannot be justified through the logics of American jurisprudence.").

110 Indian Gaming Regulatory Act, 25 U.S.C. § 2710 (1988) [hereinafter IGRA].

111 11 U.S.C. § 1108 ("[T]he trustee may operate the debtor's business.").

112 IGRA at § 2710; *see* Steven T. Waterman, *Tribal Troubles – Without Bankruptcy Relief,* AM. BANKR. INST. J., Jan. 2010, at 33. Similar problems arise in the non-profit sector. *See, e.g.,* Bruckner, *supra* note 11, at 727 ("Nonprofit colleges' lack of shareholders and the nondistribution constraint prevent a bankruptcy filing from shifting control of that enterprise from its current management.").

113 IGRA, *supra* note 110.

114 *See* Stephan A. Hoover, Comment, *Forcing the Tribe to Bet on the House the Limited Options and Risks to the Tribe when Indian Gaming Operations Seek Bankruptcy Relief*, 49 CAL. W.L. REV. 269, 297 (2013); *see also* Steven T. Waterman, *Tribal Troubles—Without Bankruptcy Relief*, AM. BANKR. INST. J., Jan. 2010, at 44 (noting that IGRA's sole proprietary-interest requirement would prohibit a restructuring that converts debt into equity and that § 1129's subjugation provisions could not be satisfied without a 100% repayment plan if the tribe retains the "sole proprietary interest," as IGRA requires).

115 11 U.S.C. § 1129(b)(2)(B)(ii).

dismissal of a case.[116] Thus, the IGRA's conflict with the absolute priority rule is significant. Even if deemed eligible to file for chapter 11, if a tribal debtor cannot propose a plan that conforms with absolute priority—and compliance with the IGRA likely means it cannot—it will be unable to use the bankruptcy system to restructure its debts.[117]

In sum, the IGRA's limitations on management of a tribal gaming operation conflict with specific Bankruptcy Code provisions.[118] Because confirmation of a chapter 11 plan of reorganization requires compliance with all regulatory provisions, including the IGRA,[119] it would be nearly impossible for a tribal gaming operation to successfully restructure its debts under chapter 11 of the Bankruptcy Code.

There are several other obstacles for tribal debtors seeking to use the U.S. bankruptcy system. For example, the National Indian Gaming Commission ("NIGC") must approve all "management contracts" for tribal gaming operations, including agreements like trust indentures,[120] and some courts have interpreted this mandate as giving the NIGC broad discretion in construing these agreements as management contracts.[121] Tribes themselves are also different from other entities that restructure their debts under the Bankruptcy Code. These differences arise from tribes' structure, governmental interrelationship, and dependence on the federal government.[122] Certain federal laws, regulations, and

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116 Czyzewski v. Jevic Holding Corp., 136 S. Ct. 1242 (2016).

117 In certain instances, as in the case of some bankruptcies of nonprofit debtors, courts have held that the absolute priority rule does not apply. This is typically because these courts have determined that the nonprofit's members do not hold equity interests in the nonprofit and that they do not derive an economic benefit based on their membership interests. *See* Kavita Gupta, *Representing a Nonprofit Debtor in Bankruptcy*, 31 CAL. BANKR. J. 843, 855–57 (2012) (collecting cases); Pamela Foohey, *Chapter 11 Reorganization and the Fair and Equitable Standard: How the Absolute Priority Rule Applies to All Nonprofit Entities*, 87 ST. JOHN'S L. REV. 31, 39 (2012) ("[C]ourts overall . . . hold that the absolute priority rule is inapplicable to nonprofits."). In the case of a tribal corporation bankruptcy, it is unlikely that this exception would apply to excuse compliance with the absolute priority rule, because unlike members of a nonprofit, tribes do derive economic benefit based on their interests in the corporation. Indeed, this was the very purpose of IGRA. *See* Part I.A.1 *supra*.

118 Hoover, *supra* note 10, at 296–98 (noting that appointment of a trustee under § 1104 of the Code would be prohibited under the IGRA).

119 11 U.S.C. § 1129(a)(3) (noting that the plan must not be "forbidden by law").

120 Blaine I. Green, Craig A. Barbarosh, & Daron T. Carreiro, *Seventh Circuit Rejects Bond Indenture and Its Waive of Tribal Sovereign Immunity, But Allows Leave to Amend for Equitable Claims*, PILLSBURY (Oct. 31, 2011), https://www.pillsburylaw.com/en/news-and-insights/seventh-circuit-rejects-bond-indenture-and-its-waiver-of-tribal.html (last visited Feb. 7, 2018).

121 Hoover, *supra* note 10, at 276; Wells Fargo Bank N.A. v. Lake of the Torches Econ. Dev. Corp., 658 F.3d 684, 699–700 (7th Cir. 2011) (holding that indenture was an unapproved management contract for the Indian gaming facility and was therefore void as a violation of the IGRA).

122 Waterman, *supra* note 112, at 87.

treaties apply uniquely to tribal entities;[123] consequently, some scholars have analogized tribal corporations to certain regulated industries, such as public utilities, rather than run-of-the-mill corporations.[124] This unique regulatory backdrop has led some scholars to conclude that bankruptcy is unworkable for Indian nations and their businesses.[125]

A tribe's relationship with the federal government further complicates matters.[126] The federal government holds about eleven million acres of real property in trust for tribes,[127] meaning that tribes must obtain express approval from the government in order to sell, convey, or otherwise encumber the trust property.[128] This property is also shielded from alienation under state laws.[129] This trust arrangement, with its corresponding restraint on alienation, was designed to protect and even benefit Indian nations by guaranteeing tribal possession of land and protecting tribal land from sale by state authorities for infractions like nonpayment of taxes.[130] When an entity is financially distressed, however, restraints on alienation like the ones that apply to tribes may negatively impact an entity's ability to access financing.[131] Prospective creditors are naturally hesitant to lend to entities in financial distress. To entice a creditor to loan money, a distressed entity may therefore seek to offer creditors a lien on unencumbered property as security for that loan. Such scenarios are common in

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[123] *See Frequently Asked Questions*, U.S. DEPT. OF INTERIOR INDIAN AFFAIRS, https://www.bia.gov/frequently-asked-questions (explaining the Bureau of Indian Affairs and the work that it does with tribal governments).

[124] Waterman, *supra* note 112, at 87.

[125] *Id.* (suggesting non-bankruptcy alternatives, such as a bailout, for financially struggling tribal businesses).

[126] *See* Miller, *supra* note 46, at 38 ("[T]he federal government is heavily involved in most business dealings in Indian Country.").

[127] Miller, *supra* note 46, at 37.

[128] Purchases or grants of lands from Indians, 25 U.S.C. § 177 ("No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."); Leases of restricted lands, 25 U.S.C. § 415 (2012) (providing that leasing of trust lands must be approved by the Secretary of the Interior); FRED ANDREW SEATON & ELMER F. BENNETT, FEDERAL INDIAN LAW 685 (U.S. Gov't Printing Office, 1958); *see* Haddock & Miller, *supra* note 51, at 221 ("That so many of their assets remain under governmental trust under outdated policy rationales creates great difficulty for indigenous peoples."); Miller, *supra* note 46, at 36 ("'Trust lands' are lands that tribal governments or individual Indians own as the beneficial owner but the United States owns the legal title and is the legal owner.").

[129] *Cf. id. See* Cohen's Handbook, *supra* note 69, at § 16.03(4)(d)(iii) (describing how involuntary transfers of allotments, including those that may occur in bankruptcy, are impermissible and noting that "if an allotee becomes a bankrupt, title to the allotment does not pass to the bankruptcy trustee").

[130] SEATON & BENNETT, *supra* note 128, at 685.

[131] *See* Miller, *supra* note 46, at 44 ("The fact that the United States retains the trusteeship and legal ownership of these lands makes them almost totally unavailable for borrowing money and for developing economic activities.").

bankruptcy, particularly in the early stages of a case, in order to provide the debtor with adequate funding to proceed with the bankruptcy case.[132] Because tribes may not encumber trust property without the federal government's consent, a tribal debtor's ability to obtain financing quickly by offering up unencumbered property may be severely limited if the tribe owns few to no non-trust assets.[133]

Tribes and tribal corporations thus face severe roadblocks if they seek to use the Bankruptcy Code. Even if a tribal debtor were deemed eligible to file for bankruptcy, the Code's incompatibility with tribal norms, federal laws, and policies such as the trust relationship make use of the Code unappealing at best and downright impossible at worst.

C. Incompatibility Illustrated: Alaska Native Corporations

There is perhaps no better illustration of the incompatibility of bankruptcy and tribal law than the cases of Alaska Native Corporations. Alaska Native Corporations are regional and village corporations established by the Alaska Native Claims Settlement Act ("ANCSA").[134] Signed into law in 1971, ANCSA was, at the time, the largest land claims settlement in U.S. history.[135] In return for the abrogation of Native claims to certain aboriginal land, Alaska Natives[136] received land and money from the federal government, which were divided among the various tribal corporations established under the law.[137]

The Act and its amendments created 13 regional economic development corporations.[138] Alaska Natives hold stock in these corporations, enabling them to earn income, remain in their traditional villages, and preserve their culture.[139] The Act enjoyed significant support from Natives and non-Natives alike and was

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[132] *See* 11 U.S.C. § 364 (contemplating mechanisms that a debtor may use to obtain credit).

[133] Moses, *supra* note 20 ("[T]here are important limitations on what collateral tribes can grant their lenders without obtaining federal approval, including, for example, limitations on the ability of a tribe to encumber its land.").

[134] 43 U.S.C. §§ 1601–24 (1971).

[135] Monica E. Thomas, *The Alaska Native Claims Settlement Act: Conflict and Controversy*, POLAR RECORD, 1986, http://www.alaskool.org/projects/ancsa/articles/mthomas/ancsa_conflict.htm#Historical perspective.

[136] "Native" is defined in the ANCSA as, *inter alia*, "a citizen of the United States who is a person of one-fourth degree or more Alaska Indian . . . Eskimo, or Aleut blood, or combination thereof." 43 U.S.C. § 1602(b).

[137] E. Budd Simpson, *Doing Business with Alaska Native Corporations: A New Model for Native American Business Entities*, ABA BUS. L. SECT., July/Aug. 2007 https://apps.americanbar.org/buslaw/blt/2007-07-08/simpson.shtml.

[138] Thomas, *supra* note 135.

[139] *Id.*

created with substantial involvement from Alaska Natives.[140] Because they were created for specific purposes under a federal statute, Alaska Native Corporations are considered "unique," even in the world of federal Indian law, and represent a type of entity that is different from most other tribal and non-tribal corporations.[141]

Since their creation, a few regional and village corporations have filed for bankruptcy.[142] During the course of the bankruptcy proceedings, "conflicts between the legislative purposes inherent in ANCSA and in the Bankruptcy Code have come to light," leading scholars to argue that "the two statutes do not mesh well."[143] Notably, the Alaska Native Corporations, created by a political process, were fundamentally different from the voluntary corporations that characterize much of U.S. commerce.[144] In addition, the ANCSA, like the IGRA, directly inverted the priority scheme of the Bankruptcy Code, dictating that Native shareholders receive priority over their creditors.[145] Scholars studying the Bankruptcy Code and the ANCSA noted additional conflicts between the two statutes relating to taxation; obligations with respect to land; income; and conflicts with the Code's liquidation and plan confirmation provisions.[146] In short, "[r]esolving the conflicts between the Bankruptcy Code and ANCSA is not easy, as neither statute was drafted with a view to harmonizing with the other."[147] Although the Native Corporations that filed for bankruptcy were able to use the bankruptcy system, they found the Bankruptcy Code an inappropriate framework,[148] leading scholars to conclude that the only way to reconcile the Code with the ANCSA was to "relax" interpretations of both statutes.[149]

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[140] *Alaska Native Claims Settlement Act*, ALASKA HUMANITIES FORUM, http://www.akhistorycourse.org/modern-alaska/alaska-native-claims-settlement-act (last visited Feb. 6, 2018).

[141] Simpson, *supra* note 137 (emphasizing these entities' uniqueness and highlighting some of the distinctive opportunities they represent); DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 198 (3rd ed., Univ. of Alaska Press 2012) (1978) (describing the ANCSA as an "evolving" experiment).

[142] Kathryn A. Black, David H. Bundy, Cynthia Pickering Christianson, & Cabot Christianson, *When Worlds Colide: Alaska Native Corporations and the Bankruptcy Code*, 6 ALASKA L. REV. 73 (1989), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1251&context=alr.

[143] *Id.* at 75.

[144] *Id.* at 86; *see also id.* at 91 ("Many of the Bankruptcy Code's most fundamental underlying assumptions about corporations . . . do not apply to Native corporations at all.").

[145] *Id.* at 90.

[146] *Id.* at 101.

[147] *Id.* at 130.

[148] *See* CASE & VOLUCK, *supra* note 141, at xii (suggesting that the 1991 amendments to ANCSA and the sale of Native net operating losses, rather than the bankruptcy process itself, "rescued several Native corporations from bankruptcy").

[149] Black, *supra* note 142, at 131.

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The Bankruptcy Code appears ill-equipped to handle tribal debtors of all sorts. Although tribal entities regularly transact in the U.S. commercial sphere, it is not clear that these entities, when faced with financial difficulty, will be able to play by the normal rules of the Bankruptcy Code without requiring adjustments to both bankruptcy and tribal law. The U.S. Bankruptcy Code is fundamentally incompatible in many ways with the laws and policies pertaining to tribal entities.

D. The Case for Tribal Debt Relief

If a tribal debtor cannot effectively use the Bankruptcy Code, should it be cut off from the structured debt relief the Code provides? There are several reasons why structured debt relief may be valuable to tribal debtors. One reason relates to these entities' asymmetrical treatment in the bankruptcy system. Despite the lack of clarity surrounding tribal entities' eligibility to be *debtors* in bankruptcy, tribal entities can be and have been forced to use the system when they are *creditors* of a debtor in bankruptcy.[150] The law is clear that parties adverse to tribes may bring the tribe (or a tribal business) into existing bankruptcy proceedings as either a party in interest or a creditor.[151] This means that "[c]ourts can force tribes to participate in a system from which they cannot simultaneously derive a benefit."[152]

Of course, Indian nations are not the only entities that can be brought into court as creditors without being able to use the system as debtors. Banks and other financial institutions are treated in the same manner,[153] and the federal government, the largest creditor in the country,[154] cannot file for bankruptcy. But providing tribal entities with access to debt relief could bestow distinct

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[150] Cartwright, *supra* note 10, at 104 ("In a clear majority of courts, Native American sovereign immunity is abrogated, and tribal casinos are subject to numerous federal statutes, including the Bankruptcy Code when they are creditors."); Cohen's Handbook, *supra* note 69, at § 2.03 (finding that "several cases have concluded, often without discussion, that the Code applies to the commercial activities of tribes as creditors"); *In re* White, 139 F.3d 1268 (9th Cir. 1998) (holding that tribe's participation as a creditor in bankruptcy waived immunity from adjudication of its claim in bankruptcy proceedings).

[151] *See, e.g.*, Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055 (9th Cir. 2004) (holding that because Congress abrogated Indian tribes' sovereign immunity under the Bankruptcy Code, debtor's adversary proceeding against the Navajo Nation could proceed in bankruptcy court).

[152] Hogan, *supra* note 10.

[153] *See generally* Hynes & Walt, *supra* note 13.

[154] Brief for the United States as Amicus Curiae, Lamar, Archer & Cofrin, LLP v. R. Scott Appling, No. 16-1215 at 21 ("The United States is the largest creditor in the Nation and frequently appears as a creditor in bankruptcy cases.").

commercial benefits. For example, some research has shown that access to debt relief provides more certainty at the lending stage and may even open up new lending options.[155] In contrast, the economic uncertainty that characterizes a lack of access to bankruptcy relief looms large in the face of a tribal entity's default.[156] This uncertainty about whether relief is available and what form it will take increases transaction costs at the lending stage and may deter non-tribal entities from entering into loans with tribes and their affiliated businesses.[157] In some cases, lack of access to bankruptcy gives creditors leverage over a business in distress: without the threat of bankruptcy looming, creditors may be able to coerce distressed entities into accepting terms that favor them and/or give them substantial control over operations.[158]

In the tribal gaming context, the IGRA's restrictions on equity in a tribal business may prevent creditors from exercising some traditional remedies, such as foreclosure on tribal property or a debt-for-equity swap.[159] But even gaming lenders retain some leverage. For example, gaming lenders can freeze the credit markets for tribal gaming entities if a gaming business refuses to cooperate or negotiate in good faith.[160] The gaming industry in particular is incredibly reliant on credit, so an industry-wide freeze would be particularly harmful.[161] Lenders can also take steps to increase their leverage by asking the National Indian Gaming Commission, which approves contracts, for a determination that their loan agreement is not a "management agreement" under the IGRA, such that any sovereign immunity waivers the gaming company executes would be enforceable.[162] Additionally, lenders who transact with non-gaming tribal

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[155] *See* Stephan A. Hoover, *Forcing the Tribe to Bet on the House the Limited Options and Risks to the Tribe When Indian Gaming Operations Seek Bankruptcy Relief*, 49 CAL. W.L. REV. 269 (2013); *cf.* Barry E. Adler, *A World Without Debt*, 72 WASH. U.L.Q. 811 (1994) (arguing that "a world without debt or bankruptcy . . . is efficient").

[156] Hoover, *supra* note 155.

[157] *See* Hogan, *supra* note 10; Thomas Weathers, *Encouraging Business with Indian Tribes: A Brief Discussion of the Tribal Exhaustion Doctrine*, AMERICAN BAR ASSOCIATION, Dec. 2008, https://apps.americanbar.org/buslaw/blt/2008-11-12/weathers.shtml (noting that many nonnative companies and lawyers "may hesitate to do business with Indian tribes for fear of the unknown"); Haddock & Miller, *supra* note 51, at 223 (suggesting that tribes might reassure investors by structuring contracts "with an eye to facilitating federal court intervention in disputes . . . .").

[158] *See* David McAfee, *Marijuana Industry Can't Partake in Bankruptcy Protection*, BLOOMBERG BNA 29 BBLR 717 (June 20, 2017).

[159] Scott J. Greenberg & Jeffrey H. Taub, *When Tribal Gaming Goes Sour… Rights & Remedies in an Unclear Legal Environment*, CADWALADER WICKERSHAM & TAFT LLP, Apr. 11, 2011, https://www.lexology.com/library/detail.aspx?g=d7d11d74-d3a9-45dd-ba14-5ed3d20d34dd.

[160] *Id.*

[161] *Id.*

[162] *Id.*

businesses may have more traditional remedies available to them in the face of a tribal business unable or unwilling to repay debt.

Tribal entities in fiscal distress currently face a no-win situation: their uncertain eligibility status, combined with the incompatibility of the Bankruptcy Code with other laws and policies governing tribes, make using the existing bankruptcy system difficult if not impossible. Nevertheless, tribal entities seeking comprehensive debt relief have nowhere else to turn if they have engaged in commerce with other entities. This is because tribal law cannot be used to "bind dissenting non-tribal lenders."[163] In addition, bankruptcy offers distinct benefits—including an automatic stay preventing creditor action and the ability to restructure debt over the objection of creditors—traditionally unavailable outside of the Bankruptcy Code.[164] Thus, tribal law on its own is not a substitute for bankruptcy when a tribal entity has engaged in commercial transactions with non-tribal entities. If tribal insolvency law cannot address the debt restructuring, and if Indian nations are similarly precluded from using the Bankruptcy Code, this suggests that Congress should devise a path for relief.[165]

As tribal entities continue to engage in commerce with others, it will become increasingly likely that they will encounter the same risks that all businesses face, including debt overhang, holdout creditors, and the need for breathing space to adjust debts. Indeed, the rise of claims trading and distressed debt purchases, where parties with no prior interests in the debtor purchase claims in the hope of making a large return or to thwart a reorganization, makes it likely that tribal entities, like other U.S. businesses, will be faced with increasing numbers of creditors uninterested in a consensual debt restructuring.[166] Bankruptcy is distinctly equipped to address these problems by providing access

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[163] Kim & Koenig, *supra* note 17. The tribal exhaustion doctrine, which requires litigants to exhaust their tribal remedies before proceeding in state or federal court, likely does not apply to bankruptcy cases because federal law designates federal courts as the exclusive fora for bankruptcy claims. *See* Weathers, *supra* note 157 ("Exhaustion is not required where . . . federal law expressly provides that a claim can only be heard in federal court.")

[164] For an in-depth discussion of bankruptcy's unique attributes, *see* Coordes, *Gatekeepers Gone Wrong*, *supra* note 11, at 1206–07. Of course, as described *infra*, recently Congress has expanded access to bankruptcy tools to entities not eligible for Code-based relief.

[165] For a similar argument in the contexts of municipal bankruptcy and Puerto Rico, *see* Mitu Gulati & Robert K. Rasmussen, *Puerto Rico and the Netherworld of Sovereign Debt Restructuring*, 91 S. CAL. L. REV. 133, 149 (2017) ("[T]he power to enact a debt adjustment scheme is an integral part of a state's sovereign power, and . . . Congress cannot take that power away and put nothing in its place.").

[166] *See generally* Randolph J. Haines & John Worth, *Trading in Bankruptcy Claims*, 1992 ANN. SURV. OF BANKR. L. 1 (1992) (explaining various motivations for trading in bankruptcy claims); Anthony J. Casey, *Auction Design for Claims Trading*, 22 AM. BANKR. INST. L. REV. 133, 133 (2014) ("Claims are traded regularly in today's large corporate bankruptcy cases . . . the volume has increased dramatically in the last decade.").

to specific tools, namely nonconsensual debt adjustment and the automatic stay, that are not available elsewhere.[167] At bottom, when tribes and tribal businesses have a demonstrated need for these relief mechanisms, they should be able to access these tools.

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There are valid concerns about granting tribal debtors access to bankruptcy and about the ways in which the Code conflicts with other federal laws, regulations, and policies toward tribes. Despite these concerns, access to structured debt relief can provide distinct benefits for Indian nations, including increased certainty, more options for tribal entities struggling with debts or holdout creditors, and the ability to access a valuable set of tools traditionally defined by access to the Bankruptcy Code.

Tribes that engage in commerce with non-tribal entities are effectively injecting themselves onto a broader commercial playing field. Indeed, Indian nations often willingly submit themselves to non-tribal law in commercial circumstances by, for example, waiving sovereign immunity as a concession to doing business.[168] If tribal laws, norms, and customs can be reconciled with Western ones in the commercial context, it seems inappropriate to limit the debt relief tribal entities can obtain by foreclosing tribal debtors' access to bankruptcy relief. The next Part will discuss what appropriate bankruptcy relief for tribal entities might look like. Recent experiences suggest that when the Bankruptcy Code excludes a particular prospective debtor, it is not necessary to try and reconcile the Code with conflicting laws that apply to that entity. Instead, Congress can enact special legislation that provides structured debt relief tailor-made for entities not eligible to be debtors under the Bankruptcy Code.

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[167] *See* Laura N. Coordes, *Gatekeepers Gone Wrong: Reforming the Chapter 9 Eligibility Rules*, 94 WASH. U.L. REV. 1191 (2017); *see also* Michelle M. Harner, *Rethinking Preemption and Constitutional Parameters in Bankruptcy*, 59 WM. & MARY L. REV. 147, 198 (2017) (noting that the Supreme Court has "repeatedly described a discharge of a debtor's financial obligations as one of the hallmarks of a bankruptcy law that is within the exclusive purview of Congress under the Bankruptcy Clause"); Lubben, *supra* note 51, at 10 ("Insolvency systems are designed for debtors that risk having their value destroyed by individualistic creditor behavior.").

[168] *See* ROBERT J. MILLER, RESERVATION CAPITALISM: ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 98 (Univ. Neb. Press 2013) (noting that "there are literally thousands of examples of tribal governments voluntarily waiving their immunity in contracts" and citing the Confederated Tribes of the Siletz Indian Reservation in Oregon, which had waived immunity in thirty-five of its approximately 275 business contracts).

II. SEARCHING FOR RELIEF: THE BANKRUPTCY CODE AND BEYOND

If we accept that tribal debtors should be eligible for structured debt relief, we must next consider where such relief should come from. Scholars have made various proposals to reform or adapt the Bankruptcy Code to provide a clearer path for tribal eligibility. Others have suggested that non-bankruptcy mechanisms, such as bailouts, may be more appropriate forms of debt relief. After critically reviewing existing proposals, this Part examines the possibility of taking an alternate path: looking outside the Bankruptcy Code to design tailor-made structured debt relief.

A. Existing Proposals

Observers have long been troubled by tribal entities' lack of access to bankruptcy relief. Over the years, they have proposed various mechanisms to create access for these entities. This subsection surveys existing proposals and offers some commentary on their potential benefits and drawbacks.

1. Proposals for Determining Eligibility

Several proposals deal with the question of how to deem tribal entities eligible for relief under the Bankruptcy Code. A recent proposal suggests that courts find that Native American commercial entities are eligible for bankruptcy using the *Tuscarora-Coeur D'Alene* doctrine.[169] This doctrine splits tribal activities into two categories: those that are "governmental" and those that are "commercial" in nature.[170] The doctrine divides tribal pursuits so that tribal economic activities can be regulated in a manner similar to private-sector business activities in the contexts of federal employment and benefits laws.[171]

The *Tuscarora-Coeur D'Alene* doctrine derives from two cases. In the first, *Federal Power Commission v. Tuscarora Indian Nation*, the U.S. Supreme Court held that "a general statute in terms applying to all persons includes Indians and their property interests."[172] In the second, *Donavan v. Coeur D'Alene Tribal Farm*, the Ninth Circuit limited the application of *Tuscarora*, holding that it does not apply if (1) the law in question deals with intramural tribal self-governance; (2) application would contradict relevant treaties; or (3)

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169 Amanda L. Cartwright, *Can Native American-Owned Casinos File for Chapter 11?*, AM. BANKR. INST. J., Oct. 2012, at 50.

170 *Id.*

171 *Id.* at 51.

172 Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960).

legislative history demonstrates that Congress did not intend for the law to abrogate tribal sovereignty.[173]

The synthesized *Tuscarora-Coeur D'Alene* doctrine has been applied to find that Native American commercial activities, including casino operations, are subject to acts of Congress.[174] The doctrine thus limits tribal sovereign immunity to purely intramural governmental matters.[175] Using the proposal in question, a court could extend the doctrine to the Bankruptcy Code to find that Native American commercial entities are subject to U.S. bankruptcy law and that they are eligible for bankruptcy.[176]

Another suggestion for tribal debtor eligibility comes from the immunity doctrine.[177] An early motivation for granting tribes sovereign immunity was the fear that tribes might otherwise be subjected to economic hardship.[178] Indeed, many Indian nations are still in a precarious economic state such that they are not financially strong enough to withstand suit.[179] Some have argued that if a tribal entity is protected by immunity, it has less of a need to file for bankruptcy due to this protection.[180] Courts could therefore use the immunity doctrine to determine whether a tribe's sovereignty precludes the entity from filing for bankruptcy.[181] For example, under this proposal, a tribal business may not be covered by tribal immunity and may thus be able to access the bankruptcy system if (1) the business is sufficiently distinct from the tribe or (2) the tribe voluntarily waives the immunity upon incorporation.[182] Thus, under this proposal, there would be two categories of tribal enterprises: (1) those protected by immunity that cannot file for bankruptcy, and (2) those without immunity that can file.[183] This approach appears similar to the one the court in the *Santa Ysabel Resort and Casino* case used to determine that the business in that case was ineligible for bankruptcy.

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173 Donovan v. Coeur D'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985).

174 Cartwright, *supra* note 169, at 103.

175 *Id.*

176 *Id.*; *see also* San Manuel Indian Bingo and Casino v. N.L.R.B., 475 F.3d 1306 (D.C. Cir. 2007) (holding that National Labor Relations Act applied to an Indian-owned casino because applying the Act to a tribe's commercial activities would not impair tribal sovereignty).

177 Hogan, *supra* note 10, at 571.

178 *Id.* at 590.

179 *Id.*

180 *Id.* at 614.

181 *Id.* at 613.

182 *Id.*

183 *Id.*

Finally, Emir Aly Crowne, Andrew Black and S. Alex Constantin have argued that when a tribal corporate entity voluntarily enters into a business contract with non-tribal investors, that entity must be made subject to both bankruptcy law and to the terms of the agreements it undertakes because "[b]eing a commercial participant entails being commercially responsible."[184] These scholars contend that when a tribe voluntarily enters the public marketplace in a commercial capacity, it is subjecting itself to all of the relevant rules and regulations of that space, including the rules of bankruptcy.[185]

The above proposals offer various pathways to tribal eligibility for bankruptcy but do not explain how a tribal bankruptcy should proceed once the entity is deemed eligible. As the discussion in Part I shows, conflicts between the Bankruptcy Code and other federal laws that apply to tribes present the need for clarification and adjustment before a tribal debtor can proceed with bankruptcy. Thus, although there is uncertainty surrounding eligibility that should be clarified, if tribal debtors are to successfully use the bankruptcy system, the inquiry cannot stop at the eligibility stage.

2. Alternative Mechanisms

A second group of proposals calls for exploration of alternative mechanisms to assist tribes. For example, Blake Quackenbush has proposed using chapter 15 for tribal bankruptcy, arguing that this chapter of the Bankruptcy Code may "bridge the jurisdictional gap between tribal courts and U.S. [b]ankruptcy courts."[186]

Chapter 15, which was designed to facilitate cooperation between U.S. courts and foreign courts in cross-border insolvency cases,[187] may not be a good fit for Indian nations for several reasons. First, Indian tribes are distinct from the foreign states where companies seeking to use chapter 15 are based, as Quackenbush himself acknowledges.[188] Due to the restraints on tribal sovereignty discussed in Part I, treating a tribe as the equivalent of a sovereign nation for purposes of chapter 15 bankruptcy recognition is a technically difficult proposition. In particular, chapter 15 presupposes that the other sovereigns involved in a case have well-developed laws and public policies

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184 Emir Aly Crowne, Andrew Black, & S. Alex Constantin, *Not Out of the (Fox)Woods Yet: Indian Gaming and the Bankruptcy Code*, 2 UNLV GAMING L.J. 25, 26 (2011).

185 *Id.* at 44.

186 Quackenbush, *supra* note 10, at 69.

187 *See generally* 11 U.S.C. § 1501 et seq.

188 *See* Quackenbush, *supra* note 10, at 76.

related to bankruptcy. Thus, to use chapter 15 successfully, tribes would have to enact "substantial portions" of the Bankruptcy Code—portions which, due to their conflicts with the IGRA and other federal Indian law, would need to be further adapted for tribal use.[189] In all, applying chapter 15 of the Bankruptcy Code to accommodate tribal debtors would require significant adaptations, to both chapter 15's application and to tribal law itself. Thus, simply arguing that tribal debtors should use chapter 15 does not resolve the conflicts identified in Part I.

An alternative proposal suggests that Congress could simply consider a bailout for fiscally distressed tribal entities.[190] A bailout for tribal debtors is not as simple as it may seem, however. Bailout proposals are politically charged and are often extremely unpopular, with many contending that an offer of a bailout encourages reckless behavior.[191] In addition, if numerous tribal entities were suffering from severe financial distress, due perhaps to another acute recession, Congress may be in the difficult position of having to pick and choose which Indian nations it would offer to bail out.[192] Thus, bailouts may be both politically unpopular and economically undesirable.

In sum, alternatives to traditionally considered avenues for tribal bankruptcy are creative but likely difficult to implement, requiring adjustment in both legal and political contexts.

3. Clarification

The final set of proposals simply calls for clarification to the Bankruptcy Code when it comes to tribes.[193] In particular, Congress could refine provisions relating to tribes' status and eligibility under the Code, as well as whether Indian nations may be subject to involuntary bankruptcy petitions.[194] One commentator

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189 *See* Quackenbush, *supra* note 10, at 81–82.

190 *See* Waterman, *supra* note 110, at 87.

191 *See, e.g.*, Sita Slavov, *The Hidden Cost of Bank Bailouts*, U.S. NEWS & WORLD REPORT, Sept. 26, 2013, https://www.usnews.com/opinion/economic-intelligence/2013/09/26/study-shows-bank-bailouts-are-an-incentive-to-be-reckless (citing research that suggests bailing out banks "made the financial system riskier"); Daniel Mitchell, *Why the Bailout is Bad for America*, REALCLEARPOLITICS, Oct. 1, 2008, https://www.realclearpolitics.com/articles/2008/10/financial_bailout_would_impose.html (arguing that bailouts "will hurt the U.S. economy in the short run and long run").

192 *See* Adam J. Levitin, *Bankruptcy's Lorelei: The Dangerous Allure of Financial Institution Bankruptcy*, Feb. 6, 2018, *available at* SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3120145 ("Bailouts create opportunities for government favoritism.").

193 *See* Clift, *supra* note 10, at 207.

194 *See id.*

has suggested that Congress settle the matter of tribal eligibility using either "appropriate legislation or statutory amendment to the Code."[195]

Cohen's Handbook on Federal Indian Law notes that applying the Code to tribal government debtors is "problematic" and suggests that these debtors be dealt with "by the tribes themselves and by the executive or legislative branches of the federal government."[196] Yet, Cohen's Handbook also notes that tribally owned business entities "should be entitled to petition in bankruptcy."[197] Cohen's Handbook does not, however, elaborate on how issues with tribal government debtors should be addressed nor on how a tribal business might navigate the Bankruptcy Code if deemed eligible to file.

In other words, amending the Code or creating new legislation with tribes specifically in mind would provide clarity where there is currently only confusion. This Article has already detailed the challenges that amending the Code would entail, given the significant conflicts with the IGRA and other federal laws. However, providing clarity through "appropriate legislation" is an as-yet-underexplored avenue.

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Although the existing proposals contemplate various ways in which tribal debtors could access the bankruptcy system, none have resolved the thornier problem of reconciling the Bankruptcy Code with the body of federal law, policy, and customs relating to Indian nations. Indeed, scholars have been unable to articulate how a bankruptcy would proceed should a tribal debtor be deemed eligible.[198] Until recently, the prospect of structured debt relief for tribal debtors seemed inconceivable. As the next subsection explains, however, recent events offer significant promise on this front.

B. Specialized Laws for Otherwise Ineligible Entities

This subsection provides the necessary backdrop for this Article's proposal: Congress should enact special legislation providing tailored bankruptcy relief to tribes. Although this proposal may seem radical, it is not unprecedented. Indeed, Congress has twice recognized that the Bankruptcy Code is not an appropriate

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195 *Id.* at 252.

196 Cohen's Handbook, *supra* note 69, at § 2.03.

197 *Id.*

198 *See* Pandeli, *supra* note 51, at 274–79 (concluding that a chapter 7 liquidation would be "legally challenging, impractical and against federal policy with respect to Indian tribes" and that a chapter 11 reorganization would come with "caveats," including an inability to use a debt-for-equity swap).

solution and has instead adopted new and entirely personalized debt relief laws, once in the context of Puerto Rico, and once in the context of financial institutions. Each will be discussed in turn.

1. PROMESA

In 2016, Congress passed the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"),[199] marking a new approach to bankruptcy law in the United States.[200] PROMESA is not a pure bankruptcy law; rather, the legislation recognizes Puerto Rico's unique status as a U.S. territory with a complicated debt structure, providing a mixture of Bankruptcy Code-based rules and procedures and sovereign debt restructuring practices to aid Puerto Rico in its financial struggles.[201]

PROMESA, which was passed in response to Puerto Rico's severe economic crisis, was designed uniquely for Puerto Rico and has no application to other U.S. debtors, including other U.S. territories.[202] Signed into law by President Obama, PROMESA allows Puerto Rico to enter into a form of bankruptcy and creates a financial oversight board to govern the territory's fiscal decisions.[203] PROMESA has been described as one of "the most collaborative and bipartisan pieces of legislation" that Congress has passed in recent years.[204]

PROMESA's enactment occurred one day before Puerto Rico defaulted on substantial payment obligations,[205] and the events leading up to PROMESA's passage were turbulent. In 2014, Puerto Rico, already deeply in debt and concerned that its municipalities were not eligible for relief under the

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[199] *See PROMESA: A Summary of the Puerto Rico Oversight Legislation*, KUTAK ROCK NEWS & PUBLICATIONS, Sept. 7, 2016, http://www.kutakrock.com/PROMESA-Puerto-Rico-Oversight-Economic-Stability-Act/ [hereinafter PROMESA Summary].

[200] *See* Cheryl D. Block, *Federal Policy for Financially-Distressed Subnational Governments: The U.S. States and Puerto Rico*, 53 WASH. U.J.L. & POL'Y 215, 232 (2017) (describing PROMESA as a "hybrid procedural approach to restructuring Puerto Rico's otherwise unpayable debt").

[201] *See id.*; *see also* James Spiotto, *Beyond Hurricane Maria: Federal Action in Puerto Rico with PROMESA*, MUNINET GUIDE, Dec. 7, 2017, https://muninetguide.com/federal-action-in-puerto-rico/ (noting that PROMESA was designed to be a mixture of past mechanisms used to resolve governmental financial distress).

[202] *See* Sheelah Kolhatkar, *Profiting from Puerto Rico's Pain*, THE NEW YORKER (Nov. 6, 2017) (noting that Puerto Rico has been described as "America's own Third World country").

[203] *See id.*

[204] *See* Melissa Jacoby, *Aurelius Seeks a Do-Over; Puerto Rico and the Appointments Clause Litigation*, CREDIT SLIPS, Jan. 8, 2018, http://www.creditslips.org/creditslips/2018/01/aurelius-seeks-a-do-over-puerto-rico-appointments-clause-litigation.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+creditslips%2Ffeed+%28Credit+Slips%29.

[205] *See* PROMESA Summary, *supra* note 199.

Bankruptcy Code,[206] passed its own Recovery Act to try and address its problems firsthand.[207] The Recovery Act would have enabled some of Puerto Rico's instrumentalities to adopt debt restructuring plans.[208] The U.S. Supreme Court quickly declared the Recovery Act invalid on the grounds that the Bankruptcy Code preempted the Act.[209] According to the Court, Puerto Rico was subject to the Bankruptcy Code, even though its municipalities were ineligible to file under the Code, because the territory fell within the Code's definition of a "State."[210] Therefore, the Recovery Act was preempted by the Bankruptcy Code's provision prohibiting states from enacting their own bankruptcy legislation. Puerto Rico's path to structured debt relief thus entailed exhausting all possible legal options before Congress acted.

PROMESA is "the first of its kind in many respects."[211] Key features of the Act include an automatic stay, which stayed all actions and litigation against Puerto Rico and its instrumentalities to collect or enforce liabilities or claims and actions to possess or control their property;[212] the oversight board, which has broad authority and discretion over the territory;[213] a path for Puerto Rico and its instrumentalities to file a case to reorganize debts via a plan of adjustment;[214] and provisions for collective creditor action to modify bond terms.[215] Many Bankruptcy Code provisions are incorporated into PROMESA, including the Code's conditions for a court to confirm a bankruptcy plan.[216] Yet overall, PROMESA goes beyond Code-based bankruptcy relief to address Puerto Rico's unique needs as a territory.[217] As much as PROMESA and the Bankruptcy Code share certain characteristics, PROMESA makes significant departures from the Code, notably in the inclusion of the oversight board and

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[206] The Bankruptcy Code "allows only the municipalities of *states* to declare bankruptcy." Jose A. Cabranes, *3 Main Reasons Why Puerto Rico Can't Declare Bankruptcy*, BUSINESS INSIDER, July 22, 2015, http://www.businessinsider.com/3-main-reasons-why-puerto-rico-cant-declare-bankruptcy-2015-7 (last visited Feb. 28, 2018) (emphasis in original).

[207] *See id.*; Puerto Rico Public Corporation Debt Enforcement and Recovery Act, 2014 P.R. Laws Act No. 71.

[208] *See* PROMESA Summary, *supra* note 199.

[209] *See* Franklin California Tax-Free Trust, 136 S. Ct. 1938.

[210] *See id.* The Court also noted, however, that Puerto Rico was not a "State" for purposes of determining whether a state's municipalities may be debtors under the Code. *Id.*

[211] PROMESA Summary, *supra* note 199.

[212] *See* Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. § 2194 (2016).

[213] *See* PROMESA Summary, *supra* note 199.

[214] *See generally* Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. §2161 et seq. (2016).

[215] *See* PROMESA summary, *supra* note 199; Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. § 2231 et seq. (2016).

[216] *See* PROMESA Summary, *supra* note 199.

[217] *See id.*

creditor collective action clauses, as well as in allowing the territory itself to adjust all of its debts "in a comprehensive process."[218] "PROMESA is thus not solely for the purpose of adjusting or reorganizing the debts of Puerto Rico or covered instrumentalities, but has broader purposes."[219]

Since its passage, PROMESA, and the oversight board in particular, have been the subject of much debate and criticism. In 2017, one of Puerto Rico's creditors, hedge fund Aurelius Capital Management, sued, seeking a dismissal of the debt relief proceedings and a declaration that the oversight board was unconstitutional.[220] Notably, Aurelius argued that the board's creation violated the Constitution's Appointments Clause.[221] Although the board's members answer to the President, their appointments were never confirmed by the Senate.[222] Aurelius also argued that the process for appointing the board's members violates separation of powers principles.[223] Namely, six out of the seven board members were, according to Aurelius, "hand-picked" by Congress.[224] Aurelius sought to bar the oversight board from operating until it has been "validly constituted."[225]

Although the court ultimately held that establishment of the oversight board was constitutional,[226] the Aurelius litigation highlights some of the uncertainties that can be exploited in new legislation such as PROMESA. In addition, because PROMESA is different from a typical U.S. bankruptcy proceeding, Puerto Rico and those affected by its financial crisis have had to hire numerous experts to help interpret the law and chart the way forward.[227] The Puerto Rican

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[218] Colin Dwyer, *Puerto Rico Makes Unprecedented Move to Restructure Billions in Debt*, NPR, May 3, 2017, https://www.npr.org/sections/thetwo-way/2017/05/03/526750751/puerto-rico-makes-unprecedented-move-to-restructure-tens-of-billions-in-debt (calling PROMESA "a bankruptcy process custom-built for Puerto Rico's debt crisis").

[219] PROMESA Summary, *supra* note 215.

[220] Tom Hals, *Aurelius Hedge Fund Seeks to Toss Puerto Rico's Bankruptcy Filing*, REUTERS (Aug. 7, 2017), https://www.reuters.com/article/us-puertorico-debt-bankruptcy/aurelius-hedge-fund-seeks-to-toss-puerto-ricos-bankruptcy-filing-idUSKBN1AN27H.

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] *Id.*

[226] Opinion and Order Denying the Aurelius Motinos to Dismiss the Title III Petition and for Relief from the Automatic Stay, *In re* Fin. Oversight & Mgmt. Bd. for P.R., No. 17 BK 3283-LTS, Doc. # 3503 (Jul. 13, 2018).

[227] Elizabeth Olson, *Judge Pushes Back Against $75M in Fees for Puerto Rico Bankruptcy*, BLOOMBERG BNA BANKR. L. REP. (Mar. 19, 2018) (quoting the court-appointed fee examiner's report, which stated that the Puerto Rico bankruptcy presents "profound" legal issues and that "financial and legal professionals working on these cases have confronted massive challenges of time and distance, analysis and advocacy, with little directly applicable precedent").

government alone had paid nearly $300 million to advisors as of November 2017, with the amount projected to grow as the territory continues to pursue a debt restructuring under the new law.[228] As the territory already does not have enough money to go around, funds paid to advisors represent money that will not go toward paying creditors.

Austerity measures[229] and the influence of the oversight board have also been the subject of substantial criticism. On the island, the board is colloquially known as "La Junta," a reference to a ruling group that comes to power by force.[230] Protests have erupted in San Juan, Puerto Rico's capital, in response to the board and the measures it has imposed.[231] Residents and observers have expressed concern that "the whole democratic process [is breaking] down" due to PROMESA.[232] Even the United Nation's Commissioner on Human Rights has weighed in, noting that "Puerto Rico's human rights [are]…being massively undermined by the economic and financial crisis and austerity policies."[233]

In passing PROMESA, Congress made a deliberate choice to pursue an individualized solution to Puerto Rico's pressing debt problems.[234] As scholars have observed, Congress could have chosen to amend the Bankruptcy Code to extend its relief to Puerto Rico and its political subdivisions.[235] The fact that chapter 9 of the Code did not apply to Puerto Rico's municipalities has even been described as a "technical error."[236]

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228 Kolhatkar, *supra* note 202 ("If we don't come out of this with a new and super-improved Puerto Rico . . . this has just been a total waste of time.").

229 *See* Michelle Kaske, *Greek Tragedy Redux? Puerto Rico Embraces Risky Austerity Plan*, BLOOMBERG BNA BANKR. L. REP., Mar. 15, 2018 (describing an austerity-focused plan promulgated by Puerto Rico's governor and noting that "self-imposed discipline is bound to increase the pain, much as it did in Greece").

230 Ed Morales, *Puerto Rico's Political and Economic Crisis Deepens*, THE NATION, May 24, 2017, https://www.thenation.com/article/puerto-ricos-political-economic-crisis-deepens/.

231 *Id.* ("The fiscal oversight board is seen on the island as an external force, emblematic of Puerto Rico's second-class status.").

232 *Id.*

233 "Puerto Rico: Human Rights Concerns Mount in Absence of Adequate Emergency Response," U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, Oct. 30, 2017, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22326&LangID=E.

234 For an argument that Title III of PROMESA violates the uniformity requirement of the Bankruptcy Clause, *see* Stephen J. Lubben, *PROMESA and the Bankruptcy Clause: A Reminder About Uniformity*, 12 BROOK. J. CORP. FIN. & COM. L. 53, 54–55 (2017) (suggesting that extension of PROMESA to include the U.S. Virgin Islands could "potentially defuse the uniformity issue").

235 John A. E. Pottow, *What Bankruptcy Law Can and Cannot Do for Puerto Rico*, 85 REV. JR. U.P.R. 689, 700 (2016).

236 *Id.* ("I testified a year ago urging Congress to fix [the error], but for mysterious reasons it has not yet done so despite long-pending legislation.").

In creating a debt restructuring path for Puerto Rico outside of the Bankruptcy Code, Congress demonstrated that for certain entities, in this case territories with "layers upon layers of debt,"[237] ordinary bankruptcy law is inapt. As a quasi-sovereign U.S. territory, Puerto Rico is situated differently from other debtors under the Bankruptcy Code.[238] PROMESA is thus an example of Congress' ability to design tailored bankruptcy relief for special entities.

The experience with PROMESA lends further support to extending specialized bankruptcy relief to tribal entities. Thanks in part to their quasi-sovereign status, tribal entities face roadblocks to using the Bankruptcy Code. Yet, PROMESA also serves as a cautionary tale of the repercussions of waiting for a crisis to strike before passing legislation. Puerto Rico's financial crisis and legal limbo spurred Congress to act; if Congress had deliberated more thoroughly on PROMESA's effects on the commonwealth and its citizens, it could perhaps have avoided some of the problems Puerto Rico is facing as it struggles to adjust its debt under the guidance of the oversight board.

2. Dodd-Frank

After the 2008 financial crisis, Congress saw the need for serious bank financial reform.[239] Banks are ineligible to file under the Bankruptcy Code; instead, the Federal Deposit Insurance Corporation ("FDIC") can exercise substantial control when a bank becomes insolvent.[240] In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or the "Act") to provide comprehensive regulatory reform and to better prepare banks to face fiscal distress.[241]

The Dodd-Frank Act was designed to mitigate the systemic risk of the collapse of significant financial institutions.[242] The Act created the Financial Stability Oversight Council, which monitors U.S. financial markets, and requires certain large financial companies to submit periodic reports and "living wills"

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[237] Pottow, *supra* note 235, at 701.

[238] *See, e.g.*, Frank Shafroth, *Fiscal Economic Dislocation?*, THE GMU MUNICIPAL SUSTAINABILITY PROJECT, Jan. 22, 2017, https://fiscalbankruptcy.wordpress.com/2018/01/22/fiscal-economic-dislocation/ (describing federal tax reform that "treats Puerto Rico as a foreign jurisdiction").

[239] *The Dodd-Frank Act: A Cheat Sheet*, MORRISON & FOERSTER, 2010, http://media.mofo.com/files/uploads/Images/SummaryDoddFrankAct.pdf.

[240] *See generally* Hynes & Walt, *supra* note 13 (explaining that the FDIC acts as a receiver when a bank becomes insolvent). In contrast, bank holding companies can and do file for bankruptcy. *Id.* at 987 n.2.

[241] *The Dodd-Frank Act, supra* note 239, at 2.

[242] Post of David S. Huntington, *Summary of Dodd-Frank Financial Regulation Legislation*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG., July 7, 2010, https://corpgov.law.harvard.edu/2010/07/07/summary-of-dodd-frank-financial-regulation-legislation/.

that outline steps to be taken in the event of financial distress.[243] Notably, the Act established a so-called "orderly liquidation mechanism," which allows the FDIC to seize, break up, and wind down a failing financial company whose failure would threaten financial stability across the U.S.[244] In its role as a receiver for these institutions, the FDIC wields significant powers, including the power to take over and manage the company's assets, merge the company with another company, create a "bridge financial company," and transfer any of the company's assets or liabilities without approval.[245] Under the same orderly liquidation provisions, the government can provide a loan to the failing financial institution, and such loan must be backed by the assets of the firm and recovered either in the resolution process itself or from the largest members of the financial industry.[246]

Like tribal debtors, financial institutions cannot use the Bankruptcy Code as currently constituted. Indeed, "the failure of a systemically important financial institution is materially different from that of most non-financial businesses."[247] Yet, Congress provided tools to aid these struggling financial institutions. Congress did not enact bankruptcy relief for financial institutions;[248] however, it did provide these institutions with a set of tools tailored to address their unique status and position in the United States. Like a big bank failure, the financial failure of tribal entities is materially different from that of a non-tribal entity, in particular given the tribal entity's need to coordinate with other federal regulators.

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243 *Id.*

244 *Id.*; Adam J. Levitin, *Bankruptcy's Lorelei: The Dangerous Allure of Financial Institution Bankruptcy*, Feb. 6, 2018, *available at* SSRN (noting that Dodd-Frank "includes an 'Orderly Liquidation Authority,' that gives federal regulators broad powers to place failing 'financial companies'…that pose systemic risk into a receivership administered by the Federal Deposit Insurance Corporation").

245 Huntington, *supra* note 242.

246 *Id.*

247 Levitin, *supra* note 244.

248 Congress has recently been contemplating bankruptcy for banks. Financial CHOICE Act of 2017, H.R. 10 (proposing to replace Dodd-Frank's Orderly Liquidation Authority with a bankruptcy procedure to address the failure of systemically important financial institutions). For a discussion as to why bankruptcy is inapt for banks, *see, e.g.,* Mark Roe, *Don't Bank on Bankruptcy for Banks*, PROJECT SYNDICATE, Oct. 18, 2017, https://www.project-syndicate.org/commentary/bank-bankruptcy-regulations-by-mark-roe-2017-10 ("Restructuring a mega-bank requires pre-planning, familiarity with the bank's strengths and weaknesses, knowledge of how to time the bankruptcy properly in a volatile economy, and the capacity to coordinate with foreign regulators.").

III. DESIGNING TRIBAL DEBT RELIEF

PROMESA and the Dodd-Frank Act illustrate two instances where Congress looked beyond the Bankruptcy Code to provide relief for entities that were not included in the Code's eligibility provisions. Like territories and financial institutions, tribes are not contemplated as prospective debtors under the Bankruptcy Code. And just as Puerto Rico and many banks found themselves in situations where a debt restructuring was desirable, Indian nations and their businesses may encounter similar scenarios. It is thus not inconceivable that Congress would enact structured debt relief for tribal entities. And, as PROMESA and Dodd-Frank show, this debt relief need not come from the Bankruptcy Code. Instead, Congress can create specialized legislation for entities for whom use of the Code would be impractical.

This Part sketches out some key features of structured debt relief for tribal entities and flags potential issues to be resolved. Because this Article's proposal calls for substantial input from the groups the legislation would impact, the Article does not attempt to draft the proposed legislation in detail. Rather, what follows are guidelines as to what specialized bankruptcy relief for tribal debtors should look like.

A. Key Features and Benefits

The previous Parts identified several major problems with allowing tribal debtors to use the Bankruptcy Code. Although tribal entities often engage in commerce as if they were ordinary commercial players, they simply cannot be treated like ordinary commercial debtors. Specialized bankruptcy legislation for tribal entities would give tribal debtors and their creditors the same certainty afforded to other entities when they take out loans or otherwise engage in commerce.

1. Substance

Bankruptcy laws for tribal debtors should provide these entities with access to the same basic tools afforded to other debtors under the Bankruptcy Code—namely, protection from creditor debt collection attempts via an automatic stay, and the means to allow tribal debtors to liquidate (in the case of a tribal business entity) and to adjust their debts without the full consent of all creditors. These tools are the hallmarks of U.S. bankruptcy law and are part of what distinguish

bankruptcy from other forms of debt relief.[249] Thus, the general purpose of a tribal bankruptcy law should be consistent with bankruptcy's overarching goals: resolving debt overhang, eliminating holdout creditors, and providing breathing space to financially distressed debtors.

To achieve these goals, however, adjustments will have to be made to acknowledge the ways in which tribal debtors are uniquely situated. For example, although tribes are sovereign, tribal sovereignty is unlike the sovereignty of an independent nation, whose sovereignty cannot be abrogated by a higher power.[250] If bankruptcy law is to apply to tribal entities, it is important that bankruptcy not overly detract from tribal sovereignty. Specialized bankruptcy legislation should therefore recognize Indian nations' unique status and contain provisions that balance respect for tribal sovereignty with the goals of bankruptcy law. For example, any tribal bankruptcy should be voluntary,[251] meaning that the bankruptcy process should be initiated only by the tribal entity itself, rather than a creditor or other party in interest. In this way, tribal debtors will not be forced into bankruptcy. In addition, tribal debtors should be granted exclusivity,[252] meaning that they should be the only entities able to propose a plan of liquidation or debt adjustment. Incorporating these elements into the legislation protects tribal sovereignty interests. In addition, these provisions may make tribes who are not involved in commerce feel more comfortable with the legislation, since they will not be forced into a bankruptcy filing or forced to comply with a plan imposed upon them.[253]

The sovereign nature of Native American tribes suggests that a tribal bankruptcy law could also draw upon sovereign debt restructuring tools, for example by providing for the use of collective creditor action to modify the terms of a debt instrument. Similar to what Congress did in PROMESA, tribal bankruptcy law could draw from a mixture of sovereign debt restructuring tools

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[249] *See* Coordes, *Gatekeepers Gone Wrong*, *supra* note 167, at 1206–07 (delineating bankruptcy's unique functions).

[250] *See* "The Issue of Sovereignty," GLOBALIZATION 101 (2016), http://www.globalization101.org/the-issue-of-sovereignty/ (last visited Feb. 26, 2018) ("State sovereignty is the concept that states are in complete and exclusive control of all the people and property within their territory.").

[251] 11 U.S.C. § 301(a) ("A voluntary case . . . is commenced by the filing with the bankruptcy court of a petition…by an entity that may be a debtor.").

[252] *See, e.g.*, 11 U.S.C. § 1121(b) (noting that "only the debtor may file a [chapter 11] plan until after 120 days after the date" the bankruptcy petition is filed).

[253] Such "opt-in" features have become a trend with respect to recent congressional legislation as it pertains to tribes. *See, e.g.*, Tribal Law and Order Act of 2010, H.R. 725, 111th Cong. (2010) (requiring tribes to actively opt in if they want expanded punitive abilities); Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong. (2013) (designating "participating tribes," which can elect to use special domestic violence criminal jurisdiction).

and domestic bankruptcy provisions that recognize that tribal debt might be hybrid in nature—a mix of ordinary commercial loans and loans and guarantees backed by the tribe itself. Incorporating sovereign debt restructuring practices into the proposed legislation may be particularly valuable if a tribe itself were to seek a debt restructuring, or if a tribal business entity's debt was linked so closely to the tribe itself (i.e. through guarantees, cross-default provisions, or other contractual stipulations) that the tribe was heavily involved in the bankruptcy process.[254]

Several other important features of the proposed law deserve consideration. It will be critical to establish rules for determining what property becomes property of the debtor's bankruptcy estate, available for distribution to creditors. It will also be necessary to develop a property distribution system that is fair to creditors yet respects external constraints such as the IGRA's requirement that the tribe be in control of any tribal gaming operation. As a starting point for addressing these issues, Congress might look at bankruptcy reorganizations for nonprofits, churches, and heavily regulated entities. Courts have sometimes held that different rules apply in these bankruptcies,[255] and scholars have offered creative proposals to reconcile the application of the Bankruptcy Code to nonprofit and church debtors.[256]

A critical part of many bankruptcy cases is debtor-in-possession ("DIP") lending, in which a creditor extends money to the debtor to allow the debtor to proceed in bankruptcy. DIP lenders may be creditors the debtor has previously dealt with, or they may be entirely new lenders. Regardless of their identity, DIP

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[254] Scholars have suggested, for example, that tribal governments might provide start-up loans and other sorts of funding to businesses operated on reservations. Miller, *supra* note 16, at 857–58.

[255] *See, e.g.*, *In re* Wabash Valley Power Ass'n, 72 F.3d 1305 (7th Cir. 1995) (holding that absolute priority rule was not violated when debtor's plan contemplated cooperative members remaining in control of reorganized debtor); *In re* Whittaker Mem'l Hosp. Ass'n, 149 B.R. 812 (Bankr. E.D. Va. 1993) (holding that absolute priority rule not violated when individuals retained control of a non-profit hospital after bankruptcy); *In re* Gen. Teamsters, Warehousemen and Helpers Union, Local 890, 265 F.3d 869 (2001) (noting that the absolute priority rule is generally applied to *for-profit corporations* facing bankruptcy) (emphasis added).

[256] There is a growing body of scholarly literature on this topic. *See, e.g.*, Pamela Foohey, *Chapter 11 Reorganization and the Fair and Equitable Standard: How the Absolute Priority Rule Applies to All Nonprofit Entities*, 86 ST. JOHN'S L. REV. 31 (2012) (arguing that the fair and equitable standard encompasses more than the absolute priority rule and that, viewed in this light, the rule can be applied to nonprofits); Amelia Rawls, Comment, *Appling the Absolute Priority Rule to Nonprofit Enterprises in Bankruptcy*, 118 YALE L.J. 1231 (2009) (proposing a framework for courts to adjudicate absolute priority claims in nonprofit bankruptcies); Reid K. Weisbord, *Charitable Insolvency and Corporate Governance in Bankruptcy Reorganization*, 10 BERKELEY BUS. L.J. 305 (2013) (proposing for the appointment of bankruptcy examiners in nonprofit reorganizations involving substantial charitable assets because, among other problems, the absolute priority rule does not apply in this context). For a discussion of tensions that arise in church bankruptcy cases, *see* David A. Skeel, Jr. *"Sovereignty" Issues and the Church Bankruptcy Cases*, 29 SETON HALL LEGIS. J. 345 (2005).

lenders typically exercise a substantial amount of power and influence over the debtor during the case.[257] Indeed, many scholars have expressed concern about the outsize influence of DIP lenders.[258] Similarly, in the sovereign debt restructuring context, lenders who provide bailouts or other emergency funds to sovereign nations often attach stringent conditions to their loans and impose severe austerity measures.[259] It will be important for tribal bankruptcy legislation to provide a DIP lending structure that does not accord undue influence to DIP lenders or to the U.S. government, which holds property in trust for many Indian nations. Giving the tribal debtor the exclusive ability to propose a plan may help curtail lenders' influence. Another possibility would be to provide standards for adjudicator scrutiny over DIP loan terms to ensure that the terms are not unduly onerous for the tribal debtor and do not impinge upon tribes' right to self-govern. Alternatively, using its plenary powers, Congress could simply allow trust properties to be offered to creditors when a tribal debtor is in bankruptcy. This could give tribal debtors a broader choice of potential DIP lenders as well as decrease the federal government's oversight over trust properties.[260]

In general, Congress should tread carefully when it comes to oversight of the debtor. Both PROMESA and the Dodd-Frank Act provide for substantial external oversight of the financially distressed entities in question. The PROMESA oversight board exercises significant authority over Puerto Rico and its instrumentalities,[261] while the FDIC and other financial regulators exert substantial control over a struggling financial institution under the Dodd-Frank Act.[262] As discussed, the oversight board in particular has been the subject of much criticism, as observers and critics note that it wields its power despite its members not being democratically elected.

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[257] Adam J. Levitin, *Bankruptcy's Lorelei: The Dangerous Allure of Financial Institution Bankruptcy*, Feb. 6, 2018, *available at* SSRN (noting that "call[ing] the shots" in a bankruptcy case "is what DIP lenders do").

[258] *See, e.g.*, Laura Napoli Coordes, *The Geography of Bankruptcy*, 68 VAND. L. REV. 381, 406–07 (2015) (critiquing occasions when "the debtor and its powerful supporters—including its lawyers and postpetition lenders—run every aspect of the case"); Michelle M. Harner & Jamie Marincic, *Behind Closed Doors: The Influence of Creditors in Business Reorganizations*, 34 SEATTLE U.L. REV. 1155, 1158 (2011) (noting that creditors' self-interest is the most common reason for creditor disputes).

[259] *See, e.g.*, Laura N. Coordes, *When Borders Dissolve*, 93 CHI-KENT L. REV. 649 (2018) (describing the effects of austerity measures imposed in Greece).

[260] Such an arrangement would have broader implications for the federal government's relations with Indian nations, a discussion of which is beyond the scope of this Article.

[261] Morales, *supra* note 230.

[262] Adam J. Levitin, *Bankruptcy's Lorelei: The Dangerous Allure of Financial Institution Bankruptcy*, Feb. 6, 2018, *available at* SSRN (noting that Dodd-Frank's Orderly Liquidation Authority "gives federal regulators substantial discretion in whether to trigger the authority and gives the FDIC substantial discretion in implementing a receivership").

As a measure of respect for tribal sovereignty, tribal bankruptcy legislation should break with this pattern of extreme external oversight and instead consider a more limited approach to interference with tribal affairs. The protests in Puerto Rico and the backlash from the United Nations, described previously, should serve as cautionary tales about the perils of enacting changes without the consent of the governed.[263] To ensure minimal interference with tribal affairs, Congress could draw upon chapter 9 of the Bankruptcy Code, which prohibits undue influence with municipal affairs, for inspiration.[264] Recognition that tribal entities carry potentially weighty sovereignty concerns is important to avoid the knee-jerk imposition of significant external oversight.

Another key consideration will be the individual or panel running the proceedings. Entities restructuring their debts under the Bankruptcy Code do so primarily under the auspices of bankruptcy judges.[265] In contrast, under PROMESA, a district court judge oversees the restructuring proceedings.[266] Although Congress's precise reasons for choosing a district judge over a bankruptcy judge are unclear,[267] the drafters may have believed there were distinct benefits to district court oversight that would inure to Puerto Rico, perhaps because unlike bankruptcy judges, district courts are Article III judges.[268] Additionally, in sovereign debt restructurings, there is a growing practice of using arbitration to resolve claims.[269] Thus, it need not be a given

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[263] *See* Coordes, *When Borders Dissolve*, *supra* note 259 (discussing the drawbacks of enacting significant changes in the absence of political will). For a view that PROMESA actually gives the oversight board too little power in certain respects, *see* David A. Skeel, *Reflections on Two Years of P.R.O.M.E.S.A.*, 87 REVISTA JURIDICA UPR 862 (2018).

[264] In practice, however, judges in chapter 9 cases regularly exercise substantial authority. *See* Laura N. Coordes, *Formalizing Chapter 9's Experts*, 116 MICH. L. REV. 1249; Melissa B. Jacoby, *Federalism Form and Function in the Detroit Bankruptcy*, 33 YALE J. ON REG. 55, 58-59 (2016) (describing judicial work-arounds of chapter 9's limitations); Clayton P. Gillette & David A. Skeel Jr., *Governance Reform and the Judicial Role in Municipal Bankruptcy*, 125 YALE L.J. 1150, 1206 (2016) (discussing ways judges can overcome chapter 9's limitations and arguing that it is appropriate for judges to do so).

[265] *See* 28 U.S.C. § 157(b)(1) ("Bankruptcy judges may hear and determine all cases under [the Bankruptcy Code].").

[266] 48 U.S.C. § 2168 ("[T]he Chief Justice of the United States shall designate a district court judge to sit by designation to conduct the case.").

[267] *See* "Puerto Rico: PROMESA and Presiding Judges," ABI, https://www.abi.org/feed-item/puerto-rico-promesa-and-presiding-judges (last visited Feb. 8, 2018) (speculating that the Natural Resources Committee, which drafted PROMESA, "may not have been in the best position to appreciate the . . . risks" resulting from appointment of a district judge to oversee Puerto Rico's restructuring proceedings).

[268] *See* Melissa B. Jacoby, *Presiding over Municipal Bankruptcies: Then, Now, and Puerto Rico*, 91 AMER. BANKR. L.J. 375, 390 (2017) (questioning the accuracy of any perception of greater expertise on the part of these district judges and noting the "significant institutional costs of forfeiting the formidable body of substantive and procedural expertise a bankruptcy judge would have brought to the task").

[269] Abubakar Isa Umar & Muhammad Bello, *The Utility of International Investment Arbitration in Sovereign Debt Restructuring*, 14 U.S.-CHINA L. REV. 335, 336 (2017) ("[D]espite initial skepticism,

that a bankruptcy judge oversee the case. Instead, the merits and drawbacks of various options, including bankruptcy and district court judges and arbitrators, should be discussed to determine the best fit. Among other factors, expertise, the desired role for a judge or arbitrator, and the ability of the parties to play a role in choosing the judges or arbitrators may be relevant to the ultimate decision.[270] For example, bankruptcy judges have specialized expertise in restructuring debt, something that may be valuable in the context of a potentially complex tribal case. On the other hand, giving the parties the ability to choose an arbitrator (or panel of arbitrators) to oversee the case may provide both specialized expertise and reassurance to tribal debtors that they will have a role in selecting their adjudicator. There may also be efficiencies in the arbitration process that are harder to match in a more traditional courtroom setting.[271]

2. Process and Benefits

The process for creating this specialized tribal bankruptcy law is as important as the substance of the law itself. Although this Article has set forth recommended features, the exact contours of the legislation should be defined in consultation with the parties that the legislation is designed to impact—namely, tribes, tribal businesses, and non-tribal entities that play a significant role in tribal commerce.[272] The Bureau of Indian Affairs, a federal agency tasked with partnering with Indian nations to "help them achieve their goals for self-determination,"[273] would also likely play a role in shaping the new legislation.[274] A collaborative process for drafting the proposed legislation minimizes the risk

international arbitration is gradually becoming an option for addressing claims arising from sovereign debt defaults."); *see* Christoph G. Paulus, *A Standing Arbitral Tribunal as a Procedural Solution for Sovereign Debt Restructurings*, *in* SOVEREIGN DEBT AND THE FINANCIAL CRISIS, *available at* http://siteresources.worldbank.org/INTDEBTDEPT/Resources/468980-1238442914363/5969985-1295539401520/9780821384831_ch13.pdf (discussing a proposal for the creation of a sovereign debt arbitral tribunal).

[270] *See also* Laura N. Coordes, *Formalizing Chapter 9's Experts*, 116 MICH. L. REV. 1249 (cautioning that, despite facial limitations on judicial power in chapter 9 cases, judges exert substantial influence and control over a case through the use of appointed experts).

[271] *See* Melika Hadziomerovic, Note, *An Arbitral Solution: A Private Law Alternative to Bankruptcy for Puerto Rico, Territories, and Sovereign Nations*, 85 GEO. WASH. L. REV. 1263, 1285-86 (2017) (noting the "considerable" "time and cost efficiencies of arbitration").

[272] For a discussion of the history and practice of consultation and consent in relations between American Indian nations and the United States, *see* Robert J. Miller, *Consultation or Consent: The United States' Duty to Confer With American Indian Governments*, 91 N.D.L. REV. 37 (2015).

[273] *Mission Statement*, BUREAU OF INDIAN AFFAIRS, https://www.bia.gov/bia (last visited Feb. 7, 2018).

[274] Involving the Bureau of Indian Affairs, while politically likely, may raise its own concerns. *See* Haddock & Miller, *supra* note 51, at 175 ("Indians would benefit from a reduction in oversight from Washington that would place them on a footing with other citizens.").

of the new law being perceived as forced upon tribal entities without their input or consent.[275]

Although it may be possible to amend the Bankruptcy Code to allow tribal entities to use it, an advantage of special legislation is that it could be drafted specifically to take account of tribes' unique status and the extensive legal, regulatory, and policy frameworks surrounding tribal entities. By building legislation from the ground up, Congress could accommodate the unique needs of these quasi-sovereign, heavily regulated entities—needs not currently contemplated anywhere in the Bankruptcy Code.

Creation of a new law requires significant time and effort—and complying with that new law may also require time and money.[276] Yet, Congress need not start completely from scratch. Legislators can and should draw upon existing bankruptcy law, tribal law, and sovereign debt restructuring practices to create structured debt relief for tribes, much in the way Congress drew from multiple restructuring techniques when it drafted PROMESA.[277] In addition, by putting effort in to enact a law before a crisis hits and immediate action becomes necessary, Congress can ensure that affected parties have time to react to the effects of the legislation before dire need for relief is demonstrated.

Encouraging action *before* a crisis is one of the primary challenges in bankruptcy law.[278] As the experiences with PROMESA and Dodd-Frank illuminate, relief sometimes appears either just before or even after a crisis has reached a breaking point.[279] Given the extent of tribal entities' engagement in commerce, it seems likely if not certain that the next recession or financial downturn will affect tribal entities, causing them to look for debt relief. Acting now, before a wave of tribal bankruptcies creates uncertainty and instability for Indian nations and the entities that do business with them, can help ensure that when tribal debtors seek bankruptcy relief, adequate, timely relief will be

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[275] This risk is coming to fruition in Puerto Rico, where citizens have protested against PROMESA's oversight board. *See* Edwin Melendez, *Is Congress' Plan to Save Puerto Rico Working?*, THE CONVERSATION, July 31, 2017, https://theconversation.com/is-congress-plan-to-save-puerto-rico-working-80785.

[276] *See, e.g.*, Kolhatkar, *supra* note 202 (discussing the numerous experts Puerto Rico's oversight board hired to assist it with interpreting and carrying out the provisions of PROMESA).

[277] *See* David Skeel, *Reflections on Two Years of P.R.O.M.E.S.A.*, 87 REVISTA JURIDICA UPR 862 (2018).

[278] *See, e.g.*, Coordes, *Gatekeepers Gone Wrong*, *supra* note 11, at 1214 (discussing literature describing government "officials . . . delay[ing] bankruptcy relief or avoid[ing] it entirely").

[279] Such hasty relief sometimes results in a suboptimal framework. *See* David A. Skeel, "Single Point of Entry and the Bankruptcy Alternative" in ACROSS THE GREAT DIVIDE: NEW PERSPECTIVES ON THE FINANCIAL CRISIS 313, 314 (Martin N. Baily & John B. Taylor eds., 2014) (contrasting the Title II process Congress devised in Dodd-Frank with the single point of entry strategy regulators actually use to implement a Title II resolution).

available to them. In addition, Congress can avoid possible negative effects of hastily-enacted legislation.[280]

Developing unique legislation tailored to tribal debtors may work well for several additional reasons. First, as previously discussed, reconciling the Bankruptcy Code with other laws governing tribes would be a complex and difficult task. Puerto Rico's experience provides a telling illustration of just how difficult an undertaking this might be. Although many believed that Puerto Rico's municipalities might be eligible for debt relief under chapter 9 of the Bankruptcy Code, the territory *itself* had substantial debt that would not have been addressed even if its instrumentalities were deemed eligible for chapter 9.[281] Similarly, "tribal debt" may take the form of debt owed by a tribe *or* by a tribal corporation. As complex and difficult as enacting new legislation would be, a specialized bankruptcy law would likely be a better fit given potential multiple layers of debt for tribal entities. Further, as discussed, merely amending the Bankruptcy Code to make tribal debtors eligible for bankruptcy would not resolve the numerous conflicts with the IGRA, tribal law and customs, and other federal laws and policies applicable to tribes.

PROMESA is an example of how legislation can be tailored to address a prospective debtor's unique needs.[282] Yet, observers have expressed concern that Congress, in imposing extensive external oversight as a condition of debt relief, has gone a step too far. Seeking input from critical potential players in a tribal bankruptcy may help address this concern in the context of a tribal bankruptcy law. Notably, involving Indian nations in the deliberative process may help tribal entities accept the new law and be more willing to use it in times of distress.[283]

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[280] *See* John Copeland Nagle, *Direct Democracy and Hastily Enacted Statutes*, 1 N.Y.U. J.L & PUB. POL'Y 163, 173 (1997) (noting that "a lack of deliberation, a lack of careful drafting, and the inability to ascertain the people's intent characterize statutes that are hastily enacted by the legislature").

[281] Jose A. Cabranes, *3 Main Reasons Why Puerto Rico Can't Declare Bankruptcy*, BUSINESS INSIDER, July 22, 2015, http://www.businessinsider.com/3-main-reasons-why-puerto-rico-cant-declare-bankruptcy-2015-7 (noting that an amendment to the Bankruptcy Code would have addressed less than half of Puerto Rico's total debt, leaving the island with "crippling payments" on the other two-thirds of its debt and smothering economic growth).

[282] Patricia Guadalupe, *Here's How PROMESA Aims to Tackle Puerto Rico's Debt*, NBC NEWS, June 30, 2016, https://www.nbcnews.com/news/latino/here-s-how-promesa-aims-tackle-puerto-rico-s-debt-n601741.

[283] *See* Joel Brockner, *Why It's So Hard to Be Fair*, HARV. BUS. REV., Mar. 2006 (proposing that companies pay more attention to stakeholders' needs when undergoing change); Melissa B. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. PENN. L. REV. 1715 (2018) (arguing that there is "a strong public interest in understanding who makes the key decisions [in bankruptcy] and whether that process comports with basic constitutional and democratic norms").

B. Concerns

Specialized bankruptcy legislation for tribal entities comes with its share of trade-offs. As discussed, starting from "scratch" may be a more expensive and uncertain process than amending existing law. Yet, if tribal entities are to have access to structured debt relief, the process of providing that relief will be a difficult one no matter the route that is taken. Amending the Bankruptcy Code to accommodate tribal debtors would require sorting out and resolving the various conflicts between the Code and other laws and policies that apply to tribes. Simply ignoring the problem and allowing the Bankruptcy Code to continue to apply as-is to tribal debtors is unworkable and would prevent bankruptcy's rules from applying neutrally and predictably.[284] By contrast, creating new legislation allows Congress to avoid conflicts at the outset and signals that tribal entities are distinct, in many ways, from other debtors. Although creating and implementing a new system is costly, leaving tribal debtors to navigate an ill-fitting bankruptcy system imposes its own significant costs. In the long run, having a system that works for tribal debtors and that addresses the concerns and needs of those affected will ideally provide more efficient results than the status quo.

Another concern may arise from Congress's constitutional directive to create "uniform" laws on the subject of bankruptcies.[285] Although there is room for debate on what exactly this requires, scholars and jurists have interpreted this provision of the Constitution to prohibit "private" bankruptcy laws that affect only particular debtors.[286] Furthermore, in *Hanover National Bank v. Moyses*, the Supreme Court stated that laws passed on the subject of bankruptcy must be uniform throughout the United States, but that uniformity is geographical rather than personal.[287] This means that the general operation of bankruptcy law must be uniform even though it may result in particular differences in different states. Thus, while diversity in local law inevitably produces non-uniform results in

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[284] *See* Adam J. Levitin, *Bankruptcy's Lorelei: The Dangerous Allure of Financial Institution Bankruptcy*, Feb. 6, 2018, *available at* SSRN (arguing that financial institution bankruptcy is "not workable as a restructuring system" and would "undermine the credibility of the bankruptcy system writ large" if attempted, despite acknowledging that bankruptcy offers the appearance of "neutral," "predictable," and "generally applicable" rules).

[285] U.S. CONST. art. I, § 8, cl. 4.

[286] Todd Zywicki, *Bankruptcy Clause*, THE HERITAGE GUIDE TO THE CONSTITUTION, https://www.heritage.org/constitution/articles/1/essays/41/bankruptcy-clause; *see* Lubben, *supra* note 234, at 53 ("What it means for a bankruptcy law to be uniform is massively unclear.").

[287] Hanover Nat. Bank v. Moyses, 186 U.S. 181, 188 (1902).

bankruptcy cases in different states, this outcome does not contravene the uniformity requirement.[288]

Legal arguments notwithstanding, uniformity is also valuable from a policy perspective. Generally applicable laws, whereby debtors and creditors receive the same treatment, create predictability and certainty and contribute to a perception of overall fairness in the bankruptcy system. Special legislation, as suggested above for tribal debtors, pushes against the policy benefits of uniformity.

In the context of tribal entities, however, uniformity with other types of debtors seems inapt. As discussed above, tribes are sovereign entities that seem to fall outside of the scope of the Bankruptcy Code. In addition, Article I, Section 8 of the U.S. Constitution provides that "Congress shall have the power to regulate Commerce with foreign nations and among the several states, *and with the Indian tribes*."[289] This indicates that Indian nations were (and should be) considered separate from the federal government, the states, and foreign nations—they are, essentially, in a class by themselves.[290] Indeed, as Part I illustrates, tribal entities are often given special treatment outside of the bankruptcy context to encourage business development. This warrants separate legislation—legislation that would apply uniformly to Indian nations *as a class of debtor*.

If Congress does not act pursuant to its Bankruptcy Clause authority, it could perhaps draw upon other sources of authority to enact the proposed legislation.[291] The Plenary Power Doctrine gives Congress ultimate authority with regard to matters affecting Indian tribes.[292] There is also a trust relationship

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[288] Brian A. Blum, EXAMPLES & EXPLANATIONS: BANKRUPTCY AND DEBTOR/CREDITOR 84 (5th ed.) (Aspen 2010).

[289] U.S. CONST. art. I, § 8 (emphasis added).

[290] *See also* Lubben, *supra* note 234, at 58 (summarizing the Supreme Court's holding in a uniformity case as providing "Congress with the ability to enact laws dealing with geographically isolated problems, as long as the law operates uniformly upon a *given class* of creditors and debtors") (emphasis added).

[291] Cohen's Handbook, *supra* note 69, at § 5.01 ("Congress's power to give effect to [the Constitution's Indian commerce clause and treaty clause], coupled with the supremacy of federal law provides ample support for the federal regulation of Indian affairs.").

[292] Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."); United States v. Lara, 541 U.S. 193, 200 (2004) ("[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'"); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."); Darrel Smith, *Why Indians are Second Class Citizens: Congress' Plenary Power, Tribal Sovereignty and Constitutional Rights*, CITIZENS EQUAL

between the federal government and the tribes,[293] which implies that the federal government has a duty to protect tribes. This in turn implies the necessary legislative and executive authorities to effectuate that duty.[294] As noted above, the Commerce Clause of the Constitution explicitly provides that Congress's power to regulate commerce extends to "[c]ommerce . . . with the Indian tribes" rather than commerce *within* the tribes.[295] Accordingly, any bankruptcy-related law that Congress enacts should deal only with situations in which debt problems extend beyond the tribe itself. If a tribe's financial distress is contained within the tribe (i.e., all involved are members of the tribe or otherwise affiliated with the tribe), Indian nations can and should address that distress using tribal law.

Thus, it is likely that Congress has the authority to enact specialized bankruptcy legislation for tribal entities, given their unique status under U.S. law. Separate, specialized legislation for tribes would not impact the uniformity requirement because the same law would be applied equally to all tribal entities.[296]

It is also important to recognize that tribes and tribal businesses are distinct, not just from non-tribal entities, but from each other. The collaborative process this Article proposes for creating the legislation should seek input from a wide range of tribal entities and creditors, as well as experts, legislators, and other policymakers. But involving so many entities in the creation of legislation risks fostering disagreement that could slow down or halt the process. To facilitate progress and ensure that the legislation is completed in a timely manner, the process for getting input could be based on other, similar processes that have resulted in effective legislation in the past, such as the process used to create the ANCSA (described below)[297] or the commissions the American Bankruptcy

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RIGHTS ALLIANCE, http://citizensalliance.org/indians-second-class-citizens-congress-plenary-power-tribal-sovereignty-constitutional-rights/.

[293] Stephen L. Pevar, *The Federal-Tribal Trust Relationship: Its Origin, Nature, and Scope*, www.saige.org/conf/12CO/TrustResponsibilityOutline%20SAIGE2012.doc.

[294] *Id.*

[295] Cohen's Handbook, *supra* note 69, at § 5.01 (noting that the Indian commerce clause recognizes tribes "as distinct political entities" and that the clause is "broader in scope" than the portion of the commerce clause dealing with interstate commerce); *see also* THE FEDERALIST NO. 42 (James Madison) ("The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce . . . that the expediency of it seems not likely to be drawn into question."); *but see* Ry. Labor Exec. Ass'n v. Gibbons, 455 U.S. 457, 469 (1982) (cautioning that Congress may not enact nonuniform bankruptcy laws under the Commerce Clause).

[296] Kurt H. Nadelmann, *On the Origin of the Bankruptcy Clause*, 1 AM. J. LEGAL HIST. 215, 227 (1957) ("[I]t is no accident, we think, that the Bankruptcy Clause speaks of 'uniform laws,' rather than one 'uniform law,' which Congress may pass on the subject of bankruptcies, thus leaving Congress a free hand in adopting, if it so desired, different laws for different types of debtors.").

[297] *See* Part I.C, *supra*.

Institute uses to promulgate suggestions for improvements to the Bankruptcy Code.[298] Some amount of compromise will be inevitable in this process, but a collaborative product will help to ensure that tribal entities are not coerced into becoming debtors in a system they do not want or need.

Allowing the parties affected by the legislation to have a say in the drafting process, while democratic, may have other significant downsides. Lobbyists for various sides may battle for influence, and the resulting legislation risks mirroring the preferences of the wealthiest and/or loudest voices. Despite these potential drawbacks, history has demonstrated that it is possible for a collaborative, inclusive drafting process to achieve satisfactory results. The Bankruptcy Code itself is the result of an extensive, collaborative effort involving multiple parties with diverse viewpoints.[299]

Another prominent example of such a process was the one leading to passage of the ANCSA. The Alaska Federation of Natives, a coalition of "more than 400 Alaska Natives representing 17 Native organizations," was formed to address issues with the land rights of Alaska Natives and was extremely involved in passage of the ANCSA, as well as in providing assistance with implementation of and subsequent amendments to the Act.[300] Although the resulting legislation was not perfect, it received substantial support on both sides of the political aisle.[301] The process leading to the ANCSA's passage thus illustrates that there are ways to overcome deadlock and ways to work with those most affected under the proposed legislation to achieve a result that is workable and satisfactory. Whether through the development of a coalition interested in bankruptcy issues for tribal debtors, or through some other means, it is possible for the pitfalls of the drafting process to be minimized.

There may be also concerns that treating tribal debtors differently may disadvantage Indian nations and their citizens by subjecting them to different standards than non-tribal entities. These concerns have arisen in other contexts

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[298] *Purpose of the Commission*, ABI COMMISSION TO STUDY THE REFORM OF CHAPTER 11, http://commission.abi.org/purpose-commission (last visited Feb. 26, 2018); *The ABI Commission on Consumer Bankruptcy*, ABI COMMISSION ON CONSUMER BANKRUPTCY, https://consumercommission.abi.org/ (last visited Feb. 26, 2018).

[299] *See* RONALD J. MANN, BANKRUPTCY AND THE U.S. SUPREME COURT 24–25 (Cambridge University Press 2017) ("[T]he Code was not produced by the partisan designs of a single party or drafted to satisfy the interests of particular businesses.").

[300] *History*, ALASKA FEDERATION OF NATIVES, http://www.nativefederation.org/about-afn/history/ (last visited Feb. 15, 2018).

[301] *See* Eric F. Myers, *Letter to Rep. Don Young*, AUDUBON ALASKA (May 15, 2013), http://docs.audubon.org/sites/default/files/documents/representative_young_-_sealaska_hr_740_5-15-13_final.pdf.

where special legislation has been passed that uniquely applies to tribes. For example, the Indian Child Welfare Act (ICWA)[302] sets distinct federal requirements that apply only to state child custody proceedings involving Indian children.[303] Critics of the ICWA have asserted that it violates the equal protection rights of parents of Indian children by treating them differently from other parents.[304] Indeed, the ICWA is a "dramatic departure" from most state laws involving child custody proceedings and requires significant procedural and substantive differences from a non-Indian child custody proceeding.[305] Like this Article's proposed legislation, the ICWA was passed in part because of concerns about non-Indian actors failing to appreciate the differences between Indian and non-Indian practices.[306] Although the ICWA has "brought attention to the unique needs of Indian children,"[307] its critics contend that the Act also took away significant personal liberties.[308]

Experience with the ICWA thus demonstrates both the benefits of special legislation in the sense that it can address unique needs and situations, as well as the drawbacks, in the sense that the effects of different treatment may bring disadvantages. For this reason, care should be taken to ensure, as much as possible, that bankruptcy legislation for tribes does not result in inherently unequal treatment or put Indian nations, their citizens, or their creditors at a disadvantage solely because of the fact that the debtor is a tribal entity. Involving tribal entities, creditors, and other representatives in the drafting process, as described above, and ensuring that drafters are given the time necessary to solicit feedback and input on the legislation will be critical to ensuring that the proposed legislation does not have overly adverse results.

Ultimately, this proposal does treat tribal entities differently than other debtors. However, as described in Part I, tribal entities are given different treatment in nearly every other commercial respect, and there is a long history in U.S. law of distinct treatment of Indian affairs.[309] This different treatment has

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302 25 U.S.C. § 1901 et seq.

303 *About ICWA*, NICWA, https://www.nicwa.org/about-icwa/ (last visited Feb. 13, 2018).

304 Christine D. Bakeis, *The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe*, 10 NOTRE DAME J. L., ETHICS & PUB. POL'Y 543, 543-45 (1996).

305 B.J. Jones, *The Indian Child Welfare Act: The Need for a Separate Law*, AMERICANBAR, https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/indianchildwelfareact.html (last visited Feb. 13, 2018).

306 *Id.*

307 *Id.*

308 Bakeis, *supra* note 304, at 544.

309 *See generally* Miller, *supra* note 16 (exploring the federal government's different treatment of reservation economies compared with the capitalism principles it applies to the rest of the American economy).

been upheld in the courts as based on tribes' unique political status.[310] More specifically, the fact that a tribal debtor experiences financial distress—even the same type of distress as a non-tribal debtor—does not mean that tribal debtors should be expected to conform to the same bankruptcy laws as non-tribal entities when those bankruptcy laws are an ill fit.

CONCLUSION: A BROADER PERSPECTIVE

In recent years, Congress has taken the unusual step of creating bankruptcy-like laws tailored to address the unique, complex difficulties of special types of prospective debtors. This Article suggests that Congress could do the same for Native American tribal entities, which are distinctly situated and have effectively been barred from traditional bankruptcy relief. This Article thus reinforces the notion that, in certain circumstances, access to key debt restructuring tools does not have to come through the Bankruptcy Code itself.

If Congress provides tribal entities with their own debt restructuring legislation, it could represent a broadening of U.S. bankruptcy law, as well as a fragmenting of the Bankruptcy Code. As debt structures become increasingly complex[311] and as U.S. states face their own staggering debt problems,[312] it may be desirable for Congress to pass new legislation uniquely tailored to address issues and entities independently of the Bankruptcy Code. Technological developments have also created new potential debtors,[313] along with assets, such

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[310] *See, e.g.*, Morton v. Mancari, 417 U.S. 535 (1974) (upholding statutory hiring preference in the Bureau of Indian Affairs because the intent was to aid Indian self-government); Fisher v. District Court of Sixteenth Jud. Dist. Of Mont., in and for Rosebud Cty., 424 U.S. 382, 390 (1976) ("[E]ven if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government."); United States v. Antelope, 430 U.S. 641 (1977) (holding that statutes providing for prosecution of Indians under federal criminal law due to their enrollment in federally recognized tribes do not violate due process or equal protection).

[311] *See, e.g.*, Puerto Rico's complex debt, discussed in Part II.B.1 *supra*.

[312] *See, e.g.*, *10 States With Enormous Debt Problems: Report*, HUFFPOST (Oct. 28, 2012), https://www.huffingtonpost.com/2012/08/28/state-debt-report_n_1836603.html (noting that collectively, America's state governments owe $4.19 trillion); *see also* Gulati & Rasmussen, *supra* note 165, at 136 (discussing state debt restructuring and "argu[ing] that while Congress can adjust [the power of states to restructure their debt] by replacing a state's scheme with one of its own, it cannot, consistent with federalism, prohibit state action while putting nothing in its place.").

[313] For example, Mt. Gox, a bitcoin exchange, filed for bankruptcy in Japan in 2014. Patrick Riesterer & Waleed Malik, *Recognizing Foreign Proceedings Under the Canadian Bankruptcy and Insolvency Act: Re MtGox Co*, WEIL BANKRUPTCY BLOG (Nov. 24, 2014), https://business-finance-restructuring.weil.com/international/recognizing-foreign-proceedings-under-the-canadian-bankruptcy-and-insolvency-act-re-mtgox-co/. For other examples of new debtor types, including high-technology companies and organizations that exist entirely online, as well as a discussion of the difficulty of the Code accommodating these entities, *see* Laura N. Coordes, *New Rules for a New World: How Technology and Globalization Shape Bankruptcy Venue Decisions*,

as cryptocurrencies, that simply did not exist when the Code was created.[314] Seen in this light, the Bankruptcy Code is not a static set of tools but rather a launching pad for new ideas. If bankruptcy relief continues to be broadened beyond the Bankruptcy Code itself, further research will be necessary to determine the role of the Bankruptcy Code in the future, and in particular to examine the question of when it is appropriate or necessary to create "personalized," non-Code-based structured debt relief. Although this Article does not seek to resolve these issues in a conclusory fashion, it does shed some light on their answers. When an entity, be it an Indian tribe, a bank, or a U.S. territory, exhibits distinct differences in structure and function from other entities contemplated by the Bankruptcy Code and experiences the need for bankruptcy-specific tools, special legislation may be warranted. If there are ways to replicate the pattern of providing tailored bankruptcy relief to nontraditional debtor entities, there are likely many prospective debtors that would benefit.

17 ASPER REV. INT'L BUS. & TRADE L. 85, 93–95 (2017).

[314] *See* Coordes, *New Rules*, *supra* note 313, at 93.

KRYSTAL ENERGY CO. v. NAVAJO NATION

No. 02-17047.

357 F.3d 1055 (2004)

KRYSTAL ENERGY COMPANY, Plaintiff-Appellant, v. NAVAJO NATION, Defendant-Appellee.

United States Court of Appeals, Ninth Circuit.

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Attorney(s) appearing for the Case

J. Kent MacKinlay, Warnock, MacKinlay & Associates, Mesa, Arizona, for the plaintiff-appellant.

Marcelino R. Gomez, Navajo Nation Department of Justice, Window Rock, Navajo Nation (Arizona), for the defendant-appellee.

Before LEAVY, PAEZ, and BERZON, Circuit Judges.

As Amended on Denial of Rehearing En Banc April 6, 2004. *

BERZON, Circuit Judge:

Appellant Krystal Energy Company ("Krystal") appeals the district court's dismissal of its adversary action under the

[357 F.3d 1056]

Bankruptcy Code, 11 U.S.C. §§ 505 and 542, against the Navajo Nation, an Indian tribe. The district court based its dismissal on the Navajo Nation's sovereign immunity to suit in the absence of explicit abrogation of that immunity by Congress. Whether Congress has abrogated the sovereign immunity of Indian tribes by statute is a question of statutory interpretation and is reviewed de novo. *Demontiney v. United States,* 255 F.3d 801, 805 (9th Cir.2001). Because we conclude that Congress did abrogate the sovereign immunity of Indian tribes under 11 U.S.C. §§ 106(a) and 101(27), we reverse. [1]

Immunity from suit has been recognized by the courts of this country as integral to the sovereignty and self-governance of Indian tribes. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.,* 523 U.S. 751, 756-58, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998) ("*Kiowa Tribe*"). *See also 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) ("*Potawatomi*") (recognizing the sovereign immunity of Indian tribes absent a clear waiver by the tribe or congressional abrogation); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g,* 476 U.S. 877, 890, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986) ("The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance."); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."). Tribal sovereign immunity is not absolute, however. Congress may abrogate it and thereby authorize suit against Indian tribes. *Santa Clara Pueblo,* 436 U.S. at 58, 98 S.Ct. 1670 (citing *United States v. Testan,* 424 U.S. 392, 399, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976)). Such an abrogation must be "unequivocally expressed," *id.,* in "explicit

legislation," *Kiowa Tribe,* 523 U.S. at 759, 118 S.Ct. 1700. Abrogation of tribal sovereign immunity may not be implied. *Santa Clara Pueblo,* 436 U.S. at 58, 98 S.Ct. 1670 (citing *Testan,* 424 U.S. at 399, 96 S.Ct. 948).

Identical language is used by courts in determining whether Congress has abrogated the sovereign immunity of states. *Seminole Tribe of Fla. v. Fla.,* 517 U.S. 44, 55, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) ("In order to determine whether Congress has abrogated the States' sovereign immunity, we ask[,] ... first, whether Congress has `unequivocally expresse[d] its intent to abrogate the immunity'" (citations omitted)); *Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 73, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) (same); *see also Osage Tribal Council v. United States Dep't of Labor,* 187 F.3d 1174, 1181 (10th Cir.1999) ("Conceding potential differences between tribal and state sovereign immunity, we note that courts have often used similar language in defining the requirements for waiver of [Eleventh Amendment state sovereign immunity]."); *Fla. Paraplegic, Ass'n v. Miccosukee Tribe of Indians,* 166 F.3d 1126, 1131 (11th Cir.1999) (equating the standards applied in determining whether Congress abrogated "federal and state governments' protection from suit" and tribal sovereign immunity). While there are additional constraints on Congress's power to abrogate state sovereign immunity, we may look to state sovereign immunity precedent to help determine how "explicit" an abrogation must be, and do so in deciding the issue before us.

That issue is whether Congress abrogated the sovereign immunity of Indian tribes when it enacted § 106 of the Bankruptcy Code. To answer this question, we look to the text of the code: [2]

> (a) Notwithstanding 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 ... 505, ... 542....

11 U.S.C. § 106(a) (1995).

"Governmental unit," in turn, is defined as:

> United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States ..., a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic governments. ...

11 U.S.C. § 101(27) (1995). Neither the Supreme Court nor any circuit has determined whether these statutes, which do not include the term "Indian tribes" or any similar language, suffice to abrogate Indian tribes' immunity from suit. [3]

It is clear from the face of §§ 106(a) and 101(27) that Congress did intend to abrogate the sovereign immunity of *all* "foreign and domestic governments." Section 106(a) explicitly abrogates the sovereign immunity of all "governmental units." The definition of "governmental unit" first lists a sub-set of all governmental bodies, but then adds a catch-all phrase, "or other foreign or domestic governments." 11 U.S.C. § 101(27). Thus, *all* foreign and domestic governments, including but not limited to those particularly enumerated in the first part of the definition, are considered "governmental units" for the purpose of the Bankruptcy Code, and, under § 106(a), are subject to suit.

Indian tribes are certainly governments, whether considered foreign or domestic (and, logically, there is no other form of government outside the foreign/domestic dichotomy, unless one entertains the possibility of extra-terrestrial states).

The Supreme Court has recognized that Indian tribes are "`domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Potawatomi,* 498 U.S. at 509, 111 S.Ct. 905 (citing *Cherokee Nation v. Georgia,* 5 Pet. 1, 17, 8 L.Ed. 25 (1831)); *see*

also, Blatchford v. Native Village of Noatak, 501 U.S. 775, 782, 111 S.Ct. 2578, 115 L.Ed.2d 686 (comparing Indian tribes to states and foreign sovereigns, and concluding that both states and Indian tribes are "domestic" sovereigns). So the category "Indian tribes" is simply a specific member of the group of domestic governments, the immunity of which Congress intended to abrogate.

Had Congress simply stated, "sovereign immunity is abrogated as to all parties who otherwise could claim sovereign immunity," there can be no doubt that Indian tribes, as parties who could otherwise claim sovereign immunity, would no longer be able to do so. Similarly here, Congress explicitly abrogated the immunity of *any* "foreign or domestic government." Indian tribes are domestic governments. Therefore, Congress expressly abrogated the immunity of Indian tribes. *See In re Russell,* 293 B.R. 34, 44 (D.Ariz.2003) (concluding that § 106(a) abrogates tribal sovereign immunity "unequivocally[] and without implication"); *see also In re Davis Chevrolet, Inc.,* 282 B.R. 674, 683 n. 5 (Bankr.D.Ariz. 2002) ("It seems to this court that `other domestic government' is broad enough to encompass Indian tribes."); *In re Mayes,* 294 B.R. 145, 157-60 (10th Cir.2003) (McFeeley, J., dissenting) (arguing that § 106(a) does abrogate tribal sovereign immunity); *In re Vianese,* 195 B.R. 572, 575 (Bankr.N.D.N.Y. 1995) (holding that Tribe had individually waived its sovereign immunity, and stating in dicta that § 106(a) did abrogate the sovereign immunity of Indian tribes under the Bankruptcy Code).

Similar syllogistic reasoning was followed in *Kimel,* a case concerning the abrogation of state sovereign immunity. *Kimel,* 528 U.S. at 73-74, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000). In that case, the Supreme Court held that Congress had clearly expressed its intent to abrogate the sovereign immunity of the states when passing certain amendments to the Age Discrimination Enforcement Act (ADEA). *Id.* At the same time, *Kimel* recognized that this expression of intent, while explicit, did not appear in terms on the face of the ADEA:

> The ADEA states that its provisions shall be enforced in accordance with the powers, remedies, and procedures provided in section[] ... 216 ... of this title.... 29 U.S.C. § 626(b). Section 216(b), in turn, clearly provides for suits by individuals against States. That provision authorizes employees to maintain actions for backpay against any employer (including a public agency) in any Federal or State court of competent jurisdiction. ... Any doubt concerning the identity of the public agency defendant named in § 216(b) is dispelled by looking to § 203(x), which defines the term to include the government of a State or political subdivision thereof, and any agency of ... a State, or a political subdivision of a State. Read as a whole the plain language of these provisions clearly demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees.

Id. Congress, therefore, need not make its intent to abrogate "unmistakably clear" in a single section of a statute. *Id.* at 76, 120 S.Ct. 631. *See also Osage Tribal Council v. United States Dep't of Labor,* 187 F.3d 1174, 1181-82 (10th Cir.1999) (holding that the Safe Drinking Water Act "contains a clear and

explicit waiver of tribal immunity" despite the fact that the court had to piece together various subsections of the statute to arrive at that conclusion).

The difference between *Kimel* and *Osage,* on the one hand, and the case presently before us, on the other, is evident but, in the end, unimportant: Unlike the definition

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of "public agency" in the ADEA, which *does* list "States," [4] no definition in the Bankruptcy Code actually lists "Indian tribes" as either a foreign or domestic government. However, in enacting the Bankruptcy code, Congress was legislating against the back-drop of prior Supreme Court decisions, which *do* define Indian tribes as domestic nations, i.e., governments, as well as against the ordinary, all-encompassing meaning of the term "other foreign or domestic governments."

In the realm of Eleventh Amendment abrogation, Congress clearly does not have to list all of the specific states, beginning with Alabama and ending with Wyoming, for a court to conclude in one specific instance that Wisconsin's sovereign immunity has been abrogated by a statute that abrogates the sovereign immunity of all states. Similarly, Congress has abrogated the sovereign immunity of all foreign and domestic governments in § 106(a) of the Bankruptcy Code. The Navajo Nation is a specific example of a domestic government. Therefore, the Navajo Nation's sovereign immunity, like that of all individual domestic governments, has been abrogated.

We can find no other statute in which Congress effected a generic abrogation of sovereign immunity and because of which a court was faced with the question of whether such generic abrogation in turn effected specific abrogation of the immunity of a member of the general class. In *Bassett v. Mashantucket Pequot Tribe,* 204 F.3d 343 (2d Cir.2000), and *Fla. Paraplegic, Ass'n v. Miccosukee Tribe of Indians of Fla.,* 166 F.3d 1126 (11th Cir.1999), our sister circuits held that Congress had not expressly abrogated Tribal sovereign immunity in either the Copyright Act or the ADA. However, the sections of those statutes purporting to abrogate *states'* sovereign immunity do not also purport to abrogate the sovereign immunity of "other foreign or domestic governments," or some similarly generic term. *See* 17 U.S.C. § 511 (1999) ("Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity, for a violation of any of the exclusive rights of a copyright owner provided by section 106 through 122, for importing copies of phonorecords in violation of section 602, or for any other violation under this title."); 42 U.S.C. § 12188 (1995) (providing a general cause of action for "any person who is being subjected to discrimination on the basis of disability in violation of this subchapter"); *see also,* 42 U.S.C. § 12202 (1995) ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." (footnote omitted)). [5] We cannot, thus, rely on these cases for guidance under the Bankruptcy Code.

It is clear from the text of § 106(a) that Congress intended to abrogate the sovereign immunity of both the states and another group of those who may assert sovereign immunity, other foreign and domestic governments. The statute explicitly uses the terms "sovereign immunity" and "abrogate." This manifest intent distinguishes the present case from those

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Eleventh Amendment cases in which courts had to determine whether the provision of a general, federal cause of action abrogated states' sovereign immunity.

In *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 245-46, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985), for example, the court held that Congress had not unequivocally expressed its intent to abrogate the sovereign immunity of the states in the Rehabilitation Act. That statute simply authorized suit in federal court against any recipient of federal funds — a category that certainly included individuals other than states or parties capable of claiming sovereign immunity. *Id.* ("The Statute thus provides remedies for violations of [the Rehabilitation Act] by *`any'* recipient of Federal assistance." There is no claim here that the State of California is not a recipient of federal aid. "*A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.*" (second emphasis added)). *See also Davidson v. Bd. of Governors of State Colls. & Univs. for W. Ill. Univ.,* 920 F.2d 441, 443 (7th Cir.1990) (holding that Congress need not have "said in so many words that it was abrogating the states' sovereign immunity in age discrimination cases" to effectively abrogate states' immunity, but distinguishing those cases where Congress had simply provided a general cause of action as "insufficiently unequivocal a designation of the state to override its sovereign immunity").

Section 106(a) does not simply "authorize suit in federal court" under the Bankruptcy Code — it specifically abrogates the sovereign immunity of governmental units, a defined class that is largely made up of parties that could claim sovereign immunity. So to recognize is not, as the Navajo Nation suggests, to *imply* an abrogation that is not explicit in the statute. Instead, reading § 106(a)'s express abrogation as reaching Indian tribes simply interprets the statute's reach in accord with both the common meaning of its language and the use of similar language by the Supreme Court. No implication beyond the words of the statute is necessary to conclude that Congress "unequivocally expressed" its intent to abrogate Indian tribes' immunity.

Finally, we also note that, were Indian tribes not "governmental units" for the purpose of § 106(a), a tribe that voluntarily proceeded in federal court under the Code would not be a "governmental unit" under the other sections of the Bankruptcy Code, either. The sections applicable to "governmental units" are myriad, and include § 523 — Exceptions to discharge — which states: "A discharge under[certain sections] of this title does not discharge an individual debtor from any debt ... to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than [certain] tax penalt[ies]." 11 U.S.C. § 523. Thus, although Indian tribes' sovereign immunity is abrogated by § 106(a), Congress has also provided certain special treatment to Indian tribes as governmental units within the Bankruptcy Code.

We are well aware of the Supreme Court's admonitions to "tread lightly" in the area of abrogation of tribal sovereign immunity. *See, e.g., Santa Clara Pueblo,* 436 U.S. at 72, 98 S.Ct. 1670 ("Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly strained."); *see also id.* at 60, 98 S.Ct. 1670 ("Although Congress clearly has power to authorize civil actions against tribal officers, ... a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."); *Kiowa Tribe,* 523 U.S. at 759, 118 S.Ct. 1700 ("The capacity of the Legislative Branch to address the issue [of tribal sovereign immunity] by comprehensive legislation counsels some caution by us in this

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area."). But the Supreme Court's decisions do not require Congress to utter the magic words "Indian tribes" when abrogating tribal sovereign immunity. Congress speaks "unequivocally" when it abrogates the sovereign immunity of "foreign and domestic governments." Because Indian tribes

are domestic governments, Congress has abrogated their sovereign immunity in 11 U.S.C. § 106(a).

REVERSED and REMANDED.

FootNotes

* Judges Paez and Berzon vote to deny the petition for rehearing en banc. Judge Leavy recommends denial of the petition for rehearing en banc.

1. The Navajo Nation does not argue that, even had Congress abrogated Indian tribal sovereign immunity, such abrogation would be unconstitutional. In fact, the Navajo Nation states in its brief to this Court that Congress "clearly" had power "to abrogate tribal sovereign immunity in the Bankruptcy courts."

2. *In re Mitchell,* 209 F.3d 1111 (9th Cir.2000), invalidated § 106 insofar as it attempts to abrogate the sovereign immunity of States. *Id.* at 1118-20 (holding that, (1) if enacted pursuant to the Bankruptcy Clause of Article I, § 106 is unconstitutional pursuant to *Seminole Tribe;* and, (2) if passed to enforce "a protection afforded by the Fourteenth Amendment," then "[u]ntil Congress makes findings of a pattern of state violations and passes legislation that is proportional to its remedial aims, § 106(a) must be viewed as an unconstitutional assertion of Congress's power" under the "congruent and proportional" test of *City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997)). No question has been raised in this case concerning the constitutionality of § 106 as it applies to Indian tribes.

3. In two earlier opinions, we noted but did not decide the issue befure us in this case. In *Richardson v. Mt. Adams Furniture (In re Greene),* 980 F.2d 590, 597-98 (9th Cir.1992), we construed an earlier version of § 106 that did not expressly abrogate sovereign immunity for any governmental unit in the circumstances pertinent in that case and in this one. Assuming "without deciding" that Indian tribes are "governmental units" for the purposes of § 101(24) and § 106, we held that just as § 106 as it then existed was not sufficiently explicit to waive the sovereign immunity of states and the federal government with regard to money judgments, so that section did not abrogate the sovereign immunity of Indian tribes with regard to such judgments. *In re Greene,* 980 F.2d at 597-98. As the court in *In re Greene* was not applying the present language of § 106, expressly abrogating sovereign immunity for specified sections of the bankruptcy code of all "governmental unit[s]," and only assumed, but did not decide, whether Indian tribes are "governmental units" under § 101(24), *In re Greene* does not aid us in deciding the issue before us today. *See also Confederated Tribes of the Colville Reservation Tribal Credit v. White (In re White),* 139 F.3d 1268, 1270 n. 1 (9th Cir.1998)("White did not appeal the district court's alternative holding that § 106 of the Bankruptcy Code did not abrogate tribal immunity. Therefore, that issue is not before us and we express no view on whether an Indian Tribe is a `governmental unit' for purposes of § 106(a) or (b).").

4. Similarly, as discussed in *Osage,* the definition of "municipality" in the SDWA lists "Indian tribe." *Osage,* 187 F.3d at 1182.

5. The Supreme Court has accepted a petition for certiorari in a case concerning the constitutionality of Congress's attempt to abrogate the rights of states in Title II of the ADA. *Lane v. Tennessee,* 315 F.3d 680 (6th Cir.2003), *cert. granted Tennessee v. Lane,* 539 U.S. 941, 123 S.Ct. 2622, 156 L.Ed.2d 626 (2003). The issue in *Lane,* however, is whether or not Congress abrogated state sovereign immunity under Section 5 of the Fourteenth Amendment, not whether the abrogation was explicit enough.

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IN RE RUSSELL

Bankruptcy No. 02-06628-PHX-RJH. Adversary No. 02-01215.

293 B.R. 34 (2003)

In re Darrell Duane RUSSELL, Debtor. Darrell Duane Russell, Plaintiff, v. Fort McDowell Yavapai Nation, Defendant.

United States Bankruptcy Court, D. Arizona.

May 15, 2003.

Attorney(s) appearing for the Case

Ronald Rosier, Fountain Hills, AZ, for Fort McDowell Yavapai Nation.

Gary L. Thomas, Phoenix, AZ, for Darrell Duane Russell.

OPINION DENYING NATION'S MOTION TO DISMISS

RANDOLPH J. HAINES, Bankruptcy Judge.

Debtor Darrell Russell received his chapter 7 discharge and then filed an adversary proceeding against Defendant Fort McDowell Yavapai Nation (the "Nation") to enforce the discharge. His complaint seeks to preclude the Nation from collecting his debt to the Nation by withholding his monthly entitlement to gaming revenues. The Nation moved to dismiss on the ground of tribal sovereign immunity, and that motion has been briefed, argued and taken under advisement. For the reasons set forth below, the Court denies the Nation's motion to dismiss.

Facts

Russell is a tribal member of the Nation. In 1998, he obtained a $200,000 business loan from the Nation's Commercial Development Fund to finance his own collection business, which his application described as the "purchase of chattel paper." He committed to repayment of the loan by 60 equal monthly payments of $3,960 each from 1999 through 2004. The loan application, signed by Russell, stated that as "additional security for the loan, [Russell] shall assign any Per-Capita payments due to [Russell] at that time that the loan is officially in default, on a pro-rata basis, for such time as is necessary to repay the loan." The promissory note also referenced this provision as security for the note.

Russell's business apparently failed. He filed chapter 7 in May 2002 and obtained his discharge in September, 2002. He listed the business loan from the Nation as an unsecured [sic] debt in his Schedule F and included the Nation as a creditor on the master mailing list. The Nation in fact received notice of the bankruptcy filing and attended the first meeting of creditors, but did not file a proof of claim, object to the debtor's discharge, or object to the scheduling of its debt as unsecured. The Nation also received notice of the Debtor's discharge.

As a tribal member, Russell is entitled to a per capita distribution from the Nation's gaming revenues, which is currently approximately $2100 per month. [1] Each

month, before and after the discharge, the Nation has been deducting from these per capita payments approximately $1200 per month on account of the business loan. [2] Russell's adversary complaint seeks to have these deductions terminated on account of the discharge. [3]

The Issue

The Nation seeks dismissal of the adversary complaint on the ground the court lacks jurisdiction due to tribal sovereign immunity. The Debtor responds the sovereign immunity of "governmental units" is abrogated by 11 U.S.C. § 106(a) as to various sections of the Bankruptcy Code, including § 524(a)(2), [4] which provides that the discharge "operates as an injunction against" "an act, to collect, recover or offset any such [discharged] debt as a personal liability of the debtor." The Nation replies that it, and Indian tribes generally, are not specifically identified as among the governmental units to which that abrogation applies, because the definition of "governmental unit" in Bankruptcy Code § 101(27) does not mention Indian tribes:

> [G]overnmental 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 Nation supports this argument by adding that any Congressional abrogation of tribal immunity "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58-59, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (citations omitted).

Thus the issue is whether "domestic government" is an unequivocal expression that includes Indian tribes, or merely implies that. [5]

[293 B.R. 37]

Analysis

It is beyond debate that tribes enjoy sovereign immunity from private suit absent waiver or abrogation by Congress. That doctrine was announced in 1940, [6] withstood challenge in 1991, [7] and was recently reaffirmed and applied even off the reservation. [8] It is also beyond debate that Congress can abrogate tribal sovereign immunity. *Martinez,* 436 U.S. at 58, 98 S.Ct. 1670 ("This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress."); *Kiowa Tribe,* 523 U.S. at 759, 118 S.Ct. 1700 ("Congress `has occasionally authorized limited classes of suits against Indian tribes' and `has always been at liberty to dispense with such tribal immunity or to limit it'"), quoting *Potawatomi,* 498 U.S. at 510, 111 S.Ct. 905.

Any Congressional abrogation, however, "cannot be implied but must be unequivocally expressed." *Martinez,* 436 U.S. at 58-59, 98 S.Ct. 1670. Case law provides examples of purported waivers that have been found to be either by implication only or by equivocal expression. [9]

Martinez is an example of an attempt to imply an abrogation of sovereign immunity. It dealt with the Indian Civil Rights Act of 1968. The plaintiff sued the Santa Clara Pueblo for violation of its equal protection clause by denying tribal membership to children of female members who marry outside the tribe, but not to children of male members who do so. Because nothing in the Indian Civil Rights Act "purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief," the Court concluded that Congress had not abrogated tribes' sovereign immunity from such suits. 436 U.S. at 59, 98 S.Ct. 1670. It was not that a purported abrogation was equivocal, as there was not even an arguably equivocal attempt at abrogation. Rather, the argument for abrogation was solely based on implication, that Congress would not have imposed legal obligations on tribes to recognize their members' civil rights without also authorizing private suits to enforce those rights. In fact, the plaintiff's argument really rested on two inferences, because the Court also found that the Act implied no private right of action at all, not even against a tribal officer who was "not protected by the tribe's immunity from suit." *Id.* at 59, 98 S.Ct. 1670. [10]

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The best example of an "equivocal" abrogation of immunity is *United States v. Nordic Village, Inc.,* 503 U.S. 30, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992). In that case Justice Scalia explained why Bankruptcy Code § 106(c), the direct ancestor of the current § 106(a) prior to its amendment in 1994, failed to satisfy the "unequivocal expression" requirement — because "It is susceptible of at least two interpretations that do *not* authorize monetary relief." *Id.* at 34, 112 S.Ct. 1011 (emphasis in original). So according to the "plain meaning" of "unequivocal," to be equivocal the statute purporting to abrogate sovereign immunity must be susceptible of an alternative interpretation that does not do so.

Here there is no purported abrogation of the first type, by implication. The Bankruptcy Code does not merely define the right — the right to a discharge like the right to equal protection in the Indian Civil Rights Act — but also the available remedies to enforce and protect that right, here § 524's express injunctive relief. So the availability of private judicial relief is not implied, but express. The next step is to determine whether the ability to assert it against a sovereign is also express or only implied. That is answered by the current § 106(a), which expressly abrogates sovereign immunity as to any governmental unit, with respect to the private judicial remedies that the Code provides.

"Governmental unit" is expressly defined to include the United States, a State, a foreign state, or "other foreign or domestic government." § 101(27). The Nation argues that because "there is no mention of Indian tribes" in that definition or elsewhere in the Code, it would only be by implication that they could be included, and sovereign immunity cannot be abrogated by implication.

Resolution of the Nation's argument hinges on the meaning of "implied" in the Supreme Court's admonition that abrogation of tribal immunity cannot be implied. As noted by the premier lexicographer of modern legal usage, there are three possible meaning of "imply," [11] but only the third, incorrect usage gives us any pause.

The first possible meaning is "to impute or impose on equitable or legal grounds." [12] This usage is unique to legal writing, and very common in legal writing, and is therefore is the most likely usage the Court intended. This is the usage when courts imply a contract, a trust, or a promise that was never actually made or even suggested. Perhaps the usage closest to the present context is when courts imply a private right of action in a statute. When they do so, they are not using the term in its ordinary English usage, because the

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court's holding is express rather than implied, and usually the court is not suggesting that the Congress or legislature consciously intended there to be a private right of action but only indicated it by implication. Instead, the court is imposing it because it is equitable to do so, just as a promise or a contract may be implied when a party acts to its detriment in reliance on another's statement or conduct. That is a particularly apt meaning in this context, because it means the Court is saying that abrogation of sovereign immunity cannot be implied in the same way a right of action might be implied even when the statutory language is silent on the subject. Under that meaning, however, there can be no argument that application of § 106(a) to tribes would be to imply an abrogation of sovereign immunity, because the language of § 106 is quite express. To apply § 106 to tribes would not be "to impute or impose" a legal right or obligation on which the statute is silent but is merely to apply the express words of the statute.

The second possible meaning is "to read into (a document)." [13] This means to infer a meaning that the author probably intended but is not found in the express words of the document. [14] Perhaps, for example, the authors of the Constitution implied a right of privacy even though no words make that intention express. Again, however, it is clear that under this meaning the abrogation of sovereign immunity was not merely implied by Congress,

because it is express in § 106. Concluding that §§ 101(27) and 106(a) include Indian tribes is not to conclude the authors implied something without making it express, but merely to apply what is expressly said. So under this meaning as well there is no violation of the Court's proscription against abrogation by implication in concluding that § 106 includes Indian tribes.

The third meaning, according to Mr. Garner, is simply erroneous, and that is "to infer." [15] Simply because it is erroneous may be sufficient reason to reject it, because the Supreme Court has made clear that the Bankruptcy Code is to be interpreted according to its "plain meaning," [16] which would obviously preclude a conclusion that the words of the statute were used erroneously. Presumably the Court's rules for interpreting the Code are similarly to be interpreted according to the "plain meaning" of the words used by the Court. It is erroneous to use "imply"

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when "infer" is meant, so there is no reason to read *Martinez* as saying anything other than abrogation may not be implied, according to one of the two correct usages of that term already discussed, but not to prohibit a deduction from express statutory language.

But even if "implied" were meant to mean "inferred," a further analysis shows that the process of determining whether tribes are included within § 106's abrogation is not by inference, but by an altogether different process, deduction.

The Court has repeatedly held, as the Nation admits, that Indian tribes are domestic governments. "Indian tribes are `domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Potawatomi,* 498 U.S. at 509, 111 S.Ct. 905, quoting *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831). "Indian tribes are `distinct, independent political communities, retaining their original natural rights' in matters of local self-government." *Martinez,* 436 U.S. at 55, 98 S.Ct. 1670, quoting *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 559, 8 L.Ed. 483 (1832). They are "separate sovereigns pre-existing the Constitution." *Martinez,* 436 U.S. at 56, 98 S.Ct. 1670. Indeed, if they were not sovereign governments they would not enjoy sovereign immunity at all.

So the abrogation of tribal sovereign immunity by §§ 101(27) and 106(a) can be stated as a simple syllogism: Sovereign immunity is abrogated as to all domestic governments. Indian tribes are domestic governments. Hence sovereign immunity is abrogated as to Indian tribes.

The syllogism, of the classic form — All men are mortal; Socrates is a man; hence Socrates is mortal — is one of the two forms of reasoning. The other is induction, drawing implications or inferences from examples. According to Aristotle, these are the *only* two methods of reasoning, or persuasion by proof:

> With regard to the persuasion achieved by proof or apparent proof: just as in dialectic [logic] there is induction on the one hand and syllogism or apparent syllogism on the other, so it is in rhetoric. The example is an induction, the enthymeme is a syllogism, and the apparent enthymeme is an apparent syllogism. . . . Every one who effects persuasion through proof does in fact use either enthymemes or examples: there is no other way. . . . When we base the proof of a proposition on a number of similar cases, this is induction in dialectic, example in rhetoric; when it is shown that, certain propositions being true, a further and quite distinct proposition must also be true in consequence, whether invariably or usually, this is called syllogism in dialectic, enthymeme in rhetoric.17

Implication and inference are the rhetorical versions of induction, drawing conclusions from examples. For example, if the last phrase were eliminated from § 106(a), one might draw the inference that because sovereign immunity is expressly abrogated as to the United States, the States, the Commonwealths, the Districts, and foreign governments, Congress must have intended to abrogate it as to all governments. That would be reasoning by implication or inference. While that might be equally as sound, and in fact how all new knowledge is achieved, it nevertheless

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retains the possibility for error. [18] The Court may well have intended to proscribe this method of concluding that there has been an abrogation of sovereign immunity, but the Court has not similarly proscribed that conclusion when reached by deduction.

But because the statute expressly abrogates sovereign immunity as to all domestic governments, the statute applies to Indian tribes by deduction rather than by implication, so the conclusion is not proscribed by the Court's limitations. In other words, the proscription against abrogation by implication does not require the listing or naming of each government as to which it applies so long as they are unequivocally identified by the statute. Indeed, if the Nation's argument here were to be adopted, then Arizona could similarly argue that § 106(a) does not apply to it because it is not mentioned. But § 106(a) does apply to Arizona by the exactly the same logical process that it applies to the Fort McDowell Yavapai Nation: Sovereign immunity is abrogated as to States, Arizona is a state, therefore sovereign immunity is abrogated as to Arizona.

That leaves the other possibility, that the abrogation is equivocal, susceptible of more than one meaning, in its application to Indian tribes. But the Nation has not suggested, either in its memoranda or at oral argument, any possible other meaning of "domestic government" that would not include Indian tribes. Indeed, since the meaning of "or other foreign or domestic government" cannot include the United States, or a State, Commonwealth, Territory or District, or a municipality, or a foreign state, or an agency, department or instrumentality of any of them, because they are all expressly mentioned, it is difficult if not impossible to come up with any possible meaning for "other domestic government" *except* Indian tribes. Without another reasonable plausible alternative meaning, the abrogation of sovereign immunity as to all domestic governments is not equivocal. It could hardly be more absolute. [19]

It remains to test this analysis by the case law.

The Ninth Circuit has "assume[d], without deciding, that Indian tribes are `governmental units' for the purposes of § 106." *Richardson v. Mt. Adams Furniture (In re Greene),* 980 F.2d 590, 597 (9th Cir.1992). That case ultimately concluded, on the basis of *Nordic Village,* that the pre-1994 version of § 106 did not abrogate sovereign immunity against a money judgment. That conclusion is moot after the 1994 amendment to § 106, which made express that the abrogation of sovereign immunity included "an order or judgment awarding a money recovery." § 106(a)(3).

[293 B.R. 42]

Mitchell v. Franchise Tax Board (In re Mitchell), 209 F.3d 1111, 1118 (9th Cir.2000) ("Congress has clearly expressed its intent to abrogate state sovereign immunity in § 106(a)"); *Elias v. United States (In re Elias),* 218 B.R. 80, 83 (9th Cir. BAP 1998) ("It is clear from the text that § 106(a) `manifests the requisite intent to abrogate.'"), *aff'd,* 216 F.3d 1082 (9th Cir.2000).

At least three bankruptcy court opinions have concluded, arguably in dictum, that § 106 does abrogate sovereign immunity as to Indian tribes as "domestic governments." *Warfield v. The Navajo Nation (In re Davis Chevrolet, Inc.),* 282 B.R. 674, 683 (Bankr.D.Ariz.2002); *Turning Stone Casino v. Vianese (In re Vianese),* 195 B.R. 572, 576 (Bankr.N.D.N.Y.1995); *In re Sandmar Corp.,* 12 B.R. 910 (Bankr.D.N.M.1981). [20] The Nation does not address *Warfield,* but argues that the conclusion in *Vianese* was dictum because the tribe there had filed a proof of claim and therefore waived its immunity by virtue of § 106(b), so the analysis of waiver pursuant to § 106(a) was unnecessary to the result. While it is true that both *Warfield* and *Vianese* rested on

§ 106(b) rather than on § 106(a) as we must here, it is also the case that waiver pursuant to § 106(b) expressly applies only to governmental units. So the courts' findings of waiver pursuant to that section necessarily hinged on a conclusion that the tribe qualified as a "governmental unit" as defined and used throughout § 106. In fact, *Warfield* made this conclusion explicit, in similarly concluding that tribes are included in § 106 as "other domestic government." 282 B.R. at 683 n. 5.

There are at least two cases to the contrary. An Iowa bankruptcy court concluded that § 106 would apply to Indian tribes only by inference, and therefore run afoul of the Supreme Court's proscription of abrogation by implication:

> The Code makes no specific mention of Indian tribes. Unlike States and foreign governments, Indian tribes are not specifically included in the § 101(27) definition of governmental unit. In order to conclude Congress intended to subject Indian tribes to suit under the Code, the Court would need to infer such intent from language which does not unequivocally and unambiguously apply to Indian tribes. Considering the Supreme Court's pronouncements on tribal sovereign immunity, such an inference is inappropriate.

In re Nat'l Cattle Cong., 247 B.R. 259, 267 (Bankr.N.D.Iowa 2000).

That analysis, however, did not consider the language "or other foreign or domestic government," nor whether Indian tribes would be included in the scope of the statute by deduction from those terms rather than by inference from the prior examples. Because *National Cattle Congress* did not consider the analysis made here, it does not demonstrate any weakness in the present analysis.

A Washington district court employed similar reasoning in concluding that § 106 does not abrogate tribal sovereign immunity:

> The Court finds that the Bankruptcy Code does not meet the Martinez standard. There is no express mention of Indian tribes anywhere in the Bankruptcy Code, and the Court could only infer that an Indian tribe is a domestic government under the definition of governmental unit. For these reasons, the Court concludes that Congress has not unequivocally expressed clear legislative intent to abrogate tribal sovereign immunity pursuant to the Bankruptcy Code.

Confederated Tribe of Colville Reservation Tribal Credit v. White (In re White), 1996 WL 33407856, at *3 (E.D.Wash.1996), *aff'd on other grounds,* 139 F.3d 1268 (9th Cir.1998).

Again, the court failed to note the distinction between implication and deduction, and that the Supreme Court has only proscribed the former as a method of deriving an abrogation of sovereign immunity, not the latter. It similarly failed to demonstrate what is even potentially equivocal about "domestic government," in that it failed to suggest an alternative meaning that would not include Indian tribes. Again, therefore, nothing in this opinion suggests any weakness in the present analysis. On appeal, the Ninth Circuit affirmed on grounds of waiver and "express[ed] no view on whether an Indian Tribe is a `governmental unit' for purposes of § 106(a) or (b)." 139 F.3d at 1270 n. 1.

Finally, the Nation also argues that because other statutes that abrogate tribal sovereign immunity do so by express mention of Indian tribes, Congress would have similarly made an express mention of Indian tribes in § 106 if it had intended to abrogate their immunity. The Nation notes, for example, that the Eighth Circuit found that Congress abrogated tribal sovereign immunity as to suits under the Resource Conservation and Recovery Act of 1976 (RCRA) because it permitted suits against "any person," and defined "person" to include municipalities, and defined "municipalities" to "include `an Indian tribe or authorized tribal organization.'" *Blue Legs v. United States Bureau of Indian Affairs,* 867 F.2d 1094, 1097 (8th Cir.1989); *accord, Washington, Dep't of Ecology v. United States Envtl. Prot. Agency,* 752 F.2d 1465, 1469 (9th Cir.1985). Similarly, the Eighth and Ninth Circuits found an abrogation of tribal sovereign immunity in the Hazardous Materials Transportation Uniform Safety Act of 1990, because it also expressly mentioned "Indian tribe." *Public Service Co. of Colo. v. Shoshone-Bannock Tribes,* 30 F.3d 1203 (9th Cir.1994); *Northern States Power Co. v. The Prairie Island Mdewakanton Sioux Indian Cmty.,* 991 F.2d 458 (8th Cir.1993). And the Tenth Circuit found an abrogation of tribal sovereign immunity in the Safe Drinking Water Act, because it authorized actions against "persons," which were defined to include "municipalities," which were defined to include "an Indian tribe." *Osage Tribal Council v. United States Dep't of Labor,* 187 F.3d 1174 (10th Cir.1999).

But that is a rather weak inductive argument, that because Congress abrogated tribal sovereign immunity three times by mentioning Indian tribes, that must be the only way that Congress drafts such legislation. And however powerful the induction might become through a multitude of examples, it fails to demonstrate any fallacy in the deduction made above, or any equivocation in the term "domestic government" as it is found in § 106.

The Eleventh Circuit recently adopted an argument similar to the Nation's in concluding that the Americans With Disabilities Act did not abrogate sovereign immunity as to tribes:

> These two statutes — the (now repealed) HMTUSA and the RCRA — are not before us. . . . We note, however, that the wording of these laws at least implies that Congress comprehends the need to address Indian tribes specifically and individually when it describes the means of enforcing statutorily created rights through judicial action. When we compare Title III of the ADA to the HMTUSA and the RCRA, the absence of any reference to Indian tribes in the former statute stands out as a stark omission of any attempt by Congress to declare tribes subject to private suit for violating the ADA's public accommodation requirements.

The Fla. Paraplegic Ass'n, Inc., v. Miccosukee Tribe of Indians of Fla., 166 F.3d 1126, 1132 (11th Cir.1999)(emphasis in original).

The conclusion of *Florida Paraplegic* is not applicable here, however, because the ADA does not contain a provision similar to §§ 101(27) and 106 that abrogates sovereign immunity as to all "domestic governments." To the contrary, the ADA expressly only abrogates state sovereign immunity under the Eleventh Amendment, not the common law sovereign immunity of other governmental entities. The Eleventh Circuit also relied on this glaring omission to conclude that the ADA did not abrogate tribal sovereign immunity:

> One other provision of the ADA provides further support for our conclusion that Congress did not intend to abrogate sovereign immunity with respect to Indian tribes. Section 12202 states:
>
> A State shall not be immune under the eleventh amendment . . . from an action in Federal or State court of competent jurisdiction for a violation of [any portion of the ADA]. . . .
>
> 42 U.S.C. § 12202. This provision demonstrates Congress's full understanding of the need to express unambiguously its intent to abrogate sovereign immunity where it wishes its legislation to have that effect. . . .
>
> That it chose not to similarly include an abolition of the immunity of Indian tribes is a telling indication that Congress did not intend to subject

tribes to suit under the ADA.

Id. at 1133.

The Eleventh Circuit's latter conclusion appears to be sound. Not only does the ADA fail to contain any words that, by deduction, could be construed to abrogate tribal sovereign immunity, but the doctrine of *expressio unis* would even preclude an inference of that intent, given the express abrogation as to States and the Eleventh Amendment only. Consequently there is no need to resort to its initial conclusion that Congress must "address Indian tribes specifically and individually" in order to abrogate their immunity, which in any event seems to be a significant expansion on the Supreme Court's requirements.

Conclusion

The term "other foreign or domestic government" in § 101(27) unequivocally, and without implication, includes Indian tribes as "governmental units." Section 106(a) unequivocally, and without implication, abrogates sovereign immunity as to governmental units, including Indian tribes, with respect to application of the enumerated sections of the Bankruptcy Code, including § 524's injunctive effect of the discharge. Consequently the Nation's motion to dismiss on grounds of sovereign immunity must be denied.

This does not, however, mean that Debtor will prevail. As has already been noted, some courts have held that tribal members' rights to receive per capita gaming revenues are property of the estate, rather than earnings from individual services that are excluded from the estate by virtue of § 541(a)(6). [21] If the postpetition monthly payments are the

proceeds of such property interest, in which the Debtor had granted a security interest prepetition, then the Nation's security interest would not be cut off by virtue of § 552(b)(1). *Johnson v. Cottonport Bank,* 259 B.R. 125, 130 (W.D.La.2000). And if the Nation's lien therefore survived the petition, it also survived the discharge, because a chapter 7 discharge does not invalidate a lien. "[I]n cases where the creditor holds a secured interest in property subject to a scheduled debt, a discharge extinguishes only the personal liability of the debtor," so the lien rides through unaffected. *Garske v. Arcadia Fin., Ltd. (In re Garske),* 287 B.R. 537, 542 (9th Cir. BAP 2002), quoting *Johnson v. Home State Bank,* 501 U.S. 78, 80, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991) ("Notwithstanding the discharge, the secured creditor's right to proceed against [the debtor] in rem survived the Chapter 7 liquidation."). Moreover, since the Nation is owed on the loan and owes Debtor the per capita payments, both on account of prepetition transactions, it may have additional protections under § 553 that also survive the discharge.

Unfortunately although the Nation made these arguments and cited some of these authorities for them, it did so only in its reply, so Debtor did not have an opportunity to respond to them, and they were not the basis of a Rule 12(b)(6) motion to dismiss. Consequently these issues must await another day and another motion.

FootNotes

1. The Nation notes now, but apparently did not object at the time, that the Debtor did not list his per capita income from the Nation either as an asset or as income, in his Schedules B and I and Statement of Financial Affairs, even though some bankruptcy courts have held such income to be property of the estate. *In re Kedrowski,* 284 B.R. 439, 451-52 (Bankr.W.D.Wis.2002)(debtor's per capita distributions from gaming revenues constitute property of the estate); *Johnson v. Cottonport Bank,* 259 B.R. 125 (W.D.La.2000)(same).

2. The Nation also deducts federal taxes of approximately $480 per month, and payments for a house loan of approximately $400 per month, with the result that the Debtor nets zero pay each month. Russell claims his per capita distributions are his primary source of income, but does not explain how he survives on this income that has netted him nothing for at least the past several months. He also does not explain why he seeks to preclude the Nation from collecting on the business loan by deducting payments from his per capita distribution, but does not similarly object to the deductions for his home loan. Presumably the answer is that the home loan is also secured by the home, which he would lose if the payments were not made via these deductions, but the business loan is not similarly secured, or is no longer secured, by any other collateral.

3. The Complaint asserts that despite the Debtor's discharge, the Nation withholds the Debtor's per capita payments in violation of the automatic stay of 11 U.S.C. § 362(a). But the trustee reported the estate was fully administered and the case was closed in January, 2003, so the automatic stay as to an act against property of the estate then terminated pursuant to § 362(c). The complaint prays that the Court order the Nation "to cancel the assignment and to cease taking money from the Debtor's Per Capita payments and to refund all money wrongfully taken by the [Nation] since June, 2002." The court will therefore treat it as a complaint asserting a violation of the discharge injunction under § 524.

4. Except as otherwise noted, all statutory references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330.

5. The Debtor also may be arguing that the Nation waived its immunity by appearing at the § 341 first meeting of creditors. However a transcript of that appearance makes clear that the Nation merely appeared to state that it intended to continue collecting the Debtor's debt to the Nation by setoffs against his per capita distributions. Because the Nation did not seek or obtain any affirmative relief or other benefit from that appearance, and its appearance in this adversary proceeding has been limited to a special appearance to contest jurisdiction, there is no basis to suggest the Nation has waived its immunity. *Cf. Arizona v. Bliemeister (In re Bliemeister),* 296 F.3d 858 (9th Cir.2002).

6. *United States v. U.S. Fid. & Guar. Co.,* 309 U.S. 506, 512, 60 S.Ct. 653, 84 L.Ed. 894 (1940)("These Indian tribes are exempt from suit without Congressional authorization.").

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

8. *Kiowa Tribe of Okla. v. Mfr. Techs., Inc.,* 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998).

9. Not all of these examples deal with tribal sovereign immunity, but the rule that abrogation of sovereign immunity must be unequivocal and not by implication applies generally to sovereign immunity. For example, when *Martinez* stated this rule as applicable to tribal immunity, it quoted it from a

case dealing with the United States' immunity from suit. *Martinez,* 436 U.S. at 58-59, 98 S.Ct. 1670, quoting *United States v. Testan,* 424 U.S. 392, 399, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976).

10. In addressing the suit against an officer of the Pueblo, the Court recognized that a doctrine analogous to *Ex Parte Young* applies to tribal sovereign immunity. It stated that a tribal officer "is not protected by the tribe's immunity from suit. See *Puyallup Tribe, Inc. v. Washington Dept. of Game,* [433 U.S. 165, 171-72, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977)]; cf. *Ex parte Young,* 209 U.S. 123[, 28 S.Ct. 441, 52 L.Ed. 714] (1908)." 436 U.S. at 59, 98 S.Ct. 1670. Consequently even if the Nation were immune here, the Debtor presumably could obtain equivalent injunctive relief (but not recovery of past withholdings) by an adversary proceeding against the Tribal officer who is responsible for distributing the per capita payments. *See, e.g., Duke Energy Trading and Mktg., L.L.C. v. Davis,* 267 F.3d 1042, 1051-55 (9th Cir.2001); *Goldberg v. Ellett (In re Ellett),* 254 F.3d 1135 (9th Cir.2001). *See generally* Ralph Brubaker, *Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory* Ex Parte Young *Relief,* 76 AMER. BANKR.L.J. 461 (Fall 2002). However, the present adversary complaint names only the Nation as a defendant.

11. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 423-25 (2d ed.1995); *accord* BLACK'S LAW DICTIONARY 758-59 (7th ed.1999).

12. GARNER, at 423-24.

13. *Id.* at 424.

14. Attempts have been made to argue that the authors of statutes implied an abrogation of sovereign immunity from other language in the statute, and such arguments have also been rejected by the Supreme Court, but under the rubric of requiring unequivocal expression rather than under the rubric of proscribing abrogation by implication. *See, e.g., Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985)(" [R]espondent relies on the pre- and post-enactment legislative history of the [Rehabilitation] Act and *inferences from general statutory language.* To reach respondent's conclusion, we would have to temper the requirement, well established in our cases, that Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court.") (emphasis added).

15. GARNER, at 424-25. The distinction between this usage and the second is that in the second the *author* made the implication, whereas in this usage the reader made the implication, which in correct usage would be the reader's inference, not implication.

16. *See Dewsnup v. Timm,* 502 U.S. 410, 420, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992) (Scalia, J., dissenting); *Union Bank v. Wolas,* 502 U.S. 151, 163, 112 S.Ct. 527, 116 L.Ed.2d 514 (1991)(Scalia, J., concurring); *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 241-42, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989).

17. ARISTOTLE, RHETORIC, Book I, chapter 2, at 1356a-1356b (W. Rhys Roberts trans., Random House, Inc. 1984).

18. As Bertrand Russell pointed out, we usually know the truth of the major and minor premises of a deduction only by induction. "We shall all agree that Mr. Smith (say) is mortal, and we may, loosely, say that we know this because we know that all men are mortal. But what we really know is not `all men are mortal'; we know rather something like `all men born more than one hundred and fifty years ago are mortal, and so are almost all men born more than one hundred years ago.' This is our reason for thinking that Mr. Smith will die. But this argument is an induction, not a deduction. It has less cogency than a deduction, and yields only a probability, not a certainty; but on the other hand it gives *new* knowledge, which deduction does not." Bertrand Russell, A HISTORY OF WESTERN PHILOSOPHY 199 (Simon and Schuster 1945).

19. *Cf. Choteau v. Burnet, Comm'r of Internal Revenue,* 283 U.S. 691, 51 S.Ct. 598, 75 L.Ed. 1353 (1931)(the language of the Internal Revenue Act of 1918 that made it applicable to "every individual" was broad and explicit enough to include Indians).

20. Because *Sandmar* was decided prior to *Nordic Village, Kiowa Tribe* and the 1994 amendment to § 106, its precedential value may be questionable so it is not further discussed here.

21. *See* note 1, *supra.* None of the facts presented by either party here suggests that the Nation's per capita payment program is different in any material respect from that at issue in *Kedrowski,* so the court will assume the same analysis applies here.

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IN RE WHITAKER

BAP Nos. 12-6004, 12-6005, 12-6006, 12-6007.

474 B.R. 687 (2012)

In re Linda Rose WHITAKER, Debtor. Paul W. Bucher, Trustee, Plaintiff-Appellant v. Dakota Finance Corporation, Defendant-Appellee. In re Cecil Ray Barth, formerly doing business as Ray Barth Construction; Deanna Joan Barth, Debtors. Michael Scott Dietz, Trustee, Plaintiff-Appellant v. Deanna Joan Barth, Defendant The Lower Sioux Indian Community, in the State of Minnesota, Defendant-Appellee. In re Morris Jerome Pendleton, Sr.; Constance Louise Pendleton, also known as Connie Pendleton, Debtors. Paul W. Bucher, Trustee, Plaintiff-Appellant v. The Lower Sioux Indian Community, in the State of Minnesota, Defendant-Appellee Morris Jerome Pendleton, Sr., Defendant. In re Linda Rose Whitaker, Debtor. Paul W. Bucher, Trustee, Plaintiff-Appellant v. Linda Rose Whitaker, Defendant The Lower Sioux Indian Community, in the State of Minnesota, Defendant-Appellee.

United States Bankruptcy Appellate Panel of the Eighth Circuit.

Submitted: June 20, 2012.

Decided: July 19, 2012.

Attorney(s) appearing for the Case

Paul W. Bucher, Michael Scott Dietz, John C. Beatty, Scott James Hoss, Christopher David Nelson, Rochester, MN, for appellant.

Tyler D. Candee, Minneapolis, MN, Mary Magnuson, R. Reid LeBeau, St. Paul, MN, for appellee.

Before FEDERMAN, VENTERS, and SALADINO, Bankruptcy Judges.

FEDERMAN, Bankruptcy Judge.

These four adversary proceedings involve suits by Chapter 7 bankruptcy trustees against defendants The Lower Sioux Indian Community (the "Tribe") and its "subsidiary," Dakota Finance Corporation. In three of the adversaries, the trustees are pursuing the Tribe and the debtors for turnover of ongoing tribal revenue payments owed to the debtors under the Tribe's ordinances and the Indian Gaming Regulatory Act. In one of the adversaries, the trustee is seeking to avoid a lien asserted

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by Dakota Finance Corporation on the ongoing revenue payments owed to Debtor Linda Rose Whitaker as being unperfected. Absent the filing of a bankruptcy case, the creditors of these debtors would be prohibited by the Tribe's sovereign immunity from, for example, garnishing those revenues. The issue here is whether the filing of bankruptcy by Tribe members serves to make the debtors' ongoing revenues from the Tribe available to the respective trustees for the benefit of their creditors. The Bankruptcy Court [1] held that both the Tribe and Dakota Finance Corporation are protected by sovereign immunity and dismissed the adversaries as to those parties. The trustees appeal. For the reasons that follow, we affirm.

Standard of Review

We review findings of fact for clear error, and conclusions of law *de novo.* [2] The trustees do not dispute that the Tribe is a federally recognized Indian tribe organized according to Section 16 of the Indian Reorganization Act. [3] As a federally recognized Indian tribe, it enjoys sovereign immunity. The question here is whether Congress abrogated that immunity in the Bankruptcy Code, which is a legal conclusion we review *de novo.* [4] The question of whether Dakota Finance Corporation is the type of subsidiary which shares the Tribe's immunity is a question of fact which we review for clear error

whether Dakota Finance Corporation is the type of subsidiary which shares the Tribe's immunity is a question of fact which we review for clear error.

The Tribe's Sovereign Immunity

Indian tribes have long been recognized as possessing common law immunity from suit traditionally enjoyed by sovereign powers. [5] Unlike the immunity of states, which derives from the Eleventh Amendment, [6] the immunity of tribes is a matter of common law, [7] which has been recognized as integral to the sovereignty and self-governance of tribes. [8] Indian tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities, and whether they were made on or off a reservation or settlement. [9] "This aspect of tribal

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sovereignty, like all others, is subject to the superior and plenary control of Congress. But without congressional authorization, the Indian Nations are exempt from suit." [10] Abrogation by Congress of sovereign immunity "cannot be implied," but must be "unequivocally expressed" [11] in "explicit legislation." [12]

In *In re National Cattle Congress,* [13] the Honorable Paul J. Kilburg described the law as to abrogation as follows, with which we agree:

> Courts have found abrogation of tribal sovereign immunity in cases where Congress has included Indian tribes in definitions of parties who may be sued under specific statutes. See Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1094, 1097 (8th Cir.1989) (finding congressional intent to abrogate Tribe's sovereign immunity with respect to violations of the Resource Conservation and Recovery Act, [which expressly included an Indian tribe or authorized tribal organization in the definition of municipalities covered by the Act]); Osage Tribal Council v. United States Dep't of Labor, 187 F.3d 1174, 1182 (10th Cir.1999) (same re Safe Drinking Water Act [which also included Indian Tribes in the definition of municipalities covered by the Act]). Where the language of a jurisdictional grant is unambiguous as to its application to Indian tribes, no more is needed to satisfy the Santa Clara requirement than that Congress unequivocally state its intent. Osage Tribal Council, 187 F.3d at 1182.
>
> Where the language of a federal statute does not include Indian tribes in definitions of parties subject to suit or does not specifically assert jurisdiction over Indian tribes, courts find the statute insufficient to express an unequivocal congressional abrogation of tribal sovereign immunity. See Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343, 357-58 (2d Cir.2000) (holding Indian tribe immune from suit under the Copyright Act); Florida Paraplegic [Ass'n. Inc. v. Miccosukee Tribe of Indians of Florida, 166 F.3d 1126, 1131 (11th Cir. 1999)] (stating that because Congress made no specific reference to Tribes anywhere in the ADA, tribal immunity is not abrogated; suit under ADA dismissed). A Congressional abrogation of tribal immunity cannot be implied. Santa Clara Pueblo, 436 U.S. at 58, 98 S.Ct. 1670.14

In bankruptcy cases, Congress's abrogation of sovereign immunity is found in § 106(a) of the Bankruptcy Code. Thus, the issue here is whether § 106(a) evinces Congress's unequivocal intent to abrogate the sovereign immunity of Indian tribes by explicit legislation. Section 106(a) states in relevant part as follows:

> § 106. Waiver of sovereign immunity
>
> (a) Notwithstanding 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 ...
>
> (1) [Several enumerated sections of the Bankruptcy Code, including § 542 relating to turnover of estate assets, and § 544 relating to avoidance of liens.]
>
> (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.15

As seen above, courts have found abrogation where Congress has included "Indian tribes" in the definition of the parties that may be sued under a statute. Here, the statute does not mention "Indian tribes" specifically, but instead abrogates immunity as to "governmental units," which are defined in § 101(27) as follows:

> (27) 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.16

The issue here, simply put, is whether, by enacting § 106(a) of the Bankruptcy Code, Congress unequivocally expressed its intent to abrogate the sovereign immunity of Indian tribes, in explicit legislation, by providing for such abrogation as to "other foreign or domestic governments."

A leading case holding that § 106 did abrogate sovereign immunity as to Indian tribes is *Krystal Energy Company v. Navajo Nation.* [17] There, the Ninth Circuit reasoned as follows:

> Indian tribes are certainly governments, whether considered foreign or domestic (and, logically, there is no other form of government outside the foreign/domestic dichotomy, unless one entertains the possibility of extra-terrestrial states).
>
> The Supreme Court has recognized that Indian tribes are `domestic dependent nations' that exercise inherent sovereign authority over their members and territories. Potawatomi, 498 U.S. at 509, 111 S.Ct. 905 (citing Cherokee Nation v. Georgia, [30 U.S. 1] 5 Pet. 1, 17, 8 L.Ed. 25 (1831)); see also, Blatchford v. Native Village of Noatak, 501 U.S. 775, 782, 111 S.Ct. 2578, 115 L.Ed.2d 686 (comparing Indian tribes to states and foreign sovereigns, and concluding that both states and Indian tribes are domestic sovereigns). So the category Indian tribes is simply a specific member of the group of domestic governments, the immunity of which Congress intended to abrogate.18

The trustees cite to two lower courts outside of the Ninth Circuit that have agreed with this analysis. [19] The logic of

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Krystal, as followed by those cases, is that: (1) the Supreme Court has referred to Indian tribes as "domestic dependent nations"; (2) Congress enacted §§ 106 and 101(27) of the Bankruptcy Code with that reference in mind; (3) Congress abrogated sovereign immunity as to states, foreign states, and other foreign or domestic governments; and, therefore, (4) Congress must have intended to include Indian tribes as "other foreign or domestic governments."

Granted, Indian tribes can and do provide certain governmental functions for their members. But the several steps needed to justify the holding in these cases is far from an unequivocal expression of Congressional intent to abrogate the tribes' immunity, stated in explicit legislation. [20] While resort to

legislative history should not be needed to conclude that a statute explicitly abrogates immunity, the cases relied on by the trustees do not refer to any legislative history indicating that Congress even considered the effect of § 106 on tribes' sovereign immunity. Indeed, despite the fact that *Santa Clara Pueblo* was decided six months before the 1978 Bankruptcy Code was enacted and held that abrogation of tribal sovereign immunity must be "unequivocally expressed," Congress did not mention Indian tribes in the statute. Nor did it do so in 1994 when it amended § 106 to clarify its intent with respect to the sovereign immunity of states following *Hoffman v. Connecticut Department of Income Maintenance* [21] and *United States v. Nordic Village, Inc.,* [22] which held that former § 106(c) did not state with sufficient clarity a congressional intent to abrogate the sovereign immunity of the states and the federal government. [23] Indeed, the House Report for the Bankruptcy Reform Act of 1994 refers specifically to the sovereign immunity of the "States and Federal Government," neither of which could even remotely be interpreted to include Indian tribes.

The trustees' argument based on *Krystal* also fails because the cases on which *Krystal* was based do not, in fact, support its holding. In *Cherokee Nation v. Georgia,* [24] the case in which the Supreme Court first described an Indian tribe as a "domestic dependent nation," the issue was whether the Court had jurisdiction to hear a suit by the Cherokee Nation to enjoin the State of Georgia from exercising authority over its lands in various ways. Article III of the Constitution gives the courts jurisdiction over suits "between the State or the citizens thereof, and foreign states, citizens, or subjects." In considering

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whether the Cherokee Nation was a foreign state, Chief Justice Marshall pointed out that while the tribe had a treaty with the United States, as a foreign government might, their lands were within the boundaries of the United States, so they were not a foreign state. But unlike, say Georgia, the tribe was not a domestic state either. Instead, Chief Justice Marshall for the Court held that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else." [25] For support, he pointed out that the Commerce Clause empowers Congress to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes." "In this clause, they are as clearly contradistinguished by a name appropriate to themselves from foreign nations as from the several States composing the union." [26] After stating that the relationship of Indian tribes to the United States is somewhat akin to that of a guardian and ward, he determined that rather than being domestic states or foreign nations, they should be treated as "domestic dependent nations." [27] Therefore, the Court in that case did not have jurisdiction over their suit. Chief Justice Marshall's conclusion, rather than supporting the trustees' position here, demonstrates that Indian tribes are neither foreign nor domestic governments within the meaning of the Bankruptcy Code definition of "governmental unit."

The later cases cited by the Ninth Circuit in *Krystal Energy* add nothing to the discussion. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* [28] the issue was whether a tribe waived its sovereign immunity by filing suit to enjoin a state from collecting taxes on cigarettes sold on Indian lands. The Supreme Court held that the tribe did not waive its immunity, so the state could not collect the tax from members of the tribe for such sales, but could as to sales to nonmembers. Among other things, the state had argued that the Court should construe more narrowly, or abandon altogether, the doctrine of tribal sovereign immunity because "tribal business activities such as cigarette sales are now so detached from traditional tribal interests that the tribal-sovereignty doctrine no longer makes sense in this context." [29] Further, the state argued, "the sovereignty doctrine ... should be limited to the tribal courts and the internal affairs of tribal government, because no purpose is served by insulating tribal business ventures from the authority of the states to administer their laws." [30]

In rejecting that argument, the Supreme Court pointed out that Congress in various statutes has acted to promote the "goal of Indian self-government, including its `overriding goal' of encouraging tribal self-sufficiency and economic development." [31]

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"Under these circumstances," the Court held, "we are not disposed to modify the long-established principle of tribal sovereign immunity." [32]

Finally, the Ninth Circuit in *Krystal* relied on the Supreme Court's decision in *Blatchford v. Native Village of Noatak* [33] for the proposition that, like states, Indian tribes are "domestic," as opposed to "foreign," sovereigns. While the Supreme Court did say in that case that Indian tribes are a form of "domestic sovereign," [34] it is noteworthy that the Supreme Court did not refer to Indian tribes as "domestic governments," which is the phrase used in § 101(27). Indeed, while the Supreme Court has referred to Indian tribes as "sovereigns," "nations," and even "distinct, independent political communities, retaining their original natural rights," [35] the trustees cite no case in which the Supreme Court has referred to an Indian tribe as a "government" of any sort — domestic, foreign, or otherwise. The apparent care taken by the Supreme Court *not* to refer to Indian tribes as "governments" reinforces Justice Marshall's pronouncement in *Cherokee Nation* that Indian tribes are exceptionally unique, unlike any other form of sovereign, which is why he coined the phrase "domestic dependent nation." If the Supreme Court considered an Indian tribe to be a "government," it would not go to such great lengths to avoid saying so.

In sum, the cases relied on by *Krystal* and the trustees here do not support the proposition that Congress can express its intent to abrogate sovereign immunity as to Indian tribes without specifically saying so. Instead, courts have been directed to adhere to the general principle that statutes are to be interpreted to the benefit of Indian tribes. [36] Further, since the Supreme Court does not refer to Indian tribes as "governments," a statute which abrogates sovereign immunity as to domestic governments should not be interpreted to refer to such tribes. We hold that in enacting § 106, Congress did not unequivocally express its intent by enacting legislation explicitly abrogating the sovereign immunity of tribes. [37] As the Court in *In re National Cattle Congress* held, holding otherwise requires an inference which is inappropriate in this analysis. [38] The Tribes are, therefore, protected from suit here by their sovereign immunity.

Dakota Finance Corporation's Sovereign Immunity

The next question is whether Dakota Finance Corporation ("DFC") is likewise

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protected from these suits by the Tribe's immunity.

Tribal sovereign immunity extends to arms and agencies of Indian tribes. [39] The trustees argue that, since the action against DFC is purely economic, it has no impact on the Tribe's right or ability to self-govern and, therefore, the DFC is not immune from suit. The trustees rely on Minnesota state court cases holding that if an Indian tribe mixes its use of governmental and corporate authority, it may waive or be prevented from claiming immunity. [40] But in *Prairie Island Indian Community,* for example, the Court held that the Indian tribe waived its sovereign immunity because it was acting under a federal corporate charter which expressly waived such immunity. [41] That is not the situation here. Absent waiver, the Supreme Court has made clear that immunity does apply to commercial activities of the tribe. [42] "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." [43] Indeed, the Eighth Circuit has held that that immunity is thought to be "necessary to promote the federal policies of tribal self-determination, economic development, and cultural autonomy." [44]

Tribal sovereign immunity may extend to subdivisions of a tribe, including those engaged in economic activities, provided that the relationship between the tribe and the entity is sufficiently close to properly permit the entity to share in the tribe's immunity. [45] As the Ninth Circuit has noted, immunity for subordinate economic entities "directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general." [46] While the Eighth Circuit has not established a set of factors to use in determining whether a related organization is sufficiently close to the tribe to assert its sovereign immunity, [47] the most

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commonly accepted test is the "subordinate economic entity" test, which was articulated by the Tenth Circuit Court of Appeals as relying on the following factors:

> 1) The method of creation of the economic entities;
>
> 2) Their purpose;
>
> 3) Their structure, ownership, and management, including the amount of control the tribe has over the entities;
>
> 4) The tribe's intent with respect to sharing of its sovereign immunity;
>
> 5) The financial relationship between the tribe and the entities;
>
> 6) The policies underlying tribal sovereign immunity and its connection to tribal economic development, and whether these policies are served by granting immunity to the economic entities.48

The evidence submitted supports DFC's argument that it meets this test.

On May 5, 2010, the Lower Sioux Indian Community Tribal Council adopted Resolution 10-94 clarifying the names of Dakota Futures Inc. and the Dakota Finance Corporation. This resolution clarified that both names have no legal existence apart from Dakota Services Enterprise.

Dakota Services Enterprise ("DSE") was created by Lower Sioux Indian Community Tribal Council Resolution 07-239. DSE (including its various assumed or business names) was created pursuant to Lower Sioux Community law. It is wholly owned by Lower Sioux as a "subordinate economic organization and an arm and instrumentality of the Community" established and doing business under the Community Constitution and exercising governmental powers.

The Lower Sioux's express purpose in establishing DSE was "to fulfill government purposes of generating Community governmental revenues by promoting economic development and self-sufficiency through business development." Furthermore, the Community Council clearly expressed in the Articles of Incorporation its intent that DSE be covered by the Community's "sovereign immunity from suit to the same extent that the Community would have such sovereign immunity if it has directly engaged in the activities undertaken by DSE."

Based on the foregoing, we cannot say that the Bankruptcy Court clearly erred in concluding that Dakota Finance Corporation is an arm or agency of the Tribe and that it is entitled to the same immunity from suit to which the Tribe is entitled.

Accordingly, we hold that the Bankruptcy Court did not err in concluding that both the Tribe and Dakota Finance Corporation are protected by sovereign immunity and are, therefore, immune from these suits against them. The orders of the Bankruptcy Court dismissing the adversary proceedings against them are, therefore, AFFIRMED.

FootNotes

1. The Honorable Dennis D. O'Brien, United States Bankruptcy Judge for the District of Minnesota.

2. *Addison v. Seaver (In re Addison),* 540 F.3d 805, 809 (8th Cir.2008).

3. *See Brief of Appellants Paul W. Bucher, Trustee, and Michael S. Dietz, Trustee* at 4. *Indian Reorganization Act,* 48 Stat. 984, 25 U.S.C. § 461 *et seq.*

4. *See Rupp v. Omaha Indian Tribe,* 45 F.3d 1241, 1244 (8th Cir.1995) (holding that, if the tribe possesses sovereign immunity, then the district court has no jurisdiction, and determinations of jurisdiction are subject to *de novo* review).

5. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978); *United States v. United States Fidelity & Guar. Co.,* 309 U.S. 506, 512-513, 60 S.Ct. 653, 656, 84 L.Ed. 894 (1940); *Hagen v. Sisseton-Wahpeton Cmty. Coll.,* 205 F.3d 1040, 1043 (8th Cir.2000).

6. *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996).

7. *Santa Clara Pueblo,* 436 U.S. at 58, 98 S.Ct. at 1677.

8. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.,* 523 U.S. 751, 756-58, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). *See also 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).

9. *See Kiowa Tribe,* 523 U.S. at 754-55, 118 S.Ct. at 1703 (holding that the tribe was immune from the suit, even though the contract at issue implicated the tribe's off-reservation commercial conduct), *Hagen v. Sisseton-Wahpeton Comm. Coll.,* 205 F.3d 1040 (8th Cir. 2000) (holding that sovereign immunity extended to a community college which was chartered, funded, and controlled by the tribe).

10. *Santa Clara Pueblo,* 436 U.S. at 59, 98 S.Ct. 1670 (internal quotation marks omitted). *See also In re Prairie Island Dakota Sioux,* 21 F.3d 302, 304 (8th Cir.1994).

11. *Santa Clara Pueblo,* 436 U.S. at 58, 98 S.Ct. 1670.

12. *See Kiowa Tribe,* 523 U.S. at 759, 118 S.Ct. at 1705. *See also* Patrice H. Kunesh, *Tribal Self-Determination in the Age of Scarcity,* 54 S.D. L. Rev. 398, 398 (2009) ("Tribal sovereignty and the jurisdictional counterpart of tribal sovereign immunity from suit are the bedrock principles of tribal self-determination.").

13. 247 B.R. 259 (Bankr.N.D.Iowa 2000).

14. 247 B.R. at 267.

15. 11 U.S.C. § 106(a) (emphasis added).

16. 11 U.S.C. § 101(27) (emphasis added).

17. 357 F.3d 1055 (9th Cir.2004), *cert. denied, Navajo Nation v. Krystal Energy Co., Inc.,* 543 U.S. 871, 125 S.Ct. 99, 160 L.Ed.2d 118 (2004).

18. 357 F.3d at 1057-58.

19. *See In re Platinum Oil Properties, LLC,* 465 B.R. 621, 642-44 (Bankr.D.N.M.2011); *Turning Stone Casino v. Vianese (In re Vianese),* 195 B.R. 572, 575-76 (Bankr.N.D.N.Y.1995). The trustees also cite *In re Sandmar Corp.,* 12 B.R. 910, 916 (Bankr.D.N.M.1981), but that case does not deal with § 106(c). There, the tribe asserted that it *was* a "governmental entity" to which § 362(b)(4) of the 1978 Code applied to exempt its use of its police and regulatory powers as a governmental entity from the automatic stay. The Court "grant[ed] that the Tribe [was] a governmental entity," but held that the eviction of the debtor was not an exercise of the tribe's police or regulatory powers. They also cite a dissenting opinion in *In re Mayes,* 294 B.R. 145, 157-60 (10th Cir. BAP 2003) (McFeeley, J., dissenting), taking the position that "[t]he fact that Indian tribes have been referred to as `domestic dependent nations' incorporates them into 11 U.S.C. § 106.".

20. *See Ute Distribution Corp. v. Ute Indian Tribe,* 149 F.3d 1260, 1265-66 (10th Cir.1998) (holding that, after *Santa Clara Pueblo,* abrogation of tribal sovereign immunity cannot be found if the court must "glean some congressional intent to [abrogate] immunity based on an examination of the structure or purpose of the statute."). *See also* Greggory W. Dalton, *A Failure of Expression: How the Provisions of the U.S. Bankruptcy Code Fail to Abrogate Tribal Sovereign Immunity,* 81 Wash. L. Rev. 645 n. 29 (2006).

21. 492 U.S. 96, 109 S.Ct. 2818, 106 L.Ed.2d 76 (1989).

22. 503 U.S. 30, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992).

23. *See* H.R. Rep. 103-835, Section-By-Section Analysis § 113; 2 Collier on Bankruptcy ¶ 106.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

24. 30 U.S. 1, 5 Pet. 1, 8 L.Ed. 25 (1831).

25. *Id.* at 16.

26. *Id.* at 18.

27. *Id.* at 17. *See also Native Am. Church of N. Am. v. Navajo Tribal Council,* 272 F.2d 131, 134 (10th Cir.1959) ("Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all powers [except] to the extent that they have expressly been required to surrender them by the superior sovereign, the United States.").

28. 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991).

29. *Id.* at 510, 111 S.Ct. at 909.

30. *Id.* at 510, 111 S.Ct. at 909-10.

31. *Id.* at 510, 111 S.Ct. at 910 (*citing California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 216, 107 S.Ct. 1083, 1092, 94 L.Ed.2d 244 (1987)).

32. *Id.*

33. 501 U.S. 775, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991).

34. *Id.* at 782, 111 S.Ct. at 2582-83.

35. *See Worcester v. State of Georgia,* 31 U.S. 515, 6 Pet. 515, 8 L.Ed. 483 (1832).

36. *See, e.g., Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985); *McClanahan v. State Tax Comm'n of Arizona,* 411 U.S. 164, 174, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); *Choate v. Trapp,* 224 U.S. 665, 675, 32 S.Ct. 565, 56 L.Ed. 941 (1912). *See also* Greggory W. Dalton, *A Failure of Expression: How the Provisions of the U.S. Bankruptcy Code Fail to Abrogate Tribal Sovereign Immunity,* 81 Wash. L. Rev. 645, 649 (2006).

37. *Accord In re National Cattle Congress,* 247 B.R. at 267. *See also In re Mayes,* 294 B.R. 145, 148 n. 10 (10th Cir. BAP 2003) (stating, without reaching the issue, that abrogation probably did not apply to Indian tribes because they are not "domestic governments.").

38. 247 B.R. at 267.

39. *Hagen v. Sisseton-Wahpeton Community College,* 205 F.3d 1040, 1043 (8th Cir.2000) (holding that tribal immunity extended to a community college which was chartered, funded, and controlled by the tribe); *Dillon v. Yankton Sioux Tribe Hous. Auth.,* 144 F.3d 581, 583 (8th Cir.1998) (tribal housing authority established by tribal counsel is a tribal agency entitled to sovereign immunity); *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.,* 797 F.2d 668, 670-71 (8th Cir.1986) (tribal housing authority created by tribal ordinance to develop and administer housing projects on the reservation was a tribal agency entitled to sovereign immunity).

40. *Gavle v. Little Six, Inc.,* 555 N.W.2d 284, 294 (Minn.1996); *Dacotah Properties-Richfield, Inc. v. Prairie Island Indian Cmty.,* 520 N.W.2d 167, 170 (Minn.Ct.App.1994).

41. *Dacotah Properties-Richfield,* 520 N.W.2d at 172-173.

42. *See, e.g., Kiowa Tribe,* 523 U.S. at 760, 118 S.Ct. 1700.

43. *Id.* (cataloging prior decisions). *See also Klammer v. Lower Sioux Convenience Store,* 535 N.W.2d 379, 383 (Minn.App.1995) (distinguishing the Lower Sioux from the Prairie Island tribe in *Dacotah Properties*).

44. *Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe,* 780 F.2d 1374, 1378 (8th Cir.1985).

45. *See Hagen v. Sisseton-Wahpeton,* 205 F.3d at 1043.

46. *Allen v. Gold Country Casino,* 464 F.3d 1044, 1047 (9th Cir.2006), as quoted in *Breakthrough Mgmt. Group Inc. v. Chukchansi Gold Casino and Resort,* 629 F.3d 1173, 1183 (10th Cir.2010).

47. *See J.L. Ward Assocs., Inc. v. Great Plains Tribal Chairmen's Health Bd.,* 842 F.Supp.2d 1163, 1173 (D.S.D.2012) (cataloging cases from several federal and state courts).

48. *Breakthrough Mgmt. Group v. Chukchansi Gold Casino,* 629 F.3d at 1188.

IN RE GREEKTOWN HOLDINGS, LLC

Nos. 18-1165 18-1166.

917 F.3d 451 (2019)

IN RE: GREEKTOWN HOLDINGS, LLC, Debtor. Buchwald Capital Advisors, LLC, Solely in its Capacity as Litigation Trustee to the Greektown Litigation Trust, Plaintiff-Appellant, v. Sault Ste. Marie Tribe of Chippewa Indians; Kewadin Casinos Gaming Authority, Defendants-Appellees.

United States Court of Appeals, Sixth Circuit.

Argued: October 17, 2018.

Decided and Filed: February 26, 2019.

Attorney(s) appearing for the Case

ARGUED: Gregory G. Rapawy , KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C., Washington, D.C., for Appellant. Grant S. Cowan , FROST BROWN TODD LLC, Cincinnati, Ohio, for Appellees. ON BRIEF: Gregory G. Rapawy , Michael K. Kellogg , Katherine C. Cooper , KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C., Washington, D.C., Joel D. Applebaum , CLARK HILL PLC, Birmingham, Michigan, for Appellant. Grant S. Cowan , FROST BROWN TODD LLC, Cincinnati, Ohio, for Appellees.

CLAY, J., delivered the opinion of the court in which GRIFFIN, J., joined. ZOUHARY, D.J. (pp. 22-27), delivered a separate dissenting opinion.

OPINION

CLAY, *Circuit Judge.*

Plaintiff Buchwald Capital Advisors, LLC, in its capacity as litigation trustee for the Greektown Litigation Trust, appeals the district court's January 23, 2018 order affirming the bankruptcy court's dismissal of Plaintiff's complaint on the basis of tribal sovereign immunity. Plaintiff's complaint seeks avoidance and recovery of allegedly fraudulent transfers made to Defendants Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority pursuant to the Bankruptcy Code of 1978, 11 U.S.C. §§ 544, 550. For the reasons set forth below, we AFFIRM the district court's dismissal.

BACKGROUND

Factual Background

This case arises out of the bankruptcy of Detroit's Greektown Casino (the "Casino") and several related corporate entities (collectively,

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the "Debtors"). Under the ownership and management of Defendant Sault Ste. Marie Tribe of Chippewa Indians and its political subdivision Defendant Kewadin Casinos Gaming Authority (collectively, the "Tribe"), the Casino opened in November 2000 and filed for bankruptcy in May 2008.

From the outset, the Tribe was under serious financial strain due to two obligations incurred in connection with the Casino. In 2000, the Tribe entered

into an agreement with Monroe Partners, LLC ("Monroe") to pay $265 million in exchange for Monroe's 50% ownership interest in the Casino, giving the Tribe a 100% ownership interest in the Casino. And in 2002, the Tribe entered into an agreement with the City of Detroit to pay an estimated $200 million to build a hotel and other facilities at the Casino in exchange for a continued gaming license from the Michigan Gaming Control Board ("MGCB").

In 2005, the Tribe restructured the Casino's ownership to alleviate this strain. The Tribe created a new entity, Greektown Holdings, LLC ("Holdings"), which became the owner of the Casino, while several pre-existing entities—all owned by the Tribe—became the owners of Holdings. This allowed the Tribe to refinance its existing debt, and allowed the intermediate entities to take on new debt, all to raise capital so that the Tribe could meet its financial obligations. Holdings, for example, took on $375 million of debt in various forms shortly after the restructuring.

The restructuring was subject to, and received, the approval of the MGCB. However, the MGCB conditioned its approval on the Tribe's adherence to strict financial covenants and other conditions. If those covenants and conditions were not satisfied, the MGCB could force the Tribe to sell its ownership interest in the Casino, or place the Casino into conservatorship.

On December 2, 2005, Holdings transferred approximately $177 million to several different entities. At least $145.5 million went to the original owners of Monroe—Dimitrios and Viola Papas, and Ted and Maria Gatzaros. At least $9.5 million went to other entities for the benefit of Dimitrios and Viola Papas, and Ted and Maria Gatzaros. And at least $6 million went to the Tribe.

Over the next three years, the Tribe attempted to raise additional capital to fully meet its financial obligations. However, by April 2008, the strain of these obligations had proved too much to bear, and the Tribe was in danger of losing both its ownership interest in the Casino—through failure to comply with the MGCB's restructuring conditions—and the Casino's gaming license—through failure to comply with the City of Detroit's development requirements. Accordingly, on May 29, 2008, the Debtors, including Holdings, the Casino, and other related corporate entities, filed voluntary petitions for Chapter 11 bankruptcy. [1]

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. Plaintiff Buchwald Capital Advisors, LLC (the "Trustee") was appointed as the Trust's litigation trustee, and in that capacity, the Trustee brought the instant case.

Procedural History

On May 28, 2010, the Trustee filed a complaint in the United States Bankruptcy

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Court for the Eastern District of Michigan. The Trustee's complaint alleges that, on December 2, 2005, Holdings fraudulently transferred $177 million to or for the benefit of the Tribe, and seeks avoidance and recovery of that amount pursuant to the Bankruptcy Code of 1978, 11 U.S.C. §§ 544, 550. The Tribe then filed a motion to dismiss the complaint on the grounds that the Tribe possessed tribal sovereign immunity from the Trustee's claims. The Trustee responded that that the Tribe did not possess tribal sovereignty (1) because Congress abrogated tribal sovereign immunity in the Bankruptcy Code of 1978, 11 U.S.C. §§ 106, 101(27), and (2) because the Tribe waived tribal sovereign immunity by actually or effectively filing the Debtors' bankruptcy petitions. [2] By stipulation of the parties, the bankruptcy court bifurcated the Tribe's motion—it would first decide whether Congress had abrogated the Tribe's immunity and then, if necessary, whether the Tribe had waived its immunity.

Regarding abrogation, 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" in 11 U.S.C. §§ 106, 101(27). (RE 1, Bankruptcy Court Opinion, No. 14-cv-14103, PageID # 43.) The Tribe appealed to the district court, which reversed, holding that Congress had not "clearly, unequivocally, unmistakably, and without ambiguity abrogate[d] tribal sovereign immunity" in 11 U.S.C. §§ 106, 101(27). (RE 5, District Court Opinion, PageID # 203.) The district court accordingly remanded the case to the bankruptcy court to decide whether the Tribe had waived its immunity.

Regarding waiver, and in light of the district court's holding on abrogation, the bankruptcy court granted the Tribe's motion to dismiss, holding (1) that the Tribe's litigation conduct "was insufficient to waive [tribal] sovereign immunity" since tribal law required an express board resolution, (2) that waiver of tribal sovereign immunity could not be "implied" through the litigation conduct of a tribe's alter ego or agent, and (3) that even if both of the above were possible, filing a bankruptcy petition does not waive tribal sovereign immunity "as to an adversary proceeding subsequently filed" against the tribe. (*Id.,* Bankruptcy Court Opinion, at PageID # 449, 464, 456.) The Trustee appealed to the district court which affirmed, similarly holding that no waiver of the Tribe's sovereign immunity could occur "in the absence of a board resolution expressly waiving immunity," and that the Trustee's "novel theory of implied waiver" through the "imputed" conduct of an alter ego or agent was foreclosed by binding precedent. (*Id.,* District Court Opinion, at PageID # 730, 744, 737.)

This appeal, regarding both abrogation and waiver, followed.

DISCUSSION

I. Standard of Review

On appeal from a district court's review of a bankruptcy court's order, we

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review the bankruptcy court's order directly rather than the intermediate decision of the district court. *In re McKenzie,* 716 F.3d 404, 411 (6th Cir. 2013). We review questions of subject matter jurisdiction, including sovereign immunity, *de novo. DRFP, LLC v. Republica Bolivariana de Venezuela,* 622 F.3d 513, 515 (6th Cir. 2010).

II. Analysis

A. Abrogation of Tribal Sovereign Immunity

Indian tribes have long been recognized as "separate sovereigns pre-existing the Constitution." *Michigan v. Bay Mills Indian Cmty.,* 572 U.S. 782, 788, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (2014) (quoting *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978)). As such, they possess the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.* (quoting *Santa Clara Pueblo,* 436 U.S. at 58, 98 S.Ct. 1670). Yet this immunity is not without limit. Because Indian tribes are subject to Congress' plenary authority, Congress can abrogate tribal sovereign immunity "as and to the extent it wishes." *Id.* at 803-04, 134 S.Ct. 2024. To do so, Congress must "unequivocally" express that purpose. *Id.* at 790, 134 S.Ct. 2024 (quoting *Santa Clara Pueblo,* 436 U.S. at 58, 98 S.Ct. 1670). "The baseline position [however], [the Supreme Court] [has] often held, is tribal immunity . . . ." *Id.* Thus, Indian tribes possess this "core aspect[ ] of sovereignty" unless and until Congress "unequivocally" expresses a contrary intent. *Id.* at 788, 790, 134 S.Ct. 2024.

At issue in this case is whether Congress unequivocally expressed such an intent in the Bankruptcy Code of 1978, 11 U.S.C. §§ 106, 101(27). Section 106 provides, in relevant part, that "[n]ot withstanding 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 . . . Sections . . . 544 . . . [and] 550 . . . of [the Bankruptcy Code]." (emphasis added). Section 101(27) then provides that:

> [t]he 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.

(emphasis added). The Trustee asserts that, read together, these sections constitute an unequivocal expression of congressional intent to abrogate tribal sovereign immunity. The Tribe asserts that that they do not.

In resolving this dispute, a useful place to start is Congress' knowledge and practice regarding the abrogation of tribal sovereign immunity in 1978. As *Bay Mills* and *Santa Clara Pueblo* indicate, an unequivocal expression of congressional intent is as much the requirement today as it was then. In fact, the Supreme Court decided *Santa Clara Pueblo* just six months before Congress enacted the Bankruptcy Code. Given this timing—and the fact that the Court in *Santa Clara Pueblo* simply reaffirmed a requirement already in existence, *see United States v. King,* 395 U.S. 1, 4, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969)—the normal assumption that Congress was aware of this requirement when enacting the Bankruptcy Code is well-grounded. *See Merck & Co. v. Reynolds,* 559 U.S. 633, 648, 130 S.Ct. 1784, 176 L.Ed.2d 582 (2010) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent.").

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We also need not hypothesize whether Congress understood the meaning of "unequivocal," as Congress kindly demonstrated as much in the years immediately preceding its enactment of the Bankruptcy Code. *See, e.g.,* Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6972(a)(1)(A), 6903(13), 6903(15) (authorizing suits against an "Indian tribe"); Safe Water Drinking Act of 1974, 42 U.S.C. §§ 300j-9(i)(2)(A), 300f(10), 300f(12) (authorizing suits against an "Indian tribe"). [3] The language used by Congress in these statutes accords with the Supreme Court's clear admonition that "[t]he term `unequivocal,' taken by itself," means "admits no doubt." *Addington v. Texas,* 441 U.S. 418, 432, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) (citing Webster's Third New International Dictionary (1961)). Taken in the context of tribal sovereign immunity—where an "eminently sound and vital canon" dictates that any doubt is to be resolved in favor of Indian tribes, *Bryan v. Itasca Cty., Minn.,* 426 U.S. 373, 392, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976)—that definition must be read literally. In order to abrogate tribal sovereign immunity, Congress must leave *no doubt* about its intent.

Ostensibly evidence enough that Congress *has* left doubt about its intent in 11 U.S.C. §§ 106 101(27), this issue "has been analyzed by a handful of courts, leading to two irreconcilable conclusions." *In re Greektown Holdings, LLC,* 532 B.R. 680, 686-87 (Bankr. E.D. Mich. 2015). On one side, the Ninth Circuit held in *Krystal Energy Co. v. Navajo Nation* that Congress *did* unequivocally express an intent to abrogate tribal sovereign immunity in 11 U.S.C. §§ 106, 101(27). *See* 357 F.3d 1055, 1061 (9th Cir. 2004). [4] On the other, the Seventh Circuit held in *Meyers v. Oneida Tribe of Indians of Wisc.* that Congress *did not* unequivocally express such an intent in a statute with functionally equivalent language, and in doing so noted the applicability of its reasoning to 11 U.S.C. §§ 106, 101(27). *See* 836 F.3d 818, 827 (7th Cir. 2016). [5] Unsurprisingly, the arguments made by the Trustee and

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the Tribe here largely track the reasoning used in these cases. Thus, we turn there next.

In *Krystal Energy,* the court began with the fact that Indian tribes fall within the plain meaning of the terms "domestic" and "government," and have been repeatedly referred to by the Supreme Court as "domestic dependent nations." 357 F.3d at 1057 (citation omitted). The court reasoned that Indian tribes are accordingly "simply a specific member of the group of domestic governments[ ] the immunity of which Congress intended to abrogate" when it used the phrase "other foreign or domestic government" in 11 U.S.C. § 101(27). *Id.* at 1058. Analogizing to state sovereign immunity, the court pointed out that "Congress clearly does not have to list all of the specific states, beginning with Alabama and ending with Wyoming;" rather it can instead just abrogate the immunity of "all states." *Id.* at 1059. Thus, the court concluded that by using the phrase "other foreign or domestic government," Congress effected a "generic abrogation" of sovereign immunity that unequivocally encompassed tribal sovereign immunity, "like that of all individual domestic governments." *Id.*

In support of its holding, the court in *Krystal Energy* also noted that it could find "no other statute in which Congress effected a generic abrogation of sovereign immunity and because of which a court was faced with the question of whether such generic abrogation in turn effected specific abrogation of the immunity of a member of the general class." *Id.* However, the Seventh Circuit in *Meyers* could and did find such a statute—the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), 15 U.S.C. § 1601 *et seq.*

FACTA authorizes suits against "person[s]" who accept credit or debit cards and then print certain information about those cards on receipts given to the cardholders. *See* 15 U.S.C. §§ 1681c(g)(1), 1681n, 16810. FACTA in turn defines "person" as "*any* individual, partnership, trust, estate, cooperative, association, *government,* or governmental subdivision or agency, or other entity." *Id.* § 1681a(b) (emphasis added). In *Meyers,* Meyers argued that the phrase "any . . . government" unequivocally encompassed Indian tribes. 836 F.3d at 826. And in support of that argument, Meyers pointed to the functionally equivalent language at issue in *Krystal Energy*—"other foreign or domestic government" in 11 U.S.C. § 101(27). [6] *Id.* The Seventh Circuit, however, was unconvinced. *Id.*

In *Meyers*, the court began with the unequivocal expression of congressional intent requirement, and the canon that all doubt is to be resolved in favor

of Indian tribes. *Id.* at 824. The court then listed statutes enacted around the time of the Bankruptcy Code in which Congress had unequivocally expressed such intent by authorizing suits against "Indian tribe[s]." *Id.* Turning to Meyers' argument about the phrase "any . . . government," the court reasoned that "[p]erhaps if Congress were writing on a blank slate, this argument would have more teeth, but Congress has demonstrated that it knows full and well how to abrogate tribal immunity." *Id.* "Congress . . . knows how to unequivocally [express that intent]. It did not do so in FACTA." *Id.* at 827.

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The court then addressed the Ninth Circuit's conflicting opinion in *Krystal Energy.* While not "weigh[ing] in" on the precise issue of 11 U.S.C. §§ 106, 101(27), the Seventh Circuit made clear the flaw it saw in the Ninth Circuit's reasoning:

> Meyers argues that the district court dismissed his claim based on its erroneous conclusion that Indian tribes are not governments. He then dedicates many pages to arguing that Indian tribes are indeed governments. Meyers misses the point. The district court did not dismiss his claim because it concluded that Indian tribes are not governments. It dismissed his claim because it could not find a clear, unequivocal statement in FACTA that Congress meant to abrogate the sovereign immunity of Indian [t]ribes. Meyers has lost sight of the real question in this sovereign immunity case—whether an Indian tribe can claim immunity from suit. The answer to this question must be `yes' unless Congress has told us in no uncertain terms that it is `no[,]' [as] [a]ny ambiguity must be resolved in favor of immunity. Of course Meyers wants us to focus on whether the Oneida Tribe is a government so that we might shoehorn it into FACTA's statement that defines liable parties to include `any government.' But when it comes to [tribal] sovereign immunity, shoehorning is precisely what we cannot do. Congress' words must fit like a glove in their unequivocality.

Id. at 826-27 (emphasis added) (internal citations omitted).

As for the "the real question"—unequivocality—the court found that the district court's analysis "hit the nail on the head:"

> It is one thing to say `any government' means `the United States.' That is an entirely natural reading of `any government.' But it's another thing to say `any government' means `Indian Tribes,' Against the long-held tradition of tribal immunity . . . `any government' is equivocal in this regard.

Id. at 826 (alteration in original) (quoting *Meyers v. Oneida Tribe of Indians of Wisc.,* No. 15-cv-445, 2015 WL 13186223, at *4 (E.D. Wisc. Sept. 4, 2015)). Thus the court concluded that FACTA did not abrogate tribal sovereign immunity. *Id.* at 827. Significantly, a different panel of the Ninth Circuit has since favorably cited *Meyers* for this very heart of its analysis. In a case about the abrogation of federal sovereign immunity in the Fair Credit Reporting Act, the court reasoned that "[t]he same logic in *Meyers* applies with respect to the United States. The `real question' in this sovereign immunity appeal is not whether the United States is a government; it is whether Congress explicitly [abrogated] sovereign immunity." *Daniel v. Nat'l Park Serv.,* 891 F.3d 762, 774 (9th Cir. 2018).

We find the Seventh Circuit's reasoning in *Meyers*—as applied to 11 U.S.C. §§ 106, 101(27)—persuasive. And though *Meyers* was decided after the district court's opinion in this case, the district court clearly would have found the reasoning persuasive as well. The district court correctly acknowledged that "[t]here cannot be reasonable debate that Indian tribes are both `domestic' . . . and also that Indian tribes are fairly characterized as possessing attributes of a `government.'" *In re Greektown Holdings,* 532 B.R. at 692. But that is not the real question. The real question is whether Congress—when it employed the phrase "other foreign or domestic government"—unequivocally expressed an intent to abrogate tribal sovereign immunity. "For the Litigation Trustee, it is enough to have established that Indian tribes are both `domestic' and `governments'" to answer that question in the affirmative. *Id.* at 693. The district court

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however, could not say "that Congress combined those terms in a single phrase in § 101(27) to clearly, unequivocally, and unmistakably express its intent to include Indian tribes . . . ." [7] *Id.* at 697. We agree. Establishing that Indian tribes are domestic governments does *not* lead to the conclusion that Congress unequivocally meant to include them when it employed the phrase "other foreign or domestic government." [8] *Id.* at 693.

This reasoning is both intuitive and in accordance with a broader survey of the case law. Notably, "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." *Meyers,* 836 F.3d at 824 (quoting *In re Greektown Holdings,* 532 B.R. at 680). And there is only one example at the circuit court level. *Id.* (referring to the Ninth Circuit's decision in *Krystal Energy*). In contrast, there are numerous examples of circuits courts finding that tribal sovereign immunity was abrogated where the statute specifically referred to an "Indian tribe," and refusing to do so where it did not. *Compare, e.g., Blue Legs v. U.S. Bureau of Indian Affairs,* 867 F.2d 1094, 1097 (8th Cir. 1989) (finding that tribal sovereign immunity was abrogated in the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6972(a)(1)(A), 6903(13), 6903(15)); *Osage Tribal Council v. U.S. Dep't of Labor,* 187 F.3d 1174, 1182 (10th Cir. 1999) (finding that tribal sovereign immunity was abrogated in Safe Water Drinking Act of 1974, 42 U.S.C. §§ 300j-9(i)(2)(A), 300f(10), 300f(12)), *with Bassett v. Mashantucket Pequot Tribe,* 204 F.3d 343, 357 (2d Cir. 2000) (finding that tribal sovereign immunity was not abrogated in the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.*); *Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.,* 166 F.3d 1126, 1131 (11th Cir. 1999) (finding that tribal sovereign immunity was not abrogated in the Americans with Disabilities Act of 1990, 42

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U.S.C. § 12181 *et seq.*). Here, it is undisputed that no provision of the Bankruptcy Code mentions Indian tribes. [9]

While it is true that Congress need not use "magic words" to abrogate tribal sovereign immunity, it still must unequivocally express that purpose. *F.A.A. v. Cooper,* 566 U.S. 284, 290-91, 132 S.Ct. 1441, 182 L.Ed.2d 497 (2012). The Trustee thus correctly states that "what matters is the clarity of intent, not the particular form of words." (Brief for Appellant at 32.) We need not—and do not—hold that specific reference to Indian tribes is in all instances required to abrogate tribal sovereign immunity; [10] rather we hold that 11 U.S.C. §§ 106, 101(27) lack the requisite clarity of intent to abrogate tribal sovereign immunity.

This analysis notwithstanding, the Trustee asserts three additional arguments that it contends dispel any doubt that Congress intended to abrogate the sovereign immunity of Indian tribes in 11 U.S.C. §§ 106, 101(27). None are persuasive.

First, the Trustee asserts that Indian tribes must be "governmental units" because they avail themselves of other Bankruptcy Code provisions pertaining to "governmental units." (*See* Brief for Appellant at 27.) (describing how Indian tribes would have to be "governmental units" in order to be creditors or to file requests for payment of administrative expenses, which they regularly do). Yet, as the Tribe correctly responds, the Bankruptcy Code defines the entities covered by those provisions using the word "includes"—a term of enlargement. In contrast, 11 U.S.C. § 101(27) defines "governmental unit" using the word "means"—a term of limitation. *See United States v. Whiting,* 165 F.3d 631, 633 (8th Cir. 1999) ("When a statute

uses the word "includes" rather than "means" in defining a term, it does not imply that items not listed fall outside the definition."). Thus it is not inconsistent for Indian tribes to be covered by those provisions noted by the Trustee but not covered by 11 U.S.C. § 101(27).

Second, and relatedly, the Trustee asserts that Indian tribes must be "governmental units" because the Bankruptcy Code provides governmental units with "special rights." (*See* Brief for Appellant at 30.) (describing how Congress would have shown less regard for the dignity of Indian tribes as sovereigns, compared to state, federal, and foreign governments, if they were not entitled to these special rights). Yet it could just as easily be said that Congress has shown *greater* respect for Indian tribes than for other sovereigns by *not* abrogating their immunity in the first place—and thus not necessitating the provision of any special rights. The immunities of various sovereigns also need not be, and in fact are not, co-extensive. *Bay Mills,* 572 U.S. at 800-01, 134 S.Ct. 2024. Moreover, these first two arguments raised by the Trustee both overlook the important distinction between being subject to a statute and being able to be sued for violating it. *See Kiowa Tribe v. Mfg. Tech., Inc.,* 523 U.S. 751, 755, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). Only in the

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latter context is there an unequivocality requirement. Thus it would also not be inconsistent for Indian tribes to be considered "governmental units" for some provisions of the Bankruptcy Code but not for 11 U.S.C. § 106.

Lastly, the Trustee asserts that Indian tribes must be "governmental units" because the Tribe cannot supply an example of any other entity besides Indian tribes that the phrase "other foreign or domestic government" might have been intended to cover. Yet even if Indian tribes are the only sovereigns not specifically mentioned in 11 U.S.C. § 101(27), then "why not just mention them by their specific name, as Congress has *always* done in the past?" *In re Greektown Holdings,* 532 B.R. at 697. Congress' failure to do so, after arguably mentioning every other sovereign by its specific name, likely constitutes "circumstances supporting [the] sensible inference" that Congress meant to exclude them, pursuant to the familiar *expressio unius* canon. *Chevron U.S.A. Inc. v. Echazabal,* 536 U.S. 73, 81, 122 S.Ct. 2045, 153 L.Ed.2d 82 (2002). Such an inference is certainly more sensible than the alternative inference that the Trustee's argument asks us to make—that Congress meant for Indian tribes to be the *only* sovereign covered by the phrase "other foreign or domestic government." Regardless, "this Court does not revise legislation. . . just because the text as written creates an apparent anomaly as to some subject it does not address." *Bay Mills,* 572 U.S. at 794, 134 S.Ct. 2024. [11]

"Determining the limits on the sovereign immunity held by Indians is a grave question; the answer will affect all tribes, not just the one before us." *Upper Skagit Indian Tribe v. Lundgren,* ____ U.S. ____, 138 S.Ct. 1649, 1654, 200 L.Ed.2d 931 (2018). It is the graveness of this question that led to the requirement that Congress unequivocally express its intent in order to abrogate tribal sovereign immunity. And that requirement "reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Bay Mills,* 572 U.S. at 790, 134 S.Ct. 2024. Thus, the Supreme Court has repeatedly reaffirmed the requirement, and warned lower courts against abrogating tribal sovereign immunity if there is any doubt about Congress' intent. *See id.* at 800, 134 S.Ct. 2024 ("[I]t is fundamentally Congress' job, not ours, to determine whether or how to limit tribal immunity."); *Kiowa,* 523 U.S. at 759, 118 S.Ct. 1700 ("The capacity of the Legislative Branch to address [this] issue by comprehensive legislation counsels some caution by us in this area."); *Santa Clara Pueblo,* 436 U.S. at 60, 98 S.Ct. 1670 ("[A] proper respect both for tribal sovereignty and for the plenary authority of Congress in this area cautions

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that we tread lightly in the absence of clear indications of legislative intent."). We heed those warnings, and hold that Congress did not unequivocally express an intent to abrogate tribal sovereign immunity in 11 U.S.C. §§ 106, 101(27).

B. Waiver

"Similarly [to the unequivocality requirement for congressional abrogation of tribal sovereign immunity], a tribe's waiver [of its sovereign immunity] must be `clear.'" *C&L Enters., Inc. v. Citizen Band of Potawatomi Indian Tribe of Okla.,* 532 U.S. 411, 418, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001) (quoting *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.,* 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991)). The Trustee's argument that the Tribe clearly waived any tribal sovereign immunity it possessed has three analytical steps: (1) Indian tribes can waive sovereign immunity by litigation conduct, (2) alter egos or agents of Indian tribes can waive tribal sovereign immunity by litigation conduct, and (3) filing a bankruptcy petition waives sovereign immunity as to separate, adversarial fraudulent transfer claims. If each step is a correct statement of the law, then, according to the Trustee, the Tribe may have waived its immunity from the Trustee's fraudulent transfer claim by actually or effectively filing the Debtors' bankruptcy petitions in federal court. We agree with the first step of the Trustee's analysis, but we disagree with the second and third steps. Tribal sovereign immunity can be waived by litigation conduct, but not by the litigation conduct of a tribe's alter ego or agent, and the litigation conduct of filing a bankruptcy petition does not waive tribal sovereign immunity as to a separate, adversarial fraudulent transfer claim. Accordingly, we hold that the Tribe did not waive its tribal sovereign immunity.

The first step of the Trustee's argument is that Indian tribes can waive sovereign immunity by litigation conduct. Both the bankruptcy and district courts disagreed, relying heavily on part of our decision in *Memphis Biofuels, LLC v. Chickasaw Nation Indus.,* 585 F.3d 917 (6th Cir. 2009). However, *Memphis Biofuels* does not foreclose this step.

In *Memphis Biofuels,* a contract between Memphis Biofuels and a corporation owned by the Chickasaw tribe included a provision by which both parties purported to waive all immunities from suit. *Id.* at 921-22. However, under the tribal corporation's charter, any waiver of sovereign immunity required a resolution approved by the tribe's board of directors. *Id.* Such a resolution was never obtained, and the question arose whether the tribal corporation possessed sovereign immunity. *Id.* We ultimately held that despite the contract provision purporting to waive all immunities, the Chickasaw tribe possessed tribal sovereign immunity because the contractual waiver was an "unauthorized act[]" that was "insufficient to waive tribal-sovereign immunity." *Id.* at 922. Because "board approval was not obtained, [the] charter control[led]" the issue. *Id.*

This holding, combined with the fact that the Tribe's governing code has a similar board resolution requirement that was undisputedly not satisfied, was enough for the bankruptcy and district courts to find that the Tribe did not waive its sovereign immunity. However, *Memphis Biofuels* involved no litigation conduct on the part of the Chickasaw tribe, and neither this Court nor the parties cited any of the Supreme Court cases pertaining to waiver of sovereign immunity by litigation conduct. Accordingly, *Memphis Biofuels,* like all cases, "cannot be read as foreclosing an argument that [it] never dealt with." *Waters*

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v. Churchill, 511 U.S. 661, 678, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994).

Thus we have yet to decide whether the doctrine of waiver of sovereign immunity by litigation conduct applies to Indian tribes. While the Supreme Court

has long held that such waiver is possible for non-tribal sovereigns, *see, e.g., Lapides v. Bd. of Regents of Univ. Sys. of Ga.,* 535 U.S. 613, 620, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002); *Gardner v. New Jersey,* 329 U.S. 565, 566, 573, 67 S.Ct. 467, 91 S.Ct. 504 (1947); *Gunter v. Atl. Coast Line RR. Co.,* 200 U.S. 273, 284, 26 S.Ct. 252, 50 S.Ct. 477 (1906), few courts have had the opportunity to extend the Supreme Court's holdings to Indian tribes. Those that have had the opportunity however, have largely chosen to do so, holding that certain types of litigation conduct by tribes constitute a sufficiently clear waiver of tribal sovereign immunity.

For example, two circuits have held that intervening in a lawsuit constitutes waiver. *See Hodel,* 788 F.2d at 773 ("By so intervening, a party `renders itself vulnerable to complete adjudication by the federal court of the issues in litigation between the intervenor and the adverse party.'") (citation omitted); *United States v. Oregon,* 657 F.2d 1009, 1014 (9th Cir. 1981) ("By successfully intervening, a party makes himself vulnerable to complete adjudication by the federal court of the issues in litigation between the intervenor and the adverse party."). Similarly, two circuits have considered the possibility that removal of an action from state to federal court might constitute waiver. *See Bodi v. Shingle Springs Band of Miwok Indians,* 832 F.3d 1011, 1023-24 (9th Cir. 2016); *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.,* 692 F.3d 1200, 1207-08 (11th Cir. 2012). While ultimately holding that removal did not constitute sufficiently clear waiver, these cases serve as additional examples of circuits willing to accept that some litigation conduct *may* constitute sufficiently clear waiver.

More relevant to the facts of this case, three circuits have held that filing a lawsuit constitutes waiver. *See Bodi,* 832 F.3d at 1017 ("By filing a lawsuit, a tribe may of course `consent to the court's jurisdiction to determine the claims brought' and thereby agree to be bound by the court's decision on those claims.") (citation omitted); *Rupp v. Omaha Indian Tribe,* 45 F.3d 1241, 1245 (8th Cir. 1995) ("[B]y initiating this lawsuit, the Tribe `necessarily consents to the court's jurisdiction to determine the claims brought adversely to it.'") (citation omitted); *Jicarilla Apache Tribe v. Andrus,* 687 F.2d 1324, 1344 (10th Cir. 1982) ("It is recognized, however, that `when the sovereign sues it waives [some of its sovereign immunity].' . . . This doctrine equally applies to Indian tribes.") (citation omitted).

Like intervention, and unlike removal, filing a lawsuit manifests a clear intent to waive tribal sovereign immunity with respect to the claims brought, and to assume the risk that the court will make an adverse determination on those claims. To hold otherwise would have significant implications. *See Rupp,* 45 F.3d at 1245 ("We will not transmogrify the doctrine of tribal sovereign immunity into one which dictates that the tribe never loses a lawsuit."); *Oregon,* 657 F.2d at 1014 ("Otherwise, tribal immunity might be transformed into a rule that tribes may never lose a lawsuit."). Thus, we hold that Indian tribes can waive their tribal sovereign immunity through sufficiently clear litigation conduct, including by filing a lawsuit.

The second step of the Trustee's argument is that alter egos or agents of Indian tribes can waive tribal sovereign immunity by litigation conduct. Both the bankruptcy and district courts disagreed, relying on a

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different part of our decision in *Memphis Biofuels. Memphis Biofuels* forecloses this step.

In *Memphis Biofuels,* we refused to apply "equitable doctrines" such as equitable estoppel and actual or apparent authority to attribute to the Indian tribe conduct that allegedly constituted waiver. 585 F.3d at 922. The alter ego doctrine is similarly equitable. *Trs. of Detroit Carpenters Fringe Benefit Funds v. Indus. Contracting, LLC,* 581 F.3d 313, 317-18 (6th Cir. 2009). Thus, we hold that the litigation conduct of alter egos or agents of Indian tribes cannot be attributed to the tribes for the purpose of waiving tribal sovereign immunity. Such imputation would require an impermissible implication. *See Santa Clara Pueblo,* 436 U.S. at 58, 98 S.Ct. 1670 ("It is settled that a waiver of [tribal] sovereign immunity cannot be implied. . . .").

In urging this Court to hold the opposite, the Trustee relies on *First Nat'l Bank v. Banco El Comercio Exterior de Cuba,* 462 U.S. 611, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983) and a handful of circuit court cases applying alter-ego and agency doctrines to find that foreign governments and states waived their sovereign immunity. Notably, however, the Trustee cites to no case in which these doctrines were applied to Indian tribes, and we can find none. (*See* Brief for Appellee at 37.) ("The Trustee then takes a tortured path—unsupported by a single case from any court anywhere. . . ."); *Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians,* 584 B.R. 706, 719 (Bankr. E.D. Mich. 2018) ("No court has ever applied the equitable doctrine of alter-ego/veil piercing to find a waiver of an Indian tribe's sovereign immunity. . . .").

The Trustee's cases concerning foreign and state governments are also unpersuasive. While the Supreme Court has held that the law of foreign sovereign immunity is "[i]nstructive" in cases involving tribal sovereign immunity, *C&L Enters.,* 532 U.S. at 421 n.3, 121 S.Ct. 1589, that is not the case where there is a clear conflict between the two. Significantly, the Foreign Sovereign Immunities Act ("FSIA") allows foreign governments to waive their sovereign immunity by implication. 28 U.S.C. § 1605(a)(1) ("A foreign state shall not be immune . . . in any case in which the foreign state has waived its immunity either explicitly or by implication."). In contrast, Indian tribes cannot waive their immunity by implication. *Santa Clara Pueblo,* 436 U.S. at 58, 98 S.Ct. 1670 ("It is settled that a waiver of [tribal] sovereign immunity cannot be implied. . . ."); *Allen v. Gold Country Casino,* 464 F.3d 1044, 1048 (9th Cir. 2006) ("There is simply no room to apply the FSIA by analogy. . . . [The FSIA] permits a waiver of immunity to be implied, while the Supreme Court permits no such implied waiver in the case of Indian tribes.").

Analogizing to state sovereign immunity is equally unhelpful. Though it carries a similar ban on waiver by implication, *Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 682, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999), it is "not congruent with" tribal sovereign immunity. *Three Affiliated Tribes of Fort Berthold v. Wold Eng'g,* 476 U.S. 877, 890, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986); *see also Bodi,* 832 F.3d at 1020 ("Tribal immunity is not synonymous with a State's Eleventh Amendment immunity, and parallels between the two are of limited utility."). A good example of such incongruency is provided by a set of cases dealing precisely with waiver by litigation conduct—specifically, the removal of a case from state to federal court. *States* that remove cases against them waive their sovereign immunity, while *tribes* that remove

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cases against them likely do not. *Compare Lapides,* 535 U.S. at 617, 122 S.Ct. 1640, *with Bodi,* 832 F.3d at 1020; *Contour Spa,* 692 F.3d at 1206, 1208. Accordingly, we do not place great weight on those cases concerning the litigation conduct of alter egos or agents of foreign and state governments.

The third and final step of the Trustee's argument is that filing a bankruptcy petition waives tribal sovereign immunity as to separate, adversarial fraudulent transfer claims. As the analysis of the first step hinted, whether a waiver of sovereign immunity has occurred is an inquiry separate and distinct from a waiver's scope. For instance, filing a lawsuit constitutes waiver by litigation conduct, but that waiver is a limited one. It waives sovereign immunity as to the court's decision on the claims brought by the tribe, *see Bodi,* 832 F.3d at 1017, but not as to counterclaims brought against the tribe, even where compulsory. *Okla. Tax,* 498 U.S. at 509, 111 S.Ct. 905. [12]

The Trustee relies on *Cent. Va. Cmty. Coll. v. Katz,* 546 U.S. 356, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006), in contending that filing a bankruptcy petition waives tribal sovereign immunity to separate, adversarial fraudulent transfer claims. However, while the Supreme Court did hold as much in *Katz,* its

holding pertained only to state sovereign immunity, and does not merit extension. In addition to the limited utility of any parallels between the two doctrines as noted above, the Supreme Court in *Katz* based its holding primarily on the unique relationship between states, the Constitution, and federal bankruptcy law. *See id.* at 362-63, 378, 126 S.Ct. 990 ("The history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification of the Constitution demonstrate that it was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena. . . . The ineluctable conclusion, then, is that States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to [federal bankruptcy law]. . . . In ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted. . . .").

Because of this reasoning, courts have been reluctant to extend the holding in *Katz* from states to other sovereigns, and we choose not to do so here. *See, e.g., In re Supreme Beef Processors, Inc.,* 468 F.3d 248, 253 n.6 (5th Cir. 2006) ("Regardless what effect *Katz* has with respect to some aspects of state or local governmental units' encounters with bankruptcy, *Katz* has no effect on this case involving federal sovereign immunity."). Extension to Indian tribes in particular would certainly not accord with the reasoning in *Katz,* given the tribes' obvious absence from the Constitutional Convention. *See Blatchford v. Native Village of Noatak,* 501 U.S. 775, 782, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991) ("[I]t would be absurd to suggest that the tribes

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surrendered immunity in a convention to which they were not even parties."). Thus, we hold that the filing of a bankruptcy petition does not waive tribal sovereign immunity as to separate, adversarial fraudulent transfer claims, and ultimately that the Debtors' doing so did not waive the Tribe's tribal sovereign immunity as to the Trustee's fraudulent transfer claim.

CONCLUSION

It is not lost on this Court that the Trustee may regard this result—dismissal of its complaint—as unfair. The Supreme Court has acknowledged that "[t]here are reasons to doubt the wisdom of perpetuating this doctrine" given that tribal sovereign immunity "can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter." *Kiowa,* 523 U.S. at 758, 118 S.Ct. 1700. "[B]ut that is the reality of sovereign immunity." *Memphis Biofuels,* 585 F.3d at 922. As stated above, "[i]mmunity doctrines [of all kinds] inevitably carry within them the seeds of occasional inequities. . . . Nonetheless, the doctrine of tribal [sovereign] immunity reflects a societal decision that tribal autonomy predominates over other interests." *Hodel,* 788 F.2d at 781. Accordingly, we defer to Congress and the Supreme Court to exercise their judgment in this important area.

For the reasons set forth above, we AFFIRM the district court's dismissal.

DISSENT

ZOUHARY, *District Judge*, dissenting.

What we are looking for in the Bankruptcy Code is an "unequivocal expression of . . . legislative intent" to abrogate tribal sovereign immunity. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 59, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). Such an expression need not be stated in "any particular way" nor use any "magic words." *FAA v. Cooper,* 566 U.S. 284, 291, 132 S.Ct. 1441, 182 L.Ed.2d 497 (2012). The "proper focus" of this inquiry is on "the language of the statute." *Dellmuth v. Muth,* 491 U.S. 223, 231, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989). When we look for this unequivocal expression, we employ our "traditional tools of statutory construction." *Richlin Sec. Serv. Co. v. Chertoff,* 553 U.S. 571, 589, 128 S.Ct. 2007, 170 L.Ed.2d 960 (2008).

I

We begin with the text. Section 106(a) of the Code states that "sovereign immunity is abrogated as to a governmental unit." 11 U.S.C. § 106(a). Right off the bat, we have an explicit, unmistakable statement from Congress that it intends to abrogate sovereign immunity. The sole remaining question is whose sovereign immunity.

For the answer to that question, we turn to Section 101(27), which provides:

> 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.

11 U.S.C. § 101(27) (emphasis added). In this definition, Congress chose to speak broadly. It chose to abrogate the sovereign immunity of all those governmental entities listed explicitly in Section 101(27), and, on top of those, any "other foreign or domestic government." In other words, Congress abrogated the sovereign immunity of any government, of any type, anywhere in the world. *See Krystal Energy*

[917 F.3d 468]

Co. v. Navajo Nation, 357 F.3d 1055, 1057 (9th Cir. 2004), *as amended on denial of reh'g* (Apr. 6, 2004) ("[L]ogically, there is no other form of government outside the foreign/domestic dichotomy. . . .").

Because the statute contains clear language that "sovereign immunity is abrogated" and that language applies to domestic governments, the sole remaining question is one the majority ignores: Is an Indian tribe a domestic government? A tribe is certainly domestic, residing and exercising its sovereign authority within the territorial borders of the United States. And a tribe is a form of government, exercising political authority on behalf of and over its members.

Supreme Court precedent supports this natural reading. The Court refers to Indian tribes as "`domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.,* 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (quoting *Cherokee Nation v. Georgia,* 5 Pet. 1, 17, 8 S.Ct. 25 (1831)); *see also Blatchford v. Native Village of Noatak,* 501 U.S. 775, 782, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991) (comparing Indian tribes to states and foreign sovereigns and concluding that both states and Indian tribes are "domestic" sovereigns). The Court says that tribal sovereign immunity itself derives from "Indian sovereignty and self-governance." *Three*

Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 890, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986). Indeed, the Court explains the basis of tribal sovereign immunity by comparing Indian tribes to "other governments." *Turner v. United States,* 248 U.S. 354, 357, 39 S.Ct. 109, 63 S.Ct. 291 (1919) ("Like other governments, municipal as well as state, the Creek Nation was free from liability. . . ."). This comparison to "other governments" makes sense only if tribes are themselves governments.

Congress, too, says Indian tribes are domestic governments, as numerous provisions of the United States Code demonstrate. *See, e.g.,* 6 U.S.C. § 572(a) (directing cooperation with "State, local, and tribal governments"); 15 U.S.C. § 7451(a)(2) (authorizing various cybersecurity activities that include "State, local, and tribal governments"); 19 U.S.C. § 4332(d)(4)(A)(i) (requiring sharing of best practices concerning a safety plan with "State, local, and tribal governments"); 23 U.S.C. § 202(a)(1)(B)-(C) (providing for funding of certain programs and projects "administered by" or "associated with a tribal government"); 51 U.S.C. § 60302(2) (authorizing research and development "to enhance Federal, State, local, and tribal governments' use of" certain technologies); *see also* 25 U.S.C. § 4116(b)(2)(B)(ii)(I) (referring to a "government-to-government relationship between the Indian tribes and the United States").

The clear textual evidence of congressional intent to abrogate tribal sovereign immunity in Sections 106(a) and 101(27) is stated as a simple syllogism: Sovereign immunity is abrogated as to all governments. Indian tribes are governments. Hence sovereign immunity is abrogated as to Indian tribes. *See In re Russell,* 293 B.R. 34, 40 (Bankr. D. Ariz. 2003) (explaining that logical deduction from express statutory language satisfies a standard of unequivocality). Taken together, the text of Sections 106(a) and 101(27) form a clear expression of legislative intent to abrogate the sovereign immunity of Indian tribes.

II

But if this expression is so clear, the majority asks, then how could two circuit

[917 F.3d 469]

courts come to seemingly opposite conclusions about it? *Compare Meyers v. Oneida Tribe of Indians of Wis.,* 836 F.3d 818, 826 (7th Cir. 2016), *with Krystal Energy,* 357 F.3d at 1061. This alleged circuit split is less of a conflict than the majority opinion suggests. The only appellate court to rule previously on this question—whether the Bankruptcy Code abrogates tribal sovereign immunity—is the Ninth Circuit in *Krystal Energy.* That court held the Code abrogates immunity. *Krystal Energy,* 357 F.3d at 1061.

The Seventh Circuit in *Meyers* was looking at different language in a different statute. In *Meyers,* the statute at issue was the Fair and Accurate Credit Transaction Act (FACTA). Meyers wanted to sue the Oneida Tribe because he made credit card purchases at tribe-run businesses, and those businesses produced receipts revealing his credit card number, in violation of FACTA. At issue was whether FACTA abrogated tribal sovereign immunity. The statute provides, "[N]o *person* that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." 15 U.S.C. § 1681c(g)(1) (emphasis added). It states that any "person" who violates the statute shall be subject to civil liability. 15 U.S.C. §§ 1681n, 1681o. FACTA defines a "person" as "any individual, partnership, corporation, trust, estate, cooperative, association, *government* or governmental subdivision or agency, or other entity." 15 U.S.C. § 1681a(b) (emphasis added).

The Seventh Circuit held that this statutory language did not abrogate tribal sovereign immunity. It reasoned that the term "government," as it appears in FACTA, left ambiguity about whether that word alone was intended to abrogate tribal sovereign immunity. *Meyers,* 836 F.3d at 820. But nowhere in *Meyers* did the Seventh Circuit say that Indian tribes are not governments. Further, the Seventh Circuit explicitly steered clear of ruling on how the term "government," as it appears in the Bankruptcy Code, might apply to Indian tribes. *Id.* at 826 ("We need not weigh in on . . . how to interpret the breadth [of] the term `other domestic governments' under the Bankruptcy Code. . . .").

The Seventh Circuit finding of ambiguity in FACTA does not affect our analysis of the Bankruptcy Code. Consider how different the FACTA text is from that of the Bankruptcy Code. The Bankruptcy Code states, in no mistakable terms, "sovereign immunity is abrogated as to a governmental unit." 11 U.S.C. § 106(a). FACTA, on the other hand, merely declares a rule that applies to "person[s]" and says that "person[s]" shall be liable for rule violations. *See* 15 U.S.C. §§ 1681c(g)(1), 1681n, 1681o. Where FACTA makes no mention of sovereign immunity, the Code targets it directly.

Next, consider the differences in the definition sections. The Bankruptcy Code defines "governmental units" using several specific terms and a broad, catch-all term at the end. 11 U.S.C. § 101(27). And all these terms have one common thread: they are entities that would otherwise be entitled to sovereign immunity. Contrast that with the FACTA definition of "person," which mostly lists entities that would not otherwise be entitled to sovereign immunity. *See* 15 U.S.C. § 1681a(b). These definitions are not "functionally equivalent." Majority Op. at 457-59. One gives far more evidence of intent to abrogate the sovereign immunity of any government of any type.

No wonder the Seventh Circuit could not say "with `perfect confidence'" that Congress intended FACTA to abrogate

[917 F.3d 470]

tribal sovereign immunity. *Meyers,* 836 F.3d at 827 (quoting *Dellmuth,* 491 U.S. at 231, 109 S.Ct. 2397). In contrast, the Bankruptcy Code has no such lack of textual evidence. This is why the only other circuit court to address this question concluded, "Because Indian tribes are domestic governments, Congress has abrogated their sovereign immunity." *Krystal Energy,* 357 F.3d at 1061.

Although *Meyers* and *Krystal Energy* can be reconciled based on these differences in statutory language, there is one point of reasoning upon which they —and I with the majority—fundamentally disagree. *Meyers* and the majority seem to think it important that the Bankruptcy Code does not mention the words "Indian tribe" and 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." *Meyers,* 836 F.3d at 824 (quoting *In re Greektown Holdings, LLC,* 532 B.R. 680, 693 (E.D. Mich. 2015)); *see also* Majority Op. at 459-60. Such an observation highlights the lack of on-point precedent to guide our decision, but it is otherwise irrelevant to the task of statutory interpretation before us.

In the majority's focus on these "magic words," *Cooper,* 566 U.S. at 291, 132 S.Ct. 1441, it ignores the differences in statutory language between the statutes analyzed in other cases and the one before us today. The Circuit and Supreme Court opinions referenced by the majority analyzed statutes that featured neither the Bankruptcy Code's clear language that "sovereign immunity is abrogated" nor its all-encompassing, sovereign-focused definition of "governmental unit." Our task is to determine whether "the language of the statute" contains an unequivocal expression of intent to abrogate sovereign immunity. *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985). Our task is not to hold Congress to a

standard of speaking as precisely as it possibly can or to demand that it use the same words today as it has in the past.

Justice Scalia, providing the fifth vote in *Dellmuth,* emphasized this point, saying that "congressional elimination of sovereign immunity in statutory text" need not make "explicit reference" to any particular terms. *Dellmuth,* 491 U.S. at 233, 109 S.Ct. 2397 (Scalia, J., concurring). So long as the language of the statute, in whatever form, clearly subjects the sovereign to suit, that will suffice to abrogate immunity. *Id.*; *see also United States v. Beasley,* 12 F.3d 280, 284 (1st Cir. 1993) (Breyer, C.J.) ("Congress can embody a similar . . . intent in different ways in different statutes.").

As *Krystal Energy* held and as explained above, the Code's text forms a clear expression of legislative intent to abrogate the sovereign immunity of Indian tribes.

III

Where the text gives clear evidence of congressional intent to abrogate, courts may look to the larger statutory scheme to "dispel[]" any "conceivable doubt" of that intent. *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 56-57, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); *see also Davis v. Michigan Dep't of Treasury,* 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). We next look to the Bankruptcy Code's purpose.

"[T]he object of bankruptcy laws is the equitable distribution of the debtor's assets

amongst his creditors. . . ." *Kuehner v. Irving Tr. Co.,* 299 U.S. 445, 451, 57 S.Ct. 298, 81 S.Ct. 340 (1937). "Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally." S. Rep. No. 95-989, at 49 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5835; H.R. Rep. No. 95-595, at 340 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6297; *see also Begier v. I.R.S.,* 496 U.S. 53, 58, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990) ("Equality of distribution among creditors is a central policy of the Bankruptcy Code.").

The Code's purpose of establishing and enforcing a fair and equitable distribution procedure is consistent with the broad abrogation of Sections 106(a) and 101(27). With a broad abrogation of immunity, all governments must play by the rules. This context in no way contradicts the text's plain meaning —sovereign immunity is abrogated as to any government, including Indian tribes. Congress expressed its intention unequivocally.

For these reasons, I respectfully dissent.

FootNotes

* The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation.

1. Both the bankruptcy and district courts assumed, for the purposes of considering the Tribe's motion to dismiss the Trustee's complaint on the basis of tribal sovereign immunity, that the Tribe exerted complete dominion and control over the Debtors such that the Tribe actually or effectively filed the Debtors' bankruptcy petitions. We do so as well.

2. The Tribe's governing Tribal Code waives tribal sovereign immunity only "in accordance with [Code Sections] 44.105 or 44.108." (RE 5, Tribal Code, PageID # 307.) Section 44.105 requires a "resolution of the Board of Directors expressly waiving the sovereign immunity of the Tribe" with respect to specific claims. (*Id.*) And Section 44.108, at the relevant time, waived sovereign immunity with respect to all claims arising from written contracts that involve "a proprietary function" of the Tribe. (*Id.* at PageID # 308-10.) Except as otherwise indicated, record citations refer to the record in district court action No. 16-cv-13643.

3. At times, Congress also unequivocally—though unnecessarily—expressed its *lack* of intent to abrogate tribal sovereign immunity. *See, e.g.,* Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 5332 ("Nothing in this chapter shall be construed as . . . impairing the sovereign immunity from suit enjoyed by an Indian tribe. . . ."). We normally assume congressional awareness of such relevant statutory precedent as well. *See Goodyear Atomic Corp.,* 486 U.S. 174, 184-85, 108 S.Ct. 1704, 100 L.Ed.2d 158 (1988). Moreover, both of these practices also continued long after the enactment of the Bankruptcy Code. *See, e.g.,* Fair Debt Collection Procedures Act of 1990, 28 U.S.C. §§ 3104, 3250, 3002(7), 3002(10) (authorizing suits against an "Indian tribe"); USA PATRIOT Improvement and Reauthorization Act of 2005, 18 U.S.C. § 2346 ("Nothing in this chapter shall be deemed to abrogate or constitute a waiver of any sovereign immunity of . . . an Indian tribe . . . .").

4. Several bankruptcy courts, using similar reasoning, have agreed. *See, e.g., In re Platinum Oil Props., LLC,* 465 B.R. 621, 643 (Bankr. D.N.M. 2011); *In re Russell,* 293 B.R. 34, 44 (Bankr. D. Ariz. 2003); *In re Vianese,* 195 B.R. 572, 576 (Bankr. N.D.N.Y. 1995); *In re Sandmar Corp.,* 12 B.R. 910, 916 (Bankr. D.N.M. 1981).

5. Several district courts, bankruptcy appellate panels, and bankruptcy courts, using similar reasoning, have agreed. *See, e.g., In re Whitaker,* 474 B.R. 687, 695 (B.A.P. 8th Cir. 2012); *In re Money Ctrs. of Am., Inc.,* No. 17-318-RGA, 2018 WL 1535464, at *3 (D. Del. Mar. 29, 2018); *In re Greektown Holdings, LLC,* 532 B.R. 680 (E.D. Mich. 2015); *In re Star Grp. Commc'ns, Inc.,* 568 B.R. 616 (Bankr. D.N.J. 2016); *In re Nat'l Cattle Cong.,* 247 B.R. 259, 267 (Bankr. N.D. Iowa 2000); *see also In re Mayes,* 294 B.R. 145, 148 n.10 (B.A.P. 10th Cir. 2003) (noting that 11 U.S.C. §§ 106 and 101(27) "probably" do not abrogate tribal sovereign immunity).

6. The language in FACTA is arguably *broader* than the language in 11 U.S.C. §§ 106, 101(27), as in FACTA the term "government" has no qualifying language preceding it. *See Republic Steel Corp. v. Costle,* 621 F.2d 797, 804 (6th Cir. 1980) ("The [statutory] exception was broadened by the elimination of [any] qualifying language.") (quotation omitted).

7. The district court also noted that acknowledging the real question in this case provides a persuasive response to the *Krystal Energy* court's analogy to state sovereign immunity. *Id.* at 697. ("The faulty premise in this reasoning [that `other foreign or domestic government' can be read to unequivocally

include Indian tribes the same way "states" can be read to unequivocally include Arizona] is that it presumes the very fact in contention, i.e., that `domestic government' is a phrase clearly understood beyond all rational debate to encompass an Indian tribe, just as the word `state' is clearly understood beyond all rational debate to encompass Arizona and the other 49 states.").

8. The dissent disagrees on this point, framing its analysis around the question, "Is an Indian tribe a domestic government?" Dis. Op. at 468. As this approach mirrors that taken by Meyers and by the court in *Krystal Energy,* we need not engage with it in great detail. However, to the extent that the dissent attempts to highlight the appeal of this approach by stating it as a "simple syllogism"—"Sovereign immunity is abrogated as to all governments. Indian tribes are governments. Hence sovereign immunity is abrogated as to Indian tribes." *Id.* at 468—we note that the court in *Meyers* could easily have done the same with FACTA by stating the following: All people are subject to suit. All governments are people. Indian tribes are governments. Hence Indian tribes are subject to suit. And to the extent that the dissent attempts to distinguish *Meyers* based on FACTA's use of language authorizing suit against Indian tribes as opposed to language abolishing Indian tribes' immunity, that is a distinction without difference. Congress can abrogate tribal sovereign immunity by "stat[ing] an intent *either* to abolish Indian tribes' immunity *or* to subject tribes to suit." *Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.,* 166 F.3d 1126, 1131 (11th Cir. 1999) (emphasis added). But Congress must state that intent unequivocally. The dissent's reasoning does nothing to disguise the fact that it too has "lost sight of the real question in this sovereign immunity case." *Meyers,* 836 F.3d at 826-27.

9. The dissent deems this case law "irrelevant to the task of statutory interpretation before us." Dis. Op. at 470. To the contrary, the fact that the Trustee and the dissent ask this Court to reach a holding "that deviates from all relevant decisions by our sister circuits," save for one, and "that is inconsistent with the Supreme Court's most recent guidance on the point" is highly relevant. *Armalite, Inc. v. Lambert,* 544 F.3d 644, 648 (6th Cir. 2008).

10. For instance, a court might find an unequivocal expression of congressional intent in a statute stating that "sovereign immunity is abrogated as to all parties who could otherwise claim sovereign immunity." *Krystal Energy,* 357 F.3d at 1058.

11. The dissent adds one, equally unpersuasive argument, asserting that Indian tribes must be "governmental units" because abrogation of tribal sovereign immunity aligns with the Bankruptcy Code's "purpose of establishing and enforcing a fair and equitable [asset] distribution procedure." Dis. Op. at 471. Yet an interest in fairness and equity is not unique to bankruptcy. For instance, in *Florida Paraplegic,* the court held that the Americans with Disabilities Act—the purpose of which was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"—did not abrogate tribal sovereign immunity, and in doing so even acknowledged that this "may seem . . . patently unfair." 166 F.3d at 1128, 1135. Indeed, "immunity doctrines [of all kinds] inevitably carry with them the seeds of occasional inequities. . . . Nonetheless, the doctrine of tribal [sovereign] immunity reflects a societal decision that tribal autonomy predominates over other interests." *Wichita and Affiliated Tribes of Okla. v. Hodel,* 788 F.2d 765, 781 (D.C. Cir. 1986).

12. Those circuits that have held that filing a lawsuit constitutes a waiver of tribal sovereign immunity recognize an exception to the rule in *Okla. Tax* for counterclaims sounding in equitable recoupment—a defensive action to diminish a plaintiff's recovery as opposed to one asserting affirmative relief. *See, e.g., Quinault Indian Nation v. Pearson,* 868 F.3d 1093, 1099 (9th Cir. 2017); *Rosebud Sioux Tribe v. Val-U Constr. Co. of S.D.,* 50 F.3d 560, 562 (8th Cir. 1995); *Jicarilla Apache Tribe,* 687 F.2d at 1346. We need not decide whether to join these circuits as it is undisputed that the Trustee's fraudulent transfer claim does not sound in equitable recoupment.

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IN RE STAR GROUP COMMUNICATIONS, INC.

Case No.: 15-25543-ABA Adv. No.: 15-02497-ABA.

568 B.R. 616 (2016)

IN RE: STAR GROUP COMMUNICATIONS, INC., Debtor. Thomas J. Subranni, Plaintiff v. Navajo Times Publishing Company, Inc., Defendant.

United States Bankruptcy Court, D. New Jersey.

Signed April 29, 2016.

Attorney(s) appearing for the Case

Jeffrey Kurtzman , Kurtzman Steady LLC, Philadelphia, PA, for Plaintiff.

Kate R. Buck , McCarter & English, LLP, Wilmington, DE, Patrick T. Mason , Mason and Isaacson, PA, Gallup, NM, for Defendant.

MEMORANDUM DECISION

Andrew B. Altenburg, Jr., *United States Bankruptcy Judge*.

Before the court is a Motion to Dismiss Adversary Proceeding by Defendant, Navajo Times Publishing Company, Inc. (hereinafter "Navajo Times"), under Rule 12(b)(1) and (b)(6) asserting tribal sovereign immunity. Chapter 7 Trustee, Thomas J. Subranni, (hereinafter "Trustee") commenced this Adversary Proceeding to avoid and recover preferential transfers pursuant to sections 547 and 550 of the Bankruptcy Code. For the reasons that follow, the court finds that Navajo Times is a subordinate economic entity which enables it to enjoy the benefits of sovereign immunity. Thus, Navajo Times' Motion to Dismiss is granted.

JURISDICTION AND VENUE

This matter before the court is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), (E), and (F), and the court has jurisdiction pursuant to 28 U.S.C. § 1334, 28 U.S.C. § 157(a), and the Standing Order of Reference issued by the United States District Court for the District of New Jersey on July 23, 1984, as amended on September 18, 2012, referring all bankruptcy cases to the bankruptcy court.

PROCEDURAL HISTORY

On August 17, 2015 creditors of Star Group Communications Inc. Media & Marketing Group (hereinafter "Debtor") filed an involuntary chapter 7 petition. (Case No. 15-25543-ABA). On September 10, 2015 (*nunc pro tunc*) the court entered relief against Debtor. On September 17, 2015, Trustee was appointed interim trustee of Debtor's estate. On December 7, 2015, Trustee filed an Adversary Complaint against Navajo Times, which seeks to avoid and recover preferential transfers pursuant to sections 547 [1] and 550 [2]. (Adv. No. 15-02497-ABA; Doc. 1). On January 25, 2016, Navajo Times filed a Motion to Dismiss Adversary Proceeding pursuant to Rule 12(b)(1) and (b)(6) ("Motion") on the grounds that "Navajo Times is an entity of the Navajo Nation, a federally recognized Indian tribe, who has not waived its Sovereign Immunity." (Doc. 4-1, at 4). On February 5, 2016, Trustee filed a Memorandum of Law in Opposition to [Navajo Times'] Motion to Dismiss. (Doc. 8). On February 10, 2016, Navajo Times filed a Reply in Support of Motion to Dismiss. (Doc. 10).

IN RE STAR GROUP COMMUNIC | 568 B.R. 616 (2016) | 20160502620 | Leagle.com

Andrew B. Altenburg, Jr., United States Bankruptcy Judge

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The matter was set down for hearing on February 16, 2016. At that hearing, the court preliminarily ruled that section 106 of the Bankruptcy Code does not abrogate sovereign immunity for Indian tribes and in this case, the Navajo Nation. Nevertheless, at the conclusion of the hearing, the court ordered post-hearing submissions addressing whether Navajo Times is a "subordinate economic entity"[3] likewise protecting it from Trustee's suit.

On March 22, 2016, Navajo Times filed a Supplemental Memorandum of Law in Support of Motion to Dismiss. (Doc. 11). On April 8, 2016, Trustee filed a Reply Brief of Plaintiff Thomas J. Subranni, as Chapter 7 Trustee, in Opposition to Memorandum of Law of Defendant Navajo Times Publishing Company, Inc. in Support of Motion to Dismiss Complaint. (Doc. 12). Following the receipt of the parties' post-hearing submissions, the court took this matter under advisement. This matter is now ripe for disposition.

FINDINGS OF FACT

The pertinent undisputed facts to this Motion are as follows:

Navajo Times is a "regional publishing company providing a weekly publication and other media." (Doc. 4-2, Ex. C, Articles of Incorporation). On March 11, 1997, the Navajo Nation Council directed that the Navajo Times Program within the Division of Economic Development be "privatized." (Doc. 4-2, Ex. B, Resolution of the Economic Development Committee (hereinafter the "EDC Resolution"), at 10, ¶ 4). The word "privatize", as used in the Directive, meant to establish as a separate, tribally owned business. (Id.). On October 21, 2001, the Navajo Times entered into a consulting contract to begin the formal process to establish the Navajo Times as a separate, tribally owned corporation. (Id.). Upon completion of this process the Navajo Times was ready to begin operations as a "corporation organized under the Navajo Nation Corporation Code." (Id.). On September 24, 2003, the Economic Development Committee of the Navajo Nation Council approved Resolution EDCS-75-03 recommending the incorporation of the Navajo Times Program within the Division of Economic Development as a "wholly owned corporation of the Navajo Nation, to be governed by the Articles of Incorporation and Bylaws," recommending the transfer of Navajo Times assets and liabilities into the new corporation, and approving the appropriation of $500,000.00 from the Navajo Nation Business and Industrial Development Fund to be contributed to the Navajo Times as an equity investment. (EDC Resolution, at 12, ¶¶ 1.a, 1.b, and 2).

On October 23, 2003, the Navajo Nation Counsel approved Resolution CO-68-03:

Approving the Incorporation of the Navajo Times Publishing Company, Inc. as a Wholly Owned Corporation of the Navajo Nation; Approving the Articles of Incorporation and Bylaws of Such Corporation; Approving the Transfer to Such Corporation All Assets, Liabilities, Contributed Capital, Current Fiscal Year Revenues and Expenses, and All Prior Fiscal Year Carryovers of Excess Revenues Presently on the Books and Records of the Navajo Nation

(Doc. 4-2, Ex. A, Resolution of the Navajo Nation Counsel (hereinafter the "Navajo Nation Resolution"), at 4). The Navajo Nation Resolution considered the recommendation of the EDC that:

... the reorganization of the Navajo Times Program into a for-profit corporation, to be governed by the Articles of Incorporation and Bylaws, ... and to be named Navajo Times Publishing Company, Inc. to be wholly owned by, but independent of the political control or influence of the Navajo Nation. It is concluded that the management and staff of the Navajo Times have demonstrated that they can operate a successful business and provide a quality newspaper serving the Navajo Nation and surrounding communities, and that such corporation, if freed from the construction of a governmental program, will flourish, grow and return dividends to the Navajo

Nation; and ... The Navajo Nation Council has carefully considered the above recommendations and has determined that the recommendations are sound.

(Id. at 5-6, ¶¶ 8, 9).

On November 20, 2003, the Articles of Incorporation was signed by the Incorporator, Tom Arviso, Jr. (Doc. 4-2, Ex. C, Articles of Incorporation, at 15). Currently, Mr. Arviso is the C.E.O. and Publisher of the Navajo Times. (Doc. 11-1, Affidavit of Tom Arviso, Jr. in Support of Motion to Dismiss (hereinafter "Arviso Affidavit"), at 2, ¶ 1). The Articles of Incorporation provide, in pertinent part, that:

ARTICLE III. — Corporate Purposes. The Corporation is organized to pursue the following purposes for the benefit of the shareholders, the community and the employees: A. To own and operate, directly or indirectly through the establishment of subsidiary operations, joint ventures, partnerships or other business arrangements, a publishing company providing news/media in both print and electronic media, as well as other commercial printing and publication services that serve the interests of the community; B. To create a commerce-friendly environment that provides the most effective means of conducting business with customers, vendors, service providers, financial institutions, regulatory authorities, and other business operations; C. To conduct activities in all aspects of the media/publishing industry either within or outside of the Navajo Nation; D. To engage in any lawful business with the powers permitted to a corporation organized pursuant to the Navajo Nation Corporation Code, as amended.

(Doc. 4-2, Ex. C, Articles of Incorporation, at 14).

ARTICLE V. Ownership of Corporation. . . . The Navajo Nation for its benefit and its enrolled members shall own all shares in the Corporation. No individual or legal entity other than the Navajo Nation shall acquire any shares in the Corporation and its interest may not be sold, transferred, pledged, or hypothecated, either voluntarily or involuntarily.

(Doc. 4-2, Ex. C, Articles of Incorporation, at 15).

The Bylaws provide, in pertinent part, that:

Section 1.01. Shareholder Representatives. Pursuant to the Incorporation, the Navajo Nation owns all shares in the Corporation. As the sole shareholder, the Navajo Nation's shares in the Corporation shall be exercised by eleven (11) shareholder representatives, composed of one member from each of the eleven (11) standing committees of the Navajo Nation Council or their successor committees, in accordance with these By-laws and applicable tribal laws. Each standing committee shall select a shareholder representative. At all meetings of the shareholders, these shareholder representatives shall, in all instances, subordinate their personal interests to those of the Corporation in acting in their capacity as representatives of the sole shareholder and not as members of the Navajo Nation Council.

(Doc. 4-2, Ex. D, Bylaws, at 16).

Section 10.01. Claims Against the Corporation. The Corporation is an instrumentality of the Navajo Nation and is entitled to all of the privileges and immunities of the Navajo Nation, except as provided in this Article. The Corporation and its directors, officers, employees and agents while acting in their official capacities are immune

from suit, and the assets and other property of the Corporation are exempt from any levy or execution, provided that, notwithstanding any other provision of law, including but not limited to the Navajo Sovereign Immunity Act, 1 N.N.C. § 551, et seq., the Board of Directors may waive the defenses identified in this Article, in conformity with the procedures established in this Article, in order to further the purposes of the Corporation. Any waiver of the defenses identified in this Article must be expressed and must be agreed to by the Board of Directors prior to the time any alleged cause of action accrues. . . . Any waiver by the Corporation authorized by the above paragraphs of this Article shall be in the form of a resolution duly adopted by the Board of Directors upon thirty (30) days written notice to the Speaker of the Navajo Nation Council of the Board's intention to adopt the resolution. The resolution shall identify the party or parties for whose benefit the waiver is granted, the agreement or transaction and the claims or classes of claims for which the waiver is granted, the property of the Corporation which may be subject to execution to satisfy any judgment which may be entered in the claim, and shall identify the court or courts in which suit against the Corporation may be brought. Any waiver shall be limited to claims arising from the acts or omission of the Corporation, its directors, officers, employees or agents, and shall be construed only to affect the property and income of the Corporation.

(Id. at 24) (emphasis added). Additionally, the Bylaws provide that the Directors "shall consist of professionals within the publishing industry and individuals with substantial experience in positions of responsibility in business or related academia." (Id. at 17). Finally, pursuant to the Bylaws, "[t]he Navajo Nation shall have no authority to direct the business affairs of the Corporation, except through its status as the sole shareholder of the corporation and as provided in these By-laws." (Id. at 18).

DISCUSSION

A. Motion to Dismiss Standard under Rule 12(b)(1) and 12(b)(6)

Navajo Times moves to dismiss the Complaint in the Adversary Proceeding under Rule 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim upon which relief may be granted. A motion to dismiss on the basis of sovereign immunity tests the court's subject matter jurisdiction to entertain the action. In re Greektown Holdings, LLC, 532 B.R. 680, 685 (E.D. Mich. 2015) (applying Rule 12(b)(1) subject matter jurisdiction standard to tribal immunity dispute). See also FDIC v. Meyer, 510 U.S. 471, 475, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994) ("[s]overeign immunity is jurisdictional in nature"); Lewis v. Norton, 424 F.3d 959, 961 (9th Cir. 2005) (courts lack subject matter jurisdiction to determine claims barred by tribal sovereign immunity); E.F.W. v. St. Stephen's Indian High Sch., 264 F.3d 1297, 1302-03 (10th Cir. 2001) ("Tribal sovereign immunity is a matter of subject matter jurisdiction, which may be challenged by a motion to dismiss under [Rule] 12(b)(1)").

In Mortensen v. First Federal Savings & Loan Ass'n, 549 F.2d 884 (3d Cir. 1977), the Third Circuit for the United States Court of Appeals divided Rule 12(b)(1) motions into two categories: facial and factual. Id. at 891. A facial attack on jurisdiction is directed to the sufficiency of the pleading as a basis for subject matter jurisdiction. "In reviewing a facial attack, the court must only consider the allegations of the complaint and documents referenced therein and attached thereto in the light most favorable to the Plaintiff." Gould Electronics, Inc. v. United States, 220 F.3d 169, 176 (3d Cir. 2000). In a factual attack on jurisdiction under 12(b)(1), however, the movant

calls into question the essential facts underlying a claim of subject matter jurisdiction. "Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction[,] its very power to hear the case[,] ... the trial court is free to weight the evidence and satisfy itself as to the existence of its power to hear the case." Mortensen 549 F.2d at 891; see also Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc., 227 F.3d 62, 69 (3d Cir. 2000). Under this standard, no presumptive truthfulness attaches to plaintiff's allegations of jurisdictional facts. Robinson v. Dalton, 107 F.3d 1018, 1021 (3d Cir. 1997) (citing Mortensen, 549 F.2d at 891). Therefore, in a 12(b)(1) factual challenge, a court may consult material outside the pleadings, and the burden of proving jurisdiction lies with the plaintiff. Gould Electronics, 220 F.3d at 178. "In general, when a Rule 12(b)(1) motion is supported by a sworn statement of facts, the court should treat the Defendant's challenge as a factual attack on jurisdiction." Med. Soc'y of N.J. v. Herr, 191 F.Supp.2d 574, 578 (D.N.J. 2002) (citing Int'l Ass'n of Machinists & Aerospace Workers v. Northwest Airlines, 673 F.2d 700, 711 (3d Cir. 1982)).

Navajo Times also moves to dismiss the Complaint under Rule 12(b)(6). Rule 12(b)(6) permits a party to seek dismissal of a complaint for failure to state a claim upon which relief may be granted. Navajo Times' assertion of tribal sovereign immunity is jurisdictional in nature, thus the court will proceed under the Rule 12(b)(1) motion to dismiss standard. See Rovinsky v. Choctaw Mfg. & Dev. Corp., No. CIV. A. 09-0324(GEB), 2009 WL 3763989 (D.N.J. Nov. 10, 2009) (applying Rule 12(b)(1) standard to subordinate economic entity analysis).

B. Section 106 does not abrogate sovereign immunity for Indian tribes

At the hearing on February 16, 2016, the court preliminarily ruled that section 106(a) of the Bankruptcy Code does not abrogate sovereign immunity for Indian tribes for the following reasons:

The court agrees with the reasoning in In re Whitaker, 474 B.R. 687 (8th Cir. BAP 2012) (finding that Congress did not unequivocally express its intent to abrogate sovereign immunity of Indian tribes under section 106(a)). Indian tribes have long been recognized as possessing common law immunity from suit traditionally enjoyed by sovereign powers. Id. (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978)). The doctrine of tribal sovereign immunity is a matter of common law, which has been recognized as integral to the sovereignty and self-governance of tribes. Id. (citing Santa Clara Pueblo, 436 U.S. at 58, 98 S.Ct. 1670). Abrogation by Congress of sovereign immunity "cannot be implied," but must be "unequivocally expressed" in "explicit legislation."[4] Id. (citing Santa Clara Pueblo, 436 U.S. at 58, 98 S.Ct. 1670; Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc., 523 U.S. 751, 758, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998)).

In bankruptcy cases, Congress's abrogation of sovereign immunity is found in section 106(a) of the Bankruptcy Code. Section 106(a) provides, relevant part, that:

(a) Notwithstanding 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 ... (1) [Several enumerated sections of the Bankruptcy Code, including sections 547 and 550 relating to avoidance and recovery of preferential transfers.] (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

11 U.S.C. § 106(a) (emphasis added). The statute does not mention "Indian tribes"

specifically, but instead abrogates immunity as to "governmental units," which are defined in section 101(27) as:

(27) 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.

11 U.S.C. § 101(27).

In Whitaker, the court held that Congress did not unequivocally express its intent to abrogate sovereign immunity of Indian tribes by enacting provision of the Bankruptcy Code that abrogated sovereign immunity of "governmental units," and by defining "governmental unit" as "the United States, State, Commonwealth, District, Territory, municipality ... or other foreign or domestic government." 474 B.R. at 695. The Whitaker court concluded that Indian tribes could not be the subject of avoidance and turnover actions by chapter 7 trustees because Indian tribes were not clearly and unequivocally included in terms "other foreign or domestic governments." Id. See also In re Greektown Holdings, LLC, 532 B.R. 680 (E.D. Mich. 2015) (finding that Congress did not unequivocally express its intent to abrogate sovereign immunity of Indian tribes under section 106(a), such that Indian tribe could not be the subject of strong-arm proceeding brought by litigation trustee to avoid allegedly fraudulent transfers). Furthermore, where the language of a federal statute does not include "Indian tribes" in definitions of parties subject to suit or does not specifically assert jurisdiction over "Indian tribes," courts find the statute insufficient to express an unequivocal congressional abrogation of tribal sovereign immunity. Greektown Holdings, LLC, 532 B.R. at 694 (citing Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343, 357-58 (2d Cir. 2000) (holding Indian tribe immune from suit under the Copyright Act); Florida Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Florida, 166 F.3d 1126, 1131 (11th Cir. 1999) (stating that because Congress made no specific reference to Tribes anywhere in the ADA, tribal immunity is not abrogated; suit under ADA dismissed)).

"The Trustee respectfully disagrees with the Court's preliminary holding that § 106 does not abrogate the sovereign immunity of Indian tribes to the extent such holding is inconsistent with the decision of the Ninth Circuit Court of Appeals in Krystal Energy Company v. Navajo Nation, 357 F.3d 1055 (9th Cir. 2004), holding that Indian tribes are indeed `governmental units' within the meaning of § 106." (Doc. 12, at 2 n.1). In Whitaker, the Eighth Circuit Bankruptcy Appellate Panel expressly rejected the Ninth Circuit's reasoning in Krystal, and held that absent a specific mention of "Indian tribes" in the Bankruptcy Code, any finding of abrogation under section 106(a) necessarily must rely on inference or implication, both of which are prohibited by Supreme Court precedent. 474 B.R. at 693-94. Finding Krystal unpersuasive given its failure to cite one case where tribal immunity was found to have been abrogated in the absence of a specific mention of the words "Indian tribes," and deriding the Ninth Circuit's failure to adhere to the clear proscription against inference and implication in finding such abrogation, the Whitaker Bankruptcy Appellate Panel refused to follow Krystal — so too does this court. Id. at 695.

The Tenth Circuit Bankruptcy Appellate Panel suggested the same conclusion in In re Mayes, 294 B.R. 145 (10th Cir. BAP 2003). Although not a basis for the holding in Mayes, the panel noted that section 106(a) probably could not be interpreted as an unequivocal expression of congressional intent to abrogate tribal sovereign

immunity:

Section 101(27) does not refer to Indian nations or tribes. The only portion of that section that could be said to apply to an Indian nation or tribe is its reference to a domestic government. While several bankruptcy courts have either expressly or impliedly held that Indian nations or tribes are domestic governments to which §§ 101(27) and 106 apply, see Warfield v. Navajo Nation (In re Davis Chevrolet, Inc.), 282 B.R. 674, 678 n.2 (Bankr. D. Ariz. 2002); Turning Stone Casino v. Vianese (In re Vianese), 195 B.R. 572, 575-76 (Bankr. N.D.N.Y. 1995); In re Sandmar Corp., 12 B.R. 910, 916 (Bankr. D.N.M. 1981), we conclude that they probably are not. Accordingly, § 106(a) likely could not abrogate Appellee's immunity even if it were constitutional. See In re National Cattle Congress, 247 B.R. 259, 266-67 (Bankr. N.D. Iowa 2000). Our conclusion comports with the general proposition that Congress must make its intent to abrogate an Indian nation's immunity clear and unequivocal, and actions against tribes cannot merely be implied. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978).

294 B.R. at 148 n. 10.

As the court previously addressed at the February 16, 2016 hearing, it must adhere to the basic canons of statutory interpretation by following the plain language of section 106. As the Third Circuit noted in City of Philadelphia v. Nam (In re Gi Nam), "[f]ollowing the teaching of the Supreme Court, we have held that the `starting point of any statutory analysis is the language of the statute itself.'" 273 F.3d 281, 286 (3d Cir. 2001). The inquiry ends if the statutory language is unambiguous and the statutory scheme is coherent and consistent. Id. The plain language of the statute, section 106(a), is clear and unambiguous. It does not abrogate sovereign immunity for Indian tribes.

Statutes are to be construed and applied in accordance with the plain meaning of the words used by Congress. It is not for the court to ignore what the statute actually says, or to employ strained or imaginative interpretations not consistent with the plain and ordinary usage and meaning of the statutory language. The intent of Congress must be presumed to comport with the plain and ordinary meaning of the words in the statute as Congress wrote it, and it is not for the court to substitute its judgment in the guise of divining Congressional intent through creative construction.

In re Delta Air Lines, 341 B.R. 439, 445 (Bankr. S.D.N.Y. 2006).[5] See also, In re Mortimore, 2011 WL 6717680 (D.N.J. Dec. 21, 2011). If Congress had intended to abrogate sovereign immunity to Indian tribes under section 106, it could easily and expressly have done so, but it did not.

C. Navajo Times is entitled to tribal sovereign immunity

Tribal sovereign immunity can extend to both business and governmental activities of the tribe. Uniband, Inc. v. C.I.R., 140 T.C. 230, 250 (2013) (citing Kiowa Tribe of Ok. v. Manufacturing Technologies, Inc. 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998)). "A subdivision of tribal government or a corporation attached to a tribe may be so closely allied with and dependent upon the tribe that it is effectively an arm of the tribe. It is then actually a part of the tribe per se, and, thus, clothed with tribal immunity." Runyon ex rel. B.R. v. Ass'n of Vill. Council Presidents, 84 P.3d 437, 439 (Alaska 2004). In determining whether a corporation was an "arm of the tribe" entitled to tribal sovereign immunity, the court in Uniband considered that the

corporation's "purposes may or may not promote the general welfare of [tribe's] members, and since it may or may not be managed and controlled by [] tribal representatives, [] conclude it fails to be an `arm' of [tribe]." 140 T.C. at 252. The certificate of incorporation of the corporation in Uniband stated that its purpose was simply to engage in "any lawful act or activity" — not just activities that "promote economic development." Id. By contrast, here Navajo Times "Corporate Purposes" include for the "benefit of the shareholders, the community and the employees: [t]o own and operate ... a publishing company providing news/media in both print and electronic media, as well as other commercial printing and publication services that serve the interests of the community [and] [t]o conduct activities in all aspects of the media/publishing industry either within or outside of the Navajo Nation." (Doc. 4-2, Ex. C, Articles of Incorporation, at 14) (emphasis added). The court accepts that the service Navajo Times provides promotes the general welfare and serves the interests of the tribal community.

In its "arm of the tribe" analysis, the Uniband court also noted that there was "nothing in its corporate charter or bylaws to ensure that [corporation's] governing body is composed of [] tribal representatives." Uniband, 140 T.C. at 252. Similarly, here the Directors of Navajo Times do not appear to be limited to Navajo Nation members and "shall consist of professionals within the publishing industry and individuals with substantial experience in positions of responsibility in business or related academia." (Doc. 4-2, Ex. D, Bylaws, at 17). Furthermore, Navajo Times' Bylaws provide that "[t]he Navajo Nation shall have no authority to direct the business affairs of the Corporation; except through its status as the sole shareholder of the corporation and as provided in these By-laws." (Id. at 18). With these considerations alone, the court cannot conclude whether Navajo Times is an "arm of the tribe" entitled to tribal sovereign immunity; however, the court's inquiry does not end here.

Another factor that distinguishes an organization entitled to tribal sovereign immunity (as opposed to a mere business interest of a tribe) is that the tribal council establishes the organization pursuant to its powers of self-government. Uniband, 140 T.C. at 252. See also Dillon v. Yankton Sioux Tribe Hous. Auth., 144 F.3d 581, 583 (8th Cir. 1998) (concluding that a housing authority "established by a tribal council pursuant to its powers of self-government" is a tribal agency entitled to tribal sovereign immunity). The Uniband court concluded that the corporation at issue was not a tribal establishment because it was chartered not by the tribe but by the State of Delaware and at its inception was only partially owned by the tribe. Uniband, 140 T.C. at 252-53. Conversely, here Navajo Times is "organized pursuant to the Navajo Nation Corporation Code," and "[t]he Navajo Nation for its benefit and its enrolled members shall own all shares in the Corporation," and "[n]o individual or legal entity other than the Navajo Nation shall acquire any shares in the Corporation and its interest may not be sold, transferred, pledged, or hypothecated, either voluntarily or involuntarily." (Doc. 4-2, Ex. C, Articles of Incorporation, at 14, 15). In addition, "[t]he Trustee acknowledges that [Navajo Times] is owned by the Navajo Nation." (Doc. 12, at 8 ¶ 23). For these reasons, the court concludes that Navajo Times is a "tribal establishment" but this factor alone is not dispositive to the inquiry.[6] The court must also review the "subordinate economic entity" factors considered by many other courts.

As the district court in the Western District of Oklahoma commented, "[a]lthough the subordinate economic entity analysis has been widely adopted, its implementation is rarely uniform." Somerlott v. Cherokee Nation Distributors Inc., No. CIV-08-429-D,

2010 WL 1541574, at *3 (W.D. Okla. Apr. 16, 2010), aff'd, 686 F.3d 1144 (10th Cir. 2012).; see also Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1188 (10th Cir. 2010) (citing Gavle v. Little Six, Inc., 555 N.W.2d 284, 293 (Minn. 1996)) ("the demarcation between those business entities so closely related to tribal governmental interests as to benefit from the tribe's sovereign immunity and those so far removed as to be treated as mere commercial enterprises is not as clear.... whether tribal sovereign immunity now extends to commercial activities is an important, complex and unresolved question, which the U.S. Supreme Court has never directly considered."). Accordingly, we have looked to the various tests used by courts[7] and have employed the Johnson factors, which the court believes to be most helpful in this particular instance. Johnson v. Harrah's Kansas Casino Corp., No. 04-4142-JAR, 2006 WL 463138, at *4 (D. Kan. Feb. 23, 2006). When determining whether tribal sovereign immunity is possessed by a tribal business, which, if so, is sometimes referred to as a "subordinate economic entity," courts have considered some or all of the following factors:

(1) the announced purpose for which the entity was formed; [2] whether the entity was formed to manage or exploit specific tribal resources; (3) whether federal policy designed to protect Indian assets and tribal cultural autonomy is furthered by the extension of sovereign immunity to the entity; (4) whether the entity is organized under the tribe's laws or constitution rather than federal law; (5) whether the entity's purposes are similar to or serve those of the tribal government; (6) whether the entity's governing body is comprised mainly of tribal officials; (7) whether the tribe has legal title or ownership of property used by the entity; (8) whether tribal officials exercise control over the administration or accounting activities of the organization; (9) whether the tribe's governing body has power to dismiss members of the organization's governing body, and (10) whether the entity generates its own revenue, whether a suit against the entity would impact the tribe's fiscal resources, and whether it may bind or obligate tribal funds.

Uniband, 140 T.C. at 253-54 (citing Johnson, 2006 WL 463138, at *4).

The court will first address factors 1, 2, 3, and 5 together, as all relate to Navajo Times' purpose and the promotion of tribal autonomy:

(1) the announced purpose for which the entity was formed; (2) whether the entity was formed to manage or exploit specific tribal resources; (3) whether federal policy designed to protect Indian assets and tribal cultural autonomy is furthered by the extension of sovereign immunity to the entity; and (5) whether the entity's purposes are similar to or serve those of the tribal government.

Uniband, 140 T.C. at 253-54 (citing Johnson, 2006 WL 463138, at *4).

In Allen v. Gold Country Casino, the Court of Appeals for the Ninth Circuit held that a tribe's casino was "no ordinary business" and was entitled to tribal immunity because the casino's "creation was dependent upon [tribal] government approval at numerous levels", and the Federal statute under which the casino was created intended that creation and operation of Indian casinos promote "tribal economic development, self-sufficiency, and strong tribal governments." 464 F.3d 1044, 1046-47 (9th Cir. 2006). See also Gavle v. Little Six, Inc., 555 N.W.2d at 294 (finding that courts should determine "whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity"); Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc., 86 N.Y.2d 553, 560, 635 N.Y.S.2d 116, 658 N.E.2d 989, 993 (1995) (nonprofit corporation created by tribe was

entitled to sovereign immunity in part because the corporation was established to "enhance the health, education and welfare of Tribe members, a function traditionally shouldered by tribal government."); J.L. Ward Associates, Inc. v. Great Plains Tribal Chairmen's Health Bd., 842 F.Supp.2d 1163, 1176 (D.S.D. 2012) (citing Patrice H. Kunesh, Tribal Self-Determination in the Age of Scarcity, 54 S.D. L. Rev. 398, 402 (2009)) ("When a tribe establishes an entity to conduct certain activities, such as housing authorities, health agencies, educational institutions, cultural centers, and corporate gaming operations, the entity is immune from suit if it functions as an arm of the tribal government.").

In Uniband, the court rejected the corporation's assertion that it promoted tribal autonomy because "[w]hile [corporation] appears to have employed [tribe] members to perform its data entry services, it has not shown the extent of its employment of [tribe] members nor demonstrated that it was established to promote [tribe's] economic development, as opposed to simply generating revenue" and "[corporation's] creation did not depend only on [tribe's] approval." Uniband, 140 T.C. at 255. Whereas, here Navajo Times was created by the approval of the Navajo Nation Resolution to be "wholly owned by, but independent of the political control or influence of [t]he Navajo Nation ... to provide a quality newspaper serving the Navajo Nation and surrounding communities." (Doc. 4-2, Ex. A, Navajo Nation Resolution, at 5 ¶ 8). Navajo Times "Corporate Purposes" are for the "benefit of the shareholders, the community and the employees: [t]o own and operate ... a publishing company providing news/media in both print and electronic media, as well as other commercial printing and publication services that serve the interests of the community [and] [t]o conduct activities in all aspects of the media/publishing industry either within or outside of the Navajo Nation."[8] (Doc. 4-2, Ex. C, Articles of Incorporation, at 14) (emphasis added). Furthermore, Navajo Times claims that it is "the primary source for news and information for the Navajo people. Its physical circulation is approximately 21,000; and it has over 200,000 followers online." (Doc. 11-1, Arviso Affidavit, at 2 ¶ 5). The court is satisfied that Navajo Times was established with the purpose of serving the Navajo community by providing an impartial quality newspaper, free from Navajo government influence. Additionally, the court is persuaded that the Navajo Times newspaper, which specifically caters to "the interests of the community," promotes the tribal autonomy of Navajo Nation.

Next, the court will consider factors 4, 6, 7, 8, and 9, as they all relate to tribal control:

(4) whether the entity is organized under the tribe's laws or constitution rather than federal law; (6) whether the entity's governing body is comprised mainly of tribal officials; (7) whether the tribe has legal title or ownership of property used by the entity; (8) whether tribal officials exercise control over the administration or accounting activities of the organization; and (9) whether the tribe's governing body has power to dismiss members of the organization's governing body.

Uniband, 140 T.C. at 253-54 (citing Johnson, 2006 WL 463138, at *4).

As previously established, Navajo Times is "organized pursuant to the Navajo Nation Corporation Code." (Doc. 4-2, Ex. C, Articles of Incorporation, at 14). Although there is no evidence as to whether Navajo Times' governing body is comprised mainly of tribal officials, the Bylaws provide that "[a]s the sole shareholder, the Navajo Nation's shares in the Corporation shall be exercised by eleven (11) "shareholder representatives," composed of one member from each of the eleven (11) standing committees of the Navajo Nation Council ..." and the "Directors shall be elected at the annual meeting of the shareholder representatives..." (Doc. 4-2, Ex. D, Bylaws, at 16,

17). However, the Directors of Navajo Times are not limited to Navajo Nation members and "shall consist of professionals within the publishing industry and individuals with substantial experience in positions of responsibility in business or related academia."[9] (Id. at 17). Navajo Nation does not hold title or ownership of property used by Navajo Times; the Navajo Nation Resolution authorized the "transfer of all assets, liabilities, contributed capital, current fiscal year revenues and expenses and any prior years' carry-forward of excess revenues associated with the Navajo Times Program and carried on the books and records of the Navajo Nation into the Navajo Times Publishing Company, Inc. The Navajo Nation shall consider the transfer of asset values in excess of liabilities as equity investment in the Navajo Times Publishing Company, Inc. such equity investment shall be represented by a proportionate share of the initial common stock to be issued by the Company to the Navajo Nation." (Doc. 4-1, Navajo Nation Resolution, at 6 ¶ 2). Even if tribal officials serve as Directors of Navajo Times, the Bylaws provide that "Directors shall, in all instances, subordinate their personal interests to those of the Corporation. The Navajo Nation shall have no authority to direct the business affairs of the Corporation, except through its status as the sole shareholder of the corporation and as provided in these By-laws." (Doc. 4-2, Ex. D, Bylaws, at 18). Finally, "[a]ny officer may be removed at any time, for just cause, by action of a majority of the five members of the Board of Directors." (Id. at 22). Therefore, Navajo Times fails to definitively establish all of the "tribal control" factors, except factor 4: organization under Navajo law.

Finally, the court will address Navajo Times' financial relationship with the tribe under factor 10: "whether the entity generates its own revenue, whether a suit against the entity would impact the tribe's fiscal resources, and whether it may bind or obligate tribal funds." Uniband, 140 T.C. at 253-54 (citing Johnson, 2006 WL 463138, at *4). Courts disagree as to whether the "financial relationship" factor is a threshold and dispositive inquiry. See Runyon ex rel. B.R. v. Ass'n of Vill. Council Presidents, 84 P.3d 437, 440-41 (Alaska 2004) ("The entity's financial relationship with the tribe is therefore of paramount importance — if a judgment against it will not reach the tribe's assets or if it lacks the `power to bind or obligate the funds of the [tribe],' it is unlikely that the tribe is the real party in interest. If, on the other hand, the tribe would be legally responsible for the entity's obligations, it may be an arm of the tribe."). Contra Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1187 (10th Cir. 2010) (we did not examine the financial relationship between [corporation] and the tribe and whether a judgment against [corporation] would reach the tribe's monetary assets, much less designate that factor as a threshold determination. Although we recognize that the financial relationship between a tribe and its economic entities is a relevant measure of the closeness of their relationship ... that it is not a dispositive inquiry.").

Here, the Navajo Times was "privatized" with the capital contribution of Navajo Nation turned into equity interest. In the Navajo Nation Resolution, Navajo Nation determined that the recommendation of the EDC Resolution that "the management and staff of the Navajo Times have demonstrated that they can operate a successful business and provide a quality newspaper serving the Navajo Nation and surrounding communities, and that such corporation, if freed from the construction of a governmental program, will flourish, grow and return dividends to the Navajo Nation" was sound. (Doc. 4-2, Ex. A, Navajo Nation Resolution, at 5-6, ¶¶ 8, 9) (emphasis added). In addition, Navajo Times notes that "[t]he current unemployment rate on the Navajo Nation is 48.5 percent, and the average household income is $8,240. The Navajo Times has always been an important source of economic

development and employment for Navajo Nation tribal members." (Doc. 11-1, Arviso Affidavit, at 2 ¶ 4). Navajo Times also asserts (without supporting documentation) that "Navajo Nation carries a retained-limit liability policy pursuant to which any judgment against the Navajo Times, up to the retained limit set in the policy ($500,000), is paid from the funds of the Navajo Nation." (Id. at 3 ¶ 17). The court is persuaded that the financial relationship between the tribe and Navajo Times, in which Navajo Nation enjoys dividends from the Navajo Times and may be financially responsible for Navajo Times' legal obligations, satisfies the 10th Johnson factor.

The court must now determine whether Navajo Times' shortcomings in the Johnson factor test warrant the determination that it is not a subordinate economic entity. Navajo Times has established that: (1) its purpose is to benefit the Navajo community by providing a quality newspaper, and that its existence fosters tribal autonomy; (2) it was created under tribal law; and (3) it possesses a financial relationship with the tribe. However, the Navajo Nation lacks the requisite control over the Navajo Times as outlined in Johnson factors 6, 7, 8, and 9. The court accepts the reasoning behind this lack of control: "to be wholly owned by, but independent of the political control or influence of the Navajo Nation" and "if freed from the construction of a governmental program, will flourish, grow and return dividends to the Navajo Nation." (Doc. 4-2, Ex. A, Navajo Nation Resolution, at 5-6 ¶ 8). The court acknowledges that "debate on public issues should be uninhibited, robust, and wide open, and ... may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Dunn v. Gannett New York Newspapers, Inc., 833 F.2d 446, 450 (3d Cir. 1987).

Not all factors enumerated in the Johnson factor analysis must be met for the court to determine that Navajo Times is a subordinate economic entity entitled to sovereign immunity. See, e.g., J.L. Ward Associates, Inc. v. Great Plains Tribal Chairmen's Health Bd., 842 F.Supp.2d 1163, 1177 (D.S.D. 2012) (finding that corporation was entitled to tribal sovereign immunity — even though it was incorporated under South Dakota, rather than tribal, law and a suit against the corporation would not directly affect any particular tribe's fiscal resources — because the corporation served the general welfare of tribes, was controlled by tribes, and promoted tribal autonomy); Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173 (10th Cir. 2010) (finding that tribe's Economic Development Authority and its Casino were subordinate economic entities because (1) tribe created authority under tribal law and its constitution; (2) the entities' purpose was for financial benefit of tribe and to enable it to engage in various governmental functions; and (3) 100% of the Casino's revenues went to Authority and then to tribe, and any reduction in Casino's revenue that could result from adverse judgment against it would therefore reduce tribe's income — even though 12 out of the 15 Casino directors were not tribal members). Accordingly, the court concludes that Navajo Times is a subordinate economic entity deserving of tribal sovereign immunity.

CONCLUSION

For the foregoing reasons, the court finds that Navajo Times is entitled to rely on tribal sovereign immunity to defeat Trustee's Adversary Complaint. Therefore, Navajo Times' Motion to Dismiss under Rule 12(b)(1) is granted.

An appropriate judgment has been entered consistent with this decision.

The court reserves the right to revise its findings of fact and conclusions of law.

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Sontchi, J.

OPINION[1]

INTRODUCTION

Before the Court are two motions to dismiss preferential actions brought by the Chapter 11 Trustee of the above-captioned estates. The two movants are casinos that were formerly in a contractual relationship with the Debtors.[2] The two moving casinos are both associated with and are run by their respective Indian tribes. The motions are based the tribes' sovereign immunity from lawsuits. Therein, the Court is asked whether the casinos have a sufficient relationship with their respective Indian tribes to enjoy the tribes' sovereign immunity, whether Section 106(a) of the Bankruptcy Code abrogates their sovereign immunity, if any, and whether one of the casinos waived its sovereign immunity, if any, by filings a complaint and/or proof of claim against one of the Debtors' estates.

As set forth infra, the Court finds that (i) this is a facial attack on the Court's subject matter jurisdiction allowing the Court to review various documents attached to the pleadings; (ii) both QCA and Thunderbird are sufficiently related to their respective Indian tribes to enjoy the tribes' sovereign immunity; and (iii) neither Section 106(a) nor Section 101(27) abrogates QCA's and Thunderbird's sovereign immunity.

Thus, the Court lacks subject matter jurisdiction over the claims against QCA and Thunderbird, provided, however, the Court further finds that QCA may have waived its sovereign immunity solely to the extent of recoupment, but only to the extent of QCA's claims against the estates (i.e. the Trustee will not be able to recover any amounts in excess of QCA's claims from QCA).

JURISDICTION

The matter before the Court is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), (E) and (F), and the Court has jurisdiction pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157(a).

A bankruptcy court has jurisdiction to determine whether it has subject matter jurisdiction over an adversary proceeding filed in a case before the court.[3] The motion to dismiss for lack of subject matter jurisdiction is filed under Federal Rule of Civil Procedure 12, which apples to adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7012. Accordingly, this Court may determine whether to dismiss Trustee's claims for lack of subject-matter jurisdiction.

FACTUAL BACKGROUND

A. Background of the Debtors' Bankruptcy Cases

On March 21, 2014, Money Centers of America, Inc. ("Money Centers") filed a voluntary petition with the United States Bankruptcy Court for the District of Delaware under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). On May 23, 2014, Money Center's wholly owned subsidiary, Check Holdings, LLC ("Check Holdings," and collectively with Money Centers, the "Debtors"), filed its voluntary petition under the Bankruptcy Code. Thereafter, the Court entered an order jointly administering the Debtors' cases.

On April 23, 2014, the Court ordered that the Office of the United States Trustee appoint a Chapter 11 trustee for Money Center's estate. The Court further ordered that Money Center's interest as the sole member of Check Holdings, LLC, vests in the trustee and the trustee shall be in control of the membership interest and all powers thereto.[4] The Court later approved the appointment of Michael St. Patrick Baxter as chapter 11 trustee (the "Trustee") in the Debtors' cases.[5]

B. Parties in the Adversary Actions

i. Casino Caribbean, LLC v. Money Centers of America, Inc., Adv. Pro. No. 14-50437

The intervening plaintiff in Adversary Proceeding 14-50437 (the "QCA Adversary Action") is Quapaw Casino Authority ("QCA") an alleged governmental subdivision of the Quapaw Tribe of Oklahoma, a federally recognized Indian tribe and sovereign nation, which owns and operates the Quapaw Casino in Miami, Oklahoma. QCA is listed on Check Holdings' bankruptcy schedules as a creditor.[6] In addition, QCA filed a proof of claim in these cases.[7]

The defendant in the QCA Adversary Action is Check Holdings.

ii. Baxter v. Thunderbird Entertainment Center, Inc., Adv. Pro. No. 16-50410

The plaintiff in Adversary Proceeding 16-50410 is the Trustee on behalf of Debtors in an action to avoid preferential transfers against the defendant Thunderbird Entertainment Center, Inc., a wholly owned entity of the Absentee Shawnee Tribe of Oklahoma, a federal recognized Indian Tribe and sovereign nation (hereinafter, "Thunderbird," and Adversary Proceeding 16-50410, the "Thunderbird Adversary Action").

C. Procedural Background of Adversary Actions

i. QCA Adversary Action

On July 7, 2014, four gaming enterprises and creditors of Check Holdings brought the above-captioned QCA Adversary Action seeking to recover funds they are owed on the basis that such funds are not property of the Check Holdings' bankruptcy estate. Thereafter, on January 28, 2016, as it had substantially identical claims to that of the plaintiffs, QCA was granted leave to intervene as an additional adversary plaintiff in the QCA Adversary Action. Shortly thereafter, QCA filed its intervenor complaint (the

"QCA Complaint"). On March 2, 2016, the Trustee filed its answer and counterclaims seeking to recover alleged transfers made to QCA, pursuant to Sections 547, 548, and 550 of the Bankruptcy Code (the "QCA Counterclaims"). QCA filed a motion to dismiss (the "QCA Motion to Dismiss") the QCA Counterclaims on the basis of tribal sovereign immunity. The QCA Motion to Dismiss has been fully briefed and is the subject of this Opinion.

ii. Thunderbird Adversary Action

On March 21, 2016, the Trustee commenced the Thunderbird Adversary Action by filing a complaint against Thunderbird seeking recovery of transfers pursuant to sections 547, 548 and 550 of the Bankruptcy Code made in the 90-days prior to Money Center's petition date in an amount not less than $220,633.80, as well as claims disallowance pursuant to section 502 of the Bankruptcy Code. In response, Thunderbird filed a motion to dismiss (the "Thunderbird Motion to Dismiss") the complaint on the basis of tribal sovereign immunity. The Thunderbird Motion to Dismiss has been fully briefed and is also subject of this Opinion.

D. Factual Background Related to Adversary Actions

Both QCA and Thunderbird entered into various "Financial Services Agreements" (each an "Agreement" and together the "Agreements") with Check Holdings.[8] Through the Agreements, Check Holdings provided Automated Teller Machines ("ATM") and other cash advance transaction services to QCA and Thunderbird, both operating casinos. Patrons of both casinos would use their credit or debit cards at ATMs located in the casinos or would present checks to the casinos' cash vaults and would receive cash. The casinos would advance the cash by stocking the ATMs from their vaults or by directly providing cash to patrons for check advances, and Check Holdings would process the transactions through the patrons' financial institution (which included its fee). Check Holdings incurred an independent liability to the casinos to reimburse the casinos for the amount paid to the patron.

i. Factual History Related to QCA

QCA alleges that beginning April 25, 2014, Check Holdings failed to reimburse funds that QCA had advanced through ATM stocks and direct advances to its patrons. Several days later, as alleged by QCA, QCA's management discovered that Money Centers had filed for bankruptcy several months earlier and that Money Centers and its owners had judgments taken against them by other tribal gaming enterprises.

QCA alleges that on May 14, 2014, QCA stopped allowing cash advances and on May 15, 2014, QCA notified Check Holdings and the Trustee that it was terminating the Agreement. As noted above, about a week after this (alleged) termination, Check Holdings filed for bankruptcy.

QCA alleges that QCA advanced $502,018.00 under the Agreement from April 16, 2014 to May 14, 2014, for which Check Holdings failed to reimburse QCA. In addition to filing its proofs of claim, QCA commenced the above-captioned adversary for declaratory judgment seeking a declaration from the Court that the funds are not property of the Debtors' bankruptcy estates and that the automatic stay does not apply (or, in the alternative, for relief from the automatic stay).

In his answer and in addition to denying the claims set forth by QCA, the Trustee asserted the QCA Counterclaims to avoid and to recover preferential transfers made by Check Holdings to QCA in the 90 days preceding Check Holdings' bankruptcy. The Trustee asserts that Check Holdings made $1,114,020.76 in preferential transfers to QCA and seeks the return of those monies and disallowance of QCA's proof of claim.

QCA filed this motion to dismiss the QCA Counterclaims on the grounds that the claims are barred by tribal sovereign immunity. QCA further asserts that the QCA Counterclaims do not sound in recoupment and, therefore, do not fall within the exception to sovereign immunity for defenses and counterclaims for recoupment.

ii. Factual History Related to Thunderbird

The Trustee alleges that when a casino patron submitted their credit or debit cards to Thunderbird, Thunderbird would process those cards through equipment provided by Money Centers. If the transaction was approved by the patron's card issuer, Thunderbird would advance the cash to its patron. Thereafter, Money Centers would obtain an amount equal to the cash advance from the patron's card issuer. Upon receipt of the monies from the card issuers, Money Centers was required to forward the amount to Thunderbird, retaining its fee. The Trustee alleges that Money Centers remitted these amounts to Thunderbird and that in the 90-days prior to Money Center's bankruptcy, Money Center transferred payments aggregating an amount not less than $220,633.80 to Thunderbird. The Trustee, on behalf of Money Centers' estate, seeks avoidance and recovery of these transfers.

Thunderbird filed a motion to dismiss the complaint on the grounds that the claim is barred by tribal sovereign immunity.

STANDARD OF REVIEW

QCA and Thunderbird assert that their claims of sovereign immunity are a matter of subject matter jurisdiction and are properly challenged under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

The Trustee responds that a claim for sovereign immunity is an affirmative defense and not an issue of subject matter jurisdiction. The Trustee asserts that the QCA's and Thunderbird's sovereign immunity defense is based on facts that are not alleged in the movants' pleadings and that the QAC and Thunderbird will need to prove these facts at trial.

Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a party to bring a motion to dismiss for lack of subject matter jurisdiction.[9] As a rule, the party invoking the federal court's jurisdiction bears the burden of establishing that the Court has the requisite jurisdiction.[10] A motion to dismiss under Rule 12(b)(1) challenges the power of the federal court to hear a claim or case.[11] "If a court lacks subject matter jurisdiction, it is generally barred from taking any action that goes to the merits of the case."[12] A defendant may challenge the plaintiff's invocation of federal jurisdiction in one of two ways: (1) to challenge the sufficiency, but not the accuracy, of the facts alleged in the complaint; or (2) to challenge the accuracy of the complaint's factual allegations.[13] As discussed above, there is a dispute between the parties whether QCA's and Thunderbird's claim for sovereign immunity should be reviewed as a subject matter jurisdiction challenge or whether it should be asserted by QCA and

Thunderbird as an affirmative defense.

Sovereign immunity can be reviewed (i) on the basis of subject matter jurisdiction or (ii) as an affirmative defense.[14] In Christy v. Pennsylvania Turnpike Commission, the Third Circuit held that sovereign immunity did not implicate subject matter jurisdiction.[15] In citing Christy, the Delaware District Court explained:

The Third Circuit has recognized that an assertion of Eleventh Amendment immunity does not implicate subject matter jurisdiction in the ordinary sense. In that regard, Eleventh Amendment immunity is treated as an affirmative defense, and the party asserting immunity must prove its existence. With respect to factual questions that arise in that analysis, the party asserting Eleventh Amendment immunity bears the burden of production and persuasion.16

However, one year later, in Blanciak v. Allegheny Ludlum Corp., the Third Circuit held:

Although defendants brought their Eleventh Amendment objection by way of a motion for summary judgment under Fed.R.Civ.P. 56(b), the Eleventh Amendment is a jurisdictional bar which deprives federal courts of subject matter jurisdiction. Accordingly, the motion may properly be considered a motion to dismiss the complaint for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1).17

Thus, "[t]ypically, when jurisdiction is challenged pursuant to Rule 12(b)(1), the plaintiff bears the burden of persuading the court that subject matter jurisdiction exists. However, because ... [sovereign] immunity can be expressly waived by a party, or forfeited through non-assertion, it does not implicate federal subject matter jurisdiction in the ordinary sense, and therefore, a party asserting ... [sovereign] immunity bears the burden of providing its applicability.[18]

The District Court for the Eastern District of Pennsylvania in Frederick L. v. Department of Public Welfare, after reviewing both of the Third Circuit's holdings noted above,[19] discussed the two different varieties of Rule 12(b)(1) motions:

With regard to the first type, a facial attack on the court's subject matter jurisdiction, the court is required to assume that plaintiff's allegations are true. When confronted with the second type, a factual attack, the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case because there is no presumptive truthfulness attache[d] to plaintiff's allegations. Factual evaluations under Rule 12(b)(1) are appropriate at any stage in the proceedings after the filing of an answer. Here, no answer has been filed. Thus, regardless of whether I treat Defendants' assertion of the Eleventh Amendment bar as a motion under Rule 12(b)(1) or Rule 12(b)(6), I am required to take Plaintiffs' facts as true.20

Here, QCA and Thunderbird are making facial attacks on subject matter jurisdiction, as they have disputed the QCA Counterclaims and the Thunderbird Complaint based on the face of the allegations contained therein, rather than on any factual basis asserted by the Trustee.[21] Furthermore, it is QCA's and Thunderbird's burden to prove the entitlement to sovereign immunity. Therefore, on reviewing the question of sovereign immunity here, the Court must only consider the QCA Counterclaims, along with the exhibits, and the Thunderbird Complaint, under Rule 12 in the light most favorable to the Trustee.[22]

However, both QCA and Thunderbird provided documents establishing their connection to their respective Indian tribes (which is their burden to prove). These documents were not rebutted by the Trustee. The documents, discussed in detail below, provide support for their respective claims of sovereign immunity. As both QCA and Thunderbird are attacking the Court's subject matter jurisdiction, for the reasons set forth below, it is appropriate for the Court to review these documents under Rule 12 in making the determination whether the Court has jurisdiction to hear these matters.

ANALYSIS

A. Tribal Sovereign Immunity

i. Parties' Arguments

Both QCA and Thunderbird assert that an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. Furthermore, QCA and Thunderbird assert that abrogation by Congress of sovereign immunity cannot be implied but must be unequivocally expressed in explicit legislation. They continue that sovereign immunity possessed by Indian tribes also extends to all tribal agencies and subdivisions of a tribe engaged in economic activities, such as running of casinos.

The Trustee responds that QCA and Thunderbird are asserting facts beyond the pleadings and they will have to prove sovereign immunity as an affirmative defense (rather than a matter of subject matter jurisdiction). The Trustee further argues that Congress has abrogated any applicable tribal sovereign immunity by enacting section 106 of the Bankruptcy Code.

QCA and Thunderbird reply that the Court may determine its power to hear a case and to do so it may look to evidence extraneous to the complaint to determine if jurisdiction is proper. QCA and Thunderbird continue that sovereign immunity is properly extended to QCA and Thunderbird in these matters.

ii. Considering Facts Outside of the Pleading to Rule Upon Jurisdictional Issues.

a. Discussion

In considering whether QCA and Thunderbird are entitled to sovereign immunity, the Court must consider whether the QCA has a sufficient relationship with Quapaw Tribe of Oklahoma and whether Thunderbird has a sufficient relationship to the Absentee Shawnee Tribe of Oklahoma for sovereign immunity to also attach to the casinos. In addition, the Court must decide whether it has enough evidence at this time to make this determination.

"Tribal sovereign immunity may extend to subdivisions of a tribe, including those engaged in economic activities, provided that the relationship between the tribe and the entity is sufficiently close to properly permit the entity to share in the tribe's immunity."[23] In Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort,[24] the Tenth Circuit Court of Appeals held that the Court should look to a variety of factors when examining the relationship between the economic entities, in

this case the casinos, and the tribe. The factors including, but are not limited to:

(1) their method of creation; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) whether the tribe intended for the entities to have tribal sovereign immunity; (5) the financial relationship between the tribe and the entities; and (6) whether the purposes of tribal sovereign immunity are served by granting immunity to the entities.25

The Tenth Circuit explained that the policies underlying tribal sovereign immunity and its connection to tribal economic developed include "protection of the tribe's monies, as well as preservation of tribal cultural autonomy, preservation of tribal self-determination, and promotion of commercial dealings between Indians and non-Indians."[26]

In the cases sub judice, the Trustee asserts that the Breakthrough 6-factor test is factual, therefore, the Court "must" deny the Motions to Dismiss so that the parties may proceed with discovery. In response, the QCA and Thunderbird assert that the Court may consider the documents that the QCA and Thunderbird attached to their respective pleadings and should make determinations based on those attachments.

The relationship between a casino and a tribe was discussed by the Ninth Circuit Court of Appeals in Allen v. Gold Country Casino:

[The Indian Gaming Regulatory Act27 (the IGRA)] provides for the creation and operation of Indian casinos to promote tribal economic development, self-sufficiency, and strong tribal governments. One of the principal purposes of the IGRA is to insure that the Indian tribe is the primary beneficiary of the gaming operation. The compact that created the Gold Country Casino provides that the Casino will enable the Tribe to develop self-sufficiency, promote tribal economic development, and generate jobs and revenues to support the Tribe's government and governmental services and programs. With the Tribe owning and operating the Casino, there is no question that these economic and other advantages inure to the benefit of the Tribe. Immunity of the Casino directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general. In light of the purposes for which the Tribe founded this Casino and the Tribe's ownership and control of its operations, there can be little doubt that the Casino functions as an arm of the Tribe. It accordingly enjoys the Tribe's immunity from suit.28

In Allen, a former tribal casino employee sued the casino for various employment violations. The Ninth Circuit held that whether tribal immunity extends to a tribal business entity depends not on "whether the activity may be characterized as a business, which is irrelevant under Kiowa, but whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe."[29] The Ninth Circuit noted that the tribe authorized the casino through a tribal ordinance and interstate gaming contract, that the economic advantages created by the casino "inure[d] to the benefit of the Tribe," and that "[i]mmunity of the casino directly protect[ed] the sovereign Tribe's treasury."[30] The Ninth Circuit concluded that the casino functioned as "an arm of the Tribe" and accordingly enjoyed tribal immunity.[31]

Both the QCA and Thunderbird attached documentation showing that the casinos were indeed owned and operating by the respective tribes for the economic benefit of the tribes.

b. QCA

QCA attaches to its pleadings the Quapaw Tribe of Oklahoma's Resolution No. 082709-C (the "QCA Resolution"), which chartered a new governmental subdivision of the tribe to operate the QCA casino to "operate, manage, maintain and promote the Gaming Business ..." and to "carry out the purpose and intent of the IGRA...."[32] Furthermore, the resolution continues that the purpose of the QCA is to "provide the maximum possible economic benefit" to the Quapaw Tribe of Oklahoma.[33] The QCA Resolution also states that the QCA "shall at all times exercise its powers in the best interest of the Tribe."[34] The QCA Resolution also continues that the "QCA shall not have the power to waive the Tribe's sovereign immunity from suit.... [and the] QCA shall be entitled to all of the privileges and immunities of the Tribe, including without limitation, sovereign immunity from suit."[35] The Resolution also states that the QCA shall make monetary distribution to the tribe monthly.[36]

As a result of the provisions of the Resolution, the Court finds the QCA has a sufficient relationship with the Quapaw Tribe of Oklahoma to enjoy the Tribe's sovereign immunity. Although the Trustee asserts that this is a factual issue, the Court finds that the Resolution can be used to challenge the Court's subject matter jurisdiction. Nothing was asserted by the Trustee in it counterclaim to rebut these documents as asserted by QCA. Furthermore, the Trustee avers in the QCA Counterclaims that "QCA is a governmental subdivision of the Quapaw Tribe of Oklahoma, which owns and operates the Quapaw Casino...."[37] Thus, the Court finds that QCA enjoys the sovereign immunity of the Quapaw Tribe of Oklahoma.

c. Thunderbird

Similarly, Thunderbird attached Executive Resolution No. E-AS-2010-106 which states that Thunderbird Entertainment Center, Inc. is wholly owned by the Absentee Shawnee Tribe of Oklahoma and recognizing Thunderbird as a tribal corporation and tribal entity.[38] Furthermore, Thunderbird attached its By-laws, which state that "[a]ll shares in the Corporations shall be owned by the Absentee Shawnee Tribe for the benefit of the Tribe and its recognized members. No individual or legal entity other than the Absentee Shawnee Tribe shall acquire any shares in the Corporation or by paid any dividends."[39] The Thunderbird By-Laws continue that "[a]ll Rights of the shareholder of the Corporation shall be exercised by the Tribe's Executive Committee acting as the Shareholders' Representative, in accordance with the Tribe's Code of Laws."[40] Furthermore, the Thunderbird By-Laws state that the Thunderbird Entertainment Center "shall have the same tax status and immunities under federal law as the Absentee Shawnee Tribe."[41]

As such, based on the documents provided by Thunderbird, the Court finds that Thunderbird has a sufficient relationship with the Absentee Shawnee Tribe of Oklahoma to enjoy the tribe's sovereign immunity. Again, although this may be a factual inquiry, such inquiry may be completed by reviewing the documents attached to Thunderbird's pleadings that attack this Court's subject matters jurisdiction.[42]

d. Conclusion

As set forth above, the Court considers the corporate documents attached to the pleadings and finds that both QCA and Thunderbird enjoy the sovereign immunity of

their respective tribes. Thus, the next inquiry is whether such sovereign immunity has been abrogated by Congress in the Bankruptcy Code or has been waived by either of the movants.

iii. Congress Has Not Abrogated Sovereign Immunity Through the Bankruptcy Code.

The Trustee asserts that the tribes' sovereign immunity, if any, has been abrogated by Congress in Section 106 of the Bankruptcy Code. The Trustee asserts that even if QCA and Thunderbird are arms of their respective tribes and enjoy sovereign immunity (which the Court finds that they do), the Trustee's claims are not barred. QCA and Thunderbird respond that Section 106 does not abrogate their sovereign immunity because Congress has not clearly and unequivocally expressed an intent to abrogate the sovereign immunity of Indian tribes in the Bankruptcy Code.

Indian tribes have long been recognized as possessing common law immunity from suit traditionally enjoyed by sovereign powers.

Unlike the immunity of states, which derives from the Eleventh Amendment, the immunity of tribes is a matter of common law, which has been recognized as integral to the sovereignty and self-governance of tribes. Indian tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities, and whether they were made on or off a reservation or settlement. This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But without congressional authorization, the Indian Nations are exempt from suit. Abrogation by Congress of sovereign immunity cannot be implied, but must be unequivocally expressed in explicit legislation.43

As a result, the Court must determine if Congress, in the Bankruptcy Code, abrogated the tribes' sovereign immunity. Section 106(a) states in relevant part:

(a) Notwithstanding 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 ... (1) [Several enumerated sections of the Bankruptcy Code, including § 542 relating to turnover of estate assets, and § 544 relating to avoidance of liens.] (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.44

Section 101(27) defines "governmental unit" as:

(27) 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.45

There is a split of authority regarding whether "governmental unit" includes Indian tribes. In Krystal Energy Co. v. Navajo Nation,[46] the Ninth Circuit held that

The definition of governmental unit first lists a sub-set of all governmental bodies, but then adds a catch-all phrase, or other foreign or domestic governments. 11 U.S.C. § 101(27). Thus, all foreign and domestic governments, including but not limited to those particularly enumerated in the first part of the definition, are considered

governmental units for the purpose of the Bankruptcy Code, and, under § 106(a), are subject to suit. Indian tribes are certainly governments, whether considered foreign or domestic (and, logically, there is no other form of government outside the foreign/domestic dichotomy, unless one entertains the possibility of extra-terrestrial states). The Supreme Court has recognized that Indian tribes are `domestic dependent nations' that exercise inherent sovereign authority over their members and territories. So the category Indian tribes is simply a specific member of the group of domestic governments, the immunity of which Congress intended to abrogate. Had Congress simply stated, sovereign immunity is abrogated as to all parties who otherwise could claim sovereign immunity, there can be no doubt that Indian tribes, as parties who could otherwise claim sovereign immunity, would no longer be able to do so. Similarly here, Congress explicitly abrogated the immunity of any foreign or domestic government. Indian tribes are domestic governments. Therefore, Congress expressly abrogated the immunity of Indian tribes.47

Thus, the Ninth Circuit reasoned that: (i) the Supreme Court has referred to Indian tribes as "domestic dependent nations;" (ii) Congress enacted sections 106 and 101(27) with that reference in mind; (iii) Congress abrogated sovereign immunity as to states, foreign states, and other foreign or domestic governments; and, therefore (iv) Congress must have intended to include Indian tribes as "other foreign or domestic governments."

In In re Whitaker, the Eighth Circuit Bankruptcy Appellate Panel (hereinafter, the "Whitaker BAP") disagreed with Krystal Energy.[48] In Whitaker, trustees in separate Chapter 7 cases brought adversary proceedings to avoid liens or compel turnover against an Indian tribe and the tribal finance company.[49] The Whitaker BAP held that the 4-step process noted above in the Krystal Energy ruling is not an "explicit" abrogation of immunity. Furthermore, the Whitaker BAP found that Krystal Energy relied on cases that do not support the Krystal Energy holding.[50] The Whitaker BAP concluded that the precedent upon which the Krystal Energy court relied did not refer to Indian tribes as "governments" or "domestic governments," rather the Indian tribes were referred to as "domestic sovereigns."[51] The Whitaker BAP held that in enacting section 106, "Congress did not unequivocally express its intent by enacting legislation explicitly abrogating the sovereign immunity of tribes.... The Tribes are, therefore, protected from suit here by their sovereign immunity."[52] The Whitaker BAP ultimately dismissed the actions because Congress did not unequivocally express its intent to abrogate sovereign immunity of Indian tribes in suits under the Bankruptcy Code and the tribal finance company was sufficiently close to the Indian tribe to assert sovereign immunity and could not be subject of avoidance actions brought by the trustees.[53]

Similarly, in In re Greektown Holdings, LLC, the District Court for the Eastern District of Michigan stated:

This Court cannot say with perfect confidence that the phrase other domestic government unambiguously, clearly, unequivocally and unmistakably refers to Indian tribes. The Bankruptcy Court's conclusion does not give appropriate deference to the Supreme Court's recent admonition that [t]he special brand of sovereignty the tribes retain — both the nature and its extent — rests in the hands of Congress. While Congress may not have to utter magic words, Supreme Court precedent clearly dictates that it utter words that beyond equivocation or the slightest shred of doubt mean Indian tribes. Congress did not do so in sections 106(a) and 101(27) of the Bankruptcy Code and thus the Tribe is entitled to sovereign immunity from suit in the

underlying MUFTA proceeding.54

The Greektown court stated that it could not presume Congress intended to include Indian tribes in the abrogation set forth in section 106(a) "solely by force of deduction."[55] Although the Supreme Court has noted that Congress need not state its intent in a particular way (i.e. use "magic words") the abrogation of immunity needs to be clearly discernible from the statutory text; however, the Greektown court noted that there is not a single example in which the Supreme Court has found that Congress intended to abrogate a tribe's sovereign immunity without specifically using the words "Indians" or "Indian tribes."[56]

This Court concludes that Congress has not unequivocally abrogated the sovereign immunity of Indian tribes under sections 106(a) and 101(27) of the Bankruptcy Code. The Court is persuaded by the reasoning in Whitaker and Greektown. Both decisions discuss the case history, are well reasoned, and carefully construe the text of the Bankruptcy Code. The Court finds that, as neither the terms "Indians" nor "Indian tribes" were included in the language of section 101(27) of the Bankruptcy Code, Congress did not unequivocally express an intent to abrogate the sovereign immunity of Indian tribes in section 106(a) of the Bankruptcy Code.

iv. Conclusion

As a result, the Court finds that not only do QCA and Thunderbird enjoy their respective tribes' sovereign immunity but such sovereign immunity has not been abrogated by the Bankruptcy Code. Thus, the Trustee's claims are barred against Thunderbird. The Trustee's claims against QCA are also barred unless such sovereign immunity has been waived.

B. Waiver of Sovereign Immunity (QCA Only)

i. Parties' Arguments

The Trustee argues that QCA waived any sovereign immunity it may have had concerning the Trustee's counterclaim when it filed a proof of claim against Check Holdings. QCA asserts that it did not waive its immunity as the Trustee's counterclaim for avoidance of a preference is wholly separate and distinct from QCA's affirmative claims for recovery of funds from Check Holdings under its theory that the funds held by Check Holdings are the legal and/or equitable property of QCA. QCA asserts that the only recognized exception to sovereign immunity is that a tribe, by filing a lawsuit, waives sovereign immunity for the equitable defenses sounding in recoupment. QCA asserts that this exception is narrow and does not apply to claims of a different form or nature nor exceeding in amount that sought by the sovereign as plaintiff. QCA continues that the series of transactions subject to its claims against Check Holdings are not even in the same timeframe and thus, are not recoupment claims.

The Trustee responds that (i) both QCA's claims and the QCA Counterclaims all arise under the Finance Services Agreement and are based on the same series of occurrences; (ii) the claim and counterclaims both involve the same issue: whether the Financial Services Agreement established a debtor-creditor relationship between Check Holdings and QCA and the nature of Check Holdings' obligations under the contract; (iii) the Trustee seeks to avoid preferential transfers to QCA under the

Financial Services Agreement and courts have held that preference claims by a bankruptcy estate arise out of the same transaction or occurrence as claims filed by a governmental entity against the estate; (iv) Section 502(d) of the Bankruptcy Code bars any recovery on QCA's claim until any preferential transfers have been repaid to the estate; and (v) QCA waived it sovereign immunity by filing a proof of claim, and such waiver, although limited, is broader than that sounding in recoupment.

QCA replied that its waiver of sovereign immunity are limited to those sounding in recoupment, which is narrowly construed in the bankruptcy context.

ii. Discussion

As discussed above, the Court finds that QCA enjoys the tribe's sovereign immunity and Section 106(a) and 101(27) do not abrogate QCA's immunity. As a result, the next question becomes whether by filing a proof of claim or the Intervener Complaint, did QCA waive its sovereign immunity? In Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma,[57] an Indian tribe sought an injunction against a proposed tax assessment and the taxing commission answered and asserted a compulsory counterclaim.[58] The Supreme Court held that the tribe possessed immunity from direct suit; thus, the Indian tribe possessed a similar immunity from cross-suits.[59] The taxing commission did not argue that it received congressional authorization to adjudicate a counterclaim against the Tribe; thus, the Supreme Court concluded that "the Tribe did not waive its sovereign immunity merely by filing an action for injunctive relief."[60]

In Berrey v. Asarco, Inc.,[61] the plaintiff Indian tribe alleged the defendants caused environmental contamination on Indian lands as a result of the defendants' mining activities.[62] The defendants asserted counterclaims for contribution and indemnity, which the plaintiff Indian tribe asserted were barred by sovereign immunity.[63] The Tenth Circuit held that tribal sovereign immunity is deemed to be coextensive with the immunity of the United States.[64] The Tenth Circuit analogized that the Supreme Court has recognized that when the United States brings suit, it impliedly waives its immunity as to all claims asserted by the defendant in recoupment.[65] The Tenth Circuit continued:

Claims in recoupment arise out of the same transaction or occurrence, seek the same kind of relief as the plaintiff, and do not seek an amount in excess of that sought by the plaintiff. The waiver of sovereign immunity is predicated on the rationale that recoupment is in the nature of a defense arising out of some feature of the transaction upon which the sovereign's action is grounded.... [W]e extended application of the recoupment doctrine to Indian tribes; thus, when a tribe files suit it waives its immunity as to counterclaims of the defendant that sound in recoupment.66

The Tenth Circuit continued: "Waiver under the doctrine of recoupment, however, does not require prior waiver by the sovereign or an independent congressional abrogation of immunity. If the defendant's counterclaims are already permitted under an independent congressional abrogation of immunity, there would be no need for implied waiver under the recoupment doctrine."[67] Thus, regardless of whether Congress explicitly waived tribal sovereign immunity, a claim for recoupment is not barred.

In Jicarilla Apache Tribe v. Andrus,[68] the Tenth Circuit held:

when the sovereign sues it waives immunity as to claims of the defendant which assert matters in recoupment-arising out of the same transaction or occurrence which is the subject matter of the government's suit, and to the extent of defeating the government's claim but not to the extent of a judgment against the government which is affirmative in the sense of involving relief different in kind or nature to that sought by the government or in the sense of exceeding the amount of the government's claims; but the sovereign does not waive immunity as to claims which do not meet the `same transaction or occurrence test' nor to claims of a different form or nature than that sought by it as plaintiff nor to claims exceeding in amount that sought by it as plaintiff.69

Furthermore, the Third Circuit has held that recoupment is to be narrowly construed:

a mere logical relationship is not enough: the fact that the same two parties are involved, and that a similar subject matter gave rise to both claims, ... does not mean that the two arose from the same transaction. Rather, both debts must arise out of a single integrated transaction so that it would be inequitable for the debtor to enjoy the benefits of that transaction without also meeting its obligations.70

The Third Circuit distinguishes the right from set-off from the right of recoupment, although both permit a creditor that owes a debt to the debtor to reduce the amount of its debt by the amount of a debt owed by the debtor to the creditor, as the right to recoupment must arise out of the same transaction.[71] For example, in In re Anes, the debtor's debt arose from a loan she obtained from her government-employer's retirement system whereas the governmental unit's obligation to pay the debtor's salary arose from the debtor's contract of employment and performance of her job.[72] The Third Circuit opined that there may be a right to set-off but not a right to recoupment because the obligation to repay the loan did not arise from same transaction as their employers' obligations to pay their salaries.[73] Thus, "[f]or the purposes of recoupment, a mere logical relationship is not enough: the `fact that the same two parties are involved, and that a similar subject matter gave rise to both claims, ... does not mean that the two arose from the "same transaction."' Rather, both debts must arise out of a single integrated transaction so that it would be inequitable for the debtor to enjoy the benefits of that transaction without also meeting its obligations. Use of this stricter standard for delineating the bounds of a transaction in the context of recoupment is in accord with the principle that this doctrine, as a non-statutory, equitable exception to the automatic stay, should be narrowly construed."[74]

a. The Court Does Not Have Enough Information To Assess The Transactions Under The Financial Services Agreement.

QCA and the Debtors were parties to the Financial Services Agreement and the claims asserted against the Check Holdings' estate by QCA as well as the avoidance of the preferential transfers sought by the Trustee arise out of the Financial Services Agreement.

The Third Circuit has held that:

In the bankruptcy context, recoupment has often been applied where the relevant claims arise out of a single contract that provide[s] for advance payments based on estimates of what ultimately would be owed, subject to later correction. However, an express contractual right is not necessary to effect a recoupment. Nor does the fact

that a contract exists between the debtor and creditor automatically enable the creditor to effect a recoupment.75

In University Medical Center, the court concluded that the Department of Health and Human Services ("HHS") was not entitled to equitable recoupment for overpayments in 1985 through 1987 against amounts due to the bankrupt medical center in 1988 under a Medicare provider agreement. The court recognized that the Medicare program operated on a net balance accounting system where HHS paid the medical center based on estimates of future expenditures and then, following an annual audit to determine actual costs, adjusted subsequent payments to account for prior over or underpayments.[76] The Third Circuit further stated that while recoupment has been applied where relevant claims arise from a single contract, the fact that a contract exists between the debtor and creditor does not automatically enable the creditor to effect a recoupment.[77] The Third Circuit concluded that the provider agreement, which it characterized as a "unique type of contract" that did not "provide for a defined transaction or even a series of transactions" and had not been assumed by the medical center post-bankruptcy, merely established a "relationship between the parties."[78] This relationship was "not sufficient to support the conclusion that Medicare overpayments made to UMC in 1985 arise from the same transaction, for the purposes of equitable recoupment, as Medicare payments due UMC for services provided in 1988."[79] "Recovery of the 1985 overpayment therefore, is the final act of the transaction that began in 1985. UMC's 1988 post-petition services were the beginning of transactions that would stretch into the future, but they were not part of the 1985 transactions."[80]

Similarly, as stated by the Tenth Circuit:

A same contract equals same transaction rule would be overly simplistic. Instead, as our case law illustrates, the same transaction analysis involves an examination of the parties' equities. We held ... that recoupment permits a creditor to offset a claim that arises from the same transaction as the debtor's claim because application of the limitations on setoff in bankruptcy would be inequitable.... [W]e analogized recoupment to unjust enrichment: The situation before us is not one in which the creditor seeking relief consciously extended credit as did the bankrupt's ordinary creditors, but rather allowing [the debtor's] ... other creditors to share in this money in controversy would give them a windfall, a classic case of unjust enrichment. In light of recoupment's equitable foundation, the doctrine is only applicable to claims that are so closely intertwined that allowing the debtor to escape its obligation would be inequitable notwithstanding the Bankruptcy Code's tenet that all unsecured creditors share equally in the debtor's estate.81

"The common thread in the decisions ruling recoupment rights are present is that the rights are derived from a single agreement. The contract often called for numerous, separate deliveries, services or payments over a period of time. In finding a single transaction, the courts looked to the agreement of the parties and found the conduct at issue within the scope of the agreement."[82]

In the case sub judice, the Court simply does not have enough information to evaluate QCA's claims against Check Holdings in comparison to those claims brought by the Trustee against QCA to determine if the transfers are part of the same transaction or each individual transactions. QCA's claims against Check Holdings concern reimbursements that were not made between April 16, 2014, and May 14, 2014; whereas, the Trustee's counterclaims against QCA seek reimbursements of payments

made to QCA between February 24, 2014, and April 23, 2014. Obviously, there is some overlap of time. Furthermore, the nature of the contract between the Trustee and QCA may be one singular, yet ongoing, transaction; however, the Court does not have enough information to make this determination. At the very least, the Court would need to review the terms of the Financial Services Agreement to determine whether the terms of the contract dictate individual transactions or one cohesive transaction. However, the Court finds that, under no circumstances, could the amount sought by the Trustee under recoupment exceed the amount sought by QCA — at most, QCA's claim ($502,018) could be brought to $0 by the Trustee's claim of recoupment ($1,114,020.76), if any.[83]

Thus, the Court will deny the motion to dismiss the QCA Counterclaims solely for the purpose of determining whether the Trustee's counterclaims and QCA claims may be subject to recoupment. However, the Court determines that the Trustee may not avoid an amount in excess of QCA's claims against Money Centers. Thus, although the Court is not making a ruling on whether QCA's claims are subject to recoupment, there is a substantially narrowing of the gap between the parties.

b. Section 502(d) Does Not Apply to a Sovereign Tribe.

The Trustee asserts that, pursuant to Section 502(d), QCA is barred from recovering on its claim until the preferential transfers have been repaid to the estate. As mentioned above, the QCA Counterclaims are barred by sovereign immunity except in the limited exception of recoupment. Thus, the Court finds that Section 502(d) is not operative as to the QCA.

c. QCA Did Not Waive Its Sovereign Immunity By Filing a Claim.

QCA filed a proof of claim against Check Holdings in the amount of $502,018.[84] The Trustee asserts that by filing a proof of claim, QCA waived it sovereign immunity, at least as to the matters set forth in QCA's claim.

Section 106(b) of the Bankruptcy Code, which provides:

A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.85

Contrary to what was asserted by the Trustee, the Bankruptcy Code refers to a "governmental unit" that files a proof of claim, not a "sovereign." Thus, again, we must refer back to Section 101(27) which, as held above, does not include Indian tribes in its definition. Thus, Section 106(b) is not operative in the QCA Adversary Action.

iii. Conclusion

As discussed above, the waiver of sovereign immunity is limited to claims sounding in recoupment. The Court does not have sufficient information to determine whether the transaction contemplated in QCA's complaint against the Debtors result from the same transaction as the Trustee's preference claims against QCA. However, even if the Trustee's counterclaims sound in recoupment, the Trustee's claim would be

limited to the amount asserted by QCA. In other words, the Trustee would be unable to collect affirmative relief (i.e. cash) from QCA. Other than this limited circumstance of recoupment, QCA has not waived its sovereign immunity by filing its adversary action against the Debtors nor by filing a proof of claim.

CONCLUSION

As set forth above, the Court finds that: (i) this is a facial attack on the Court's subject matter jurisdiction allowing the Court to review various documents attached to the pleadings; (ii) both QCA and Thunderbird are sufficiently related to their respective Indian tribes to enjoy the tribes' sovereign immunity; and (iii) neither Section 106(a) nor Section 101(27) abrogates QCA's and Thunderbird's sovereign immunity. Thus, Thunderbird's motion to dismiss will be granted.

Furthermore, as to QCA only, the Court finds that it does not have sufficient information to determine whether there was a limited waiver of QCA's sovereign immunity, to the extent of recoupment only, as to QCA's claims. Although, at most recoupment would be limited to the amount of QCA's claims against the Money Center's estate.

Thus, the Court will grant, in part, and deny, in part, QCA's motion to dismiss by finding that, indeed, QCA enjoys sovereign immunity but finding that this sovereign immunity may have been waived to the extent of recoupment, but only to the extent of QCA's claims against the estates (i.e. the Trustee will not be able to recover any amounts in excess of QCA's claims from QCA).

Respective orders will be entered.

Nos. 97-56635, 97-56636 and 97-56638
United States Court of Appeals, Ninth Circuit

In re Lazar

237 F.3d 967 (9th Cir. 2001)
Decided Jan 12, 2001

970 *970 WARDLAW, Circuit Judge:

In these consolidated bankruptcy appeals, the California State Water Resources Control Board (the "State Board") and the California Underground Storage Tank Cleanup Fund (the "Fund") challenge the district court's orders denying them Eleventh Amendment immunity. In particular, the State Board contends that it is an arm of the state of California, that it did not waive its Eleventh Amendment immunity, and that 11 U.S.C. § 106 does not validly abrogate such immunity. The Fund raises a narrower Eleventh Amendment question, arguing merely that it is an "arm of the state." The State Board also appeals the district court's order ruling that abstention is not appropriate, under 28 U.S.C. § 1334(c), and, on cross-appeal, George E. Schulman, the bankruptcy trustee, (the "Trustee") seeks reversal of the district court's order finding that fees payable to the Fund are "taxes" for bankruptcy purposes, under 11 U.S.C. § 507(a)(8). We affirm in part, reverse in part, dismiss in part, and remand for further proceedings.

More precisely, we hold that while the State Board is an arm of the State of California, it has waived its Eleventh Amendment immunity in the Trustee's mandamus action. In the Fund's appeal, we apply our five-factor test and hold that the Fund is an "arm of the state" and therefore entitled to invoke Eleventh Amendment immunity. Finally, we dismiss the State Board's abstention appeal and the Trustee's cross-appeal for lack of jurisdiction.

I. BACKGROUND

On July 27, 1992, upon the seizure by the State of California of the bank accounts held by Divine Grace Lazar and Gary Lazar (the "debtors" or the "Lazars") for nonpayment of gasoline taxes, including payments imposed for contribution to the Fund, the Lazars voluntarily petitioned for Chapter 11 reorganization on behalf of themselves and eight of their corporate entities.[1] The corporate cases were substantively consolidated and ordered jointly administered with the Lazars' personal bankruptcy proceedings. George Schulman was appointed as Chapter 11 trustee and, on September 14, 1994, when the cases were converted to Chapter 7, was appointed as trustee of the Chapter 7 estate.

[1] A ninth corporate case was filed approximately one year before the others, and was substantively consolidated with them.

The Lazars and their entities owned, operated and leased some 200 retail gasoline stations throughout Southern California in the 1980s and early 1990s. In May 1992, the Los Angeles County Grand Jury returned an indictment against the Lazars, their corporate entities, and certain other individuals for environmental crimes resulting from their operation of the gas stations, including illegal disposal of hazardous wastes and falsification of tank test results related to leaking gas tanks at the Lazars' mostly older gas stations. In

September 1994, the Lazars pleaded *nolo contendere* to the charges of conspiracy and falsification of the underground storage tank test results, and, on February 22, 1995, the state court sentenced the Lazars to eight years in custody and fined their companies more than $400 million.

The state criminal charges arose from violations of the Barry Keane Underground Storage Cleanup Trust Fund Act (the "Act"), enacted by the California legislature in 1989 to address the problem of leaking petroleum underground storage tanks and the threat they pose to public health and safety and the environment. *See* Cal. Health Safety Code § 25299.10 (West 1999 Supp. 2000). The Act imposes duties on owners or operators of
972 underground *972 storage tanks, including the duty to investigate the condition of the tanks, to clean up leaks, and to establish evidence of financial responsibility for taking corrective action and compensating others for damage caused by the leaks. The Act established the Fund, a reimbursement program administered by the State Board that is used by small gasoline purveyors to comply with the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.* (1994), which requires these small gasoline purveyors to demonstrate financial ability to pay clean-up claims for damages caused by their leaking underground storage tanks.

The Fund is financed by a "fee" imposed on underground storage tank owners for each gallon of gasoline or other petroleum product stored in a permitted tank. Owners and operators of petroleum underground storage tanks may file a claim against the Fund to recover costs associated with corrective action taken in response to unauthorized releases. Cal. Health Safety Code § 25299.54 (West 1999 Supp. 2000). Before filing for bankruptcy on July 27, 1992, California Target Enterprises, one of the Lazar companies, submitted twenty claims against the Fund to the State Board. The Trustee became the holder of the twenty claims as a result of his appointment as trustee of the bankruptcy estate.

In November 1993, the Controller of the State of California (the "Controller") submitted proofs of claims for unpaid taxes against California Target Enterprises totaling in excess of $31 million in the bankruptcy proceedings. The California State Board of Equalization (the "BOE") submitted at least five proofs of claims for unpaid taxes totaling in excess of $13 million in the bankruptcy proceedings during the years 1993 through 1995. An unspecified portion of this over $44 million in claims is for taxes payable to the Fund.

The twenty reimbursement claims were denied on November 3, 1994, by David Deaner, a member of the State Board's staff and the Manager of the Fund ("Final Staff Decision"). The November 3 letter cited misconduct by the Lazars as the basis for denial. The Trustee filed an appeal of the Final Staff Decision, which was summarily denied by Harry Schueller, Chief of the State Board's Division of Clean Water Programs, in a letter dated March 9, 1995 ("Final Division Decision"). The Trustee then filed an Amended Petition for Board Review of Final Division Decision ("Amended Petition") and a Request for Hearing and Oral Argument ("Request for Hearing"). The Amended Petition and Request for Hearing were deemed denied by operation of law 270 days after the State Board received them. *See* Cal. Code Regs. tit. 23, § 2814.3(d) (2000).

Having exhausted his administrative remedies, the Trustee filed a Petition for Peremptory Writ of Administrative Mandamus or Other Appropriate Writ against the State Board in the Superior Court of the State of California for the County of Los Angeles on March 13, 1996 (the "Mandamus Adversary"). In the Mandamus Adversary, the Trustee sought "a writ requiring the [State] Board to reinstate the Trustee's claims against the [Fund], pay the claims in accordance with the statutory prioritization scheme, and thereby to permit the Trustee to use the [Fund] as a mechanism for demonstrating financial responsibility for operation of underground storage tanks in accordance [with] the provisions of state and federal law." The Trustee also sought "actual damages" in excess of $2.2 million, "reasonable attorneys fees," and "such other and further relief as appears appropriate under the circumstances." On March 22, 1996, the Trustee filed a Notice of

Removal of the Mandamus Adversary to the United States Bankruptcy Court for the Central District of California, pursuant to 28 U.S.C. § 1452.[2] In response, the State Board filed a Motion for Remand or in the
973 Alternative Abstention and Remand. The State *973 Board argued that: (1) the bankruptcy court's subject matter jurisdiction over the action was foreclosed by the Eleventh Amendment; (2) the bankruptcy court lacked subject matter jurisdiction under 28 U.S.C. § 1452(a) because the action concerned enforcement by the State of California of its police or regulatory powers; and (3) under 28 U.S.C. § 1334(c)(2), the bankruptcy court must abstain from hearing the action and remand it to state court, or, in the alternative, the bankruptcy court should abstain and remand in the interests of justice, comity and respect for state law, under 28 U.S.C. § 1334(c)(1).

2 Under 28 U.S.C. § 1452(a), "[a] party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title." 28 U.S.C. § 1452(a) (1994). Under 28 U.S.C. § 1334(a) and (b), the district courts "have original and exclusive jurisdiction of all cases under title 11" and "have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." *Id.* § 1334(a), (b). In other words, "[t]hose matters falling under the heading of concurrent jurisdiction (i.e., civil actions involving claims that arise under or in or are related to Title 11 proceedings) may be filed originally in state court, then subsequently removed by one of the parties to federal district court." *Maitland v. Mitchell (In re Harris Pine Mills)*, 44 F.3d 1431, 1435 (9th Cir. 1995); *see also* 16 *James Wm. Moore et al., Moore's Federal Practice* § 107.15[8][b], at 107-131 (3d ed. 2000) (noting that "unlike the general removal statute, which authorizes only defendants to remove, the bankruptcy removal statute authorizes *any* party to remove").

In an opinion dated September 3, 1996, the bankruptcy court rejected each of the State Board's arguments and denied the motion. *See Schulman v. California State Water Resources Control Bd.* (*In re Lazar*), 200 B.R. 358 (Bankr.C.D.Cal. 1996). It found that the Mandamus Adversary was not a civil action by a governmental unit to enforce that unit's police or regulatory power and was therefore properly removed under 28 U.S.C. § 1452(a). It also concluded that the requirements for mandatory abstention were not met, principally because the Mandamus Adversary did not present a purely state law question, and because it is a core proceeding within the meaning of 28 U.S.C. § 1334(c)(2). The bankruptcy court rejected the State Board's permissive abstention arguments, finding that the factors set forth in *Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.),* 912 F.2d 1162, 1167 (9th Cir. 1990), weighed against abstention. For similar reasons, the court found that remand was not warranted by any equitable consideration. Leaving the constitutional issues for last, the bankruptcy court, while suggesting but not holding that a state's waiver of sovereign immunity under 11 U.S.C. § 106(b) was invalid after *Seminole Tribe v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), ruled that the State of California waived its sovereign immunity by filing its proofs of claims in the bankruptcy proceeding and "by making a general appearance in support of its position as one of the most substantial secured creditors in case." *Schulman,* 200 B.R. at 377. The State Board timely appealed to the Bankruptcy Appellate Panel.

Meanwhile, on June 14, 1996, the Trustee had filed "a complaint to determine and subordinate the [BOE's] postpetition claim[s]," to "recover damages for unlawful misconduct of agencies of the State of California[,] and to recover payments improperly paid" against the State of California, the State Board, and the Fund (the "Tax Adversary").[3] In this action, the Trustee moved for partial summary judgment for determination of two discrete issues: (1) whether the Fund is an arm of the state capable of invoking immunity under the Eleventh
974 Amendment;[4] and (2) *974 whether the monies paid into the Fund are properly characterized as "fees" and not "taxes." The bankruptcy court denied the motion in a Order dated June 6, 1997, ruling that the Fund is an entity of the State of California for the purpose of claiming sovereign immunity under the Eleventh Amendment and

that the fees imposed as payment to the Fund are taxes for the purposes of 11 U.S.C. § 507(a)(8).[5] The Trustee timely appealed to the United States District Court for the Central District of California, and successfully moved to consolidate the Mandamus and Tax Adversaries.

[3] Also named as defendants to the Tax Adversary were the California State Board of Equalization, the California Franchise Tax Board, eleven individuals in their official capacities as members of agencies of the State of California and one person in his individual capacity.

[4] Because the Fund was not a party to the Mandamus Adversary, it was not covered by the bankruptcy court's prior ruling that the state had waived its immunity.

[5] 11 U.S.C. § 507(a) "sets forth nine categories of claims that are entitled to priority in bankruptcy cases." 4 Collier on Bankruptcy ¶ 507.01, at 507-9 (15th ed. rev. 2000). Under 11 U.S.C § 507(a)(8), "[a]n eighth priority is granted . . . to allowed unsecured claims of a governmental unit for certain kinds of prepetition taxes." *Id.* ¶ 507.10[1], at 507-54.

The district court affirmed the bankruptcy court's order denying the State Board's Motion for Remand or Abstention, but reversed in part and affirmed in part the bankruptcy court's order denying the Trustee's Motion for Partial Summary Judgment. The district court held that: (1) the fees paid into the Fund are taxes for purposes of 11 U.S.C. § 507(a)(8), notwithstanding any contrary characterization by California state law; (2) the Fund is not an arm of the state capable of invoking the Eleventh Amendment;[6] and (3) the bankruptcy court correctly decided against abstention in the Mandamus Adversary. The parties' cross-appeals of this decision are before us.

[6] Once it held that the Fund, which it determined would be the source of any money damages, was not an "arm of the state," the district court found that the State Board's Eleventh Amendment immunity claim was moot.

II. MANDAMUS ADVERSARY A. Eleventh Amendment Immunity

We must first address whether the State Board enjoys Eleventh Amendment immunity in the Mandamus Adversary.

We have jurisdiction to review the district court's denial of the State Board's claim of Eleventh Amendment immunity under the collateral order doctrine. *Puerto Rico Aqueduct Sewer Auth. v. Metcalf Eddy, Inc.* 506 U.S. 139, 147, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993). We review questions of Eleventh Amendment immunity de novo. *Hill v. Blind Indus. Servs.,* 179 F.3d 754, 756 (9th Cir. 1999), *amended by* 201 F.3d 1186 (9th Cir. 2000). "Under the law of this circuit, an entity invoking Eleventh Amendment immunity bears the burden of asserting and proving those matters necessary to establish its defense." *Id.* at 1186.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. "Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts," *Seminole Tribe v. Florida,* 517 U.S. 44, 54, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), the Eleventh Amendment "stand[s] not so much for what it says, but for the presupposition . . . which it confirms." *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 120 S.Ct. 631, 640, 145 L.Ed.2d 522 (2000) (quoting *Seminole Tribe,* 517 U.S. at 54, 116 S.Ct. 1114 (quoting *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 779, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991))) (internal quotation marks omitted). "That presupposition . . . has two parts: first, that each State is a sovereign entity in our federal system; and second,

that `"it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its
975 consent."'" *Seminole Tribe,* 517 U.S. at 54, 116 S.Ct. 1114 (quoting *Hans v. Louisiana,* *975 134 U.S. 1, 13, 10 S.Ct. 504, 33 L.Ed. 842 (1890) (quoting *The Federalist* No. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961))). Indeed, as the Supreme Court has recently explained, "the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment." *Alden v. Maine,* 527 U.S. 706, 119 S.Ct. 2240, 2246, 144 L.Ed.2d 636 (1999). Rather, "sovereign immunity derives . . . from the structure of the original Constitution itself." *Id.* at 2254.[7] Although some may wish to factually dispute whether "a longstanding tradition [exists] in the bankruptcy courts, dating back to 1979, of allowing the bankruptcy courts to enforce applicable law against the states," *see Schulman v. California State Water Res. Control Bd. (In re Lazar),* 200 B.R. 358, 376 (Bankr.C.D.Cal. 1996), the Supreme Court in *Seminole Tribe* interpreted the Eleventh Amendment to apply in bankruptcy proceedings.[8] As the Court stated, "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Seminole Tribe,* 517 U.S. at 72-73, 116 S.Ct. 1114.

7 In accordance with its historical, structural view of state sovereign immunity, the Supreme Court has stated that the phrase "Eleventh Amendment immunity" "is convenient shorthand but something of a misnomer." *Alden,* 119 S.Ct. at 2246. Like the Supreme Court, *see Kimel,* 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522, we will continue to use this "convenient shorthand."

8 Justice Rehnquist, in responding to Justice Stevens's concern with the majority decision's possible impact in bankruptcy cases, wrote "contrary to the implication of Justice Steven's [dissent], it has not been widely thought that . . . bankruptcy . . . statutes abrogated the States' sovereign immunity. . . . Although the . . . bankruptcy laws have existed practically since our Nation's inception, . . . there is no established tradition in the lower federal courts of allowing enforcement of those statutes against the States." *Seminole Tribe,* 517 U.S. at 73, n. 16, 116 S.Ct. 1114.

The district court held that Eleventh Amendment immunity did not apply in the Mandamus Adversary because the Fund, which it determined would be the source of any money damages, was not an "arm of the state." The State Board is the only named defendant in the Mandamus Adversary, however, and "with respect to the . . . Eleventh Amendment question, it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant." *Regents of Univ. of Cal. v. Doe,* 519 U.S. 425, 431, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997). Therefore, to determine whether Eleventh Amendment immunity applies here, we must assess the nature of the State Board, a task made easy by the California legislature.

The California Water Code provides that the State Board "shall exercise the adjudicatory and regulatory functions of the state in the field of water resources," Cal. Water Code § 174 (West 1971), and that the State Board "is in the California Environmental Protection Agency" and "consist[s] of five members appointed by the Governor," *id.* § 175. Thus, the State Board correctly contends that it is an agency of the State of California, and the Trustee does not dispute this contention. *See Rounds v. Oregon State Bd. of Educ.,* 166 F.3d 1032, 1035 (9th Cir. 1999) ("To determine whether [an entity] enjoys Eleventh Amendment immunity, we must look to its nature as created by state law.") (citing *Regents of Univ. of Cal. v. Doe,* 519 U.S. at 429-30 n. 5); *cf. Dittman v. California,* 191 F.3d 1020, 1026 (9th Cir. 1999) (holding that the State of California Acupuncture Committee is a state agency entitled to Eleventh Amendment immunity), *cert. denied,* ___ U.S. ___, 120 S.Ct. 2717, 147 L.Ed.2d 982 (2000). "[U]nder the eleventh amendment, agencies of the state are immune from private damage actions or suits for injunctive relief brought in federal court." *Id.* at 1025 (quoting *Mitchell v. Los Angeles*
976 *Community College Dist.,* 861 F.2d 198, 201 (9th *976 Cir. 1988)) (internal quotation marks omitted); *see also*

Pennhurst State Sch. Hosp. v. Halderman, 465 U.S. 89, 100, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) ("It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment.").

The State Board's Eleventh Amendment immunity is not absolute, however. "[A] State may waive its sovereign immunity by consenting to suit." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 119 S.Ct. 2219, 2223, 144 L.Ed.2d 605 (1999) (citing *Clark v. Barnard,* 108 U.S. 436, 447-48, 2 S.Ct. 878, 27 L.Ed. 780 (1883)). Furthermore, "Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment — an Amendment specifically designed to alter the federal-state balance." *Id.* (citing *Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976)). The Trustee argues that both of these circumstances are present in the Mandamus Adversary. Therefore, to determine whether the State Board enjoys Eleventh Amendment immunity, we must determine whether it waived that immunity or whether Congress abrogated that immunity in a valid exercise of its constitutional powers.

9 [9] Because the Trustee filed the Mandamus Adversary only against the State Board, and not against the appropriate officers of the State Board, the *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), exception to Eleventh Amendment immunity is, despite the Trustee's contentions to the contrary, inapposite.

1. Waiver

"[A] State's sovereign immunity is `a personal privilege which it may waive at pleasure.'" *Id.* at 2226 (quoting *Clark,* 108 U.S. at 447, 2 S.Ct. 878). "Generally, we will find a waiver either if the State voluntarily invokes our jurisdiction or else if the State makes a `clear declaration' that it intends to submit itself to our jurisdiction." *Id.* (citations omitted).

The Trustee argues that the State Board waived its Eleventh Amendment immunity in the Mandamus Adversary because other agencies of the State of California, namely the BOE and the Controller, filed proofs of claims in the Lazars' bankruptcy proceedings.

In *Gardner v. New Jersey,* 329 U.S. 565, 67 S.Ct. 467, 91 L.Ed. 504 (1947), the Supreme Court addressed the impact that filing a proof of claim in a bankruptcy proceeding has on a state's assertion of Eleventh Amendment immunity. *Id.* at 573-74, 67 S.Ct. 467. The Court held:

> It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. If the claimant is a State, the procedure of proof and allowance is not transmitted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought against the State. . . . When the State becomes the actor and files a claim against the fund it waives any immunity which it otherwise might have had respecting the adjudication of the claim.

Id. Last Term, the Supreme Court reaffirmed the validity of *Gardner. See College Sav. Bank,* 119 S.Ct. at 2228 n. 3 (stating that *Gardner* "stands for the unremarkable proposition that a State waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal courts"); *see also California Franchise Tax Bd. v. Jackson (In re Jackson),* 184 F.3d 1046, 1048-50 n. 1 (9th Cir. 1999) (relying on *Gardner* to find that the California Franchise Tax Board "waived its sovereign immunity when it filed a proof of claim for unpaid state income taxes against the Jacksons").

The question in this case, then, is not whether a state waives its Eleventh Amendment immunity by filing a
977 proof of claim in bankruptcy. *Gardner* establishes that it does. *Gardner,* 329 U.S. at 573-74, *977 67 S.Ct. 467. Rather, the relevant questions are the extent of this waiver and, more concretely, how this waiver applies to the

State Board in the Mandamus Adversary. We now turn to these questions.

a. The Rule of *Gardner*

As the Fifth Circuit has recognized, "[t]he extent to which filing a proof of claim constitutes waiver of [Eleventh Amendment] immunity is uncertain." *Texas ex rel. Board of Regents of the Univ. of Tex. Sys. v. Walker,* 142 F.3d 813, 820 (5th Cir. 1998), *cert. denied,* 525 U.S. 1102, 119 S.Ct. 865, 142 L.Ed.2d 768 (1999).

> Surely, as held in the *Gardner* decision, it encompasses defenses to the claim asserted. But does it extend to the assertion of a counterclaim, and if so, must the counterclaim arise out of the same transaction or occurrence as the state's claim? If any counterclaim is permitted on this theory, is recovery limited to an offset of some or all of the state's recoverable claim, or is an affirmative recovery permitted?

Richard H. Fallon et al., *Hart and Wechsler's The Federal Courts and the Federal System* 111-12 (4th ed. Supp. 1999) [hereinafter Hart Wechsler (Supp. 1999)]. Although we have never directly addressed these questions, we have applied *Gardner* in the past, and these past applications provide us with some guidance.

First, in *Confederated Tribes v. White (In re White),* 139 F.3d 1268 (9th Cir. 1998), we held, in accordance with *Gardner,* that by participating in a bankruptcy proceeding, an Indian tribal government "waived sovereign immunity respecting the adjudication of its claim against [the debtor]'s assets." *Id.* at 1270. In so holding, we upheld the district court's order affirming discharge of the tribal government's claim under Chapter 7 of the Bankruptcy Code. *See id.* at 1268. Similarly, in *California Franchise Tax Board v. Jackson (In re Jackson),* 184 F.3d 1046 (9th Cir. 1999), we determined that because a state agency filed a proof of claim, it was not immune from the bankruptcy court's discharge of that claim. *Id.* at 1048-50. These two decisions clarified the rule of *Gardner:* that when a state files a proof of claim against a debtor, it waives its Eleventh Amendment immunity with respect to the adjudication of that particular claim. Or, as the *Gardner* Court stated, by filing a proof of claim in bankruptcy, the state waives its immunity from "[t]he whole process of proof, allowance, and distribution" of the claim. *Gardner,* 329 U.S. at 574, 67 S.Ct. 467.

In *Jackson,* however, we indicated that this waiver may encompass more than the mere adjudication of the state's claim. We noted favorably the Fourth Circuit's holding that "when a state files a proof of claim in a bankruptcy proceeding, the state waives its sovereign immunity in regard to the debtor's claims which arise out of the same transaction or occurrence as the state's proof of claim." *Jackson,* 184 F.3d at 1049 (citing *Schlossberg v. Maryland (In re Creative Goldsmiths, Inc.),* 119 F.3d 1140, 1148 (4th Cir. 1997)). This language in *Jackson* is not inconsistent with *Gardner.* Although the waiver found constitutional in *Gardner* was limited to the state's own claim, and thus narrower than the same-transaction-or-occurrence standard, *Gardner,* 329 U.S. at 573-74, 67 S.Ct. 467; *see also Confederated Tribes,* 139 F.3d at 1271 ("The Supreme Court made clear in *Gardner v. New Jersey* that when a sovereign files a claim against a debtor in bankruptcy, the sovereign waives immunity with respect to the adjudication of the claim." (citation omitted)); *Seay v. Tennessee Student Assistance Corp. (In re Seay),* 244 B.R. 112, 118 (Bankr.E.D.Tenn. 2000) (noting that "the operative language of *Gardner v. New Jersey* . . . cannot really be read to say any more than that the filing of a proof of claim by a state waives its sovereign immunity as to matters connected with the claims allowance process"), nothing in *Gardner* precludes a broader waiver rule, *see* Hart Wechsler (Supp. 1999), *supra,* at 111-12 (suggesting that when a state voluntarily invokes federal jurisdiction, the permissible extent of the state's Eleventh Amendment
978 waiver goes *978 beyond the bounds of *Gardner*); Teresa K. Goebel, Comment, *Obtaining Jurisdiction over States in Bankruptcy Proceedings after Seminole Tribe,* 65 U. Chi. L.Rev. 911 (1998) ("The *Gardner* Court held that the defensive counterclaim rule was constitutional, but did not foreclose the possibility that a broader

test may be constitutional."); *cf. Danning v. United States,* 259 F.2d 305, 309-11 (9th Cir. 1958) (citing *Gardner* while allowing a bankruptcy trustee to assert counterclaims against the United States up to the amount of the federal government's claim).

Our sister circuits, in addressing this question, have not yet achieved consensus on the proper rule. As noted above, the Fourth Circuit has articulated a same-transaction-or-occurrence test. *Schlossberg,* 119 F.3d at 1148 (holding that "to the extent a defendant's assertions in a state-instituted federal action, including those made with regard to a state-filed proof of claim in a bankruptcy action, amount to a compulsory counterclaim, a state has waived any Eleventh Amendment immunity against that counterclaim in order to avail itself of the federal forum"). The Tenth Circuit also has held that sovereign immunity is waived for claims arising out of the same transaction or occurrence. *Wyoming Dep't of Transp. v. Straight (In re Straight),* 143 F.3d 1387, 1390 (10th Cir.) (indicating, without reaching the question, that the permissible extent of a state's waiver may be even broader than the same-transaction-or-occurrence test), *cert. denied,* 525 U.S. 982, 119 S.Ct. 446, 142 L.Ed.2d 400 (1998); *cf.* Fed.R.Civ.P. 13(c) (stating that a counterclaim "may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party").[10] The Seventh Circuit, however, has indicated that when a state files a proof of claim in bankruptcy, the state's "waiver of immunity is limited to matters . . . arising out of the same transaction or occurrence which is the subject matter of the suit, to the extent of defeating the [state]'s claim." *Jones v. Yorke (In re Friendship Med. Ctr., Ltd.),* 710 F.2d 1297, 1301 (7th Cir. 1983); *Dekalb County Div. of Family Children Servs. v. Platter (In re Platter),* 140 F.3d 676, 679 (7th Cir. 1998) (stating "that no sovereign immunity problem existed where the state filed the claim and no one sought money from the state").

10 The Eighth and Eleventh Circuits, although addressing this issue, have not explicitly decided whether *Gardner* can be extended to include claims arising out of the same transaction or occurrence. *See Rose v. U.S. Dep't of Educ. (In re Rose),* 187 F.3d 926, 930 (8th Cir. 1999) (finding that a Missouri state agency's "submission of proofs of claims in Roses' bankruptcy case waived its immunity in related proceedings required to adjudicate the dischargeability of those claims"); *Georgia Dep't of Revenue v. Burke (In re Burke),* 146 F.3d 1313, 1319 (11th Cir. 1998) (holding that "by filing a proof of claim in the debtors' respective bankruptcy proceedings, the State waived its sovereign immunity for the purposes of the adjudication of those claims").

Consistent with this authority, we hold today that when a state or an "arm of the state" files a proof of claim in a bankruptcy proceeding, the state waives its Eleventh Amendment immunity with regard to the bankruptcy estate's claims that arise from the same transaction or occurrence as the state's claim. However, whether these claims are limited to only compulsory counterclaim/recoupment, as the Seventh Circuit holds, or allow for a broader affirmative recovery from the state, need not be addressed here. Because the estate's claims are slightly
979 over $4 million and the BOE's proof of claim is at least $13 million[11] in taxes payable to *979 the Fund, affirmative recovery beyond the proof of claim amount is not being sought in this case, and we leave for a future day the question of whether *Gardner* would so permit. We must nevertheless ascertain whether the Trustee's Mandamus Adversary arises out of the same transaction or occurrence as the BOE's proof of claim.

11 The Controller also filed proofs of claims in this case, totaling in excess of $31 million. Under California law, however, only the BOE has authority to file claims for underground-storage-tank (UST) fees. *See* Cal. Health Safety Code § 25299.42 (West 1999); Cal. Rev. Tax. Code §§ 50106, 50108 (West 1994). Therefore, because it is statutorily impossible for the Controller to have filed any authorized claims for UST fees, we find that the Controller's proofs of claims are not logically related to the Trustee's claims in the Mandamus Adversary for UST reimbursement and damages.

b. Same Transaction or Occurrence

To determine whether the Trustee's claims against the State Board in the Mandamus Adversary arise out of the same transaction or occurrence as the proofs of claims filed in the Lazars' bankruptcy case by the BOE, "we apply the so-called `logical relationship' test of Fed.R.Civ.P. 13(a)." *Pinkstaff v. United States (In re Pinkstaff),* 974 F.2d 113, 115 (9th Cir. 1992).

> A logical relationship exists when the counterclaim arises from the same aggregate set of operative facts as the initial claim, in that the same operative facts serve as the basis of both claims or the aggregate core of facts upon which the claim rests activates additional legal rights otherwise dormant in the defendant.

Id.; see also Moore v. New York Cotton Exch., 270 U.S. 593, 610, 46 S.Ct. 367, 70 L.Ed. 750 (1926) ("`Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship."); *Pochiro v. Prudential Ins. Co. of Am.,,* 827 F.2d 1246, 1252 (9th Cir. 1987) (noting the same).

In these proceedings, the BOE filed several proofs of claims against the Lazars' bankruptcy estate, totaling approximately $13 million. An unspecified portion of the BOE's claims are for underground-storage-tank (UST) fees.[12] In the Mandamus Adversary, the Trustee has sued the State Board to reinstate its claims for reimbursement from the Fund and for damages. Accordingly, to determine whether the State Board is entitled to Eleventh Amendment immunity in the Mandamus Adversary, we must determine whether the BOE's claims for unpaid UST fees are logically related to the Trustee's claims for UST reimbursement. [13]*See Pinkstaff,* 974 F.2d at 115.

12 For the period after the Lazars voluntarily petitioned for bankruptcy, the bankruptcy court has determined that the correct amount of the BOE's claim for UST fees is $336,470.32, even though the BOE had initially asserted a $1.8 million claim. This judgment has not been appealed. There is insufficient information in the record to determine what amounts, if any, of the BOE's other proofs of claims are attributable to UST fees, and what amounts, if any, are attributable to sales and use taxes, local taxes, and fuel taxes. We hold that the BOE's non-UST-fee claims are not logically related to the Trustee's claims in the Mandamus Adversary.

13 Because under California law only the BOE may bring a claim to collect unpaid UST fees, *see supra* note 11, in assessing this question of waiver, we do not find it significant that the BOE and the State Board are separate state agencies.

The State Board argues that although an owner or operator of an underground storage tank for which a permit is required must pay fees to the Fund in sums based on the amount of petroleum that is stored in the tanks, *see* Cal. Health Safety Code § 25299.41 (West 1999), whether an owner or operator will receive reimbursements for cleaning up petroleum leaks is dependent upon a detailed statutory scheme under which claimants receive priority based on various factors, *see id.* §§ 25299.52-25299.58 (West 1999 Supp. 2000). The State Board further asserts that, in this case, the denial of the Trustee's reimbursement claims was not based upon the nonpayment of fees, and that, therefore, the bankruptcy court could resolve the Mandamus Adversary without probing into the Lazars' payment of UST fees. Thus, the State Board contends that although the BOE's proofs of claims and the Trustee's claims in the Mandamus Adversary both revolve around the Fund and the Lazars' maintenance of underground storage tanks, the resolution of these *980 claims involves wholly separate inquiries. We disagree.

The BOE's proofs of claims for unpaid UST fees and the Trustee's claims in the Mandamus Adversary both concern the Fund and both arise out of activities associated with the same bankruptcy case. While the BOE demands payments of fees to the Fund, the Trustee seeks reimbursement from the Fund for corrective actions

taken on underground storage tanks. *See Straight,* 143 F.3d at 1392 (holding that "the proofs of claim filed by the State and the motion filed by Mrs. Straight arose out of the same transaction or occurrence — the Debtor's business"); *995 Fifth Ave. Assocs. v. New York State Dep't of Taxation Fin. (In re 995 Fifth Ave. Assocs.),* 963 F.2d 503, 509 (2d Cir. 1992) ("Thus, the appellee's claim for a tax refund arose from the same transaction or occurrence — the sale of the Stanhope Hotel — as the State's claim for additional taxes."). Moreover, the Fund collects fees from owners and operators of underground storage tanks for the ultimate purpose of paying reimbursement claims when those tanks leak petroleum. *See* Cal. Health Safety Code §§ 25299.10, 25299.50-25299.51 (West 1999 Supp. 2000). Therefore, we hold that the Trustee's claims against the State Board in the Mandamus Adversary are logically related to the proofs of claims filed by the BOE for unpaid UST fees. *See Pinkstaff,* 974 F.2d at 115; *see also Price v. United States (In re Price),* 42 F.3d 1068, 1073 (7th Cir. 1994) ("The pertinent inquiry is whether the claim arises out of the same transaction or occurrence and not whether the claims are from the same transaction or occurrence."); *Albright v. Gates,* 362 F.2d 928, 929 (9th Cir. 1966) ("In deciding what is a transaction, we take note that the term gets an increasingly liberal construction.").

Accordingly, because the BOE filed proofs of claim in the bankruptcy proceeding that arise out of the same transaction or occurrence as the Trustee's claims against the State Board in the Mandamus Adversary, the State Board has waived its Eleventh Amendment immunity in the Mandamus Adversary.

14 [14] The bankruptcy court also held, and the Trustee argues, that the State Board waived its Eleventh Amendment immunity in the Mandamus Adversary because the State of California made a "general appearance" in the underlying bankruptcy case in support of its position as one of the most substantial secured creditors in this case. This argument fails, to the extent it is distinct from the argument, analyzed above, that the State Board waived its Eleventh Amendment immunity under *Gardner.* Here, unlike other factual circumstances in which courts have been more receptive to this argument, the State Board immediately asserted an Eleventh Amendment defense in the Mandamus Adversary and moved for remand to state court. *Cf. Wisconsin Dep't of Corrections v. Schacht,* 524 U.S. 381, 393, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998) (Kennedy, J., concurring) ("Consent to removal, it can be argued, is a waiver of the Eleventh Amendment immunity."); *Hill,* 179 F.3d at 763 ("The Eleventh Amendment was never intended to allow a state to appear in federal court and actively litigate the case on the merits, and only later belatedly assert its immunity from suit in order to avoid an adverse result.").

2. Abrogation

In 11 U.S.C. § 106(b), Congress provided that when a state files a proof of claim in a bankruptcy case, the state "is deemed to have waived sovereign immunity with respect to a claim against such [state] that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such [state] arose." 11 U.S.C. § 106(b) (1994). Several courts have considered the issue of whether, by enacting §§ 106(a) and (b), Congress has abrogated the States' sovereign immunity. Some courts have found that §§ 106(a) and (b) are unconstitutional because the sections were enacted pursuant to Article I of the United States Constitution. *See e.g., Sacred Heart Hosp. v. Pennsylvania, Dep't of Pub. Welfare (In re Sacred Heart Hosp.),* 133 F.3d 237, 243-44 (3d Cir. 1998) (holding 11 U.S.C. § 106(a), which purports to abrogate sovereign immunity,
981 unconstitutional); *Department of Transp. Dev. v. PNL* *981 *Asset Management Co. (In re Estate of Fernandez),* 123 F.3d 241, 245 (5th Cir.) (same), *amended by* 130 F.3d 1138 (5th Cir. 1997) (per curiam); *In re Creative Goldsmiths of Washington, D.C., Inc.,* 119 F.3d at 1147-48 (holding section 106(b) unconstitutional). Other courts have concluded that §§ 106(a) and (b) are constitutional because the Bankruptcy Code was enacted pursuant to Section 5 of the Fourteenth Amendment-which has long been recognized by the Supreme Court as a valid source of congressional power to abrogate state's Eleventh Amendment immunity. [15] *See e.g., In re Straight,* 209 B.R. 540, 555 (D.Wyo. 1997) (concluding that application of the Fourteenth Amendment to Section 106 renders it constitutional), *aff'd,* 143 F.3d 1387 (10th Cir.), *cert. denied,* 525 U.S. 982, 119 S.Ct.

446, 142 L.Ed.2d 400 (1998); *In re: Headrick,* 200 B.R. 963, 967 (Bankr.D.Ga. 1996) ("the Fourteenth Amendment allows debtors to enforce the provisions of the Bankruptcy Code in federal court notwithstanding the States' Eleventh Amendment immunity.").

[15] In the Supreme Court case, *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), the Court held that Congress may not abrogate state's Eleventh Amendment immunity from suit in federal court pursuant to its powers under Article I. *Id.* at 72-73, 116 S.Ct. 1114. However, the *Seminole Tribe* Court still recognized Section 5 of the Fourteenth Amendment as a valid source of congressional power to abrogate states' Eleventh Amendment immunity. *Id.* at 59, 116 S.Ct. 1114.

Because we have determined that the state waived its Eleventh Amendment immunity rendering permissible the estate's counterclaim against the state, we refrain from reaching the question of the constitutionality of sections 106(a) or (b). *State of Maryland v. E.P.A.,* 530 F.2d 215, 227 (4th Cir. 1975) ("[I]f a case can be decided on either of two grounds one involving a constitutional question, and the other, a question of statutory construction or general law, the court should decide on the basis of the latter."), *vacated on other grounds,* 431 U.S. 99, 97 S.Ct. 1635, 52 L.Ed.2d 166 (1977); *see e.g., Rose,* 187 F.3d at 930 (concluding that because the court found that the state had "waived its Eleventh Amendment immunity, [the court] need not reach issues of the constitutionality of the abrogation provision of § 106(a) and the statutory provision of § 106(b)").

3. Conclusion

In sum, we hold that because the BOE filed proofs of claims in the Lazars' bankruptcy case that are logically related to the Trustee's claims against the State Board in the Mandamus Adversary, the State Board has waived its Eleventh Amendment immunity in the Mandamus Adversary.

B. Abstention

The State Board also argues that the bankruptcy court erred by not abstaining in the Mandamus Adversary, pursuant to 28 U.S.C. §§ 1334(c)(1) and 1334(c)(2).[16] In *Security Farms v. International Brotherhood of Teamsters,* 124 F.3d 999 (9th Cir. 1997), however, we noted that "[a]bstention can exist only where there is a parallel proceeding in state court." *Id.* at 1009. Thus, we held that:

[16] Because the Lazars filed their bankruptcy petition prior to October 22, 1994, the amendments made to § 1334 by the Bankruptcy Reform Act of 1994 do not apply in this case. *See Wynns v. Wilson (In re Wilson),* 90 F.3d 347, 350 (9th Cir. 1996) (noting that "the Bankruptcy Reform Act of 1994 applies only in bankruptcy cases filed on or after October 22, 1994").

> Section 1334(c) abstention should be read in pari materia with section 1452(b) remand, so that [§ 1334(c)] applies only in those cases in which there is a related proceeding that either permits abstention in the interest of comity, section 1334(c)(1), or that, by legislative mandate, requires it, section 1334(c)(2).

Id. at 1010. On March 22, 1996, the Trustee successfully removed the Mandamus Adversary from state court, and, as a result, "[n]o other related [state] proceeding thereafter exists." *Id.* Accordingly, because *982 there is no pending state proceeding, §§ 1334(c)(1) and 1334(c)(2) are simply inapplicable to this case. *See id.* at 1009-10.

[17] [17] In *Eastport Associates v. City of Los Angeles (In re Eastport Associates),* 935 F.2d 1071 (9th Cir. 1991), we reviewed the district court's order refraining from abstention under § 1334(c)(1), even though "no state court proceeding ha[d] been commenced in [the] case." *Id.* at 1079. The Mandamus Adversary is distinguishable from *Eastport Associates,* however, because the action in *Eastport Associates* was not removed to federal court. *See id.* at 1078-79. Thus, the

> remand provisions of 28 U.S.C. § 1452(b) were inapplicable in *Eastport Associates. See* 28 U.S.C. § 1452(b). In this case, on the other hand, as in *Security Farms,* we are confronted with the interrelationship between § 1334(c) and § 1452(b). *See Security Farms,* 124 F.3d at 1010 ("To require a pendant state action as a condition of abstention eliminates any confusion with 28 U.S.C. § 1452(b). . . .").

Furthermore, to the extent that the State Board appeals the bankruptcy court's decision against remanding the Mandamus Adversary, and "to the extent that we are required to construe [the State Board's] motion to abstain as a motion to remand," *id.* at 1009, we lack jurisdiction over the appeal. 28 U.S.C. § 1452(b) (1994) (stating that "a decision to not remand . . . is not reviewable by appeal or otherwise by the court of appeals"); *Security Farms,* 124 F.3d at 1009-10 n. 7 ("Section 1452(b) prevents this court from reviewing a district court's decision not to remand.").

III. TAX ADVERSARY

In the Tax Adversary, we are confronted with two distinct issues. The Fund appeals the district court's determination that it is not an "arm of the state" and thus cannot invoke Eleventh Amendment immunity. The Trustee cross-appeals the district court's order affirming the bankruptcy court's judgment that the fees paid into the Fund are "taxes" for the purposes of bankruptcy, pursuant to 11 U.S.C. § 507(a)(8). We examine each issue in turn.

A. Arm of the State

We have jurisdiction under the collateral order doctrine to review the district court's denial of the Fund's claim that it is an arm of the State of California. *Metcalf Eddy, Inc.,* 506 U.S. at 147, 113 S.Ct. 684. We review questions of Eleventh Amendment immunity de novo. *Hill,* 179 F.3d at 756.

In determining the Eleventh Amendment status of a defendant, "[t]here may be a question . . . whether a particular suit in fact is a suit against a State." *Pennhurst,* 465 U.S. at 100, 104 S.Ct. 900. It is well established that the Eleventh Amendment's "reference to actions `against one of the United States' encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities." *Regents of the Univ. of Cal. v. Doe,* 519 U.S. at 429, 117 S.Ct. 900.

We inquire into the relationship between the state and its instrumentality to decide whether it may invoke the state's immunity. *Id.* In particular,

> [t]o determine whether a governmental agency is an arm of the state, the following factors must be examined: [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has the power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.

Durning v. Citibank, N.A., 950 F.2d 1419, 1423 (9th Cir. 1991) (quoting *Mitchell v. Los Angeles Community College Dist.,* 861 F.2d 198, 201 (9th Cir. 1988)) (internal quotation marks omitted). "[W]hether a particular state agency . . . is an arm of the State . . . is a question of federal law. But that federal question can be answered only after considering the provisions of state law that define the agency's character." *Regents of the*
983 *Univ. of Cal. v. Doe,* *983 519 U.S. at 429 n. 5, 117 S.Ct. 900. On balance, we hold that the five *Durning* factors compel the conclusion the Fund is an arm of the State of California.

The first factor, namely "whether a judgment against the [Fund] under the terms of the [Tax Adversary] complaint would have to be satisfied out of the limited resources of the [Fund] itself or whether the state treasury would also be legally pledged to satisfy the obligation," *ITSI TV Prods., Inc. v. Agricultural Ass'ns,* 3 F.3d 1289, 1292 (9th Cir. 1993) (quoting *Durning,* 950 F.2d at 1424) (internal quotation marks omitted), provides little guidance in this case. That is, in the Tax Adversary, the Trustee seeks from the Fund both reimbursement for the "improper payment of fees" and actual damages, and these differing claims point us in different analytical directions.

More precisely, under California law, the Trustee's reimbursement claims would be "paid only out of the [F]und," Cal. Health Safety Code § 25299.60(b) (West 1999), and "the [California] state treasury is not liable," *Durning,* 950 F.2d at 1425; *see* Cal. Health Safety Code § 25299.60. Thus, to the extent the Trustee seeks reimbursement from the Fund in the Tax Adversary, this first factor weighs against an arm-of-the-state finding. *See Durning,* 950 F.2d at 1424-26 ("When a state entity is structured so that its obligations are its own special obligations and not general obligations of the state, that fact weighs against a finding of sovereign immunity under the arm of the state doctrine."). As to the Trustee's nonreimbursement, damages claims, however, no statute specifically protects the state treasury from a court judgment against the Fund, and, in fact, California law provides that when the Fund sunsets, all of its liabilities shall be transferred to the state's general fund. Cal. Gov't Code § 16346 (West 1995) (providing that whenever a special fund in the state treasury is abolished, and no successor fund is specified in the act providing for abolition, all of the special fund's liabilities shall be transferred to and become a part of the general fund). Thus, to the extent the Trustee seeks not reimbursement, but actual damages from the Fund in the Tax Adversary, this factor appears to weigh in favor of an arm-of-the-state finding. In short, this first factor "is a close question and for this reason is entitled to little weight in the overall balance." *Belanger v. Madera Unified Sch. Dist.,* 963 F.2d 248, 254 (9th Cir. 1992).

The second factor in our arm-of-the-state inquiry, however, is not uncertain, and it weighs strongly in favor of finding that the Fund is an arm of the state. The Fund "performs central governmental functions," *Rounds,* 166 F.3d at 1035, and "California exercises substantial centralized control over the [Fund]," *Belanger,* 963 F.2d at 253; *see also Franceschi v. Schwartz,* 57 F.3d 828, 831 (9th Cir. 1995) (noting that, in performing an arm-of-the-state analysis, a court must "assess the extent to which the entity `derives its power from the State and is ultimately regulated by the State.'" (quoting *Greater Los Angeles Council on Deafness, Inc. v. Zolin,* 812 F.2d 1103, 1110 (9th Cir. 1987))).

The California legislature created the Fund to protect "public health and safety and the environment" in light of the perception that "a significant number of the underground storage tanks containing petroleum in the state may be leaking." Cal. Health Safety Code § 25299.10(b)(1), (3) (West 1999 Supp. 2000). Nonetheless, the Trustee argues that the Fund was enacted primarily for the financial benefit of tank owners. In particular, he characterizes the Fund as an insurance measure sponsored by a service-station lobby and as a means by which underground storage tank owners and operators may comply with their federal financial-responsibility requirements.

That the Fund works to the benefit of owners and operators of underground storage tanks does not diminish its public importance. Rather, the language of the authorizing statute demonstrates that the Fund performs services
984 that benefit owners and operators for the purpose of protecting *984 the public health. *Id.* § 25299.10(b)(5), (6) (West 1999 Supp. 2000) ("There are long-term threats to public health and water quality if a comprehensive, uniform, and efficient corrective action program is not established. . . . It is in the best interest of the health and safety of the people of the state to establish a fund to pay for corrective action where coverage is not available.").

Moreover, the California Health and Safety Code is replete with provisions establishing that the state is both the Fund's source of power and its ultimate regulator. For example, section 25299.50(a) provides that the Fund is created in the state treasury. *See id.* § 25299.50(a). This same section authorizes the State Board to expend the Fund's monies "upon appropriation by the Legislature." *Id.* Therefore, we conclude that the Fund "derives its power from the State." *Franceschi,* 57 F.3d at 831.

We also conclude that the Fund is ultimately regulated by the state through the State Board. By statute, the State Board must "report at least once every three months on the [payment of claims from the Fund] to the Senate Committee on Budget and Fiscal Review, the Senate Committee on Environmental Quality, the Assembly Committee on Budget, and the Assembly Committee on Environmental Safety and Toxic Materials, or to any successor committee, and to the Director of Finance." Cal. Health Safety Code § 25299.50(c)(2) (West Supp. 2000). Additionally, the State Board has statutory authority to "modify existing accounts or create accounts in the [F]und or other funds administered by the board, which the board determines are appropriate or necessary for proper administration." *Id.* § 25299.50(a) (West 1999 Supp. 2000). The state's regulation of the Fund is also manifested through the BOE's statutory authority to adopt regulations to carry out its role as the collector of Fund fees. *See id.* § 25299.42(a) (West 1999).

Accordingly, we find that this second factor weighs heavily in favor of finding that the Fund is an arm of the state.

As for the remaining factors, the California legislature has not granted the Fund corporate status or given it the power to take property in its own name. Thus, these two factors weigh in the Fund's favor. *See Durning,* 950 F.2d at 1427. Finally, the Fund admits that it may sue or be sued in its own name, which would weigh against an arm-of-the-state finding. *See id.* at 1427. Although recent legislation adds some uncertainty to this admission, *compare* Cal. Health Safety Code § 25299.52(g) (West 1999) ("The fund may sue and be sued in its own name."), *with id.* § 25299.52 (West.Supp. 2000) (deleting subsection (g), pursuant to 1999 legislative amendments), this factor does not turn the balance in any event.

For the foregoing reasons, then, we must conclude that, on balance, the Fund is an arm of the State of California, thereby entitled to invoke Eleventh Amendment immunity.[18] In reaching this conclusion, we find it most significant that the California legislature established the Fund to serve the central governmental function of ensuring safe and healthy water resources for the state's citizens.

[18] Whether the Fund, as opposed to the State Board, waived its Eleventh Amendment immunity is not before us on this appeal. We therefore leave that question to the bankruptcy court on remand. In answering this question, the bankruptcy court may find guidance in our discussion of the State Board's waiver of immunity. *See supra* Part II.A.1.

B. Fees as Taxes

The Trustee has cross-appealed in the Tax Adversary, arguing that the district court erred in finding that the fees paid into the Fund are taxes under 11 U.S.C. § 507(a)(8). Because we lack jurisdiction over this non-final judgment, however, we cannot consider the Trustee's appeal.

985 Under 28 U.S.C. § 158(d), we "have jurisdiction of appeals from all final decisions, *985 judgments, orders, and decrees entered under" 28 U.S.C. § 158(a). 28 U.S.C. § 158(d) (1994). 28 U.S.C. § 158(a) in turn provides that "[a] district court has jurisdiction over a bankruptcy appeal from: (1) final judgments, orders, or decrees, and (2) interlocutory orders with leave from the bankruptcy court." *Duckor Spradling Metzger v. Baum Trust*

(In re P.R.T.C., Inc.), 177 F.3d 774, 779 (9th Cir. 1999) (citing 28 U.S.C. § 158(a)(1), (3)). The Trustee "did not seek or obtain leave from the bankruptcy court to appeal. Thus, the district court had jurisdiction over the appeal, if at all, as a final judgment." *Id.*

"[T]his court has adopted a `pragmatic approach' to finality in bankruptcy cases." *Id.* at 780. "This `pragmatic approach' . . . focuses on whether the decision appealed from `effectively determined the outcome of the case.'" *Elliott v. Four Seasons Properties (In re Frontier Properties, Inc.),* 979 F.2d 1358, 1363 (9th Cir. 1992) (quoting *In re Mason,* 709 F.2d 1313, 1318 (9th Cir. 1983)). Specifically, "[a] bankruptcy court order is final and thus appealable `where it 1) resolves and seriously affects substantive rights and 2) finally determines the discrete issue to which it is addressed.'" *Law Offices of Nicholas A. Franke v. Tiffany (In re Lewis),* 113 F.3d 1040, 1043 (9th Cir. 1997) (quoting *In re Frontier Properties, Inc.,* 979 F.2d at 1363). "[T]raditional finality concerns nonetheless dictate that we avoid having a case make two complete trips through the appellate process." *Id.* (internal quotation marks and citations omitted).

In response to the Trustee's motion for partial summary judgment, the bankruptcy court ruled that "[t]he Fees imposed by Article 5 of Chapter 6.75 of the California Health Safety Code are taxes for the purposes of 11 U.S.C. § 507(a)(8)." The Trustee argues that this ruling is final under § 158(a) because the court's "characterization [of the monies paid into the Fund] will determine the priority of payments . . . because taxes have priority and fees do not." We reject the Trustee's argument.

It is true, of course, that the Bankruptcy Code grants priority status to "taxes." 11 U.S.C. § 507(a)(8) (1994). The Tax Adversary, however, is, at its core, an action by the Trustee seeking equitable subordination[19] of the BOE's postpetition claims for UST fees. In *United States v. Noland,* 517 U.S. 535, 116 S.Ct. 1524, 134 L.Ed.2d 748 (1996), and *United States v. Reorganized CF I Fabricators, Inc.,* 518 U.S. 213, 116 S.Ct. 2106, 135 L.Ed.2d 506 (1996), the Supreme Court held that "[d]ecisions about the treatment of *categories* of claims in bankruptcy proceedings . . . are not dictated or illuminated by principles of equity and do not fall within the judicial power of equitable subordination." *Noland,* 517 U.S. at 541 (emphasis added) (omission in original) (quoting *Burden v. United States,* 917 F.2d 115, 122 (3d Cir. 1990) (Alito, J., concurring in part and dissenting in part)) (internal quotation marks omitted); *accord Reorganized CF I Fabricators, Inc.,* 518 U.S. at 229, 116 S.Ct. 2106 ("The principle is simply that categorical reordering of priorities that takes place at the legislative level of consideration is beyond the scope of judicial authority to order equitable subordination under § 510(c)."). In so doing, however, the Supreme Court reaffirmed what is relevant to this case: that "`principles of equitable subordination' permit a court to make exceptions to a general rule when justified by particular facts." *Noland,* 517 U.S. at 535, 116 S.Ct. 1524; *see* *986 *also Paulman v. Gateway Venture Partners III, L.P. (In re Filtercorp, Inc.),* 163 F.3d 570, 583 (9th Cir. 1998) (noting that "equitable subordination requires that . . . the claimant who is to be subordinated has engaged in inequitable conduct"). The Trustee alleges such "particular facts" and "inequitable conduct" in his Tax Adversary complaint. Thus, if the bankruptcy court rules in favor of the Trustee on his equitable-subordination claim, the BOE's claims for UST fees, be they "taxes" or not, will be subordinated. *See Noland,* 517 U.S. at 535, 116 S.Ct. 1524.

19 [20] "Equitable subordination requires that (1) the claimant who is to be subordinated has engaged in inequitable conduct; (2) the misconduct results in injury to competing claimants or an unfair advantage to the claimant to be subordinated; and (3) subordination is not inconsistent with bankruptcy law." *Paulman v. Gateway Venture Partners III, L.P. (In re Filtercorp, Inc.),* 163 F.3d 570, 583 (9th Cir. 1998) (quoting *Spacek v. Thomen (In re Universal Farming Indus.),* 873 F.2d 1334, 1337 (9th Cir. 1989)) (internal quotation marks omitted).

20 Indeed, in his motion in the bankruptcy court for partial summary judgment on the taxes-versus-fees question, the Trustee argued only that "the [BOE's] claim for Fees . . . can be *more easily equitably subordinated* as pled in the complaint because they are not taxes." (emphasis added).

Because the bankruptcy court's order did not "resolve the question of priority," then, it is not final. *United States v. Stone (In re Stone),* 6 F.3d 581, 583 n. 1 (9th Cir. 1993); *accord Christian Life Ctr. Litig. Defense Comm. v. Silva (In re Christian Life Ctr.),* 821 F.2d 1370, 1373 (9th Cir. 1987) (holding that the bankruptcy court's order was final and appealable because it "finally determined the question of subordination of officers' indemnity claims" and "[n]o further action on this issue [wa]s contemplated or necessary"); *see also In re P.R.T.C., Inc.,* 177 F.3d at 780 (noting that, to be "final," a bankruptcy order must "finally determine the discrete issue to which it is addressed" and "resolve and seriously affect substantive rights"). The district court, therefore, did not have jurisdiction under § 158(a). 28 U.S.C. § 158(a); *In re P.R.T.C., Inc.,* 177 F.3d at 779 (explaining the district court's jurisdiction over bankruptcy appeals). And "we do not have jurisdiction to review cases in which the district court affirms an order of the bankruptcy court that is not final." *Vylene Enters., Inc. v. Naugles, Inc. (In re Vylene Enters., Inc.),* 968 F.2d 887, 895 (9th Cir. 1992). Accordingly, we dismiss the Trustee's cross-appeal.

21 [21] The State Appellants' motion to strike portions of the Trustee's reply brief is Granted. The Trustee's appeal in this case was limited to the two issues discussed above relating to the Tax Adversary. On February 12, 1998, we issued an order stating that the Trustee may file a reply brief for his appeal. Because portions of the Trustee's reply brief discuss issues extending beyond the subject matter of his appeal, we are compelled to order those portions stricken so as not to unfairly disadvantage the State Appellants in resolving the Trustee's appeal.

IV. CONCLUSION

In the Mandamus Adversary, we hold that the State Board is an arm of the State of California, but that it has waived its Eleventh Amendment immunity. Accordingly, we affirm in part and reverse in part the district court's judgment that the State Board enjoys no Eleventh Amendment immunity in the Mandamus Adversary. We also dismiss the State Board's abstention appeal for lack of jurisdiction.

In the Tax Adversary, we hold that the Fund is an arm of the state, and we therefore reverse the district court's judgment to the contrary and remand for further proceedings. Finally, we dismiss the Trustee's cross-appeal for lack of jurisdiction.

AFFIRMED in part, REVERSED in part, DISMISSED in part, and REMANDED.

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In Re Vianese, 195 B.R. 572 – CourtListener.com

195 B.R. 572

Stephen D. Gerling

195 B.R. 572 (1995)
Bankruptcy No. 95-60060. Adv. No. 95-70066.

United States Bankruptcy Court, N.D. New York.

November 3, 1995.

James F. Selbach, Syracuse, New York, for Debtors/Defendants.

Oneida Indian Nation Legal Dept., Oneida, New York (Paul J. Rinko, of counsel), for Plaintiff.

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

STEPHEN D. GERLING, Chief Judge.

Presently before the Court is a motion filed on June 26, 1995, by Constance A. Vianese (C. Vianese) seeking summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), incorporated by reference in Rule 7056 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."), in the adversary proceeding commenced by Turning Stone Casino[1] ("Plaintiff') on April 10, 1995, against C. Vianese and her husband, Joseph L. Vianese ("J. Vianese") (hereinafter jointly referred to as "Debtors"). Plaintiff seeks a determination of the dischargeability of a debt pursuant to §§ 523(a)(2)(A) and (B), as well as § 523(a)(4), of the Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code"). C. Vianese contends that the Plaintiff's Complaint as against her is not substantially justified and, therefore, she is entitled to a dismissal of the Complaint, as well as an award of attorney's fees and costs in the amount of $500 pursuant to Code § 523(d).

The Court heard oral argument on July 18, 1995, at its regular motion term in Syracuse, New York. The parties were afforded an opportunity to file memoranda of law,[2] and the matter was submitted for decision on August 8, 1995.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(2)(I).

FACTS

On January 6, 1995, the Debtors filed a voluntary joint petition ("Petition") pursuant to Chapter 7 of the Code. According to Schedule "F", filed with the Petition, Plaintiff is listed as holding a fixed and liquidated claim in the amount of $16,500, identified as gambling debts. On April 10, 1995, Plaintiff filed its Complaint against both Debtors.

In its Complaint, Plaintiff alleges that on or about February 24, 1994, J. Vianese submitted a credit application requesting an extension of credit and check cashing privileges at the Turning Stone Casino. Plaintiff alleges that J. Vianese wrote a check dated September 11, 1994, payable to Plaintiff in the amount of $16,500, which was returned because of insufficient funds in J. Vianese's bank account. Plaintiff acknowledges that its Complaint contains no allegations with respect to C. Vianese.

DISCUSSION

Fed.R.Civ.P. 56(c) provides that summary judgment must be granted when there exists "no genuine issue as to any material fact [such] that the moving party is entitled to judgment as a matter of law." Federal Deposit Ins. Corp. v. Bernstein, 944 F.2d 101, 106 (2d Cir.1991). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986); Gallo v. Prudential Residential Servs., Ltd. Partnership 22 F.3d 1219, 1223 (2d Cir.1994). For purposes of a summary judgment motion, the movant has the burden of showing that there does not exist a genuine issue as to any material fact. Securities Exchange Comm'n v. Research Automation Corp., 585 F.2d 31, 33 (2d Cir.1978).

In the case at bar, Plaintiff does not suggest that the acts of J. Vianese from which its claim arose should in any way be imputed to C. Vianese. In fact, Plaintiff's counsel acknowledges that its Complaint does not allege a single cause of action against C. Vianese. Plaintiff's counsel also admits that the inclusion of C. Vianese as a defendant in the adversary proceeding was an "innocuous oversight" on its part (see ¶ 5 of Respondent's Affidavit, dated July 14, 1995). The Court concludes that there are no genuine issues of material fact with respect to the cause of action against C. Vianese's as set forth in Plaintiff's Complaint. Accordingly, C. Vianese's motion for summary judgment dismissing the Complaint is granted and she shall not be denied a discharge of the indebtedness to Plaintiff based upon Code § 523(a)(2)(A) or (B) (see In re Schoelier, 178 B.R. 395 (Bankr.M.D.Pa. 1994)).

In addition to requesting summary judgment dismissing Plaintiff's Complaint as to C. Vianese, C. Vianese seeks to recover attorney's fees and costs pursuant to Code § 523(d) on the basis that Plaintiff's Complaint against her was not substantially justified. However, before determining whether C. Vianese is entitled to an award of attorney's fees and costs, the Court must address Plaintiff's assertion that sovereign immunity precludes C. Vianese from seeking to recover attorney's fees and costs from it.

An Indian nation possesses sovereign immunity from suit that existed at common law. Rupp v. Omaha Indian Tribe, 45 F.3d 1241, 1245 (8th Cir.1995), citing Rosebud Sioux Tribe v. A & P Steel, Inc., 874 F.2d 550, 552 (8th Cir.1989). In addition, "an action against a tribal enterprise is, in essence, an action against the tribe itself." Barker v. Menominee Nation Casino, 897 F. Supp. 389 (E.D.Wis.1995). The Supreme

Court has indicated that "Indian tribes are `domestic dependent nations' that exercise inherent sovereign authority over their members and territories." Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 508, 111 S. Ct. 905, 909, 112 L. Ed. 2d 1112 (1991). Although Indian nations have the right of internal self-government, including the right to prescribe laws applicable to nation members and to enforce those laws, no statute or treaty has been cited which would give an Indian nation the authority to litigate bankruptcy issues with non-Indians. In re Shape, 25 B.R. 356, 359 (Bankr.D.Montana 1982). In this case, Plaintiffs only recourse in seeking to have the debt owed by J. Vianese determined to be non-dischargeable was to commence an adversary proceeding in this Court. In commencing the adversary proceeding, Plaintiff necessarily consented to the Court's jurisdiction to determine any related claims brought adversely against it. See Rupp, supra, 45 F.3d at 1245. While such counterclaims generally take the form of recoupment (see Rosebud, supra, 874 F.2d at 552 (citations omitted), it would be inequitable under the present circumstances to permit Plaintiff to pursue its cause of action pursuant to Code § 523(a)(2) without allowing C. Vianese to seek to recover attorney's fees and costs as permitted under Code § 523(d). This also comports with the view that "[a] creditor cannot reasonably expect to invoke those portions of the bankruptcy code that allow it to recover on its claims and yet avoid the legal effect of other sections that do not work in its favor." In re PNP Holdings Corp., 184 B.R. 805, 807 (9th Cir. BAP 1995). Accordingly, C. Vianese was entitled to seek recovery of attorney's fees and costs with respect to Plaintiff's causes of action brought pursuant to Code § 523(a)(2).

Even if the Court had determined that Plaintiff had not waived its claim of sovereign immunity by filing its Complaint against the Debtors, its immunity "exists only at the sufferance of Congress and is subject to complete defeasance." United States v. Wheeler, 435 U.S. 313, 323, 98 S. Ct. 1079, 1086, 55 L. Ed. 2d 303 (1978). On October 22, 1994, the Bankruptcy Reform Act of 1994 ("Bankruptcy Reform Act") amended Code § 106 to make it "unmistakably clear" that Congress intended to abrogate sovereign immunity to the extent set forth in that section of the Code. In re York-Hannover Developments, Inc., 181 B.R. 271, 273 (Bankr.E.D.N.C.1995); see also In re Bison Heating & Equipment, Inc., 177 B.R. 785, 788 (Bankr.W.D.N.Y.1995) (Bankruptcy Code has significantly enlarged the statutory waiver of sovereign immunity.) The Code's waiver of sovereign immunity is applicable to the matter herein since Debtors filed their Petition after October 22, 1994, on January 6, 1995. Furthermore, the Bankruptcy Reform Act provided for retroactive application of Code § 106(a) to those cases filed prior to October 22, 1994, as well. See United States v. Ryan, 64 F.3d 1516, 1520 n. 2 (11th Cir. 1995).

Sovereign immunity is abrogated to the extent set forth in various Code sections specifically enumerated in Code § 106(a)(1), including Code § 523. Code § 106(a) provides that said abrogation is applicable to "governmental units." Code § 101(27) defines "governmental unit" as United States; State; Commonwealth; District; Territory . . . or other foreign or domestic government. As noted previously, Indian nations are considered "domestic dependent nations" and as such comprise "governmental units" within the meaning of Code § 101(27). Therefore, even if the Court had determined that Plaintiff had not waived sovereign immunity by commencing the adversary proceeding against the Debtors pursuant to Code § 523, Code § 106(a) abrogates whatever sovereign immunity Plaintiff might otherwise have had with respect to C. Vianese's motion seeking attorney's fees and costs.

To prevail on a motion pursuant to Code § 523(d), the debtor must establish (1) the

creditor sought a determination of the dischargeability of a debt pursuant to Code § 523(a)(2), (2) the debt is a consumer debt, and (3) the debt was discharged. See generally In re Harvey, 172 B.R. 314, 317 (9th Cir. BAP 1994), citing In re Kullgren, 109 B.R. 949, 953 (Bankr.C.D.Calif.1990) and FCC Nat'l Bank v. Dobbins, 151 B.R. 509, 511 (W.D.Mo.1992). The burden then shifts to the creditor to prove that its actions in requesting said determination were substantially justified and that there are special circumstances that would make an award of fees unjust. Id., citing In re Rhodes, 93 B.R. 622, 624 (Bankr.S.D.Ill.1988).

In the matter sub judice, there is no question that Plaintiff sought a determination of the dischargeability of a debt pursuant to Code §§ 523(a)(2)(A) and (B) against both Debtors and that this Court has determined that the debt is dischargeable as to C. Vianese. The question then arises whether the debt is a "consumer debt."

The Code defines "consumer debt" as one "incurred by an individual primarily for a personal, family, or household purpose." See Code § 101(8). This is to be distinguished from a "business debt" which is normally incurred "with an eye toward profit" (see In re Booth, 858 F.2d 1051 (5th Cir.1988)) and which is "motivated for ongoing business requirements" (see In re Berndt, 127 B.R. 222, 224 (Bankr.D.N.D.1991)). While gambling may be a business in some instances, in this case neither of the Debtors earns a living by gambling. According to the Petition, J. Vianese is an Assistant Superintendent of Business for Oswego County BOCES, and C. Vianese is or was a Sales Manager for a local real estate company. Under these circumstances, the gambling losses or debt should be viewed as "an excess similar to other excesses associated with living beyond one's means." See In re Hammer, 124 B.R. 287, 290 (Bankr.C.D.Ill.1991) (dictum), decision vacated by In re Pilgrim, 135 B.R. 314 (C.D.Ill.1992); see also Berndt, supra, 127 B.R. at 224 (comparing stock market investing with "gambling, a hobby or a whim" and concluding that any debt derived from such activities comprised "consumer debt"). While the debt may have been incurred in the hope of generating a profit, nevertheless, the Court concludes that it was incurred for personal purposes and is a consumer debt within the meaning of Code § 523(d).

The Court has previously concluded that C. Vianese is entitled to a discharge of the debt owed to Plaintiff. Therefore, her burden has been met with respect to the third element of proof pursuant to Code § 523(d). The burden then shifts to Plaintiff to establish that it was substantially justified in bringing its Complaint against C. Vianese. In other words, Plaintiff must prove that its allegations against C. Vianese "had a reasonable basis in law and fact." See Dobbins, supra, 151 B.R. at 512 (citation omitted); Harvey, supra, 172 B.R. at 318. As noted above, Plaintiff acknowledges that in its Complaint there are no allegations asserted against C. Vianese. Clearly, Plaintiff was not substantially justified in seeking a determination of nondischargeability against C. Vianese pursuant to Code § 523(a)(2).

The question then arises whether there are special circumstances which would preclude the Court's awarding attorney's fees and costs to C. Vianese. Plaintiff asserts that C. Vianese was included as a defendant in its Complaint as a result of a typographical error. At the hearing, counsel for Plaintiff argued that he had been willing to stipulate to the discontinuance of the action against C. Vianese as long as it was "without prejudice" (see Exhibit "C" of Affirmation of Plaintiff's attorney, dated July 14, 1995). Counsel for C. Vianese refused to sign any stipulation that did not contain language indicating that the Complaint was being dismissed "with prejudice" as to C. Vianese (see Exhibit "D" of Affirmation of Plaintiffs attorney, dated July 14, 1995). Given Plaintiff's admission that none of the allegations enumerated in its

Complaint were made against C. Vianese, the Court concludes that counsel for C. Vianese acted in the best interest of his client in requiring that the action be discontinued or dismissed "with prejudice." Therefore, the Court concludes that there are no special circumstances which would preclude an award of attorney's fees and costs to C. Vianese.

In this regard, Code § 106(a)(3) authorizes the Court to issue an order or judgment against a governmental unit, including awarding a money recovery. Code § 106(a)(3) stipulates that any recovery against a governmental unit be consistent with the provisions and limitation of 28 U.S.C. § 2412(d)(2)(A). Pursuant to 28 U.S.C. § 2412(d)(2)(A)(ii), attorney fees are not to be awarded in excess of $75 per hour "unless the court determines that an increase in the cost of living or a special factor . . . justifies a higher fee." In this case, the Court finds no basis for awarding attorney's fees at a rate in excess of the statutory rate of $75 per hour.

Based on the foregoing, it is

ORDERED that Plaintiff's Complaint against C. Vianese be dismissed with prejudice; it is further

ORDERED that C. Vianese is discharged of any alleged debt owed to Plaintiff as set forth in said Complaint; it is further

ORDERED that pursuant to Code § 523(d), C. Vianese is awarded attorney's fees at the rate of $75 per hour, as well as costs, associated with her motion for summary judgment, not to exceed $500; and it is further

ORDERED that counsel for C. Vianese file with the Court and serve on Plaintiff an affidavit, along with time records, in support of said award of attorney's fees and costs, said affidavit to be filed and served within 30 days of the date of this Order.

NOTES

[1] Turning Stone Casino, located in Verona, New York, is owned and operated by the Oneida Indian Nation of New York.

[2] Neither party elected to file a memorandum of law.

IN RE GREEKTOWN HOLDINGS, LLC

Bankruptcy No. 08-53104. Adversary No. 10-05712. No. 14-14103.

532 B.R. 680 (2015)

In re GREEKTOWN HOLDINGS, LLC, Debtor, Buchwald Capital Advisors, LLC, solely in its capacity as Litigation Trustee for the Greektown Litigation Trust, Plaintiff, v. Dimitrios ("JIM") Papas, et al., Defendants. Sault Ste. Marie Tribe of Chippewa Indians; Kewadin Casinos Gaming Authority, Appellants, v. Buchwald Capital Advisors, LLC, Litigation Trustee for the Greektown Litigation Trust, Appellees.

United States District Court, E.D. Michigan, Southern Division.

Signed June 9, 2015.

Attorney(s) appearing for the Case

Joel D. Applebaum, Clark Hill, Detroit, Linda M. Watson, Clark Hill, Birmingham, MI, Mark N. Parry, Moses and Singer, New York, NY, for Plaintiff/Appellees.

David A. Lerner, Plunkett & Cooney (Bloomfield Hills), Bloomfield Hills, MI, Grant Cowan, Frost Brown Todd LLC, Cincinnati, OH, for Appellants.

OPINION AND ORDER REVERSING THE BANKRUPTCY COURT'S AUGUST 13, 2014 ORDER DENYING THE TRIBE'S RENEWED MOTION TO DISMISS ON THE GROUNDS OF SOVEREIGN IMMUNITY AND REMANDING FOR FURTHER PROCEEDINGS

PAUL D. BORMAN, *District Judge.*

This matter is before the Court on Appellants Sault St. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority's (Appellants or collectively "the Tribe") appeal of United States Bankruptcy Judge Walter J. Shapero's August 13, 2014 Opinion and Order denying Appellants' motion to dismiss based on sovereign immunity. (ECF No. 1, Notice of Appeal; ECF No. 8, Brief of Appellant.) Appellee Buchwald Capital Advisors LLC, Litigation Trustee for the Greektown Litigation Trust (Appellee or "the Litigation Trustee") filed a Response (ECF No. 10) and the Tribe filed a Reply (ECF No. 12). The Court held a hearing on April 1, 2015.

For the reasons that follow, the Court REVERSES the decision of the Bankruptcy Court, finds that Congress did not clearly and unequivocally express an intent to abrogate the sovereign immunity of Indian tribes in section 106(a) of the Bankruptcy Code, and REMANDS the matter to the Bankruptcy Court for further proceedings on the issue of whether the Tribe waived its sovereign immunity from suit in the underlying bankruptcy proceedings.

INTRODUCTION

In this bankruptcy appeal, the Tribe challenges the Bankruptcy Court's ruling in the underlying Adversary Proceeding that Congress intended to abrogate tribal sovereign immunity from suit in section 106(a) of the Bankruptcy Code when it abrogated the sovereign immunity of "governmental unit[s]," and further defined a "governmental unit" in section 101(27) of the Bankruptcy Code to include "other ... domestic government[s]." The Tribe appeals the Bankruptcy Court's Order denying its motion to dismiss based on sovereign immunity, arguing that the failure of the Legislature to clearly

and unequivocally manifest an intent to abrogate tribal sovereign immunity when describing the entities whose sovereign immunity was abrogated under the Bankruptcy Code requires dismissal of the claims against it in the Bankruptcy Court Adversary Proceeding. The Litigation Trustee responds that the Legislature need not invoke the magic words "Indian tribes" when intending to remove the cloak of sovereign immunity that otherwise shields Indian tribes from suits against them and argues that the Legislature clearly and equivocally intended just that when it included the catchall phrase "or other ... domestic government" in section 101(27) of the Bankruptcy Code when defining the term "governmental unit."

I. BACKGROUND

On May 28, 2008, Greektown Holdings, LLC and certain affiliates (collectively the "Debtors"), commenced proceedings under Chapter 11 of the United States Bankruptcy Code, *In re: Greektown Holdings, LLC, et al., Debtors* (E.D.Mich.Bankr.No. 08-53104). On or about May 28, 2010, this Adversary Proceeding was commenced, *The Official Committee of Unsecured Creditors on Behalf of the Estate of Greektown Holdings, LLC*[1] *v. Dimitrios*

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("Jim") Papas, Viola Papas, Ted Gatzaros, Maria Gatzaros, Barden Development, Inc., Lac Vieux Desert Band of Lake Superior Chippewa Indians, Sault Ste. Marie Tribe of Chippewa Indians, Kewadin Casinos Gaming Authority, and Barden Nevada Gaming, LLC (E.D.Mich. Bankr.Adv.Pro. No. 10-05712). The Complaint in the Adversary Proceeding alleges that $177 million was fraudulently transferred by the debtor, Greektown Holdings, LLC ("Holdings"), to the Defendants for no or inadequate consideration. (Adv. Pro. ECF No. 1, Complaint.)[2] The Complaint alleges that the fraudulent transfers from Holdings may be avoided and recovered under sections 544 and 550 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.,* and under the Michigan Uniform Fraudulent Transfers Act ("MUFTA") (Mich. Comp. Laws § 566.31 *et seq.*).

Shortly after the Adversary Proceeding was commenced, on June 25, 2010, the Tribe filed a motion to dismiss the MUFTA claims against it on the grounds of sovereign immunity. (Adv. Pro. ECF No. 8.) The Litigation Trustee opposed the motion (Adv. Pro. ECF No. 56) and the Tribe replied (Adv. Pro. ECF No. 69). Subsequently the parties stipulated to bifurcate the hearing on the motion to dismiss to first decide the purely legal question of whether Congress, in Section 106(a) of the Bankruptcy Code, abrogated the Tribe's sovereign immunity and thereafter, if necessary, to decide whether the Tribe waived its sovereign immunity by participating in the Bankruptcy proceedings. The Bankruptcy Court heard oral argument on December 29, 2010, and took the matter under advisement.

While the issue of sovereign immunity was still under advisement in the Bankruptcy Court, in 2012 the Tribe and the Litigation Trustee reached a settlement, filed a motion to have the settlement approved and requested that the Bankruptcy Court hold off ruling on the Tribe's motion to dismiss pending a decision on the Settlement Motion. This Court approved the Settlement Agreement, which contained a claims bar order that was an important aspect of the Settlement Agreement. (*In re Greektown Holdings, LLC,* Case No. 12-12340, ECF No. 10, Opinion and Order Granting Corrected Motion for Order Approving Settlement Agreement.) The non-settling Defendants in the Adversary Proceeding, Maria Gatzaros, Ted Gatzaros, Dimitrios Papas and Viola Papas ("the Papas and Gatzaros Defendants"), appealed the Court's Order approving the Settlement Agreement, objecting to the inclusion of the claims bar order. (*In re Greektown,* No. 12-12340, ECF No. 33, Notice of Appeal.) The Sixth Circuit reversed and remanded with instructions to this Court to reconsider the propriety and scope of the claims bar order. With the claims bar order under fire, the parties stipulated in this Court to withdraw the motion for an order approving the settlement and the case was dismissed. (*In re Greektown,* No. 12-12340, ECF Nos. 48, 49, Stipulation and Dismissal.) The parties thereafter

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agreed to voluntary mediation before Bankruptcy Chief Judge Phillip Shefferly in an effort to resolve all of the claims against the all of the remaining Defendants in the MUFTA Adversary Proceeding. Despite their efforts under Judge Shefferly's guidance, the parties were unable to achieve a settlement of the Adversary Proceeding. (Adv. Pro. ECF No. 449, Mediator's Certificate, 6/2/2014). To date, a global settlement has not been reached.

On June 9, 2015, with settlement negotiations at a standstill, the Tribe renewed its 2010 motion to dismiss on the grounds of sovereign immunity. (Adv. Pro. ECF No. 453, Renewed and Supplemented Motion to Dismiss Adversary Proceeding Re: Sovereign Immunity.) On June 27, 2015, the Litigation Trustee responded and opposed the motion. (Adv. Pro. ECF No. 463.)[3] The Tribe replied (Adv. Pro. ECF No. 469) and the Bankruptcy Court heard oral argument on July 21, 2014.

On August 13, 2014, the Bankruptcy Court issued its Opinion and Order Denying the Tribe's Renewed and Supplemented Motion, concluding that "Congress sufficiently, clearly, and unequivocally intended to abrogate [the Tribe's] sovereign immunity in [section 106 of the Bankruptcy Code]." (August 12, 2014 Opinion and Order, Adv. Pro. ECF No. 474 at 36.) The Tribe now appeals that ruling to this Court. The question to be answered is purely one of statutory construction: Does Section 106 of the Bankruptcy Code, by reference to section 101(27)'s definition of "governmental unit" to include "other ... domestic government[s]," clearly and unequivocally express Congress's intent to abrogate the sovereign immunity of Indian tribes? As discussed *infra,* the Court concludes that it cannot say "with perfect confidence" that Congress intended, by using the generic phrase "other domestic governments" in § 101(27), to clearly, unequivocally, unmistakably and without ambiguity abrogate tribal sovereign immunity in § 106(a) of the Bankruptcy Code.

Accordingly, the Court REVERSES the August 13, 2014 Order of the Bankruptcy Court, finds that Congress did not clearly and unequivocally express an intent to abrogate the sovereign immunity of Indian tribes in section 106(a) of the Bankruptcy Code, and REMANDS this matter to the Bankruptcy Court for further proceedings to address the limited factual issue of whether the Tribe, while enjoying sovereign immunity from suit under the relevant provisions of the Bankruptcy Code, nonetheless waived that immunity in this proceeding.[4]

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II. JURISDICTION AND STANDARD OF REVIEW

The parties do not dispute this Court's jurisdiction to entertain the Tribe's appeal. Under 28 U.S.C. § 158(a)(1), this Court has jurisdiction to hear appeals "from final judgments, orders, and decrees" issued by the Bankruptcy Court. The denial of a motion to dismiss on the grounds of sovereign immunity is an immediately appealable "collateral order." *Sault Ste. Marie Tribe of Chippewa Indians v. State of Michigan,* 5 F.3d 147, 149-50 (6th Cir. 1993). A ruling on a motion to dismiss a bankruptcy court adversary proceeding is reviewed *de novo. In re Grenier,* 430 B.R. 446, 449 (E.D.Mich.2010) (citing *Mezibov v. Allen,* 411 F.3d 712, 716 (6th Cir.2005)).

A motion to dismiss on the basis of sovereign immunity tests the Court's subject matter jurisdiction to entertain the action. *Memphis Biofuels, LLC v.*

A motion to dismiss on the basis of sovereign immunity tests the court's subject matter jurisdiction to entertain the action. *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.,* 585 F.3d 917, 919-20 (6th Cir.2009). The Tribe moves under Fed. R. Civ. P. 12(b)(1) to dismiss the Complaint in the Adversary Proceeding for lack of subject matter jurisdiction. "In determining whether the Court has subject matter jurisdiction of a claim under Fed. R. Civ. P. 12(b)(1), the Court must assume that plaintiffs' allegations are true and must construe the allegations in a light most favorable to them." *3D Systems, Inc. v. Envisiontec, Inc.,* 575 F.Supp.2d 799, 802 (E.D.Mich.2008) (citing *Little Traverse Bay Bands of Odawa Indians v. Great Spring Waters of America, Inc.,* 203 F.Supp.2d 853, 855 (W.D.Mich. 2002)). "Relief is appropriate only if, after such construction, it is apparent to the district court that there is an absence of subject matter jurisdiction." *Id.* at 803. "Where jurisdiction is challenged under Fed. R. Civ. P. 12(b)(1), a plaintiff bears the burden of proving jurisdiction in order to survive the motion." *Id.* (citing *Rogers v. Stratton Indus., Inc.,* 798 F.2d 913, 915 (6th Cir.1986)).

III. ANALYSIS

The parties are in agreement that "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,* 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). Tribal sovereign immunity is a matter of common law, a judicially created doctrine, not deriving from the Eleventh Amendment or an act of Congress. *Id.* at 756, 118 S.Ct. 1700 (noting that the doctrine of tribal immunity developed "almost by accident" and is said to rest in the Supreme Court's decision in *Turner v. United States,* 248 U.S. 354, 39 S.Ct. 109, 63 L.Ed. 291 (1919)). "*Turner's* passing reference to immunity, however, did become an explicit holding that tribes had immunity from suit." *Id.* at 757, 118 S.Ct. 1700

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(citing *United States v. United States Fidelity & Guaranty Co.,* 309 U.S. 506, 512, 60 S.Ct. 653, 84 L.Ed. 894 (1940) (*USF & G*) (holding that "Indian Nations are exempt from suit without Congressional authorization").

"To abrogate tribal immunity, Congress must "unequivocally" express that purpose." *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.,* 532 U.S. 411, 418, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001) ("*Potawatomi*") (citing *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978)). As Judge Shapero noted in his Opinion and Order, the Tribe throughout retains "a thumb on the interpretive scale tending to tip the balance in their favor in the event of an ambiguity or lack of clarity." (8/12/2014 Opinion and Order 36.) *See Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985) ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit"); *Federal Aviation Administration v. Cooper,* ____ U.S. ____, 132 S.Ct. 1441, 1448, 182 L.Ed.2d 497 (2012) ("Legislative history cannot supply a waiver that is not clearly evident from the language of the statute. Any ambiguities in the statutory language are to be construed in favor of immunity, so that the [Tribe's] consent to be sued is never enlarged beyond what a fair reading of the text requires. Ambiguity exists if there is a plausible interpretation of the statute that would not authorize" suit against the Tribe.) (internal quotation marks and citations omitted) (alteration added). [5] Finally, although immune from suit absent express abrogation by Congress, Indian tribes remain bound to comply notwithstanding the fact that the laws cannot be enforced against them:

> To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. In [Oklahoma Tax Com'n v. Citizen Band] Potawatomi [Indian Tribe of Oklahoma, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991)] for example, we reaffirmed that while Oklahoma may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes. 498 U.S., at 510, 111 S.Ct., at 909-910. There is a difference between the right to demand compliance with state laws and the means available to enforce them. See id., at 514, 111 S.Ct., at 911-912.

Kiowa, 523 U.S. at 755, 118 S.Ct. 1700.

Whether Congress has unequivocally expressed the intent, in section 106 of the Bankruptcy Code, to abrogate tribal sovereign immunity is the question presented in this bankruptcy appeal. The issue has

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been analyzed by a handful of courts, leading to two irreconcilable conclusions. *Compare, e.g., Krystal Energy Co. v. Navajo Nation,* 357 F.3d 1055 (9th Cir.2004), *cert. denied, Navajo Nation v. Krystal Energy Co., Inc.,* 543 U.S. 871, 125 S.Ct. 99, 160 L.Ed.2d 118 (2004) (finding that sections 106(a) and 101(27) of the Bankruptcy Code expressly and unequivocally waive the sovereign immunity of an Indian tribe) *with In re Whittaker,* 474 B.R. 687 (8th Cir. BAP 2003) (finding that Congress did not unequivocally express its intent to abrogate tribal sovereign immunity in actions under the Bankruptcy Code).

A. The Statutory Text and the Interpretive Issue

11 U.S.C. § 106(a) provides as follows:

> § 106. Waiver of sovereign immunity (a) Notwithstanding 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 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.
>
> (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
>
> (3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.
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> (4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.
>
> (5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

> (6) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.
>
> (c) Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate. 11 U.S.C. § 106 (1995).

The claims in this MUFTA Adversary Proceeding are brought under Sections 544 and 550 of the Bankruptcy Code and thus would be claims as to which the sovereign immunity of "governmental units" has been abrogated. 11 U.S.C. § 101(27) in turn defines "governmental unit" as follows:

> (27) 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.

It is not disputed that these statutory sections do not specifically mention "Indian tribes," nor does any other provision of the Bankruptcy Code expressly mention "Indian tribes." *In re Nat'l Cattle Cong.,* 247 B.R. 259, 267 (Bankr.N.D.Iowa 2000) (concluding that Congress has not unequivocally abrogated the Tribe's sovereign immunity to suit under the Bankruptcy Code and noting that the "Code makes no specific mention of Indian tribes"). The issue is whether the Tribe can be considered a "governmental unit" whose sovereign immunity is abrogated under section 106(a) because Congress defined "governmental unit" to include, in addition to those sovereign entities specifically listed, "other domestic government[s]."

To summarize the opposing arguments, the Litigation Trustee asserts that the Tribe is undeniably both "domestic," i.e. not foreign, and a "government," i.e. possessing sovereign status. The Litigation Trustee notes that the Supreme Court has historically used both terms (although admittedly never together apart from a very recent reference discussed *infra*) when referring to Indian tribes, describing them, for example, as "tribal governments" and "domestic dependent nations." The Tribe argues that the Supreme Court has never referred to Indian tribes with the phrase "domestic governments" and insists that in order to abrogate tribal immunity, Congress must invoke the phrase Indian tribes, tribal governments, or some verbiage that uniquely and historically has been used to describe the Indian tribes. The Tribe submits that the phrase "domestic government" is not sufficiently unequivocal, without specific reference to Indian tribes, to state an intent to include Indian tribes among the entities whose sovereign immunity has been waived in section 106(a) of the Bankruptcy Code.

B. The Common Law Doctrine of Tribal Sovereign Immunity

The Supreme Court recently addressed the issue of tribal sovereign immunity in *Michigan v. Bay Mills Indian Community,* ____ U.S. ____, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (2014). In *Bay Mills,* the Supreme Court held that tribal sovereign immunity protected Bay Mills from suit against it for opening a casino outside Indian lands. At issue was the interpretation of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.,* which creates the framework for regulating gaming activity on Indian lands. 134 S.Ct. at 2028. The opinion is important for our purposes not for its ultimate interpretation of the IGRA but rather for its restatement of the historical underpinnings of the doctrine of tribal sovereign immunity and its refusal to revisit and reverse course on prior decisions holding that tribal immunity cannot be abrogated absent an express Congressional statement or waiver.

By way of background, the Court in *Bay Mills* provided the following historical synopsis of the Court's own rulings on the judicially created, common law doctrine of tribal sovereign immunity:

> Indian tribes are `domestic dependent nation' that exercise inherent sovereign authority. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (Potawatomi) (quoting Cherokee Nation v. Georgia, 5 Pet. 1, 17, 8 L.Ed. 25 (1831)). As dependents, the tribes are subject to plenary control by Congress. See United States v. Lara, 541 U.S. 193, 200, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004) ([T]he Constitution grants Congress powers we have consistently described as `plenary and exclusive' to legislate in respect to Indian tribes). And yet they remain separate sovereigns preexisting the Constitution. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56,98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). Thus, unless and until Congress acts, the tribes retain their historic sovereign authority. United States v. Wheeler, 435 U.S. 313, 323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978).
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> Among the core aspects of sovereignty that tribes possess — subject, again, to congressional action — is the common-law immunity from suit traditionally enjoyed by sovereign powers. Santa Clara Pueblo, 436 U.S., at 58, 98 S.Ct. 1670. That immunity, we have explained, is a necessary corollary to Indian sovereignty and self-governance. Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C., 476 U.S. 877, 890, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986); cf. The Federalist No. 81, p. 511 (B. Wright ed. 1961) (A. Hamilton) (It is inherent in the nature of sovereignty not to be amenable to suit without consent). And the qualified nature of Indian sovereignty modifies that principle only by placing a tribe's immunity, like its other governmental powers and attributes, in Congress's hands. See United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512, 60 S.Ct. 653, 84 L.Ed. 894 (1940) (USF & G) (It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit). Thus, we have time and again treated the doctrine of tribal immunity [as] settled law and dismissed any suit against a tribe absent congressional authorization (or a waiver). Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc., 523 U.S. 751, 756, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998).

134 S.Ct. at 2030-31.

Applying these precedents, Justice Kagan, writing for the majority and joined by Justices Roberts, Kennedy, Breyer and Sotomayor, relied on the doctrine of *stare decisis* and concluded that tribal sovereign immunity remained a strong shield for Indian tribes and deferred to Congress to alter the course set by these precedents if it so chose. The dissent urged that it was time for the Court to reverse course, admit that previous cases were wrongly decided "[r]ather than insist that Congress clean up a mess" that the Court created and significantly scale back the broad doctrine of tribal sovereign immunity. *Id.* at 2045 (Scalia, J. dissenting). Justice Thomas, writing the principal dissent and joined by Justices Scalia, Ginsburg and Alito, criticized the majority for failing to appreciate the changing economic reality in which "the commercial activities of tribes have increased dramatically ... [with] tribes engage[d] in domestic and international business ventures including manufacturing, retail, banking, construction, energy, telecommunications, and more," *id.* at 2050 (internal quotation marks and citation omitted) (alterations added), yet remaining "largely litigation-proof" in the majority of these commercial enterprises. *Id.* at 2051. "As long as tribal immunity remains out of sync with this reality," Justice Thomas wrote, "it will continue to invite problems." *Id.* at 2052.

Although the majority in *Bay Mills* appeared to appreciate that a change in the doctrine of tribal sovereign immunity may be called for, it held fast to precedent, and in particular to the Court's decision in *Kiowa, supra,* which fully embraced the doctrine in its broadest sense. The majority observed that the Court in *Kiowa*

"comprehended the trajectory of the tribes' commercial activity (which is the dissent's exclusive rationale for ignoring *stare decisis* ...)," and concluded that "[t]he special brand of sovereignty the tribes retain-both its nature and its extent-rests in the hands of Congress." *Id.* at 2037.

C. Did Congress Intend to Abrogate Tribal Sovereign Immunity in Section 106(a) of the Bankruptcy Code?

It is against the backdrop of this recent Supreme Court decision, reaffirming the sanctity of the "special brand of sovereignty" that Indian tribes have historically enjoyed, that we analyze whether, in section 106 of the Bankruptcy Code, Congress unequivocally, unmistakably and without ambiguity, by invoking the phrase "or other domestic governments," intended to abrogate the "special brand of sovereignty" that Indian tribes enjoy.

1. The Ninth Circuit's decision in *Krystal Energy* and similar authority finding an unequivocal Congressional expression of abrogation in section 106 of the Bankruptcy Code.

Arguing that section 106 of the Bankruptcy Code unequivocally abrogates tribal sovereign immunity, the Litigation Trustee relies on the Ninth Circuit's decision in *Krystal Energy,* which explicitly so holds. In *Krystal Energy,* the Ninth Circuit found that the definition of "governmental unit" in § 101(27) broadly captured *all* foreign and domestic governments:

> It is clear from the face of §§ 106(a) and 101(27) that Congress did intend to abrogate the sovereign immunity of all foreign and domestic governments. Section 106(a) explicitly abrogates the sovereign immunity of all governmental units. The definition of governmental unit first lists a sub-set of all governmental bodies, but then adds a catch-all phrase, or other foreign or domestic governments. 11 U.S.C. § 101(27). Thus, all foreign and domestic governments, including but not limited to those particularly enumerated in the first part of the definition, are considered governmental units for the purpose of the Bankruptcy Code, and, under § 106(a), are subject to suit.

357 F.3d at 1058. The court observed that "Indian tribes are certainly governments," and further found that "[t]he Supreme Court has recognized that Indian tribes are "domestic dependent nations," and concluded that therefore "the category "Indian tribes" is simply a specific member of the group of the domestic governments, the immunity of which Congress intended to abrogate." *Id.* at 1057-58. Having reached the conclusion that Indian tribes are "domestic governments," the Ninth Circuit concluded that therefore Congressional intent to abrogate their sovereign immunity was clearly expressed in section 106, citing several bankruptcy court decisions so holding:

> Had Congress simply stated, sovereign immunity is abrogated as to all parties who otherwise could claim sovereign immunity, there can be no doubt that Indian tribes, as parties who could otherwise claim sovereign immunity, would no longer be able to do so. Similarly here, Congress explicitly abrogated the immunity of any foreign or domestic government. Indian tribes are domestic governments. Therefore, Congress expressly abrogated the immunity of Indian tribes. See In re Russell, 293 B.R. 34, 44 ([Bankr.]D.Ariz.2003) (concluding that § 106(a) abrogates tribal sovereign immunity unequivocally[] and without implication); see also In re Davis Chevrolet, Inc., 282 B.R. 674, 683 n. 5 (Bankr. D.Ariz.2002) (It seems to this court that `other domestic government' is broad enough to encompass Indian tribes.); In re Mayes, 294 B.R. 145, 157-60 (10th Cir. [BAP] 2003) (McFeeley, J., dissenting) (arguing that § 106(a) does abrogate tribal sovereign immunity); In re Vianese, 195 B.R. 572, 575 (Bankr. N.D.N.Y.1995) (holding that Tribe had individually waived its sovereign immunity, and stating in dicta that § 106(a) did abrogate the sovereign immunity of Indian tribes under the Bankruptcy Code).

357 F.3d at 1058 (alteration in original).

The *Krystal* court noted that this "syllogistic reasoning" had been followed by the Supreme Court in the context of Congressional abrogation of state sovereign immunity in *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), where the Supreme Court held that Congress had clearly expressed its intent to abrogate the sovereign immunity of the states when passing certain amendments to the Age Discrimination Enforcement Act (ADEA) that permitted suits against "any employer (including a public agency)" to be brought in any Federal or State court. *Kimel,* 528 U.S. at 73, 120 S.Ct. 631. Although "states" were not expressly listed in the provision authorizing such suits, the Supreme Court in *Kimel* looked to a different section of the ADEA which expressly defined "public agency" to include "the government of a State or political subdivision thereof," to conclude that "[r]ead as whole the plain language of these provisions clearly demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees." *Kimel,* 528 U.S. at 74, 120 S.Ct. 631. In relying on *Kimel,* the Ninth Circuit found it "evident but, in the end, unimportant," that unlike the definition of "public agency" in the ADEA that specifically lists "States," no definition in the Bankruptcy Code mentions "Indian tribes." *Krystal Energy,* 357 F.3d at 1058-59.

The Ninth Circuit found sufficient support for its conclusion in the fact that "in enacting the Bankruptcy code, Congress was legislating against the back-drop of prior Supreme Court decisions, which *do* define Indian tribes as domestic nations, i.e. governments, as well as against the ordinary, all-encompassing meaning of the term `other foreign or domestic governments.'" *Id.* at 1059. Just as Congress need not "expressly mention Alabama and Wyoming" when abrogating the Eleventh Amendment immunity of "all states," the Ninth Circuit reasoned, it need not mention "Indian tribes" when abrogating the sovereign immunity of all "domestic governments." *Id.* Finding Indian tribes to be members of the "generic class" of "domestic governments" did not, the Ninth Circuit concluded, run afoul of the Supreme Court's "admonitions to `tread lightly' in the area of abrogation of tribal sovereign immunity." *Id.* at 1060. "[T]he Supreme Court's decisions do not require Congress to utter the magic words "Indian tribes" when abrogating tribal sovereign immunity." *Id.* at 1061. According to *Krystal,* no prohibited implication is necessary to conclude that in section 106(a) Congress unmistakably intended to abrogate tribal sovereign immunity:

> Section 106(a) does not simply authorize suit in federal court under the Bankruptcy Code — it specifically abrogates the sovereign immunity of governmental units, a defined class that is largely made up of parties that could claim sovereign immunity. So to recognize is not, as the Navajo Nation suggests, to imply an abrogation that is not explicit in the statute. Instead, reading § 106(a)'s express abrogation as reaching Indian tribes

> simply interprets the statute's reach in accord with both the common meaning of its language and the use of similar language by the Supreme Court. No implication beyond the words of the statute is necessary to conclude that Congress unequivocally expressed its intent to abrogate Indian tribes' immunity.

357 F.3d at 1060. *See also In re Russell,* 293 B.R. 34, 39 (Bankr.D.Ariz.2003) (finding a distinction between inference (prohibited) and deduction (permitted) and concluding that deduction from what is expressly said in sections 101(27) and 106(a) yielded the conclusion that Congress expressly intended to abrogate tribal sovereign immunity and thus finding "no violation of the Court's proscription against abrogation by implication in concluding that § 106 includes Indian tribes"). More recently, in *In re Platinum Oil Props., LLC,* 465 B.R. 621, 643 (Bankr. D.New Mexico 2011) the bankruptcy court relied on the *Krystal Energy* and *In re Russell* line of authority, to similarly conclude that "[t]he language "or other foreign or domestic government" found in 11 U.S.C. § 101(27) includes Indian tribes, such that 11 U.S.C. § 106 together with 11 U.S.C. § 101(27) embodies Congress' clear and unequivocal abrogation of tribal sovereign immunity." The court in *Platinum Oil* recognized that this was not "the universal view," but apparently found it to be the better reasoned one. *Id.* at 644 n. 19.

In addition to this line of authority, the Litigation Trustee urges the Court to consider also that Justice Sotomayor, in her concurring opinion in *Bay Mills,* used the very phrase at issue here, i.e. "domestic governments," when comparing the sovereign status of States and Indian tribes. Justice Sotomayor observed that it would not foster comity among sovereigns to permit States to sue Indian tribes for commercial activity on State lands while at the same time precluding tribes from suing States for commercial activity on Indian lands. Following this observation, she noted that "[b]oth States and Tribes are domestic governments who come to this Court with sovereignty that they have not entirely ceded to the Federal Government." 134 S.Ct. at 2042 (Sotomayor, J. Concurring). While interesting to note that Justice Sotomayor used the very phrase at issue here, to wit "domestic governments," to characterize both States and Indian tribes, Justice Sotomayor was neither called upon to, nor did she imply that she was attempting to, create a generic description that could be used as a substitute for the phrase "Indian tribes" in the context of a Congressional abrogation of tribal sovereign immunity. Apart from this one instance in this concurring opinion, uttered years after section 106(a) of the Bankruptcy Code was adopted by Congress, it is undisputed that Indian tribes have never been referred to by the Supreme Court as "domestic governments." The bankruptcy court placed little weight on this statement in Justice Sotomayor's concurring opinion in *Bay Mills* and so does this Court.

There cannot be reasonable debate that Indian tribes are both "domestic" (in fact the Tribe concedes this attribute) and also that Indian tribes are fairly characterized as possessing attributes of a "government." *See Bay Mills,* 134 S.Ct. at 2030 (observing that immunity is a "necessary corollary to Indian sovereignty and *self-governance*" and that a tribe's immunity, "like its other *governmental powers*" are in Congress's hands); *Id.* at 2032 (noting that courts will not "lightly assume that Congress intends to undermine Indian *self-government*"); *Turner v. United States,* 248 U.S. 354, 357-58, 39 S.Ct. 109, 63 L.Ed. 291 (1919) ("Like other *governments,* municipal as well as state, the

Creek Nation was free from liability for injuries to persons or property due to mob violence or failure to keep the peace."); *Parks v. Ross,* 52 U.S. 362, 374, 11 How. 362, 13 L.Ed. 730 (1850) ("The Cherokees are in many respects a foreign and independent nation. They are *governed* by their own laws and officers, chosen by themselves.") (all emphasis added).

For the Litigation Trustee, it is enough to have established that Indian tribes are both "domestic" and "governments" to reach the inevitable and unassailable conclusion that Congress expressly and unequivocally meant to include Indian tribes when it employed the phrase "domestic governments" in § 101(27). *Krystal Energy, In re Platinum Oil,* and *In re Russell* expressly so hold and Judge McFeeley's dissent in *In re Mayes* concurs in this result. These courts agree with the Litigation Trustee that Congress need not invoke the "magic words Indian tribes" when intending to abrogate tribal sovereign immunity. *But,* these decisions do not recognize 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. Nor do these decisions place any significance on the fact that in many instances, when Congress did mean to abrogate tribal immunity, it did use the "magic words" "Indian tribes" in doing so. As discussed *infra, Krystal* and *In re Russell* do not give sufficient consideration to the "special brand" of sovereign immunity that Indian tribes enjoy. *Bay Mills,* 134 S.Ct. at 2037.

2. The Eight Circuit Bankruptcy Appellate Panel's decision in *In re Whittaker* and similar authority finding that Congress did not clearly and unequivocally abrogate the sovereign immunity of Indian tribes in § 106 of the Bankruptcy Code. [6]

In *In re Whittaker,* 474 B.R. 687 (8th Cir. BAP 2012), the Eighth Circuit Bankruptcy Appellate Panel expressly rejected the Ninth Circuit's reasoning in *Krystal,* and held that absent a specific mention of "Indian tribes" in the Bankruptcy code, any finding of abrogation under § 106(a) necessarily must rely on inference or implication, both of which are prohibited by Supreme Court precedent. Quoting from *In re National Cattle Congress, supra,* the panel noted cases in which specific statutory reference to Indian tribes had been found sufficiently unequivocal to abrogate tribal sovereign immunity:

> Courts have found abrogation of tribal sovereign immunity in cases where Congress has included Indian tribes in definitions of parties who may be sued under specific statutes. See Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1094, 1097 (8th Cir.1989) (finding congressional intent to abrogate Tribe's sovereign immunity with respect to violations of the Resource Conservation and Recovery Act, [which expressly included an Indian tribe or authorized tribal organization in the definition of municipalities covered by the Act]); Osage Tribal Council v. United States Dep't of Labor, 187 F.3d 1174, 1182 (10th Cir.1999) (same re Safe Drinking Water Act [which also included Indian tribes in the definition of municipalities covered by the Act]). Where the language of a jurisdictional grant is unambiguous as to its application to Indian tribes, no more is needed to satisfy the Santa Clara requirement than that Congress unequivocally state its intent. Osage Tribal Council, 187 F.3d at 1182.
>
> Where the language of a federal statute does not include Indian tribes in definitions of parties subject to suit or does not specifically assert jurisdiction over Indian tribes, courts find the statute insufficient to express an unequivocal congressional abrogation of tribal sovereign immunity. See Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343, 357-58 (2d Cir.2000) (holding Indian tribe immune from suit under the Copyright Act); Florida Paraplegic [Ass'n. Inc. v. Miccosukee Tribe of Indians of Florida, 166 F.3d 1126, 1131 (11th Cir.1999)] (stating that because Congress made no specific reference to Tribes anywhere in the ADA, tribal immunity is not abrogated; suit under ADA dismissed). A Congressional abrogation of tribal immunity cannot be implied. Santa Clara Pueblo, 436 U.S. at 58, 98 S.Ct. 1670.

474 B.R. at 691 (quoting *In re Nat'l Cattle Congress,* 247 B.R. at 267) (alterations added). Finding *Krystal* unpersuasive given its failure to cite one case where tribal immunity was found to have been abrogated in the absence of a specific mention of the words "Indian tribes," and deriding the Ninth

Circuit's failure to adhere to the clear prescription against inference and implication in finding such abrogation, the panel refused to follow *Krystal*.

> In sum, the cases relied on by Krystal and the trustees here do not support the proposition that Congress can express its intent to abrogate sovereign immunity as to Indian tribes without specifically saying so. Instead, courts have been directed to adhere to the general principle that statutes are to be interpreted to the benefit of Indian tribes.... We hold that in enacting § 106, Congress did not unequivocally express its intent by enacting legislation explicitly abrogating the sovereign immunity of tribes. As the Court in In re National Cattle Congress held, holding otherwise requires an inference which is inappropriate in this analysis. The Tribes are, therefore, protected from suit here by their sovereign immunity.

474 B.R. at 695 (footnotes omitted).

The Tenth Circuit Bankruptcy Appellate Panel suggested the same conclusion in *In re Mayes,* 294 B.R. 145 (10th Cir. [BAP] 2003). Although not a basis for the holding in *In re Mayes,* the panel noted that § 106(a) "probably" could not be interpreted as an unequivocal expression of Congressional intent to abrogate tribal sovereign immunity:

> Section 101(27) does not refer to Indian nations or tribes. The only portion of that section that could be said to apply to an Indian nation or tribe is its reference to a domestic government. While several bankruptcy courts have either expressly or impliedly held that Indian nations or tribes are domestic governments to which §§ 101(27) and 106 apply, see Warfield v. Navajo Nation (In re Davis Chevrolet, Inc.), 282 B.R. 674, 678 n. 2 (Bankr.D.Ariz.2002); Turning Stone Casino v. Vianese (In re Vianese), 195 B.R. 572, 575-76 (Bankr. N.D.N.Y.1995); In re Sandmar Corp., 12 B.R. 910, 916 (Bankr.D.N.M.1981), we conclude that they probably are not. Accordingly, § 106(a) likely could not abrogate Appellee's immunity even if it were constitutional. See In re National Cattle Congress, 247 B.R. 259, 266-67 (Bankr.N.D.Iowa 2000). Our conclusion comports with the general proposition that Congress must make its intent to abrogate an Indian nation's immunity clear and unequivocal, and actions against tribes cannot merely be implied. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978).

294 B.R. at 148 n. 10.

The Tribe also convincingly relies on Supreme Court precedent analyzing issues of state sovereign immunity suggesting that inference from generic descriptions of a group of entities is impermissible to support a finding of abrogation. In *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985), the Court found that a provision in the Rehabilitation Act of 1973 that permitted suit to be filed against "any recipient of federal assistance," was insufficient to express clearly and unequivocally Congress's intent to abrogate the sovereign immunity of the states:

> The statute thus provides remedies for violations of § 504 by any recipient of Federal assistance. There is no claim here that the State of California is not a recipient of federal aid under the statute. But given their constitutional role, the States are not like any other class of recipients of federal aid. A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically. Accordingly, we hold that the Rehabilitation Act does not abrogate the Eleventh Amendment bar to suits against the States.

473 U.S. at 245-46, 105 S.Ct. 3142 (citations omitted). [7]

Similarly, in *Dellmuth v. Muth,* 491 U.S. 223, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989), reiterating its reasoning in *Atascadero,* the Supreme Court found insufficient Congressional intent to abrogate states' immunity in the Education of Children With Handicaps Act ("EHA"). First, the Court completely rejected efforts to rely on *any* nontextual source as support for a finding of such intent:

> More importantly, however, respondent's contentions [regarding Congress's amendments to the Rehab Act in response to Atascadero clarifying an intent to abrogate state immunity as evidence of such intent in the EHA] are beside the point. Our opinion in Atascadero should have left no doubt that we will conclude Congress intended to abrogate sovereign immunity only if its intention is unmistakably clear in the language of the statute. Atascadero, 473 U.S., at 242, 105 S.Ct., at 3147. Lest Atascadero be thought to contain any ambiguity, we reaffirm today that in this area of the law, evidence of congressional intent must be both unequivocal and textual. Respondent's evidence is neither. In particular, we reject the approach of the Court of Appeals, according to which, [w]hile the text of the federal legislation must bear evidence of such an intention, the legislative history may still be used as a resource in determining whether Congress' intention to lift the bar has been made sufficiently manifest. [Muth v. Central Bucks School Dist.] 839 F.2d [113], at 128 [(3d Cir.1988)]. Legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment. If Congress' intention is unmistakably clear in the language of the statute, recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the rule of Atascadero will not be met.

491 U.S. at 230, 109 S.Ct. 2397 (alteration added).

Turning to the textual arguments in support of abrogation, the Court noted first that "the EHA makes no reference whatsoever to either the Eleventh Amendment or the States' sovereign immunity." 491 U.S. at 231, 109 S.Ct. 2397. [8] The Court then rejected the suggested inference that because the EHA refers often to "states" and to their important role in effectuating the purposes of the EHA, Congress must have intended to subject them to suit:

> We recognize that the EHA's frequent reference to the States, and its delineation of the States' important role in securing an appropriate education for handicapped children, make the States, along with local agencies, logical defendants in suits alleging violations of the EHA. This statutory structure lends force to the inference that the States were intended to be subject to damages actions for violations of the EHA. But such a permissible inference, whatever its logical force, would remain just that: a permissible inference. It would not be the unequivocal declaration which, we reaffirm today, is necessary before we will determine that Congress intended to exercise its powers of abrogation.

491 U.S. at 232, 109 S.Ct. 2397. Thus, *Dellmuth* forbids consideration of nontextual evidence and rejects logical inference as a method of divining Congressional intent to abrogate sovereign immunity, at least in the absence of other concrete textual support permitting one to draw "with perfect confidence" the conclusion that abrogation was intended. *Id.* at 231, 109 S.Ct. 2397.

3. Bankruptcy Judge Shapero's opinion.

Judge Shapero largely adopts the reasoning of the Ninth Circuit in *Krystal Energy* and embraces the "deductive reasoning" rationale of *In re Russell*

Judge Shapero was persuaded by the distinction he perceived between interpreting a statute that is silent on the topic of abrogation of sovereign immunity and interpreting a statute that mentions the subject but imperfectly defines its scope. The former instance, in Judge Shapero's opinion, requires implication (prohibited) but the latter requires only deduction (permitted):

> In the Court's opinion, there is a material difference between (a) determining the scope or extent of an explicitly stated abrogation of sovereign immunity, as is the issue here; and (b) determining whether there was any abrogation in the first place where the statute is silent on the matter.
>
> In the Court's opinion, the most important lesson from In re Russell is that implication is distinguishable from deduction. Black's Law Dictionary (9th ed. 2009) defines deduction as [t]he act or process of reasoning from general propositions to a specific application or conclusion. For example, the Bankruptcy Code does not specifically list Arizona in its definition of governmental units whose sovereign immunity is abrogated. But that conclusion can be deduced by a simple syllogism: sovereign immunity is abrogated as to states; Arizona is a state; therefore sovereign immunity is abrogated as to Arizona. In re Russell, 293 B.R. at 41. Similarly, it can be said that sovereign immunity is abrogated as to other ... domestic governments, Indian tribes are other... domestic governments (and indeed they are the only other ... domestic governments), therefore sovereign immunity is abrogated as to Indian tribes.

In re Greektown Holdings, LLC, 516 B.R. 462, 474-75 (Bankr.E.D.Mich.2014) (initial citations and footnote omitted). According to Judge Shapero, because in this case the statute undeniably directly addresses abrogation of sovereign immunity in § 106(a), and the Tribe only objects that it does not do so clearly enough as to the special sovereign immunity possessed by Indian tribes, Judge Shapero concludes that this is a case of "deductive" reasoning, to be distinguished from those cases where the statute does not touch upon the issue of sovereign immunity *at all,* which then require the prohibited "implication and inference." And because Judge Shapero also concludes that "domestic government" clearly encompasses "Indian tribes," he "deduces" that therefore § 106(a) unequivocally expresses an intent to abrogate tribal immunity.

The faulty premise in this reasoning is that it presumes the very issue in contention, i.e. that "domestic government" is a phrase clearly understood beyond all rational debate to encompass an Indian tribe, just as the word "state" is clearly understood beyond all rational debate to encompass Arizona and the other 49 "states." But the two "deductions" are quite obviously qualitatively different. While this Court accepts the conclusions that Indian tribes are both "domestic" and bear the hallmarks of "governments," it does not necessarily follow that combining these admitted attributes together in a single generic phrase in § 101(27) "unequivocally and unmistakably," and "without ambiguity" leads one to conclude with "perfect confidence" that Congress intended thereby to include Indian tribes and to abrogate the "special brand" of sovereign immunity enjoyed by Indian tribes without so much as a reference to Indian tribes in the Bankruptcy Code.

4. This Court cannot conclude with "perfect confidence" that Congress intended to abrogate tribal sovereign immunity by invoking the catchall phrase "other domestic governments" in section 101(27) of the Bankruptcy Code.

While perhaps it may be said with "perfect confidence" that Indian tribes are both "domestic" in character and function as a "government," this Court cannot say with "perfect confidence" that Congress combined those terms in a single phrase in § 101(27) to clearly, unequivocally and unmistakably express its intent to include Indian tribes among those sovereign entities specifically mentioned whose immunity was thereby abrogated. While logical inference may support such a conclusion, Supreme Court precedent teaches that logical inference is insufficient to divine Congressional intent to abrogate tribal sovereign immunity. And if indeed the only sovereign entity not specifically listed in section 101(27) is Indian tribes, and if Congress clearly intended that they be included, why not just mention them by their specific name, as Congress has *always* done in the past?

The argument in favor of abrogation relies heavily on the fact that § 106(a) contains a broad, sweeping abrogation of the immunity of every type of sovereign entity and reasons from this that excluding Indian tribes from that list would be anomalous, or "sophistry" to quote the

Litigation Trustee. But this is not necessarily so. The Supreme Court early, and recently, has expressed the view that the immunity possessed by the Indian tribes is different in kind from that possessed by foreign entities and different in kind from that possessed by the states. Early, the Supreme Court held:

> But we think that in construing them, considerable aid is furnished by that clause in the eighth section of the third article; which empowers congress to `regulate commerce with foreign nations, and among the several states, and with the Indian tribes.'
>
> In this clause they are as clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several states composing the union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in fair construction applied to them. The objects, to which the power of regulating commerce might be directed, are divided into three distinct classes — foreign nations, the several states, and Indian tribes. When forming this article, the convention considered them as entirely distinct. We cannot assume that the distinction was lost in framing a subsequent article, unless there be something in its language to authorize the assumption.

Cherokee Nation v. State of Georgia, 30 U.S. 1, 18, 5 Pet. 1, 8 L.Ed. 25 (1831).

Recently, in *Bay Mills,* Justice Sotomayor in her concurrence draws on this description of the Indian tribes in *Cherokee Nation* in characterizing the tribes today:

> The case of Cherokee Nation v. Georgia, 5 Pet. 1, 8 L.Ed. 25 (1831), is instructive. In 1828 and 1829, the Georgia Legislature enacted a series of laws that purported to nullify acts of the Cherokee government and seize Cherokee land, among other things. Id., at 7-8. The Cherokee Nation sued Georgia in this Court, alleging that Georgia's laws violated federal law and treaties. Id., at 7. As the constitutional basis for jurisdiction, the Tribe relied on Article III, § 2, cl. 1, which extends the federal judicial power to cases between a state, or the citizens thereof, and foreign states, citizens, or subjects. 5 Pet., at 15 (internal quotation marks omitted). But this Court concluded that it lacked jurisdiction because Tribes were not foreign state[s]. Id., at 20. The Court reasoned that [t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. Id., at 16. Tribes were more akin to domestic dependent nations, the Court explained, than to foreign nations. Id., at 17. We have repeatedly relied on that characterization in subsequent cases. See, e.g., Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982).

134 S.Ct. at 2040-41 (Sotomayor, J. Concurring) (alterations in original).

Given the historical treatment of Indian tribes as special and distinct from either states or foreign governments, one cannot presume that Congress intended to include them, without mentioning them but solely by force of deduction, as among a group of sovereign entities with whom they share very little other than their sovereign status. There is not a single example of a Supreme Court decision finding that Congress intended to abrogate the sovereign immunity of the Indian tribes without specifically using the words "Indians" or "Indian

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tribes." When asked at the hearing on this matter to provide the Court with an example of a case where the Supreme Court found an abrogation of tribal immunity where the words "Indians" or "Indian tribes" were not used, counsel for the Litigation Trustee referenced *F.A.A. v. Cooper,* ____ U.S. ____, 132 S.Ct. 1441, 182 L.Ed.2d 497 (2012), which did not touch on the issue of tribal sovereign immunity at all. The Court in *Cooper* explained that although congressional intent to waive the Government's immunity must be unmistakably clear, "Congress need not state its intent in any particular way," and the Court has "never required Congress to use magic words." *Id.* at 1448. *Cooper* stands for the general proposition that Congress need not use any particular "magic words" if the intent to abrogate immunity is clearly discernible from the statutory text. *Cooper* is not a case dealing with Indian tribes or tribal sovereign immunity and thus was unresponsive to the Court's inquiry. Counsel for the Litigation Trustee also directed the Court's attention on this point to *Amoco Production Co. v. Village of Gambell, AK,* 480 U.S. 531, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987), a case in which the Supreme Court concluded that the phrase "in Alaska," as used in a statute providing for protection of Alaska's natural resources, was unambiguous and therefore rejected the Ninth Circuit's reliance on the maxim of statutory construction that "doubtful expressions must be resolved in favor of Indians." 480 U.S. at 55, 107 S.Ct. 989. *Gambell* had nothing to do with tribal sovereign immunity at all and certainly was not a case where the Supreme Court found a waiver of tribal immunity in a statute that did not mention the words "Indian" or "Indian tribes."

By contrast, there are many examples where lower courts have found such abrogation where Indian tribes *are* mentioned by name. *See Osage Tribal Council v. United States Dept. of Labor,* 187 F.3d 1174, 1182 (10th Cir.1999) (concluding that Congress intended the Safe Drinking Water Act to abrogate tribal sovereign immunity where jurisdiction was granted over "persons" and "persons" was defined to include "municipalities" which in turn was defined to include "Indian tribes"); *United States v. Weddell,* 12 F.Supp.2d 999, 1000 (D.S.D.1998) (concluding that Indian tribe was subject to garnishment under the FDCPA where "garnishee" defined to include "person" and person defined to include an Indian tribe); *Blue Legs v. United States Bureau of Indian Affairs,* 867 F.2d 1094, 1097 (8th Cir.1989) (concluding that Congress intended the Resource Conservation and Recovery Act to abrogate tribal immunity where "person" is defined to include a municipality and municipality is defined to include an Indian tribe).

In contrast to these cases, we have examples of lower courts refusing to find abrogation of tribal immunity where Indian tribes are *not* referenced by name. *Florida Paraplegic,* 166 F.3d 1126, 1132-33 (11th Cir.1999), is particularly instructive. In *Florida Paraplegic,* the Eleventh Circuit concluded that Congress did not clearly express an intent in the Americans With Disabilities Act ("ADA") to abrogate tribal sovereign immunity, although it explicitly provided that "states" were not immune from suit under the ADA, because it failed to specifically mention Indian tribes. The Eleventh Circuit first noted that abrogation of tribal immunity must be "unequivocally expressed," heeding "the Supreme Court's repeated instruction that, because of the `unique trust relationship between the United States and the Indians,' where Indian rights are at issue, ambiguities in federal laws must be resolved in the Indians' advantage." *Id.* at 1131 (quoting *Blackfeet, supra*). The court then concluded that the absence of any

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reference to "Indians" or "Indian tribes" anywhere in the ADA precluded a finding that Congress intended to abrogate their immunity from suit:

> An examination of Title III of the ADA reveals that it does not meet the strict requirements of this test. Despite its apparent broad applicability, see supra Part III.A, no specific reference to Indians or Indian tribes exists anywhere in Title III.

166 F.3d at 1131. Finding no mention of Indian tribes in the provision of the ADA expressly providing that States were not immune from suit under the Eleventh Amendment, the Eleventh Circuit ruled that no such abrogation could be implied:

> Congress has demonstrated in this very statute its ability to craft laws satisfying the Supreme Court's mandate that courts may find that Congress has abrogated sovereigns' immunity from lawsuits only where it has expressed unequivocally its intent to do so. That it chose not to similarly include an abolition of the immunity of Indian tribes is a telling indication that Congress did not intend to subject tribes to suit under the ADA.

166 F.3d at 1133.

Importantly, as discussed *supra,* the Supreme Court has refused to permit an inference of abrogation in the context of state immunity from suit where such intent must be implied based on a generic definition that logically encompasses the sovereign entity. *See Atascadero, supra,* 473 U.S. at 245, 105 S.Ct. 3142.

Finally, in a number of statutes, Congress has clearly considered Indian tribes to be different from other forms of "government," and needing separate and distinct appellation. *See* 7 U.S.C. § 8310 (listing "States or political subdivisions of States, national governments of foreign countries, domestic or international organizations, Indian Tribes and other persons"); 42 U.S.C. § 9601(16) ("CERCLA") (listing "any State or local government, any foreign government, any Indian Tribe"); 16 U.S.C. § 698v-4 (listing "Federal, State, and local governmental units, and [] Indian Tribes and Pueblos"); 49 U.S.C. § 5121 (listing "a unit of State or local government, an Indian Tribe, a foreign government").

While one may question the historical legitimacy of the doctrine, and one may be uncomfortable with the notion that Indian tribes are subject to many laws yet in many cases we are powerless to enforce them against the tribes, and while one may find it tempting to deduce that Congress actually meant to include Indian tribes when it employed the catchall phrase "other domestic governments," notwithstanding the fact that Indian tribes are not mentioned by name in any provision of the Bankruptcy Code, this Court has recent, explicit direction from the Supreme Court rejecting this interpretation. This Court is instructed in *Bay Mills* that Indian tribes retain every bit of sovereign immunity they have historically possessed and that, absent clear, unequivocal and unmistakable language abrogating that immunity, it is not our place to lightly depart from centuries of unwavering judicial deference to Congress's role in defining with exactitude the instances in which it is appropriate to abrogate the sovereign immunity of Indian tribes. The Litigation Trustee concedes that if this Court finds any ambiguity in § 106(a), it cannot conclude that the language is clear, unequivocal and unmistakable and must favor the Indian tribes and uphold their immunity from suit.

This Court cannot say with "perfect confidence" that the phrase "other domestic government" unambiguously, clearly, unequivocally and unmistakably

refers to Indian tribes. The Bankruptcy Court's conclusion does not give appropriate deference to the Supreme Court's recent admonition that "[t]he special brand of sovereignty the tribes retain — both the nature and its extent — rests in the hands of Congress." *Bay Mills,* 134 S.Ct. at 2037. While Congress may not have to utter "magic words," Supreme Court precedent clearly dictates that it utter words that beyond equivocation or the slightest shred of doubt mean "Indian tribes." Congress did not do so in sections 106(a) and 101(27) of the Bankruptcy Code and thus the Tribe is entitled to sovereign immunity from suit in the underlying MUFTA proceeding.

IV. CONCLUSION

For the foregoing reasons, the Court REVERSES the ruling of the Bankruptcy Court, holds that the Tribe is entitled to sovereign immunity from suit in this MUFTA proceeding and REMANDS the matter to the Bankruptcy Court for further proceedings on the issue of waiver of sovereign immunity, as outlined in the Bankruptcy Court's December 23, 2010 Stipulated Order.

IT IS SO ORDERED.

FootNotes

1. By Stipulation dated August 9, 2012 (and approved by Consent Order dated August 14, 2010) the Defendants agreed that Buchwald Capital Advisors LLC ("Buchwald"), in its capacity as the Litigation Trustee of the Greektown Litigation Trust and in its capacity as the Trustee of the Greektown General Unsecured Creditors Distribution Fund Trust, replace the Official Committee of Unsecured Creditors of Greektown Holdings, LLC (the "Committee") as Plaintiff in this Adversary Proceedings. (Bankr. ECF. No. 3359, p. 3 ¶ 8.) When referring to docket entries in the underlying Bankruptcy Proceeding, (E.D. Mich. Bankr. No. 08-53104), the Court will use the reference "Bankr. ECF No. ____."

2. When referring to docket entries in the MUFTA Adversary Proceeding, (Adv. Pro. No. 10-05712), the Court will use the reference "Adv. Pro. ECF No. ____."

3. The additional remaining Defendants in the MUFTA Adversary Proceedings, Maria Gatzaros, Ted Gatzaros, Dimitrios Papas and Viola Papas ("the Papas and Gatzaros Defendants") also filed a response to the Tribe's motion to dismiss on grounds of sovereign immunity, indicating that they take "no position on whether [legal precedent] entitled the Tribe to dismissal." (Adv. Pro. ECF No. 465, Response at 3.) The Papas and Gatzaros Defendants take the position, however, that "[i]f the Tribe is found to be sovereignly immune and dismissed from this case, Papas' and Gatzaros' rights and defenses will be so seriously impaired that their own dismissal will be required." *Id.* at 6.

4. In the underlying Adversary Proceeding, the Litigation Trustee responded to the Tribe's motion to dismiss arguing in part that, even assuming the Tribe enjoyed sovereign immunity from suit, the Tribe waived that immunity by "causing the bankruptcy filings" in the underlying proceedings. (Adv. Pro. ECF No. 56, Response and Brief in Opposition to Motion of Defendants Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority 2 n. 3.) The Bankruptcy Court subsequently, on December 23, 2010, entered a stipulated order bifurcating argument and determination on the Tribe's motion to dismiss. (Adv. Pro. ECF No. 85, Order Upon Stipulation Regarding Bifurcation of Argument on Motions to Dismiss.) The parties agreed to have the bankruptcy court first decide the legal issue of whether Congress abrogated the Tribe's sovereign immunity in section 106 of the Bankruptcy Code and to hold the waiver issue in abeyance pending that ruling. If the bankruptcy court found in favor of the Tribe, the bankruptcy court would schedule a status conference at which the parties would determine a schedule for briefing (and possibly limited discovery) on the issue of waiver. At the hearing on the Tribe's appeal in this Court, the parties acknowledged this agreement and concurred that the issue of waiver should be addressed in the first instance by Judge Shapero. (ECF No. 14, Transcript of April 1, 2015 Bankruptcy Appeal Hearing at 41-42.) Accordingly the Court REMANDS this matter to the Bankruptcy Court for further proceedings related to the issue of waiver.

5. Tribal immunity derives from the common law, *see Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (observing that "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers"), and the Supreme Court has relied upon Eleventh Amendment immunity cases in defining the requirements of waiver of tribal immunity. *See Osage Tribal Council ex rel. Osage Tribe of Indians v. U.S. Dept. of Labor,* 187 F.3d 1174, 1181 (10th Cir.1999) (noting that courts have used similar language in defining the requirements of waiver of these immunities) (citing *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (noting that Congress must "unequivocally express its intent to abrogate the immunity") (quoting *Green v. Mansour,* 474 U.S. 64, 68, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985), an Eleventh Amendment immunity case)). *See also Krystal Energy Co. v. Navajo Nation,* 357 F.3d 1055, 1056 (9th Cir.2004) (when analyzing whether tribal sovereign immunity is abrogated, courts "may look to state sovereign immunity precedent to help determine how "explicit" an abrogation must be").

6. This Court recognizes that a Bankruptcy Appellate Panel (BAP) holding is not on par with a Circuit Court of Appeals holding. A BAP is a three judge panel consisting of three bankruptcy judges that hears appeals from a single bankruptcy judge. An appeal can be taken from the BAP decision to that Judicial Circuit's Court of Appeals. A BAP ruling is not binding precedent in that Circuit. Nevertheless, this Court finds persuasive the reasoning and conclusion of the Eighth Circuit BAP in *Whittaker.*

7. Congress in fact responded to *Atascadero* by passing clarifying legislation. *See* 42 U.S.C. § 2000d-7(a)(1), which explicitly states that "[a] state shall not be immune ... from suit in Federal court for a violation of Section 504 of the Rehabilitation Act of 1973."

8. As discussed *infra,* and as urged by the Litigation Trustee, this is a point of distinction between *Dellmuth* and this case, in which the subject of abrogation of sovereign immunity is expressly addressed in section 106(a) of the Bankruptcy code.

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No. 96-10919-BH
United States Bankruptcy Court, W.D. Oklahoma

In re Barrett Refining Corp.

221 B.R. 795 (Bankr. W.D. Okla. 1998)
Decided Jun 5, 1998

797 *797 ***MEMORANDUM OF DECISION AND ORDER DENYING OBJECTION OF THE STATE OF MISSISSIPPI TO THE JURISDICTION OF THIS COURT***

RICHARD L. BOHANON, Bankruptcy Judge.

The Mississippi Commission on Environmental Quality and the Mississippi Department of Environmental Quality (hereinafter, collectively, "Mississippi") have objected to, inter alia, the jurisdiction of this court.[1] The issue to be decided concerns the Eleventh Amendment of the Constitution of the United States which states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

[1] The full title of Mississippi's motion is "Motion of the Mississippi Commission on Environmental Quality and the Mississippi Department of Environmental Quality to Deny Discharge, Subordination, or Other Treatment of Injunctive Relief and Penalties Ordered by that Commission, or, in the Alternative, Motion for Withdrawal of Proof of Claim, or, in the Further Alternative, Motion to Abstain and to Withdraw the Reference and Memorandum Brief in Support."

FACTS PROCEDURAL HISTORY

The debtor, Barrett Refining Corporation, is an Oklahoma Corporation which operated a crude oil refinery in the State of Mississippi. Mississippi brought charges against Barrett for pollution, resulting in the assessment of a demand for remediation of the pollution and fines and penalties of $750,000, which, in turn, resulted in Mississippi's claim in this court. Subsequently, Barrett filed this Chapter 11 petition in the Western District of Oklahoma.

Mississippi then filed its proof of claim for remediation of the pollution and the fines and penalties. Included in Mississippi's proof of claim was a statement that the filing was not a consent to jurisdiction of this court nor a
798 *798 waiver of any rights. Barrett then proposed a plan which included references to 11 U.S.C. § 106.[2] This section abrogates sovereign immunity on the part of governmental units as to certain sections of the Bankruptcy Code and provides further that governmental units waive sovereign immunity by filing a proof of claim.

[2] 11 U.S.C. § 106 states, in pertinent part:

> (a) Notwithstanding 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 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.
>
> (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
>
> (3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such an order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412 (d)(2)(A) of title 28.
>
> (b) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

Barrett's proposed plan includes the following provisions concerning Mississippi: 1) the claim for remediation of the pollution is allowed priority treatment and will be paid in full and 2) all other claims by Mississippi are classified as unsecured and will receive the same treatment as that class.

The Supreme Court then decided *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), which raised several questions about state sovereign immunity and the Eleventh Amendment.

Subsequently, Mississippi filed this motion and Barrett and the Unsecured Creditors' Committee have both responded.

CLAIMS

Mississippi makes the following assertions:

1) The fines and penalties must also be allowed the same priority treatment as the remediation claim and cannot be subordinated or discharged, and, further, this court lacks jurisdiction over Mississippi for the following reasons:

A) 11 U.S.C. § 106 is unconstitutional pursuant to *Seminole*; and

B) Mississippi has not waived sovereign immunity by filing a proof of claim; or

2) In the alternative, to permit Mississippi to withdraw its proof of claim, pursuant to Fed.R.Bankr.P. 3006, and for a declaration that any action by Mississippi to enforce the fines and penalties will not violate the automatic stay; or

3) In the further alternative, for this court to abstain from deciding this issue pursuant to 28 U.S.C. § 1334 (c) and for the United States District Court to withdraw the reference of this case, pursuant to 28 U.S.C. § 157 (d), for the following reasons:

A) The issue is not a core proceeding;

B) The issue involves matters of constitutional law, sovereign immunity, and environmental protection.

Mississippi's request to withdraw the reference has already been denied by the District Court. In its order, the Court ruled that Mississippi's motion was untimely, as it was 55 days late, and that the matter under consideration appeared to be a core proceeding. The District Court also noted that Mississippi was a claimant and that neither Barrett nor the Unsecured Creditors' Committee had asserted any claims against Mississippi. Although the District Court did not address the issue of abstention, its order specifically addressed Mississippi's grounds for requesting abstention, rejected them, and upheld the federal bankruptcy jurisdiction and the referral of this case to this court.

799 *799 *ISSUES*

Mississippi's claims should be analyzed in accordance with the following questions:

1) Is 11 U.S.C. § 106 unconstitutional?

A) Is 11 U.S.C. § 106 contrary to the Eleventh Amendment?

(1) Is a bankruptcy case a "suit" under the Eleventh Amendment?

(2) Is a bankruptcy case comparable to an admiralty suit?

B) Is 11 U.S.C. § 106 constitutional in light of Seminole?

(1) Does *Seminole*, on its face, apply to bankruptcy cases?

(2) Is the federal statute considered in *Seminole* comparable to 11 U.S.C. § 106?

(3) Does *Seminole* apply Eleventh Amendment immunity to states in bankruptcy cases because the Bankruptcy Code is based on Article I of the Constitution?

(4) Does *Seminole* conflict with the position that bankruptcy cases are not suits subject to the Eleventh Amendment?

2) Did Mississippi waive sovereign immunity by filing its proof of claim and participating in the case?

A) What constitutes a waiver of state sovereign immunity under the Eleventh Amendment?

B) What constitutes a valid waiver, of state sovereign immunity under 11 U.S.C. § 106?

C) How do the Eleventh Amendment and 11 U.S.C. § 106 interface?

D) Do the actions of Mississippi, including the filing of its proof of claim, constitute a valid waiver of sovereign immunity?

3) Should Mississippi be allowed to withdraw its proof of claim and, if so, what is the affect of withdrawal?

HISTORY OF THE ELEVENTH AMENDMENT

The catalyst for the enactment of the Eleventh Amendment was the decision by the Supreme Court in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 1 L.Ed. 440 (1793). Chisholm was a suit in assumpsit (i.e., a breach of contract) by Chisholm who was the executor of a deceased citizen of South Carolina against the State of Georgia. Both Chisholm and the deceased were citizens of South Carolina During the Revolutionary War, the

deceased had provided Georgia war supplies and Georgia had not paid the debt by the time of his death. Chisholm then brought an original action in the Supreme Court. Georgia, however, refused to appear, claiming that the Supreme Court did not have jurisdiction. The Court ruled in Chisholm's favor, four to one, but withheld final judgment, providing the State of Georgia the opportunity to appear.

Justice James Wilson, one of the affirmative votes, who, as a signer of both the Declaration of Independence and the Constitution and formerly a delegate to the Federal Constitutional Convention,[3] was eminently qualified to write for the Court. He presented three grounds in support of his affirmative vote. First, he explained that "sovereignty", with regard to a state and the people within the state, is such that the state is subordinate to the people. Indeed, states and governments are made to serve man. A state is merely a conglomeration of individuals. Thus, as individuals are bound by the law and subject to the jurisdiction of the courts, why should a state (merely a conglomeration of individuals) not also be bound by the laws and the jurisdiction of the courts? *Id.*, 2 U.S. at 453-58.

[3] Justice Wilson was also a member of the Committee of Detail which oversaw the drafting of Article III of the Constitution. Clyde E. Jacobs, The Eleventh Amendment and Soverign Immunity 17 (Greenwood Press 1972).

Further, stated Justice Wilson, the concept of "sovereignty" necessarily involves subjects. He noted that, in the United States, there are no subjects, but, rather, there are citizens. Indeed, in the Constitution, itself, there are no references to American "subjects", "immunity", or even to "sovereignty." Thus, he concluded that in our political system there are no sovereigns. Moreover, power, which is the essence of sovereignty, rests with the
800 "People of the United States" and Georgia *voluntarily* became a part of the *800 United States, thereby yielding its previous sovereign immunity. Therefore, with respect to the purposes of the Union, the State of Georgia is not a sovereign state. Moreover, sovereignty is a concept linked with the monarchs of Europe, to include Great Britain. There are no monarchs in the United States or in the State of Georgia. Thus, concluded Justice Wilson, sovereignty is not a principle applicable to the states and Georgia is subject to the jurisdiction of the federal courts. *Id.* at 453-58.

Even with regard to monarchs in other political systems in an historical context, Justice Wilson acknowledged that it was possible to bring suit against them. For example, in ancient Saxon England, it was possible to sue the king. The same was true in Prussia under Frederic, where all men were held to be equal to obtain justice. *Id.* at 459-61. Justice Wilson specifically responded to the argument that English law, which, at that current time, had monarchs and sovereign immunity, was the source of this concept of sovereign immunity. But that current English monarchy was a despotic government. *Id.* at 462. Thus, the English law was not a suitable reference or authority for and should not apply to the United States, as the United States was not nor was it intended to be a despotic government.

Justice Wilson also wrote that because the Constitution empowered the United States with forming a more perfect union, establishing justice, ensuring domestic tranquility, providing for the common defense, and securing the blessings of liberty; it was a necessary condition that the United States be vested with judicial authority and not just legislative and executive authority. And further, because the people of Georgia were ratifiers of the Constitution, they were subject to such judicial authority. Moreover, Justice Wilson explained that it would be superfluous to make laws and then prohibit the judiciary from enforcing them. The Constitution has stated the highest laws: to form a more perfect union, to establish justice, and to ensure domestic tranquility. If the judiciary does not have authority over the states to enforce them, then these constitutional mandates would be meaningless. Justice Wilson, and rightly so, rejected this idea. *Id.* at 463-65.

Chief Justice John Jay, also one of the Founding Fathers, echoed the arguments of Justice Wilson. For Chief Justice Jay, the source of sovereignty was European feudalism, which was not the philosophical basis of the United States, whereas the Constitution was a social compact. *Id.* at 471-73. Indeed, if the Constitution was intended to prohibit suits against states as a defendant, it would have clearly so stated, claimed the Chief Justice. *Id.* at 476-77.

Despite the continuance, Georgia never appeared before the Supreme Court in this case. Subsequently, the Eleventh Amendment was passed and *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 1 L.Ed. 440 (1793), was dismissed in *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 1 L.Ed. 644 (1798).

The reaction to *Chisholm* was harsh, especially in Georgia. Georgia almost enacted a state law which would have mandated death by hanging, without benefit of clergy, for any person bringing suit in the United States Supreme Court against Georgia.[4] As a resuit, the Eleventh Amendment was enacted within a few years of *Chisholm*.

4 [5] John V. Orth, *The Judicial Power of the United States 18 (Oxford University Press 1987)*; Clyde E. Jacobs, *The Eleventh Amendment and Sovereign Immunity* 56-57 (Greenwood Press 1972).

5 The Eleventh Amendment was apparently ratified in February 1795. See William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 83 Stan. L.R. 1033, 1059 (1983). However, it was not reported to Congress until January 8, 1798. *See* 1 Annals of Cong. 809-10 (1798).

Two reasons have been advanced for explaining the reaction to Chisholm and the swift passage of the Eleventh Amendment: 1) that the initial understanding of the states was that they were immune to suit from individuals
801 under the Constitution at the time of its ratification[6] and 2) that states were *801 fearful of being haled into federal court to pay their debts.

6 [7] This understanding seems to be inaccurate for a number of reasons. During their ratification debates of the federal Constitution, at least five states (Virginia, North Carolina, New York, Massachusetts, and New Hampshire) proposed amendments negating the Article III clause permitting suits between citizens and states from being heard in the federal courts. And a sixth state (South Carolina) proposed a similar amendment during the ratification debates of the Bill of Rights. *See* William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 83 Stan. L.R. 1033, 1051-52 (1983).

Further, it seems that, overall, the greater number of the Founding Fathers believed that under Article III, the states could be sued in federal courts. Clyde E. Jacobs, *The Eleventh Amendment and Sovereign Immunity* 39-40 (Greenwood Press 1972) (stating that all the Anti-Federalists and a portion of the Federalists believed that Article III permitted the states to be sued in federal courts).

Additionally, the Federal Judiciary Act of 1798, § 13, conferred original, but not exclusive, jurisdiction upon the United States Supreme Court over suits between states and citizens of other states. The Act passed Congress without any opposition.

Moreover, the opinions of Chief Justice Jay and Justice Wilson in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 1 L.Ed. 440 (1793), and Chief Justice Marshall in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 5 L.Ed. 257 (1821), also present the belief that the states could he sued under the Constitution in the federal courts.

Thus, it appears that there was the general understanding on the part of the states, prior to the Eleventh Amendment, that the states were subject to federal jurisdiction.

7 Although one scholar feels that this reason might be inaccurate, as the states had the desire to pay their debts and tried to do so and many of the Founding Fathers were pro-creditor (Clyde E. Jacobs, *The Eleventh Amendment and Sovereign Immunity* 69-71 (Greenwood Press 1972)) the majority of writers hold that this reason is accurate. *See* William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 83 Stan. L.R 1033, 1058 (1983) (citing, at n. 114, I C. Warren, *The Supreme Court in United States History* 99 (1922); J. Goebel, *History of the Supreme Court of the United States, Antecedents and Beginnings to 1801* 741-56 (1971); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L.Rev. 1, 8 (1972); John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 Colum. L.Rev. 1413, 1439-41 (1975)). *See also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 5 L.Ed. 257 (1821) (Marshall, C.J.).

One of the best explanations for why Federalists, who were pro-strong central government, voted to ratify the Eleventh Amendment, which limited strong central government, was that the Federalists understood the Amendment as just addressing the question of states being sued in federal courts for their debts. John V. Orth, *The Judicial Power of the United States* 28 (Oxford University Press 1987).

ANALYSIS

As a preliminary matter, bankruptcy jurisdiction should be explained. First, the Bankruptcy Clause, which is the foundation of federal bankruptcy law and authority, is found in Article I, § 8, of the Constitution and it provides that "The Congress shall have power . . . To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States." Under 28 U.S.C. § 1334, original and exclusive jurisdiction over bankruptcy cases is then vested in the United States district courts. Under 28 U.S.C. § 157, each district court has the authority to refer bankruptcy cases to the bankruptcy courts. Particular, enumerated, circumstances can be the grounds for a withdrawal of the reference by the district court. The United States District Court for the Western District of Oklahoma has a standing order referring all bankruptcy cases to the bankruptcy court.

ISSUE I IS 11 U.S.C. § 106 UNCONSTITUTIONAL?

Mississippi argues that *Seminole* stands for the proposition that, pursuant to the Eleventh Amendment, federal courts do not have jurisdiction over the states pursuant to any statute based on Article I or Article III powers; including bankruptcy.

8 [8] This court notes that the Supreme Court has ruled that there is a presumption of constitutionality of an act of Congress. *O'Gorman Young, Inc. v. Hartford Insurance Company*, 282 U.S. 251, 257-58, 51 S.Ct. 130, 75 L.Ed. 324 (1931). 11 U.S.C. § 106 is an act of Congress. Thus, Mississippi has the burden of demonstrating that the act is unconstitutional.

The Eleventh Amendment has been subject to a number of interpretations by the Supreme Court. Two of the
802 most important have significantly expanded the scope of the *802 Amendment beyond its plain language. For example, it has been held that the Amendment applies not only to citizens from different states, but also to citizens from the same state. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890) [9]*See also United States v. Texas*, 143 U.S. 621, 12 S.Ct. 488, 36 L.Ed. 285 (1892). Further, Eleventh Amendment immunity applies not only to the states, but also to agencies of the states. *Pennhurst State School Hospital v. Halderman*, 465 U.S. 89, 100, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984).

9 There is a continuing significant controversy over the *Hans* decision. Numerous scholars feel the case was wrongly decided as it has no basis in the plain language of the Eleventh Amendment. *See* Carlos Manuel Vazquez. *What is Eleventh Amendment Immunity?* 106 Yale L.J. 1683, 1685 (1997) (citing John Norton Pomeroy, *The Supreme Court*

and State Repudiation — The Virginia and Louisiana Cases, 17 Am. L.Rev. 684, 684-85 (1883) and Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 3-4 (1988)). Indeed, over the years, dissenting justices of the Supreme Court have strongly advocated for the reversal of *Hans*. *See, e.g., Welch v. Texas Highways and Public Transportation Department*, 483 U.S. 468, 478, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987). Also, in *Seminole*, the dissenting justices sharply criticize *Hans*.

The most persuasive position offered against *Hans*, in favor of the earlier rulings, is that the justices who gave the earlier decisions were involved in the writing and ratification of the Constitution and were alive during the time of the enactment of the Eleventh Amendment and would have had a clearer understanding of its meaning than the justices who have attempted to interpret it nearly a century later, as occurred with *Hans*. John V. Orth, *The Judicial Power of the United States* 22 (Oxford University Press 1987).

The Supreme Court has also examined what types of legal actions fall within the ambit of the Eleventh Amendment. For example, the Court, noting that admiralty suits are not, technically, "suits in law or equity", ruled that they are, nevertheless, subject to the Amendment. *Welch v. Texas Highways Public Transportation Department*, 483 U.S. 468, 473, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987). *See also Ex parte New York*, 256 U.S. 490, 41 S.Ct. 588, 65 L.Ed. 1057 (1921).

The Supreme Court has, however, specifically stated that bankruptcy cases are not "suits" under the Eleventh Amendment. *See Gardner v. New Jersey*, 329 U.S. 565, 572, 67 S.Ct. 467, 91 L.Ed. 504 (1947). Indeed, one passage in *Gardner* could, arguably, be used to resolve this matter:

> It is traditional bankruptcy law that he who involves the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. [citation omitted.] If the claimant is a State, the procedure of proof and allowance *is not transmitted into a suit* against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought against the State. The whole process of proof and allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a res. It is none the less such because the claim is rejected in toto, reduced in part, given a priority inferior to that claimed, or satisfied in some way other than payments in cash. When the State becomes the actor and files a claim against the fund it waives any immunity it might have had respecting the adjudication of the claim [citations omitted] (emphasis added).

Id. at 573-74, 67 S.Ct. 467. *Gardner* is further supported by an earlier decision of the Supreme Court. *New York v. Irving Trust Company*, 288 U.S. 329, 53 S.Ct. 389, 77 L.Ed. 815 (1933). In *Irving Trust*, although New York argued that the bankruptcy court did not have jurisdiction to exercise power over the State as a matter of state sovereignty, the Court pronounced that the "federal government possesses supreme power in respect of bankruptcies" and upheld federal bankruptcy jurisdiction. *Id.* at 333, 53 S.Ct. 389 (citing *International Shoe Company v. Pinkus*, 278 U.S. 261, 49 S.Ct. 108, 73 L.Ed. 318 (1929)). Even though the Eleventh Amendment was not specifically mentioned in *Irving Trust*, the focus of the decision was state sovereignty, which is the essence of the Eleventh Amendment.

The support for the position that the Eleventh Amendment does not apply to bankruptcy cases is not limited to these two decisions. Whether a bankruptcy case falls within the scope of the Eleventh Amendment *803 turns upon the definition of a "suit". The Supreme Court first presented the definition of a suit within the meaning of the Eleventh Amendment in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 5 L.Ed. 257 (1821).

In *Cohens*, Chief Justice Marshall wrote that not all legal actions were suits. The decision shows that a suit consists of: 1) an adversarial proceeding, 2) which arises as a result of a deprivation or injury, 3) which involves at least two parties, 4) which compels the attendance of the parties, 5) which asserts and prosecutes a claim against one of the parties, and 6) which demands the restoration of some thing from the defending party. *Id.*, 19 U.S. at 407-12. Chief Justice Marshall noted in his decision that there are legal actions which are, not "suits" within the scope of the Eleventh Amendment.

It, thus, appears that, under *Cohens*, a bankruptcy case is not a "suit" within the meaning of the Eleventh Amendment. In the first place, a bankruptcy case is not an adversarial proceeding. Instead, it is a request by a single party to discharge or rearrange debts. This stance is highlighted by the style of a bankruptcy case: " *In re John Debtor*." A bankruptcy case is not styled " *John Debtor v. Jane Creditor*."[10] Further, a bankruptcy case does not, as a matter of parties of record, involve two or more adversarial parties, unless a debtor, creditor, or trustee initiates a complaint within the bankruptcy case. In such an instance, this adversary proceeding is dependent on the bankruptcy case and is not an independent cause of action. Further, a bankruptcy case, itself, is not prompted by a deprivation or injury by an opposing party.

10 There is a significant difference between a bankruptcy case and an adversary proceeding within a bankruptcy case. An adversary proceeding is a civil proceeding arising in or relating to a bankruptcy case. *See* 28 U.S.C. § 1334 (b) and Fed.R.Bankr.P. 7011. The adversary proceeding often involves the recovery of property or the determination of the value of property and has adversarial parties. However, the adversary proceeding is related to and dependent on the bankruptcy case and cannot occur unless a bankruptcy case has been filed. *Kenan v. FDIC (In re George Rodman, Inc.)*, 33 B.R. 348 (Bankr.W.D.Okla. 1983) (citing Fed.R.Bankr.P. 7001). Indeed, in many bankruptcy cases, adversary proceedings do not occur.

However, this case, concerns an objection filed by Mississippi to the confirmation of the plan filed by Barrett, which is not an adversary proceeding.

Also, in a bankruptcy case, the only party required to attend is the debtor. Creditors are not compelled to attend. Notice is given to the creditors but they are free to ignore the case.

Finally, a petition commencing a bankruptcy case does not assert or prosecute a claim against any other party. The debtor does not demand the presence of other parties to adjudicate a claim. Nor does the debtor, by the petition, "sue" anyone or demand the restoration of some thing from an opposing party. In all of these explanatory instances, where the term "party" has "been used, the term "state" can be substituted. Thus, under *Cohens*, a bankruptcy case is not a "suit" falling within the scope of the Eleventh Amendment such that state sovereign immunity is triggered.

The postulate advanced by Chief Justice Marshall in *Cohens*, concerning the elements of a suit, is also present in a modern Supreme Court decision holding that a bankruptcy case is not a suit. In *Gardner*; as previously mentioned, the Court stated: " *If the claimant is a State, the procedure of proof and allowance is not transmitted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought against the State." Gardner v. New Jersey*, 329 U.S. 565, 573-74, 67 S.Ct. 467, 91 L.Ed. 504 (1947) (emphasis added). Thus, there is significant modern support for Chief Justice Marshall's decision concerning "suits" and the Eleventh Amendment. *See also Missouri v. Fiske*, 290 U.S. 18, 26-27, 54 S.Ct. 18, 78 L.Ed. 145 (1933) (citing *Cohens* with approval of Chief Justice Marshall's definition of a suit.)

Additional authority for this position is also found in another early Supreme Court decision, also authored by Chief Justice Marshall, where the Court acknowledged that a suit, generally, requires the adversarial litigation
804 of a right between two parties in a court of *804 justice to obtain a remedy. *Weston v. City Council of Charleston*, 27 U.S. (2 Peters) 449, 464, 7 L.Ed. 481 (1829). This definition requires that there be an initial deprivation or injury for which a redress can be obtained. Thus, *Weston* also supports the proposition that a bankruptcy case is not a suit. A bankruptcy case does not have adversarial parties nor does it depend upon any injury or deprivation caused by a "defendant".

Further, a bankruptcy petition does not seek a remedy or redress in the traditional sense of the term. *See also Federal Housing Administration, Region No. 4 v. Burr*, 309 U.S. 242, 246 n. 8, 60 S.Ct. 488, 84 L.Ed. 724 (1940) (citing Weston as authority for the definition of a suit). Moreover, in Burr, the Supreme Court indicated that a "suit" encompassed the use of such legal processes as attachment and garnishment: *i.e.*, instruments of compulsory process against a party. *Id.* at 245-46, 60 S.Ct. 488. These compulsory processes are not employed in bankruptcy cases.[11] Thus, additional modern support for Chief Justice Marshall's explanation of a suit, within the scope of the Eleventh Amendment, *does* exist.

[11] Such instruments of compulsory process may be employed in adversary proceedings arising in or relating to the bankruptcy case. The issue at hand, however, does not concern an adversary proceeding.

This leads to the question of what types of legal actions do fall within the scope of the Eleventh Amendment. Turning to the question of whether a bankruptcy case is sufficiently similar to an admiralty case, such that Eleventh Amendment immunity should also be extended to states in bankruptcy cases, this court concludes that it is not. In support, this court notes that in the seminal case deciding that admiralty cases were subject to the Eleventh Amendment, the Supreme Court acknowledged that: 1) the admiralty suit in question asked for damages to be levied against an agent of the State of New York, 2) if the agent could not be found, the process mandated that the goods of New York should be attached, and 3) the court issued compulsory process which was served upon an agent of the State. *Ex parte New York*, 256 U.S. 490, 495-96, 41 S.Ct. 588, 65 L.Ed. 1057 (1921). A bankruptcy case can be easily distinguished from the admiralty suit presented in *Ex parte New York*. First, a bankruptcy petition does not seek damages against another party.[12] Second, there is no opposing party whose property is subject to attachment. Third, compulsory process is not issued against an opposing party by the filing of a bankruptcy petition. Thus, *Ex parte New York* illustrates, an admiralty suit has sufficient similarities to a regular suit (involving adversarial parties, injuries, claims, compulsory process, etc.) that it is within the scope of the Eleventh Amendment. However, a bankruptcy case does not have these enumerated elements and is significantly different from an admiralty suit. Thus, any analogous argument, that because admiralty suits are covered by the Eleventh Amendment, bankruptcy cases should also be covered by the Eleventh Amendment, is without sufficient foundation in fact and law.

[12] However, a complaint in an adversary proceeding does ask for relief from the opposing party. *See* Fed R. Bankr.P. 7001. In the instant matter there is no complaint or adversary proceeding.

In its brief, Mississippi asserts that a bankruptcy case is a suit for Eleventh Amendment purposes, but presents no authority in support of this position. Indeed, Mississippi asks "What is this action, if not a `suit' . . .?" *See* Supplemental Brief of Mississippi, pp. 8-9. In answer to Mississippi's question, it is a legal remedy which does not fall within the meaning of "suit" for Eleventh Amendment purposes.

Thus, as a matter of law, pre- *Seminole*, this court finds that the Eleventh Amendment does not apply to the Bankruptcy Code as a bankruptcy case is not a suit within the scope of the Amendment. The next consideration is the effect of *Seminole* upon this issue.

Seminole stated that Congress may abrogate states' immunity if: 1) Congress "unequivocally expresse(d] its intent to abrogate this immunity," *Seminole Tribe of Florida*, 517 U.S. at 55-56, and n. 2, 116 S.Ct. at 1123, and
805 n. 2) Congress did so "pursuant to a valid exercise of power." *Seminole Tribe of* *805 *Florida*, 517 U.S. at 55, 116 S.Ct. at 1124 (quoting *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985)). However, in *Seminole*, the Court ruled that the "Eleventh Amendment restricts the judicial power under Article III, and Article I. cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Seminole Tribe of Florida*, 517 U.S. at 72-73, 116 S.Ct. at 1131-32, overruling *Pennsylvania v. Union Gas Company*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989) (which allowed Congressional abrogation of state sovereignty under the Eleventh Amendment based upon the Commerce Clause of Article I). Indeed, the only way currently recognized by the Supreme Court for Congress to abrogate Eleventh Amendment sovereign immunity from suits is through the Fourteenth Amendment. *Seminole Tribe of Florida*, 517 U.S. at 58-60, 116 S.Ct. at 1125 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976)). However, *Seminole* appears to leave open that there may be other ways for Congress to negate the Eleventh Amendment's grant of sovereign immunity to the states.

13 [13] *See Diaz-Gandia v. Dapena-Thompson*, 90 F.3d 609, 616, n. 9 (1st Cir. 1996) (holding that the War Powers, under Article I of the Constitution was a valid authority to abrogate the Eleventh Amendment, despite the ruling in *Seminole*).

It is important to realize that *Seminole* does not address bankruptcy cases and involved a federal statute, based upon the Indian Commerce Clause of Article I, which imposes a duty upon a state to negotiate in good faith with a tribe concerning the formation of a compact to regulate gaming. 25 U.S.C. § 2710 (d)(1)(C). Further, the statute in question authorized a tribe to bring suit in federal court to compel a state to negotiate. 25 U.S.C. § 2710 (d)(7).

Mississippi argues that *Seminole* stands for the proposition that, pursuant to the Eleventh Amendment, the bankruptcy court lacks jurisdiction over it. Examining the decision itself, it appears that *Seminole* has no affect upon federal bankruptcy jurisdiction.

14 [14] This is true, at least outside of adversary proceedings. However, this court notes that one recent Supreme Court decision indicated that when a party files a proof of claim in a bankruptcy case, and then participates in an adversary proceeding, subordinate to that bankruptcy case, certain rights under the Constitution are lost. *See Katchen v. Landy*, 382 U.S. 323, 336-37, 86 S.Ct. 467, 15 L.Ed.2d 391 (1966) (holding that the Seventh Amendment right to a jury trial is lost when a proof of claim has been filed). This court sees no distinguishing reason why any Eleventh Amendment rights would not also be lost. However, this circumstance is not present in this decision so the issue of the waiver of sovereign immunity within an adversary proceeding where the state has filed a claim is. not addressed.

Mississippi relies upon the dissent of Justice Stevens as its basis for arguing that the majority decision in *Seminole* prohibits bankruptcy courts from exercising jurisdiction over the states. In his dissent, Justice Stevens writes that the majority decision "prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy,. . . ." *Seminole Tribe of Florida*, 517 U.S. at 77, 116 S.Ct. at 1133 (Stevens, J., dissenting). Mississippi's reliance on Justice Stevens' dissent is misplaced, and not just for the reason that it was a dissent.[15] The majority specifically responded to the dissent, stating:

15 The Supreme Court has indicated that it is not proper to rely on *dicta* as precedential authority. *See Colgrove v. Battin*, 413 U.S. 149, 157, 93 S.Ct. 2448, 37 L.Ed.2d 522 (1973). Using this same rationale, this court holds that it is not proper to rely on a dissent as authority for a proposition of law.

> Justice Stevens understands our opinion to *prohibit federal jurisdiction over suits to enforce the bankruptcy*, copyright, and antitrust laws *against the States*. He notes that federal jurisdiction over those statutory schemes is exclusive, and therefore concludes that there is "no remedy" for state violations of those federal statutes. Post, at 101 n. 1, 116 S.Ct. at 1145 n. 1.
>
> That conclusion is exaggerated both in its substance and in its significance. . . . *[C]ontrary* to the implication of Justice Stevens conclusion, it has not been widely thought that the federal antitrust,
806 bankruptcy, *806 or copyright statutes abrogated the States' sovereign immunity.

Seminole Tribe of Florida, 517 U.S. at 73 n. 16, 116 S.Ct. at 1132 n. 16 (emphasis added). In other words, this part of the majority's response to Justice Stevens explains that; according to Justice Stevens, there would be no remedy for state violations of federal bankruptcy law. This might, arguably, be true, but perhaps for reasons which are different from what either the majority or the dissent considered in *Seminole*.

Examining the comments on the two issues, remedy and jurisdiction, raised by the Court. in response to the dissent, this court concludes that the response arguably supports a conclusion that *Seminole* does not apply to bankruptcy cases. First, a bankruptcy petition seeks no "traditional" remedy for redress as a state is not compelled to appear in federal court by a citizen in a suit to obtain redress for injuries or damages. A bankruptcy case is such that the bankruptcy court exercises its jurisdiction over the debtor and the property of the estate. *See* 28 U.S.C. § 1334 (e) and *Gardner v. New Jersey*, 329 U.S. 565, 577, 67 S.Ct. 467, 91 L.Ed. 504 (1947). By the mere commencement of the case, the bankruptcy court does not acquire jurisdiction over either anyone else or anyone else's property. Thus, it does not acquire jurisdiction over the state, either *in personam* or *in rem*. Thus, it remains that a bankruptcy case is not a "suit" within the meaning of the Eleventh Amendment and the Court's response to Justice Stevens' dissent does not stand for the proposition that *Seminole* applies Eleventh Amendment sovereign immunity to bankruptcy cases. *See also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 5 L.Ed. 257 (1821); *Gardner v. New Jersey*, 329 U.S. 565, 67 S.Ct. 467, 91 L.Ed. 504 (1947).

Second, the majority specifically states "contrary to the implication of Justice Stevens' conclusion, it has not been widely thought that the federal . . . bankruptcy statutes abrogated States' sovereign immunity." *Seminole Tribe of Florida*, 517 U.S. at 73 n. 16, 116 S.Ct. at 1132 n. 16. Justice Stevens, in his dissent, concluded that the majority "prevents Congress from providing a federal forum for a broad range of actions . . . to those concerning bankruptcy. . . ." *Id.* at 77, 116 S.Ct. at 1134. In this part of its refutation of Justice Stevens' concerns, the majority concludes that *Seminole* does not stand, nor was intended to stand, for the proposition that the Eleventh Amendment prohibits bankruptcy courts from exercising jurisdiction over states, as demonstrated by the following two points.

First, considering these statements on their face and by their plain language, the majority states " *contrary* to the implication of Justice Stevens' conclusion. . . ." (Emphasis added). A contrary is an opposite. Justice Stevens concluded that *Seminole* would prohibit bankruptcy jurisdiction over the states. Thus, by its own language, the *Seminole* Court denies that the Eleventh Amendment prohibits federal bankruptcy jurisdiction over the states.

Second, the Court also states that it has never been widely thought that bankruptcy statutes have abrogated states' sovereign immunity. *Id.* at 73 n. 16, 116 S.Ct. at 1132 n. 16. This is true. In the cases previously cited in the instant opinion, the Supreme. Court has long ruled that application of bankruptcy statutes to states does not violate state sovereign immunity. *See Gardner v. New Jersey*, 329 U.S. 565, 67 S.Ct. 467, 91 L.Ed. 504 (1947);

New York v. Irving Trust Company, 288 U.S. 329, 53 S.Ct. 389, 77 L.Ed. 815 (1933). Indeed, *Seminole* does not overrule these decisions.[16] Thus, there are sufficient statements in *Seminole* and other authorities to conclude that *Seminole* does not, and was not intended to, prohibit federal bankruptcy jurisdiction over the states.

16 Although *Seminole*, in footnote 16, states that there is no established tradition in the lower federal courts of enforcing the bankruptcy statutes over the states, this statement appears contrary to *Gardner v. State of New Jersey*, 329 U.S. 565, 576, 578, 67 S.Ct. 467, 91 L.Ed. 504 (1947) (citing *Van Huffel v. Harkelrode*, 284 U.S. 225, 52 S.Ct. 115, 76 L.Ed. 256 (1931)), which is not discussed.

There may be still another consideration with the application of *Seminole* to bankruptcy cases. *Seminole* concerned a statute which provided specific direct relief in the *807 form of redress, in federal court, against a state for a violation of federal law. See 25 U.S.C. § 2710. In such an action, the state would be a named party, or at least a real party in interest such that the action would be construed to be a suit against the state. *See also Ford Motor Company v. Department of Treasury of Indiana*, 323 U.S. 459, 464, 65 S.Ct. 347, 89 L.Ed. 389 (1945); *Pennhurst State School Hospital v. Halderman*, 465 U.S. 89, 101, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). This is not applicable to a bankruptcy case. In a bankruptcy case, the state would not be a named party nor would the state be a real party in interest.[17] The state may voluntarily participate in the proceeding concerning the res, the bankruptcy estate, and such participation constitutes a waiver of sovereign immunity. Thus, the statutory subject matter of *Seminole* (i.e., 25 U.S.C. § 2710 providing a direct federal cause of action against named parties) can be sufficiently distinguished from the statutory subject matter of bankruptcy cases (i.e., 28 U.S.C. § 1334 and 11 U.S.C. § 101 et seq. providing for federal jurisdiction over bankruptcy cases) so as to render *Seminole* inapplicable to bankruptcy cases.

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17 The distinction between a nominal party and a real party in interest was first raised in *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 857-58, 6 L.Ed. 204 (1824). Although Chief Justice Marshall wrote that the Eleventh Amendment was limited to suits where the state was a named party, he inferred that a nominal party substituting for the real party in interest (the state) could trigger the Eleventh Amendment. The Supreme Court explained the distinction with greater clarity in *In Re Ayers*, 123 U.S. 443, 8 S.Ct. 164, 31 L.Ed. 216 (1887). In that decision, the Court held that where a named party (the state) does not have an individual interest in the suit, but is only named on behalf of the real party (an individual), to avoid jurisdictional difficulties, then the state will be construed to be the real party in interest. *Id.* at 489-91, 8 S.Ct. 164. *See Pennoyer v. McConnaughy*, 140 U.S. 1, 10, 11 S.Ct. 699, 35 L.Ed. 363 (1891).

Under this definition, it is apparent that there cannot be such a "real party in interest" in a bankruptcy case because of the differences between a bankruptcy case and a traditional two-party, adversarial suit for damages. For a nominal party, under this definition, is one who *substitutes* for the real party in interest. In a bankruptcy case, considering the state as a claimant, the state is not substituting for any of the named parties. There is only one named party: the debtor. And there can be no question that the debtor is the real party in interest with regard to the bankruptcy case.

However, the Supreme Court provided another perspective from which the concept of a real party in interest could be applied. *Ford Motor Company v. Department of Treasury of Indiana*, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945). In *Ford Motor Company*, the Court stated that where an action is against a named party (NOT the state) for recovery of funds from the state treasury, then the real party in interest will be deemed to be the state. *Id.* at 464, 65 S.Ct. 347. In a bankruptcy case, this definition and application would also not apply, as the debtor who files bankruptcy is not seeking to retrieve funds from the state treasury. Thus, in the instant matter, the State of Mississippi would not be a real party in interest as Barrett is not seeking to obtain funds from Mississippi's treasury. *See also Hoffman v. Connecticut Department of Income Maintenance*, 492 U.S. 96, 102, 109 S.Ct. 2818, 106 L.Ed.2d 76 (1989) (discussing the differences and ramifications between determination by the bankruptcy court in the administration of claims and receiving a money judgment from the state.)

Further, Mississippi argues that because the source of the bankruptcy courts and judges is the Bankruptcy Clause of Article I of the Constitution, [18] *Seminole* mandates that Eleventh Amendment immunity must apply. This argument fails for, as a preliminary matter, the Eleventh Amendment does not apply, unless the matter is a "suit". As previously shown, a bankruptcy case is not a "suit" within the meaning of the Eleventh Amendment. Thus, *Seminole* cannot be used to circumvent the requirement that a matter be a "suit" for state sovereign immunity to apply.

18 This Constitutional provision is the source for 28 U.S.C. § 1334, which, in turn, is the source for 11 U.S.C. § 101 *et seq*.

Indeed, *Seminole* even implicitly approves of the position that a bankruptcy case is not a "suit" pursuant to the Eleventh Amendment. In footnote 16, the majority states that "This Court never has awarded relief against a State under [bankruptcy] statutory schemes. . . ." *Seminole Tribe of Florida*, 517 U.S. at 73 n. 16, 116 S.Ct. at 1131 n. 16. This statement is true as redress is neither sought nor awarded against a state in the administration of a bankruptcy case. This is highlighted in this case, as confirmation of Barrett's plan would not require
808 Mississippi or any creditor to redress, reimburse or make *808 whole Barrett for any injury or damage.[19] Thus, *Seminole* does not conflict with the position that bankruptcy cases are not suits pursuant to the Eleventh Amendment.

19 However, if the Supreme Court definition of `relief' includes the administration of states' claims then the statement that the Court has never awarded relief in a bankruptcy case is apparently contrary to earlier decisions. *See, e.g., Gardner v. New Jersey*, 329 U.S. 565, 67 S.Ct. 467, 91 L.Ed. 504 (1947); *New York v. Irving Trust Company*, 288 U.S. 329, 53 S.Ct. 389, 77 L.Ed. 815 (1933).

Mississippi relies on *In re NVR L.P.*, 206 B.R. 831 (Bankr.E.D.Va. 1997), and similar cases which hold that, based on *Seminole*, Congress cannot abrogate state sovereign immunity pursuant to the Eleventh Amendment when the statute is created pursuant to Article I, which is the source of bankruptcy jurisdiction and courts. *See also In re Martinez*, 196 B.R. 225 (D.P.R. 1996); *Sparkman v. State of Florida Department of Revenue (In re York-Hannover Developments, Inc.)*, 201 B.R. 137 (Bankr.E.D.N.C. 19913); *Sacred Heart Hospital v. State of Pennsylvania Department of Welfare (In re Sacred Heart Hospital)*, 199 B.R. 129 (Bankr.E.D.Pa. 1996); *Schulman v. California State Water Resources Control Board (In re Lazar)*, 200 B.R. 358 (Bankr.C.D.Cal. 1996); *Ellenberg v. Board of Regents (In re Midland Mechanical Contractors, Inc.)*, 200 B.R. 453 (Bankr. N.D.Ga. 1996).

In contrast, Barrett and the Unsecured Creditors' Committee rely on *Wyoming Department of Transportation v. Straight (In re Straight)*, 209 B.R. 540 (D.Wyo. 1997), and other cases which hold that Congress can abrogate state sovereign immunity concerning bankruptcy cases through the Fourteenth Amendment, despite the ruling in *Seminole*. *See Mather v. Oklahoma Employment Security Commission (In re Southern Star Foods, Inc.)*, 190 B.R. 419 (Bankr.E.D.Okla. 1995); [20] *Headrick v. State of Georgia (In re Headrick)*, 200 B.R. 963 (Bankr.S.D.Ga. 1996).

20 The *Southern Star Foods* decision was pre- *Seminole*, but has been used as authority for post- *Seminole* decisions. *See, e.g, Headrick v. State of Georgia (In re Headrick)*, 200 B.R. 963 (Bankr.S.D.Ga. 1996).

In the instant decision, the issue of whether the source of bankruptcy jurisdiction is Article I or the Fourteenth Amendment is not applicable for, as demonstrated, the Eleventh Amendment applies only to "suits", not to bankruptcy cases. Thus, these arguments are irrelevant. Indeed, it is the position of this court that the entire line

of cases, taking either of these postures, can be said to have overlooked the fundamental issue of the difference between a suit and a bankruptcy case.

Therefore, this court concludes that 11 U.S.C. § 106, is not unconstitutional as the Eleventh Amendment does not apply to bankruptcy cases, for they are not suits under the Eleventh Amendment. Further, *Seminole* does not stand for the proposition that the Eleventh Amendment prohibits federal courts from exercising bankruptcy jurisdiction over states. As 11 U.S.C. § 106 is constitutional and the Eleventh Amendment does not apply to it, its mandated waiver of sovereign immunity on the part of participating states is not constitutionally infirm.

21 [21] Mississippi has failed to overcome the presumption of constitutionality of 11 U.S.C. § 106. *O'Gonnan Young, Inc. v. Hartford Insurance Company*, 282 U.S. 251, 257-58, 51 S.Ct. 130, 75 L.Ed. 324 (1931).

ISSUE 2 DID MISSISSIPPI WAIVE SOVEREIGN IMMUNITY BY FILING ITS PROOF OF CLAIM AND PARTICIPATING IN THE CASE?

Mississippi then argues that it has not waived its sovereign immunity by filing its proof of claim and participating in the case.

Generally, under the Eleventh Amendment, state sovereign immunity is waived if the state consents to the jurisdiction of the particular court. *See Pennhurst State School Hospital v. Halderman*, 465 U.S. 89, 100, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). There appear to be at least three ways a state can consent to federal jurisdiction.

809 First, the voluntary appearance of a state in an action in which it has an interest *809 has been recognized by the Supreme Court to be a waiver of Eleventh Amendment sovereign immunity. *Clark v. Barnard*, 108 U.S. 436, 447, 2 S.Ct. 878, 27 L.Ed. 780 (1883); *Missouri v. Fiske*, 290 U.S. 18, 24, 54 S.Ct. 18, 78 L.Ed. 145 (1933); *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 276, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985).[22] But state law still may limit consent even when there has been an appearance by the state. It is extremely important to note that, in Clark, the Court specifically recognized that where the state, as a defendant, voluntarily made an appearance, it waived Eleventh Amendment sovereign immunity. Further, the Court stated that "[i]n the present case the State of Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination." *Clark*, at 448, 2 S.Ct. 878.

22 It should be noted that in Atascadero, even though *Clark* was cited, the Supreme Court did not specifically mention the holding in *Clark* that a state could waive sovereign immunity by its mere appearance in the action. However, it is instructive to note that *Clark* was not overruled in *Atascadero* and the options provided by the Court were not exclusive: "A State *may* effectuate a waiver of its constitutional immunity by a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular federal program." *Atascadero*, at 238 n. 1, 105 S.Ct. 3142 (emphasis added). The Court did *not state these were the only ways* to do so. Thus, *Clark* is still viable.

Ford Motor Company v. Department of Treasury of Indiana, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945), is the seminal case on statutory and constitutional preservation and waiver of state sovereign immunity. In *Ford Motor Company*, the Court noted that, Indiana had a state constitutional provision authorizing waiver of state sovereign immunity only by a general act of the legislature and that a state official, by appearing in court, could not waive state sovereign immunity unless authorized by a statute. *Id.* at 468-69, 65 S.Ct. 347. Indiana had no such statute and the state Attorney General only possessed generally delegated powers. Thus, the appearance of the Attorney General to defend against the action did not constitute a valid waiver of sovereign immunity.

However, it should be noted that, prior to this decision, Indiana had ruled that because the State appeared and filed a cross-complaint for affirmative relief, the State had given its consent, despite the presence of the state constitutional preservation of sovereign immunity. *Id.* at 467 n. 12, 65 S.Ct. 347 (citing *State v. Portsmouth Savings Bank*, 106 Ind. 435, 7 N.E. 379 (1886)). Thus, it appears that, pursuant to *Ford Motor Company*, even if there is state law which preserves state sovereign immunity, if the state does more than just appear to defend against a claim, but *also files for affirmative relief*, then consent will be held to have been given.

23 [23] This position has substantial modem support. For example, the Supreme Court has stated "[I]n the absence of consent a suit in which the *State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." Pennhurst State School Hospital v. Halderman*, 465 U.S. 89, 100, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (emphasis added). The fact that the Court limited the application of the Eleventh Amendment to instances where the state is a named defendant provides strong support for the proposition that the Eleventh Amendment will not apply where the state is not a named defendant.

Further, in *Gardner*, at 472, 67 S.Ct. 467, the Court, citing *Clark*, specifically stated that once a state has filed a claim, it waives any immunity it might have had. *See also Wiswall v. Campbell*, 93 U.S. (3 Otto) 347, 351, 23 L.Ed. 923 (1876).

Further, in *Ford Motor Company*, the Court did not overrule Clark, which permits consent by mere appearance. Indeed, the Court cited Clark in *Ford Motor Company* as standing for the proposition that a state may waive its immunity. *Id.* at 465, 65 S.Ct. 347. Moreover, modern Supreme Court decisions have cited *Clark* without overruling its holding that a state waives sovereign immunity by its appearance. *See, e.g., Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985); *Missouri v. Fiske*, 290 U.S. 18, 24, 54 S.Ct. 18, 78 L.Ed. 145 (1933). And in *Petty*, decided after both *Clark* and *Ford Motor Company*, the
810 Court cited both cases as valid *810 precedential authority. *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 276, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959).

Furthermore, in *Fiske*, the Supreme Court specifically stated: "If the State chooses to come into the court as a plaintiff, or to intervene, seeking the enforcement of liens or claims, the State may be permitted to do so, and in that event its rights will receive the same consideration as those of other parties in interest." *Id.* at 28, 54 S.Ct. 18. Thus, it follows that a state that files a proof of claim in a bankruptcy case has waived its sovereign immunity, regardless of limitations created by its own law.

In the context of bankruptcy cases, several modern Supreme Court decisions have affirmed that the mere appearance and participation in a bankruptcy case constitutes a waiver of federal constitutional rights. *See Langenkamp v. Culp*, 498 U.S. 42, 44-45, 111 S.Ct. 330, 112 L.Ed.2d 343 (1990) (per curiam); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 57-59, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989); Katchen v. Landy, 382 U.S. 328, 336-37, 86 S.Ct. 467, 15 L.Ed.2d 391 (1966). Each of these cases concerned the waiver of the Seventh Amendment right to trial by jury and they hold that by filing a claim, a party submits to federal bankruptcy jurisdiction.[24] Thus, it is evident that the law is well established that once a claim is filed in a bankruptcy case, the party filing the claim submits to the jurisdiction of the bankruptcy court. Even though these cases concerned the Seventh Amendment, and not the Eleventh Amendment, they still address the question of a waiver of constitutional rights; one of which is state sovereign immunity under the Eleventh Amendment. This court concludes that there are insufficient facts and circumstances to distinguish the waiver of constitutional rights in them with the waiver of sovereign immunity in the instant case.

24 [25] Even if the state does not appear and does not file a proof of claim, the state is still bound by the decision of the bankruptcy courts concerning the estate. *Hoffman v. Connecticut Department of Income Maintenance*, 492 U.S. 96, 102, 109 S.Ct. 2818, 106 L.Ed.2d 76 (1989); *New York v. Irving Trust Company*, 288 U.S. 329, 330, 333, 53 S.Ct. 389,

77 L.Ed. 815 (1933).

25 *See In re Stoecker*, 202 B.R. 429, 448 (Bankr. N.D.Ill. 1996) (arriving at the same conclusion).

Even if Eleventh Amendment sovereign immunity did apply to bankruptcy cases, this court finds that once Mississippi filed its proof of claim, and affirmatively participated in the case, it submitted to the jurisdiction of the court and waived any sovereign immunity. *Clark v. Barnard*, 108 U.S. 436, 447, 2 S.Ct. 878, 27 L.Ed. 780 (1883); *Missouri v. Fiske*, 290 U.S. 18, 24, 54 S.Ct. 18, 78 L.Ed. 145 (1933); *Ford Motor Company v. Department of Treasury of Indiana*, 323 U.S. 459, 467, 65 S.Ct. 347, 89 L.Ed. 389 (1945); *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 276, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959). Further, as the Supreme Court stated in *Gardner*: "When the State becomes the actor and files a claim . . ., it waives any immunity which it otherwise might have had respecting the adjudication of the claim." *Gardner v. New Jersey*, 329 U.S. 565, 574, 67 S.Ct. 467, 91 L.Ed. 504 (1947) (citing, inter alia, *Clark v. Barnard*, 108 U.S. 436, 447-48, 2 S.Ct. 878, 27 L.Ed. 780 (1883)).

There is an additional possible limitation on consent by the appearance and participation of a state in a legal action. The Supreme Court has ruled that constructive consent is not appropriate for a waiver of constitutional rights. *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). In *Edelman*, Illinois participated in a federal executive program and received benefits in turn, which was the basis for Jordan's argument for constructive consent. The Court did not provide a general definition of constructive consent. Rather, it just responded to Jordan's argument that the State's participation in the federal program amounted to constructive consent to federal court jurisdiction. *Id.* The Court rejected the argument. Thus, for constructive consent to apply, the Court held that the federal statute in question must expressly say that participation in the federal program mandates submission to federal jurisdiction. *Id.*

Where *Edelman* has been cited for the denial of the "constructive consent" argument, the Court has not
811 expanded its original meaning. *See, e.g., Atascadero State Hospital* *811 *v. Scanlon*, 473 U.S. 234, 238 n. 1, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985). *See also Parden v. Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964) overruled in part by *Welch v. Texas Highways Public Tranportation Department*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987); *Employees v. Missouri Public Health Welfare Department*, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973); *Welch v. Texas Highways Public Transportation Department*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987). Although these subsequent decisions have focused on the constructive consent doctrine while ignoring the doctrine of consent by appearance, thus arguably implying that consent by appearance is not valid, none of these decisions have overruled either *Clark, Fiske* or *Gardner*. Thus, the appearance and participation of Mississippi in this case is still a valid waiver of sovereign immunity under *Clark, Fiske* and *Gardner* and the doctrine of consent by appearance and any contrary interpretation or holding would have no significant precedential foundation.

Mississippi, relying on *In re NVR L.P.*, 206 B.R. 831 (Bankr.E.D.Va. 1997), argues that participation in a bankruptcy case is not an effective waiver of state sovereign immunity where a state statute preserves that right. Mississippi contends that it has just such a statute, referring to 1984 Miss. Laws 495, Section 3 (4), citing *Papasan v. Allain*, 478 U.S. 265, 276 n. 10, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). Further, Mississippi claims that it has not waived "its sovereign immunity due to its position as a defendant in the current bankruptcy proceeding." See Supplemental Brief of Mississippi, p. 13. Mississippi also claims that it has preserved its sovereign immunity in its filings.

This court has examined the Mississippi Constitution and finds no provision which explicitly preserves or waives state sovereign immunity nor does Mississippi cite any such provision, which would be similar to the provision of the Indiana Constitution in *Ford Motor Company*. Mississippi has claimed the benefit of a statute preserving state sovereign immunity under the Eleventh Amendment. The cited statute, which "is part of a general act concerning state immunity, reads: "Nothing contained in this act shall be construed to waive the immunity of the state from suit in federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States." 1984 Miss. Laws 495, Section 3 (4).

26 [26] Reading this statute, by its plain language, it appears to add nothing to the immunity already granted by the Eleventh Amendment, nor could it. It just states that this particular act does not waive immunity. Further, this statute does not affirmatively preserve state sovereign immunity as did the provision of the Indiana. Constitution cited in *Ford Motor Company*.

In response to Mississippi's argument, that its filing of a proof of claim does not waive its sovereign immunity, this court must disagree. The filing of a proof of claim is not merely a defense, but is an affirmative claim for relief. The State of Mississippi, by filing the proof of claim, has asked the court to provide it with relief: payment of the debt by the debtor, Barrett. *See Gardner v. New Jersey*, 329 U.S. 565, 573-74, 67 S.Ct. 467, 91 L.Ed. 504 (1947) (stating " *if the claimant is a State, the procedure of proof and allowance is not transmitted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the Debtor*." (emphasis added)). Thus, under *Ford Motor Company and Pennhurst State School Hospital*, because Mississippi has filed for affirmative relief and is not just defending a legal action, Mississippi has waived its' sovereign immunity.[27] Thus, despite Mississippi's statute preserving its state sovereign immunity, this court concludes that by its act of filing for affirmative relief with a proof of claim, Mississippi has waived any sovereign immunity it may have had.

27 *Ford Motor Company v. Department of Treasury of Indiana*, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945); *Pennhurst State School Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984).

This conclusion regarding waiver would be valid even if a bankruptcy case should be construed to be a "suit"
812 within the Eleventh Amendment, and it has the support of numerous post- *Seminole* bankruptcy decisions. *812 *See, e.g., In re Martinez*, 196 B.R. 225, 229-30 (D.P.R. 1996); *Ossen v. State of Connecticut Department of Social Serrices (In re Charter Oak Associates)*, 203 B.R. 17, 21-22 (Bankr.D.Conn. 1996); *Sparkman v. State of Florida Department of Revenue (In re York-Hannover Developments, Inc.)*, 201 B.R. 137, 142 (Bankr.E.D.N.C. 1996); *Sacred Heart Hospital v. State of Pennsylvania Department of Welfare (In re Sacred Heart Hospital)*, 199 B.R. 129, 134 (Bankr.E.D.Pa. 1996); *Schulman v. California State Water Resources Control Board (In re Lazar)*, 200 B.R. 358, 377 (Bankr.C.D.Cal. 1996); *Koehler v. Iowa College Stndent Aid Commission (In re Koehler)*, 204 B.R. 210, 217-20 (Bankr. D.Minn. 1997); *Burke v. State of Georgia (In re Burke)*, 203 B.R. 493, 497-98 (Bankr. S.D.Ga. 1996); *Headrick v. State of Georgia (In re Headrick)*, 203 B.R. 805, 809-10 (Bankr.S.D.Ga. 1996); *Wyoming Department of Transportation v. Straight (In re Straight)*, 209 B.R. 540, 555-58 (D.Wyo. 1997).

Mississippi also characterizes itself as a "defendant" in this case, apparently in an attempt to support its claim for Eleventh Amendment protection. This posture lacks any foundation as Mississippi has not been sued as a defendant. Moreover, Mississippi has not presented any argument or authority to support this contention.

Mississippi also presents the argument that because it "reserved" state sovereign immunity in its filings, it should somehow be granted Eleventh Amendment protection.[28] Apparently, Mississippi, by this argument, is trying to equate the legal binding force of its pleadings to that of a statute or constitutional provision. This court

rejects this argument for the Bankruptcy Code, including 11 U.S.C. § 106, which mandates a waiver of state sovereign immunity by the filing of a proof of claim, is constitutional. Thus, as a matter of application of the Supremacy Clause,[29] a state statute (never mind a pleading) will not preempt a federal statute. Indeed, Mississippi was on, at least, constructive notice that filing a proof of claim constitutes a waiver. *See* 11 U.S.C. § 106. Therefore, this court rules that the State of Mississippi, by filing its proof of claim, has waived any sovereign immunity.

[28] There are bankruptcy decisions holding that where creditors make "conditional" filings of proofs of claim, reserving constitutional rights but such filings clearly waive the right in question, the constitutional right is, nevertheless, deemed to be waived despite the express reservation of the right by the creditor. See Charles Tabb, *The Law of Bankruptcy* 249 (Foundation Press 1997) (citing *Travellers International AG v. Robinson*, 982 F.2d 96 (3rd Cir. 1992), *cert. denied*, 507 U.S. 1051, 113 S.Ct. 1946, 123 L.Ed.2d 651 (1993)). This court expressly adopts this rule and holds that Mississippi cannot have it both ways. Mississippi was aware that filing a proof of claim would waive sovereign immunity, thus, its purported reservation of Eleventh Amendment sovereign immunity is without affect.

[29] U.S. Coost. art. VI, cl. 2. *See also New York v. Irving Trust Company*, 288 U.S. 329, 333, 53 S.Ct. 389, 77 L.Ed. 815 (1933); *International Shoe Company v. Pinkus*, 278 U.S. 261, 264, 266, 49 S.Ct. 108, 73 L.Ed. 318 (1929).

The second way that a state may waive sovereign immunity is through state law. When a state grants consent by statute, it must do so "by the most express language." *Murray v. Wilson Distilling Company*, 213 U.S. 151, 171, 29 S.Ct. 458, 53 L.Ed. 742 (1909). The waiver in the state statute must be so precise that consent to sue the state in state courts will not he construed to extend to consent to sue the state in federal courts. *Great Northern Life Insurance Company v. Read*, 322 U.S. 47, 54, 64 S.Ct. 873, 88 L.Ed. 1121 (1944). Nor will a general consent to sue the state in any court be construed as permission to sue the state in federal court. *Employees v. Missouri Public Health Welfare Department*, 411 U.S. 279, 283, 285, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973); *Welch v. Texas Highways Public Transportation Department*, 483 U.S. 468, 478, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987). As neither Barrett nor the Unsecured Creditors' Committee claim Mississippi has waived state sovereign immunity in this manner, it will not be examined.

The third way that a state may waive its sovereign immunity is by constructive consent. As discussed
813 previously, the Supreme Court has ruled that participation by a state in a federal program, *i.e.*, a federal *813 executive branch program which provides aid to the state, does not amount to "constructive consent" such that the participation amounts to a waiver of sovereign immunity under the Eleventh Amendment and consent to jurisdiction of the federal courts. *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 n. 1, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985). Indeed, the Court ruled that constructive consent of this nature, where submission to federal jurisdiction is not expressly stated in the federal statute, should not be used for the waiver of constitutional rights. However, *Edelman* was not the death knell of the doctrine of constructive consent.

In *Parden v. Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964) overruled in part by *Welch v. Texas Highways Public Transportation Department*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987), the Supreme Court clarified the constructive consent doctrine. In *Parden*, the Court ruled that where a statute permits a state to participate in a federal program (in *Parden* it was the Federal Employers' Liability Act — FELA — 45 U.S.C. § 51, 56) and where that statute permits suit to be filed in federal court, and when the state, in fact, participates in the program, the state has constructively consented to federal jurisdiction. *Id.* at 195-98, 84 S.Ct. 1207.

However, *Welch* overruled *Parden* to the extent that any such waiver by the states of their sovereign immunity "must be expressed in unmistakably clear language . . . ." *Welch* at 478, 107 S.Ct. 2941. Thus, the test for "constructive consent" has two prongs: 1) Congress must have stated in clear and unmistakable language the intent that the state will be liable in federal court if the state participates in the federally regulated conduct and 2) the state voluntarily engages in the federally regulated conduct. It should also be noted that the *Welch* decision did not involve a question of Eleventh Amendment immunity. *Id.* at 478 n. 8, 107 S.Ct. 2941.

In the instant matter, there is no doubt that 11 U.S.C. § 106 presents just such a clear and unmistakable intent on the part of Congress that if a state files a claim in a bankruptcy case, it waives its sovereign immunity.[30] This court has already demonstrated that the Eleventh Amendment does not apply to bankruptcy cases. Furthermore, as Mississippi has filed a proof of claim, it follows that Mississippi has, pursuant to 11 U.S.C. § 106, validly waived any sovereign immunity it may have had under the doctrine of constructive consent. For, Mississippi had the option not to participate in the bankruptcy case, yet it voluntarily chose to participate and consequently constructively also consented to the jurisdiction of the bankruptcy court, with the knowledge that Congress had expressly mandated the waiver of sovereign immunity in 11 U.S.C. § 106.

30 11 U.S.C. § 106 was amended in 1994 (See 1994 Bankruptcy Reform Act) to address the rulings of the U.S. Supreme Court that the previous statute had not. sufficiently and clearly stated Congress' intent to abrogate state sovereign immunity. *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992); *Hoffman v. Connecticut Department of Income Maintenance*, 492 U.S. 96, 109 S.Ct. 2818, 106 L.Ed.2d 76 (1989).

It is interesting to note that *Hoffman*, which ruled that the prior version of 11 U.S.C. § 106 was constitutionally infirm, acknowledged that once a state has filed a proof of claim, it waives its sovereign immunity.

Although it may be argued that *Seminole* mandates that the Eleventh Amendment applies to this case because the Bankruptcy Code is based on Article I of the Constitution, such an argument simply fails because a bankruptcy case is not a "suit" within the meaning of the Eleventh Amendment. This court also concludes that by its act of appearing and requesting affirmative relief, the State of Mississippi has given its consent to the jurisdiction of the bankruptcy court and has waived its sovereign immunity. This is so in spite of *Seminole's* ruling concerning Article I and the Eleventh Amendment.

Therefore, alternatively and in addition to the ruling on consensual waiver, this court concludes that the
814 doctrine of "constructive consent" also applies and that Mississippi has *814 constructively consented to jurisdiction by filing its proof of claim, pursuant to the clear and unmistakable language expressing the intent of Congress in 11 U.S.C. § l06.

31 [31] This Memorandum and Order does not address the issue of whether the Eleventh Amendment would apply when a state is named as a defendant in an adversary proceeding arising in or relating to a bankruptcy case. *See* Fed R.Bankr.P. 7001.

ISSUE 3 SHOULD MISSISSIPPI BE ALLOWED TO WITHDRAW ITS PROOF OF CLAIM AND, IF SO, WHAT IS THE AFFECT OF WITHDRAWAL?

Mississippi moves, in the alternative, to withdraw its proof of claim, pursuant to Fed.R.Bankr.P. 3006.

Fed.R.Bankr.P. 3006 allows a creditor to withdraw a proof of claim, as a matter of right, unless, *inter alia*, an objection has been filed to the claim, the creditor has accepted or rejected a plan, or has otherwise significantly participated in the case. In this case, at least one of the enumerated actions have occurred which negate

Mississippi's ability to withdraw its proof of claim as a matter of right: Mississippi has participated significantly in the case. However, in such circumstances, the rule does allow the court to permit a creditor to withdraw as a matter of discretion.

Mississippi presents no reason, argument, or authority to justify its request that it be permitted to withdraw its proof of claim. Mississippi merely presents the request.

This court finds persuasive the position argued by the Unsecured Creditors' Committee, that once a waiver of rights has been made, it cannot be undone. *See* Brief of Unsecured Creditors' Committee, at pp. 18-19. This position has extensive support throughout American jurisprudence. *Thompson v. Phenix Insurance Company*, 136 U.S. 287, 10 S.Ct. 1019, 34 L.Ed. 408 (1890); *Sturm v. Sturm*, 61 Ohio St.3d 298, 574 N.E.2d 522 (1991); *MacKnight Hoffman, Inc. v. Programs for Achievement in Reading, Inc.*, 96 R.I. 345, 191 A.2d 354 (1963); *Engstrom v. Farmers Bankers Life Insurance Company*, 230 Minn. 308, 41 N.W.2d 422 (1950); *Thomas N. Carlton Estate v. Keller*, 52 So.2d 131 (Fla. 1951). *See also* 28 Am. Jur.2d *Estoppel Waiver*, § 156 at 838-39 (1966); 92 C.J.S.2d *Waiver* at 1069 (1955); 91 Or. 59, 174 P. 1161, 3 A.L.R. 205 (1918). Therefore, this court concludes that withdrawal would be of no affect and denies Mississippi's motion to withdraw, its proof of claim.

CONCLUSION

Accordingly, this court concludes that Mississippi does not have sovereign immunity in this case and denies the relief requested in Mississippi's motion.

IN RE NATIONAL CATTLE CONGRESS | 247 B.R. 259 | Bankr. N.D. Iowa | Judgment | Law

PAUL J. KILBURG, Chief Judge.

This matter came before the undersigned on March 8, 2000 pursuant to assignment. The matter at issue is the Court's jurisdiction over the Sac and Fox Tribe. Attorney John Titler represented Debtor National Cattle Congress, Inc. Attorneys Steven Olson and Jack Blair represented the Sac and Fox Tribe of the Mississippi in Iowa. After argument by counsel, the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. § 157 (b)(2)(A), (B), (K), and (O).

STATEMENT OF THE CASE

Debtor's Chapter 11 Plan proposes to extinguish a real estate mortgage lien held by the Sac and Fox Tribe ("the Tribe"). In exchange, Debtor offers a restrictive covenant prohibiting gambling on the property. The Tribe argues its sovereign immunity prevents this Court from allowing Debtor to negate its legal rights in the mortgage lien through a Chapter 11 Plan.

FINDINGS OF FACT

This is Debtor's second Chapter 11 reorganization. In its first filing, Debtor's Plan paying all creditors in full was implemented through a "bail-out" by the Sac and Fox Tribe. Debtor and the Tribe entered into a Master Agreement through which the Tribe paid $9.1 million to Debtor in exchange for a note and mortgage creating a lien on all of Debtor's real estate, Debtor's agreement not to carry on gambling activities on its property, and other provisions concerning management of Debtor's property and businesses. The Court confirmed Debtor's plan in the first Chapter 11 case on January 17, 1996.

The Tribe was not a creditor in Debtor's first Chapter 11 case. It entered no appearance in the case and filed no claims. After confirmation of the plan, on March 6, 1996, the Tribe, represented by attorneys Robert Wilson and John Stitely, filed an "Application to Modify Chapter 11 Plan of Debtor and Modify the Order re: Confirmation of Plan." Debtor filed a Motion to Strike the Tribe's Application. On March 21, 1996, Attorneys Wilson and Stitely filed a motion to withdraw as counsel for the Tribe. On March 29, 1996, the Tribe, represented by substitute counsel, withdrew the Application to Modify.

Debtor filed the pending Chapter 11 case on November 20, 1997. Its Plan of Reorganization seeks to restructure the rights and obligations between Debtor and the Tribe under the Master Agreement. Essentially, the Plan proposes to extinguish the mortgage lien and other rights of the Tribe under the Master Agreement in exchange for a restrictive covenant on the real estate prohibiting use of the premises for gambling or gaming of any type.

On March 20, 1998, the Tribe filed a Proof of Claim in this case in the amount of $9,199,892, of which $9.1 million is claimed secured by Debtor's real estate. Attached to the Proof of Claim is a Waiver Disclaimer. The disclaimer states that the Tribe filed

the proof of claim to preserve all rights with regard to its mortgage lien. Further, it states:

> By filing a proof of claim, the Tribe does not intend to participate in or submit to any plan of reorganization or in any way compromise its secured interest. Nor does the Tribe intend, by this filing, to submit to the jurisdiction of this or any other forum with regard to any adversary proceeding. The Tribe hereby expressly retains its sovereign immunity from adversary proceedings.

Claim No. 16, Waiver Disclaimer (filed Mar. 20, 1998).

The Tribe filed a "Motion to Dismiss Petition as it Relates to the Sac Fox Tribe of the Mississippi in Iowa, and, in the Alternative, Objections to Debtor's Proposed Plan of Reorganization" on January 24, 2000. Among other things, the Tribe asserts its sovereign immunity bars this Court from altering the Tribe's security interest in Debtor's property. The Tribe also asserts other collateral arguments regarding the Court's jurisdiction. The Court carved out these jurisdictional issues for hearing prior to consideration of the remainder of the Tribe's Motion to Dismiss and Objections to the Plan.

The focus of this matter is the Tribe's sovereign immunity. The Tribe also asserts Debtor is improperly attempting to determine the validity, priority, or extent of its lien in the confirmation process rather than through an adversary proceeding. Further, the Tribe argues this is not a core proceeding and does not present a justiciable "case or controversy."

Debtor argues the Code allows modification of rights of secured creditors in a Chapter 11 Plan. It asserts it is not seeking to determine the validity, priority or extent of the Tribe's lien. Rather, Debtor is extinguishing the Tribe's lien in the Chapter 11 reorganization process by offering the "indubitable equivalent" in its Plan. Debtor argues the Code abrogates the Tribe's sovereign immunity. In the alternative, Debtor asserts the Tribe waived its sovereign immunity by appearing in the first Chapter 11 case and by filing a proof of claim in this case. Additionally, Debtor asserts that confirmation of its Plan is not a suit against the Tribe and therefore is not barred by sovereign immunity.

CONCLUSIONS OF LAW

General acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary. Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 120, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960); E.E.O.C. v. Fond du Lac Heavy Equip. Constr. Co., 986 F.2d 246, 248 (8th Cir. 1993). This general rule does not apply when the interest sought to be affected is a specific right reserved to the Indians. Fond du Lac. 986 F.2d at 248. As otherwise stated, general statutes presumptively apply to Indian tribes unless such application would: 1) abrogate rights guaranteed under an Indian treaty; 2) interfere with purely intramural matters dealing with the tribe's right to self-governance; or 3) contradict the intent of Congress. Florida Paraplegic Assoc., Inc. v. Miccosukee Tribe, 166 F.3d 1126, 1129 (11th Cir. 1999). General federal laws which courts have recently found broad enough to apply to Indian tribes include OSHA and ERISA. Id. n. 3. A tribe's commercial dealings with non-Indians are not "matters dealing with the tribe's right to self-governance." Id.

The Bankruptcy Code is a general statute having broad application. Congress has not expressed a clear and plain intent to except Indian tribes from its application. Thus, the Code presumptively applies to Indian tribes. See In re Sandmar Corp., 12 B.R. 910, 917 (Bankr.D.N.M. 1981) (finding Bankruptcy Code applies to subject Tribe to automatic stay); Aubertin v. Colville Confederated Tribes, 446 F. Supp. 430, 435 (E.D.Wash. 1978) (applying Bankruptcy Act to Indian tribe). General application of the Code to Indians does not abrogate rights under an Indian treaty, interfere with the Tribe's right to self-governance, or contradict Congressional intent.

Although Indian Tribes may be subject to general federal laws, they continue to enjoy immunity from suits. The Supreme Court recently noted that there is a difference between the right to demand compliance with general laws and the means available to enforce them. Kiowa Tribe v. Manufacturing Technologies, Inc., 523 U.S. 751. 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). This principle spells out the distinction between a right and a remedy. Florida Paraplegic, 166 F.3d at 1130. While the Bankruptcy Code applies to the Tribe, the Tribe can, nevertheless, retain its sovereign immunity from suit under the Code. "[W]hether an Indian tribe is subject to a statute and whether the tribe may be sued for violating the statute are two entirely different questions." Id. (emphasis in original).

It is undisputed that an Indian Tribe enjoys sovereign immunity from suit. Hagen v. Sisseton-Wahpeton Comm. College, 205 F.3d 1040, 1043 (8th Cir. 2000). "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." Kiowa Tribe v. Manufacturing Technologies, Inc., 523 U.S. 751. 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). Indian tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation or settlement. Id. Sovereign immunity is a jurisdictional question. Hagen, 205 F.3d at 1043.

ABROGATION OF SOVEREIGN IMMUNITY BY CONGRESS

Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); United States v. United States Fidelity Guar. Co., 309 U.S. 506, 512-513, 60 S.Ct. 653, 84 L.Ed. 894 (1940). "This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But `without congressional authorization,' the `Indian Nations are exempt from suit.'" Santa Clara Pueblo, 436 U.S. at 59, 98 S.Ct. 1670; In re Prairie Island Dakota Sioux, 21 F.3d 302, 304 (8th Cir. 1994). Abrogation by Congress of sovereign immunity cannot be implied but must be unequivocally expressed. Santa Clara Pueblo, 436 U.S. at 59, 98 S.Ct. 1670. Applying these principles, the court in Florida v. Seminole Tribe, 181 F.3d 1237, 1242 (11th Cir. 1999), stated: "Congress may abrogate a sovereign's immunity only by using statutory language that makes its intention unmistakably clear, and . . . ambiguities in federal laws implicating Indian rights must be resolved in the Indians' favor." See also State v. Whitebreast, 409 N.W.2d 460, 461 (Iowa 1987) (considering the extent of Congress' abrogation of immunity for civil causes of action in Public Law 280).

Debtor argues that § 106(a) of the Bankruptcy Code evinces Congress' unequivocal intent to abrogate the sovereign immunity of Indian tribes. § 106(a) states:

§ 106. Waiver of sovereign immunity

> (a) Notwithstanding 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 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.
>
> (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

Reference to the definition of "governmental unit" is necessary to determine the scope of § 106(a). "Governmental unit" is defined in § 101 (27) as follows:

> (27) "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 Supreme Court has found that this language reflects Congress' clear intent to abrogate the sovereign immunity of States under the Eleventh Amendment. Seminole Tribe v. Florida, 517 U.S. 44, 57, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (finding Congress did not have the authority to do so). Section 106(a) has also been found to effectively abrogate the sovereign immunity of foreign states. In re Tuli, 172 F.3d 707, 711 (9th Cir. 1999) (concluding Iraq can no longer assert sovereign immunity under the Code after the 1994 amendment to § 106(a)).

Two Bankruptcy Courts have found § 106 sufficient to abrogate sovereign immunity of Indian tribes. Most recently, the court in In re Vianese, 195 B.R. 572, 576 (Bankr.N.D.N.Y. 1995), held that the 1994 amendment to § 106(a) applies to Tribes which are "domestic dependent nations" and thus qualify as governmental units. The court in In re Sandmar Corp., 12 B.R. 910, 916 (Bankr.D.N.M. 1981), also found that an Indian Tribe was a "governmental unit" under the § 101 definition then in effect.

In In re Greene, 980 F.2d 590, 592 (9th Cir. 1992), cert. denied, 510 U.S. 1039, 114 S.Ct. 681, 126 L.Ed.2d 649 (1994), the court considered whether a Chapter 7 trustee could sue an Indian tribe to avoid a preferential transfer. It queried whether the Bankruptcy Code shows an intent to subject the tribe to bankruptcy court jurisdiction. Id. at 597. The court dismissed the adversary proceeding, concluding that the bankruptcy court's jurisdiction over property of the estate and adversary proceedings does not act to pierce the tribe's immunity from suit. Id. at 598. Since only Congress can limit the scope of tribal immunity and has not done so, the tribes retain the immunity sovereigns enjoy at common law. Id. at 594.

Debtor urges the Court to follow Vianese to find that the Tribe's sovereign immunity is abrogated under § 106(a). The Tribe argues the language of the Code is not sufficiently unequivocal to abrogate its immunity from suit. In Santa Clara Pueblo, the Supreme Court considered whether the Indian Civil Rights Act included congressional abrogation of tribal sovereign immunity. 436 U.S. at 59, 98 S.Ct. 1670. It found that "[n]othing on the face of . . . the ICRA purports to subject tribes to the

jurisdiction of the federal courts in civil actions." Id.; Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 898 (2d Cir.) (following Santa Clara Pueblo), cert. denied, 519 U.S. 1041, 117 S.Ct. 610, 136 L.Ed.2d 535 (1996).

Courts have found abrogation of tribal sovereign immunity in cases where Congress has included "Indian tribes" in definitions of parties who may be sued under specific statutes. See Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1094, 1097 (8th Cir. 1989) (finding congressional intent to abrogate Tribe's sovereign immunity with respect to violations of the Resource Conservation and Recovery Act); Osage Tribal Council v. United States Dep't of Labor, 187 F.3d 1174, 1182 (10th Cir. 1999) (same re Safe Drinking Water Act). "Where the language of a jurisdictional grant is unambiguous as to its application to Indian tribes, no more is needed to satisfy the Santa Clara requirement than that Congress unequivocally state its intent." Osage Tribal Council. 187 F.3d at 1182.

Where the language of a federal statute does not include "Indian tribes" in definitions of parties subject to suit or does not specifically assert jurisdiction over "Indian tribes", courts find the statute insufficient to express an unequivocal congressional abrogation of tribal sovereign immunity. See Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343, 357-58 (2d Cir. 2000) (holding Indian tribe immune from suit under the Copyright Act); Florida Paraplegic, 166 F.3d at 1131 (stating that because Congress made no specific reference to Tribes anywhere in the ADA, tribal immunity is not abrogated; suit under ADA dismissed). A Congressional abrogation of tribal immunity cannot be implied. Santa Clara Pueblo, 436 U.S. at 58, 98 S.Ct. 1670.

Based on the foregoing, the Court concludes that Congress has not unequivocally abrogated the Tribe's sovereign immunity to suit under the Bankruptcy Code. The Code makes no specific mention of Indian tribes. Unlike States and foreign governments, Indian tribes are not specifically included in the § 101 (27) definition of "governmental unit". In order to conclude Congress intended to subject Indian tribes to suit under the Code, the Court would need to infer such intent from language which does not unequivocally and unambiguously apply to Indian tribes. Considering the Supreme Courts pronouncements on tribal sovereign immunity, such an inference is inappropriate. Congress has not abrogated the Tribe's immunity from suit under the Bankruptcy Code. The Tribe is not subject to suit by Debtor absent a clear waiver by the Tribe itself.

WAIVER OF SOVEREIGN IMMUNITY BY TRIBE

Debtor argues the Tribe waived its sovereign immunity from suit by participating in its first Chapter 11 proceeding and by filing a claim in this proceeding. A tribe's waiver of immunity from suit must be unequivocally expressed. Rosebud Sioux Tribe v. Val-U Constr. Co., 50 F.3d 560, 562 (8th Cir. 1995) (filing of lawsuit is not a waiver of immunity from counterclaims), cert. denied, 516 U.S. 819, 116 S.Ct. 78, 133 L.Ed.2d 37 (1995). Nothing short of a clear, express waiver satisfies the requirement that a tribe's waiver cannot be implied but must be unequivocally expressed. American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1375 (8th Cir. 1985). Waivers are strictly construed. Seneca-Cayuga Tribe v. Oklahoma, 874 F.2d 709, 715 (10th Cir. 1989). In bankruptcy cases, filing of a proof of claim generally constitutes a waiver of sovereign immunity. In re White, 139 F.3d 1268, 1271 (9th Cir. 1998).

In White, an Indian tribe filed a claim in a Chapter 11 case which was subsequently converted to Chapter 7. Id. at 1269. The court held the waiver continued to operate to

subject the tribe to suit after conversion. It stated conversion is not the commencement of a new case for purposes of sovereign immunity. Id. at 1273.

Debtor argues that the Tribe has likewise waived its immunity from suit in this case. The Tribe has filed a proof of claim, which usually constitutes a waiver of sovereign immunity in bankruptcy cases. However, it attached a Waiver Disclaimer to its claim and has persistently continued to assert its sovereign immunity. The Tribe argues its proof of claim should be treated as a special appearance filed to challenge the court's jurisdiction.

Debtor points out that in its first Chapter 11 case, the Tribe filed an Application to Modify Chapter 11 Plan of Debtor and to Modify Order of Confirmation. Debtor moved to strike for failure to state a claim and the Tribe subsequently withdrew the Application to Modify. No mention of any waiver of sovereign immunity was made in any of these filings by the Tribe.

The Court concludes the Tribe has not waived its immunity from suits in this case. The Tribe's Application to Modify in the Debtor's Chapter 11 proceeding does not express a clear waiver of the Tribe's immunity. It did not constitute a claim in that case. The subject matter of the Application was never considered by the Court. This case is not a continuation of the first Chapter 11 filing. Any waiver which might be implied from the Tribe's Application to Modify has no effect in the current Chapter 11 case.

As the Tribe requests, the Court will treat the Tribe's Proof of Claim with its attached Waiver Disclaimer as a special appearance. The Tribe has consistently maintained its immunity and has not made any clear and express waiver of that immunity. The Waiver Disclaimer prevents the Proof of Claim from being construed as a waiver of sovereign immunity.

The filing of a Proof of Claim, however, commonly has the effect of subjecting a secured creditor's claim to treatment under a Chapter 11 Plan of Reorganization. See In re Be-Mac Transp. Co., 83 F.3d 1020, 1027 (8th Cir. 1996) (stating that where a secured creditor participates by filing a proof of claim, its lien may be extinguished if not preserved by a Chapter 11 plan); In re Harnish, 224 B.R. 91, 94 (Bankr.N.D.Iowa 1998) (applying Be-Mac in context of Chapter 13 plan).

The posture of this case causes a conundrum for the Court. The Tribe asserts its sovereign immunity as a jurisdictional bar to this Court allowing Debtor to extinguish its lien through its Chapter 11 Plan. By filing the Proof of Claim, however, the Tribe appears to be "participating" in Debtor's reorganization. Having now acknowledged the Tribe's sovereign immunity, the Court concludes that continuing to maintain a Proof of Claim in this case would contradict the Tribe's assertion of immunity.

The Tribe must now make an election between withdrawing its Proof of Claim or asserting an unqualified claim by removing the Waiver Disclaimer from the Proof of Claim as filed. Under F.R.Bankr.P. 3006, a creditor may withdraw a proof of claim as a matter of right unless an objection has been filed to the claim, the creditor has accepted or rejected a plan, or the creditor has otherwise significantly participated in the case. In re Barrett Ref. Corp., 221 B.R. 795, 814 (Bankr.W.D.Okla. 1998) (ruling on state's request to withdraw claim). Withdrawal of a claim under Rule 3006 renders the withdrawn claim a legal nullity and leaves the parties as if the claim had never been brought. Smith v. Dowden, 47 F.3d 940, 943 (8th Cir. 1995).

The Court concludes that the Tribe has not significantly participated in this case. The Tribe is entitled to withdraw its claim as of right under Rule 3006. The Tribe shall elect to either (1) withdraw its claim by filing a notice of withdrawal pursuant to F.R.Bankr.P. 3006 or (2) retract the Waiver Disclaimer from its Proof of Claim. In order to expedite proceedings. the Court directs the Tribe to make such election within 15 days of the date of this order.

"SUIT" AGAINST THE TRIBE

Pursuant to the foregoing, the Court has determined that the Bankruptcy Code generally applies to the Tribe. Further, the Tribe's sovereign immunity from suit has not been abrogated by Congress or waived by the Tribe. The Court must next consider whether Debtor's attempt to modify the Tribe's secured claim in its Chapter 11 Plan constitutes a "suit" against the Tribe.

A thorough analysis of whether a judicial proceeding constitutes a suit against a sovereign must consider both the procedural posture and substantive nature of the proceeding. In re NVR, LP, 189 F.3d 442, 450 (4th Cir. 1999), cert. denied, ___ U.S. ___, 120 S.Ct. 936, 145 L.Ed.2d 815 (2000). Suits are defined by looking to "the essential nature and effect of the proceeding." Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464, 65 S.Ct. 347, 89 L.Ed. 389 (1945). The Supreme Court has stated:

> The general rule is that a suit is against the sovereign if "the judgment would expend itself on the public treasury or domain, or interfere with the public administration," or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act."

Pennhurst State Sch. Hosp. v. Halderman, 465 U.S. 89, 102 n. 11, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (considering United States' sovereign immunity); Thomas v. FAG Bearings Corp., 50 F.3d 502, 505 (8th Cir. 1995) (applying definition to States' sovereign immunity).

In the absence of cases on point regarding what constitutes a "suit" against Indian tribes, the Court will consider cases concerning the sovereign immunity of the United States and the Eleventh Amendment immunity of States.

An early opinion by Chief Justice Marshall considers the question in the context of a State's immunity under the Eleventh Amendment.

> What is a suit? We understand it to be the prosecution, or pursuit, of some claim, demand, or request. In law language, it is the prosecution of some demand in a court of justice. The remedy for every species of wrong is, says Judge Blackstone, the being put in possession of that right whereof the party injured is deprived. The instruments whereby this remedy is obtained, are a diversity of suits and actions, which are defined by the Mirror to be the lawful demand of one's right. . . . Blackstone then proceeds to describe every species of remedy by suit; and they are all cases where the party suing claims to obtain something to which he has a right.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 407-08, 5 L.Ed. 257 (1821) (internal quotation marks omitted); NVR, LP, 189 F.3d at 450 (quoting Cohens).

These early definitions address the substantive nature of a suit. There is also a

procedural component to the definition of a "suit" against a sovereign. NVR, LP, 189 F.3d at 450. The procedural query considers whether the sovereign is a named defendant or served with process mandating that it appear in federal court. Maryland v. Antonelli Creditors' liquidating Trust, 123 F.3d 777, 786-87 (4th Cir. 1997). "[T]wo issues are important: first, the degree of coercion exercised by the federal court in compelling the [sovereign] to attend; and second, whether the resolution, or the remedy, would require [a federal court's] jurisdiction over the [sovereign]." NVR, LP, 189 F.3d at 452 (citations omitted).

A bankruptcy case standing alone is not necessarily a "suit" against a sovereign, even though the sovereign's pecuniary interest may be inadvertently eliminated or modified. In re Pitts, 241 B.R. 862, 868 (Bankr.N.D.Ohio 1999). "[T]he demarcation line between those actions within a bankruptcy case that constitute a suit . . ., and those actions which do not, is not always clear." Id. at 869. In Pitts, the court sets out six factors to examine in determining whether an action is a suit against a State for purposes of the Eleventh Amendment:

1) whether the proceeding is adversarial;

2) whether the proceeding arose as a result of a deprivation or injury;

3) whether there are at least two parties involved in the proceeding;

4) whether the attendance of the parties is required;

5) whether one of the parties is prosecuting a claim against the other;

6) whether the injured party is demanding the restoration of something from the defending party.

241 B.R. at 869.

The court in Antonelli held that a confirmation order is not a suit against one of the states. 123 F.3d at 786. "Neither the party status nor the immunity of state and local governments has any impact on the bankruptcy court's power to determine whether the terms of a reorganization plan comply with federal law." Id. at 787. Likewise, courts have found that sovereign immunity is not offended by granting a bankruptcy discharge, Texas v. Walker, 142 F.3d 813, 823 (5th Cir. 1998), cert. denied, 525 U.S. 1102, 119 S.Ct. 865, 142 L.Ed.2d 768 (1999); by valuing a secured claim to write down mortgages in Chapter 12 reorganizations, In re Crook, 966 F.2d 539, 543 (10th Cir.), cert. denied 506 U.S. 985, 113 S.Ct. 491, 121 L.Ed.2d 430 (1992); or by interpreting the scope of the automatic stay, In re International Heritage, Inc., 239 B.R. 306, 310 (Bankr.E.D.N.C. 1999).

An adversary action against a sovereign is a "suit" for purposes of sovereign immunity. Antonelli, 123 F.3d at 786. A contested matter under Rule 9014 may be a "suit" as there are at least two parties who are opposing each other with respect to relief sought by one of them. NVR, LP, 189 F.3d at 452. In bankruptcy cases, a sovereign may assert immunity when a debtor asks, by motion or adversary proceeding, that a federal court dispossess that sovereign of an asset presently in its possession. University of Virginia v. Robertson, 243 B.R. 657, 665 (W.D.Va. 2000).

Generally, avoidance or invalidation of a lien requires an adversary proceeding. In re Colortran, 218 B.R. 507, 510 (9th Cir. BAP 1997); In re Commercial Western Fin.

Corp., 761 F.2d 1329, 1337 (9th Cir. 1985) (finding confirmation of Chapter 11 plan with provision to avoid interest under § 544 improper under former Rule 701); In re McKay, 732 F.2d 44, 48 (3d Cir. 1984) (refusing to confirm Chapter 13 plan including provision avoiding lien under § 522(f) under former Rule 701). Rule 7001(2) lists an action to determine the extent, priority and validity of a lien as one type of adversary proceeding. Compare F.R.Bankr.P. 3012 (providing that valuation of a secured claim may be made by motion and may be combined with other hearings such as confirmation hearings). In Pitts, the court notes that avoidance of liens comports with all six factors used to determine whether an action is a suit against a sovereign. 241 B.R. at 869. "For example, a proceeding to avoid a lien clearly stems from a deprivation or injury, and upon a favorable outcome for the plaintiff, will also result in the restoration of something from the defending party." Id.

The Court has previously touched on the effect of the Tribe's refusal to file a proof of claim. The Tribe need not file a claim in Debtor's Chapter 11 proceeding in order to preserve its lien. Be-Mac Transp., 83 F.3d at 1025. Rather, as a creditor with a loan secured by a lien on Debtor's real estate, the Tribe may ignore the bankruptcy proceeding and look to the lien for the satisfaction of the debt. Id. If no proof of claim relating to the lien is filed in the bankruptcy case, the lien will not be affected. Harmon v. United States. 101 F.3d 574, 581 (8th Cir. 1996) (citing 11 U.S.C. § 506 (d)(2); Long v. Bullard, 117 U.S. 617, 620-21, 6 S.Ct. 917, 29 L.Ed. 1004 (1886)). If the bankruptcy court never considers the lien, the plan cannot extinguish it. Harmon, 101 F.3d at 581; Be-Mac Transp., 83 F.3d at 1027.

A secured creditor may be dragged into the bankruptcy involuntarily by way of the trustee or debtor filing a proof of claim on the creditor's behalf. In re Penrod, 50 F.3d 459, 462 (7th Cir. 1995); 11 U.S.C. § 501 (b), (c). The Code authorizes a debtor to file a proof of claim on the creditor's behalf in order to protect the debtor by causing the creditor's secured claims to be considered in the bankruptcy action. In re Jones, 122 B.R. 246, 250 (W.D.Pa. 1990). A proof of claim is in the nature of a complaint. Id. n. 3; Smith v. Dowden, 47 F.3d 940, 943 (8th Cir. 1995) (analogizing a creditor's claim to a civil complaint, a claim objection to an answer and an adversarial proceeding to a counterclaim).

An objection to a proof of claim initiates a contested matter, serving the purpose of putting the parties on notice that litigation is required to resolve the objection and to make a final determination on the allowance or disallowance of the claim. In re Taylor, 132 F.3d 256, 260 (5th Cir. 1998). A reorganization plan cannot substitute for an objection to a secured claim. Id. at 261. Filing of a plan does not clearly place a claim in issue. Id.

A debtor cannot avoid the effects of sovereign immunity by filing a surrogate claim for the Tribe under § 501(c). Resort to § 501(b) and (c) cannot compel a sovereign's participation in the bankruptcy proceedings in violation of its immunity from suit. In re Hemingway Transp., Inc., 993 F.2d 915, 928 (1st Cir.), cert. denied, 510 U.S. 914, 114 S.Ct. 303, 126 L.Ed.2d 251 (1993). A surrogate claim filed under § 501(c) should not be construed as the equivalent of a creditor consenting to bankruptcy court jurisdiction over its claim. In re Naugatuck Dairy Ice Cream, Co., 106 B.R. 24, 28 (Bankr. D.Conn. 1989).

As is evident from the foregoing, the Court has considered this matter from several perspectives. The Court concludes that regardless of the posture from which Debtor attempts to extinguish the Tribe's lien, whether through plan confirmation, adversary proceeding or filing a proof of claim on the Tribe's behalf, Debtor is barred by the

Tribe's assertion of sovereign immunity. All of these methods of extinguishing the Tribe's lien result in a "suit against the Tribe."

The lien cannot be extinguished without coercing the Tribe into court. The tribe has refused to file a proof of claim or to participate in the reorganization. Therefore, the Chapter 11 Plan cannot affect the Tribe's lien. The Tribe has asserted its sovereign immunity from suit. Therefore, Debtor may not force the Tribe into bankruptcy court through an adversary proceeding determining the validity of the lien or through a surrogate proof of claim placing the lien into dispute.

CONCLUSION

The Tribe is subject to the Bankruptcy Code. However, it retains its sovereign immunity from suit under the Code. Congress has not unequivocally abrogated the Tribe's immunity to suit under the Code. Nor has the Tribe made a clear and express waiver of its sovereign immunity. Regardless of how the proceeding is postured, any attempt by Debtor to extinguish the Tribe's lien on its property is a suit against the Tribe which is barred by the Tribe's sovereign immunity.

WHEREFORE, the Sac and Fox Tribe is protected by its sovereign immunity from Debtor's attempt to extinguish its lien.

FURTHER, the Court does not have jurisdiction to allow Debtor to extinguish the Tribe's lien through its Chapter 11 Plan or by any other means.

FURTHER, the Tribe shall elect to either (1) withdraw its claim by filing a notice of withdrawal pursuant to F.R.Bankr.P. 3006 or (2) assert an unqualified claim by retracting the Waiver Disclaimer from its Proof of Claim.

FURTHER, the Tribe shall either withdraw its claim or retract its Waiver Disclaimer on or before 15 days of the date of this order.