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# GENERAL MEMORANDUM 12-090

## Eighth Circuit Bankruptcy Panel Affirms Tribal Sovereign Immunity in Bankruptcy Suit

On Thursday, July 19, 2012, an Eighth U.S. Circuit Court of Appeals Bankruptcy Appellate Panel (Panel) affirmed both tribal sovereign immunity from bankruptcy proceedings, and the immunity of a business enterprise of the tribe. The opinion in Bucher v. Dakota Finance Corp. (Dakota Finance) resolves the combined appeal of four bankruptcy cases[1] brought by bankruptcy trustees against the Lower Sioux Indian Community (Tribe) and a business enterprise of the Tribe, Dakota Finance Corp. (Enterprise).

Dakota Finance began when four members of the Tribe filed for bankruptcy under Chapter 7. In a Chapter 7 bankruptcy, a bankruptcy trustee first gathers and sells those assets of the debtor that are not exempt from such proceedings, then uses the proceeds to pay creditors. In three of the cases, the bankruptcy trustees asked the Bankruptcy Court to order the Tribe and the tribal member to turn over the debtor's per capita payments, which are drawn from the Tribe's gaming revenue. In the fourth case, the Enterprise had a lien on the debtor's per capita payment, and the bankruptcy trustee sought to avoid that lien. The Bankruptcy Court held that tribal sovereign immunity protected both the Tribe and the Enterprise, and dismissed the suits against them. The Panel affirmed both holdings.

The Panel first concluded that the Bankruptcy Act (Act) does not abrogate tribal sovereign immunity. This creates a split with the Ninth Circuit, which held that the Act does abrogate tribal sovereign immunity.[2] The Act expressly abrogates the sovereign immunity of "governmental units," which are defined as "United States; State; Commonwealth; District; Territory; municipality; foreign state; . . . or other foreign or domestic government." The Ninth Circuit, citing U.S. Supreme Court cases that refer to Indian tribes as "domestic dependant nations" and "domestic sovereigns," reasoned that tribes fall within the category of domestic governments; and even if tribes are not domestic governments, the Ninth Circuit reasoned, the phrase "other foreign or domestic government" must include tribes.

The Panel disagreed. The Panel first noted the rule, repeatedly expressed by the Supreme Court, that "[a]brogation by Congress of sovereign immunity 'cannot be

[1] Bucher v. Dakota Finance Corp., No. 12-6004 (B.A.P. 8th Cir. July 20, 2012); Dietz v. Barth, No. 12-6005 (B.A.P. 8th Cir. July 20, 2012); Bucher v. Lower Sioux Indian Community, No. 12-6006 (B.A.P. 8th Cir. July 20, 2012); and Bucher v. Whitaker, No. 12-6007 (B.A.P. 8th Cir. July 20, 2012).

[2] 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 (2004).

implied,' but must be 'unequivocally expressed' in 'explicit legislation.'" It then held that the Act contains no such unequivocal expression. Congress never named Indian tribes in the Act, despite the fact that it enacted the Act shortly after the Supreme Court reaffirmed tribal sovereign immunity, and amended the Act to clearly express the abrogation of federal and state sovereign immunity. Furthermore, the Panel rejected both the idea that tribes are domestic governments, and the idea that the phrase "other foreign and domestic government" must include tribes.

> Indeed, while the Supreme Court has referred to Indian tribes as "sovereigns," "nations," and even, "distinct, independent political communities, retaining their original natural rights," 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 [v. Georgia] 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.

Therefore, the Panel concluded, because abrogation of tribal sovereign immunity requires an explicit act of Congress, and because Congress did not name Indian tribes in the Act, the Act does not abrogate the Tribe's sovereign immunity.

The Panel's holding concerning the Enterprise was narrower. In asking whether the Enterprise is sufficiently close to the Tribe to assert the Tribe's sovereign immunity, the Panel employed the Tenth Circuit's "subordinate economic entity" test, considering: 1) how the Enterprise was created; 2) the purpose of the Enterprise; 3) the structure, ownership, and management of the Enterprise, including the amount of control the Tribe has over the Enterprise; 4) the Tribe's intent with respect to extending sovereign immunity to the Enterprise; 5) the financial relationship between the Enterprise and the Tribe; and 6) whether the policies underlying tribal sovereign immunity are served by extending that immunity to the Enterprise.[3] The Panel held that the Tribe and the Enterprise had provided ample evidence to conclude that the Tribe's sovereign immunity should extend to the Enterprise, including a statement by the Tribe in the Enterprise's Articles of Incorporation that the Tribe wished its immunity to extend to the Enterprise.

We will continue to monitor developments in this field. Please let us know if we may provide additional information regarding this case.

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[3] Breakthrough Mgmt. Group Inc. v. Chukchansi Gold Casino and Resort, 629 F.3d 1173, 1188 (10th Cir. 2010).