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GENERAL MEMORANDUM 12-110

Washington Supreme Court Rules Suit Against Gasoline Tax Compact May Continue Despite Tribal Sovereign Immunity

The Washington Supreme Court held on August 30, 2012, that Washington Indian tribes are not "indispensable" parties to a lawsuit brought by private gas station owners against the State of Washington (and two State officials) challenging the State's gasoline tax compact with the tribes. The court's ruling means that the trial court may go forward and rule on the legality of the compact despite the tribes' absence in the case and despite their sovereign immunity. The decision was 5 to 4.

The case was brought by the Automotive United Trades Organization of Washington (AUTO), a nonprofit trade group of motor fuel retailers and suppliers. AUTO believes that the State's compact with Washington's tribes is unfair and violates Washington's Constitution by allowing tribal gas retailers to lower their gas prices and placing private gas retailers at a competitive disadvantage. Pursuant to State law, RCW 82.36.450, the State compacts with 22 Washington tribes and requires the tribes to collect the State's gas tax. The State then refunds 75 percent of the collected tax to the tribes. The tribes must spend the refunds on transportation-related purposes. The State refunded nearly \$30 million to the tribes in 2011. AUTO believes that the refunds allow the tribes to subsidize their purchase of gasoline and then lower their retail prices.

At the trial court level, the State defendants moved for the case to be dismissed under Washington Court Rule (CR) 19, on the grounds that Indian tribes were, in the language of CR 19, "necessary" and "indispensable" parties to the suit, but who could not be made defendants, without their consent because of their sovereign immunity. CR 19, which is based on Federal Rule of Civil Procedure 19, requires the joinder of a party whose interests are at stake, and requires dismissal if for some reason such party cannot be joined. The trial court held that the tribes were necessary and indispensable parties because they had a financial stake in the outcome of the suit and yet could not be required to join because of their sovereign immunity, and therefore dismissed the suit against the State.

AUTO appealed the decision, and the Washington Supreme Court reversed the trial court. The court decided only the question of whether AUTO's suit could proceed without requiring the tribes to become parties in the case. The court did not reach the underlying question of whether the tribal-state compact violated the Washington Constitution.

The Washington Supreme Court conducted a three-part analysis. First, the court determined that under CR 19(a) the absent parties – the tribes – were "necessary" to the suit because the tribes had a protected legal interest and their ability to protect that interest could be impaired if they were not parties to the suit. Second, the court determined the tribes could not be joined without their consent, because of tribal sovereign immunity.

However, third, as provided by CR 19 in such cases, the court went on to consider whether, "in equity and good conscience," the action should still proceed without the tribes even though they could not be required to become parties in the case. In other words, were the tribes not "indispensable?" The court found that suit should still proceed, because "in equity and good conscience" the tribes were not "indispensable." The court balanced several equitable considerations, noting that it "must carefully consider the circumstances of each case in balancing prejudice to the absentee's interests against the plaintiff's interest in adjudicating the dispute." Ultimately, the court gave the greatest weight to the fact that AUTO would have no other remedy if the suit was dismissed, but was strongly influenced in this regard by what it viewed as the "public interest" in having the constitutional issues resolved. In light of these considerations, the court held that, "Where no other forum is available to the plaintiff, the balance tips in favor of allowing this suit to proceed without the tribes."

The court's decision reaches a different conclusion after applying this balancing test than did the holdings of two similar cases by mid-level appellate courts in Washington, but does not expressly overturn those cases. In *Matheson v. Gregoire*, 139 Wn. App. 624 (2007), a Puyallup tribal member sought to overturn Washington's tribal cigarette compact with his Tribe. In *Mudarri v. State*, 147 Wn. App. 590 (2008), a non-Indian casino operator sought to overturn Washington's gaming agreement with the Puyallup Tribe. In both cases, the Washington Court of Appeals (the level below the Washington Supreme Court) dismissed the suits because the tribes were necessary parties but could not be joined because of sovereign immunity, finding that in the circumstances presented in those cases the tribes were indispensable. The *AUTO* decision also cites but departs from the holding in a 2005 decision involving a cigarette tax agreement between the State and the Swinomish Tribe, in which the Ninth Circuit U.S. Court of Appeals dismissed the suit because the Tribe was a necessary and indispensable party. *Wilbur v. Locke*, 423 F.3d 1101 (9th Cir. 2005).

Four of the nine appellate judges filed a strong dissent in the case. They felt that the decision went against many state and federal precedents, and that adjudication in the State courts of the legality of the tribes' compacts without the tribes' participation, would *per se* be an abrogation of the tribes' sovereign immunity. The dissent was especially critical of the majority's reliance on the "the public interest in having the constitutionality of executive conduct addressed" as a "paramount" consideration that effectively trumped the tribes' legal interests and undermined their sovereign immunity.

The case will presumably now go back to the State trial court for litigation on the question of whether the compacts are illegal. We will continue to track the proceedings and keep you informed on any developments.

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