“ZEALOUSLY SOVEREIGN”: Ethical Assertion and Waiver of Tribal Sovereign Immunity

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October 13th, 2017 - CILA 17th Annual Indian Law Conference
SOVEREIGN IMMUNITY BASICS
SUITS AGAINST TRIBES

Barred by sovereign immunity unless:

☐ Clear tribal waiver

OR

☐ Congress expressly authorizes suit
Suits Against Tribal Entities

Suit allowed against entities in cases of:

- **Waiver or abrogation**: Tribe or Congress gives permission

  OR

- **Not arm of tribe**: Entities only immune where created and controlled by Tribe to serve sovereign interests
Suits Against Tribal Officials

Where suit might be permitted:

☐ Tribe or Congress gives permission
☐ Actions outside scope of authority
☐ Tort claims for money damages (*Lewis v. Clarke*, 2017)
☐ *Ex Parte Young* injunctive relief
Ethical Guidelines & Sovereign Immunity
“Zealous” Advocacy

- Attorneys must “represent [their] clients to the hilt” (People v. Crawford, 1968)

- “As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.” (Model Rules of Professional Conduct, Preamble, ¶ 2)
Attorneys have duty to “support the Constitution and laws of the United States and of this state” (Cal. Bus. & Prof. Code § 6068 (a))
PROCEDURE COUNTS

- Attorneys must not assert frivolous positions lacking “a basis in law and fact” (ABA Model Rule 3.1)

- Comment 1 to Rule 3.1 recognizes that “procedural” laws, as well as substantive ones, “establish[] the limits within which an advocate may proceed.”
ABR Model Rule Model Rule 2.1:

“[A] lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”
Duty To Be Practical (Cont’d)

ABA Model Rule Model Rule 2.1 (Comment 2):

“Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant.”
Effective Waiver Of Tribal Sovereign Immunity
WAIVER REQUIREMENTS

■ “Clear” (C&L Enters., 2011)
■ “Unequivocally expressed” (Santa Clara Pueblo, 1978)
Waiver Requirements (Cont’d)

- Authorized
  - Tribal law (compare power to contract)
  - Apparent authority insufficient
- Conditions and limitations strictly construed
- “[S]trong presumption against waiver”
  
  *(Demontiney v. United States, 2001)*
WHAT ISN’T A WAIVER?

No waiver by:

☐ Implication

☐ Filing suit (with narrow exceptions) (*Okla. Tax Comm’n*, 1991)


☐ Performance

☐ Estoppel/equity
What Is A Waiver?

Waiver may occur through:

☐ Agreement to arbitrate (*C&L Enters.*, 2011)
  (But language matters (*California Parking*, 2011))

☐ Recoupment counterclaim

POTENTIAL ENFORCEMENT CONSIDERATIONS

- Subject matter jurisdiction (*Kennerly, 1971*)
- Tribal court jurisdiction
- Interjurisdictional challenges
- Enforcement on or off reservation
- Gaming management contract approval (*Sharp Image Gaming v. Shingle Springs Band, 2017*)
How to Protect a Drug Patent?
Give it to a Native American Tribe

By KATIE THOMAS  SEPT. 8, 2017
Allergan transferred 6 patents for dry-eye treatment to St. Regis Mohawk Tribe

- Paid $13.8 million, plus $15 million per year
- Tribe moved to dismiss inter partes proceedings based on sovereign immunity
Potential benefits of transfer:

- Avoid inter partes review (state universities have successfully asserted immunity)
- District court proceedings are slower and more patent-holder-friendly
PATENT ACQUISITION: LEGISLATIVE RESPONSE

Sen. McCaskill Bill

(Released Oct. 6th)

115TH CONGRESS
1ST SESSION

S. _______

To abrogate the sovereign immunity of Indian tribes as a defense in inter partes review of patents.

IN THE SENATE OF THE UNITED STATES
(b) **Abrogation Of Immunity For Purposes Of Inter Partes Review.**—Notwithstanding any other provision of law, an Indian tribe may not assert sovereign immunity as a defense in a review that is conducted under chapter 31 of title 35, United States Code.
PAYDAY LENDING

- Immunity from state law enforcement action
- Possible enforcement by United States
Two tribes’ payday lending entities lacked immunity from state enforcement

Cal. Supreme Court applied multifactor test

Considered creation method, intent of tribe, entity’s purpose, tribal control, financial relationship

Tribal entities had burden to show sufficient relationship
PEOPLE v. MIAMI NATION (Cont’d)

- Day-to-day operation showed very little tribal control *in practice*
- Entity and nontribal revenues commingled
- No evidence of tribes’ revenue share
PRACTICAL CONSIDERATIONS

- Costs of litigation
- Judicial attitudes toward tribal sovereignty
- Possibility of negative precedent
- Political and optical implications
- Suit against officials and employees
“There are **reasons to doubt** the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity **extends beyond what is needed to safeguard tribal self-governance.**”

Questions?

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