

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

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# 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)



## “SUPPORT” THE LAW

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.”



## DUTY TO BE PRACTICAL

ABA 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)
- ☐ Federal court removal (*Bodi v. Shingle Springs Band of Miwok Indians*, 2016)
- ☐ 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
- Joining equitable decree (*U.S. v. Oregon*, 1982)



## 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)



# OFFENSIVE USE OF SOVEREIGN IMMUNITY



## HEALTH

The New York Times

# *How to Protect a Drug Patent? Give it to a Native American Tribe*

By KATIE THOMAS   SEPT. 8, 2017





## ST. REGIS MOHAWK TRIBE MAKES THE NEWS

- 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



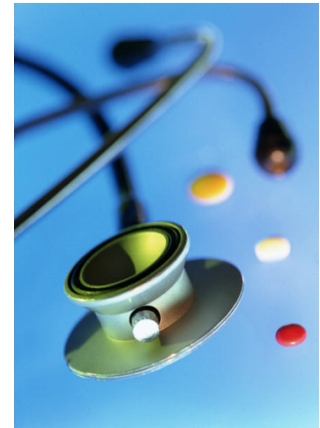




## PATENT ACQUISITION

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



## LEGISLATIVE RESPONSE (CONT'D)

### *Sen. McCaskill Bill*

...

(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







## *PEOPLE V. MIAMI NATION (2016)*

- 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.**”



— Justice Kennedy, *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* (1998)





## QUESTIONS?



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