

Rare Victory For Tribes Bucks Trend Before High Court



Law360, New York (May 30, 2014, 3:27 PM ET) -- On May 27, 2014, the U.S. Supreme Court decided *Michigan v. Bay Mills Indian Community*, a case involving Michigan's efforts to stop the Bay Mills Indian Community from operating a casino outside of its reservation. In a 5-4 decision, the Supreme Court affirmed a lower court's decision, thus determining that tribal sovereign immunity bars a state from suing in federal court to enjoin a tribe from violating the Indian Gaming Regulatory Act ("IGRA") outside of Indian lands. This is a significant decision for tribal sovereignty and an increasingly rare victory for tribes before the nation's highest court.

Case Background

In 2010, the Bay Mills Indian Community, a federally recognized Indian tribe, opened a casino in Vanderbilt, Michigan, more than 100 miles from the Bay Mills Reservation, on land purchased with funds received through the Michigan Indian Land Claims Settlement Act, land the National Indian Gaming Commission later determined is not Indian land. Shortly after the casino opened, Michigan, as well as the Little Traverse Bay Band of Odawa Indians, filed suit against Bay Mills in the U.S. District Court for the Western District of Michigan. Both Michigan and Little Traverse claimed that Bay Mills' casino violated state and federal law, including IGRA. The district court entered a preliminary injunction ordering Bay Mills to cease operating the casino.

Bay Mills appealed the order in the Sixth Circuit, which vacated the preliminary injunction and permitted Bay Mills to reopen the casino — Bay Mills opted to keep the casino closed pending the outcome of litigation. First, the Sixth Circuit found that the district court's jurisdictional authority only extends to IGRA claims involving casinos located on Indian lands. Second, citing *Kiowa Tribe of Oklahoma v. Manufacturing Technologies Inc.*, the Sixth Circuit concluded that Bay Mills is immune from suit in federal court because Congress had not abrogated Bay Mills' tribal sovereign immunity nor had Bay Mills waived its tribal sovereign immunity. Michigan alone petitioned for Supreme Court review.

Implications for Tribal Sovereign Immunity

In a majority decision written by Supreme Court Justice Elena Kagan, who was joined by Chief Justice John R. Roberts as well as Associate Justices Stephen G. Breyer, Anthony M. Kennedy and Sonia M. Sotomayor, the court decided that tribes enjoy sovereign immunity in suits involving gaming off Indian lands.

The Supreme Court maintained the status quo by concluding that Congress has partially abrogated tribal sovereign immunity through IGRA, but only to the extent that a state may sue a tribe to enjoin gaming activity on Indian lands. The court declined to revisit its holding in *Kiowa*, thus preserving tribal sovereign immunity absent congressional authorization or tribal waiver. As such, tribes will remain immune from suits regarding illegal gaming off Indian lands unless an individual tribe waives immunity or Congress changes IGRA to allow such suits.

The Supreme Court firmly recited that tribal sovereign immunity is not a court-created doctrine, but rather is an inherent attribute of pre-U.S. tribal sovereignty. At the same time, tribal sovereign immunity is modifiable by Congress: "It is fundamentally Congress' job, not ours, to determine whether or how to limit tribal immunity." Additionally, the *Ex Parte Young* doctrine, developed in cases dealing with state immunity in federal court, is fully applicable to disputes with tribes and tribal officials. Thus, tribal sovereign immunity does not bar a suit for injunctive relief against individual tribal officials responsible for unlawful conduct.

As in many other areas of law as diverse as antitrust and abortion rights, the issue of adherence to precedent, or *stare decisis*, arose in the decision. The majority opinion points to the long history of Supreme Court cases recognizing tribal sovereign immunity from suit in general. Commercial parties have also specifically relied on the doctrine in the years since *Kiowa* was decided, which proved as a basis for the court not to tamper with the current understanding and application of tribal sovereign immunity to commercial activity off Indian lands.

Concurring Opinion

Justice Sotomayor's concurring opinion further detailed why history and comity weigh against limiting tribes' sovereign immunity. Emphasizing that tribes have historically possessed a unique status "more akin to 'domestic dependent nations'...than to foreign nations," Justice Sotomayor explained that the Supreme Court has declined to treat tribes as foreign states. Moreover, under principles of comity, because tribes cannot sue states for commercial activities on Indian lands, states should not be able to sue tribes for commercial activities off Indian lands.

Dissenting Opinions

The principal dissenting opinion, written by Justice Clarence Thomas and joined by Justices Samuel A. Alito, Ruth Bader Ginsburg and Antonin G. Scalia, would have overruled *Kiowa*, thus subjecting tribes to suits involving commercial activities conducted off Indian lands.

Justice Scalia wrote a separate dissenting opinion in which he noted that overruling *Kiowa* is the

preferred alternative to “[insisting] that Congress clean up a mess that [he] helped make” 16 years ago. In addition, Justice Ginsburg wrote a separate dissenting opinion in which she went further to assert her belief that the Supreme Court has gone too far in terms of sovereign immunity for states of the U.S., and that neither tribal nor state immunity will have “staying power.”

Implications for the Future

Though this ruling may alter the relationships between states and tribes, the Supreme Court left open alternative methods of stopping illegal tribal gaming off Indian lands: (1) waiver of tribal sovereign immunity through contract or compact, (2) claims for injunctive relief against individual tribal officials and (3) state law claims against individuals directly conducting illegal gaming on non-Indian lands.

Individuals and entities doing business in Indian Country can rest assured that the Supreme Court’s decision does not disrupt the current practices regarding tribal sovereign immunity in contracting with tribes. As noted above, negotiating waivers of tribal sovereign immunity has long been a common practice in doing business in Indian Country, and this decision confirms that it will remain so.

Tips for Practitioners

Transactional practitioners can note that the decision will not alter common practice regarding tribal sovereign immunity and waivers thereof. The Supreme Court maintained the status quo, which translates directly into practice.

For litigators, the Supreme Court emphasized its adherence to stare decisis in refusing to depart from Kiowa’s holding, reasoning that Kiowa was not a “one-off,” that the court has strongly relied on Kiowa subsequently, that tribes and entities doing business with tribes have relied on Kiowa for many years, and that Congress has primary authority in the area of tribal sovereign immunity and can alter what the court decides nonetheless.

It is quite possible that the Supreme Court’s adherence to stare decisis in Indian law cases will stick, thus stagnating what many practitioners and scholars today refer to as the slow erosion of tribal sovereignty by the Supreme Court.

At the same time, several of the justices expressed strong reservations about tribal sovereign immunity in their dissenting opinions. Tribal rights proponents may want to heighten their wariness of this fact in litigation, thereby limiting opportunities for courts to rely on the dissenting justices’ views in attempts to erode tribal sovereign immunity.

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