NINTH CIRCUIT ADDRESSES EFFECT OF REMOVAL ON TRIBAL SOVEREIGN IMMUNITY

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Indian Law Alert

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The Ninth Circuit Court of Appeals (the "Ninth Circuit") reaffirmed principles of tribal sovereign immunity in a ruling on August 8, 2016.[1] The Ninth Circuit issued an opinion stating that an Indian tribe does not waive its tribal sovereign immunity when it removes a case from state to federal court. The Ninth Circuit reasoned that it would be unfair and inconsistent with tribal immunity principles to imply waiver from the mere act of removal.[2]

The case serves as a reminder of best practices that attorneys and businesses should keep in mind when doing business with Indian tribes. Specifically, it is a reminder that any contract with a tribe, be it for employment, services, a business transaction, or anything else, is likely unenforceable in state and federal court if there is no express waiver of tribal sovereign immunity contained in the contract. In any dealings with an Indian tribe, it is worth bearing in mind that sovereign immunity, where not waived, may protect tribes from attempts to enforce contracts or statutes.

The case, *Bodi v. Shingle Springs Band of Miwok Indians*, involved an employment dispute. Plaintiff Beth Bodi was employed by the Shingle Springs Band of Miwok Indians (the "Tribe").[3] The Tribe terminated her employment after she attempted to take medical leave protected by the federal Family Medical Leave Act.[4] Ms. Bodi was rehired by the Tribe, but she was then terminated again after she told tribal officials she was willing to sue in state court for her earlier termination.[5] She eventually sued the Tribe in California state court for the original termination.[6]

The case quickly focused on the interaction between removal jurisdiction and tribal sovereign immunity.[7] The Tribe removed the case to federal court and then, a week later, moved to dismiss Ms. Bodi's complaint, asserting a tribal sovereign immunity defense.[8] In response, Ms. Bodi argued that removing the case to federal court acted as a waiver of the Tribe's sovereign immunity.[9] She reasoned that by removing the case, the Tribe unequivocally subjected itself to the jurisdiction of the federal court.[10] The district court agreed with Ms. Bodi, holding that the act of removing the case waived tribal sovereign immunity.[11] The Tribe then appealed directly to the Ninth Circuit.[12]

The district court's decision went against the grain of existing legal authority. The Eleventh Circuit Court of Appeals addressed this exact issue in 2012 in *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.*, and held that removal of a case alone does not waive tribal sovereign immunity.[13]

The Ninth Circuit reached the same conclusion.[14] Importantly, the Ninth Circuit based its decision on the high standard for waiver in sovereign immunity cases. A waiver of tribal sovereign immunity "cannot be implied but must be unequivocally expressed."[15] In addition, the expression of waiver must "manifest the tribe's intent to surrender immunity in 'clear' and unmistakable terms."[16] The Ninth Circuit concluded that it would "defy logic"

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to hold that removal of a case alone constituted an unequivocal expression of intent to surrender immunity.[17] The Ninth Circuit concluded that it would be unfair to force tribes to choose between their right to a federal forum and their right to assert tribal sovereign immunity, rejecting Ms. Bodi's attempts to analogize tribal immunity to Eleventh Amendment immunity and foreign sovereign immunity.[18]

The Ninth Circuit's opinion should be welcome news to Indian tribes within the Ninth Circuit, assuring them that they can remove a case to federal court without losing what is often a case-critical immunity defense. The opinion also serves as a reminder to practitioners that tribal sovereign immunity is always an important issue when interacting with tribal interests and that in transactions with Indian tribes and tribal entities, sovereign immunity must be taken into consideration and addressed appropriately.

Notes:

[1] *Bodi v. Shingle Springs Band of Miwok Indians*, No. 14-16121 (Aug. 8, 2016), http://cdn.ca9.uscourts.gov/datastore/opinions/2016/08/08/14-16121.pdf.

[2] *Id.* at 20–21.

[3] *Id.* at 4.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 4–5.

[7] *Id.* at 5.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at 6.

[13] 692 F.3d 1200, 1206–08 (11th Cir. 2012).

[14] The unanimous opinion was authored by Circuit Judge Michelle T. Friedland and joined by Circuit Judge M. Margaret McKeown and Robert D. Sack, Second Circuit Judge sitting by designation.

[15] *Bodi*, No. 14-16121, at 8 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)).

[16] *Id.* at 9 (citing *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001)).

[17] *Id.* at 12.

[18] *Id.* at 15–21.

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