KNOW YOUR TRIBAL COUNTERPARTY: TRIBAL CORPORATIONS MAY BE IMMUNE FROM SUIT

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Native American tribes are increasingly involved in commerce using corporate entities that are incorporated under either state or tribal law. A recent ruling by the Ninth Circuit makes clear that those corporations may be subject to the same sovereign immunity from suit as the tribe itself. The decision in *McCoy v. Salish Kootenai College, Inc*. [1] clarifies the test that is applied to determine if a tribal corporation is immune from suit without a contractual waiver of sovereign immunity.

In *McCoy*, a former employee of the Salish Kootenai College ("SKC"), located on the Flathead Reservation, sued SKC in Montana federal district court alleging discrimination under federal and state law. The district court dismissed the case, ruling that SKC was immune from suit under the doctrine of tribal sovereign immunity. The Ninth Circuit agreed. It found that SKC was an "arm" of the Confederated Salish and Kootenai Tribes ("CSKT"), even though it was incorporated under Montana law, and affirmed the lower court's dismissal of the suit based on SKC's tribal sovereign immunity.

TRIBAL SOVEREIGN IMMUNITY

Federally recognized Native American Indian tribes exercise inherent sovereign authority. [2] A central aspect of that authority is immunity from suits in federal, state, and tribal courts, commonly referred to as "tribal sovereign immunity." [3] The doctrine of tribal sovereign immunity extends to certain tribal entities and prevents tribes and those entities from being sued, unless the tribe clearly, expressly, and unequivocally waives its sovereign immunity or the U.S. Congress abrogates it. [4]

THE *MCCOY* CASE

Stephen McCoy sued SKC in federal district court in Montana alleging gender discrimination under Title VII of the Civil Rights Act of 1964 and under the Montana Human Rights Act. [5] SKC moved to dismiss the suit, claiming it was an arm of the CSKT entitled to the tribe's sovereign immunity from suit.

The district court and the Ninth Circuit applied a five-factor test for determining whether a commercial entity is entitled to sovereign immunity as an arm of the tribe. [6] Under that test, the court considers:

> (1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with

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> respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities. [7]

A court must consider all five factors in determining an entity's legal status. That is, a single factor is not conclusive of whether immunity applies to any particular tribal entity.

The district court and Ninth Circuit were persuaded that the following factors weighed in favor of finding the college was an arm of the tribe:

1. SKC's purposes, which include (i) representing, developing, protecting, and advancing the views, interests, resources, and education of the CSKT; (ii) providing post-secondary education opportunities for Native Americans on the Flathead Reservation; and (iii) upgrading the skills and competencies of tribal employees; [8]
2. CSKT maintained control over SKC;
3. CSKT intended to extend its sovereign immunity to SKC; and
4. The financial interconnectedness between CSKT and SKC. [9]

The Ninth Circuit concluded that these considerations outweighed the fact that SKC's method of creation was incorporation under Montana law, and SKC was therefore an arm of CSKT entitled to immunity from suit absent a clear, express, and unequivocal waiver of that immunity.

KEY TAKEAWAYS FROM THE NINTH CIRCUIT'S DECISION

McCoy is an important reminder that tribes are sovereign governmental entities with commercial affiliates that may also enjoy tribal sovereign immunity from suit. It is critical to understand the status of tribal entities before entering into agreements and/or relationships with those entities. Failing to consider the status of a tribal entity or to obtain a waiver of immunity may render a wide range of agreements unenforceable, including contracts for goods and services, mitigation agreements, taxing agreements, leases, and other commercial contracts. If a tribal entity has or may have immunity from suit, it is imperative that agreements with that entity include a clear, express, and unequivocal waiver of sovereign immunity. If there is any doubt about the status of a tribal entity, it is prudent to include a provision waiving tribal sovereign immunity in the event it applies.

NOTES:

[1] McCoy v. Salish Kootenai Coll., Inc., No. 9-17-cv-00088-DLC, 2019 WL 6185959 (Mem.) (9th Cir. Nov. 20, 2019) (unpublished decision; precedent only as provided by Ninth Circuit Rule 36-3).
[2] Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 509 (1991).
[3] Okla. Tax Comm'n, 498 U.S. at 509.
[4] C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 414 (2001).
[5] McCoy v. Salish Kootenai Coll., Inc., 334 F. Supp. 3d 1116, 1119 (D. Mo. 2017).
[6] White v. Univ. of Cal., 765 F.3d 1010, 1025 (9th Cir. 2014).

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[7] *Id.*
[8] McCoy, 334 F. Supp. 3d at 1121.
[9] McCoy, No. 9-17-cv-00088-DLC, 2019 WL 6185959 (Mem.) at *1.

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