Keeping Tribal Business Partners Close – and Their Lawyers Closer

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Non-Indian businesses are coming to realize that now is the time to develop on Indian lands or otherwise in partnership with tribal governments. And rightly so. Fueled by the $26.4 billion Indian gaming industry, Indian Country is generally faring much better than neighboring local economies since the Great Recession took hold in 2008.

Yet tribal governments are not getting complacent; they recognize that the Indian gaming industry will not sustain its exponential growth over the last decade. The legalization of Internet gaming, recently sanctioned by the U.S. Department of Justice, is very likely to put a major dent in Indian Country’s bottom line. As such, tribal governments are more than ever looking to diversify their economies and bring new streams of jobs and revenues to their reservations by partnering with non-Indian businesses. In short, the commercial relationship between Indian Country and Corporate America can be symbiotic.

“Indian law” – based upon over 200 years of federal common law, with an entire title of U.S. Code dedicated to the practice – is by its nature an intensely specialized field. As non-Indian businesses enter what is very likely to remain an extremely active period for contract negotiation with tribal governments and enterprises, it is crucial that non-Indian businesses and their attorneys have a firm grasp their understanding of the nuances of both federal Indian law and tribal law.

The Seminole Tribe of Florida’s $965 million acquisition of the multi-national Hard Rock business conglomerate in 2007 perhaps epitomizes the beautiful union between Indian Country and Corporate America. The Tribe’s general counsel, Jim Shore – the first of his Tribe to graduate from law school – oversaw the negotiations, worked with the bankers, and supervised outside lawyers. The Hard Rock deal, arguably the largest tribal

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2 See generally ALAN MEISTER, INDIAN GAMING INDUSTRY REPORT (2011).


4 See Memorandum Opinion of the Assistant Attorney General, U.S. Dept. of Justice, Whether Proposals by Illinois and New York to Use the Internet and Out-Of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act (Sept. 20, 2002).


6 See Brenda Austin, NNABA Strongly Supports Sonia Sotomayor's Nomination, INDIAN COUNTRY TODAY, July 1, 2009, at 5 (“Practitioners are often unprepared when they run into Indian law, and it is this lack of knowledge that has led to a number of bad decisions affecting all of Indian country.”)


deal to date, has not been litigated. These attorneys’ solid understanding of the principles of federal Indian law has created the model for Indian/non-Indian business relations.

Two recent cases out of involving the same Seminole Tribe, however, demonstrate just the opposite. These cases exemplify where non-Indian businesses and their lawyer’s unfamiliarity with the fundamental principles of Indian law have caused significant – but very preventable – hardship to non-Indian businesses. Even in “victory,” tribal litigants in such cases suffer hardship too, in the form of full frontal attacks on any tribal sovereignty basis for a litigation “win.” In fact, the notion of Pyrrhic victory is more often apropos in instances where trial court decisions favor tribal parties because they inevitably result in the judicial and/or political erosion of tribal sovereignty, jurisdiction, and immunity rights. Accordingly, tribal parties to certain commercial dealings must change the way they approach and handle those transactions.

**Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida**

In *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Florida*[^9], a contractual dispute arose between the Seminole Tribe and Contour Spa (“Contour”), a spa facility located inside of the Tribe’s Hard Rock Hotel and Casino.

Assuming that a lease negotiated by the parties was valid, Contour invested over $1.5 million in designing and building its spa, which opened in May of 2004. Contour immediately began generating “large revenues,” and continued to do so until early 2005, when the parties began disputing whether the Tribe’s hotel guests could use the spa free of charge. The dispute came to a head in June of 2007, when the Tribe disclosed to Contour that the Department of Interior Secretary never approved the lease. Contour then spent the next two years urging the Tribe to submit the lease, but to no avail. Then, in March of 2010, the Tribe emailed a letter to Contour informing it that the Tribe had decided to permanently close the spa. The next day the Tribe declared the lease void and locked out the spa owner and its employees.

Contour immediately filed suit in a Florida state court, alleging various claims under the Indian Civil Rights Act, the Indian Long Term Leasing Act, wrongful eviction, unlawful entry, fraud, promissory estoppel, and unjust enrichment. The Tribe promptly removed the suit to U.S. District Court, alleging federal jurisdiction pursuant to 28 U.S.C. § 1367, and then filed a Rule 12(b)(1) and 12(b)(6) motion to dismiss.

Specifically, the Tribe argued that because it had not waived its sovereign immunity, Contour was estopped from bringing suit in federal court, and the suit must therefore be dismissed. Contour, on the other hand, argued that because through the language in the lease the Tribe completely and explicitly “agreed to waive its sovereign immunity as to certain lawsuits that [Contour] might bring,” the Tribe was estopped from asserting a sovereign immunity argument.[^10]

[^10]: *Id.* at *1.
The District Court found the Tribe’s argument compelling. According to the court,

[w]hen Indian tribes do enter the commercial realm, federal law requires that the United States Government approve certain contracts between Indian tribes and non-Indians. First, 25 U.S.C. § 81 provides that “[n]o agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of Interior or a designee of the Secretary.” 25 U.S.C. § 81(b). It is undisputed that 25 U.S.C. § 81 is applicable to the instant lease. Secretarial approval is thus a condition precedent to the validity of such a lease. Accordingly, a lease of restricted Indian lands that lacks secretarial approval is null and void ab initio. . . . Second, the Indian Long Term Leasing Act, 25 U.S.C. § 415 and its accompanying regulations, 25 C.F.R. § 162, provide in relevant part that restricted Indian lands may only be leased with the approval of the United States Government.11

Because “tribal governments retain sovereign immunity even when they operate commercial enterprises, both on and off reservations,” the Tribe could not be sued in federal court; end of story.12

Had Contour made certain that the Secretary of the Interior had approved the lease before investing over $2 million in the project – as is par-for-the-course due diligence in any tribal lease – the entire dispute could have been argued on the merits. However, because of Contour’s inattention to the fundamental principles of federal Indian law, the dispute didn’t even get that far.

*Everglades Ecolodge at Big Cypress, LLC v. Seminole Tribe of Florida*

*Everglades Ecolodge at Big Cypress, LLC v. Seminole Tribe of Florida*13 also involved a contractual dispute between a non-Indian business and the Seminole Tribe. In this case, Everglades Ecolodge at Big Cypress, LLC (“Everglades”), sought to develop a full service resort-style hotel on the Big Cypress Seminole Indian Reservation. Everglades negotiated a 25-year business lease “intended to bring eco-tourism, i.e., hotels, retail concessions, educational programs, and ecologically related entertainment, to the Big Cypress Seminole Indian Reservation.”14 Because the land was located on the Tribe’s Reservation, however, Everglades was required to go through the National Environmental Policy Act (“NEPA”) approval process before any brick-and-mortar could be applied to their plan.

Eventually, almost four years later – before any physical construction had begun, but after Everglades had spent what is assumed to be millions of dollars on the federal

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11 *Id.* at *3-4.
12 *Id.* at *3.
14 *Id.* at *1.
permitting process – the Tribe passed a Resolution that effectively rescinded the lease. Everglades then initiated a $20 million action against the Tribe in a Florida state court for breach of contract/lease and specific performance. The Tribe immediately removed the action to U.S. District Court pursuant to federal question jurisdiction.

Everglades argued that the lease was approved by the Secretary because it contained the following language under the parties’ signatures: “APPROVED: U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, SEMINOLE AGENCY.”15 At minimum, Everglades contended, the Tribe should be “estopped from asserting the lack of Secretarial approval as a defense because the Tribe made oral representations that the requisite approval had been obtained prior to executing the Lease.”16

The Tribe, on the other hand, maintained that the lease was not valid because it was not approved by the Secretary pursuant to 25 U.S.C. § 415(a) and 25 C.F.R. § 162.604(a). Thus, the Tribe would be immune from this lawsuit by virtue of its sovereign status, and the suit must be dismissed.

The court agreed with the Tribe:

Although tribes and tribal corporations have the authority to grant leases, a lease is only effective upon the approval of the Secretary of the Interior. The approval process requires that the lease be limited in scope and purpose, be negotiated to the satisfaction of the BIA, and that the land use comply with environmental regulations . . . . The Secretary's required written approval is consistent with Congress’ intention to ensure that adequate consideration is given to the impact of leases on tribes, neighboring lands and the environment. . . . The regulations governing Indian land leases, as a whole, lead to the conclusion that the printed language on the Lease is part of the standard leasing form required by the BIA, and does not serve as the requisite “written approval.” [Further, t]he federal regulations mandate that environmental assessments be taken into consideration before Secretarial approval. Logically, it therefore follows that the Lease was not approved in 2008. The lack of approval ultimately gave the Tribe the right to rescind the Lease, with or without notice to Everglades.17

As to the question of estoppel, the court ruled that

[w]hen a party relies on another’s misrepresentation, that reliance must have been reasonable in that the party claiming the estoppel did not know or should it have known that its adversary’s conduct was misleading. Reliance is not reasonable if the person induced to act has access to the truth. [T]he Lease expressly disclaims any reliance Everglades may have

15 Id. at *4.
16 Id. at *9.
17 Id. at *4-5, *8 (internal citations omitted).
on the Tribe's representations. . . . Everglades could have easily discovered that the Lease had not been approved by reviewing the governing procedural regulations, contacting the Secretary of the Interior, or by asking the Tribe for proof of the Secretary's approval. Everglades did not exercise “reasonable diligence,” and thus negligently remained ignorant of the Lease's invalidity. Even assuming, arguendo, that Everglades did reasonably rely on the Tribes alleged representations, equitable contract principles do not apply to the contract dispute at issue.

Again, had Everglades made certain that the Secretary had approved the lease before investing what is assumed to be millions of dollars in the project, the entire dispute could have been argued on the merits. However, because of Everglades’ inexperience with the fundamental principles of federal Indian law, the entirety of Everglades’ preceding efforts were forfeited.

Lessons to be Learned

Whether Corporate America has learned a lesson as to its ventures into Indian Country remains to be seen. As noted above, the field of law is extremely specialized – that there exists a steep learning curve for unfamiliar attorneys should come as no surprise.

Unfortunately, one theme that Indian law practitioners are exceptionally familiar with is the growing number of attacks on their tribal clients’ sovereignty. This, too, should come as no surprise. For those non-Indian businesses, doctrines of “tribal sovereign immunity,” “retained rights,” and the ever-elusive “domestic dependent nation” very likely play no part in their decision to partner with a tribally-owned enterprise. To these businesses, it is simply good business to deal with other, already successful businesses. It is only when a dispute arises that these fundamental concepts are even contemplated, and by then it is often too late – going straight for the throat is the only option.

The law that develops from these “beautiful union” disputes – even if it results in a “win” for the tribal litigant – will eventually take their toll on Indian Country. Numerous courts have already “expressed reluctance to recognize tribal sovereign immunity,” for example, and the Supreme Court has suggested that “[t]here are reasons to doubt the wisdom of perpetuating the doctrine.” Indeed, in the wake of Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., former Washington State Senator Slade Gorton had introduced at least five bills that would have limited the doctrine of tribal sovereign

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18 Id. at *9 (internal quotations and citations omitted).
19 Bank v. Lake of the Torches Economic Development Corp., 658 F.3d 684 (7th Cir. 2011), provides another example of a most cautionary of tale for lawyers for non-tribal businesses engaged in commercial transactions in Indian Country. In that case, a $50 million bond indenture agreement was declared null and void by a federal court for want of National Indian Gaming Commission approval required by the Indian Gaming Regulatory Act, Pub.L. 100-497, 25 U.S.C. § 2701 et seq.
22 Id.
immunity; including the “American Indian Equal Justice Act” a bill intended to abrogate the doctrine absolutely. Although the former Senator’s provisions were ultimately not enacted, there is no doubt that nullification remains on the tip of many Congressional and constituent tongues.

Appreciating that Congress has ultimately left the doctrine of tribal sovereign immunity in tact, non-Indian businesses are again pleading to the High Court. In the Petition for Writ of Certiorari in Reed v. Gutierrez, for example, the non-Indian party argued that “nearly thirteen years have passed since Kiowa and Congress has not acted. Since then, Indian tribes have become sophisticated participants in the national economy. Indian tribes are using this wealth to diversify their interests into the general economy. . . . [T]he doctrine of tribal sovereign immunity [should] be abrogated . . . .” Likewise, in Madison County v. Oneida Indian Nation of New York, the California State Association of Counties suggested that the Supreme “Court should reverse the decision that sovereign immunity prevents the enforcement of property tax on non-trust land.” Notably, the Court may have signaled an interest in revisiting the issue.

What Are Tribes To Do?

This begs the question, what can tribes do to protect business in Indian Country from further assault? Of course, waiving tribal sovereign immunity where appropriate is always one option, but this is not always feasible. In Contour Spa and Everglades, for example, the Tribe had in fact waived its sovereign immunity via its contract with the non-Indian parties. In those cases, ultimately, the fault rested with those parties tasked with overseeing the negotiation and maintenance of those business transactions.

Another solution is that tribes, in appropriate instances, ensure that their non-Indian business partners have engaged attorneys that are familiar with the fundamental principles of Indian law. Although this strategy may seem counterintuitive, a tribal party

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23 S. 1691, 105th Cong. (1998) (abolishing tribal immunity from suit and making Indian tribal governments subject to judicial review).
28 See Ryan Dreveskracht, Tribal Court Jurisdiction and Native Nation Economies: A Trip Down the Rabbit Hole, 67 NAT’L L. W. GUILD REV. 65, 89-90 (2010) (suggesting that tribes “pass their own arbitration codes, waive sovereign immunity in limited circumstances, and work hard to ensure that all their contracting partners understand the realities of tribal court practice so that non-tribal vendors [are not] fearful of being ‘hometowned’ in a tribal court”) (internal quotations omitted).
should pause during the deal to consider the old adage that “bad facts make for bad law,” while also accepting that commercial disputes are inevitable, especially in modern economic times. The tribal party should also pause to consider that it is increasingly appropriate to litigate these disputes on the merits, rather than bank on seeking a quick dismissal on Indian jurisdictional grounds – a dismissal that will very likely result in appeal.  

There is great potential that the appellate courts will force an exception to a sovereignty-based affirmative defense – and that the exception could swallow the rule.  

This proverb is particularly true for commercially successful tribes, where the perception of big-business/small-entrepreneur inequality is even more likely to drive bad results in the courts, and in the court of public opinion. Accordingly, the parties and their lawyers should ensure clarity and understanding regarding the various issues of tribal jurisdiction and federal Indian law that are implicated in Indian Country commercial transactions.

With success comes responsibility. For the sake of all that Indian Country has obtained in this era of self-determination, tribal businesses now have an obligation to appreciate and nullify the danger that non-Indian businesses and their attorneys inadvertently pose to tribal sovereignty. Indeed, the days of tribal lawyers playing “hide the ball” in business deals between tribal and non-tribal parties might need to be a thing of the past. Instead, taking preemptive steps to safeguard non-Indian businesses from themselves is not only good business, it is the defense necessary to deter the erosion of those fundamental principles of Indian law that have allowed Indian Country to flourish into the present day.

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29 See Gabriel S. Galanda, Waiving Goodbye to Tribal Sovereign Immunity?, 15 INDIAN L. NEWSL. 5, 6 (2007) (“Tribes should . . . consider litigating certain suits, such as frivolous tort claims, on the merits. . . . without putting tribal sovereignty or immunity on trial.”).

30 See e.g. Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980).