June 3, 2014

Recent Supreme Court Decision Bars State from Suing Tribe Seeking to Operate an Illegal Off-Reservation Casino

On May 27, 2014, the Supreme Court ruled that under the Indian Gaming Regulatory Act (IGRA), states may only sue to enjoin a tribe from conducting class III gaming “on Indian lands.” *Michigan v. Bay Mills Indian Cmty*., 2014 WL 2178337 (U.S. May 27, 2014). As a result, the Court ruled that the State of Michigan’s suit to enjoin the Bay Mills Indian Community from operating an illegal casino off its reservation was barred because the casino at issue was not located “on Indian lands” and no other tribal waiver of sovereign immunity applied. This ruling represents a major setback in the ability of states to stop tribes from illegally operating off-reservation casinos. On this point, Justice Thomas warned that the practical import of this decision “will continue to invite problems, including de facto regulation of highly regulated activities; unfairness to tort victims; and increasingly fractious relations with States and individuals alike.” *Id*. at *25 (Thomas, J., dissenting).

The dispute between the State of Michigan and the Bay Mills Indian Community (BMIC) arose after Bay Mills opened a casino on land purchased through a congressionally established land trust, claiming it could operate a casino there because the property qualified as Indian land. *Id*. at *3. Michigan disagreed, and sued Bay Mills under 25 USC § 2710(d)(7)(A)(ii), which allows a state to enjoin “class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact.” *Id*. The compact in question, pursuant to IGRA, authorizes Bay Mills to conduct class III gaming activities on Indian lands within the state’s borders, but prohibits it from doing so outside the territory.

The question presented in Bay Mills of the legality of operating the casino raised the interest of other parties as well. The United States filed an amicus brief on behalf of BMIC, arguing that the tribe should be immune from suit based on its sovereign immunity, and its narrow reading of IGRA. Brief for the United States as Amicus Curiae Supporting Respondents, *Michigan v. Bay Mills Indian Cmty*., WL 2178337 (2014), 2013 WL 5863581. In addition, given their respective interests in preserving their ability to stop illegally operated off-reservation casinos, the following states jointly filed an amicus brief in support of the State of Michigan: Alaska, Arizona, Colorado, Connecticut, Georgia, Hawaii, Idaho, Kansas, Louisiana, Montana, Nebraska, North Dakota, Rhode Island, South Dakota, and Utah. *See* Brief for States as Amici Curiae Supporting Petitioner, *Michigan v. Bay Mills Indian Cmty*., WL 2178337 (2014), 2013 WL 4829343, 1, 17−18 (“States Amicus Brief”).

Ultimately, the Supreme Court disagreed with Michigan, holding that under IGRA, states may only sue to enjoin a tribe conducting class III gaming “on Indian lands.” Because the casino at issue was not located “on Indian lands” and no other tribal waiver of sovereign immunity applied, the Court held that Michigan’s suit was not allowed. The Court, however, indicated that the state was not without remedies to stop the casino. For example, the Court suggested that the state could bring a civil or criminal action against tribal officials, rather than the tribe itself. *Id*. at *8. The Court also noted that the state could use its negotiating leverage when forming a gaming compact under IGRA to bargain for a waiver of tribal

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immunity. Therefore, although the Court held that the State of Michigan could not sue the tribe, the state still retains other means, albeit less preferable, to attempt to stop the casino. *Id.* at. *9.

These potential remedies, however, are of questionable value. For instance, even if a state could litigate a prosecution or forfeiture proceeding against specific contraband, it may still lack a binding judgment against the tribes and businesses mobilizing the given activity. *See* States Amicus Brief at 17−18. In addition, it is very likely that tribal officials will still raise tribal immunity as a defense. Id. (citing Brief in Support of Motion to Dismiss (Doc. 14), *Alabama v. PCI Gaming*, No. 2:13-cv-178 (M.D. Ala. May 9, 2013)). In addition, the fact that the United States filed an amicus brief on behalf of BMIC suggests they would be reluctant to take action against Bay Mills or any other future similarly situated tribe. Moreover, "federal authorities are notoriously unwilling to act in this area. Surveys suggest that U.S. Attorneys decline to prosecute approximately 85% of felony cases arising on Indian lands. *See* Ann E. Tweedy, Connecting the Dots Between the Constitution, the Marshall Trilogy, and United States v. Lara, 42 U. MICH. J. L. REFORM 651, 691 (2009). Gambling crimes, in particular, are 'rarely prosecuted.'" Kevin K. Washburn, American Indians, Crime, and the Law, 104 MICH. L. REV. 709, 715 n.20 (2006). *See* States Amicus Brief at 17.

The Supreme Court made it very clear that the issue raised in the case is one for Congress, not the courts. In discussing precedent relevant to the *Bay Mills* decision, the Court stated, "[w]e ruled that way for a single, simple reason: because it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity. The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress." *See Bay Mills*, WL 2178337, at *11. Therefore, to the extent the states and other interested parties would like to squarely address this issue, they will have to turn to Congress to make a relatively minor amendment to IGRA. In light of certain bills currently moving through Congress relating to Indian gaming[1], the timing may be ripe for such a fix.

This document is intended to provide you with general information regarding a summary of the Bay Mill decision. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorney listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

[1] S.2188, A bill to amend the Act of June 18, 1934, to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian tribes; S.477, Tribal Gaming Eligibility Act.

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