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Feature

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SCOTUS: Tribal Sovereign Immunity Abrogated Through the Code

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In *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*,[1] the U.S. Supreme Court set out to resolve a split among circuit courts of appeals as to whether Congress had abrogated the sovereign immunity of the Indian tribes through the Bankruptcy Code. The matter rose to the Court from a dispute between a wholly owned subsidiary of a tribe, which acted as a payday lender, and a bankruptcy debtor who sought to have the Code's automatic stay imposed on that lender's post-filing collection efforts.[2] The petitioners, a federally recognized Indian tribe and its wholly owned subsidiaries, had succeeded in having the underlying bankruptcy court dismiss the debtor's stay-enforcement efforts on grounds of sovereign immunity, but later lost on the debtor's direct appeal to the First Circuit, which ruled that Bankruptcy Code §§ 106(a) and 101(27) abrogated sovereign immunity.[3]

By way of an 8-1 opinion delivered by Justice Ketanji Brown Jackson, the Court held that the Bankruptcy Code unequivocally abrogates the sovereign immunity of "any and every government" with the power to assert such immunity.[4] The Court arrived at this ruling by not only analyzing the text of applicable Code provisions, but by looking to the cornerstones of federal bankruptcy law, which, in the majority's view, reinforced congressional intent to abrogate tribal sovereign immunity.[5]

Lac du Flambeau Band also featured alternative views from Justices Clarence Thomas and Neil Gorsuch. Justice Thomas concurred with the majority by reaching the same conclusion, yet he questioned the continued viability of the tribal immunity doctrine.[6] Justice Gorsuch dissented, finding that the Indian tribes existed outside of the foreign/domestic dichotomy of § 101(27)'s catchall clause, and thus were not a "governmental unit" subject to the Code's abrogation of sovereign immunity.[7] As discussed herein, *Lac du Flambeau Band* might not be a particularly complex decision, but it contains nuances to be aware of and will likely become a case of reference for more than its central holding, given its competing dissertations on statutory interpretation and the majority's robust construction of the Bankruptcy Code.

Underlying History

Lac du Flambeau Band of Lake Superior Chippewa (the petitioner) is a federally recognized tribe that wholly owned a payday loan company known as Lendgreen.[8] The respondent, Brian Coughlin, had obtained a payday loan from Lendgreen, but before repaying such loan, he filed a voluntary chapter 13 petition in the U.S. Bankruptcy Court for the District of Massachusetts.[9]

The parties did not dispute that the automatic stay arose on the filing of Coughlin's bankruptcy petition.[10] Lendgreen nevertheless persisted with its collection efforts, and did so in such a strident manner that it allegedly led to Coughlin's attempted suicide.[11] Coughlin subsequently moved for a determination that the automatic stay had been violated by Lendgreen, its

1 2023 U.S. LEXIS 2544 at **7-8, 143 S. Ct. 1689 (2023).
2 *Id.* at **6-7.
3 *In re Coughlin*, 33 F.4th 600, 605, 607 (2022).
4 *Lac du Flambeau Band*, 2023 U.S. LEXIS 2544 at *10.
5 *Id.* at **13-15.
6 *Id.* at **23-24.
7 *Id.* at **42-43, 50-51.
8 *Id.* at *6.
9 *Coughlin*, 33 F.4th at 604. The payday loan at issue was short term and high interest such that the original principal of $1,100 had ballooned to nearly $1,600. *Id.*
10 *Lac du Flambeau Band*, 2023 U.S. LEXIS 2544 at *6.
11 *Id.*; *see also Coughlin*, 33 F.4th at 604.

parent entities and Lac du Flambeau Band.[12] The alleged stay violators, including Lac du Flambeau Band, sought dismissal of Coughlin's enforcement efforts by way of a motion, arguing that they were immune from suit before the bankruptcy court.[13] The Supreme Court granted dismissal, finding that §§ 106 and 101(27) lacked the requisite clarity of intent necessary to abrogate tribal sovereign immunity.[14]

Circuit Split

On direct appeal of the bankruptcy court's ruling to the First Circuit pursuant to 28 U.S.C. § 158(d), the appellate court reversed in a divided opinion, finding in the main that "when Congress enacted §§ 101(27) and 106, it understood tribes to be domestic governments, and when it abrogated the sovereign immunity of domestic governments in § 106, it unmistakably abrogated the sovereign immunity of tribes."[15] The First Circuit's view conformed with that of the Ninth Circuit, which in *Krystal Energy Co. v. Navajo Nation*[16] had previously held that the Bankruptcy Code unequivocally strips tribes of their immunity.

The Sixth Circuit, also by way of a divided opinion, had taken the opposite view in *In re Greektown Holdings LLC*,[17] finding that "[w]hile it is true that Congress need not use 'magic words' to abrogate tribal sovereign immunity, it still must unequivocally express that purpose," and that §§ 106 and 101(27) "lack the requisite clarity of intent to abrogate tribal sovereign immunity."[18] The court granted *certiorari* to address this split of opinion.[19]

Governing Principles and Statutory Provisions

As the Supreme Court reiterated in a ruling issued shortly before *Lac du Flambeau Band*, the "Court has often held that Congress must make its intent to abrogate sovereign immunity 'unmistakably clear in the language of the statute.'"[20] This standard to deduce congressional intent is referred to as the "clear-statement rule."[21]

Under Supreme Court precedent, federally recognized tribes possess common law immunity from suit that is granted to sovereign powers.[22] Accordingly, absent a clear statement of congressional intent to the contrary, the sovereign immunity of tribes against lawsuits is deemed a "baseline position."[23]

Under the Bankruptcy Code, § 106(a) governs the waiver of sovereign immunity as to "governmental units," but in pertinent part it provides that "[n]otwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following" and lists the various Code sections to which abrogation applies, including the automatic stay under § 362.[24] To identify governmental units subject to § 106(a)'s waiver, § 101(27), provides that "[t]he term 'governmental unit' means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a [U.S. Trustee] while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government."[25]

The Supreme Court's Opinion

As acknowledged by the majority opinion, the "clear-statement rule is a demanding standard," and "[i]f 'there is a plausible interpretation of the statute' that preserves sovereign immunity, Congress has not unambiguously expressed the requisite intent."[26] However, the clear-statement rule does not require "magic words" or particular formulations.[27] Rather, "[t]he clear-statement question is simply whether, upon applying 'traditional' tools of statutory interpretation, Congress's abrogation of tribal sovereign immunity is 'clearly discernable' from the statute itself."[28]

Turning to whether §§ 101(27) and 106(a) feature sufficiently clear statements of congressional intent to abrogate tribal sovereign immunity, the majority answered "yes" in the broadest possible sense, finding that "the Bankruptcy Code unequivocally abrogates the sovereign immunity of *any and every government* that possesses the power to assert such immunity."[29] Specifically as to § 106(a)'s waiver of sovereign immunity, the Court found no doubts to suggest that Congress intended to treat some governments differently than others. To the contrary, "Congress categorically abrogated the sovereign immunity of any governmental unit that might attempt to assert it."[30]

In assessing whether Lac du Flambeau Band constituted a "governmental unit" subject to § 106(a), the Court observed the "strikingly broad scope" of the definition provided by § 101(27), which features an extensive list of types of governments and ends with a broad catchall phrase of "or other foreign or domestic government."[31] Specifically with regard to § 101(27)'s catchall phrase, the majority explained that its pairing of extremes — in this case, "foreign or domestic" — connoted all-inclusiveness.

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12 *In re Coughlin*, 622 B.R. 491, 492 (Bankr. E.D. Mass. 2020).

13 *Id.* at 493. As the bankruptcy court explained, the motions to dismiss filed by Lac du Flambeau Band and its related entities were permissible by way of motion under Rule 12(b)(1) of the Federal Rules of Civil Procedure, given the allegation that the court lacked subject-matter jurisdiction. *Id.* Furthermore, as to the uniformity of posture among Lac du Flambeau Band and its related entities, as the First Circuit had observed, the ownership structure of Lendgreen was such that it was not disputed that it was an arm of petitioner Lac du Flambeau Band, and thus enjoyed whatever immunity was held by Lac du Flambeau Band. *Coughlin*, 33 F.4th at 604, n.1.

14 *Id.* at 494.

15 *Coughlin*, 33 F.4th at 605, 607.

16 357 F.3d 1055, 1061 (9th Cir. 2004).

17 *Buckwald Capital Advisors LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings LLC)*, 917 F.3d 451, 460-61 (6th Cir. 2019).

18 *Id.* at 461.

19 *Lac du Flambeau Band*, 2023 U.S. LEXIS 2544 at **7-8.

20 *Fin. Oversight and Mgmt. Bd. for P. R. v. Centro De Periodismo Investigativo Inc.*, 598 U.S. ___, ___, 143 S. Ct. 1176, 2023 U.S. LEXIS 2544 at *2 (2023) (holding, in pertinent part, that Puerto Rico Oversight, Management and Economic Stability Act (PROMESA) (48 U.S.C.S. § 2101, *et seq.)* did not categorically abrogate the sovereign immunity that Financial Oversight and Management Board for Puerto Rico had from legal claims, given that nothing in PROMESA made Congress's intent to abrogate Board's sovereign immunity unmistakably clear).

21 *Id.*

22 *Lac du Flambeau Band*, 2023 U.S. LEXIS 2544 at *9 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)).

23 *Id.* (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014)).

24 11 U.S.C. § 106(a)(1). Section 106(a) contains other provisions to enable a court to process and adjudicate the rights of a governmental unit whose immunity has been abrogated. 11 U.S.C. § 106(a)(2)-(4).

25 11 U.S.C. § 101(27).

26 *Lac du Flambeau Band*, 2023 U.S. LEXIS 2544 at *9 (internal citations omitted).

27 *Id.*

28 *Id.* at **9-10 (internal citations omitted).

29 *Id.* at *10 (emphasis added).

30 *Id.* at **12-13.

31 *Id.* at **10-11.

Taken together with the preceding list of highly variable governments, the Court found that "Congress unmistakably intended to cover all governments in § 101(27)'s definition, whatever their location, nature, or type."[32] As to the governmental status of the petitioners themselves, the majority found no serious dispute as to whether a federally recognized tribe like Lac du Flambeau Band constituted a government that is given the powers to make substantive law governing internal matters, enforce laws in its own forum and tax certain activities.[33]

The Bankruptcy Code's overall structure and underlying policies were also deemed relevant, with the majority highlighting key aspects of the federal bankruptcy process, such as start principles, the need for an orderly and centralized process, the purpose of the automatic stay to ward off dissipation of the estate, discharge principles and post-confirmation obligations that can bind a creditor regardless of that creditor's status in relation to a debtor's case.[34] The Court further noted the manner in which the Code already accounts for essential governmental functions by providing for exceptional circumstances, such as the exception to the automatic stay for governmental units to enforce police and regulatory powers in certain circumstances.[35] Excluding a subset of governments such as Lac du Flambeau Band from the definition of "governmental unit" would thus risk upending the careful policy choices imbued in the Bankruptcy Code.[36]

Alternative Views of the Court

Lac du Flambeau Band featured a concurrence in the judgment authored by Justice Thomas and a dissent authored by Justice Gorsuch. Although Justice Thomas concurred in denying Lac du Flambeau Band immunity from application of the Bankruptcy Code, his reasoning prescribed an entirely different route to reach that outcome. The concurrence challenged the underpinnings and continued application of tribal sovereign immunity, stating that "to the extent that tribes possess sovereign immunity at all, that immunity does not extend to 'suits arising out of a tribe's commercial activities conducted beyond its territory.'"[37]

Justice Gorsuch's dissent took an opposite view. Reminding that the doctrine of tribal sovereign immunity is settled law,[38] and further that the clear-statement rule is a hard-to-meet standard with ambiguities to be resolved in favor of immunity,[39] the dissent collected historical precedent from the founding through recent tribal law jurisprudence in support of its contention that Indian tribes occupy a unique status, neither foreign nor domestic, that puts them outside the reach of § 101(27)'s catchall phrase "or other foreign or domestic government."[40] Positing that tribes stand outside the foreign/domestic dichotomy, Justice Gorsuch was not satisfied that § 101(27) may be read to include "every government under the [s]un."[41] Instead, the dissent saw § 101(27)'s extensive recitation of types of sovereigns as begging the question as to why the tribes were not specifically mentioned.[42] The dissent concluded that governing provisions lacked clear text sufficient to justify abrogation of tribal sovereign immunity.[43]

Parting Thoughts

There are at least a few notable aspects of *Lac du Flambeau Band*. The clash between the sovereign immunity of the Indian tribes and the Bankruptcy Code is the box-office draw and, by definition, constitutes an issue of national importance. The impact that this decision could have on the commercial activity of the tribes is no small thing; there are 574 federally recognized tribes,[44] and there are more than 5 million Native Americans and Alaska Natives in the U.S. who descend from a federally recognized tribe or village.[45] The weighty rights of consumer debtors to statutory protections also must be acknowledged, as should the plight of the individual debtor in the case before the Supreme Court, who asserted severe psychological trauma as a result of Lendgreen's continued debt-collection efforts in the face of the automatic stay.[46]

That said, *Lac du Flambeau Band* should not be viewed as a broadside attack on tribal sovereign immunity. Putting Justice Thomas's concurrence aside, the decision makes the point that the Bankruptcy Code applies to any and every government whose interests or activities are implicated by the Code provisions to which abrogation applies, as specifically enumerated in § 106(a), which in *Lac du Flambeau Band* concerned the automatic stay. As for purely domestic governmental actors within the physical boundaries of the U.S. — the federal government or states and their subdivisions — the rules of the road remain the same in the sense that the Code has long accounted for when and how domestic government actors may take action against a debtor or its bankruptcy estate.[47]

Beyond sovereign immunity considerations, the manner in which the Code was interpreted in reaching the ultimate conclusion may itself garner interest. To construe § 101(27)'s catchall phrase "or other foreign or domestic government" and illustrate why the Indian tribes existed outside of a foreign/domestic dichotomy, Justice Gorsuch's dissent employed memorable analogies, including whether a houseguest could enjoy *Neapolitan ice cream* if the permitted flavors were "*chocolate or vanilla*."[48] The majority responded directly by stating that the pairing of "foreign" or "domestic" effectively "*covers the*

32 *Id.* at *12.
33 *Id.* at *15 (internal citations omitted).
34 *Id.* at *13 (internal citations omitted).
35 *Id.* at *14 (citing 11 U.S.C. § 362(b)(4)).
36 *Id.* at **14-15.
37 *Id.* at **23-24 (internal citations omitted).
38 *Id.* at *29 (internal citations omitted).
39 *Id.* at *31 (internal citations omitted).
40 *Id.* at **35-39.
41 *Id.* at **42-43.
42 *Id.* at *49.
43 *Id.* at **50-51.
44 *See* "Federally Recognized Indian Tribes and Resources for Native Americans," USAGov, *available at* usa.gov/tribes (unless otherwise specified, all links in this article were last visited on July 31, 2023).
45 *See* "American Indians and Alaska Natives: By the Numbers," Admin. for Children and Families, *available at* acf.hhs.gov/ana/fact-sheet/american-indians-and-alaska-natives-numbers.
46 *Lac du Flambeau Band*, 2023 U.S. LEXIS 2544 at **6-7.
47 *See, e.g.*, 11 U.S.C. §§ 105 (establishing framework for debtors to seek enjoinment of regulatory activities); 362(b)(1), (4), (5) (permitting exceptions to automatic stay in connection with governmental police or regulatory powers); 525 (prohibiting discrimination solely based on bankruptcy).
48 *Lac du Flambeau Band*, 2023 U.S. LEXIS 2544 at **46-47 (emphasis added).

waterfront," since every government must fall somewhere on that spectrum.[49]

Justice Jackson's decision also framed the Code in a broad-based manner that going forward could support application and enforcement of Code provisions when a matter or issue exists on the margins. The Code was framed with a wide lens, and the majority highlighted its key features that enable the orderly and centralized administration of cases under it. The Supreme Court explained that the Code was already "finely tuned" and "carefully calibrated" to account for exceptional circumstances such as essential governmental functions.[50] This structuralist view of the Code naturally supported the notion that all governments must accede to the provisions as set forth by § 106(a). abi

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49 *Id.* at *19, n.7 (emphasis added).
50 *Id.* at **14, 20.