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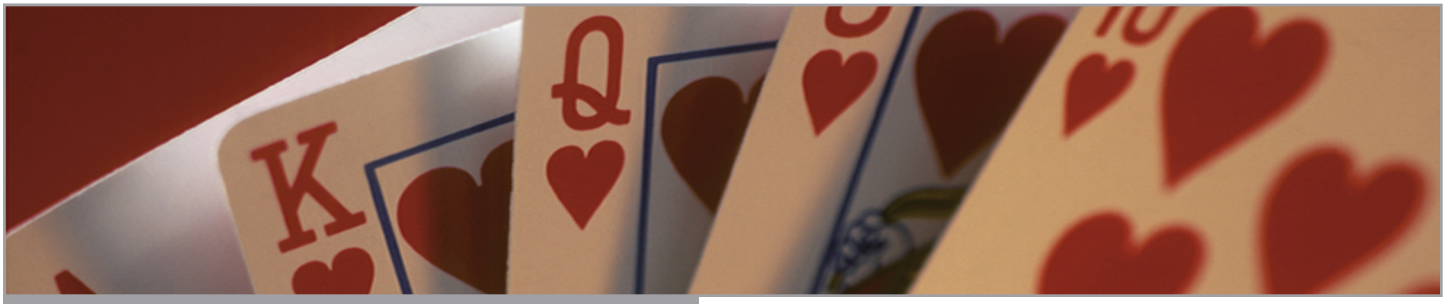

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TRIBAL CASINO BANKRUPTCIES – THE TRAIN IS LEAVING THE STATION

by Dennis J. Whittlesey

There long has been a legal debate as to whether businesses owned and operated by Indian tribes could either file for protection under the federal Bankruptcy Code or, correspondingly, be involuntarily taken into bankruptcy by creditors.

During 2010, the issue was elevated to a new level of urgency when Foxwoods, the mega-casino owned by the Mashantucket Pequot Tribe of Connecticut, was unable to satisfy its debt service and the creditors and investors were unable to quickly agree on a debt restructuring that would avoid a total financial collapse of the tribal gaming/resort enterprises, prompting a national debate as to whether bankruptcy was even an option for Foxwoods. Indeed, *Gaming Legal News* published a major article in the fall of 2010 that examined the relevant statutory and case law concerning the issue. *See* "Bankruptcy and Tribal Casinos: 'Conventional Wisdom' Meets Reality" (Vol. 3, No. 28 – Oct. 27, 2010).

Foxwoods never went into bankruptcy, nor did other tribal casinos in deep financial distress such as the Inn of the Mountain Gods and Lake of the Torches, but the debate has continued albeit with a lower level of publicity. However, the issue is now front and center with the recent bankruptcy filing in Southern California by the Santa Ysabel Resort and Casino, a wholly owned property of the Iipay Nation of Santa Ysabel located in San Diego County.

The Iipay Nation – formerly known as the Santa Ysabel Band of Mission Indians – filed for protection under the Bankruptcy Code a month ago, and that filing has now been opposed by both the County and the casino's largest creditor, the Yavapai-Apache Nation of Arizona. Yavapai holds approximately $33 million of the project's $40 million indebtedness, and the County has been awarded some $3 million in payments owed by the Tribe, an award determined through mediation and confirmed by court judgment. The Yavapai sued the Iipay for its default in making loan payments and won a $9 million judgment earlier this year. Both opponents contend that the Iipay Nation cannot file for bankruptcy due to the lack of eligibility and authority for tribal filings.

To reiterate points discussed in the article of October 27, 2010, the question directly goes to whether Iipay is eligible to file for bankruptcy,

and that takes us to Section 109 of the Bankruptcy Code, which defines those who qualify as "debtors" eligible to obtain relief under the Code.

Although Indian tribes are not specifically excluded from bankruptcy protection under the Code, they are not expressly included either. Thus, in order for federally recognized Indian tribes (or Indian casinos) to be eligible for relief, they must fall under one of Section 109's prescribed categories of "debtors" – a "municipality" or a "person."

A tribe does not meet the definition of "municipality" under 11 U.S.C. § 101(40) because it is not a "political subdivision or public agency or instrumentality of a State." It similarly is unlikely that a tribe constitutes a "person" as defined in 11 U.S.C. § 101(41). Not only are there no reported court decisions ruling that an Indian tribe meets the expansive definition of "person" for purposes of bankruptcy relief, it is significant that the definition of "person" specifically excludes "governmental units" from eligibility.

This gets us to Section 101(27), which defines "governmental unit" broadly to include domestic and foreign governments at all levels, as well as their constituent units. Courts have held that Congress intended to define governmental units in the broadest possible sense. *See TI Fed. Credit Union v. DelBonis*, 72 F.3d 921, 930 (1st Cir. 1995); H.R. Rep. No. 95-595, 95th Cong., 1st Ses. 311 (1977). The fact that the definition "adds a catch-all phrase, 'or other foreign or domestic governments'" means that "all foreign and domestic governments, including but not limited to those particularly enumerated in the first part of the definition, are considered 'governmental units' for the purpose of the Bankruptcy Code." *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1057 (9th Cir. 2004), cert. den. 543 U.S. 871 (2004).

The Supreme Court has recognized that Indian tribes are "'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Okla. Tax Comm. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509; 111 S. Ct. 905; 112 L.Ed.2d 1112 (1991), *citing Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782; 111 S. Ct. 2578; 115 L.Ed.2d 686 (1991) (concluding that both states and Indian tribes are "domestic" sovereigns); *In re Vianese*, 195 B.R. 572, 575 (Bankr. N.D.N.Y. 1995).

It must be emphasized that the reported decisions have examined whether an Indian tribe constitutes a "governmental unit" for purposes of applying the sovereign immunity provisions of 11 U.S.C. § 106 (discussed infra). But they have not examined specifically whether a tribe is a "governmental unit" or "domestic sovereign" for purposes of eligibility for bankruptcy relief. Thus, based on existing statutory and case law, it appears that tribes, as domestic sovereigns, arguably fall under Section 101(27)'s definition of "governmental unit" and, thus, are excluded from eligibility as bankruptcy debtors.

However, it is noted that California is within the Ninth Circuit, and that fact could be critical to the ultimate outcome of the legal challenges to the Iipay filing.

A number of courts have ruled that Indian tribes are not eligible to file under the Bankruptcy Code because they are not specifically identified therein. However, the contrary conclusion has been reached by three courts, including the Ninth Circuit Court of Appeals itself. In ruling that Indian tribes are "governmental units" within the meaning of Section 101(27), those courts focused on statements of former Supreme Court Chief Justice John Marshall in the second of his three-decision "Marshall Trilogy" describing tribes as "domestic dependent nations." That decision was rendered in *Cherokee Nation v. Georgia* and articulated one of the constitutional predicates upon which the doctrine of Indian tribal sovereign immunity is recognized today. The most significant of these decisions is the Ninth Circuit decision in *Krystal Energy*, holding that Indian tribes are domestic governments and Section 106 abrogates sovereign immunity as to tribes. In support are two lower court decisions holding the same that were rendered by bankruptcy courts in Arizona (*In Re Russell*, 293 B.R. 34, 40 (Bankr. Ariz. 2004)) and New York (*In re Vianese*, 195 B.R. at 575-576).

While the Ninth Circuit is standing somewhat alone on the jurisdiction issue, it seems that the Iipay Nation has good arguments for jurisdiction before courts within the circuit in light of *Krystal Energy*. It must be emphasized that the issue is far from resolved with any degree of finality when one examines the Ninth Circuit's pre-*Krystal Energy* ruling that Section 106 is unconstitutional insofar as it attempts to abrogate a state's sovereign immunity. *In re Mitchell*, 209 F.3d 1111 (9th Cir. 2000). Significantly, the *Mitchell* decision followed one of the most firmly entrenched rules of Indian Law that while Congress may annul Indian tribes' historic immunity from suit, such abrogation must be "unequivocally expressed," and not simply implied. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

The bottom line here is that both sides of the Santa Ysabel bankruptcy have strong arguments and outstanding law firms to present them. This case is being watched by all of Indian Country and everyone doing business with Indian tribes. The stakes are high, and the outcome could dramatically affect future financings for tribal projects.

DETROIT CASINOS' JULY AGGREGATE REVENUES DECREASE COMPARED TO SAME MONTH LAST YEAR: MICHIGAN GAMING CONTROL BOARD RELEASES JULY 2012 REVENUE DATA

by Ryan M. Shannon

The Michigan Gaming Control Board ("MGCB") released the revenue and wagering tax data for July 2012 for the three Detroit, Michigan, commercial casinos. The three Detroit commercial casinos posted a collective 6.75% decrease in gaming revenues compared to the same month in 2011. Aggregate gross gaming revenue for the Detroit commercial casinos increased slightly, however, rising by approximately 0.5% in July compared to June 2012 revenue figures, continuing a trend of increase from June to July in prior years.

MGM Grand Detroit posted decreased gaming revenue results for July 2012 as compared to the same month in 2011, with gaming revenue

decreasing by more than 4.2%. MGM Grand Detroit continued to maintain the largest market share among the three Detroit commercial casinos and had total gaming revenue in July 2012 of over $48.8 million. MotorCity Casino had monthly gaming revenue of nearly $35 million and posted a 12.73% decrease in revenues in July 2012 compared to July 2011. Greektown had gaming revenue of nearly $28.2 million, a slight decrease compared to July 2011.

The revenue data released by the MGCB also included the total wagering tax payments made by the casinos to the State of Michigan. The gaming revenue and wagering tax payments for MGM Grand Detroit, MotorCity Casino, and Greektown Casino for July 2012 were:

Casino	Gaming Revenue	State Wagering Tax Payments
MGM Grand Detroit	$48,820,780.88	$3,954,483.25
MotorCity Casino	$34,988,360.07	$2,834,057.17
Greektown Casino	$28,194,024.07	$2,283,715.95
Totals	$112,003,165.02	$9,072,256.37

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