

## Justices Urged To Nix Tribal Immunity In Casino Bankruptcy

By **Andrew Westney**

Law360 (March 22, 2019, 8:30 PM EDT) -- A litigation trustee has asked the U.S. Supreme Court to hear its case seeking to claw back \$177 million transferred from a tribe-owned casino in Detroit before it went bankrupt, saying there is a circuit split on whether tribes have sovereign immunity in bankruptcy cases.

Buchwald Capital Advisors LLC filed a petition March 18 asking the justices to tackle a divided Sixth Circuit panel's **February ruling** in which the majority held that the litigation trustee for the Chapter 11 estate of the Greektown Casino — owned and run by the Sault Ste. Marie Tribe of Chippewa Indians and its Kewadin Casinos Gaming Authority — couldn't bring its clawback suit because Congress didn't clearly and unequivocally abrogate tribes' sovereign immunity in the Bankruptcy Code.

The trustee told the high court that the code does in fact clearly abrogate tribes' immunity, saying that the pertinent language describing the governmental entities that must face bankruptcy suits is "not more ambiguous in covering tribes" than the language used in other federal laws; "it is only broader."

There's a circuit split on the issue with the Ninth Circuit, and the question of tribal sovereign immunity in bankruptcies is worth the court's time "both because it recurs frequently in the bankruptcy courts and because it involves two weighty, competing interests: the uniformity and integrity of the federal bankruptcy system on one hand, and the autonomy of tribal governments on the other," according to the petition.

And Buchwald warned that "if tribes are immune from bankruptcy court jurisdiction, then any tribe can place the assets of any tribally owned enterprise — including, as this case illustrates, any controlled subsidiary of any tribally owned entity — beyond the reach of creditors simply by transferring those assets to the tribe itself."

Greektown opened in Detroit in 2000 and was initially half-owned by the Sault Ste. Marie tribe, which soon purchased the other half for \$265 million from Monroe Partners LLC. Two years later, the tribe agreed to pay the city of Detroit \$200 million as part of a deal to build a hotel and other facilities in exchange for the continuation of Greektown's gaming license.

Those two deals put the casino under "serious financial strain," according to the Sixth Circuit's majority opinion, and three years later, in 2005, the tribe restructured the ownership of Greektown in an attempt to refinance its debt. As part of that deal, the tribe transferred \$177 million to several entities, mainly the former owners of Monroe, who received about \$145 million.

In 2008, the casino filed for bankruptcy, and during that process, Buchwald was appointed as the estate's litigation trustee. Buchwald filed a clawback action against the tribe in 2010, alleging Greektown had already been functionally insolvent when the \$177 million was transferred and seeking to return that money to the estate.

The bankruptcy court eventually found that the tribe's sovereign immunity prevented the trustee from bringing those claims, and last year a district court affirmed that decision.

In its Feb. 26 opinion, the Sixth Circuit majority said the tribe's immunity defense centered on Section 106 of the U.S. Bankruptcy Code.

That section states that "notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section." A "governmental unit" is defined as including the United States, various types of municipalities and other entities and, critically, "a foreign state; or other foreign or domestic government."

The question then, the majority said, is "whether Congress — when it employed the phrase 'other foreign or domestic government' — unequivocally expressed an intent to abrogate tribal sovereign immunity," which the majority ultimately found it hadn't.

In his dissent, Circuit Judge Jack Zouhary said that an Indian tribe must be considered a “domestic government” for purposes of the Bankruptcy Code and that its sovereign immunity was therefore abrogated.

Buchwald stressed that same point in its petition to the Supreme Court, saying the “broad abrogating language [of the code] permits bankruptcy trustees to bring actions against otherwise immune sovereigns to avoid and recover preferential and fraudulent transfers,” and “reflects Congress’ determination that even governments must be included in the bankruptcy process in order to serve the fundamental, centuries-old policy of treating all creditors equally and fairly in bankruptcy.”

The Sixth Circuit found that the “domestic government” language didn’t clearly cover tribes because Congress in other federal laws has used the words “Indian tribe” when abrogating tribal immunity, but “in that reasoning, the court made the mistake of confusing statutory breadth with statutory ambiguity — an error against which this [Supreme] Court has often warned,” the petition says.

The trustee also pointed out that the Sixth Circuit majority recognized that there was a split between its ruling and the Ninth Circuit’s 2004 decision in *Krystal Energy Co. v. Navajo Nation*, which found that Congress did abrogate sovereign immunity for Native American tribes in the Bankruptcy Code.

While it’s up to Congress “to determine which of the conflicting values of bankruptcy policy and tribal autonomy should prevail in this and similar cases ... deference to the legislature in matters of tribal immunity makes it all the more important that courts properly ascertain the legislature’s will,” according to the petition.

If tribes do have immunity from bankruptcy court proceedings, “it is hard to see why a rational tribal government would then leave assets in the possession of a tribally owned business entity that is reaching or approaching insolvency; and equally hard to see why nonsovereign creditors of such an entity would not move to secure assets before the tribe could act” — a situation “that bankruptcy law has long worked to prevent,” the trustee said.

Representatives for the parties were not immediately available for comment Friday.

Buchwald Capital Advisors LLC is represented by Michael K. Kellogg, Gregory G. Rapawy and Katherine C. Cooper of Kellogg Hansen Todd Figel & Frederick PLLC, Joel D. Applebaum and Linda M. Watson of Clark Hill PLC, and Mark N. Parry of Moses & Singer LLP.

Counsel information for the tribe was not immediately available Friday.

The case is *Buchwald Capital Advisors LLC v. Sault Ste. Marie Tribe of Chippewa Indians et al.*, case number 18-1218, in the U.S. Supreme Court.

--Additional reporting by Ryan Boysen and Cara Salvatore. Editing by Aaron Pelc