

## Tribal Casino Bankruptcy Suit Settles Before High Court Look

By [Mike LaSusa](#)

Law360 (April 6, 2020, 8:34 PM EDT) -- The U.S. Supreme Court won't get to decide if it will hear a case brought by a litigation trustee seeking to claw back \$177 million transferred from a tribe-owned casino in Detroit before it went bankrupt, with the parties telling the justices that they have agreed to end the dispute.

According to a Thursday docket entry at the high court, the justices dismissed a petition filed last year by Buchwald Capital [Advisors LLC](#), 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.

The parties had informed the Supreme Court on March 27 that they had mutually agreed to call off the legal fight and pay their own costs.

The tribe and the gaming authority promised to pay the trustee \$1 million, in addition to pledging to cooperate in related litigation by preserving documents and making witnesses available, according to a settlement agreement filed March 4 in Michigan district court. Neither side admitted any wrongdoing.

Buchwald Capital President Lee Buchwald told Law360 on Monday that the settlement was in the parties' best interests.

"We are satisfied that the matter could be resolved with a mutually agreeable settlement which avoids further costly litigation," he said.

Counsel for the tribe did not respond Monday to requests for comment.

Buchwald had [asked the high court](#) to tackle a divided Sixth Circuit panel's [February 2019 ruling](#) in which the majority held that the litigation trustee 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 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.

Moreover, Buchwald warned in the petition 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 February 2019 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, U.S. District Judge Jack Zouhary, sitting by designation, 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 Capital Advisors LLC was represented at the high court by Michael K. Kellogg of [Kellogg Hansen Todd Figel & Frederick PLLC](#).

The tribe was represented at the high court by Matthew C. Blickensderfer of [Frost Brown Todd LLC](#).

The case is Buchwald Capital Advisors LLC v. Sault Ste. Marie Tribe of Chippewa Indians et al., case number [18-1218](#), in the [Supreme Court of the United States](#).

--Additional reporting by Andrew Westney. Editing by Orlando Lorenzo.