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The Newest Threat To Tribal Sovereign Immunity: Recoupment

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As sovereign nations, federally recognized Indian tribes have come to depend on the well-established principle that they cannot be sued without their express consent or the authorization of Congress.[1] A limited equitable exception to sovereign immunity, known as recoupment, allows a defendant to assert counterclaims against a tribe to diminish the tribe's recovery in certain limited instances. Although recoupment has historically been narrowly applied, tribes and their legal counsel should be aware of a recent federal court decision on appeal to the Ninth Circuit which could broaden the application of the exception and consequently undermine the protections of sovereign immunity.


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A Narrow Exception

Courts have held that a tribe does not waive its sovereign immunity simply by initiating a lawsuit.[2] Rather, when an Indian tribe files an action, and it has not consented to be sued, a defendant may not bring counterclaims against a tribe unless the claims satisfy a three-pronged test. To sound in recoupment, counterclaims must arise out of the same transaction or occurrence as the original claim(s), seek the same kind of relief, and not seek an amount in excess of that sought by the tribal plaintiff.[3] Only where a defendant can satisfy each of these requirements will it be permitted to bring counterclaims against a tribe. Additionally, recoupment is not intended to create a cause of action in its own right, but is instead a defensive action which waives a tribe's immunity only to the extent necessary for the defendant to recoup on a counterclaim an amount equal to — but not in excess of — the principal claim by the tribe.[4]

Yet, despite the intended narrowness of the exception and the stringency of the requirements for counterclaims to qualify under recoupment, recent case law may breathe new life into what was a limited exception to sovereign immunity.

An Expanding View

In late 2015, the U.S. District Court for the Northern District of California decided Guidiville Rancheria of California v. United States, currently on appeal to the Ninth Circuit.[5] In Guidiville, the tribe and another plaintiff sued the city of Richmond, the United States, and federal officials for various claims related to the transfer of trust lands and development and operation of a gaming facility. After the court entered judgment in favor of the city, the city sought an award of attorneys' fees in excess of $2 million against the tribe and second plaintiff.

The district court largely granted the city's motion for attorneys' fees, finding the tribe and other plaintiff were jointly and severally liable to the city for just under $2 million in attorneys' fees, despite the tribe having made no recovery on its own claims. Even though the nature of the award was as affirmative relief instead of an offset or deduction of the tribe's recovery, the court held that the fees were in the nature of recoupment as the doctrine intended.[6] Although the court acknowledged that the tribe's mere participation in litigation did not waive sovereign immunity for all counterclaims, in a significant departure from existing case law, the court nonetheless found that the tribe had waived its sovereign immunity because the underlying contract allowed for fees and by simply including a prayer for relief in the complaint which also included a request for attorneys' fees.

The outcome of the pending appeal could have significant impacts on the future of sovereign immunity. In contravention of the rule that recoupment is a defensive action only, Guidiville could open the door to tribal liability for attorneys' fees — even where the tribe's own claims for monetary damages are unsuccessful. Should the Ninth Circuit affirm the district court's award of attorneys' fees, the decision is certain to be wielded by defendants in tribal-initiated lawsuits as support for the argument that monetary damages can and should be awarded not only as an offset to a sovereign's claims, but as separate and affirmative relief. Such a proposition is dangerous to the broad protections afforded by sovereign immunity.

In the wake of Guidiville, tribes and their lawyers should be particularly alert to similar attacks on sovereign immunity disguised under recoupment.

Tips for Tribes in Navigating Recoupment

1. Pay Close Attention to Contract Language. When entering into a contract or written agreement that contains a limited waiver of sovereign immunity, tribal legal counsel should be particularly thoughtful about attorneys' fees provisions, and consider contract language requiring each party to bear its own fees, regardless of the outcome.

2. Tailor Your Claims. Because a counterclaimant can only bring claims under recoupment that arise from the same transaction or occurrence as the tribe's original claims, tribes considering litigation should fashion their claims narrowly, such that anticipated counterclaims are more likely to be found not to have arisen from the same transaction or occurrence for the purposes of recoupment. Similarly, where financial damage is not significant, tribes should give thought to the relief requested — if a counterclaim for damages may be imminent, it may be advantageous to only seek injunctive relief or a declaratory judgment to preclude a counterclaimant from seeking money damages under recoupment.

3. Actively Preserve Recoupment as a Defense. If, in response to tribal-initiated litigation, a defendant files counterclaims against a tribe, the tribe should swiftly file a motion to dismiss those claims. Immediately bringing the doctrine of recoupment to the court's attention is likely to help ensure that even where the counterclaims are allowed to proceed, they will operate only as a setoff to the tribe's claims and not as affirmative relief against the tribe's treasury.

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[1] Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 509, 111 S. Ct. 905, 909, 112 L. Ed. 2d 1112 (1991) ("Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.").

[2] Oklahoma Tax Comm'n, 498 U.S. at 509–10; McClendon v. United States, 885 F.2d 627, 630 (9th Cir. 1989) ("[A] tribe's participation in litigation does not constitute consent to counterclaims asserted by the defendants in those actions.").

[3] United States of America, et al. v. State of Washington, --- F.3d ---, Case No. 13-35474, Slip op. at 37-38 (9th Cir., Jun. 27, 2016).

[4] U. S. v. U. S. Fid. & Guar. Co., 309 U.S. 506, 511, 60 S. Ct. 653, 656, 84 L. Ed. 894 (1940); Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah, 790 F.3d 1000, 1011 (10th Cir. 2015) (citing Bull v. United States, 295 U.S. 247, 262, 55 S.Ct. 695, 79 L.Ed. 1421 (1935)); United States v. Atlas Minerals & Chemicals, Inc., 797 F. Supp. 411, 421 (E.D. Pa. 1992).

[5] Not Reported in F.Supp.3d, 2015 WL 4934408, at *2 (N.D. Cal. Aug. 18, 2015), appeal pending No. 15-17069 (9th Cir.).

[6] Id. at *5.