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Supreme Court Affirms in *Michigan v. Bay Mills Indian Community*: Don't Roll the Dice with Tribal Sovereign Immunity

By Bart J. Freedman, Benjamin A. Mayer

The U.S. Supreme Court's recent decision in *Michigan v. Bay Mills Indian Community*¹ is a reminder to a broad range of entities, including energy companies, financial service providers, and state and local governments, that they must be fully informed when entering into commercial transactions with Indian tribes. In *Bay Mills*, the Supreme Court ruled that the State of Michigan could not enforce the terms of a gaming compact under the Indian Gaming Regulatory Act (IGRA). The compact, between Michigan and the Bay Mills Indian Community (Bay Mills), a federally recognized Indian tribe, expressly preserved both parties' sovereign immunity. The case involved Michigan's attempt to enjoin Bay Mills from allegedly violating the compact by conducting Las Vegas-style gambling outside Indian lands within Michigan. The Court held that Michigan's suit was barred by Bay Mills' sovereign immunity, and affirmed that Indian tribes enjoy broad immunity from lawsuits in state and federal courts.

Tribal Sovereign Immunity

As domestic dependent nations, federally recognized Indian tribes exercise inherent sovereign authority.² A central aspect of that sovereignty is immunity from suits in federal and state courts, commonly known as "tribal sovereign immunity."³ Under the doctrine of tribal sovereign immunity, an Indian tribe cannot be sued by a state, a private party, or other governmental authority, such as another tribe or a municipality, unless the tribe expressly waives its sovereign immunity or Congress abrogates it.⁴ The Supreme Court has recognized that the words "waiver" and "sovereign immunity" are not necessary to constitute a clear waiver.⁵ In *Michigan v. Bay Mills*, Michigan asked the Supreme Court to reconsider whether tribal sovereign immunity should apply to suits arising out of a tribe's off-reservation commercial activities.⁶

¹ 134 S. Ct. 2024 (2014).

² *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991).

³ *Id.*

⁴ *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 414 (2001).

⁵ See *id.* at 412, 423.

⁶ See *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760 (1998).

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Michigan's Suit and the Court's Decision

In 1993, Bay Mills and Michigan entered into a compact pursuant to IGRA that permits Bay Mills to conduct certain types of gaming "on Indian lands" located within Michigan's borders. The compact contained an arbitration provision to resolve disputes. The compact also provided that "[n]othing in this Compact shall be deemed a waiver" of Bay Mills' or Michigan's sovereign immunity.⁷

In 2010, Bay Mills opened a gaming facility on land that Michigan argued did not constitute "Indian lands" under the compact. Michigan sought to enjoin that gaming but, curiously, did not bring a contract claim under the compact's terms. Rather, Michigan brought a statutory claim under IGRA, which permits suits in federal court to enjoin certain gaming activities conducted *on Indian lands* in violation of a tribal-state compact.⁸ One might speculate that Michigan anticipated that a contract claim would have been rejected on tribal sovereign immunity grounds.⁹ However, because the compact contained an arbitration provision, a contract claim might have posed a close question on waiver of immunity.¹⁰

The Court ultimately held that Bay Mills' tribal sovereign immunity barred Michigan's suit. The Court found that Congress had not abrogated Bay Mills' immunity because IGRA permits suits to enjoin gaming conducted in violation of a compact only *on Indian lands*. Michigan contended that the gaming in question took place *off Indian lands*; thus, Michigan could not maintain its suit.

The main point of contention between the majority and dissenting opinions was whether tribal sovereign immunity should apply to an Indian tribe's off-reservation commercial activities. Notably, the majority and dissent were split along nontraditional lines.¹¹ The majority deferred to Congress the question of whether tribal sovereign immunity should extend to off-reservation commercial acts, though it stated that state laws apply outside Indian lands and suggested that Michigan could bring suit against tribal officials to enforce its civil and/or criminal laws. In her concurring opinion, Justice Sonia Sotomayor argued that there is no categorical exemption to tribal sovereign immunity for a tribe's commercial activity. The dissent would have held that tribal sovereign immunity does not apply to suits related to a tribe's off-reservation commercial activities.

⁷ 134 S. Ct. at 2029.

⁸ 25 U.S.C. § 2710(d)(7)(A)(ii).

⁹ As the Court notes in dicta "Michigan does not argue here that Bay Mills waived its immunity from suit. Recall that the compact expressly preserves both the Tribe's and the State's sovereign immunity." 134 S. Ct. at 2032 n.4.

¹⁰ See *C & L Enterprises* where the Court found an arbitration provision with no express waiver of sovereign immunity, but also no express non-waiver of immunity, enforceable. 532 U.S. at 412, 423. Note that an express waiver is the best practice.

¹¹ The majority opinion, authored by Justice Elena Kagan, was joined by Justices John Roberts, Anthony Kennedy, Stephen Breyer, and Sotomayor. Justice Sonia Sotomayor wrote a concurrence. The dissenting opinion was written by Justice Clarence Thomas, and was joined by Justice Ruth Bader Ginsburg and Justice Samuel Alito. Justice Ginsburg also wrote a brief dissenting opinion.

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Tribal Sovereign Immunity after the Court's Decision

The Court's opinion reaffirms the broad principles informing the doctrine of tribal sovereign immunity, which are: (i) Indian tribes are domestic dependent nations; (ii) tribes retain inherent sovereign authority, including immunity from lawsuits; (iii) tribal sovereign immunity applies to a tribe's off-reservation commercial activities; and (iv) Congress and Indian tribes alone may waive tribal sovereign immunity. In the aftermath of the Court's decision, these principles will continue to inform negotiations and business deals between Indian tribes and other entities, as well as dictate the relative bargaining power of Indian tribes and those parties they do business with, both on and off Indian lands.

Conducting Business with Indian Tribes after *Michigan v. Bay Mills*

The Court's decision is an important reminder of the positive aspects of conducting business with Indian tribes, both on and off Indian lands. As the Court points out, tribal enterprises, including gaming, cigarette sales, ski resorts, tourism, recreation, mining, forestry, agriculture, manufacturing, retail, banking, construction, energy, telecommunications and more, continue to flourish and extend well beyond the reservation to domestic and foreign markets and lands. As tribal enterprises grow and expand, Indian tribes will continue to partner with governmental and private entities to form beneficial business relationships.

The decision also illustrates the importance of understanding and appreciating that tribal business relationships and contracts are structured and negotiated against a backdrop of tribal sovereign immunity. In the dissent's words, "[tribal sovereign] immunity renders the tribes largely litigation-proof."¹² When entering into commercial relationships, whether between a tribe and a private entity, a tribe and a governmental entity, or two tribes, on or off Indian lands, the parties must be prepared to negotiate a waiver of tribal sovereign immunity or dispute resolution provision, where appropriate, to protect all interests involved.

Finally, because of the Court's sharp divide on the ongoing viability of tribal sovereign immunity, at least as it applies to off-reservation commercial activities, it will be important to monitor the doctrine as it continues to develop in the federal courts. For example, the Court could be asked to determine the enforceability of an arbitration provision containing language expressly preserving a tribe's sovereign immunity.¹³

If you would like more information on the Court's decision in *Michigan v. Bay Mills*, and/or conducting business with Indian tribes, please contact us at your convenience.

Authors:

Bart J. Freedman

bart.freedman@klgates.com

+1.206.370.7655

Benjamin A. Mayer

ben.mayer@klgates.com

+1.206.370.8074

¹² 132 S. Ct. at 2051 (Thomas, J., dissenting).

¹³ Compare *C & L Enterprises*, 532 U.S. 411 (no express preservation of immunity).

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