

NOT OUT OF THE (FOX)WOODS YET: INDIAN GAMING AND THE BANKRUPTCY CODE

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I. INTRODUCTION: DOWN A FOXHOLE

The recent economic downturn has caused Foxwoods Resort Casino, one of the largest casinos in the world, to seek a restructuring of nearly \$1.5 billion in debt.¹ Ordinarily, bankruptcy proceedings are triggered when a typical commercial enterprise defaults on its debt. Under these proceedings, creditors step in and collect monies owed to them before any residual equity is dispersed amongst owners. The rub here is that Foxwoods is owned and operated by the Mashantucket Western Pequot Tribal Nation, a sovereign nation under U.S. federal law.² This triggers questions of paramouncy; namely, whether tribal sovereignty can trump federal bankruptcy law.

These concerns are hardly limited to the academic environment. The practical consequence of dealing with the bankruptcy of a sovereign nation is that creditors (specifically, unsecured bondholders) may see their claims subordinated to the ownership claims of Foxwoods' equity holders (i.e., tribal mem-

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¹ Scott Van Voorhis, *Foxwoods Debt Mess and the Bay State Gambling Debate*, BANKER & TRADESMAN (Sept. 2, 2009, 3:45 PM), <http://www.bankerandtradesman.com/blogs/deals/developments/2009/09/02/foxwoods-debt-mess-and-the-bay-state-gambling-debate>.

² Standard and Poor's lowered the Mashantucket Western Pequot Tribe to a rating of "D" (the lowest credit rating) to reflect the default on those payments. See *Mashantucket Western Pequot Tribe*, STANDARD & POOR'S RATINGS, <http://www.standardandpoors.com/prot/ratings/entity-ratings/en/us/?entityID=272381§orCode=CORP> (last visited Feb. 6, 2011). On January 20, 2010, a forbearance agreement meant to expire that day was extended by senior lenders to April 30, 2010 as a temporary measure allowing more time for the Tribe to restructure its debt. See DEALBOOK, *Foxwoods Owner Reaches New Debt Forbearance Pact*, N.Y. TIMES (Jan. 20, 2010, 6:08 PM) <http://dealbook.blogs.nytimes.com/2010/01/20/foxwoods-owner-reaches-new-debt-forbearance-pact>.

bers). This would have significant implications for investors, creditors, the native gaming industry and the Mashantucket Tribe itself. Although these parties are currently in the process of negotiation and may very well reach an agreeable solution without litigation, important legal and policy questions arise from this situation.

In this article, we argue that where a tribal corporate entity voluntarily enters into a business contract with non-tribal investors, it must be made subject both to U.S. bankruptcy law and creditors' rights, as well as to the terms of the agreements it undertakes. Being a commercial participant entails being commercially responsible. It means paying liabilities where and as they become due, in accordance with law and the principles of equity. Three arguments are made in support of this.³

First, we draw a distinction between a tribe itself acting in a sovereign capacity and a tribal entity acting in a *commercial* capacity. The issue giving rise to this suit concerns the latter scenario. The loan agreement is between Foxwoods, a tribal casino acting in a commercial capacity, and its creditors, the non-tribal investing public. Second, the Bankruptcy Code ("the Code")⁴ is a statute of general applicability, sufficient to constitute congressional abrogation of governmental unit immunity. Third, there are sound policy reasons for abrogating Foxwoods' immunity as a corporate-commercial entity.

II. TRIBAL NATION RECOGNITION

The common law concept of tribal sovereign immunity is several centuries old and has gone through stages of narrow and broad construction.⁵ Upon European colonial contact with Indian settlements, natural law and European legal theory deemed that the settlements were to be regarded as "nations."⁶ Via national recognition, Europeans could enter into treaties—by their nature limited to sovereigns—and acquire land.⁷ King George III's Royal Proclamation of 1763 reinforced the idea of tribes being sovereign entities and saw them as

³ We have assumed that the contractual agreement between Foxwoods and its creditors is sufficiently "standard" (*i.e.*, creditors are to be repaid interest plus principal at maturity, creditors have distribution priority over equity holders on insolvency, etc.), as we are not privy to that arrangement (for obvious reasons).

⁴ See generally 11 U.S.C.A. § 101 (West 2010) amended by the Bankruptcy Technical Corrections Act of 2010, H.R. 6198, 111th Cong., § 2(a)(1), Pub. L. No. 111-327, 124 Stat. 3557, 3557 (2010)).

⁵ See generally Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177 (2001).

⁶ R. Spencer Clift, III, *The Historical Development of American Indian Tribes; Their Recent Dramatic Commercial Advancement; and a Discussion of the Eligibility of Indian Tribes under the Bankruptcy Code and Related Matters*, 27 AM. INDIAN L. REV. 177, 183 (2002-2003) (citing Dan Gunter, *The Technology of Tribalism: The Lehmi Indians, Federal Recognition, and the Creation of Tribal Identity*, 35 IDAHO L. REV. 85, 93 (1998)).

⁷ *Id.* (citing FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 52 (Rennard Strickland et al. eds., 1982)).

protectorates of the Crown.⁸ Recognition of this “nation” status has continued to the present day.

In the United States, the Constitution allows Congress to regulate every economic and commercial aspect of relationships with Indian tribes via the Commerce Clause.⁹ However, the application of the Commerce Clause is subject to Constitutional limitations and legislative branch review; this limitation recognizes the fact that Indian tribes have authority to enter into international agreements among sovereigns.¹⁰ As a consequence, it is the executive branch of the U.S. government that deals primarily with Indian affairs.

The Marshall Trilogy of cases delineated tribes’ legal and political standing.¹¹ Within the Trilogy, the Supreme Court declared that tribes lacked the legal authority to transfer or alienate their lands or to enter into treaties with sovereigns other than the United States.¹² However, the Court held that tribes possessed the right to self-government, subject to Federal congressional control, but free from individual state interference.¹³ Short of being complete sovereigns, tribes were reduced to independent peoples with the right of self-government, as wards under the United States.¹⁴

To this day, tribal recognition by the federal government bestows “the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes . . . [and] the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes.”¹⁵ This pledge seeks to protect the sovereign character of Indian tribes. Sovereignty is “the absolute power of a nation to determine its own course of action with respect to other nations,”¹⁶ and to be governed by one’s own laws.¹⁷ A tribe’s authority to adopt and enforce its own laws stems from this inherent sovereignty,¹⁸ and it is this status as a sovereign that gives the tribe the benefit of immunity from suit under the Eleventh Amendment.¹⁹ Tribal sovereign immunity in particular is a federal common law doctrine stemming from the 1919

⁸ *Id.* (citing *Appeal from the Supreme Court of the United States to the Supreme Court of the American Indian Nations: The Cherokee Nation of Indians, et al. v. Georgia*, 8 KANS. J.L. & PUB. POL’Y 159, 163 (1999)).

⁹ U.S. CONST. art. I, § 2, cl. 3 (Indians not taxed); U.S. CONST. art. I, § 8, cl. 3 (Indian Commerce Clause); U.S. CONST. amend. XIV, § 2 (Indians not taxed).

¹⁰ U.S. CONST. art. II, § 2, cl. 2 (denoting the treaty power possessed by the President with the advice and consent of the Senate).

¹¹ *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

¹² Milner S. Ball, *John Marshall and Indian Nations in the Beginning and Now*, 33 J. MARSHALL L. REV. 1183, 1188 (2000).

¹³ *Id.* at 1186-87.

¹⁴ *Id.* at 1188, 1193.

¹⁵ 25 C.F.R. § 83.2 (1994).

¹⁶ Vine Deloria, Jr., *Self Determination and the Concept of Sovereignty*, in NATIVE AMERICAN SOVEREIGNTY 118, 118 (John R. Wunder ed. 1999).

¹⁷ Patrice H. Kunesch, *Tribal Sovereignty in the 21st Century: Governing Economic Activities in Indian Country*, 2 Ann.2001 ATLA-CLE 1861 (2001) (citations omitted).

¹⁸ *Id.*

¹⁹ U.S. CONST. amend. XI.

Supreme Court decision of *Turner v. United States*,²⁰ which defined the basic framework of the doctrine.²¹ Although this framework has several key characteristics, for our purposes, the most salient aspects are that tribal sovereign immunity can be waived by the affected tribe or abrogated by Congress.

Since *Turner*, the Supreme Court has issued five leading decisions outlining the doctrine's scope and continued applicability.²² Twenty years after *Turner*, the Supreme Court held that "Indian Nations are exempt from suit without Congressional authorization."²³ This rule is reiterated in *Puyallap Tribe v. Department of Game*,²⁴ where the Court found that the state had no jurisdiction absent the tribe's consent to suit or congressional "waiver" of immunity.²⁵ In *Santa Clara Pueblo v. Martinez*,²⁶ the Court held that "in the absence of an 'unequivocal expression' of contrary intent," Congress had not intended to subject tribes to suit for claims under the 1968 Indian Civil Rights Act²⁷ and "their immunity therefore barred any suit."²⁸ Two subsequent decisions further entrenched the doctrine of sovereign immunity.²⁹ The first decision was *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*,³⁰ in which the Court declined the plaintiff's request to reconsider the doctrine, preferring to defer the task of "dispens[ing] with . . . tribal immunity or . . . limit[ing] it" to the legislative branch.³¹

In the second case, *Kiowa Tribe v. Manufacturing Technologies, Inc.*,³² a Kiowan tribal entity contracted with non-tribal creditors whereby the chairman of the tribe's business committee executed a promissory note payable to the creditors. The tribe defaulted, the creditors sued and the tribe moved to dismiss for lack of jurisdiction on grounds of tribal sovereign immunity.³³ The tribe's motion was dismissed both at trial and on appeal, with both courts holding that the creditors could sue the tribe for commercial activity.³⁴ When it reached the Supreme Court, however, the majority noted that despite "reasons to doubt the wisdom of perpetuating the doctrine," and in light of the increasingly commercial context in which tribes operate, the Court's sentiment was still in preference of "defer[ring] to the role [of] Congress."³⁵ The Court noted that Congress had not explicitly distinguished between matters of tribal governance and tribal commercial activity and so the creditors' suit was dismissed.³⁶

²⁰ 248 U.S. 354 (1919).

²¹ Clay Smith, *Tribal Sovereign Immunity: A Primer*, THE ADVOCATE, May 2007, at 19, 19.

²² *Id.*

²³ *United States v. United States Fid. & Guar. Co.*, 309 U.S. 512 (1940) (citations omitted).

²⁴ 433 U.S. 165 (1977).

²⁵ *Id.* at 172-73 (citations omitted).

²⁶ 436 U.S. 49, 58 (1996).

²⁷ 25 U.S.C. §§ 1301 - 1303 (2006).

²⁸ Smith, *supra* note 21, at 19 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978)).

²⁹ *Id.*

³⁰ 498 U.S. 505 (1991).

³¹ *Id.* at 510.

³² 523 U.S. 751 (1998).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 758.

³⁶ *Id.*

In his dissent, Justice Stevens noted that the situation before the Court was unique.³⁷ He disagreed with the majority's broad application of the doctrine to the commercial context:

[D]espite the broad language used in prior cases, it is quite wrong for the Court to suggest that it is merely following precedent, for we have simply never considered whether a tribe is immune from *a suit that has no meaningful nexus to the tribe's land or its sovereign functions*.³⁸

According to Justice Stevens, "the Court's broad interpretation of tribal immunity risks usurping Congress' superior authority to set the doctrine's contours[, unfairly] accord[ed] tribes stronger immunity . . . than exist[ed] for other sovereigns [(including the United States),] and unjustly denie[d] recovery to . . . many potential plaintiffs[.]"³⁹ Even the majority, while ultimately deciding in favor of the tribe, made a noteworthy concession:⁴⁰ "The rationale [for applying immunity to tribal business entities], it must be said, can be challenged as inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities."⁴¹ Indeed, the Court held that certain tribal undertakings or omissions⁴² will, in some cases, cause a tribe's "embers of sovereignty to grow cold."⁴³ In terms of contractual obligations, entrance into the public commercial sphere could certainly fall under this analogy. Tribal gaming clearly constitutes a commercial activity that does not, it is argued here, "touch on core tribal sovereignty concerns" of self-governance.⁴⁴ The justification for tribal immunity is thereby diminished, if not eliminated.

Notwithstanding over eighty years of relevant case law, no single substantive issue in Indian law currently produces more judicial attention than sovereign immunity.⁴⁵ Less attention has been paid however, to the "complex and nuanced"⁴⁶ ramifications of sovereign immunity in the arena of bankruptcy law. A general rule is that federally recognized Indian tribes are immune from suit by any entity or individual, absent the tribe's consent or abrogation by Congress.⁴⁷ However, defining these two parameters is more difficult than a first reading might suggest. As a common law doctrine, tribal immunity is not

³⁷ *Id.* at 764.

³⁸ *Id.* (emphasis added).

³⁹ Courtney J. A. DaCosta, *When "Turnabout" Is Not "Fair Play": Tribal Immunity Under the Indian Gaming Regulatory Act*, 97 GEO L.J. 515, 520 (2008) (citing *Kiowa Tribe*, 523 U.S. at 764-66).

⁴⁰ Andrea M. Kurak, *Florida Paralegic Association v. Miccosukee Tribe of Indians of Florida: Balancing Competing Interests*, 30 STETSON L. REV. 361, 373 (2001) (citing *Kiowa Tribe*, 523 U.S. at 757-58).

⁴¹ *Kiowa Tribe*, 523 U.S. at 757-58.

⁴² See *Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 214 (2005) (citations omitted) (holding that the tribe no longer enjoyed sovereignty over a piece of land it had reclaimed after not having possessed it for approximately 200 years and reasoning that "'standards of federal Indian law and federal equity practice' preclude[d] the Tribe from rekindling its extinguished embers of sovereignty").

⁴³ DaCosta, *supra* note 39, at 524 (citing *Sherrill*, 544 U.S. at 214).

⁴⁴ *Id.* at 552.

⁴⁵ Smith, *supra* note 21, at 19.

⁴⁶ BRIAN A. BLUM, *BANKRUPTCY AND DEBTOR/CREDITOR: EXAMPLES AND EXPLANATIONS* 154 (4th ed. 2006).

⁴⁷ Smith, *supra* note 21, at 19.

expressly granted by any act of Congress, yet it remains subject to any limitations that Congress may impose. “The doctrine . . . remains intact [primarily] because limitations proposed by the legislature . . . do not [usually] survive . . . judicial scrutiny.”⁴⁸

Another issue in the doctrine of sovereign immunity is that of consent. In *Robles v. Shoshone-Bannock Tribes*,⁴⁹ the Idaho Supreme Court held that the term “‘sovereign immunity’ is generally associated with immunity from tort claims” and that in contract cases “the question would be whether, by entering into the contract, the tribal corporation subjected itself to suit.”⁵⁰ Inherent to any standard creditor-debtor agreement is a stipulation that, should the debtor become insolvent, creditors are to be paid from whatever is left over before any residual equity is dispersed amongst company owners. The question then becomes whether Foxwoods’ undertaking to agree to, and be bound by, such terms constitutes consent. The following section will therefore examine issues surrounding immunity waivers as well as Congress’ abrogative powers.

A. Waiver of Immunity

In the tribal sovereignty lexicon, consent is often referred to as “waiver.” Tribal immunity can be waived in any one of three ways: under contract, through litigation and through “corporate” action.⁵¹

Courts have found, in certain circumstances, that tribal immunity is waived where tribes consent to contractual provisions which provide counterparties with legal recourse against the tribes. Contractual waiver is addressed in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*.⁵² There, the unanimous court held that an arbitration provision in the contract constituted valid consent to waive immunity.⁵³ It is unknown whether the contract between Foxwoods and its creditors has a similar provision. However, the holding in *C & L Enterprises* is persuasive evidence that, when a tribal entity enters into a private commercial contract, that entity can be bound by its terms. Further, should the entity default on its contractual obligations, it should not be able to cloak itself in the warm blanket of tribal immunity.

In determining whether a tribe has waived its protection with sufficient clarity of intent, courts are required to take a “practical, commonsense approach”⁵⁴ in discerning the parties’ intentions. Although we do not have access to the contract, one can assume that both Foxwoods and its creditors are sufficiently sophisticated in the business domain to have included explicit lan-

⁴⁸ Kurak, *supra* note 40, at 366 (citing Deloria, Jr., *supra* note 16, at 121 (1996)) (additional citation omitted).

⁴⁹ 876 P.2d 134 (Idaho 1994).

⁵⁰ *Id.* at 136 n.5.

⁵¹ Smith, *supra* note 21, at 20.

⁵² 532 U.S. 411 (2001).

⁵³ *Id.* at 422 (citations omitted) (The court held that the provision “has a real world objective; it is not designed for regulation of a game lacking practical consequences. And to the real world end, the contract specifically authorizes judicial enforcement. . .”).

⁵⁴ *E.g.*, *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 31 (1st Cir. 2000) (citations omitted) (“. . . whether the language of [the agreement] might have hoodwinked an unsophisticated Indian negotiator into giving up the tribe’s immunity from suit without realizing he was doing so.”).

guage addressing this issue. Considering the billions of dollars at stake, it is hard to imagine either party lacking the requisite experience, counsel, and savvy that would give rise to the hoodwinking envisioned by some courts.⁵⁵ In addition, it is standard practice for creditors to be paid before equity holders in bankruptcy. The commonsense approach begs a finding of consensual, contractual waiver.

With respect to waiving immunity by way of litigation, the Supreme Court in *United States v. United States Fidelity & Guaranty*⁵⁶ explained that where a tribe commences a suit against a non-tribal private party in state or federal court, the tribe waives immunity with respect to the issue at hand.⁵⁷ The Supreme Court has not yet addressed corporate action waiver,⁵⁸ which is unfortunate because therein lies the fundamental distinction between sovereign tribes and corporate tribal entities.⁵⁹ Although most courts recognize this distinction,⁶⁰ the Supreme Court should take the opportunity to draw a clear line between the intra-tribal affairs of a sovereign tribe and the commercial activities of tribal corporations. Foxwoods should not be permitted to invoke the sovereign immunity of the Mashantucket Pequot Tribe where its commercial dealings with non-tribal entities are defined by contractual relationships that recognize the possibility of suit.

Section 17 of the Indian Reorganization Act (“IRA”)⁶¹ authorizes the Secretary of the Interior to issue to tribes charters of incorporation under which tribes are given “powers as may be incidental to the conduct of corporate business.”⁶² Enabling tribes “to conduct business through th[e] modern device”⁶³ of corporations has been described as the “animating purpose”⁶⁴ of Section 17. In enacting IRA, Congress was attempting to draw the distinction between the sovereign identity of a tribal government and the corporate identity of a tribal corporation.⁶⁵ Indeed, “encouraging tribal independence and attractiveness as

⁵⁵ *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 660 (7th Cir. 1996).

⁵⁶ 309 U.S. 506 (1940).

⁵⁷ *Id.* at 513. (i.e., it is subject to counter- and cross-claims).

⁵⁸ Smith, *supra* note 21, at 20 (citing Request for Interpretive Opinion on the Separability of Tribal Organizations Organized Under Sections 16 and 17 of the Indian Reorganization Act, Opinion No. M-36515, 65 Interior Dec. 483, 484 (1958) [hereinafter IRA Separability Opinion]).

⁵⁹ See e.g., *Ramey Constr. Co. v. Apache Tribe*, 673 F.2d 315, 320 (10th Cir. 1981) (“The trial judge recognized that the [tribe’s] constitutional and corporate entities [are] separate and distinct . . . [T]he record supports . . . the district court’s findings.”).

⁶⁰ *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492-93 (9th Cir. 2002) (citing *Ramey Constr. Co.*, 673 F.2d at 320) (“The *Indian Reorganization Act*, 25 U.S.C. § 476, authorizes Indian tribes to organize as a constitutional entity, and § 477 of the Act authorizes organization of a corporate entity. Most courts that have considered the issue have recognized the distinctiveness of these two entities.”).

⁶¹ 25 U.S.C. § 477 (2006).

⁶² *Id.*

⁶³ IRA Separability Opinion, *supra* note 58, at 483-84.

⁶⁴ Smith, *supra* note 21, at 20 (citations omitted).

⁶⁵ See generally 25 U.S.C. §§ 476 - 477 (2006). A tribal “organization” refers to one of governmental purposes. A tribal “incorporation” conducts business operations.

a business partner justifies such a distinction.”⁶⁶ Put another way, an incorporated structure is familiar to the market and, consequently, a more attractive vehicle for investment, especially as it relates to investor/creditor confidence. Unfortunately, the provisions of IRA fall short of addressing the issue of immunity abrogation.

Many Section 17 charters include explicit waivers of immunity, generally referred to as “sue and be sued” (“SABS”) provisions. Although SABS clauses are aimed at tribal corporations, there have been disagreements over whether a particular undertaking is that of the tribal corporate entity (which can be sued) or whether it is “sufficiently sovereign” to be an undertaking of the tribe itself (which cannot be sued).⁶⁷ In *Linneen v. Gila River Indian Community*,⁶⁸ the court held that the tribe had not waived its immunity because the subject matter forming the basis of the suit was governmental rather than corporate in nature:

[S]ue and be sued” clauses waive immunity with respect to a tribe’s corporate activities, but not with respect to its governmental activities. . . . The “sue and be sued” clause in the [Gila River Indian] Community’s corporate charter in no way affects the sovereign immunity of the Community as a constitutional, or governmental, entity.⁶⁹

The difference between actions taken in a corporate capacity and those taken as a sovereign is a question of fact.⁷⁰ Complicating the issue further, however, is the fact that SABS provisions, in and of themselves, do not constitute an effective waiver—there must also be express approval of the decision to waive on the part of the tribe.⁷¹ Again, without being able to examine the Foxwoods contract, we can only presume that the creditors (and their lawyers), being sufficiently sophisticated, included such waiver or dispute resolution provisions in the loan agreement.

Finally, it should be noted that whereas U.S. states can impliedly waive immunity by participating in areas under federal constitutional regulation, such as commerce,⁷² tribal waiver cannot be implied; it must be clear⁷³ and unequivocal.⁷⁴ However, the Supreme Court has also held that the use of talismanic

⁶⁶ Kurak, *supra* note 40, at 377 (citing Julie A. Clement, Note, *Strengthening Autonomy by Waiving Sovereign Immunity: Why Indian Tribes Should Be “Foreign” under the Foreign Sovereign Immunities Act*, 14 THOMAS M. COOLEY L. REV. 653, 654 (1997)).

⁶⁷ Smith, *supra* note 21, at 20 (citations omitted).

⁶⁸ 276 F.3d 489 (9th Cir. 2002).

⁶⁹ *Id.* at 492-93 (citations omitted).

⁷⁰ Smith, *supra* note 21, at 20.

⁷¹ Edward Rubacha, *Construction Contracts with Indian Tribes or on Tribal Lands*, 26 CONSTR. LAW 12, 12 (2006) (citing *Padilla v. Pueblo of Acoma*, 754 P.2d 845, 850 (N.M. 1988)).

⁷² Wambi Awanwicake Wastewin, *Federal Courts – Indians: The Eleventh Amendment and the Seminole Tribe: Reinvigorating the Doctrine of State Sovereign Immunity*, 73 N.D. L. REV. 517, 529 (1996) [hereinafter Wastewin] (citations omitted).

⁷³ *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (citing *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)) (“ . . . to relinquish its immunity, a tribe’s waiver must be ‘clear’.”).

⁷⁴ *E.g.*, *Bassett v. Mashantucket Pequot Tribe*, 204 F. 3d 343, 356-57 (2d Cir. 2000) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1996)) (“[C]ongressional abrogation . . . cannot be implied but must be unequivocally expressed.”).

terms such as “sovereign immunity” are not required to constitute a valid waiver.⁷⁵

B. Congressional Abrogation

Congress possesses plenary power to abrogate tribal immunity,⁷⁶ subject only to the qualification that in order for there to be a valid abrogation of sovereign immunity, the Congressional intent to do so must be unequivocally expressed.⁷⁷ Where federal legislation is silent about its applicability to Indian tribes, courts will have to establish whether a particular law is relevant to tribes. This is a question of statutory interpretation and is reviewed *de novo*.⁷⁸ If the statute is found to apply to the tribe, the court will then have to establish whether the tribe—or tribal corporation—is subject to private suit.

The Washington Supreme Court has stated that “court[s] should be particularly cautious of substituting [their] policy judgment for that of Congress in this area.”⁷⁹ However, one such area in which “courts are willing to pierce what once appeared to be impenetrable sovereignty” is where it concerns “general” statutes or statutes of “general applicability.”⁸⁰ The Supreme Court held in *Federal Power Commission v. Tuscarora Indian Tribe*⁸¹ that the Federal Power Act,⁸² a “broad general statute,” included Indian tribes as well as their property interests.⁸³ Similarly, it was held in *Donovan v. Coeur d’Alene Tribal Farm*⁸⁴ that because the Occupational Safety and Health Act is “a statute of general applicability and broad remedial purpose . . . [its] coverage is comprehensive . . . [and therefore] clearly includes the [tribe].”⁸⁵ The court concluded this point by stating, “we have not adopted the proposition that Indian tribes are subject only to those laws of the United States expressly made applicable to them. Nor do we do so here.”⁸⁶ It is in this vein that the Code may also apply to Foxwoods.

⁷⁵ Rubacha, *supra* note 71, at 12 (citing *C & L Enters., Inc.*, 532 U.S. at 420).

⁷⁶ *Santa Clara Pueblo*, 436 U.S. at 58 (noting that the immunity “aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress”).

⁷⁷ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996) (citing *Green v. Mansour*, 474 U.S. 64, 68 (1985)).

⁷⁸ Rubacha, *supra* note 71, at 12 (citations omitted).

⁷⁹ *Wright v. Colville Tribal Enter. Corp.*, 147 P. 3d 1275, 1286 (Wash. 2006) (citing *Kiowa Tribe v. Mfg. Tech., Inc.*, 523 U.S. 751, 757-58 (1998)).

⁸⁰ Kurak, *supra* note 40, at 367 (citing *Fed. Power Comm’n v. Tuscarora Indian Tribe*, 362 U.S. 99, 116 (1960)).

⁸¹ 362 U.S. 99 (1960).

⁸² 16 U.S.C. §§ 791 (repealed 1953) - 828(c) (2006).

⁸³ *Fed. Power Comm’n*, 362 U.S. at 116.

⁸⁴ 751 F.2d 1113 (9th Cir. 1985).

⁸⁵ *Id.* at 1115.

⁸⁶ *Id.* at 1116.

III. INDIAN BUSINESS INCENTIVES: TAX BREAKS AND THE INDIAN TRIBAL ECONOMIC DEVELOPMENT AND CONTRACT ENCOURAGEMENT ACT

Indian tribes control 56 million acres of land, which are essential to improving their economies.⁸⁷ Development of tourism, exploitation of natural resources (*e.g.*, fishery and forestry) and facilitation of commerce are the primary means of accomplishing this.⁸⁸

Several unique factors spur the development of tribal commerce and business. The Tribal Governmental Tax Status Act⁸⁹ allows tribes to raise funds for the construction of private manufacturing facilities on reservations by issuing bonds with tax-exempt interest income. Business property on tribal reservations is also eligible for rapid depreciation, and there are income tax incentives available for employing tribal members.⁹⁰ In addition, some tribes offer tax breaks to attract businesses.⁹¹

To further encourage commercial development, the Indian Tribal Economic Development and Contract Encouragement Act was signed into law in 2000.⁹² Its purpose was to revamp legislation governing tribal and non-tribal party contracts, which had been left untouched for more than a century.⁹³ The old 1872 Section 81 put stringent contractual drafting requirements on the non-tribal party and required the endorsement of both the Secretary of the Interior and the Commissioner of Indian Affairs.⁹⁴ Failure of the non-tribal party to meet these contractual prerequisites would render the contract null and void, and force the non-tribal party to return any funds “paid by the Tribal party in excess of the amount set by the Secretary for such services or goods.”⁹⁵ The old 1872 Section 81 also allowed third parties to bring *qui tam* suits under the null-and-void clause.⁹⁶

The scope of the 1872 Section 81 protections is limited by the 2000 Section 81. The latter “only covers contracts which ‘encumber Indian lands for a period of 7 or more years[,]’”⁹⁷ a drastic departure from the 1872 coverage of any contract between a tribal and non-tribal party “relative to their lands.”⁹⁸ The 2000 Section 81 is also without the stringent drafting requirements and

⁸⁷ See generally FELIX COHEN’S HANDBOOK OF FEDERAL INDIAN LAW ch. 15 (Nell Jessup Newton ed. 2005) [hereinafter “COHEN”].

⁸⁸ *Id.*

⁸⁹ 26 U.S.C. § 7871(c)(1),(f) (2006 & Supp. III 2009); see generally COHEN, *supra* note 87, § 21.03(2)(d).

⁹⁰ 26 U.S.C.A. § 168(j) (West, Westlaw through Pub. L. No. 111-240, effective Sept. 27, 2010). These rules apply to property put in service prior to December 31, 2005.

⁹¹ See generally COHEN, *supra* note 87, § 21.02(4).

⁹² 25 U.S.C. § 81 (2006).

⁹³ *Id.*

⁹⁴ Anna-Emily C. Gaupp, *The Indian Tribal Economic Development and Contracts Encouragement Act of 2000: Smoke Signals of a New Era in Federal Indian Policy?*, 33 CONN. L. REV. 667, 669-70 (2001) (citations omitted).

⁹⁵ *Id.* at 670 (citing 25 U.S.C. § 81 (2006)).

⁹⁶ *Id.* at 669.

⁹⁷ Indian Tribal Economic Development and Contract Encouragement Act, S.B. 613, 106th Cong., Pub. L. No. 106-179, 114 Stat. 46 (2000). See also Gaupp, *supra* note 94, at 679 (citing S.B. 613).

⁹⁸ 25 U.S.C. § 81 (2006).

instead enumerates those contractual provisions which warrant refusal by the Secretary.⁹⁹ In addition, it requires that a contractual provision “either disclosing or addressing tribal immunity from suit” be included in contracts covered by the Act.¹⁰⁰

Fortunately, the 2000 statute addressed the concern that its predecessor’s methods and procedures created unpredictability/uncertainty for the non-tribal party; by addressing sovereign immunity, it provides a remedy for the non-tribal party if a tribe breaches its obligations. In effect, the 2000 statute affords the tribal party the unfettered ability to draft and enter into contracts at its sole discretion, provided that any resulting encumbrance of Indian lands last for no more than seven years.¹⁰¹ Thus, the vast majority of business dealings and day-to-day contracts fall outside the statutory reach and continue to be subject to tribal sovereign immunity.

Anna-Emily C. Gaupp, however, argues that the 2000 legislation catches the large-scale gaming resort development contracts,¹⁰² thereby making it less risky for non-tribal parties to enter into financing arrangements with tribes.¹⁰³ Gaupp also argues that the 2000 legislation ensures that the tribal and non-tribal parties negotiate on equal footing.¹⁰⁴ The non-tribal party negotiates for a waiver of sovereign immunity due to the waiver clause, although, “waiver is already the common practice.”¹⁰⁵ In turn, the tribal party is able to negotiate for better financing because, due to the removal of the null-and-void clause and the third party *qui tam* standing, the non-tribal party can sell tribal obligations on the secondary market as a derivative investment without the debt-purchaser uncertainty of judicial intervention.¹⁰⁶

It is important to note that in order to establish a common and predictable legal system, tribes must consider whether to adopt the Uniform Commercial Code, in whole or in part, or to develop their own laws governing commercial exchanges. Article 2 (sales of goods) and Article 9 (secured transactions) ought to be adopted,¹⁰⁷ as should corporation codes.¹⁰⁸ Contracts entered into between tribal and non-tribal parties are thus often governed by an interaction of laws. For example, a contract involving a lease may be governed by the tribe’s enactment of Article 2 and by the 2000 Section 81 of the Indian Tribal

⁹⁹ See Gaupp, *supra* note 94, at 681 (citing S.B. 613, § 2(d)).

¹⁰⁰ S. REP. NO. 106-150, at 1 (1999). See Gaupp, *supra* note 94, at 682 (citing S. REP. NO. 106-150, at 1).

¹⁰¹ S.B. 613, § 2.

¹⁰² Gaupp, *supra* note 94, at 689.

¹⁰³ However, we wonder whether tribes could simply structure deals on a six year renewal basis, for instance, akin to many government outsourcing deals (i.e., the casino lease could simply expire every six years and require renewal at the tribes’ discretion, as to avoid the seven year rule), or perhaps one could argue that tribal gaming is not an agreement or contract with an “Indian tribe” per se, and is therefore outside the ambit of the Act, or even if within the Act’s confines, perhaps the tribal entity could be sold or assigned to other intra-tribal entities on a five year basis, escaping the rule once again.

¹⁰⁴ Gaupp, *supra* note 94, at 689.

¹⁰⁵ *Id.* at 682.

¹⁰⁶ See generally *id.* at 681, 683-84, 688 (citations omitted).

¹⁰⁷ Fred H. Miller & Duchess Bartmess, 2000 *Native American Law Symposium: Uniform Laws: Possible Useful Tribal Legislation*, 36 TULSA L. J. 305, 315 (2000).

¹⁰⁸ See generally COHEN, *supra* note 87, § 21.02(5)(b).

Economic Development and Contract Encouragement Act if the contract covers a period of seven or more years.

Tribal sovereign immunity will be an issue via the Indian Tribal Economic Development and Contract Encouragement Act if the contract deals with the encumbrance of tribal land for seven years or more. Tribes will often grant limited immunity waivers so as to assure lenders of being able to tap the tried-and-tested federal and state jurisdiction if the arrangement goes sour. As earlier noted, such waivers need to be clear and unambiguous.¹⁰⁹ The reality is that sovereign immunity continues to play a distinct role in tribal financing arrangements. Understanding its applicability to business relationships is important for both parties.

IV. THE BANKRUPTCY CODE

In the debtor-creditor relationship, the federal Bankruptcy Code provides equitable solutions for both parties should the relationship break down. Bankruptcy legislation is comprehensive by design “to secure an equality of distribution of the assets of the bankrupt among his creditors.”¹¹⁰

The Code¹¹¹ is written with social and economic concerns in mind. “It is the twofold purpose of the [B]ankruptcy [A]ct . . . to convert the estate of the bankrupt into cash and distribute it among creditors and then to give the bankrupt a fresh start with such exemptions and rights as the [Act] left untouched.”¹¹² The Code also provides a fresh start to the debtor with “a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.”¹¹³

A. *Jurisdiction Under the Bankruptcy Code*

The U.S. Court of Appeals for the Eighth Circuit has characterized the interplay between Congressional abrogation and the Code as “a complex and serious issue”¹¹⁴ worthy of further study.¹¹⁵ The conflict arises between the

¹⁰⁹ See e.g., *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) (employment application and employee manual stating that the tribe would comply with applicable federal employment law did not waive tribal sovereign immunity because the statements were not “clear”); *Seminole Tribe of Fla. v. McCor*, 903 So.2d 353, 359 (Fla. Dist. Ct. App. 2005) (“Although it may be a plausible inference that the purchase of insurance indicates an intention to assume liability and waive tribal immunity, such an inference is not a proper basis for concluding that there was a clear waiver by the Tribe.”).

¹¹⁰ *Wood v. Wilbert’s Sons Shingle & Lumber Co.*, 226 U.S. 384, 387 (1912). This case refers to the Bankruptcy Act of 1898 (also known as the Nelson Act), ch. 541, 55th Cong., 30 Stat. 544 (1898), which was the first successful federal legislation on bankruptcy laws. The Bankruptcy Act of 1898 was superseded by The Bankruptcy Act of 1978, H.R. 8200, 95th Cong., Pub. L. No. 95-598, 92 Stat. 2549 (1978), which contains most of the current laws on bankruptcy.

¹¹¹ See generally 11 U.S.C. §§ 1 et seq. amended by the Bankruptcy Technical Corrections Act of 2010, H.R. 6198, 111th Cong., Pub. L. No. 111-327, 124 Stat. 3557 (2010)).

¹¹² *Kokoszka v. Belford*, 417 U.S. 642, 645-46 (1974) (quoting *Burlingham v. Crouse*, 228 U.S. 459, 473 (1913)).

¹¹³ *Perez v. Campbell*, 402 U.S. 637, 648 (1971) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (other citations omitted)) (quotations omitted).

¹¹⁴ *In re Nat’l Cattle Cong.*, 91 F.3d 1113, 1114 (8th Cir. 1996) (citations omitted).

power of Congress to exercise its power pursuant to the Code and a tribe's status as a sovereign entity.¹¹⁶

Pursuant to its powers under the Constitution, Congress has inherent jurisdiction to enact "uniform laws on the subject of bankruptcies throughout the United States."¹¹⁷ The Code is a manifestation of this power and it provides federal district courts with jurisdiction¹¹⁸ over "all persons who are present within the territorial boundaries of the United States."¹¹⁹ Naturally, this includes corporate entities¹²⁰ as "persons" at law. In addition, because Foxwoods is located in Connecticut, it is equally clear that it meets the criteria of being inside the "territorial boundaries" of the United States.

The Code provides that a court may "issue any order, process, or judgment that is necessary or appropriate"¹²¹ to enforce bankruptcy law on the parties subject to it. It is therefore necessary to establish whether Foxwoods is such a party. The Code's definition of "governmental unit" includes foreign states and "other foreign or domestic government[s]."¹²² As a matter of interpretation, Foxwoods would seem to fall under at least one of these categories. Indeed, the U.S. Court of Appeals for the Ninth Circuit agreed that Indian tribes *are* included in Section 101(27)'s definition.¹²³ This would seem to suggest that the creditors have a valid claim, insofar as they are authorized to enforce that claim against the debtor (Foxwoods).¹²⁴ In order to give force and effect to this claim, the Code further provides that one party's interest (e.g., the tribal equity claim) may be subordinated to the interest of the other (e.g., the non-tribal debt claim), thus ensuring that creditors are paid first.¹²⁵

Under the Constitution, "General Acts of Congress" (i.e. laws of general applicability) do not apply to Indian tribes unless unequivocally expressed in the particular statute. Nevertheless, the Supreme Court in *Federal Power Com-*

¹¹⁵ John M. Czarnetzky, *When the Dealer Goes Bust: Issues in Casino Bankruptcies*, 18 Miss. C. L. REV. 459, 474 (1998) (citing *In re Nat'l Cattle Cong.*, 91 F.3d at 1114).

¹¹⁶ Sean McFarland, *Bankruptcy Court Jurisdiction Over Tribal Creditors: Lower Brule Construction Co. v. Sheesley's Plumbing & Heating Co.*, 15 AM. INDIAN L. REV. 309, 314 (1990-1991).

¹¹⁷ U.S. CONST. art. 1, §8, cl. 4.

¹¹⁸ 28 U.S.C. § 1334 (2006).

¹¹⁹ BLUM, *supra* note 46, at 128.

¹²⁰ 11 U.S.C.A. § 101(9)(A) (West 2010) *amended by* the Bankruptcy Technical Corrections Act of 2010, H.R. 6198, 111th Cong., Pub. L. No. 111-327, 124 Stat. 3557 (2010)).

¹²¹ *Id.* § 105(a) (West 2010).

¹²² *Id.* § 101(27) (West 2010) *amended by* the Bankruptcy Technical Corrections Act of 2010, H.R. 6198, 111th Cong., Pub. L. No. 111-327, 124 Stat. 3557 (2010)).

¹²³ *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1057 (9th Cir. 2004) (citing 11 U.S.C.A. § 101(27) (West 2010)).

¹²⁴ 11 U.S.C. § 502(b)(1) (2006).

¹²⁵ *Id.* § 510(c)(1) (2006). Under this section, a court may subordinate any claim or interest to any other claim or interest, under the principles of equitable subordination. It should be noted, however, that this is an extraordinary remedy and courts have generally held that the following conditions must be satisfied before it will be imposed: the claimant must have engaged in some kind of inequitable conduct; the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Code.

*mission v. Tuscarora Indian Nation*¹²⁶ stated that, “a general statute in terms applying to all persons includes Indians and their property interests.”¹²⁷ The Eighth Circuit has shown similar sentiment, declaring that, “while the Supreme Court has expressed its protectiveness of tribal sovereign immunity by requiring that any waiver be explicit, it has never required the invocation of magic words stating that the tribe hereby waives its sovereign immunity.”¹²⁸ Thus, it appears that the inclusion of governmental units in the provisions of the Code, while falling short of “magic words,” is sufficiently explicit to include tribes in their application.

In order to assist with the “threshold inquiry”¹²⁹ of “whether an otherwise silent but general statute applies to tribes[,]” the Ninth Circuit in *Donovan v. Coeur d’Alene Tribal Farm*¹³⁰ adopted a three-pronged test:

A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches “exclusive rights of self-governance in purely intramural matters”; (2) the application of the law to the tribe would “abrogate rights guaranteed by Indian treaties”; or (3) there is proof “by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations[.]”¹³¹

The court concluded that the operation of what was, in that case, a commercial venture did not fall into any of these categories. In both *Donovan* and the case at hand, the relevant statutes are ones of general applicability.

Applying the test in *Donovan* to the case at hand, it is apparent that the Code is sufficiently general to include tribes within its ambit. First, the Code does not touch on the self-governmental rights of the Mashantucket Pequot because the relationship involved is between Foxwoods and outside commercial actors. The bankruptcy proceedings, as they affect the commercial acts of Foxwoods, are separate and distinct from the sovereign acts of the tribe. Second, the only treaty right that is relevant in the instant case is immunity itself, which the Code, it is argued here, abrogates. Third, there is nothing in the Code—a manifestation of Congress’ *intent*—to suggest that Congress did not intend for the provisions in the Code to apply to tribes. On the contrary, the Code’s section regarding waiver of immunity explicitly includes governmental units in its language.

Perhaps the most helpful case in delineating the jurisdictional scope of the Code is *Krystal Energy Co. v. Navajo Nation*.¹³² There, the Ninth Circuit read “governmental unit” to include tribes and found that they can be held subject to suit in adversary proceedings brought under the Code.¹³³ “Section 106 is not [merely] a ‘general authorization for suit in federal court’ of the kind held insufficiently explicit to abrogate state immunity,”¹³⁴ but rather, “specifically

¹²⁶ 362 U.S. 99, 116 (1960).

¹²⁷ *Id.*

¹²⁸ *Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560, 563 (8th Cir. 1995).

¹²⁹ Smith, *supra* note 21, at 21.

¹³⁰ 751 F.2d 1113 (9th Cir. 1985).

¹³¹ *Id.* at 1116 (quoting *United States v. Farris*, 624 F.2d 890, 893-94 (9th Cir. 1980)).

¹³² 357 F.3d 1055 (9th Cir. 2004).

¹³³ *Id.* at 1057-58 (citations omitted).

¹³⁴ *Bankruptcy Code’s Abrogation of Tribes’ Sovereign Immunity is Sufficiently Explicit*, 16 Bankr. L. Rep. (BNA) 161, 161 (2004) [hereinafter “BNA”] (citing *Atascadero State Hosp.*

abrogates the sovereign immunity of governmental units, a defined class that is largely made up of parties that could claim sovereign immunity. . . . No implication beyond the words of the statute is necessary to conclude that Congress ‘unequivocally expressed’ its intent to abrogate Indian tribes’ immunity.”¹³⁵ The decision goes on to state that Congress “need not make its intent to abrogate ‘unmistakably clear’ in a single section of a statute,”¹³⁶ but rather the statute must be read as a whole¹³⁷ to establish whether abrogation was intended. In this case, both the plain language of the Code, as well as its nature of general application, make clear Congress’ intent to abrogate immunity in bankruptcy.

The Code explicitly accounts for the possibility that a governmental unit may claim sovereign immunity in order to avoid its duties in bankruptcy. Section 106 states that, “[n]otwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to . . . Sections 105 [Power of Court and] 502 [Allowance of claims or interests]. . . .”¹³⁸ Section 106(a)(2) authorizes the court to hear and determine any issue under Sections 105 and 502 in proceedings involving a governmental unit, and Section 106(a)(3) empowers the court to issue orders and judgments against them.¹³⁹ In *Krystal Energy*, Judge Berzon held that the Code’s abrogation of governmental unit immunity, “while not expressly mentioning ‘Indian tribes,’ [was] sufficiently explicit to override tribal immunity [in] bankruptcy proceedings”:¹⁴⁰

The definition of “governmental unit” first lists a sub-set of all governmental bodies, but then adds a catch-all phrase, ‘or other foreign or domestic governments’ . . . Thus, *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, and, under § 106(a), are subject to suit.¹⁴¹

Concluding on this point, the court held that tribes are “simply a specific member” under the Code’s umbrella term for domestic governments, which is sufficient evidence of Congressional intention to abrogate immunity. Just as Congress need not list each U.S. state separately in a federal law of general application, it need not list tribes among the various domestic governments referred to in Section 106 of the Code.¹⁴²

B. Corporate vs. Governmental: The Distinction

In *Argentina v. Weltover, Inc.*,¹⁴³ the Supreme Court noted that a sovereign state engaging in commercial activities is “not exercis[ing] powers pecu-

v. Scanlon, 473 U.S. 234 (1985)) (discussing *Krystal Energy Co.*, 357 F.3d 1055 (9th Cir. 2004)).

¹³⁵ *Krystal Energy*, 357 F.3d at 1060.

¹³⁶ *Id.* at 1058 (citations omitted).

¹³⁷ *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 74 (2000).

¹³⁸ 11 U.S.C.A. § 106(a)(1) (West 2010). These are the two powers discussed.

¹³⁹ BLUM, *supra* note 46, at 157.

¹⁴⁰ BNA, *supra* note 134, at 161.

¹⁴¹ *Krystal Energy*, 357 F.3d at 1057 (citing 11 U.S.C.A. § 101(27) (West 2010)).

¹⁴² BNA, *supra* note 134, at 161.

¹⁴³ 504 U.S. 607 (1992).

liar to sovereigns” but rather, “powers that can also be exercised by private citizens.”¹⁴⁴ The Foreign Sovereign Immunities Act (“FSIA”)¹⁴⁵ defines a commercial activity as being “either a regular course of commercial conduct or a particular commercial transaction or act,”¹⁴⁶ with the added caveat that it must have an effect in the United States.¹⁴⁷

The cited purpose of, and justifications for, tribal immunity—self-sufficiency, self-determination, etc.—is irrelevant to this determination of *effect*. “The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.”¹⁴⁸ Thus, where a sovereign nation exercises such commercial power (i.e., the power to engage in business¹⁴⁹), it will not be entitled to immunity under FSIA. A natural extension of this principle *should* be that where a sovereign corporation—i.e., not the sovereign itself—engages in commercial dealings, immunity will likewise not apply.

The requirement that the commercial activity have an effect in the United States is satisfied for the simple reason that the agreement is between Foxwoods and *non-tribal* investors. It is given that Foxwoods’ securities are subject to the regulations of U.S. accounting standards, exchange intermediaries and reporting agencies and transactional funds flow in and out of the financial institutions of America (e.g., banks, trusts, bond markets, stock exchanges, etc.). As these *effects* clearly occur in the non-tribal domain of the United States, the courts necessarily have the statutory authority to enforce compliance with applicable laws.¹⁵⁰

Currently, it is uncertain whether tribes fall under the banner of “foreign nation” sufficient to trigger the judicial statutory authority of FSIA. The Commerce Clause¹⁵¹ specifically distinguishes between “Foreign Nations,” “the Several States,” and “Indian Tribes,” which suggests they are to be treated separately.¹⁵² To this, Andrea M. Kurak argues:

Treating tribes as “foreign nations” [under FSIA] would allow courts more leeway to draw a distinction between tribal governance and tribes as marketplace participants. Rather than defer to Congress, as the Court chose to do in *Kiowa*, courts could utilize preexisting legislation that distinguishes between governance and commercial activity. If immunity exceptions applicable to foreign sovereigns were applied to tribal sovereignty, the immunity would remain intact with respect to intra-tribal and governmental affairs and only abrogated when tribes choose to enter the marketplace.¹⁵³

¹⁴⁴ *Id.* at 614 (citing *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 704 (1976)).

¹⁴⁵ 28 U.S.C. §§ 1602 - 1611 (2006).

¹⁴⁶ *Id.* § 1603(d) (2006).

¹⁴⁷ *Weltover*, 504 U.S. at 611 (citing 28 U.S.C. § 1603(a)-(b) (2006)).

¹⁴⁸ 28 U.S.C. § 1603(d) (2006).

¹⁴⁹ Kurak, *supra* note 40, at 384 (citing *Weltover*, 504 U.S. at 614 (discussing *Alfred Dunhill*, 425 U.S. at 704)).

¹⁵⁰ *Weltover*, 504 U.S. at 619 (“Because New York was thus the place of performance for [the tribe’s] ultimate contractual obligations . . . those obligations necessarily had a ‘direct effect’ in the United States.”).

¹⁵¹ U.S. CONST. art. I, § 8, cl. 3.

¹⁵² Kurak, *supra* note 40, at 382 (citing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831)).

¹⁵³ *Id.* at 385 (citations omitted).

Essentially, if tribes were considered “foreign nations” under FSIA, then courts could rely on the distinction drawn in the legislation that separates governance from commerce. This distinction provides that commercial activities are not subject to the protection of sovereign immunity.

C. Justifications for Immunity: Flawed Reasoning

The courts’ reluctance to abrogate immunity may have less to do with lack of jurisdiction than with a misguided attempt at furthering Congress’ stated goal of promoting tribal economic self-sufficiency.¹⁵⁴ A variety of reasons support this theory. First, tribal nations have been largely dependent on the support of the federal government; gaming is seen as holding the potential to “reduce the tribes’ involuntary but longstanding reliance on federal funding”¹⁵⁵ by providing revenues for services, infrastructure and other means of governmental self-sufficiency.

Second, tribal gaming is a significant source of income for many tribes. Recognizing this, Congress sought to enact a statutory scheme to encourage what is perceived as a means to economic self-sufficiency.¹⁵⁶ Under the Indian Gaming Regulatory Act (“IGRA”),¹⁵⁷ Congress held that “a principle goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government.”¹⁵⁸ Because economic self-sufficiency is a necessary condition precedent to social and political independence, one author notes that “[i]t is ironic that economic self-sufficiency is typically a prerequisite to sovereign status, but in the case of [Indian] tribes, fostering economic stability characteristic of a sovereign is the primary justification for retaining tribal sovereign immunity.”¹⁵⁹

From Foxwoods’ perspective, decisions that bolster the doctrine of tribal immunity may be hailed as beneficial,¹⁶⁰ but in reality, they reveal the disadvantages to entering into a business relationship with an entity that is not subject to suit. The “self-sufficiency through immunity” argument holds that sovereign protection is necessary in order to foster tribal economic progress and is integral to the self-governance of tribes.¹⁶¹ A closer examination reveals that, in the commercial context at least, such a rationale may be outdated and even counter-productive.

In the commercial marketplace, immunity to suit likely presents more of a hindrance than a benefit.¹⁶² Although the stated justification for retaining immunity is to encourage the economic development of tribal communities, denying legal protection to non-tribal investors renders the tribal entity *less*

¹⁵⁴ *Id.* at 378-79 (citing Nicholas S. Goldin, Note, *Casting a New Light on Tribal Casino Gaming: Why Congress Should Curtail the Scope of High Stakes Indian Gaming*, 84 CORNELL L. REV. 798, 812, 819-21 (1999)).

¹⁵⁵ Goldin, *supra* note 154, at 812.

¹⁵⁶ Kurak, *supra* note 40, at 362 (citing 25 U.S.C. § 2702(1) (2006)).

¹⁵⁷ 25 U.S.C. § 2701 (2006).

¹⁵⁸ *Id.* § 2701(4) (2006).

¹⁵⁹ Kurak, *supra* note 40, at 367.

¹⁶⁰ Wastewin, *supra* note 72, at 540-42 (citations omitted).

¹⁶¹ Rubacha, *supra* note 71, at 12.

¹⁶² Clement, *supra* note 66, at 654.

attractive as an investment to the business community, thus *impeding* economic gains.¹⁶³ Whereas return on an investment or loan is commensurate with the degree of risk involved, future creditors of Foxwoods will have to weigh not only the risk of default, but the risk that a tribe may invoke immunity and refuse to pay in *any* event.

Relying less on the shield of tribal immunity and more on their own viability as active and successful marketplace participants would allow tribes to maximize the benefits of commercial activity and more quickly obtain economic self-sufficiency. . . . Through vigorous litigation intended to protect its sovereign immunity, the tribe has asserted a shield against all who may challenge its business practices. However, this shield may be the sword that causes the tribe's demise. . . .¹⁶⁴

If the courts fail to take this opportunity to draw a clear line between government and corporation—between Mashantucket Pequot and Foxwoods Resort Casino—the sovereign shield of immunity may very well serve as the sword that “tribal economic development”¹⁶⁵ falls on.

Despite the stated economic rationale for upholding the doctrine of tribal immunity (which, we submit, is flawed to begin with), the principles of equity suggest a common sense, “back to basics” approach. In *United States v. State Bank*,¹⁶⁶ Justice Swayne for the Supreme Court stated that “[a]n action will lie whenever [a] defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial.”¹⁶⁷

That decision was rendered forty-one years before the doctrine of tribal immunity was put into effect in *Turner*, but insofar as it pertains to the principles of “natural justice and equity,” its reasoning is sound. Foxwoods has received money, which, for all intents and purposes, is the property of the creditors. Because Foxwoods took it upon itself to borrow money, natural justice and equity dictate that they have a duty to pay it back, regardless of any special status.

As an interesting comparison, tribes may actually have jurisdiction over non-Indians in some cases. The Supreme Court held in *Montana v. United States*¹⁶⁸ that “tribes can exercise civil jurisdiction over a non-Indian [where] (a) the non-Indian has a relevant consensual relationship with the tribe[,] or (b) the non-Indian is doing something that imperils the tribe's . . . economic security[] or . . . welfare.”¹⁶⁹ Equating the tribe with the tribal entity, this reasoning appears analogous to the case at hand, except that it operates in reverse. The agreement between Foxwoods and its creditors is obviously a “consensual relationship” of debtor-creditor, and Foxwoods—by refusing to pay back its creditors—is doing something that “imperils the economic security” of non-Indian creditors (or, it could be argued, U.S. debt markets). Being that “sovereign

¹⁶³ Kurak, *supra* note 40, at 377 (citing Clement, *supra* note 66, at 654).

¹⁶⁴ *Id.* at 377, 390.

¹⁶⁵ 25 U.S.C. § 2701(4) (2006).

¹⁶⁶ 96 U.S. 30, 35 (1877).

¹⁶⁷ *Id.* (citing *Bayne v. United States*, 93 U.S. 642).

¹⁶⁸ 450 U.S. 544 (1981).

¹⁶⁹ William Bacon, 20 *Questions About Indian Law*, THE ADVOCATE, May 2007, at 17, 17.

immunity stems from notions of equality among sovereigns[.]”¹⁷⁰ this one-way street of risk is not conducive to long-term, harmonious business relationships between tribes and the business community at large.

D. *Passing the Buck on Sovereign Immunity*

Tribal sovereign immunity is not impenetrable, and judges are not required to apply it where it would run contrary to law and equity. In the majority of cases however, the doctrine will nonetheless be applied and upheld, “often reaching inequitable results.”¹⁷¹ One of the reasons for this is that there has historically been a back-and-forth between Congress and the courts, whereby the former cannot muster the political will to limit the doctrine, and the latter cannot justify the authority to keep from applying it—even where it acknowledges a “patently unfair”¹⁷² result. For example, in *Kiowa* the court opted in favor of deferring to Congress the task of distinguishing between tribal commercial activities and governmental ones. However, under IRA, it is apparent that Congress deferred to tribes, allowing them to make the distinction for themselves.

“[B]y relying and referring to each other’s precedents and by deferring to the power of each to resolve certain issues related to tribal sovereignty and recognition of the doctrine of immunity, the branches [of the U.S. legal system] largely preserve and perpetuate the *status quo* with respect to tribal immunity.”¹⁷³ When courts *choose* deference over statutory interpretation,¹⁷⁴ they perpetuate the trend of passing the buck, and, it may be argued, shirk their responsibilities as arbiters of the law.

There are two possible solutions. One is for Congress to enact specific legislation delineating separation of the tribe from the tribal corporate enterprise.¹⁷⁵ The second solution lies with the Supreme Court to draw the distinction (i.e., to re-consider *Kiowa*). The doctrine of tribal sovereign immunity was developed in the courts, and it is open for the courts to amend or limit it. In addition, the federal government itself has come to recognize that sovereign immunity is not absolute. FSIA gives the courts explicit power to adjudicate matters of abrogation¹⁷⁶ and specifically cites an exception to sovereign immunity when the plaintiff’s claim “is based upon a commercial activity carried on in the United States by the foreign state[.]”¹⁷⁷ Kurak proposes that adopting a regime similar to FSIA—if not FSIA itself—would go a long way towards

¹⁷⁰ Kurak, *supra* note 40, at 383.

¹⁷¹ *Id.* at 369.

¹⁷² Fla. Paraplegic Ass’n. v. Miccosukee Tribe of Indians of Fla., 166 F.3d 1126, 1135 (11th Cir. 1999).

¹⁷³ Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661, 762 (2002) (emphasis added).

¹⁷⁴ See *Kiowa Tribe v. Mfg. Tech., Inc.*, 523 U.S. 751, 760 (1998) (“[W]e decline to revisit our case law and choose to defer to Congress.”).

¹⁷⁵ Although this would certainly address the problem, an analysis of the political mechanics involved are beyond the scope of this paper.

¹⁷⁶ 28 U.S.C. § 1602 (2006) (“Claims of foreign states to immunity should henceforth be decided by courts of the United States. . .”).

¹⁷⁷ 28 U.S.C. § 1605(a)(2) (2006 & Supp. II 2008) (“commercial activity” exception).

alleviating some of the uncertainty: "Legislation similar to *FSIA*, explicitly severing tribal and commercial activities from tribal governmental functions, would avoid the statute-by-statute interpretation that the courts now undergo."¹⁷⁸

The courts and Congress have the power to abrogate immunity where they see fit, but insofar as case-by-case determinations are concerned, it is apparent that Congress wishes to leave the decision-making function with the courts. Simply stated, Congress has made its intent plain and obvious. It is incumbent on the courts to make order out of chaos.

E. Intra-tribal disputes

In passing, we will discuss the issue of intra-tribal disputes, as they mark an important departure from the proposed commercial relationship tribes ought to have with non-tribal entities. When the debtor-creditor relationship is characterized by multiple tribal entities, federal courts have not recognized subject matter jurisdiction over such disputes, preferring instead to characterize them as intra-tribal.

In *In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litigation*,¹⁷⁹ where tribal members issued a recall on the elected tribal council administering the tribe's gaming activities and the elected council subsequently ignored it, the federal court that heard the action refused to assert jurisdiction because the action was characterized as an intra-tribal dispute.¹⁸⁰ After the appointed council seized control of tribal gaming facilities, the elected tribal council filed suit in federal court, alleging that the appointed council lacked legal authority and that the elected council had exclusive control over the tribe's finances. The appellate court agreed with the district court to the extent that it was being asked to resolve an internal tribal leadership dispute, and that IGRA did not provide a private right of action.¹⁸¹

Where business dealings are intra-tribal, it is unlikely that jurisdiction will be afforded under the Code, and the tribal parties to the transaction will only have a right of action in their respective tribal courts.

V. CONCLUSION: FIGHTING FAIRLY

When a tribe takes it upon itself to enter into the public marketplace, it must be made subject not only to the relevant rules and regulations of the respective jurisdiction, but also to the terms of its agreements. By being empowered to conduct business with the corporate community at large, Foxwoods enjoys greater economic freedom to pursue its interests in the marketplace than if it were restricted to dealing in tribal assets alone. Foxwoods implicitly, if not explicitly, waived immunity to suit when it entered into a loan agreement with its creditors. It is incumbent on Foxwoods to take responsibil-

¹⁷⁸ Kurak, *supra* note 40, at 389 (emphasis added).

¹⁷⁹ 340 F.3d 749, 753 (8th Cir. 2003).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 767.

ity for its actions as a corporate entity, discharge its duties at law and pay back its creditors.

Being a commercial participant entails being commercially responsible. It means paying liabilities where and as they become due in accordance with the agreement, the law and the principles of equity. If a core purpose underlying the doctrine of tribal immunity is to foster economic development and self-sufficiency, courts should enforce the provisions of the Code and ensure that creditors are paid first. Such a decision would adhere to Congressional intent to include tribes in the application of the Code, would send the signal that investors can conduct business with Native tribes on a fair and profitable playing field for all parties and, ultimately, would promote the economic self-sufficiency which the doctrine of tribal immunity is supposed to support, but instead impedes.

