Legal Sidebar

Supreme Court Rules Bankruptcy Code Abrogates Tribal Sovereign Immunity

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On June 15, 2023, the Supreme Court decided *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin* (*Lac du Flambeau*). The case involved a dispute over lifting an automatic stay in a Chapter 13 bankruptcy proceeding, but more broadly presented a conflict between the Bankruptcy Code and tribal sovereign immunity. Ultimately, the Court held that the Bankruptcy Code (the Code) unambiguously abrogates the sovereign immunity of all governments, including that of federally recognized Indian tribes.

This Sidebar provides an overview of tribal sovereign immunity and introduces § 106 of the Code, which contains the sovereign immunity provision at issue in *Lac du Flambeau*. It then discusses the factual and procedural history of *Lac du Flambeau*, and summarizes the Supreme Court's opinion. This Sidebar then examines the ramifications of the decision for both bankruptcy law and federal Indian law, including considerations for Congress.

Tribal Sovereign Immunity and Bankruptcy Code Section 106

Federally recognized tribes maintain "inherent sovereign authority," which generally includes a common-law immunity from lawsuits. This tribal sovereign immunity applies equally to lawsuits brought by states and lawsuits brought by individuals.

Tribal sovereign immunity may be overcome in two ways, each allowing suits to be brought against tribes. Either the tribe itself may waive sovereign immunity in certain cases, or Congress may *abrogate*, or eliminate, tribal sovereign immunity in certain contexts using its plenary constitutional authority to legislate with respect to Indian tribes. In *Lac du Flambeau*, the Court considered this latter path: whether Congress had abrogated tribal sovereign immunity in particular circumstances—namely, those governed by certain provisions of the Bankruptcy Code.

Although Congress has the power to legislate with regard to tribal sovereign immunity and other tribal rights, courts have developed *canons of construction* when evaluating whether Congress has done so. One of these canons generally requires that if Congress wishes to diminish tribal rights or authority, it must do so unequivocally. The Supreme Court has explained that courts must "tread lightly" and not presume a congressional intent to undermine tribal authority absent a clear indication of such intent. The Court has

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cautioned, however, that the clear-statement rule does not require any "magic words"; Congress "need not state its intent" to abrogate tribal sovereign immunity "in any particular way."

The Code contains a provision speaking to sovereign immunity, Section 106, which is entitled "Waiver of sovereign immunity." Notwithstanding the word "waiver" appearing in the section's title, subsection (a) provides that "sovereign immunity is abrogated as to a governmental unit" with respect to dozens of Code sections. Pertinent to *Lac du Flambeau*, one of those Code sections is Section 362, which imposes an automatic stay on the commencement or continuation of lawsuits against a debtor once that debtor has declared bankruptcy. The Code defines "governmental unit" to mean "United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government."

Factual and Procedural History

The tribe at the center of this case is the petitioner, Lac du Flambeau Band of Lake Superior Chippewa Indians (the Band). A federally recognized Tribe, the Band owns a number of businesses, including Lendgreen, "a financial loans network that connects payday loan lenders with borrowers seeking short-term loans." Respondent Brian Coughlin (Coughlin) took out a $1,100 payday loan from Lendgreen in 2019. Later that year, Coughlin filed a Chapter 13 bankruptcy petition in the U.S. Bankruptcy Court for the District of Massachusetts. Under Chapter 13, an individual may discharge certain debts pursuant to a court-supervised repayment plan.

In accordance with the Code, after Coughlin filed the Chapter 13 petition, the bankruptcy court imposed an automatic stay prohibiting all actions to collect on Coughlin's debts. Lendgreen nevertheless continued to contact Coughlin about the payday loan repayment, the bill for which had grown to $1,600 by the time of the petition.

Coughlin moved in bankruptcy court to enforce the automatic stay against Lendgreen and its corporate parents, including the Band. The Band moved to dismiss Coughlin's motion and asserted that, as a tribal sovereign nation, it was immune from suit. The bankruptcy court agreed with the Band and dismissed the motion for lack of subject matter jurisdiction. The court reasoned that Code Section 106(a) broadly abrogates sovereign immunity for governmental units, but that the Bankruptcy Code's definition section does not specifically include federally recognized Indian Tribes in its list of governmental units. In support of that reasoning, the bankruptcy court noted multiple circuits had held that Section 106 lacked the necessary specificity to abrogate tribal sovereign immunity.

A divided First Circuit reversed the bankruptcy court's decision. The court observed that the statutory list of governmental units covered essentially all forms of domestic government, including a catchall for "other … domestic government[s]." The court also noted that when Congress enacted the relevant Code provisions, Congress would have understood that Indian tribes were legally considered "domestic independent nations." Accordingly, the First Circuit held that when Congress abrogated the sovereign immunity of domestic governments, it necessarily abrogated the sovereign immunity of tribes. The court did not find persuasive the Band's arguments that neither the Code nor its legislative history used the word "tribe," nor any other specific reference to tribal nations, explaining that the statute's text was nonetheless clear on the abrogation.

The Supreme Court: Majority Opinion and Dissent

The Supreme Court granted certiorari to answer the question whether Congress unequivocally intended to abrogate the sovereign immunity of Indian tribes. Like the courts below, the Supreme Court focused on

the text of Section 106, as well as the established rule that Congress must make its intent unmistakably clear in the text of a statute to abrogate sovereign immunity—the "clear-statement rule." However, the Court reiterated that the clear-statement rule does not entail a "magic-words requirement."

After analyzing the relevant statutory provisions, the Court affirmed the First Circuit in an 8–1 opinion, determining that the Code unequivocally abrogated the sovereign immunity of any and every government possessing authority to assert sovereign immunity. Federally recognized tribes such as the Band, the Court concluded, were necessarily covered by that comprehensive abrogation.

The Court found support from the statutory text, the Code's policy goals, and Congress's understanding of tribes' governmental function, as follows. According to the Court, the Code's definition of governmental unit "exudes comprehensiveness from beginning to end," and the phrase "other foreign or domestic government" signaled congressional intent to cover all governments. The Court labeled "far-fetched" the Band's argument that federally recognized tribes—described in long-standing Supreme Court precedent as "domestic dependent nations"—are neither completely foreign nor purely domestic, and thus should not be covered by the Bankruptcy Code's language. In other words, the Court rejected the premise that the text imposed a rigid division between foreign and domestic governments, covering both but not governmental entities with characteristics of both.

The Court also reasoned that the Code in general provides broad protections to debtors against all creditors. Although the Code contains a number of exceptions for government creditors, it generally does not subdivide those exceptions among certain types of governmental units. In the Court's view, this supported an interpretation that Congress intended comprehensive abrogation of sovereign immunity. As to the Band's argument that neither of the relevant Code provisions mentions Indian tribes specifically, the Court referred to the lack of a "magic-words requirement" for abrogating sovereign immunity.

The sole dissenting justice, Justice Gorsuch, countered with an analogy: a host who gives a guest permission to help herself to "chocolate or vanilla ice cream," he wrote, has not *clearly* given permission for the guest to eat the Neapolitan ice cream she may also find in the freezer. If a clear statement is required, the Neapolitan ice cream is not available to be eaten, notwithstanding that it shares some characteristics with both chocolate and vanilla ice cream. Justice Gorsuch recognized that "tribes may have some features of both domestic and foreign governments, but they do not qualify as either, and they have some features found in neither." Therefore, he reasoned, they cannot be included within the phrase "foreign or domestic government."

Considerations for Congress

The holding in *Lac du Flambeau* generally redounds to the benefit of debtors like Coughlin by making automatic stays of debt collection efforts more widely applicable to creditors. One could view the implications from two perspectives. On one hand, the decision may have the practical effect of eliminating tribal sovereign immunity in situations where it was previously perceived to be intact. This result may be viewed by some as an infringement or limitation of tribal self-governance principles because it limits tribal sovereign immunity without input or consent from the tribe itself. Although Congress has constitutional authority to limit tribal sovereign immunity unilaterally, proponents of tribal sovereignty may object that *Lac du Flambeau* functionally undermined—albeit while technically reiterating—the "enduring principle of Indian law" that "courts will not lightly assume that Congress in fact intends to undermine Indian self-government."

From another perspective, the decision could be framed as consistent with the Code's goal of preventing certain types of government creditors—in this case, tribally owned lenders—from being able to pursue debt collection when others may not. Put differently, the *Lac du Flambeau* holding furthers one of the automatic stay's purposes, preventing a race to the courthouse by creditors. This framing may be viewed

by some as potentially promoting a more orderly recovery for a greater number of creditors in certain situations, such as cases with limited bankruptcy estate assets.

As discussed above, under the Court's decision in *Lac du Flambeau*, tribal sovereignty in bankruptcy cases is abrogated and debtors may take action against tribes to enforce the Code's automatic stay, just as a debtor could generally do for any other creditor. Should Congress choose to eliminate the abrogation of tribal sovereign immunity, the relevant Bankruptcy Code provisions offer at least three textual options for doing so. First, Congress could expressly carve out tribal governments from Section 106(a), the abrogation provision, either by stating that the provision does not apply to tribal governments, or that tribal sovereign immunity is not abrogated. Congress may consider, however, that carving out tribal governments from Section 106(a)'s immunity waiver would create multiple classes of governmental entities. A court could view such an action as running counter to the "policy choices" embodied in the Code, which "generally subjects all creditors (including governmental units) to certain overarching requirements."

Second, Congress could expressly include in Section 101, the definition provision, that tribal governments are not governmental units. Eliminating or excepting tribal governments from the definition of governmental units entirely may be seen by a court as consonant with the principle of generally treating governmental units (though not all creditors) alike.

In either scenario, Congress could also consider altering the catchall provision—"other foreign or domestic government"—at the end of Section 101, thereby narrowing the scope of the statute to align with Congress's specific intent to waive certain categories of sovereign immunity.

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