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Can the Gaming Enterprise of a Native American Tribe be a "Debtor" under the US Bankruptcy Code?

On July 2, 2012, the Santa Ysabel Resort and Casino, owned and operated by the Iipay Nation of Santa Ysabel on its reservation land in Santa Ysabel, California, filed for protection under Chapter 11 of the US Bankruptcy Code[1]. This case highlights unresolved issues relating to the ability of federally recognized Indian tribes to seek protection under the Code.

Factual Background[2]

In September of 2003, the Santa Ysabel Band of Diegueno Mission Indians, a federally recognized Indian tribe now known as the Iipay Nation of Santa Ysabel (the "**Iipay Nation**"), and the State of California (the "**State**") entered into a Tribal-State Gaming Compact (the "**Compact**"). The Compact authorized the Iipay Nation to establish a gaming facility, operate up to 350 slot machines and offer table games in exchange for payment to the State of five percent of the net win from the slot machines. The Compact also required the Iipay Nation to consult with North San Diego County (the "**County**") regarding its costs and expenses in connection with the gaming operations. The County and the Iipay Nation subsequently entered into a Memorandum of Understanding (the "**MOU**") which required the Iipay Nation to pay the County approximately $600,000 each year for public safety and other services provided by it.

Construction of the gaming facility was funded with a $26,000,000 loan from JPMorgan Chase & Co. (the "**JPMorgan Loan**"). Construction cost overruns were funded from a $7,000,000 second loan (the "**YAN Loan**") from the Yavapai Apache Nation (the "**YAN**"), another federally recognized Indian tribe. Both the JPMorgan Loan and the YAN Loan appear to be secured by all of the Iipay Nation's personal property, including all personal property in the gaming facility, and the JPMorgan Loan purports to be secured also by a pledge of the "receipts, revenues and rents from Casino [a]ssets." No portion of the gaming facility or other real property interests secures either the JPMorgan Loan or the YAN Loan. In 2009, the YAN purchased the JPMorgan Loan.

The gaming facility opened in 2007 as the Santa Ysabel Resort and Casino (the "**Casino**"). The Casino is located on tribal Indian reservation land in Santa Ysabel, California, a remote location. The Casino has struggled to attract customers since its opening. As a result, the Iipay Nation was unable to make payments to the County and the YAN. In May of 2011, an arbitrator awarded the County over $3,000,000 due under the MOU and on May 29, 2012, the County levied (the "**County Judgment Lien**") against an Iipay Nation's bank account which froze the approximately $70,000

Contacts

Douglas Wisner
Partner

T: +1 212 878 3345
E: douglas.wisner
@cliffordchance.com

Rick Antonoff
Partner

T: +1 212 878 8513
E: rick.antonoff
@cliffordchance.com

deposited therein. In early February of 2012, the YAN received a $9,004,577.64 judgment in the Yavapai Apache Nation Tribal Court against the Iipay Nation which purports to attach to all personal property of the Iipay Nation, including the Iipay Nation's personal property at the Casino (the "**YAN Judgment Lien**"). In addition, Arizona and California state courts have determined that the YAN is currently owed approximately $35,000,000 under the JPMorgan Loan.

On July 2, 2012, the Casino commenced a bankruptcy proceeding by filing a voluntary petition for relief under Chapter 11 of the Code in the United States Bankruptcy Court for the Southern District of California. In its petition, the Casino describes itself as "an unincorporated company. . . . owned by the Iipay Nation of Santa Ysabel".[3]

Issues

This case highlights unresolved issues relating to the ability of federally recognized Indian tribes to seek protection under the Code. In this case, the fact that the Casino is the gaming enterprise of a federally recognized Indian tribe creates a further complication since a "corporation" under the Code includes an "unincorporated company" which is eligible as a "person" to file a petition under the Code. But the gaming enterprise may also be a "governmental unit" in which case it is expressly excluded from the definition of "person" but it is not clear from the definition how this inconsistency is resolved. Finally, the facts indicate that the Iipay Nation, and not the Casino, has direct liability for the JPMorgan Loan and the YAN Loan, two of the obligations that bear significant responsibility for the Casino's financial distress. If the parties are treating the Iipay Nation's gaming enterprise as an activity that enjoys sovereign immunity unless expressly waived and as the direct source of repayment (rather than looking only to the net amounts distributed by the Casino to the Iipay Nation), the division between the Iipay Nation and the Casino becomes blurred calling into question whether the gaming enterprise is a business activity being conducted by the Iipay Nation and not by an "unincorporated company?" In its Limited Objection to Debtor's Emergency First Day Motion for Order Approving Operating Budget; Declaration of Ira Bibbero in Support Thereof; Request for Judicial Notice, the YAN disputes the Casino's existence as a separate entity and asserts that the Casino's bankruptcy case should be dismissed.[4] Similarly, in its County of San Diego's Objections to Debtor's Emergency First Day Motion for Order Approving Operating Budget (the "**County Objection**"), the County has asserted that the Casino has described itself as a "Casino", a "venture", an "unincorporated company" and a "corporation".[5]

Analysis

Much has been written about whether or not a federally recognized Indian tribe can seek bankruptcy protection under the Code with most writers concluding that it cannot. §109 of the Code states that "only a person that resides in or has a domicile, a place of business, or property in the United States or a municipality, may be a debtor under [the Code]."[6] §101 of the Code defines a debtor as "a "person" or "municipality."[7] §101 of the Code defines "municipality" as either a "political subdivision," "public agency", or "instrumentality of a State."[8] The same section of the Code defines "person" as including an "individual," "partnership," and "corporation," while specifically excluding "governmental units" (save for three exceptions that are not applicable to the Iipay Nation).[9] Unless the Casino meets the Code's definitions of "person" or "municipality", and is not excluded from the definition of "person" (that is not a "governmental unit"), it is ineligible to be a "debtor."[10]

A. Municipalities

It is generally agreed that federally recognized Indian tribes are not "municipalities."[11] In American jurisprudence, federally recognized Indian tribes exist as distinct sovereign entities known as "domestic dependent nations"[12] having their own "inherent sovereign authority."[13] As such, they are not political subdivisions, public agencies, or instrumentalities of any State.[14]

B. Individuals, Partnerships, and Corporations

There appear to be no reported decisions in which a court has found a federally recognized Indian tribe to be a "person" under the Code. Under the Code, a "person" is defined as an "individual" although "individual" is not defined in the Code. Most writers have concluded that the term refers to a human being.

Similarly, a federally recognized Indian tribe likely does not qualify as a "partnership" of its members. Although that term is not defined in the Code, a partnership is generally understood to be "a voluntary partnership of two or more persons who jointly own and carry on a business for profit."[15] It is clear under the Indian Gaming Regulatory Act (the "**IGRA**")[16], the Compact and the Iipay Nation's gaming ordinance (the "**Gaming Ordinance**") that only the Iipay Nation, and not its members, can engage in gaming activities.

In its petition, the Casino states that it is "an unincorporated company . . . owned by the Iipay Nation of Santa Ysabel" which, if so, puts the Casino squarely in the Code's definition for "corporation".[17] Notwithstanding the Casino's statement, the JPMorgan Loan Agreement shows a different understanding between the parties:

1. Only the Iipay Nation and not the Casino is a party to the JPMorgan Loan Agreement.
2. Proceeds of the JPMorgan Loan were advanced to the Iipay Nation for the sole purpose of refinancing indebtedness relating to the Casino and providing funds for operations and debt service.
3. The JPMorgan Loan Agreement expressly provides that the Iipay Nation shall not form or acquire any separate corporation, instrumentality, or other business entity for the purpose of directly or indirectly owning the Casino or the property associated with it unless the corporation, instrumentality or other business entity becomes a party to the JPMorgan Loan Agreement.
4. The parties to the JPMorgan Loan Agreement acknowledged that the Iipay Nation "operates the Casino as a 'tribal enterprise' which has no separate legal existence from [the Iipay Nation]."

The JPMorgan Loan Agreement has been amended four times and the only signatories to the amendments are the original parties. The last amendment was executed and delivered by those parties in early 2009 at which time the Iipay Nation ratified and reaffirmed its representations made under the JPMorgan Loan Agreement.

In *In re Cabazon Indian Casino*, the Ninth Circuit Bankruptcy Appellate Panel decided two cases related to the casino of the Cabazon Band of Mission Indians (the "**Cabazon Indian Casino**").[18] Although the debtor named in the petition was the Cabazon Indian Casino, the Ninth Circuit Bankruptcy Appellate Panel dealt with the issues as if it was dealing with the federally recognized Indian tribe. Nowhere in the opinions did the court determine or discuss the eligibility of the Cabazon Indian Casino to file a bankruptcy petition so these cases are not dispositive.

Section 101(27) of the Code defines a "governmental unit" as,

> 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 [the Code]), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.[19]

Clearly, the definition of "governmental unit" does not mention a federally recognized Indian tribe.

Courts have addressed the issue in deciding whether Section 106 of the Code applies to federally recognized Indian tribes. Section 106(a) of the Code provides 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 the following [sections of the Code]"…. The issue is whether this abrogation applies to federally recognized Indian tribes which are creditors under the Code. The Supreme Court has held that abrogation of tribal sovereign immunity must be unequivocal, or else it fails.[20] In the cases deciding the application of Section 106, the majority view, embodied in one line of cases, holds that federally recognized Indian tribes fit within the definition of "governmental units."[21] In another line of cases, courts have held or stated in dicta that the failure to specifically include federally recognized Indian tribes in §101(27) meant that "Congress ha[d] not unequivocally abrogated the Tribe's sovereign immunity to suit under the Bankruptcy Code."[22]

Since these cases only considered sovereign immunity under Section 106 of the Code and not the specific context of debtor eligibility under Section 109 of the Code and because the authorities are split, the law remains unclear as to whether a federally

recognized Indian tribe would actually be deemed to be a "governmental unit" and therefore be prevented from filing for relief as a debtor under the Code. It is equally unclear if an "unincorporated company" which is owned by a federally recognized Indian tribe would be a "governmental unit" if it is determined that such definition includes a federally recognized Indian tribe. Presumably such "unincorporated company," like its parent, would claim that it also possesses sovereign immunity.

Other Observations

In an effort to collect amounts due to it under the MOU, the County levied against an account of the Iipay Nation.[23] Prior to the filing of the bankruptcy petition by the Casino, the National Indian Gaming Commission (the "**NIGC**") wrote a letter to the County warning that its collection efforts would amount to the management of the Casino by the County, a violation of the IGRA.[24] This determination appears to be in direct conflict with the previous approval by the NIGC of the enforcement rights granted to the YAN in the YAN Note described below.

The YAN Loan is evidenced by a note (the "YAN Note") which was submitted to the NIGC to review and determine if it was a "management contract" under the IGRA or if it violated the sole proprietary interest clause in the IGRA. The IGRA requires that all management contracts be approved by the Chairman of the NIGC failing which the Chairman has the authority to void the management contract or require appropriate contract amendments.[25] The County never submitted the MOU to the NIGC for approval.

In a letter dated July 7, 2006 from the NIGC to the Iipay Nation (the "**NIGC Letter**"), the provisions of the YAN Note were generally described. The NIGC Letter notes that the YAN have an exclusive, first priority security interest and lien on all earnings, income, revenues and the rights to receive them. The NIGC determined that the YAN Note was not a management contract and that it did not require approval by the Chairman of the NIGC.[26]

While there may be priority issues between the security interest granted to the YAN in the YAN Note and the County Judgment Lien obtained by the County, both appear to affect the same personal property of the Iipay Nation and enforcement of each would have the same result. Since the automatic stay prohibits further enforcement action, this issue may never be decided unless it is determined that the Casino cannot be a "debtor" under the Code and the County resumes the enforcement of the County Judgment Lien.

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[1] 11 U.S.C. §§1101–1532.

[2] Summarized from the Omnibus Statement of Facts and Omnibus Declaration of David Chelette in Support Thereof, *In re Santa Ysabel Resort and Casino*, No. 12-09415 (Bankr. S.D. Cal. July 3, 2012), ECF No. 11 and the Limited Objection to Debtor's Emergency First Day Motion for Order Approving Operating Budget; Declaration of Ira Bibbero in Support Thereof; Request for Judicial Notice, *In re Santa Ysabel Resort and Casino*, No. 12-09415 (Bankr. S.D. Cal. July 26, 2012).

[3] Chapter 11 Voluntary Petition, *In re Santa Ysabel Resort and Casino*, No. 12-09415 (Bankr. S.D. Cal. July 2, 2012), ECF No. 1.

[4] Limited Objection to Debtor's Emergency First Day Motion for Order Approving Operating Budget; Declaration of Ira Bibbero in Support Thereof; Request for Judicial Notice, at footnote 2, *In re Santa Ysabel Resort and Casino*, No. 12-09415 (Bankr. S.D. Cal. July 26, 2012).

[5] County of San Diego's Objections to Debtor's Emergency First Day Motion for Order Approving Operating Budget, at 2, *In re Santa Ysabel Resort and Casino*, No. 12-09415 (Bankr. S.D. Cal. July 26, 2012).

[6] §109(a).

[7] §101(13).

[8] §101(40).

[9] §101(41).

[10] The legislative history explains that "[t]he exclusion of governmental units is made explicit in order to avoid any confusion that may arise if, for example, a municipality is incorporated and thus is legally a corporation as well as a governmental unit." S. Rep. No. 989, 95th Cong., 25, 1978 U.S.C.C.A.N. 5787, 5811. Thus, it appears that, if an entity has one qualifying factor sufficient to meet the definition of "person," but also has a disqualifying feature, then the disqualifying feature prevails in this context.

[11] *See e.g.,* Steven T. Waterman, "Tribal Troubles—Without Bankruptcy Relief," 28 Am. Bankr. Inst. 10 (2010) (observing that "[c]learly, tribes are not a subdivision of a state.").

[12] *See Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

[13] *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991).

[14] §101(52).

[15] BLACK'S LAW DICTIONARY 1230 (9th ed. 2009).

[16] 25 U.S.C. §§2701–2721.

[17] Omnibus Statement of Facts and Omnibus Declaration of David Chelette in Support Thereof at 2, *In re Santa Ysabel Resort and Casino*, No. 12-09415 (Bankr. S.D. Cal. July 3, 2012), ECF No. 11.

[18] *In re Cabazon Indian Casino*, 35 B.R. 124 (9th Cir. BAP 1983); *In re Cabazon Indian Casino*, 57 B.R. 398 (9th Cir. BAP 1986).

[19] §101(27).

[20] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

[21] *See e.g.*, *In re Platinum Oil Properties, LLC*, 465 B.R. 621, 643-44 (Bankr. D. N.M. 2011) (holding that Native American tribes fall within the Code's definition of "governmental unit," which includes "other foreign or domestic government," and that §106 abrogates tribal sovereign immunity); *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 57-58 (9th Cir. 2004) (Concluding that tribes fit the definition of "domestic governments" and that Congress therefore expressly abrogated the sovereign immunity of Native American tribes when it enacted §106 of the Code); *In re Russell*, 293 B.R. 34, 40-44 (Bankr. D. Ariz. 2003) (holding that a Native American tribe is a "governmental unit" because it is a "domestic government," and that "§106(a) unequivocally, and without implication, abrogates sovereign immunity as to governmental units, including Indian tribes"); *In re Vianese*, 195 B.R. 572, 575 (Bankr. N.D.N.Y. 1995) (concluding that Native American tribes are considered "domestic dependent nations" and thus are "governmental units").

[22] *See e.g.*, *In re Mayes*, 294 B.R. 145, 148 n.10 (BAP 10th Cir. 2003) ("Section 101(27) does not refer to Indian nations or tribes. The only portion of that section that could be said to apply to an Indian nation or tribe is its reference to a "domestic government." While several bankruptcy courts have either expressly or impliedly held that Indian nations or tribes are "domestic governments" to which §§101(27) and 106 apply, we conclude that they probably are not.") (internal citations omitted).

[23] Issues regarding the attachment of the account by the County were raised by the Iipay Nation including whether the proper account had been attached. That issue was not resolved prior to the filing by the Casino.

[24] *See East County Magazine*, County Enforcement Efforts Against Tribe Could Violate Federal Law, May 29, 2012.

[25] 25 U.S.C. §§ 2711. It is interesting that the County has asserted in the County Objection that the Casino is managing the gaming enterprise on behalf of the Iipay Nation pursuant to a management contract that was not approved by the NIGC and therefore violates the IGRA. County of San Diego's Objections to Debtor's Emergency First Day Motion for Order Approving Operating Budget, at 4, *In re Santa Ysabel Resort and Casino*, No. 12-09415 (Bankr. S.D. Cal. July 26, 2012).

[26] In addition to interest payable under the YAN Note, the Iipay Nation agreed to pay the YAN a fee if it guaranteed a permanent loan secured by

the Casino. Although the economics of the YAN Note were redacted from the NIGC Letter, the fee was described as a cash flow participation interest. Initially, the NIGC determined that the cash flow participation interest was a profit sharing arrangement which created a proprietary interest in violation of the IGRA. The Iipay Nation submitted additional information and, after further consideration by the Acting General Counsel, the NIGC determined in a supplemental letter dated February 26, 2007 that the YAN Note did not grant the YAN an ownership interest in the gaming operation and therefore did not violate the IGRA.

Clifford Chance, 31 West 52nd Street, New York, NY 10019-6131, USA