

Encouraging Business with Indian Tribes

A BRIEF DISCUSSION OF THE TRIBAL EXHAUSTION DOCTRINE

By Thomas Weathers

Indian tribes occupy a unique status under our law. They are domestic dependent nations that exercise inherent sovereign authority over their members and their lands similar to that of states and foreign governments. They have the power to make their own substantive law on internal matters and to enforce that law in their own forums. They are, in effect, little (sometimes big) self-governing countries located within the United States.

The sovereign status of Indian tribes has created some confusion and concern on the part of nonnative companies wishing to do business with Indian tribes. Businesses want transparency and predictability when doing business; they want to know the rules of the game. Because many nonnative companies (and the lawyers that represent them) lack a full understanding of Indian law, they may hesitate to do business with Indian tribes for fear of the unknown. To increase understanding and encourage business with Indian tribes, this article will address one area of possible confusion and concern—the exhaustion of tribal remedies doctrine.

As all business lawyers should know by now, Indian tribes cannot be

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sued absent consent by Congress or an unequivocal waiver of sovereign immunity by the tribe. Tribes, as sovereigns, enjoy the same immunity from suit as states and foreign governments. This is known as the tribal sovereign immunity doctrine. A second and separate lesser-known doctrine is the exhaustion of tribal remedies. This doctrine requires a party involved in a lawsuit with an Indian tribe to first exhaust his or her tribal remedies before proceeding to state or federal court. A failure to exhaust tribal remedies can have disastrous consequences—possibly costing the client the right to sue. The business lawyer should be aware of this doctrine and address it directly when drafting agreements with Indian tribes.

Background on the Doctrine

Generally, Indian tribes lack jurisdiction over the conduct of nonmembers unless the nonmember enters a consensual relationship with the tribe or the activities of the nonmember directly affect the tribe's political integrity, economic security, health, or welfare. Given this rule, businesses (especially insurance companies) sued in tribal court have often challenged the jurisdiction of the tribal court to hear the case. They would rather have the dispute heard in a forum they perceive to be less hostile. This has raised the question of who decides—tribal court or state/federal court—whether the tribal court has jurisdiction to hear the case. The U.S. Supreme Court answered this question

in the seminal tribal exhaustion case of *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) by declaring that any examination should be conducted in the first instance in the tribal court. In other words, the U.S. Supreme Court clarified and created the tribal exhaustion doctrine.

According to the Court, the congressional policy supporting tribal self-government and tribal self-determination favors a rule that provides the forum whose jurisdiction is being challenged—the tribal court—the first opportunity to evaluate the grounds for the challenge. Tribal courts play a vital role in tribal self-government, and the federal government has consistently encouraged their development. Because a state or federal court's exercise of jurisdiction over matters relating to tribal affairs can impair the authority of tribal courts, the Supreme Court has concluded that, as a matter of comity, the examination of tribal sovereignty and jurisdiction should be conducted in the first instance by the tribal court itself. As the Court stated in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), the other leading case on tribal exhaustion, "[r]egardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a full opportunity to determine its own jurisdiction."

In addition to encouraging tribal self-government, the Supreme Court noted in *National Farmers Union* that

the exhaustion of tribal remedies permits

a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed . . . Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

In other words, exhaustion promotes tribal self-government and self-determination, fosters administrative efficiency, and provides other decision makers with the benefit of the tribal court's expertise, thereby making judicial review in the federal court that much easier.

While a matter of comity, exhaustion nonetheless functions as a prerequisite to a court's exercise of its jurisdiction. Ordinarily, the exhaustion of tribal remedies is mandatory and applies to federal and state courts (and even if no proceeding is actually pending in the tribal court). It also applies to both judicial and administrative

proceedings as well as when a tribal agency other than a tribal court arguably has jurisdiction. The doctrine also applies whether the contested claims are to be defined substantively by state or federal law (as opposed to tribal law). In sum, absent an explicit waiver of the exhaustion doctrine by the tribe, a litigant must first exhaust his or her tribal remedies before proceeding in a state or federal forum.

However, certain exceptions exist to this exhaustion requirement. Exhaustion is not required where: (1) an assertion of tribal court jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) the action is patently violative of express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction; (4) federal law expressly provides that a claim can only be heard in federal court; (5) it is plain that no federal grant provides for tribal governance of nonmembers' conduct on certain lands; or (6) it is otherwise clear that the tribal court lacks jurisdiction so that the exhaustion requirement would serve no purpose other than delay. But mere allegations of bad faith or bias are not enough to

avoid tribal court jurisdiction. Also, the "futility" exception applies generally only when the tribe lacks a functioning court system. These exceptions tend to be applied conservatively and narrowly.

Assuming no exception exists, a business that has contracted with a tribe that is sued in tribal court and wants to challenge the tribal court's jurisdiction must exhaust its remedies in the tribal court (which includes tribal appellate courts) before seeking jurisdictional review in federal court. A federal court will likely refuse to hear the case until the tribal court has had a chance to determine whether it has jurisdiction over the case. If the tribal court determines it has jurisdiction, the matter must be litigated in tribal court. If the nonnative company thereafter wishes to have the matter reviewed by a federal court, the only question that can be litigated in federal court is whether the tribal court had the authority to adjudicate the case. If the tribal court had jurisdiction, the nonnative business cannot relitigate the merits of the case in federal court. The business must accept the decision of the tribal court.

Consequences of Failing to Exhaust

This requirement to exhaust tribal remedies can lead to unintended consequences if a business fails to comply. For example, a business may choose to ignore the tribal proceeding and let a default judgment be taken while it files and litigates in federal court. The business may have assumed it could litigate the merits in federal court regardless of the tribal court proceedings. This could be a mistake. If the federal court finds that the business should have first exhausted its tribal remedies, the business may be bound to the default judgment entered in tribal court. A federal court will likely not undo the default judgment because a federal court cannot relitigate the merits if the tribal court had proper jurisdiction. Therefore, a business that ignores tribal court proceedings does so at some risk to its legal interests. A business should probably never let a

default judgment be taken against it in tribal court.

In addition, a business may be precluded altogether from bringing a lawsuit in state or federal court if the business fails to exhaust certain tribal administrative remedies. For example, some tribes have enacted tribal claims ordinances as an aspect of sovereignty. Similar to state or federal claims ordinances, these ordinances usually require a litigant to first file a claim with a tribal agency for review before filing in any court. This gives the tribe the opportunity to resolve the claim without the expense of litigation. If the claim is valid, the tribal agency usually authorizes payment; if the claim is denied, the plaintiff can then file in the appropriate court.

Federal, state, and tribal claims ordinances generally require that a claim be filed within a certain time period or the claim will be forever barred. If a plaintiff fails to file a timely claim, he or she will have failed to exhaust tribal administrative remedies. As happened in *Rivera v. Hopland Band of Pomo Indians Econ. Dev. Corp.*, 2007 WL 2310773 at *4 (Cal. Ct. App. Aug. 14, 2007), this failure will preclude a state or federal court from permitting a lawsuit to move forward on the merits. The court would most certainly send the matter back to the tribe so the plaintiff could exhaust its administrative remedies; but the business could never satisfy the exhaustion requirement because the plaintiff failed to file a claim within the time limit. The business would be forever barred from bringing suit. A business may inadvertently lose any right to sue by letting the time within which to file a claim lapse while the business seeks to litigate in state or federal court. A business should probably never fail to file a claim within the time limit prescribed by a tribal claims ordinance.

Dealing with the Exhaustion Doctrine

In the context of the tribal sovereign immunity doctrine, business lawyers and tribal lawyers have developed a process to deal with immunity to permit completion of a contract. Typically, a contract between a nonnative

company and an Indian tribe will include a limited waiver of sovereign immunity. This limited waiver by the tribe will usually allow the business to sue on certain grounds for certain amounts in binding arbitration (tribes rarely want their disputes resolved in state courts, and federal courts typically lack jurisdiction). In contrast, a contract between a nonnative business and an Indian tribe rarely addresses the tribal exhaustion doctrine.

This may be for two reasons; the business lawyer has no knowledge of the tribal exhaustion doctrine or the business lawyer assumes that a forum selection clause eliminates the need to exhaust tribal remedies. Either reason

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would be a mistake. As to the former, the discussion above points out some pitfalls of not knowing about the tribal exhaustion doctrine. As to the latter, there is disagreement among the courts regarding the impact of a forum selection clause upon the tribal exhaustion doctrine. Some courts hold that a valid forum selection clause essentially waives any exhaustion requirement; some courts hold the opposite. The safer approach for business lawyers (as well as tribal lawyers) would be to deal directly with the tribal exhaustion requirement in some manner.

There are two general approaches to dealing directly with the tribal exhaustion requirement. The first would be to acknowledge its existence in the contract and have the nonnative business agree to exhaust its tribal remedies before proceeding to arbitration or court. This may mean having to comply with tribal administrative remedies such as a claims ordinance. This may also mean having to resolve certain disputes in the tribal court or before tribal administrative commissions. The

second approach would be to acknowledge its existence in the contract and have the Indian tribe waive the exhaustion requirement. According to one federal court, "as a general rule, if a tribe has not explicitly waived exhaustion, courts lack discretion to relieve its litigation adversary of the duty of exhausting tribal remedies before proceeding in a federal forum." The waiver of exhaustion cannot be implied; it must be express. If the parties agree to a waiver of the requirement to exhaust tribal remedies in order to get the deal done, then the contract should include an express clause acknowledging and waiving the exhaustion requirement. A contract could include a waiver of

exhaustion similar to a waiver of sovereign immunity. The key is to acknowledge the tribal exhaustion doctrine's existence and deal with it rather than assume a forum selection clause will negate the need to exhaust tribal remedies. The parties will have to negotiate which approach to use.

Conclusion

Doing business with Indian tribes can be profitable for the tribe and for the nonnative company. Businesses should not be intimidated by the unique, sovereign status of Indian tribes. Instead, lawyers who represent businesses should consider employing some of these basic principles of Indian law so they can facilitate greater economic interaction with Indian tribes. In particular, business lawyers need to be cognizant of the tribal exhaustion doctrine and deal with it directly when drafting contracts between their clients and Indian tribes. ■■■

Please see page 1 for information on the upcoming BLT Live teleconference on this topic.