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GENERAL MEMORANDUM 20-006

Arizona Supreme Court Creates New Tribal Sovereign Immunity Test for Tribal Corporations

On February 25, 2020, the Arizona Supreme Court ruled that the sovereign immunity of the Hualapai Tribe does not extend to one of its tribal corporations. In doing so, the court set forth a six-part test for determining when a tribal corporation is protected by tribal sovereign immunity.

In *Hwal'Bay Ba: J Enterprises Inc. v. Jantzen et al.*, No. 19-0123 (Ariz. Feb. 25, 2020), the plaintiff was severely injured in 2016 while whitewater rafting on the Colorado River. She and her husband filed a negligence suit against the Hualapai Tribe and the rafting operator, Hualapai River Runners, which is owned by the Grand Canyon Resort Corporation, a tribal company incorporated under the laws of the Tribe. The plaintiffs sought compensatory and punitive damages. The lower court dismissed the claim against the Tribe on the basis of tribal sovereign immunity but held that the case against the tribal corporation could go forward because the corporation was not protected by the Tribe's sovereign immunity. An appellate court later agreed. The Arizona Supreme Court agreed to determine whether the tribal corporation was a "subordinate economic organization" which would make it an arm of the tribe and thus protected by sovereign immunity.

The court first noted that, "[w]e have not established a test to identify subordinate economic organizations, and no nationwide consensus exists on the appropriate inquiry." The court then went on to create its own test for the Arizona courts to follow that involves six factors:

1. The entity's creation and business form. The court said that it is important to consider who created the entity, under what authority, and whether the entity is an unincorporated enterprise, a partnership with a non-Indian enterprise, or a corporation. The court said that if it is a corporation, it "weighs heavily" against it being a subordinate economic organization. The court said particular attention should be paid to whether the entity was created by a governmental organization of the tribe formed under section 16 of the Indian Reorganization Act (IRA) or by a corporation formed under section 17 of IRA. The court said the former favors sovereign immunity while the latter does not.
2. The entity's purpose. The court said that, "[i]f the entity's purpose is solely to engage in commercial activity, this factor weighs against immunity. ... But if the purpose is to further goals of tribal self-governance, even if the entity also has a commercial purpose, this factor weighs in favor of immunity."
3. The business relationship between the tribe and the entity. The court said, "this inquiry should illuminate the tribe's ownership interest and the amount of control exercised by it

over the entity's affairs." The court said a factor weighing against the entity being an arm of the tribe is shared or indirect ownership of the entity. On the other hand, "a tribe's ownership of property used by the entity for its business pursuits weighs in favor of finding that the entity is a subordinate economic organization." Another consideration is "whether the entity represents the tribe in any capacity. The more the entity represents the tribe's interests, the more likely the entity serves as an arm of the tribe."

4. The tribe's intent to share immunity with the entity. The court said that lower courts should pay attention to the actions of the tribe in determining intent. The courts said, for instance, an entity's indemnification of the tribe for tort liability or purchasing of liability insurance that protects the tribe from the entity's negligence is evidence that the tribe expects the entity to be responsible for its torts.
5. The financial relationship between the entity and the tribe. The court said that lower courts should determine "whether the tribe's assets are protected from judgments entered against the entity." The court said that even if tribal assets are not directly at risk, the courts must consider whether a judgment against the entity would "effectively strike a blow against the tribal treasury" if the tribe depends upon the entity's revenues to fund governmental functions.
6. Whether immunizing the entity furthers federal policies underlying sovereign immunity. The court said courts should separately consider whether recognizing sovereign immunity for the tribal entity would further the federal policies behind the immunity doctrine.

In ruling against tribal sovereign immunity for the tribal corporation, the court made several key findings that it said outweighed other factors in favor of sovereign immunity. For instance, the court noted that (1) the tribal corporation's assets did not belong to the Tribe; (2) the board of directors, and not the Tribe, handles its control and operation; (3) that the corporation can "merge, consolidate, reorganize [and] recapitalize" without tribal council approval; and (4) that the Tribe does not oversee its day-to-day operations.

The court acknowledged there were facts weighing in favor of sovereign immunity that included: (1) the Tribe's constitution authorizing the tribal council to "manage all tribal economic affairs and enterprises" and "establish and regulate subordinate organizations for economic and other purposes"; (2) a tribal council resolution adopting a plan of organization and bylaws for the tribal corporation; (3) a plan of organization stating that the tribal corporation has sovereign immunity that cannot be waived without the tribal council's permission; (4) the Tribe's capitalization of the tribal corporation and authorization to make additional capital investments or loans; (5) the Tribe's role as the sole corporate shareholder with a prohibition on the transfer or pledging of its stock; (6) the tribal council's ability to appoint, suspend or remove the board of directors; (7) the tribal corporation's monthly reports to the tribal council; and (8) a requirement that the board must get tribal council approval for key business decisions, including borrowing or making expenditures of more than \$50,000 and selling all or substantially all of its assets.

Despite these important findings, the court ruled that the tribal corporation did not meet its burden of proof to establish that it was a subordinate economic organization. The court,

however, said the tribal corporation could still ask to be dismissed as a defendant by presenting more evidence in the lower court. For instance, new evidence might illuminate whether the tribal corporation's revenues fund any governmental functions of the Tribe and the extent to which the Tribe depends on those revenues for those functions.

Please let us know if we may provide additional information regarding this case.

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