

The Three Billion Dollar Question: Enforcement of Tribal Court Judgments

By Heidi McNeil Staudenmaier

Notwithstanding the enormous success of tribal gaming and its wide-ranging benefits for Indian Country, the jurisdiction of Tribal Courts has not experienced a similar expansion. To the contrary, in the wake of the recent United States Supreme Court decision of *Plains Commerce Bank v. Long Family Land and Cattle Co*, 128 S. Ct. 2709 (2008), the reach of Tribal Courts over non-tribal members appears to be further limited. Against this backdrop, whether the Northern District of New York decides to uphold a nearly \$3 Billion Tribal Court judgment against Harrah's is being monitored with great interest. This article will summarize the history behind the judgment (likely the largest ever issued by any Tribal Court) and the unsettled areas of Federal Indian Law that will need to be resolved in coming to a decision.

The Tribal Court judgment at issue stems from a failed casino project involving the St. Regis Mohawk Tribe (located in upstate New York) and Park Place Entertainment (acquired by Harrah's in 2005). The Mohawk Tribe had originally entered into certain contracts with Catskill Development (and related entities) in 1996 for a proposed casino project. The land sought for the tribal casino was not located on the reservation; rather, the parcel was located in the Catskills region (near the lucrative New York City market). Due to its "off reservation" status, the land needed federal approval before gaming was permissible. Within days of securing initial Federal approval of the proposed casino site in April of 2000, the Tribe rescinded its contracts with the Catskill developers and then entered into certain casino development agreements with Park Place.

Litigation by certain Tribal members and the Catskill developers immediately ensued against Park Place and others. The Catskill developer lawsuit proceeded in Federal Court, while the Tribal member lawsuit was filed in the Mohawk Tribal Court. Various claims were made against Park Place, including fraudulent inducement to enter into the contract with Park Place and tortious interference with the prior Catskill developer contracts.

Park Place objected to the Tribal Court's jurisdiction, and filed a separate action in Federal Court to enjoin the Tribal suit. Park Place asserted that the Tribal Court was invalid, based on extensive turmoil that had been ongoing for a number of years over Tribal leadership and the authority of the Tribal Court. The Tribe was split as to the proper governing structure of the Tribe, which in turn led to questions as to whether the Tribal Court itself was validly constituted.

Notwithstanding the tumultuous inter-tribal controversy, the Federal Court determined that it lacked jurisdiction to address the Tribal Court's validity. Park Place, however, refused to return to Tribal Court and did nothing further to defend itself in those proceedings. Thereafter, after sending multiple notices to Park Place seeking its participation and defense for over a year, the Tribal Court entered a default judgment in 2001 in the amount of \$1.782 Billion in actual damages and \$5 Million in punitive damages. The Tribal Court cited Park Place's purported "willful and wanton disregard" of the Court and its authority in entering the judgment.

Thereafter, Park Place sought to settle the whole matter (both in Tribal Court and in the Federal Court, where appeals and other proceedings had continued). In 2003, the Federal Court entered a Judgment Dismissing Action Based Upon Settlement. Apparently, however, there is a question whether the settlement was fully consummated, because one or two of the plaintiffs did not sign the agreement.

In July of 2007, the Tribal Court approved an assignment of the default judgment to the Catskills Litigation Trust. The Trust consists of certain Tribal members, the original Catskill developers, and other individuals, including Dennis Vacco, former New York Attorney General. The Trust apparently has agreed to prosecute the matter in exchange for a share of any proceeds obtained from the default judgment. The Tribal Court also re-affirmed the original default judgment and added \$1 Billion in interest -- bringing the total to approximately \$2.8 Billion (with interest continuing to accrue on a daily basis).

With Harrah's acquisition of Park Place in 2005, Harrah's is now on the hook for the default judgment. Because Harrah's assets are beyond the Tribal Court's jurisdiction, the Trust has filed suit in the Northern District of New York to enforce the judgment. Harrah's was acquired by certain private equity funds in early 2008.

In determining whether to enforce the Tribal Court judgment, the New York Federal Court will first need to decide what standard to apply. There is no definitive answer in the existing case law as to whether tribal court judgments are accorded "full faith and credit" -- requiring enforcement -- or "comity" -- giving the Court discretion as to enforcement. For various reasons, it is more likely the Court will conduct a comity analysis, as opposed to full faith and credit.

The Ninth Circuit Court of Appeals has examined a similar issue involving a tribal court judgment and concluded that federal comity principles should apply in determining whether to enforce a tribal court judgment. *See Wilson v. Marchington*, 127 F. 3d 805 (9th Cir. 1997). Because the Ninth Circuit decision is not binding on the New York Federal Court, it is unknown what standard will be applied. If the New York Court chooses to follow the federal comity rule as espoused in *Wilson v. Marchington*, or crafts a similar rule, the Court can refuse to uphold the Tribal Court judgment if it determines that: (1) the Tribal Court lacked jurisdiction, or (2) the defendants were not afforded due process in the Tribal Court proceedings.

To determine whether the Tribal Court had jurisdiction over Park Place, the Federal Court will need to assess both subject matter jurisdiction and personal jurisdiction. For subject matter jurisdiction, the general rule in Federal Indian Law is that tribes do not possess jurisdiction over non-Indians who come within their borders. But there are two broad exceptions to that rule: (1) Tribes may regulate the activities of non-members who enter into consensual relationships with the Tribe or its members, through commercial dealing, contracts, leases, or other arrangements; and (2) Tribes may regulate the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe.

Here, Park Place entered into a consensual agreement with the Tribe pertinent to the proposed casino whereby such casino would have benefited the tribal members. As such, the Tribal Court arguably had subject matter jurisdiction over Park Place.

Regarding personal jurisdiction, the courts usually look to state law in comity cases. Under New York state law, the mere fact that Park Place entered into a contract with the Tribe may be sufficient to establish personal jurisdiction.

The more difficult question is whether Park Place was afforded sufficient due process. If the Tribal Court proceedings did not possess adequate procedures to ensure fairness, the Court may have sufficient grounds to deny recognition of the default judgment. The Court's analysis of due process will likely focus on the validity of the Tribal Court. The controversy within the tribal government and whether the Tribal Court was duly authorized to function is sure to be hotly contested. Harrah's will likely contend that the Tribal Court wholly lacked authority and therefore there was no reason to participate in the proceedings. Harrah's also will likely argue that Park Place refused to participate because such proceedings were lacking in fairness and due process. Finally, whether the matter was settled will be scrutinized.

Nevertheless, Harrah's will likely need to explain the fact that Park Place's counsel apparently filed an application for permission to appear and practice in the Tribal Court and agreed "under penalty of perjury" to submit to the jurisdiction of the Tribal Court. Park Place also filed a motion to dismiss whereby it only references a challenge to the authority of the Tribal Court by way of a footnote.

To date, neither the Department of the Interior nor the Federal Courts have been willing to make a determination as to Tribal Court's validity.

Harrah's initial motion to dismiss the New York Federal Court enforcement action was denied in late 2007. No trial date is set and discovery is ongoing.

It is difficult to predict whether the New York Federal Court will enforce the judgment. Concerns over due process and the validity of the Tribal Court will be key inquiries. Further, the initial parcel of land where the tribal casino was to be located was officially denied for gaming purposes in January of this year by the Department of the Interior. Thus, there may be an argument that the underlying contract was void as a matter of law or possibly against public policy since the land was not legally permissible for gaming purposes. Moreover, the political climate for permitting off-reservation gaming projects continues to be hostile and volatile.

Harrah's also may be able to attack the monetary amount of the judgment, particularly since there has yet to be an operating, profitable tribal casino. Finally, even if the New York Federal Court decides to enforce the judgment, Harrah's would presumably pursue all appeal options. And, if the matter somehow ends up in the United States Supreme Court – which has been a less than friendly forum for Native Americans in recent years -- there is some likelihood that any decision will not be favorable for the Tribe.

One thing is clear: this whole scenario has been costly and time-consuming for all involved. Indeed, the Mohawk judgment nearly derailed the \$17.1 Billion private equity acquisition of Harrah's earlier this year. At a minimum, the situation has highlighted the need for companies doing business with Indian Tribes to recognize the potential for litigation in Tribal Court unless they have agreed to dispute resolution in state court, binding arbitration or otherwise. No matter what the outcome is for Harrah's, to gamble that a court will disagree with a tribe's right to exert its jurisdiction over matters of interest to the tribe may pose a risky business decision.

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