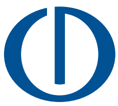

CROWE&DUNLEVY
ATTORNEYS AND COUNSELORS AT LAW

D. Michael McBride III, Director
Indian Law & Gaming Practice Group

Chairs

D. Michael McBride III, Director
michael.mcbride@crowedunlevy.com

Jimmy Goodman, Director
jimmy.goodman@crowedunlevy.com

Susan Huntsman, Director
susan.huntsman@crowedunlevy.com

Members

Zane Anderson, Associate
zane.anderson@crowedunlevy.com

Walter Echo-Hawk Jr., Of Counsel
walter.echohawk@crowedunlevy.com

Gerald Jackson, Director
gerald.jackson@crowedunlevy.com

Courtney Jordan, Associate
courtney.jordan@crowedunlevy.com

Michael Laird, Director
michael.laird@crowedunlevy.com

Paige Masters, Associate
paige.masters@crowedunlevy.com

Georgeann Roye, Associate
georgeann.roye@crowedunlevy.com

Mark Walker, Director
mark.walker@crowedunlevy.com

Michigan Comes Up "Snake Eyes" Before the Supreme Court in Quest to Dismantle Tribal Immunity: The Bay Mills Casino Case and Warning Signs for the Future

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In the past several decades, Indian law cases generally have not gone well for tribes before the Supreme Court. However, in *Michigan v. Bay Mills Indian Community*, decided on May 27, 2014, Justice Kagan writing for a 5-4 majority handed Indian country a rare and monumental win. The Court had to revisit whether to preserve the doctrine of tribal sovereign immunity and whether to revisit and reverse its prior decision in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies* (1998). Recall that *Kiowa* vacated a series of decisions from the Oklahoma Supreme Court that refused to recognize tribal immunity off of Indian country.[1] Declining Michigan's plea to follow the same path, the Court stated that "We will not rewrite Congress' handiwork. Nor will we create a freestanding exception to tribal immunity for all off-reservation commercial conduct. This Court has declined that course once before." (Sl. op. at 21.) The Court adhered to prior precedent and made clear that it is the prerogative of Congress, not the courts, to modify tribal immunity.

A Close Call

Indian country held its breath waiting on this case. *Bay Mills* was the oldest case on the docket and once the parties argued it on December 2, each passing day brought more trepidation. The stakes were extremely high. A bad outcome could have crippled tribal governments and left tribal treasuries vulnerable to legal assault. Michigan, joined by other states, including Oklahoma, asked the Court to toss the long-standing doctrine of tribal immunity for off-reservation commercial conduct.

Chief Justice Roberts, along with Justices Kennedy, Breyer and Sotomayor, joined Justice Kagan to affirm *Kiowa* and other cases recognizing tribal governmental immunity to suit. Justice Kagan wrote the majority opinion with wit and flair utilizing gaming diction in gems such as, "that argument comes up snake eyes" (Sl. op. at 9) and "[t]o overcome all these reasons for this Court to stand pat, Michigan would need an ace up its sleeve." (Sl. op. at 16.)

The Court took a close look at the Indian Gaming Regulatory Act of 1988 and parsed whether the gaming activity occurred on Indian lands or not. The entire basis of the State of Michigan's lawsuit rested on a claim that the Bay Mills Indian Community constructed a casino on *non-Indian* land. Reading IGRA narrowly, the majority found the IGRA does not waive tribal immunity when the alleged compact violations did not occur "on Indian lands."

Tribal Governments Depend on Commercial Revenue

Justice Sotomayor wrote a sympathetic, concurring opinion detailing

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1 Other Kiowa Tribe cases vacated after the Manufacturing Technologies decision include Aircraft Equip. Co. v. Kiowa Tribe, 1997 OK 62, 939 P.2d 1143, vacated, 524 U.S. 901 (1998), and Hoover v. Kiowa Tribe, 1998 OK 23, 957 P.2d 81, vacated, 525 U.S. 801 (1998). An earlier 1996 decision, First Nat'l Bank v. Kiowa, Comanche & Apache Intertribal Land Use Ctte., 1996 OK 34, 913 P.2d 299, was also found overruled by Manufacturing Technologies. See Carl. E. Gungoll Exploration Joint Venture v. Kiowa Tribe, 1998 OK 128, 975 P.2d 442.

the history and comity against limiting tribes' sovereignty immunity. She detailed the fortified history of immunity and noted the particular challenges that small and struggling tribal governments have in garnering revenue for governmental operations. She noted that tribes must rely on commercial activities to meet their citizens' needs.

Ominous Dissention
The four-justice dissent would have overruled *Kiowa* in its entirety—eliminating any tribal immunity for off-reservation commercial activity. Justice Thomas, joined by Justices Scalia, Ginsberg and Alito, stated that tribal immunity is judicially created federal common law, *Kiowa* was a mistake and the Supreme Court should fix it. "Allowing legislative inaction to guide common-law decision making is not deference, but abdication." (Thomas, J., dissenting, at 15.) Tribes should pay heed to this narrow victory and take proactive steps to protect immunity.

Warning Signs
Despite the significant win for Indian Nations, the majority foreshadows trouble for tribes on other fronts—particularly in the realm of personal injury and individual tort claims. For example, in footnote 8, the majority notes that "special justification" might exist in the future for abandoning the tribal immunity precedent "if no alternative remedies were available" for an ordinary "tort victim, or other plaintiff who has not chosen to deal with a tribe, [and] has no alterative way to obtain relief for off-reservation commercial conduct." (Sl. op. at 16) The majority also acknowledged the ability of states to seek injunctive relief against tribal officials and even to pursue criminal prosecution against gamers on tribally owned property not considered "Indian lands." (Sl. op. at 13.)

A number of current cases in the tort realm readily come to mind, both in Oklahoma and beyond. In Oklahoma, there is the flip-flop precedent of *Sheffer v. Buffalo Run Casino*, where the Oklahoma Supreme Court reversed its own, recent prior opinions that had declared that a tribe could be sued for dram shop liability, finding (after the death and replacement of a Justice) that a tribe does remain immune to suit. Meanwhile, four days before *Bay Mills*, the Supreme Court of Alabama denied a claim of immunity by the Poarch Band of Creek Indians in a dram shop case. Slip and fall cases, automobile accidents, alcohol-dram shop liability cases—they all present possibilities for expansion for potential claims against tribes.

Proactive Steps for Tribes
To forestall courts concluding that no remedy exists for non-Indian tort victims, tribes should enact laws which provide a limited waiver of immunity in their own courts or administrative law systems to redress and provide plaintiffs justice—on the tribes' terms. Not only is this good government practice for a sovereign, but it provides protection for tribes against the arguments raised by the *Bay Mills* majority and welcomed by the four-person dissent. (Thomas, J., dissenting, at 15 n.5.)

Proactive tribal action might also help discourage Congress from accepting the Court's invitation "for Congress, now more than ever, to say whether to create an exception to tribal immunity for off-reservation commercial activity." (Sl. op. at 20.) Tribes should take their future in their own hands and eliminate the perceived "injustice" that may cause Congress or the Courts to act in the face of bad facts and, thereby, create bad law.

If you have any questions about this recent Supreme Court decision, please contact Michael McBride or any other member of Crowe & Dunlevy's Indian Law & Gaming practice group.

Contact:
D. Michael McBride III
918.592.9824

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For more than 110 years, Crowe & Dunlevy has provided innovative and effective legal services to clients in numerous industries. The firm's attorneys are regularly ranked among the top lawyers in the nation by recognized peer-review organizations.

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