

Bankruptcy Automatic Stay: Tribal Sovereign Immunity Abrogated

by Steven T. Waterman

First Circuit - *Coughlin v. Lac Du Flambeau Band of Lake Superior Chippewa Indians*

The issue was whether tribal sovereign immunity protected the tribal lender from the automatic stay. On May 6, 2022, the First Circuit held that tribal sovereign immunity was abrogated by section 106 of the Bankruptcy Code. *Coughlin v. Lac Du Flambeau Band of Lake Superior Chippewa Indians*, 33 F.4th 600 (1st Cir. 2022) [hereinafter *Coughlin*].

Congress may abrogate tribal sovereign immunity provided it is “unequivocally express[ed]”. The question was whether section 106 of the Bankruptcy Code “unequivocally expressed” the intent to abrogate tribal sovereign immunity. Section 106 expressly abrogates the sovereign immunity of governmental units, as to various provisions of the Bankruptcy Code, including the automatic stay. The sub-issue for the Court was whether tribes are within the Bankruptcy Code definition of governmental unit.

The First Circuit agreed with the Ninth Circuit in ruling that the term governmental unit covers essentially all forms of government, including tribes. Although tribes are not specifically listed within section 101(27) of the Bankruptcy Code, the First Circuit held that tribes are within the catchall of “other foreign or domestic government” in that section. Thus, the tribal lender was not immune from the Bankruptcy Code’s automatic stay against collections and was liable for damages due to the violation thereof.

The dissent in *Coughlin*, like the Sixth Circuit previously, argues for a higher standard of clarity in determining whether Congress intended to abrogate sovereign immunity in a statute. The dissent argues that domestic governments are only those that can trace their origins to the U.S. Constitution, which tribes cannot. In other words, simply concluding “domestic government” could be read to encompass Indian tribes is not enough—Congress must name Indian tribes directly or at least very clearly indicate an intent to abrogate tribal sovereign immunity. After *Coughlin* there is no question that tribes are subject to the automatic stay that bars collection activity once debtors file for

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The decision of the First Circuit in *Coughlin* complements other decisions holding that tribes are within the Bankruptcy Code's definition of governmental unit. Consequentially, applying the definition to section 109 of the Bankruptcy Code means tribes are not eligible for bankruptcy relief. See, Steven T. Waterman, *Tribal Troubles – Without Bankruptcy Relief*, 24 AM. BANKRUPTCY INST. J. 44 (2010).

The Court's decision is available [here](#). We expect to supplement this e-Update in case a petition for *certiorari* to the U.S. Supreme Court is granted, which is possible given the circuit split on the issue.