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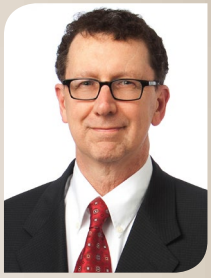

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Godfrey & Kahn's Transactional Experience Helps Tribal Clients Evaluate Business Opportunities

Godfrey & Kahn, a business law firm of approximately 160 attorneys, has a well-deserved reputation for outstanding representation of clients in large transactions. In 2018, the firm's highly experienced Corporate Team represented clients in:

- 104 transactions with an aggregate value of approximately $10.2 billion, including:
  - 63 mergers and acquisitions for a combined purchase price of over $2.5 billion
  - 41 restructuring and recapitalization transactions with an aggregate value of over $7.7 billion

Our clients include tribes, public companies, private companies, private equity firms and underwriters, with transactions involving a variety of industries, including accounting, banking/financial services, business support services, distribution, health care, investment management, manufacturing, media, private equity/venture capital, professional services, retail, software, supply and technology.

Godfrey & Kahn works with tribes seeking to diversify into non-gaming businesses. Our deep transactional experience allows us to identify key issues and helps tribes avoid spending time and money on flawed proposals. When our tribal clients identify an appropriate opportunity, we negotiate to assure that our tribal clients' interests are fully protected.

For more information on Godfrey & Kahn's transactional practice, contact Brian Pierson at 414.287.9456 or bpierson@gklaw.com.

Selected Court Decisions

In *Gingras v. Think Finance, Inc.*, 2019 WL 1780951 (2d. Cir. 2019), Vermont residents brought a putative class action against individuals and companies involved in an **online lending** operation owned by the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation. The loan agreements required arbitration and permitted borrowers to select the procedures of the American Arbitration Association or JAMS, and the arbitration could occur on the reservation or within 30 miles of the borrower's residence at the choice of the borrower. The arbitrator was required to apply Chippewa Cree tribal law to the dispute and was barred from hearing class action claims. State law was made expressly inapplicable. Plaintiffs alleged that the high interest rates violated Vermont and federal law and sought prospective declaratory and injunctive relief against tribal officers in charge of lenders as well as an award of money damages against other defendants. Some defendants moved to dismiss on the basis of tribal sovereign immunity, and all defendants moved to compel arbitration under the terms of the loan agreements. The district court denied

The Godfrey & Kahn Indian Nations Law Practice Group provides a full range of legal services to Indian nations, tribal housing authorities, tribal corporations and other Indian country entities, with a focus on business and economic development, energy and environmental protection, and housing development.

both motions and the Second Circuit affirmed: "An *ex parte Young*-type suit protects a state's important interest in enforcing its own laws and the federal government's strong interest in providing a neutral forum for the peaceful resolution of disputes between domestic sovereigns, and it fairly holds Indian tribes acting off-reservation to their obligation to comply with generally applicable state law. … Some district courts (and at least one treatise) endorse a rule that government entities, and their officers sued in their official capacities, cannot ordinarily be sued under RICO. … It appears that the reasoning in these and other decisions has less to do with the inability of a public entity to form a criminal intent than with concern over the appropriateness of imposing the burden of punitive damages on taxpayers based on misconduct of a public official. … But concern for the inappropriateness of saddling the taxpayers with the financial burden of punitive damages imposed on a government entity is plainly not implicated where, as here, the relief sought is an injunction and not money damages. Accordingly, we hold that Plaintiffs' RICO claim applies substantively to the Tribal Defendants in this case. …Plain Green is a payday lending entity cleverly designed to enable Defendants to skirt federal and state consumer protection laws under the cloak of tribal sovereign immunity. That immunity is a shield, however, not a sword. It poses no barrier to plaintiffs seeking prospective equitable relief for violations of federal or state law. Tribes and their officers are not free to operate outside of Indian lands without conforming their conduct in these areas to federal and state law. Attempts to disclaim application of federal and state law in an arbitral forum subject to exclusive tribal court review fare no better."

In *Hestand v. Gila River Indian Community*, 2019 WL 1765219 (9th Cir. 2019), the Gila River Indian Community Tribal Court had dismissed Hestand's age discrimination claim based on **sovereign immunity**. When Hestand sued in federal district court, the court dismissed based on the doctrines of claim and issue preclusion. On appeal, Hestand argued that the federal court review should have been *de novo* but the Ninth Circuit disagreed, citing the "general rule" that "federal courts may not readjudicate questions—whether of federal, state or tribal law—already resolved in tribal court absent a finding that the tribal court lacked jurisdiction or that its judgment be denied comity for some other valid reason. … While we review *de novo* a district court's determination whether sovereign immunity applies, … this case involves a tribal court's determination. Principles of comity generally require us to recognize and enforce tribal court decisions. … There are, however, two circumstances [that] preclude recognition: when the tribal court either lacked jurisdiction or denied the losing party due process of law. … Neither applies here." (Internal quotations, citations and emendation omitted.)

In *United States v. Santistevan*, 2019 WL 1915791 (D.S.D. 2019), Rosebud Sioux Tribe law enforcement officers stopped Santistevan, a non-Indian, within the Rosebud Sioux Reservation, after observing Santistevan speeding, observed an open beer container and evidence of marijuana in the front seat of Santistevan's vehicle, pursued Santistevan at high speed after Santistevan sought to escape and held him for over seventy minutes for county law enforcement officers. After federal authorities charged him with possession of ammunition by a prohibited person, Santistevan moved to suppress evidence seized as a result of the detention by tribal officers. The district court denied the motion: "Although tribes generally do not have criminal jurisdiction over non-Indians, … tribal police have the **authority to detain non-Indians** who commit crimes within Indian country until they can be turned over to the appropriate state or federal authorities. … The tribal officers' detention of Santistevan was reasonable under the Fourth Amendment. Officers conducted a traffic stop for speeding and discovered Santistevan was driving with a suspended driver's license. When Officer Antman learned that Santistevan was a non-Indian, he contacted the Todd County Sheriff's Office immediately. … Before Officer Antman was able to secure Santistevan, Santistevan led officers on a high-speed chase. After officers were able to use road spikes to stop the vehicle, Santistevan was placed in a patrol car until Deputy Red Bear arrived and arrested Santistevan on state charges. The tribal officers' detention of Santistevan lasted approximately seventy-five minutes. … This was not an unreasonable amount of time under the circumstances. ... The tribal law enforcement detention of Santistevan did not violate the Fourth Amendment. … A search that includes the passenger compartment of the vehicle, its trunk and all containers,

packages and compartments in the vehicle was proper under the automobile exception to the warrant requirement." (Citations and internal quotations omitted.)

In *Cain v. Salish Kootenai College, Inc.,* 2019 WL 1643634 (D. Mont. 2019), former employees of Salish Kootenai College, Inc. (the College) brought a *qui tam* action against the College and eight of the College's board members (Individual Defendants), alleging that defendants violated the federal False Claims Act (FCA) which permits suits against "any person" who defrauds the government by "knowingly present[ing] ... a false or fraudulent claim for payment or approval," Montana law by providing false progress reports on students in order to keep grant monies coming from the Department of Health and Human Services and the Indian Health Service, and the retaliation provisions of 31 U.S.C. § 3730(h). After permitting jurisdictional discovery, the district court determined that the College was an arm of the Tribe entitled to share its **sovereign immunity** and dismissed claims against it. On the Individual Defendants' motions to dismiss based on sovereign immunity, the court held that (1) the plaintiffs could pursue FCA claims against the Individual Defendants personally, (2) the amended complaint satisfied the particularity requirements of Fed. R. Civ. Proc. 9(b), (3) the plaintiffs could not maintain their retaliation claims against the Individual Defendants because the retaliatory actions could only have been taken by the College employer, and (4) the court could exercise supplemental jurisdiction over the Plaintiffs' claims against Individual Defendants based on allegations of defamation, blacklisting, and breach of good faith and fair dealing under Montana law: "The Ninth Circuit explained that the general rule against official capacity claims 'does not mean that tribal officials are immunized from individual capacity suits arising out of actions they took in their official capacities. Rather, it means that tribal officials are immunized from suits brought against them because of their official capacities—that is, because the powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe.'… Tribal sovereign immunity derives from the same common law immunity principles that shape state and federal sovereign immunity. … An individual capacity suit proves proper, therefore, when a plaintiff seeks to hold a government official or employee personally liable for their own unlawful choice or action."

In *Mitchell v. Preston*, 2019 WL 1614606 (Wyo. 2019), Mitchell, a member of the Cheyenne River Sioux Tribe, and Preston, a non-Indian, were the father and mother, respectively, of a child born in Montana in 2010. While both parties were residing in Wyoming, a state court awarded Preston temporary custody, subject to Mitchell's visitation rights. Mitchell ignored court orders and moved with the child to the Cheyenne River Sioux Reservation in South Dakota. The state court awarded custody of the child to Preston in 2015 but Mitchell refused to return the child. Mitchell moved in state court to transfer the case to the tribal court, contending that the tribal court had issued orders assuming jurisdiction. The state court struck the motion on the ground that it had "exclusive, continuing original jurisdiction to make a custody determination." The Wyoming Supreme Court affirmed: "The tribal court appropriately recognized the limitations on its authority under the [Parental Kidnapping Prevention Act] PKPA. In the March 10, 2016 order, the tribal court stated that the Wyoming district court retained primary jurisdiction over the custody matter. The tribal court's May 29, 2017 order … confirmed that the tribal court was bound to recognize the Wyoming custody order. The tribal court also stated that the PKPA prohibited it from modifying the permanent custody order unless the Wyoming court lost or relinquished jurisdiction. Therefore, the tribal court's assertion of emergency jurisdiction in its March 10, 2016 and November 3, 2016 orders did not affect the February 2015 Wyoming custody order or the Wyoming district court's continuing jurisdiction to make permanent custody determinations. … Father's argument that the child is a ward of the tribal court is apparently based upon the emergency orders discussed above and a November 29, 2017 notice from the Tribal Chairman stating that he was placing the child under permanent protection of the tribe, as a ward of the tribe, in the care of Grandmother. Father incorrectly suggests that the Tribal Chairman's notice is an order from the tribal court."

In *United States v. Cortiz*, 2019 WL 1517583 (N.M. 2019), the United States prosecuted Cortiz based on the Indian country status of the land where he allegedly committed his crime. Cortiz argued that the status of the land, and the question of jurisdiction, should be submitted to the jury but the court disagreed and granted the

government's motion to make a pre-trial determination: "The Court finds that a pretrial determination of land status will promote efficiency in this proceeding and will in no way deprive Defendant of his right to a jury trial. If the Court concludes that the area in question is Indian Country, the Government must still prove at trial, beyond a reasonable doubt, that the alleged offense occurred at this location. This satisfies the constitutional requirement that all elements of the offense be submitted to the jury and proven beyond a reasonable doubt." (quoting *United States v. Hunter*).

In *Brice v. Plain Green*, 2019 WL 1500361 (N.D. Cal. 2019), plaintiffs were non-Indians residing in California off reservation who **borrowed money over the internet** from lenders affiliated with the Chippewa Cree and Otoe-Missouri tribes at interest rates exceeding the maximum allowed under federal law. The plaintiffs sued non-Indian entities involved in the loans for violations of state usury law and the federal Racketeering Influenced and Corrupt Organizations (RICO) Act. The defendants moved to dismiss, transfer to another court where similar claims were pending or enforce the arbitration clause in the loan agreements, which purported to be governed by tribal law. The federal district court denied all of the motions: "Given the size and commercial value of the California market, plaintiffs assert that defendants cannot claim ignorance that their loans would be secured by California consumers. The exercise of jurisdiction over the Haynes defendants is reasonable in light of the Haynes' defendants' alleged immense profit from loans secured by California consumers, California's significant interest in having its usury rates applied to California consumers, the miniscule burden to defendants of litigating here, and that the only other law defendants contend applies to this dispute (tribal law) is a sham attempt to avoid state usury laws."

In *Employers Mutual Casualty Company v. Branch*, 2019 WL 1489121 (D. Ariz. 2019), Employers Mutual Casualty Company (EMC), an Iowa-based insurance company, sold commercial general liability policies to Service Station Equipment and Sales, Inc. (SSES) and Milam Building Associates, Inc. (Milam). Neither company has any tribal affiliation. SSES and Milam performed work on a gas station in Chinle, Arizona on tribally-owned land within the Navajo Nation reservation. In March 2005, an employee of a Milam subcontractor breached a fuel line, causing over 15,000 gallons of gasoline to leak into the ground. The Navajo Nation sued multiple parties, including SSES, Milam and EMC, in Navajo tribal court. EMC moved to dismiss for lack of jurisdiction. After the tribal courts denied the motion, EMC sued in federal court seeking declaratory and injunctive relief. The court granted EMC's motion to dismiss: "[T]o the extent the Ninth Circuit has suggested an insurance company may be sued in tribal court despite the absence of any physical presence on tribal land, its decisions have been limited to circumstances where the policyholder was a tribal member and the insurance company engaged in conduct specifically directed toward the reservation. No court has ever recognized tribal jurisdiction under the circumstances presented here, where an insurance company simply sold a policy to a non-tribal member. The Court thus concludes this case doesn't satisfy either of the jurisdictional tests recognized by the Ninth Circuit: (1) EMC isn't subject to jurisdiction under the 'right to exclude' test because EMC has never done anything to enter tribal land (and thus can't be excluded), and (2) neither of the exceptions recognized in ***Montana v. United States***, 450 U.S. 544 (1981), is applicable."

In *Pueblo of Isleta v. Lujan*, 2019 WL 1429586 (D.N.M. 2019), the Pueblos of Isleta, Sandia, Tesuque, Santa Ana, Santa Clara, and San Felipe (collectively, "the Pueblos") had entered into **gaming compacts** with New Mexico in 2007, 2015 and 2016 that included quarterly revenue sharing payments to the State in exchange for the Pueblos' nearly exclusive right to conduct certain kinds of gaming. The State sent notices of non-compliance in 2017, asserting that the Pueblos had miscalculated their revenue sharing obligations under the 2007 Compact by excluding the face value of free play and by deducting the value of prizes won by patrons as a result of free play wagers from their Class III gaming machines' "Net Win." The Pueblos sued for a declaratory judgment. On motions for summary judgment, the district court held that the Defendants notices constituted an attempt to impose a tax, fee, charge, or other assessment in violation of the Indian Gaming Regulatory Act (IGRA) and the *per se* rule prohibiting state taxation of federally recognized Indian tribes without express Congressional authorization: "Subsection 4(C)

of the 2007 Compacts required the Pueblos to: (1) maintain all of their gaming books and records in accordance with generally accepted accounting principles (GAAP); (2) verify their Net Win calculations in accordance with GAAP; and (3) specify the 'total amount wagered' for purposes of calculating their Net Win in accordance with GAAP. Read together, these provisions are clear: the 2007 Compact required the Pueblos to calculate their Net Win in accordance with GAAP. And, as previously discussed, under GAAP the face value of free play must be excluded, and the value of prizes won as a result of free play wagers must be deducted, from net win. Thus, Subsection 4(C) required the Pueblos to exclude the face value of free play and deduct the value of prizes won as a result of free play wagers in calculating their Net Win. … Lacking any authorization under Section 2710(d)(3)(C), Defendants' claims for such payments from the Pueblos constitute an impermissible attempt to impose a tax, fee, charge, or other assessment under Section 2710(d)(4)."

In *Sault Ste. Marie Tribe v. Bernhardt*, 2019 WL 1789458 (D.D.C. 2019), the Michigan Indian Land Claims Settlement Act, enacted by Congress in 1997, had established a trust fund for the Sault Ste. Marie Tribe (Sault Tribe) from money judgments awarded under the Act and provided that interest and other investment income from this fund could be used "for consolidation or enhancement of tribal lands" and that "lands acquired using amounts from interest or other income of the [trust fund] shall be held in trust by the Secretary for the benefit of the tribe." The Sault Tribe requested that the U.S. Department of the Interior (Department) take parcels **of land into trust, which the Sault Tribe intended to use for gaming**, several hundred miles from its reservation. The Department refused on the ground that the tribe had not shown how the parcels would enhance the value of its existing landholdings and that parcels cannot be consolidated unless they are contiguous. The Sault Tribe sued in federal court. Two tribes, the Saginaw Chippewa Indian Tribe of Michigan and the Nottawaseppi Huron Band of the Potawatomi (NHBP), and two commercial casinos moved to intervene. The court granted the motions over the objection of the Sault Tribe: "The Sault Tribe, the Saginaw Tribe, and NHBP all have agreements with the State of Michigan. These compacts explicitly prohibit the tribes from submitting trust applications to the Department without prior written agreement from Michigan's other federally recognized tribes. … The Intervenor Tribes allege that the Sault Tribe failed to seek this prior written agreement before filing its applications. … Put simply, they have an interest in the Court's determination about how, if at all, the compacts apply to the Sault Tribe's submissions to the Department, and to the Department's decision to deny these applications. … As discussed above, if the Court orders the Department to take the parcels of land into trust, the Sault Tribe will likely succeed in opening casinos on the land. The resulting loss in gaming dollars from increased competition is not too speculative to preclude the Casinos from intervening. And even if the fate of the proposed casinos is speculative, an order compelling the Department to take the parcels of land into trust would cause a significant immediate injury by depriving [the Casinos] of the benefit of a favorable final judgment." (Emendations and quotations omitted.)

In *Clay and Osceloa v. Commissioner of Internal Revenue Service*, 152 T.C. No. 13 (2019), 2019 WL 1793323, Tax Ct. Rep. Dec. (RIA), Clay and Osceola, a married couple and members of the Miccosukee Tribe, had received quarterly distributions, Christmas bonuses and miscellaneous payments from **tribal gaming revenues**. The Tribe had, apparently on the advice of in-house legal counsel, urged members not to disclose their existence or report them to the IRS as income. Outside counsel had advised the Tribe that the payments were taxable. When the IRS sought to tax their tribal distributions, plaintiffs sued, alleging that the lease payments and/or "general welfare" payments were not subject to taxation. The court concluded that the payments were taxable under the Indian Gaming Regulatory Act Section 2710(b)(3)(D) ("per capita payments are subject to Federal taxation") and that the plaintiffs' arguments were meritless: "[T]he record does not support petitioners' recharacterization of the gross receipts tax as rent payments that fall outside the IGRA. … There is no written lease between the Tribe and the Casino, and the 1995 gross receipts tax ordinance makes no mention of a lease or the use of tribal land. Nor have we found any reference to a lease from the Tribe to the Casino in any of the General Council meeting minutes in the record."