RECENT DEVELOPMENTS—RIVERBOAT CASINOS AND TRIBAL SOVEREIGNTY ISSUES IN GAMING BANKRUPTCY CASES

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Riverboat casinos and tribal gaming operations sparked a dramatic expansion of the American gaming industry in the 1990s and early 2000s. Most of that growth occurred outside of the industry's historical homes in Nevada and New Jersey, forcing a host of new jurisdictions to develop their own body of gaming law. As the gaming industry has continued to evolve, the same riverboats and tribal operations that led the boom are facing increasing financial pressure, creating a host of novel legal questions—particularly as gaming law interacts with other specialized legal niches, such as maritime security interests, tribal sovereignty and bankruptcy.

Gaming and bankruptcy each exist under specialized, almost sui generis, legal doctrines. When they interact (as they are destined to do), each area's bedrock legal fictions often give way to results-oriented policy concerns.[1] The result is a hybrid jurisprudential framework that can present a number of potential frustrations and pitfalls even for the most experienced practitioners.

Similar complications have arisen as courts, creditors and gaming companies have struggled to deal with questions of how to perfect and enforce security interests in floating

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[1]Policy concerns, such as the treatment of casino chips in first-day orders, among others, are addressed in Bankruptcy Trends in the Gaming Field, 10 J. Bankr. L. & Prac. 293 (May/June 2001) by Gerald M. Gordon, Rudy J. Cerone and Scott Fleming. This article a partial update of, and sequel to, portions of that article.

casinos and whether, and to what extent, tribal sovereignty disrupts both creditors' and debtors' rights generally, and in the context of bankruptcy.

I. MORTGAGES AND SECURITY INTERESTS ON FLOATING COLLATERAL

All along the Mississippi River, riverboat casino laws served as the vehicle to introduce limited legalized gaming operations to new markets. Though each state's regulations varied, the one constant was that gaming activities were limited to floating structures. Those structures then served as collateral for the creditors (usually bondholders) financing casino construction and operations. As creditors began to enforce their security interests, basic security interest questions of perfection and priority often turned on the eternal and fundamental debate of maritime law—Vessel or Non-Vessel?

A. The Ship Mortgage Act versus UCC Article 9: Unsafe Harbors for Perfection and Performance

Section 31321 of the Ship Mortgage Act requires that a conveyance, mortgage or related instrument concerning a vessel, including any part of a documented vessel or a vessel for which the application for documentation is filed, be filed with the Secretary of Transportation in order to be valid against any persons except the grantor or a person having actual notice of the security instrument.[2] The statute further provides that each conveyance, mortgage or related instrument that is filed in substantial compliance with § 31321 is valid against any person from the time it is filed with the Secretary. A preferred ship mortgage attaches to the vessel and all the equipment and appurtenances on board owned by the vessel's owner.[3]

In the event the vessel is not a documented vessel as

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[2]The Ship Mortgage Act is codified in 46 U.S.C.A. §§ 31301, et. seq., titled "Commercial Instruments and Maritime Liens." Ship mortgage filings are made with the United States Coast Guard's National Vessel Documentation Center in Falling Waters, West Virginia.

[3]*Estate of Rhyner v. Farm Credit Bank of Spokane*, 780 P.2d 1001, 1005, 1990 A.M.C. 1185 (Alaska 1989); *U.S. v. F/V Golden Dawn*, 222 F. Supp. 186, 1964 A.M.C. 691 (E.D. N.Y. 1963), quoted in *First National Bank & Trust Company of Escanaba v. Oil Screw Olive L. Moore, Barge Wiltranco I*, 521 F.2d 1401 (6th Cir. 1975).

defined at 46 U.S.C.A. §§ 12101, et seq., it is necessary to look to the applicable state law to determine the perfection of the security interest in the vessel and the equipment and appurtenances on board. Under state law, perfection is governed by the Uniform Commercial Code.[4]

When a floating casino is not a "vessel," the courts have found that the documentation filed by a lender, purportedly to perfect a ship mortgage under federal law, was invalid and the lender did not possess a valid first ranking security interest enforceable in a bankruptcy case.[5] Conversely, if the floating casino is considered to be a "vessel" under federal law,[6] security interests therein are governed by the Ship Mortgage Act, which would preempt any conflicting state security interest statutes and invalidate any existing security interests recorded under the state law.[7] In sum, "when an application for documentation for a vessel is filed with the Coast Guard in substantial compliance with the statute and regulations, the vessel drops out of the perfection regime of article 9. In fact, when the application for documentation is filed, previously perfected security interests under article 9 become unperfected."[8]

As such, the classification of a riverboat casino as a vessel or non-vessel under federal law will have a substantial effect on the perfection and priority of a creditor's security interests in that casino.

B. Vessel versus Non-Vessel: *Lozman* Punches A Hole In "Anything That Floats"

Classification of moored, dockside casinos has been the subject of much discussion by the courts. In 1995, the early days of Mississippi's dockside casinos, the Fifth Circuit, in *Pavone v. Miss. Riverboat Amusement Corp.,* established

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[4]See, e.g., La. R.S. §§ 10:9-101 et seq.

[5]*Matter of Treasure Bay Corp.*, 205 B.R. 490, 497 (Bankr. S.D. Miss. 1997); *In re Biloxi Casino Belle Inc.*, 176 B.R. 427, 435 (Bankr. S.D. Miss. 1995).

[6]*Credit Suisse First Boston Mortg. Capital LLC v. DORIS*, 102 F. Supp. 2d 709, 713, 2001 A.M.C. 273 (N.D. Miss. 2000).

[7]See *Kathy Benetrix v. Louisiana Riverboat Gaming Partnership, d/b/a Isle of Capri Casino*, 1995 WL 867854 (W.D. La. 1995).

[8]Bruce A. King, Ships As Property: Maritime Transactions in State and Federal Law, 79 Tul. L. Rev. 1259, 1277 (2005).

what would become its controlling precedent, that casinos built on indefinitely moored barges did not constitute "vessels" for purposes of federal admiralty and maritime matters.[9] These Mississippi casinos were ordinary barges constructed as floating dockside casinos. The casinos were not designed or intended for, and were not capable of, being used as a means of water transportation. The casinos were not equipped with standard marine equipment; instead, they were moored permanently and may have been positioned in non-navigable waterways.

In 2005, the Supreme Court altered the test for determining if something is a vessel for the purposes of maritime law through its decision in *Stewart v. Dutra Constr. Co.*[10] *Stewart* seemingly expanded the definition of a "vessel" to include anything that is practically capable of sailing, whether or not it was intended to sail or sailing was its primary purpose.[11] Such language was given a broad interpretation by some courts, which read *Stewart* as implementing an "anything that floats" approach to defining a "vessel."[12]

Despite the seemingly broad language of *Stewart*, the Fifth Circuit re-affirmed its *Pavone* opinion in *De La Rosa*, holding that "indefinitely moored" barge-based casinos are not "vessels."[13] In contrast, the Seventh Circuit drew a distinction between "indefinitely moored" and "permanently moored" barges, finding that for a barge to cease being a vessel, it must be permanently incapacitated from sailing,

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[9]*Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 1995 A.M.C. 2038, 32 Fed. R. Serv. 3d 271 (5th Cir. 1995); *King v. Grand Casinos of Mississippi, Inc.-Gulfport*, 697 So. 2d 439 (Miss. 1997); accord *Chase v. Louisiana Riverboat Gaming Partnership*, 709 So. 2d 904 (La. Ct. App. 2d Cir. 1998), writ denied, 719 So. 2d 1057 (La. 1998).

[10]*Stewart v. Dutra Const. Co.*, 543 U.S. 481, 125 S. Ct. 1118, 160 L. Ed. 2d 932, 2005 A.M.C. 609 (2005).

[11]Stewart, 543 U.S. at 490.

[12]See discussion in *Lozman v. City of Riviera Beach, Fla.*, 133 S. Ct. 735, 743, 184 L. Ed. 2d 604, 2013 A.M.C. 1 (2013).

[13]*De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185, 187, 2006 A.M.C. 2997 (5th Cir. 2006); see also *In re Complaint of American Milling Co., Unlimited*, 2008 WL 2727257, *6 (E.D. Mo. 2008) (finding that where the "entire physical construction" of a once-vessel had been " modified to carry out its sole purpose as an indefinitely moored floating casino" it was no longer a "vessel").

becoming the equivalent of landfill.[14] Additionally, the Eleventh Circuit adopted perhaps the broadest interpretation, holding that a barge must be rendered "practically incapable of transportation or movement" over water at the time vessel is moored in order to avoid "vessel" status.[15]

Partially out of concern for the "anything that floats" interpretation of *Stewart* by some lower courts, in *Lozman v. City of Riviera Beach*, the Supreme Court in 2013 again altered the "vessel" standard. In *Lozman,* the Court implemented a four-part test, which considers whether a (1) reasonable observer (2) looking at the physical characteristics and activities of the structure determines that (3) the structure was designed to a practical degree for the (4) transportation on water of things or people.[16]

C. *Lozman* Applied: The Curious Final Voyage of a Non-Vessel

While the Court's stated intention in *Lozman* was to narrow the *Stewart* test, in practice, its impact still is uncertain, particularly so in the realm of riverboat casinos. That uncertainty is illustrated perhaps best by a series of Louisiana cases, pre- and post-*Lozman,* all concerning a single vessel—the M/V Crown Casino.

Louisiana initially adopted what is commonly referred to as a "cruises to nowhere" riverboat gaming statute—requiring its riverboat casinos to schedule and conduct regular cruises and allowing gambling only once the riverboat had

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[14] *Tagliere v. Harrah's Illinois Corp.*, 445 F.3d 1012, 1016, 2006 A.M.C. 1290 (7th Cir. 2006); but see *Howard v. Southern Illinois Riverboat Casino Cruises, Inc.*, 364 F.3d 854, 858, 2004 A.M.C. 956 (7th Cir. 2004) (holding that an "indefinitely" moored casino was not a vessel under Stewart).

[15] *Board of Com'rs of Orleans Levee Dist. v. M/V BELLE OF ORLEANS*, 535 F.3d 1299, 1312 (11th Cir. 2008); see also *Luckhart v. Southern Ill. Riverboat/ Casino Cruises, Inc.*, 2010 WL 2137451, *5 (S.D. Ill. 2010).

[16] Lozman, 133 S.Ct. at 741. For a more comprehensive analysis of the evolution of the "vessel" definition up to and since Lozman, see Stewart F. Peck and David B. Sharpe, What Is A Vessel?: Implications for Marine Finance, Marine Insurance, and Admiralty Jurisdiction, 89 Tul. L. Rev. 1103, 1104 (2015).

left the dock.[17] Unlike the Mississippi casino barges at issue in *Pavone*, the Louisiana riverboats, by definition, were capable of conducting cruises under their own power and had to comply with the safety and licensing requirements of a vessel.

In 2001, Louisiana amended its law to allow for so-called "dockside gambling," under which riverboats not only were not required to leave the dock, they were prohibited from making cruises or excursions.[18] The result was a fleet of Louisiana riverboat casinos that originally were constructed to conduct, and were capable of conducting, cruises, but which now were moored permanently, both physically and by operation of law. One of those riverboats was the M/V Crown Casino in Lake Charles.

The question of how to classify this Louisiana breed of floating casino came before the Fifth Circuit in 2006 in *De La Rosa v. St. Charles Gaming Co.*[19] David De La Rosa was a customer on board the dockside incarnation of the Crown Casino who tripped over what he alleged was improperly installed carpet. He sued the Crown Casino's parent company in federal court under federal admiralty jurisdiction, the existence of which depended on the Crown Casino being classified as a "vessel."[20] Despite the physical differences between Mississippi's dockside barge casinos and Louisiana's cruise-to-nowhere riverboat casinos, the Fifth Circuit still relied on its *Pavone* precedent and found that, like the Mississippi barges, the Crown Casino was a non-vessel at the time of Mr. De La Rosa's fall because, even though it was "physically capable of sailing," it had been "indefinitely moored" and not used as a seagoing vessel since 2001.[21]

Later in 2006, the Court of Appeals for the Third Circuit of Louisiana also was tasked with designating the Crown

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[17]See Terry D. Freeman, Rolling Down the Mississippi From Minnesota to Louisiana And Out Into The High Seas, SF89 ALI-ABA 79, 83 (March 29, 2001).

[18]See *Hertz v. Treasure Chest Casino, L.L.C.*, 274 F. Supp. 2d 795, 797 (E.D. La. 2003).

[19]*De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185, 2006 A.M.C. 2997 (5th Cir. 2006).

[20]De La Rosa v. St. Charles Gaming Co., 474 F.3d at 187.

[21]De La Rosa v. St. Charles Gaming Co., 474 F.3d at 187.

Casino as a vessel or non-vessel in the case of *Breaux v. St. Charles Gaming Co.*[22] Like Mr. De La Rosa, Jennifer Ann Breaux suffered a fall while patronizing the Crown Casino and attempted to bring her resulting claim under federal maritime law by arguing that the Crown Casino's previous life of cruises to nowhere along the Calcasieu River and on Lake Charles provide it was a vessel.[23] The Louisiana Third Circuit disagreed and instead adopted the reasoning of the U.S. Fifth Circuit in *Pavone/De La Rosa* that past-use and physical capabilities were not dispositive of vessel status if the structure at issued was moored permanently.[24] Further, Louisiana courts had noted that Louisiana's gaming statute actually prohibited riverboat casinos from engaging in excursions or cruises unless they were licensed specifically to do so.[25] Therefore, riverboats that were licensed to operate only as moored casinos were considered non-vessels almost as a matter of Louisiana law.[26]

In 2012, the Louisiana Third Circuit once again was asked to classify the Crown Casino as a vessel in *Lemelle v. St. Charles Gaming Co., Inc.*[27] This time, the plaintiff presented evidence that, not only was the Crown Casino physically capable of acting as a vessel, it was actively running its engines and thrusters at the time Thomas Lemelle suffered the fall at issue in his tort suit. The Louisiana Third Circuit was unmoved and again relied on what had become well-settled Louisiana precedent that permanently moored

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[22]See *Breaux v. St. Charles Gaming Co., Inc.*, 68 So. 3d 684, 687 (La. Ct. App. 3d Cir. 2011), writ denied, 71 So. 3d 322 (La. 2011) (citing *De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185, 187, 2006 A.M.C. 2997 (5th Cir. 2006)).

[23]Breaux, 68 So. 3d at 687.

[24]Breaux, 68 So. 3d at 687.

[25]Breaux, 68 So. 3d at 687. (citing La. R.S. § 27:65(c)); see also *Bourgeois v. Boomtown, L.L.C. of Delaware*, 18 So. 3d 68 (La. 2009).

[26]Breaux, 68 So. 3d at 687.

[27]*Lemelle v. St. Charles Gaming Company, Inc.*, 118 So. 3d 1, 2 (La. Ct. App. 3d Cir. 2012), writ denied, 86 So. 3d 627 (La. 2012) and cert. granted, judgment vacated, 133 S. Ct. 979, 184 L. Ed. 2d 759 (2013).

structures were de jure non-vessels under *Pavone/De La Rosa.*[28]

However, the seemingly well-settled precedent of Louisiana and the U.S. Fifth Circuit was disrupted when the United States Supreme Court, on the same day it issued the *Lozman* opinion, vacated the judgment in *Lemelle.* By vacating *Lemelle* and remanding the case for further consideration under the *Lozman* standard, the Supreme Court seemed to indicate that *Lozman* had altered the status quo in Louisiana and in the Fifth Circuit in such a way that some riverboat casinos, which previously were classified as non-vessels, now might be considered vessels under the new four-part *Lozman* test. However, that question never was addressed by the Louisiana courts. Before the *Lemelle* case could be heard on remand, the case settled. The Crown Casino (which, in both *De La Rosa* and *Breaux*, had been classified legally as a non-vessel) was sold for scrap—at which point it started its engines and sailed away on one final cruise to nowhere.

While the odyssey of the Crown Casino involved tort claims, the federal jurisdiction vessel classification at issue is the same standard used to determine whether a mortgage or security interest is governed by the Ship Mortgage Act or the UCC. Therefore, the Crown Casino cases highlight the potentially disruptive effect *Lozman* may have on creditors' rights in riverboat casino collateral. As the definition of "vessel" continues to evolve, and as the courts begin to interpret *Lozman*'s four-part test, this shifting area of law may disrupt the perfection and priority of existing and future security interests in floating casinos.

II. BETTING ON SOVEREIGNTY WITH TRIBAL CASINOS

Along with riverboats, Native American tribes rose to prominence in the 1990s and early 2000s by introducing legal casino gaming to new American markets. However, federally recognized tribes' special status as sovereigns raise a host of complicated legal issues, such as the interplay between sovereign immunity and the Bankruptcy Code and whether a tribe's immunity extends to tribal gaming

[28]Lemelle, 118 So. 3d at 2.

corporations. Further, there is ongoing uncertainty as to whether the same factors that provide tribes with immunity from the Bankruptcy Code also prohibit tribes and tribal entities from seeking bankruptcy protection.

A. Does the Bankruptcy Code Reach The Tribes?

Section 106 of the Bankruptcy Code provides a Congressional waiver of sovereign immunity of all "governmental units" with respect to virtually every substantive provision of the Code.[29] In Section 106, Congress also granted the bankruptcy courts the power to enter judgments, and to enforce its orders and judgments, against any governmental unit.[30]

In *Seminole Tribe of Florida v. Florida, et al.*, the Supreme Court called into question whether the Section 106 waiver of the states' sovereign immunity was constitutional.[31] The language of *Seminole Tribe* created a circuit split, with five circuits finding that section 106 was an unconstitutional abrogation of the states' sovereign immunity.[32] In an attempt to address the split, the Supreme Court followed up *Seminole Tribe* with *Central Virginia Community College v. Katz*[33] holding that the *Seminole Tribe* dicta was not binding precedent as to the constitutionality of Section 106, and further holding that Congress's power to abrogate the states' sovereign immunity in the context of bankruptcies flows directly from Bankruptcy Clause of the Constitution.[34] But *Katz* failed to cure the lingering circuit split, as some courts have interpreted the opinion as creating a new "consent by ratification" analysis, while continuing to suggest that their

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[29] 11 U.S.C.A. § 106(a)(1).

[30] 11 U.S.C.A. § 106(a)(3) to (4).

[31] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 52, 116 S. Ct. 1114, 1121, 134 L. Ed. 2d 252, 34 Collier Bankr. Cas. 2d (MB) 1199, 42 Env't. Rep. Cas. (BNA) 1289, 67 Empl. Prac. Dec. (CCH) P 43952 (1996).

[32] *In re Hood*, 319 F.3d 755, 761, 40 Bankr. Ct. Dec. (CRR) 225, 49 Collier Bankr. Cas. 2d (MB) 1875, Bankr. L. Rep. (CCH) P 78790, 190 A.L.R. Fed. 767 (6th Cir. 2003) (collecting cases).

[33] *Central Virginia Community College v. Katz*, 546 U.S. 356, 378, 126 S. Ct. 990, 163 L. Ed. 2d 945, 45 Bankr. Ct. Dec. (CRR) 254, 54 Collier Bankr. Cas. 2d (MB) 1233, Bankr. L. Rep. (CCH) P 80443 (2006).

[34] Katz, 546 U.S. at 378–79.

pre-Katz holdings that Congress exceeded its constitutional authority in passing Section 106(a) may remain good law.[35]

Somewhat ironically, this ongoing split caused by *Seminole Tribe* has not been applied, and may not apply, to cases concerning the impact of Section 106 on tribes. At the heart of the *Seminole Tribe/Katz* discussions is the idea that the states possessed certain sovereign rights entering into the constitutional convention and, as part of ratification, yielded certain of those rights to the federal government. Those sovereign rights not ceded to the federal government were reserved by the states, leaving Congress with a limited scope of authority. To the extent Congress exceeds the bounds of that limited authority, such actions are invalid and unconstitutional. Those circuits holding Section 106 to be unconstitutional did so based on a finding that Congress exceeded its authority through abrogation of the **states**' retained sovereign rights, which are reflected in (but not defined by) the Eleventh Amendment.[36]

Of course, tribes did not participate in the constitutional convention, the constitution does not contemplate a reservation of rights to the tribal governments and tribes are not included in the Eleventh Amendment. Therefore, while the sovereign immunity of the tribes and the sovereign immunity of the states share common law roots, their interaction with the U.S. Constitution is fundamentally different. Congressional action to abrogate the tribes' sovereign immunity does not raise constitutional issues—or, at least, does not raise the same constitutional issues—as Congressional action to abrogate the states' sovereign immunity.[37]

However, a question still exists as to whether Section 106 abrogates tribal sovereign immunity. As with abrogation of states' immunity, the intent of Congress to abrogate tribal

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[35]See, e.g., *In re Diaz*, 647 F.3d 1073, 1084, 66 Collier Bankr. Cas. 2d (MB) 214, Bankr. L. Rep. (CCH) P 82044 (11th Cir. 2011); *In re Philadelphia Entertainment and Development Partners, L.P.*, 549 B.R. 103, 121 (Bankr. E.D. Pa. 2016).

[36]See, e.g. *In re Crow*, 394 F.3d 918, 922, 53 Collier Bankr. Cas. 2d (MB) 645, Bankr. L. Rep. (CCH) P 80212 (11th Cir. 2004).

[37]The Supreme Court has classified the tribes as "subjects" of the federal government, which means "Congress can abrogate [tribal] immunity as it wishes." *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2039, 188 L. Ed. 2d 1071 (2014).

sovereign immunity by statute must be expressed clearly and unequivocally.[38] Unlike the states, there is a dispute as to whether the language of the Section 106 waiver indicates Congress' clear intent to abrogate the sovereign immunity of the tribes. For tribal sovereign immunity, then, the question is one of statutory interpretation, specifically—does the "governmental unit" language in Section 106 express the clear and unequivocal intent of Congress to abrogate the sovereign immunity of "domestic dependent nations" such as the tribes?[39]

To determine the meaning of the term "governmental unit," the courts look to Section 101(27), which defines "governmental unit" as "United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States, a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government."[40] On this question, the courts are split.

Despite the inclusive language of the "governmental unit" definition, some courts have found that the combination of Section 101(27) and Section 106(a) does not express sufficiently Congress's "clear and unequivocal" intent to abrogate tribal immunity, because neither of the statutory provisions expressly identify tribal governments by name.[41] While tribal governments logically might be included under the broad wording of "domestic government," such an

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[38]*C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418, 121 S. Ct. 1589, 1594, 149 L. Ed. 2d 623 (2001); see also *In re Mayes*, 294 B.R. 145, 149 (B.A.P. 10th Cir. 2003) (discussing the distinction between states' 11th Amendment immunity and tribes' common law immunity).

[39]Tribes are "domestic dependent nations" that exercise "inherent sovereign authority," but, as dependents, "are subject to plenary control by Congress." *In re Greektown Holdings, LLC*, 532 B.R. 680, 688–90, 61 Bankr. Ct. Dec. (CRR) 52, Bankr. L. Rep. (CCH) P 82835 (E.D. Mich. 2015) (collecting cases).

[40]11 U.S.C.A. § 101(27).

[41]See *In re Whitaker*, 474 B.R. 687, 695, 56 Bankr. Ct. Dec. (CRR) 213, 79 A.L.R. Fed. 2d 613 (B.A.P. 8th Cir. 2012); Greektown Holdings, 532 B.R. at 698–701; see also *In re Mayes*, 294 B.R. 145, 149 (B.A.P. 10th Cir. 2003) (holding that an avoidance motion against a tribe was barred by sovereign immunity, but not engaging in an in-depth interpretation of Section 106 or the Section 101(27) definition of "governmental unit").

inclusive interpretation does not satisfy the special, "unequivocal" standard for Congressional actions to abrogate tribal immunity. Under such an interpretation, tribes fall into an uncertain territory where they are neither foreign governments nor domestic governments, but a unique no-man's land that is beyond the reach of the Bankruptcy Code.

Alternatively, other courts have read the "other foreign or domestic government" wording of Section 101(27) as a purposeful catch-all term that clearly expresses Congress's intent that "government unit" be interpreted as encompassing tribal entities for the purposes of the sovereign immunity waiver under Section 106(a).[42] In the most prominent such case, the Ninth Circuit reasoned:

> Had Congress simply stated, "sovereign immunity is abrogated as to all parties who otherwise could claim sovereign immunity," there can be no doubt that Indian tribes, as parties who could otherwise claim sovereign immunity, would no longer be able to do so. Similarly here, Congress explicitly abrogated the immunity of *any* "foreign or domestic government." Indian tribes are domestic governments." Therefore, Congress expressly abrogated the immunity of Indian tribes.[43]

B. The Imputed Immunity of Tribal Corporations

Further complicating matters is the question of whether and to what extent tribal corporations fit under the tribal sovereign immunity doctrine. Generally, tribal sovereign immunity extends to protect divisions of the tribal government. That extension also may apply to commercial entities related to the tribe, so that even when a bankruptcy court is dealing with a corporation, rather than directly with the sovereign tribe, the reach of the Bankruptcy Code may be limited or non-existent due to sovereign immunity.[44] In fact, the Supreme Court has held explicitly that tribal sovereign immunity includes immunity from suits or actions arising from the commercial activities of tribe, or a tribal entity—includ-

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[42]See *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1057, 42 Bankr. Ct. Dec. (CRR) 144, Bankr. L. Rep. (CCH) P 80048 (9th Cir. 2004), as amended on denial of reh'g, (Apr. 6, 2004); *In re Platinum Oil Properties, LLC*, 465 B.R. 621, 643, 176 O.G.R. 7 (Bankr. D. N.M. 2011).

[43]Krystal Energy Co., 357 F.3d at 1058.

[44]*In re Whitaker*, 474 B.R. 687, 697, 56 Bankr. Ct. Dec. (CRR) 213, 79 A.L.R. Fed. 2d 613 (B.A.P. 8th Cir. 2012).

ing commercial activities that take place outside of tribal lands.[45]

As support for the extension of immunity, courts often cite to the principle that "the immunity of [a casino] directly protects the Tribe's treasury, which is one of the historic purposes of sovereign immunity in general."[46] As stated by the Ninth Circuit, "the question is not whether the activity may be characterized as a business . . . but whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe."[47] Therefore, if a gaming corporation is tied sufficiently to the tribal government, it may be protected under tribal immunity.

To evaluate the closeness of the tribe-tribal entity relationship, courts look primarily to the Tenth Circuit's *Chuckansi* factors: (1) the method of creation of the entity; (2) the entity's purpose; (3) the entity's structure, ownership and management, including the level of tribal control; (4) the tribes intent regarding whether the entity should share in the tribe's immunity; (5) the financial relationship between the tribe and the entity; and (6) the underlying policy concerns regarding tribal economic development.[48] However, at least one court has found that the creation and operation of tribal casinos under the Indian Gaming Regulatory Act are such that tribal casinos are de facto arms of the tribal

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[45]*Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2031, 188 L. Ed. 2d 1071 (2014) (citing *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998)).

[46]*Mastro v. Seminole Tribe of Florida*, 2013 WL 3350567, *5 (M.D. Fla. 2013), aff'd, 578 Fed. Appx. 801, 124 Fair Empl. Prac. Cas. (BNA) 140 (11th Cir. 2014) (quoting *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047, 25 I.E.R. Cas. (BNA) 238, 88 Empl. Prac. Dec. (CCH) P 42565, 153 Lab. Cas. (CCH) P 60303 (9th Cir. 2006)). Courts also may utilize a similar set of factors established by the Ninth Circuit in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116, 12 O.S.H. Cas. (BNA) 1169, 1984-1985 O.S.H. Dec. (CCH) P 27162 (9th Cir. 1985).

[47]*Allen v. Gold Country Casino*, 464 F.3d 1044, 1046, 25 I.E.R. Cas. (BNA) 238, 88 Empl. Prac. Dec. (CCH) P 42565, 153 Lab. Cas. (CCH) P 60303 (9th Cir. 2006).

[48]*Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1181 (10th Cir. 2010).

government sufficient to satisfy the *Chuckansi* factors, qualifying them for tribal immunity.[49]

As a practical matter, individuals and entities dealing directly with tribes and tribal corporations can protect themselves through the inclusion of immunity waivers as part of their contractual agreements.[50] However, contractual waivers offer only limited relief in the context of a bankruptcy proceeding, as is illustrated in the most recent case to take up the issue, *In re Greektown Holdings, LLC*.[51] There the tribal entity was not the primary debtor, but the recipient of an alleged fraudulent transfer from the debtor. When the trustee brought an adversary proceeding against the tribe for avoidance and recovery of the transferred assets, the district court barred the proceeding based on the tribe's sovereign immunity.[52]

Therefore, until Congress clarifies its intent regarding tribes under the Section 106 waiver provision, or until the Supreme Court reverses its current laissez-fare approach to tribal matters, uncertainty as to the status of tribes, and particularly tribal casinos, within the context of the Bankruptcy Code will continue to be a source of confusion and litigation for debtors, creditors, courts and trustees.

C. Can a Tribal Casino Be A Bankruptcy Debtor?

Finally, the classification issues that potentially place tribes in the no-man's land as far as sovereign immunity is concerned also might serve to foreclose tribes and tribal enti-

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[49]Mastro v. Seminole Tribe of Florida, 2013 WL 3350567, at *6. For a more in-depth analysis of this issue and an argument for why casinos should not be granted tribal immunity, see Emir Aly Crowne et. al., Not Out of the (Fox)woods Yet: Indian Gaming and the Bankruptcy Code, 2 UNLV Gaming L.J. 25 (2011).

[50]In fact, this is the method that was prescribed specifically by the Supreme Court. Bay Mills Indian Cmty., 134 S. Ct. at 2036.

[51]*In re Greektown Holdings, LLC*, 532 B.R. 680, 61 Bankr. Ct. Dec. (CRR) 52, Bankr. L. Rep. (CCH) P 82835 (E.D. Mich. 2015).

[52]*In re Greektown Holdings, LLC*, 532 B.R. 680, 61 Bankr. Ct. Dec. (CRR) 52, Bankr. L. Rep. (CCH) P 82835 (E.D. Mich. 2015).

ties from seeking protection under the Bankruptcy Code when they face insolvency.[53]

Section 109 of the Bankruptcy Code limits who can be a debtor for the purpose of seeking bankruptcy protection to persons or municipalities.[54] "Person" is defined as any "individual, partnership, and corporation."[55] Government units are excluded from the definition of "person."[56] "Municipality" is defined as a political subdivision, public agency or instrumentality of a State.[57]

Under the Section 109 limitations, therefore, a tribe itself cannot be a debtor under the Bankruptcy Code and, to date, no tribe has filed successfully for bankruptcy protection.[58] In court opinions which find that tribal immunity is not abrogated by Section 106, the courts have found that tribes, generally, fall under the classification of a "government unit." But that general phrase is not sufficient to satisfy the heightened standard of specificity required for the abrogation of tribal sovereign immunity.[59] Because interpretation of a "debtor" under Section 109 does not involve a question of abrogation of immunity, that heightened standard and the need for specificity does not apply. Therefore, courts may find that tribes are "governmental units" for the purposes of exclusion from bankruptcy protection under Section 109, while simultaneously maintaining that tribes are not included in the definition of "governmental units" for the purposes of the immunity waiver in Section 106.

But, once again, the question is more complicated when it

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[53]For more in-depth analysis on this issue, see Blake F. Quackenbush, Cross-Border Insolvency & the Eligibility of Indian Tribes to Use Chapter 15 of the Bankruptcy Code, 29 T.M. Cooley L. Rev. 61, 64 (2012).

[54]11 U.S.C.A. § 109(a).

[55]11 U.S.C.A. § 101(41).

[56]11 U.S.C.A. § 101(41).

[57]11 U.S.C.A. § 101(52).

[58]But see Blake F. Quackenbush, Cross-Border Insolvency & the Eligibility of Indian Tribes to Use Chapter 15 of the Bankruptcy Code, 29 T.M. Cooley L. Rev. 61, 64 (2012) (discussing a path by which tribes conceivably could utilize Chapter 15 of the Bankruptcy Code).

[59]See *In re Whitaker*, 474 B.R. 687, 695, 56 Bankr. Ct. Dec. (CRR) 213, 79 A.L.R. Fed. 2d 613 (B.A.P. 8th Cir. 2012); *In re Greektown Holdings, LLC*, 532 B.R. 680, 61 Bankr. Ct. Dec. (CRR) 52, Bankr. L. Rep. (CCH) P 82835 (E.D. Mich. 2015).

concerns tribal entities such as gaming corporations. The status of a gaming corporation likely will turn on an interpretation of whether the tribal gaming entity is sufficiently distinct from the tribal government—creating a double-edge result where tribal entities would have to shed the protection of sovereign immunity in exchange for the protection of the Bankruptcy Code. Additionally, as discussed by the Ninth Circuit in *Gold Country* and the Middle District of Florida in *Mastro*, the regulatory framework for tribal casinos creates a particularly close bond between the tribe and the casino entity; and a tribal casino would have a hard time escaping the gravity of the tribal government and distinguishing itself as a distinct entity for the purposes of the Bankruptcy Code.[60]

To date, no binding judicial opinion has been issued regarding whether a tribal entity is eligible to be a debtor under the Bankruptcy Code.[61] However, the Bankruptcy Court for the Southern District of California considered this very issue in the bankruptcy of the Santa Ysabel Resort and Casino. There a tribal casino argued that it was an "unincorporated entity" and, therefore, eligible to be a debtor. Three parties in interest filed motions to dismiss challenging the tribal casino's eligibility.[62] The Bankruptcy Court granted the motions and dismissed the resort's Chapter 11 case without written opinion.[63]

III. CONCLUSION

While tribal issues and maritime law are not traditional aspects of bankruptcy practice, the continuing evolution of these specialized areas of law, particularly as they concern gaming operations, can have a dramatic impact on both debt-

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[60]*Mastro v. Seminole Tribe of Florida*, 2013 WL 3350567, *5 (M.D. Fla. 2013), aff'd, 578 Fed. Appx. 801, 124 Fair Empl. Prac. Cas. (BNA) 140 (11th Cir. 2014) (quoting *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047, 25 I.E.R. Cas. (BNA) 238, 88 Empl. Prac. Dec. (CCH) P 42565, 153 Lab. Cas. (CCH) P 60303 (9th Cir. 2006)).

[61]See Ji Hun Kim & Christoper S. Koenig, Rolling the Dice on Debtor Eligibility, 34 A.B.I. J. 18 (June 2015).

[62]In re Santa Ysabel Resort and Casino, U.S.B.C., S.D. Cal. Case No. 12-09415-CL11 [Docs. 57, 65 & 66].

[63]Santa Ysabel Resort and Casino, U.S.B.C., S.D. Cal. Case No. 12-09415-CL11 [Doc. 98].

ors' and creditors' rights in bankruptcy cases. Basic concepts, such as perfection and priority of a mortgage or the classification of a "debtor," can be altered dramatically as courts across the country attempt to deal with the controversial issues in those areas. And, if the gaming markets shift away from riverboat and tribal gaming operations, these unsettled issues will become significantly more prevalent in the bankruptcy courts.