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LITIGATION IN INDIAN COUNTRY

“Indian country” is a legal term of art that generally refers to tribal reservations and federal trust lands which are situated within the territorial boundaries of one or more states. Cases occurring in Indian country or which involve Native American tribes present a host of unique issues in both civil and criminal law. Considering that it is not a matter of “if” but rather “when” you will have to face these issues, it is important to understand the basics of litigation in “Indian country.”

Against the historical backdrop of treaties dating back to the U.S. Constitution, and the characterization of tribes as being “domestic dependent nations,” the promotion of self-determination of indigenous peoples and respect for the sovereign rights of Native American governments has spurred economic development in many areas, including real estate, finance, natural resources, retail and commercial operations, apart from the enormous impact of gaming and tourism. Indian nations not only interact with the Federal government, in today’s commercial marketplace they must negotiate intergovernmental “compacts” with the states as well as business agreements with corporations and individuals in almost every spectrum of private enterprise.



There are 562 federally-recognized Indian tribes in the United States, with Alaska, California, Oklahoma, Arizona and New Mexico being among the states with the largest presence. In Arizona alone, there are 22 Indian tribes whose 22 million acres of territorial lands comprise 28% of the state and constitute the largest percentage of tribal land in the United States. Thus, while many business leaders or legal practitioners normally might not expect to be litigating in “Indian country,” in reality it is almost inevitable. To prepare yourself for that eventuality, you should ask some of the following questions and promptly seek advice on how to proceed.

Start with the basic questions of *who* are the parties, *what* kind of case is it and *where* did it occur? All too often lawyers mistakenly assume that the federal courts have jurisdiction over Indian matters only to have the case dismissed. Consider that in many cases the tribal courts will have exclusive jurisdiction and the resolution of disputes may be subject to tribal law and rules of procedure.

Fundamentally, if the “who” part of the equation involves one or both parties being a Native American tribe, a tribal business or even an individual living on the reservation, there most likely will be concurrent if not exclusive jurisdiction in the tribal courts. Be aware that tribal corporations and wholly-owned business “enterprises” have the same attributes of sovereignty, including immunity from suit, as the tribal government itself. Although immunity can be waived, keep in mind that even if a tribe has expressly waived sovereign immunity, there may be other procedural pitfalls, such as notice of claim provisions and statute of limitations deadlines pertaining to actions against the tribal government or employees.

What is the case about? Determining which court has jurisdiction can vary dramatically depending on what kind of case it is and the type of law involved. In some areas of civil law, for example, Congress has passed specific legislation, such as laws dealing with domestic relations or regulating Indian gaming. On the other hand, many types commercial disputes and negligence claims have not traditionally been subject to Congressional regulation. What this means is that tribal courts may have exclusive jurisdiction and tribal law may apply. Regardless of the court, Indian tribes, business entities and even individuals acting on behalf of the tribe generally have absolute immunity from suit, unless expressed waived by the tribe or specifically abrogated by an act of Congress.

Finally, the question of where the claim or incident occurred is an important factor in determining whether the case must be decided in tribal court and what law will ultimately apply. In commercial transactions it is more likely to be a matter of what the parties agreed to in the contract rather than where the contract was actually signed. For personal injury actions, whether or not the accident occurred on the reservation is often determinative, yet there can be many twists, such as if a road is on an easement or was maintained by the state or federal government. In other cases, the existence of a remedy may depend on whether there is a specific tort claims procedure in place, or which covers certain types of claims, such as those brought by casino patrons.

The law relating to litigating in “Indian country” is far too complex to address here, and while some of the fundamental principles of jurisdiction and tribal sovereignty are deeply rooted in our system of jurisprudence, many aspects

of it are still undergoing change, whether by legislation in Congress or the interpretation and enforcement of the rule of law by the Courts. One thing that is certain is these cases and issues will become increasingly prevalent in the law and in commercial relations, and that every case is different. Understanding that there are unique issues is the first step in being prepared to successfully manage them.