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Indian Law: What You Should Know

While complex, Indian law has some basic concepts that every lawyer should know—tribal sovereignty, tribal immunity, and tribal jurisdiction. These concepts will influence the “who, what, when, where, why and how” of a matter involving an Indian tribe. So, when handling a matter that involves an Indian tribe, it behooves a lawyer to know something about these basic Indian law principles or at least know enough to contact an experienced Indian law practitioner for guidance.

Tribal Sovereignty

Similar to states, tribes are sovereigns that exercise inherent authority over their members and their lands. However, unlike states, tribes are subject to the plenary power of the federal government to alter or terminate the sovereign status of a given tribe as the federal government sees fit. In other words, despite being mentioned in the U.S. Constitution, Indian tribes legally exist at the discretion of the federal government (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49 [98 S.Ct. 1670, 56 L.Ed.2d 106].)

Tribes determine their own membership (usually based on blood quantum and community affiliation) and tribes make their own laws. Because tribes are sovereign, state laws do not usually apply on tribal lands (*McClanahan v. State Tax Comm'n of Arizona* (1973) 411 U.S. 164 [93 S. Ct. 1257, 36 L.Ed.2d 129].) Some tribes have well developed bodies of written law as individual sovereigns pre-dating the U.S. Constitution (and so not bound by the U.S. Constitution), thus tribes may have laws and governments that differ from that of California and the United States. The protections and requirements set forth in the U.S. Constitution do not apply on an Indian reservation (*Talton v. Mayes* (1896) 163 U.S. 376 [16 S.Ct. 986, 41 L.Ed. 196].) Tribes may govern themselves by elected leaders through a tribal council or use

a hereditary chief system. Tribes may have a separate legislative, executive, and judicial branch or have the tribal council act as all three branches of government. Many tribes have tribal courts which might have exclusive jurisdiction over a given case. Each tribe is unique.

In handling a matter that might involve Indian law, a lawyer should research and understand the tribal government, the tribal decision-making process, the tribal adjudication process, and the tribal laws that might apply.

Tribal Immunity

Tribal immunity is probably the most basic of Indian law concepts all lawyers should know. Indian tribes as sovereigns enjoy sovereign immunity from unconsented suit similar to the immunity enjoyed by states and the federal government. A practitioner cannot sue an Indian tribe unless Congress has authorized the suit or the tribe has clearly waived its immunity. It does not matter whether the suit is based in law, equity, tort, contract, or otherwise. It does not matter whether the dispute involves the tribe's governmental or commercial activities. It does not matter whether the conduct giving rise to the dispute occurred on or off reservation. All courts—tribal, state, and federal—lack subject matter jurisdiction absent a clear waiver or Congressional authorization (*Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751[118 S.Ct. 1700, 140 L.Ed.2d 981].)

Tribal immunity will also protect individual tribal officials as well as tribal agents acting in their official capacity and within the scope of their authority (*Cook v. AVI Casino Enterprises, Inc.* (9th Cir. 2008) 548 F.3d 718.) However, tribal immunity will generally not immunize individual tribal members. Courts have found that a tribal resolution waiving immunity, a “sue and be sued” clause in a corporate charter, and an arbitration clause in a contract can serve as express waivers (*C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma* (2001) 532 U.S. 411[121 S.Ct. 1589, 149 L.Ed.2d 623]; *Rosebud Sioux Tribe v. A & P Steel, Inc.* (8th Cir. 1989) 874 F.2d 550.) But, a tribe's purchase of liability insurance, without more, will generally not act as a waiver (*Seminole Tribe v. McCor* (Fla.App. 2005) 903 So.2d 353.)

Tribal immunity is a changing and oft-litigated area of Indian law (*Michigan v. Bay Mills Indian Community* (2014) 572 U.S. ____ [134 S.Ct. 2024, 188 L. Ed. 2d 1071].) When dealing with tribal immunity, it helps to consult with a lawyer who keeps abreast of the recent changes in this area of the law.



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Tribal Jurisdiction

As with tribal immunity, tribal jurisdiction is a complicated and ever evolving area of Indian law. Many tribes have tribal courts. Whether a tribal court will have jurisdiction over a civil dispute will turn on where an incident occurred and who the incident involved.

Generally, the jurisdiction of a tribal court does not extend beyond tribal boundaries or tribal members. Tribal courts are not courts of general jurisdiction. But, a tribal court will normally have exclusive jurisdiction over civil disputes that arise on the reservation involving tribal members or a non-member suing a member. So, if two tribal members get into an auto accident on the reservation, a state court will generally have no subject matter jurisdiction (*Williams v. Lee* (1959) 358 U.S. 217 [79 S.Ct. 269, 3 L.Ed.2d 251].)

However, if a non-member and a tribal member get into an auto accident on the reservation, jurisdiction will likely depend on who sues whom. Tribal courts generally have no jurisdiction over the conduct of non-Indians unless the non-Indian has entered a consensual relationship with the tribe (e.g., contract) or the activities of the non-Indian directly affect the tribe's political integrity, economic security, health, or welfare (*Montana v. United States* (1981) 450 U.S. 544[101

S.Ct. 1245, 67 L.Ed.2d 493].) There is a presumption against tribal civil jurisdiction over non-Indians. But, tribal courts have exclusive jurisdiction over suits filed by non-members against members for claims arising in Indian country. Again, this can be a complicated area of the law requiring diligent legal research and possible consultation.

Conclusion

Indian law is a complex body of law with at least three underlying principles all lawyers should know—tribal sovereignty, tribal immunity, and tribal jurisdiction. However, knowing these basic principles may not be enough. If a tribe, tribal entity, tribal member, or tribal agent is involved in any way, a prudent attorney should strongly consider consulting with an experienced Indian law attorney. ☞

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