

Native American Law Watch



Jurisdiction for Injuries Arising at Tribal Casinos: The Importance of Clear Dispute Resolution Terms

The State supreme courts in Oklahoma and New Mexico both have recently determined that their state courts lack jurisdiction over tort claims arising from conduct at tribal casinos. These cases are a reminder of the importance of clear dispute resolution and forum selection clauses in agreements with tribal nations.

Case Background: Congress passed the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 – 2721 (“IGRA”) in 1988. Apparently as a compromise, IGRA provided that tribal-state compacts may include provisions relating to “the allocation of the criminal and civil laws and regulations . . . that are directly related to, and necessary for, the licensing and regulation of such [gaming] activity.” 25 U.S.C. § 2710(d)(3)(C). For about nine years, parties in Oklahoma and New Mexico have contested whether that statutory language encompasses compact authority to delegate civil jurisdiction over tort claims arising at tribal casinos.

Tribal nations in both Oklahoma and New Mexico entered into tribal-state compacts which did not conclusively allocate civil adjudicatory jurisdiction over tort claims, but appear to have reserved the issue for litigation. Beginning in 2004, several Oklahoma based Indian nations and the State of Oklahoma entered compacts providing that tribal gaming enterprises would be subject to tort claims “in a court of competent jurisdiction,” and that the compact “shall not alter tribal, federal, or state civil adjudicatory or criminal jurisdiction.” *Sheffer v. Buffalo Run Casino, PTE, Inc.*, 2013 OK 77, ¶ 5.¹ In 2001, the State of New Mexico entered compacts with several tribal nations, providing that tort claims could be brought in “a court of competent jurisdiction,” including a state court “unless it is finally determined by a state or federal court that IGRA does not permit the shifting of jurisdiction over visitors’ personal injury suits to state court.” *Pueblo of Santa Ana v. Nash*, No. 11-CV-00957, Mem. Op. and Order at 4 (D. N.M. Sept. 25, 2013); *Doe v. Santa Clara Pueblo*, 2007-NMSC-008, ¶¶ 7-8, 141 N.M. 269, 154 P.3d 644.

¹ As of publication of this article, *Sheffer* had not been released for publication, and is subject to revision.



Oklahoma Proceedings: In 2009, the Oklahoma Supreme Court ruled that Oklahoma state courts had jurisdiction over tort claims arising at several tribal casinos. *Dye v. Choctaw Casino of Pocola*, 2009 OK 52, 230 P.3d 507; *Griffith v. Choctaw Casino of Pocola*, 2009 OK 51, 230 P.3d 488; *Cossey v. Cherokee Nation Enters.*, 2009 OK 6, 212 P.3d 447. Subsequently, two tribal nations that were not party to those cases and the State of Oklahoma agreed to binding arbitration to decide whether state courts had jurisdiction over claims arising in those nations' casinos. The arbitrator determined that Oklahoma's courts lacked jurisdiction over such tort claims. Federal courts in Oklahoma thereafter issued injunctions, putatively barring Oklahoma's courts from exercising jurisdiction over tort claims arising at tribal casinos (at least as to those tribes involved in the litigation). See *Sheffer*, 2013 OK 77, ¶¶ 7-9 (describing the arbitration process).

The Peoria Tribe was not a party to either the 2009 Oklahoma Supreme Court cases or the subsequent arbitration. The Tribe and its tribal gaming enterprise were sued in state court by three persons injured in a 2006 vehicle accident. The plaintiffs alleged that the casino over-served alcohol to the alleged tortfeasor. In *Sheffer*, the Oklahoma Supreme Court overruled a 2009 decision, and held that Oklahoma's state courts lack jurisdiction over the tort claim.

The *Sheffer* court began its analysis by noting that "recent decisions from federal courts of this state and the above-mentioned arbitration proceedings have caused us to re-examine our previous holdings. . . ." *Sheffer*, 2013 OK 77, ¶ 11. The court explained, "[a]s the arbitrator pointed out and as the federal courts of this state have concluded, Part 9 of the gaming compact preserves the civil-adjudicatory status quo – that 'states are generally presumed to lack jurisdiction in Indian Country.'" *Id.* ¶ 22. The court noted that "[o]nly an express grant of jurisdiction by Congress or adoption of Public Law 280 will confer civil-adjudicatory jurisdiction to the State of Oklahoma." *Id.* The court then explained that it was "undisputed that Oklahoma was not a state which was allowed to assert civil jurisdiction over Indian Tribes under Public Law 280," and that IGRA did not expressly grant civil adjudicatory jurisdiction to the State over tort claims. *Id.* Accordingly, the court held that the "gaming compact preserved the civil-adjudicatory jurisdictional status quo, and Oklahoma state courts are not courts of competent jurisdiction" to adjudicate tort claims against Indian tribes for tribal activities on tribal land." *Id.* ¶ 25.

Finally, it appears that in Oklahoma at least some tribal purveyors of alcohol are licensed by the state for sales for off-premises consumption. In this area, the United States Supreme Court has ruled that Congress has divested tribal nations of inherent authority, and has delegated to states the right to regulate. *Rice v. Rehner*, 463 U.S. 713 (1983). Notwithstanding, the Oklahoma Supreme Court held that application for and issuance of such licenses does not waive immunity.



New Mexico Proceedings: In 2004, the New Mexico Supreme Court determined that its courts had jurisdiction over tort claims arising at tribal casinos. *Doe v. Santa Clara Pueblo*, 2007-NMSC-008, 141 N.M. 269, 154 P.3d 644. *Doe* framed the issue as: whether the Pueblo had waived sovereign immunity, or whether the IGRA did not permit such a waiver. The court determined that the Pueblo could consent to state court jurisdiction without the express authorization from Congress to do so, and that the legislative history of the IGRA indicated that tribes could consent to state jurisdiction. As a result, *Doe* held New Mexico's courts had jurisdiction.

In 2011, relying on *Doe*, the New Mexico Supreme Court found that its courts had jurisdiction over tort claims arising from over-serving alcohol at a casino. *Mendoza v. Tamaya Enterprises, Inc.*, 2011-NMSC-030, 150 N.M. 258, 258 P.3d 1050. In contrast to Oklahoma, the casino in New Mexico was not licensed by the state of New Mexico. The Pueblo and its gaming enterprise then brought a collateral suit in federal court to challenge the New Mexico Supreme Court's ruling. *Pueblo of Santa Ana v. Nash*, No. 11-957-LH/LFG (D.N.M. Sept. 25, 2013). The federal court determined that New Mexico state courts lacked jurisdiction over the tort claims arising from the Pueblo's casino. The Court relied on the same rationale as the *Sheffer* court. Pueblo of Santa Ana also determined that adjudicatory jurisdiction over tort claims was not "necessary for" tribal gaming within the meaning of IGRA. Thus, Congress had not authorized tribes and states to agree to state jurisdiction over tort arising at tribal casinos. The case currently is on appeal to the Tenth Circuit Court of Appeals.

Why the Cases Matter: These cases serve as a warning regarding dispute resolution terms in agreements with tribal nations. The United States Supreme Court has ruled that tribal nations may be bound to agreements which waive sovereign immunity, select a forum other than tribal court, including arbitration, and select state law, including for enforcement of an arbitration award. *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001). The terms, however, must be clear and express. Ambiguous terms may result in costly litigation and collateral proceedings.

Moreover, the dispute resolution and forum selection clauses will be interpreted in light of treaties, Congressional actions, and federal Indian law. These areas of law differ by topic and provide a complex backdrop, against which dispute resolution terms will be interpreted. For instance, the backdrop results in opposite presumptions about on-reservation sales of alcohol for consumption off premises, which states may regulate, and on-reservation sales of alcohol for consumption anywhere which result in tort claims, over which the states lack adjudicatory jurisdiction. If Congress has provided a specific procedure or framework for tribal consent to state jurisdiction, that may limit a tribe's authority to waive its immunity or consent to jurisdiction in another forum.

In *Pueblo of Santa Ana*, the Pueblo appears to have shied away from an argument that it may agree to state jurisdiction only if Congress permits it to do so. Rather, the Pueblo argued that its putative consent to state jurisdiction, in the compact, relied only on Congressional intent to permit such consent. By not relying on its inherent authority to consent to state jurisdiction, the Pueblo avoided both state jurisdiction, and any limit on its authority to consent without Congressional permission.

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