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Doing business with American Indian tribal businesses

The last decade has seen an explosion in commercial ventures owned and operated by Native American Indian tribes. Most of the world knows American Indians through old Hollywood movies, but it has become increasingly important to have a basic understanding of the legal principles that are involved in doing business with Indian tribes; or what are known as tribal business entities.

Basically, there is a network of treaties between the United States government and numerous Indian tribes, which allocate certain tracts of land to these tribes as tribal "reservations." The Indian tribes enjoy "tribal sovereignty," or "sovereign immunity" within their reservations. The tribes and their reservation lands are treated, under the law, like quasi-sovereign nations. Reservations typically have their own courts, their own civil and criminal laws, and their own police forces.

This system did not have real commercial significance until Indian tribes began to conduct business activities that gradually stretched beyond the boundaries of their reservations. For example, the last decade has seen Indian tribes building, owning, and operating huge resorts and casinos on tribal lands; or manufacturing and selling (including exporting) vast quantities of alcohol and cigarettes. (Tribal entities are not subject to most of the taxes that other businesses are required to pay — and can therefore offer significant price advantages.) These types of activities necessarily bring the tribal businesses into contact with off-reservation businesses: construction companies, materials suppliers, shipping

companies, freight handlers, advertising agencies, to cite just a few examples. And it is at this point that the unwary can fall into a trap.

Cases in several Federal Courts over the last decade have expanded the concept of tribal sovereign immunity to hold that tribal business entities are immune from suit in the regular State or Federal Courts of the United States, and are not subject to judgments and orders rendered in these courts. One case goes so far as to hold that Indian businesses are not subject to the U.S. copyright laws — and, by implication, the laws against patent and trademark infringement.

The result is that the Italian supplier that sold \$1,000,000 worth of carpet to a huge casino on a tribal reservation cannot sue in the courts of the United States when the tribal casino refuses to pay the bill, and cannot take any action in a U.S. court to attach assets. Tribal immunity — sovereign immunity — protects the tribal business from such a suit, and makes any judgment from such a court unenforceable. Any action would have to be brought in an Indian tribal court, where the chances of success would be small. Similarly, the Hong Kong distributor of cigarettes could not sue in a U.S. court when the tribal cigarette manufacturer breached the distributorship agreement or withheld funds or refused to ship product. (American Indian cigarette manufacturers are becoming very aggressive in registering their trademarks abroad and setting up new distribution systems abroad, as the global demand for cigarettes increases while the U.S. demand stagnates.) The risk, as can be seen, is enormous.

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How can you protect your clients who may find themselves doing business with an American Indian tribal business? The cases hold that a tribal business entity can be sued in a regular U.S. court if it has specifically waived sovereign immunity. Therefore, any business that enters into a contract with a tribal business enterprise should be sure to include in the contract a provision that the tribal entity specifically waives sovereign immunity. Otherwise, the tribal business can basically breach the contract anytime it wishes, with impunity.

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