

The Illusion of Federal Jurisdiction in Tribal Contracts



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Contracts with Indian tribes should specify a venue for disputes arising from those agreements. A common **mistake** for attorneys drafting agreements involving tribes is **to assume that federal courts automatically have subject matter jurisdiction over matters involving Indian tribes**. In fact, the presence of an Indian tribal party in litigation invokes neither diversity nor “arising-under” federal jurisdiction. Contracts often specify a federal court as the venue for disputes, likely because tribal parties sometimes distrust state courts and non-tribal parties may distrust tribal courts, so federal court seems like a neutral choice. However, experienced Indian law attorneys know that federal courts generally lack subject matter jurisdiction over contract disputes and will summarily dismiss such actions. As a result, litigants may unexpectedly find themselves in state and tribal courts. In

fact, state courts increasingly defer to tribal courts when such courts have jurisdiction and may dismiss in favor of tribal court as a matter of comity.

A related issue is the proper venue for enforcement of tribal court awards. The 2010 Florida case of ***Miccosukee Tribe v. Kraus-Anderson*** involved a construction firm's tribal court action against the Miccosukee Tribe for breach of contract. The tribal court found for the Tribe and awarded it \$1.65 million on a counterclaim. When the firm refused to pay the judgment, the Tribe sued to enforce the award in federal court. The district court granted the construction firm summary judgment, but the Eleventh Circuit reversed and remanded with instructions to dismiss for lack of subject matter jurisdiction. The Eleventh Circuit held that federal question jurisdiction did not exist merely because an Indian tribe was a party or because the case involved a contract with an Indian tribe. It further ruled that the Tribe's presence did not establish diversity jurisdiction and that no issue of "federal common law" established jurisdiction as the Tribe has argued.

Brenner v. Bendigo, an action recently dismissed from a federal district court in South Dakota, reiterates the point. After a federal criminal conviction for the tragic murder of a child, the victim's family brought a civil wrongful death action in Cheyenne River Sioux Tribal Court, which entered a \$3 million award for the plaintiffs. The plaintiffs sought to enforce the tribal court award in federal district court, pursuant to South Dakota's garnishment law. They requested garnishment and the setting aside of transfers of personal assets and real property interests on the Cheyenne River Sioux Reservation. The federal court rejected plaintiffs' argument that the court had federal question jurisdiction over the action, despite the fact that the claim implicated Indian land interests. The court dismissed, holding that the action arose under state law despite the claim for Indian land and assets, and it held that the proper venue to enforce the tribal court judgment against tribal members is the tribal court itself.

While the tribal court is a natural venue for resolution of claims involving Indian assets, the outcome begs the question of the proper venue to execute tribal court awards involving off-reservation property. In that case, prevailing litigants will have to pursue off-reservation assets in state courts. In order to reach those assets, tribal court awards must generally be domesticated in the court of the state where the assets are located pursuant to state law.

Contracting with Indian tribes can sometimes appear to be a tangled mess of tribal, state, and federal jurisdiction. While federal courts seem like a tempting middle ground for dispute resolution, ordinary contracts with Indian tribes should specify arbitration or a tribal or state court venue, specify tribal or state law, provide for a valid waiver of tribal sovereign immunity, and consider in advance the proper venue for enforcement of judgment and arbitration awards.

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