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2022 First Circuit Review

Coughlin v. Lac du Flambeau Band of Lake Superior Chippewa Indians (In re Coughlin), 33 F.4th 600 (1st Cir. 2022), *cert. granted*, 143 S. Ct. 645 (2023).

Petition for Writ of Certiorari: Telling the Supreme Court that "[t]his case presents a question of utmost importance to Indian tribes and over which the courts of appeals are undisputedly divided," the petitioner, Lac du Flambeau Band of Lake Superior Chippewa Indians—a federally recognized Indian tribe—successfully petitioned the Supreme Court for review of the First Circuit's decision.

Holding: In a 2-1 decision, the First Circuit held that the Bankruptcy Code "unequivocally strips" tribal sovereign immunity, even though it never expressly mentions native nations.

Summary: Approximately five months after taking out an $1,100 payday loan from the tribe's lending subsidiary, the debtor filed Chapter 13. Debtor listed the payday lender as a nonpriority unsecured creditor and the payday lender had notice of the bankruptcy case. Despite the automatic stay and actual knowledge of the bankruptcy case, the payday lender continued its debt-collection efforts: the payday lender "repeatedly contacted" the debtor seeking repayment of the debt and, after the debtor directly informed the payday lender of his bankruptcy case and provided his attorney's contact information, the payday lender continued contact in an unconcealed effort to collect the debt.

Approximately two months into his bankruptcy case, the debtor attempted suicide on account of his belief that his "financial agony" would never end because the payday lender's "incessant telephone calls, emails and voicemails," continued notwithstanding his bankruptcy filing. In an effort to stop the payday lender's postpetition collection efforts, the debtor moved to enforce the automatic stay by seeking an order prohibiting further collection efforts, and seeking damages, attorneys' fees, and expenses. The debtor did not dispute that the payday lender—as an arm of the tribe—would enjoy whatever immunity the tribe itself would have and the payday lender asserted tribal sovereign immunity as a complete defense to the claims. The bankruptcy court agreed with the payday lender and dismissed the stay enforcement proceedings based on the tribe's sovereign immunity. The First Circuit took the matter on direct appeal and reversed.

The majority began by announcing that "Congress may abrogate tribal sovereign immunity if it "unequivocally expresses that purpose." This rule of construction, the First Circuit explained, "reflects an enduring principle of Indian law: Although Congress has plenary authority of tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." The First Circuit focused on the broad waiver of sovereign immunity in § 106(a) of the Bankruptcy Code, which provides that "sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to" numerous provisions of the Bankruptcy Code, including the automatic stay. In turn, § 101(27) of the Bankruptcy Code defines "governmental unit," to mean "United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government."

To the majority, the absence of any explicit mention of Indian tribes in the Congressional waiver was not an issue because there "is no real disagreement that a tribe is a government" and the tribes must, in turn, be "domestic" rather than foreign because

they "belong or occur within the sphere of authority or the boundaries of the United States." Additionally, because the phrase "domestic dependent nations" was used historically by all three branches of government to refer to tribes, which phrase is the "functional equivalent" of "domestic governments," the majority held that Congress "unmistakably" abrogated the sovereign immunity of the tribes. Finally, the majority explained that being classified as a governmental unit under the Bankruptcy Code would carry with it the benefits enjoyed by other governmental units such as priority for tax claims and exceptions to discharge. "Thus, in practice, tribes benefit from their status as governmental units."

The dissent asked pointedly "[w]hy, if Congress wanted to be crystal clear in abrogating tribal immunity through the Code, did it not use the clearest means of abrogating that immunity by including 'Indian Tribe'—or its equivalent—in the list of expressly named governmental types that makes up the bulk of § 101(27)?" Answering his own question, Chief Judge Barron wrote that "[o]ne possible answer is quite straightforward: Congress did not mention Indian tribes in § 101(27) because Congress did not intend to include them as 'governmental unit[s].' " Although conceding that there are interpretive arguments supporting the majority, Judge Barron determined that "it is not enough for us to be convinced that the text could be read to include Indian tribes. Indeed, it is not even enough for us to be convinced that, all else equal, the better reading of the text is that it does include Indian tribes. Rather, because we are trying to determine whether Congress—through that phrase—abrogated tribal sovereign immunity, we must be convinced that there is no plausible way of reading those words to exclude Indian tribes."

Kriss v. United States (In re Kriss), 53 F.4th 726 (1st Cir. 2022).

Holding: When Chapter 13 debtor did not file Forms 1040 until years after they were due, his filings did not qualify as "returns" under applicable nonbankruptcy law, and therefore, taxes (including interest and penalties) for those years were nondischargeable.

Summary: The debtor failed to file tax returns for 1997 and 2000, or pay the taxes that were owed for either year. In 2007, the debtor filed Forms 1040 for both years at issue, but did not pay any of what was owed to the IRS. He filed Chapter 13 in 2012 and received a discharge in 2017, leaving open the issue whether the discharge covered his debts owed to the IRS for the 1997 and 2000 tax years. The bankruptcy court held that the tax liabilities were not discharged and the district court affirmed.

The First Circuit began its analysis by turning to what it referred to as the "puzzling section of the Bankruptcy Code," § 523(a)(1)(B)(i)-(ii), followed by the definition of a "return" provided under § 523(a)(*), to determine whether the debtor's filings satisfied "the requirements of applicable nonbankruptcy law (including applicable filing requirements)." Applying the so-called "*Beard* test" developed by the Sixth Circuit, the First Circuit concluded that the debtor's filings did not qualify as "returns" under § 523(a)(*) and affirmed. The only part of the *Beard* test at issue here was whether the filings were "an honest and reasonable attempt to satisfy the requirements of the tax law." The debtor argued for the first time on appeal that the court should apply an "objective" standard to this prong of the *Beard* test, based only on the face of Form 1040, without looking to the debtor's conduct, as embraced by the Eighth Circuit (the "*Colsen* test"). The First Circuit rejected the invitation to apply the *Colsen* test based on waiver, finding that the debtor had previously argued that the *Beard* test should be applied in the same manner as three other courts that had *rejected* the *Colsen* test: subjectively looking to the taxpayer's conduct. Under the subjective test, failure to file a timely return without a reasonable explanation or excuse "evinces the lack of a reasonable effort to comply with the law." The First Circuit concluded that the debtor fell "well short" of showing that he had made reasonable efforts to timely file his returns and, therefore, he never filed "returns."

Brown v. Harrington (In re Brown), 55 F.4th 945 (1st Cir. 2022).

Holding: Failure of Chapter 11 debtor to submit quarterly reports to the U.S. Trustee as required by confirmation order is "cause" for dismissal.

Summary: The debtor filed Chapter 13 and then converted the case to Chapter 11. A confirmation order was entered by the bankruptcy court requiring the debtor to timely pay quarterly fees to the United States Trustee ("UST") until the case was closed or dismissed, pursuant to 28 U.S.C.A. § 1930(a)(6), and requiring the debtor to submit postconfirmation quarterly reports to the UST. The debtor was relieved of these obligations if the case was administratively closed. Although the case was administratively closed at one point, it was reopened twice and, during the periods in which the case was reopened, the debtor did not pay quarterly fees for 18 quarters or submit quarterly reports for 21 quarters. The UST moved to dismiss the case for "cause" under § 1112(b)(1) of the Code. The bankruptcy court granted the motion, finding that the debtor had failed to comply with its confirmation order on numerous occasions, and a reopened case was synonymous with an opened case, meaning

the requirements under the confirmation order, including § 1930(a)(6), were triggered each time the case was reopened. The district court affirmed, finding that, despite the debtor's arguments, there was no meaningful distinction between an "opened" and "reopened" case.

The First Circuit affirmed, deferring to the bankruptcy court's interpretation of its own order, including that the case was "open in all operative respects during the periods in which it had been reopened." The debtor pointed out that, at the time the confirmation order entered, § 1930(a)(6) did not refer to "reopened" cases, yet, the 2021 version of the statute does so and separately refers to "opened" cases, which meant, according to the debtor, that the confirmation order requirements ceased after the case was administratively closed the first time. But, as the First Circuit observed, § 1930(a)(6) only addresses quarterly payments, not submission of quarterly reports to the UST. Thus, "cause" existed to dismiss the case based solely on the debtor's failure to submit quarterly reports.

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