

# The Daily Deal

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## Gambling attrition

*As tribal gaming faces setbacks, deal participants restructure debt in a highly regulated environment*

BY ADAM R. MOSES

Once thought of as an industry almost impervious to the gyrations of the broader domestic economy, Native American gaming steadily tallied strong results in the years preceding the economic downturn and soaked up its share of the readily available financing that flooded the domestic gaming space as a whole during this period. However, as the domestic economy retrenched in 2008, many tribal casinos saw their previously meteoric growth taper off and they began to reel under the strain of outsized leverage incurred in anticipation of ever-increasing earnings.

This change in fortunes occasioned a number of restructurings that confronted tribes and creditors alike with difficult, often novel questions about how to restructure debt in an industry subject to legal and regulatory requirements unlike those in place in the broader domestic gaming space. With restructurings recently completed by the Odawa Casino Resort in Michigan, the Inn of the Mountain Gods Resort and Casino in New Mexico, the Buffalo Thunder Resort and Casino in New Mexico, the River Rock Casino in California, Mohegan Sun in Connecticut and several other tribal gaming enterprises, it is a fitting time to take stock of the key regulatory and legal drivers at play in these restructurings.

In addition to the core business considerations that animate all restructurings, revamps of tribal enterprises are subject to special regulatory and legal constraints. For example, under the Indian Gaming Regulatory Act, a tribe must have the "sole proprietary interest and responsibility for the conduct of any gaming activity." Accordingly, unlike in corporate restructurings, creditors of a tribal gaming enterprise cannot convert their debt into equity. Nor can creditors unilaterally install themselves or their designees as managers of an Indian casino resort.

Moreover, there are important limitations on what collateral tribes can grant their lenders without obtaining federal approval, including, for example, limitations on the ability of a tribe to encumber its land.

What's more, under settled federal case law, Indian tribes and their instrumentalities are accorded sovereign immunity from many suits. As a result, it is common for creditors to obtain a waiver of sovereign immunity in the debt documentation governing tribal financing transactions. Nevertheless, recent successful judicial challenges to these waivers initiated by tribes illustrate the possibility that they may not always be given their expected effect and can even be invalidated altogether.

The bankruptcy option, another mainstay of corporate restructurings, may not be available in tribal cases. Numerous legal commentators have long argued that tribal entities are precluded altogether by the Bankruptcy Code from being debtors in bankruptcy cases. One recent bankruptcy case involving the Santa Ysabel Resort and Casino, owned by the Iipay Nation of Santa Ysabel, presented an opportunity for the jurisdictional questions debated by the legal commentariat to be tested. Ultimately, the Bankruptcy Court concluded that the Santa Ysabel Resort and Casino was not eligible to avail itself of bankruptcy protection, largely validating the prevailing view among commentators.

The Bankruptcy Court did, however, rest its determination in part on the specific characteristics of the entity in question, so the decision was not quite as sweeping of a statement as some had predicted. In any event, the lesson from experience to date has been that the U.S. bankruptcy process very seldom plays a role in tribal restructurings.

In addition to the technical effects noted, the regulatory and legal features surveyed above also have practical consequences. For example, these features eliminate several common weapons of influence in the creditor arsenal, and, owing to the resultant reduction in creditor negotiating leverage, tend to impart a more consensual quality to tribal restructurings. In addition, with creditors reluctant to test waivers of sovereign immunity and tribes and creditors alike generally disinclined to seek the involvement of bankruptcy courts or contend with the associated jurisdictional questions, there is frequently no third-party neutral to quickly settle the tough questions and some tribal restructurings have consequently been protracted affairs, with several taking years to complete.

In conclusion, like the balance of the domestic gaming industry, the tribal gaming space experienced setbacks during the economic downturn and witnessed its share of restructurings. However, the highly regulated environment in which tribal gaming restructurings are undertaken means that they are subject to special constraints making them distinct from traditional corporate restructurings in several important respects, especially as a result of the limited application of bankruptcy and limitations on creditors taking ownership interests in, or exercising management control over, tribal gaming enterprises in these restructurings. In spite of the thorny legal backdrop, with several significant restructurings in the industry recently completed, tribes and creditors alike have demonstrated that the attendant challenges can be successfully navigated. ■

*Adam R. Moses is a partner in the Los Angeles office of Milbank, Tweed, Hadley & McCloy LLP. Mr. Moses is a member of the firm's Global Corporate Group and its Gaming & Hospitality Practice.*



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