



Dollar General Shows a Path Forward for Tribal Law

JULY 12, 2016

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A single sheet of paper issued recently by the United States Supreme Court in the case of [Dollar General v. Mississippi Band of Choctaw Indians](#) gave rise to a collective sigh of relief among federally recognized Native American tribes. The court's 4-4 tie affirmed the ruling in favor of tribal courts by the United States Court of Appeals for the Fifth Circuit. The tie vote ended months of speculation. If tribes and their allies wish to avoid a similar challenge in the future, the result in this case should set off a flurry of advocacy and institution building to protect tribal court powers.

Many modern Native American nations boast sophisticated governments, court systems and economies of their own. A modest number of tribes are able to drive their regional economies with success in tourism, natural resource development, gaming, agriculture and light manufacturing. Native American nations have the power to make laws to govern their own affairs, and can enforce and adjudicate these laws — under certain circumstances — in tribal courts. A significant number of these tribal court systems have appellate divisions beyond the trial court level. Retail giant Dollar General faced a civil lawsuit in the Mississippi Choctaw courts and challenged the court's jurisdiction over non-Native Americans all the way to the [U.S. Supreme Court](#). At oral argument, held before Justice Antonin Scalia died, five justices were openly hostile or skeptical of the arguments in favor of tribal jurisdiction. The power of all tribal courts hung in the balance as a slim majority on the court seemed poised to label them as inherently unfair places for the adjudication of non-Native American interests.

The court's tie likely raises more questions for legal historians as to what happened behind closed doors with this case than it does hard questions of legal reasoning. This was the oldest undecided case when the justices took the bench on the morning of June 23, with six months and 17 days elapsing between argument and decision. Justice Scalia had expressed significant skepticism regarding the tribe's position during oral argument. Was he writing the opinion at his death? Was a 5-4 majority thrown into disarray as the assigned justice tried to craft an opinion that gathered the necessary fifth vote again? Common sense may suggest a range of possibilities, but court-watchers will only truly know how the court arrived at this tie vote when and if the papers of sitting justices are released for historical research. Despite this lack of transparency, however, the court's action is a bullet dodged for the plaintiff who brought the case against Dollar General, the courts of the Mississippi Band of Choctaw Indians, and tribal courts and dispute resolution generally. This ruling may not create new law or clarify existing precedent, but the questions raised by the justices during argument, and the arguments of all parties and amici, should shape tribal lawmaking, congressional advocacy and private party contracting with tribal businesses for years to come.

This case involved the alleged sexual molestation of a young tribal member interning at a Dollar General store located on tribally controlled lands within the boundaries of the Mississippi Choctaw reservation. Dollar General consented to tribal court jurisdiction with regards to its lease with a tribal corporation. The company also operated pursuant to a business license issued by a governmental arm of the tribe. An employee of Dollar General consented to participate in the tribal internship program by placing the

youth at the center of this case in a position at the store. However, there was no formal documentation between the company and the tribe consenting to the application of tribal law and jurisdiction for matters arising from its involvement in the youth job training program. This case could have been narrowly fought and decided on the facts of what constitutes sufficient “consent” by a non-Native American company to tribal court jurisdiction. Instead, what developed was a question of constitutional dimensions: are there due process deprivations when subjecting non-Native American businesses to civil court jurisdiction in tort cases?

It is ironic that Dollar General challenged the fairness of Mississippi Choctaw courts. The tribe has sophisticated trial and appellate courts. The key tribal court decision in the Dollar General case was written by long-time tribal appellate judge Frank Pommersheim, a renowned jurist and prolific legal scholar. The tribe’s economy is also robust. It has light manufacturing, tourism, retail and gaming operations. It is among the top 10 private employers in the state of Mississippi and reports driving \$500 million into the Mississippi state economy through various development projects. The tribe drives its regional economy, and its courts no doubt exceed the capacities of small- to moderately-sized local or municipal courts throughout the country.

This case may not have produced an opinion giving either side the clarity it desired, but its end still suggests some key imperatives for Indian Country and non-Native American businesses alike. Careful arms-length negotiations in business relationships between tribal entities and their partners can solve for how and where business disputes must be resolved. Continued attention to building sophisticated laws and courts in Indian Country can perhaps prevent the attacks on tribal courts seen in the Dollar General case. In short, there is hope that this kind of case may never be heard again. If the question does arise, hopefully it will not devolve into a wholesale effort to strip tribal institutions of their inherent powers.

To avoid another Dollar General, here is what must happen.

First, tribal governments and their allies must redouble efforts to develop robust tribal courts and dispute resolution procedures. Tribal courts with experienced judges and procedures that balance key aspects of due process, judicial review and traditional practices may encourage potential business partners to consent to jurisdiction in certain circumstances. Each tribe is a separate sovereign entity, but even accounting for how culturally diverse approaches may influence specific practices in a tribal justice system, consistency with regards to procedures and experienced judicial oversight may allay some of the concerns expressed by Dollar General and its supporters. Further, smaller tribes with limited resources should continue to collaborate in the development and funding of regional intertribal court systems. Intertribal court systems allow multiple tribes to route disputes to a single court where advanced procedures and experienced judicial staff ensure that each tribe’s disputes are resolved according to its own laws.

In addition, tribal nations must continue to replace more general ordinances with detailed and specific statutory and regulatory codes. This is necessary for both substantive areas of law like environmental regulation or employment rights ordinances, and procedural areas such as court or arbitration rules. Detailed laws and institutionally strong courts that enforce them can discourage attacks like those lodged by Dollar General, which claimed that non-Native American parties are unable to access what the law is or how it is to be enforced by a particular tribal nation. This was a hollow attack by Dollar General on the well-developed and easily available codes of the Mississippi Band of Choctaw legal system. But fair or not, the argument had traction with several justices in Dollar General. The development and

publication (easily accomplished through internet databases) of tribal and statutory codes are the best strategy for defusing arguments that tribal law is unknown and unavailable to non-Native American parties.

Next, both non-Native American companies and tribes must up their game in negotiating commercial contracts with one another. They already spend a fair amount of time in arms-length negotiations over governing law and dispute resolution. Far too often, however, the process is too narrow, and is limited to crafting waivers of sovereign immunity rather than on agreeing which procedures, laws and forums are to be used for categories of disputes. For example, a carefully designed arbitration clause can deter disputes over how and where a dispute will be heard. These arbitration agreements can set procedures for process and arbitrator expertise that give both parties comfort about dispute resolution at the beginning of a relationship. These can be fruitful economic partnerships, but the record of the Dollar General case demonstrates that more front-end planning is likely needed.

Non-Native American companies and tribal entities need to be realistic in constructing a fruitful business partnership. Some potential disputes are likely best left to tribal law — leasing on tribal lands, environmental regulation and natural resource development are potential examples. Conversely, some aspects of a business relationship are likely more amenable to another forum — such as agreeing to [American Arbitration Association](#) procedures when financing complex debt instruments. There are no absolute rules to delineate these categories, but discovering what they are in each commercial arrangement depends on equal parts good faith, careful planning and a dose of common sense.

Finally, Indian Country interests should seek as many congressional pronouncements as possible supporting tribal courts and a broad concept of non-Native American consent to tribal law and jurisdiction. Congress has plenary power over Native American affairs. The arguments in favor of tribes throughout Dollar General noted that Congress had clearly stated its support for the competence and evolving sophistication of tribal court systems. The more the record shows that Congress has not directly or impliedly limited the power of tribal courts (or their confidence therein), the more unlikely it will be that courts consider attacks like those lodged by Dollar General.

The records from this case and its predecessor, Plains Commerce Bank (the last case where tribal jurisdiction over a non-Native American company was discussed), show that these issues are contentious and prone to divide the U.S. Supreme Court. The lesson from Dollar General is to plan and contract in a way that avoids presenting the question again.

For more information

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