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## Silent Intent? Analyzing the Congressional Intent Requirement to Abrogate Tribal Sovereign Immunity

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# SILENT INTENT? ANALYZING THE CONGRESSIONAL INTENT REQUIRED TO ABROGATE TRIBAL SOVEREIGN IMMUNITY

**Abstract:** On February 26, 2019, the United States Court of Appeals for the Sixth Circuit in *Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings, LLC III)* held that Congress did not intend to abrogate tribal sovereign immunity through the enactment of the Bankruptcy Code, Title 11 of the U.S. Code. In so holding, the Sixth Circuit split from the Ninth Circuit and emphasized the long-held principle that all ambiguities in statutes be construed in a manner that favors the Indian tribes. This Comment argues that the Sixth Circuit properly applied the standard that the Ninth Circuit failed to respect: namely, that Congress must express an unequivocal intent to abrogate an Indian tribe's sovereign immunity.

## INTRODUCTION

Indian tribes have long been considered distinct political communities that pre-exist the United States Constitution, and as such, retain many of their rights to self-governance.<sup>1</sup> The rights that Indian tribes retain include the immunity from suit traditionally provided to other sovereign entities.<sup>2</sup> This tribal sovereign immunity is subject to restriction only by a tribe itself or by Congress, which has the power to abrogate the immunity through an unequivocal expression of its

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<sup>1</sup> See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (citing *Worcester v. Georgia*, 31 U.S. 515, 559 (1932)) (explaining that Indian tribes retain power over internal and social relations despite no longer retaining full sovereignty).

<sup>2</sup> *Id.* at 58. The first Supreme Court case to explicitly hold that Indian tribes possess a level of immunity from suit similar to other sovereigns occurred in 1940. See *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940) (holding that an Indian tribe should retain the same level of immunity that it possessed when it was considered a separate sovereign); see also William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587, 1594 (2013) (noting that the Supreme Court first explicitly recognized the doctrine of tribal immunity in *Fidelity*). The overarching policy goal of providing this type of immunity to Indian tribes was to allow these tribes to continue to self-govern and to encourage their economic growth. See *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991) (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987)) (stating that congressional decisions upholding the tribal immunity doctrine demonstrate the congressional goal of encouraging a tribe's ability to be self-sufficient and to develop economically). In general, boundaries to this immunity exist when Congress expressly permits a lawsuit, or the tribe itself waives its immunity. Ryan Seelau, *In Defense of Tribal Sovereign Immunity: A Pragmatic Look at the Doctrine as a Tool for Strengthening Tribal Courts*, 90 N.D. L. REV. 121, 138 (2014). This tribal immunity, however, only applies to the tribe itself or tribe-owned businesses and does not provide immunity to individual members of the tribe for their individual actions. *Id.*

intent to do so.<sup>3</sup> Recently, this power of tribal immunity has become more pervasive as a result of the growth in economic activity between tribes and non-tribal parties, increasing the potential impact of this immunity for both Indian tribes and potential non-tribal legal adversaries.<sup>4</sup>

In 2019, in *Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings, LLC III)*, the United States Court of Appeals for the Sixth Circuit held that Congress did not unequivocally intend to abrogate tribal sovereign immunity by enacting the Bankruptcy Code of 1978.<sup>5</sup> Thus, according to the Sixth Circuit, aggrieved parties cannot sue Indian tribes for actions resulting from the filing of a bankruptcy petition under the Bankruptcy Code.<sup>6</sup>

The prevailing issue in *In re Greektown Holdings, LLC III* was whether Congress intended to include Indian tribes within the meaning of the phrase

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<sup>3</sup> See *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 754 (1998) (stating that an Indian tribe can only be sued under federal law if the tribe waived its tribal immunity, or if Congress has taken an action to authorize the suit). Congress has been able to authorize suits against Indian tribes for over a century. See *Thebo v. Choctaw Tribe of Indians*, 66 F. 372, 373–74 (8th Cir. 1895) (explaining that Congress’s power to pass acts that authorize lawsuits against Indian tribes has never been in doubt and that Congress has done so numerous times in the past). The Eighth Circuit justified Congress’s ability to authorize suits against Indian tribes, and therefore abrogate any immunity, because Indian tribes are domestic and dependent states, rather than completely sovereign states. See *id.* at 375 (noting that although Indian tribes do possess significant self-governance rights, they are still subject to the jurisdiction and authority of the United States, and as a result, the United States is able to authorize suits against these tribes); see also *Worcester*, 31 U.S. at 561 (holding that an Indian tribe is its own “nation” and that only United States federal law, and not individual states, can place legal boundaries on a tribe).

<sup>4</sup> See *Kiowa Tribe*, 523 U.S. at 758 (noting that tribal immunity was originally meant to protect a tribe’s ability to self-govern, but now covers a number of off-reservation commercial activities, including sales of cigarettes, that could potentially put individuals dealing with these tribes at a risk of harm without any recourse); see also Lorie M. Graham, *An Interdisciplinary Approach to American Indian Economic Development*, 80 N.D. L. REV. 597, 601–02 (2004) (explaining that Indian tribes have begun offering an increasing number of commercial services, including the opening of banks, operating retail and tourist enterprises, and serving as cell phone and internet service providers). Recently, this doctrine of tribal immunity has come under increased scrutiny as it has continued to extend beyond its original purpose. See *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 922 (6th Cir. 2009) (citing *Kiowa Tribe*, 523 U.S. at 758) (noting that the doctrine of tribal immunity could potentially lead to unfair results, but that it is Congress, rather than the courts, that needs to change the contours of this immunity); see also Hunter Malasky, Note, *Tribal Sovereign Immunity and the Need for Congressional Action*, 59 B.C. L. REV. 2469, 2475, 2481 (2018) (explaining that the doctrine of tribal immunity has provided a means of avoiding lawsuits against Indian tribes in cases involving a number of different commercial transactions occurring off of tribal lands).

<sup>5</sup> *Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings, LLC III)*, 917 F.3d 451, 461 (6th Cir. 2019).

<sup>6</sup> See *id.* at 467 (holding that the cited provisions of the Bankruptcy Code lack the requisite clarity to abrogate tribal immunity and that a tribe could not be sued under such provisions). See generally 11 U.S.C. §§ 101, 106 (2018) (stating that sovereign immunity is abrogated for “governmental units” and also defining governmental units to include “other foreign or domestic governments,” without specifically mentioning Indian tribes).

“governmental unit” as defined in 11 U.S.C. § 101(27).<sup>7</sup> After analyzing relevant Supreme Court precedent, the Sixth Circuit split with the Ninth Circuit by holding that insufficient evidence existed to demonstrate that Congress unequivocally intended to abrogate tribal immunity in the Bankruptcy Code.<sup>8</sup> In so ruling, the Sixth Circuit adopted reasoning similar to that of a recent Seventh Circuit Court of Appeals’ decision, in which the Seventh Circuit held that Congress did not intend to abrogate tribal sovereign immunity in a statute with language similar to that of the Bankruptcy Code.<sup>9</sup>

Part I of this Comment discusses the factual and procedural history of *In re Greektown Holdings, LLC III* and provides a legal background of the doctrine of tribal sovereign immunity.<sup>10</sup> Part II examines and discusses the different positions argued before the Sixth Circuit as well as in previous cases related to the potential abrogation of tribal sovereign immunity.<sup>11</sup> Finally, Part III argues that

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<sup>7</sup> *In re Greektown Holdings, LLC III*, 917 F.3d at 456. Specifically, a “governmental unit” is defined as “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.” 11 U.S.C. § 101(27). Congress abrogated the sovereign immunity for all “governmental units” in the Bankruptcy Code, forcing the Sixth Circuit to assess whether this abrogation for all governmental units extended to Indian tribes. *Id.* § 106; *see In re Greektown Holdings, LLC III*, 917 F.3d at 456 (noting that the plaintiff asserted the definition of a “governmental unit” included in the Bankruptcy Code demonstrated Congress’s unequivocal intent to abrogate tribal immunity).

<sup>8</sup> Compare *In re Greektown Holdings, LLC III*, 917 F.3d at 461 (explaining that the definition of a “governmental unit” in the Bankruptcy Code is not an unequivocal expression of congressional intent such that it would abrogate tribal sovereign immunity, as the definition is not sufficiently descriptive); *with* *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1057–58 (9th Cir. 2004) (holding that the Bankruptcy Code contained sufficient evidence of congressional intent to abrogate sovereign immunity as the phrase “other foreign or domestic government,” which is included in the definition of a “governmental unit,” includes Indian tribes).

<sup>9</sup> *See In re Greektown Holdings, LLC III*, 917 F.3d at 460 (noting that simply including governmental units within the list of entities for which sovereign immunity is abrogated is not evidence of unequivocal congressional intent to abrogate tribal immunity); *see also* *Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 827 (7th Cir. 2016) (holding that the inclusion of the term “government” in the definition of a person within the Fair and Accurate Credit Transaction Act is not an unequivocal expression of congressional intent to abrogate tribal sovereign immunity). In addition to the Seventh Circuit Court of Appeals, a number of lower courts throughout the country have also ruled that the enactment of the Bankruptcy Code did not abrogate tribal immunity. *See, e.g.*, *Bucher v. Dakota Fin. Corp. (In re Whitaker)*, 474 B.R. 687, 695 (B.A.P. 8th Cir. 2012); *Subranni v. Navajo Times Publ’g Co. (In re Star Group Comm’ns, Inc.)*, 568 B.R. 616, 622 (Bankr. D.N.J. 2016). In contrast, several bankruptcy courts used similar reasoning to that of the Ninth Circuit, ruling that Congress did abrogate tribal immunity in the Bankruptcy Code. *See, e.g.*, *In re Platinum Oil Props., LLC*, 465 B.R. 621, 643 (Bankr. D.N.M. 2011); *Russell v. Fort McDowell Yavapai Nation (In re Russell)*, 293 B.R. 34, 44 (Bankr. D. Ariz. 2003).

<sup>10</sup> *See infra* notes 13–37 and accompanying text.

<sup>11</sup> *See infra* notes 38–65 and accompanying text.

the Sixth Circuit properly applied the unequivocal intent standard in assessing tribal sovereign immunity under the Bankruptcy Code.<sup>12</sup>

## I. LEGAL AND FACTUAL CONTEXT

The Supreme Court formally upheld the doctrine of tribal sovereign immunity in 1978, the same year in which Congress passed the current Bankruptcy Code.<sup>13</sup> Thus, the issue of whether Congress abrogated tribal sovereign immunity through the Bankruptcy Code has troubled courts throughout the country for nearly the entire existence of the doctrine and the Code.<sup>14</sup> Section A of Part I provides an overview of tribal sovereign immunity in the United States and the relevant sections of the Bankruptcy Code.<sup>15</sup> Section B details the factual background of *In re Greektown Holdings, LLC III* and the procedural history of the case from its initiation in bankruptcy court, through its appeal to the district court, and finally to its appeal in the Sixth Circuit.<sup>16</sup>

### A. History of Indian Tribal Sovereign Immunity and Relevant Bankruptcy Code Provisions

Indian tribes possess a level of common-law sovereign immunity that can only be abrogated through actions by Congress or through waiver by the tribe itself.<sup>17</sup> Congress originally granted this sovereign immunity to Indian tribes to protect the tribes' ability to self-govern.<sup>18</sup> To encourage a policy of tribal self-governance and self-sufficiency, the Supreme Court has held that all ambiguities in federal laws should be interpreted in a manner that benefits the Indian tribes.<sup>19</sup>

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<sup>12</sup> See *infra* notes 66–82 and accompanying text.

<sup>13</sup> See *Santa Clara Pueblo*, 436 U.S. at 72 (holding that plaintiffs cannot bring a lawsuit against Indian tribes unless Congress allows the lawsuit, thereby affirming tribal sovereign immunity); *In re Greektown Holdings, LLC III*, 917 F.3d at 456 (explaining that the Supreme Court decided *Santa Clara Pueblo* just six months before the enactment of the Bankruptcy Code).

<sup>14</sup> Compare *In re Sandmar Corp.*, 12 B.R. 910, 917 (Bankr. D.N.M. 1981) (concluding that Congress intended for the Bankruptcy Code to apply to Indian tribes), with *In re Nat'l Cattle Congress*, 247 B.R. 259, 267 (Bankr. N.D. Iowa 2000) (holding that Congress did not abrogate Indian tribes' ability to be immune from suit through the Bankruptcy Code).

<sup>15</sup> See *infra* notes 17–24 and accompanying text.

<sup>16</sup> See *infra* notes 25–37 and accompanying text.

<sup>17</sup> *Kiowa Tribe*, 523 U.S. at 754; see also *Santa Clara Pueblo*, 436 U.S. at 72 (explaining that a lawsuit cannot be brought against an Indian tribe unless Congress clearly intends to allow the lawsuit).

<sup>18</sup> See *Kiowa Tribe*, 523 U.S. at 758 (explaining that Congress initially recognized this tribal sovereign immunity because it believed the immunity was necessary to protect Indian tribes from encroachment by the individual states).

<sup>19</sup> See *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (explaining that courts should not use the standard statutory interpretation methods while analyzing statutes when an Indian tribe is involved); see, e.g., *Meyers*, 836 F.3d at 827 (holding that the definitions within the Fair and Accurate Credit Transaction Act did not demonstrate an unequivocal expression of congressional intent to abrogate tribal sovereign immunity as the court resolved a perceived ambiguity in the statute in favor of the tribal immunity). Congress previously passed a statute that expressly states a policy

In assessing whether Congress has authorized a lawsuit against a sovereign entity, the first step is to determine whether Congress's intent to abrogate the immunity was unequivocal.<sup>20</sup> Courts have held that this unequivocal expression does not need to specifically mention the Indian tribes by name, but the statute itself must leave no doubt as to the clarity of congressional intent.<sup>21</sup>

In § 106 the Bankruptcy Code, Congress abrogated the sovereign immunity of all “governmental units” with respect to a number of listed sections of the Code.<sup>22</sup> Section 101 of the Bankruptcy Code defines a “governmental unit” to include a number of specific entities, and also includes a general clause that “other foreign or domestic governments” are considered governmental units.<sup>23</sup> As such, in *In re Greektown Holdings, LLC III*, the Sixth Circuit needed to assess whether Congress unequivocally intended to include tribal governments

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goal of encouraging tribes to grow economically and become self-sufficient. See 25 U.S.C. § 1451 (2018) (declaring a policy that Congress would aid Indian tribes so that these tribes would eventually be able to provide fully for themselves).

<sup>20</sup> See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000) (describing how the requirement of an unequivocal expression mandates a presumption that Indian tribes possess this tribal sovereign immunity); see also *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143–44 (1980) (explaining that any ambiguity in a federal law is construed in a manner that favors tribal independence).

<sup>21</sup> See *In re Greektown Holdings, LLC III*, 917 F.3d at 461 (explaining that in order for courts to find congressional intent, the statute does not need to include “magic words”). Although the Supreme Court has stated that Congress does not need to explicitly specify that Indian tribes are included in a statute to abrogate tribal immunity, there are no instances in which the Supreme Court has found unequivocal congressional intent without some mention of Indian tribes within the statute. See *Fed. Aviation Admin. v. Cooper*, 566 U.S. 284, 291 (2018) (noting that the Court has never required Congress to state its intent in any particular manner, including the use of specific words); *Meyers*, 836 F.3d at 824–25 (citing *Buchwald Capital Advisors, LLC v. Papas (In re Greektown Holdings, LLC II)*, 532 B.R. 680, 693 (E.D. Mich. 2015)) (noting that there are no Supreme Court cases that identified congressional intent without explicit mention of Indian tribes, and that the only circuit case to find such intent was *Krystal Energy Co.*).

<sup>22</sup> 11 U.S.C. § 106. The applicable sections for which sovereign immunity is abrogated under this definition include § 544 and § 550 of the Bankruptcy Code, under which the plaintiff in *Buchwald Capital Advisors, LLC* made its claims. *Id.* (noting that sovereign immunity is abrogated with respect to both § 544 and § 550, among other sections of the Bankruptcy Code); Brief of Plaintiff-Appellant *Buchwald Capital Advisors LLC* at 12, *In re Greektown Holdings, LLC III*, 917 F.3d 451 (No. 18-1165) [hereinafter Brief of Plaintiff-Appellant]. In this case, the plaintiffs claimed that the defendant tribe fraudulently transferred money to a number of related entities prior to filing a petition for bankruptcy protection. *In re Greektown Holdings, LLC III*, 917 F.3d at 454. The defendants sought avoidance of these potentially fraudulent transfers under § 544 of the Bankruptcy Code as well as recovery of the money from these transfers under § 550 of the Code. *Id.* at 455; see 11 U.S.C. §§ 544, 550 (2018) (providing for the avoidance of fraudulent transfers and the potential recovery of money from the fraudulent transfers, respectively).

<sup>23</sup> 11 U.S.C. § 101(27). Specifically, under the Bankruptcy Code, the term “governmental unit” includes the following entities: “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.” *Id.*

within the meaning of “other foreign or domestic government,” as Congress did not specifically include Indian tribes within the statutory definition.<sup>24</sup>

### B. *In re Greektown Holdings, LLC’s Factual and Procedural History*

In 2000, the Defendant-Appellee Sault Ste. Marie Tribe of Chippewa Indians (Tribe) opened the Greektown Casino (Casino) in Detroit, Michigan.<sup>25</sup> Almost immediately after opening the Casino, the Tribe experienced financial troubles.<sup>26</sup> In response to this financial strain, the Tribe altered the Casino’s ownership structure and created a new entity, Greektown Holdings, LLC (Holdings).<sup>27</sup> In December of 2005, Holdings transferred approximately \$177 million to a number of entities, including the original part owners of the Casino, Monroe Partners, LLC (Monroe), and to the Tribe itself.<sup>28</sup> Despite these reorganizational efforts, by April 2008, the Tribe could no longer operate due to its increasing financial obligations.<sup>29</sup> Accordingly, in May 2008, Holdings and the Casino (Debtors) filed a petition for bankruptcy protection under Chapter 11 of the Bankruptcy Code.<sup>30</sup> Under the Tribe’s reorganization plan, the Greektown Liti-

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<sup>24</sup> See *In re Greektown Holdings, LLC III*, 917 F.3d at 456, 459–60 (explaining that simply proving that Indian tribes are both domestic and a form of government does not prove the congressional intent required to abrogate tribal sovereign immunity).

<sup>25</sup> *Id.* at 454; Brief of Plaintiff-Appellant, *supra* note 22, at 3. The Greektown Casino (Casino) opened with the assistance of Defendant-Appellee Kewadin Casinos Gaming Authority, a political subdivision of the Sault Ste. Marie Tribe of Chippewa Indians (Tribe). Brief of Plaintiff-Appellant, *supra* note 22, at 3.

<sup>26</sup> *In re Greektown Holdings, LLC III*, 917 F.3d at 454; Brief of Plaintiff-Appellant, *supra* note 22, at 3. These financial troubles were the result of two obligations the Tribe incurred related to the Casino. *In re Greektown Holdings, LLC III*, 917 F.3d at 454. First, in 2000, the Tribe paid Monroe Partners, LLC (Monroe) \$265 million in exchange for Monroe’s 50% interest in the Casino, allowing the Tribe to obtain a 100% ownership of the Casino. *Id.* The Plaintiffs, Buchwald Capital Advisors, LLC, serving as litigation trustee (Trustee) for the Greektown Litigation Trust (Trust), alleged that this amount was substantially more than the actual market value at the time. Brief of Plaintiff-Appellant, *supra* note 22, at 7. Second, in 2002, the Tribe paid the City of Detroit \$200 million as part of a Development Agreement to build a hotel at the Casino site in exchange for a gaming license from the Michigan Gaming Control Board (MGCB). *In re Greektown Holdings, LLC III*, 917 F.3d at 454; Brief of Plaintiff-Appellant, *supra* note 22, at 8.

<sup>27</sup> *In re Greektown Holdings, LLC III*, 917 F.3d at 454; Brief of Plaintiff-Appellant, *supra* note 22, at 8. This new entity became the owner of the Casino. *In re Greektown Holdings, LLC III*, 917 F.3d at 454. The Tribe refinanced its debt using this new entity and also raised capital to help pay for its existing financial obligations. *Id.* In total, Greektown Holdings, LLC (Holdings) took on approximately \$375 million in debt, which consisted of a \$190 million term loan, a \$100 million revolving credit facility and senior notes worth \$185 million. Brief of Plaintiff-Appellant, *supra* note 22, at 9. The MGCB conditioned its approval to this restructuring on strict financial covenants imposed on the Tribe. *In re Greektown Holdings, LLC III*, 917 F.3d at 454.

<sup>28</sup> *In re Greektown Holdings, LLC III*, 917 F.3d at 454. Of this \$177 million, Holdings transferred at least \$145 million to the former owners of Monroe, and at least \$6 million to the Tribe. *Id.*

<sup>29</sup> *Id.* (explaining that the Tribe was on the verge of losing both its Casino ownership rights and its Michigan gaming license due to its financial obligations).

<sup>30</sup> Brief of Plaintiff-Appellant, *supra* note 22, at 10. A debtor will typically file for Chapter 11 bankruptcy protection as a way to receive legal protection and simultaneously reorganize its financial

gation Trust (Trust) would pursue the unsecured claims against the Debtors' estate, and the Plaintiff, Buchwald Capital Advisors, LLC (Trustee), became the litigation trustee for the Trust.<sup>31</sup>

In 2010, the Trustee filed a complaint in the United States Bankruptcy Court for the Eastern District of Michigan alleging that Holdings had fraudulently transferred \$177 million for the benefit of the Tribe.<sup>32</sup> The Tribe filed a motion to dismiss the complaint, arguing it possessed tribal sovereign immunity.<sup>33</sup>

The bankruptcy court initially denied the Tribe's motion to dismiss and held that Congress unequivocally intended to abrogate tribal sovereign immunity through § 101(27) and § 106 of the Bankruptcy Code.<sup>34</sup> The District Court for the Eastern District of Michigan reversed this decision, finding insufficient evidence of congressional intent to abrogate tribal sovereign immunity in the Bank-

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structure to continue to operate with limited obligations in the future. *In re Gibson Group, Inc.*, 66 F.3d 1436, 1442 (6th Cir. 1995). The purpose of this reorganization is to ensure that a debtor does not go into liquidation, as it is more economically efficient to use assets within a reorganization than to sell such assets in liquidation. H.R. REP. NO. 95-595, at 220 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6179. Upon the filing of a bankruptcy petition, all actions by creditors against the debtor are stayed. *Id.* The debtor then discusses its financial obligations with its creditors in an attempt to negotiate a solution to the debtor's financial issues. *Id.* The debtor next creates a reorganization plan, which specifies how much each creditor will be paid, among other items. *Id.* A certain percentage of impacted creditors must accept this plan of reorganization before it can go before a bankruptcy court. *Id.* at 221. After creditors and stockholders agree, the bankruptcy court will assess whether all legal requirements are met. *Id.* If all requirements are met, the court will accept the plan, and the debtor emerges from the bankruptcy proceedings as a reorganized company. *Id.* A Chapter 11 bankruptcy proceeding therefore differs from a Chapter 7 bankruptcy proceeding, in which the sole motivation is maximizing value from the bankruptcy estate, by instead attempting to provide an opportunity for the debtor's operations to continue in the future. *In re Gibson Group, Inc.*, 66 F.3d at 1442.

<sup>31</sup> *In re Greektown Holdings, LLC III*, 917 F.3d at 454. Under the Bankruptcy Code, a debtor may file a reorganization plan which designates classes of unsecured and secured claims as part of the bankruptcy proceedings, as well as the treatment of claims that are impaired under the plan of reorganization. 11 U.S.C. §§ 1121, 1123 (2018). An unsecured claim is "a claim by a creditor who does not have a lien or a right of setoff against the debtor's property." *Unsecured Claim*, BLACK'S LAW DICTIONARY (11th ed. 2019). In contrast, a secured claim is defined as "a claim held by a creditor who has a lien or a right of setoff against the debtor's property." *Secured Claim*, BLACK'S LAW DICTIONARY, *supra*.

<sup>32</sup> *In re Greektown Holdings, LLC III*, 917 F.3d at 454-55; Brief of Plaintiff-Appellant, *supra* note 22, at 12. The Trustee sought avoidance and recovery of the \$177 million under § 544 and § 550 of the Bankruptcy Code. *Buchwald Capital Advisors, LLC III*, 917 F.3d at 455. Specifically, § 544 of the Bankruptcy Code provides for the potential avoidance of fraudulent transfers, whereas § 550 provides for the potential recovery of the money from these transfers. 11 U.S.C. §§ 544, 550.

<sup>33</sup> *In re Greektown Holdings, LLC III*, 917 F.3d at 455. In response, the Trustee argued that the Tribe did not possess immunity under these claims because Congress had abrogated this potential immunity through its enactment of the Bankruptcy Code, and that the Tribe waived its immunity by deciding to file for bankruptcy protection. *Id.*

<sup>34</sup> *Buchwald Capital Advisors, LLC v. Papas (In re Greektown Holdings, LLC I)*, 516 B.R. 462, 473, 476 (Bankr. E.D. Mich. 2014) (holding that Congress's use of the phrase "domestic government" demonstrated sufficient intent of its desire to abrogate tribal sovereign immunity within the Bankruptcy Code).



ruptcy Code.<sup>35</sup> Finally, the Sixth Circuit affirmed the district court's decision as it similarly held that Congress, through its enactment of § 101(27) and § 106 of the Bankruptcy Code, did not unequivocally express its intent to abrogate tribal sovereign immunity.<sup>36</sup> The Trustee subsequently filed a petition for writ of certiorari to the Supreme Court, and this petition is currently pending.<sup>37</sup>

## II. INTERPRETING THE UNEQUIVOCAL INTENT REQUIREMENT: CIRCUIT COURTS DISAGREE ON THE ASSESSMENT OF UNEQUIVOCAL CONGRESSIONAL INTENT

Although it is firmly established that congressional intent must be unequivocal to abrogate tribal sovereign immunity within a statute, the circuit courts have differed in their application of this standard.<sup>38</sup> Section A of Part II discusses the Ninth Circuit's analysis of the potential abrogation of immunity within the Bankruptcy Code using the unequivocal intent standard.<sup>39</sup> Section B of this Part discusses the Seventh Circuit's analysis of the potential abrogation of tribal sovereign immunity within the Fair and Accurate Credit and Transactions Act.<sup>40</sup> Finally, Section C examines the Sixth Circuit's application of the unequivocal congressional intent requirement to the definitions included within the Bankruptcy Code.<sup>41</sup>

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<sup>35</sup> *In re Greektown Holdings, LLC II*, 532 B.R. at 684. The district court then remanded to the bankruptcy court to decide whether the Tribe had waived its tribal immunity through its actions in the bankruptcy litigation. *Id.* The court ultimately deemed the Tribe's litigation conduct insufficient to waive the tribal sovereign immunity. *In re Greektown Holdings, LLC III*, 917 F.3d at 455. The district court affirmed this ruling and further held that a waiver of immunity cannot be implied through actions performed by the conduct of an agent or alter-ego of a tribe. *Id.* In this instance, the plaintiffs argued that the Debtors, acting as an alter-ego of the Tribe, waived the Tribe's immunity by filing for bankruptcy protection. *Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians*, 584 B.R. 706, 712 (E.D. Mich. 2018). The district court determined that a tribe can only waive its immunity through an explicit agreement, or through a board resolution, and that no court has ever applied the "alter-ego" theory to waivers of tribal immunity. *Id.* at 713 (citing *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 921 (6th Cir. 2009); *id.* at 719).

<sup>36</sup> *In re Greektown Holdings, LLC III*, 917 F.3d at 461.

<sup>37</sup> Petition for Writ of Certiorari, *In re Greektown Holdings, LLC III*, 917 F.3d 451 (No. 18-1165).

<sup>38</sup> *Compare Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 827 (7th Cir. 2016) (holding that the Fair and Accurate Credit Transactions Act did not contain sufficient evidence of congressional intent to abrogate tribal immunity), with *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1057 (9th Cir. 2004) (holding that the Bankruptcy Code contained sufficient evidence of congressional intent to abrogate sovereign immunity).

<sup>39</sup> See *infra* notes 42–49 and accompanying text.

<sup>40</sup> See *infra* notes 50–58 and accompanying text.

<sup>41</sup> See *infra* notes 59–65 and accompanying text.

*A. Government Means Government: The Ninth Circuit's Analysis of Unequivocal Congressional Intent*

In 2004, in *Krystal Energy Co. v. Navajo Nation*, the United States Court of Appeals for the Ninth Circuit held that Congress expressed an unequivocal intent to abrogate tribal sovereign immunity in the Bankruptcy Code.<sup>42</sup> In assessing whether the congressional action was unequivocal and explicit, the Ninth Circuit first analyzed the actual wording of the Bankruptcy Code and noted that Congress abrogated the immunity of “foreign and domestic governments” within the Bankruptcy Code.<sup>43</sup> Next, the Ninth Circuit relied on Supreme Court precedent to establish that Indian tribes are considered both domestic and a form of government.<sup>44</sup> As the Supreme Court has previously considered Indian tribes to be domestic governments, the Ninth Circuit concluded that Congress intended to abrogate the immunity of Indian tribes through the definitions included within

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<sup>42</sup> See *Krystal Energy Co.*, 357 F.3d at 1061 (holding that Congress acted to unequivocally abrogate tribal sovereign immunity by including the phrase “foreign or domestic government” within the Bankruptcy Code). In this case, the Ninth Circuit assessed the potential abrogation of tribal sovereign immunity that arose from actions taken by *Krystal Energy Co.* (*Krystal*) against the Navajo Nation tribe under §§ 505 and 542 of the Bankruptcy Code. *Id.* at 1055–56. Specifically, *Krystal* filed a petition for bankruptcy protection and sought a determination of tax amounts due to the Navajo Nation under § 505 of the Bankruptcy Code, as well as the turnover of assets under § 542 of the Bankruptcy Code. *Krystal Energy Co. v. Navajo Nation (In re Krystal Energy Co.)*, 308 B.R. 48, 50 (D. Ariz. 2002). Under § 505, the bankruptcy court has a broad ability to determine the amount of tax a debtor must pay as part of a bankruptcy proceeding. 11 U.S.C. § 505 (2018); see also David W. Patton, Comment, *Bankruptcy Courts' Authority Under § 505*, 34 EMORY BANKR. DEV. J. 643, 643 (2018) (explaining that the bankruptcy court’s authority in assessing taxes under § 505 is “essentially limitless” and that there are only three small exceptions to the court’s power). *Krystal* filed a proceeding against the Navajo Nation under this provision in order for the court to determine the amount of tax *Krystal* owed to the tribe during *Krystal*’s bankruptcy proceedings. *In re Krystal Energy Co.*, 308 B.R. at 50. Additionally, under § 542 of the Bankruptcy Code, a bankruptcy trustee in a bankruptcy proceeding has the ability to compel an entity to return all property interests so that the estate could use or sell such property during the bankruptcy proceedings. 11 U.S.C. § 542. *Krystal* sought the return of specific assets from the Navajo Nation in accordance with this section. *In re Krystal Energy Co.*, 308 B.R. at 50. The Navajo Nation filed a motion to dismiss these two claims on the grounds that they were barred, as the tribe possessed immunity from suit under the Bankruptcy Code. *Id.* The district court dismissed the suit as it determined that Congress did not explicitly abrogate the tribe’s immunity within the relevant sections of the Bankruptcy Code. *Krystal Energy Co.*, 357 F.3d at 1056.

<sup>43</sup> See *Krystal Energy Co.*, 357 F.3d at 1056–57. Specifically, § 106(a) of the Bankruptcy Code includes a clause abrogating the immunity of “governmental units.” 11 U.S.C. § 106(a). Further, the definition of “governmental unit” within the Bankruptcy Code includes a clause that “other foreign or domestic governments” are considered governmental units under the Bankruptcy Code. *Id.* § 101(27).

<sup>44</sup> See *Krystal Energy Co.*, 357 F.3d at 1057–58 (stating that the Supreme Court has referred to Indian tribes both as a domestic dependent nation and as a domestic sovereign in previous rulings); see, e.g., *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782 (1991) (explaining that Indian tribes are similar to domestic sovereigns); *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (explaining that Indian tribes are “domestic dependent nations” (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831))).

the Bankruptcy Code.<sup>45</sup> Additionally, the Ninth Circuit analyzed a previous Supreme Court case regarding the abrogation of immunity for individual states to further support its position.<sup>46</sup> Using this precedent, the court noted that a statute does not need to use “magic words” specifically identifying an individual group to prove Congress’s intent to abrogate immunity from such a group.<sup>47</sup>

The Ninth Circuit thus found unequivocal congressional intent to abrogate tribal immunity through the enactment of the Bankruptcy Code.<sup>48</sup> The court reached this decision because Congress was aware of Supreme Court decisions referring to Indian tribes as domestic governments as well as decisions finding unequivocal congressional intent to abrogate a state’s immunity without mentioning the states by name.<sup>49</sup>

### *B. Unequivocal Intent Must Leave No Doubt: The Seventh Circuit’s Analysis of the Unequivocal Congressional Intent Requirement*

In contrast to the Ninth Circuit’s conclusion, the Seventh Circuit has ruled that a statute must leave no doubt as to congressional intent in order for immunity to be abrogated.<sup>50</sup> In 2016, in *Meyers v. Oneida Tribe of Indians of Wisconsin*, the United States Court of Appeals for the Seventh Circuit held that Congress did not express an unequivocal intent to abrogate tribal sovereign immunity through the Fair and Accurate Credit Reporting Act (FACTA).<sup>51</sup> Similar to the

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<sup>45</sup> See *Krystal Energy Co.*, 357 F.3d at 1058 (explaining that these tribes are just a specific instance of the domestic governments from which Congress intended to abrogate immunity).

<sup>46</sup> See *id.* (explaining that the Supreme Court previously held that unequivocal congressional intent to abrogate a state’s sovereign immunity can be found without mentioning the individual states by name in any one section of the statute in question); see, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73–74 (2000) (holding that Congress unequivocally intended to abrogate the sovereign immunity of states in the Age Discrimination in Employment Act of 1967 despite not listing states in the section of the act relating to the abrogation of immunity).

<sup>47</sup> See *Krystal Energy Co.*, 357 F.3d at 1059, 1061 (explaining that the Navajo Nation tribe is a specific example of a domestic government and that Congress does not need to explicitly name the tribe to abrogate its immunity, just as Congress does not need to specifically list individual states to abrogate their immunity).

<sup>48</sup> *Id.* at 1061.

<sup>49</sup> See *id.* at 1058 (holding that congressional intent to abrogate tribal immunity in the Bankruptcy Code was unequivocal as Indian tribes are domestic governments, and Congress abrogated immunity from all domestic governments); *id.* at 1059 (explaining that Congress does not need to list out every example of a generic term to show that it intended to abrogate immunity from every entity included within the generic definition).

<sup>50</sup> Compare *Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 826 (7th Cir. 2016) (concluding that simply because an Indian tribe is a government and that Congress abrogated immunity for governments is not sufficient evidence to find unequivocal congressional intent), with *Krystal Energy Co.*, 357 F.3d at 1061 (holding that because an Indian tribe is a domestic government and the relevant sections of the Bankruptcy Code abrogated immunity as to domestic governments, that Congress expressed unequivocal intent to abrogate immunity from Indian tribes).

<sup>51</sup> *Meyers*, 836 F.3d at 827. In this case, the plaintiff purchased items using a credit card from three separate stores that the Oneida tribe owned in Green Bay, Wisconsin. *Id.* at 820. The receipts for

Ninth Circuit, the Seventh Circuit began its assessment of congressional intent by inspecting the text of the statute itself.<sup>52</sup> The Seventh Circuit further noted that the Supreme Court previously ruled that any ambiguity within a federal law must be interpreted in favor of the Indian tribe and its immunity.<sup>53</sup>

Unlike the Ninth Circuit, however, the Seventh Circuit did not analyze whether the Indian tribe could potentially be included within FACTA's definition of a person.<sup>54</sup> The Seventh Circuit instead attempted to identify any evidence of congressional intent to abrogate the tribal immunity.<sup>55</sup> Further, the court ruled that in order for Congress to demonstrate its intent, it must make a clear statement.<sup>56</sup> The Seventh Circuit questioned Congress's intent here because Congress had specifically abrogated the sovereign immunity from Indian tribes in other statutes but chose not to do so in FACTA.<sup>57</sup> The Seventh Circuit concluded that FACTA was facially ambiguous, as the statute did not specifically mention Indian tribes by name, and therefore held that the statute lacked sufficient evidence of congressional intent to abrogate tribal immunity.<sup>58</sup>

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these items contained information about the plaintiff's credit card that was illegal to print under the Fair and Accurate Credit Reporting Act (FACTA). *Id.* FACTA prohibits any individual or business that accepts credit cards from printing on the receipt more than the last five digits of a purchaser's credit card number and the credit card's expiration date. 15 U.S.C. § 1681c (2018). The statute states that any "person" who fails to comply with these provisions is liable. *Id.* § 1681n. It then defines a "person" as "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." *Id.* § 1681a. As the receipts printed by tribe-owned stores contained the plaintiff's full credit card number and expiration date, the plaintiff instituted a class action lawsuit against the tribe for violating these FACTA provisions. *Meyers*, 836 F.3d at 820. In response, the Oneida tribe moved to dismiss this claim as the tribe believed it possessed tribal immunity. *Id.* The district court subsequently dismissed this class action lawsuit as the court agreed that the Oneida tribe possessed tribal sovereign immunity from such a suit. *Id.* at 820–21.

<sup>52</sup> See *Meyers*, 836 F.3d at 824 (noting that the statute at issue did not specifically include Indian tribes within the definition of a person).

<sup>53</sup> *Id.* at 827.

<sup>54</sup> See *id.* at 826 (explaining that the district court dismissed the plaintiff's claim because of a lack of evidence regarding congressional intent, not because Indian tribes are not governments). Although the definition of a person in FACTA includes the phrase "government or governmental subdivision," the Seventh Circuit reasoned that Congress did not unequivocally intend for this phrase to cover Indian tribes, as it concluded that this phrase was ambiguous. *Id.*

<sup>55</sup> See *id.* (explaining that the argument set forth by the plaintiff—and therefore the Ninth Circuit's rationale in *Krystal Energy*—"misse[d] the point," as the real issue in this case was assessing congressional intent, not whether an Indian tribe fits the definition of a government).

<sup>56</sup> *Id.* at 827.

<sup>57</sup> See *id.* (noting that unequivocal congressional intent is only present when the court has "perfect confidence" that Congress intended to abrogate the tribal immunity). The court further emphasized the difference between a statute of general applicability and being shielded from suit through immunity, and it concluded that simply because a statute generally applies to everyone does not mean that plaintiffs are able to sue sovereigns that possess immunity. *Id.*

<sup>58</sup> See *id.* (holding that the tribe did possess sovereign immunity under FACTA and affirming the district court's grant of the defendant tribe's motion to dismiss).

*C. Recognizing the Ambiguity: The Sixth Circuit's  
Agreement with the Seventh Circuit*

Similar to the Seventh Circuit, the Sixth Circuit focused on the principle that any ambiguity in a statute should be interpreted in a manner that favors the tribe and its immunity.<sup>59</sup> In 2019, in *Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings, LLC III)*, the United States Court of Appeals for the Sixth Circuit held that Congress did not unequivocally intend to abrogate tribal immunity through the Bankruptcy Code of 1978.<sup>60</sup>

The Sixth Circuit also agreed with the Seventh Circuit that the key question to consider when assessing tribal immunity is whether Congress unequivocally expressed its intent to abrogate it, and not whether Indian tribes could be implicitly included within a definition from the statute in question.<sup>61</sup> Although the Seventh Circuit in *Meyers* assessed FACTA while the Sixth Circuit focused on the Bankruptcy Code, the Sixth Circuit drew a parallel between these two cases, as both courts needed to assess whether a general abrogation of immunity extended to a specific member of a general class.<sup>62</sup> The Sixth Circuit reasoned that Congress only expresses an unequivocal intent in instances where it leaves no doubt as to its intention to abrogate the immunity.<sup>63</sup>

The Sixth Circuit then concluded that Congress had created some level of doubt through the definitions in the Bankruptcy Code, as evidenced by courts throughout the country reaching different conclusions as to Congress's intent.<sup>64</sup>

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<sup>59</sup> See *Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings, LLC III)*, 917 F.3d 451, 457, 463 (6th Cir. 2019) (holding that Congress did not unequivocally intend to abrogate tribal immunity in a statute that the court determined to be ambiguous).

<sup>60</sup> *Id.* at 463.

<sup>61</sup> See *id.* at 459 (stating that Indian tribes are both domestic and a form of government, but that simply because Indian tribes could fit within the definition of "domestic government" was not relevant to determining whether congressional intent to abrogate immunity was unequivocal).

<sup>62</sup> See *id.* at 458 (noting that the Ninth Circuit's observation in *Krystal Energy*—that there are no other statutes where Congress generally abrogated sovereign immunity but left open questions regarding specific members of the generally immune class—was incorrect as evidenced by the Seventh Circuit's holding in *Meyers*).

<sup>63</sup> See *id.* at 457 (explaining that, because any ambiguity should be interpreted in favor of the Indian tribe, Congress must leave no doubt as to its intent); see also *Meyers*, 836 F.3d at 827 (noting that to demonstrate unequivocal intent, "Congress' words must fit like a glove."). The requirement of leaving no doubt as to Congress's intent initially developed when the Supreme Court consulted the *Webster's Dictionary* definition of "unequivocal", which was defined as "proof that admits no doubt." *Addington v. Texas*, 441 U.S. 418, 432 (1979) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961)).

<sup>64</sup> *In re Greektown Holdings, LLC III*, 917 F.3d at 457. Compare *Krystal Energy Co.*, 357 F.3d at 1061 (holding that Congress unequivocally intended to abrogate tribal immunity in the Bankruptcy Code), with *Bucher v. Dakota Fin. Corp. (In re Whitaker)*, 474 B.R. 687, 695 (B.A.P. 8th Cir. 2012) (holding that Congress did not unequivocally intend to abrogate tribal immunity by enacting the

As a result of this perceived ambiguity, the Sixth Circuit ultimately held that Congress did not unequivocally intend to abrogate tribal sovereign immunity through the enactment of the Bankruptcy Code, and thus interpreted the ambiguities in favor of tribal immunity.<sup>65</sup>

### III. THE SIXTH CIRCUIT'S PROPER APPLICATION OF THE UNEQUIVOCAL INTENT STANDARD

The Sixth Circuit Court of Appeals' holding in *In re Greektown Holdings, LLC III* that the enactment of the Bankruptcy Code does not abrogate tribal immunity is consistent with the historical treatment and policy goals of providing immunity to Indian tribes.<sup>66</sup> Additionally, the Sixth Circuit properly applied the unequivocal congressional intent standard.<sup>67</sup>

Since at least 1940, Indian tribes have possessed immunity from suit under federal law, unless the tribe waives the immunity or Congress specifically abrogates it.<sup>68</sup> The Supreme Court has repeatedly upheld this doctrine of tribal im-

Bankruptcy Code of 1978), and *Subranni v. Navajo Times Publ'g Co.* (*In re Star Group Communs., Inc.*), 568 B.R. 616, 622 (Bankr. D.N.J. 2016) (same).

<sup>65</sup> *In re Greektown Holdings, LLC III*, 917 F.3d at 463. The Sixth Circuit then needed to consider whether the Tribe's conduct in the bankruptcy proceedings waived the Tribe's immunity. *Id.* Relying on precedent from other circuits, the court first noted that filing a lawsuit shows a clear intention on behalf of an Indian tribe to waive any immunity it possesses. *Id.* at 464. The court, however, also held that the alter-ego doctrine is inapplicable to the consideration of tribal waivers of immunity, as this doctrine would require an implication of waiver, and the Supreme Court has held that waivers of tribal immunity cannot be implied. *Id.* at 465 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)); see *Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians*, 584 B.R. 706, 712 (E.D. Mich. 2018) (noting the plaintiffs' argument that the Debtors, acting as the Tribe's alter-ego, waived immunity by filing for bankruptcy protection). Finally, the Sixth Circuit needed to consider whether the filing of the bankruptcy petition itself waived the immunity related to a separate fraudulent transfer claim. *In re Greektown Holdings, LLC III*, 917 F.3d at 466. The court ultimately declined to consider these actions a waiver of tribal immunity, as Indian tribes had no input in ratifying the Bankruptcy Clause of the United States Constitution, unlike states, which can waive their immunity through filing a bankruptcy petition. *Id.* After concluding on these three issues, the Sixth Circuit ultimately dismissed the Trustee's complaint in its entirety. *Id.* at 467.

<sup>66</sup> See *Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians* (*In re Greektown Holdings, LLC III*), 917 F.3d 451, 462–63 (6th Cir. 2019) (noting that, based on previous rulings, courts should "tread lightly" in assessing tribal immunity without clear congressional intent); see also *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144–45 (1980) (stating that the overarching policy of maintaining tribal sovereign immunity is to encourage tribal independence); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) (explaining that Indian tribes are exempt from suit unless Congress authorizes the lawsuit).

<sup>67</sup> See *Santa Clara Pueblo*, 436 U.S. at 58 (citing *United States v. Testan*, 424 U.S. 392, 399 (1976)) (stating that a tribe waives sovereign immunity only through an unequivocal expression); *In re Greektown Holdings, LLC III*, 917 F.3d at 461 (explaining that intent must be unequivocal in order for Congress to have abrogated tribal immunity).

<sup>68</sup> See *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940) (holding explicitly for the first time that Indian tribes possess a level of immunity from suit); see also *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 754 (1998) (explaining that Indian tribes have immunity from suit so long as the tribes did not waive the immunity and Congress did not abrogate such immunity).

munity, as the Court has found this immunity necessary to protect tribes' ability to govern themselves.<sup>69</sup> As such, by holding that Congress did not intend to abrogate Indian tribal immunity in this case, the Sixth Circuit protected tribal ability to self-govern and placed the burden on Congress to make any changes to the doctrine of tribal immunity.<sup>70</sup>

Additionally, the Sixth Circuit properly applied the standard that Congress must unequivocally express its intent to abrogate tribal sovereign immunity through a statute.<sup>71</sup> Although there is a strong argument that Indian tribes are indeed both domestic and a form of government, the court correctly determined that the key question in *In re Greektown Holdings, LLC III* was whether Congress expressed its unequivocal intent to abrogate immunity from Indian tribes.<sup>72</sup> Congress has included specific clauses abrogating immunity from Indian tribes within other statutes, so by not specifically mentioning Indian tribes within the Bankruptcy Code, Congress left some doubt as to its intentions.<sup>73</sup> As all ambigu-

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<sup>69</sup> See *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986) (stating that the sovereign immunity is necessary to allow Indian tribes to continue with their self-governance); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334–35 (1983) (stating that tribes should have the ability to manage themselves to encourage the broader goal of tribal self-sufficiency); *Santa Clara Pueblo*, 436 U.S. at 58 (same).

<sup>70</sup> See *White Mountain Apache Tribe*, 448 U.S. at 143–44 (stating that courts have attempted to be consistent with the belief that tribal self-governments need to be protected); *In re Greektown Holdings, LLC III*, 917 F.3d at 462 (citing *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790, (2014)) (explaining that courts should not assume Congress intends to infringe upon an Indian tribe's right to self-governance).

<sup>71</sup> See *Santa Clara Pueblo*, 436 U.S. at 59 (holding that congressional intent must be unequivocal in order for an Indian tribe to be subject to suit); *In re Greektown Holdings, LLC III*, 917 F.3d at 463 (holding that congressional intent to abrogate tribal immunity in the enactment of the Bankruptcy Code was not unequivocal); see also Gregory W. Dalton, Comment, *A Failure of Expression: How the Provisions of the U.S. Bankruptcy Code Fail to Abrogate Tribal Sovereign Immunity*, 81 WASH. L. REV. 645, 647 (2006) (explaining that general phrases, such as "other foreign or domestic governments" have historically been deemed insufficient to abrogate immunity under the unequivocal expression standard).

<sup>72</sup> See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000) (explaining that the congressional intent must be "unmistakably clear" to abrogate immunity from states (quoting *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989))); *In re Greektown Holdings, LLC III*, 917 F.3d at 457, 459 (noting that the key question in tribal immunity is whether Congress made an unequivocal expression and left no doubt as to the clarity of its intent); *Krystal Energy Co.*, 357 F.3d at 1057 (stating that the Supreme Court has previously held that Indian tribes were "domestic dependent nations," as well as a form of government).

<sup>73</sup> See *In re Greektown Holdings, LLC III*, 917 F.3d at 457 (explaining that Congress has previously demonstrated an ability to clearly and unequivocally express its intent to abrogate immunity from Indian tribes); see also 25 U.S.C. § 5321 (2018) (stating, in a statute covering liability insurance for Indian tribes, that the tribe and its insurance carrier "shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit"); Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6903, 6972 (2018) (stating that under this act, citizens can bring suits against any "person" and that "person" includes "municipalities," which also includes Indian tribes); *Osage Tribal Council v. U.S. Dep't of Labor*, 187 F.3d 1174, 1182 (10th Cir. 1999) (holding that Congress abrogated tribal immunity within the Safe Water Drinking Act of 1974 as the statute specifi-

ities within statutes are to be construed in a manner that favors the Indian tribes and their immunity, the Sixth Circuit properly concluded that the congressional intent behind the Bankruptcy Code was ambiguous and therefore tribal immunity was not abrogated.<sup>74</sup>

The Sixth Circuit stopped short of holding that Congress needs to specifically mention Indian tribes by name to unequivocally express its intent to abrogate immunity.<sup>75</sup> Based on the standard that Congress must leave absolutely no doubt as to its intent, however, it is difficult to imagine a scenario where Congress unequivocally expresses an intent without mentioning Indian tribes by name.<sup>76</sup> As such, the Sixth Circuit should have taken its holding a step further by requiring that Congress specifically mention Indian tribes by name to abrogate their immunity.<sup>77</sup>

This decision in *In re Greektown Holdings, LLC III* will have a significant impact on Indian tribes moving forward.<sup>78</sup> Historically, this doctrine has allowed the Indian tribes to conduct their affairs without fear of being sued and to prevent potentially large monetary losses that could negatively impact the financial well-being of the tribe and the federal government as a whole.<sup>79</sup> If the Sixth Cir-

cally mentions Indian tribes within the definition of municipalities, and that municipalities are considered “persons” that can be sued under the act).

<sup>74</sup> See *White Mountain Apache Tribe*, 448 U.S. at 143–44 (holding that the ambiguity in any federal law is construed in a manner that favors tribal independence); *In re Greektown Holdings, LLC III*, 917 F.3d at 461.

<sup>75</sup> See *In re Greektown Holdings, LLC III*, 917 F.3d at 461 (declining to hold that a statute must mention Indian tribes by name to constitute an unequivocal expression of intent).

<sup>76</sup> See *Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 824 (7th Cir. 2016) (citing *Buchwald Capital Advisors, LLC v. Papas (In re Greektown Holdings, LLC II)*, 532 B.R. 680, 693 (E.D. Mich. 2015)) (explaining that the Supreme Court has never found sufficient congressional intent in a statute that does not specifically mention Indian tribes by name); see also *Dalton*, *supra* note 71, at 666 (noting that just because a phrase logically seems to include Indian tribes does not mean that Congress necessarily intended for tribes to be included).

<sup>77</sup> See *In re Greektown Holdings, LLC III*, 917 F.3d at 461 (noting that the Bankruptcy Code is not sufficiently clear as it does not mention Indian tribes by name); see also *Meyers*, 836 F.3d at 827 (explaining that congressional intent is not sufficiently clear in a statute that does not mention Indian tribes by name). Although requiring that Congress specifically mention Indian tribes within a statute to abrogate tribal immunity would be consistent with all previous Supreme Court rulings, this proposed rule could be inconsistent with other methods of statutory interpretation. See *Fed. Aviation Admin. v. Cooper*, 566 U.S. 284, 291 (2018) (citing *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008)) (noting, in the context of state sovereign immunity, that the Court has never required Congress to state its intent in any particular manner, and that courts should still use other tools of statutory construction in assessing whether congressional intent is unequivocal and not rely solely on the express words in the statute).

<sup>78</sup> See *In re Greektown Holdings, LLC III*, 917 F.3d at 462 (noting that assessing the limits of tribal immunity is a “grave question” and “the answer will affect all tribes, not just the one before us.” (quoting *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018))).

<sup>79</sup> See *Seelau*, *supra* note 2, at 140 (explaining that Congress has justified the need for tribal immunity because tribes have limited capital and may be unable to pay large damages, which could lead to immediate bankruptcy if a tribe is sued). The tribes’ lack of fear of being sued has also led to potentially unfair verdicts for parties that are unable to recover damages from interactions with tribes in



cuit had reached the opposite conclusion, it would have impacted all tribes, as this ruling would unilaterally reduce the strict requirement that congressional intent be unequivocal and therefore lead to other similar decisions.<sup>80</sup> This change in the congressional intent standard would allow courts to shoe-horn Indian tribes into many other statutory definitions, greatly reducing the Indian tribes' ability to be protected from suit.<sup>81</sup> Such a ruling would therefore be inconsistent with the historical treatment of these tribes.<sup>82</sup>

## CONCLUSION

The Sixth Circuit Court of Appeals' ruling in *In re Greektown Holdings, LLC III* properly recognized that assessing whether Congress abrogated tribal immunity is principally an issue of congressional intent. Although the Ninth Circuit Court of Appeals' logic that Indian tribes could fit within the definition of "governmental units" under the Bankruptcy Code is reasonable, it fails to properly consider the issue of congressional intent, and instead solely strives to infer a term within the definition of a statute. The approach used by the Sixth and Seventh Circuits requiring unequivocal congressional intent is consistent with Supreme Court precedent. Additionally, this ruling allows tribes to remain protected from potential lawsuits, which was the original purpose behind the tribal immunity doctrine. As such, the Sixth Circuit's decision that Congress did not intend to abrogate tribal immunity through the enactment of the Bankruptcy Code follows the best method of assessing congressional intent. This case, and the standard used to assess tribal sovereign immunity, could receive additional exposure in the coming months as the Trustee filed a petition for writ of certiorari to the Supreme Court in March 2019, and this petition is currently pending as of the date of this Comment.

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which such parties were unaware that they were dealing with a tribe. See *Kiowa Tribe*, 523 U.S. at 758 (explaining that, in our evolving society, the powers of tribal sovereign immunity have extended far beyond the doctrine's original purpose of protecting tribal self-governance); see also Malasky, *supra* note 4, at 2472 (explaining that although Indian tribes have caused injustices without repercussions, courts have determined that adjusting the boundaries of tribal sovereignty is not the job of the judicial system).

<sup>80</sup> See *In re Greektown Holdings, LLC III*, 917 F.3d at 462 (explaining that this unequivocal requirement standard exists because of the negative impact that all tribes would feel if an additional limit was placed on tribal immunity).

<sup>81</sup> See *Meyers*, 836 F.3d at 827 (explaining that it is not the job of courts to force Indian tribes into a statutory definition that could potentially be inconsistent with congressional intent).

<sup>82</sup> See *Kiowa Tribe*, 523 U.S. at 758 (explaining that historically Congress, rather than the courts, have placed limits on tribal immunity).