What Do Fracking in North Dakota and Gambling in Minnesota Have in Common?

By Norman Baer and Kristin Rowell

"Fracking" – the process of extracting oil from shale formations through the use of hydraulic fracturing. We are all aware of the economic boom occurring in western North Dakota as a result of the redevelopment and vast expansion of the oil patch through the use of fracking. You may have heard that as a result of the oil boom, unemployment sits around 1% (or less) and North Dakota is enjoying such a budgetary surplus that they considered ending the state's property tax. Less well known is that the Fort Berthold Indian Reservation sits in the heart of North Dakota's oil patch. Fort Berthold is what remains of the traditional territorial lands of the Mandan, Hidatsa and Ankara tribes. It consists of approximately one-million acres and includes about 600 miles of shoreline on Lake Sakakawea – the source for most of the millions of gallons of water used every month in fracking operations.

"Gambling" – the process of extracting money from the citizenry through the use of games of chance. In Minnesota, legalized gambling in recent years has existed in four primary forms: state-sponsored lottery, charitable "pull-tab" games, horse racing, and casinos operated by Native American tribes. A year ago, developers tried (unsuccessfully) to persuade the legislature to authorize a casino in downtown Minneapolis proposing that it would pay millions of dollars in fees and taxes – enough to pay for a substantial portion of a new Vikings stadium. In addition, for many years, the owners of Canterbury Downs and Running Aces have (largely unsuccessfully) sought approval for expanded gambling operations at the horse tracks. Not surprisingly, the efforts to expand gambling have met with strong opposition from some of the Native American casinos that would rather not have the competition. In 2012, the Shakopee Mdewakanton Sioux Community, the tribe that operates Mystic Lake Casino, took the opposition to new heights. It entered into a multi-million dollar, 10-year "Cooperative Marketing Agreement" to support the purses at Canterbury Downs in exchange for, among other things, Canterbury Downs' promise to oppose expansion of off-reservation gambling.

Both fracking in North Dakota and gambling in Minnesota are interesting due to their far-ranging economic impacts. For lawyers – both transactional lawyers and litigators – there is another common factor that must be considered: both of these developments (and others around the country) increase the chance that your clients will someday become familiar with tribal courts. Because Native American tribes have their own sovereign governments, they have their own justice system and their own courts. In general, if your client is conducting business on tribal lands or with tribal members, there is a significant possibility that resulting disputes will be resolved in tribal court.

Whether a tribal court has jurisdiction over a dispute is determined by reference to the rules of that court – just as state and federal courts have their own jurisdictional rules. As with any other court, both personal jurisdiction and subject-matter jurisdiction should be considered. Tribal courts generally have personal jurisdiction over defendants if there are sufficient contacts with the tribe or tribal land. Subject-matter jurisdiction is typically established where the tribe has the authority to regulate the activity under federal law (which, of course, includes disputes involving tribal members or tribal land). In other words, often the only jurisdictional requirement of tribal courts is that the dispute involves tribal lands or members. In some instances, jurisdiction even extends to disputes that do not directly involve tribal lands or tribal members but in which the resolution will impact tribal lands or tribal members.

If jurisdiction could be exercised by a tribal court and some other court, you will probably be in tribal court. As a matter of practice, both state and federal courts are unlikely to exercise jurisdiction over a dispute pending in a tribal court. Transactional lawyers sometimes include venue and/or jurisdiction clauses in their clients' contracts in an attempt to control the location of any future dispute. Litigators know that such clauses are usually given very substantial deference in state and federal courts. The same cannot be said for tribal court. Even if the parties have contracted for venue and jurisdiction in a state or federal court, if a tribal court accepts jurisdiction, it is unlikely that the state or federal court will take control of the case – at least not before the parties have exhausted their tribal court remedies.

Another tactic for controlling venue – that will not work if your client winds up in tribal court – is to remove the case to federal court under 28 U.S.C. § 1441 or § 1442. Those statutes allow for removal of civil actions brought in "a state court." When presented with cases removed from tribal court, many federal district and appellate courts have held that removal is unavailable because tribal courts are not "state courts."

Whether it is good or bad for your client to be in tribal court will depend upon the particular circumstances of the dispute. However, the possibility that your client will experience tribal court increases as the economic activity of tribes and their members expands. If nothing else, the expansive jurisdiction of tribal courts makes this an issue that merits attention by the bench and bar.

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