



Using Tribal Limited Liability Companies to Protect Tribes Even Without Tribal Sovereign Immunity

by Sam Cohen

Tribes need a back up plan to protect themselves just in case tribal sovereign immunity is limited. Tribal sovereign immunity is currently at issue before the U.S. Supreme Court in *Michigan v. Bay Mills Indian Community*. Previously, Justice Kennedy in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* (1998), suggested there are “reasons to doubt the wisdom of perpetuating the doctrine,” but then deferred to Congress to make any decision to limit sovereign immunity. In 2001, Justice Ginsberg wrote for the majority in *C & L Enterprises* that the provisions of an AIA contract that did not mention sovereign immunity at all somehow effectuated an express waiver of tribal sovereign immunity.

Private sector businesses limit their liability with business entities. Tribes can utilize limited liability companies to limit tribal liability in business transactions even without tribal sovereign immunity.

There are mainly four types of business entities:

- (1) Partnerships: all partners are jointly liable as both principals and agents (can be limited in some states with limited liability partnerships);
- (2) Limited partnerships: limited partners have limited liability up to the amount of their investment so long as they engage in no management activities;
- (3) Corporations: shareholders have limited liability up to the amount of their investment so long as corporate formalities are observed (so called “piercing of the corporate veil”);
- (4) Limited liability companies (LLCs): LLC members have limited liability up to the amount of their investment; may also have possible “piercing of the LLC veil” but almost no case law.

Brief History of the LLC

Starting with the pioneering state of Wyoming in 1977, and ending with the Hawaii legislature in 1996, every state has, in recent years, now passed laws creating a new type of legal entity called a “limited liability company.” LLCs became investment vehicles of choice in the nineties for business people looking to protect themselves from personal liability in the event that their business liabilities exceeded their assets.

Organizing an LLC

First, an LLC ordinance needs to be adopted. Three easy models for the tribal ordinance are the LLC ordinance of the state where the tribe is located, the Uniform Limited Liability Company Act, or ordinances already adopted by other tribes. All LLC ordinances have basically the same features: Articles

of Organization, an Operating Agreement and a tribal resolution to adopt both.

Articles of Organization usually contain the official name of the LLC, street address of initial registered office, name of initial registered agent at initial office, management of LLC, ownership of LLC, and enumerated limitations of the LLC. I also like to include a statement about retained tribal sovereign immunity in the Articles of Organization.

Management of the LLC: there are member (owner) managed and manager managed LLCs. Member managed LLCs are managed like partnerships with group decision-making. Manager managed LLCs are more like corporations (or governments) with CEO/President/Chairperson, Vice Chairpersons, Secretary and Treasurer. Actually, tribes can create their own officers and titles, but the more commonly used ones make them more easily accepted by outsiders.

Ownership of the LLC: instead of shares of stock in a corporation, LLCs have membership units. Instead of shareholders, LLCs have members. Members are more like partners than shareholders.

Operating Agreement: the Operating Agreement is a hybrid between a partnership agreement and the by-laws of a corporation (especially in a manager managed LLC). In a private sector LLC, Operating Agreements will have a lot of partnership tax language from the U.S. Internal Revenue Code. So long as the tribe itself is the only member, you can consider leaving most of this out. The Operating Agreement is also where you will define all the LLC manager positions if it is a manager managed LLC. For both manager managed and member managed LLCs, the Operating Agreement is where meeting procedures are included.

Member Managed LLCs and Tribal Council/Business Committee

Santa Ynez Chumash has a five member elected Business Committee. Under the Chumash LLC Ordinance, the Business Committee are typically the managers of any tribal LLC with their titles staying the same within the LLC. The LLC members (owners) select the LLC managers so the underlying LLC ordinance will need to establish a way to elect or appoint the LLC managers. The Tribal Council/Business Committee can appoint the LLC managers, the Tribal Council/Business Committee can automatically be the managers of the LLC or the tribe can elect the LLC managers.

LLC Members

Tribal LLCs are unique as they have only one member, the tribe and are established under tribal law. Having the tribe as the single member has two benefits. First, under the U.S.

Internal Revenue Code, single member LLCs are disregarded for federal income tax purposes which means there is no separate filing of partnership tax returns. Second, while there is almost no case law, I suspect that non-tribal members make it more likely some court will decide a tribal LLC does not have tribal sovereign immunity.

Tribal LLC Sovereign Immunity

Over and above the limited liability of the tribal LLC, most likely a tribally chartered LLC also shares the tribe's sovereign immunity. Again, there is not much case law, but in *American Property Management Corporation v. Superior Court*, the California Court of Appeals on May 24, 2012 narrowly held that a state chartered limited liability company solely owned by the Sycuan Band of the Kumeyaay Nation did not have tribal sovereign immunity from suit. The court applied a multi-factor test drawn from the Tenth Circuit's decision in *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1185 (10th Cir. 2010), focusing on:

- (1) The method of the corporation's creation;
- (2) Its purpose;
- (3) Its structure, ownership, and management, including the amount of control the tribe has over the entities;
- (4) Whether the tribe intended for the entity to have tribal sovereign immunity;
- (5) The financial relationship between the tribe and the entity;
- (6) Whether the purposes of tribal sovereign immunity are served by granting immunity to the entity.

The chartering of the LLC under tribal law would have satisfied the method of the corporation's creation and increased the likelihood of the extension of tribal sovereign immunity to the tribally chartered LLC.

Conclusion

Non-tribal businesses are using limited liability companies to limit their liability and there is no reason for tribes not to

establish their own tribal limited liability company ordinances to create the same shields from liability for tribal business transactions. Tribal LLCs will assist in protecting the tribe regardless of the future of tribal sovereign immunity. ♣

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