Analysis

Native American Cases To Watch In 2018

 By **Andrew Westney**

Law360, New York (January 1, 2018, 3:04 PM EST) -- In the coming year, Native American law practitioners will be following the Cherokee Nation's suit over the opioid epidemic and also watching a U.S. Supreme Court decision in a tribal casino challenge, a patent battle testing tribal sovereign immunity and Texas' bid to upend a federal Indian family law.

Here are four cases attorneys think could have a big impact on Native American law in 2018.

Cherokee Nation v. McKesson Corp.

The Cherokee Nation's tribal court suit against major drug distributors and pharmacies for their alleged role in worsening the opioid crisis among the tribe's citizens has teed up the next key battle for the authority of tribes over non-Indian companies.

Cherokee Attorney General Todd Hembree launched a complaint in April targeting Wal-Mart Stores Inc., Walgreens Boots Alliance Inc. and other pharmacies and distributors, alleging that the companies have failed to limit the spread of illegally prescribed opioids.

Hembree has said that other tribes could follow the Cherokee Nation's model in going after non-Indian corporations in tribal courts for harm done to tribal citizens.

However, the companies, which also include McKesson Corp., Cardinal Health Inc., AmerisourceBergen Corp. and CVS Health, have asked an Oklahoma federal court to block the suit, arguing that the Cherokee courts lack jurisdiction over the suit because the alleged illegal activity took place outside of Indian Country.

That bid to move the case to federal court closely echoes Dollar General's failed effort to escape the Mississippi Band of Choctaw Indians courts' jurisdiction over a tort suit against the company that ended in a 4-4 tie before the U.S. Supreme Court in 2016, according to Pipestem Law Firm PC partner Mary Kathryn Nagle, an enrolled citizen of the Cherokee Nation.

But the Cherokee case marks an even more aggressive assertion of tribal court jurisdiction over non-Indian companies that don't have a specific contract to do business on tribal lands, unlike in the Dollar General case, experts say.

"It'll be interesting to see whether the federal courts are going to look at this type of jurisdiction differently when presented in these real world terms, where before they were looking at it in a more or less theoretical way," said Dorsey & Whitney LLP senior attorney James Nichols.

The tribal court case is The Cherokee Nation v. McKesson Corp. et al., case number CV-2017-203, in the District Court of the Cherokee Nation.

The federal court case is McKesson Corp. et al. v. Hembree et al., case number 4:17-cv-00323, in the U.S. District Court for the Northern District of Oklahoma.

Mylan Pharmaceuticals Inc. v. Saint Regis Mohawk Tribe

The Mohawk tribe's novel deal to acquire patents to Allergan's dry eye drug Restasis could lead to the affirmation of the tribe's right to assert sovereign immunity in a Patent Trial and Appeal Board challenge

but could also invite lawmakers to clamp down on aggressive uses of tribal immunity, experts say.

Under a September deal, Allergan will pay the New York tribe $13.75 million upfront and $15 million in annual royalties in exchange for licensing the patents back to the company and seeking to dismiss a PTAB inter partes review of several Restasis patents that began at the request of generic-drug makers Mylan Inc., Teva Pharmaceuticals USA Inc. and Akorn Inc.

A Texas federal judge questioned the legitimacy of the deal in an October ruling tossing Allergan's patent infringement suit against generic-drug makers, shortly after Sen. Claire McCaskill, D-Mo., floated a bill in reaction to the deal that would limit the immunity of tribes in patent cases.

And the inter partes review itself has attracted more than a dozen amicus briefs — marking the first time the board has allowed amicus briefs in a case — with tech giants and generic-drug makers slamming the deal as a "sham" and other tribes and a group of law professors stoutly defending the Saint Regis Mohawk Tribe's right to assert its immunity.

The tribe's move, while it may be legitimate, is also risky as it may give "ammunition to the forces out there that are trying to constrain or limit or create exceptions to tribal sovereign immunity," Nichols said.

"I'm all for tribes having ingenuity in seeking economic development opportunities, but I would also say that this particular arrangement makes me nervous," said Kilpatrick Townsend & Stockton LLP partner Keith M. Harper. "Because if it is seen, as I think it is by some, as upsetting sort of settled ways of doing business in a relatively distinct area that impacts the entirety of the country, then my fear is that either Congress or the courts will find a way to diminish the tribe's immunity."

The PTAB has said it will make a final decision in the cases by April.

The cases are Mylan Pharmaceuticals Inc. v. Saint Regis Mohawk Tribe, case numbers IPR2016-01127, IPR2016-01128, IPR2016-01129, IPR2016-01130, IPR2016-01131 and IPR2016-01132, before the Patent Trial and Appeal Board.

Patchak v. Zinke

One of the Native American-related cases on the Supreme Court's current docket will see the justices rule on whether Congress unconstitutionally intruded on the judiciary's powers by passing a law blocking challenges to a Michigan tribal casino project.

In a petition granted in May, Michigan resident David Patchak claims that the Gun Lake Act, which confirmed the federal government taking a parcel of the Gun Lake Tribe's land into trust for a casino and removed federal court jurisdiction over litigation connected with the land, violated the constitutional separation of powers by directing a particular result to his suit.

During Nov. 7 oral arguments in the case, several justices questioned whether upholding the Gun Lake Act would open the door for Congress to enact laws that cut off suits targeting corporations or are connected with controversial issues.

Although, the direction of the justices' questioning showed that the focus of the court remains on the separation of powers issues raised rather than issues of Indian law, experts say.

But "if nothing else, win or lose, this will be significant for other tribes in that if there is a legislative fix for other situations like this, one way or another, we'll find out how that needs to be formulated," Nichols said.

The case is Patchak v. Zinke et al., case number 16-498, before the Supreme Court of the United States.

Brackeen et al. v. Zinke et al.
The state of Texas has added a new dimension to the pressure on a nearly 40-year-old law meant to protect Indian families by becoming the first state to challenge the constitutionality of the law.

Texas and non-Indian foster parent Chad and Jennifer Brackeen hit the U.S. government with an Oct. 25 complaint in their bid to adopt a Native American boy eligible for membership in the Navajo Nation and the Cherokee Nation of Oklahoma, alleging that the Indian Child Welfare Act unconstitutionally dictates rules for adoption and custody cases involving Native American children on the basis of race.

While the state contends that the ICWA contradicts Texas law requiring that adoption decisions be made in the best interest of the child, advocates for the law have argued in other ICWA cases for the principle that tribes are political organizations rather than racial groups and that the law is needed to protect Indian families.

With the Texas suit following the Goldwater Institute's push to back suits attacking the ICWA — despite the Supreme Court's Oct. 30 denial of certiorari to an ICWA-related petition brought by the conservative group — "this is becoming a full-out attack on tribal sovereignty," Nagle said.

The case is Brackeen et al. v. Zinke et al., case number 4:17-cv-00868, in the U.S. District Court for the Northern District of Texas.

Upper Skagit Indian Tribe v. Sharline Lundgren et al.
The Supreme Court has also taken up a property dispute involving the Upper Skagit Indian Tribe that looks at whether a court's authority over a piece of land can trump tribal sovereign immunity.

In December, the justices **granted certiorari** to the Upper Skagit Indian Tribe, agreeing to review the Washington Supreme Court's holding that the tribe could not invoke its sovereign immunity to dismiss a land ownership suit brought against it by Sharline and Ray Lundgren because the trial court overseeing the matter was exercising jurisdiction over the property itself, rather than the tribe.

The Washington Supreme Court's ruling contributed to a split in authority, given that the Second Circuit and the New Mexico Supreme Court have held that tribal immunity does apply in cases involving such in rem jurisdiction. The high court is expected to settle the debate.

Holland & Knight LLP partner James Meggesto said it is notable that the justices took up a case in which the tribe petitioned for certiorari after losing in lower court, because it "doesn't happen that often."

"The fact that the court has granted a tribe's petition from a negative state decision leads one to believe that the court thinks this is a very important issue," he continued.

Meanwhile, Blaine Green, a partner at Pillsbury Winthrop Shaw Pittman LLP, said the grant can be viewed as "the Supreme Court wanting to weigh in on how broadly or how narrowly its past decisions on tribal sovereign immunity should be construed."

The case is Upper Skagit Indian Tribe v. Sharline Lundgren et al., case number 17-387, in the Supreme Court of the United States.
--Additional reporting by Christine Powell. Editing by Christine Chun and Kelly Duncan.