

Appleby Law PLLC  
333 North Fairfax Street  
Suite 302  
Alexandria, VA 22314

office: 703-837-0001  
mobile: 202-577-5655  
[www.applebylawpllc.com](http://www.applebylawpllc.com)

## INDIAN LAW ALERT JUNE 30, 2011

### *The Continuing Importance of Waivers of Sovereign Immunity*

At the risk of harping . . . in light of a number of recent cases, it behooves me to remind you of the importance of obtaining enforceable **waivers of sovereign immunity** when you contract with a tribe or a tribal entity that, too, is immune from suit. *Seminole Tribe of Florida v. Eastern Regional Director, Bureau of Indian Affairs*, decided by the Interior Board of Indian Appeals on June 3, 2011, is illustrative.

In *Seminole Tribe of Florida*, the Tribe (STOF) appealed the BIA Eastern Regional Director's refusal to cancel the Tribe's commercial lease to Hollywood Mobile Home Estates, Ltd. (HME) because, the Regional Director found, either that HME had not breached the lease, or the tribe had waived the defaults.

HME operated a mobile home park on STOF land pursuant to a 55-year lease that HME assumed in 1986. The lease was set to expire in 2024. In 2008, STOF claimed various defaults under the lease and notified HME that the tribe was terminating the lease, ejecting HME and retaking the property. HME denied that it breached the lease and demanded arbitration. The tribe responded that the arbitration clause in the lease did not apply to defaults; and, on July 15, 2008, the tribe declared the lease terminated and re-took the property. Earlier the same day, HME had filed an emergency motion to prevent STOF from retaking the leased premises. Relief was denied because, the federal court said, the tribe had not waived its sovereign immunity; and, therefore, HME could not satisfy one of the requirements for obtaining a preliminary injunction, namely that it was likely to prevail on its claims against the tribe. In concluding that the tribe had not waived its immunity from suit, the court agreed with STOF's assertion that the arbitration clause did not apply to the default provision in the lease.

The Interior Board of Indian Appeals (IBIA) was kinder to HME on appeal. It found that, generally, HME had not breached the lease and that, even if some of HME'S management practices rose to the level of defaults, the lease would not be cancelled because the tribe violated BIA's leasing regulations (25 C.F.R. Part 162) when it failed to give HME notice and an opportunity to cure any claimed default before dispossessing HME.

Unfortunately for HME, its victory before the IBIA is, at best, a half of a loaf. IBIA did not rule in HME's favor on the arbitration or sovereign immunity issues (in fact, the IBIA did not address them at all) and did not order STOF to permit HME to occupy the leased premises. As a result, HME will likely have to litigate to regain possession. Absent an enforceable waiver of immunity, that path is uphill and treacherous.

Much of HME's uphill trek could have been avoided (and, perhaps, a preliminary injunction issued) had the lease only included a clear waiver of immunity and an arbitration clause that clearly applies to disputes over defaults and breaches of the lease.

**Your Take-Away:** Don't be pushed or cajoled into accepting a contract that lacks a clear waiver of immunity, draft carefully and consult with an expert in federal Indian law before entering into any contract with a tribe or tribal entity. You will have a much better chance of developing a favorable exit strategy if you take care of the basics at the beginning of your deal.

