

COPY

Miccosukee (2002)

Memorandum

Native American Rights Fund
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To: Yvonne Knight/Lorna Babby / KSG
From: Timothy L. Taylor
Date: July 1, 2002
Re: Miccosukee Tribe of Indians (476062)

On March 12, 2001, the district court granted summary judgment in favor of Tamiami, enforcing the 1993 arbitration award. The Miccosukee Tribe appealed to the United States Court of Appeals for the Eleventh Circuit. Tamiami Partners, Ltd v. Miccosukee Tribe of Indians of Florida, No. 92-00489-CV-SH. On April 15, 2002, the panel affirmed the district court's order of summary judgment for Tamiami. The panel considered six issues on that appeal.

(1) The district court had jurisdiction to hear the case because it implicated the Indian Gaming Regulatory Act (IGRA) and that the Tribe entered into an agreement that provided for the arbitration and oversight of that arbitration by Florida or federal courts. *See supra* p. 12 *Tamiami II*; and *supra* p. 15 *Tamiami III*.

(2) The arbitration award was valid because: (a) the Tribe's conduct after having a choice by the arbitration panel to either pay damages in lieu of performance; (b) the Tribal Court lack the authority to stay arbitration proceedings because the arbitration panel's authority derived from the parties' agreement to arbitrate; (c) the absence of the Tribe's arbitrator did not invalidate the award because the Tribe voluntarily absented itself from the arbitration hearing.

(3) Tamiami's second amended complaint was not barred by the statute of limitations because the claim was filed within the four-year limit set by Florida's "catch-all" statute of

limitation - Fla. Stat. sec. 95.11(3)(p), not the FAA's one year statute of limitation - 9 U.S.C.A. sec. 9.

(4) Tamiami did not waive its right to arbitration because Tamiami's lawsuit which sought to compel arbitration and protect its rights pursuant to arbitration was a necessary step to preserve the status quo until the dispute was settled. The panel also stated that at no time during arbitration did the Tribe claim the Tamiami waived the right to arbitrate.

(5) The arbitration award is valid, because on September 23, 1993, the arbitration panel ordered the Tribe to either reinstate Tamiami or pay \$9.5 million in damages. On March 12, 2001, the district court, granted summary judgment for Tamiami because it would be impractical to order performance after eight years and ordered the Tribe to pay the \$9.5 million. The panel concluded that by resisting all efforts of Tamiami to resume the management of the MIB, the Tribe chose the damage option.

(6) The district court did not err in awarding Tamiami prejudgment interest because the \$9.5 million award was valid and enforceable, Tamiami is entitled to interest for the time it had to wait to collect.

STATEMENT OF THE FACTS

On September 25, 1985, the Miccosukee Tribe of Indians of Florida (Tribe) enacted *an* Ordinance (1985 Ordinance), which authorized bingo gaming on its tribal lands. This Ordinance provided that the Tribe, through its duly constituted officers, may conduct ^(a) (bingo game or games) ? on the Reservation either directly or through a qualified Contractor and that Tribal revenue from the operation of the bingo gaming shall be utilized by the Tribe to promote the health, education and ^{the} general welfare of its people. Tamiami Partners Ltd. v. Miccosukee Tribe of Indians, 63

F.3d 1030, 1037 (11th Cir. 1995). Acting ~~in~~ pursuant to this Ordinance, the Tribe established a bingo facility and entered into a Management and Development Agreement (Agreement) with Tamiami Development Corporation (Tamiami), the qualified contractor. After Congress enacted IGRA in 1988, the Tribe amended the 1985 Ordinance by adding references to the statute and amending other provision^{of} to the ordinance to conform to IGRA.¹

On April 7, 1989, the Tribe entered into aⁿ Agreement with Tamiami to operate a bingo hall facility on Tribal lands under a gaming scheme authorized by the Indian Gaming Regulatory Act (IGRA) of 1988,² and the 1985 Ordinance. The Agreement had a seven-year term and was renewable at Tamiami's option for an additional three years. In ~~the~~ exchange for forty percent of the facility's monthly net revenue, Tamiami agreed to purchase a parcel of land outside the reservation, convey title to the United States to be held in trust for the Tribe, and then build and managed a bingo hall.

After the Agreement was approved by a designee of the Secretary of the Interior, Tamiami purchased the parcel and began to construct the bingo facility. Thereafter, Tamiami completed the facility and began operating it as Miccosukee Indian Bingo (MIB) in September 1990. Before the Tribe could operate its bingo hall, IGRA required the adoption of a tribal ordinance authorizing and governing gaming on its Reservation.³ On August 9, 1991, the Tribe, carrying out IGRA's mandates, adopted ^{the} Ordinance (1991 Ordinance) which provided for the registration and subsequent licensing of managers and key employees of its gaming enterprise,

¹The record does not show whether the 1985 Ordinance was amended before of after the execution of the management agreement.

²25 U.S.C. sec. 2701-2721 (1988).

³Class II gaming includes bingo and card games. 25 U.S.C sec. 2703(7). Class II gaming on reservations is within the jurisdiction of the Indian Tribes, subject to the provisions of IGRA. 25 U.S.C. sec. 2710(a)(2).

including those managed by Tamiami.⁴ As mandated under Section 2710(b)(2)(F) of IGRA, the Ordinance established a Tribal Gaming Agency (Gaming Agency) to oversee the Tribe's gaming operations. The Ordinance also provided for background investigations and licensing of managers and key employees of Tamiami.⁵ Anyone denied a license was given the right to appeal to the Gaming Agency, and if still not satisfied, to the Tribal Court.

During the first sixteen months of operations the Tribe offered on two separate occasions to purchase Tamiami's interest in the MIB. The Tribe's first offer was for \$2 million less than Tamiami's initial investment (\$6.5 million) in the enterprise. The second offer was for the amount of Tamiami's investment. Both offers were rejected by Tamiami. The Tribe's two offers are described in Tamiami's amended complaint. The Tribe's answer to that complaint denied the two offers. The materials in the record suggested the offers were made. However, the panel in *Tamiami II* determined that the allegation, whether true or not, had no bearing on the case. Tamiami Partners Ltd. v. Miccosukee Tribe of Indians, 63 F.3d 1030, 1037 & n.29.

On January 28, 1992, the Tribe notified Tamiami by letter that the Agreement had been terminated by action of the Tribe's Business Council (Business Council). The Tribe's notice to terminate the Agreement was to be effective on February 28, because of repeated and flagrant violations of the letter and spirit of the Agreement. The Tribe alleged that Tamiami had: (1) refused to allow Tribal representatives to inspect the business and financial records; (2) impeded the ability of outside accountants to conduct an audit; (3) failed to obtain the Tribe's approval of non-budget expenditures, (4) violated the 1991 Ordinance by failing to register its managers and

⁴Section 2710(b)(2)(F).

⁵The ordinance gave the Tribe's Chief of Police the duty to conduct background checks, report his results to the agency, and make recommendations as to whether a license should issue.

key employees, and (5) failed to provide a plan for preferential employment of Tribal members. *Id.* at 1039.

On February 4, 1992, Tamiami responded by denying each of the allegations and declaring that the Tribe's termination of the Agreement was ineffective and a nullity. On February 11, the Tribe received Tamiami's response and notified Tamiami that the Agreement had been terminated, effective on February 28.

On February 25, pursuant to Article 12, of the Agreement, Tamiami formally demanded arbitration to determine the validity of the Tribe's purported notice of termination. In its demand letter, Tamiami provided an interpretation of the dispute and requested that the Tribe respond by noon the next day. The Tribe did not respond, instead filed suit on the following day in Miccosukee Tribal Court (Tribal Court), seeking a declaration that the Agreement had been terminated. The Tribe alleged that Tamiami, as manager, has violated federal and state law, tribal ordinance and customs, and a federally-approved management agreement to the detriment of the Tribe.⁶ On February 27, Tamiami filed its original complaint against the Tribe in the United States District Court for the Southern District of Florida. The complaint sought a declaratory judgment that Article 12 bound the Tribe to arbitrate all disputes, as well as an injunction compelling the Tribe to arbitrate the termination disputes and preventing it from taking control of MIB. On February 28, the district court issued a temporary restraining order directing the parties to maintain the status quo.

AP — The Agreement contains two articles that are at the center of the jurisdictional dispute, they are:

⁶The tribe sought the following relief: (1) a declaration that the Agreement had been terminated; (2) an order directing that Tamiami vacate the premises and give the Tribe control of the MIB; (3) an order directing the Tribal police to enforce the order; and (4) attorney's fees and cost.

Article 12 provides that “[a]ll disputes, controversies and/or claims arising out of or related to this Agreement, or the breach thereof, shall be settled by arbitration.” This Article includes the method of selecting arbitrators, the procedures for those arbitrators to follow, and states that (unless otherwise provided) the commercial Arbitration Rules of the American Arbitration Association are to govern any arbitration proceedings.

Article 23 provides that “[t]he Tribe waives its sovereign immunity from suit as expressly provided in this Article. The United States District Court for the Southern District of Florida, shall have jurisdiction over the parties hereto in order to enforce the terms hereof specifically, upon one or both of the following events (i) [the Tribe] fails to participate in an arbitration proceeding invoked as provided in Article 12, or (ii) failure by [the Tribe] to abide by the terms of an arbitration award... This waiver of sovereign immunity shall not become effective until [TDC] has given written notice to the Miccosukee Tribal Business Council, detailing the nature of the complaint and the [Tribe] shall have failed after 30 days following such notice to cure such complaint.”

On March 5, 1992, the district court issued its first omnibus order in the case. The court determined it had subject matter jurisdiction because the case presented the federal question of Tribal Court power over a non-Indian entity. The district court vacated the February 28, temporary restraining order. However, the court stayed further proceedings in the case pending the parties' exhaustion of their remedies in the Tribal Court. See Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians, 788 F.Supp. 566 (S.D.Fla.1992). The court indicated that it would lift the stay if: (1) the Tribe, attempted to evict or otherwise impede Tamiami from operating the gaming enterprise; or (2) the Tribe failed to provide Tamiami with two business days notice prior to taking any action ordered by the Tribal Court. *Id.* at 567.

T.Ct.
orders
arbitration

On July 16, 1992, the Tribal Court issued a ruling directing the parties to initiate arbitration proceedings in accordance with Articles 12 and 23 of the Agreement.⁷ During the same month, the Tribe denied seventeen license applications that Tamiami employees had submitted to the Gaming Agency. On July 21, Tamiami returned to the district court and filed an

⁷The Tribal Court retained jurisdiction pending the outcome of the arbitration proceeding, to hear and determine the claims, if any, the Tribe had asserted against Tamiami under its civil governmental powers to the extent that those claims were not the subject of arbitration under the Agreement.

emergency motion for an order enjoining the Tribe from exercising self-help to terminate *the* Agreement.⁸ On July 24, the district court lifted its stay and issued a temporary injunction that prohibited the Tribe from denying any additional license applications, pending its review of the licensing process of the Tribe established under the IGRA. On August 5, during a two-day evidentiary hearing before the district court, the Tribe filed in the Tribal Court a notice of compliance with its July 16 order compelling arbitration.

In its second omnibus order, issued on August 19, the district court addressed Tamiami's motion. The court found that the Tribe's licensing process was arbitrary and capricious under the Administrative Procedure Act. Nevertheless, the court concluded that Congress, in enacting the IGRA, had made no provision for suits by management contractors (such as Tamiami) to challenge a Tribe's licensing procedures. Moreover, it held that the Tribe's narrow waiver of sovereign immunity did not constitute consent to federal court suits challenging its licensing process. Drawing on Congress' failure to allow management contractors the right to judicially challenge a tribe's licensing decision, the district court held that Tamiami could not challenge, in any arbitration proceeding, the Tribe's refusal to license its managers and key employees; the court therefore denied Tamiami's emergency motion. See Tamiami Partners Ltd. v. Miccosukee Tribe of Indians, 803 F.Supp. 403 (S.D.Fla.1992).

On August 21, Tamiami moved the district court for leave to file a supplemental complaint and for a preliminary injunction that would compel arbitration of the licensing dispute and prevent the Tribe from using the licensing process to frustrate Tamiami's operations of MIB.

⁸Tamiami alleged in its motion that the Tribe, under the pretext of legitimately denying license applications was engaging in self-help to prevent Tamiami from operating MIB and thus effectively terminating the Agreement.

The court denied this motion on September 15. Two days later, Tamiami took interlocutory appeals from the district court's August 19 and September 15 orders.

On December 17, 1992, an arbitration panel eventually convened pursuant to the Tribal Court's July 16 order compelling arbitration. On April 13, 1993, while interlocutory appeals and arbitration were pending, the Tribe took several steps to oust Tamiami from MIB. The Gaming Agency denied licenses to Tamiami and two principal^{al} officers—Cye Mandel and John Sisto. ✓✓ The Gaming Agency also appointed a conservator to take control of MIB and to operate the facility; the conservator was instructed to pay the Tribe its share of MIB's net revenue and deposit Tamiami's forty percent share into a trust account at Jefferson National Bank in Miami, Florida.⁹

Also on April 13, Tamiami returned to the district court seeking an injunction to prevent the Tribe from exercising self-help. In its third omnibus order, issued on April 15, the district court found that the Tribal Court had exceeded its jurisdiction in ratifying the conservator's appointment. The court also concluded that the Tribe had exceeded its sovereign powers in rejecting the license applications of Tamiami, Mandel and Sisto.¹⁰ This court determined that the above rejections were simply an attempt by the Tribe to circumvent the ongoing arbitration and to terminate the Agreement. Accordingly, the court declared that all of the Tribe's April 13 actions were void and ordered the parties to return to the status quo ante of April 12.

⁹The Tribal police then forced Mandel and Sisto to leave the premises, the MIB accountant surrendered Tamiami's financial records to the Tribe, and the Tribe began the process of obtaining control of MIB's bank account.

¹⁰In the court's view, these rejections were an attempt to circumvent the ongoing arbitration and terminate the Agreement.

The Tribe requested the district court to certify its April 15 order allowing it to appeal. The district court certified the order, and the United States Court of Appeals, for the Eleventh Circuit (panel) permitted the appeal. The panel consolidated the appeal with the interlocutory appeals taken by Tamiami on September 17, 1992. The Court stayed the district court's third omnibus order pending the disposition of these appeals.

On August 16, 1993, the United States Court of Appeals for the Eleventh Circuit decided these three appeals. Tamiami Partners Ltd. v. Miccosukee Tribe of Indians, 999 F.2d 503(11th Cir. 1993) (*Tamiami I*). Addressing subject matter jurisdiction of the district court, the panel held that Tamiami's complaint failed to state a federal question within the meaning of 28 U.S.C. § 1331 (1994). *See id* at 506-07.¹¹ Tamiami's complaint merely invoked section 1331 and then presented facts establishing a breach of contract claim. Accordingly, the panel reversed the district court's third omnibus order and remanded the case with instructions.¹²

On remand, Tamiami filed an amended complaint on September 14, 1993. In addition to the Tribe, Tamiami named as defendants the Business Council, the Gaming Agency, the Tribal Court, and eight individual members of those bodies. The amended complaint asserted (four) bases of federal question jurisdiction: First, the Tribe's purported termination of the Agreement violated IGRA. Second, the Tribe's denial of gaming licenses violated IGRA. Third, individual members of the Business Council and the Gaming Agency had acted outside their lawful

¹¹The Court recognized the right to be protected against an unlawful exercise of tribal court power is a claim arising under federal law, *id.* at 507, but stated the Tamiami's complaint failed to assert such a right.

¹²The Court remanded the case to the district court because it was aware of facts that could allow subject matter jurisdiction with directions to dismiss the action unless one of the parties files a complaint or pleading which alleges jurisdiction. *Tamiami Partners Ltd. v. Miccosukee Tribe of Indians*, 999 F.2d 503, 508 (1993).

authority. Fourth, the Tribal Court exceeded its authority. Tamiami also sought declaratory and injunctive relief.¹³

On September 15, five days before a final hearing was to be held, the arbitration panel convened pursuant to the Tribal Court's order of July 16, 1992. The Tribe moved to stay the arbitration proceedings. The Tribe's reason for the stay was Tamiami's allegations in its amended complaint that the Tribal Court lacked jurisdiction over Tamiami because of its non-Indian status. On September 16, the Tribal Court granted the motion and stayed the arbitration proceedings pending further order.

*T. Ct.
stays
arbitration*

On September 21, the arbitration panel, ^{with} concluded that the Tribal Court had no jurisdiction to enforce the arbitration provision of the Agreement and that the arbitration panel's authority derived from Article 12 of the Agreement, disregarded the Tribal Court's September 16 order and declined to postpone the final hearing which took place as scheduled on the 23. The Tribe and its chosen arbitrator refused to participate in the final hearing. On October 6, the arbitration panel made its decision ~~finding~~ in favor of Tamiami and against the Tribe on all counts.¹⁴ The arbitration panel gave the Tribe the choice to either reinstate Tamiami to its position as manager of MIB or terminate the Agreement by paying Tamiami \$9.5 million.¹⁵

*arb. panel
goes
ahead*

After the arbitration panel's decision, the Tribal Court entered two orders that collectively withdrew itself *from* the controversy. First, on October 12, 1993, the court vacated

further

¹³~~First~~, Tamiami asked the district court to declare invalid the Tribal Court's April 13 order ratifying the Gaming Agency's appointment of the conservator and its refusal to licence Tamiami, Mandel and Sisto. ~~Second~~, Tamiami asked the district court to return the parties to the status quo as of April 12, to issue an injunction against the Tribe to prevent the interference with its management of the MIB, and issue an order forcing the Tribe to turn over its forty percent share of the enterprise's gaming revenue. (40)

¹⁴Although the Tribe's arbitrator refused to participate in the final hearing, he did file a formal dissent to the panel's October 6 decision and award.

¹⁵The arbitration panel also awarded Tamiami fees and cost.

its April 13 order, regarding the appointment of the conservator of the MIB, ^A at the Tribe's direction, the conservator withdrew Tamiami's share of net revenues from the trust account at Jefferson National Bank, ^{and} received those funds in the form of a cashier's check for \$1,566,000 made payable to Dexter Lehtinen. Lehtinen, the Tribe's legal counsel, endorsed the check over to the Tribe for deposit in a separate account at the same bank entitled MIB reserve account.

Second, on October 25, the Tribal Court granted the Tribe's motion to dismiss the tribal suit. The court also moved the district court to dismiss it from the controversy.¹⁶ The Business Council, the Gaming Agency and the individual defendants also moved for dismissal, contending both lack of subject matter jurisdiction ^{that} and the action was barred because of the Tribe's sovereign immunity. On October 27, the district granted Tamiami's request for an order to freeze the funds held in the MIB reserve account.

On February 28, 1994, after dismissing the Tribal Court from the controversy, the district court addressed the Business Council, the Gaming Agency and the individual defendants claim that the Tribe's sovereign immunity barred the suit.¹⁷ The district court determined that the Business Council ^{were} and the Gaming Agency was protected because the Tribe had not clearly waive ^d its sovereign immunity and Congress had not abrogate ^d such immunity from suits based on federal common law. Accordingly, the court dismissed these claims with prejudice.

As for the individual defendants the district court determined they were not shielded by the Tribe's sovereign immunity. The district court held that the individual defendants acted beyond the authority that the Tribe is capable of bestowing upon them under federal laws

¹⁶On February 28, 1994, the district court dismissed the Tribal Court from the case.

¹⁷The district court held that Tamiami's amended complaint, whether these defendants exceeded their tribal powers, presented a federal question.

defining sovereign powers of Indian tribes. See *Ex parte Young*, 209 U.S. 123, 151 28 S.Ct. 441, 52 L.Ed. 714 (1908). The court also made clear that Tamiami was not required to exhaust its Tribal Court remedies against the defendants because Tamiami had alleged bad faith on the part of the individual defendants and, thus established an exception to the exhaustion rule.¹⁸ The court therefore, denied the individual defendants' motion to dismiss. On March 28, 1994, both the individual defendants and Tamiami appealed.

On August 16, 1995, a second panel consolidated these appeals and issued its opinion. Tamiami Partners Ltd. v. Miccosukee Tribe of Indians, 63 F.3d 1030 (11th Cir. 1995) (*Tamiami II*). Tamiami presented three claims: (1) a breach of contract claim against the Tribe; (2) a claim against the Tribe and Gaming Agency brought under IGRA's regulations; and (3) a claim against the individual defendants as members of both the Business Council and Gaming Agency also brought under IGRA's regulations. As to the subject matter jurisdiction of the district court, the panel held Tamiami's three claims presented a federal question. As to Tamiami's claim that the Tribe had breached the Agreement ^{the court viewed this} as a claim that the Tribe, acting through its Gaming Agency, violated IGRA and its associated regulations (which the Agreement incorporated) by failing to process Tamiami's license application in good faith with the sole purpose of taking over MIB. ~~The Court of Appeals held that the claim presented a federal question.~~ The panel also concluded that Tamiami's second and third claims, which were based directly on IGRA and its regulation, presented federal question.⁵ *Id.* at 1047.

Turning to the issue of sovereign immunity and failure to state a claim, the panel examined Tamiami's first and second claims against the Tribe. It agreed with the district court's

¹⁸National Farmers Union Ins. v. Crow Tribe of Indians, 471 U.S. 845, 852, 105 S.Ct. 2447, 2451, 85 L.Ed.2d 818 (1985).

conclusion that Tamiami's first claim was barred by the Tribe's sovereign immunity, which Congress had not abrogated and the Tribe had not clearly waived. Although Article 23 of the agreement did provide a waiver for the limited purposes of compelling the Tribe to arbitrate or to enforce an arbitration award, the panel found that Tamiami's first claim, simply a breach of contract claim for which it sought money damages and injunctive relief, did not seek the type of relief contemplated by that waiver. *Id.* at 1048. In footnote 66, which appeared at the end of its decision of Tamiami's first claim, the panel offered the following comment:

Tamiami's original complaint sought an order compelling the Tribe to submit to arbitration; its amended complaint, however, does not seek that relief. Tamiami remains free, of course, to seek enforcement in the district court of the October 6, 1993 arbitration award and to seek an order in the district court compelling arbitration of any remaining contract disputes. *Id.*

As to Tamiami's second claim alleging violations of IGRA's regulations, the panel did not agree^x that it was barred by the Tribe's sovereign immunity. The panel disposed^{o d} that claim on separate grounds because IGRA provides Tamiami no right of action, accordingly Tamiami failed to state a claim. *Id.*

Finally, the panel considered Tamiami's claim against the individual defendants. It found^x that the district court's denial of the individual defendants' motions to dismiss on the ground of tribal immunity immediately appealable. The panel then affirmed the district court's ruling under the doctrine of *Ex parte Young*, that the individual defendants were not shielded by the Tribe's sovereign immunity. It declined to decide, however, whether Tamiami could state a claim for relief against the individual defendants. *See id.* at 1051 & n.72.

On remand, the district court granted Tamiami's amended complaint, ^{leave to file an} ^{which was} filed on November 17, 1995, ^{The amended complaint} which contained six counts and named as defendants the Tribe, individual members of

its Business Council and Gaming Agency,¹⁹ and Dexter Lehtinen. The first count requested two types of declaratory relief, referred to as one (a) and one (b): ^{one (a) sought} (a) a declaration that all disputes between the parties that arise out of or relate to the Agreement, including the licensing dispute are arbitrable; and ^{one sought} (b) a declaration against defendants that the funds in the frozen account belong to Tamiami. The second and third counts request ^a judgment requiring the Tribe to comply with the October 1993 arbitration award and compelling the Tribe to arbitrate certain other disputes arising out of ^{or} related to the Agreement.

The fourth count ~~Tamiami~~ sought an injunction against the Tribe in the form of an order directing the Gaming Agency and Business Council ^(to) rescind their orders of April 13 and October 12, 1993.²⁰ The fifth count was a conversion claim against Billy Cypress, Chairman of the Tribe, and Dexter Lehtinen.²¹ The sixth count requested that the court order all defendants to make an accounting to Tamiami for funds taken from the frozen account and for MIB's revenues since October 1993.

On December 4 and 5, defendants filed motions to dismiss Tamiami's amended complaint contending lack of subject matter jurisdiction, sovereign immunity, and failure to state a claim. The district court denied these motions in a memorandum opinion and order dated September 27, 1996.²² Referring to the *Tamiami II* panel's comments in footnote 66, it

¹⁹Billy Cypress, Jasper Nelson, Jimmie Bert, Max Billie, and Henry Bert.

²⁰These orders converting Tamiami's share of MIB's net revenue to the Tribe. Tamiami sought return of the funds in the frozen account to them.

²¹The court charged Cypress and Lehtinen with converting to the Tribe sums rightfully belonging Tamiami, including the frozen Jefferson National Bank trust account, as well as \$50,000 in the custody of the conservator as of April 13, 1993.

²²The district court found that the first three counts of Tamiami's complaint were predicated on the arbitration clause of the Agreement.

concluded that the Eleventh Circuit had contemplated the assertion of such arbitration claims on remand. *See supra* p. 10. The court therefore rejected the defendant's claims.

Turning to counts four through six, the court found that it had supplemental jurisdiction to consider state law claims asserted. The court also rejected the individual defendants' invocation of sovereign immunity, pursuant to its prior analysis under the doctrine of *Ex parte Young*, which was affirmed by the panel. Defendants filed an interlocutory appeal contending that the district court erred in rejecting each of the three grounds upon which they based their motion to dismiss.

On interlocutory appeal, the panel considered whether the district court had subject matter jurisdiction and whether the Tribe and individual defendants were shielded by sovereign immunity, however, it declined to exercise pendent appellate jurisdiction over the issue of failure to state a claim. Tamiami Partners Ltd. v. Miccosukee Tribe of Indians, 177 F.3d 1212 (11th Cir. 1999) (*Tamiami III*)

The panel held that the first three counts of Tamiami's complaint stated federal questions as they related to the Tribe's rejection of gaming license applications. The Court agreed with the panel in *Tamiami II*, that the Agreement incorporated by operation of law, if not by reference, IGRA's provisions and its associated regulations regarding license procedures. The defendants argued that the district court lacked the power to exercise supplemental jurisdiction over counts four through six. The panel disagreed, holding that the district court had the power to exercise supplemental jurisdiction over counts four through six of Tamiami's complaint since those claims formed part of the same case or controversy under Article III of the United States Constitution.

The Court next examined the district court's ruling that sovereign immunity does not shield the Tribe and the individual defendants from suit. The Court held that IGRA does not abrogate the sovereign immunity of tribes that participate in Indian gaming. As to the partial waiver of immunity in Article 23 of the Agreement, the panel held that counts one (b), four, and six were not within the scope of Article 23's waiver. However, the Court affirmed the district court's decision that counts one (a), two and three of the complaint plainly sought the type of relief expressly contemplated by Article 23. The Court further held that count five of the complaint was not directed against the Tribe; it only sought to hold Cypress and Lehtinen individually liable for conversion and therefore sovereign immunity was not a defense. *next, the court turning to the individual defendants' claims of sovereign immunity as Tribal officers acting in their official capacity. In Tamiami II, the Court had relied on Ex parte Young in affirming the district court's ruling that the Tribe's sovereign immunity did not shield the individual defendants from Tamiami's suit. Tamiami Partners Ltd. v. Miccosukee Tribe of Indians, 63 F.3d 1030, 1050-51 (1995). However, that holding pertained to the third count of Tamiami's amended complaint, which was brought under IGRA and its regulation.²³ However, Tamiami's claims against the individual defendants in its second amended complaint, neither IGRA nor licensing was mentioned. Instead Tamiami merely offered various theories under which individuals defendants must pay its forty percent of MIB's net revenues. The Court held, that these claims against the individual defendants were attempts by Tamiami to obtain specific performance of the Tribe's obligation under the Agreement, which the doctrine of Ex parte*

²³This count essentially alleged that the individual defendants, by abusing the licensing authority conferred by IGRA, had acted beyond the authority that the Tribe was capable of bestowing upon them.

Young expressly prohibits. The Court held that the district court erred in rejecting the individuals defendants' claims of sovereign immunity under the doctrine of *Ex parte Young*.