

Tribal Casino Bankruptcy? Not yet.

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In the case of *In re Santa Ysabel Resort and Casino*, the Bankruptcy Court for the Southern District of California heard arguments on September 4, 2012, as to whether the **alleged debtor, a tribal casino, was eligible for bankruptcy protection**. The court concluded the casino was not an eligible debtor under the Bankruptcy Code.

The casino claimed that it was not a governmental unit, which is excluded as an eligible debtor for purposes of Chapter 11, but an unincorporated company. Opposing creditors and the US Trustee argued that the tribe was merely doing business as the Santa Ysabel Resort and Casino, which was **an arm of the tribal government and that it had never been, and did not possess the hallmarks of, an unincorporated company**.

The court noted that, while there was some appeal to expanding bankruptcy protection as the casino requested on the grounds that Congress intended such protection to be expansive, the casino failed to meet the characteristics of an unincorporated company as the casino had recently begun describing itself. Accordingly, the court concluded that the tribal casino failed to satisfy its burden of establishing eligibility under section 109 of the Bankruptcy Code.

The evidence was stacked against the debtor. The **tribe had twice filed fictitious business names but now claimed that the casino had always been an unincorporated company**—organized collectively by its 120 employees. The court decried the “chicken and egg” problem of the debtor’s argument that the casino’s employees had formed an unincorporated company while employed by the very casino they allegedly formed. Moreover, the court highlighted the apparent discord between the alleged formation of an unincorporated company by individuals who had no ownership of, no control over, and no liability for the casino they had allegedly formed—while the evidence pointed to the fact that the casino had always been owned and controlled by the tribe. While it was clear that the tribe had originally owned the casino assets, if they were now owned by another entity, there were no formal assignments or assumptions of assets, contracts or debt. The court stated, “There is something so ethereal about what the [casino] proposed as to how it qualifies [as an eligible debtor under the Bankruptcy Code]. This thing came up as vapors from the ground and this thing is suddenly just there.” Without evidence of the formal relationships and rights of the purported entity, without some characteristics of the structure of a business entity, the court refused to grant eligibility. Finally, while not dispositive, the court averred it was affected by the fact that sovereign immunity extended from the tribe to its casino, evidence that the relationship was not that of a separate

business entity but of a mere arm or DBA of the tribe.

While it acknowledged that an appellate court may decide differently, the Bankruptcy Court could not find that the tribal casino was eligible for bankruptcy relief under section 109 of the Bankruptcy Code and requested a proposed order of dismissal.

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