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Ponca Tribe Of Oklahoma v. State Of Oklahoma, No. 92-6331, No. 93-2018, No. 93-2020, No. 93-3110 1994 U.S. App. Lexis 24084 (10th Cir. Sept. 2, 1994)

continued.

Finally, noting the conflict between antitrust and labor law policies, the court found that where a collective bargaining arrangement is established and a valid agreement formed, federal labor law, not antitrust law, controls. Thus, the court granted the NBA the declaration it sought, finding that the continued implementation of these policies, despite the expiration of the formal collective bargaining agreement, does not violate antitrust laws as the Players alleged, as long as the collective bargaining relationship exists.

The court also noted that, even if the nonstatutory exemption did not apply, the Players' charge that such practices comprise a *per se* violation of the Sherman Act would be insufficient. Professional athletic associations are characterized primarily as joint ventures, and are judged under the rule of reason, an analysis of market power and structure designed to assess the actual effects of any practices in question. The Players failed to show that the alleged restraints on trade were unreasonably anti-competitive. In fact, the court pointed out that the college draft, right of first refusal and salary cap had pro-competitive effects, especially that of maintaining competitive balance throughout the NBA, that may outweigh any restrictive consequences. Thus, the Players' counterclaims were denied.

C.K.

PONCA TRIBE OF OKLAHOMA V. STATE OF OKLAHOMA, No. 92-6331, No. 93-2018, No. 93-2020, No. 93-3110 1994 U.S. App. Lexis 24084 (10th Cir. Sept. 2, 1994)

This appeal raises Tenth and Eleventh Amendment questions dealing with the process Indian tribes and states utilize in setting up gaming facilities on Indian reservations. In 1988, in response to the proliferation of Indian gaming operations, Congress enacted the Indian Gaming Regulatory Act ("IGRA"). IGRA is designed to promote strong leadership and tribal economic development as a result of gaming facilities, and to provide a federal and state regulatory function to prevent the infiltration of organized crime and other corrupting influences.

IGRA classifies gaming operations into three degrees, imposing various forms of federal, state and tribal regulations over each class. Class I gaming, consisting of "social games for minimal prizes" or as part of tribal celebrations, falls under the complete regulatory control of the tribal governments. Class II gaming, con-

sisting of bingo and similar games, lotto and non-banking card games, is permitted only if the state where the gaming is located allows such activity. Assuming the state permits such gaming, Indian tribes maintain regulatory jurisdiction, subject to the supervision of the Department of the Interior. These appeals stem from Class III gaming, described by IGRA "as all forms of gaming not included in Classes I and II, e.g., banking card games, slot machines, casinos, horse and dog racing, and jai-alai." Such gaming is permitted on Indian lands only if it is legal in the state where the gaming is located and is conducted in conformance with a compact between the Indian tribe and the state. To facilitate this, IGRA directs the states to "negotiate with the Indian tribe in good faith" to craft a compact governing Class III gaming.

Negotiations involving the four Indian tribes that brought these suits (the "Tribes") and the states of Kansas, New Mexico and Oklahoma failed, and the Tribes sued, seeking an injunction under IGRA requiring the states to negotiate compacts. The Tribes also sought an order directing the governors of Oklahoma and New Mexico to negotiate compacts, thus raising an *Ex Parte Young* question.[1] Each state moved to dismiss on Eleventh Amendment grounds, and two of the states contended that IGRA violated the Tenth Amendment as well. Oklahoma and New Mexico also claimed the tribes could not obtain injunctive relief against their governors under the doctrine of *Ex Parte Young*.

The district courts reached differing conclusions on the states' defenses, with three dismissing the Tribes' suits, holding the suits were barred by the Eleventh Amendment because Congress lacked the authority to abrogate the states' Eleventh Amendment immunity. The same three courts also held that the suits against the governors of Oklahoma and New Mexico fell outside the parameters of *Ex Parte Young* because a court order to negotiate a tribal-state compact would infringe upon executive discretion. Finally, these three courts held that IGRA violates the Tenth Amendment because it does not allow the states the option to refuse to regulate Class III gaming, and allows the Secretary of the Interior to commandeer state governments. In the fourth case, the court held that Congress does have the power to abrogate the states' Eleventh Amendment immunity.

Held: Although the Eleventh Amendment imposes a constitutional limitation on the jurisdiction of Article III courts, Congress

1. Under *Ex Parte* Young, 209 U.S. 123 (1908), the courts may consider a suit against a state official to enjoin a non-discretionary violation of federal law.

may abrogate the states' Eleventh Amendment immunity as long as it makes its intent unmistakably clear in the statute that empowers Congress with abrogation rights. Since IGRA specifically empowers federal courts to entertain causes of action initiated by an Indian tribe arising out of a state's failure to enter into negotiations with the tribe, and because the statute places the burden on the states to prove good faith, the court found Congress unmistakably expressed its intent to subject states to suit in federal court. In determining whether Congress has the power to abrogate, the court looked to the Indian Commerce Clause of the Constitution, saying the key question is whether the Indian Commerce Clause gives Congress the plenary power to legislate in the area of Indian affairs. The court held that it does, giving Congress no less authority than it has under the Interstate Commerce Clause.

The court also held that IGRA does not violate the Tenth Amendment because the "good faith" provision does not directly compel states to enact a legislative program, but merely invites them to do so. If a state chooses not to enter into a tribal-state compact, the Secretary of the Interior will ultimately prescribe and enforce regulations to govern Class III gaming.

Additionally, since Class III gaming is only permissible on Indian lands in states where such activity is legal, states are free to outlaw such gaming and need not worry about negotiating with the Indian tribes. This also preserves state governmental accountability, a critical component of the states' Tenth Amendment Sovereignty.

Finally, the court held that since the act of negotiating involves discretion and is not ministerial in nature, the suits against the governors of Oklahoma and New Mexico are not barred by *Ex Parte Young*. Since IGRA names only the state as a party to a potential suit, the court found that an injunction to compel a governor to enter into a compact with an Indian tribe is improper. Affirmed in part, reversed in part.

C.L.

GORDON & BREACH SCI. PUBLRS. S.A. v. AMERICAN INSTITUTE OF PHYSICS, 1994 U.S. Dist. LEXIS 11435 (S.D.N.Y. 1994)

Plaintiffs Gordon & Breach (G&B) publish and distribute a wide range of technical, scientific, medical, commercial and business journals and books. Defendants, the American Institute of Physics (AIP) and the American Physical Society (APS), are nonprofit physics societies that publish physics journals. G&B brought