

WHO SHOULD PAY FOR THE ERRORS OF THE TRIBAL AGENT?: WHY COURTS SHOULD ENFORCE CONTRACTUAL WAIVERS OF TRIBAL IMMUNITY WHEN AN AGENT EXCEEDS HER AUTHORITY UNDER TRIBAL LAW

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I. INTRODUCTION

As tribal commercial enterprises have expanded the size and scope of their operations, the business of tribes has become the business of the nation. The commercial interests of large tribes such as the Navajo now run the gamut from energy to tourism to industrial activities.¹ Moreover, gaming interests held by all tribes nationwide produced revenues of \$26,482,447,000 in 2009, according to the National Indian Gaming Commission.²

When tribal commercial organizations engage in commercial dealings, their non-tribal counterparties almost universally insist that a waiver of tribal immunity be included within any contractual agreement so as to retain their access to state and federal courts should they decide to litigate any commercial disputes against the tribal entity.³ In a recent case, the Sixth Circuit weakened the reliability of these waivers by ruling that the court will not enforce such a waiver when a tribal agent assents to one while possessing only apparent authority in the eyes of the tribal

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1. See Amanda J. Crawford, *A Bond Offering from the Navajo Nation*, BUSINESSWEEK, Nov. 14, 2011, at 53–54 (noting the variety of enterprises which would be financed by a tribal bond offering).

2. NATIONAL INDIAN GAMING COMM'N, NIGC TRIBAL GAMING REVENUES, http://www.nigc.gov/Gaming_Revenue_Reports.aspx (follow “Gaming Revenues 2006–2010” hyperlink).

3. Amelia A. Fogleman, Note, *Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver for Tribal Businesses*, 79 VA. L. REV. 1345, 1365 (1993).

counterparty but not actual authority under tribal law.⁴ This comment will argue that there are three reasons that courts should enforce such waivers: because doing so is consistent with the principles associated with waivers of tribal immunity; because it will not have deleterious effects on tribal sovereignty; and because it will improve the efficiency of tribal commercial dealings with non-tribal entities.

For purposes of brevity and clarity this comment will use the term “erroneous waiver” to refer to cases in which a tribal agent agreed to a waiver of tribal immunity while possessing apparent authority but not while possessing necessary authorization under tribal law to constitute actual authority.

This comment will consist of four parts. Part I includes this introduction and definitions of relevant terminology. Part II will discuss the background of tribal immunity and of the treatment of waivers of tribal immunity. Part III will discuss the legal basis for enforcement of erroneous waivers of tribal immunity. Part IV will discuss the policy implications of adopting a standard that enforces erroneous waivers of tribal immunity.

II. BACKGROUND

Although tribal immunity has deep roots in the nation’s legal history, the Supreme Court did not officially acknowledge its development until well into the 20th century. The concept of tribal immunity first originated in the 1850 Supreme Court decision of *Parks v. Ross*.⁵ In a later case, the Supreme Court cited *Turner v. United States and Creek Nation of Indians* as the modern source of the doctrine of tribal immunity.⁶ Tribal immunity was subsequently fully endorsed by the Court in *United States v. United States Fidelity & Guaranty Co.*,⁷ and remains in place to this day⁸ despite occasional questioning of its continued utility among some judges.⁹

4. *Memphis Biofuels v. Chickasaw Nation Industries Inc.*, 585 F.3d 917 (6th Cir. 2009).

5. *Parks v. Ross*, 52 U.S. 362 (1850). See also Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L. J. 137, 148 (2004) (discussing the Supreme Court’s history of recognizing tribal sovereign immunity).

6. *Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, 523 U.S. 751, 759 (1998) (citing *Turner v. United States*, 248 U.S. 354 (1919)).

7. *United States v. U.S. Fid. Guar. Corp.*, 309 U.S. 506 (1940).

8. Catherine T. Struve, *The Story of Santa Clara Pueblo v. Martinez: Tribal Sovereignty, Sex Equality, and the Federal Courts*, in *FEDERAL COURT STORIES*, 321 (Vicki C. Jackson ed., 2010).

9. See *Kiowa Tribe*, 523 U.S. at 756–58 (writing for the majority, Justice Kennedy questioned the validity of the legal origins of the doctrine of tribal immunity before ultimately affirming it).

Despite this questioning, both Congress and the Supreme Court have affirmed federal recognition of tribal immunity.¹⁰

The terminology of waiver can be both complex and inconsistent. Although different courts and commentators use different terminology,¹¹ for the sake of simplicity this comment will refer to the court's opinion in *Memphis Biofuels* as the basis for delineating the terminology of waivers of tribal immunity. The court's opinion points to two notable distinctions. Waivers of tribal immunity can be either automatic or express.¹² While automatic waivers occur because of an involuntary status of a tribal corporation—such as incorporation of a tribal commercial organization under Section 17 of the Indian Reorganization Act¹³—express waivers can only occur as result of a deliberate action by a tribal organization.¹⁴ The court's opinion in *Memphis Biofuels* also indicates that waivers can either be specific or general.¹⁵ While specific waivers remove immunity only with respect to a unique transaction or relationship, general waivers typically absolve all immunity for a tribal organization—for example, through a broad “sue or be sued” clause in its incorporating charter.¹⁶ More specifically still, this comment will deal with waivers that are not only specific and express but also that are erroneous in that the agent assenting

10. See Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661, 664–66 (2002) (discussing the jurisprudential and political background to the Court's decision to uphold the doctrine of tribal immunity in *Kiowa Tribe*). See generally Patrice H. Kunesh, *Tribal Self-Determination in the Age of Scarcity*, 54 S.D. L. REV. 398, 400–01 (2009) (discussing tribal immunity in the context of the nation's declining economic fortunes and the

U.S. Supreme Court's inclination to reshape . . . tribal sovereignty by abandoning a formalistic adherence to these foundational principles . . . for a more functional approach involving a complex balancing of state and tribal political interests, with the scale tipping . . . in favor of the state's interests . . .

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11. Cf. *C&L Enters., Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 420–23 (2001) (which did not make specific terminological distinctions as to different types of waiver as did the court in *Memphis Biofuels*).

12. *Memphis Biofuels v. Chickasaw Nation Industries Inc.*, 585 F.3d 917, 920–23 (6th Cir. 2009).

13. *Id.*

14. See *id.* (noting that while incorporation under section 17 could theoretically completely divest a tribal entity of its immunity, an express waiver in this context would only have waived immunity for the purposes of this transaction).

15. See *id.* at 920–22 (the court's opinion does not explicitly use the terminology of general versus specific waiver but does note the distinction between these two varieties of waiver).

16. *Id.*

to the unique waiver in an individual commercial relationship did not have the authority to do so under tribal law.¹⁷

Under the current operative interpretation, tribal immunity exempts tribal organizations from suit in federal, state and tribal courts,¹⁸ and applies to both commercial and non-commercial tribal activities, both on and off reservation.¹⁹ While courts have broadly upheld tribal immunity, they have recognized several circumstances in which tribes can waive their immunity.²⁰ In *Memphis Biofuels*, the Sixth Circuit noted that some courts have construed tribes as having waived their immunity through an automatic waiver under Section 17 of the Indian Reorganization Act—through general express waiver in the form of “sue or be sued” clauses included within charter,²¹ or through specific express waiver in the form of contractual arrangements with counterparties in commercial arrangements.²² While some courts have claimed that automatic waiver exists when a tribal organization is incorporated under Section 17 of the Indian Reorganization Act,²³ the court in *Memphis Biofuels* disagreed and noted that the Supreme Court’s 1998 holding in *Kiowa Tribe*, concluding that tribal immunity exists under federal common law unless specifically abrogated by Congress, likely invalidated previous rulings by lower courts holding that incorporation under Section 17 could implicitly waive tribal immunity.²⁴

By comparison, the issue of general express waiver is less settled; some circuits state that clauses within tribal incorporating documents holding that the tribal entity declares broad power to “sue and be sued” completely waive tribal immunity, while others hold the opposite.²⁵

17. *But cf. id.* (however, *Memphis Biofuels* labeled what this comment refers to as erroneous waivers under the heading of “equitable doctrines.”).

18. Seielstad, *supra* note 10, at 699–700.

19. *Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754–55 (1998).

20. *But cf. Seielstad, supra* note 10, at 699 (noting some instances in which tribes have no choice but to waive their immunity stating that the Indian Tribal Economic Development and Contract Encouragement Act, enacted by Congress in 2000, effectively forced tribes to waive immunity in certain special circumstances such as if a commercial immunity would require an encumbrance of tribal lands lasting longer than 7 years).

21. *See Memphis Biofuels v. Chickasaw Nation Industries Inc.*, 585 F.3d 917, 920 (6th Cir. 2009) (noting that Section 17 of the Indian Reorganization Act allowed that “The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe” with respect to creation of a tribal commercial entity).

22. *Kiowa Tribe*, 523 U.S. at 754–55.

23. *GNS Inc. v. Winnebago Tribe of Nebraska*, 866 F. Supp. 1185, 1187 (N.D. Iowa, 1994)

24. *Memphis Biofuels*, 585 F.3d at 920–21.

25. WILLIAM C. CANBY JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 111 (5th ed. 2009). *See also Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 687–88 (8th Cir. 2011) (ruling that a provision in the charter of a tribal corporation stating that it would “assume the obligations and liabilities” of a successor corporation was not sufficient to waive tribal

Although this remains an unsettled issue, many courts are able to avoid the problem altogether since many tribes choose not to include such clauses in the incorporating charters of their tribal commercial organizations and are thus never subject questions concerning the general express waiver of their tribal immunity.²⁶

Although courts differ in determining how unambiguous a specific waiver of tribal immunity must be in order to be enforced by the court,²⁷ all now follow the legal consensus that tribes have the ability to waive tribal immunity in individual transactions with non-tribal entities.²⁸ Nevertheless, in the course of commercial transactions, tribal representatives sometimes overstep their authority by agreeing to waivers of tribal immunity, and non-tribal entities sometimes mistakenly believe the tribal agents to possess sufficient authority to waive immunity. The majority view among courts that have dealt with this issue is that a waiver of tribal immunity should not be enforced if the agent exceeded his authority under tribal law by granting the waiver in question.²⁹ Such courts frequently cite the Supreme Court's ruling in *Santa Clara Pueblo v. Martinez*, holding that a waiver of tribal immunity "cannot be implied and must be unequivocally expressed" in support of this opinion.³⁰ However, the court in *Memphis Biofuels* did note

immunity).

26. See *Memphis Biofuels v. Chickasaw Nation Industries Inc.*, 585 F.3d 917, 921–22 (6th Cir. 2009) (noting that, unlike the incorporating documents of some tribal organization, the incorporating document of Chickasaw Nations Industries did not contain a broad "sue and be sued clause").

27. *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assoc. Inc.*, 86 F.3d 656, 660 (7th Cir. 1996).

28. See *Memphis Biofuels*, 585 F.3d at 922 (noting that tribes have the ability to waive immunity for the purposes of a single transaction).

29. *Id.* (citing all the following authorities in support of their ruling); *World Touch Gaming, Inc. v. Massena Mgmt.*, 117 F. Supp. 2d. 271, 275–76, (N.D.N.Y. 2000). Cf. *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1295 (10th Cir. 2008) (ruling that the false statement by a tribal official that the tribe itself waived immunity through a "a sue or be sued" clause in the charter of its corporation entity did not equitably estop the tribe from claiming tribal immunity); *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1288 (11th Cir. 2001) (ruling that the Chief of the Seminole tribe did not affect automatic waiver of the Seminole tribe's immunity by accepting federal funding since he did not have the authority to waive immunity under the tribal constitution). See also *Stillaguamish Tribe of Indians v. Pilchuck Group II*, No. C10-995RAJ, 2011 WL 4001088 at *6 (W.D. Wash. Sept. 7, 2011) (citing *Memphis Biofuels* in support of its ruling that authority to waive tribal immunity is defined by tribal law or, when tribal law is silent, federal common law, not state common law principles of agency); *Colombe v. Rosebud Sioux Tribe*, No. CIV 11-3002-RAL, 2011 WL 3654412 at *8 (D. S.D. Aug. 17, 2011) (citing *Memphis Biofuels* in support of its rulings that tribal immunity waivers are not effective if they do not comply with tribal law); *Dilliner v. Seneca-Cayuga Tribe*, 2011 OK 61, 258 P.3d 516, 519–20, ¶¶ 15–16 (citing *Memphis Biofuels* to support its ruling that tribal immunity cannot be waived if the circumstances of the supposed waiver violate tribal law).

30. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

the existence of a minority approach whereby an erroneous waiver of immunity would be enforced when the tribal agent possessed apparent authority in the view of the non-tribal counterparty.³¹

The crux of the disagreement between the minority and majority courts with respect to the enforceability of an erroneous waiver of tribal immunity is whether courts should give effect to a waiver when a claimant can prove that the tribe's agent had apparent authority to waive immunity but did not possess actual authority to do so under tribal law.³² Under the Restatement (Third) of Agency, apparent authority is defined as, "the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations."³³ While courts following the majority view have held that such apparent authority is not sufficient to bind the tribe to a waiver of tribal immunity, courts following the minority view have held the opposite.³⁴

The Colorado Court of Appeals provided a framework for applying the theory of apparent authority to the question of when to enforce erroneous waivers of tribal authority in *Rush Creek Solutions Inc. v. Ute Mountain Ute Tribe*.³⁵ In that case, the Colorado Court of Appeals ruled that the determination of whether to enforce an erroneous waiver should be focused around the fact-intensive question of whether the principal created apparent authority through "written or spoken words or other conduct of the principal which, reasonably interpreted, causes a person to believe that the principal consents to have the act done on his behalf by a person

31. *Memphis Biofuels*, 585 F.3d at 922 (citing *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 407–08 (Colo. App. 2004)).

32. The Restatement (Third) of Agency defines actual authority, "[a]n agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." RESTATEMENT (THIRD) OF AGENCY § 2.01 (2006).

33. *Id.* § 2.03.

34. Compare *Memphis Biofuels*, 585 F.3d at 922 (holding that a contract between Chickasaw Nation Industries and a non-tribal counterparty did not waive tribal immunity because only a waiver that complied with the requirement for board approval under tribal law could be effective) and *World Touch Gaming, Inc. v. Massena Mgmt.*, 117 F. Supp. 2d 271, 275–76, (N.D.N.Y. 2000) (holding that a management company acting as an agent of the St. Regis Mohawk Tribe could not bind the tribe to an agreement with a contractor waiving tribal immunity where tribal law held that only the Tribal Council had the authority to grant an immunity waiver) with *Rush Creek Solutions v. Ute Mountain Ute Tribe*, 107 P.3d 402, 407–08 (Colo. App. 2004) (holding that an immunity waiver signed by the tribal CFO would be enforced by the court even though it potentially did not comply with the tribal constitution).

35. *Rush Creek Solutions*, 107 P.3d at 407–08.

purporting to act for him.”³⁶ Federal courts and other state courts could easily use this standard of apparent authority when determining whether to give effect to an erroneous waiver.

This comment will argue that courts should adopt the minority viewpoint that tribes should be bound by agents who agree to waivers of tribal immunity while possessing apparent but not actual authority. This comment will argue that doing so would promote economic efficiency in tribal commercial ventures and would be consistent with the principals of tribal sovereignty, as well as with previous Supreme Court rulings dealing with waivers of tribal immunity.

III. LEGAL BASIS FOR ENFORCING ERRONEOUS WAIVERS

Although the status of the enforceability of erroneous waivers remains a contentious and unsettled issue, substantial authority exists to support the proposition that courts should give effect to such waivers. This authority stems from Supreme Court and Circuit Court rulings which have adopted a narrow formulation of the unambiguous statement requirement from *Santa Clara Pueblo v. Martinez*, the Supreme Court’s ruling in *C&L Enters. v. Citizen Band Potawatomi* clarifying the limited applications of the Court’s deference to Congress with respect to tribal immunity matters noted in *Kiowa*, and the example provided by waivers of sovereign immunity in the context of foreign sovereign immunity.

A. *Reconciling the enforcement of specific erroneous waivers with the unambiguous statement requirement*

While the Sixth Circuit ruling in *Memphis Biofuels v. Chickasaw Nation Industries* was the highest court to rule directly on the issue of enforceability of specific erroneous waivers, it did not make any new arguments in support of this opinion, but rather relied on direct citation to earlier rulings that had come to similar conclusions.³⁷ Although the Court did not specifically articulate the basis for its ruling on this point, all the cited cases invalidated erroneous waivers on the basis of the unambiguous statement requirement.³⁸ Moreover, the petitioner’s brief, which supported the position ultimately adopted by the court that erroneous waivers are not sufficient to abrogate tribal immunity, cited the preceding cases to prove

36. *Id.* at 407 (quoting *Lucero v. Goldberger*, 84 P.2d. 206, 209 (Colo. App. 1990)).

37. *See Memphis Biofuels*, 585 F.3d at 921–22 (relying primarily on a string cite of supporting cases to support its holding that an unauthorized agent of Chickasaw Nations Industries could not waive immunity through apparent authority).

38. *See infra* notes 40 and 41.

the proposition that waivers were invalid under the unambiguous statement requirement.³⁹

Some of the opinions cited by the court in *Memphis Biofuels*, such as *Sanderlin v. Seminole Tribe of Florida* and *Native American Distributing v. Seneca-Cayuga Tobacco Company*, dealt not with specific erroneous waivers but with general or automatic erroneous waivers.⁴⁰ Reviewing courts should note the significant differences between specific, general, and automatic erroneous waivers and decline to hold such cases to be pertinent to the context of specific erroneous waivers. Other cases cited by *Memphis Biofuels* rely on the broad reading of the *Martinez v. Santa Clara Pueblo* requirement enunciated in *World Touch v. Massena* and *Danka v. Sky City* to rule that the unambiguous statement requirement forbids the enforcement of immunity waivers when the tribal agent possessed apparent but not actual authority to assent to the waiver.⁴¹ Reviewing courts could enforce specific erroneous waivers despite the standard enunciated in *World Touch* and *Danka* by noting the trend towards the narrower readings of the unambiguous statement requirement, and by citing the example of the Colorado Court of Appeals ruling in *Rush Creek Solutions* stating that enforcement of specific erroneous waivers is not barred by the unambiguous statement requirement.⁴²

Unlike general or automatic waiver, specific waiver carries a smaller risk of unintentional waiver by a tribal representative. A tribal official could easily initiate an unintentional general or automatic waiver by accepting federal funding or including a “sue or be sued” clause without anticipating potential consequences of these actions in federal courts. In contrast, a specific waiver would come in the context of explicit contractual negotiations. Tribal officials would be more likely to anticipate the potential that contractual stipulations could waive tribal immunity than to anticipate the same with a federal grant application or a general provision within a tribal constitution, and would therefore be able take greater care in avoiding an accidental waiver of tribal immunity.⁴³

39. Brief of Appellee, *Memphis Biofuels v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917 (6th Cir. 2009) (No. 08-6145).

40. *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1288 (11th Cir. 2001) (ruling that accepting federal funds was not sufficiently unequivocal to constitute a valid waiver of tribal immunity); *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1295 (10th Cir. 2008) (ruling that the false statement by a tribal official that the tribe itself waived immunity through a “a sue or be sued” clause in the charter of its corporation entity did not equitably estop the tribe from claiming tribal immunity).

41. *World Touch Gaming, Inc. v. Massena Mgmt.*, 117 F. Supp. 2d 271, 275–76, (N.D.N.Y. 2000); *Danka Funding Co., LLC v. Sky City Casino*, 747 A. 2d 837, 841 (N.J. Super. Ct. Law Div. 1999).

42. *Rush Creek Solutions v. Ute Mountain Ute Tribe*, 107 P.3d 402, 408 (Colo. App. 2004).

43. Heidi M. Staudenmeier & Metchi Palaiappan, *Intersection of Corporate America*

Courts should also be more willing to enforce erroneous specific waivers because the negative effects on tribal sovereignty from specific erroneous waiver are much less severe than the effects of general or automatic waiver. While an effective specific waiver abrogates tribal immunity in the context of a single contractual relationship, a general or automatic waiver can entirely waive tribal immunity.⁴⁴ In practice, most specific waivers have a very limited scope, often waiving immunity in suits related to, and claiming damages from, the revenue stream associated with a specified commercial project.⁴⁵ Courts should thus be more willing to enforce an erroneous specific waiver because these arrangements carry much less severe consequences for a tribe than do other varieties of erroneous waiver.

B. Courts should reject the broad view of the unambiguous statement requirement and follow a more narrow reading

Courts also have ample basis for rejecting the broad view of the unambiguous statement requirement enunciated in *World Touch Gaming* and *Danka*. In reaching this alternate determination, courts could follow the narrow view of the unambiguous statement requirement that has become increasingly prevalent in federal court opinions.

Although numerous courts have held that both automatic and specific waivers are often not sufficiently explicit to meet the *Santa Clara Pueblo v. Martinez* standard, courts are split on the status of specific erroneous waivers.⁴⁶ Two notable district court opinions and an opinion coming from the New Jersey Superior Court have cited *Santa Clara Pueblo v. Martinez* in holding that an erroneous waiver was necessarily insufficiently unambiguous.⁴⁷ These cases relied on a broad view of the unambiguous statement requirement in that they expanded it to apply not only to the

and Indian Country: Negotiating Successful Business Alliances, 22 T.M. COOLEY L. REV. 569, 577 (2005) (arguing that tribes have become increasingly sophisticated in bargaining over contractual provisions in commercial arrangements with non-tribal entities).

44. See *Memphis Biofuels v. Chickasaw Nation Industries Inc.*, 585 F.3d 917, 920–22 (6th Cir. 2009).

45. Staudenmeier & Palaiappan, *supra* note 43, at 578 (discussing the proliferation of business transaction between American businesses and Indian Tribes and the intricacies and legal principles involved in doing business with tribes and tribal entities).

46. See *supra* notes 40 and 41; CANBY JR., *supra* note 26 (showing the circuit split on the issue of whether “sue or be sued” clauses were sufficiently unequivocal to effectively waive tribal immunity).

47. *Winnebago Tribe v. Kline*, 297 F. Supp. 2d 1291, 1303 (D. Kan. 2004); *World Touch Gaming, Inc. v. Massena Mgmt.*, 117 F. Supp. 2d 271, 275–77, (N.D.N.Y. 2000); *Danka Funding Co., LLC v. Sky City Casino*, 747 A. 2d 837, 841 (N.J. Super. Ct. Law Div. 1999).

language of the waiver itself, as was the case in *Martinez*,⁴⁸ but also to the circumstances surrounding the agreement to the waiver.⁴⁹ However, these rulings are at odds with the narrow view of the unambiguous waiver requirement adopted by the Supreme Court opinions in *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma* and by jurists such as Judge Posner on the Seventh Circuit in *Sokaogon Gaming v. Tushie-Montgomery*.⁵⁰ In both *C&L* and *Sokaogon*, the reviewing court ruled that a standard arbitration clause, which made no explicit mention of tribal immunity, was sufficiently clear to meet the unambiguous statement requirement.⁵¹ Judge Posner expressed the court's policy behind this narrow reading of the unambiguous statement requirement in *Sokaogon* when he wrote that federal courts should reject standards that have the "paternalistic purpose of protecting the tribe against being tricked by a contractor into surrendering a valuable right for insufficient consideration."⁵² The Colorado Court of Appeals ruling in *Rush Creek Solutions v. Ute Mountain Ute Tribe* similarly followed a narrow ruling of the unambiguous statement requirement and held that it did not bar the court from enforcing erroneous specific waivers of tribal immunity.⁵³ Future reviewing courts thus have ample support for following this more limited reading of the unambiguous statement requirement and should feel comfortable reading *Martinez* as not rejecting enforcement of erroneous waiver.

C. *Kiowa deference is not an obstacle to enforcing erroneous waivers*

Critics could also argue that the Supreme Court's ruling in *Kiowa Tribe v. Manufacturing Technologies* that it would not unilaterally abrogate tribal immunity and would instead defer to Congress on the issue⁵⁴ should

48. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58–59 (1978).

49. *See supra* note 47.

50. *See C&L Enters., Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 420 (2001) (ruling that an arbitration clause was sufficiently unambiguous to waive tribal immunity); *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assoc. Inc.*, 86 F.3d 656, 660–64 (7th Cir. 1996) (ruling that an arbitration clause was sufficiently unambiguous to waive tribal immunity).

51. *Sokaogon Gaming Enter. Corp.*, 86 F.3d at 660–61.

52. *Id.* at 660. *See also* Staudenmeier & Palaiappan, *supra* note 43, at 577 (arguing that increasing tribal commercial sophistication has caused courts to relax the unambiguous statement requirement).

53. *Rush Creek Solutions v. Ute Mountain Ute Tribe*, 107 P.3d 402, 408 (Colo. App. 2004). *See also* *Bates Assoc. v. 132 Assocs., LLC*, 799 N.W.2d 177, 182–84 (Mich. Ct. App. 2010) (explicitly refusing to follow *Memphis Biofuels* and deciding to enforce a tribal immunity waiver despite its contravention for the procedures for immunity waivers under tribal law).

54. *Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, 523 U.S. 751, 759 (1998).

lead future courts to refrain from issuing rulings which affect the doctrine of tribal immunity. However, the *Kiowa* ruling is not applicable to a clarification of a relatively minor point concerning the circumstances of immunity waivers because the *Kiowa* ruling was addressed only to the question of whether the court should take the radical step of completely abrogating tribal immunity.⁵⁵ Moreover, the Court did not ultimately interpret *Kiowa* as limiting the Court's ability to issue rulings interpreting matters concerning the contours of tribal immunity waivers when it issued an opinion in *C&L Enterprises, Inc. v. Citizens Band Potawatomi*.⁵⁶ In that case, which modified the law of tribal immunity waivers by ruling that arbitration agreements could constitute immunity waivers, the court took a very similar action as to the one it would need to take to recognize erroneous waivers in that it issued a ruling which did not fundamentally alter the nature of tribal immunity but rather created new standards for interpreting immunity waivers in specific factual circumstances.⁵⁷ In this way, issuing a ruling which affects courts' propensity to enforce a waiver within the specific context of a contract is consistent with the *Kiowa* standard as modified by *C&L*, whereby the Court will not issue rulings which fundamentally alter the nature of tribal immunity but will issue rulings which affect the standards courts use in determining when such a waiver exists.⁵⁸

D. Effect of choice of law provisions on erroneous waivers

Certain courts have also relied on choice of law provisions within contracts between tribal organization and non-tribal entities in enforcing erroneous waivers. In *Bates Associates v. 132 Associates* the Michigan Court of Appeals refused to follow *Memphis Biofuels*, ruling that a choice of law provision specifying that a contract between the tribe and a non-tribal organization be interpreted under Michigan law, meaning that the court should apply Michigan doctrines of agency and reject the contention that a tribal agent should have to comply with tribal law to effectively waive immunity.⁵⁹ In making this ruling, the court cited an earlier opinion

55. *Id.*

56. *C&L Enters., Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 422 (2001) (citing *Kiowa Tribe* even while ultimately ruling that arbitration agreements waive tribal immunity).

57. *Id.*

58. *Cf. Seielstad, supra* note 10, at 664–66 (arguing that *C&L* did not overturn *Kiowa Tribe* deference but was rather “an interpretation of a specific contractual arrangement” that “did not alter the Court’s fundamental position with respect to tribal immunity.”).

59. *Bates Assoc. v. 132 Assocs., LLC*, 799 N.W.2d 177, 182–84 (Mich. Ct. App. 2010) (ruling that a waiver of tribal immunity need not comply with tribal law because the contract had a choice of law provision, leading the court to conclude that Michigan agency principles

issued by the California Court of Appeals in *Smith v. Hopland Band of Pomo Indians*, which endorsed a similar proposition.⁶⁰

Although choice of law provisions could conceivably be used as a basis for applying state agency doctrines, rather than requiring that an agent has actual authority under tribal law, this approach seems to beg the question of whether such doctrines can be used to find an immunity waiver under the unambiguous statement requirement. Under a more limited reading of what constitutes an unambiguous statement, a court could conceivably rule that a contractual provision that does not deal with tribal immunity cannot alter the terms under which it would otherwise be waived.⁶¹ On the other hand, a more expansive reading of what constitutes an unambiguous statement would likely be willing to hold that a provision that does not specifically address tribal immunity can alter the conditions under which it is waived.⁶² As such, while choice of law provisions can be a basis on which courts can enforce erroneous waivers under common law standards of apparent authority, courts will likely only choose to do so in the future to the extent to which they do not adopt a narrow interpretation of the unambiguous statement requirement.

E. Erroneous waiver in the context of waivers of foreign sovereign immunity

Courts continue to recognize that tribal sovereignty is different in character than all other forms of sovereignty acknowledged by American courts.⁶³ Although courts have long considered tribes to be “domestic dependent nations,”⁶⁴ they have relied on the treatment of other types of sovereigns in similar contexts to provide a model for delineating the extent and nature of tribal sovereignty.⁶⁵ Supreme Court rulings have indicated

should apply to determine the authority of an agent to waive tribal immunity).

60. *Smith v. Hopland Band of Pomo Indians*, 115 Cal.Rptr.2d 455, 462 (Cal. Ct. App. 2002) (ruling that a choice of law designating that California law would be applied to interpreting the contract meant that California law, not tribal law would apply to consider the question of whether a Tribal Council resolution was needed to waive tribal immunity).

61. *Cf. World Touch Gaming, Inc. v. Massena Mgmt.*, 117 F. Supp. 2d 271, 275–76, (N.D.N.Y. 2000) (holding that a management company acting as an agent of the St. Regis Mohawk Tribe could not bind the tribe to an agreement with a contractor waiving tribal immunity where tribal law held that only the Tribal Council had the authority to grant an immunity waiver, applying a broad reading of the unambiguous statement requirement).

62. *See Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assoc. Inc.*, 86 F.3d 656, 660–61 (7th Cir. 1996) (ruling that an arbitration clause was sufficiently unambiguous to waive tribal immunity, applying a broad view of the unambiguous statement requirement).

63. 41 AM. JUR. 2D *Indians; Native Americans* § 8 (2010).

64. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

65. *See Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, 523 U.S. 751, 759 (1998).

that foreign sovereign immunity is the most instructive model for considerations relating to the extent and nature of tribal immunity.⁶⁶ This model provides further support for enforcing waivers of tribal immunity in cases in which the tribal agent waives immunity while possessing apparent but not actual authority.

Although the issue may seem to be somewhat academic on its face, courts could come to strikingly different conclusions as to the proper nature and extent of tribal immunity depending on which model of tribal sovereignty they find most instructive. In other contexts, courts have ruled that tribal sovereignty most closely matches the contours of state and federal sovereignty.⁶⁷ Were courts to rely on the principles of federal and state sovereign immunity when delineating the extent of tribal immunity, they would likely come to the conclusion that tribal immunity could not be waived by a tribal agent who lacked actual authority to consent to a waiver. State sovereign immunity can, generally, only be waived by specific statutory or constitutional provisions.⁶⁸ Similarly, federal sovereign immunity can generally only be waived by an act of Congress, and “must be unequivocally expressed in the statutory text.”⁶⁹ Were courts to follow the model used in the cases of state and federal sovereign immunity they would likely hold that tribal waivers of sovereign immunity could only be enforced if directly authorized by a tribal governing body.

The Supreme Court has issued rulings indicating that the law of sovereign immunity of foreign nations offers an appropriate framework for evaluating many of the contours of waiver of tribal immunity most relevant to the issues addressed in this comment.⁷⁰ The Supreme Court first noted that the law of foreign sovereign immunity offers an appropriate model for

(explaining that “we find instructive the problems of sovereign immunity for foreign countries” when considering tribal immunity).

66. See *C&L Enters., Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 421 n.3 (2001) (noting that “[i]nstructive here [in the discussion of tribal immunity] is the law governing waivers of immunity by foreign sovereigns.”).

67. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982) (ruling that the same standards apply to tribal governments as apply to federal, state, and local governments with respect to abrogating the power of taxation); *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1295 (10th Cir. 2008) (applying principles of federal sovereign immunity to determine that the false statement by a tribal official that the tribe itself waived immunity through a “sue or be sued” clause in the charter of its corporation entity did not equitably estop the tribe from claiming tribal immunity).

68. 72 AM. JUR. 2D *States, Etc.* § 115 (2010). *But cf.* 72 AM. JUR. 2D *States, Etc.* § 121 (2010) (stating that, “in some states, a state implicitly waives its sovereign immunity by expressly entering into a valid contract.”).

69. 32A AM. JUR. 2D *Federal Courts* § 943 (2011).

70. See *C&L Enters., Inc.*, 532 U.S. at 421 n.3 (discussing whether the tribe waived sovereign immunity for purposes of enforcing a construction contract’s arbitration clause); *Kiowa Tribe*, 523 U.S. at 759 (establishing that Indian tribes enjoy sovereign immunity absent waiver or congressional abrogation). *But cf.* cases discussed *supra* note 67.

considering the proper authority of Congress over reformation of tribal immunity in *Kiowa Tribe v. Manufacturing Technologies*,⁷¹ and later extended this rule to state that the principles associated with waivers of foreign sovereign immunity are specifically applicable to issues associated with waivers of tribal immunity in a footnote in its decision in *C&L Enterprises v. Citizen Band Potawatomi*.⁷²

Although courts have supported the application of the principles of state of federal sovereign immunity to certain issues relating to tribal immunity,⁷³ the Court's application of the principles of foreign sovereign immunity is consistent with long-established precedent of treating tribes as separate sovereigns with powers deriving from sources wholly independent of the constitutional framework that underpins the authority of state and federal governments. As stated in *Cohen's Handbook of Federal Indian Law*, the framers of the Constitution treated tribal governments as separate sovereign bodies through the Constitution's recognition of tribes as separate sovereigns along with state and foreign governments in the Indian Commerce Clause,⁷⁴ and through the exclusion of "Indians not taxed" from categorization as "free persons" for the purposes of Congressional apportionment.⁷⁵ As *Cohen's Handbook* notes, this formulation which recognizes tribes as possessing sovereignty independent of the constitutional framework of the state and federal government has been recognized and relied upon in Supreme Court decisions such as *Talton v. Mayes* in 1896, and *United States v. Wheeler* in 1978.⁷⁶

Although the nature of tribal immunity is clearly not identical to that of foreign sovereign immunity,⁷⁷ the Court's decision to treat waivers of tribal and foreign sovereign immunity similarly in *C&L Enterprises* is supported by important similarities between the nature of tribal and foreign sovereigns. Both tribal and foreign sovereignty derive authority from outside the constitutional frameworks that are a vital underpinning for state and federal authority,⁷⁸ and recognition of both tribal and foreign sovereign immunity is subject to unilateral modification by federal statute.⁷⁹ Because

71. *Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, 523 U.S. 751, 759 (1998).

72. *C&L Enters., Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 421 n.3 (2001).

73. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982).

74. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01, at 207 (Neil Jessup Newton ed., 2009).

75. *Id.*

76. *Id.* at 208–09.

77. *Cf. id.* (noting that the framers of the Constitution drew a distinction between foreign and tribal sovereigns in the Indian Commerce Clause).

78. Seielstad, *supra* note 10, at 675.

79. Christopher D. Totten, *Head-of-State and Foreign Official Immunity in the United States after Samantar: A Suggested Approach*, 34 FORDHAM INT'L L.J., 332, 336–39 (2011).

of these similarities, the Court in *C&L Enterprises* could have rightly supported its favorable comparison between the law of tribal immunity and foreign sovereign immunity.

The Court could have noted that their shared extra-constitutionality is an important similarity with respect to waivers of immunity and that both tribal and foreign sovereign immunity can be limited by a power other than the sovereign itself—namely, by the federal government through statute or common law.⁸⁰ By comparison, neither state nor federal sovereign immunity is subject to unilateral and unequivocal statutory or common law abrogation by a power other than the sovereign itself.

State sovereign immunity is, in many instances, protected from diminishment by federal courts through the Eleventh Amendment.⁸¹ Federal sovereign immunity is a power that federal courts recognize to be retained by the federal government itself and which only Congress can waive.⁸² Thus, unlike with state and federal sovereign immunity, both foreign and tribal authority come from an extra-constitutional source and can be unilaterally modified or abridged by federal law.

As such, the Court could justify its conflation of foreign and tribal waivers of sovereign immunity by noting that congressional and judicial acknowledgment of tribal and foreign immunity are less absolute and sacrosanct than that of state or federal sovereign immunity in that both are extra-constitutional⁸³ and subject to unilateral modification by Congress. Courts should therefore be less exacting in their requirements concerning the circumstances of assent to an immunity waiver by the sovereign's governing body than they would be for a state or federal sovereign.⁸⁴ These shared qualities between foreign and tribal sovereign immunity relating to the foreign and tribal sovereignty's shared extra-constitutional source⁸⁵ and

80. *See id.* (showing the various ways in which foreign sovereign immunity has historically been modified by statute and common law); *Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, 523 U.S. 751, 756 (1998) (noting congressional power to abrogate or modify tribal immunity and implicitly acknowledging judicial power to do so though deciding not to exercise its power to abrogate tribal immunity).

81. 72 AM. JUR. 2D *States, Territories & Dependencies* § 101 (2010).

82. 32A AM. JUR. 2D *Federal Courts* § 943 (2011).

83. *But cf.* Seielstad, *supra* note 10, at 772 (arguing that the extra-constitutional source of tribal sovereignty strengthens the case for treating tribal sovereign immunity with greater deference than state sovereign immunity because tribal sovereignty predates the constitutional order and because tribes did not consent to be a part of the constitutional order).

84. *But cf.* *C&L Enters., Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001) (noting that immunity waivers must be clear in order to be effective and showing that tribes' more limited sovereignty does not stop the court from requiring waivers to tribal immunity to be clear).

85. *Cf.* Julie Clement, Comment, *Strengthening Autonomy by Waiving Sovereign Immunity: Why Indian Tribes Should be "Foreign" Under the Foreign Sovereign Immunities Act*, 14 T.M. COOLEY L. REV. 653, 675–76 (1997) (arguing that tribes' extra-

shared subjection to unilateral modification by federal authorities provide sufficient basis to support the Supreme Court's usage of foreign sovereignty as a mode for issues relating to tribal sovereignty in *Kiowa* and *C&L Enterprises*.

Although the Court in *C&L Enterprises* did not long expound on its justification for applying the law concerning waivers of foreign sovereign immunity to circumstances surrounding tribal immunity,⁸⁶ the preceding reasoning was echoed in the brief from the petitioner supporting the position ultimately adopted by the Court. In its brief, the petitioner argued that "the Court has recognized that Indian tribes enjoy less than the full attributes of sovereignty," because prior court decisions had limited tribal sovereignty by declaring tribes to be subject to federal and state authority in many circumstances.⁸⁷ While previously noting that tribal sovereignty is, in some ways, more limited than that of foreign sovereigns, the brief concluded by stating that the limited nature of tribal sovereignty supported the proposition that "the Seventh Circuit Court of Appeals and the Alaska Supreme Court were correct in looking to foreign relations law for the standard to apply to waivers of tribal sovereign immunity from suit."⁸⁸

Critics of this approach could potentially counter the judicial application of the principles of waivers of foreign sovereign immunity to that of waivers of tribal immunity by pointing to other instances in which the courts have analogized tribal sovereign powers to those of the state or federal governments. While the Supreme Court has analogized tribal sovereign taxing authority to the taxing authority of state and federal governments,⁸⁹ and other courts have argued that courts should not treat tribal sovereigns in a similar manner to foreign sovereigns in certain contexts,⁹⁰ the Court's direct statement as to the applicability of the law of foreign sovereign immunity to waivers of tribal immunity in *C&L Enterprises*⁹¹ is a much more authoritative position on the issue than are opinions with deal with tribal sovereignty in contexts unrelated to waivers of tribal immunity.

constitutionality from state constitutions and the federal Constitution, makes the nature of its sovereignty similar to that of a foreign sovereign in some ways).

86. *C&L Enters., Inc.*, 532 U.S. at 420–22.

87. Brief for Petitioner, at 27, *C&L Enters., Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411 (2001) (No. 00-292), 2000 WL 1868097, at *27.

88. *Id.*

89. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982).

90. *Cf. Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 900 (2nd Cir. 1996) (noting that, unlike with foreign sovereigns, tribal authority is intertwined with federal authority and that courts should give tribes less deference in applying local standards than they might a foreign sovereign to the question of determining what constitutes a significant constraint on liberty for the purposes of habeas review).

91. *C&L Enters., Inc.*, 532 U.S. at 421 n.3.

Although courts have ample authority for determining that the law of foreign sovereign immunity offers an effective model for dealing with issues relating to waivers of tribal immunity, they must also determine how to best apply this body of law. Fortunately, a Supreme Court ruling and rulings in Colorado and California appellate courts offer significant guidance on this matter.

Specifically applying the law of foreign sovereign immunity to issues associated with waivers of tribal immunity, both the Supreme Court in a footnote in its opinion in *C&L Enterprises* as well as state appellate courts in Colorado and California cited Section 456 of the Restatement (Third) of the Foreign Relations Law of the United States as being a particularly relevant source of authority for considering standards to apply to waivers of tribal immunity.⁹² The California and Colorado appellate courts drew particular attention to comment (b) of Section 456, which states in part that:

The party relying on the waiver has the burden of establishing that the person giving the waiver had authority to bind the state. When a person has authority to sign an agreement on behalf of a state, it is assumed that the authority extends to a waiver of immunity contained in the agreement.⁹³

The last sentence of comment (b) is a clear indication that tribes can be bound to immunity waivers through apparent authority in that agents do not need actual authority to bind the tribe and in that principals are only bound by the agreement to the extent to which they manifest an intent to delegate authority to the agent and give them the power to sign an agreement on behalf of the tribe.⁹⁴ Appellate courts in California and Colorado affirmed this reading of comment (b) by citing the provision to support opinions holding that a tribe could be bound by immunity waivers agreed to by tribal agents who possessed apparent but not actual authority to bind the tribe to such an agreement.⁹⁵ Rulings by the Supreme Court and by state appellate courts thus offer additional support for the proposition that the law of foreign sovereign immunity provides a model for enforcing waivers of tribal immunity in cases where the tribal agent has apparent authority but does not have actual authority.

92. *Id.*; *Smith v. Hopland Band of Pomo Indians*, 115 Cal.Rptr.2d 455, 462 (Cal. Ct. App. 2002); *Rush Creek Solutions v. Ute Mountain Ute Tribe*, 107 P.3d 402, 408 (Colo. App. 2004).

93. *Smith*, 115 Cal. Rptr. 2d at 462; *Rush Creek Solutions*, 107 P.3d at 408; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 456 cmt. b (2010).

94. *See supra* note 33 (showing standard for delineating apparent authority).

95. *Smith*, 115 Cal. Rptr. 2d at 462; *Rush Creek Solutions*, 107 P.3d at 408.

III. POLICY CONSIDERATIONS

A. *Economic efficiency of recognizing apparent authority*

Refusing to recognize apparent authority with respect to waivers of tribal immunity creates significant inefficiencies for tribal commercial relationships. Failure to recognize apparent authority both creates additional costs for tribal commercial relationships that make such relationships less profitable for all involved parties and increases the likelihood that such waivers occur by inefficiently allocating the responsibility for monitoring tribal agents to prevent them from exceeding their authority in agreeing to waivers of tribal immunity.

Confronting the inefficiencies created by the refusal to acknowledge the apparent authority of agents to waive immunity is an even more important priority in the context of tribal immunity than it is in the context of foreign or state sovereign immunity. Waiving tribal immunity is often a condition of engaging in commercial transactions with non-tribal entities and doubts about the efficacy of immunity waivers could cause such entities to refrain from doing business with tribal commercial organizations.⁹⁶ Moreover, tribal commercial organizations play a unique and vital role in raising funds to support the wellbeing of the tribe. Since most tribes do not have the ability to raise significant funds through taxation, tribal commercial organizations offer one of the only means through which most tribes can raise money to pay for governmental functions and tribal social programs.⁹⁷

When confronting the economic ramifications of courts' refusal to enforce erroneous waivers of tribal immunity, commentators are faced with a dearth of relevant data from which to draw conclusions about the extent of these effects. This lack of empirical evidence should give courts, litigators, and commentators, cause for pause in making claims about the extent of the inefficiencies created by courts' refusal to enforce erroneous waivers.

While courts and policymakers cannot look to authoritative empirical data concerning the economic impact of courts' refusal to enforce erroneous waivers, they may consider other relevant, if ultimately unconvincing, pieces of evidence. Proponents of enforcing erroneous waivers could note that some commentators⁹⁸ and government officials⁹⁹

96. Fogleman, *supra* note 3, at 1365.

97. Lorie Graham, *Securing Economic Sovereignty Through Agreement*, 37 NEW ENG. L. REV. 523, 533–34 (2003).

98. Fogleman, *supra* note 3, at 1347.

99. Sue Woodrow, *Tribal sovereign immunity: Obstacle for non-Indians doing business in Indian Country?*, COMMUNITY DIVIDEND ENCORE, Mar. 2001, at 7.

believe that the uncertainties surrounding tribal immunity are a major impediment to tribal commercial development. These proponents could argue that enforcing erroneous waivers would therefore lessen this uncertainty by allowing commercial counterparties to put greater reliance on the efficacy of tribal waivers. On the other hand, opponents of enforcing erroneous waivers could note that tribes themselves have not made a push for federal authorities to recognize erroneous waivers, and have in fact litigated against the enforcement of erroneous waivers in federal and state courts on a number of occasions.¹⁰⁰ Ultimately, courts and policymakers should consider neither of these considerations to be particularly compelling. The aforementioned commentators cannot be construed as completely authoritative because they fail to support their claims with data. Moreover, tribes' silence on the matter of erroneous waiver might simply reflect the fact that the issue is relatively obscure, especially since it is very common for tribes to grant immunity waivers in the course of commercial dealings with non-tribal entities.¹⁰¹ Finally, tribes' decision to contest erroneous waivers likely reflects *ex post* priorities of avoiding liability in ongoing litigation rather than more objective *ex ante* determinations as to whether the tribe would be made better off by a court's decision to enforce erroneous waivers.

Despite this lack of authoritative evidence, the theoretical support for the proposition that courts create such inefficiencies whenever they refuse to acknowledge apparent authority in the context of immunity waivers is sufficiently compelling for relevant parties to conclude that such inefficiencies likely exist and likely have non-trivial effects on tribal commerce.

Refusing to enforce immunity waivers agreed to by an agent possessing apparent but not actual authority creates a classic asymmetric information problem. When a buyer is aware that some members of a category of sellers have unseen undesirable characteristics, but the buyer does not have the ability to identify those members within the group, the market price for goods produced by the members of the group that do not possess the undesirable characteristic will decline compared to what it would be if the buyer could differentiate between producers.¹⁰² While

100. *Memphis Biofuels v. Chickasaw Nation Industries Inc.*, 585 F.3d 917, 918–19 (6th Cir. 2009); *Winnebago Tribe v. Kline*, 297 F. Supp. 2d 1291, 1303–04 (D. Kan. 2004); *World Touch Gaming, Inc. v. Massena Mgmt.*, 117 F. Supp. 2d 271, 275–77, (N.D.N.Y. 2000); *Rush Creek Solutions*, 107 P.3d at 406; *Danka Funding Co., LLC v. Sky City Casino*, 747 A. 2d 837, 841 (N.J. Super. Ct. Law Div. 1999).

101. *Cf. Crawford*, *supra* note 1, at 54 (noting that a Navajo bond offering was unique in insisting that any disputes be litigated in tribal court).

102. *See* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488, 490–93 (1970) (illustrating the "lemon" problem in the used car market whereby the market price declines and the market potentially collapses

sellers can take certain steps to mitigate the problems associated with asymmetric information, to the extent to which information asymmetry remains in place, the market will act inefficiently and sellers of non-standard goods and services will be worse off than they would be in a transparent market.¹⁰³

Information asymmetry problems associated with tribal immunity are exacerbated by courts' refusal to enforce erroneous waivers. Counterparties frequently have difficulty in understanding when tribal immunity will bar them from suing tribes in federal court because of the complex interplay between federal and tribal law that delineates the contours of tribal immunity.¹⁰⁴ When federal courts refuse to enforce erroneous waivers, they effectively require counterparties to interpret tribal law to determine whether the agent with whom they are negotiating possesses actual authority to consent to an immunity waiver. Because tribes understand their own law better than do outsiders, they will have a much greater understanding of the actual authority of agents to consent to waivers. This creates another information asymmetry problem whereby tribal counterparties know less about the enforceability of immunity waivers than do tribes. In addition, counterparties also understand that tribes, which have laws that heavily restrict the ability of agents to consent to immunity waivers, would have little incentive to inform counterparties of this fact. As such, in the same way that economists expect sellers of high-quality used cars to be disadvantaged by information asymmetry problems,¹⁰⁵ they should also expect tribes that try to honestly bargain for tribal immunity waivers to be disadvantaged by information asymmetry problems with respect to the actual authority of an agent to consent to an immunity waiver under tribal law.

Michael Walch offers a detailed model in his Stanford Law Review Note of how these inefficiencies could manifest themselves in the context of erroneous waivers of federal sovereign immunity that is equally applicable to the context of erroneous waivers of tribal immunity. Walch argues that the existence of sovereign immunity creates economic inefficiency to the extent that it leads courts to not recognize apparent authority.¹⁰⁶ The ultimate source of this inefficiency stems from the fact

when buyers cannot differentiate between sellers of good and bad used cars).

103. *Id.* at 499–500.

104. *See* Woodrow, *supra* note 99 (noting that the complexities and uncertainties of the doctrine of tribal immunity dis-incentivizes non-tribal entities from contracting with tribal entities).

105. Akerlof, *supra* note 102, at 489–93.

106. *See* Michael C. Walch, Note, *Dealing with a Not-So-Benevolent Uncle: Implied Contracts with Federal Government Agencies*, 37 STAN. L. REV. 1367, 1381–85 (1985) (showing that refusing to recognize apparent authority in the context of federal sovereign immunity creates several economic inefficiencies).

that the sovereign can more cheaply monitor and evaluate the actions of its own agent than can the sovereign's counterparty, and refusing to acknowledge apparent authority subverts the most efficient arrangement by placing the burden of monitoring and evaluating the actions of the agent on the counterparty.¹⁰⁷ A counterparty to a sovereign who seeks to mitigate the risk of losses from the sovereign's agent exceeding his or her actual authority must either commit substantial legal expenses to evaluating the actions of the agent as well as the terms of the commercial agreement with the sovereign, or must purchase some form of insurance to cover potential losses.¹⁰⁸ In contrast, the sovereign could more cheaply avoid these legal and insurance expenses since it would be in a better position to understand its own procedures and to monitor and direct its agent without having to pay for legal advice or pay for coverage against the risk of contingencies it cannot understand.¹⁰⁹ Thus, either form of mitigation entails substantial costs that will both deter counterparties from contracting with the sovereign and raise the cost business between the sovereign and non-sovereign entity.¹¹⁰

All of these negative effects associated with refusing to acknowledge apparent authority with respect to sovereign agreements would apply to an equal or greater extent in the context of tribal immunity. While the contours of federal sovereign immunity law can often be complicated and poorly understood by commercial counterparties,¹¹¹ non-tribal entities similarly, if not more so, lack confidence in their understanding of tribal law.¹¹² In order to insulate themselves from the risk of ineffective waivers of tribal immunity, non-tribal counterparties would likely find it necessary to hire legal counsel that understands the law of the contracting tribe with sufficient depth so as to ensure that the tribal agent possesses sufficient authority to assent to a waiver of tribal immunity.¹¹³ Refusing to acknowledge apparent authority with respect to tribal waivers thus decreases the profitability of tribal enterprises by discouraging non-tribal entities from contracting with tribal commercial organizations and by

107. *Id.* at 1383.

108. *Id.*

109. *Id.* at 1384–85.

110. *Id.*

111. *See id.* at 1383 (noting the need to hire legal counsel to understand the nature of the authority of a federal agent).

112. Fogleman, *supra* note 3, at 1347.

113. *See* R. Lance Boldrey & Jason Hanselman, *Proceed with Prudence: Advising Clients Doing Business in Indian Country*, MICH. B. J., Feb. 2010 at 34, 35. (advising that, in light of the *Memphis Biofuels* decision that waivers are not enforceable if they are not valid under tribal law, practitioners should “seek a legal opinion from a tribe’s counsel that a waiver was executed pursuant to tribal and other applicable laws” in order to determine whether an immunity waiver is valid under tribal law).

increasing the costs that non-tribal entities bear in doing business with tribal commercial organizations. Correcting this issue should be considered an especially pressing matter in light of the importance non-tribal entities place on securing reliable waivers of tribal immunity as a condition of doing business with tribal organizations,¹¹⁴ and the crucial role of profits from tribal enterprises in financing the initiatives of tribal governments.¹¹⁵

B. Implications for tribal sovereignty

Although enforcing immunity waivers when a tribal agent has apparent but not actual authority would force tribes to expend more effort in monitoring their representatives, it need not have any deleterious effects on tribal sovereignty. While these efforts would not be completely costless, they could be easily and cheaply adopted and would almost completely protect a tribe from the potential for erroneous waiver.

Tribal authorities could take several steps to avoid being bound by apparent authority to an agent's erroneous immunity waiver by minimizing the risk that a third party could reasonably believe the agent to have the authority to agree to immunity waivers.¹¹⁶ Tribes could substantially reduce this risk by providing written disclosures to counterparties outlining the authority of the tribe's agent and specifically disclaiming the agent's authority to waive tribal immunity. By requiring written disclosures of their agent's lack of authority to waive tribal immunity, tribes would create an airtight defense against any claims of apparent authority by providing counterparties with a clear and incontrovertible indication that they did not intend to be bound by an agents' waiver.¹¹⁷

Tribes could further reduce the potential for erroneous waiver by using the threat of civil liability against their agents to incentivize them to not exceed their authority. Agents acting on behalf of the tribe could be held civilly liable if their failure to adhere to the tribal procedures caused the tribe to be liable in federal or state court. Such an oversight on behalf of the tribal agent would constitute a failure to exercise ordinary care and could allow the tribe to hold the agent civilly liable for professional negligence in either tribal court,¹¹⁸ or depending on circumstances that

114. See Woodrow, *supra* note 99 (noting that the complexities and uncertainties of the doctrine of tribal immunity dis-incentivizes non-tribal entities from contracting with tribal entities).

115. See Fogleman, *supra* note 3, at 1347.

116. See *generally*, RESTATEMENT (THIRD) OF AGENCY § 201 (2006) (showing standard for delineating apparent authority).

117. *Id.*

118. See *Navajo Tribe of Indians v. Jones*, No. WR-CV-178-84 (Navajo D. Ct. Dec. 15, 1986), <http://www.tribal-institute.org/opinions/1986.NANN.0000014.htm> (showing an

determine whether a tribal court can exercise civil jurisdiction over a non-member,¹¹⁹ in state or federal court. Through these means, a tribe could both reduce the potential for a third party to have a strong claim of apparent authority and provide strong incentives for tribal agents to refrain from waiving tribal immunity in contravention of the wishes of the tribe. Although any such efforts would increase the economic costs of failing to recognize agents' apparent authority, these measures prove that a tribe can effectively absolve itself from liability for erroneous waivers if it so chooses. In this way, tribes are free to determine whether they want to adopt a policy of allowing courts to enforce erroneous waivers.

IV. CONCLUSION

Although the issue of the validity of erroneous waivers remains unsettled, reviewing courts should feel comfortable enforcing such waivers. Reviewing courts are justified in drawing a distinction between specific explicit waivers and general or automatic waivers and disregarding the sources of authority that only speak to the validity of erroneous waivers in the context of general or automatic waivers of tribal immunity. While the *World Touch Gaming* line of cases argues that the unambiguous statement requirement should be read to bar enforcement of specific erroneous waivers, reviewing courts can argue that the trend in Supreme Court opinions, such as *C&L Enterprises*, and Circuit Court opinions such as *Sokaogon Gaming Enterprise*, to narrowly interpret the unambiguous statement requirement belies this conclusion. Reviewing courts can look to the Colorado Court of Appeals ruling in *Rush Creek Solutions* for an example of a court opinion which enforced a specific erroneous waiver of tribal immunity by relying on a narrow reading of the unambiguous statement requirement. Reviewing courts need not be concerned that enforcing erroneous waivers will run afoul of the principles of *Kiowa* deference in light of the Supreme Court's ruling in *C&L Enterprises*, which reformed the standards associated with interpreting waivers of tribal immunity despite the Court's prior ruling in *Kiowa*. In addition, reviewing courts can rely on the model provided by Section 456 of the Restatement (Third) of the Foreign Relations Law of the United States in ruling that tribal agents acting with authority to sign a contract on behalf of the tribe should also be presumed to have the authority to waive tribal immunity.

Reviewing courts should also consider the positive policy implications of enforcing erroneous waivers of tribal immunity. While enforcing

example of civil liability in tribal court for negligent handling of tribal assets).

119. See generally, Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973, 988-94 (noting the complicated legal standards under which courts determine when tribal civil jurisdiction extends to non-members).

erroneous waivers will have minimal effects on tribal sovereignty, particularly because of the significant steps tribes could take to prevent such waivers, their enforcement could create significant positive economic effects for tribal commercial organizations. Reviewing courts should give particular weight to this consideration in light of the crucial role tribal commercial organizations play in financing tribal institutions.