

How They Won It: Akin Gump Lands High Court Win For Tribe

By **Andrew Westney**

Law360 (March 13, 2018, 10:24 PM EDT) -- Recognizing that the U.S. Supreme Court might be on the verge of overturning a D.C. Circuit ruling that Congress didn't violate the constitutional separation of powers with a law blocking a legal challenge to the Gun Lake Tribe's Michigan casino project, Akin Gump Strauss Hauer & Feld LLP stepped in and refocused the case on a new argument that tipped the scales decisively in the tribe's favor.

Akin Gump headed up the Gun Lake Tribe's bid to preserve a D.C. Circuit panel's July 2016 decision backing the federal government's move to set aside a parcel of tribal land for a casino, in which the lower court ruled that Congress didn't violate federal courts' powers by enacting the Gun Lake Act, a law that stymied legal challenges to the project.

The firm helped the tribe and the government cobble together six votes from the Supreme Court to affirm the circuit court's judgment, but only by pushing hard for its argument that the Gun Lake Act should be read as restoring the federal government's sovereign immunity to the suit — a strategy that offered those justices worried about the constitutional separation of powers issue raised by the circuit court's decision another way to rule for the tribe, according to Akin Gump partner Pratik A. Shah, who led the tribe's team at the high court.

Shah said the firm — which joined the case after the high court granted certiorari to Michigan resident David Patchak's petition in May — saw "three red flags" that meant "we probably needed to do more than just defend the D.C. Circuit's reasoning."

The high court agreed to hear the case "without a really meaningful circuit split, and when the court does that, it's sometimes a signal that the justices think the court of appeals got it wrong," Shah said.

In addition, tribes "haven't fared all that well at the Supreme Court in recent years," Shah said.

And then there were the concerns with the Gun Lake Act itself and its Section 2(b), which simply stripped federal courts of jurisdiction over any suits connected with the land parcel where the tribe's casino is located.

"At first blush, at least, it strikes most lawyers as potentially raising separation of powers concerns," Shah said. "I think most people's first instinct is, 'Can Congress really do that?'"

Akin Gump had originally been involved in the case the first time it reached the Supreme Court, when Patchak won a 2012 ruling that the federal government had waived its sovereign immunity to his suit in the Administrative Procedure Act, and that the suit could go forward.

Patchak, who lives near the casino, had brought his initial suit in 2008, alleging that because the Gun Lake Tribe, also known as the Match-E-Be-Nash-She-Wish Band, wasn't recognized by the federal government until after the Indian Reorganization Act was passed in 1934, the government's acquisition of almost 150 acres in western Michigan to be taken into trust for the tribe's casino project was illegal.

Following the Supreme Court's remand of the case to district court, Congress passed the Gun Lake Act, which was signed into law by President Barack Obama in 2014. The statute's Section 2(a) affirmed the U.S. Department of the Interior's decision to take the land belonging to the tribe into trust under the IRA, while Section 2(b) deprived Patchak and any other potential claimants of the ability to challenge that decision in federal court.

Patchak then challenged the constitutionality of the law, a bid that was ultimately rejected by the D.C. Circuit, which said that Supreme Court precedent backed Congress' authority to set a new standard to apply to pending litigation without directly amending the substantive laws on which the suit is based.

After Patchak's petition was granted certiorari in May, Akin Gump was hired by the tribe to handle the case at the high court, with Fredericks Peebles & Morgan LLP, which won the case for the Gun Lake Tribe at the D.C. Circuit, providing support.

With the justices likely to divide over the separation of powers question based on their prior opinions, Akin Gump calculated that the tribe would have to discover an alternative path to appeal to enough justices to affirm the judgment, according to Shah.

Akin Gump devised a strategy to "mount a forceful defense of the D.C. Circuit's reasoning why this doesn't violate the separation of powers, but we thought we also needed to look for a new and different theory to the extent that wasn't enough to get five votes in our client's favor," Shah said.

That theory, which became the lead argument in the tribe's brief to the high court, said that "really what Congress was doing [in Section 2(b) of the Gun Lake Act] was restoring the United States' sovereign immunity to suit that had been waived in the APA," Shah said.

While the federal government had suggested to the D.C. Circuit that the Gun Lake Act provided an exemption of the government's waiver of sovereign immunity, the circuit panel found that it didn't need to rule on that issue.

But Akin Gump recognized that the Supreme Court's ruling in 2012 initiated "a conversation between the Supreme Court and Congress," according to Shah, the co-head of Akin Gump's Supreme Court and appellate practice.

While the Supreme Court in the earlier Patchak ruling said the government wasn't immune to the suit, the court "essentially extended an invitation to Congress to come to a different conclusion," Shah said.

"And in the Gun Lake Act, we argued, that's exactly what Congress did," he said.

The firm's new strategic tack would be needed to tackle the anticipated split among the justices regarding

the D.C. Circuit's opinion. In particular, the firm thought that Justice Sonia Sotomayor — who had joined Chief Justice John Roberts' dissent to the high court's April 2016 ruling in *Bank Markazi v. Peterson*, which dealt with related issues — "would find a real separation of powers problem with the Gun Lake Act."

"We really thought the difference maker could be this sovereign immunity argument that had not been briefed at the cert stage. We wanted to bring that argument into prominence," Shah said.

Fredericks Peebles & Morgan partner Nicole E. Ducheneaux, whose firm has represented the Gun Lake Tribe since its federal recognition in 1998, said that the case brought together the firm's Indian law expertise with Akin Gump's Supreme Court savvy, and that Fredericks Peebles was "proud of the outcome" and Shah's work in the case.

Shah, who served for more than five years as an assistant to the U.S. solicitor general, coordinated with that office to share the firm's revised strategy, comfortable in the fact that the government would be strongly arguing for the separation of powers defense in the case.

"It gives you a little bit more freedom to be creative and present a different angle because you know the one angle will be covered so well," Shah said.

Akin Gump also took notice of an amicus brief filed by "a lot of heavyweight federal court scholars saying this was a separation of powers violation," he said.

"Because this is such an academic issue, we knew that we needed to push back on that amicus brief, and so we were able to get a great lineup of amici on our side to serve as a counterweight and really take it on," Shah said.

The plan seemed to gain traction with Justice Sotomayor during Nov. 7 oral arguments in the case, as she put the most focus on the sovereign immunity issue.

In the court's decision, the justices, as the firm expected, sharply split over the separation of powers question.

A plurality of four judges led by Justice Clarence Thomas said the law didn't unconstitutionally interfere with the federal courts' role by directing a particular result, while a dissent by Chief Justice John Roberts, joined by Justices Anthony Kennedy and Neil Gorsuch, said that Congress overstepped its bounds by effectively deciding the outcome of the case.

That meant the tribe's fate hinged on the concurrences by Justices Sotomayor and Ruth Bader Ginsburg. Justice Sotomayor's concurrence made clear just how close the tribe came to losing her vote, as she largely sided with the dissent on the separation of powers question, but ultimately agreed with Justice Ginsburg that the Gun Lake Act shouldn't be read as stripping federal court jurisdiction, but instead restoring the federal government's sovereign immunity to the suit.

Scott E. Gant of Boies Schiller Flexner LLP, who represented Patchak in the petition, noted that Justices Sotomayor and Ginsburg affirmed the D.C. Circuit's judgment but not its reasoning, "so the strategy of resuscitating the sovereign immunity argument paid off, in that without that, they wouldn't have won."

Gant also said the D.C. Circuit's opinion is "no longer good law," given the lack of decisive support from the justices regarding the circuit court's ruling on the separation of powers.

Shah acknowledged that a hypothetical suit dealing with similar separation of powers issues that involved private parties — meaning that the government's sovereign immunity would no longer be an issue — might have a different result, with Justice Ginsburg likely to be the swing vote in that situation.

But the most important result in the current case was notching a win for the Gun Lake Tribe, Shah said.

"Even if this doesn't create definitive separation of powers law going forward, in that there weren't five justices for any one proposition, the one clear proposition that comes out of the case, as the chief justice said in his dissent, is that Mr. Patchak's suit is dead, and that is really what ultimately the tribe was seeking here," Shah said.

--Editing by Katherine Rautenberg and Catherine Sum.