McKinsey & Co. v. Boyd, ___ F. Supp. 3d ___, 2022 WL 1978735 (W.D. Wis. June 6, 2022)

- **Holding:** Tribal officials were preliminarily enjoined from further tribal court proceedings in an opioid-related suit against a management consultant firm that provided marketing advice to pharmaceutical companies where the firm had no contact with the involved tribe's reservation.
- **Summary:** Plaintiff, a New York management consultant firm, provides marketing advice to pharmaceutical companies that produce and sell opioids. In 2022, the Red Cliff Band of Lake Superior Chippewa Indians sued Plaintiff in its tribal court for such consulting work "and the ensuing, devasting opioid epidemic on the Red Cliff Reservation." Plaintiff responded by suing the tribal council members and the tribal court's chief judge, alleging that the court lacked jurisdiction, and moved for a preliminary injunction.

  The district court granted the motion. As it explained early in the decision, "McKinsey has no offices on the Red Cliff Reservation nor anywhere else in Wisconsin; none of its opioid-related engagements originated within the Reservation or this state; and none of its consultants could have been based in an office there. ... McKinsey also does not have any commercial dealings with the Tribe." It rejected Defendants' argument against application of the principle that, under controlling United States Supreme Court and Seventh Circuit authority, "'[t]he actions of nonmembers outside of the reservation do not implicate the Tribe's sovereignty' at all." The court then expanded upon its earlier factual summary of Plaintiff's lack of any relationship to the Reservation:

  > Here, there is no suggestion that any activity took place on tribal land. While defendants broadly argue that McKinsey's aid to the opioid industry contributed to addiction on the reservation, threatening the health of the tribe, that is too attenuated to be considered "conduct of non-Indians on fee lands within its reservation." Opioid addiction certainly plagues tribal lands, along with the majority of the rest of the country, but McKinsey is being sued for advising pharmaceutical companies selling opioids, who in turn manufacture, distribute and prescribe the use of these drugs to physicians, dentists and patients throughout the country, arguably creating demand and addiction that would not be there otherwise. However, defendants do not point to any action by plaintiff taking place on tribal land, and the court is skeptical that any such evidence exists given McKinsey's lack of ties [to the] state of Wisconsin, much less the Red Cliff Tribe. Accordingly, the strong general rule against the exercise of tribal jurisdiction over non-tribe members plainly applies here.

  It also rejected Defendants' contention that tribal court exhaustion was required, citing *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), for the proposition that the Supreme Court has "narrowed the applicability of th[e] general exhaustion rule for non-members unwillingly dragged into tribal courts, and instead held '[w]hen, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct,' tribal exhaustion is unnecessary."

  The court, lastly, concluded that Defendants had not established irreparable harm, in part because of the adequacy of multi-district litigation "brought by tribes regarding McKinsey's consulting with pharmaceutical companies on the promotion of opioids already underway." Replying to Defendant's suggestion that "the MDL is not a substitute,

as its tribal action is bringing common law claims under its tribal sovereignty rather than federal or state law claims," it reasoned:

> [W]hen one factors in the obvious efficiency of trying all such tribal claims before one court, the MDL would certainly seem the preferable forum. ... This is especially true since: (1) any viable claims can be asserted by each of the Tribes in the MDL; and (2) any proceedings in tribal court will almost certainly be found to be a nullity in the end. Moreover, even if the MDL is not a perfect or even preferred substitute, the court finds, at least for purposes of deciding the motion for a preliminary injunction before it, that the existence of this parallel MDL case including similar claims by many, other tribes ameliorates defendants' claim that an injunction would cause them great injury.

- **Relevant (2022) Deskbook Sections:** 6:4 n.28; 6:9 n.7