Spivey v. Chitimacha Tribe of Louisiana, --- F.4th ---, 2023 WL 5274419 (5th Cir., August 16, 2023).

- **Holding**: Upon concluding that it lacks subject matter jurisdiction due to tribal sovereign immunity of defendants, a federal court cannot dismiss the claims with prejudice, and must grant any pending motion to remand the matter if removed from state court.
- **Summary**: Spivey, the former Chief Financial Officer of the Cypress Bayou Casino, brought an action in federal district against the Chitimacha Tribe of Louisiana, the Casino, and four tribal council members, alleging that they conspired to have his gaming license revoked. The federal magistrate concluded all claims were barred by tribal sovereign immunity, and recommended that the claims be dismissed with prejudice. Prior to the district court's adoption of the magistrate's recommendation, Spivey filed a materially identical claim in state court, which defendants then removed to federal court. Spivey moved to remand. The district court, over Spivey's objections, adopted the magistrate judge's recommendations, denied Spivey's remand motion, and dismissed all Spivey's claims with prejudice.

  On appeal, the defendants argued that denial of remand was proper, since any remand was futile given that all claims were barred by tribal sovereign immunity. The panel, while noting that some unreported Fifth Circuit decisions had invoked the futility exception to remand motions, held that under the plain language of 28 U.S.C.A. § 1447(c), "when a district court determines that it lacks subject matter jurisdiction over a removed case, it must remand." (§ 1447(c) provides: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction [over a case removed from state court], the case *shall* be remanded") (emphasis added).

  The panel also concluded that the district court, once determining that it lacked subject matter jurisdiction due to tribal sovereign immunity, was "emphatically powerless to reach the merits," and could not "render a judgment that carries res judicata effect—including, as relevant here, a dismissal with prejudice."
- **Relevant (2023) Deskbook Section**: 7:1 n.7
- **Comment**: As noted in Deskbook § 7:1, n.7, some courts treat tribal sovereign immunity as an affirmative defense—in such cases, the court retains subject matter jurisdiction and can dismiss claims against the tribe with prejudice. If a court treats sovereign immunity as an affirmative defense, it also raises the question of whether it could deny remand as futile, since it would likely conclude that § 1447 does not apply.