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02-6130(Con), 02-6140(Con), 02-6200(Con),
02-6211(Con), 02-6219(Con), 02-6301(Con),
02-6131(Xap), 02-6151(Xap), 02-6309(Xap)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CAYUGA INDIAN NATION OF NEW YORK,
Plaintiff-Appellee-Cross-Appellant,

SENECA-CAYUGA TRIBE OF OKLAHOMA, and
Plaintiff-Intervenor-Appellee-Cross-Appellant,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor-Appellee,

vs.

GEORGE PATAKI, as Governor of the State of New York, et al.
CAYUGA COUNTY and SENECA COUNTY,
MILLER BREWING COMPANY, et al.,
Defendants-Appellants-Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICUS* SIX NATIONS HAUDENOSAUNEE CONFEDERACY IN SUPPORT OF CAYUGA NATION'S PETITION FOR REHEARING AND REHEARING *EN BANC*

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ARGUMENT

The Haudenosaunee urges rehearing.[1] A divided panel of this Court has crafted a new rule of laches that gives district and circuit judges unprecedented discretion to extinguish valid legal claims filed within the applicable statute of limitations. This dramatic reformulation of the law of laches lacks support in law or policy and directly contradicts several decisions of this Court and the Supreme Court. The panel majority used this new discretion to overturn a substantial money damages judgment and to completely dismiss a valid legal claim brought within the statute of limitations by the Cayuga Indian Nation of New York.[2]

The panel majority held that since *one of the remedies* sought by the Cayuga Nation, a possessory remedy, is barred by laches, *all other remedies* and *the valid legal claim itself* are also entirely barred. Based on this novel analysis, the panel majority avoided the usual question in a laches case: whether the remedy actually granted below – here, money damages – should be barred. Nor did the panel majority explain how any delay could be attributable to the Cayuga Nation, since it was legally precluded from bringing suit for almost 200 years as there was no

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[1] The Haudenosaunee has authorized and approved the filing of this brief.

[2] The panel majority did not question the conclusion of the district court that the 1795 and 1807 "treaties" between the Cayugas and the State of New York violated the Trade and Intercourse Act, 25 U.S.C. § 177, and that, as a result, New York's title is void *ab initio*.

court with jurisdiction to hear such a claim, and the courts refused to recognize the capacity of Indian nations to bring any suit.

The panel majority also ruled that the claim is barred by laches as if it were simply a matter of law – scarcely mentioning the district court's contrary findings of fact on laches,[3] and not considering the Cayugas' particular circumstances or remanding for a further evidentiary hearing. The result is a grave injustice to the Cayuga Nation, and the panel majority's reformulation of the law of laches promises to do a similar injustice to countless future litigants.

Laches has always been limited to a plaintiff's unreasonable delay that has caused prejudice to the defendant, and it is disfavored where there is an applicable statute of limitations. The determination is fact-specific, and the burden is on the defendant asserting laches. *See generally* D. B. Dobbs, *The Law of Remedies* § 2.4(4) (2d ed. 1993) and cases discussed below. The basis and reasoning of the panel majority's decision, and its reformulation of the law of laches, are fundamentally unsound and in conflict with existing law.

1. Laches bars a specific, usually equitable remedy, not an entire legal claim. *Ivani Contracting Corp. v. City of New York*, 103 F.3d 257, 261-262

[3] For example, the district court found as a fact that the Cayugas' were not responsible for the delay in filing suit, 165 F. Supp.2d at 354, but the panel majority took as a "fact" that their "long delay in seeking equitable relief" doomed the claim. 2005 WL 1514245 *12.

(2nd Cir. 1997); *Ikelionwu v. United States*, 150 F.3d 233 (2nd Cir. 1998); *Oneida Indian Nation v. State of New York*, 691 F.2d 1070 (2nd Cir. 1982); *Felix v. Patrick*, 145 U.S. 317 (1892); Dobbs, § 2.4(4) (laches "does not ordinarily bar legal claims, only equitable remedies"); *City of Sherrill v. Oneida Indian Nation of New York,* 125 S.Ct. 1478, 1487-94 (2005)(laches might apply to equitable remedy, but not to legal remedy).

The panel majority concluded, like the district court, that the possessory remedy requested in the complaint was too disruptive and barred by laches. But the majority opinion went on to bar the damages remedy, one that is not disruptive and delay of which does not prejudice the defendant. The panel held that if *any* remedy requested in a complaint is barred by laches, *all* remedies and *the entire, otherwise valid legal claim* are also barred.

2. Laches is fact-specific and depends on a balancing of equities, and the defendant asserting laches has the burden of proof. Laches is not appropriately adjudicated by an appellate court as a matter of law unless based on a full evidentiary hearing and facts found by a trial court. *Tri-Star Pictures, Inc. v. Leisure Time Productions*, 17 F.3d 38, 44 (2nd Cir. 1994); *Stone v. Williams*, 873 F.2d 620, 625 (2nd Cir. 1989)*, cert. denied* 493 U.S. 959 (1989), *vacated on other grounds*, 891 F.2d 401 (2nd Cir. 1989); *Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187 (2nd Cir. 1996); Dobbs, § 2.4(4).

The panel majority relied on selective facts, completely ignored the lower court's findings, and did not remand the matter for further evidentiary hearings.

3. Under the longstanding Second Circuit standard of review, a district court's findings of fact on laches should be overturned on appeal only if they amount to an "abuse of discretion." *Stone v. Williams*, 873 F.2d at 625; *Perez v. Danbury Hosp*., 347 F.3d 419, 426 (2nd Cir. 2003).

The panel majority's version of the facts differs markedly from the facts found by the district court; yet the panel majority did not find an abuse of discretion by the district court.

4. Laches may not be invoked by a party with unclean hands. *Pennecom B.V. v. Merrill Lynch & Co., Inc.*, 372 F.3d 488, 493 (2nd Cir. 2004). The panel majority does not mention the finding of the district court that New York State was guilty of bad faith in its dealings with the Cayugas. 165 F. Supp.2d 266, 355-356 (N.D. N.Y. 2001).

5. Laches cannot be applied where legal or practical obstacles prevented a party from bringing suit. *Stone v. Williams*, 873 F.2d at 625; *Galliher v. Cadwell*, 145 U.S. 368, 372 (1892); *Ewert v. Bluejacket*, 259 U.S. 129, 138 (1922); Dobbs, § 2.4(4). The plaintiff must have had ample opportunity to assert the claim in court. The delay must be unreasonable.

The district court found that the Cayugas were shut out of court for over 184 years. 165 F. Supp. 2d at 355. Yet the panel majority did not consider any of the legal or practical barriers that precluded the Cayuga Nation from bringing suit earlier.

From the earliest days of the republic through the nineteenth century, Indian nations lacked juridical personality in the federal courts except where provided by special statute. Efforts by Indian nations to surmount this barrier by appealing to the original jurisdiction of the Supreme Court as "foreign nations" were decisively rejected in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). "The courts have not been open to the Indian, and the civil liberty which is the boast of our system has not been given to the Indians in any period of our history." *Jaeger v. United States*, 27 Ct.Cl. 278, 282 (1892). The same rule obtained in the state courts of New York. *Johnson v. Long Island R.R. Co.,* 56 N.E. 992 (N.Y. 1900).

In addition, Indian nations faced insurmountable jurisdictional barriers. For example, federal courts were not granted general federal question jurisdiction until 1875.[4] Even after federal question jurisdiction was established, the federal courts

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[4] See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 255, n. 1 (1985) (Stevens, J. dissenting). Diversity of citizenship as a basis of federal court jurisdiction was almost never available to Indian nations, and certainly not to the Cayugas, until 1924 at the earliest, when the Indian Citizenship Act was passed. Before that date, Indians generally were not considered citizens of the United States in the absence of a treaty or statute conferring such status with the consent of the Indian nation. *Elk v. Wilkins,* 112 U.S. 94 (1884).

remained closed to tribal claims based on the Trade and Intercourse Act. *Deere v. St. Lawrence River Power Company*, 32 F.2d 550 (2nd Cir. 1929) (Mohawk claim under the Trade and Intercourse Act for lands taken by State of New York does not raise a federal question). New York State courts were closed to such claims as well. *Seneca Nation of Indians v. Christy,* 27 N.E. 275 (1891) (New York State could acquire Indian lands to which it held "right of preemption" without violating federal law); *see Travelers Insurance Co. v. Cuomo,* 14 F.3d 708, 714 (2nd Cir. 1993), *rev'd on other grounds,* 514 U.S. 645 (1995) (not bringing suit when the law "created little hope of success" is not delay).

Nor were suits by the United States on behalf of Indian nations available. *See generally* F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) at 47-204 (discussing policies of assimilation, termination and self-determination). For many decades Indian nations could not reliably look to federal officials to file suit to protect their rights when the Indian nations themselves could not do so. *See Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 472 (1976) (28 U.S.C. § 1362 "opened federal courts to the kinds of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought"). In a rare case when the United States did file suit, the court held that tribal rights under the Trade and Intercourse Act could not be enforced against the

State of New York. *United States v. Franklin County,* 50 F. Supp. 152 (N.D. N.Y. 1943).

Moreover, even if the courts had been open, Indian nations faced enormous practical obstacles to filing suit, such as lack of financial resources, unfamiliarity with the English language, inability to retain attorneys, and unfamiliarity with the American legal system. *See* Katherine F. Nelson, "Resolving Native American Land Claims and the Eleventh Amendment: Changing the Balance of Power," 39 *Vill. L. Rev.* 525, 537 (1994). There was no meaningful opportunity to assert Indian rights sufficient to justify the conclusion that the Cayuga Nation "unreasonably delayed."

Not until 1966 were most of these jurisdictional and juridical barriers overcome, when Congress enacted 28 U.S.C. § 1362. But even after the enactment of the jurisdictional statute, the ability of Indian nations to enforce the requirements of the Trade and Intercourse Act against states and private parties was not firmly established. Federal question jurisdiction was not established until 1974 (*County of Oneida v. Oneida Indian Nation*, 414 U.S. 661 (1974), and the existence of a right of action under the Trade and Intercourse Act was not firmly established until 1985. *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226 (1985).

The panel majority has substantially re-written the law of laches in the Second Circuit without reason, a factual basis or supporting authority. The unprecedented discretion to dismiss valid legal claims filed within the statute of limitations on the ground that any one of the remedies requested by a plaintiff is barred by laches is not supported by legal authority and lacks common sense and basic fairness. Given the origins and purposes of laches in equity, application of this newly cast law of laches to claims and plaintiffs who have been excluded from the courts is particularly inappropriate. The decision in effect punishes the Cayuga Nation for "delay" caused by the failure of our nation and courts to recognize them as others have been recognized.

Dated: August 19, 2005 Respectfully submitted,

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