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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)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

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

UNITED STATES OF AMERICA,
Plaintiff-Intervenor-Appellee,

v.

GEORGE E. 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

**UNITED STATES' PETITION FOR PANEL REHEARING AND
PETITION FOR REHEARING EN BANC**

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The United States petitions for panel rehearing and rehearing en banc in this suit to compensate successors of the ancient Cayuga Nation fairly for the State of New York's unlawful acquisition of the Cayuga Reservation in violation of the Nonintercourse Act (NIA). The Supreme Court's Oneida decisions established that "Congress' clear policy" embodied in the NIA was that no "entity should purchase Indian land without the acquiescence of the Federal Government," with those who violate this rule subject to suits for damages to vindicate unextinguished tribal property rights. County of Oneida v. Oneida Indian Nation (Oneida II), 470 U.S. 226, 232–50 (1985); see Oneida Indian Nation v. County of Oneida (Oneida I), 414 U.S. 661, 666–82 (1974). Based on these decisions, many tribes have pursued land claims in lengthy and hard-fought federal litigation. The district court here awarded two tribal plaintiffs and the United States, as plaintiff-intervenor, about \$248 million in damages to be paid by the State as full compensation for the lost Reservation.

With one judge dissenting, a panel of this Court reversed, holding that laches bars these claims altogether. That holding conflicts with this Court's decision in Oneida Indian Nation v. New York, 691 F.2d 1070 (2d Cir. 1982). The majority concluded that this decision had been effectively overruled by the Supreme Court's intervening decision in City of Sherrill v. Oneida Indian Nation, 125 S. Ct. 1478 (2005), which held that equitable considerations barred a tribe from asserting tax immunity regarding ancient reservation land reacquired on the open market. The majority's conclusion is incorrect. The Court in Sherrill expressly did not disturb its rulings in the Oneida cases involving damages claims like those at issue here, and it expressed approval of the district court's approach of allowing damages against the wrongdoer but not dispossession of innocent residents. The majority's application

of laches is unprecedented and contrary to explicit statutory language. So too is the majority's further holding that laches applies here even against the United States as plaintiff-intervenor. As the dissent explains, both holdings are incorrect and thus rehearing by the panel is appropriate. Rehearing en banc is also appropriate under Federal Rule of Appellate Procedure 35. First, the decision conflicts with numerous decisions of the Supreme Court and this Court. Second, the proceeding involves questions of exceptional importance: (1) whether the land claim cases that have been fiercely litigated in this Court and the district courts for thirty years based on the Supreme Court's Oneida decisions have been doomed from inception; and (2) whether the United States can be subject to laches when it seeks to enforce a federal statute in a manner consistent with the applicable statute of limitations.

BACKGROUND

1. Statutory background. — In 1790, Congress enacted the first of the Trade and Intercourse Acts that have long embodied the essential features of federal Indian policy and that included the first NIA. Special Appendix (SPA) 636. In its form in 1793, the NIA read: “no purchase or grant of lands” from Indian tribes “shall be of any validity in law or equity” unless “made by a treaty or convention entered into pursuant to the constitution.” SPA638. The NIA remains effective today. 25 U.S.C. 177. As the Supreme Court has explained:

The obvious purpose [of the NIA] is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress, and to enable the Government * * * to vacate any disposition of their lands made without its consent.

Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960).

2. Factual background. — In 1789, the Cayuga Nation ceded 1600 square miles to the State but retained a 64,000-acre Reservation. SPA155; SPA632–33. Soon thereafter, Congress enacted the first NIA to protect such tribal land. SPA636. Then, in 1794, the United States in the Treaty of Canandaigua “acknowledge[d] the lands reserved” to the Cayugas “to be their property” and guaranteed that the Reservation “shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.” SPA180–81; SPA676–79. Nonetheless, in 1795 and 1807 treaties, the State acquired the Reservation in violation of the NIA. SPA184–229; cf. Oneida II, 470 U.S. at 232 (noting how the State ignored federal warnings regarding the NIA). Acting in bad faith, the State paid little for the destitute Cayugas’ land and quickly resold it at many times the purchase price. SPA184–229.

After the 1795 and 1807 treaties, the Cayugas had no homeland and scattered in various groups. SPA227; Appendix (A) 7197–7203. In the following years, the Cayugas attempted to obtain fair compensation. SPA230–32. The State repeatedly rebuffed the Cayugas while recognizing that it had a “moral obligation” given the unfairness of the 1795 and 1807 treaties. SPA230–32. Throughout this period, the Cayugas had no effective recourse against the State in federal or state court. SPA232. That changed in 1974 with the Supreme Court’s landmark holding in Oneida I that tribes present federal questions within federal jurisdiction when asserting “possessory rights * * * to their aboriginal lands, particularly when confirmed by treaty.” 414 U.S. at 667. After this decision, the Cayugas again attempted to settle with the State and filed this suit only after that attempt failed. SPA480.

2. Procedural background. — In 1980, the Cayuga Indian Nation of New York and the Seneca-Cayuga Tribe of Oklahoma sued the State, Seneca and Cayuga

Counties, and a class of landowners. A204–29; A342–49. Their complaints asserted the invalidity of the 1795 and 1807 treaties under the NIA and sought relief including ejectment of the current occupants of the land that was their Reservation and trespass damages in the amount of fair rental value for the period of dispossession. Over the following years, the court denied motions to dismiss and granted the Cayugas summary judgment on various liability issues. SPA527–90. In 1992, the United States intervened as a plaintiff. A2588–89. Its motion for intervention made clear that, “[u]nder [the NIA], the United States has a legal interest in protecting any property in which the Cayugas have an interest.” A2583. It asserted that it acted both pursuant to its “trust relationship with the Cayugas” and “on its own behalf.” A2583.

After lengthy settlement attempts failed, the court turned to remedies issues. In 1999, it rejected the remedy of ejectment. SPA453–86. It stated: “monetary damages will produce results which are as satisfactory to the Cayugas as those which they could properly derive from ejectment.” SPA478–79. The court deemed the Cayugas’ delay in seeking ejectment “not completely unreasonable, when * * * tak[ing] into account the efforts to reclaim their homeland which the Cayugas have made over the years.” SPA480. Still, the court could not “overlook the prejudicial consequences which the defendants would sustain if the court were to order ejectment” given the intervening improvements on the land. SPA481. The court thus concluded: “even though some delay on the part of the Cayugas is explainable, in the context of determining whether ejectment is an appropriate remedy, given this prejudice, the delay factor tips decidedly in favor of the defendants.” SPA481.

The court found that the State could be held responsible for all damages as the original tortfeasor, SPA353–62, and conducted a nineteen-day trial in January and

February 2000. The jury found that the fair market value of the land was \$35,000,000 and that the fair rental value for the land, minus a set-off for the State's past payments, totaled \$1,911,672.62 for the period of dispossession. A4758–67. A twenty-three-day bench trial followed in July and August 2000 pertaining to prejudgment interest and, in the resulting decision in October 2001, the court awarded \$211,000,326.80 in interest, for a total of \$247,911,999.42 in damages. SPA68–255. In its analysis, the court issued factual findings that the State lacked good faith in its relevant conduct and that the Cayugas could not be held responsible for any delay in bringing this action. SPA184–229; SPA235–36. The court certified its rulings for appeal under Federal Rule of Civil Procedure 54(b) and 28 U.S.C. 1292(b). SPA1–8.

This Court held oral argument in the consolidated appeals in March 2004. After Sherrill issued, the panel reversed, with one judge dissenting. The majority concluded “[b]ased on Sherrill * * * that the possessory land claim alleged here is the type of claim to which a laches defense can be applied.” Slip op. at 4. The majority reasoned that “what concerned the [Sherrill] Court was the disruptive nature of the claim” at issue there. Id. at 13. Finding that such “disruptiveness is inherent in the [Cayugas’ claim] * * * rather than an element of any particular remedy,” the majority found that the fact that the district court awarded damages in lieu of ejectment was immaterial to the application of laches. Id. at 14–15. That conclusion held true, the majority found, even though ejectment is an action at law and the Supreme Court in Oneida II stated that “application of the equitable defense of laches in an action at law would be novel indeed.” Id. at 15–17 (quoting 470 U.S. at 244 n.6). After finding the defense of laches legally available, the majority concluded that the defense would apply here for the same factual reasons as in Sherrill. Id. at 18. Having applied

laches to a damages remedy meant to substitute for ejectment, the majority found that this conclusion required rejection of the separate award of trespass damages because “the trespass claim * * * is predicated entirely upon plaintiffs’ possessory land claim.” *Id.* at 19. Finally, the majority held that the traditional rule that the United States is not subject to laches “does not seem to be a per se rule” and that laches could apply here because the delay was egregious, because no statute of limitations was enacted “until one hundred fifty years after the cause of action accrued,” and because “the United States intervened in this case to vindicate the interest of the [Cayugas], with whom it has a trust relationship,” not to enforce public rights. *Id.* at 20–22.

DISCUSSION

I. THE PANEL MAJORITY’S DECISION WAS IN ERROR.

A. Laches Should Not Apply to the Cayugas’ Requests for Damages.

1. The effect of *Sherrill*. — The Supreme Court’s decision in *Sherrill* does not support the majority’s analysis. *Sherrill* concerned a particular and unique equitable remedy relating to the reassertion of tribal sovereignty over land after a 200-year hiatus and the displacement of local and State authority. 125 S. Ct. at 1489–94. Neither any equitable remedy nor an assertion of tribal sovereignty is at issue here. The district court awarded only damages — the type of relief that the Supreme Court approved in the earlier *Oneida* decisions, which involved a tribal claim for trespass damages regarding property that was the subject of an NIA violation. *Oneida II*, 470 U.S. at 229–30; *Oneida I*, 414 U.S. at 664–65. The *Sherrill* Court explicitly noted: “the question of damages for the [Oneidas’] ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in *Oneida II*.” 125 S. Ct. at 1494. The *Sherrill* Court’s discussion of laches was limited to the application of the

defense to the particular equitable remedies at issue, as the dissent here documents in detail. Slip op. at 37–39. Significantly, the Sherrill Court repeated the observation from Oneida II that “application of a nonstatutory time limitation in an action for damages would be ‘novel.’” 125 S. Ct. at 1494 n.14 (quoting 470 U.S. at 244 n.16). The majority emphasized the Sherrill Court’s further statement that “[n]o similar novelty exists when the specific relief [a tribe] seeks would project redress * * * into the present and future.” Slip op. at 16 (quoting 125 S. Ct. at 1494 n.14). As the dissent notes, however, an award of damages does not “project redress into the present and future.” Id. at 39 n.13. Such an award is retrospective and resolves the case with no continuing consequences.

Furthermore, consistent with these explicit acknowledgments that the holding in Sherrill did not apply to damages, the reasons the Supreme Court gave for rejecting the equitable remedies at issue there do not apply to damages. Its analysis of laches depended on questions of sovereignty and governance. 125 S. Ct. at 1490–93. An award of damages does not implicate such issues. In fact, Sherrill expressed approval of the very approach the district court took here. The Sherrill Court repeatedly referred to Oneida Indian Nation v. County of Oneida, 199 F.R.D. 61 (N.D.N.Y. 2000), a decision by the same district court judge in the Oneida land claim litigation. 125 S. Ct. at 1487–88, 1489, 1493. In that decision, the district court relied upon its earlier rulings in this case and denied the remedy of ejectment while recognizing that the Oneidas could obtain monetary damages from parties other than private landowners. 199 F.R.D. at 70–95. As the Supreme Court noted, the district court was “transcend[ing] the theoretical” and adopting “a pragmatic approach” to do justice to all parties. 125 S. Ct. at 1488 (quoting 199 F.R.D. at 92). The same is equally true

here. The Sherrill Court also relied (*id.* at 1491–93) on two cases that specifically recognized that damages would be available even though (indeed, because) recovery of the land would not. Yankton Sioux Tribe v. U.S., 272 U.S. 351, 357–59 (1926); Felix v. Patrick, 145 U.S. 317, 334 (1892). Thus, Sherrill lends no support to the majority’s conclusion that laches may be applied to bar even an award of damages against the State and to leave the United States and the Cayugas with no remedy at all for clear violations of the NIA that rendered the State’s purchases void.

2. Fair market value damages. — As the dissent explains, laches should depend on the remedy sought, not merely the cause of action itself, and on a showing that the plaintiff’s undue delay prejudiced the defendant. Slip op. at 29–31. Nevertheless, with no meaningful analysis of undue delay or prejudice,¹ the majority read Sherrill to make laches applicable to “‘disruptive’ Indian land claims.” *Id.* at 13–14. It further reasoned that “disruptiveness is inherent in the claim itself — which asks this Court to overturn years of settled land ownership — rather than an element of any particular remedy.” *Id.* at 15. Even if the Sherrill Court had adopted a “disruptiveness” test for laches, its analysis demonstrates that it was considering the “disruptive remedy” at issue. 125 S. Ct. at 1491 (emphasis added); see *id.* at 1490 n.9, 1491 n.11. That is, disruptiveness is not inherent in the claim itself.

^{1/} The majority found that the district court “explicitly agreed” that laches would apply. Slip op. at 18. In fact, the court deemed the Cayugas’ delay in seeking ejectment “not completely unreasonable” but concluded: “in the context of determining whether ejectment is an appropriate remedy, * * * the delay factor tips decidedly in [defendants’] favor.” SPA480–81. As the dissent explains, the court never held that laches barred ejectment. Slip op. at 26–27 & n.3. Moreover, its analysis was expressly predicated on the availability of damages. SPA478–79; SPA485. Furthermore, the court later awarded prejudgment interest based on the finding that the Cayugas could not be held responsible for any delay. SPA235–36.

