

hazardous chemicals to list target organ effects on their hazardous chemical shipping labels is a reasonable interpretation, and conforms to both the language and purpose of the HCS. We are not persuaded by the arguments advanced by Cyanamid that the Secretary's interpretation is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. We thus **GRANT** the Secretary's petition for review, **SET ASIDE** the order of the OSHRC, and **DIRECT** that the order of Administrative Law Judge Edwin Salyers be **REINSTATED**.



SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS; Grand Traverse Band of Ottawa and Chippewa Indians; Keweenaw Bay Indian Community; Hannahville Indian Community; Bay Mills Indian Community; and Lac Vieux Desert Band of Lake Superior Chippewa Indians, Plaintiffs-Appellants,

v.

STATE of MICHIGAN, Defendant-Appellee.

No. 92-1683.

United States Court of Appeals,
Sixth Circuit.

Argued June 18, 1993.

Decided Sept. 15, 1993.

Indian tribes sought declaration that state failed to negotiate in good faith under Indian Gaming Regulatory Act for purposes of entering tribal-state compact and sought order directing parties to conclude compact within 60 days. The United States District Court for the Western District of Michigan, Benjamin F. Gibson, Chief Judge, 800 F.Supp. 1484, granted motion to dismiss, and appeal was taken. The Court of Appeals, Suhrheinrich, Circuit Judge, held that:

(1) Court of Appeals lacked jurisdiction over an appeal by Indian tribes from a district court order dismissing state as defendant in suit under Indian Gaming Regulatory Act, and (2) order granting state sovereign immunity under Eleventh Amendment was not appealable collateral order.

Dismissed.

1. Federal Courts ⇌571

Court of Appeals has jurisdiction over appeals from final decisions which dispose of litigation on merits. 28 U.S.C.A. § 1291.

2. Federal Courts ⇌600

Indians ⇌27(7)

Court of Appeals lacked jurisdiction over an appeal by Indian tribes from district court order dismissing state as defendant in suit under Indian Gaming Regulatory Act; dismissal of state as defendant did not end litigation as suit continued against governor in his individual capacity. Indian Gaming Regulatory Act, §§ 2-22, 25 U.S.C.A. §§ 2701-2721; 28 U.S.C.A. § 1291.

3. Federal Courts ⇌572

Court of Appeals may hear appeal from nonfinal collateral orders if order conclusively determines disputed questions, resolves important issue completely separate from merits of action, and is effectively unreviewable on appeal from final judgment.

4. Federal Courts ⇌574

Orders denying state sovereign immunity are effectively unreviewable as part of final decision, but grant of state sovereign immunity is not appealable collateral order; grant of immunity preserves benefit of immunity pending final decision and may be corrected on appeal. U.S.C.A. Const.Amend. 11.

5. Federal Courts ⇌574

Order granting state sovereign immunity under Eleventh Amendment was effectively reviewable on appeal from final decisions and thus was not appealable collateral order. U.S.C.A. Const.Amend. 11.

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Before: NELSON and SUHRHEINRICH, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

SUHRHEINRICH, Circuit Judge.

In this interlocutory appeal brought under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721, plaintiffs Sault Ste. Marie Tribe of Chippewa Indians, Grand Traverse Band of Ottawa and Chippewa Indians, Keweenaw Bay Indian Community, Hannahville Indian Community, Bay Mills Indian Community, and Lac Vieux Desert Band of Lake Superior Chippewa Indians challenge the district court's order dismissing their suit against defendant the State of Michigan (Michigan) under the Eleventh Amendment. For the following reasons, we **DISMISS** this appeal for lack of jurisdiction.

I.

In 1988, Congress enacted IGRA to regulate the use of gaming by Indian tribes "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments...." 25 U.S.C. § 2702(1). IGRA distinguishes between three classes of gaming. Class I gaming consists of social gaming for "prizes of minimal value" or traditional Indian games, and is not subject to regulation. 25 U.S.C. §§ 2703(6), 2710(a). Class II gaming consists of bingo and certain card games, and is subject to the exclusive jurisdiction of the Indian tribes as long as the state in which the tribe is located permits such gaming for any purpose. 25 U.S.C. §§ 2703(7), 2710(b). Class III gaming includes all other forms of gaming, such as blackjack, video games of chance, and slot machines, and is allowed only if the state in which the tribe is located allows these games for any purpose. 25 U.S.C. §§ 2703(8), 2710(d)(1)(B). To operate Class III gaming, there must be a Tribal-State compact governing operation of the games. 25 U.S.C. § 2710(d)(1)(C). Tribes must request their states to negotiate such a compact, and states must then negotiate in good faith. 25 U.S.C. § 2710(d)(3)(A).

If a state does not so negotiate, a tribe may sue the state in district court. 25 U.S.C. § 2710(d)(7)(A)(i). Upon a finding that the state has not acted in good faith, the court may order the parties to reach a compact within sixty days. 25 U.S.C. § 2710(d)(7)(B)(iii). If they fail to do so, the court may appoint a mediator to select a compact which becomes effective upon the state's consent. 25 U.S.C. § 2710(d)(7)(B)(iv)-(vi). If the state refuses to consent, the Secretary of the Interior is authorized to decide how Class III gaming shall be regulated. 25 U.S.C. § 2710(d)(7)(B)(vii).

Plaintiffs have engaged in Class III gaming for several years. When IGRA was enacted, plaintiffs began negotiations with Michigan to reach a Tribal-State compact to govern continued operation of the games. During negotiations, Michigan took the posi-

tion that video games of chance and slot machines were illegal in Michigan for any purpose and not subject to negotiation. An impasse developed, and plaintiffs filed suit in July 1990, seeking a declaration that video games of chance and slot machines are allowed under Michigan law and an order that a compact be reached.

On January 24, 1992, Michigan filed a motion to dismiss on the grounds of state sovereign immunity under the Eleventh Amendment. Plaintiffs responded that Congress had abrogated Michigan's sovereign immunity when it enacted IGRA. The district court found that although IGRA was a clear attempt to abrogate the state sovereign immunity of the Eleventh Amendment, Congress did not have power under the Indian Commerce Clause to do so. *Sault Ste. Marie Tribe of Chippewa Indians v. Michigan*, 800 F.Supp. 1484, 1488-90 (W.D.Mich.1992). On March 26, 1992, the court granted the motion, and gave plaintiffs thirty days to amend their complaint to fall within the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), in which the Supreme Court held that the Eleventh Amendment does not bar suits against individually-named state officials for violating the United States Constitution. *Id.* at 159-60, 28 S.Ct. at 453-54. Plaintiffs have since amended their complaint and named Governor John Engler as the defendant.

II.

Plaintiffs argue that the district court erred in granting Michigan's motion to dismiss, maintaining that Congress abrogated state sovereign immunity when it enacted IGRA. Michigan contends, however, that we do not have jurisdiction over this appeal because it is not taken from a "final decision." Michigan is correct.¹

[1, 2] Under 28 U.S.C. § 1291, we have jurisdiction over appeals from "final decisions" which dispose of the litigation on the merits. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373-74, 101 S.Ct. 669,

672-74, 66 L.Ed.2d 571 (1981) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978)); *Henry v. Detroit Manpower Dep't*, 763 F.2d 757, 760 (6th Cir.) (en banc), *cert. denied*, 474 U.S. 1036, 106 S.Ct. 604, 88 L.Ed.2d 582 (1985). Here, the order of the district court dismisses Michigan as a defendant, but does not end the litigation; the merits of plaintiffs' action remain unresolved, and the suit continues against Governor Engler. Because it does not conclude the litigation, the order is not a final decision under § 1291.

[3] However, we may also hear appeals from certain non-final "collateral orders." In *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), the Supreme Court held that a "small class" of orders which do not terminate the entire litigation are appealable. *Id.* at 546-47, 69 S.Ct. at 1225-26. The Court later clarified that to be appealable under the *Cohen* doctrine an order "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 U.S. at 468, 98 S.Ct. at 2458. Plaintiffs argue that the order of dismissal is just such an order. There is no dispute that the order meets the first and second requirements to be an appealable collateral order: It conclusively determines the disputed question of whether Michigan is entitled to sovereign immunity here, an important issue unrelated to the merits of plaintiffs' action. The decisive question is whether the order is "effectively unreviewable" as part of a final decision.

Orders denying state sovereign immunity are "effectively unreviewable" as part of a final decision. *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, — U.S. —, —, —, 113 S.Ct. 684, 687-89, 121 L.Ed.2d 605 (1993). In *Metcalf & Eddy*, the Court reasoned that state sovereign immunity is an immunity from suit itself, not just liability. *Id.* — U.S. at —, —, 113 S.Ct. at 687-88. As such, its value would be

1. Michigan also argues that plaintiffs' notice of appeal is untimely under Fed.R.App.P. 4(a) because it was filed fifty-seven days after the date of entry of the district court's order. Plaintiffs counter that because the order was not effective

until thirty days after the date of entry, the notice needed to be filed thirty days after the effective date, not the earlier date of entry. We need not decide this issue because in either case, the order is not an appealable collateral order.

lost if a state had to wait until a final decision to challenge its denial, and an order denying that immunity is therefore "effectively unreviewable" as part of a final decision. *Id.* — U.S. at ———, 113 S.Ct. at 688–89.

[4] Here, we are faced with the opposite issue: whether a *grant* of state sovereign immunity is "effectively unreviewable" as part of a final decision. In *Clemens v. Kansas*, 951 F.2d 287 (10th Cir.1991), the Tenth Circuit held that a grant of sovereign immunity is not "effectively unreviewable." *Id.* at 288. That court stated:

The rationale for allowing [an] interlocutory appeal of an order *denying* immunity is that the defendant's right to be free from standing trial can not be effectively vindicated on appeal after trial. A *grant* of immunity, in contrast, "may be fully and effectively reviewed after final judgment. Accordingly, it does not fall under the collateral order doctrine."

Id. (quoting *Branson v. City of Los Angeles*, 912 F.2d 334, 335 (9th Cir.1990)) (other citations omitted) (emphasis original). See also *Branson*, 912 F.2d at 335–36; *Coe v. Zeigler*, 817 F.2d 29, 29–30 (6th Cir.1987) (per curiam); *Theis v. Smith*, 827 F.2d 260, 261 (7th Cir.1987) (per curiam); *Thompson v. Betts*, 754 F.2d 1243, 1246 (5th Cir.1985) (grants of absolute judicial immunity from suit are not appealable collateral orders). We agree.

[5] Unlike a denial, a grant of state sovereign immunity preserves the benefit of a state's immunity pending a final decision on the merits. If the grant is erroneous, it may be corrected on appeal from that final decision and the case may continue on remand with no loss of the substantive rights of either party. We therefore hold that an order granting state sovereign immunity under the Eleventh Amendment is effectively reviewable on appeal from a final decision, and is not an appealable collateral order under *Cohen*.

III.

For the foregoing reasons, we **DISMISS** this appeal for want of jurisdiction.



In re **BELL & BECKWITH**, Debtor.

Patrick A. McGRAW, Trustee,
Plaintiff-Appellee,

v.

SOCIETY BANK & TRUST,
Garnishee-Appellant.

No. 92-3676.

United States Court of Appeals,
Sixth Circuit.

Argued June 29, 1993.

Decided Sept. 16, 1993.

Trustee for partnership's bankruptcy estate brought adversary proceeding to garnish contributions made by partnership to ERISA-qualified profit-sharing retirement plan in alleged violation of terms of plan. The United States Bankruptcy Court for the Northern District of Ohio entered judgment in favor of defendant, on ground that trustee's action was barred by antialienation provisions of ERISA, and trustee appealed. The District Court, Nicholas J. Walinski, Senior District Judge, reversed. On further appeal, the Court of Appeals, Alan E. Norris, Circuit Judge, held that contributions allegedly made in violation of terms of plan, by partnership which had no net income in years in question to fund its contributions, would be void ab initio and never become part of plan.

Order of district court affirmed.

1. Pensions ⇐138

Benefits provided under ERISA-qualified pension plan may not be alienated either voluntarily or involuntarily, either inside or outside bankruptcy, or for equitable reasons. Employee Retirement Income Security Act of 1974, § 206(d)(1), 29 U.S.C.A. § 1056(d)(1).

2. Pensions ⇐101

Contributions made to ERISA-qualified profit-sharing retirement plan in alleged vio-