EXPLORING TRIBAL SOVEREIGN IMMUNITY WITH *LEWIS V. CLARKE*

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The U.S. Supreme Court recently held that tribal employees can be sued in their individual capacities for torts they commit while acting within the scope of their employment.[1] Relying upon cases involving tort suits against state and federal employees, the Court first held that tribal employees cannot assert the tribe's sovereign immunity as a defense in those lawsuits. The Court next held that a tribe's agreement to indemnify a tribal employee for damages or injuries caused by his or her negligent acts does not extend the tribe's sovereign immunity defense to that employee.

The decision could lead to tribal employees becoming the focus of lawsuits, as they cannot rely upon a defense of tribal sovereign immunity for torts committed within the scope of their employment. It could also result in more tribal employees suing their tribal employers seeking indemnification — where a tribe has agreed to indemnify the employee — thus ultimately putting tribes on the hook to cover adverse judgments in tort actions against tribal employees.

The case is also another reminder of the importance of understanding the various implications of tribal sovereign immunity when entering into commercial transactions with Native American Indian tribes. Regardless of who may or may not be covered by tribal sovereign immunity, a tribe can only be sued and money damages can only be recovered from a tribe where the tribe has entered into a valid and enforceable waiver of sovereign immunity.

WHAT IS TRIBAL SOVEREIGN IMMUNITY?

Federally recognized Indian tribes exercise inherent sovereign authority.[2] A central aspect of that sovereignty is immunity from suits in federal, state, and tribal courts, commonly known as "tribal sovereign immunity."[3] Under the doctrine of tribal sovereign immunity, a tribe cannot be sued by a state, a private party, or other governmental authority, such as another tribe or a municipality, unless the tribe expressly waives its sovereign immunity or Congress abrogates it.[4] As recently as 2014, the Court affirmed that tribal sovereign immunity applies to a tribe's off-reservation commercial activities.[5]

THE JOURNEY OF *LEWIS V. CLARKE*

Brian and Michelle Lewis (the Lewises) were driving on an interstate in Connecticut when they were hit from behind by a limousine driven by William Clarke (Clarke), an employee of the Mohegan Tribal Gaming Authority ("Gaming Authority").[6] The Lewises sued Clarke in Connecticut state court alleging negligence and "Clarke moved to dismiss for lack of subject matter jurisdiction on the basis of tribal sovereign immunity."[7] Clarke

argued that because at the time of the accident he was acting within the scope of his employment for the Gaming Authority — a commercial entity of the Mohegan Tribe of Indians of Connecticut (the "Tribe") entitled to sovereign immunity — he too was entitled to sovereign immunity. The trial court denied Clarke's motion to dismiss finding that Clarke, rather than the Gaming Authority or the Tribe, was "the real party in interest because the damages remedy sought was solely against Clarke and would in no way affect the Tribe's ability to govern itself independently."[8] Clarke appealed, and the Supreme Court of Connecticut reversed, holding tribal sovereign immunity barred the Lewises' suit.[9]

THE SUPREME COURT'S DECISION

Official-capacity claims versus individual-capacity claims

The Court held that tribal sovereign immunity does not bar individual-capacity claims against tribal employees for torts committed within the scope of their employment. The Court focused its analysis on the distinction between individual- and official-capacity claims.[10] Sovereign immunity applies to official-capacity claims, i.e., where the plaintiff sues the employee as a proxy for the tribe, but not to individual-capacity claims. "In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself. . . . The real party in interest is the government entity, not the named official."[11] In an individual capacity claim, however, "[o]fficers sued in their personal capacity come to court as individuals" and "the real party in interest is the individual, not the sovereign."[12]

The Court found these "general principles foreclose Clarke's sovereign immunity defense in this case."[13] The Court reasoned that to find otherwise would "extend sovereign immunity for tribal employees beyond what common-law sovereign immunity principles would recognize for either state or federal employees. The protection offered by tribal sovereign immunity here is no broader than the protection offered by state or federal sovereign immunity."[14]

The Court stated the tribe's sovereign immunity "is simply not in play" in the Lewises' suit.[15] "This is a negligence action arising from a tort committed by Clarke on an interstate highway within the State of Connecticut. . . . It is simply a suit against Clarke to recover for his personal actions, which will not require action by the sovereign or disturb the sovereign's property."[16] The Court thus held the Gaming Authority's immunity did not apply to Clarke and did not preclude the suit.

An agreement to indemnify does not extend sovereign immunity

Clarke also argued that because the Gaming Authority is required to indemnify him for any adverse judgment, "the Gaming Authority *is* the real party in interest" and he is entitled to the Gaming Authority's sovereign immunity.[17] But the Court rejected this argument and held that an indemnification clause cannot "extend sovereign immunity to individual employees who would otherwise not fall under its protective cloak."[18] While the Gaming Authority may ultimately have to pay an adverse judgment imposed against Clarke, the "critical inquiry is who may be legally bound by the court's adverse judgment, not who will ultimately pick up the tab."[19] In the Court's opinion, the Gaming Authority's obligation to indemnify Clarke, if any, could be resolved in a later suit.

A TRAIL BLAZED BUT LEFT UNFINISHED

While opening the door to lawsuits against tribal employees and officials for negligent acts they commit within the scope for their employment in *Lewis v. Clarke*,the Supreme Court did not give plaintiffs an absolute right to sue those individuals. In fact, because the issue was not properly raised, the Court explicitly declined to rule on the question of whether Clarke was protected by the doctrine of official immunity, which as discussed above protects certain officials in carrying out their official duties.[20] Because the Court did not resolve the issue, official immunity could come to the forefront in future lawsuits against tribal employees and officials for actions taken in their official capacities.

As with any lawsuit involving a tribe, there could also be questions relating to jurisdiction, proper forum, and choice of law, depending on whether the plaintiffs and defendants are tribal members and whether the alleged tortious acts took place on or off the reservation. In addition, to the extent future cases raise issues regarding the enforceability of indemnification agreements or other agreements with a Tribe, governing law continues to require that waivers of sovereign immunity be clear, express, and unambiguous.

CONCLUSION: *LEWIS V. CLARKE* IS NOT THE FINAL FRONTIER ON SUITS AGAINST TRIBAL EMPLOYEES AND OFFICIALS

Tribes and entities that engage with tribes should take note: *Lewis v. Clarke* could signal more lawsuits against tribal employees and officials. It could also lead to more litigation between those employees or officials and their tribal employers and governments, assuming the existence of a valid waiver of sovereign immunity. The Court's holding makes clear that a tribal employee can be sued for torts committed within the scope of his or her employment because tribal sovereign immunity does not cover tribal employees for suits in their individual capacity. This is true even if the alleged tort occurs within the scope of the employee's tribal employment and even if the tribe has agreed to indemnify the employee for torts committed within the scope of that employment. If a tribe has agreed to indemnify the employee and that agreement contains a valid waiver of sovereign immunity, the tribe may be responsible for adverse judgments against that employee.

The decision leaves open the question of how sovereign immunity would apply to a tribal employee sued in his or her official capacity. If the Court's reasoning in *Lewis v. Clarke* is any indication, the Court could follow the law in the state and federal contexts to find that tribal employees sued in their official capacity are protected by sovereign immunity, as the real party in interest in those lawsuits would be the tribe itself. Because this question was not before the Court, however, its resolution is left for another day. Finally, although the Court did not address this issue, any valid indemnification from a tribe to its employee would have to contain a valid waiver of sovereign immunity. Otherwise the tribe would not be subject to suit and could never be the real party in interest.

In sum, while *Lewis v. Clarke* charts new ground, it leaves plenty of territory to explore.

NOTES:

[1] Lewis v. Clarke, No. 15-1500, slip op. at 3 (U.S. Apr. 25, 2017).

[2] Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 509 (1991).

[3] *Id*.

[4] C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411, 414 (2001)

[5] *See* Michigan v. Bay Mills, 134 S. Ct. 2024 (2014); *see also*, Bart J. Freedman & Benjamin A. Mayer, "Supreme Court Affirms in *Michigan v. Bay Mills Indian Community*: Don't Roll the Dice with Tribal Sovereign Immunity," July 2014, http://www.klgates.com/files/Publication/d7ba791a-3500-4969-8ed9-de789e6855f1/Presentation/PublicationAttachment/bd010292-414a-408e-90cc-eb3434ae710a/EI_Alert_07232014.pdf.

[6] *Lewis*, No. 15-1500, slip op. at 3.

[7] *Id*.

[8] *Id*. at 4.

[9] *Id*.

[10] *Lewis* at 6.

[11] *Id*.

[12] *Id.* (internal citations and quotations omitted).

[13] *Id*. at 7.

[14] *Id*. at 7–8 (internal citation omitted).

[15] *Id*. at 7.

[16] *Id*. (quoting Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 687 (1949)).

[17] *Id*. at 8 (emphasis in original).

[18] *Id*. at 8–9.

[19] *Id*. at 9.

[20] *Id*. at 8 n.2.

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