

Insights, News & Events

LEWIS V. CLARKE AND THE FAILED EXPEDITION TO SECURE TRIBAL RIGHTS: SCOTUS RULES AGAINST TRIBAL EMPLOYEE IMMUNITY

Insights
Apr 26, 2017

The U.S. Supreme Court unanimously ruled yesterday that tribal sovereign immunity does not apply to employees who are sued in their individual capacities, even if the alleged wrongdoing occurs while the employee is acting within the course and scope of employment by the tribe, and even when the tribe has agreed to indemnify the employee. Stated differently, the Court ruled that the doctrine of tribal sovereign immunity does not extend to tribal employees who are not being sued in their official capacity as agents of the tribe.

This decision somewhat reduces the power of tribes to immunize tribal employees from suit with tribal sovereign immunity, although still left intact is the shield protecting those employees who are sued in their official capacities as agents of the tribe. Tribal employers and those doing business with tribes should understand and be aware of the new boundaries of tribal sovereign immunity drawn today by the Supreme Court (*Lewis v. Clarke*).

WHAT IS SOVEREIGN IMMUNITY?

Most employees and their employers can be held liable for employees' acts if the employee is performing their

Service Focus

Litigation and Trials

job at the time of the incident in question. However, Indian tribes – like state and federal governments – are often shielded from liability under the doctrine of sovereign immunity. This legal doctrine prevents Indian tribes from being sued in state or federal court unless the tribe waives its immunity or Congress abrogates it through clear and unequivocal legislative action.

As a result, if individuals wish to bring suit against a tribe, they must establish that the tribe's sovereign immunity has been waived or abrogated. Further, in most circumstances, potential plaintiffs are limited to pursuing relief through the tribe's own judicial system and cannot take their claims to federal or state courts.

However, whether tribal sovereign immunity extended to suits against tribal employees in their individual capacities for actions taken in the course and scope of their employment remained unsettled – until yesterday.

ACCIDENT LEADS TO EXPLORATION OF THE BOUNDARIES OF TRIBAL SOVEREIGN IMMUNITY

On October 22, 2011, William Clarke was involved in an automobile accident that would set this entire legal drama into motion. At the time, Clarke worked for the Mohegan Tribal Gaming Authority (MTGA), transporting Mohegan Sun Casino patrons to their homes via limousine. While driving along Interstate 95 in Norwalk, Connecticut (and not on tribal land), Clarke crashed the tribe-owned vehicle into the rear of a passenger car, injuring two people in that car – Brian and Michelle Lewis.

Through its tribal code, the Mohegan Tribe of Indians of Connecticut waived its sovereign immunity as to tort claims brought against the MTGA, but required that such claims be brought before Mohegan Gaming Disputes Court. That tribal court applies the Mohegan Tribal Code, which differs in many respects from Connecticut Law – including strictly limiting the types of relief that may be obtained by those bringing tort claims.

JOURNEY TO SUPREME COURT TAKES TWISTS AND TURNS THROUGH LOWER COURTS

On October 21, 2013, the Lewises brought a personal injury suit in the Connecticut Superior Court to recover damages for their injuries. To avoid tribal court, the lawsuit only sought relief against Clarke, and they did not pursue claims against the Mohegan Tribe or the MTGA as defendants. Clarke asked the court to dismiss the complaint, arguing that he was entitled to sovereign immunity as an employee acting within the course and scope of his employment for the MTGA at the time of the accident.

Although the Lewises contended the sovereign immunity doctrine did not apply because they were not seeking relief from the tribe, only from Clarke, Clarke argued that this “remedy-sought” analysis should be rejected. He also alleged that the MTGA was the real party in interest, since it had agreed to defend and indemnify him, which meant that sovereign immunity should apply.

The lower court rejected Clarke’s arguments and allowed the Lewises to pursue their claims against Clarke in his individual capacity. The court said the case did not implicate the tribe’s right to self-governance, and the MTGA’s choice to indemnify Clarke did not transform the case into a suit against the tribe. Clarke appealed the decision to the Connecticut State Supreme Court, which reversed the lower court and ruled in his favor. The state supreme court decided that “the doctrine of tribal sovereign immunity extends to the plaintiffs’ claims against the defendant because the undisputed facts of this case establish that he was an employee of the tribe and was acting within the scope of his employment when the accident occurred.”

The Supreme Court accepted review of the case to settle the matter once and for all. (Note that even after litigating the matter all the way to the Supreme Court, the merits of the Lewises’ claims have yet to be litigated. The appeal solely answers the question of

whether they can sue Clarke in state court or whether they must pursue their claims in tribal court.)

SCOTUS: TRIBAL SOVEREIGN IMMUNITY DOES NOT EXTEND THAT FAR

In a unanimous decision authored by Justice Sotomayor (Justice Gorsuch did not participate), the Court held that tribal immunity does not bar claims against individuals who happen to work for tribes, even if their allegedly wrongful or negligent acts occur in the course and scope of their employment with the tribe and even if the tribe has agreed to defend and indemnify the employee. However, if the lawsuit relates to actions taken by the employee in their official capacity as an officer of the tribe, sovereign immunity still might apply.

According to the Court, the question of whether tribal sovereign immunity bars suits against tribal employees for torts committed in the course and scope of their employment turns on whether the “the remedy sought is truly against the sovereign.” In other words, application of immunity depends on “the identity of the real party in interest.” The fact that the alleged wrong occurs in the course and scope of employment is not enough on its own to transform the suit into an action against the tribe. The Supreme Court recognized the Connecticut Supreme Court’s concern that plaintiffs might name tribal employees individually in order to “circumvent” tribal sovereign immunity, but determined that sovereign immunity was simply not applicable under the circumstances presented in the case at bench.

Here, the Court determined that Clarke was himself the real party in interest, because the suit was against Clarke in his personal capacity, and any “judgment will not operate against the Tribe.” Simply put, the action sought to recover against Clarke for his own personal actions and not any alleged conduct by the tribe. For the Court, whether the tribe or the employee was the real party in interest turned on the distinction between

personal capacity and official capacity suits. In personal capacity suits, the plaintiff seeks relief from the employee individually for the employee's own alleged misconduct. However, in official capacity suits, the individual is named in their capacity as an agent of the tribe and seeks relief from the tribe.

The Court also held that a tribe's commitment to defend and indemnify the employee did not render the tribe a real party in interest. The Court explained that because state and tribal governments "institute indemnification policies voluntarily ... the indemnification provisions do not implicate one of the underlying rationales for" sovereign immunity – that the government be able to "make its own decisions about the allocation of scarce resources." Thus the court concluded that although sovereign immunity was relevant to suits brought against individual tribal officers in their official capacities, "it is simply not present when the claim is made against those employees in their individual capacities."

WHAT DOES THIS DECISION MEAN FOR TRIBAL EMPLOYERS?

This decision is a wake-up call for tribes across the country. Tribal employees might not be immune from suit in the U.S. court system for alleged wrongdoing committed while the employee is acting in the course and scope of tribal employment.

Tribal sovereign immunity precludes suit against the tribe, but the circumstances where this sovereign immunity extends to tribal employees are limited. Importantly, a tribe cannot extend its sovereign immunity to its employees by agreeing to indemnify them for actions taken in the course and scope of employment. However, if the suit relates to official actions taken on behalf of the tribe, employees might be able to use tribal sovereign immunity as a shield.

For example, although sovereign immunity does not extend to suit against a driver in his individual capacity for alleged negligence in performing his job duties,

sovereign immunity might be applicable in an action where the tribal police chief is named in a suit alleging negligence by tribal police officers in the performance of their job duties. Importantly, however, sovereign immunity would likely not apply to lawsuits against individual police officers for their own personal negligence.

Unfortunately, the Supreme Court left several important questions regarding the boundaries of tribal sovereign immunity unanswered. For example, we are still left to wonder whether the Mohegan Tribe's immunity would apply under the particular circumstances of this case – a car accident occurring off tribal land and involving persons who did not patronize the MTGA – had plaintiffs not withdrawn their complaint against the MTGA. The concurring opinions authored by Justices Thomas and Ginsberg, suggest that, at least from their perspective, it would not.

Justices Thomas and Ginsburg joined in the opinion of the Court but wrote separately. Justice Thomas maintained that he would have held that Clarke was not covered by the tribe's sovereign immunity because that "tribal immunity does not extend to suits arising out of a tribe's commercial activities conducted beyond its territory." Justice Ginsberg similarly expressed doubt that tribal sovereign immunity should be applicable where the tribe is "interacting with nontribal members outside reservation boundaries."

For now, however, tribes have some guidance from the Supreme Court to allow them to take proactive steps to navigate the new landscape. Specifically, tribal governments and enterprises should be cognizant of situations where tribal immunity is unlikely to cover individual employee actions, and reevaluate the scope and extent of their employee indemnification agreements. Tribes should consider whether and to what extent they wish to indemnify their employees for claims that will not be encompassed under the shield of sovereign immunity.

For more information about this case, contact the authors at ABrook@fisherphillips.com (602.281.3400), DGarcia@fisherphillips.com (858.597.9621), or your regular Fisher Phillips attorney.

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