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High court ruling will expose tribes to new liability

By Jeremy Robinson

Tribal sovereign immunity has always been problematic for the courts.

Created "almost by accident" in *Turner v. United States,* 248 U.S. 354 (1919), it has increasingly come under fire for being inapt in modern settings. Indeed, in *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998), Justice Anthony Kennedy, writing for the majority, said: "There are reasons to doubt the wisdom of perpetuating the doctrine." He noted that "[a]t one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance." Nonetheless, the majority in *Kiowa Tribe* did perpetuate the doctrine, holding tribal immunity applied to a commercial contract entered into outside tribal lands. Justices John Paul Stevens, Clarence Thomas and Ruth Bader Ginsburg dissented, arguing, "[t]here is no federal statute or treaty that provides [a tribe] any immunity from the application of [state] law to its off-reservation commercial activities."

That lack of consensus on the high court has not abated. A few years ago, the U.S. Supreme Court handed down its decision in *Michigan v. Bay Mills Indian Community,* 134 S. Ct. 2024 (2014), again a hotly contested decision most notable for the vigorous dissent of four justices who appeared ready to toss the tribal sovereign immunity doctrine altogether in some circumstances, or at least severely restrict it. Perhaps emboldened by this increasingly vocal dissent, the California Supreme Court in People ex rel. *Owen v. Miami Nation Enterprises*, 2 Cal. 5th 222, 256 (2016), rejected the argument by two payday lenders with tribal affiliations that they could invoke sovereign immunity under the "arm of the tribe" doctrine.

Now comes the most recent volley from the U.S. Supreme Court in *Lewis v. Clarke*, 2017 DJDAR 3953 (Apr. 25, 2017).

Lewis was a personal injury case where the plaintiffs' car was hit from behind by defendant Clarke, a Mohegan Tribal Gaming Authority employee who was transporting Mohegan Sun Casino patrons home. The plaintiffs sued Clarke in his individual capacity in Connecticut state court. Clarke moved to dismiss for lack of subject- matter jurisdiction, arguing that because he was an employee of the Gaming Authority — an arm of the Mohegan Tribe — and was acting within the scope of his employment at the time of the crash, he was entitled to sovereign immunity. He also argued the immunity applied because the Gaming Authority was bound by tribal law to indemnify him.

Clark lost at the trial court but ultimately prevailed at the Supreme Court of Connecticut, which held that tribal sovereign immunity barred the suit because Clarke was acting within the scope of his employment when the accident occurred. To hold otherwise, the court reasoned, would "eviscerate" the protections of tribal immunity because plaintiffs could plead around the immunity by not naming the tribe as a defendant even though the tribe was going to be paying any damages awarded.

The U.S. Supreme Court granted certiorari. In a decision that will have potentially far-reaching ramifications, the high court held that the plaintiffs' suit against Clarke could proceed in state court even though he was acting in the course and scope of his employment with the tribe and the tribe was required to indemnify him. Justice Sonia Sotomayor wrote for the majority.

The first part of the court's holding — that acting within the course and scope of employment of a tribe does not automatically provide immunity to the individual actor — is a significant erosion of tribal immunity. While the court discusses the issue as if it is fairly self-evident and hardly controversial, it is potentially a big change in the law.

The court reasoned that since sovereign immunity does not generally apply to acts of individual tribal members, a tribal employee being sued in his or her individual capacity is the real party in interest, not the tribe. The court contrasted this to cases where the tribal member is being sued in an official capacity, in which case the tribe is the proper defendant. In this way, the court aligned tribal immunity with the general analysis of claims against government employees or officials under 28 U.S.C. Section 1983.

The distinction between official capacity and individual capacity suits in tribal cases is, by itself, not new. Even before *Lewis*, courts distinguished between tribal employees sued in their official capacity and those sued in their individual capacity.

What is new is the high court's narrowing of what acting in an "official capacity" means. Previously, courts have read that to include tribal employees who are simply acting in the course and scope of their employment and at the direction of the tribe. For example, in *Great W. Casinos, Inc. v. Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407, 1422 (1999), the 2nd District Court of Appeal extended sovereign immunity to individual tribal employees solely based on allegations that they were employed by and acting on behalf of the tribe.

The *Lewis* majority was not done, though. It also rejected Clarke's argument that he was entitled to immunity because tribal law required the tribe to indemnify him for actions taken in the course and scope of his employment. The court concluded that indemnity agreements and other similar provisions cannot extend sovereign immunity to people not otherwise entitled to claim it because agreeing to provide indemnity is a voluntary act on behalf of the sovereign.

Again, the majority couches this holding as if it is the only reasonable conclusion under the circumstances — which it may be — without also acknowledging it will work a significant change in the law. Consider that the 9th U.S. Circuit Court of Appeals currently uses a "remedy-based" analysis to determine the reach of immunity to individual tribal members, meaning the court looks to whether the damages sought will impact the tribe itself. *See Maxwell v. Cty. of San Diego*, 708 F.3d 1075 (9th Cir. 2013). So, in Maxwell, the court used that analysis to deny sovereign immunity to tribal paramedics sued in their individual capacity because "[a]ny damages will come from their own pockets, not the tribal treasury."

Lewis casts serious doubt on the continuing validity of the "remedy-based" analysis used in *Maxwell*. Under *Lewis*, it doesn't matter if the tribe is ultimately liable, what matters is whether the tribal members were acting in their official capacity as members of the tribe.

Justices Thomas and Ginsburg concurred in the judgment, agreeing with the result but reiterating their stance that tribal sovereign immunity should not apply to off-reservation commercial activities in general. The newest member of the court, Justice Neil Gorsuch, did not participate in the decision, so his views on tribal sovereign immunity remain unclear for now.

In any event, *Lewis v. Clark* is an important decision and could expose tribes to new liability in state and federal courts.

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