
NAIHC
Lewis v. Clarke: An Update on Sovereign Immunity
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Lewis v. Clarke
(2017) ___ U.S. ___, 137 S.Ct. 1285, 197 L.Ed.2d 631

- **HELD**: In a suit brought against a tribal employee in his individual capacity for a tort committed in the scope of employment, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated.
- **HELD**: An indemnification provision codified under tribal law cannot, as a matter of law, extend the tribe's sovereign immunity to individual employees who would otherwise not fall under its protective cloak.

Facts of the Case

- Brian and Michelle Lewis were driving on a Connecticut interstate when they were struck from behind by a vehicle driven by William Clarke.
- William Clarke was an employee of the Mohegan Sun Tribal Gaming Authority who was transporting Mohegan Sun Casino patrons in a limousine owned and insured by the Gaming Authority.

What the Majority Said

- Clarke was sued in his personal or individual capacity, as opposed to official, capacity.
- Suits against government officers for actions taken under the color of state law are not barred by the state's sovereign immunity. (*citing Hafer* and *Bivens)*
- "There is no reason to depart from these general principles in the context of tribal sovereign immunity. It is apparent that these general principles foreclose Clarke's sovereign immunity defense in this case."

What the Majority Said

- The "tribal employee was operating the vehicle within the scope of his employment, but on state lands, and the judgment will not operate against the tribe" (because the State courts have no jurisdiction over the Tribe per *Kiowa* and *Bay Mills*).
- "This is not a suit against Clarke in his official capacity. 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."
- "The protection offered by tribal sovereign immunity here is no broader than the protection offered by state or federal sovereign immunity."

What the Majority Said

- "The critical inquiry is who may be legally bound by the court's adverse judgment, not who will ultimately pick up the tab."
- "[I]ndemnification is not a certainty here. Clarke will not be indemnified by the Gaming Authority should it determine that he engaged in 'wanton, reckless, or malicious' activity.'" Indemnification provisions are a voluntary choice on the part of the state.
- The court then reviews decisions that hold civil rights claims against state employees in their individual capacity do not implicate or alter a state's immunity under the Eleventh Amendment.

What the Opinion Did Not Do

- Despite the arguments in the concurrences, the Court did not revisit the question of Tribal sovereign immunity off-reservation
- Thus both the *Kiowa* and *Bay Mills* holdings are left intact.
- The Court also did not address the question of "qualified" or "official immunity."

A sampling of subsequent cases that cite *Lewis v. Clarke*

- In 2019, *Lewis v. Clarke* has been cited in 33 federal cases, and at least one state case
- The cases cover a variety of scenarios involving Tribal immunity.
- 8 involve the immunity of tribal officials in some form
  - *Stanko v. Oglala Sioux Tribe (8th Cir.)*
  - *Gingras v. Think Finance (2nd Cir.)*
  - *J.W. Gaming v. James (9th Cir.)*
  - *Cain v. Salish Kootenai College (D. Mt.)*
  - *Bell v. City of Lacey (W.D. Wa.)*
  - *Solomon v. American Web Loan (E.D. Va.)*
  - *Williams v. Big Picture Loans (E.D. Va.)*
  - *Mc Fadden v. Williams (E.D. Va.)*

Kulic v. Landsdowne Pub, Superior Ct. of CT, unpub. (November 14, 2019)

- Plaintiff was struck and injured by a drunk driver who was allegedly overserved by a pub located at Mohegan Sun Casino and operated under Tribal permit.
- Defendants are the non-Indian backers and operators of the pub and identify themselves as “Mohegan tribal entities” and argue that no claim, including individual capacity, can be brought for conduct that allegedly occurred in Mohegan Tribal territory.
- Neither the Tribe, nor any of its officials or employees are named as Defendants to this action nor do Defendants argue that “the underlying activity directly affects the Tribe’s political integrity, economic security, health or welfare.”

Kulic v. Landsdowne Pub, Superior Ct. of CT, unpub. (November 14, 2019)

- HELD: Claims do not fall under the Mohegan Torts Code or the jurisdiction of the Mohegan Gaming Disputes Court.
- In reaching its opinion, the Court applies a mixture of State and Federal law post-*Lewis,* emphasizing *"the Connecticut courts exercise no jurisdiction over the Tribe or Gaming Authority, and their judgments will not bind the Tribe…" (SCOTUS)*

HELD: In applying *Lewis* to the present case, the court finds that the real parties in interest are Landsdowne, Lyons, and Lyons Group, *not* the Mohegan Tribe. Accordingly, this court finds that tribal sovereign immunity is not implicated here, and the Superior Court has subject matter jurisdiction…"

Stanko v. Oglala Sioux Tribe, 916 F.3d 694 (8th Cir. 2019)

- Plaintiff makes claims under common law and 42 U.S.C 1983 against Tribe and Tribal officers in their individual capacities alleging civil rights violations including imprisonment on an illegal warrant, assault, theft, and that he was placed in solitary confinement in Tribal jail because he was a non-Indian

- "[T]he question is whether the 'sustainability doctrine' reflected in *Bivens* should be extended to permit a non-Indian to bring a damage action in federal court for violation of [Plaintiff's] constitutional rights by tribal officers acting under color of tribal law, when non-Indian citizens have a right to bring that action against officials acting elsewhere under color of state or federal law."

Stanko v. Oglala Sioux Tribe (cont.)

HELD: Affirmed trial court's dismissal without prejudice of individual capacity claims against tribal officers for failure to exhaust an available tribal court remedy.

HELD: Although the federal court has jurisdiction here, "tribal court resolution of a tribal law claim under the Indian Civil Rights Act might well moot or otherwise affect [Plaintiff's] assertion of a direct federal claim for violation of his federal constitutional rights."
Opines that Tribes should be treated like States under the "*Pullman* abstention" allowing [Tribal] courts to resolve "'difficult and unsettled questions' of [Tribal] law…before a substantial federal constitutional question can be decided." *citing* SCOTUS.

- *c.f.* payday lending decisions

Cain v. Salish Kootenai College, CV-12-181-M-BMM, (D.Mt. April 16, 2019 – Amended Order)

- Plaintiffs are relators in a *qui tam* action* filed in 2012 alleging that members of the Tribal College Board falsified reports on federal grants and also committed illegal retaliatory acts against Plaintiffs.
- Ruling on motion to dismiss claims against individual tribal official Defendants for failure to state a claim under the False Claims Act (FCA) and for lack of subject matter jurisdiction under FRCP 12(b).

*In a *qui tam* action, a private party called a *relator* brings an action on the government's behalf. ... For example, the federal False Claims Act authorizes *qui tam* actions against parties who have defrauded the federal government.

Cain v. Salish Kootenai College (cont.)

HELD: "this Court cannot ignore the fact that fraud equals fraud, regardless of one's position and duties in any governmental capacity…a tribal governmental employee sued in his or her personal capacity…may be subject to liability for knowingly submitting false information to the United States for purposes of FCA liability. It is of no consideration that Defendant[s] made the alleged fraudulent decision 'because of' their official tribal duties."

HELD: Plaintiff's claims against Tribal College and federal retaliation claims against individual tribal official D's are dismissed -- however, claims against individual tribal official D's under FCA and State defamation and blacklisting laws may proceed. Federal court has supplemental jurisdiction under 28 USC 1331 to hear State law claims arising under "common nucleus of operative facts" with FCA claims.

- Case ends with Stipulation and Dismissal 8/19/19

Gingras v. Think Finance, Inc. 922 F.3d 112 (2nd Cir. 2019)

- "Tribal lending entity" making online loans with up to 376% interest, with non-tribal partners. Sued in federal court in Vermont.
- "Official capacity" suit against officers of lending entity.
- Loan agreements included an arbitration clause applying tribal law exclusively, with only appeal to tribal court. Disclaimed the application of state and federal consumer protection laws.

Gingras v. Think Finance, Inc. (cont.)

Court found sovereign immunity did not shield the lending operation from suit, reasoning :

- "*Ex Parte Young*" legal fiction allowing claims against state and federal officers for prospective / injunctive relief applies to Tribes too. (Relying on *Bay Mills* case).
- Off-rez conduct
- Arbitration clause "unenforceable" and "unconscionable" because "cleverly designed" to avoid "state and federal consumer protection laws." Lending operation was a "scheme."

Gingras v. Think Finance, Inc. (cont.)

Other observations:

- 2nd Circuit expressed a dark view of tribal court, referencing corruption, crimes, and instances where tribal court judges had been "intimidated."
- *Ex Parte Young* legal fiction was seen as broad enough to include RICO claims (federal civil racketeering law providing for attorneys fees).
- Loan agreement "forced" borrowers "to disclaim the application of federal and state law."
- Use of tribal sovereign immunity as a "sword" (not a shield) was frowned upon.

Gingras v. Think Finance, Inc. (cont.)

Gingras take-aways:

"official capacity suit"
+ "prospective injunctive relief"
+ "off-rez conduct"
+ "violation of state or federal law"

= No sovereign immunity defense.

❖There is a clear trend coming out of online high-interest lending cases . . .

Solomon v. American Web Loan, 375 F.Supp.3d 638 (E.D.Va. 2019) (Opinion and Order I, March 26, 2019)

- "Complicated lending scheme…." created by an individual who kept "lion's share" of profit and attempted to "use the sovereign immunity" of a tribe to evade lawsuits.
- Class action of borrowers filed suit in federal court.
- "Individual capacity" claims for money damages allowed (citing *Lewis v. Clark*) (allowing for RICO claims too).
- Arbitration clause held to be "unconscionable" because "intentional avoidance" of state and federal law, and Tribal Court venue created a "conflict of interest."

Solomon v. American Web Loan (Cont.)

Observations:

- Tribe got into online lending when casino revenue dropped.
- Court scrutinized the "purpose" of the lending enterprise. Where enterprise "operates to enrich primarily persons outside the tribe or only a handful of tribal leaders," sovereign immunity erodes . . .
- Court frowns upon Tribe "providing its immunity to shelter outsiders from the consequences of their otherwise illegal actions."
- Tribe indemnified non-Indian promoters

JW Gaming v. James, et al.
778 Fed.Appx. 545 (9th Cir. October 2, 2019)

- JW thought it was making a "matching" investment in Pomo Nation's casino project.
- No match was provided.
- JW sues tribal leaders and others alleging fraud, RICO, etc. Defendants include four tribal entities, eleven tribal officials/members named in their individual capacity.
- District Court held that Tribal officials/members not entitled to sovereign immunity defense because sued in "individual capacity" (citing *Lewis v. Clarke*) and because Tribe not "real party in interest."

JW Gaming v. James, et al. (cont.)

- Tribal officials appealed to Ninth Circuit, which upheld District Court.
  - Court says it applies a "***remedy-focused analysis***," under which the Tribe is "not the real party in interest with respect to such claims."
  - "JW Gaming seeks to recover only monetary damages on such claims."
  - "If JW Gaming prevails on its claims against the tribal defendants, only they personally—and not the Tribe—will be bound by the judgment. Any relief ordered on the claims alleged against the tribal defendants will not, as a matter of law, 'expend itself on the public treasury or domain,' will not "interfere with the [Tribe's] public administration," and will not "restrain the [Tribe] from acting, or ... compel it to act." *Id.* (internal quotation marks omitted). "

Bell v. City of Lacey (W.D. Wa.) 2019 WL 2578582 (W.D. Wa. June 24, 2019)

- Kevin Bell is a non-Indian who was arrested and charged with a crime by the City of Lacey.
- He was incarcerated in a detention facility owned and operated by the Nisqually Tribe, on reservation land.
- The City pays the Tribe for beds to incarcerate inmates.
- Bell suffered a stroke while in the Tribal facility.
- Sued the City, the Tribe, and two Tribal officials (the CEO and CFO), naming the officials in their "individual" capacity.
- Claims involved negligence, negligent infliction of emotional distress, false imprisonment, deliberate indifference to medical needs, and conspiracy to deprive him on constitutional rights.

Bell v. City of Lacey (cont.)

- Tribal Defendants moved to dismiss and the motion was granted.
- Tribe, CEO, and CFO all protected by Tribal sovereign immunity.
- Bell argued that CEO and CFO could be sued because he named them in their individual capacity, citing *Lewis v. Clarke*.
- Court rejected the *Lewis v. Clarke* "individual capacity" argument.

Bell v. City of Lacey (cont.)

- "Courts 'may not simply rely on the characterization of the parties in the complaint' [quoting *Lewis v. Clarke*] when assessing whether a claim is actually against an officer in their official capacity."
- "Here, Bell's claims against Simmons and Tiam stem from policy-level decisions made as representatives of the Tribe and administrative conduct undertaken as officers of the Tribe."
- "None of Simmons and Tiam's actions were directed at Bell personally."

Bell v. City of Lacey (cont.)

- Focus was not on who would bear the actual cost (i.e., not a "remedy-focused analysis"), but rather on the functions the individual defendant officers carried out within the Tribal institutional framework.
  - "Policy-level conduct"
  - "Administrative conduct"
  - None of the actions were aimed at the defendant personally.
- Provides a roadmap for protecting, to some extent, Tribal administrative officials from individual liability.
- But will it survive 9th Circuit ***remedy-focused analysis*** on appeal?

Bell v. City of Lacey (cont.)

One side note:

- Bell also made a claim for declaratory and injunctive relief against CEO and CFO under *Ex parte Young* theory.
- No financial liability under such a theory, but it is a means of getting around sovereign immunity.
- Issue had not been briefed; therefore court reserved judgment on this question for future briefing.
- Subsequently dismissed the *Ex parte Young* claims as well. *Bell v. Simmons*, (W.D. WA, July 29, 2019)
- Based on a functional analysis, as did main decision.

Williams v. Big Picture Loans, and McFadden v. Williams (E.D. Va.)

- *2019 WL 542300, 2019 WL 542304* (Feb. 11, 2019)
- These two cases are corollary to *Williams v. Big Picture Loans* (a payday lending case we discussed last year)
- *Big Picture Loans*: Lac Vieux Desert Band of Lake Superior Chippewa Indians casino operation diversifies into online lending business, which involves non-Indian partners/co-venturers.
- Borrowers in Virginia sue, alleging high-interest loans (+/- 650%) are illegal.
- **HELD**: None of Defendants are sheltered by Tribe's immunity.

Williams v. Big Picture Loans, and McFadden v. Williams (cont.)

- These two decisions involve a convoluted discovery dispute in the *Big Picture Loans* litigation.
- Two former officials of the companies being sued (tribal entities), received a notice of deposition.
- Each filed a motion to quash – mainly focused on standard "burdensome discovery" arguments, which the court generally rejected while imposing some limits.
- But each also asserted sovereign immunity to the subpoenas because the information about which he is being asked to testify was related to his employment by a tribal entity at the time.

Williams v. Big Picture Loans, and McFadden v. Williams (cont.)

- Each argued that he should not have to testify because he shares the same immunity as the Tribe and thus cannot be deposed by third-party subpoenas.
- "The Court finds this argument unpersuasive…. Liang/McFadden has failed to provide a single case in which a court has held that an officer of a tribal entity is protected by his employer's sovereign immunity from being questioned about his employment before working for the tribal entity. Nor has the Court found any case that so holds."
- "Further, although the Supreme Court has acknowledged that tribal immunity may cover tribal employees and officials acting within the scope of their employment so that they cannot be sued, [citation omitted] the Supreme Court has also held that tribal employees may be sued in their individual capacity for torts committed by the individual employee." [Citing *Lewis v. Clarke*]"

Williams v. Big Picture Loans, and McFadden v. Williams (cont.)

- "If they can be sued in their individual capacity, surely they can be subpoenaed for depositions as individuals."
- ***This broad statement cuts a large swath through sovereign immunity case law***.
- Does not even apply remedy-focused analysis, much less a functional analysis.
- The information that these two individuals would testify about would be specific to the work they did as officials of the Tribal corporate entity.
- It would be information that the Tribal corporate entity has an interest in, not the individuals.

Legislative Solutions?-Subpoena issue

- Consider legislation that clearly and expressly defines information developed and events observed during the course of employment/service as the property of the tribe.
- Provide consideration in some form to employees/officers for maintaining the confidentiality of such information.
- Require express approval of Tribal governing body for release of such information/observations.

Executive Privilege. Members of the Tribal Council have executive privilege in civil proceedings and civil discovery processes that relate to actions taken within the official responsibilities of the Tribal Council. This executive privilege allows Tribal Council members in their discretion to decline to respond to subpoenas, orders and discovery requests arising from the types of proceedings described above.

Legislative Solutions?
Federal/State Tort Claims Act approach

- Provides for limited waiver of governmental immunity
- Caps on liability based on dollar amounts, following certain notice procedures, etc.
- But provides access to relief for a plaintiff where the tribe may ultimately have a role.
- Many tribes have adopted similar tort claims acts.
- These could be the vehicle for addressing the *Lewis v. Clarke* problem.
- Condition use of the waiver in the tort claims act on not utilizing any other approach to obtain relief, including individual capacity suits.

Legislative Solutions?-Tribal Code Indemnification (1 of 2)

The Tribal Entity shall indemnify any and all persons who may serve or who have served at any time as directors or officers, or who, at the request of the Tribal Entity, may serve or at any time have served as director or officer of another entity in which the Tribal Entity owns shares of the capital stock or of which the Tribal Entity is or may be a creditor, and their respective heirs and personal representatives against any and all costs and expenses which may be imposed upon or incurred by him in connection with or resulting from any claim, action, suit , or proceeding in which such person may be involved by reason of his being or having been a director or officer of the Tribal Entity, or such other entity described herein.

Legislative Solutions?-Tribal Code Indemnification (2 of 2)

This indemnification shall be effective whether or not such person continues to be a director or officer of the Tribal Entity, or of such other entity, at the time such costs and expenses are imposed or incurred. As used herein, the term "costs and expenses" shall include, but shall not be limited to, legal counsel and fees, and any amount of judgments against paid in settlement (before or after suit is commenced), actually and necessarily incurred by any such director or officer, other than amounts paid to the Tribal Entity. Provided, however, that no such director or officer shall be indemnified in any action, suit, or proceeding in which he is adjudged liable for his own negligence or misconduct in performance of his duty to the Tribal Entity.

Legislative Solutions?
Tribal Code Legislative Immunity (1 of 2)

The meetings of the Tribal Council are the deliberations of a governing body of the Tribe. Presentation of information and other comments made during such meetings by Tribal Council members, General Council members, and other employees and officers of the Tribe are an integral and necessary part of those legislative deliberations. Therefore, presentation of information and other comments made during such meetings by Tribal Council members, General Council members, and other employees and officers of the Tribe are hereby deemed to be made as part of the deliberations of that governing body.

Legislative Solutions?
Tribal Code Legislative Immunity (2 of 2)

It is the intent of the Tribal Council that the persons presenting such information or making such statements shall be protected by the doctrine of legislative immunity, in order to allow the Tribal Council, General Council members, and those there to assist them to do their work without fear that a hostile executive or judicial branch, or a constituent, is going to make a particular individual defend their work in court. Provided, however, that no such Tribal Council member, General Council member, employee or other officer shall be entitled to the protections of legislative sovereign immunity where he or she is alleged to be liable for misconduct in performance of his duty to the Tribe.

Summary Thoughts: Moving Forward

The core language repeatedly cited by most of the courts is: "The critical inquiry is who may be legally bound by the court's adverse judgment, not who will ultimately pick up the tab."

- But there are various ways to determine "who may be legally bound by the court's adverse judgment," and that appears to be still settling out.
- One approach that courts are using is to rely on the same kind of analysis used when determining whether a tribal subsidiary corporation is protected by the Tribe's immunity.
- Yet there are several versions of the "subsidiary entity" analysis.

Summary Thoughts: Moving Forward

In addressing immunity of employees and officers, tribes may want to consider these lines of cases and how to structure codes/policies to help with sovereign immunity protection.

- ✓ Indemnify employees and officials
- ✓ Define their roles as officials/employees expansively (while carving out those things that would not be included: e.g., defamation, harassment, etc.)
- ✓ Express tribe's intent to have immunity apply
- ✓ Articulate how policies underlying immunity apply to protect such officials/employees

Thank You. Questions?

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