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U.S. Supreme Court to Consider Tribal Sovereign Immunity Issue Related to Individual Tribal Employees

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The U.S. Supreme Court recently granted certiorari in *Lewis v. Clarke*, (No. 15-1500) addressing the issue of whether the sovereign immunity of an Indian Tribe bars individual-damages actions against tribal employees for torts committed within the employees' scope of employment.

In *Lewis v. Clarke*, Respondent William Clarke, a limousine driver and employee of the Mohegan Tribal Gaming Authority ("MTGA"), struck another vehicle while working for MTGA and driving Mohegan Sun Casino customers to their home. Petitioners were in the other vehicle and sustained injuries in the accident. Petitioners brought a suit against both the Respondent Clarke and the MTGA in Connecticut Superior Court. Days later, the Petitioners voluntarily dismissed their claims against the MTGA, leaving the Respondent as the sole defendant. In other words, the Petitioners sued the Respondent in his individual capacity, not in his official capacity as an employee of the MTGA.

The Respondent moved to dismiss on the ground of tribal sovereign immunity. The Petitioners claimed that he was not entitled to the protection of tribal sovereign immunity because they were seeking relief from the Respondent personally, in his individual capacity, not from his tribal employer. The trial court agreed with the Petitioners and denied the motion to dismiss, reasoning that the negligence claims against an individual were not barred by tribal sovereign immunity. Respondent Clarke appealed the decision to the Connecticut Supreme Court.

The Connecticut Supreme Court reversed the trial court's decision, holding that the doctrine of tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their employment. Specifically, writing for the Connecticut Supreme Court majority, Justice Dennis G. Eveleigh observed, "It is well established that

‘[t]he doctrine of tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority.’”

On November 14, 2016, Petitioners filed their brief on the merits, arguing that based on Supreme Court precedent, tribal sovereign immunity does not bar a damages suit against individually-named tribal employees for tortious conduct, even if the suit arises from on-the-job conduct. Citing Supreme Court cases involving federal and state governmental employees, Petitioners argue that the sovereign immunity of the United States does not bar individual-capacity damages lawsuits against federal employees and that state sovereign immunity does not bar individual-capacity damages actions against state employees. It follows, Petitioners claim, that tribal sovereign immunity is no different: “The policies underlying immunity do not support expanding tribal sovereign immunity to bar individual-capacity damages actions against tribal employees: doing so is not necessary to protect the sovereign dignity of Indian tribes or to protect the tribal fisc, nor is it needed to protect tribal autonomy and self-government.”

The U.S. Supreme Court’s last substantive consideration regarding tribal sovereign immunity was *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014). In that case, the court considered whether Bay Mills Indian Community was immune from the State of Michigan’s suit to enjoin the Community’s operation of class III gaming activities off its reservation on land owned by the Tribe. The Supreme Court held (by a narrow 5 to 4 vote) that Michigan could not sue the Bay Mills Indian Community because neither the tribe, nor Congress, waived its sovereignty.

In 2016, the Supreme Court deadlocked on a challenge to tribal court jurisdiction in another case involving alleged tortious conduct by a tribal member against a store manager on tribal land.

Both of these recent Supreme Court cases involved on-reservation conduct. Notably, in *Bay Mills*, Justice Kagan observed:

We have never, for example, specifically addressed (nor, so far as we are aware, has Congress) whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct.

In *Lewis v. Clarke*, the Justices will now consider that precise issue.

Oral arguments in *Lewis v. Clarke* have not been scheduled but could take place in early 2017. Given the voting-breakdown in the previous Supreme Court cases involving tribal immunity and the current makeup of the Court following Justice Scalia’s death, there remains the potential for another impasse vote.