THE CONTINUING ATTACK ON TRIBAL SOVEREIGN IMMUNITY AT THE SUPREME COURT

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Immunity of tribal officers and employees from suit in state and federal court for tort liability should concern tribal governments engaged in gaming operations. Often, because of historical antecedents and general belief, the existence of that immunity is taken for granted. Since the federal common-law created tribal immunity, the United States Supreme Court controls its scope and application, until altered by Congress.[1] The Court has long recognized that penultimate Congressional authority and receded from directly limiting that immunity. *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756 (1998). Nevertheless, the Supreme Court continues to grant certiorari sought by those challenging sovereign immunity and has recently limited that immunity's availability for tribal employees.

The question of whether sovereign immunity extends to tribal employees for tort claims arising from off-reservation, commercial conduct was recently decided by the U.S. Supreme Court. *Lewis v. Clarke*, 15-1500 (Slip Op. April 25, 2017). The case warrants comment for several reasons. Initially, the case is the Court's first consideration of tribal sovereign immunity's extent in the tort context. Additionally, the case comes on the heels of *Bay Mills Indian Community* which, based on the doctrine of *stare decisis*, continued the Court's common-law protection of tribal sovereign immunity. Further, *Lewis* directly impacts the unchangeable fact that virtually all tribes are required to engage in activity beyond their reservations or other trust property. Finally, and perhaps most significantly for long-term jurisprudential development, although the case suggests that the Supreme Court views tribes as sovereigns similar to the United States and claims to treat them as such, the tribal sovereign's treasury is now practically at risk for certain tort claims.

A. SUPREME COURT DEVELOPMENT OF TRIBAL IMMUNITY

The Supreme Court has, in an unbroken line of cases culminating in *Bay Mills Indian Community*, recognized the sovereign immunity of Indian tribes. "Indian tribes are 'domestic

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"It is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity. The special brand of sovereignty the tribes retain – both its nature and its extent – rests in the hands of Congress."

Michigan v. Bay Mills Indian Community, 572 U.S. __, 134 S.Ct. 2024, 2037 (2014).

dependent nations' that exercise 'inherent sovereign authority.'" *Bay Mills Indian Community*, at 2030, quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991) (quoting *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831)). "And yet they remain 'separate sovereigns pre-existing the Constitution.'" *Bay Mills Indian Community*, at 2030, quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). "Thus, unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Bay Mills Indian Community*, at 2030, quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978). As the Court explained in *Bay Mills Indian Community*, at 2030, "[a]mong the core aspects of sovereignty that tribes possess — subject, again, to congressional action — is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.' *Santa Clara Pueblo*, 436 U.S. at 58, 98 S.Ct. 1670."[2] That immunity applies to contracts involving off-reservation, commercial activity. *Kiowa Tribe*, at 760.

Although the tribal sovereign immunity has received a less than enthusiastic recognition of its judicial origins,[3] previously has been subjected to substantial criticism in Supreme Court opinions, concurrences and dissents,[4] and has had its continued vitality assaulted by Supreme Court litigants,[5] that common-law derived immunity was nevertheless reaffirmed by the Supreme Court by a bare majority on the basis of *stare decisis* and, in that majority's view, should continue until congressionally abrogated. Specifically, *Bay Mills Indian Community* noted the Court's prior decision in *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756 (1998), recognizing sovereign immunity's application to off-reservation commercial activity. In language particularly useful for gaming tribes, *Bay Mills Indian Community*, at 2039, the Court stated:

> Having held in *Kiowa* that this issue is up to Congress, we cannot reverse ourselves because some may think its conclusion wrong. Congress of course may always change its mind—and we would readily defer to that new decision. But it is for Congress, now more than ever, to say whether to create an exception to tribal immunity for off-reservation commercial activity. As in *Kiowa*—except still more so —"we decline to revisit our case law[,] and choose" instead "to defer to Congress." *Id.*, at 760.

Accordingly, prior to *Lewis* tribal sovereign immunity continued to protect the tribe itself from suits based on off-reservation commercial activity.[6]

B. THE MOST RECENT ATTACK ON TRIBAL SOVEREIGN IMMUNITY IN THE U.S. SUPREME COURT

Against that backdrop of recently reaffirmed sovereign immunity of Indian tribes in *Bay Mills Indian Community*, the United States Supreme Court granted certiorari in *Lewis v. Clarke*, No. 15-1500. There, a tribal gaming authority employee was driving casino guests home from the authority's casino in a casino vehicle on a state highway not within a reservation or otherwise on trust land, rear-ended a vehicle and injured the casino guest passengers. The tribe, in accord with its tribal-state gaming compact, had established a tribal court in which the passengers could sue the tribe for damages, subject to limitations as to amount and a prohibition against punitive damages. The tribe, by statute, had waived its sovereign immunity against suits by any person,

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> In reversing the Connecticut Supreme Court, the U.S. Supreme Court emphasized that it was treating tribes like state and federal governments for purposes of sovereign immunity by noting that although the state supreme court had 'extended sovereign immunity for tribal employees beyond what common-law sovereign immunity principles would recognize for either state or federal employees,' the Court here was affording tribal sovereign immunity 'no broader than the protection offered by state or federal sovereign immunity.'

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wherever located, who alleges that he was injured by the tribal gaming authority or by its employees acting within the scope of their authority. Plaintiff must bring such suits in the tribe's Gaming Disputes Court, which applies Connecticut tort law, subject to minor modifications. As in the Connecticut courts, punitive damages are not available and individual employees cannot be sued for acts taken within their official duties. Plaintiffs must sue the tribal gaming authority itself, which has assumed liability for its employees' negligence. Additionally, the tribe has enacted an indemnity statute that requires it to indemnify and pay any judgment entered against the employee.

The passengers did not pursue their tribal remedies. Instead, the passengers sued the tribal gaming authority and its driver in Connecticut state court for negligence. However, no judgment in state action could be rendered against the tribe because of its sovereign immunity. The passengers then withdrew their claims against the authority and proceeded against the employee in his "individual capacity." Plaintiffs alleged that the employee was acting in the scope of his employment and was driving the vehicle with the employer's permission as its employee. The employee moved to dismiss, invoking the tribe's sovereign immunity. The trial court denied the motion.[7]

In an interlocutory appeal, the Connecticut Supreme Court unanimously reversed and directed the entry of judgment for the employee.[8] The Connecticut Supreme Court held that tribal immunity excludes individual tribal officials acting in their representable capacity and within the scope of their authority and that immunity is not eliminated by simply describing the claims as in his "individual capacity."

Challenging the application of sovereign immunity, the passengers obtained a writ of certiorari from the United States Supreme Court to address the question of whether the sovereign immunity of an Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment.

The United States was presented with the opportunity to support the tribe. It chose not to do so. The Solicitor General filed an amicus brief in support of the passengers and against application of sovereign immunity to the tribal governmental employee. Although not addressed in the question presented on certiorari, or in the passengers' opening merits brief, the United States argued that tribal employees sued in their individual-capacities are entitled under federal common-law to official immunity from liability arising out of actions involving discretionary activity. The United States requested remand to see if the driver was engaged in "discretionary activity" when he rear-ended the plaintiff's vehicle.

In his merits brief, the employee argued that because of its statutory indemnity obligation the tribe, rather than he, is the real party in interest and therefore sovereign immunity bars the claim. Invoking economic reality, he argued that since the tribe's indemnity obligation extends sovereign immunity to the indemnified tribal instrumentality acting for the tribe, immunity should also extend to a tribal official acting for the tribe. The employee argued alternatively that the common-law doctrine of official immunity bars the suit, to the same extent that federal officials enjoy official immunity, albeit pursuant to a statute which the employee asserted now embodies the common-law.

The passengers replied that sovereign immunity does not apply in the individual-capacity suit because the tribe, as sovereign, will not be bound by a judgment against the employee. Likewise, the passengers noted that no decision extends sovereign immunity to an action against a government employee simply because the government had indemnified the employee. As to the official immunity argument, the passengers claimed the argument is not within the question presented, was not expressly raised or considered below and that no source of law

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[1] *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991) (noting that since Congress has the power to limit tribal sovereign immunity, the Court is not "disposed to modify" its scope).

[2] *Bay Mills Indian Community*, at 2030, "[T]he qualified nature of Indian sovereignty modifies that principle only by placing a tribe's immunity, like its other governmental powers and attributes, in Congress's hands."

[3] *Kiowa Tribe*, supra at 756, ("Though the doctrine of tribal immunity is settled law and controls this case, we note that it developed almost by accident.")

[4] *Kiowa Tribe*, at 757, (The rationale, it must be said, can be challenged as in opposition to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities.); *Citizen Band Potawatomi Indian Tribe*, *supra* at 514, Stevens, J., concurring ("The doctrine of sovereign immunity is founded upon an anachronist fiction.") *Kiowa Tribe*, at 760, Stevens, J., dissenting ("There is no federal statute or treaty that provides petitioner, the Kiowa Tribe of Oklahoma, any immunity from the application of Oklahoma law to its off-reservation, commercial activities.") *Bay Mills Indian Community, supra* at 2045, Thomas, J., dissenting ("Such an expansion of tribal immunity is unsupported by any rationale for that doctrine, inconsistent with the limits on tribal sovereignty, and an affront to state sovereignty.")

[5] Certiorari was granted within a period of three terms to review decisions applying sovereign immunity in the dismissal of actions. See, *Lewis* and *Bay Mills Indian Community*.

supports creation of a doctrine of tribal official immunity. Further, in an argument indicating the potential illusory nature of the United States invocation of official immunity, the passengers asserted that negligent driving does not involve the discretion to which official immunity applies.

The Supreme Court, without dissent,[9] held that tribal sovereign immunity did not extend to the tribal employee for the off-reservation, commercially related conduct at issue. The Court determined that in a suit brought against a tribal employee in his individual-capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated. Slip Op. at 5-7. The Court announced that in determining whether the suit is actually an individual-capacity suit, "courts may not simply rely on the characterization of the parties in the complaint, but must determine in the first instance whether the remedy sought is truly against the sovereign." *Id.* at 5. A defendant in an official capacity action where the relief sought is nominally against the official and in fact is against the official's office and thus against the sovereign itself, may assert sovereign immunity. *Id.* at 6. But an officer in an individual capacity action may not. *Id.* Particularly, the Court observed that the case arose from a tort committed by the tribal employee on a state interstate highway to recover for the employee's personal actions. *Id.* at 7.

In reversing the Connecticut Supreme Court, the U.S. Supreme Court emphasized that it was treating tribes like state and federal governments for purposes of sovereign immunity by noting that although the state supreme court had "extended sovereign immunity for tribal employees beyond what common-law sovereign immunity principles would recognize for either state or federal employees", the Court here was affording tribal sovereign immunity "no broader than the protection offered by state or federal sovereign immunity." Slip Op. at 7-8.

The Court continued its discussion by addressing, on an issue not decided below, whether tribal indemnification statute requiring the tribe to indemnify the employee for negligently incurred damage liability in an individual action, extends sovereign immunity to individual employees who otherwise would not have it.[10] Although the Court created the impression that it was merely extending its common-law of sovereign immunity to tribes, in fact the Court did much more than a mere equality-based extension. The Court acknowledged that it was presented a question of first impression in the context of sovereign immunity of any type of government — the effect of mandatory, statutory indemnity requiring the sovereign to bear the cost of liability for the claim:

> We have never before had occasion to decide whether an indemnification clause is sufficient to extend a sovereign immunity defense to a suit against an employee in his individual capacity.
> Slip Op. at 8.

The Court was free to recognize the economic reality of such indemnity provision on the government's treasury and accordingly afford the protection of that treasury that undergirds sovereign immunity. The Court chose not to do so. Instead the Court exposed the tribe to potential financial obligation for the tort at issue by resolving the question as a matter of law by stating, "[w]e hold that an indemnification provision cannot, as a matter of law, extend sovereign immunity to individual employees who would otherwise not fall under its protective cloak." *Id.* at 9. By so holding, the Court foreclosed any factual consideration of the terms and effect of indemnity.[11] The Court noted that the Connecticut courts have no jurisdiction over the tribes or its instrumentalities and the state's judgment will have no binding effect on them. *Id.* at 9-10.

The Court rejected the employee's argument that the extension of immunity to private healthcare insurance companies in certain circumstances should apply by analogy. In the healthcare insurer context, the insurers, as fiscal intermediaries, were essentially state intermediaries.

Lastly, because the issue was not raised in the tribal court, the Supreme Court refused to address the issue of whether the employee is entitled to the personal immunity defense of official immunity, implicitly remanded the issue for determination by the state court.

C. IMPLICATIONS OF *LEWIS*

The Supreme Court's decision to review the Connecticut Supreme Court's determination that tribal sovereign immunity prohibited the passengers' negligence claim against the tribally-indemnified, tribally-employed driver should cause significant

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[6] The *Bay Mills Indian Community* Court, at 2036–2037 fn. 8, added troublesome dictum, completely unnecessary to resolve the question presented. The Court suggested that the availability of tribal sovereign immunity might depend on the knowledge of the tribe's identity by the plaintiff rather than on the sovereign's status as a domestic dependent nation that, by virtue of that status alone, possesses common-law immunity from suit traditionally enjoyed by sovereign powers:
Adhering to *stare decisis* is particularly appropriate here given that the State, as we have shown, has many alternative remedies: It has no need to sue the Tribe to right the wrong it alleges. See *supra*, at 2034–2035. We need not consider whether the situation would be different if no alternative remedies were available. 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. The argument that such cases would present a "special justification" for abandoning precedent is not before us. *Arizona v. Rumsey*, 467 U. S. 203, 212 (1984).
That dictum likely had its genesis in the dissent in *Kiowa Tribe*, *supra* at 766, where Justice Stevens criticized tribal sovereign immunity by stating:
Third, the rule is unjust. This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity; yet nothing in the court's reasoning limits the rule to lawsuits arising out of voluntary contractual relationships.

[7] *Lewis v. Clarke*, 2014 W.L. 5354956 (Conn. Superior Court September 10, 2014).

[8] *Lewis v. Clarke*, 320 Conn. 706 (2016).

[9] Justices Thomas and Ginsburg filed concurrences. Justice Gorsuch did not participate.

> **"The practical effect of the Court's decision on tribal governments, clearly predicted to the Court in the pre-decisional briefing, is another matter entirely. The Court gave no effect to the tribe's obligation to indemnify its driver employee. By doing so, the Court effectively destroyed the tribe's sovereign immunity for torts arising from off-reservation conduct involving commercial activity."**

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concern for tribal governments and their gaming operations. Initially, the Supreme Court has made its first foray into tribal sovereign immunity in the tort context. Although the five-justice majority in *Bay Mills Indian Community* echoed Justice Stevens' earlier concern about application of tribal immunity in cases of tort where the victim had no ability to negotiate or waiver, the Court had not previously addressed tort liability in an actual controversy. In *Lewis*, while recognizing the tribe's legal protection from direct liability, the Court made clear its lack of interest in implementing that protection in real economic terms. This anti-tribal result, coupled with the Court's review on certiorari twice in three terms of judgments of dismissal due to tribal sovereign immunity, does not bode well for tribes in the future. If the immunity is so well established in the federal common-law, why is the Court particularly interested in petitions for certiorari challenging it and why does the federal government, trust responsibility notwithstanding, continue to aid those challenges?

Lewis' language claims to treat tribes on a par with federal and state sovereigns as to sovereign immunity. In light of the strong reaffirmation of *Bay Mills Indian Community*, that language of equality is not surprising. As a jurisprudential matter, hopefully significant in future Supreme Court cases, the Court has recognized the equality of tribal sovereign immunity to that of federal and state governments and their instrumentalities.

However, the practical effect of the Court's decision on tribal governments, clearly predicted to the Court in the pre-decisional briefing, is another matter entirely. The Court gave no effect to the tribe's obligation to indemnify its driver employee.[12] By doing so, the Court effectively destroyed the tribe's sovereign immunity for torts arising from off-reservation conduct involving commercial activity.[13] The purpose of the sovereign immunity is to protect the sovereign's treasury. The purpose of *Lewis* is to make that treasury available to satisfy judgments in state courts for off-reservation, commercial conduct by tribal employees in potentially unlimited circumstances.

No doubt supporters of the *Lewis* erosion will likely offer two rebuttals. Initially, they will claim that the decision is geographically limited and applies only to individual-capacity torts arising outside of Indian Country. The assertion overlooks the practicality of the need of tribes to venture outside of Indian Country incidental to their governmental activity, including gaming. Focus on geography undermines the *Kiowa Tribe* guarantee of tribal immunity for off-reservation, commercial activity by focusing on the accident of geography rather than the inherent sovereignty of the tribe, which of course can only act through officers, employees and agents. Secondly, *Lewis* supporters will claim that the tribe can easily protect its treasury by not authorizing, and actually precluding, indemnity of its agents. While theoretically correct, the argument ignores economic reality and operates to diminish tribal ability to attract and retain good employees, while likely increasing tribal governmental costs by forcing tribes to purchase insurance or becoming self-insured.

Lewis, while adopting a matter of fact analysis and benign tone, is hardly inconsequential. The assault on tribal immunity has shifted from the philosophical to the practical. The ardor of those oppressing tribal self-government has been stoked. Tribal immunity from tort liability may well be the next battle.[14] Tribes should not expect support from the Supreme Court. ❄

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[10] The Court acknowledged that the legal impact of the tribe's indemnification statute on tribal sovereign immunity was not reached by the Supreme Court of Connecticut, Slip Op. at 8, n.3, and the issue was not mentioned in the question included in the grant of certiorari, the opinion inserted the issue into its statement of the reason for the grant of certiorari. Slip Op. at 1.

[11] The Court also observed, in its legal ruling rejecting any impact of the indemnification statute, that the facts have not yet established a right of the employee to indemnification. Slip Op. at 10.

[12] In minimizing the tribe's indemnity obligation, the Court noted that the obligation may not exist because that actual nature of the driver's wrongdoing is not yet known and may preclude indemnity. In light of that factual issue, perhaps the decision was premature and a remand to determine if indemnity is available would have been appropriate.

[13] Justice Sotomayor's authorship of this decision effectively exposing the tribal treasury to damage claims via indemnity of the employee is particularly interesting in light of her concurrence defending tribal sovereign immunity in *Bay Mills Indian Community*.

[14] In *Lewis*, Justices Thomas and Ginsburg each filed concurrences expressing their legal discern for sovereign immunity in the off-reservation, commercial activity context.