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Native Americans

In *Lewis v. Clarke,* the U.S. Supreme Court ruled that tribal employees won't be protected by tribal immunity from liability for torts committed at work unless the tribe is the real party in interest in the suit. But attorneys from Dentons US LLP say that the opinion doesn't necessarily foreclose employees' claims for immunity. Instead, they note that ''official immunity'' such as absolute and qualified immunity may still be available to tribal employees.

'Official Immunity' After *Lewis v. Clarke*: A Check Against Further Erosion of Tribal Sovereign Immunity?



BY IAN BARKER, SARA DUTSCHKE SETSHWAELO, AND SAM DAUGHETY

Tribal officials and employees serve Indian nations by carrying out the business of government. Many of these employees regularly put their lives on the line – from fighting fires to providing emergency and public safety services – to protect both tribal members and neighboring non-Indian communities.

The authors are attorneys in the Native American Law and Policy practice of Dentons US LLP. They were part of a Dentons team, also including Paula M. Yost, that served as counsel of record on a U.S. Supreme Court amicus brief supporting the respondent in Lewis v. Clarke, which was signed by 21 Indian tribes.

Claimants seeking to circumvent the immunity of Indian tribes have long targeted tribal employees. Judges typically rejected such tactics until recently.

But the Supreme Court's April 25th decision in *Lewis v. Clarke* opens the door to claims against tribal employees, potentially exposing these hardworking citizens to the perils of lawsuits in foreign forums for conduct in the scope of their tribal duties. The Court's opinion left open the issue of when tribal officials may avail themselves of the personal defense of ''official immunity.''

Tribal employees will now likely seek to make greater use of official immunity doctrines.

Lewis v. Clarke and the Backdrop of Tribal Sovereign Immunity

Just two terms ago, the Supreme Court once again affirmed the doctrine of tribal sovereign immunity, hold-

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ing in *Michigan v. Bay Mills Indian Community* that a tribe's immunity barred suit by a state seeking to enjoin gaming outside the tribe's Indian lands. Then the *Lewis v. Clarke* Court was faced with the question of whether a tribal employee, engaged in off-reservation conduct within the scope of his duties, was protected by his employer's sovereign immunity from an individual capacity tort suit.

An employee of the Mohegan Tribe named William Clarke was involved in a limousine accident while transporting patrons outside the Tribe's reservation. Brian and Michelle Lewis sued Clarke for negligently injuring them in the accident. The Connecticut Supreme Court eventually held Clarke was protected by the Tribe's immunity because he was acting within the scope of his tribal employment.

The Supreme Court reversed. Justice Sotomayor and five other justices opined that Clarke did not possess the Tribe's immunity. Analogizing to individual capacity suits against state and federal employees, the Court looked to whether the Mohegan Tribe or its tribal gaming agency was the ''real party in interest'' in the lawsuit against Clarke.

The Court found that the off-reservation tort suit against Clarke in his individual capacity ''will not require action by the sovereign or disturb the sovereign's property.'' The Tribe's immunity was thus ''simply not in play.''

The Court also held that the Tribe's decision to indemnify Clarke did not cloak him with the Tribe's immunity. Justice Sotomayor explained that ''the critical inquiry is who may be legally bound by the court's adverse judgment, not who will ultimately pick up the tab.''

Lewis v. Clarke Leaves Unanswered Sovereign Immunity Questions

The *Lewis* decision leaves open a number of questions related to tribal employee immunity. While the opinion repeatedly refers to the fact that the accident occurred off-reservation, it does not discuss whether immunity attaches for torts committed on-reservation.

But less than a week after its decision in *Lewis*, the Court denied cert in *Tunica-Biloxi Gaming Authority v. Zaunbrecher*, another case in which the lower court had declined to apply immunity in a suit against tribal employees for their on-reservation conduct. Additional litigation on this issue will almost certainly follow.

The Court's opinion also was silent as to whether individual immunity survives in other contexts where suit for money damages against the tribal employee threatens tribal self-governance.

Recent cases have denied sovereign immunity to medical personnel providing care to a gunshot victim, tribal law enforcement officials participating in a criminal investigation on tribal land, and tribal council members sued for millions of dollars in a dispute over a tribal lease. This trend would seem likely to continue in the wake of the Court's decision in *Lewis*; indeed, a federal court in Washington State already has cited *Lewis* in an opinion permitting a suit to proceed against tribal officials alleged to have wrongfully stripped tribal citizens of their tribal membership. Order Granting Defendant Dodge's Motion to Dismiss, *Rabang v. Kelly*.

Official Immunity: The Next Defense?

Other immunity defenses may exist for tribal officials and employees even where tribal sovereign immunity is lacking. Following *Lewis* these defenses likely will see renewed attention.

Official immunity arises from ''the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability.'' *Scheuer v. Rhodes*. Precedent supports applying official immunity principles to tribal employees. *Davis v. Littell* (holding general counsel of Indian tribe possesses ''executive privilege,'' like that possessed by federal officials); *White Mountain Apache Tribe v. Shelley* (holding general counsel and general manager of tribal entity possess ''executive immunity'').

Indeed, leading Indian law commentators have referred to sovereign immunity and official immunity interchangeably as ''tribal official immunity.'' Matthew L.M. Fletcher & Kathryn E. Fort, *Advising—and Suing—Tribal Officers: On the Scope of Tribal Official Immunity*, Michigan State University College of Law Legal Studies Research Paper Series, Research Paper No. 07-02, Feb. 20, 2009, at 2, 42-48, available at http://src.bna.com/paU.

There are many different types of official immunity, ranging from ''absolute'' to ''qualified'' immunity. Which type may ultimately apply to tribal officials will depend on the nature of the claims and the conduct at issue.

Absolute Immunity to State Tort Claims

In *Westfall v. Erwin*, the Supreme Court held in 1988 that federal employees were not immune to all state law torts arising from performance of their duties, but only those arising out of the exercise of discretionary judgment.

But Congress swiftly moved to override the decision the same year. Recognizing ''an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation,'' the Westfall Act confirmed immunity for employees acting within the scope their employment, regardless of whether the conduct was discretionary. The Westfall Act thus made claims against the United States the exclusive remedy for persons injured by discretionary or nondiscretionary acts of federal employees within the scope of their authority.

Assuming tribal officials possess common law official immunity coextensive with federal officials' immunity, Congress's correction of the common law suggests the possibility that tribal officials and employees should be accorded the same immunity.

The parties and the U.S. Solicitor General grappled with these concerns in *Lewis*. The Supreme Court effectively punted on the question, concluding that a *Westfall*-style defense was not before it on an appeal from a sovereign immunity dismissal. The issue thus remains unresolved. This means tribal employees who may lack tribal sovereign immunity in the wake of *Lewis* will have to consider invoking the personal immunity doctrine of official immunity.

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Absolute Immunity for Judicial and Prosecutorial Conduct

It is well established that certain conduct of judges and prosecutors is absolutely immune from suits for damages, regardless of whether that conduct is discretionary and regardless of the type of claim. This immunity also reaches certain conduct by administrative officials that ''shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages.'' *Butz v. Economous*.

Immunity even applies where judicial duties are performed maliciously or corruptly. Multiple courts have addressed extended judicial immunity to tribal judges. *See, e.g.*, *Penn v. United States, cert. denied*.

Like judges, prosecutors generally possess absolute immunity when acting as officers of the court (as opposed to engaging in investigative or administrative tasks). At least one tribal court has extended prosecutorial immunity to tribal prosecutors. *Sandell v. Little Traverse Bay Bands of Odawa Indians*, No. C-056-1004 (Little Traverse Trib. Ct. Sept. 21, 2006).

Absolute Immunity for Legislative Conduct

Members of Congress and state and regional legislators are generally immune from liability for their legislative activities. This immunity protects legislators not only from liability, but from the burdens of litigation, including discovery into legislative processes.

Lower federal court decisions have recognized immunity attaches to tribal legislative action, as well. *See, e.g.*, *Runs After v. United States*.

Qualified Immunity to Federal Law Claims

Outside of the activities to which absolute immunity applies, federal officials possess ''qualified'' immunity where their discretionary acts give rise to federal law claims. This immunity attaches where the official ''makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted.'' *Brosseau v. Haugen*. The inquiry focuses on whether the official had fair notice that the conduct was unlawful.

Qualified immunity bars suit unless the law at the time of the conduct clearly established that the official's conduct would violate constitutional or statutory rights. Federal courts have extended qualified immunity principles to tribal employees. *Kennerly v. United States*; *Bressi v. Ford*.

Conclusion

As plaintiffs' attorneys begin to target tribal employees in the wake of the *Lewis* decision, litigation in the months and years to come will reveal the extent to which other immunity doctrines still limit such suits.

Official immunity may yet still be available where courts reject attempts to limit *Lewis*. By arguing official immunity in tandem with arguments for narrowly construing *Lewis*, tribal employees maximize their chances of successfully defending claims challenging their government activities.