

Sovereign Immunity For Tribal Officials At Risk

Law360, New York (February 26, 2016, 11:06 AM ET) --Tribal officials have long relied on the doctrine of official sovereign immunity to shield them from liability for official acts within the scope of their authority.[1] In at least two circuit courts, the doctrine is imperiled and its future use to defend litigation has been dramatically curtailed. Recent decisions highlight the new challenges facing tribal officials defending litigation.

The Evolving Doctrine

The general rule has long been that a suit against an Indian tribe or its officials in their official capacity is a suit against the tribe and is barred by tribal sovereign immunity unless that immunity has been expressly waived.[2] The Tenth Circuit in *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, was the first to change course, holding that tribal defendants were not immunized from individual-capacity suits where money damages were sought, even where the alleged misconduct occurred in the course of defendants' official duties.[3] Soon thereafter, in *Maxwell v. County of San Diego*, the Ninth Circuit followed suit, denying sovereign immunity to tribal first responders because the plaintiffs sought money damages from defendants personally.[4] Recently, the Ninth Circuit affirmed its analysis in *Pistor v. Garcia*, in which the court denied, for a second time, sovereign immunity in an individual-capacity suit seeking monetary damages from tribal employees.[5]



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These decisions have emboldened plaintiffs to cleverly plead around tribal sovereign immunity by simply naming tribal defendants in their individual capacity and seeking monetary damages.[6] Future resolution of claims against tribal defendants will hinge on the Ninth's Circuit's mechanical "remedy-focused analysis" cemented in *Pistor*. Action taken in the course of a tribal defendant's official duties alone is no longer sufficient to invoke tribal sovereign immunity. Moreover, indemnification by the tribe will not make the remedy run against the tribe.[7]

Further guidance on the application of tribal sovereign immunity to tribal officials may be forthcoming in *Eagleman v. Rocky Boys Chippewa-Cree Tribal Business Committee or Council*[8] This case squarely addresses the immunity of elected Tribal Council members, a class of defendants still shielded from liability. The Ninth Circuit's decision, likely to be made in 2017, could have profound impacts on the viability of the doctrine.

Practical Tips for Tribal Official Defendants

1. Is the Defendant a High-Ranking Official?

Maxwell and Pistor may be distinguished on the grounds that the claims in those cases sought relief from tribal employees, not high-ranking tribal officials.[9] The relief sought in suits against high-ranking officials, monetary relief or otherwise, is more likely to run against the tribe. Assuming that the tribe is not a party to the case, a motion to dismiss claims against a tribal defendant may be coupled with a motion under Rule 19 to preclude a suit against the tribe in its absence.[10]

2. Does the Remedy Run Against the Tribe?

Some remedies are more likely to run afoul of sovereign immunity and therefore should be dismissed, including: liability based on a defendant's legislative action,[11] individual liability sought to establish vicarious liability of the tribe,[12] relief concerning voting rights in future elections,[13] relief affecting sovereign interests in land,[14] reinstatement of a plaintiff as a tribal member,[15] payment of funds from general revenues,[16] specific performance of a contract,[17] restructuring and funding of a government institution[18] and relief that "brings the operation of governmental machinery into play".[19]

3. Immunities Available to Tribal Defendants:

Tribal defendants may assert other available immunities such as absolute, legislative,[20] qualified[21] or judicial immunity. Despite the wealth of relevant state and federal case law regarding these personal immunities,[22] they have yet to be fully tested in individual-capacity suits against tribal defendants.[23]

4. Rule 12(b)(6) and Other Defenses:

Courts have dismissed individual-capacity claims and suits against tribal defendants under Rules 8 and 12(b)(6) where plaintiffs failed to plead more than conclusory allegations regarding defendants' individual actions.[24] Further, subject-matter jurisdiction may properly lie in tribal court if plaintiffs have failed to exhaust remedies available there[25] or where a dispute requires the interpretation of tribal law.

5. Review Your Client's Risk Management Policy:

Carefully review your tribal client's risk management policies to ensure that they accurately reflect the current state of the law. Director and officer liability insurance should explicitly cover individual-capacities suits for damages against tribal officials and key employees for actions taken during the course of their official duties.

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[1] Exemplary federal cases: See, e.g., *Miller v. Wright*, 705 F.3d 919, 928 (9th Cir. 2012) (extending sovereign immunity to Tribal Tax Department enforcement officer and Tribal Chairman); *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 727 (9th Cir. 2008) (extending sovereign immunity to casino employees); *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 491 (9th Cir. 2002) (affirming dismissal of suit against tribe and tribal officials in their official and individual capacity for damages); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) (extending sovereign immunity to tribal officials sued in their individual capacity); *Hardin v. White Mtn. Apache Tribe*, 779 F.2d 476, 478, 480 (9th Cir. 1985) (extending sovereign immunity to tribal officials sued in their individual capacity for declaratory and injunctive relief and for damages); *Snow v. Quinault Indian Tribe*, 709 F.2d 1319, 1322 (9th Cir. 1983) (barring suit naming tribal revenue clerk sued in her official capacity); *Kenai Oil and Gas, Inc. v. Dept. of Interior*, 522 F.Supp. 521 (9th Cir. 1981) (extending sovereign immunity to tribal officials sued in their individual capacity). Exemplary state cases: See, e.g., *Young v. Duenas*, 262 P.3d 527, 531 (Wash. Ct. App. 2011) (extending sovereign immunity to tribal police officers involved in the death of plaintiff's brother); *Chayoon v. Sherlock*, 877 A.2d 4, 9, 89 Conn.App. 821, 829 (Conn.App. 2005) (extending sovereign immunity to casino employee alleged to have violated the Family Medical Leave Act); *Suarez v. Newquist*, 855 P.2d 1200, 1203 (Wash. Ct. App. 1993) (extending sovereign immunity to tribal police officer sued in his individual capacity).

[2] See n. 1 supra.

[3] 546 F.3d 1288, 1296-1298 (10th Cir. 2008).

[4] 697 F.3d 941, 953-955 (9th Cir. 2012). But cf. *Miller*, 705 F.3d at 928; *Tonasket v. Sargent, et al.*, 510 Fed.Appx. 648 (9th Cir. 2013).

[5] 791 F.3d 1104 (9th Cir. 2015).

[6] See, e.g., *Nahno-Lopez v. Houser*, 627 F.Supp.2d 1269, 1285 (W.D.Okla. 2009) (extending sovereign immunity to officials for equitable relief that would run against the tribe, but denying sovereign immunity for individual capacity claims for damages). Such pleading tactics run contrary to well-established precedent prohibiting the evasion of tribal sovereign immunity "through a mere pleading device." See, e.g., *Maxwell*, 697 F.3d at 954 quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 48, 70-71 (1989).

[7] *Maxwell*, 697 F.3d at 955.

[8] Slip Copy, (D.Mont. 2015) (extending tribal sovereign immunity to tribal officials in suit requesting damages).

[9] See *Maxwell*, 697 at 953 (noting that "while individual capacity suits against low-ranking officers typically will not operate against the sovereign, we cannot say this will always be the case.").

[10] See, e.g., *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992).

[11] Hardin, 779 F.2d at 478, 480 (extending sovereign immunity to tribal officials involved in the exclusion of an individual from the reservation); Imperial Granite Co., 940 F.2d at 1271 (extending sovereign immunity to tribal officials who voted to deny plaintiff access to road crossing reservation and easement).

[12] Cook, 548 F.3d at 727.

[13] Fletcher v. United States, 116 F.3d 1315, 1324 (10th Cir. 1997).

[14] See Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 282 (1997).

[15] Allen v. Smith, (not reported).

[16] See Edelman v. Jordan, 415 U.S. 651, 666-668 (1974) (barring retroactive payment of wrongfully-withheld benefits where the fund to satisfy the award would have come from the state's general revenues); Papasan v. Allain, 478 U.S. 265, 278 (1986) (barring claim seeking to compel state officials to provide certain schools with trust income).

[17] Edelman, 415 U.S. at 666-667.

[18] See Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 106 (1984).

[19] See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949).

[20] See, e.g., Imbler v. Pachtman, 424 U.S. 409 (1976); Pierson v. Ray, 386 U.S. 547 (1967).

[21] See, e.g., Harlow v. Fitzgerald, 457 U.S. 800 (1982); Wood v. Strickland, 420 U.S. 308 (1975).

[22] See Kentucky v. Graham, 473 U.S. 159, 166-168 (1985) (collecting cases recognizing absolute, legislative and qualified immunity).

[23] See Kennerly v. United States, 721 F.2d 1252, 1260 (9th Cir. 1983) (affirming dismissal of suit against tribal defendants for damages on the basis of qualified immunity and finding that common law immunity of Indian tribes is coextensive with that of the United States) citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); Davis v. Littell, 398 F.2d 83, 85-86 (9th Cir. 1968) (affirming lower court's grant of absolute executive immunity to tribe's general counsel sued for defamation).

[24] Native Am. Distrib., 546 F.3d at 1296-1298; Fritcher v. Zucco, (E.D.Cal. 2012) (dismissing complaint against tribal police officer, casino and police department for failure to plead more than "the-defendant-unlawfully-harmed-me- accusation[s]"); Phillips v. Salt River Police Dept., (D.Ariz. 2013) (same).

[25] Kizis v. Morse Diesel Int'l, Inc., et al., 794 A.2d 498, 504-506 (Conn. 2002) (dismissing suit for lack of subject-matter jurisdiction where Mohegan Gaming Disputes Court was the exclusive forum for adjudication of tort claims against the tribe and its employees).