

Insights: Alerts

The Supreme Court's Decision in *Lewis v. Clarke* Potentially Opens the Door of Tort Liability for Tribal Employees

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On April 25, 2017, the Supreme Court announced its decision in *Lewis v. Clarke*, holding that tribal sovereign immunity does not bar individual-capacity damages actions against tribal employees for torts committed within the scope of their employment even where a tribe is legally obligated to indemnify the employee.

In *Lewis v. Clarke*, Petitioners Brian and Michelle Lewis (Lewis) sued William Clarke after he hit their vehicle with his limousine while transporting patrons of Mohegan Sun Casino on Interstate 95 in Connecticut. Lewis sued Clarke in his individual capacity in Connecticut state court, and Clarke moved to dismiss the case on the basis of tribal sovereign immunity. The trial court denied Clarke's motion to dismiss, but the Connecticut Supreme Court reversed. Because Clarke was acting within the scope of his employment for the Gaming Authority, which is an arm of the Tribe entitled to immunity, the Connecticut Supreme Court held that tribal sovereign immunity barred Lewis's lawsuit. That Supreme Court reasoned that "plaintiffs cannot circumvent tribal immunity by merely naming the defendant, an employee of the tribe, when the complaint concerns actions taken within the scope of his authority." *Lewis v. Clarke*, 581 U.S. ____ (2017) (Slip. Op.) at 4-5. The United States Supreme Court granted Lewis's petition to review the Connecticut Supreme Court's decision.

The United States Supreme Court's analysis focused on the singular question of whether Clarke or the Mohegan Tribe was the "real party in interest." *Id.* The Court emphasized that the answer to this question is not resolved simply by the complaint's characterization of the parties, but by determining against whom the remedy is truly sought. *Id.* at 5 (citing *Ex parte New York*, 256 U.S. 490, 500-502 (1921)). The relief sought against an individual in an official capacity suit is nominal, and in fact seeks relief from the sovereign itself. In a true individual capacity suit, however, a plaintiff seeks to impose *individual* liability directly upon the government officer for actions taken pursuant to law. *Id.*; *Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Edelman v. Jordan*, 415 U.S. 641, 663-665 (1974). In the latter suit, the real party in interest is the individual, not the sovereign, and therefore, sovereign immunity does not apply. *Id.* In *Lewis v. Clarke*, the Court found that the individual capacity suit against Clarke for a tort committed while operating a vehicle within the scope of his employment on state lands would "not operate against the Tribe" (*id.* at 7) or "disturb the sovereign's property." *Id.* (citing *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 687 (1949)). The Court held, contrary to the Connecticut Supreme Court, that there was no reason to extend the principles of sovereign immunity beyond their extent for state or

federal employees.

The Court next considered and rejected the argument that the Tribe's indemnification of Clarke under tribal law affected the immunity analysis. While conceding that the Tribe ultimately would "pick up the tab" for Clarke's defense, the Court concluded that the state court's judgment would not bind the Tribe or its instrumentalities in any way. *Id.* at 9-10. In other words, the Tribe's indemnification of Clarke would not convert the suit against him into a suit against the sovereign, and it did not purport to determine the Tribe's indemnity obligations. *Id.* at 10. Finally, the Court suggested that tribes do not automatically become a required party for joinder purposes under Federal Rule of Civil Procedure 19 simply by virtue of indemnification of the defendant.

Importantly, the Supreme Court noted in a footnote that, while sovereign immunity was not available to the tribal employee, various personal immunity defenses may be available, including official immunity. However, given that Clarke's motion to dismiss before the trial court was based solely on sovereign immunity, the availability of official immunity as a defense for Clarke was not addressed. *Id.* at 8 n. 2.

The potential practical implications of *Lewis v. Clarke* should not be understated. Tribes should work with insurance coverage counsel and their insurance companies to identify options to address this area of law that is sure to be the subject of litigation in the foreseeable future.

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