



## Employee Immunity Challenged by Court

by Richard McGee

On April 25, 2017 the United States Supreme Court ruled against tribal interests in the employee sovereign immunity decision titled *Lewis v. Clarke*. Recall that William Clarke operated a Mohegan Sun limousine wherein he allegedly crashed into Brian and Michelle Lewis causing property damage and personal injuries.

The case challenges the application of tribal sovereign immunity for the protection from a lawsuit for an employee of a tribal enterprise. The case is an appeal of a ruling by the Connecticut Supreme Court wherein court claims were dismissed against an individual employee for his on the job behavior. Clarke was employed by the Mohegan Tribal Gaming Authority (Mohegan Sun) as a limousine driver and he allegedly caused an automobile accident generating personal injuries and property loss to the Lewises. The limousine driven by Clarke was owned by the Mohegan Sun and he was using it to transport Mohegan Sun patrons to their home. The Lewises pursued Clarke as an individual and argued that since they were not asking for money from the Mohegan Sun, there is no immunity. Instead, the Lewises asked the Connecticut courts to permit a lawsuit against Clarke (the limo driver-employee) and Clarke's assets. This is the same argument in the *Maxwell* decision which prevailed in California courts. The Connecticut Supreme Court rejected the *Maxwell* argument by stating it is well established law that the doctrine of sovereign immunity extends to individuals acting in their official capacity and within the scope of their authority.

The Supreme Court disagreed with the Connecticut Courts and has returned (remanded) the case to the Connecticut Courts for further hearings. The Supreme Court decision focused on two issues:

Was William Clarke immune while operating the Mohegan Sun limousine?

Court's Answer: No.

Did the tribe's extension of financial protection (indemnification) to its employees also extend immunity to those employees?

Court's Answer: No.

### Takeaway

The immunity of tribal officials and employees still exists but will likely be interpreted more narrowly by courts in the future. When Clarke appealed, he only argued protection of the tribe's sovereign immunity but he did not argue the doctrine of official immunity. The Court refused to address the

official immunity question because it was not timely raised by Clarke.

Under official immunity a tribal official is not personally responsible (liable) for a negligent act in performing a discretionary act. On the other hand, official immunity does not protect when the tribal official or employee is performing a ministerial act. A discretionary act calls for the exercise of deliberation or judgment while a ministerial act involves the execution of a specific duty. The distinction between a discretionary and ministerial act, and under which conditions will immunity apply, generates a more complicated issue which will breed more litigation.

### Consequences

There will be more court cases where tribal officials and employees will be sued individually for duties performed on behalf of the government, gaming enterprise or other tribal entity. This case will create more enthusiasm for plaintiffs to name individual tribal officials and employees as defendants in lawsuits. It appears to already be a trend which will likely accelerate.

### Recommendations

Insurance – Remember, insurance for a covered event or incident extends protection to tribal officials and employees for the fees and costs of defending the suit and for payment of the judgment if the defense does not prevail. More specifically, directors and officers liability insurance or similar products which extends coverage to tribal council, general managers, tribal administrators and department directors. In other words, insurance for decision makers.

Indemnification – Employers should protect tribal officials and employees when they act for the tribal government or enterprise.

Training – Clear delegation of authority through the law, employee handbooks, standard operating procedures and job descriptions. Moreover, reinforcement of the delegation of authority through training, monthly and more frequent meetings, performance evaluations and more frequent reinforcement of good behavior and corrective action for challenging behavior. ♣

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