The Sovereign Immunity (or not) of Tribal Officials

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FUNDAMENTALS

* Suits against individual tribal members do not implicate tribal sovereign immunity. They may implicate controversies about state or tribal court jurisdiction, but not sovereign immunity.

* Sovereign immunity is relevant only if the suit implicates the individual's Tribe as the "real party in interest."

PARTY CHARACTERIZATION IRRELEVANT

Just because the caption of a case states that a tribal official is sued in his or her “official capacity” does not mean that the Tribe is the “real party in interest.”

ACTING WITHIN SCOPE OF OFFICIAL DUTIES IRRELEVANT

"The test for immunity is not whether the alleged wrongdoing occurred when the officer or employee acted within the scope of his or her duties, but whether the remedy is sought against the Tribe."

ALI, draft *Restatement of the Law of American Indians*, Reporters' Notes to Section 33, Council Draft (Dec., 2019).

ACTING WITHIN SCOPE OF OFFICIAL DUTIES IRRELEVANT

"By its essential nature, an individual or personal capacity suit against an officer seeks to hold the officer personally liable for the wrongful conduct taken *in the course of her official duties*. As the officer *personally* is the target of the litigation, she may not claim sovereign immunity – and that is so regardless of whether she was acting under color of tribal or state law at the time of the wrongful conduct in question." *Pistor v. Garcia,* 791 F.3d 1104, 1112 (9th Cir. 2015).

REAL PARTY IN INTEREST TEST

The Tribe is the real party in interest if the remedy sought is (A) for retroactive money damages from the Tribe, (B) would have a direct effect on the Tribe's property, or (C) would force the tribal official to act or refrain from acting in his or her office.

EX PARTE YOUNG EXCEPTION

Tribal officials are subject to suit for prospective injunctive or declaratory relief to prevent violations of federal law. *Santa Clara Pueblo v. Martinez*

LEWIS V. CLARKE

- The defendant was acting within the scope of his employment for the Mohegan Tribe of CT at the time of the accident on a CT highway.
- He was sued for money damages for negligence.
- Just because he was acting within the scope of his employment for the Tribe did not render him immune from suit.

LEWIS V. CLARKE

The Mohegan Tribe of CT was not the “real party in interest”:

- The remedy sought was not for retroactive money damages from the Tribe.
- The remedy sought would not have a direct effect on the Tribe’s property.
- The remedy sought would not force the tribal official to act or refrain from acting in his or her office.

LEWIS V. CLARKE

The Mohegan Tribe's law requiring it to indemnify Clarke did not make the Tribe the "real party in interest":

- The remedy sought was not for retroactive money damages from the Tribe.
- "The critical inquiry is who may be legally bound by the court's adverse judgment, not who will ultimately pick up the tab."

DRAFT "BLACK LETTER LAW" OF THE RESTATEMENT

SEE HANDOUT