

4th Circuit Finds Lenders Entitled to Tribal Sovereign Immunity

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A panel for the U.S. Court of Appeals for the Fourth Circuit recently found that two lending entities affiliated with the Lac Vieux Desert Band of the Lake Superior Chippewa Indians (the Tribe) are entitled to tribal sovereign immunity as “arms of the tribe”. The panel then ordered the dismissal of an underlying putative class action brought by five Virginia residents who claimed the payday loans they obtained online from the tribe-affiliated lenders violated state usury laws. The panel’s decision reverses that of the district court, which held that the affiliated lenders failed to sufficiently prove they were “arms of the tribe” and thus were subject to the court’s jurisdiction.

One of the lending entities, Big Picture, was formed by the Tribe in 2014 to consolidate the Tribe’s lending activities, and in 2015, the Tribe formed Ascension as a subsidiary to support its lending activities by providing marketing, technological, and vendor services. The appellees, Virginia residents, initiated a class action in federal court in 2015 in which they alleged that the payday loans they received from Big Picture came with interest rates fifty times higher than the legal limit in Virginia. The lending entities moved to dismiss the case for lack of subject matter jurisdiction on the basis of tribal sovereign immunity, but the district court denied their motion, asserting that the appellants’ claim of immunity was unsupported by the evidence they provided.

In reaching its conclusion, the district court applied an “arm-of-the-tribe” analysis, which is used to determine whether tribal immunity may apply when a tribe-created entity engages in commercial activity. The “arm-of-the-tribe analysis” typically involves consideration of the following factors: “(1) the method of the entities’ creation; (2) their purpose; (3) their structure, ownership, and management; (4) the tribe’s intent to share its sovereign immunity; (5) the financial relationship between the tribe and the entities; and (6) the policies underlying tribal sovereign immunity.”

Upon evaluating the lenders’ proffered evidence, the district court found that the formation of Big Picture and Ascension was to “shelter outsiders” rather than to further the policies underlying tribal sovereign immunity. Ascension was formed after the Tribe entered into a seller-financed purchase agreement with Ascension’s current president, purchasing the

company the Tribe previously contracted with for day-to-day management of its lending operations. Furthermore, the district court noted that while Big Picture is headquartered on the reservation and employs 15 tribal members, most of Ascension's employees (including its president) are non-tribal and work outside the reservation. Because Ascension's non-tribal employees handle most of the day-to-day management of the Tribe's lending activities, the district court also found the third factor weighed heavily against immunity.

On appeal, the Fourth Circuit panel reversed the district court's decision after engaging in its own arm-of-the-tribe analysis and finding that the entities *do* in fact function as arms of the tribe and are therefore entitled to sovereign tribal immunity. The Fourth Circuit panel emphasized the policies underlying tribal sovereign immunity, especially those of tribal economic development and self-governance, as well as the financial benefit the entities provide to the Tribe. The panel acknowledged that non-tribal employees handle much of the lenders' day-to-day management but chalked the arrangement up to a matter of delegation, claiming deference to the Tribe's judgment regarding its business organization furthers the goal of tribal self-governance.

Notably, in its decision, the Fourth Circuit briefly mentioned a 2014 case involving the Tribe in the Second Circuit—*Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*—in which the Second Circuit held that sovereign immunity shall *not* be recognized when tribal affiliated entities engage in off-reservation activity such as lending online to New York residents. Despite the direct conflict that case presents to the panel's holding, the panel did not discuss the case in detail nor address the conflicting result.