

Tribal Sovereign Immunity for Tribal Entity Economic Arms Defeats Payday Loan Class Action

The Lac Vieux Desert Band of the Lake Superior Chippewa Indians (“the Tribe”) formed two business entities under tribal law. Those entities were Big Picture Loans, LLC and Ascension Technologies, LLC. They were set up in order to get into the payday loan business and charged interest at rates many times the rates allowed under Virginia law. Five prospective class members filed suit against Big Picture and Ascension alleging violations of state law. The district court judge undertook a tribal sovereign immunity analysis which concluded that the Tribe and the entities it established had the burden of proof to establish they were entitled to tribal sovereign immunity. The Fourth Circuit agreed with that ruling. However, the Fourth Circuit disagreed with the legal conclusions arrived at by the district court.

The Fourth Circuit looked to several factors set forth in *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010) and modified by the Ninth Circuit in *White v. Univ. of Cal.*, 765 F.3d 1010, 1026 (9th Cir. 2014). Both the Ninth and the Fourth Circuits adopted the first five “*Breakthrough* factors,” disregarded its sixth factor, and “allow[ed] the purpose of tribal immunity to inform [its] entire analysis.” After reviewing those factors -- the method of creation, purpose, control, tribal intent and financial relationship -- the court concluded all of the factors in favor of immunity applied favorably to Big Picture and all but one favored Ascension. For those reasons, both of those economic entities were “entitled to tribal immunity as arms-of-the-tribe by a preponderance of the evidence.” The court added that it reached its conclusion

- with due consideration of the underlying policies of tribal sovereign immunity, which include tribal self-governance and tribal economic development as well as protection of ‘the tribe’s monies’ and the ‘promotion of commercial dealings between Indians and non-Indians.’ *Breakthrough*, 629 F.3d at 1187–88. The evidence here shows that the Entities have increased the Tribe’s general fund, expanded the Tribe’s commercial dealings, and subsidized a host of services for the Tribe’s members. Accordingly, the Entities have promoted ‘the Tribe’s self-determination through revenue generation and the funding of diversified economic development.’ *Breakthrough*, 629 F.3d at 1195.

The court noted that plaintiffs might have sustained injuries as a result of the commercial activities engaged in by those arms of the Tribe, but stated that was not an issue which affected a proper tribal immunity analysis. Rather, it would be for "Congress- not the court-...to abrogate tribal immunity."

This issue of tribal sovereign immunity might not come up in most of our practices. But, as tribes across this country increasingly engage in economic activities which might adversely affect others in the population, it is important for class action litigators to remember about tribal immunity which, when the *Breakthrough* factors apply, also provide tribal immunity to economic arms of the tribes.

Case citation: *Lula Williams v. Big Picture Loans, LLC*, 929 F.3d 170 (4th Cir. 2019)