Tribal Immunity- What is it?

By Mike Crow

I. Introduction

"Immunity" is most generally freedom from any legal obligation to perform actions or to suffer penalties.[1] Specifically, *tribal* immunity, or Native American Indian tribal sovereign immunity, is judicially created.[2] This doctrine provides immunity from lawsuit for Native American Indian tribes in the United States.[3] However, as a result, the Native American Indian tribal sovereign immunity doctrine has essentially, and instead, become an endless means of completely avoiding liability and lawsuits.[4]

II. The History Of Tribal Immunity- Poarch Band Of Creek Indians

The relevant history of tribal immunity is best illustrated through the history of the Poarch Band of Creek Indians, also referred to as "the Poarch Band."[5] The Poarch Band is a "federally recognized Indian tribe." However, when Congress passed the Indian Reorganization Act ("IRA") in 1934, the Poarch Band was not recognized as an Indian tribe by the United States federal government.[6] Realistically, the only existing best piece of evidence concerning the Poarch Band's tribal relations with the United States is a 1983 submission to the United States Department of the Interior in support of the Poarch Band's application for federal recognition, most prominently containing a detailed history of the Poarch Band.[7] This submission by the Poarch Band had ". . . no formal political organization . . . in the nineteenth century nor in much of the twentieth century, in the sense of an established, named leadership position or regular body such as a council."[8]

A. Poarch Band of Creek Indians Historical Background

The history of the Poarch Band was scant until the 1950s. Not only was no tribal council of any fashion established by the Poarch Band until the year 1950, but the Poarch Band did not even select a chief until that year or begin to enroll an overall tribal membership.[9] Even more significantly, it was not until two entire decades later – in the 1970s – that the Poarch Band's tribal council slowly began to be recognized as a legitimate governing organization after lacking a community legitimacy as a governing body since the tribal council's creation in the 1950s.[10] Around the same time, the Poarch Band began to seek out ways to distinguish themselves to the United States Department of the Interior in order to receive federal recognition – namely in response to rivals for tribal legitimacy arising in and around the southeast regions of Florida, Alabama, and Mississippi.[11]

More specifically, the Poarch Band noted to the United States Department of the Interior that the tribe was a "separate and distinct entity" from the other Creek Indians, albeit the lack of any tribal membership criteria until 1979.[12] Additionally in the history submitted to the United States Department of the Interior, the Poarch Band made effort to note the tribe's relation to the "friendly Creeks" who were "friendly" with and ultimately sided with the United States in the Creek War of 1813-1814, as opposed to the "hostile Creeks" who fought the United States during the war.[13]

After persistent debate on the specific entity status of the Poarch Band, the United States Department of the Interior finally granted the Poarch Band's application for federal recognition on June 4, 1984.[14] Only one year after finally achieving their federal recognition, the Poarch Band opened its first casino in Escambia County, Alabama. The casino was originally known as the "Creek Bingo Palace," but has

since expanded to additionally become a hotel, currently known as “Wind Creek Casino and Hotel.”

Administratively, the United States Department of the Interior’s authority to accept the land into the trust for the Poarch Band comes from Section 465 of the Indian Reorganization Act of 1934, which authorizes the Secretary of the Interior to acquire land “for the purpose of providing land for Indians.”[15]

Significantly, the United States Supreme Court recently construed and interpreted provisions of the Indian Reorganization Act of 1934 to mean that the United States Department of the Interior is only empowered to take land into trust for Indian tribes that were “under federal jurisdiction *at the time of the statute’s enactment*” in 1934, reversing the United States First Circuit Court of Appeals’ opinion holding that the United States Department of the Interior was entitled to take land into trust for any tribe under present federal jurisdiction.[16],[17]

As a result of the United States Supreme Court’s ruling interpreting the Indian Reorganization Act of 1934, as applied to the Poarch Band, the United States Department of the Interior is only permitted, and empowered, for that matter, to take land into trust for the Poarch Band if the Poarch Band was “under federal jurisdiction” in 1934.[18] In the Wilkes case we argued that since the United States federal government had no relationship with the Poarch Band as an entity in 1934, but rather only had dealings with the Poarch Band’s individual members, the Poarch Band was not “under federal jurisdiction” in 1934, an argument that strips away the United States Department of the Interior’s aforementioned powers. More specifically, argues substantively that:

- the tribal defendants are not immune because the courts increasingly disfavor tribal immunity;
- the tribal defendants were not properly recognized by the federal government and do not enjoy tribal immunity because federal law grants tribes any immunity they possess and the legislature has plenary power over tribes;
- the United States Supreme Court itself altered the entire landscape of tribal immunity in *Carcieri v. Salazar* in interpreting the scope of the United States Department of the Interior very strictly in terms of tribal powers; and
- the United States Department of the Interior itself acted beyond its own scope of authority when the Department recognized the Poarch Band as a tribe, going against the "presently acknowledging" language of federal law[19], which is not outweighed by federal regulations in this area

III. Subsequent Opinions Resulting in Settled Alabama (Tribal) Immunity Law

Two cases most prominently reflect the subsequent opinions resulting in settled Alabama immunity law out of the Alabama Supreme Court. These two cases consist of *Wilkes, et. al v. Wind Creek, et. al.* and *Harrison v. Creek Entertainment Center, et. al.*[20] Both of these opinions out of the Alabama Supreme Court are *per curiam*.

A. Wilkes, et. al. v. Wind Creek, et. al., Supreme Court of Alabama

In *Wilkes, et. al. v. Wind Creek, et. al.*, on appeal to the Supreme Court of Alabama from the Circuit Court of Elmore County, Alabama, both Casey Wilkes and Alexander Russell appealed the grant of summary judgment favoring PCI Gaming Authority[21] on claims of both negligence and wantonness.[22] Both Wilkes and Russell asserted these two claims seeking compensation for injuries received as a result of an automobile – driven by Wilkes – collision with a pickup truck that

belonged to Wind Creek-Wetumpka – driven by Barbie Spraggins, an employee at Wind Creek-Wetumpka.[23]

In the "interest of justice", the Supreme Court of Alabama declined to extend and utilize the tribal sovereign immunity doctrine here.[24] The Supreme Court of Alabama refused to utilize the tribal sovereign immunity doctrine here because doing so would have gone beyond the circumstances in which the Supreme Court of the United States itself has applied the doctrine.

In the absence of any foundational statute or treaty, it has accordingly been left to the Supreme Court of the United States to define the limits of tribal sovereign immunity in situations where tribal and non-tribal members interact, although that Court has repeatedly expressed its willingness to defer to Congress should Congress act in this arena. See, e.g., *Bay Mills*, 572 U.S. at 783, 134 S.Ct. at 2037 In *Kiowa*, the Court extended the tribal-sovereign-immunity doctrine to shield tribes from lawsuits asserting contract claims based on commercial activities conducted outside tribal land. We take particular notice of the Court's comment that tribal sovereign immunity hurts most those who "have no choice in the matter" and the Court's limitation of its holding in ***Kiowa*** to "suits on contract." *Id.*

In *Bay Mills*, the Supreme Court further recognized this limitation, explaining in a footnote that it had never "specifically addressed (nor, so far as we are aware, has Congress) whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct."

In light of the fact that the Supreme Court of the United States has expressly acknowledged that it has never applied tribal sovereign immunity in a situation such as this, we decline to extend the doctrine beyond the circumstances to which that Court itself has applied it; accordingly, we hold that the doctrine of tribal sovereign immunity affords the tribal defendants no protection from the claims asserted by Wilkes and Russell. They had no opportunity to negotiate with the tribal defendants for a waiver of immunity. Wilkes and Russell did not voluntarily choose to engage in a transaction with the tribal defendants; rather, they were merely traveling on the public roads of this State when they were injured in an automobile accident involving—and, by all accounts, caused by—a Wind Creek–Wetumpka employee driving a Wind Creek–Wetumpka vehicle.

Thus, to the extent the *Bay Mills* Court buttressed its decision affording tribal sovereign immunity to tribes with regard to claims stemming from a tribe's commercial activities by reasoning that plaintiffs could "bargain for a waiver of immunity" beforehand, 572 U.S. at 796, 134 S.Ct. at 2035, that rationale has no application to the tort claims asserted by Wilkes and Russell. Moreover, for the reasons explained by Justice Thomas in his dissent in *Bay Mills*, we likewise conclude that none of the other rationales offered by the majority in *Bay Mills* as support for continuing to apply the doctrine of tribal sovereign immunity to tribes' off-reservation commercial activities sufficiently outweigh the interests of justice so as to merit extending that doctrine to shield tribes from tort claims asserted by individuals who have no personal or commercial relationship to the tribe.[25]

B. Harrison v. Creek Entertainment Center, et. al., Supreme Court of Alabama

In *Harrison v. Creek Entertainment Center, et. al.*, on appeal to the Supreme Court of Alabama from the Circuit Court of Escambia County, Alabama, Benjamin

Harrison was injured early on March 1, 2013 as a passenger in an automobile accident resulting from a high-speed police chase on a portion of a county roadway that intersects with land held by the Poarch Band of Creek Indians in Escambia County, Alabama.[26] Roil Hadley was the driver of the vehicle in which Harrison was a passenger, and Hadley had consumed alcohol while a consumer at Wind Creek Casino on the evening of February 28, 2013 into the morning hours of March 1, 2013.[27]

As mother and next friend of passenger Harrison, Amanda Harrison sued both two individuals and the tribal defendants alleging responsibility for wantonly or negligently serving alcohol to Hadley despite the clear visibility of Hadley's intoxication.[28] Amanda Harrison also asserted, among other claims, that the tribal defendants violated Alabama's Dram Shop Act.[29] Subsequently, the defendants, however, moved to dismiss on grounds of immunity under the tribal sovereign immunity doctrine, also claiming that the lower court lacked subject matter jurisdiction because of the existence of the Tribal Court's exclusive jurisdiction over the asserted claims.[30]

Once again, the Supreme Court of Alabama, on appeal, declined to extend and utilize the tribal sovereign immunity doctrine to actions in tort, resulting in no opportunity for the plaintiff to bargain for a waiver, nor having any other avenue for relief.[31]

Naturally, the Supreme Court of Alabama, on appeal, concluded that the judgment entered by the lower court was due to be reversed, and the case was subsequently remanded for the lower court to solve a related adjudicative[32] issue addressing the

tribal defendants' claims of the case arising on Indian land, albeit Harrison's injuries having taken place on an Escambia County roadway.[33]

The Supreme Court of Alabama also directed the lower court to consider whether this adjudicative issue is affected by the fact that the tortious conduct, although merely alleged, of the tribal defendants leads to violations of Alabama's Dram Shop Act.[34] These alleged violations would therefore constitute both statutory and regulatory scheme violations on part of the tribal defendants if true.[35]

These statutory and regulatory scheme violations involving Alabama's Dram Shop Act and the sale of alcohol in Alabama are schemes to which Congress itself has specifically declared the Tribe to be subject to and involved in, weighing on the side of Harrison here.

The Tribe in the Wilkes case filed a Petition for Writ of Certiorari to the U.S. Supreme Court, which was subsequently denied.

IV. Conclusion

Based on the foregoing timeline of case law regarding the evolution of the tribal sovereign immunity doctrine, the consistent involvement with the "tribal defendants" and various lower courts in the state of Alabama eventually play a larger role in the state's highest court.

The Alabama Supreme Court, at least most recently and prominently in 2017, is faced with reckoning with the Supreme Court of the United States' precedent on the tribal sovereign immunity doctrine to aid and control in these decisions. The tribes are plainly affecting plaintiffs by continuing to assert a defense that although numerously fails them, has the potential to create enough of a controversy in the

future so as to warp the status of that defense. The courts, and plaintiffs' counsel in particular, thus have an incentive to closely watch this doctrine evolve in order to continue to protect plaintiff's rights in personal injury law.

If you need more information, contact Mike Crow, a lawyer in our Personal Injury & Products Liability Section, at 800-898-2034 or by email at Mike.Crow@beaselyallen.com.

Sources: westlaw.com, law.cornell.edu and lawdigitalcommons.bc.edu

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[1] *Immunity*, Cornell Law School, Legal Information Institute (July 1, 2020, 10:00 AM), https://www.law.cornell.edu/wex/immunity.
[2] Hunter Malasky, *Tribal Sovereign Immunity and the Need for Congressional Action*, 59 Boston College L. Rev. 7, (July 1, 2020, 10:25 AM), https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3703&context=bclr#:~:text=Abstract%3ANative%20American%20Indian%20tribal,tribes%20in%20the%20United%20States.&text=As%20a%20result%2C%20tribal%20sovereign,of%20avoiding%20lawsuits%20and%20liability.
[3] *Id.*
[4] *Id.*
[5] *Wilkes et. al. v. Wind Creek Casino & Hotel et. al*, 29-CV-2015-900057.00. This case arises out of the Circuit Court of Elmore County, Alabama, and most relevant is the Response to the Defendant's Motion for Summary Judgment Pursuant to Rule 56 of Alabama Rules of Civil Procedure.
[6] *See* Letter from Secretary of Interior John Collier to Chairman, Committee on Indian Affairs, Elmer Thomas, Mar. 18, 1937, List of Indian Tribes Under the Indian Reorganization Act.
[7] *See* Recommendation and Summary of Evidence for Proposed Finding for Federal Acknowledgment of the Poarch Band of Creeks of Alabama, Dec. 29, 1983.
[8] *Id.* at 43.
[9] *See* Recommendation and Summary of Evidence for Proposed Finding for Federal Acknowledgment of the Poarch Band of Creeks of Alabama, Dec. 29, 1983 at 48-49.
[10] *See Id.* at 51.
[11] *See Id.* at 50.
[12] *See Id.* at 51, 63.
[13] *See Id.* at 51. The Creek War brought about the Treaty of Fort Jackson, which contained a provision that would allow land grants to individual Creeks who sided with the United States during the Creek War of 1813-1814. The Treaty of Fort Jackson allowed ancestors of the Poarch Band to acquire land grants near Tensaw, Alabama.
[14] *See Final Determination for Federal Acknowledgment of the Poarch Band of Creeks*, 49 Fed. Reg. 24083 (June 4, 1984).
[15] *See* 25 U.S.C. § 465; *See also* Letter of Intent from Thomas Tureen to Morris Thompson, May 15, 1975.

[16] *See Carcieri v. Salazar*, 129 S. Ct. 1058, 1061 (2009); 25 U.S.C. §§ 465, 479.
[17] While the *Carcieri* opinion only applied to one of the three definitions in §479, *Poarch Band of Creek Indians v Hildreth*, 656 Fed App 934, 11th Cir. (Ala); *Confederate Tribes of Grand Ronde Community of Oregon v. Jewell*, 850 F. 3rd 552 D.C. Cir. (2016); *Cherokee Nation v Jewell*, 2017WL 2352011, U.S. E.D. OK, all held the phrase "now under Federal jurisdiction" in the Indian Reorganization Act (IRA) definition of "Indian" referred to an Indian tribe that was under federal jurisdiction at the time of the IRA's enactment. (See §465)
[18] *Id*.
[19] 25 C.F.R. § 83.1 (2008).
[20] 287 So3d 330; 251 So3d 24.
[21] PCI Gaming Authority d/b/a Wind Creek Casino and Hotel Wetumpka ("Wind Creek-Wetumpka"), and the Poarch Band of Creek Indians are all known collectively as "the tribal defendants."
[22] *Wilkes, et. al. v. Wind Creek, et. al.*, CV-15-900057 (2017).
[23] *Id*.
[24] *Id*.
[25] *Wilkes v Wind Creek 287 So3d 334, 335*
[26] *Harrison v. Creek Entertainment Center, et. al.*, 251 So. 3d 24(Ala 2017)
[27] *Id.*
[28] *Id*.
[29] *Id*.
[30] *Id*.
[31] *Id*.
[32]This adjudicative issue was a "direct" subject matter jurisdiction issue, more specifically.
[33] *Harrison*, CV-13-900081 (2017).
[34] *Id.*
[35] *Id*.