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No Good Deed Goes Unpunished: Personal Liability Exposure for Tribal Officials in the Wake of *Maxwell v. County of San Diego*

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From firefighting in California, to clearing mudslides in Washington State, tribal governments routinely respond when calamity strikes: both on and off the reservation. Unfortunately, the Ninth Circuit Court of Appeals' recent decision in *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013), creates personal liability exposure for the tribal officials carrying out these good deeds. The Supreme Court's suggested "special justification" for allowing off-reservation tort victims to sue tribal governments in *Michigan v. Bay Mills Indian Community*, 572 U.S. ___ (2014), only complicates matters. This article provides a brief background of the Ninth Circuit's prior holdings concerning the extension of tribal sovereign immunity to tribal employees, a summary of the *Maxwell* decision, a discussion of the potential implications of the decision, and an overview of precautionary measures to limit *Maxwell* personal liability exposure.

I. Background

Prior to *Maxwell*, the Ninth Circuit determined that "tribal immunity protects tribal employees acting in their official capacity and within the scope of their authority." *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008). To that end, "a plaintiff cannot circumvent tribal immunity 'by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity.'" *Id*. (*citing Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983)).

In *Cook*, the plaintiff sued for damages suffered as a result of a motor vehicle accident. *Id*. at 720. The plaintiff was hit by a drunk driver while on a motorcycle. *Id*. The driver was an employee of AVI Casino Enterprises, Inc. ("AVI Casino"), a corporation organized under the laws of the Fort Mojave Indian Tribe and wholly owned and controlled by the Fort Mojave Indian Tribe. *Id*. The driver became intoxicated at AVI Casino, after another employee served her alcoholic beverages while she was visibly intoxicated. *Id*. at 720-21. The plaintiff sued the AVI Casino, and several of its employees, alleging negligence and dramshop liability. *Id* at 720. The U.S. District Court dismissed the suit, and the Ninth Circuit affirmed, holding that both the tribal corporation and its employees were immune from suit.

Similarly, in *Hardin v. White, Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir. 1985), the plaintiffs filed suit against various tribal entities and tribal officials, in their individual capacities. *Id*. at 478. The court held that, regardless of the form of the plaintiffs pleading, the individual defendants were immune because they were "acting within the scope of their delegated authority." *Id*. at 479-80.

In contrast, *Maxwell* put forth a self-styled "remedy focused analysis" that turns on precisely what the court in *Cook* cautioned against: determining liability based on the "the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity.'" *Cook, 548* F.3d at 727 (*citing Snow*, 709 F.2d at 1322).

II. The Opinion

Maxwell involved the aftermath of the shooting of Kristin Maxwell-Bruce by her husband. *Id*. at 1079. In response to the shooting, an ambulance of paramedics from the Viejas Band of Kumeyaay Indians Tribal Fire Department responded. *Id*. at 946. The San Diego County Sherriff's Department also responded. *Id*. at 945. Though delayed by the Sherriff's Department, the Viejas ambulance took Mrs. Maxwell-Bruce to an air ambulance landing zone. Unfortunately, Ms. Maxwell-Bruce died en route. *Id*. at 946.

The woman's family sued, alleging that officers and paramedics delayed medical treatment for the victim, resulting in the victim's death. The family brought two sets of claims, one alleging constitutional violations by officers of the San Diego County Sherriff's Department ("Sheriff's officers"), the other seeking tort damages against the Viejas Fire Department and its paramedics ("Viejas defendants"). *Id*. at 1081. The Sheriff's officers' moved for summary judgment in the District Court, on the basis of qualified immunity. The Viejas defendants moved to dismiss for a lack of subject matter jurisdiction, based on tribal sovereign immunity. *Id*. The District Court denied the motion for summary judgment, but granted the motion to dismiss. *Id*.

The Ninth Circuit affirmed the denial of summary judgment on the claims against the Sheriff's officers, finding that they did not have qualified immunity based on the danger creation exception. *Id*. at 1082. The court found that the Sheriff's officers affirmatively increased the danger the victim was in when they prevented her ambulance from leaving. *Id*.

Yet as to tribal sovereign immunity, the court employed a "remedy-focused analysis." Under this analysis, sovereign immunity does not bar suit against tribal employees so long as the plaintiff names the employees in their individual capacity and seeks damages from them personally. *Id*. at 1088-89. The court determined that because the plaintiffs sought only money damages from the tribal employees personally, the tribe was not a "real, substantial party in interest." *Id*. at 1088. The court concluded that sovereign immunity only applies where "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting, or to compel it to act." *Id*.

The *Maxwell* court attempted to differentiate the precedential cases discussed above. The court stated that in *Cook*, the only reason the court looked at the "scope of authority" to determine if sovereign immunity applied was because the tribe was a "real, substantial party in interest." *Id*. at 1088. The court also discussed *Hardin*, stating that while the decision did not mention the "remedy sought" principle, the principle was not required because (1) the plaintiff did not identify which officials were being sued or the

exact nature of the claims and (2) the suit concerned tribal council member legislative functions that "would therefore have attacked 'the very core of tribal sovereignty.'" *Id*. at 1089 (quoting *Baugus v. Brunson*, 890 F.Supp. 908, 911 (E.D. Cal. 1995)). The court found that its previous cases "do not question the general rule that individual officers are liable when sued in their individual capacities." *Id*.

The court refused to award additional protections to tribal officers, "see[ing] no reason to give tribal officers broader sovereign immunity protections than state or federal officers given that tribal sovereign immunity is coextensive with other common law immunity principles." *Id*.

In short, the *Maxwell* court held that sovereign immunity does not bar tort claims against tribal employees acting within the scope of their authority, so long as the plaintiff names employees in their individual capacities and seeks damages from them personally. There will certainly be new litigation that tests the limits of the "remedy sought" principle.

III. Implications

Maxwell leaves a host of unsettling issues in its wake. At its worse, *Maxwell* creates personal liability exposure for tribal responders who aid the public outside of the reservation. In Washington, courts have already limited the ability of tribal responders to perform their duties outside of the reservation. *State v. Eriksen (Eriksen III)*, 172 Wash. 2d 506, 259 P.3d 1079 (2011) (holding that stop-and-detain rule does not extend to tribal police officers detaining non-Indians outside of an Indian reservation). If that were not bad enough, the Supreme Court's very recent *Bay Mills* decision contains language suggesting a possible "special justification" to limit sovereign immunity for an off-reservation tort victim with no other recourse. The federal courts seemingly fail to appreciate the chilling effect these decisions have on tribal responders who are called to aid the public around or beyond Indian reservation boundaries.

Additionally, although the case concerned off-reservation conduct of tribal emergency responders, the court did not limit its holding to that fact pattern, leaving open the possibility of individual capacity lawsuits for on-reservation acts. Because the court did not limit its holding, sovereign immunity may not be effective against individual capacity suits for on-reservation conduct. Accordingly, tribes should consider enacting statutory immunities to shield tribal officials from personal capacity suits.

Congress and most state legislatures have enacted fairly comprehensive immunities for their officials, against individual capacity suits. However, many tribal, governments do not have the same degree of statutory protection established for their officials. In order to provide tribal officials with the same protections, tribes should consider, for example, passing legislation expressing that tribal officials and responders, who act within the course and scope of their duties, even off-reservation, enjoy sovereign immunity and cannot be sued in tort without the consent of the tribe.

In addition, tribes might consider legislating tort claim ordinances that in part allow off-reservation tort claimants to in limited ways seek liability insurance proceeds. *See Townsend v. Muckleshoot*, 137 Wn. App. 1002 (Wash. Ct. App. 2007) ("As a matter of policy, the Tribe has determined not to assert its immunity to bar resolution of personal injury or property damage claims that are covered by and are within the coverage limits of its liability insurance."). Similar to the Federal Tort Claims Act, *supra*, tribal tort claims ordinances should pre-empt any individual claims against tribal officials.

Still, a court may not give these legislative immunities or conditional waivers effect beyond the bounds of the reservation. The *Maxwell* decision stated that a "unilateral decision to insure a government officer against liability does not make the officer immune from that liability." *Maxwell*, 697 F.3d at 955. But for as long as the immunity protection afforded for off-reservation conduct in *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760 (1998), holds, it is certainly worth having such tribal legislation on the books. *See* Greg Wong, *Intent Matters: Assessing Sovereign Immunity for Tribal Entities*, 82 Wash. L. Rev. 205 (2007).

The intersection of the Federal Tort Claims Act ("FTCA") and the Indian Self-Determination and Education Assistance Act ("ISDEAA") also provides a measure of relief. The FTCA allows parties that have been injured by the negligence of tribal employees carrying out contracts and agreements pursuant to the ISDEAA to file a claim against the federal government. 25 U.S.C. § 450f (note). Essentially, FTCA coverage is given to tribal employees where the tribal employee is performing a federal function. FTCA cover is not automatic. In order to be covered by the FTCA, a tribal employee must be acting within the scope of his or her employment and within the scope of a tribe's contract or agreement with the U.S. government. *Id*. FTCA coverage can decrease *Maxwell* liability because FTCA claims displace or pre-empt any other related claims a plaintiff may file. 28 U.S.C. § 2676, 2679. Therefore, if FTCA coverage applies, a party may sue the U.S. government but then may not sue a tribal employee personally. *Id*.

However, tribal immunities and FTCA coverage cannot cover all of the liabilities created by *Maxwell*. In order to address the remaining areas of risk, tribes should consider taking out ironclad liability insurance policies for all tribal officials. Beware when negotiating coverage: among other things, standard tribal insurance policies exclude coverage for tort claims that are eligible for FTCA defense, even if the U.S. does not accept those claims for defense. Such exclusion language must be addressed through insurance contract negotiation to avoid a gap in coverage for tribal officials.

Overall, there are more legal and practical questions, than answers, after *Maxwell*. Until the new rule provided in *Maxwell* is applied, tribes should take steps to ensure that the good efforts of tribal responders are not rewarded with lawsuits.

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