Wisconsin Tribal Judges Association

January 19, 2017

Legal Update

Attorney Paul Stenzel

Lewis v. Clarke – Oral argument was January 9 before U.S. Supreme Court.

Issues:

- Sovereign immunity; *Nevada v. Hall*
- Official immunity = "official capacity" this is position of U.S.
- Off reservation location of accident
- State bargaining with tribes over jurisdiction in compact negotiations
- Perhaps headed back to Connecticut Supreme Court
- Connecticut Supreme Court case: 320 Conn. 706, 2016 WL 878893

Pending for cert: *Kelsey v. Bailey*

Decided at 6th Circuit in favor of tribal court jurisdiction over a criminal conviction of tribal member for off-reservation conduct.

"This consensual agreement between a tribe and its members provides the core principle underpinning and justifying a membership-based jurisdiction that is not rigidly tied to geographic qualifications." 809 F.3d at 856.

Meyers v. Oneida Tribe of Indians of Wisconsin

The Fair and Accurate Credit Transaction Act (FACTA) prohibits merchants from printing more than the last 5 digits of the credit or debit card number.

Meyer sued the Oneida Tribe when two stores owned by Oneida printed receipts which included more than 5 numbers of his credit card.

Tribal sovereign immunity not waived even though the statute includes “any … government.”

Meyer has appealed to U.S. Supreme Court.

Dollar General Corporation v. Mississippi Band of Choctaw

On June 26, 2016, the U.S. Supreme Court voted 4-4 which meant the ruling below was affirmed.

Fifth Circuit opinion: 746 F.3d 167

It's troubling that 4 justices voted to reverse or at least not affirm.

Very aggressive argument by Dollar General to deny tribal court jurisdiction.

U.S. v. Bryant, the question was whether uncounseled tribal court convictions could be used as predicate offenses under 18 USC 117 which required two previous convictions for domestic violence.

Court ruled unanimously that tribal court convictions, even those without counsel, could count as predicate offenses. Decided June 13, 2016.

Really interesting part of the decision was Justice Thomas' concurrence.

Two assumptions about Indian law for which Thomas sees no sound constitutional basis:

1. that Tribes' retained sovereignty entitles them to prosecute tribal members in proceedings that are not subject to the U.S. Constitution.

2. that Congress can punish assaults that tribal members commit against each other on Indian lands. (*Kagama*)

Tension between these two assumptions.

On the one hand, the only reason why tribal courts had the power to convict Bryant in proceedings where he had no right to counsel is that such prosecutions are a function of a tribe's core sovereignty.

On the other hand . . . . . .

the validity of Bryant's ensuing federal conviction rests upon a contrary view of tribal sovereignty. …… Congress could make Bryant's domestic assaults a federal crime subject to federal prosecution only because our precedents have endowed Congress with an "all encompassing" power over all aspects of tribal sovereignty.

Thus, even though tribal prosecutions of tribal members are purportedly the apex of tribal sovereignty, Congress can second-guess how tribes prosecute domestic abuse perpetrated by Indians against other Indians on Indian land by virtue of its “plenary power” over Indian tribes.

I continue to doubt whether either view of tribal sovereignty is correct.

Tribes are all different

Tribes are treated as possessing “an identical quantum” of sovereignty.

Congress’ plenary power rests “on even shakier foundations.” Talks about *Kagama*.

Shopbell v. State of Washington DFW, TUL-CV-GC-2016-0278, Tulalip Tribal Court, 12-21-16.

State of Washington (Dept. of Fish and Wildlife) applied for and received search warrant in Tulalip Tribal Court.

Executed warrant and confiscated several items.

Allegedly not all returned.

Target of warrant sued in Tribal Court.

State of Washington raised sovereign immunity.

Three forms of relief sought:

1. Injunctive
2. Return of seized property
3. Declaratory

Court said only #2 could go forward; other two forms of relief barred by state's sovereign immunity.

In re the Estate of Charles Colombe, 2016 S.D. 62

Issues:

- Custom and tradition
- Comity

BACKGROUND: Charles Colombe was a Rosebud Sioux Tribal member; had a gaming management contract with the Tribe; disputes arose; significant litigation arose in RST Court and federal court.

The Tribe obtained a tribal court judgment against Colombe for $527,000 in 2007.

Colombe passed away on June 9, 2013; filed a petition for informal probate in South Dakota state court.

Tribe filed a claim in probate case based on $527K judgment

Colombe's son, Wesley contested the claim. Litigation ensued in probate court.

SD Supreme Court examined the tribal court litigation in determining whether to extend comity to the judgment.

Pro tem judge – "special judge" – not explicitly in code or constitution, but done for 20 years; considered custom

Alvarez v. Lopez, Ninth Cir., 835, F.3d 1024, Aug. 30, 2016

Alvarez brought habeas action on the grounds that he was not informed he was required to request a jury trial, only that he had a right to a jury trial.

Represented himself at a bench trial and was convicted in Gila River Tribal Court and sentenced to 5 years in prison.

Defendant's rights form said: "You have the right to a jury trial."

Alvarez's interests outweighed the interests of the Tribe.

"We hold that the Community denied Alvarez his right under ICRA to be tried by a jury."

Was in the news due to federal judge calling the Gila River Court System a "rat's nest" of problems.

Bodi v. Shingle Springs Band of Miwok Indians, 832 F.3d 1011, Ninth Circuit, August 8, 2016

Member of the Tribe brought action against the Tribe in state court claiming she was wrongfully terminated from employment in violation of the FMLA.

The Tribe removed to federal court.

HELD: Removal by the Tribe did not constitute a waiver of sovereign immunity.

O'Brien v. Berry, 2016 OK CIV APP 28.

Sherrine O'Brien sought in Citizen Potawatomi Tribal Court a protective order against her boy friend, Chris Berry.

The Tribal Court denied a temporary emergency order and set the matter for a full evidentiary hearing.

O'Brien dismissed her petition and re-filed in Oklahoma State Court.

The state district court granted O'Brien's request for an injunction.

Berry argued that the tribal court proceeding barred the state court ruling due to the doctrine of issue preclusion.

OK Appellate court disagreed with boyfriend (Berry):

- Tribal Court had not ruled fully on merits
- Not clear whether and to what extent the Tribe's law and state's law were similar
- O'Brien voluntarily dismissed tribal court claim before full adjudication could occur.

Villarreal v. Villarreal, No. 04-15-00551-CV, Court of Appeals of Texas, August 3, 2016.

Wife filed for divorce in Texas state court; took no further action and the case was not dismissed.

Six months later, wife filed for divorce in San Carlos Apache Tribal Court. The Tribal Court entered a default judgment when husband did not answer the petition or appear.

State Trial Court ruled (wrongly) that ICWA precluded it from going further.

On appeal, decision notes that under the UCCJEA:

- Texas was the home state of the children
- Once Wife filed in Texas court, no other court had jurisdiction to enter order with respect to the children.

What are the implications for *Teague* protocols and *Teague* cases?

In Re: Bartolo Montoya, Debtor, 547 B.R. 439 (3/14/16).

Debtor filed chapter 7 bankruptcy

Owns and operates smoke shop on Isleta Pueblo.

Isleta Tax Administration filed tax enforcement action against debtor in Tribal Court seeking $366,875.

After the bankruptcy had been filed (and automatic stay in place) tribal court entered lien against debtor

Bankruptcy court ruled that tribal court order was void even though the Tribe had essentially respected the bankruptcy court proceeding.

Debtor could not collect any damages as the tribal court recognized the bankruptcy action and no steps on collection were taken.

Other cases of note:

Upstate Citizens Equality Inc. v. United States, 16 WL 6608942, 2nd Circuit Appellate court upheld the U.S. taking 13,000 acres of land into trust for the Oneida Nation of New York .

Williams v. Poarch Band of Creek Indians, 893 F.3d 1312 (11th Cir.); Federal appellate court upheld ruling that tribe was not subject to suit for alleged violation of the Age Discrimination in Employment Act.

CWA Update

- Litigation: Challenges to ICWA
- *A.D. et al. v. Washburn et al.*, Phoenix federal district court; motions to dismiss pending.
- 2:15-cv-01259-NVW is case number; can follow on PACER

- This case is a direct challenge to validity of ICWA.

- Motions to dismiss still pending.

Several other ICWA challenges in other states.

In Minnesota, *Doe et al. v. Piper et al.*, 0:15-cv-02639-JRT-SER.

Still at early stages – Plaintiffs survived motion to dismiss; some defendants dismissed.

25 CFR 23 went into effect on December 12, 2016

Summary:

- No EIF exception
- Clarifies steps in conducting a thorough inquiry at the beginning of child-custody proceedings as to whether the child is an “Indian child.”
- More specifics on emergency proceedings
- Notice
- Transfer requirements
- QEW interpretation

Summary (cont'd)

- Placement preferences – provides presumptive standards for good cause to depart from preferences and prohibits courts from considering certain factors as basis for departure
- Voluntary proceedings
- Information, recordkeeping and other rights

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