



Native Groups Say Lender Ruling Cramps Tribal Businesses

By [Andrew Westney](#)

Law360 (January 25, 2019, 9:27 PM EST) -- Three national Native American groups urged the Fourth Circuit on Thursday to overturn a Virginia district court's refusal to toss a proposed class action against two lending companies, saying the ruling that they weren't entitled to share in a Michigan tribe's immunity to suit intrudes on tribal sovereignty and hamstrings tribal economic development.

The Virginia judge [in July](#) denied a bid by Big Picture Loans LLC and Ascension Technologies to end a suit alleging that they sought to use their connection with the [Lac Vieux Desert Band](#) of Lake Superior Chippewa Indians as a shield from accusations that they charged illegally high interest rates on loans. The judge ruled that the companies had not met their burden of proof to show that they were "arms of the tribe" that would be entitled to tribal immunity to the suit under a six-factor test established by the Tenth Circuit.

The [National Congress of American Indians](#), the [National Indian Gaming Association](#) and the National Center for American Indian Enterprise Development backed the companies' appeal of that decision in an amicus brief Thursday, saying the lower court used an analysis from a California state court decision and mistakenly expanded the Tenth Circuit test to improperly limit the companies' immunity and how tribes are able to organize their businesses.

"This court should confirm that, in the absence of congressional action to the contrary, the lower court must give deference to the tribe's sovereign determinations and actions to structure tribal enterprises consistent with tribal law, and the tribe's intent to create an arm of the tribe that shares in the tribe's sovereign immunity," according to the brief.

Luna Williams and four other plaintiffs claimed in their June 2017 complaint that the companies had sought to use the Lac Vieux Desert Band's sovereign immunity to suit to insulate themselves from legal liability for charging loans to the plaintiffs and others with interest rates higher than 600 percent, which the suit says far exceeded the legal limit under Virginia usury law.

Big Picture Loans purported to be owned by the Lac Vieux Desert Band, but the tribe did not control Big Picture, and an outside company called Bellicose Capital LLC "funded the loans, controlled the underwriting and handled the day-to-day operations of the business" in an alleged "rent-a-tribe" scheme, the complaint alleged.

Senior U.S. District Judge Robert E. Payne ruled in July that the two companies, while they are

tribe-owned and organized under tribal law, had not shown they were fulfilling their stated purpose of supporting the tribe's goal of economic self-sufficiency, as the restructuring of the companies was "for the real purpose of helping [Bellicose founder Matt] Martorello and Bellicose to avoid liability, rather than to help the tribe start a business."

Judge Payne said he applied the six-factor framework from the Tenth Circuit's 2010 opinion in *Breakthrough Management Group v. Chukchansi Gold Casino & Resort* "to decide if the relationship between tribes and entities is close enough to justify immunity" as an arm of the tribe.

While the weighing of those factors "must permit a finding of immunity," in the current case "that balance actually falls the other way," and neither Big Picture nor Ascension qualifies as an arm of the tribe, the judge said.

The tribe showed it intended to share its sovereign immunity with the companies, which normally supports the argument that they are arms of the tribe, but "the intent factor must be assessed in perspective of the context in which Big Picture and Ascension were created," since "the record shows that those entities were intended to be vehicles that would shield Martorello and Bellicose from liability," the judge said.

"On this record, the intent factor weighs against a finding of immunity because to do otherwise is to ignore the driving force for the tribe's intent to share its immunity," the judge said. "Here, the tribe's intent no doubt was, in part, to help the tribe, but to do so by providing its immunity to shelter outsiders from the consequences of their otherwise illegal actions."

In the companies' opening brief to the Fourth Circuit in October, they called the suit "an assault on the centuries-old federal policy of recognizing Indian tribes as sovereigns" and said that the tribal companies are facing "the potential of ruinous judgments that would destroy their ability to earn money for the tribe and its people — and stifle tribal economic development."

The plaintiffs responded in December that the appeal centers on the companies' "effort to free themselves from any legal accountability for this unlawful lending scheme" and that the circuit court should affirm the lower court's ruling that the companies were intended "to shelter outsiders from the consequences of their otherwise illegal actions."

"Extending tribal immunity on this record would offer a road map for payday lenders and others looking for ways to disregard federal and state laws: find a tribe, offer a sliver of revenue, and move the operations over on paper," the plaintiffs said.

The plaintiffs added that the lower court "correctly placed the burden on the defendants to establish an entitlement to arm-of-the-tribe sovereign immunity" and "was correct to consider the practical application of the [Breakthrough] factors as well as the formal structures created by the defendants."

In their brief Thursday, the national Native American organizations said that the core of the "arm of the tribe" analysis is whether the tribe intended to create a subordinate business with the tribe's immunity, whether the tribal government legally controls the business, and if there could be some financial impact on the tribe if its business lost its immunity.

But the lower court improperly relied on a 2016 [California Supreme Court](#) decision to expand the Breakthrough test beyond legal factors to an analysis of how the tribe operates — and upholding the judge’s “intrusive, second-guessing analysis of the tribe’s decisions, instead of a legal analysis of the factors” would “condone the lower court’s ignorance of the legal significance of the intent and action of tribes, as well as disregard tribes’ sovereign authority, both of which are contrary to federal law and federal Indian policy,” the groups said.

"The logical outcome of the lower court’s analysis is that tribal enterprises could not hire experts or experienced managers to run their business, could not lose money, could not borrow money, could not buy businesses, and are not otherwise free to contract — for if the tribal enterprise made decisions that are not, in any court’s view, good business decisions, they are not arms of the tribe," according to the brief.

Pilar M. Thomas of [Lewis Roca Rothgerber Christie LLP](#), who represents the groups on the brief, said the groups’ purpose was to educate the Fourth Circuit on the longstanding federal policy backing tribal enterprises as avenues for tribes to generate governmental revenue.

Thomas also said that analyzing the operational aspects of tribal businesses is being seen more often in recent cases as tribes create more complex business structures, but said “there’s no basis in law for that kind of looking under the hood.”

James Williams Jr., Chairman of the Lac Vieux Desert Band, said in a statement Friday that "tribal immunity has been acknowledged and reaffirmed over centuries of history through treaties, laws, executive orders, and intergovernmental agreements," and the briefs "highlight important legal arguments of our case and reinforce that the court’s decision is of significant interest to Indian country as a whole and is a major concern to every tribal business operating as an economic arm of the tribe."

In a separate amicus brief filed Friday, the Conference of Tribal Lending Commissioners, an association of tribal agencies that regulates tribal loans, said the group’s members “are concerned that the lower court’s decision will cause tribally owned businesses to operate without the professional expertise and leadership they need,” after the judge “determined that the tribe’s commercial borrowing and engagement of specialized experts for the startup of its business was a sure sign of a sham.”

“Any decision from this court that would require a tribally owned company to dismiss third-party experts and replace them with tribal-member novices is dangerous and misguided,” the group said. "Moreover, it would trap tribes into engaging only in businesses that tribes could fully staff with available tribal-member personnel."

Representatives for the plaintiffs and the companies did not immediately respond to request for comment Friday.

The plaintiffs are represented by Andrew J. Guzzo, Casey S. Nash and Kristi Cahoon Kelly of Kelly & Crandall PLC.

The companies are represented by William H. Hurd, David Neal Anthony and Timothy J. St.

George of [Troutman Sanders LLP](#), and Justin A. Gray of [Rosette LLP](#).

The National Congress of American Indians, the National Indian Gaming Association and the National Center for American Indian Enterprise Development are represented by Pilar M. Thomas of Lewis Roca Rothgerber Christie LLP and Derrick Beetso of the NCAI.

The Conference of Tribal Lending Commissioners is represented by Sarah J. Auchterlonie of [Brownstein Hyatt Farber Schreck LLP](#), and Brendan Johnson and Luke A. Hasskamp of [Robins Kaplan LLP](#).

The case is Williams et al. v. Big Picture Loans LLC et al., case number 18-1827, in the U.S. Court of Appeals for the Fourth Circuit.