

Who Are You?: *U.S. v. Salish Kootenai College, Inc., The False Claims Act And Sovereign Immunity*

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It is no secret there are too many lawyers in California and not enough jobs. When I graduated law school in 2008, the Great Recession was at its height. After obtaining my law license in 2009, I found myself facing a pile of student loan debt and no job prospects. It took me almost two years of hustling for contract attorney work before I found full time, permanent employment as an associate attorney at a private firm. During those years I was “hustling.” I remember hearing more and more complaints from graduates of my alma mater about how employment data was fabricated and the true number of graduates who were actually employed v. the number of graduates who were not employed was misrepresented in marketing materials.

My alma mater is not alone in weathering these claims. An article published in the Washington Post on March 8, 2016 about a lawsuit filed by a graduate of Thomas Jefferson School of Law in San Diego

alleging her law school misled her with promises of employment. The lawsuit was eventually dismissed.

But what happens when the school is on a reservation? Is that school an extension of the tribe itself? Even though tribal land is technically federal land, is there a conflict with tribal immunity? If there is a conflict, is the case heard in federal court in the 50 states, or is it heard in tribal court?

The *U.S. v. Salish Kootenai College Matter*

The Ninth Circuit Court ruled on the matter of *U.S. v. Salish Kootenai College* on July 10, 2017. Plaintiffs are former employees of Salish Kootenai College, Inc. The Defendant is Salish Kootenai College, Inc., which is a college located on the Confederated Salish Kootenai Tribes in Montana. The former employees alleged the College violated the False Claims Act by knowingly providing false progress reports on students in order to keep grant monies coming from the Department of Health and Human Services and the Indian Health Service.

The United States declined to intervene pursuant to 31 USC Section 3730(b)(4)(B) and Defendant moved to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim on the grounds the

suit was barred by tribal sovereign immunity. However, the district court found the College was an arm of the Confederated Salish Kootenai Tribes (“Tribe”) that shared the Tribe’s sovereign immunity. Furthermore, neither the Tribe nor Congress waived the College’s immunity nor the board members were protected by sovereign immunity because they had been sued in their official capacities. Plaintiffs then filed an appeal challenging Defendant’s claim it was not a person under the FCA and the board members had sovereign immunity.

What Is the False Claims Act?

The False Claims Act (“FCA”) is an American federal law which imposes liability on persons and companies (i.e.: federal contractors) who defraud governmental programs. It is the federal government’s primary litigation tool in combating fraud. The law includes a provision which allows people who are not affiliated with the government to file actions on behalf of the government and those persons can receive approximately 15-25% of any recovered damages. Most claims under the law involve health care, military, or other government spending programs.

What is Sovereign Immunity?

Sovereign immunity is a legal doctrine by which the sovereign or state cannot commit a legal wrong and is immune from civil suit or criminal prosecution. It is also a principle of international law which exempts a sovereign state from the jurisdiction of foreign national courts. The law connotes a state, unless it chooses to waive its immunity, is immune to the jurisdiction of foreign courts and the enforcement of court orders. It also precludes the assertion of jurisdiction by the national courts of a foreign country over a sovereign or state, without the latter's consent.

Analysis

The Ninth Circuit considered 1) whether the Tribe is a “person” under the FCA and 2) whether the College was an arm of the Tribe and shares the Tribe's status for purposes of the FCA. The Court opined if the College is a sovereign entity to which Congress did not intend the FCA to apply, the College could not make the FCA apply to itself by voluntarily waiving its sovereign immunity; if the College was not a sovereign entity and therefore is a “person” under the FCA, it has no sovereign immunity to waive.

The Ninth Circuit noted historically via *Vermont Agency of Natural Resources v. US ex rel. Stevens* that sovereign States were excluded from the “person” under the FCA ((2000) 529 U.S. 765, 787). It had reached this

conclusion by relying on “longstanding interpretive presumption that ‘person’ does not include the sovereign.” (Id. at 780). The Court did not see any difference between *Stevens* and the case at hand because while tribal sovereignty was no longer absolute, courts continue to recognize Indian tribes as sovereign entities. And like states, Indian tribes are immune from suits unless their immunity is waived or abrogated by Congress. However, the case at hand was not necessarily about tribal sovereign immunity, but whether a College on tribal land could technically be a “person” and if the College functioned as part of the Tribe and therefore could share status, something which had not been previously discussed.

The Court stated the proper standard for answering the question of whether the school was an extension of the Tribe was in *White v. California*, which found, “whether an entity is entitled to sovereign immunity as an arm of the tribe” turns on several factors, “including: (1) the method of creation of the entity; (2) the purpose; (3) the structure, ownership and management including the amount of control the tribe has over the entity, (4) the tribe's intent with respect to the sharing of its sovereign immunity and (5) the financial relationship between the tribe and the entity.” ((2014) 765 F.3d 1010, 1025).

Plaintiffs argued *White* was inapplicable because *White* was not a FCA case and argued *Stoner*

v. Santa Clara County Office of Education (2007) 502 F.3d 1116 was more on point. However, *Stoner* turned on whether the State is directly or functionally liable for monetary judgments against a purported state agency. Furthermore, the Ninth Circuit found *Stoner* undermined Plaintiffs' arguments because the Court held whether a state entity is covered by the FCA depends on whether that entity shares the State's sovereign immunity. Therefore, to answer whether the College is covered by the FCA, a test should be applied to determine whether the College shares the Tribe's sovereign immunity. That is exactly what the test does in *White v. California*.

The Court then remanded the case back to the district court and ordered the test in *White v. California* be applied.

Takeaways:

The moral of the story is this: while there may be controversy over what constitutes a “person” in the court system, it is important to be able to navigate the differences for sovereign immunity in a federal court and a tribal court. To combat these claims, the defense should retain an attorney who understands the complexities of both federal and tribal court and can navigate both accordingly.

ABOUT THE AUTHOR

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