

Case Law Update

Wisconsin Tribal Judges Association

January 7, 2016

Case Law Update

- ▶ *Dollar General* - oral argument was Dec 7
- ▶ Dollar General store on Mississippi Choctaw Reservation
- ▶ Store manager alleged sexually molested a teenager serving there as an unpaid summer intern in 2003.
- ▶ Youth and his family sued in tribal court. Litigation ensued as DG sought to avoid tribal court jurisdiction.

Case Law Update

- ▶ Tribal court jurisdiction affirmed every step of the way:
 - ▶ Miss. Choctaw Supreme Court
 - ▶ Federal District Court
 - ▶ Fifth Circuit Court of Appeals

Case Law Update

- ▶ Dollar General is arguing for a bright line rule of no civil jurisdiction over non-Indians.
- ▶ Conservatives on the Court are skeptical of tribal court jurisdiction

Case Law Update

- ▶ Secondary issue: DG manager was also sued but district dismissed as it was found he had not entered into consensual relationship with Doe or the Tribe.

Case Law Update

▶ Dollar General discussion

- ▶ What would be effect in WI tribal courts if Supreme Court ruled no jurisdiction over non-Indians without explicit consent?
- ▶ What, if anything, should tribes and or tribal courts and/or tribal judges do to counteract this trend of diminishing tribal court jurisdiction?

Case Law Update

- ▶ Discussion (cont'd):
- ▶ In many recent cases, the lower courts are affirming tribal court jurisdiction, but not the Supreme Court.
- ▶ What, if anything, should be made of this?
- ▶ Should it affect how tribes approach this issue?

Case Law Update

- ▶ *U.S. v. Bryant* - The U.S. Supreme Court granted cert. Question here is whether prior unrepresented tribal court convictions can count for purposes of conviction under federal law (18 USC 117(a)).
- ▶ 117(a) elevates a repeat DV offender to a felony charge.

Case Law Update

- ▶ Tribal court defendants' criminal rights are not the same as those under the Sixth Amendment to the U.S. Constitution.
- ▶ Ninth Circuit ruled the tribal court pro se convictions *cannot* be used as element to prove repeater status.

Case Law Update

- ▶ *Harris v. Lake of the Torches Resort & Casino*, 14 AP 1692 (3/10/2015)
- ▶ Case started in state court, was transferred to tribal court.
- ▶ Trial held in tribal court. No decision for 11 months.

Case Law Update

- ▶ Plaintiff then filed a motion in state court to have the case transferred back to state court under Wis. Stat. 801.54(3) which permits state court to take actions “as the interests of justice require.”
- ▶ Although the tribal court issued a decision before state motion was heard, the state court took the case back.

Case Law Update

- ▶ *Fort Yates Public School District v. Murphy et al.*, 786 F.3d 662 (8th Cir, 5/15/15).
- ▶ Two minors fighting; mother filed suit against the school district in tribal court under various causes of action.
- ▶ School district filed suit in federal court seeking to avoid tribal court jurisdiction.

Case Law Update

- ▶ Federal district court ruled in favor of the parent and affirmed tribal court jurisdiction.
- ▶ Eighth Circuit overruled the district court.

Case Law Update

- ▶ In looking at the two *Montana* exceptions the Court the first didn't apply because ND statute limited what the school could agree to. (School district and tribe had signed a Joint Powers Agreement.)

Case Law Update

- ▶ As for the second exception, the Court construed narrowly in light of *Plains Commerce Bank*, ruling that the threat to the welfare of the tribe must “imperil its subsistence” in order to meet the second exception.

Case Law Update

- ▶ Sovereign immunity of the Tribal Court upheld.

Discussion

- ▶ How should tribes to balance integration versus isolation?
- ▶ Will it be practical to get all entities and individuals on a reservation to give explicit consent to tribal courts?
- ▶ What are some other alternatives?

Case Law Update

- ▶ *FMC v. Shoshone-Bannock Tribes*, 2015 WL 6958066. (Dist. Ct. Idaho, 11/17/2015).
- ▶ Underlying issue is about hazardous waste storage, tribal permitting and \$20 million tribal court judgment for back fees.
- ▶ Issue in this decision is about whether FMC can conduct discovery on the “fairness” of the Tribal Court.

Case Law Update

- ▶ FMC argued two claims of due process violations:
- ▶ 1) Tribal Court improperly influenced by Tribal Council
- ▶ 2) Two tribal court appellate judges biased based on comments made at a conference.

Case Law Update

- ▶ Tribe argued that FMC could not conduct discovery in federal court on issues that it did not fully litigate at the Tribal court level.
- ▶ Essentially a *National Farmers Union* failure to exhaust.

Case Law Update

- ▶ Federal judge agreed.
- ▶ FMC prohibited from conducting discovery in federal court proceeding but still allowed to present material it did use at the tribal court level: transcript of critical comments by two tribal appellate judges at a conference.

Case Law Update

- ▶ *C'Hair v. District Court of Ninth Judicial District and Strohecker*, 2015 WL 5037011 (8/26/2015)
- ▶ Accident on the Wind River Reservation, non-Indian plaintiff, Indian defendants.

Case Law Update

- ▶ Plaintiff sues in state court, then in Tribal Court (Northern Arapahoe).
- ▶ Tribal Court dismisses based on statute of limitations (2 years).
- ▶ State court found jurisdiction; WY Supreme Court affirmed.

Case Law Update

- ▶ *Jones v. Mashantucket Employment Rights Office, et al.*, CV-AA-2014-168 (6/3/2015)
- ▶ Plaintiff is aggrieved as she alleges the Tribe's preference law was incorrectly applied when another tribal member receive a position at the tribe's gaming enterprise.

Case Law Update

- ▶ Jones alleges that another tribal member, Steven Thomas, wrongly received preference because he should not have been viewed as a tribal member “in good standing” at the time of hire.

Case Law Update

- ▶ Hiring was Dec 15, 2013.
- ▶ Mr. Thomas was banished by the Elder's Council in March, 2014 after conviction of embezzlement from the Tribe.
- ▶ Elder's Council banished Mr. Thomas and at that time he was not in good standing but already hired.

Case Law Update

- ▶ Court deferred to Elder's Council as the sole body authorized to determine which tribal members are in good standing (or not).
- ▶ The MERO cannot do so based on its own judgment even though Mr. Thomas had pending criminal charges at the time of hire.

Case Law Update

- ▶ *Wright v. Langdeau*, CIV 15-4097 (D.S.D. 06/10/2015)
- ▶ Internal tribal political dispute over alleged \$24 million in missing federal funds.
- ▶ Suit in tribal court to remove council members
- ▶ One faction sought to enjoin tribal court from going forward.
- ▶ Federal court refused to intervene.

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