

# The “Big Picture” on Tribal Immunity: Tribal Lending Business Wins on Appeal in Fourth Circuit

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**B**ased in Virginia, the U.S. Court of Appeals for the Fourth Circuit has not seen the wide array of Indian law issues as have its sister circuits in the West. In 2019, however, the Fourth Circuit decided a major case involving the sovereign immunity of tribally owned online lenders. The case, *Williams v. Big Picture Loans*, will likely serve as a key precedent for other courts around the country as they confront claims against Indian tribes engaged in e-commerce.<sup>1</sup> The decision also provides guidance to Indian tribes seeking to create commercial entities to generate revenue outside of gaming.

The case involved the Lac Vieux Desert Band of Lake Superior Chippewa Indians (the “LVD Tribe”), a federally recognized Indian tribe located in the remote western reaches of Michigan’s Upper Peninsula. With little economic development in the region, the LVD Tribe is limited in what it can do locally to raise revenue for improving the lives of its people. Like many tribes, it has a casino, but the recession of 2008 cut sharply into casino revenues, and those revenues never recovered.

Resorting to e-commerce, the LVD Tribe decided to conduct business with the larger society by means of the internet. Thus, in 2011, it began an online business of making small-dollar loans to consumers

across the country. Looking outside its own ranks for expertise, the LVD Tribe contracted with non-Indian companies Bellicose VI, LLC and SourcePoint VI, LLC to provide the LVD Tribe with vendor management services, compliance management, marketing material development, and data analytics. The business proved successful, bringing millions of dollars in revenue into the tribal treasury.<sup>2</sup>

In 2015, the LVD Tribe restructured its lending operations, organizing a new lending company, Big Picture Loans, LLC (“Big Picture”) as well as its own servicing company, Ascension Technologies, LLC (“Ascension”). As part of the restructuring, the LVD Tribe acquired all the assets of SourcePoint under an agreement that allows the LVD Tribe to receive a percentage of the profits off the top, and then provides that, after operating expenses are paid, any remaining revenue is used to pay down the \$300 million purchase-money note. Offsetting the large purchase price, the agreement calls for any note obligations remaining after seven years to be forgiven—a significant benefit to the LVD Tribe.

Under this arrangement, millions of dollars flowed into the tribal treasury, allowing the LVD Tribe to make substantial improvements and provide services on its reservation for the benefit of tribal members and the neighboring communities, including:

- Securing \$14.1 million in financing for the LVD Tribe’s new health clinic.
- Refinancing the LVD Tribe’s casino debt.
- Funding college scholarships and paying for members’ educational costs, such as student housing, books, school supplies, and equipment.

- Subsidizing tribal members' home purchases and rentals.
- Funding new vehicles for the LVD Tribe's Police Department.
- Providing foster care payments for eligible children.
- Funding renovations and new office space for the LVD Tribe's Social Services Department.<sup>3</sup>

It was not long before both Big Picture and Ascension (collectively, the "Tribal Businesses") were sued by a group of disgruntled customers, who filed their complaint in the U.S. District Court for the Eastern District of Virginia ("District Court"). Represented by a group of "consumer advocates," the plaintiffs claimed that the triple-digit interest rates charged by Big Picture violated Virginia usury laws, which generally cap interest rates at 12 percent. Big Picture and Ascension contended that Virginia law did not govern the loans because the loans originated on the LVD Tribe's reservation lands, and the loan documents contained a choice-of-law clause under which tribal law—not state law—governed the transactions.

More importantly, the Tribal Businesses argued that the complaint should be dismissed for lack of subject matter jurisdiction because they possessed sovereign immunity—an immunity possessed by all federally recognized Indian tribes as well as tribal subsidiaries qualifying as "arms of the tribe." Attached to their motion to dismiss was a stack of 44 documents showing the close relationship between the LVD Tribe and the Tribal Businesses. The documents showed, for example, that the LVD Tribe organized both Big Picture and Ascension under tribal law, not state law; that the LVD Tribe appointed two tribal leaders as co-managers of the businesses; and that the LVD Tribe expressly documented its intention to imbue both businesses with its own tribal sovereign immunity.

Even so, the plaintiffs challenged the Tribal Businesses' claim to immunity and were allowed to take unprecedented jurisdictional discovery, ultimately persuading the District Court that the Tribal Businesses failed to meet the applicable criteria for arm-of-the-tribe status. Those criteria—both parties agreed—are found in the 2010 case of *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, where the Tenth Circuit identified six factors to be used in determining whether a tribal business qualifies as an arm of the tribe, so as to entitle the business to sovereign immunity. As identified by the Tenth Circuit, the first five factors are:

1. The method of creation of the economic entities.
2. Their purpose.
3. Their structure, ownership, and management, including the amount of control the tribe has over the entities.
4. The tribe's intent with respect to the sharing of its sovereign immunity.
5. The financial relationship between the tribe and the entities.

The Tenth Circuit also identified separately "a sixth factor: the policies underlying tribal sovereign immunity and its connection to tribal economic development, and whether those policies are served by granting immunity to the economic entities."<sup>4</sup>

A few years later, in 2014, the Ninth Circuit decided the case of *White v. University of California*, where it adopted the first five factors.<sup>5</sup> And in 2016, the Supreme Court of California, in *People v. Miami Nation Enterprises*, modified the *Breakthrough* factors to suit California's state jurisprudence and interests.<sup>6</sup> Before the *Big Picture* case, the Fourth Circuit had never addressed the criteria that must be

met to qualify as an arm of the tribe.

In *Big Picture*, the District Court purportedly used the six-factor version of the test, but with a couple of twists, leading the court to deny arm-of-the-tribe status to the Tribal Businesses. The twists included (i) stepping away from federal court jurisprudence to use the *Miami Nation* approach, and (ii) broadening the "purpose" factor from an objective standard to a subjective one, finding that the "real" purpose of the Tribal Businesses was to give immunity to a non-Indian businessman who had beneficial ownership of SourcePoint through an intermediary company and who benefitted from money paid by Big Picture to acquire its assets. That supposed "purpose" was used by the District Court to turn virtually every factor against the Tribal Businesses, which bore the burden of proof to establish their entitlement to immunity.

In a dramatic reversal, on July 3, 2019, the Fourth Circuit held that both Big Picture and Ascension are, indeed, arms of the LVD Tribe and entitled to immunity. The Fourth Circuit agreed with the District Court that the Tribal Businesses bore the burden of proof. Yet, the Fourth Circuit had no trouble finding that the documents and other facts presented by the Tribal Businesses met that burden. Avoiding reliance on California law—and adopting the five-factor version of the *Breakthrough* test—the court of appeals gave a clear and concise analysis that is now binding in the five states within the Fourth Circuit, and that, when considered with *Breakthrough* and *White*, will be highly persuasive in other courts across the country.

On each of the five factors, the contrast between the analyses used by the District Court and the Fourth Circuit is dramatic.

**1. Method of Creation.** Heading into the Fourth Circuit, the *Big Picture* plaintiffs had the benefit of a decision that used not just *Breakthrough*, but also a California state court's *Miami Nation* factors, to evaluate the method of creation. Using that expanded approach, the District Court considered not just the law under which the Tribal Businesses were created but also "[t]he *circumstances* under which the entity's formation occurred, including whether the tribe initiated or simply absorbed an operational commercial enterprise' ...." Thus, while the District Court found that the first factor favored immunity, it also found more generally that there were "circumstances [that] limit the extent to which this factor weighs in favor of sovereign immunity."<sup>7</sup>

On appeal, the *Big Picture* plaintiffs urged the Fourth Circuit to follow the District Court and consider extraneous circumstances surrounding the Tribal Businesses' creation, as suggested by *Miami Nation*. The Fourth Circuit declined to do so. Instead, the Fourth Circuit considered only "the law under which the entities were formed."<sup>8</sup> Finding it to be "undisputed that Big Picture and Ascension were 'created under tribal law,'" the Fourth Circuit held that "this factor weighs in favor of tribal sovereign immunity for both Entities."<sup>9</sup>

**2. Purpose of the Tribal Entities.** The District Court placed great emphasis on what it viewed as the nontribal businessman's supposed purpose in assisting the LVD Tribe in the creation of Big Picture and Ascension. In ruling against the Tribal Businesses on the purpose factor, the District Court said:

The formation of Big Picture and Ascension, and indeed, much of the tribal restructuring, was for the real purpose of helping [the nontribal businessman and his company] to avoid liability, rather than to help the [LVD] Tribe start a business.

And, that finding means that Big Picture and Ascension have not carried their burden on the purpose factor.<sup>10</sup>

On appeal, the Fourth Circuit followed a decidedly different and narrowly focused approach, noting that “[t]he second *Breakthrough* factor incorporates both [1] the *stated purpose* for which the Entities were created as well as [2] *evidence related to that purpose*.”<sup>11</sup>

Under the “stated purpose” inquiry, the Fourth Circuit looked at the Tribal Businesses’ articles of organization, which declared Big Picture’s purpose to be “diversify[ing] the economy of the Tribe’s Reservation in order to improve the Tribe’s economic self-sufficiency.” Similarly, Ascension’s stated purpose, included in its articles of organization, was to “engage in the business of operating one or more Tribal marketing, technology and vendor service business(es).” The Fourth Circuit recognized that these objectives were aimed at “fulfilling the same tribal economic development efforts.”<sup>12</sup>

In addition to looking at the *stated purpose*, the Fourth Circuit also looked at evidence related to *that purpose* (not evidence related to other alleged purposes). Here, the Fourth Circuit took note of the money generated for the LVD Tribe by Big Picture and found that money sufficient to satisfy this subfactor:

[T]he district court found that the money generated by Big Picture constitutes more than 10% of the Tribe’s general fund and may contribute more than 30% of the fund within the next few years.

\* \* \* \* \*

That these funds constitute a significant portion of the Tribe’s general fund in and of itself suggests that Big Picture’s revenue has contributed to the Entities’ stated purpose of tribal economic development.

Thus, the Fourth Circuit’s straightforward approach to the “purpose” factor weighed in favor of immunity for the Tribal Businesses.<sup>13</sup>

**3. Structure, Ownership, and Management.** It was undisputed that the Tribal Businesses were owned 100 percent by an intermediate entity, Tribal Economic Development Holdings, LLC (“TED”), which was, in turn, owned 100 percent by the LVD Tribe. It was also undisputed that two tribal leaders served as co-managers of all three entities: Big Picture, Ascension, and TED. Even so, the District Court found that this factor “on balance” weighed against a finding of immunity for the Tribal Businesses and, “at best,” was neutral. The District Court based that conclusion on two points:

- (1) that the LVD Tribe’s formal oversight of Big Picture was “meaningless,” given Ascension’s “dominant role in Big Picture’s lending operations,” and
- (2) that Ascension was not controlled by the Tribe.<sup>14</sup>

According to the District Court, Big Picture’s role was “limited to verifying details at the loan approval stage,” which was further emphasized by the alleged lack of knowledge of Big Picture’s co-managers regarding entities owned by Big Picture and its daily operations. The District Court then found that the LVD Tribe was a “passive” owner of Ascension, given that Ascension conducted most activities outside the reservation, employed only nontribal members, and had

a nontribal member managing day-to-day operations.<sup>15</sup>

On appeal, the Fourth Circuit disagreed on multiple grounds. Considering Big Picture, it first noted that, as the District Court correctly found, the LVD Tribe has a *substantial* role in the operations of Big Picture, and its overall “structure is to assure that Big Picture is answerable to the Tribe at every level, which supports immunity.”<sup>16</sup>

Significantly, the Fourth Circuit disagreed that Big Picture’s decision to outsource its management to Ascension tipped the balance on this factor against immunity. Big Picture, instead, remained “in control of its essential functions.” According to the Fourth Circuit, the District Court “discounted these facts and instead speculated” regarding Ascension’s role in identifying potential borrowers as “proof” that Big Picture had little involvement or discretion in the business. Rather, Big Picture had chosen to utilize Ascension’s services and possessed the contractual right to “choose differently in the future.”<sup>17</sup>

The Fourth Circuit also ruled that the District Court went too far in criticizing the testimony of Big Picture’s co-managers, including the LVD Tribe’s chairman, and in suggesting that the LVD Tribe did not actually control Big Picture. The court of appeals ruled instead that the District Court “erred in concluding that Big Picture was not controlled by the [LVD] Tribe simply because of [its co-managers’] outsourcing of certain day-to-day management tasks and their lack of knowledge of some aspects of the lending operation.” Even if they did lack knowledge about the day-to-day activities of the Tribal Businesses, the Fourth Circuit found that this would not itself weigh against immunity, given the other evidence of tribal control.<sup>18</sup>

Finally, as to Ascension, while its structure and ownership were clearly tribal, the Fourth Circuit agreed that the management (i.e., control) question was closer. LVD Tribe members served as Ascension’s co-managers, yet all duties were delegated (by official acts of the LVD Tribal Council) to a nontribal individual, granting him wide authority. Given this and certain contractual limitations on Ascension’s actions, the Fourth Circuit ruled that the *Breakthrough* control factor weighed slightly against a finding of immunity for Ascension.<sup>19</sup>

**4. Intent to Share Immunity.** When the *Big Picture* case reached the Fourth Circuit, the plaintiffs had the benefit of a decision that was highly favorable on the fourth factor: the LVD Tribe’s intent to share immunity. As the District Court correctly recognized, “Big Picture’s and Ascension’s formation documents show that the Tribe *intended* for both entities to share its immunity.” Even so, the District Court went the other way, ruling that “the intent factor weighs *against* a finding of immunity.” This was because of what the court viewed as the underlying purpose of the Tribal Businesses, which the court said was “shield[ing] [the nontribal businessman and his company] from liability.”<sup>20</sup>

On appeal, the plaintiffs urged the Fourth Circuit to follow the same analysis, but the Fourth Circuit rejected the argument in no uncertain terms:

The district court ... concluded that this factor weighed against a finding of immunity “because to do otherwise is to ignore the driving force for the Tribe’s intent to share its immunity.” ... This conclusion was in error, because the district court improperly conflated the purpose and intent factors. This factor focuses *solely* on whether the *Tribe* intended to provide its immunity to the Entities. As Plaintiffs conceded, it did.

Thus, the Fourth Circuit found that the “intent to share immunity” factor weighed in favor of immunity for the Tribal Businesses.<sup>21</sup>

**5. Financial Relationship.** Before the District Court, the plaintiffs prevailed on the fifth factor by successfully making arguments that proved irrelevant when the case reached the Fourth Circuit. For example:

- Even though payments on the note will end in 2022, the District Court was concerned that the Big Picture revenues thus far used to pay that note were greater than the revenues sent to the LVD Tribe’s treasury.
- The District Court was also concerned that the Tribal Businesses did not trace how much of the Big Picture revenues were allocated to each of the various tribal services listed as benefitting from the loan business.

On appeal, the Fourth Circuit disregarded these concerns and focused exclusively on the percentage of the LVD Tribe’s general fund that comes from Big Picture:

Given that 10% of the Tribe’s general fund comes from Big Picture, a judgment against Big Picture or Ascension could in fact significantly impact the tribal treasury, which is at the heart of this analysis, even if it is unclear what the exact repercussions of that impact might be on tribal members and services. Where, as here, a judgment against the Entities could significantly impact the Tribe’s treasury, this factor weighs in favor of immunity even though the Tribe’s formal liability is limited.<sup>22</sup>

Finally, the Fourth Circuit gave “due consideration of the underlying policies of tribal sovereign immunity, which include tribal self-governance and tribal economic development as well as protection of ‘the tribe’s monies’ and the ‘promotion of commercial dealings between Indians and non-Indians.’”<sup>23</sup> With all five factors weighing in favor of immunity for Big Picture—and four of the five weighing in favor of immunity for Ascension—the Fourth Circuit concluded that the Tribal Businesses are arms of the LVD Tribe and, thus, entitled to sovereign immunity. The Fourth Circuit remanded the case with instructions to “grant the [Tribal Businesses’] motion to dismiss for lack of subject matter jurisdiction.”<sup>24</sup>

The Fourth Circuit’s decision is an important precedent because it provides a roadmap for an Indian tribe that wants to create a tribal business that will qualify as an arm of the tribe. It provides a significant step in the progression of tribal commercial development, as it provides guidance beyond the gaming context (*Breakthrough*) and outside of culture-focused nonprofits (*White*) to show how tribes with limited resources can structure and bargain to develop sophisticated and successful commercial entities. The Fourth Circuit decision in *Big Picture* allows tribes to create nongaming commercial entities that utilize the resources they have—and obtain the resources they need—to create immune arms of the tribe to benefit the tribe. As each tribe faces unique resources and hardships, *Big Picture* confirms that tribes have broad latitude to exercise their sovereignty to further their self-determination without sacrificing tribal sovereign immunity.

Under the Fourth Circuit decision, most of the factors (i.e., method of creation, purpose, and intent to share immunity) can be

satisfied by creating entities that are tailored to the tribe’s unique structure, memorialized by careful drafting of tribal and business documents to reflect the close tie between the tribe and the business. Under the Fourth Circuit precedent, the financial relationship factor appears to involve a sliding scale and can weigh in favor of a tribe when the overall financial relationship has the long-term goal of benefitting the tribe, even when the short-term benefits are relatively limited. And, the amount of revenue to the LVD Tribe compared to the amount spent on operating expenses and financing ranked low in the Fourth Circuit’s considerations. Finally, while outsourcing day-to-day management was held to weigh against immunity (in the case of *Ascension*), it does so “only slightly” when the tribe retains oversight of the non-Indian manager. The Fourth Circuit seems to suggest that the delegation of day-to-day operations to nontribal members is not problematic when evidence of strong tribal controls exists to oversee delegated authority. But because immunity depends on the overall combination of *Breakthrough* factors, tribes that do not have internal expertise and must hire nontribal personnel might carefully address the other factors and internal controls to avoid any misperception that hiring nontribal experts to provide day-to-day management interferes with tribal control.

Overall, the Fourth Circuit recognizes that these factors are designed to evaluate whether an entity achieves the purposes underlying tribal sovereign sovereignty. “[T]he extent to which a grant of arm-of-the-tribe immunity promotes the purposes of tribal sovereign immunity is too important to constitute a single factor and will instead inform the entire analysis.”<sup>25</sup> With the principles of tribal sovereignty driving the creation of tribal commercial entities, the Fourth Circuit decision stands as an important development in Indian law in the United States. ☉



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## Endnotes

<sup>1</sup>*Williams v. Big Picture Loans*, 939 F.3d 170 (4th Cir. 2019) (“*Big Picture II*”).

<sup>2</sup>*See Williams v. Big Picture Loans*, 329 F. Supp. 3d 248, 255 (E.D. Va. 2018) (“*Big Picture I*”).



<sup>3</sup>*Id.* at 264.

<sup>4</sup>*Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010).

<sup>5</sup>*White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014).

<sup>6</sup>*People v. Miami Nation Enters*, 2 Cal. 5th 222, 236, 211 Cal. Rptr. 3d 837, 847, 386 P.3d 357, 365-66 (2016).

<sup>7</sup>*Big Picture I*, 329 F. Supp. 3d at 273-74 (quoting *Miami Nation*, 386 P.3d at 372 (emphasis added)).

<sup>8</sup>*Big Picture II*, 929 F.3d at 177 (citing *Breakthrough*, 629 F.3d at 1191).

<sup>9</sup>*Id.* at 177-78 (quoting and citing *Breakthrough*, 629 F.3d at 1191).

<sup>10</sup>*Big Picture I*, 329 F. Supp. 3d at 274.

<sup>11</sup>*Big Picture II*, 929 F.3d at 178 (emphasis and bracketed numbers added).

<sup>12</sup>*Id.*

<sup>13</sup>*Id.* at 179-80, 182.

<sup>14</sup>*Big Picture I*, 329 F. Supp. 3d at 278.

<sup>15</sup>*Id.*

<sup>16</sup>*Big Picture II*, 929 F.3d at 181 (quoting *Big Picture I*, 329 F. Supp. 3d at 277).

<sup>17</sup>*Id.* at 182-83.

<sup>18</sup>*See id.* at 183.

<sup>19</sup>*See id.* at 183-84.

<sup>20</sup>*Big Picture I*, 329 F. Supp. 3d at 280 (emphasis added).

<sup>21</sup>*Big Picture II*, 929 F.3d at 184 (emphasis added).

<sup>22</sup>*Id.* at 185 (emphasis added).

<sup>23</sup>*Id.*

<sup>24</sup>*Id.* at 184-85 (emphasis added).

<sup>25</sup>*Id.* at 177.

## Hon. Suzanne Segal (Ret.) joins Signature Resolution

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