

Adopting Breakthrough Factors, Connecticut Supreme Court Hands Victory to Tribal Lending Entity Great Plains Lending

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In late May, the Connecticut Supreme Court held^[1] that the tribal lending entity Great Plains Lending (Great Plains) is protected by tribal sovereign immunity as an “arm of the tribe,” adopting a test first established by the Tenth Circuit in *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort*.^[2] The case represents a major victory for the tribe and for tribal lending entities overall, and serves as further guidance to other courts faced with similar claims as tribes continue to establish a strong presence in e-commerce lending activities.

The case concerned two lending entities, Great Plains and American Web Loan, Inc. d/b/a Clear Creek Lending (Clear Creek) — both established by the federally recognized Otoe-Missouria Tribe (Otoe-Missouria) located in Oklahoma — as well as Otoe-Missouria Chair John Shotton (Shotton).

Connecticut’s department of banking — represented by the Connecticut attorney general — investigated both entities, as well as Shotton, for potential violations of Connecticut’s banking and usury laws. The banking commissioner found that the entities had issued online consumer loans to Connecticut residents without the required license. In addition, the commissioner found that interest rates exceeded state caps. Following administrative appeals, the commissioner issued a final order requiring the plaintiffs to cease and desist from their lending activities and pay civil penalties totaling \$1,500,000.

The tribe filed a motion to dismiss the administrative proceedings for lack of jurisdiction, citing tribal immunity for itself and for Shotton in his capacity as an official of the tribe. The commissioner denied the appeal, and the tribe appealed the commissioner’s final orders to the trial court. The trial court concluded that the lending entities bore the burden of showing that they were arms of the tribe and applied a multifactor test from *People ex rel. Owen v. Miami Nation Enterprises*.^[3] Under the *Miami Nation* test, the trial court determined that the lending entities had failed to establish their status as arms of the tribe. The entities and Shotton appealed.

The case presented the Connecticut Supreme Court with three issues of first impression: (1) which party bears the burden of proving the entity’s status as an arm of the tribe, (2) the legal standard governing that inquiry, and (3) the extent to which a tribal officer shares in that immunity for his/her actions in connection with the business entity.

Well-established law holds that tribal sovereign immunity extends to any business enterprise considered to be an “arm of the tribe,” but the U.S. Supreme Court has not yet established a test or standard for making that determination. Most recently, the Fourth Circuit adopted the *Breakthrough* factors in holding that two tribal entities

with varying levels of tribal involvement were immune from a suit alleging unlawfully high-interest rates in *Williams v. Big Picture Loans, LLC*.^[4] *Breakthrough*'s fact-specific inquiry involves assessing the following non-exhaustive factors: (1) the method of the entities' creation; (2) their purpose; (3) their structure, ownership, and management; (4) the tribe's intent to share its sovereign immunity; (5) the financial relationship between the tribe and the entities; and (6) the policies underlying tribal sovereign immunity and the entities' connection to tribal economic development, and whether those policies are served by granting immunity to the economic entities.

Adopting the *Breakthrough* factors, the Connecticut justices held that Great Plains had established itself as an arm of the tribe as a matter of law and that Shotton, in his capacity as an officer of Great Plains and of the Otoe-Missouria Tribe was similarly entitled to sovereign immunity from civil penalties. The Court remanded to the commissioner for further administrative proceedings to determine whether Clear Creek could also establish itself as an arm of the tribe as a matter of law.

As with the circuit court cases, the state court decision provides helpful guidance for Indian tribes using commercial lending entities as a means to establish financial independence through legitimate tribal enterprise. Outside of gaming, tribal lending entities represent a significant revenue source for tribes. Tribes wishing to establish tribal lending entities should focus on the *Breakthrough* factors to ensure that their commercial enterprises are operating as an arm of the tribe. In particular, tribes should carefully consider the commercial entity's method of creation; purpose; structure, ownership, and management; lack of intent to extend immunity to any third parties; and the financial relationship of the entity to the tribe.

Otoe-Missouria's approach to establishing Clear Creek's status as an arm of the tribe before the commissioner, in light of this ruling, should also prove instructive. We will monitor the remanded case, the commissioner's decision, and any subsequent appeals to the court and will provide updates in this space.

[1] *Great Plains Lending, LLC v. Conn. Dep't of Banking*, 2021 Conn. LEXIS 136 (Conn. 2021), at *3-4.

[2] *Breakthrough Mgmt, Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010).

[3] *People ex rel. Owen v. Miami Nation Enters.*, 386 P.3d 357, 365 (Cal. 2016).

[4] *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 177 (4th Cir. 2019).

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