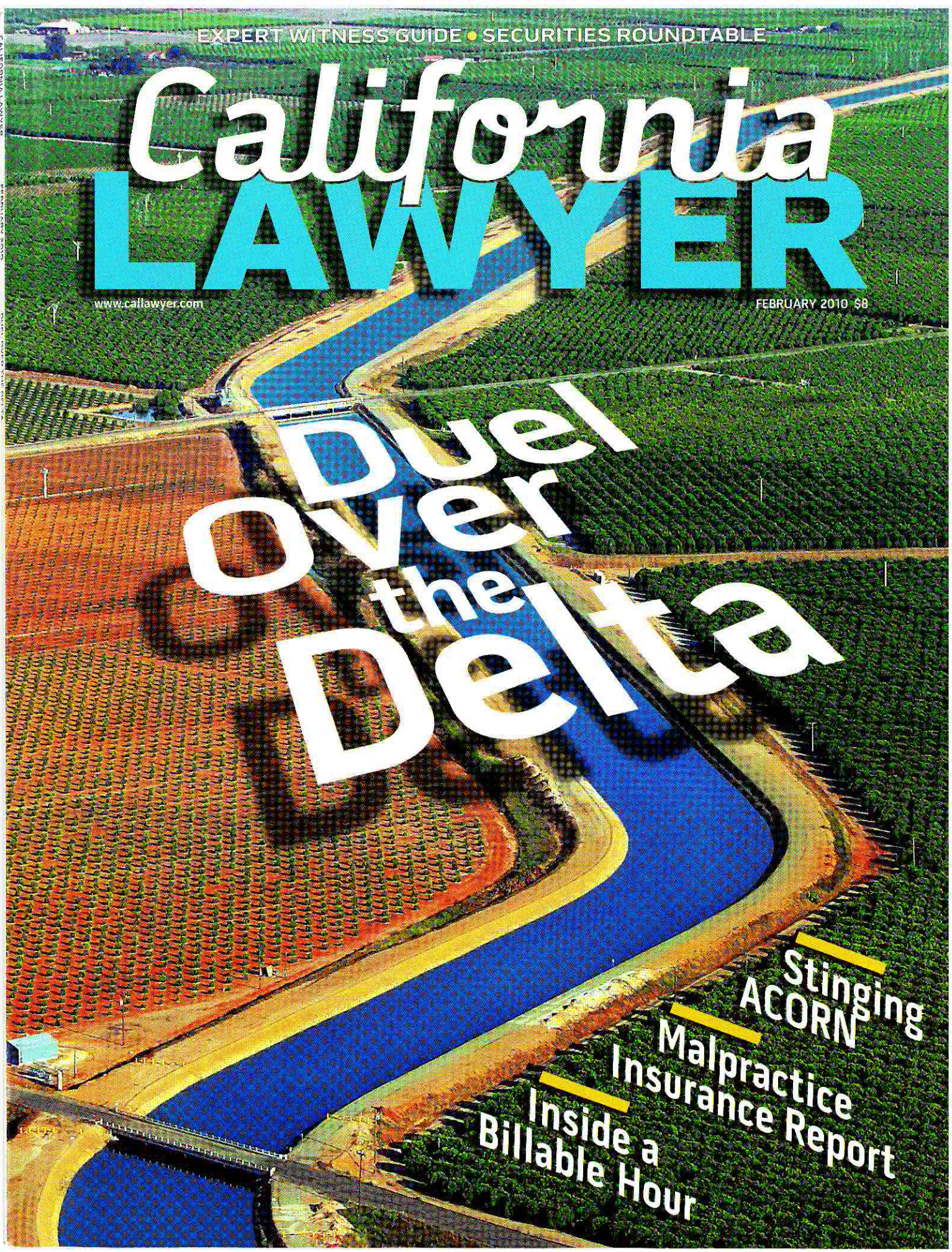
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Do Tribal Employees Have Sovereign Immunity?

IF A PERSON IS INJURED IN CALIFORNIA BY AN EMPLOYEE OF an Indian tribe, can that person sue the employee and recover damages? The short answer is, it depends.

Generally speaking, courts have viewed tribes as sovereign governmental entities and have accorded them the same immunity traditionally enjoyed by other sovereign powers (*Great Western Casinos, Inc. v. Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407, 1419 (1999)).

In most jurisdictions, including the Ninth Circuit, this immunity also extends to tribal employees, provided they are "acting in their official capacity and within the scope of their authority." (*Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008).) So, if the case lands in federal court, the plaintiff has a problem.

But things are murkier in California state court, where tribal employees may *not* be immune from suit, even when acting within the scope of their duties.

IMMUNITY PRINCIPLES

An Indian tribe cannot be sued—whether in tort or contract, law or equity—unless Congress has authorized the suit or the tribe has clearly waived its immunity (*Campo Band of Mission Indians v. Superior Court*, 137 Cal. App. 4th 175, 182 (2006)). A waiver of tribal immunity cannot be implied; it must be expressed unequivocally (*Warburton/Buttner v. Superior Court*, 103 Cal. App. 4th 1170, 1182 (2002)).

Sovereign immunity extends to a tribe's commercial activities (*Big Valley Band of Pomo Indians v. Superior Court*, 133 Cal. App. 4th 1185, 1191 (2005)),



including a tribal casino located on tribal land (*Redding Rancheria v. Superior Court,* 88 Cal. App. 4th 384, 388–89 (2001)). Immunity also extends to a tribal business located on non-tribal land. "The doctrine of tribal sovereign immunity," said one court, "also protects the tribe's off-reservation, for-profit commercial conduct." (*Ameriloan,* 169 Cal. App. 4th at 89 (2009).)

TRIBAL OFFICIALS

Tribal immunity extends to tribal officials acting in their official capacity and within the scope of their authority (*Trudgeon v. Fantasy Springs Casino,* 71 Cal. App. 4th 632, 643 (1999)). However, "there is inherent in the term 'tribal officials' a recognition that not all individuals associated with a tribe are entitled to immunity." (*Turner v. Martire,* 82 Cal. App. 4th 1042, 1049 (2000).)

As the Ninth Circuit observed in the *Cook* case, the principles that motivate the immunizing of tribal officials from suit—protecting an Indian tribe's treasury and preventing a plaintiff from bypassing tribal immunity simply by naming a tribal official—apply equally to tribal employees when they are sued in their official capacity.

THE CALIFORNIA RULE

Although many states adhere to the view taken by the Ninth Circuit, California does not. In this state, immunity does not extend to all tribal employees; it covers only tribal officials who perform high-level or governing roles in the affairs of the tribe. To qualify for immunity, an individual defendant must show that he or she "performed discretionary or policymaking functions within or on behalf of the Tribe, so that [exposure] to liability would undermine the immunity of the Tribe itself." (*Turner,* 82 Cal. App. 4th at 1054.)

PRACTICAL EFFECTS

California is thus at odds with the Ninth Circuit, and the rule applied in state court may be unworkable and unfair to lower-level employees who work for Indian tribes but do not perform high-level functions.

Indeed, given that tribal immunity is a matter of federal law not subject to diminution by the states (*see Ameriloan v. Superior Court,* 169 Cal. App. 4th 81, 89 (2009)), a good argument can be made that the Ninth Circuit's view expressed in *Cook* trumps the California policy announced in *Turner.*

A higher court may one day be forced to resolve this conflict. But until that happens, a lawyer suing or defending a tribal employee in a California court must consider whether the case will be removed to federal court. If the case remains in state court, lawyers for both sides will have to address the question of whether the tribal employee exercised discretion or performed policymaking duties. The answer to that question will determine whether the case proceeds.

Thomas Weathers is an Aleut and a founding partner of Alexander, Berkey, Williams & Weathers, a Berkeley law firm that represents tribal interests.



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