

Law 360 Article

BREAKING: Justices' Tie Means Dollar General Can't Dodge Tribal Court

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Law360, New York (June 23, 2016, 11:04 AM ET) -- Dollar General will have to face a \$2.5 million lawsuit in tribal court over the alleged sexual assault of an underage Native American intern, after the U.S. Supreme Court deadlocked Thursday and upheld a decision that said the tribe had jurisdiction.

With its 4-4 per curiam ruling, the Supreme Court affirmed a Fifth Circuit ruling that a Mississippi Band of Choctaw Indians tribal court could hear the sexual assault case brought by a former underage tribe member who was part of an internship program at an on-reservation Dollar General store.

Dollar General had argued that there is a strong presumption against tribal court jurisdiction over nonmembers and that a win for the tribe could expose businesses to civil claims in tribal court over most of their activities on tribal land, but the high court's ruling leaves the Fifth Circuit's ruling in place.

The case dates to 2003, when a 13-year-old member of the Choctaw tribe was assigned an internship at the Dollar General store on the tribe's reservation as part of a youth opportunity program. While working there, the intern said he was sexually assaulted by store manager Dale Townsend, and he sued Townsend, Dollar General and Dolgencorp LLC, which operates the store, in 2005 in the Choctaw tribal court.

In an August brief, Dollar General had argued that the court has repeatedly held that tribes generally lack regulatory authority over nonmembers, and that even the limited laws that could be applied to outsiders can't be enforced through criminal prosecutions in tribal court.

In October, the Mississippi Band of Choctaw Indians told the Supreme Court that the case belongs there and that four tribunals — the tribe's civil court, the tribe's Supreme Court, a Mississippi district court and the Fifth Circuit — had all reached the same conclusion based on the court's 1981 decision in *Montana v. U.S.*, which set down exceptions to the general rule that tribes cannot exercise jurisdiction over nonmembers on their lands.

The absence of late Justice Antonin Scalia may have led to the tie. During oral arguments in the case on Dec. 7, the high court appeared split on how much control tribal courts can exert over nontribe members. Scalia and Chief Justice John Roberts both challenged Neal Kumar Katyal of

Hogan Lovells, who represents the tribe, over his contention that the case lay in the "heartland" of sovereign tribal jurisdiction recognized by the high court.

"You say this is in the heartland?" Roberts asked. "We have never before recognized Indian ... court jurisdiction over a nonmember, have we?"

Katyal pointed to four Supreme Court cases involving tort claims in tribal court over nonmembers, including the high court's 1997 decision in *Strate v. A-1 Contractors*, that supported the assertion of tribal court jurisdiction for tort claims against nonmembers.

"I think it's a little odd to say this is in the heartland of Indian jurisdiction," Chief Justice Roberts persisted.

"I don't think it's odd at all," Katyal replied. "That's the rule that this court laid down. That's the language in *Strate*."

Scalia rejoined that the pertinent part of *Strate* was dictum, and "dictum doesn't make something a heartland."

"Cases make it. Judgments make it heartland," Scalia said.

The Mississippi Band of Choctaw Indians is represented by Neal Kumar Katyal of Hogan Lovells.

Dollar General and Dolgencorp are represented by Thomas C. Goldstein of Goldstein & Russell PC.

The federal government is represented by Edwin S. Kneedler of the U.S. Department of Justice.

The case is *Dollar General Corp. et al. v. Mississippi Band of Choctaw Indians et al.*, case number 13-1496, in the Supreme Court of the United States.

--Additional reporting by Vidya Kauri and Jonathan Randles. Editing by Patricia K. Cole.

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