



**CHEROKEE NATION**  
**OFFICE OF THE ATTORNEY GENERAL**  
P.O. Box 948  
Tahlequah, OK 74465-0948  
918-453-5000

A. Diane Hammons  
Attorney General

**OPINION OF THE CHEROKEE NATION ATTORNEY GENERAL**

**Question Submitted by:** The Honorable Chadwick Smith, Principal Chief  
**Opinion Number:** 2006-CNAG-2  
**Date Decided:** July 21, 2006

This office has received your request for an official Attorney General Opinion in which you asked whether or not you are entitled to a legal defense at the expense of the Cherokee Nation in Case No. CIV-06-251-RAW, O'Leary vs. Smith, in the United States District Court for the Eastern District of Oklahoma. The answer to said question is dependent on the answers to the following questions:

- 1. When is an elected official of the Cherokee Nation entitled to a legal defense at the expense of the Cherokee Nation?**
- 2. If committed, would the alleged actions complained of in the subject lawsuit have been committed by the Principal Chief acting in his official capacity?**
- 3. If the Principal Chief would have been acting in his official capacity as stated in Question 2, does the Nation's Tribal Official insurance policy cover payment of the Principal Chief's legal defense even when he is sued by members of the Tribal Council?**

The answers to the first two questions turn on the rules concerning government official scope of authority. The last answer turns, in part, on the terms of the Cherokee Nation's insurance policy concerning government officials.

It should be noted that, at this time, the Attorney General's Office provides no opinion as to whether or not the actions complained of in the subject lawsuit were actually committed by the Principal Chief or, if in fact committed, the propriety thereof. Thus, the actions complained of are referred to as alleged actions herein. Further, this opinion is issued solely on the issues as applicable to the Principal Chief and not as to the other defendants in the lawsuit. Additionally, this opinion is issued based solely on the Complaint as filed on June 23, 2006, in the subject suit.

**A GOVERNMENT OFFICIAL OF THE CHEROKEE NATION IS ENTITLED TO A LEGAL DEFENSE IN A CIVIL SUIT AT THE EXPENSE OF THE CHEROKEE NATION**

## **IF HE/SHE WAS ACTING WITHIN HIS/HER SCOPE OF AUTHORITY WHEN COMMITTING THE ACTIONS ALLEGED IN THE LAWSUIT.**

Government officials who are acting within the scope of their authority granted by the laws and Constitution of the Nation are considered to be acting as the Nation itself. As such, those officials are entitled to a defense paid for by the Nation when the officials are sued in a civil case for taking an official action which is within the scope of the official's authority pursuant to Cherokee Nation law.

Scope of authority law generally arises from actions where sovereign immunity is claimed. If a suit is brought against a government official in his individual name but the official was acting within the scope of his authority when committing the acts complained of, he is considered to be acting on behalf of the government and is thus immune from suit just as the government itself is. The naming of the defendant in his individual capacity by the plaintiff is not enough to determine whether the officer acted in his official or individual capacity. Larson v. Domestic and Foreign Comm. Corp., 337 U.S. 682, 688 (1949).

In order to determine if an official is acting within the scope of his/her authority, courts look to determine if the official's "action[s] [have] more or less connection with the general matters committed by law to his control or supervision." Spalding v. Vilas, 161 U.S. 483, 498 (1896). See also, Barr v. Matteo, 360 U.S. 564, 573-74 (1959), reh'g. denied, Oct. 12, 1959; Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950); Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F.2d 1339, 1344 (2d Cir. 1972).

An official may be sued in his individual capacity and "may be held to be personally liable for *ultra vires* acts which include acts beyond the official's statutory authority, acts taken pursuant to constitutionally void powers, or acts exercised in a constitutionally void manner." Davis v. Reed, 462 F. Supp. 410, 412 (W.D. Okla. 1977). Thus, the actions complained of must be based on a lack of delegated power. Id. at 691.

A mere allegation in the pleadings that a person acted outside scope of his duties is insufficient. Bivens, 456 F.2d at 1345. The plaintiff must set out in the complaint the statute or Constitutional provision which limits the officer's powers and beyond which the officer is alleged to have acted. Larson, 337 U.S. at 690. When there is no allegation that the officer's actions were outside of his powers as granted by the Constitution or a controlling statute of the sovereign, then the suit is one against the official acting in his official capacity. Id. at 703.

A claim of error in the exercise of a delegated power is also insufficient. Larson, 337 U.S. at 690. If the official is acting within the scope of his authority, he still cannot be sued in his individual capacity for those official actions even if he performs them negligently or makes a mistake of law or fact in the performance of his duties. Id. at 690, 695 (incorrect decision as to law or fact does not make official's action outside scope of authority if he was empowered to make the decision). Further, even if, in exercising the powers granted to him/her, an official acts "with partiality, or maliciously or corruptly or arbitrarily or oppressively," the officer cannot be subjected to a personal civil suit. Spalding, 161 U.S. at 494. The courts have determined that a

civil suit is not the manner in which to remedy the alleged wrong but the official should instead “be called to on account by impeachment, and suspended or removed from office.” Id.

The courts have noted that the protection of officials acting within the scope of their authority is necessary even if it sometimes permits inappropriate behavior to go unpunished. The policy behind the scope of authority rule is that:

It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties-suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

Barr v. Matteo, 360 U.S. 564, 571 (1959), reh’g. denied, Oct. 12, 1959.

**THE ALLEGED ACTIONS COMPLAINED OF IN THE SUBJECT LAWSUIT ARE ACTIONS WHICH THE PRINCIPAL CHIEF WOULD HAVE COMMITTED IN HIS OFFICIAL CAPACITY BECAUSE HE WOULD ONLY HAVE THE POWERS AND DUTIES TO ACT PURSUANT TO HIS OFFICE.**

To determine whether or not the allegations are made against the Principal Chief in his individual capacity or in his official capacity, one must examine the allegations in the Complaint and the powers and authority of the Principal Chief’s office. The executive power of the Cherokee Nation is vested in the Principal Chief. Cherokee Nation Const. art. VII, § 1 (2003). Additionally, the Principal Chief is empowered to conduct “all communications and business of the Cherokee Nation.” Cherokee Nation Const. art. VII, § 9 (2003). As such, the Principal Chief is given broad authority and power over activities of the Nation. See, e.g., Nixon v. Fitzgerald, 457 U.S. 731 (1982).

The caption of the Complaint names “Chad Smith, an individual” as one of three defendants. Compl. at 1. It appears that the Complaint is naming Chad Smith in his individual capacity; however, because the mere naming of a defendant in his individual capacity does not control the determination of scope of authority, Larson, 337 U.S. at 688, the entire Complaint must be reviewed.

Initially, it must be noted that the Complaint is vague in some of its allegations such that it is difficult to make a determination on the scope of authority issue for some of the allegations; this is especially true since specific actions and which defendant allegedly took the actions are not set out in every allegation. However, it is most notable that when setting out the parties in the Complaint, the Plaintiffs name Chad Smith who “is the current elected Chief of the Cherokee Nation. He is the sole stockholder of Cherokee Nation Industries as trustee for the Cherokee Nation.” Compl. at ¶ 22. This is evidence that Chad Smith is being named in his official capacity because he is only the stock holder for CNI and the trustee for the Nation in his official capacity as Principal Chief.

The First Claim for Relief makes allegations that the Defendants deceived the Plaintiffs with respect to a purchase of securities. Compl. at ¶ 28. No particular actions are alleged to have been taken by Chad Smith, but Chad Smith would only have a duty to provide information in connection with a purchase of securities by a Nation entity in his official capacity as Principal Chief.

In the Second Claim for Relief, Plaintiffs allege that Defendants made untrue assertions to Plaintiffs which deceived Plaintiffs who then relied on the statements. Compl. at ¶ 31. No particular actions are alleged to have been taken by Chad Smith, but Chad Smith would only have a duty to give information in connection with a purchase of securities by a Nation entity in his official capacity as Principal Chief.

In the Third Claim for Relief, the basis for the claim is made by “reason of the positions of trust [the Defendants] held within the Nation and the power they held over the assets of the Nation.” Compl. at ¶ 34. That Claim also alleges that the Principal Chief was required to give them information based on his “management and control of the assets and affairs of the Nation.” Compl. at ¶ 35. This Claim is also based on the Principal Chief’s fiduciary duty owed to the Nation. Compl. at ¶ 36. Chad Smith would only be in a position of trust and hold power over the Nation’s assets when acting in his official capacity as Principal Chief.

In the Fourth Claim for Relief, Plaintiffs allege concealment of “negligent actions of mismanagement” of the Nation’s businesses. Compl. at ¶ 40. Chad Smith would only be in a position to have any type of management and power over the Nation’s businesses when acting in his official capacity as Principal Chief.

Based on the language of the Complaint as filed, all of the allegations for which relief is claimed are thus based on alleged actions which would have been committed by the Principal Chief in his official capacity. The Complaint contains no allegations that Chad Smith acted outside the scope of his authority as Principal Chief, an allegation which is required in order to name an official in his/her individual capacity. *See* § 1 *supra*. Further, there is no allegation containing a Cherokee Nation statute or Constitutional provision pertaining to the Principal Chief’s powers and authority which Chad Smith allegedly acted beyond, an allegation which is required in order to name an official in his/her individual capacity. *See* § 1 *supra*.

Because the Complaint as filed never alleges that Chad Smith was acting in his individual capacity, nor does it allege that he was acting *ultra vires* his authority and/or powers delegated to him as Principal Chief by the Cherokee Nation Constitution or statute, and because the allegations for which the relief is requested are all actions which would be committed by Chad Smith in his official capacity as Principal Chief, the Complaint is against the Principal Chief in his official capacity. Because the Principal Chief is thus sued in his official capacity, he is entitled to a legal defense at the expense of the Nation.

**THE PLAINTIFF TRIBAL COUNCIL MEMBERS ACTED OUTSIDE THE SCOPE OF THEIR AUTHORITY WHEN THEY BROUGHT THE SUBJECT LAWSUIT IN THE NAME OF THE CHEROKEE NATION AND THUS THE PROHIBITION ON**

## **COVERAGE OF SUITS BY ONE ASSURED AGAINST ANOTHER ASSURED DOES NOT APPLY.**

The Nation's "Tribal Officials Liability Coverage Policy" (the "Policy") provides for an exception to coverage by stating that the Policy "shall not apply to any claim by any Assured against another Assured." Policy at 11, "Errors and Omissions Liability," § 2. The Principal Chief is an Assured for purposes of the subject litigation. An Assured also includes "any individual while acting in his/her capacity as tribal council member . . . in the discharge of their regular duties or services of the Assured . . ." Policy at 10, "Tribal Officials Liability." Under Cherokee Nation law, the Plaintiffs' regular duties do not give them the authority to file lawsuits on behalf of the Cherokee Nation. Further, even if the Tribal Council had authority to file a lawsuit, the subject suit was not filed under such Tribal Council authority because its filing was done in violation of the Constitutional and legal parameters which control Tribal Council conduct. Because Plaintiffs did not file the subject suit under their regular duties and thus do not fit the definition of Assureds, application of the exception to coverage for cases involving Assureds against Assureds does not apply for claims made in the subject suit.

In the Complaint filed by Plaintiffs, the caption names each individual Plaintiff and states that the Plaintiffs are bringing the suit "On Behalf of the Cherokee Nation." Compl. at 1. The Complaint also states that the action is based on defendants' duties to "the Plaintiff Nation." Compl. at ¶ 1. As such, it appears the Plaintiffs were attempting to bring the case in their capacity as government officials. However, when a government official exceeds his/her authority, he/she no longer represents the government and thus acts as an individual. Land v. Dollar, 330 U.S. 731, 736 (1947). As noted below, under the laws of the Cherokee Nation, when filing the subject suit, the Plaintiffs exceeded their authority as Tribal Council members and thus have acted as individuals. Because they have acted as individuals rather than under governmental authority, Plaintiffs are not Assureds under the Policy. Because the Plaintiffs are not Assureds under the Policy, the Section 2 exception for claims brought by Assureds against Assureds does not apply.

### **1) Plaintiffs had no authority to file the subject suit because the filing of lawsuits on behalf of the Cherokee Nation is beyond the scope of the Tribal Council's authority.**

The executive power is vested in the Principal Chief. Cherokee Nation Const. art. VII, § 1 (2003). It is the Constitutional duty of the Principal Chief to cause all laws of the Cherokee Nation to be faithfully executed and to conduct all communications and business of the Nation. Cherokee Nation Const. art. VII, § 9 (2003). As the chief executive of the Cherokee Nation, the Principal Chief is vested with the duty to protect the rights and interests of the Nation itself and of the Cherokee people.

Further, the 1999 Constitution, in place when the suit was filed, provides that the "Attorney General shall represent the Nation . . . in all civil actions wherein the Cherokee Nation is named as a party." Cherokee Nation Const. art. VII, § 13 (2003) (emphasis added). The Attorney General is part of the Executive Branch. Id.

Nothing in the Constitution gives power to the Council to bring a lawsuit on behalf of the Cherokee Nation. The Tribal Council has the power to establish laws. Cherokee Nation Const. art. VI, § 7 (2003). The Council also have the power to remove elected and appointed officials. Cherokee Nation Const. art. VI, § 8 (2003). Article 10 gives the Council various powers in relation to fiscal matters. Cherokee Nation Const. art. 10 (2003). Article 10 of the Constitution empowers the Council: to approve the budget pursuant to Section 2; authorize the Treasurer to make investments pursuant to Section 6; to approve pledges of the Cherokee Nation's credit pursuant to Section 7; make laws for the deposit of public funds pursuant to Section 9; and to designate the amount of surety bonds for those in positions of trust pursuant to Section 11. Cherokee Nation Const. art. X (2003). None of those powers gives the Council the authority to bring a federal lawsuit on the Nation's behalf.

The Constitution prohibits one branch from exercising the powers belonging to another branch. Cherokee Nation Const. art. V (2003). The Constitution does not empower the Council to bring lawsuits but specifically delegates the power to enforce laws and represent the Nation in lawsuits to members of the Executive Branch in Article VII. Further, the Constitution certainly does not give a minority of the Tribal Council authority to file a lawsuit on behalf of the Cherokee Nation. As such, the Plaintiffs have exceeded their authority as Tribal Council members by filing the subject suit in violation of the above-referenced Constitutional provisions, and thus the Plaintiffs were acting outside of their governmental powers and were not performing their regular duties.

It could be argued that the decision of the Cherokee Nation Supreme Court in Phillips v. Eagle gives the Plaintiffs the power to bring the subject suit. However, that case is not on point and does not provide the Plaintiff Council Members with authority to file the subject suit. The Phillips case held that an individual Council member in his/her official capacity has standing to bring a suit in Tribal Court against an Executive Branch official who is "exercising the constitutional powers of the Cherokee Nation Council and/or dictating the rules for credentials, decorum, procedure and/or operation of the Council of the Cherokee Nation." Phillips v. Eagle, JAT-98-09 at 6 (July 25, 1998). The Executive Branch officials' actions must interfere with the exercise of the Council members' power and authority to act as a Council member. Id. In that case, the individual Councilor was able to show the requisite injury in fact because the Deputy Principal Chief was dictating how and when Council meetings could occur and suspended the appointments of Council committee chairpersons, all of which were powers granted to the Tribal Council under the 1975 Constitution. Id. at 1.

The Phillips case is not applicable here for a multitude of reasons. First, the allegations in the subject suit do not involve assertions concerning the credentials, decorum, procedure or operation of the Tribal Council, nor do they involve any allegations that the Principal Chief has usurped the powers of the Council as delegated by the Constitution. The Phillips case is further distinguishable because it involved a case in the Cherokee Nation courts and thus involved the jurisdictional power of the Nation's Supreme Court to hear the case; the subject suit is one filed in a federal court, and a federal court's jurisdiction to hear a suit against a tribal official is not the same as a tribal court's jurisdiction. Next, the Phillips case was decided prior to the ratification of the 1999 Constitution and thus there was no Attorney General section which provides the power to litigate on behalf of the Cherokee Nation to the Attorney General. Additionally, the

Plaintiffs here brought the suit in the name of the Cherokee Nation not as individual Council members. As such, the Phillips rule does not give the Plaintiffs authority to file the subject suit.

**2) Plaintiffs exceeded their authority as government officials because they violated the Cherokee Nation Constitution's quorum requirements when they made the decision to file the subject suit.**

The Cherokee Nation Constitution states that, "No business shall be conducted by the Council unless at least two-thirds (2/3) of [the] members thereof regularly qualified shall be in attendance, which number shall constitute a quorum." Cherokee Nation Const. art. VI, § 4 (2003). Plaintiffs filed the subject suit in the name of "Linda Hughes-O'Leary, Bill John Baker, S. Joe Crittenden, David Thornton Sr., Charles Hoskin, Melvina Shotpouch, John F. Keener On Behalf of the Cherokee Nation." CIV06-251-RAW Compl. at 1.

Under the 1999 Constitution, which was in effect at the time the subject suit was filed, the Tribal Council consists of seventeen (17) members. Cherokee Nation Const. art. VI, § 3. Therefore, a quorum of the Council consists of twelve (12) Council members. At the time the suit was filed, there were only fifteen (15) Council members actually seated, and a quorum of those fifteen (15) would have been ten (10). Holder v. Byrd, JAT 97-14 at 2. There was never an actual meeting where the decision to file the subject suit was deliberated and voted upon. Seven (7) Council members decided to file the subject suit. CIV06-251-RAW Compl. at 1. Seven (7) members is less than the quorum of twelve (12) required to conduct Council business. Further, seven (7) members would not even constitute a majority of the fifteen (15) Council members seated at the time the subject suit was filed.

An attempt to take an action against another branch of the government by less than a quorum of Council members is void. In the Matter of the Cherokee Nation Courthouse, JAT AD-100 at 1 (attempt to impeach Judicial Appeals Tribunal Justices by less than a quorum of Council members held null and void). The Cherokee Nation's highest court has consistently ruled that the Council may only act as a body and in accordance with the Constitutional quorum requirement. "[I]t takes at least two-thirds of the full Council or ten members present to conduct any business." Mayes v. Crittenden, JAT 97-10 at 2 (case under previous Constitution where total number of Council members was 15). "Without the presence of [a quorum], no business of the Cherokee Nation can be considered or discussed." Id. at 3. See also, Phillips v. Eagle, JAT 98-09 at 23 (no action taken by Council at a special or regular meeting is valid if no quorum is present); Holder v. Byrd, JAT 97-14 at 5 (decision of nine members of Council to request Bureau of Indian Affairs rather than Cherokee Nation Marshal Service to enforce laws within Cherokee Nation held void and illegal). Again, the holding in the Phillips case that an individual Council member can bring a suit on his/her own in order to protect his/her ability to function as a Council member is inapplicable here. The Plaintiffs did not bring the suit as individual Council members but rather brought it "on behalf of the Cherokee Nation." Compl. at 1.

Because the filing of the subject suit was never discussed at or voted upon at a meeting of a quorum of the Tribal Council and was filed upon the decision of only seven (7) Council members, the filing of the suit was done in violation of the constitutional parameters which control the Council's conduct of business. Therefore, even if the Council otherwise had some

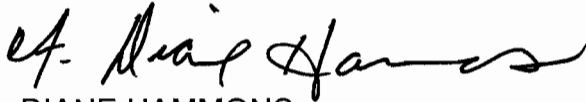
authority to file the suit, the filing of the suit exceeded the Plaintiffs' authority as Council members because they violated the Constitution's quorum requirements when deciding to file it.

**IT IS, THEREFORE, THE OFFICIAL OPINION OF THE ATTORNEY GENERAL THAT:**

**1. An elected official is entitled to a legal defense at the expense of the Nation when the suit against him/her consists of allegations against the official for taking actions which are within the scope of the official's authority pursuant to Cherokee Nation law, either statutory or constitutional.**

**2. The actions complained of in the Complaint as filed in the subject lawsuit are made against Chad Smith in his official capacity as Principal Chief because all of the actions alleged, if committed, would have been committed pursuant to the Principal Chief's Constitutional executive powers including the power to conduct the business of the Cherokee Nation. This is supported by the fact that the Complaint fails to allege that the Principal Chief acted beyond the scope of his authority and failed to allege any particular Cherokee Nation statutory or Constitutional violation committed by the Principal Chief.**

**3. Because the Plaintiff Tribal Council members acted *ultra vires* their authority as Council Members when they filed the suit, the subject suit is not one by an Assured against an Assured, and therefore, the Nation's insurance policy should apply to coverage of the Principal Chief's defense.**



A. DIANE HAMMONS  
Attorney General of the Cherokee Nation