Williams v. Big Picture Loans, LLC, 2020 WL 6784352 (E.D. Va. Nov. 18, 2020), *aff'd*, ___ F.4th ___, 2023 WL 364903 (4th Cir. Jan. 24, 2023)

- **Holding:** Non-tribal defendant misrepresented various facts concerning operation of a payday loan enterprise, and although the misrepresentations would not affect a court of appeals' determination that the tribal defendants were entitled to dismissal on immunity-from-suit grounds, they would be taken into account in resolving future motions.
- **Summary:** In *Williams v. Big Picture Loans, LLC*, 929 F.3d 170 (4th Cir. 2019), the court of appeals held that the several entities created by the Lac Vieux Desert Tribe of the Lake Superior Chippewa Indians--Defendant Big Picture Loans, LLC; Tribal Economic Development Holdings, LLC; and Defendant Ascension Technologies, LLC—were arms of the tribe and therefore entitled to immunity from suit in a class action alleging violation of state usury laws. The Fourth Circuit's decision is summarized at https://docs.google.com/document/d/1AFyu_XhjGStUnS1prD6ntCaJy3RsMH5B/edit#heading=h.gjdgxs. The principal non-tribal Defendant, Matt Martorello, remains in the case. On remand and in response to the district court's inquiry concerning the appellate decision's impact on future proceedings, "the Plaintiffs asserted, inter alia, that Martorello and others made material misrepresentations to this Court and to the Fourth Circuit about the facts pertaining to sovereign immunity and that, as a result, the Fourth Circuit's decision on that issue cannot be relied on by Martorello." Following a July 2020 evidentiary hearing, the submission of deposition excerpts and supplemental briefing, the court issued a detailed memorandum identifying four categories of alleged misrepresentations and finding that Plaintiffs' assertions were accurate.
    - Misrepresentations About Martorello's Involvement in the Creation of Red Rock. Martorello formed Red Rock Tribal Lending in 2011. It was later "supplanted" by Big Picture and Ascension in what the court characterized as a "Rent A Tribe scheme." Martorello filed a declaration stating that "'I was not involved in the creation of Red Rock, but made aware Red Rock had been formed.'" After looking to Merriam-Webster for the definition of "involved," the court found the contrary: "The facts that Martorello's counsel prepared the formational documents for Red Rock and that Martorello reviewed them before they were sent to LVD Tribal Council for approval, and the fact that Martorello chose the name 'Red Rock' show that his representation that he 'was not involved in the creation of Red Rock' is not true." It added that "the record shows that Martorello sought out a connection with the LVD so that he could get into the Tribal lending business."
    - Misrepresentations About the Control of Red Rock's Lending Operations. The court began its analysis of this misrepresentation category by stating that "[i]n pressing their motion to dismiss on the basis of sovereign immunity, the Tribal Defendants argued that Red Rock's managers made all final decisions about operations and that Martorello was a consultant. And, the Court accepted those representations in making findings about the control of Red Rock, relying principally on Martorello's affidavit." Again, however, the newly created record established the contrary:

> All of this shows quite clearly that the key ingredient of the lending operation, the underwriting criteria or "secret sauce," was SourcePoint's, not that of any Tribal Entity. And, the record shows that Martorello controlled the lending operations of LVD because, inter alia, he controlled the secret sauce (the key loan

underwriting criteria), the linchpin to the lending operations. [¶] ... And, it is not disputed that Red Rock later was "rebranded" to become Big Picture. And, except for a few cosmetic changes (or "optics" as Martorello described them), the LVD lending operation by way of Big Picture continued as it had under the Red Rock structure.

- Misrepresentations About How and Why Bellicose Was Sold to LVD. Martorello stated in his declaration that "'[c]ontrary to the allegations of Plaintiffs, the decision to sell Bellicose to LVD was not motivated by impending threats of litigation or enforcement action by government agencies.'" The court was unpersuaded:

> The record is ... clear beyond serious question that Martorello was motivated to sell Bellicose to LVD because of the threats of litigation and enforcement actions against him and his entities under the then-current lending arrangement between him, his entities, and LVD. Nonetheless, Martorello, at the evidentiary hearing, testified that his motivations for the sale included "the attractive offer that [he] received from the Tribes' Council and the Tribe, and his wish to raise his child in the mainland United States." ... That testimony is simply not credible in view of the substantial record written at the time by Martorello and the evidence presented at the evidentiary hearing. Nor, judged by his demeanor when testifying on the point at the evidentiary hearing, can the Court accept Martorello's testimony as credible.

- Misrepresentations About the Creation of Big Picture. The court concluded that "[t]he record ... proves the falsity of the assertions made in Martorello's declaration that 'neither I nor any company I owned, managed, directed or controlled the creation of Big Picture" and "neither I, nor Bellicose, helped form Big Picture.'" Rather, "the record shows convincingly that Big Picture was not created by LVD as the result of the Tribe's years of knowledge and business acumen related to online lending. In fact, Big Picture was created by Martorello for use with a different tribe and, when that fell through, Big Picture, at Martorello's instruction, was used to rebrand Red Rock."

The court turned then to describing how "the misrepresentations produced significantly erroneous findings by this Court." In that regard, it quoted nine portions of the decision reviewed by the Fourth Circuit that were factually incorrect in light of the new record of misrepresentations and stated further that "the entire section of the opinion describing Big Picture's lending process ... was materially erroneous because of the misrepresentations." Thus, "[t]he established misrepresentations strongly suggest that the Fourth Circuit's decision on the Tribal Defendants' entitlement to share LVD's sovereign immunity is open to question. But, that is not a matter for this Court to decide." Nevertheless, the court of appeals' decision does not spare Martorello: "[I]n analyzing all pending and future motions in which Martorello argues that his position is supported by the Fourth Circuit's decision, this Court will now be required to take into account the record about the misrepresentations and the findings about them that are made herein."

- **Relevant (2020) Deskbook Section:** 7:20 nn.4, 7, 8
- **Comment:** This is a highly unusual decision. Needless to say, it does not bode well for the non-tribal Defendants.