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Insurance and Risk Management Considerations in Indian Country

By Daniel E. Gomez

While on the campaign trail in August of 2004, President George W. Bush attended the UNITY Conference, a convention of diverse journalists. He was asked by Mark Trahant, former president of the Native American Journalists Association, to comment on tribal sovereignty. He said, "Tribal sovereignty means that. It's sovereign. You're a ... you're a ... you've been given sovereignty and you're viewed as a sovereign entity."[1] Aside from the misnomer that tribes were "given" sovereignty – a distinction that rightfully caused a firestorm of criticism from Indian country[2] – the president's response exemplified that tribal sovereignty is often not well-understood.

Modern day Indian tribes and nations are "self-governing sovereign political communities."[3] Tribes, however, lack the ability to raise revenues by traditional means enjoyed by other sovereign governments such as income, sales or property taxes, and they therefore rely on commercial activities to raise revenues to support programs for the benefit of tribal citizens.[4] Some tribes have been extraordinarily successful in their business enterprises and economic development initiatives. The Oklahoma Indian Gaming Association's *Economic Impact Report for 2016* reported that tribal government gaming output was $4.75 billion in 2015, representing 3 percent of private production in the Oklahoma economy, and had an overall impact of $7.2 billion when both direct and indirect impacts are taken into account.[5] In 2012, an OCU report on the statewide impact of Oklahoma tribes found the total output impact of all tribal activities, including gaming and nongaming activities, exceeded $10 billion.[6] The Cherokee Nation reports that in 2016, the overall economic impact of its governmental and business activities, including, but not limited to, gaming, exceeded $2 billion, representing a 23 percent increase from 2014.[7]

A key attribute of tribal sovereignty is immunity from lawsuits and legal process.[8] Nontribal businesses that regularly do business in Indian country often retain counsel versed in Indian law to address how sovereign immunity affects their relationship. However, what happens when people interact with tribes or tribal businesses involuntarily or tangentially, such as car accidents with tribal employees that occur outside of Indian land, injuries at tribal gaming properties or through employment with a tribal business enterprise? Are tribes required to carry liability insurance even though they cannot be sued? Do tribal employers carry workers' compensation insurance for occupational injuries? Can casino patrons sue a

tribe if they are injured and, if so, in what court? Do tribal gaming enterprises have insurance to cover tort claims? What types of insurance coverage are tribes required to have, and what types of insurance do they typically obtain voluntarily?

This article addresses some of these questions and situations that arise frequently in Indian country. However, it is first helpful to understand some basic concepts of tribal sovereign immunity and its unique status under federal law.

INDIAN TRIBES' 'SPECIAL BRAND' OF SOVEREIGNTY

Tribal sovereign immunity is based on tribes' status as "distinct, independent political communities, retaining their original natural rights" and "separate sovereigns pre-existing the Constitution[.]"[9] Because of this unique status, tribal sovereign immunity is not congruent to immunity enjoyed by the federal government or the states.[10] For example, states can sue other states because they surrendered their immunity for such suits at the Constitutional Convention; however, states cannot sue Indian tribes because "it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties."[11] Tribal sovereign immunity, ultimately, is a matter of federal law and is not subject to diminution by the states.[12] Due to these unique attributes, the Supreme Court recently acknowledged tribal sovereign immunity as a "special brand" of sovereignty.[13]

Sovereign immunity applies not only to the tribes in their exercise of traditional governmental functions but to tribes' business activities as well.[14] A tribally owned business enterprise enjoys the same immunity as the tribe itself if it is an "arm of the tribe," meaning that it is owned by the tribe and its profits are used to support the tribe's governmental functions.[15] To determine whether a business entity is an arm of the tribe, factors to be considered are 1) its method of creation; 2) its purpose; 3) its structure, ownership and management, including the amount of tribal control; 4) the tribe's intent with respect to the sharing of its sovereign immunity; and 5) the financial relationship between the tribe and the entity.[16] Tribal gaming enterprises are presumed to satisfy these requirements because the Indian Gaming Regulatory Act requires tribal ownership and that profits be used solely for the benefit of the tribes.[17] Tribal enterprises also enjoy immunity because, as noted, their profits are a substitute for traditional government revenues, and immunity therefore "directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general."[18]

Tribal sovereign immunity can be waived by consent or by Congress, but any such waiver must be "clear."[19] Waivers "cannot be implied, but must be unequivocally expressed."[20] "Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government."[21] Statutes that are alleged to waive tribal sovereign immunity must also be interpreted under the Indian Canons of Construction, which provide that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."[22] Under these strict standards, the Supreme Court has never found a statutory waiver of sovereign immunity unless Congress has explicitly referred to Indian tribes in the legislation.[23]

ACCIDENTS IN THE COURSE AND SCOPE OF TRIBAL EMPLOYMENT

Tribal sovereign immunity was tested in the Supreme Court's most recent term. In *Lewis v. Clarke*, it was alleged that an employee of a tribal gaming enterprise caused an off-reservation automobile accident while acting within the course and scope of his employment.[24] The defendant, Clarke, was a limo driver for the Mohegan Sun Casino, a gaming enterprise of the Mohegan Tribe of Connecticut, and allegedly caused the accident injuring the Lewises.[25] The Lewises sued Clarke in Connecticut state court for negligence. It was not disputed that Clarke was acting within the course and scope of his employment. Clarke moved to dismiss claiming tribal sovereign immunity, which was denied by the trial court, but granted by the Connecticut Supreme Court. The U.S. Supreme Court reversed, holding that Clarke was sued in his individual capacity and that he – not the tribe – was the real party in interest.[26] Clarke argued that the tribe was liable, even though it was not named as a defendant, because it had enacted a statute that indemnified him for on-the-job accidents. The court held that the tribe's voluntary indemnification did not extend its sovereign immunity to its employees because the sovereign immunity defense did not otherwise apply to employees in their individual capacities.[27]

The court, however, left open the door for tribal employees to assert personal defenses – including official immunity – a form of governmental immunity afforded to tribal officers and employees when they act within the scope of their employment and the liability results from a discretionary act.[28] The court cited its earlier decision in *Westfall v. Erwin*, which held that a "discretionary act" occurs "when officials exercise decision making discretion[.]"[29] The purpose of official immunity is "to insulate the decision making process from the harassment of prospective litigation[.]"[30] Future litigation may concern what constitutes a "discretionary act" for purposes of official immunity. For example, it has been held that an employee's ordinary operation of a motor vehicle does not invoke official immunity, but a police officer who causes an accident while pursuing a suspect often can assert official immunity.[31] It seems likely that tribal employees would be treated on equal footing in official immunity cases.

Overall, the *Lewis* decision is considered narrow because it ruled solely on tribal sovereign immunity and placed tribes in the same position as states and the federal government.[32] It is generally believed that the decision will not cause any major shift in Indian law policy, but it calls attention to the often unclear bounds of liability that tribes and tribal businesses face when their employees have on-the-job accidents, and the impact of tribal sovereign immunity. As a practical matter, even before the *Lewis* decision, many tribes obtained automobile insurance policies, and these policies often include liability coverage. While tribes themselves are still entitled to immunity, tribes often will allow claims against their liability insurance to foster goodwill with the nontribal public and to avoid bad publicity. They can do so on a case-by-case basis, or, like the Navajo Nation, enact tribal law to allow such claims. The Navajo Nation's Sovereign Immunity Act waives sovereign immunity for claims brought in tribal court where insurance is available to cover the claim, but only to the limits of insurance.[33]

Tribes also sometimes secure automobile liability insurance voluntarily to protect their employees from liability – and after *Lewis*, it is now clear they can be sued individually. Tribes compete with nontribal employers for employees, and protecting employees from individual capacity suits for course and scope automobile accidents puts them on equal footing with private employers. At a minimum, tribes and tribal employers – especially those involved in business activities – should review their insurance policies to determine if their employees are covered for a potential new wave of litigation directly against tribal employees as a result of *Lewis* and, if not, to make an informed decision whether to secure such coverage. The duty to defend is perhaps the most important coverage in this area because even a "slam dunk" case of official immunity will require litigation to assert the defense and obtain dismissal if a plaintiff tests its bounds. Plaintiff's counsel should inquire about coverage and study tribal law to determine whether their clients have recourse against the tribe and/or if such accidents are covered by voluntary or mandatory insurance.

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CASINO TORTS UNDER TRIBAL-STATE GAMING COMPACTS

For tribes that operate gaming facilities, their most common interaction with the general public usually comes from visitors and gaming patrons. In 2015, tribal gaming operations in Oklahoma had 45.9 million visits, including 18.7 million from out of state.[34] Inevitably, patrons will suffer injuries through slip-and-fall accidents or otherwise through interactions with casino staff and other guests. The process for asserting tort claims against tribal gaming facilities in Oklahoma was the subject of many years of litigation, but the key issue has finally been resolved: Casino patrons must first submit a tort notice to the tribe or gaming enterprise, and if the claim is not paid, the patron can sue but only in tribal courts.

The modern boom of tribal gaming in Oklahoma began with passage of State Question 712, which the state's voters approved in 2004. This law authorized the state to enter into gaming compacts with tribes for class III gaming

pursuant to the federal Indian Gaming Regulatory Act. Class III includes most casino style gaming such as slot machines and card games. The state Legislature drafted a model compact, which is published at Okla. Stat. tit. 3A, §281. All tribes in Oklahoma that conduct class III gaming do so pursuant to a compact with the state in the statutory form.

The model compact addresses tort claims at Part 6. Under the compact, tribal gaming enterprises must maintain public liability insurance to cover tort claims in amounts not less than $250,000 for any one person and $2 million for any one occurrence involving personal injury, and $1 million for any one occurrence involving property damage.[35] The compact also includes a limited waiver of tribal sovereign immunity provided that the claimant follows all required processes and satisfies the time limitations, and no award can exceed the required insurance limits.[36] As noted, a patron initiates a tort claim by filing a notice with the tribe or gaming enterprise, which must be filed within one year of the date of injury, but claims filed more than 90 days after the injury are subject to a 10 percent reduction in damages.[37] The tribe or enterprise should investigate the claim and respond to the claimant within 90 days or can obtain agreed extensions.[38] The tribe or enterprise can also refuse to respond at all, in which case the claim is deemed denied.[39] In many circumstances, the tribe or gaming enterprise will accept or deny the claim based on an insurance administrator's evaluation and decision.

The model compact further provides that a lawsuit may be filed against the tribe or gaming enterprise if the claim is denied, in which case the lawsuit must be filed within 180 days of the denial.[40] The immunity waiver requires that the claim be filed in "a court of competent jurisdiction."[41] In *Cossey v. Cherokee Nation Enterprises*, the Oklahoma Supreme Court in 2009 held that state courts were "courts of competent jurisdiction" under the compact and that compacting tribes had waived immunity for state court lawsuits involving torts at gaming facilities.[42] A group of compacting tribes demanded arbitration under the compact to challenge the decision, arguing that only tribal courts could hear such cases based on the compact's provision providing that "[t]his Compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction."[43] The tribes prevailed in arbitration and a federal court issued an injunction that precluded state courts from exercising jurisdiction over tribal gaming facility tort claims.[44] In *Sheffer v. Buffalo Run Casino, PTE, Inc.*, decided in 2013, the Oklahoma Supreme Court overruled its holding in *Cossey* consistent with the federal court injunction.[45]

Thus, it is now clear that casino tort claims that are denied by the gaming enterprise and/or by the insurance administrator can be brought only in tribal courts, and only to the extent of the insurance limits set forth in the tribal-state gaming compacts. Plaintiffs' attorneys would be wise to study the procedures set forth in the compact to avoid improperly filing in the wrong court and to ensure that all the time limitations are met to avoid dismissal of the claim on procedural and/or jurisdictional grounds. Failure to meet these requirements could result in the loss of the claim, including access to insurance coverage that would otherwise be available for casino torts.

WORKERS' COMPENSATION FOR OCCUPATIONAL INJURIES

Another common interaction between tribes and the public is through tribal employment. In 2015, Oklahoma tribal gaming facilities had an average annual employment of 27,944, of whom 43.2 percent were Native American and 56.8 percent were non-Native American.[46] In 2012, it was reported that the total employment impact of tribes in both gaming and nongaming employment (including tribal government administration jobs) was 87,174.[47] This large population of employees inevitably leads to occupational injuries akin to those compensable under the Oklahoma Workers' Compensation Act. The questions presented are whether tribes are subject to the Oklahoma Workers' Compensation Act and, if not, if they hold insurance to respond to occupational injuries.

In *Waltrip v. Osage Million Dollar Elm Casino*, an injured employee sued in Oklahoma Workers' Compensation Court for benefits under the casino's "sovereign nation workers' compensation insurance."[48] The claimant invoked the "estoppel act," Sections 65.2 and 65.3 of the Oklahoma Workers' Compensation Code, for the proposition that an insurer that collects premiums is estopped to deny coverage to an injured tribal employee.[49] The policy expressly excluded risks covered by state workers' compensation law, but agreed to cover only claims brought in tribal court pursuant to tribal law.[50]

The Osage Tribe, however, had not enacted its own tribal occupational injury law, so the question arose whether the insurer could refuse to participate in a claim in the state's workers' compensation court based on the tribe's sovereign immunity.

The Oklahoma Supreme Court held that the tribe itself could not be sued for recovery on the occupational injury in the state's workers' compensation court, but that the workers' compensation insurer was subject to the court's jurisdiction pursuant to the estoppel act.[51] However, the court made clear that if a tribe has enacted its own occupational injury law, the state cannot exercise jurisdiction; jurisdiction lies solely in the tribal court. The law on workers' compensation has been relatively stable since *Waltrip* was decided in 2012. Tribes that have enacted their own occupational injury laws can avoid state jurisdiction, while tribes that do not have such laws cannot. The first question an attorney representing an injured tribal employee must ask is whether a tribal occupational injury law is in effect, because that will determine where to pursue the remedy. Tribes, of course, are immune from suit, including from their employees in most instances, and are not required to purchase workers' compensation insurance – however many tribes will purchase such coverage to compete with private employers who offer such benefits, or will otherwise provide mechanisms to pay for occupational injuries.

FEDERAL PROGRAMS AND THE FEDERAL TORTS CLAIMS ACT

The Indian Self-Determination and Education Assistance Act (ISDEA) authorizes tribes to enter into contracts with the federal government to administer programs and services that the federal government would otherwise provide.[52] As of 2015, it was reported that over 50 percent of all federal Indian programs were being carried out by tribes pursuant to self-governance contracts.[53] Such programs include healthcare, education, law enforcement, housing, family protection and other forms of social welfare.[54] Tribes initially faced trouble in performing these tasks due, in part, to the costs of liability insurance (particularly medical malpractice insurance) and it was determined that funding was inadequate.[55]

In response to this problem, Congress amended the ISDEA to provide that any tort committed by a tribe or tribal employee in the course of administering an ISDEA contracted program would be covered by the Federal Tort Claims Act (FTCA).[56] It was initially contemplated that the amendment would be temporary while the federal government assisted tribes in obtaining insurance, but the ultimate result was to make FTCA coverage permanent.[57] Thus, a member of the general public who is injured by a tribal employee during the administration of a federal program can look to the FTCA for remedy, and a suit against the tribe is unnecessary and would be dismissed.

CONCLUSION

The foregoing addresses some of the most common areas of interplay between tort liability, insurance coverage and tribal sovereign immunity. A basic understanding should help to guide tribes in their evaluation of coverage and plaintiffs in determining where and how to seek a remedy. It may turn out that insurance coverage is available and that the remedy is not so dissimilar to those existing in the private sector.

1. A clip of the full exchange is available at www.youtube.com/watch?v=kdimK1onR4o.

2. Lewis Kamb, "Bush's Comment on Tribal Sovereignty Creates a Buzz," *Seattle Post-Intelligencer* (Aug. 12, 2004) (available at www.seattlepi.com/local/article/Bush-s-comment-on-tribal-sovereignty-creates-a-1151615.php).

3. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2043 (2014) (Sotomayor, J., concurring).

4. In her concurring opinion in *Bay Mills Indian Community*, Justice Sotomayor explained using the most prominent example of tribal business enterprises as follows:

> "[T]ribal gaming operations cannot be understood as mere profit-making ventures that are wholly separate from the Tribes' core governmental functions. A key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on federal funding. And tribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases may be the only means by which a tribe can raise revenues. This is due in large part to the insuperable (and often state-imposed) barriers Tribes face in raising revenue through more traditional means.
>
> For example, States have the power to tax certain individuals and companies based on Indian reservations, making it difficult for Tribes to raise revenue from those sources. States may also tax reservation land that Congress has authorized individuals to hold in fee, regardless of whether it is held by Indians or non-Indians. As commentators have observed, if Tribes were to impose their own taxes on these same sources, the resulting double taxation would discourage economic growth. Fletcher, "In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue," 80 *N.D. L. Rev.* 759, 771 (2004); *see also* Cowan, "Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal Governmental Revenues," 2 *Pittsburgh Tax Rev.* 93, 95 (2005); Enterprise Zones, Hearings before the Subcommittee on Select Revenue Measures of the House Committee On Ways and Means, 102d Cong., 1st Sess., 234 (1991) (statement of Peterson Zah, President of the Navajo Nation) ("[D]ouble taxation interferes with our ability to encourage economic activity and to develop effective revenue generating tax programs. Many businesses may find it easier to avoid doing business on our reservations rather than ... bear the brunt of an added tax burden").

Id. at 2043-44 (some internal citations have been omitted).

5. The full report is available at oiga.org/wp-content/uploads/2015/11/OIGA-2015-Annual-Impact-Report-singlepg.pdf.

6. The full report is available at sovnationcenter.okstate.edu/sites/default/files/documents/Tribal%20Impact%20Report.pdf.

7. The full report is available at www.cherokeenationimpact.com/images/economic_impact_report_2016.pdf.

8. *Bay Mills Indian Community*, 134 S. Ct. at 2030.

9. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 98 S. Ct. 1970, 1675 (1978) (quoting *Worcester v. Georgia*, 6 Pet. 515, 559, 8 L. Ed. 483 (1832)).

10. *See Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890, 106 S. Ct. 2305, 2313 (1986).

11. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782, 111 S. Ct. 2578, 2583 (1991).

12. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756, 118 S. Ct. 1700, 1703 (1998).

13. *Bay Mills Indian Community*, 134 S. Ct. at 2037.

14. *Id*. at 2031 (citing *Kiowa Tribe*, 523 U.S. at 760, 118 S. Ct. at 1705).

15. *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1191 (10th Cir. 2010).

16. *Id*. at 1187.

17. 25 U.S.C. §2701 *et seq.; Cohen's Handbook of Federal Indian Law* §21.02[2], at 1328 (2012 ed.) (citing *Allen v. Gold Country Casino*, 464 F.3d 1044, 1146-47 (9th Cir. 2006)).

18. *Allen*, 464 F.3d at 1047 (citing *Alden v. Maine*, 527 U.S. 706, 750, 119 S. Ct. 2240, 1264 (1999)); *see also Breakthrough Management*, 629 F.3d at 1191.

19. *Bay Mills Indian Community*, 134 S. Ct. at 2031.

20. *Santa Clara Pueblo*, 436 U.S. at 58, 98 S. Ct. at 1677.

21. *Bay Mills Indian Community*, 134 S. Ct. at 2032.

22. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 2403 (1985).

23. *Buchwald Capital Advisors, LLC v. Papas (In re Greektown Holdings, LLC)*, 532 B.R. 680, 693 (E.D. Mich. 2015) (noting that "there is not one example in all of history where the Supreme Court has found that Congress intended to abrogate tribal sovereign immunity without expressly mentioning Indian tribes somewhere in the statute.").

24. *Lewis v. Clarke*, 137 S. Ct. 1285, 1290 (2017).

25. *Id*.

26. *Id*. at 1291.

27. *Id*.

28. *Id*. at 1292, n.2.

29. *Westfall v. Erwin*, 108 S. Ct. 580, 584 (1988).

30. *Id*. at 583.

31. *United States v. Gaubert*, 499 U.S. 315 (1991); *McBride v. Bennett*, 764 S.E.2d 44 (Va. 2014).

32. *Lewis*, 137 S. Ct. at 1292 ("The protection offered by tribal sovereign immunity here is no broader than the protection offered by state or federal sovereign immunity.").

33. Navajo Nation Code Annotated, Title 1, Chapter 1, §554(F), available at www.navajonationcouncil.org/Navajo%20Nation%20Codes/V0010.pdf.

34. *See* Oklahoma Indian Gaming Association *2016 Annual Impact Report*, *supra*, n.5.

35. Okla. Stat. tit. 3A, §281 Part 6(A)(1).

36. *Id*. at Part 6(A)(1), Part (A)(2), and Part 6(C).

37. *Id*. at Part 6(A)(4).

38. *Id*. at Part 6(A)(8).

39. *Id*.

40. *Id*. at Part 6(A)(9).

41. *Id*. at Part 6(C).

42. *Cossey v. Cherokee Nation Enterprises*, 212 P.3d 447, 460 (Okla. 2009); *see also Griffith v. Choctaw Casino of Pocola*, 230 P.3d 488, 498 (Okla. 2009); *Dye v. Choctaw Casino of Pocola*, 230 P .3d 507, 510 (Okla. 2009).

43. Okla. Stat. tit. 3A, §281 Part 9.

44. *Choctaw Nation of Okla. v. Oklahoma*, No. CIV-10-50-W, 2010 WL 5798663, at *4 (W.D. Okla. June 29, 2010).

45. *Sheffer v. Buffalo Run Casino, PTE, Inc.*, 315 P.3d 359 (Okla. 2013).

46. *See* Oklahoma Indian Gaming Association *2016 Annual Impact Report*, *supra*, n.5.

47. *See* The Statewide Impact of Oklahoma Tribes, *supra*, n.6.

48. *Waltrip v. Osage Million Dollar Elm Casino*, 290 P.3d 741, 742 (Okla. 2012).

49. *Id*. at 743.

50. *Id*. at 744.

51. *Id*. at 746-47.

52. 25 U.S.C.§§450 & 450a.

53. Strommer, "The History, Status, and Future of Tribal Self-Governance under the Indian Self-Determination and Education Assistance Act," 39 *Am. Indian L. Rev.* 1, at 1 (2014).

54. *Id*.

55. *Coverage Issues Under the Indian Self-Determination Act*, 22 U.S. Op. Off. Legal Counsel 65, 1998 WL 1751077 (Office of Legal Counsel, U.S. Department of Justice, 1998).

56. *Id*. at *3.

57. *Id*.

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