Are You in Good Hands?
Ensuring Tribal Insurers Honor & Protect Sovereignty

By Gabriel S. Galanda & Debora Juarez

Corporate America has for too long deceived, disrespected and ignored Indian people. Energy companies have pillaged tribal lands for oil and gas and underpaid Indians for rights-of-way across allotted lands. Powerhouse financial institutions that were either unable or unwilling to assist tribes Before Casinos (“B.C.”) – before Indian gaming blossomed into a multi-billion dollar industry – are now roaming the halls of tribal administration buildings trying to land large Indian financial investment accounts or commercial loans. Insurance companies, which also gave little attention to Indian people B.C., now pocket lucrative tribal premiums.

It is high time Indian Country insist and ensure that Big Business, which eloquently talks the talk of tribal sovereignty, also walks the walk. The intent of this particular article is to help Indian tribes and Alaska Native Corporations convey that message to their friends in the multi-trillion dollar insurance industry. Native people are paying millions upon millions of dollars in insurance premiums each year to ensure the protection of the tribal treasury and other Indian assets. But do you know that those expensive insurance contracts that purport to safeguard Indian property and monies probably waive tribal sovereignty, jurisdiction and immunity?

Now increasingly drawn to the reservation by the $23 billion Indian gaming industry, insurers and their agents sell tribes on how they will “protect the tribe and its sovereignty” – and they command five- or six-figure premiums to do so, at least ostensibly. But those same insurers commonly retain discount lawyers with no Indian legal experience to defend tribal insureds from attack. And when sued by tribal insureds for contractual insurance coverage, those same insurers routinely object to the jurisdiction and authority of tribes and their courts. When all’s said and done, the insurance industry is responsible for many federal and state court decisions that have eroded away tribal jurisdiction over reservation-based disputes.

Indian Country must take a renewed approach to insurance procurement. Tribes and Alaska Native Corporations can no longer afford to treat their insurance policies as form contracts, by rubber stamping whatever insurance agents are packaging and selling. Rather, Indian business leaders and tribal lawyers must approach and negotiate those two-inch insurance policies/contracts as they would a multi-million dollar
real estate acquisition or commercial loan transaction. Tribal insureds now must get what they deserve in exchange for those exorbitant premiums—business partners who will make decisions, or honor tribal decisions, that are in the best interest of the tribe and all of Indian Country.

What follows are some practical tips for Indian decision-makers to ensure that the insurance they purchase not only maximizes the protection that should be afforded to tribal assets, but does not waive Indian sovereignty, jurisdiction and immunity.

**Ensuring Tribal Choice of Defense Counsel to Facilitate Sovereign Decisionmaking.** Insurance companies command trillions of dollars in premiums—$3.4 trillion worldwide and $946 billion domestically last year. And they control billions of dollars in damage claims—$61.2 billion in the U.S. in 2005, the year the likes of Hurricane Katrina caused the most property damage in our country’s history. (Note the enormous disparity between premium dollars and estimated damages in the U.S. alone last year.) In turn, insurers exert great influence over, among many other things, the legal marketplace. Insurers often dictate to law firms the hourly rate they will pay for defense of an insured, rather than those legal businesses commanding their standard rate as is common with most attorney-client relationships. Ultimately insurance companies command sizeable discounts on the legal bills they must pay on behalf of their insureds. But as the old adage goes, you get what you pay for.

Consider the everyday tort lawsuit brought by non-Indian Joe Citizen against a tribal insured for injuries allegedly sustained in a casino. If the facts he alleges against the insured could, if proven, impose liability upon the tribe within its policy’s coverage, the insurer must retain and pay outside lawyers to defend the tribe. When the insurer and/or its claims adjustor are presented with that tort claim, they often hire the same local discount defense lawyers that they hire to defend non-Indian businesses from personal injury suits. But in the context of even the most routine slip-and-fall claim, federally-recognized Indian tribes and Alaska Native Corporations have vastly different legal rights than off-reservation grocery or hardware store owners. Therefore, the cookie cutter approach to insurance defense, which is common in the business world, is not acceptable in Indian Country.

Many tribal insurance policies allow the insurer to select defense counsel for the tribe when it faces a tort claim or lawsuit. Take, for example, one popular tribal insurance underwriter’s Tribal Officials Errors and Omissions Liability Occurrence Form, conferring what is commonly known as director and officers, or “D&O,” coverage, which states:

The [insurer] shall have the right and duty to select counsel and defend any suit against the insured . . . The [insurer] shall have the sole right to assign counsel to defend any suit against the insured, and the insured agrees and consents to the [insurer’s] exercise of that sole right.
Why? So the insurer can pay discount non-tribal defense lawyers to defend any suit against the tribal insured. And such policy language has been invoked by carriers when they unilaterally retain defense lawyers with no experience representing Indian people, to defend tribal insureds.

Notwithstanding any such insurance contract language, tribal insurers have a duty to employ defense counsel who understand the significant legal, political and social implications of even the most frivolous tort lawsuit against a tribal sovereign, even if tribal defense lawyers cost insurers a bit more per hour given their specialty. Still, tribal insureds get only what the insurers are willing to pay for—discount defense lawyers who simply do not understand Indian Country, let alone the profound consequences of litigation against a sovereign tribal government in this day and age. If that is not a bad faith insurance practice, what is?

Now ponder the tribal insured’s opportunity to assert sovereign immunity and move to dismiss Joe Citizen’s lawsuit. Current common law makes clear that tribes, tribal businesses and casinos, and tribal officials and employees who act within the scope of their employment, are all generally immune from tribal, state or federal suit. Still, an experienced Indian defense lawyer would first explain to the tribe that courts, including Indian courts, are increasingly skeptical of federal Indian jurisdictional defenses like sovereign immunity, feeling that aggrieved reservation-goers should not be deprived the right to have their case aired on their merits before a judge or jury. That is particularly true in cases that involve “unknowing” non-Indian patrons and/or arise out of tribal “commercial” enterprises (despite the fact that such businesses’ proceeds provide essential governmental services to tribal people).

Indian defense counsel would also advise the tribal insured that it can no longer automatically assert the defense of sovereign immunity because courts increasingly “doubt the wisdom of perpetuating the doctrine,” suggesting to Congress “a need to abrogate tribal immunity, at least as an overarching rule.” See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 758 (U.S. 1998). That tribal lawyer would further explain to the tribe that once it files a motion to dismiss, it essentially relinquishes the tribe’s (and Indian Country’s) control over the outcome of the lawsuit, to the judicial system.

On the other hand, a non-tribal defense lawyer may not appreciate this legal and political context, particularly the intense scrutiny courts give federal Indian jurisdictional defenses, or the profound negative effect of the published opinions judges write, urging Congress’s modification or outright abrogation of legal doctrine like tribal immunity. As such, that lawyer might very well haul off and file the motion to dismiss Joe Citizen’s suit, giving rise to the perfect storm for the next federal or state appellate court decision, or Congressional bill, that will divest Indian courts from inherent authority over certain reservation disputes, or severely impact sovereign immunity.
When tribal sovereignty is at stake, tribes simply cannot allow insurers to be pennywise and poundfoolish, by assigning defense counsel based upon cost rather than expertise. Tribal business leaders must insist that the tribe “shall have the sole right to assign counsel to defend any suit against the insured.” Like large non-Indian companies that demand of their insurers and obtain the right to select defense counsel, tribes and Alaska Native Corporations must enjoy that same prerogative to assign lawyers they trust. If the insurer balks at such language, the tribe and insurer could agree that they will jointly select counsel, which would have the practical effect of giving the tribal insured veto power over the carrier’s choice of inexperienced defense lawyer.

**Expressly Retaining or Waiving Sovereign Immunity in the Policy.** Consider two points about the interplay of tribal immunity and insurance law. First, numerous courts have ruled that a tribe’s purchase of liability insurance is not enough, without more, to constitute a clear and unequivocal immunity waiver. While an insurance policy that includes a clear provision waiving tribal immunity could allow suit against the tribe, a policy by itself would not. For public policy reasons, some tribes have purchased liability insurance for certain business activities and passed tort claims laws that operate to waive immunity, but only to the extent of the policies’ available coverage and limits. Yet if a tribe does not wish to affect a blanket immunity waiver by purchasing insurance (as is the case for most tribes), their policy should provide that nothing therein should be read to waive immunity or confer jurisdiction to any court.

Secondly, unless the policy provides otherwise, an insurer is not, as a matter of law, authorized or empowered to waive or otherwise limit a tribal insured’s sovereign immunity. Put more bluntly, an insurer has absolutely no business asserting Indian immunity as a defense to suit unless they have received the express consent of the tribal sovereign. Notwithstanding, there have been situations where insurers and claims adjustors have meddled with, or even made, the deplorable decision to assert sovereign immunity without tribal permission – yet another bad faith practice. Many, but not all, tribal policies make clear that in the event of a claim or suit against the tribe or tribal officers or employees, the insurer shall not assert or waive tribal immunity absent written authorization from the tribe. All tribal policies should make clear that only the tribal sovereign shall decide whether or not to assert its immunity.

**Not Allowing the Policy to Waive Tribal Jurisdiction.** Due to aggressive tribal economic development and diversification, there are more significant insurable Indian assets – e.g., buildings, automobiles, operations and employees – than ever before. As a result, there are an increasing number of tribal insurance coverage disputes, about whether the carriers should cover and/or defend claims against a tribal policy. In that instance, the very same insurer that commanded an exorbitant premium and promised to “protect and defend,” vehemently objects to the tribe’s assertion of civil jurisdiction over the insurer. An insurer’s objection to Indian jurisdiction is essentially why a reservation auto injury lawsuit ended up before the U.S. Supreme Court, *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (U.S. 1985). That case thankfully yielded a win for Indian Country – a decision mandating that non-tribal courts not intercede in litigation involving questions of tribal authority so Indian courts can initially determine such cases.
A tribal court should, as a matter of self-governance, be allowed to assert subject matter jurisdiction over any dispute about a tribal insurance policy’s coverage. If insurers can accept Indian money, shouldn’t they also accept Indian justice systems? Under the federal Supreme Court’s landmark decision in *Montana v. United States*, 450 U.S. 544 (U.S. 1981), insurers that enter into “consensual relationships with the tribe or its members” through insurance contracts, should be subject to tribal court jurisdiction in disputes arising out of such a contract. But that presumes the subject policy does not waive tribal jurisdiction through choice-of-forum and/or arbitration provisions. Consider another policy provision advanced by that same tribal insurance underwriter, a standard “Binding Arbitration” endorsement providing that:

If we and the [tribal] insured do not agree whether coverage is provided under this Coverage Part for a claim made against the insured, then either party may make a written demand for arbitration. . . . [A]rbitration will take place in the county or parish in which the address is shown in the Declarations is located. Local rules of law as to procedure and evidence will apply.

Arguably, this language divests an Indian court from jurisdiction to entertain a reservation-based insurance coverage dispute and vests that authority with a non-tribal arbitration tribunal. The endorsement could also be read to disallow the application of tribal law in such a dispute, in favor of “local” or state law.

What’s more, the provision would likely be read to waive the tribal insured’s sovereign immunity from any suit or countersuit the insurer may advance, as a result of *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001). In that case, the Supreme Court ruled that the inclusion of an arbitration clause in a form contract constitutes “clear” manifestation of intent to waive tribal immunity. As a result, the tribe could be preliminarily subject to the subject matter jurisdiction of a state or federal court in an action by the insurer to, e.g., compel arbitration rather than allow the tribal court to decide the matter.

A tribal insured may very well decide that a non-Indian forum such as an arbitration panel should adjudicate any insurance coverage dispute with its insurer, and that it wishes to waive immunity in limited form relative to any such dispute. But those vital legal/political decisions and exercises of sovereignty must be made by tribal leadership as they would in a complex, commercial transaction; not inadvertently by rubber stamping a two-inch insurance contract assembled by a broker that the tribe mistakenly trusts will protect their sovereignty.

**Supplementing, not Supplanting, Federal Tort Claims Act Coverage.** Under government-to-government agreements authorized by the federal self-determination act, the federal government supplies funding to over 200 tribes, allowing them to conduct programs that the U.S. would otherwise provide them in fulfillment of its trust responsibility to Indians. A 1990 amendment to that act provides tribes and/or tribal employees full protection under the Federal Tort Claims Act (FTCA) for claims resulting from negligent or wrongful, perhaps even intentional, acts or omissions arising from
their performance of self-governance contractual functions. In that instance, a claimant’s remedy against the tribal defendants, vis-à-vis the federal government, is “exclusive of any other civil action or proceeding for money damages,” including any tort lawsuit against tribal governments and tribal employees covered by the FTCA.

Federal courts have affirmed the applicability of the FTCA to tortious acts arising out of, e.g., health care clinics and human service programs; schools and early learning centers; law enforcement; and general contractor construction work. Essentially, the FTCA provides self-governance tribes primary tort liability coverage for a host of everyday personal injury claims. Importantly, the U.S. Department of Justice (DOJ) must defend personal injury claims or lawsuits against self-governance tribal contractors and/or employees that fall within the ambit of the FTCA. Most self-determination contracts make that clear. The federal defense duty is a critical means of protecting the tribal treasury, resulting from decades of tribal investment in self-determination law and policy.

An insurance policy for a self-governance tribe – and their premium amounts – should expressly reflect the protection afforded the tribe by the federal government pursuant to the FTCA, and the relationship between the tribe’s insurance coverage and FTCA protection. Moreover, the policy should make clear that the insurer shall not tender an FTCA-covered claim or suit to the federal government without written tribal authorization (just as an insurer cannot waive tribal immunity without express tribal consent). Only a tribe should be allowed to invoke its trust relationship with the federal government by requesting federal tort defense.

And if for public policy reasons the self-governance tribe opts against tendering the federal defense – much like deciding against asserting tribal immunity – the insurance contract should reflect the insurer’s continued duty to defend the matter. Another policy provision advanced by tribal insurance underwriters provides:

It is the intent of this policy that any claim or ‘suit’ covered . . . under the [FTCA] as it applies to Self-Determination Contractors under Pub. L. 101-512 shall be deemed to be other insurance . . . excess over such claims or ‘suits.’ It is further the intent of this policy that when this insurance is excess over such claims or ‘suits,’ we will not have the duty . . . to defend any claim or suit for which the insured is entitled to defense by the U.S. Department of Justice under the provisions of the [FTCA].

In the eyes of the insurers, such language alleviates their duty to defend self-governance tribal insureds when “they are entitled to defense” by DOJ. Put another way, insurers do not believe they need defend any self-governance tribal defendants when a tribe, for public policy reasons, decide against tendering the defense of an FTCA-covered claim to the federal government.

Even worse, insurers might read that language to suggest that if DOJ does not defend a self-determination contractor/employee even though they are entitled to federal defense, the carriers need not defend them either. With the current federal...
executive branch increasingly reluctant to honor the United States’ legal, contractual and trust obligations to defend self-governance tribes under the FTCA, such tribes must impose even clearer defense obligations on their insurers. Accordingly, a self-governance tribe’s insurance policy must make clear that the insurer has a duty to defend a claim or lawsuit against the tribal insured unless and until “they are provided defense” – i.e., until DOJ formally agrees to defend the matter under the provisions of the FTCA.

It is nothing short of a bad faith insurance practice to defend Indian sovereignty on the cheap, or abuse inherent tribal rights for economic gain. Has your tribal insurer committed bad faith – are you in bad hands?

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