Tribal Tort Ordinances, Personal Injury Claims and Tribal Sovereignty

by Jack Duran

As the Indian Gaming Regulatory Act (IGRA) of 1988 brought with it tremendous opportunity for Indian tribes to acquire fantastic wealth and economic prosperity, so too has it brought an equal amount of federal and state court scrutiny and attacks on tribal sovereignty. Tribal sovereignty is currently under attack from many angles, from whether the National Labor Relations Act is applicable to Indian gaming facilities in *San Manuel Indian Bingo and Casino v. N.L.R.B.* (D.C.Cir.2007) 374 U.S. App. D.C. 435[475 F.3d 1306] (San Manuel), a case pending before the United States Supreme Court, to whether a tribal-state compact may include jurisdiction-shifting language over personal injury claims occurring in gaming casinos, *Doe v. Santa Clara Pueblo*, 141 N.M. 269 (2007). As such, Indian tribes are finding it harder and harder to assert their status as sovereign nations within their own jurisdictions where Indian interests collide with non-Indians.

**Tribal Personal Injury and Property Damage Claims**

One of the areas that has thus far eluded court scrutiny and where sovereignty still remains somewhat intact, is the area of tribal personal injury and property damage claims. Commonly referred to as tribal tort claims, these claims are most often adjudicated under tribal ordinances that set forth the parameters of any and all tort actions (personal injury and property damage) that occur within a tribe’s jurisdictional boundaries.

While it is settled law that lawsuits involving tribal members or non-members who conduct business within tribal lands routinely are permitted to be resolved under tribal law and within a tribal forum, so too are actions involving non-tribal members with limited tribal contacts. The most common of these situations involves a patron to a tribal business who is injured on the business premises or who has property damaged within the tribe’s jurisdiction. Most states that permit gaming or include tribes with developed court systems have negotiated tort claims provisions within their IGRA permitted tribal-state gaming compacts allowing these actions to be brought within a tribal system pursuant to tribal law.

The IGRA required tribal-state compact in most instances sets forth minimal conditions under which tort claims involving non-tribal casino patrons are to be handled. The State of California, for example, in its 1999 tribal-state compact, of which sixty-one (61) gaming tribes are signatories, laid the initial framework for tribal tort actions by specifically requiring tribes to waive their sovereign immunity against civil suit to the extent of the limits of a $5,000,000 policy of insurance. The compact also requires tribes to ensure claims “are adjudicated promptly, that legitimate claims will be paid and that the tribe promulgate a tribal tort ordinance, setting forth the terms and conditions of the tribe’s waiver of immunity and the process by which tort claims are to be adjudicated.”

**The Winnowing of Tribal Sovereignty**

In subsequent California Compacts, beginning in 2003, the compacts began to include language permitting the arbitration of tort claims if patrons were dissatisfied with the tribal outcome. The inclusion of the additional requirement of arbitration is somewhat troubling and is a clear attempt to vitiate sovereignty by exposing tribal claims to outside jurisdiction and handling by non-tribal courts or arbitration panels. The addition of arbitration appears to be purely political, rooted in an unsupported perception that tribal courts cannot provide the same level of scrutiny or justice provided by state courts. It may also have its roots in racial prejudice. Some states, such as New Mexico, have attacked tribal sovereignty by advancing jurisdictional shifting language within their compacts requiring patron tort claims to be resolved exclusively in state court. The New Mexico compact language was litigated to the New Mexico Supreme Court, which upheld the language as permissible and not expressly prohibited by the IGRA, and therefore valid.

In California, courts have appeared somewhat reluctant to assert jurisdiction over tribal matters although in several cases courts asserted jurisdiction over matters included within a compact. In one case involving a Northern California tribe, the tribe’s entire casino employee workers’ compensation program was subjected to state court jurisdiction simply because the tribe failed to timely file a notification to the governor’s office indicating they had set up their own workers’ compensation system. In a seminal California tribal tort case, *Campo Band of Mission Indians v. Superior Court* (2006) 137 Cal.App.4th 175, a California court of appeals issued a lengthy opinion outlining the scope of the Campo tribe’s waiver of sovereign immunity, as juxtaposed against the terms of their compact, before graciously remanding the case back to tribal court for additional proceedings. In sum, these two cases illustrate that state courts will not hesitate to assert jurisdiction over tribal cases when the right case and facts come along.

**Protecting Tribal Sovereignty**

The best defense available to tribes to protect themselves and their sovereignty against the assertion of state jurisdiction in tort matters, is to participate in the drafting of compact language concerning tort claims. After that, tribes must follow the language of their state compacts’ tort claims requirements to the letter. If the compact requires a tort ordinance, consult with your legal counsel to ensure that the tort ordinance drafted contains any and all language, terms and processes
required by the compact, including language concerning insurance policy limits and/or the length and types of coverage required. Additionally, make sure that all required trial court and any appellate court procedures, if required, are also included along with provisions for discovery, evidence and the burden of proof required to prevail. Also, be sure to include language stating expressly what is both included and excluded from a damages award, as items such as attorneys’ fees and punitive damages are currently excluded in all forms of the California compacts. Be sure to expressly exclude from the ordinance any claims not required to be included, for example employee, third-party liability, and claims for intentional torts. Tort ordinance language should also be clear and concise, even though it is settled law that tribes have the ultimate authority to interpret their administrative processes, unclear language may permit a court unfamiliar with tribal court proceedings, tradition and custom, to interpret your tort ordinance in an unfavorable manner.

A review of tort ordinances at least annually, if not bi-annually, is recommended which will ensure that the tort ordinance reflects current tort law and personal injury holdings. Additionally, it is a perfectly acceptable practice to provide only the procedures and processes that are required by the compact in the tort ordinance and nothing more. A review of several California tribal tort ordinances currently in effect reveals that they provide excess processes and/or procedures that are not required by the terms of their compacts. Excess procedures are a fertile playground for adventurous personal injury attorneys and will also likely lead to additional expenses related to case processing and unnecessary hearing costs that could be better spent elsewhere.

Concerning the training of tort hearing officers and/or court personnel, consult your insurance carrier. Because they are likely responsible for paying claims, insurance carriers regularly provide free training classes and seminars on such subjects as damages calculations, independent medical evaluations and mock tort hearings in order to better familiarize their clients with personal injury law and practice. Regional and national gaming associations, in addition to vendors who specialize in tribal government training, are also excellent starting points when investigating training options related to the tort claim process.

In sum, negotiating favorable tort language in a gaming compact and following the requirements of the compact with a well drafted tort ordinance and adjudication process is its own insurance policy against the erosion of tribal sovereignty.

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