



In Defense of the Nation: Why Tribes Should Adopt Tort Claim Ordinances

by Anthony S. Broadman

Imagine that if every time the federal government upset someone, that person could file a complaint in state court, serve President Obama, and cause an assistant U.S. attorney to appear in court to explain to a judge why the United States is not subject to regular lawsuits. It sounds ridiculous, but that's exactly what tort plaintiffs force Indian tribal governments to do on an all too regular basis. Even plaintiffs' lawyers who are aware of tribal sovereign immunity might file a suit to ferret out whether a tribe is willing to pay a nuisance settlement for doubtful claims. Defending these claims costs tribes, and opens up sovereign immunity and tribal court jurisdiction to attack.

But just as federal and state governments protect public resources from litigation, tribes can protect their valuable governmental resources from attack with tribal tort claims ordinances. Acutely, these tribal laws can prevent constant pinprick attacks on sensitive tribal coffers. But prudentially and over the long haul, such ordinances may stave off a catastrophic court decision regarding sovereign immunity. State courts, constantly looking for chinks in the armor of tribal immunity from suit, may take solace in the fact that plaintiffs with otherwise valid tort claims have some mechanism for being made whole.

One Model and Your Existing Tort Claim Law: The FTCA

Many tribes already have a tort claim law that protects them from suit: the Federal Tort Claims Act (FTCA). For certain claims stemming from tribal employee and official conduct under P.L. 638 contracts, the United States substitutes for the tribe and claims are subject to the FTCA claims process. Given the existing coverage through the FTCA, tribes shouldn't legislate (or pay for) coverage for the same types of torts.

In addition to providing tribes some coverage, the FTCA is a helpful philosophical model for the tribal tort claims ordinance. Under the FTCA, the federal government gave partial consent to be sued for some torts. The United States is otherwise, and generally, immune from most tort claims. The FTCA exposes the United States to suit for the negligence of its employees and certain contractors while acting within the scope of their employment. But in the late 1980s, Congress extended the FTCA to negligent acts of tribal contractors carrying out contracts, grants, or cooperative agreements pursuant to Public Law (P.L.) 93-638, the Indian Self-Determination and Education Assistance Act.

FTCA protection differs for tribal employees. Tribal

employees are deemed to be federal employees for the purpose of FTCA coverage while acting within the scope of their employment in "carrying out" contracts/compacts under P.L. 93-638.

The hitch for would-be plaintiffs with claims arising under the FTCA in general, and as related to tribal officials and employees in particular, is that he must first file an administrative tort claim with the United States. That future plaintiff's exclusive remedy is the federal tort claim – no action may be filed in court until the claim is filed and the claims are subject to a strict two year statute of limitations. If the agency does not resolve the claim during a six-month administrative review period, the now-plaintiff can file suit – but must file suit if at all within six months of the denial of the claim. Tort claims, settlements, or court judgments are generally paid directly from the U.S. Treasury.

These procedural hoops may seem somewhat daunting to plaintiffs. But, in a way, that is the point. Governmental operations must enjoy such procedural protections to ensure they are able to undertake essential governmental functions. Tribal governments who employ the same procedural safeguards in filtering out tort claims may find that accepting some liability, through an ordinance, actually reduces defense costs and improves risk management practices.

Tailored Insurance

Tribal insurance policies often carve out claims related to the above described FTCA coverage or tribal workers' compensation claims – appropriately. Tribes should avoid paying premia related to insurance policies or amounts that they don't need. But just as tribal insurance should be tailored to the existence of any workers compensation programs, insurance should dovetail with tribal torts claims ordinances.

Risks and Models

When dismissing suits based on sovereign immunity, courts often express concern regarding plaintiffs' options for redress. Although there is no authority for such concern, it must be taken into account in weighing – proactively – whether a tribal tort claim ordinance is advisable. Courts have expressed concern over lack of redress for plaintiffs dismissed on immunity grounds, or at least noted the availability of alternative remedies with approval. See *Wright v. Colville Tribal Enterprise Corporation*, 159 Wash.2d 108, 127, 147 P.3d 1275, 1286 (2006) (Madsen, J., concurring). It may be a matter of time before an activist jurist puts his or her

concerns into a harmful opinion regarding equitable or constructive waivers of sovereign immunity.

Many gaming compacts already require a tort claim ordinance containing provisions under which patrons injured in casinos may seek redress from the tribe through designated channels and procedures. When these ordinances are in place, they are deemed limited waivers of sovereign immunity, but claimants are required to follow the procedures designated in the ordinance to recover. *Campo Band of Mission Indians v. Superior Court*, 137 Cal.App.4th 175, 185 (2006) citing *Rosebud Sioux v. Val-U Const. Co.*, 50 F.3d 560, 562 (8th Cir. 1995).

Generally, ordinances should contain at least (a) time constraints for making claims; (b) limitations on types of claims subject to the claims procedure (i.e., only physical personal injury claims for unintentional torts) and an express bar of claims related to conduct outside the scope of employment (c) an explicit procedure for submitting such claims; (d) a limitation on awards; (e) an agreement subjecting plaintiffs to tribal court jurisdiction (or arbitration); and (f) any limitations or restrictions on the type of arbitration or trial on the merits

contemplated as a final resolution. In any case, ordinances should make clear that the claims procedures outlined therein are the exclusive and sole remedies for anyone pursuing any tort claim against the tribe or its employees acting in furtherance of the tribe's business.

Implemented and used properly, a tribal torts claim ordinance can be a useful short-term tool in defending suits and provide limited redress to those patrons or other persons to whom a tribe wishes to compensate for tribal employee or other negligence. In the long-term, ordinances present a potentially invaluable barrier to further erosion of tribal sovereignty. Courts analyzing dismissal of plaintiffs' claims based tribal immunity from suit will almost certainly take the availability of alternative tribal remedies into account. It is these remedies, crucially, over which the tribe can exercise nearly total control. ♣

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