

Tribal Errors and Omissions Liability Webinar

Presented by | John Link, CPCU
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QUESTIONS

If you have questions following today's presentation, please contact John directly at jlink@cottinghambutler.com.

Tribal officials (and employees) make decisions effecting the tribe and enterprise operations 24 hours a day...
Not all those decisions are popular and some can have negative consequences

What then happens when tribes and tribal officials get sued?

1. What do you think will happen?
2. Is the tribe defended?
3. Are you defended?
4. Who will pay for defense costs?

Why???

Example: A council member makes the decision to terminate an employment contract and doesn't follow the required provisions in the contract for notification

2 months later....

The tribe and ALL council members are sued for “tortious interference”

1. What do you think will happen?
2. Is the tribe defended?
3. Are the council members defended?
4. Who will pay for defense costs?

Why???

The answers revolve around proper policies, compliance, procedures, and insurance

This insurance is known as:

- Tribal Official Errors & Omissions Liability or
- Tribal Management Liability or
- Public Officials Management Liability

1 Maxwell v. County of San Diego (CA) -2012

- Tribe Protected by sovereign immunity
- 2 paramedics allowed to be sued

2 Rivera v. Puyallup Tribe of Indians (2012)

- Employment Case
- Tribal officials shielded by sovereign immunity because voting on council resolution was within scope of authority

3 City of San Bernardino (CA) v. San Manuel Band of Mission Indians - 1985

- Construction of new facility caused landslide and adversely affected neighborhoods
- Council members sued because they chose the contractor



What is this coverage?

- Title language is misleading - The portion of the policy is actually broader in scope
- Insurance is designed to protect the “insured” against claim or claims against them while acting in his/her capacity as a tribal council member, director, officer, commissioner or manager (and can further extend to all employees.)
- Additionally – Insurance can extend to include heirs, executor, estate, administrator, assignee or legal representative of the individual in event of death

Why do I need this Insurance?

Reasons why you don't need it: "3 Myths – Misperceptions"



1. Protection through sovereign immunity
2. Tribal Officials afford same immunity
3. If sued, Federal Tort Claims Act will be my primary defense

1. Sovereign Immunity – Well documented through Supreme Court decisions – Yes, Sovereign Immunity is good for the Tribe and viable defense

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2. Sovereign immunity extending to Tribal Officials is viable defense as long as the official is acting within their scope of authority or scope of agreement

There have been court cases where tribal officials were sued and venue was even changed to state court where plaintiffs alleged continuing unlawful conduct or where declaratory or injunctive relief were sought

Your protection under sovereign immunity may hinge on answers to the following questions:

- a) How narrow or broad is your scope of authority?
- b) Is that scope clearly defined?
- c) Does that authority only apply on tribal lands? What about while traveling?
- d) You can still get sued in an “individual capacity” and then who covers your defense?
- e) Tribal law may authorize your actions but Federal Law may limit that authority
- f) What about inter-tribal disputes?

3. Finally, let's consider the Federal Tort Claims Act where this would be primary coverage for 638 funded operations and self-governance tribes within their scope of agreement

- a) FTCA comes into play with Law Enforcement, Healthcare and Educators
- b) Several exclusions to FTCA:
 - 1. Slander
 - 2. Liable
 - 3. Tortuous Interference with Contracts
- c) FTCA allows subrogation if Tribe would have had viable coverage
 - 1. Danger – The tribe loses control of the process at this point
 - 2. Claims will still appear on your loss records effecting insurance shopping

We should have this insurance...

What do I need to know?

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Insurance Market is very small

Three Primary Insurance Companies:

1. Travelers
2. Tribal First
3. OnPoint Underwriting



Two Periphery Insurance Companies

Native Nations (rebirth of First Americans)

Amerind

Take into account the actual form –
Policy language is not the same for each of these
insurance companies:

1. Manuscript versus ISO forms
2. Limits
3. Definition of Insureds
4. FTCA provisions
5. Exclusions

Some insurance companies use Manuscript forms (those specifically designed for Indian Country) and some use ISO forms which are insurance industry standard but restrictive

Example: ISO language states in the policy that the insurance company “may at our discretion investigate any wrongful act and settle any claim or suit that may result.” By having that language in your policy, you allowed the insurance company to peel back your sovereignty!

What are limits?

- Limits are the maximum an insurance company will pay on a claim which includes defense costs
- Limits can be from \$100,000 to \$10,000,000 depending on your insurance carrier
- Does the umbrella sit over the limits?
- Does a claim erode the aggregate protection under the policy?

How is “insured” defined? As I mentioned earlier, the protection can extend from council member to employee to estate and heirs...

How broad or limited is “insured” in your policy?

Deductibles or S. I. R.(Self-Insured Retention)

- Do you know the difference?
- A deductible is an amount the insured will pay back to the insurer
- A self-insured retention acts like a deductible except the insured pays that amount first and then the insurance company starts paying
- Some would argue that an SIR allows greater protection of sovereign immunity
- What is best for your government?

Tribal Official Errors & Omissions are on a “claims made” rather than “occurrence” form

A retroactive date is determined for how far back in time the insurance company is willing to take on issues from the past. Anything prior to that date, you are self-insured.

The further back the date, the better protection

(Critical to verify dates when moving programs)

Does the insurance policy specifically limit the FTCA from subrogating back against the tribe?

The Federal Government has the right to subrogate back against the tribe for claims paid under this Act, if the tribe has viable coverage

Insurance policy language can be specific or silent on whether the insurance company will cover this subrogation exposure

How does your policy read?

How is the “jurisdiction” defined in the policy?

Jurisdiction is where the case will be heard and settlement sought....

Does your policy state:

“governed and construed in accordance with your internal laws”

If not, could you find yourself subject to outside jurisdiction? YES!

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How do I know??

First - Work with a competent insurance broker/advisor who understands the true difference of insurance for Indian Country

Second - Conduct a formal review of all your insurance policies.

Example: At Cottingham & Butler, client and prospective client policies are put through our Risk Management Analysis to determine risk exposures...This becomes a working, breathing document to which is reviewed with council – Thus, offering a level of additional protection showing due diligence was done

Third - You could actually read the policy...

Fourth - You'll know what you have when you have a law suit...which is the worst time to find out!

Insurance is not the only method of protecting yourself or the tribe

1. As tribal leaders, make sure you are operating within your “scope of authority”...is that defined? Do you know where the lines are drawn? You have ordinances and policies which need to be complied with...Are you stepping outside these even if you think it was for the greater good?
2. Don't interfere with contracts with your vendor partners...This area is where most of the defensible issues occur in Indian Country

1. There is a need for liability protection
2. Transferring risk through insurance is a small cost – “what if” is very expensive
3. Insurance policies are not equal – Review them!
4. Risks continue to evolve and change and the courts continue to evaluate this exposure
5. Sovereign Immunity is continually being attacked



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For a more in-depth look: Join John at a panel discussion regarding Tribal Errors and Omissions at **NAFOA on April 18th in Nashville, TN.**