

## Tribes Need More Than Just The Sovereign Immunity Defense

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Even a winning defense can be expensive! For tribes with gaming or other vibrant business operations and perceived “big pockets,” lawsuits unfortunately happen all too often. And even meritless lawsuits are expensive to defend. Although many tribes and their commercial operations enjoy sovereign immunity, they nevertheless should buy liability insurance, which covers the costs of defending a lawsuit and a resulting judgment or settlement.

First, sovereign immunity is not absolute. Tribes often contractually agree to limited waivers of sovereign immunity when engaging in commercial transactions, and also have tribal laws that allow for limited waivers for tort and/or employment claims, particularly when a tribe has a tribal-state gaming compact. Additionally, tribes sometimes choose not to assert sovereign immunity for business or policy reasons. And, of course, courts do not always recognize and are arguably narrowing tribal sovereign immunity.

Second, even when a tribe has not waived sovereign immunity with respect to a particular claim, the tribe nevertheless will need to defend itself until the lawsuit is dismissed. While a motion to dismiss is usually an efficient and successful vehicle, courts sometimes allow discovery on this limited issue. Plaintiffs might also assert claims against tribal officials or employees, which are evaluated under a different standard and could remain even if a tribe is dismissed. The defense costs a tribe will incur until these issues are resolved can be substantial.

In the unfortunate event that a lawsuit moves forward against the tribe and/or its officials or employees, a tribe can turn to its liability insurance to pay for continuing defense costs and any resulting settlement or judgment.

Liability insurance therefore is a critical asset even for tribes that may have a silver bullet defense to liability. This article addresses common liability insurance policy provisions that define or impact tribes’ rights and liability carriers’ obligations regarding the defense of underlying claims. Also, because tribes and carriers do not always agree on their respective rights and obligations, we summarize common policy provisions regarding dispute resolution proceedings between tribes and their carriers.

### Which Defense-Related Liability Policy Provisions Should Matter to Tribes?

The following are common but pivotal liability policy provisions that bear on insurance carriers’ defense-



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related obligations to tribes.

### ***Duty to Defend v. Duty to Advance or Reimburse Defense Costs***

A threshold issue is which party has the right and duty to defend the lawsuit. If the carrier does, then it is obligated to retain and pay counsel to defend the tribe in the underlying action. Under these circumstances, the carrier has far more control over the defense, but defense costs typically do not erode or deplete the policy's coverage limits.

By contrast, where the tribe retains the duty to defend and the carrier has a duty to advance or reimburse defense costs, the tribe typically has more control over the defense, but must retain and directly pay defense counsel. The carrier is obligated to reimburse reasonable defense costs; however, the tribe bears the risk of disputes with the carrier over the reasonableness of defense costs and the risk of untimely reimbursement. Additionally, when the carrier has a duty to advance or reimburse defense costs, defense costs typically erode the policy's coverage limits.

There are pros and cons to each option. Many tribes would prefer to control the defense, but may not want to run the risk of a dispute with the carrier and being stuck with the bill. Tribes need to know their internal management and financial situations and understand these policy differences when deciding what type of policy to buy.

### ***Selection of Defense Counsel***

Some liability policies provide the carrier with the unilateral right to select defense counsel. Others authorize the tribe to select counsel, subject to the carrier's consent. Other policies state that the parties jointly will select defense counsel. Being able to select counsel of your choice can be particularly important for tribes because of sovereignty concerns and high stakes cases. If your policy does not allow you to select defense counsel, consider requesting policy language that does.

### ***Notice Provisions and Coverage (or not) for Prenotice Defense Costs***

Insurance policies typically require that notice of a claim be provided to the carrier within a specified time frame. Tribes should adhere to this requirement for at least two reasons. First, untimely notice can jeopardize a tribe's right to coverage, and disputes over whether notice was timely can be protracted and expensive. Additionally, insurance carriers often deny coverage for defense costs that were incurred before notice was provided. Tribes can avoid disputes about coverage for these costs by providing notice as soon as possible, particularly if they intend to retain counsel to begin investigating and defending them against the underlying claims.

### ***Decision to Assert, or not to Assert, Sovereign Immunity***

Policies typically have provisions addressing which party has the right to assert, or to decide not to assert, a sovereign immunity defense. Some policies expressly confer these rights upon the tribe. Other policies, by contrast, state that the tribe agrees not to waive sovereign immunity. Tribes should make sure their policies provide them with the unilateral right to decide whether to assert sovereign immunity. Surrendering this power to an insurance carrier creates a serious risk that a carrier will assert this doctrine in cases involving unfavorable facts and unsympathetic judges, which can lead to erosion of this important doctrine. Tribes also should make sure that their policies state that nothing in the policies is intended to waive sovereign immunity.

Retaining the right to control the sovereign immunity defense is especially important for tribes providing services to their members under the Indian Self Determination and Education Assistance Act (ISDEA). This act entitles tribes to potential coverage under the Federal Tort Claims Act. Tribes thus can benefit by tendering tort claims to the United States, rather than litigating the tribe's potential sovereign immunity defense. If a tribe has abdicated its ability to control the assertions of sovereign immunity, a carrier might needlessly litigate, and jeopardize, this defense.

### ***The Federal Tort Claims Act Exclusion***

Look out for an exclusion for tort claims asserted against a tribe performing functions under the ISDEA. Many tribal liability policies purport to exclude coverage for tort liability resulting from the performance of, or failure to perform, duties within the scope of a contract authorized by the ISDEA if: (1) the tribe is eligible for protection from tort liability under the FTCA; or (2) would have been eligible for FTCA protection had it properly tendered the claim the United States. While these provisions sometimes are ambiguous in certain respects, tribes should review these provisions carefully to understand when and how they may apply.

### ***Extracontractual Litigation Management Guidelines***

Virtually all insurance carriers require defense counsel to comply with litigation management guidelines, which contain a litany of requirements. While certain provisions generally are reasonable, others often are not. For example, many carriers' guidelines state that written preapproval must be received before performing more than a few hours of legal research. This requirement not only adds a significant administrative burden to defense counsel's very full plate, it also can be prejudicial, as defense counsel often need to perform research with little or no advanced notice. Many guidelines also state that carriers will not pay for meetings or conversations between two people in the same office. How is a team supposed to function as a team if members are not permitted to talk to one another?

Some carriers contend that compliance with their guidelines is a condition for obtaining coverage. But these guidelines typically are not included — or even referenced — in the insurance policy itself (or even mentioned during the underwriting process); rather, they are imposed on policyholders after-the-fact. Moreover, as some courts and bar associations have recognized, compliance with these guidelines can interfere with defense counsel's unfettered right to represent their clients' interests. If a tribe receives litigation management guidelines from its carrier, it and its counsel should carefully review them and send a letter objecting to those guidelines that are unreasonable (and reserve their right to object to other guidelines).

### **How Should a Tribe Approach Dispute Resolution Clauses?**

Ideally, disputes between tribes and their carriers regarding coverage issues will be resolved amicably through negotiation; however, mutually agreeable resolutions are not always possible. Tribes therefore should pay close attention to policy provisions that specify the manner, location and forum in which dispute resolution proceedings may or must take place (which might be construed as waiving sovereign immunity), as well as provisions specifying the time frame in which such proceedings must be initiated.

### ***Arbitration Clauses***

Some policies state that coverage disputes must be resolved through binding arbitration. While such

clauses might not be enforceable under certain circumstances — for example, when the tribe pursues extracontractual claims (such as bad faith) against the carrier — they often are enforceable and are problematic for tribes that prefer to litigate disputes in tribal or other courts. Moreover, these clauses often state that the arbitration will be governed by American Arbitration Association rules, which allow parties to initiate litigation in federal court to enforce an arbitration award. Consequently, arbitration clauses may be construed as limited waivers of sovereign immunity.

### ***Venue Provisions***

Some policies specify the jurisdiction or forum for dispute resolution proceedings between the tribe and the carrier, and often designate the state in which the insurance company is located. This venue not only can be inconvenient, but also can make things more expensive as tribes and their lawyers, witnesses and experts will need to incur travel expenses. Tribes should request modifications to these clauses as appropriate.

### ***Choice-of-Law Clauses***

Some insurance policies specify what jurisdiction's law governs the interpretation of the policy. Tribal liability insurance policies often state that the tribe's internal laws will apply, which at first glance is deferential to tribal sovereignty. For tribes that do not have an insurance code or ordinance, and do not have case law addressing insurance issues, however, this provision may not provide much benefit as a practical matter. These clauses often further state that in the event of ambiguous policy language, the policy will not automatically be construed in favor of the tribe and against the carrier. This approach essentially contracts around a fundamental rule of insurance policy interpretation (and contract interpretation in general) that ambiguous policy language will be construed against the carrier (which wrote the policy). As a result, the tribe essentially achieves a pyrrhic victory. This type of provision is unusual outside of the tribal market, and is extremely unfair. Tribes should consider requesting that these clauses be stricken or at least modified.

### ***Contractual Limitations Period***

Policies often contain a deadline for initiating dispute resolution proceedings against the carrier. These provisions contract around the otherwise applicable statute(s) of limitations. These contractual deadlines often are as short as one year after the carrier denied coverage, and usually are shorter than the deadlines that otherwise would have been available under the statute(s) of limitations. While a tribe can dispute whether a contractual deadline should apply to a particular claim, these disputes can be protracted and costly. Therefore, tribes should be aware of and calendar these deadlines, and request (in writing) extensions of them, when necessary.

### **Conclusion**

No one wants to pay to defend a lawsuit, but liability carriers can be obligated to do so. Tribes have a unique defense of sovereign immunity, but tribes must incur legal costs to assert that defense and the defense is not always successful. Tribes thus should take full advantage of the benefits of liability insurance to cover both defense costs and any resulting settlement or liability.

In order to do so, tribes should review their policies carefully to determine what requirements, deadlines and limitations are included, and should speak with their brokers and counsel about provisions that concern them. Brokers can ask carriers to modify provisions of particular concern and/or

shop the market to see if more favorable terms are available through other carriers.

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