Wisconsin's Tribal Gaming Compacts and Their Effects on Sovereign Immunity

The gaming compacts by which Indian tribes obtained sole and exclusive right to conduct specific gaming enterprises in Wisconsin require tribes to secure liability insurance and a carrier endorsement that limit the carrier from asserting a sovereign immunity defense as specified. Attorneys who defend Indian tribes regarding casino-related injuries or contract matters can learn more here about the compact-based limitation on the assertion of immunity by carriers and best practices in addressing these issues.

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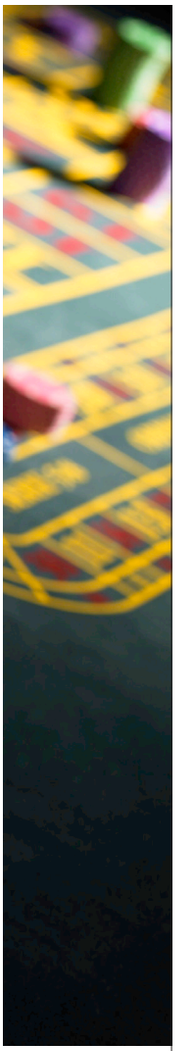

When the federally recognized, sovereign, American Indian tribes entered into separate tribal gaming compacts over 30 years ago with the state of Wisconsin, a quid pro quo provided benefits to each party.

The tribes obtained the sole and exclusive right to conduct certain Class II and Class III gaming enterprises in Wisconsin. In turn, the state received an annual percentage of the tribes' gaming revenue. Further, the state agreed to and is required to spend that revenue in a way that may benefit the tribes, such as economic development initiatives in regions around casinos or promotion of targeted tribal tourism ads within Wisconsin, investments that may add to the state's tax base. Annual revenue from tribal gaming is estimated at approximately $1.9 billion (setting aside the pandemic years).[1]

As further part of the *quid pro quo* to gain access to gaming opportunities, tribes were asked to secure liability insurance and a carrier endorsement that limited the carrier from asserting a sovereign immunity defense as specified. In doing so, the tribes did not, and have not since, waived their tribal sovereign immunity.

This article examines the background of the compacts, the strong tradition of tribal sovereign immunity in Wisconsin, the compact-based limitation on the assertion of immunity by carriers, and best practices in addressing these issues for business and litigation attorneys who defend tribes.

Gaming Compact Agreements

Wisconsin has 11 federally recognized sovereign tribes. All the tribes entered into gaming compact agreements with Wisconsin, as authorized by the Indian Gaming Regulatory Act of 1988 (IGRA).[2] These tribes are the Bad River Band of Lake Superior Chippewa, the Forest County Potawatomi Community of Wisconsin, the Ho-Chunk Nation, the Lac Courte Oreilles Band of Lake Superior Chippewa, the Lac du Flambeau Band of Lake Superior Chippewa, the Menominee Tribe of Indians of Wisconsin, the Oneida Nation, the Red Cliff Band of Lake Superior Chippewa, the Sokaogon Chippewa Community (Mole Lake Chippewa), the St. Croix Chippewa Indians of Wisconsin, and the Stockbridge-Munsee Band of Mohican Indians [hereinafter the Wisconsin tribes].

To be federally recognized, a tribe must be specifically recognized within federal law and identified in the Federal Register. Federal recognition is necessary to gain access to federal financial support such as health care and other services, and it also empowers tribes to enter into compacts and pursue approval for gaming activities.

When Congress passed the IGRA, it recognized that tribes had already become engaged in or had licensed gaming activities taking place on tribal lands as a means of generating revenue. Because one of the principal "goal[s] of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government," the IGRA sought to clarify regulation of these gaming activities through the Secretary of the Interior, the Interior Department's Bureau of Indian Affairs (BIA), and states that did not authorize or did not choose until a later date to authorize gaming activity.[3]

The IGRA permitted tribes to conduct certain gaming activities on tribal lands.[4] Generally, each

tribe has committed to and does regulate its own gaming activities, subject to oversight by the National Indian Gaming Commission,[5] in line with its compact with the state. The IGRA also recognized a role for the states where these tribes were located to determine whether and how to permit gaming. As such, all tribes engaged in gaming have an independent body responsible for the regulation of that tribe's gaming in line with the IGRA.[6]

In response to this opportunity, the Wisconsin tribes each began to negotiate with the Wisconsin Department of Administration. Over time, each tribe negotiated its own gaming compact in 1991 or 1992, and since then many have negotiated amendments, all of which can be found online at the Department of Administration's dedicated website.[7]

Sovereign Immunity and Insurance Coverage

In general, the tribal gaming compacts between the state and the Wisconsin tribes contain no clear, explicit, and unequivocal waiver of sovereign immunity for claims by third parties.

In fact, the tribal compacts that the state entered into with one Wisconsin tribe specifically disclaim any contractual waiver of sovereign immunity by either a signatory tribe or the state.[8] As some lawyers know, federal sovereign immunity protects tribes from third-party suit. However, there are a few caveats.

1) The parties to the compact, the state and each tribe, waived immunity insofar as litigation was required to enforce compact-based promises against the other party.

2) The compacts do not contain any waiver of tribal sovereign immunity in general, an element of federal Indian law that is vital to protection of the Wisconsin tribes. Immunity protects Wisconsin tribes from lawsuits that might be brought by, for example, gaming patrons allegedly injured at a Wisconsin tribe's casino or an outside vendor seeking to hold a Wisconsin tribe liable for some contractual damages. With that said, in the former case, the allegedly injured party can likely pursue a remedy in the tribe's court and, in the latter case, it is common for tribal administration or counsel for the tribes to insert a provision for choice of forum and choice of law in vendor contracts so the parties agree to resolve all disputes in tribal court.

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3) A further caveat might be a compact provision that requires the Wisconsin tribes to carry liability insurance up to a specified amount. While the Wisconsin tribes never agreed to waive their sovereign immunity to suit by third parties and non-signatories, the compacts typically require each tribe to secure an endorsement with their insurance carrier that requires the *carrier* to limit its assertion of its privity-based assertion of a tribe's sovereign immunity defense unless and until a certain defined monetary liability insurance limit is reached. Because the Wisconsin tribes operate casinos and other gaming enterprises open to the public, the state has an interest in the tribes' providing proof that some level of protection is provided to individuals, such as injured members of the public, and entities.

To accomplish that goal, the compacts generally require each tribe to have some form of liability insurance with certain defined limits for personal-injury liability, property-damage liability, or both. To be clear, the requirements of this compact provision are *not* intended to permit causes of action for injuries outside the coverage of the general liability insurance required by the compacts or to modify the Wisconsin tribes' ability to assert a broad sovereign immunity defense.

These provisions clearly do not qualify as a waiver of the sovereign immunity defense by or on behalf of the Wisconsin tribes: the standard is very high and requires an explicit and unequivocal waiver.[9] However, these provisions require discussion among tribal risk managers, tribal attorneys, insurance brokers, insurance carriers, and outside counsel to ensure that tribes can be competently appraised of their obligation to secure insurance as specified in the compacts, to obtain the carrier endorsement, and to ensure the carriers are aware of the privity-based compact-required sovereign immunity defense limitation.

The compacts generally provide that the compacts with Wisconsin tribes do not change or modify the fundamental

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allocation of civil jurisdiction among federal, state, and tribal courts, unless specifically provided otherwise in the compact(s).

Tribes and carriers sued for an alleged tort by a third party or an alleged contract breach by a vendor have a compact-protected right to assert any basis for a motion to dismiss at the start of litigation, such as a statute-of-limitation defense, failed service of process, untimely service of process, fundamentally flawed process, or other failures under Wis. Stat. chapter 804 or, if in federal court, Federal Rule of Civil Procedure 12.

Untested Compact Issue

The one yet untested compact issue is the following: in cases in which a tribe is dismissed on sovereign immunity grounds but the insurance carrier is still a defendant, can the defendant insurance carrier be held liable for alleged damages in the absence of the insured tribe? Allowing this result would run contrary to existing Wisconsin insurance law cases.

Under Wisconsin's direct-action statute, the liability of a carrier is *predicated* upon the liability of the insured because the right of action against the carrier exists only to the extent the right of action exists against the insured for negligence.[10] In *Parsons v. American Family Insurance Co.*, the Wisconsin Court of Appeals adopted the reasoning that "there was but one wrong and but one cause of action" and, thus, when liability cannot be imposed on the insured, liability cannot be imposed on the insurer.[11] Because sovereign immunity bars imposition of liability on an insured tribe, in theory liability also cannot be imposed on the tribe's carrier, in line with *Parsons*.[12]

Assuming a tribe complies with this insurance provision and maintains the required level of insurance specified under its compact, this does not mean that anyone allegedly injured at a Wisconsin-based tribal casino can simply present proof of an injury and secure ready access to an unreasonable amount of insurance proceeds without any objection from the carrier.

There are no existing Wisconsin Supreme Court or Court of Appeals decisions that interpret or apply this language to a given situation. As such, the limitation on a carrier's assertion of the sovereign immunity defense has not been tested in court.

Lawyers who defend tribes must ensure that a proper reading of the tribal compacts' language as written takes place to reaffirm tribal immunity and hold plaintiffs to their obligations to, among other things, effect proper service of process, file suit against the correct tribal entities, and discover and substitute the appropriate carrier in place of a fictitiously named carrier.

A reasoned analysis of all procedural and substantive defenses is essential to ensuring that the tripartite relationship

between counsel, the tribe, and the carrier remains strong and that the relationship partners can agree to and use a solid defense strategy at the earliest possible stage.

Best Practices

Business and litigation lawyers who defend a tribe after an accident has occurred at a casino should keep several best practices in mind.

- Upon being assigned, counsel should develop a working knowledge of the tribe's background, language, and history and of tribal sovereign immunity to ensure that appropriate respect is shown in all dealings to the tribe and its history.
- Counsel should thoroughly review a tribe's gaming compact (and any amendments) that may govern an insured dispute before any substantive discussions begin.
- Counsel should request all liability policies that may apply to an incident to ensure that the applicable tribal compact requirements have been followed and, if any questions exist, that the questions are addressed and discussed.
- The sovereign immunity assertion limitation that applies must be discussed with the tribe and the carrier to ensure a full understanding of the parties' relative position – there is no limitation on the tribe's assertion of immunity; however, the carrier's assertion may be limited going forward. Counsel must gather and preserve all evidence of procedural and substantive defenses to a claim and any witness statements.
- Counsel should review the progress of the matter to date. Which, if any, tribal entity has been named? Which entity was served? Who was served? In which county was the tribe sued? Consideration of any procedural, substantive, or other defenses should initially be considered to bring an end to any litigation.[13]

Conclusion

Like other public- and private-sector clients, Wisconsin tribes and their insurance partners need competent defense counsel to thoughtfully defend their interests. For tribes, sovereign immunity always must be front and center of any defense strategy.

However, as the compacts make clear by reaffirming the tribes' protection as defendants in line with Wis. Stat. chapter 802 and other authorities, tribes are entitled to all the same procedural and substantive defenses that a Wisconsin-based business would be able to assert in defense of a case filed in circuit court. In this way, tribes have the same constitution-based rights to service of process and other rights along with sovereign immunity. As counsel would do with any other Wisconsin-based client and its carrier, counsel should consider these defenses and press any reasonably grounded procedural defenses to resolution. **WL**

Because the Wisconsin tribes operate casinos and other gaming enterprises open to the public, the state has an interest in the tribes' providing proof that some level of protection is provided to individuals, such as injured members of the public, and entities.

ENDNOTES

[1]*See* https://doa.wi.gov/Gaming/TribalNetWinSummary.pdf (last visited May 13, 2024).

[2]25 U.S.C. §§ 2701-2721.

[3]25 U.S.C. § 2701(4), (5).

[4]The Act's approval of Class II and Class III gaming activities is in 25 U.S.C. § 2710(b) and (d). Class I gaming is not regulated under the Act but may be regulated by the state. 25 U.S.C. § 2710(c).

[5]25 U.S.C. § 2706(b); *see also* 25 U.S.C. § 2074.

[6]*See Forest County Potawatomi Gaming Commission*, https://www.paysbig.com/gaming-commission (last visited May 13, 2024).

[7]Wis. Dep't of Admin., *Tribal Compacts and Amendments*, https://doa.wi.gov/Pages/AboutDOA/TribalCompactsAndAmendments.aspx (last visited May 13, 2024).

[8]The compacts do, to some extent, contain a very limited waiver to both the state and each tribe to permit enforcement of compact-based promises; however, there is no waiver by either a tribe or the state with regard to claims by third parties. *See infra* note 13.

[9]*See, e.g., Kiowa Tribe of Okla. v. Manufacturing Techs. Inc.,* 523 U.S. 751, 756 (1998); *Wisconsin v. Ho-Chunk Nation,* 512 F.3d 921, 928 (7th Cir. 2008) (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering P.C.,* 476 U.S. 877, 894 (1986)); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *see also, e.g., Koscielak v. Stockbridge-Munsee Comm.*, 2012 WI App 30, ¶ 7, 340 Wis. 2d 409, 811 N.W.2d 451; *C&B Invs. v. Wisconsin Winnebago Health Dep't*, 198 Wis. 2d 105, 108, 542 N.W.2d 168 (Ct. App. 1995).

[10]Wis. Stat. § 632.24; *see also Parsons v. American Fam. Ins. Co.*, 2007 WI App 211, ¶ 11, 305 Wis. 2d 630, 740 N.W.2d 399 (holding that, pursuant to Wisconsin's direct-action statute, Wis. Stat. section 632.24, liability of insurer is predicated on liability of insured, meaning "the right of action against the insurer exists only to the extent it exists against the insured for his or her negligence…").

[11]*Id.* ¶ 12 (citing *Stucker v. Muscatine Cnty.*, 87 N.W.2d 452, 457 (Iowa 1958) ("As no liability can be imposed on the county defendants, none can be imposed upon their alleged indemnity carrier.")).

[12]*See id.*

[13]For example, if the tribe were sued in federal court based on 28 U.S.C. § 1332 diversity of citizenship and amount in controversy, a motion to dismiss should be considered because tribes are not "citizens." "It is well established that the Indian tribe itself – the constitutional tribe – is a 'stateless entity' that is never subject to federal diversity jurisdiction. A federal court cannot hear a case in which an Indian tribe is a party unless there is another basis for subject matter jurisdiction, such as federal question jurisdiction." Graham Safty, *Federal Diversity Jurisdiction and American Indian Tribal Corporations*, U. Chi. L. Rev. vol. 79.4 (Fall 2012), https://chicagounbound.uchicago.edu/uclrev/vol79/iss4/8/. **WL**