Insights: Alerts

Tribes Really Need More Than Sovereign Immunity Defense

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The title of this article might seem familiar — it should. A year ago we published an article titled "Tribes Need More Than Just The Sovereign Immunity Defense." In that article, we advised tribes about the value of liability insurance despite the fact that (as noted below) sovereign immunity had recently received a boost by the Connecticut Supreme Court in *Lewis et al. v. Clarke*. We emphasized that although tribes and their commercial enterprises generally enjoy sovereign immunity, they still should buy liability insurance to cover both the costs of defending against lawsuits and, in the event that a court determined that the sovereign immunity doctrine does not apply, a resulting judgment or settlement.

In *Lewis v. Clarke*, the plaintiffs' car was struck by a vehicle being driven by Clarke — an employee of the Mohegan Tribal Gaming Authority, which is an arm of the Mohegan Tribe — who was transporting Mohegan Sun Casino patrons. The plaintiffs filed an action for damages against Clarke in his individual capacity, for which the tribe was obligated to indemnify him. The trial court denied Clarke's motion to dismiss on the basis of tribal sovereign immunity, finding that he was the real party in interest because the plaintiffs sought damages solely from him, which would not impact the tribe's self-governance abilities. The Supreme Court of Connecticut reversed and held that tribal sovereign immunity barred a lawsuit against Clarke because he was acting within the scope of his authority and the Mohegan Tribal Gaming Authority was an arm of the tribe. Unfortunately, the United States Supreme Court recently reversed the Connecticut Supreme Court's favorable decision and held that tribal sovereign immunity does not bar individual capacity damages actions against tribal employees for torts committed within the scope of their employment even where the tribe is obligated to indemnify the employee.

This development has generated much discussion regarding the impact of the decision — from the viability of existing tribal law to the new types of actions that might be asserted in state courts. Many have predicted that *Lewis v. Clarke* will encourage more lawsuits against tribal officials and employees. For example, Michigan State University College of Law Professor Matthew Fletcher recently predicted that even though the impact will likely be minimal over the time, "[t]he breadth of the court's opinion surely will encourage plaintiffs' attorneys to test or even stretch the holding" and will cause a temporary uptick in litigation. In short, the Lewis v. Clarke opinion serves as a powerful reminder of the importance of reviewing comprehensive tribal risk management programs, including ensuring that tribes have adequate liability insurance to respond to this increased exposure.

As we mentioned in our previous article, even if a tribe or tribal employee has sovereign immunity, it or (s)he nevertheless might be sued — liability insurance provides valuable coverage for defense costs incurred until that lawsuit is dismissed. And when tribes and tribal employees are not immune from suit, liability insurance is an even more valuable asset because it can cover tribes and their employees who ultimately might be subject to a damages award. The good news is that liability insurance policies typically cover tribal employees for tort claims asserted against them particularly if their alleged conduct is within the scope of their employment. In order to maximize the

value of liability insurance, tribes and tribal employees must recognize the types of events that are likely to trigger coverage under tribal liability policies and have a general understanding of their and their insurance carriers' respective rights and obligations. While all insurance policy provisions should be reviewed carefully, below is a summary of common liability insurance policy provisions and issues to be aware of in order to minimize the risk of inadvertently forfeiting coverage for those tort and other types of claims that they are likely to face in the near future and to facilitate the insurance claim adjustment process.

Preserving Rights Under Tribal Liability Insurance Policies

The Importance of Giving Timely Notice of a "Claim" or "Occurrence"

Liability policies typically require a policyholder to provide notice of a covered "claim" or "occurrence" within a specified time period. The deadline for providing notice can be as early as "immediately," and as vague as "as soon as practicable." Some policies provide a specific deadline for providing notice, such as during, or within 60 days after, the policy period.

While the interpretation of notice provisions may be subject to debate, it is best to provide notice — in writing and in a manner that provides proof of delivery — as soon as possible. In some jurisdictions, late notice can be a complete bar to coverage. In other jurisdictions, untimely notice is not a bar to coverage unless the carrier can prove actual and material prejudice as a result; however, litigating these issues tends to be fact-intensive, time-consuming and expensive.

Additionally, even if notice is not deemed untimely or prejudicial, carriers often contend that they are not responsible for pre-tender costs, i.e., any fees or costs incurred prior to the date on which they received notice. While there may be arguments as to why these costs nevertheless are covered, it is better to avoid these disputes altogether, and to give notice "early and often" under all potentially applicable insurance policies. Don't invite unnecessary disputes.

Recognizing What Constitutes a "Claim" or "Occurrence"

As noted above, make sure that notice of a "claim" or "occurrence" is promptly provided to the carrier(s), which begs the question of what types of events qualify as a covered "claim" or "occurrence." While the answer of course will depend on the particular policy language at issue, there are a few general rules of thumb. As explained below, certain qualifying events — such as a lawsuit — are obvious; however, many other types of events that may be less obvious – such as a request for an interview from a government official — also frequently constitute a "claim."

By way of background, tribal liability insurance policies typically are package policies that contain a number of different types of liability coverages, including general liability coverage (i.e., coverage for claims alleging bodily injury, personal injury or property damage) and employment practices liability coverage (i.e., coverage for claims alleging wrongful employment practices). Some of these liability coverages (such as general liability coverage) typically are occurrence-based coverages; others (such as employment practices liability coverage) typically are claims-made coverages. You need to understand the differences between these two types of coverages.

Tribal occurrence-based coverages typically are triggered by an "occurrence" that causes bodily injury, personal injury or property damage, and typically define an "occurrence" as an accident, or continuous exposure to harmful conditions, that takes place or commences during the policy period. Alternatively or additionally, some policies specify that the injury or harm must take place during the policy period. Determining the relevant policy is

straightforward when a single act results in immediate injury. The analysis tends to be more complex when a claim against the insured arises from conduct that spanned multiple policy periods and/or involves progressive injury or harm spanning multiple policy periods. Under those circumstances, all policies in effect from the time the injury-causing conduct began through the entire time that the injury or damage continues might provide coverage. You should provide notice under all potentially applicable policies (including excess policies).

Tribal claims-made coverages typically are triggered by a "claim" that is made against the policyholder and is reported to the carrier during (or sometimes within a specified period after) the policy period. The term "claim" typically is broadly defined to include far more than a lawsuit or other formal proceeding. For example, many tribal liability policies define "claim" to also include written demands for money; formal civil, administrative or regulatory proceedings or subpoenas; investigations; and written requests for an interview of an insured issued by a governmental entity or a self-regulatory authority.

Navigating the Insurance Claim Adjustment Process

Defense-Related Provisions and Obligations

At the outset, communicate and coordinate with your carrier(s) regarding the selection of defense counsel. Some policies specify whether the insured or the carrier has the right to select counsel. Other policies are silent on that issue. At a minimum, you should promptly advise your carrier(s) of which law firm you seek to retain, particularly if your policy states that the carrier will not reimburse any costs or payments to which it has not consented (as discussed below).

Communicating With Your Carrier

Cooperation and Coordination

Tribal liability policies often require the insured to cooperate and coordinate with the carrier regarding the defense and settlement of the underlying lawsuit. While the specific policy language will dictate the scope of the duty to cooperate, in general, a policyholder should provide the carrier with key documents and information about the underlying lawsuit but, as noted in the next section, special precautions should be taken if your carrier requests information that is privileged and confidential. In some circumstances, the obligation to share information with the carrier might be limited based on privilege grounds.

Relatedly, liability policies typically state that they will not reimburse insureds for any voluntary settlements or payments unless they have advised, and obtained consent from, the carrier. In most jurisdictions, the carrier must show prejudice from the policyholder's failure to cooperate to avoid paying policy benefits, which is a heavy burden for the carrier to satisfy. But as a practical matter, if you are seeking to have the carrier fund a settlement, keep the carrier apprised of the underlying lawsuit and developments, including all settlement opportunities. In return, the carrier is required to provide a prompt and good faith response, or risk potential bad faith liability.

Privilege Considerations

The carrier's response to a claim tender, and applicable law, will determine the existence and scope of any common interest between a carrier and its insured and the risk of privilege waiver and other risks associated

with providing the carrier with otherwise privileged information regarding the underlying action. When a carrier defends pursuant to a reservation of rights, it typically requests information about the underlying lawsuit, including privileged information. Defense counsel therefore must assess: (1) actual or potential conflicts of interest created by the reservation of rights; (2) the existence and scope of any common interest between the tribe and its carrier notwithstanding the reservation of rights; and (3) what information to share and how to share it in a manner that best protects against waiver of the privilege and otherwise protects the tribe's interests.

Dispute Resolution Provisions and Deadlines

Ideally, any 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 insurance policy provisions that specify the manner, location, and forum in which dispute resolution proceedings either may or must take place (which might be construed as waiving sovereign immunity), as well as provisions specifying the timeframe in which such proceedings must be initiated. A more detailed discussion of dispute resolution provisions that often are found in tribal liability policies is addressed in our prior article.

Conclusion

At the end of the day, while *Lewis v. Clarke* may provide cause for concern for tribal employees and for tribes that may be obligated to indemnify them, tribes can protect themselves by making sure that they carefully review and assess their risk management programs and the sufficiency of their liability insurance policies in terms of both the scope and the amount of coverage they provide.