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Bargaining for Jurisdiction: Tort Liability in Tribal-State Gaming Compacts

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Bargaining for Jurisdiction:

Tort Liability in Tribal-State Gaming Compacts

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by

Lindsey Ann Fletcher

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ABSTRACT OF THE THESIS

Bargaining for Jurisdiction:

Tort Liability in Tribal-State Gaming Compacts

by

Lindsey Ann Fletcher

Master of Arts in American Indian Studies

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Professor Carole Eudice Goldberg, Chair

Tribal-State gaming compacts, required by the Indian Gaming Regulatory Act, often include provisions regarding tort liability. While compact tort provisions within states tend to be consistent with one another, the provisions fluctuate widely between states. I have analyzed compacts from eleven states and placed them into five categories. Each category has played out differently in practice with varying effects on tribal sovereign immunity. When entering into compact negotiations, it is important for tribes to evaluate the lessons of these categories to be fully apprised of the host of options available to address tort liability. Considering how existing provisions have played out, there are various things a tribe could negotiate for to avoid the disadvantages of some of the categories. These negotiation topics include: a clear statement on tort liability; liability insurance; a tort liability ordinance; and a limited waiver of sovereign immunity for the resolution of tort claims.

The thesis of Lindsey Ann Fletcher is approved.

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I. INTRODUCTION

In the wake of the United States Supreme Court decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), Congress enacted the Indian Gaming Regulatory Act of 1988 ("IGRA"), 25 U.S.C. § 2701 et seq. With the passage of IGRA, Congress sought to respond to concerns about the regulatory framework surrounding Indian gaming by striking a compromise between federal, state, and tribal interests.[1] States were concerned because *Cabazon* denied them a role in regulating tribal gaming all together.[2] Indian tribes were concerned because *Cabazon* allowed states to completely prohibit tribal gaming simply by outlawing all forms of gambling within a given state.[3] Additionally, *Cabazon* left open the question of federal jurisdiction to prosecute under the Organized Crime Control Act and the Johnson Act.[4] In response, IGRA provided the statutory footing on which Indian tribes can

[1] *See* STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO

[2] *See id.*at 42-43; Kevin Washburn, *Recurring Problems in Indian Gaming*, 1 WYOMING L. REV. 427, 428 (2001); Kevin Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 NEV. L.J. 285, 289 (2004).

[3] *See* LIGHT & RAND, *supra* note 1, at 42-43; Washburn, *Federal Law, State Policy, and Indian Gaming*, *supra* note 2 at 289.

[4] Under the Johnson Act, 15 U.S.C. § 1171, et seq., it was illegal to have gambling devices, which included slot machines, in Indian Country. Johnson Act, 15 U.S.C. § 1175 (2000). *Cabazon* said that if a tribe is operating bingo games, the tribe would not run afoul of the Johnson Act. But, if a tribe wanted to operate chance games, like slot machines, there was no such guarantee. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

operate gaming facilities, providing tribes with greater certainty in their gaming ventures.[5] IGRA also appeased some of the states' concerns by creating three categories of gaming, each subject to different regulatory control.[6] Class I and Class II gaming serve as the umbrella for social and traditional tribal games, as well as high-stakes bingo games.[7] These two classes of gaming remain beyond state regulation. Class III gaming, the most controversial of the categories, refers to high-stakes casino-style gaming.[8] Here, states gain a participatory role in gaming regulation because IGRA requires tribes to negotiate with the state within which they reside to create a tribal-state gaming compact.[9] The compact requirement gives states a regulatory role in the most lucrative form of tribal gaming.

IGRA envisioned a wide array of provisions that can be negotiated for and included in tribal-state gaming compacts. These include the application of laws and jurisdiction, remedies for breach, operational standards, and any other subjects that are directly related to the operation of gaming activities.[10] There have been disputes over the inclusion of some topics in gaming compacts. Many of these disputes have related to the inclusion of provisions relating to labor relations, environmental concerns, and revenue sharing.[11] Unlike these topics, there has been little, if any, dispute over the inclusion of provisions relating to tort claims for casino-related

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[5] *See generally* Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. (1988).

[6] For definitions of the different classes of gaming, *see id.* at § 2703.

[7] *See id.*

[8] *See id.*

[9] *Id.* at § 2710(d).

[10] *Id.* at § 2701(d)(3)(c).

[11] For a discussion regarding some of the many challenges regarding the scope of gaming compact provisions, *see* Kevin Grover & Tom Gede, *The States as Trespassers in a Federal-Tribal Relationship: A Historical Critique of Tribal State Compacting Under IGRA*, 42 ARIZ. ST. L.J. 185 (2010).

injuries. Accordingly, within the context of their gaming compacts, many states and tribes have negotiated and decided the procedures by which casino patrons can file tort claims against tribal enterprises and the circumstances, if any, under which a tribe will waive its sovereign immunity to suit to resolve tort claims.

These types of provisions are important for many reasons. First, they are important because they can be used to ensure that patrons are afforded a fair process to pursue their tort claims. Second, they are important for business purposes. It would be bad business if patrons come to understand that they are not going to be compensated if they are injured. Finally, tort provisions are important because tribal sovereign immunity and the decision to waive it is a central element of tribal sovereignty. Owing to their sovereign status, Indian tribes are protected from nonconsensual lawsuits and can assert their sovereign immunity to prevent being hauled into a courtroom.[12] However, tribes may decide to waive their sovereign immunity, by a clear statement of waiver, for specific situations in whatever forum they choose.[13] Thus, during the compact negotiation process, tribes have to grapple with the decision of whether and/or where to waive sovereign immunity to accommodate the resolution of patron tort claims.

While tort provisions in gaming compacts within states tend to be relatively consistent with one another, the provisions fluctuate widely from state to state. As a case study, I have analyzed tribal-state gaming compacts within eleven states. These states include the two most lucrative Indian gaming states, California and Connecticut. The other states I analyzed are Arizona, Michigan, Minnesota, New Mexico, New York, Oklahoma, Oregon, Washington, and Wisconsin. To better understand the range of options available to tribes in negotiating compacts,

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[12] *See* Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661, 678-711 (2002).

[13] *See id.* at 688-701.

I have categorized the gaming compacts from these states under five broad headings based on their respective treatment of tort liability. I have limited my case study such that all five categories are represented by the eleven analyzed states. I recognize that the narratives of many states are not included in this paper. This paper does not purport to be a comprehensive analysis of all gaming compact tort provisions. Rather, the paper is meant to provide representative examples of the various treatments of tort liability.

The first category of compacts generally contains the most robust statements on the allocation of tort liability. This category requires tribes to adopt a tort liability ordinance that creates a tribal dispute resolution process for patron claims. In doing so, this category leaves most of the details of tort claims procedures up to the discretion of the tribes. These provisions generally carry a limited waiver of tribal sovereign immunity, or require none at all. California, Connecticut, Arizona, and New York have tort liability provisions of this breed.

The second category of compacts requires that tribes waive their sovereign immunity for tort claims brought in a "court of competent jurisdiction." For example, New Mexico provides that state courts are courts of competent jurisdiction for the adjudication of patron tort claims. Oklahoma compacts, on the other hand, state that tribes consent to suit in a "court of competent jurisdiction," but leave the term undefined. The omission of the definition led to judicial interpretations of the compact that temporarily infringed on Oklahoma tribes' sovereign immunity.

The third category of compacts does not contain a provision allocating tort liability within the compact, but rather, makes it clear that there is absolutely no waiver of tribal sovereign immunity within the compact for third party suits. These compacts implicitly leave

tribes with the discretion to make decisions about the adjudication of patron tort claims outside of the compacts. Washington State falls into this category.

The fourth category of compacts does not include an explicit tort liability provision on their face and these compacts lack a clear waiver of sovereign immunity. Accordingly, the compacts leave the regulation of tort liability to the discretion of the tribes. Michigan and Minnesota fall into this category.

Finally, the fifth category of compacts requires tribes to carry a minimum amount of liability insurance and provides tort victims the opportunity to file a claim with a tribe's insurance carrier. The insurance carrier is barred from invoking tribal sovereign immunity up to the limits of the policy. This category tends to overlap with the others. California, Oregon, Oklahoma, New York, New Mexico, and Wisconsin subscribe to this category of compacts.

Numerous factors could explain why there is so much variance in tort provisions among states. It could have to do with the history of tribal-state relations. Have tribal-state relations been good? Bad? Collaborative? Have tribes and the state interacted on a government-to-government basis or has the state sought to overpower tribal governments? Another factor could have to do with the history of Indian gaming in the state. Was the state initially hostile to the idea of Indian gaming or did the state welcome tribes into the gaming arena? Did the state refuse to negotiate compacts at all or did the state begin negotiating in good faith after tribes requested it? Did tribes have to pursue legislation or some other avenue to get compacts? Another factor could be whether there is a strong plaintiffs bar in the state. This may shape whether a compact's tort provision is more liberal in allowing for specific types of litigation or if it leaves most of the discretion to tribes. An additional factor may be the financial success of Indian casinos within a state and the political activities of tribes. The answers to these questions may

provide some indication or pattern as to why some compact provisions are much more hands-off when it comes to tort issues, while others have a heavy regulatory hand. Unfortunately, the scope of this paper will only be looking at the differences in tort provisions among states and is not broad enough to explore why these differences exist. The "why" question deserves its own research paper and I encourage interested scholars to explore the factors listed above.

The five categories of gaming compacts have played out differently than one another in practice with varying affects on tribal sovereign immunity. While some categories of compacts have remained relatively unlitigated because of their clarity and noncontroversial nature, others have spawned intense litigation with some outcomes severely compromising the sovereign immunity of tribes. More specifically, compacts containing no waiver of sovereign immunity and those that simply require tribes to maintain liability insurance have not resulted in a great deal of litigation. However, scenarios in which tribes have been required to adopt tort liability ordinances and those that have consented to a suit in a court of competent jurisdiction have been subject to litigation. The bulk of this paper will explore the litigation that has been created as a result of these various provisions and the lessons that can be learned from it.

When entering into the compact negotiation process, it is important for tribes and states to evaluate the lessons of these five categories of tort provisions to be fully apprised of the host of options available to deal with tort liability. The lessons of the five categories are important because most tribal-state gaming compacts have expiration dates and they are often amended and renegotiated for renewal. Even for tribes with an expiration date far in the future, planning for renegotiation happens years before expiration to prevent a stalemate on the eve of expiration. Moreover, while it may be difficult for tribes with more disadvantageous compact provisions to extricate themselves from them, having evidence of how other states are successfully handing

tort issues may provide tribes with the necessary leverage to break free from their current provisions. In a broader way, the lessons of these categories are important because they can be transferred into other areas where agreements between states and tribes arise. Intergovernmental agreements between tribes and states are becoming more prevalent and, similar to tribal-state gaming compacts, many of these contracts, especially cross-deputization agreements, also have a liability component. The lessons of the five categories of gaming compacts can be generalized to these contracts as well. Considering how existing provisions have played out, there are various things a tribe could negotiate for to avoid the disadvantages of some of the categories. These negotiation topics include: a clear statement on tort liability; liability insurance; a tort liability ordinance; and a limited waiver of sovereign immunity for the resolution of tort claims.

In Part II of this paper, I will give an overview of the Indian Gaming Regulatory Act and tribal sovereign immunity and its relation to tort liability provisions within tribal-state gaming compacts. In Part III, I will provide a detailed analysis of tort liability provisions from eleven states by placing them into five categories. I will also explain how these provisions have played out in practice, paying particular attention to how they have been treated by courts and the effect they have had on tribal sovereign immunity. In Part IV, I will provide a negotiations framework, in light of how existing provisions have played out in practice, delineating what types of provisions tribes could negotiate for to avoid the disadvantages associated with of some of the categories. I will also discuss the obstacles to achieving such a framework.

II. THE INDIAN GAMING REGULATORY ACT AND TRIBAL SOVEREIGN IMMUNITY

Before Congress enacted the Indian Gaming Regulatory Act, the status of Indian gaming was uncertain. This uncertainty was fortified by the United States Supreme Court decision in

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). The facts of this case are as follows. The Cabazon Band of Mission Indians and the Morongo Band of Mission Indians were conducting high stakes bingo games on their respective reservations.[14] The Cabazon Band was also operating a card club.[15] These games were open to the off-reservation public, and were played predominately by non-Indians.[16] California believed the tribes were in violation of state laws that only permitted charitable organizations to operate bingo games and limited prizes to $250 per game.[17] Unhappy with the tribal gaming operations, California and Riverside County sought to regulate the tribes' gaming activities by forcing them to comply with state criminal law via Public Law 280 ("Pub. L 280").[18] To avoid the state regulation, the tribes sought declaratory judgment that California law has no force within the reservations.[19] Moreover, the tribes sought an injunction against enforcement of the state laws.[20]

In finding for the tribes, the Supreme Court drew on the distinction between criminal/prohibitory laws and civil/regulatory laws to determine whether Pub. L 280 authorized California to regulate these tribal gaming operations.[21] This distinction dictated, "if the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L 280's grant of criminal jurisdiction [to states], but if the state generally permits the conduct at issue, subject to

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[14] California v. Cabazon Band of Mission Indians, 480 U.S. 202, 204-05 (1987).

[15] *Id.* at 205.

[16] *Id.*

[17] *Id.* at 205-06.

[18] *Id.* at 208.

[19] *Id.* at 206.

[20] *Id.*

[21] *See id.* at 209-10.

regulation, it must be classified as civil/regulatory and Pub. L 280 does not authorize its enforcement on and Indian reservation."[22] Because California permits a substantial amount of gambling activity in the form of bingo, pari-mutuel horse race betting, and the state lottery, the Court found that "California regulates rather than prohibits gambling in general and bingo in particular."[23] Thus, the Court held that California could not regulate the gaming operations on the tribes' reservations.[24]

After *Cabazon*, tribal gaming increased as tribes began to develop plans for economic development unfettered by state control.[25] However, the status of Indian gaming remained uncertain. Per the decision in *Cabazon*, states could prohibit tribal gaming by outlawing all forms of gambling within the state.[26] By completely prohibiting gambling, the state would have a criminal/prohibitory law that could be used to dismantle Indian gaming operations.[27] Additionally, *Cabazon* left open the question of federal jurisdiction to prosecute under the Organized Crime Control Act and the Johnson Act. Under the Johnson Act, 15 U.S.C. § 1175, it was illegal to have slot machines in Indian Country. *Cabazon* said that if a tribe were operating bingo games, the tribe would not run afoul of the Act. But, if a tribe wanted to operate chance games, like slot machines, there was no such guarantee. States too were not pleased with the

[22] *Id.* at 209.

[23] *Id.* at 211.

[24] *Id.* at 221-22.

[25] *See* Washburn, *Federal Law, State Policy, and Indian Gaming*, *supra* note 2 at 289; Washburn, *Recurring Problems in Indian Gaming*, *supra* note 2 at 428.

[26] California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). *See* Washburn, *Federal Law, State Policy, and Indian Gaming*, *supra* note 2 at 289.

[27] *Id.*

outcome in *Cabazon*, and continued congressional lobbying efforts to enact some type of legislative limitation on the newly recognized tribal power to game.[28]

Congress responded to these concerns and uncertainties by enacting the Indian Gaming Regulatory Act of 1988 ("IGRA"), 25 U.S.C. § 2701 et seq. The enactment of IGRA gave Indian tribes greater certainty in their gaming activities by providing a statutory basis for such activities and delineated the role of states in the regulation of such gaming.[29] As a response to diverse concerns, IGRA was a compromise between tribal, federal, and state/local interests.[30] Accordingly, the statute was aimed at promoting tribal self-sufficiency, economic development, and strong tribal governments, while at the same time, the statute sought to create a regulatory scheme to appease the concerns of states.[31]

IGRA created a comprehensive regulatory regime in which gaming activities are classified into three different categories, each with different regulatory players.[32] The least controversial class, Class I gaming, refers to social and traditional tribal games that are used mostly during tribal ceremonies or celebrations.[33] These games have prizes of minimal or no value.[34] IGRA proscribes that Class I gaming operated on tribal land is regulated exclusively by Indian tribes and is not limited by the statute in any way.[35] High-stakes bingo games are

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[28] *See* LIGHT & RAND, *supra* note 1, at 42-43; Washburn, *Federal Law, State Policy, and Indian Gaming*, *supra* note 2, at 289; Washburn, *Recurring Problems in Indian Gaming*, *supra* note 2 at 428.

[29] *See generally* 25 U.S.C. § 2701 et seq. (1988).

[30] *See* LIGHT & RAND, *supra* note 1.

[31] *See* 25 U.S.C. § 2702.

[32] *See id.* at § 2710.

[33] *Id.* at § 2703(6).

[34] *Id.*

[35] *Id.* at § 2710(a)(1).

categorized under Class II gaming.[36] IGRA states that tribes can only engage in Class II gaming if the state in which they are located allows other entities, organizations, or individuals to also engage in such activity.[37] Thus, if a state allows charitable organizations like churches to host bingo nights, tribes within the state can engage in Class II gaming. Class II gaming is regulated by the tribes and the National Indian Gaming Commission.[38]

The most controversial and contentious class, Class III gaming, refers to high-stakes casino gaming, blackjack, and slot machines.[39] Like Class II gaming, a tribe can only engage in Class III gaming if it is "located in a State that permits such gaming for any purpose by any person, organization, or entity."[40] However, unlike Class II gaming, in order for a tribe to engage in Class III gaming, it must enter into a tribal-state compact with the state in which it plans to operate such gaming and conduct the operation in conformance with the compact.[41] The compact requirement is where states gain some control over the regulation of tribal gaming enterprises; IGRA empowers states to negotiate the logistical and jurisdictional issues associated with casino-style tribal gaming.

IGRA provides some guidelines as to what topics are appropriate for tribal-state compact negotiations.[42] These topics include the application of criminal and civil laws and regulations,

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[36] *Id.* at § 2703(7).

[37] *Id.* at § 2710(b)(1).

[38] *See id.* at § 2710(b).

[39] *See id.* at § 2703(8).

[40] *Id.* at § 2710(d)(1)(B).

[41] *Id.* at § 2710(d)(1)(C). Also unlike Class II gaming, Class III gaming is not regulated by the National Indian Gaming Commission. *See* Colorado River Indian Tribes v. National Indian Gaming Commission, 466 F.3d 134 (D.C. Cir. 2006).

[42] 25 U.S.C. § 2701(d)(3)(C).

the allocation of criminal and civil jurisdiction between the state and the tribe, the assessment of taxation and fees to defray the cost of regulation, remedies for breach of contract, standards for operation of the gaming enterprise, and other *subjects directly related to the operation of gaming activities*.[43] These named subjects, authorized by IGRA, have resulted in a wide variety of provisions.[44]

Because IGRA mentions broad subjects rather than specific provisions, the scope of provisions authorized by IGRA has been disputed. Many of these disputes have centered on the inclusion of provisions relating to labor relations, environmental concerns, and revenue sharing.[45] Tribes have sought to prevent the inclusion of such provisions, while states have pressed for their inclusion. For example, *In re Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003), is a case that involved the legality of including labor relations in tribal-state gaming compacts. California sought the inclusion of labor relations provisions while tribes sought to exclude them. The Ninth Circuit found that labor relations, though not expressly mentioned in

[43] *Id.* IGRA states: "Tribal-State gaming compacts may include provisions relating to the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity; the allocation of criminal and civil jurisdiction between the State and Indian tribe necessary for the enforcement of such laws and regulations; the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity; taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities; remedies for breach of contract; standards for operation of such activity and maintenance of the gaming facility, including licensing; and any other subjects that are directly related to the operation of gaming activities." *Id.*

[44] Cohen's Handbook of Federal Indian Law states that many compacts have provisions dealing with "tribal and state licensing and certification for employees; tribal and state enforcement of compact provisions; allocation of civil, regulatory, and criminal jurisdiction and law enforcement; the tribe's sovereign immunity and whether or to what extent it is waived for gaming activities; size of gaming operations; which games are authorized; technical requirements of electronic gaming devices; state inspection, testing, and approval of gaming devices and facilities; tribal payment of state regulatory costs; casino security and monitoring; tribal and state reciprocal access to records and reports; alcohol regulation; day-to-day rules of operation; conditions for amendments; and intrastate parity of gaming operations among tribes." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 12.05(2) (Nell Jessup Newton, et al. ed., 2005) [hereinafter, COHEN'S HANDBOOK].

[45] For a discussion regarding the many challenges regarding the scope of gaming compact provisions, *see* Kevin Gover & Tom Gede, *The States as Trespassers in a Federal-Tribal Relationship: A Historical Critique of Tribal State Compacting Under IGRA*, 42 ARIZ. ST. L.J. 185 (2010).

IGRA, is "directly related to the operation of gaming activities," and thus a permissible negotiation topic.[46] In the same case, the Coyote Valley Tribe challenged California's stance that the Tribe needed to contribute gaming revenue to a Revenue Sharing Trust fund for nongaming tribes and a Special Distribution Fund to affected local governments.[47] The Ninth Circuit upheld the Tribe's obligation to pay into these funds despite IGRA's prohibition on state taxation of tribal gaming within tribal-state compacts.[48] As to environmental provisions, in *Big Lagoon Rancheria v. California*, 759 F.Supp.2d 1149, 1153 (N.D. Cal. 2010), the Big Lagoon Rancheria argued that California failed to negotiate in good faith by insisting the Tribe engage in environmental mitigation measures. The United Stated District Court granted the Tribe's motion for summary judgment finding that environmental measures may be included in negotiations, however, the State failed to provide the required meaningful concessions in connection with their requests for mitigation.[49]

Unlike labor relations, revenue sharing, and environmental provisions there has been little dispute over the inclusion of provisions relating to tort claims for casino-related injuries because IGRA contains a catchall that authorizes provisions on any subject directly related to the operation of gaming activities.[50] As such, tribal-state gaming compacts regularly contain

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[46] In re Gaming Related Cases, 331 F.3d 1094, 1115-17 (9th Cir. 2003).

[47] *Id.* at 1114-15.

[48] *Id*. *See* 25 U.S.C. § 2710(d)(4). The Department of Interior has approved compacts with revenue sharing provisions so long as the state promises exclusivity to the tribes in exchange. *See* AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 867 (Carole E. Goldberg et al. ed., 6th ed. 2010) [hereinafter, AMERICAN INDIAN LAW].

[49] Big Lagoon Rancheria v. California, 759 F.Supp.2d 1149, 1162-63 (N.D. Cal. 2010).

[50] 25 U.S.C. § 2701(d)(3)(C).

provisions regarding tribal sovereign immunity "and whether and to what extent it is waived for gaming activities."[51]

In addition to provisions waiving sovereign immunity into tribal court or an alternative dispute forum such as arbitration, some states have read IGRA to authorize tort provisions that extend state jurisdiction over tort claims arising in Indian Country.[52] States and tribes may not make agreements to extend/alter preexisting jurisdictional limits on reservations unless Congress has given its consent.[53] This rule was upheld by the United States Supreme Court in *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971), where the Court held, despite a Tribal Council resolution authorizing concurrent state court jurisdiction, Montana courts lacked jurisdiction over tribal members acting on a tribal reservation because no federal statute authorized the extension of state jurisdiction.[54] Several federal laws empower tribes and states to alter preexisting jurisdictional limits. These include Public Law 280, the Indian Child Welfare Act, and IGRA.[55] IGRA authorizes states and tribes to address the jurisdictional allocations necessary for the enforcement of criminal and civil laws and regulations that are directly related to and necessary

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[51] COHEN'S HANDBOOK § 12.05(2). While the inclusion of tort provisions within compacts remains relatively uncontroversial, there has been some dispute over whether IGRA authorizes a change in the jurisdictional allocation such that tort claims may be heard in state court. *See* Doe v. Santa Clara Pueblo, 154 P.3d 644 (N.M. 2007); Pueblo of Santa Ana v. Nash, Civ. No 11-0957 BB-LFG (2012) *available at* . http://turtletalk.files.wordpress.com/2012/04/memo-opinion.pdf

[52] *See e.g.,* Doe v. Santa Clara Pueblo, 154 P.3d 644, 656 (N.M. 2007) (holding that a New Mexico tribal-state gaming compact that waived tribal sovereign immunity in New Mexico state court for the purposes of the adjudication of tort claims was lawful).

[53] *See* Kennerly v. District Court of Montana, 400 U.S. 423, 429 (1971).

[54] *Id.*

[55] Before the 1968 amendments of Public Law 280, states could condition their assumption of jurisdiction on tribal agreements, and after 1968, states could assume jurisdiction under the Act only if there is Indian consent manifest in a vote of the tribal members. AMERICAN INDIAN LAW 936. Under the Indian Child Welfare Act, "[s]tates and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case by case basis and agreements which provide for concurrent jurisdiction…" Indian Child Welfare Act, 25 U.S.C. § 1919(a) (1978).

for the licensing and regulation of Class III gaming.[56] As such, many negotiators of tribal-state gaming compacts have concluded they are at liberty to include provisions regarding the allocation of tort liability for injuries occurring on the premises of a gaming facility.[57] Accordingly, tribes and states have been negotiating and deciding the procedures by which casino patrons can file tort claims against tribal enterprises and the circumstances, if any, under which the tribe will waive its sovereign immunity to suit in order to resolve tort claims.

Tort issues may arise out of a wide range of scenarios. First, there are the most obvious slip and fall cases. For example, a patron may slip over a negligently maintained planter in a casino parking lot or trip over a cord as a casino employee vacuums. Torts may also arise when there is property damage. For example, a patron's car may be damaged at a casino's valet parking. On a more extreme side of things, torts may arise if a patron is struck by a casino shuttle cart or runaway vehicle at valet parking; or, if a casino employee physically attacks a patron; or, if a casino employee strikes a patron in the head with a tray of playing chips. Tort issues may also arise when a patron stays overnight in a casino's hotel. For example, a tort may arise if a jacuzzi tub's waterspout dislodges and strikes a patron, or if a patron is bitten by bed bugs. Taking tort issues even further, there could be state law dram shop claims, which are claims brought by third parties injured by patrons who were over served alcohol at a gaming

[56] 25 U.S.C. § 2701(d)(3)(C).

[57] Not all tribal negotiators agree with this interpretation of IGRA. For example, in *Doe v. Santa Clara Pueblo*, the Santa Clara Pueblo argued that IGRA does not authorize an extension of state jurisdiction over tort claims arising at Indian casinos and the provision in the Tribe's compact authorizing such jurisdiction was unlawful. Doe v. Santa Clara Pueblo, 154 P.3d 644, 653 (N.M. 2007). The New Mexico Supreme Court disagreed. *Id.* at 656. *See also* Pueblo of Santa Ana v. Nash, Civ. No 11-0957 BB-LFG (2012) *available at* . http://turtletalk.files.wordpress.com/2012/04/memo-opinion.pdf.

establishment.[58] Because torts arise from a multitude of scenarios, they happen at Indian casinos all the time.

Because torts are inevitable, tort provisions in gaming compacts are very important. They are important, not only to ensure patrons are afforded a fair process to pursue their claim, but also because tribal sovereign immunity and the decision to waive it is a central element of tribal sovereignty. Sovereigns have immunity from suit based on their status as sovereigns.[59] Because Indian tribes are sovereigns, like the federal government and the states, Indian tribes too are protected from nonconsensual suits by the doctrine of sovereign immunity, as derived from their inherent sovereignty.[60] The doctrine of sovereign immunity means that casino patrons cannot sue a tribe for a tort claim unless that tribe consents to being sued. The courts have long protected this doctrine of tribal sovereign immunity.[61] For example, in *Santa Clara Pueblo v. Martinez*, the United States Supreme Court stated, "Indian tribes have long been recognized as

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[58] *See e.g.*, Mendoza v. Tamaya Enterprises, Inc., 238 P.3d 903 (N.M. Ct. App. 2010) (holding that state dram shop actions apply to tribal enterprises); Bittle v. Bahe, 192 P.3d 810 (Okla. 2008) (holding that 18 U.S.C. § 1161 waives tribal sovereign immunity from suit.).

[59] *See* Seielstad, *supra* note 12 at 698; Kawanannakoa v. Polybank, 205 U.S. 349 (1907) (Holmes, J.) (supplying the rationale for the sovereign immunity doctrine).

[60] *See* Seielstad, *supra* note 12 at 698; Bottomly v. Passamaquoddy Tribe, 599 F.2d 1061 (1st Cir. 1979) (referencing the inherent sovereign immunity of an Indian tribe). It is important to note that although Indian tribes have sovereign immunity from suit, tribal officers are not protected by the doctrine for declarative and injunctive relief. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978) (holding that the Governor of Santa Clara Pueblo did not have sovereign immunity from suit). However, if tribal officials act within the scope of their official capacity and within the scope of their authority, the officials share the tribe's immunity. *See e.g.,* Fletcher v. United States, 116 F.3d 1315, 1324 (10th Cir. 1997); Linneen v. Gila River Indian Community, 276 F.3d 489, 492 (9th Cir.), cert denied, 536 U.S. 939 (2002).

[61] Although the courts have consistently upheld and protected the doctrine of tribal sovereign immunity, some courts have questioned its continued application. In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, Justice Kennedy criticized the doctrine and invited Congress to limit it. Kennedy stated, "tribal immunity extends beyond what is needed to safeguard tribal self-governance." Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 758 (1998). Kennedy seemed most concerned with tribal commercial and economic activities stating, "In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Id.*

possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."[62] Thus, the Court held that absent an unequivocal waiver of sovereign immunity from the Tribe, a suit against the Santa Clara Pueblo under the Indian Civil Rights Act was barred by tribal sovereign immunity.[63] In addition, in *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), the Supreme Court again pronounced its commitment to the doctrine of tribal sovereign immunity.[64] The Court held that even though Oklahoma has the right to tax the sale of cigarettes to non-members on tribal land, and the Tribe has an obligation to collect the tax for the state, the state cannot sue the Tribe to enforce that duty unless the Tribe consents to such a suit.[65] Similarly, the Supreme Court protected tribal sovereign immunity in 1998 when it decided *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,* 523 U.S. 751 (1998). There, the Court held that tribes have sovereign immunity from suits on contracts even when the contract involves commercial, not governmental, activities taking place outside of Indian County.[66]

While the courts have protected tribal sovereign immunity, there are some serious limitations on the doctrine. One limitation is that a tribe cannot assert its sovereign immunity in suits brought by the United States.[67] Another limitation is the power of congressional abrogation. Based on its plenary power over tribes, Congress can abrogate a tribe's sovereign

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[62] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

[63] *Id.* at 58-59.

[64] Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991).

[65] *Id.*

[66] Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998). *See* Seielstad, *supra* note 12 at 698.

[67] *See e.g.,* EEOC v. Karuk Tribe Housing Auth., 260 F.3d 1071, 1075 (9th Cir. 2001).

immunity from suit.[68] However, while Congress does have the power to abrogate tribal sovereign immunity, this abrogation must be "unequivocally expressed," and cannot be implied.[69] Absent clear congressional abrogation of a tribe's sovereign immunity, a tribe is protected from nonconsensual suits unless a tribe makes an unequivocal waiver itself. [70]

A tribe can waive its sovereign immunity by contract.[71] In order for a waiver to be effective, it must be clear, though no talismanic words are required and the waiver does not need to include the term "sovereign immunity."[72] Despite the requirement that a tribal waiver be clear, it is important to note that courts may stretch to find contractual language indicating a waiver. For example, in *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001), the Supreme Court held that a tribe waived its immunity by entering a form construction contract with a clause requiring arbitration of any disputes and a choice of law clause agreeing that arbitration awards may be enforced "in any court having jurisdiction thereof."[73]

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[68] *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (stating that tribal sovereign immunity "is subject to the superior and plenary control of Congress"); Seielstad, *supra* note 12 at 714-22.

[69] *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

[70] *Id.*

[71] *See e.g.*, Native Village of Eyak v. GC Contractors, 658 P.2d 756 (Alaska 1983) (native village had inherent sovereignty to waive its own sovereign immunity by contract); Nenana Fuel Co. v. Native Village of Venetie, 834 P.2d 1229 (Alaska 1992). In addition to a contractual waiver, a tribe may also waive its immunity by its conduct, i.e., engaging in litigation. A tribe waives its immunity for the full adjudication of claims that it sues upon and to claims of recoupment or set-off that arise from the transaction sued upon. *See* United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981); Rosebud Sioux Tribe v. A & P Steel, Inc., 874 F.2d 550 (8th Cir. 1989); Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324 (10th Cir. 1982). However, a tribe does not waive its immunity for counter claims by bringing an action. *See* Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 509 (1991).

[72] *See* Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Assoc., 86 F.3d 646, 660 (7th Cir. 1996).

[73] C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411, 414 (2001). The waiver of immunity arising from an arbitration agreement is limited to arbitration and its enforcement. *See* Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians, 63 F.3d 1030, 1048-49 (11th Cir. 1995).

Because tribes have inherent sovereign immunity and the right to waive it, tribes have the choice of deciding when and in what forum they are willing to be hauled into court. This choice carries important implications during gaming compact negotiation with states because tribes have to grapple with the decision of whether to waive their sovereign immunity to accommodate the adjudication of tort claims, what forum to waive into, and how to appropriately phrase the waiver within the compact.

III. FIVE CATEGORIES OF TORT LIABILITY PROVISIONS

Even though each tribe is afforded the right under IGRA to negotiate a gaming compact individually with the state in which it is located, gaming compacts within a given state tend to be very similar to one another. While there are some differences in revenue sharing agreements or the number of slot machines a given tribe may operate, tort liability issues tend to be treated very similarly within a given state. This pattern likely arises because the state's concerns and interests regarding tort issues remain the same regardless of which individual tribe it is negotiating with. In addition, a state's earlier compacts and the tort provisions within them likely serve as a model for future negotiations with other tribes.

While the gaming compacts within a given state tend to be very similar to one another, gaming compacts, and thus tort provisions within them, fluctuate widely from state to state. This fluctuation is likely attributed to the fact that each state has its own set of concerns and interests that affects how they negotiate for the regulatory regime to be structured.[74] In evaluating the gaming compacts of eleven states, I have found that tort provisions vary from the extremes where, on one hand, some gaming compacts are devoid of any statement of tort liability, and on

[74] For example, in some states the plaintiffs' bar may be stronger and many encourage the state to negotiate for a tort provision that provides for liberal litigation. For a short discussion of additional factors affecting how states negotiate, *see supra* Part I.

the other, others delineate clear and stringent procedures for the filing of tort claims with a tribe. I have placed these gaming compacts into five broad categories each of which has played out differently in practice with varying effects on tribal sovereign immunity.

A. Category 1: Compact Requires Tribe to Adopt Tribal Law

The first category of tribal-state compacts requires a tribe to adopt a tort liability ordinance that spells out the process for the filing of tort claims and the forum(s) within which the tribe will waive its sovereign immunity. In general, these compacts provide some guidelines as to what must be included in the tribal ordinances; however, the details of the tribal dispute resolution process delineated in the ordinances are often left of up to a tribe's discretion. By requiring tribes to adopt a tort liability ordinance, states seek to ensure that patrons are afforded some process by which to pursue a tort claim against a tribe while remaining relatively hands-off in determining the details of the claims process.

For some states in this category, the tort liability ordinance requirement is not a sufficient safeguard to ensure the resolution of patron tort claims. Thus, some Category 1 compacts not only require a tribe to adopt a tort liability ordinance but also require a tribe to waive its sovereign immunity into an additional forum for the resolution of claims which may be pursued after the tribal dispute process is exhausted. This additional forum gives a patron a second bite at the apple if they are unsatisfied with the outcome of a tribe's dispute resolution process. California, Connecticut, Arizona, and New York are Category 1 gaming compacts.

1. CALIFORNIA

California has ratified sixty-eight gaming compacts with tribes.[75] Many California tribes negotiated and signed gaming compacts with the state in 1999; additionally, some of those compacts have since been amended.[76] Seven additional tribes signed their first gaming compacts with the state after 1999.[77] For clarity I will refer to the *amended* 1999 compacts and the compacts signed *after* 1999 as "Amended/Newer" compacts. [78]

The 1999 compacts require tribes to adopt a tort liability ordinance that creates some type of tribal dispute resolution process for tort claims.[79] The compacts give tribes a great deal of discretion by allowing them to set their own forum, process, and enforcement mechanisms for tort issues. Furthermore, the 1999 compacts do not contain a judicial review provision. Thus,

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[75] *See* California Gambling Control Commission, Ratified Tribal-State Gaming Compacts, http://www.cgcc.ca.gov/?pageID=compacts (2011).

[76] *See id.*

[77] *See id.* Los Posta Band of Diegueno Mission Indians, Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation, and Torres-Martinez Band of Cahuilla Mission Indians signed their first compacts with California in 2003. *See id.* Coyote Valley Band of Pomo Indians, and Fort Mojave Indian Tribe of AZ, CA, and NV signed their first gaming compacts with California in 2004. *See id.* The Yurok Tribe of the Yurok Reservation signed their first compact with California in 2007. *See id.* The Habematolel Pomo of Upper Lake signed a compact with California in 2011. *See id.*

[78] The path to obtaining tribal-state gaming compacts in California was a long and contentious one. For a thorough treatment of the ordeal see Carole Goldberg and Duane Champagne's *Ramona Redeemed? The Rise of Tribal Political Power in California*, 17 WICAZO SA REV. 43 (2001).

[79] *See e.g.*, Tribal-State Compact Between the State of California and the Pechanga Band of Luiseño Mission Indians, Oct. 3, 1999, § 10.02(d), *available at* http://www.cgcc.ca.gov/?pageID=compacts. California's Proposition 5, a statewide initiative seeking fair compact terms, contained a detailed model compact that California was to offer to tribes. *See* Tribal Government Gaming and Economic Self-Sufficiency Act of 1998, 16 CAL. GOV'T CODE § 98000-98012 (1998). As to tort issues, tribes were required to maintain two million dollars in liability insurance for patron claims. *Id.* Tribes also were required to provide reasonable assurances that claims would be promptly and fairly adjudicated and that legitimate claims would be paid. *Id.* This language was expanded on in the compacts that were signed in 1999. In those compacts, the insurance requirement was increased to five million dollars and the language regarding providing reasonable assurances was expanded in more detail by setting a deadline by which the tribe had to adopt a tort ordinance in which it waives its immunity for the purposes of tort claims. *See e.g.*, Tribal-State Compact Between the State of California and the Pechanga Band of Luiseño Mission Indians, Oct. 3, 1999, § 10.02(d), *available at* http://www.cgcc.ca.gov/?pageID=compacts.

the compacts themselves do not grant jurisdiction to state or federal courts to compel a tribe to abide by the tribal ordinance or to enforce the awards resulting from a tribe's tort liability procedure. Thus, by the text of the 1999 gaming compacts, tribes completely control the processing of tort claims.

Courts have interpreted the tort liability ordinance requirement of the 1999 compacts in tribes' favor by declining to find a waiver of tribal sovereign immunity in state court. In *Lawrence v. Barona Valley Ranch Resort & Casino*, 153 Cal.App.4th 1364 (Cal. Ct. App. 2007), the Court held that by entering into the 1999 tribal-state gaming compact, a tribe did not waive its sovereign immunity for tort claims brought in state court.[80] Rather, the tribe merely engaged in a limited waiver of sovereign immunity for the resolution of tort claims bought in tribal court, in compliance with the tribe's tort liability ordinance.[81] The Barona Tribe entered into the 1999 gaming compact with California and, as required by the compact, the Tribe adopted a tort liability ordinance.[82] The ordinance required patrons to first file their claims with the Tribe's insurance carrier.[83] If the insurance carrier denied the patron's claim, the denial could then be appealed to Barona Tribal Court at the request of the patron.[84] Nellie Lawrence was injured at the Barona Casino when someone ran into her and knocked her down.[85] Claiming the person was a negligent employee, Lawrence made a one million dollar claim against the Tribe's

[80] Lawrence v. Barona Valley Ranch Resort & Casino, 153 Cal.App.4th 1364 (Cal. Ct. App. 2007).

[81] *Id.* at 1370.

[82] *Id.* at 1366.

[83] *Id.* at 1367-68.

[84] *Id.*

[85] *Id.* at 1368.

insurance carrier.[86] The insurance company denied the claim and Lawrence appealed the denial to the Barona Tribal Council, acting as tribal court, in accordance with the Tribe's tort liability ordinance.[87] Finding that evidence established the negligent party was actually a casino patron and not an employee, the Tribal Council denied Lawrence's appeal.[88]

Unhappy with the decision of the Tribal Council, Lawrence then sued the Tribe in state court.[89] The Tribe made a motion to quash, arguing that it had sovereign immunity from suit in state court and the court lacked subject matter jurisdiction over the claim.[90] Lawrence, on the other hand, claimed the tribe waived its sovereign immunity by entering into the gaming compact and that the Tribe's tort claims ordinance was "grossly unfair" to tort claimants.[91] The Court held that the Tribe was still protected by tribal sovereign immunity even though it had entered the 1999 compact.[92] By entering into the compact and adopting the tort liability ordinance, the Tribe only waived its sovereign immunity for certain tort claims brought in tribal court in conformance with the ordinance, and this limited waiver did not constitute consent to suit in state court.[93] Furthermore, the 1999 compact did not authorize a patron to challenge the

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[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.* at 1370.

[93] *Id.*

fairness of the Tribe's tort ordinance in state court.[94] This decision, declining to find a waiver of sovereign immunity into state court within the 1999 gaming compacts, has been upheld.[95]

While courts have not found a waiver of sovereign immunity into state court in the 1999 compacts, California courts have stretched to find a limited waiver within the compacts. In *Campo Band of Mission Indians v. Superior Court*, 137 Cal.App.4th 175 (Cal. Ct. App. 2006), the Court held that a provision in a tribe's 1999 compact stating that the compact did not "waive [the tribe's] immunity from suit except to the extent of the policy limits and insurance coverage [provided in the compact]" constituted a waiver of sovereign immunity into the forum specified in the tribe's tort liability ordinance for determination of a patron's procedural compliance with the tort ordinance.[96]

The Campo Band of Mission Indians entered into the 1999 compact with California.[97] As required by the compact, the Tribe maintained liability insurance and adopted a tort liability ordinance delineating the terms and conditions under which it would waive its sovereign immunity relating to tort claims and the procedures for processing those claims.[98] The Tribe's ordinance required a patron first to seek settlement with the Tribe's insurance carrier within

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[94] *Id.* at 1371.

[95] In *Chisley v. Barona Band of Mission Indians*, 2009 WL 82563 (Cal. Ct. App.), the California Court of Appeal upheld the decision in *Lawrence* that the Barona Band of Mission Indians did not consent to suit in state court in its tort liability ordinance with regard to patron tort claims. In upholding *Lawrence*, the Court granted Barona's motion to quash service of summons in a tort claim filed by patrons of the Tribe's casino claiming they were bitten by bed bugs. Chisley v. Barona, 2009 WL 82563, *1 (Cal. Ct. App.). Just as courts have refused to find a waiver of sovereign immunity in state court within the 1999 gaming compacts, courts have also refused to find similar waivers within tribal tort claims ordinances. *See* Merrill v. Picayune Rancheria of Chukchansi Indians, No. 1:10-CV-01155-OWW-SKO (E.D. Cal. 2011).

[96] Campo Band of Mission Indians v. Superior Court, 137 Cal.App.4th 175, 182-83 (Cal. Ct. App. 2006).

[97] *Id.* at 178.

[98] *Id.* at 178-80.

thirty days of the injury.[99] If a settlement is not reached, the patron could request to proceed to binding arbitration within thirty days of its negotiations with insurance.[100] Moreover, if an arbitral award was granted, the tribal ordinance allowed the award to be enforced against the Tribe in state court.[101] These procedures must be adhered to in order for the patron's claim to be resolved. When Celeste Bluehawk allegedly slipped and fell on a wet floor at the Tribe's Golden Acorn Casino, Bluehawk filed a suit with the Tribe's insurance carrier.[102] When the insurance carrier denied her claim, Bluehawk filed suit in California state court.[103] Her complaint was dismissed on sovereign immunity grounds and the Court encouraged the parties to negotiate a settlement.[104] After failed negotiations, Bluehawk submitted a request to the Tribe for binding arbitration on her claim.[105] Because she had missed the thirty day deadline specified in the Tribe's tort ordinance, the Tribe rejected her request for arbitration as "untimely, defective and non-compliant" with its tort liability ordinance.[106]

Bluehawk then filed a motion to compel arbitration in state court.[107] The Court found that the Tribe's 1999 compact contained a limited waiver of sovereign immunity.[108] The Court relied on language in the compact, which states that the compact did not "waive [the Tribe's]

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[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.* at 180.

[103] *Id.*

[104] *Id.* at 180-81.

[105] *Id.* at 181.

[106] *Id.*

[107] *Id.*

[108] *Id.* 182-83.

immunity to suit *except to the extent of the policy limits and insurance coverage [provided for therein]*."[109] The Court stated, "[b]y virtue of this language in the Compact, the Tribe unambiguously waived its immunity from suits based on patron claims for negligent acts to the extent of the insurance coverage it contractually obligated itself to obtain for such claims."[110] Because the Tribe had waived into an arbitral forum within its tort ordinance, the Court required the Tribe "to submit the issue of Bluehawk's procedural compliance [with the tort liability ordinance] to arbitration and, if the arbitrators conclude that Bluehawk in fact complied with the procedural requirements," the Tribe would then be required to also arbitrate the merits of Bluehawk's claim.[111] Bluehawk later settled her claim with the tribe for five hundred thousand dollars.[112] Thus, we have seen with *Campo* and *Barona* that while the 1999 gaming compacts have not waived tribes' sovereign immunity for tort claims to be adjudicated on the merits in state court, California courts have found a limited waiver of sovereign immunity in the compacts, the details of which may be spelled out in the required tribal tort liability ordinance.[113]

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[109] *Id.*

[110] *Id.* at 184. Justice Benke dissented, reasoning that the statement relied on by the majority was merely a limitation on damages, not a waiver of sovereign immunity. *Id.* at 186-87.

[111] *Id.* at 186. The Court reasoned that the Tribe lacked the unilateral right to determine whether a patron has complied with the procedural prerequisites of the ordinance to pursuing the merits of her claim in arbitration. *Id.* at 185. The Court stated that the Tribe cannot "retain[] the sole and unfettered discretion to determine whether a claimant has complied with the procedural requirements set forth it its [ordinance]." *Id.* Thus, the procedural compliance issue needed to be determined in the arbitral forum chosen by the Tribe. It is important to note that the Court also held that it lacked subject matter jurisdiction to compel arbitration on the merits of Bluehawk's claim. *Id.*

[112] Greg Moran, *Suit Against Indian Tribe is Settled for $500,000*: *Gaming Compact Opened Up Liability*, SAN DIEGO UNION TRIB., Feb. 20, 2009, *available at* http://www.utsandiego.com.

[113] The California Nations Indian Gaming Association (CNIGA) has requested depublication of the *Campo* decision. *See* Letter from California Nations Indian Gaming Association to Honorable Chief Justice Ronald M. George (May 1, 2006) *available at*, http://www.cniga.com/documents/legal/34.11.CNIGAreq.pdf. CNIGA believes that the compact "contains no express, unequivocal waiver of tribal sovereign immunity." *Id.* Rather, CNIGA believes that the Court's holding in *Campo* that the Tribe "waived its immunity merely by agreeing to carry specific limits of insurance coverage in its 1999 compact is inconsistent with the Compacts' very premise and the well-established law of tribal sovereign immunity." *Id.*

The Amended/Newer California gaming compacts differ from the 1999 compacts in important ways. While both versions require tribes to adopt tort liability ordinances, the Amended/Newer compacts provide extensive guidelines as to what must be included in the ordinances and provide for what happens when a tribe's dispute resolution process fails to resolve a patron's claim.[114] Thus, the Amended/Newer compacts are a more aggressive type of Category 1 compacts. Specifically, within an ordinance, a tribe is free to create a tribal dispute resolution process that a patron must first exhaust. However, the Amended/Newer compacts require that if patrons are dissatisfied with the resolution, they are entitled to arbitrate their claim before a retired judge where California tort law will apply. [115] This gives patrons a second bite at the apple. Thus, the compact requires a tribe to waive its sovereign immunity for binding arbitration of patron claims up to the limits of its insurance policy.[116] Moreover, a tribe cannot assert its sovereign immunity in actions to enforce its obligation to arbitrate, to confirm, correct, modify, or vacate the arbitral award, or to enforce a judgment based on an arbitral award.[117] This provision of the Newer/Amended compacts allowed a Federal District Court to order the Agua Caliente Band of Cahuilla Indians to arbitration in 2010.[118] In most cases, this review is to be conducted by the Federal District or Appellate court in the area within which the specific tribe

[114] Examples of what must be included in the ordinances include: a statement that California tort law will apply and ta statement that a patron has one hundred and eighty days to file their claim with a tribe after being notified of the dispute resolution process created by a tribe. *See e.g.*, Amendment to the Tribal-State Compact Between the State of California and the San Manuel Band of Mission Indians, Aug. 28, 2006, § VII(C), *available at* http://www.cgcc.ca.gov/?pageID=compacts.

[115] *See e.g., id.* at § VII. While California tort law does apply, its provision of punitive damages does not. *Id*.

[116] *See id.*

[117] *Id*. at § VII(C).

[118] Saroli v. Agua Caliente Band of Cahuilla Indians, 2010 WL 4788570 (S.D. Cal.). In this case, a patron was allegedly injured when a pressurized metal waterspout on the jacuzzi tub in his room broke off and struck him in the head. *Id.* at *1.

resides.[119] However, the compacts provide that if the federal court declines to hear the action, it can then be brought in state court.[120]

The judicial review provisions provided in the Amended/Newer compacts are absent from the 1999 compacts. In the 1999 compacts, awards made to patrons under a tribe's ordinance cannot be enforced or reviewed in federal or state court unless such review is provided for in the tribe's ordinance. The opposite is true of the Amended/Newer compacts. There, if a patron's claim makes it to arbitration, federal and possibly state court may step in to enforce a tribe's obligation to arbitrate, to change the arbitral award, or to enforce the award. This enforcement mechanism has huge implications for patrons who are awarded damages by a tribe or an arbitrator but then must seek enforcement of that award. This difference between the compacts is best illustrated by an example.

The Sycuan Band of the Diegueño Mission Indians signed a 1999 gaming compact with California.[121] Per the tribal-state compact, the Tribe enacted a tort claims ordinance that delineated the procedures for the filing of a patron tort claim with the Tribe and the limited circumstances in which the Tribe waives its sovereign immunity with regard to such claims.[122] The Sycuan ordinance states that a tort claim is to be filed with the Sycuan Gaming Commission.[123] Appeals from denial of claims are to be heard by an arbitrator selected by the

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[119] *See e.g.*, Amendment to the Tribal-State Compact between the State of California and the Pechanga Band of Luiseño Indians, Aug. 28, 2006, § VII(C), *available at* http://www.cgcc.ca.gov/?pageID=compacts.

[120] *Id.* For example, the Pechanga gaming compact states, the Tribe will waive its sovereign immunity "in any action brought in the United States District Court where the Tribe's Gaming Facility is located and the Ninth Circuit Court of Appeals (and any successor court), or, if the federal court declines to hear the action, in any action brought in the courts of the State of California that are located in Riverside County, including courts of appeal." *Id.*

[121] Harris v. Sycuan Band of Diegueño Mission Indians, 2009 WL 5184077, *1 (S.D. Cal).

[122] *Id.*

[123] *Id.*

Commission.[124] The ordinance bars the Tribe from challenging any award or settlement made by the Commission or the arbitrator.[125] However, an award made by the arbitrator can be enforced by the patron against the Tribe in the United States District Court for the Southern District of California under the Federal Arbitration Act.[126] Thus while not required by the 1999 compact, the Tribe waives its sovereign immunity for enforcement of an arbitral award in federal court in its ordinance.

After sustaining injuries while at the Sycuan Casino, Sara Harris filed a tort claim with the Tribe.[127] As required by the Tribe's ordinance, Harris filed a claim with the Sycuan Gaming Commission.[128] After the Commission denied her claim, she appealed the denial.[129] An arbitrator selected by the Commission heard her appeal.[130] The arbitrator awarded Harris $160,000 on her claim.[131] The Tribe then refused to comply with the arbitrator's award.[132] Thus, pursuant to the ordinance, Harris filed a complaint in federal district court to enforce the arbitration award.[133] Even though the Tribe's ordinance provided for enforcement in district

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[124] *Id.* at *2

[125] *Id.*

[126] *Id.*

[127] *Id.* at *1.

[128] *Id*.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

court, the Tribe moved to dismiss the complaint for lack of subject matter jurisdiction.[134] The court agreed with the Tribe.[135]

The Court reasoned that the Tribe's tort liability ordinance does not confer subject matter jurisdiction to the Court because "'[a]n ordinance enacted by a federally recognized Indian tribe is not itself a federal law; the mere fact that a claim is based upon a tribal ordinance consequently does not give rise to federal question jurisdiction. Nor does it suffice that one of the parties to a dispute is an Indian tribe.'"[136] In addition, the Federal Arbitration Act does not confer subject matter jurisdiction on the Court because Harris did not allege "an independent jurisdictional basis over the parties' dispute."[137] Thus, even though the Tribe clearly waived its sovereign immunity in federal district court for the enforcement of arbitral awards, the Court must still meet its federal question requirement. Because that requirement was not met here, the Court refused to enforce the $160,000 award for Harris's injuries.[138]

Even though Harris conformed to the Tribe's tort liability ordinance, because the federal court declined to hear the case, she was left without a way to enforce the judgment awarded to her. This lack of enforcement would not have happened if the case arose under the Amended/Newer compacts. While awards made under the 1999 compact can only be enforced in state court if a tribe waive its sovereign immunity for such review in the its ordinance, the Amended/Newer compacts themselves waive the sovereign immunity of tribes to enforce arbitration awards in federal court *and* in state court if the federal court declines to hear the case.

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[134] *Id.*

[135] *Id.* at *8.

[136] *Id.* at *4 (quoting Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1077 (9th Cir. 1990)).

[137] *Id.*

[138] *Id.* at *8.

Whereas Sycuan waived its sovereign immunity into federal court for enforcement, had this been under the Amended/Newer compact, its sovereign immunity would also have been waived in state court. Thus, Harris would have the opportunity to simply seek execution in state court once the district court declined to hear the case.

The tort ordinances of California tribes use a wide variety of different mechanisms to resolve patron claims. Because most California Indian tribes do not have tribal courts, these mechanisms vary from utilizing insurance carriers to tribal councils and gaming commissions to arbitration.[139] While these tort ordinances seem to be successfully resolving the majority of patron tort claims, there have been instances where patrons express dissatisfaction when they do not prevail in the mechanism provided by a tribe's ordinance. For example, in *Lawrence v. Barona Valley Ranch Resort & Casino*, 153 Cal.App.4th 1364 (2007), a patron claimed that a tribe's ordinance was grossly unfair to claimants, after a Tribal Council, sitting as tribal court, denied her appeal from an insurance company's denial of her claim. The patron's attorney seemed particularly unhappy with the Barona Tribal Council's role in hearing the claim, stating that "[y]ou had the same people being sued adjudicating the same case…[s]o how do you think that went."[140] In addition to some patron discontent, it appears that some personal injury attorneys dislike the tort ordinance system because of what they consider to be vague wording in ordinances and the limitations placed on damages within ordinances.[141] Moreover, while the

[139] At least one tribe has executed a limited waiver of its sovereign immunity into an intertribal court. *See* Rincon Band of Luiseño Mission Indians, A Resolution Adopting the Revised Rincon Patron Tort Claims Ordinance, Resolution No. 2009-11 (2009), *available at* http://rinconmembers.net/filestore/Patron%20Tort%20Claim.pdf. The Rincon Band of Luiseño Indians waived its sovereign immunity for the purposes of tort claims into the Intertribal Court of Southern California in their tort claims ordinance. *Id.*

[140] Cheryl Miller, *Indian Casinos Offer Roll of Dice*, THE RECORDER, May 12, 2008, *available at* http://www.law.com/jsp/pc/LawArticleLit.jsp?id=1202421308876.

[141] *Id.*

Newer/Amended compacts give some patrons a second chance at their claim in arbitration, some attorney's do not see this as a viable option because getting to arbitration may take a long time resulting in the abandonment of claims.[142] California Indian casinos are patronized by millions of visitors each year. For example, 2.2 million visitors patronize San Manuel Indian Bingo and Casino alone annually.[143] While there appears to be some patron and attorney discontent with how California tribes are dealing with tort claims, given the immense number of visitors, the limited number of complaints suggests that for the most part the tort ordinance scheme is successfully handling patron tort claims.

2. *CONNECTICUT*

Connecticut gaming compacts also require tribes to adopt a tort liability ordinance outlining the forum and procedure for the filing of tort claims with tribes. Connecticut has signed gaming compacts with two tribes—The Mashantucket Pequot Tribe and the Mohegan Tribe.[144] With regards to tort liability, Section 3(g) of the gaming compacts state:

> The Tribe shall establish, prior to the commencement of Class III gaming, reasonable procedures for the disposition of tort claims arising from alleged injuries to patrons on its gaming facilities. The Tribe shall not be deemed to have waived its sovereign immunity from suit with respect to such claims by virtue of any provision of this Compact, but may adopt a remedial system analogous to that available for similar claims arising against the State or such other remedial system as may be appropriate following consultation with the state gaming agency.[145]

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[142] *Id.*

[143] California Welcome Center: Inland Empire-San Bernardino, San Manuel Indian Bingo and Casino: Serving Up Fun For Everyone, http://www.cwcinlandempire.com/partners_San_Manuel.html (2012).

[144] *See* State of Connecticut Department of Consumer Protection, Tribal State Gaming Compacts and Agreements, http://www.ct.gov/dcp/cwp/view.asp?a=4107&q=482878 (2011).

[145] Tribal-State Compact Between the Mohegan Tribe and the State of Connecticut, Dec. 5, 1994, § 3(g), *available at* http://www.ct.gov/dcp/cwp/view.asp?a=4107&q=482878. The Mashantucket Gaming compact reads almost exactly the same, however, it does not include the stipulation that the procedures must be established before commencing class III gaming. *See* Tribal-State Compact Between the Mashantucket Pequot Tribe and the State of Connecticut, 1991, § 3(g), *available at* http://www.ct.gov/dcp/cwp/view.asp?a=4107&q=482878.

This section of the gaming compacts makes it clear that it is up to the tribes to establish the procedures to deal with tort claims, and the tribes are not required by the compact to waive their sovereign immunity as to such matters.

Based on the directive in Section 3(g) of their gaming compact, the Mashantucket Pequot have since adopted *Title 4: Tort Claims (Gaming Enterprise)* into their tribal code.[146] The ordinance states that the Mashantucket Tribal Court has jurisdiction over tort claims brought by patrons for injuries received while at the Tribe's gaming facility.[147] Furthermore, the Tribe clearly waives its sovereign immunity as to such claims in tribal court and explicitly states its sovereign immunity has not been waived in state or federal court.[148] As to the process set up by the ordinance, claims must be filed within one year of the injury, the Tribal Court will follow tribal law and precedent, and the claim will be presented to the Tribal Court and not a jury.[149] In addition, the Mashantucket ordinance demonstrates how tort ordinances can be used to place limitations on the types of allowable awards. For example, no award based on strict liability, punitive damages, or loss of consortium is be allowed when using the Tribe's tort claims procedure.[150] Moreover, no declaratory or injunctive relief will be granted.[151]

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[146] Tort Claims: Gaming Enterprise, 4 MASHANTUCKET PEQUOT TRIBAL CODE § 3 (2008), *available at* http://www.mptnlaw.com/laws/Titles%201%20-%2023.pdf.

[147] *Id.*

[148] *Id.*

[149] *Id.* at § 1.

[150] *Id.* Loss of consortium is "a loss of the benefits that one spouse is entitled to receive from the other, including companionship, cooperation, aid, affection, and sexual relations." BLACKS LAW DICTIONARY (Bryan A. Garner ed., 3rd ed, 2006).

[151] *Id.*

Unlike many tribes in California, the Mashantucket Pequot has an established tribal court system. Significantly, the Mashantucket Pequot created its tribal court in response to its gaming activities, and it has blossomed into a specialized gaming court with eighty-five percent of its caseload relating to activities arising from the Tribe's resort and casino.[152] The Mashantucket Tribal Court and tort liability ordinance appear to be successfully and satisfactorily handling patron claims.[153] In fact, the process delineated in the ordinance has resulted in the largest personal injury award ever negotiated in a tribal court.[154] A man was struck by a runaway vehicle at the casino valet and lost his leg as a result of his injuries. He filed a claim in the Mashantucket Tribal Court.[155] The case was settled minutes before the trial began for $2.9 million.[156] This award is the Mashantucket's largest award yet.[157]

Similar to the Mashantucket Pequot, the Mohegan Tribe has created a specialized Gaming Disputes Court to deal with gaming issues.[158] This court, with both a Trial Court and Court of Appeals, is used by the Tribe to adjudicate tort issues, discriminatory employment

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[152] *See* The Mashantucket (Western) Pequot Tribal Nation, The History of the Mashantucket Tribal Court, http://www.mptn-nsn.gov/mptntchistory.aspx (2012).

[153] This is likely because the Mashantucket Pequot has long attempted to ensure that legitimate patron tort claims are compensated. For example, prior to having its compact, the Tribe waived its sovereign immunity to resolve a patron's claim after she was injured at the Tribe's bingo hall and after the Tribe's insurer denied the patron's claim for lack of negligence. See Amelia A. Fogleman, *Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver for Tribal Businesses*, 79 VA. L. REV. 1345, 1362-63 (1993). Even though not required to do so by a compact, the Tribe executed a limited waiver of sovereign immunity to resolve the patron's claim because the Tribe believed "it was unfair for people to be injured and have no recourse." Id.

[154] *See* Gale Courey Toensing, *Mashantucket Awards $2.9m in Personal Injury Suit*, INDIAN COUNTRY TODAY, Sept. 5, 2009, *available at* http://indiancountrytodaymedianetwork.com/.

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *See* The Mohegan Tribe, Mohegan Gaming Disputes Court, http://www.mohegan.nsn.us/Government/gc_main.aspx (2009).

practices, tribal employment rights, debt collection, and licensing issues.[159] The Mohegan Tribe has also adopted a tort liability ordinance as required by its gaming compact with Connecticut. The ordinance requires that tort claims must be filed with the Tribe within one year of the injury.[160] Furthermore, it states that the Tribe's Gaming Disputes Court has jurisdiction over tort claims related to injuries that were sustained at the Tribe's gaming enterprise.[161] As based on this jurisdiction, the Tribe has waived its sovereign immunity for these claims in the Mohegan Tribal Court, but not in state or federal court. In addition to not having a right to a jury trial, the Mohegan Tribe has put some limitations on the type of awards that are allowed under the ordinance.[162] There are to be no punitive damages or damages for loss of consortium.[163] In addition, there is a limit on non-economic damages and total damages awards cannot exceed the Tribe's liability insurance.[164]

Similar to those in California, Indian casinos in Connecticut are patronized by an overwhelming number of people. Forty thousand people a day visit the Mashantucket's Foxwoods Casino alone.[165] Despite this huge number of patrons, there have been very few challenges to the Tribes' tort ordinances. When there has been a challenge asserting that one of

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[159] *See id.*

[160] The Mohegan Tribe, Mohegan Torts Code, 2 MOHEGAN TRIBE OF INDIANS CODE § 3 (2009), *available at* http://www.municode.com/library/CT/Mohegan_Tribe.

[161] *Id.* at § 3-250.

[162] *Id.* at § 3-248.

[163] *Id.* at § 3-251.

[164] *Id.*

[165] Press Release, Mashantucket Pequot Tribal Nation, Foxwoods Development Company to Renovate and Reopen the Former Oasis Resort in Grand Bahama Island, *available at* http://www.foxwoods.com/fdcpressreleases.aspx.

the tribes waived its sovereign immunity in its tort ordinance into state court, the court has disagreed.[166]

3. ARIZONA

As in California and Connecticut, Arizona gaming compacts require tribes to adopt a tort liability ordinance for the disposition of tort claims. In Arizona, there are twenty-one tribal-state gaming compacts.[167] These compacts were signed in 2003 and amended in 2009.[168] The model gaming compact for the State, which was signed by these tribes, provides that the tribes must create written procedures for dealing with tort claims.[169] In addition, tribes have not waived their sovereign immunity from suit by complying with the compact and creating an ordinance.[170]

Similar to the Mashantucket Pequot and Mohegan Tribe in Connecticut, some tribes in Arizona have used their tort ordinances to execute a limited waiver of sovereign immunity into tribal court. While these ordinances comply with the requirements of the compacts, some casino patrons are dissatisfied with the use of tribal courts because of potential and/or perceived limitations placed on available representation in tribal court. For example, the Fort McDowell Yavapai Community in Arizona adopted a tort ordinance in which it waives its sovereign

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[166] *See* Kizis v. Morse Diesel Int'l, Inc., 260 Conn. 46, 794 A.2d 498 (2002) (dismissing a patron's tort claim because Connecticut state court lacked subject matter jurisdiction to hear the matter because the Mohegan Tort Code deemed the Mohegan Gaming Disputes Court as the sole forum for the adjudication of the claim).

[167] *See* Arizona Department of Gaming, Tribal-State Compacts, http://www.gm.state.az.us/compacts.htm (last visited Mar. 6, 2012).

[168] *See id.*

[169] Arizona Model Tribal-State of Arizona Gaming Compact, 2003, § 13(c), *available at* http://www.gm.state.az.us/pdf_compacts/compact.final.pdf.

[170] *Id.*

immunity in tribal court for the resolution of tort claims.[171] Sharyn Nesbitt filed a tort claim in Fort McDowell Tribal Court but was unhappy with the representation she received from two attorneys listed on a referral sheet she had obtained from the Tribe.[172] While any attorney in good standing with their state bar can appear in Fort McDowell Tribal Court, Nesbitt relied on the referral list provided by the Tribe and both of her representatives missed a crucial filing deadline.[173] Similarly, at least one patron has complained about the limitations on representation in the Salt River Pima Maricopa Indian Community Tribal Court. When it comes to tort claims, the Tribal Court limits representation to court-approved lay advocates.[174] In at least one situation where an injured patron was seeking representation, the approved advocates were difficult to reach or were unwilling to take on the patron's claim.[175] Thus, even with a waiver of tribal sovereign immunity in tribal court, some patrons may be dissatisfied.

4. NEW YORK

New York has entered into gaming compacts with three tribes within the state: Oneida Indian Nation of New York, St. Regis Mohawk Tribe, and Seneca Nation of Indians.[176] Similar

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[171] *See* Fort McDowell Yavapai Community, General Law of Torts and Tribal Tort Claims Act, Ordinance No. 98-28, § 22-401 (1998), *available at* http://www.narf.org/nill/Codes/ftmcode/ftmcodech22torts.htm.

[172] Joe Ducey, *What Happens When You File a Claim Against a Casino in Arizona?*, Nov. 21, 2011, http://www.abc15.com/dpp/news/local_news/investigations/What-happens-if-you-file-a-claim-against-a-casino-in-Arizona.

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] *See* New York State Racing & Wagering Board, Indian Gaming, http://www.racing.state.ny.us/indian_digl.php#compacts (last visited Mar. 6, 2012). The State has also entered into a compact with a tribe from Wisconsin, the Stockbridge-Munsee Community Band of Mohican Indians. *See* Tribal-State Gaming Compact Between the Stockbridge-Munsee Community Band of Mohican Indians and the State of New York, Nov. 22, 2010, *available at* http://www.scribd.com/doc/46046842/Stock-Bridge-Munsee-Compact.

to other states in this category, the New York compacts require each tribe to establish internal procedures for the proper resolution of patron tort claims.[177] These compacts clearly state that the tribes have not waived their sovereign immunity for tort suits within the compacts.[178]

Similar to tribes in Connecticut and Arizona, the St. Regis Mohawk Tribe has used their tort ordinance to waive into tribal court.[179] In contrast, the Oneida Indian Nation of New York's tort ordinance demonstrates that tribal court is not the only option. The Oneida's ordinance established a "Claims Commissioner" office to process the resolution of tort claims.[180] An injured patron may submit a claim to the Claims Commissioner, who is appointed by the Tribe.[181] The Claims Commissioner then investigates the claim and issues a written decision with respect to each claim, evaluating it and recommending an amount of compensation.[182] A member, or members, of the Tribal Government then review the Commissioner's recommendation and may approve, amend, or remand the claim with instructions of further fact finding.[183] The ordinance clearly states that the Tribe does not waive its sovereign immunity

[177] *See e.g.*, Nation-State Gaming Compact Between the Seneca Nation of Indians and the State of New York, Apr. 12, 2002, § 9, *available at* http://www.ncai.org/ncai/resource/agreements/ny_gaming-seneca_nation-4-12-2002.pdf.

[178] *See e.g., id.* Additionally, the Oneida Nation's compact states that the compact does not constitute a waiver of the Tribe's sovereign immunity for a failure to pay a tort claim. Nation-State Compact Between the Oneida Indian Nation of New York and the State of New York, June 4, 1993, § 13, *available at* http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/compacts/Oneida%20Indian%20Nation%20of%20New%20York/oneidaindiancomp060493.pdf.

[179] *See* Saint Regis Mohawk Tribe, Tribal Council Resolution No. 2008-19, § 2 (2008), *available at* http://srmt-nsn.gov/_uploads/site_files/SRMT_Civil%20Code_2008.pdf.

[180] *See* Oneida Indian Nation, Amended Tort Claims Resolution Ordinance, Ordinance No. 0-94-02A, § 3 (1995), *available at* http://www.oincommunications.net/codesandordinances/ordinances/TortRes.pdf.

[181] *Id.* at § 4.

[182] *Id.*

[183] *Id.*

within the ordinance for any reason.[184] This ordinance teaches that tribes can be creative with the procedures they choose to resolve tort claims in required ordinances.

As seen in California, Connecticut, Arizona, and New York compacts, Category 1 compacts require tribes to adopt ordinances delineating procedures to resolve patron tort claims. These compact provisions range from very hands-off, like those in New York (simply requiring each tribe to establish internal procedures for the resolution of tort claims), to very controlling, like the Amended/Newer compacts in California. Category 1 compacts strike a balance between state and tribal concerns such that patrons are ensured a process to pursue their tort claims, while tribes generally determine what that process will be. The processes range from claim determination by insurance carriers, tribal governments, claims commissioners, and arbitrators, to waivers of sovereign immunity into tribal courts, some of which were created expressly for the purpose of adjudicating gaming issues.

A tribe's choice of what procedure to adopt is likely influenced by the costs associated with the procedures and resources available to the particular tribe. Most California tribes lack tribal courts and the costs and resources necessary to establish a tribal court are sizeable. Thus, California tribes' ordinances generally rely on alternative forums for the resolution of tort claims, like insurance, tribal governments, and arbitration. The opposite is true of the Mashantucket Pequot and Mohegan of Connecticut. No matter what process a tribe chooses to adopt, *Sycuan* teaches that enforcement mechanisms may be as important as the process itself. Additionally, while tribes may be happy with tribal court as the forum for resolution, patrons may not be. Regardless of the procedure/forum chosen by a tribe, Category 1 compacts teach that tort liability ordinances can effectively lead to the proper adjudication of patron claims.

[184] *Id.* at § 5.

B. CATEGORY 2: CONSENTING TO SUIT IN A "COURT OF COMPETENT JURISDICTION"

In the second category of tribal-state gaming compacts, negotiations between tribes and states have resulted in tribes consenting to suit in a "court of competent jurisdiction" for the resolution of patron tort claims. Both Oklahoma and New Mexico fall into this category; however, each state defines "court of competent jurisdiction" differently. This definition has had severe ramifications for tribal sovereign immunity in Oklahoma.

1. OKLAHOMA

In May 2004, Oklahoma Governor Brad Henry signed Senate Bill 1252 into law.[185] The bill was agreed upon by state and tribal negotiators and became the basis for Oklahoma's statutory model Class III gaming compact.[186] Oklahoma offers this gaming compact to tribes within the state as a pre-approved gaming compact.[187] Since the adoption of the model gaming compact, Oklahoma has entered into thirty-three gaming compacts with tribes.[188]

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[185] *See* In the Matter of the Joint Referral to Binding Arbitration by the Choctaw Nation of Oklahoma, the Chickasaw Nation and the State of Oklahoma of Disputes Under and/or Arising from the Choctaw Nation of Oklahoma and State of Oklahoma Gaming Compact and the Chickasaw Nation and the State of Oklahoma Gaming Compact, 3 (2009) (Phillips, Arb.), *available at* http://turtletalk.files.wordpress.com/2010/01/choctaw-chickasaw-oklahoma-arbitration-decision.pdf [hereinafter, Joint Referral to Binding Arbitration].

[186] Model Tribal Gaming Compact, OKL. ST. ANN. tit. 3A, § 281 (2004).

[187] *Id.* at § 280 (2004).

[188] *See* Oklahoma Office of State Finance Gaming Compliance Unit, Compacted Tribes (2010), http://www.ok.gov/OGC/Compacted_Tribes/index.html. These tribes are: Absentee Shawnee Tribe, Apache Tribe, Caddi Nation of Oklahoma, Citizen Potawatomi Nation, Cherokee Nation of Oklahoma, Cheyenne-Arapaho Tribes, Chickasaw Nation, Comanche Nation, Delaware Nation, Eastern Shawnee Tribe, Fort Sill Apache Tribe, Iowa Tribe of Oklahoma, Kaw Nation of Oklahoma, Kickapoo Tribe of Oklahoma, Kiowa Tribe of Oklahoma, Miami Nation, Modoc Tribe of Oklahoma, Muscogee (Creek) Nation, Osage Nation, Otoe-Missouria Tribe, Ottowa Tribe, Pawnee Nation of Oklahoma, Peoria Tribe of Oklahoma, Ponca Tribe of Oklahoma, Quapaw Tribe of Oklahoma, Sac & Fox Nation, Seminole Nation, Seneca-Cayuga Tribes of Oklahoma, Thlopthlocco Tribal Town, Tonkawa Tribe, Wichita and Affiliated Tribes, and Wyandotte Nation. *See id.*

The model gaming compact makes it clear that patrons are to be afforded due process in seeking and receiving reasonable compensation for their tort claims.[189] In addition to maintaining public liability insurance and posting the procedure by which patrons can pursue their claims, Oklahoma gaming compacts require tribes to engage in a limited waiver of sovereign immunity in a "court of competent jurisdiction" for the resolution of tort claims.[190] Thus, if a patron correctly follows the procedure delineated in the compact, and a tribe denies their claims, they are entitled to file suit within one hundred and eighty days of the denial in a "court of competent jurisdiction."[191] In addition, while the compact does not define which courts are courts of competent jurisdiction under the compact, the compact states that "[t]he Compact shall not alter, tribal, federal or state civil adjudicatory or criminal jurisdiction."[192]

While both Oklahoma tribes and Governor Henry were under the impression that tribal court is the only "court of competent jurisdiction" under the gaming compact, the Oklahoma Supreme Court interpreted the tort liability provision to be a waiver of tribal sovereign immunity in state court.[193] This interpretation temporarily subjected Oklahoma tribes to state court jurisdiction even though they did not intentionally waive their tribal sovereign immunity in state court.

On January 10, 2009, in Oklahoma Supreme Court, with no majority opinion and four justices dissenting, the opinions of five justices asserted that Oklahoma state court is a "court of

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[189] Model Tribal Gaming Compact, *supra* note 186, at § 281(6)(A)(1).

[190] *Id*. at § 281(6)(C). The compacts state: "The tribe consents to suit against the enterprise in a court of competent jurisdiction with respect to a tort claim . . ." *Id*.

[191] *Id.* at § 281(6)(A)(9)(c).

[192] *Id.* at § 281(9).

[193] *See* Cossey v. Cherokee Nation Enterprises, LLC., 212 P.3d 447 (Okla. 2009); Griffith v. Choctaw Casino of Pocola, 2009 WL 1877899 (Okla).

competent jurisdiction" under the Cherokee Nation-Oklahoma Gaming Compact.[194] The decision concluded that there is state court jurisdiction over compact-based tort lawsuits against the Cherokee Nation.[195] Loyman Cossey, a non-Indian and patron of the Cherokee Casino in Roland, Oklahoma sued Cherokee Nation Enterprises in state court for personal injuries he sustained while at the Cherokee Casino.[196] The Tribe argued that the only "court of competent jurisdiction" under the compact is the Cherokee Nation Tribal Court.[197] However, Cossey argued that Oklahoma state court is a "court of competent jurisdiction" because the compact is derived from an Oklahoma statute.[198]

The plurality opinion states, "[a] 'court of competent jurisdiction' is one having jurisdiction of a person and the subject matter and the power and authority at the time to render the particular judgment."[199] The Court reasoned that because the compact is derived from an Oklahoma statute and incorporated Oklahoma's Governmental Tort Claims Act into its provisions, the district courts of Oklahoma have subject matter jurisdiction.[200] In addition, the plurality stated that state court was the only place the suit could be heard because the Cherokee Nation Tribal Court lacked jurisdiction, reasoning that Cossey is a non-Indian, there was no consensual relationship, no direct impact on the Tribe's political integrity, and the compact did

[194] Cossey *supra* note 193, at 460.

[195] *Id.*

[196] *Id.* at 450.

[197] *Id.* at 451.

[198] *Id.* at 452.

[199] *Id.* at 454.

[200] *Id.* at 455.

not expressly grant jurisdiction to the Tribal Court.[201] In finding that state court was a court of competent jurisdiction, the plurality disregarded an affidavit filed by Governor Henry and Oklahoma Treasurer Meacham, who negotiated the compact with the Tribe, stating that the waiver within the compact was into tribal court and not state courts.[202]

The dissent questioned the reasoning of the plurality and emphasized the importance of a different provision in the compact. The dissent states, "The Compact represents the *mutually agreed* conditions under which the Cherokee Nation may conduct Class III gaming."[203] The compact does not expressly extend Oklahoma tort law to the Cherokee Nation, nor does it "expressly allocate civil jurisdiction to the State of Oklahoma for tort *claims against the Cherokee Nation* that arise from the Cherokee Nation's gaming activity on Cherokee lands."[204] Rather, Part 9 of the compact clearly states that tribal, federal, and state civil adjudicatory or criminal jurisdiction is not to be altered. Thus, the only "court of competent jurisdiction" is the court that "could adjudicate the liability of the Cherokee Nation for tribal activity on tribal land in absence of the compact."[205] Tribal court is the only court that can adjudicate tribal activity on tribal land.[206] Thus, "[w]hile the Compact secures a tort remedy against the Cherokee Nation for

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[201] *Id.* at 460. *See* Nelson Rose, *Indian Gaming Law Update 2009*, 13 GAMING L REV. AND ECON. 4 (2009), *available at* http://www.gamblingandthelaw.com/articles/258-indian-gaming-law-update-2009.html. The plurality stated that Cossey did not enter a "consensual relationship with the Tribe 'through commercial dealing, contracts, leases, or other arrangements' by entering the casino as a customer." Cossey *supra* note 193, at 460. "The Compact represents a consensual relationship between the Tribe and the State, but Cossey was not a party to it." *Id*.

[202] Brief of Brad Henry, Governor of Oklahoma, and Scott Meacham, Treasurer of Oklahoma, as Amici Curiae Supporting Defendants'/Petitioners' Petition for Rehearing, Cossey v. Cherokee Nation Enterprises, LLC., 212 P.3d 447 (Okla. 2009). *See* Rose, *supra* note 201; Joint Referral to Binding Arbitration, *supra* note 185.

[203] Cossey *supra* note 193, at 482.

[204] *Id.* at 483.

[205] *Id.*

[206] *Id.*

Indians and non-Indians alike, it does not secure the enforcement of that remedy in the courts of the State of Oklahoma, or by the federal courts in absence of an independent federal question, such as denial of due process."[207] On June 11, 2009, the Oklahoma Supreme Court denied the Tribe's Petition for Rehearing.[208]

Two subsequent cases agreed that Oklahoma state court is a "court of competent jurisdiction" under the gaming compacts in Oklahoma. In *Griffith v. Choctaw Casino of Pocola*, 2009 WL 1877899 and companion case *Dye v. Choctaw Casino of Pocola Oklahoma*, 2009 WL 1877902, with four justices dissenting, the Oklahoma Supreme Court again held Oklahoma state courts have civil-adjudicatory jurisdiction over compact based tort claims against the Tribes.[209] The Choctaw Nation of Oklahoma entered into the model gaming compact on February 9, 2005.[210] Pursuant to the compact, the Tribe operated the Choctaw Casino of Pocola, Oklahoma.[211] While patronizing the casino, Griffith "stepped into a flowerbed and fell on her face and head."[212] After submitting notice of her tort claim to the Tribe, it was denied.[213] Griffith then filed a tort claim in Oklahoma state court against the casino and the Tribe. Relying on *Cossey*, the Court held that "Oklahoma district courts are courts of competent jurisdiction […] and therefore […] may exercise jurisdiction over the tort claims against the Choctaw

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[207] *Id.*

[208] *See* Complaint at 7, Choctaw Nation of Oklahoma v. Oklahoma, 5:10-cv-00050-W (2009), *available at* http://turtletalk.files.wordpress.com/2010/01/choctaw-nation-chicasaw-nation-v-oklahoma-complaint.pdf.

[209] Griffith v. Choctaw Casino of Pocola, 2009 WL 1877899 (Okla.); Choctaw Casino of Pocola, Oklahoma, 2009 WL 1877902 (Okla.).

[210] *See* Griffith *supra* note 209, at 490.

[211] *Id.* at 489-90.

[212] *Id.* at 490.

[213] *Id.*

Nation."[214] To reach this holding, the Court pointed out that the gaming compact does not restrict tort recovery to tribal law nor does that compact clearly limit the suits to tribal court.[215] Had it been the intent that tribal court be the only court of competent jurisdiction, "the simple words 'in tribal court only' could have been included in the compact."[216] If this were the true intention, "'[i]n tribal court only' could have been typed on the keyboard by whoever typed the proposed compact. It is that simple."[217] The Court does seem to suggest that state, federal, and tribal courts are all courts of competent jurisdiction and a patron can choose to file their tort claim in any of them.[218] The Choctaw Nation filed Petitions for Rehearing in both *Griffith* and *Dye*.[219]

The story of Oklahoma's tort provision does not end here. Part 12 of the model gaming compact includes a provision for dispute resolution procedures.[220] Any party to the compact can unilaterally invoke the dispute resolution procedures if they in good faith believe there is "a dispute over the proper interpretation of the terms and conditions of [the] Compact.[221] In accordance with the compact, the Choctaw Nation provided notice of dispute to Oklahoma over

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[214] *Id.* at 491.

[215] *Id.* at 496.

[216] *Id.*

[217] *Id.* at 498.

[218] *Id.*

[219] *See* Complaint, *supra* note 208, at 8.

[220] Model Tribal Gaming Compact between the Choctaw Nation of Oklahoma and the State of Oklahoma, Mar. 8, 2005, § 12, *available at* http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/compacts/Choctaw%20Nation%20of%20Oklahoma/choctawcomp3.8.05.pdf.

[221] *Id.*

the proper interpretation of the terms and conditions of the compact.[222] This notice triggered the dispute resolution procedures.[223] The Chickasaw Nation too independently invoked its compact's dispute resolution procedures by providing a notice of dispute to Oklahoma.[224]

On July 20, 2009, the Choctaw Nation, Chickasaw Nation, and Oklahoma agreed to joint referral to binding arbitration to resolve the interpretation of the jurisdictional allocation within the compacts.[225] The parties also agreed to review of the resulting arbitration award in the United States District Court for the Western District of Oklahoma.[226] The arbitrator, former Oklahoma federal judge Layn R. Phillips, found that Oklahoma state courts are *not* a "court of competent jurisdiction" under the compacts, and that the Tribes' tribal courts are.[227] In reaching this conclusion, the arbitrator reasoned that before the compacts were created, tort claims arising on tribal land could not have been brought in state courts, though they could have been brought in tribal courts.[228] Thus, in order for these tort claims to have been properly brought in state

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[222] *See* Complaint, *supra* note 208, at 6. The compact's dispute resolution provision states, "The goal of the parties shall be to resolve all disputes amicably and voluntarily whenever possible. A party asserting noncompliance or seeking an interpretation of this Compact first shall serve written notice on the other party. The notice shall identify the specific Compact provision alleged to have been violated or in dispute and shall specify in detail the asserting party's contention and any factual basis for the claim." Model Tribal Gaming Compact between the Choctaw Nation of Oklahoma and the State of Oklahoma, *supra* note 220, at § 12(1).

[223] Despite the triggering of the dispute resolution procedures regarding the interpretation of the compact, the Oklahoma Supreme Court refused to stay the proceedings of *Dye* and *Griffith* pending the completion of the dispute resolution. *See* Complaint, *supra* note 208, at 6.

[224] *Id.* at 7.

[225] *See* Joint Referral to Binding Arbitration, *supra* note 185. The joint referral states, "The Arbitrating Compacting Parties submit to binding arbitral interpretation in light of controlling extrinsic law the issue of whether, under the Choctaw Nation of Oklahoma and State of Oklahoma Gaming Compact and the Chickasaw Nation and State of Oklahoma Gaming Compact, jurisdiction over all Compact-based tort claim and/or prize claim lawsuits lies exclusively in Choctaw Nation or Chickasaw Nation forums." *Id.*

[226] *Id.*

[227] *Id.* at 12.

[228] *Id.*

court, the Tribes must have consented to suit in state court within the compacts.[229] The Tribes' consent to suit in "a court of competent jurisdiction" is textually ambiguous because it does not specify whether Oklahoma state courts are "a court of competent jurisdiction."[230] Furthermore, Part 9 of the compacts states, "[the] Compact[s] shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction."[231] It thus reserves the status quo ante. Because the state did not have jurisdiction over these claims before the compacts, there is no new or altered state jurisdiction after the compact.[232] Thus, "there is no express waiver anywhere in the compacts of either the Choctaw Nation's or the Chickasaw Nation's sovereign immunity from any relevant Indian country-arising Class III casino-related lawsuit in any Oklahoma state court."[233]

On January 19, 2010, the Choctaw and the Chickasaw Nations filed a complaint against Oklahoma in the United States District Court for the Western District of Oklahoma seeking certification and enforcement of the arbitration award.[234] In their complaint, the Choctaw and Chickasaw Nations sought a permanent injunction against Oklahoma from exercising jurisdiction over compact-based tort lawsuits against the Nations.[235] Relying on the arbitration award, the District Court held that tribal courts are the only courts of competent jurisdiction under the Oklahoma compacts.[236] State courts are not courts of competent jurisdiction because "there was

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[229] *Id.*

[230] *Id.*

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] *See* Complaint, *supra* note 208.

[235] *Id.*

[236] Choctaw Nation of Oklahoma and Chickasaw Nation, v. Oklahoma, No. CIV-10-50-W, 7-8 (W.D. Okla. 2010) *available at* http://turtletalk.files.wordpress.com/2010/07/2010-06-29-38-judgment.pdf.

no relevant pre-existing state court jurisdiction before the Compacts, and the Compacts did nothing to alter state court jurisdiction."[237] The Court permanently enjoined Oklahoma state courts from asserting jurisdiction over compact-based tort claims against the Tribes.[238]

Luckily for the Tribes, the Court found in their favor and the threat to their sovereign immunity was only temporary. However, this problem would have never arisen had the intentions of the parties been stated explicitly in the compact (i.e., "the only courts of competent jurisdiction are tribal courts. Oklahoma state courts are not courts of competent jurisdiction for the purposes of resolving compact-based tort claims."). Oklahoma compacts teach that the intentions of the negotiating parties should be clearly stated within the compact to avoid unfavorable judicial interpretation of tribal sovereign immunity waivers.

2. NEW MEXICO

Similar to Oklahoma tribes, New Mexico tribes waive their sovereign immunity into a "court of competent jurisdiction" for the purposes of tort claims.[239] However, unlike Oklahoma compacts, New Mexico compacts explicitly define "court of competent jurisdiction" to include state courts.[240] The history of how this provision came to be is rich with contention. After appointing a task force to negotiate gaming compacts, in 1991 New Mexico Governor Bruce King refused to sign them.[241] In 1994, Gary Johnson who campaigned on the fact that he would

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[237] *Id.* at 8.

[238] *Id.* at 9.

[239] *See* 2007 Amended Tribal-State Class III Gaming Compact, 2007, § 8, *available at* http://www.nmgcb.org/tribal/2007%20compact.pdf.

[240] *Id.*

[241] *See* State of New Mexico Gaming Control Board, New Mexico Indian Gaming Historical Perspective (2012), http://www.nmgcb.org/tribal/history.htm. Despite the lack of a valid gaming compact, numerous tribes in New

sign tribal-state compacts if elected, defeated Governor King.[242] Keeping his campaign promise, in 1995, Governor Johnson negotiated and signed thirteen compacts.[243] However, the New Mexico Supreme Court invalidated these compacts on the grounds that Governor Johnson lacked the authority to bind the state to the compacts.[244] Per the New Mexico Constitution, the compacts needed to be adopted legislatively in order to be valid.[245] The Governor's office introduced a bill into the 1997 New Mexico Legislative Session to enact the compacts in the New Mexico legislature.[246] After heated and contentious committee hearings, some lasting days, and numerous legislative amendments to the compacts, they were ratified and signed by tribes in 1997.[247] New compacts were later negotiated and legislatively approved in 2001, with amendments arriving in 2007.[248]

One topic of particular contention during the legislative ratification of the compacts was the issue of tort liability. While tribes offered to waive their sovereign immunity into both tribal court and arbitration, the New Mexico legislature insisted that tribes also waive into state

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Mexico began operating casino's offering slot machines and table games. *See* Pueblo of Santa Ana v. Kelly, 932 F.Supp. 1284, 1290-91 (10th Cir. 1996).

[242] *See* State of New Mexico Gaming Control Board, New Mexico Indian Gaming Historical Perspective (2012), http://www.nmgcb.org/tribal/history.htm.

[243] *Id.* The signing tribes included the Pueblos of Acoma, Isleta, Laguna, Pojoaque, Sandia, San Felipe, San Juan, Santa Ana, Santa Clara, Taos and Tesuque, and the Jicarilla and Mescalero Apache Tribes. *Id*.

[244] State of New Mexico ex rel. Clark v. Johnson, 904 P.2d 11, 26-27 (N.M. 1995) (holding based on state constitutional law). Moreover, secretarial approval did not overcome the deficiencies of the compacts because IGRA contains two distinct compact-related requirements. First, the compact has to have been "entered into" by the tribe and the state. 25 U.S.C. § 2710(d)(1)(C). Second, the compact must be "in effect" pursuant to secretarial approval and notice. *Id.* at § 2710(d)(3)(B). *See* Pueblo of Santa Ana v. Kelly, 104 F.3d 1546 (10th Cir. 1997).

[245] *See* State of New Mexico ex rel. Clark, *supra* note 244, at 26-27 (holding based on state constitutional law).

[246] *See* State of New Mexico Gaming Control Board, *supra* note 241.

[247] *Id.*

[248] *Id.*

court.[249] Tribes believed this was unlawful because under their reading of IGRA, the statute did not authorize the shifting of jurisdiction for the purposes of tort claims.[250] However, many New Mexico tribes were already operating Class III gaming and needed a valid gaming compact to prevent being shut down by the federal government.[251] Thus, the tribes accepted the legislatively mandated waiver into state court as more favorable than the alternative—closing their casino doors.[252]

New Mexico tribes waive their sovereign immunity into binding arbitration or a "court of competent jurisdiction." Unlike Oklahoma compacts which do not define "court of competent jurisdiction," the New Mexico compacts state that in addition to tribal court, tort claims "may be brought in state district court, including claims arising on tribal land, *unless it is finally determined by a state or federal court that IGRA does not permit the shifting of jurisdiction over visitors' personal injury suits to state court*."[253] The italicized language was a compromise between the state, which wanted tort claims heard in state court, and tribes, which believed state court jurisdiction was unlawful.

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[249] Interview with Richard Hughes, Partner, The Rothstein Law Firm (Feb. 10, 2012).

[250] *Id.* *See* Brief of Petitioner, Doe v. Santa Clara Pueblo, 154 P.3d 644 (N.M. 2007). Remember, states and tribes may not enter into any agreements extending state jurisdiction to Indian Country unless authorized by Congress. *See supra* notes 53-57 and accompanying text.

[251] Interview with Richard Hughes, *supra* note 249.

[252] An interesting facet of the New Mexico story is how IGRA's requirement of good faith negotiations comes into play. IGRA requires states to negotiate compacts in good faith, though this duty cannot be enforced judicially. *See infra* Part IV(E). If the New Mexico legislature rewrote the gaming compact with amendments, without tribes at the table, did New Mexico negotiate in good faith? In 1999, a bill was enacted in New Mexico, which created a process whereby the Governor and tribes could negotiate a compact, submit it to the legislature who then would have to approve or deny the compact with no amendments. *See* N.M. STAT. ANN § 11-13A-4 (2012). This process was used for the 2001 compacts. Despite this process, the legislature is not without its influence over compact provisions. For example, when the Governor and tribes were negotiating the 2001 compacts, the legislature made it clear that it would only approve compacts in which tribes waive sovereign immunity in state court for the purposes of tort claims. Interview with Richard Hughes, *supra* note 249.

[253] *See* 2007 Amended Tribal-State Class III Gaming Compact, *supra* note 239, at § 8.

After the compacts were approved, New Mexico tribes immediately began challenging the jurisdiction of cases brought in state court. Unfortunately, tribes did not get the judicial determination they were hoping for. Rather, the New Mexico Supreme Court held that the jurisdiction shifting language relating to tort claims in the 2001 compacts was lawful as authorized by IGRA.[254] Thus, tort claims may continue to be resolved in New Mexico state court at patrons' election.[255] Moreover, despite the two other viable options, arbitration and tribal court, most tort claims that are unresolved by a Tribe's insurance carrier are brought by patrons in state court.[256]

C. CATEGORY 3: EXPLICIT STATEMENT OF NO WAIVER OF SOVEREIGN IMMUNITY

The third category of tort liability provisions does not to rely on a judicial interpretation of the compact to determine the extent of the tribes' waiver of sovereign immunity. Rather, instead of remaining silent and risking a judicial decision finding a waiver, these compacts clearly state that a tribe does not waive its sovereign immunity at all in the compact. Washington State compacts fall into this category.

In Washington, there are twenty-nine tribal-state gaming compacts.[257] These compacts make it clear that there is no waiver of tribal sovereign immunity for tort liability suits. Rather

[254] Doe v. Santa Clara Pueblo, 154 P.3d 644 (N.M. 2007).

[255] Some New Mexico tribes continue to challenge state jurisdiction over tort claims. *See e.g.,* Mendoza v. Santa Clara Pueblo, 148 N.M. 534 (N.M. Ct. App. 2010); Pueblo of Santa Ana v. Nash, Civ. No 11-0957 BB-LFG (2012) *available at* . http://turtletalk.files.wordpress.com/2012/04/memo-opinion.pdf.

[256] Interview with Richard Hughes, *supra* note 249.

[257] *See* Washington State Gambling Commission, Compact Negotiations (2011), *available at* http://www.wsgc.wa.gov/docs/tribal/tribe_update.pdf.

than simply not saying anything, the compacts have a "Limitation of Liability" provision that clearly states that tribes are not waiving their sovereign immunity.[258] The provision states,

> Neither the Tribe nor the State are creating, or intend to create, any rights in third parties which would result in any claims for any nature whatsoever against the Tribe or the State as a result of this Compact. Neither the Tribe nor the State has waived immunity from third party suits or claims of any kind or nature whatsoever against them, and nothing contained in this compact shall be construed to effect a waiver, in whole or in part, of said immunity.[259]

This language ensures that there is no way a court can interpret the compact as constituting a waiver of the tribes' sovereign immunity. While the gaming compacts state that the tribes have not waived their sovereign immunity, tribes are free to waive immunity in tribal ordinances or in other places.

In places like Washington, if patrons are injured at a tribe's casino, they can try to file a claim with the tribe's insurance carrier, if the tribe maintains insurance. However, there is no guarantee that the tribe will not allow the insurance carrier to assert the tribe's sovereign immunity. Maintaining an insurance policy, by itself, does not waive a tribe's sovereign immunity, and absent an agreement otherwise, an insurer may not waive or limit a tribe's sovereign immunity.[260] Moreover, an insurer may not invoke a tribe's sovereign immunity as a

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[258] *See e.g.*, Confederated Tribes of the Colville Reservation and the State of Washington Class III Gaming Compact, Dec. 18, 2002, § 17, *available at* http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/compacts/Colville,%20Confederated%20Tribe%20of/colvillecomp12.18.02.pdf; Tribal-State Gaming Compact for Class III Gaming Between the Quinault Indian Nation and the State of Washington, Oct. 1, 1996, § 16, *available at* http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/compacts/Quinault%20Indian%20Tribe/quinaultcomp100196.pdf; Tribal-State Compact for Class III Gaming Between the Confederated Tribes and Bands of the Yakama Indian Nation and the State of Washington, July 28, 1996, § 16, *available at* http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/compacts/Yakama%20Indian%20Nation,%20Confederated%20Tribes%20and%20Bands%20of/yakamacomp072696.pdf.

[259] *Id.*

[260] *See* Gabriel S. Galanda, *Insuring Indian Country: The Intersection of Tort, Insurance, and Federal Indian Law*, 35 A.B.A. BRIEF 32 (Fall 2005).

defense to a claim, unless authorized by the tribe.[261] Thus, since not required by a compact, it is possible that a Washington tribe may allow its insurance company to assert the tribe's sovereign immunity as a defense to a patron claim, leaving the patron without a remedy.

In addition, in Washington a patron would not be able to go to state or federal court to sue a tribe for tort liability because the court will likely be forced to dismiss the claim on the basis of tribal sovereign immunity. Thus, injured patrons in this situation are left with essentially no recovery, unless a tribe allows recovery independent of the compact. Luckily, while not required to do so by the gaming compact, some tribes such as the Tulalip Tribes have adopted a tort liability ordinance in which they effectuate a limited waiver of sovereign immunity in tribal court.[262] However, patrons cannot rely on all tribes in Washington to have a tort liability ordinance when the compact does not require one. Thus, provisions such as these carry the danger that legitimate patron claims will be completely ignored which is unfavorable both for the patron and for tribal business.

D. CATEGORY 4: NO EXPLICIT TORT PROVISION IN THE COMPACT

The fourth category of compacts does not contain an explicit tort provision. In these types of compacts, there is no specific provision addressing tort liability or sovereign immunity.

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[261] *See id*. *See generally* McConnell v. Adams, 829 F.2d 1319, 1330 (4th Cir. 1987) (holding insurance policy does not provide coverage where the insured sovereign is not obligated to pay damages because the insured has not waived its sovereign immunity).

[262] Tulalip Tribes of Washington, Tort Claims, Ordinance No. 122, § 3 (2004), *available at* http://www.narf.org/nill/Codes/tulalipcode/tulalip122torts.htm. The ordinance states that one of its purposes is "to provide a remedy to private persons who are injured by negligent or wrongful acts or omissions of the Tribes or its agents, employees, or officers." *Id.* at § 1. The ordinance limits awards to the amount of insurance maintained by the Tribes and prohibits awards based on strict/absolute liability, punitive damages, prejudgment interest, and attorneys' fees. *Id.* at § 7. The ordinance also limits the Tribes' waiver of sovereign immunity to specific claims. *Id.* at § 5. Excluded from the waiver are, among other things, claims of intentional torts such as malicious prosecution, abuse of process, and defamation. *Id.* The Tulalip Tribal Court recently dismissed a claim alleging damages for abuse of process and wrongful prosecution because "these causes of action are specifically excluded from the Tribe's limited waiver of sovereign immunity" under the ordinance. Bradley v. Tulalip Tribes, No. TUL-CV-GC-2001-0118 (2011), *available at* http://turtletalk.files.wordpress.com/2011/06/order-of-dismissal.pdf.

This category leaves the decision about how to handle tort liability and whether to waive sovereign immunity up to the tribes. Michigan and Minnesota fall into this category.

1. MICHIGAN

In Michigan there are twelve tribal-state gaming compacts.[263] Seven tribes signed gaming compacts in 1993, four more signed in 1998, and the remaining signed compacts in 2007.[264] Within these twelve compacts there is no explicit discussion of tort liability or liability insurance, nor is there a clear waiver of tribal sovereign immunity for tort claims.[265] At first glance, the absence of such provisions may lead one to believe that the parties neglected to think about tort liability when negotiating. Or perhaps, the parties did not believe such a provision merited inclusion in the compacts. However, to think that would be incorrect. Rather, one section in the compacts indicates that Michigan made a policy decision to stay out of the tribal regulatory business, and the regulation of tribal tort liability, altogether.

Section 8 (Notice to Patrons) of the Michigan gaming compacts is where this hands-off policy decision can be found. Section 8 requires gaming tribes to prominently post a two feet by three feet notice to patrons on the premises of their gaming operation.[266] The notice must read:

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[263] *See* Michigan Gaming Control Board, Tribal-State Compacts in Michigan (2011) http://www.michigan.gov/mgcb/0,1607,7-120-1380_1414_2182---,00.html.

[264] *Id.*

[265] *See e.g.*, A Compact Between the Sault Ste. Marie Tribe of Chippewa Indians and the State of Michigan Providing for the Conduct of Tribal Class III Gaming by the Sault Ste. Marie Tribe of Chippewa Indians, Dec. 6, 1993, *available at* http://www.michigan.gov/documents/SSM_Compact_70618_7.pdf; A Compact Between the Little Traverse Bay Bands of Odawa Indians and the State of Michigan Providing for the Conduct of Tribal Class III Gaming by the Little Traverse Bay Bands of Odawa Indians, Dec, 3, 1998, *available at* http://www.michigan.gov/documents/LTBB_Compact_70591_7.pdf; A Compact Between the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan and the State of Michigan Providing for the Conduct of Tribal Class III Gaming by the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan, May 9, 2007, *available at* http://www.michigan.gov/documents/mgcb/Gunlake_Compact_276443_7.pdf.

[266] *See id.* at § 8.

> THIS FACILITY IS REGULATED BY ONE OR MORE OF THE FOLLOWING: THE NATIONAL INDIAN GAMING COMMISSION, BUREAU OF INDIAN AFFAIRS OF THE U.S. DEPARTMENT OF THE INTERIOR AND THE GOVERNMENT OF THE [NAME OF TRIBE]. *THIS FACILITY IS NOT REGULATED BY THE STATE OF MICHIGAN*.[267]

This statement makes Michigan's regulatory stance clear. Furthermore, it implies the state will be hands-off when it comes to tort liability matters.

While one may expect this hands-off approach to negatively affect patrons' access to reasonable disposition of their tort claims against a tribe, the opposite has happened in practice. All of Michigan's gaming tribes have tribal courts that may be used to process patron claims.[268] Capitalizing on the Michigan's policy choice, many tribes have adopted tort liability ordinances in which they consent to a limited waiver of tribal sovereign immunity in tribal court. They do this even though the compact does not require them to.[269]

For example, the Grand Traverse Band of Ottawa and Chippewa Indians has adopted a tort liability ordinance that patrons may use to pursue claims against the Tribe.[270] This ordinance is very similar to the Connecticut ordinances discussed earlier.[271] Within the ordinance, the Tribe and its Gaming Commission waive its sovereign immunity for tort claims in tribal court.[272] A patron is given one hundred and eighty days to file a claim and can receive damages up to the

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[267] *Id.* (*emphasis added*).

[268] *See* Michigan Courts State Court Administrative Office, Indian Tribal Courts Located in Michigan (2011), http://courts.michigan.gov/scao/services/TribalCourts/tribal.htm.

[269] I have been unable to determine whether all Michigan gaming tribes have adopted tort ordinances waiving sovereign immunity into tribal court. If some tribes have not, there is value in conducting research comparing the consequences of not adopting an ordinance waiving into tribal court versus doing so.

[270] *See* Grand Traverse Band of Ottawa and Chippewa Indians, Sovereign Immunity Waiver Ordinance, 6 G.T.B.C. § 1 (1994), *available at* http://www.narf.org/nill/Codes/gtcode/6.pdf.

[271] *See supra* Part III(A)(2).

[272] *See* Grand Traverse Band of Ottawa and Chippewa Indians Sovereign Immunity Waiver Ordinance, *supra* note 270.

limits of the Tribe's liability insurance.[273] Furthermore, tort claims can only be brought if based on the negligent acts or omissions of the gaming commission and tribal police and if injury was caused by a dangerous condition on the property.[274] Moreover, the Tribe spells out limits on pain and suffering and that damage awards are to exclude strict liability, punitive damages, and loss of consortium.[275]

The Pokagon Band of Potawatomi Indians adopted a very similar ordinance. It waived its sovereign immunity for tort claims in Pokagon Tribal Court, put the same limitations on damage awards, and requires patrons to file their claims within one hundred days.[276] Other Michigan tribes' tort liability ordinances are slightly stricter in terms of the claims that may be pursued. For example, the Sault Ste. Marie Tribe of Chippewa Indians requires gross negligence rather than simple negligence.[277]

The Michigan gaming compacts have clearly left the regulation of tort liability up to tribes. Luckily for patrons, many of these tribes have stepped up to the plate by offering patrons a forum to pursue their claims within a tort liability ordinance. However, much like in Washington, the gaming compacts does not require these ordinances. Michigan tribes could simply decide to bar tort claims by refusing to waive their sovereign immunity in any forum.

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[273] *Id.* Michigan compacts do not require tribes to maintain any liability insurance. *See supra* note 265. Thus, the reference to insurance in the Grand Traverse Band of Ottawa and Chippewa Indians' ordinance is to insurance the Tribe has adopted independent of its compact.

[274] *See* Grand Traverse Band of Ottawa and Chippewa Indians Sovereign Immunity Waiver Ordinance, *supra* note 270. For an example of a case interpreting what is meant by a "dangerous condition" *see* Argyle v. Grand Traverse Band Gaming Com'n, 8 Am. Tribal Law 167 (2009).

[275] *See* Grand Traverse Band of Ottawa and Chippewa Indians Sovereign Immunity Waiver Ordinance, *supra* note 270.

[276] *See* Pokagon Band of Potawatomi Indians, Tort Claims Ordinance, Res. No. 01-01-30-01 (2001), *available at* http://www.pokagonband-nsn.gov/display.aspx?id=1007&terms=tort.

[277] *See* Sault Ste. Marie, Tribal Tort Claims Ordinance, Res. No. 97-29, § 85-107 (1997), *available at* http://www.saulttribe.com/images/stories/government/tribalcode/chaptr85.pdf.

While I have not found any cases such as this, the possibility that a patron will be left with no route to pursue their claim exists because of the language of the Michigan compacts.

2. MINNESOTA

In 1989, Minnesota entered into twenty-two gaming compacts with the tribes within the state.[278] Today, there is gaming on all of the eleven Minnesota reservations.[279] Similar to Michigan compacts, Minnesota gaming compacts do not contain an explicit provision addressing tort issues.[280] Additionally, the compacts do not contain any statement about tribal sovereign immunity or a waiver.[281] Thus, Minnesota tribes have not waived their sovereign immunity for tort claims within the gaming compacts. Unlike Michigan, Minnesota compacts do not contain a provision excluding state regulatory control.

By themselves, the gaming compacts do not provide any means by which patrons can pursue their tort claims against tribes; however, it appears that tribal liability insurance is being used to fill gap in the compacts. The Minnesota Indian Gaming Association ("MIGA") makes it clear to patrons that if they are injured at a tribal casino they can pursue their tort claims through a tribe's insurance carrier.[282] While the compacts do not require Minnesota tribes to carry liability insurance, MIGA's website explains that while tribes have sovereign immunity from

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[278] *See* Minnesota Indian Gaming Association, Overview-Our Compacts (2011), http://www.mnindiangamingassoc.com/our_compacts.html.

[279] *Id.*

[280] *See e.g.*, Tribal-State Compact or Control of Class III Video Gaming of Chance on The Fond Du Lac Band of Lake Superior Chippewa Reservation in Minnesota, Aug. 1, 2007, *available at* https://dps.mn.gov/divisions/age/gambling/Pages/indian-compacts.aspx.

[281] *See e.g., id.*

[282] *See* Minnesota Indian Gaming Association, Frequently Asked Questions-Tribal Governments, Sovereignty and Indian Gaming (2011), http://www.mnindiangamingassoc.com/faqs.html.

nonconsensual suits, Minnesota's tribes carry liability insurance to respond to legitimate claims of injury occurring on casino premises.[283]

Category 4 compacts do not contain tort provisions or statements regarding sovereign immunity. While the compacts do not require tribes to do anything with respect to tort claims, generally these compacts do not bar a patron from pursuing a tort claim against a tribe. Rather, many tribes take it upon themselves to waive their sovereign immunity in tribal court, like many Michigan tribes, or tribe allow patrons to pursue their claims through the tribe's insurance carrier, like Minnesota tribes.

E. CATEGORY 5: TRIBE MUST CARRY LIABILITY INSURANCE

The fifth category of tort liability provisions overlaps with many of the categories previously discussed. This category requires tribes to carry a certain minimum amount of liability insurance. Generally, with this sort of provision, a patron is able to file their tort claim with a tribe's insurance carrier for amounts up to the limits of the policy. Claims in excess of the policy amount are generally barred. Maintaining an insurance policy, by itself, does not waive a tribe's sovereign immunity, and absent an agreement otherwise, an insurer may not waive or limit a tribe's sovereign immunity.[284] Moreover, an insurer may not invoke a tribe's sovereign immunity as a defense to a claim, unless authorized by the tribe.[285] This category of provisions ensures that the insurer will be barred from invoking tribal sovereign immunity for claims up to

[283] *See id.*

[284] *See* Galanda, *supra* note 260.

[285] *See supra* note 260.

the limits of the policy.[286] This sort of provision provides patrons a reasonable means to pursue their claims without unnecessarily subjecting tribes to a waiver of sovereign immunity in court. California, Oklahoma, Oregon, New York, New Mexico, and Wisconsin all fall into this category.

California (Category 1), New York (Category 1), Oklahoma (Category 2), and New Mexico (Category 2) compacts fall into other categories in addition to this one. In addition to the compact requirements discussed in the previous categories, each of these states' gaming compacts require tribes to maintain liability insurance. They also require that the tribe's insurance carrier may not assert the tribe's sovereign immunity up to the coverage limits of the policy. California, New Mexico, and New York compacts require tribes to carry either five million dollars or ten million dollars of public liability insurance depending on the tribe.[287] Oklahoma compacts require tribes to maintain public liability insurance of at least two hundred and fifty thousand dollars for any one person and at least two million dollars for any single occurrence of personal injury.[288]

In California, New York, Oklahoma, and New Mexico, where compacts require liability insurance in addition to another means of tort resolution, patrons first file their claim with a

[286] If an insurer did try to invoke tribal sovereign immunity for claims within the range of the policy, it would likely be a violation of the compact and the contract between the tribe and the insurer.

[287] The 1999 California compacts require tribes to adopt the lesser amount. *See e.g.*, Tribal-State Gaming Compact Between the State of California and the Agua Caliente Band of Cahuilla Indians, Sept. 14, 1999, *available at* http://www.cgcc.ca.gov/enabling/tsc.pdf. The Amended/Newer compacts require tribes to maintain the greater amount. *See e.g.,* First Amendment to the Tribal-State Compact Between the State of California and the Agua Caliente Band of Cahuilla Indians, June 26, 2007, *available at* http://gov.ca.gov/pdf/press/2009UpperLakeCompactFinal.pdf. The 2007 New Mexico compacts required ten million dollars in insurance. *See* Tribal-State Class III Gaming Compact, 2007, *available at* http://www.nmgcb.org/tribal/2007%20compact.pdf. The 2001 New Mexico compacts required tribes to adopt fifty million dollars of insurance coverage per aggregate. *See* Tribal-State Class III Gaming Compact State of New Mexico and Pueblo of Sandia, Nov. 21, 2001, *available at* http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/compacts/Pueblo%20of%20Sandia/sandiacomp113001.pdf.

[288] Model Tribal Gaming Compact, OKL. ST. ANN. tit. 3A, § 281 (2004).

tribe's insurance carrier. If denied or unsatisfied with the insurance award, a patron is free to pursue the additional path provided in the compacts. For example, in Oklahoma a patron denied recovery by insurance could then bring suit in a court of competent jurisdiction. In this way, insurance is a patron's first stab at recovery and the additional compact requirements serve as a safety net for patrons to continue to pursue their claims.

Oregon and Wisconsin are two states in which there is no overlap with other categories of tort liability provisions. These states' compacts require tribes to maintain a certain amount of liability insurance and provide assurances that the tribes' insurance carriers may not assert tribal sovereign immunity up to the limits of the policies. Oregon compacts require its nine gaming tribes to carry liability insurance of at least two hundred and fifty thousand dollars for any one person and at least two million dollars for any single occurrence of personal injury.[289] The compacts make it clear that this is the only means by which tort claims may be pursued.[290] Similarly, Wisconsin requires its eleven tribes to maintain no less than four million dollars of liability insurance, which is the only avenue for the resolution patron claims provided for in the compact.[291] If the insurer denies a patron's claim, or the patron is unhappy with an award, the

[289] *See e.g.,* Tribal- State Compact for Regulation of Class III Gaming Between the Burns-Paiute Tribe and the State of Oregon, § 7, Dec. 12, 1996, *available at* http://archivedwebsites.sos.state.or.us/Governor_Kitzhaber_2003/governor/compacts/BurnsPaiute/compact.pdf. For a list of compacting tribes *see* Oregon State Police Gaming Division, Tribal Information (2009), http://www.oregon.gov/OSP/GAMING/tgaming_historical.shtml.

[290] The compacts state that the provision regarding insurance is the only place in which the tribe executes a limited waiver of sovereign immunity. *See e.g.*, Tribal- State Compact for Regulation of Class III Gaming Between the Burns-Paiute Tribe and the State of Oregon, *supra* note 289. Other than that provision, "[n]othing in this Compact shall be construed as creating or granting any right to any third party, or as establishing any objection or defense for any third party to any charge, offense, or prosecution." *See e.g., id*. at § 12.

[291] *See e.g.*, Bad River Band of Lake Superior Chippewa Indians and State of Wisconsin Gaming Compact of 1991, § 19, Mar. 30, 1992, *available at* http://www.doa.state.wi.us/docview.asp?docid=2127. For a list of the eleven gaming tribes in the state *see* Wisconsin Department of Administration Division of Gaming, Gaming Compact Agreements (2007), http://www.doa.state.wi.us/section_detail.asp?linkcatid=694&linkid=117&locid=7. The Wisconsin compacts state that other than the limited waiver for claims filed with the insurance carrier, "[n]othing in this Compact shall be construed as creating or granting any rights to any third party, or as establishing any objection or defense for any third party to any charge, offense or prosecution." *See e.g.*, Bad River Band of Lake Superior Chippewa Indians and State of Wisconsin, *supra* note 291, at § 23.

compact does not provide the patron with any other avenue of redress. Thus, unless a tribe has voluntarily adopted tribal law in which it waives its sovereign immunity for tort claims into another forum, the patron's only means for recovery is through the insurance company.

Some tribes that fall solely in Category 5, while not required to do so by the compacts, have adopted tort ordinances waiving sovereign immunity in tribal court for the resolution of patron tort claims.[292] For example, the Confederated Tribes of Grand Ronde Community of Oregon, the Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians, the Confederated Tribes if Siletz Indians, and the Confederated Tribes of Warm Springs have adopted such ordinances.[293] While some tribes have waived immunity in tribal court on their own volition, the compacts do not require them to do so.

IV. THE NEGOTIATION FRAMEWORK—WHAT TO INCLUDE IN A TRIBAL-STATE COMPACT

When entering into the negotiation process for a tribal-state Class III gaming compact, it is important that tribes and states are fully apprised of the host of options available to them to deal with tort liability. Thus, it is useful to know how other tribal-state gaming compacts are treating the issue of tort liability and how those various treatments have played out in the real world. This is where the lessons from the five categories of gaming compacts come in. The lessons from this case study can help tribes and states decide what to negotiate for, where to draw the line, and where to allow concessions when it comes to tort liability. These lessons must

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[292] *See e.g.*, The Confederated Tribes of the Grande Ronde Community of Oregon, Tort Claims Ordinance, Tribal Code § 255.6 (1998), *available at* http://www.narf.org/nill/Codes/grcode/gr2556tort.htm.

[293] *See id.*; The Confederated Tribe of Coos, Lower Umpqua and Siuslaw Indians, Tort Claims, § 2-7-1 (2002), *available at* http://www.narf.org/nill/Codes/cooscode/2_2-7.pdf; The Confederated Tribes if Siletz Indians, Torts and Indian Civil Rights Act, § 3.200 (2011), *available at* http://www.ctsi.nsn.us/uploads/downloads/Ordinances/Torts%20Indian%20Civil%20Rights%20Act%20Final%204-15-11.pdf; The Confederated Tribes of Warm Springs, Tort Claims, § 205, *available at* http://www.warmsprings.com/images/Warmsprings/Tribal_Community/Tribal_Government/Current_Governing_Body/Tribal_Code_Book/Doc_Files/205_tortclaims.pdf. It is unclear if any Wisconsin tribes or other Oregon tribes have done the same.

be carefully factored into the negotiation equation that includes the divergent interests of tribes and states.

As the analysis of Oklahoma (Category 2) compacts demonstrates, courts may stretch compact language to find waivers of tribal sovereign immunity. Thus, when negotiating tort liability issues, managing tribal sovereign immunity will be a central concern. However, the importance and management of tribal sovereign immunity must be carefully balanced against a tribe's need to operate legitimately as a business by not slamming the remedial door in the face of patrons. Thus, compacts like those in Washington (Category 3), Michigan (Category 4), and Minnesota (Category 4) may carry too much uncertainty that this sort of situation will occur. This uncertainty is bad for both the patron and for tribal business legitimacy and thus may not strike the desirable balance. Such uncertainty can likely be avoided if a tribe provides for some reasonable procedure by which patrons can pursue their claims.

States too have concerns and interests that must be factored into the negotiation of tort liability provisions. States are likely interested in protecting the health and safety of their citizens by ensuring they will have a means of redress if injured while patronizing a tribal casino. This concern for patron safety is amplified by the fact that states will likely shoulder some of the financial responsibility if a non-tribal member patron becomes disabled as a result of injury.[294] A state's procedural preferences are likely colored by its perception of a tribe's ability to handle patron complaints fairly with their own judicial or procedural system. The manifestation of a state's interests as a heavy regulatory hand when it comes to tort liability may be the result of the

[294] *See e.g.*, State of California Employment Development Department, Disability Insurance (2010), http://www.edd.ca.gov/disability/disability_insurance.htm; State of Connecticut Department of Social Services, Services to Adults and People with Disabilities (2012), http://www.ct.gov/dss/cwp/view.asp?a=2353&q=305236; New York State Insurance Fund, Disability Benefits (2011), http://ww3.nysif.com/DisabilityBenefits.aspx.

lack of a functioning tribal court system. Moreover, the state may be more likely to concede discretion to a tribe when there are reasonable assurances that claims will be handled fairly.

Based on the analysis of how the five categories of tort liability provisions have played out in practice, there are various things a tribe could negotiate for inclusion in its gaming compact that would balance the interests of operating a legitimate business, managing sovereign immunity, and ensuring that tort claimants are afforded a process by which to pursue their claims. These negotiation topics include: a clear statement regarding tort liability; liability insurance; a tort liability ordinance; and a limited waiver of sovereign immunity for the resolution of tort claims.

A. Clear Tort Liability Provisions

Negotiating for a clear provision regarding tort liability within a compact carries some distinct advantages. Tort liability is something that tribes will always face when operating gaming facilities because of the sheer number of patrons and visitors. It is inevitable that someone will get injured or his or her property damaged while on casino premises. Tribes and states cannot ignore this inevitability. With the foresight of knowing that they will have to deal with torts in the future, tribes and states can maintain some compromised control over the situation by negotiating the framework at the outset. This is after all the purpose of IGRA's compact requirement. Without addressing it, tribes and states run the risk of completely slamming the remedial door on injured patrons or worse opening the door for the judiciary to interpret what the gaming compact means as it relates to tort liability. Category 4 compacts, like those in Michigan and Minnesota, carry a great deal of uncertainty that these risks will

materialize. By including a provision explicitly relating to tort liability tribes and states will not be subject to this uncertainty.

The clearer the tort liability provision the better. As with any issue remotely related to sovereign immunity, not only is silence not really an option, but clarity too is imperative because its removes the interpretive license of the courts. This is where the lessons of the Oklahoma compacts are most profound. By failing to define what a "court of competent jurisdiction" means, the compacts seriously, though temporarily, compromised the tribes' sovereign immunity and the parties' actual intention to cabin tort suits to tribal courts was lost with the judicial interpretation of the compacts. Perhaps because the negotiating parties thought the definition was obvious, they failed to include a simple key explanatory phrase in the compact—"in tribal court only." Because of this omission, compacting tribes in Oklahoma temporarily became subject to state court jurisdiction over tort claims arising on gaming facility premises. This was despite the statements of the Tribes and the governor that this interpretation was in direct contravention of the intentions of the parties at the time the compact was negotiated. Thus, clarity and descriptiveness within compacts are essential to preserving the true intentions of the negotiating parties.

Unfortunately, even when compact language is clearly written, there is still the possibility of misinterpretation. To protect against disadvantageous interpretations, there is benefit to negotiating for a dispute resolution clause in which challenges to interpretations of the compact may be submitted to some form of review, be it arbitration or otherwise. This type of provision is what ultimately resulted in the restoration of Oklahoma tribes' sovereign immunity for tort claims brought in state court.

B. LIABILITY INSURANCE

Tribes invite thousands of patrons to their casinos and, because of the sheer number of people, injuries are inevitability going to occur. In light of this inevitability, carrying liability insurance is a relatively easy way for tribes to quietly deal with tort claims. Maintaining liability insurance decreases the likelihood that patron tort claims will be taken to court and increases the likelihood that patrons with legitimate claims will be afforded redress. The majority of tort claims never make it to court because when a tribe carries liability insurance, patrons can deal directly with the insurance carrier allowing for tort claims to be quietly settled out of court.

Some tribes, like those in Minnesota (Category 4), may decide to maintain liability insurance even though their compacts do not require it. However, there may be strategic reasons for tribes to negotiate for an insurance provision in their gaming compacts. By pushing for the inclusion of such a provision, a state's concerns about the health and safety of its citizens may be pacified with little intrusion on the tribe because the tribe will likely be maintaining the insurance anyway. By doing this, tribes may gain a slight advantage in achieving favorable terms on tort liability or on other issues. By putting a reasonable minimum on the insurance policy and by providing that the insurance carrier may not assert sovereign immunity for claims up to the amount of the policy, states are offered a tangible way in which patrons can pursue claims. Furthermore, tribal sovereign immunity remains protected because the tribe will be insulated from claims exceeding its policy amount.

There are, however, difficulties with maintaining insurance and including such a requirement in a compact. What is considered a reasonable minimum of insurance coverage will likely vary from state to state, and could be a source of major disagreement between tribes and states during negotiations. For example, some compacts have required $250,000 of coverage

while others have required $50,000,000.[295] Maintaining liability insurance is costly and the difference between $250,000 of coverage and $50,000,000 in coverage likely results in thousands of dollars in premiums. While very lucrative casinos may be able to shoulder the burden of high premiums, economically marginal casinos may struggle in this respect.

C. TORT LIABILITY ORDINANCES

As Category 1 compacts and the independent actions of numerous tribes[296] demonstrate, there are benefits to adopting a tort liability ordinance and there are advantages to negotiating for a tort ordinance to be required by a compact. Tort liability ordinances are beneficial in that they give tribes a high degree of control over how tort claims will be processed and handled. The ordinance requirement allows tribes to choose a process that is deemed to be the best fit for the individual tribe while still ensuring that patron claims will be processed and that legitimate claims will receive a remedy.

A tribe's tort liability ordinance may include procedural prerequisites that patrons must complete before their claim will be processed. Procedural prerequisites can include filing deadlines, submission requirements, and initial claims processing by a tribe's insurance carrier. After these procedural elements are satisfied, the ordinance can allow a patron's claim to proceed in whatever way a tribe deems appropriate.[297] This type of ordinance entitles the tribe to almost

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[295] *See supra* note 287 and accompanying discussion.

[296] The Tulalip Tribes of Washington and many Michigan and Oregon tribes have adopted tort liability ordinances independent of what is required by their compacts. *See supra* note 262 and accompanying discussion; *supra* note 270 and accompanying discussion; *supra* note 292 and accompanying discussion.

[297] As to procedural prerequisites, it is important to mind the lessons of California to avoid a "Bluehawk" problem. Campo Band of Mission Indians v. Superior Court, 137 Cal.App.4th 175 (Cal. Ct. App. 2006), teaches that if procedural hurdles are going to be a precondition to the resolution of a patron's claims, a tribe cannot be the unitary decision maker in deciding whether or not those procedures have been met. This is something to consider when structuring a tribal tort liability ordinance. Compliance with this decision may result in tribes submitting the issue of

complete control over the process of dispute resolution while ensuring that disputes will be handled and that patrons will be provided with a process to pursue their claim.

Additionally, tort ordinances may include limitations on the types of damages that can be awarded. For example, a tribe could decide to disallow punitive damages, damages based on loss of consortium and strict liability offenses, attorneys' fees, and prejudgment interest.[298] Limitations could also be placed on non-economic damages, like emotional distress. Most importantly, tribal ordinances can state that awards cannot exceed the amount of liability insurance carried by the tribe.

The process a tribe chooses to adopt in its tort ordinance can take many forms. For example, an ordinance may allow patrons to file their claim with a tribe's insurance carrier within a specified time period while providing assurances that the insurance carrier may not assert the tribe's sovereign immunity up to the limits of the policy. Or, a tribe could go further by allowing patrons to appeal an insurance carrier's denial of a claim to a person or entity in the tribal government, like a tribal council, similar to what the Barona Band of Mission Indians has done.[299] Or, the ordinance could be used to create an officer who can be appealed to, like a Claims Commissioner, like what the Oneida Indian Nation of New York has done.[300] Further, a tribe's ordinance could execute a limited waiver of sovereign immunity into arbitration, mediation, or some type of tribal court or inter-tribal court, like the Campo Band of Mission

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procedural compliance to a claims officer or other body. This will ensure that procedural elements are not acting as a pretext for an unfair denial of a claim.

[298] It is interesting to note that punitive damages cannot be recovered in an action against the Federal government or public entities, thus, there similarly should be no recovery of punitive damages against tribes. *See,* Federal Tort Claims Act, 28 U.S.C. § 2674 (1948).

[299] *See supra* Part III(A)(1) discussing Lawrence v. Barona Valley Ranch Resort & Casino, 153 Cal.App.4th 1364 (Cal. Ct. App. 2007).

[300] *See supra* notes 180-184 and accompanying discussion.

Indians, Sycuan, and Connecticut tribes have done.[301] The value of waiving into arbitration, tribal court, or state court is discussed in the next section.

One difficulty with including a provision requiring a tort ordinance within a gaming compact is that states may want to dictate what is included within the ordinances, effectively limiting tribal control over the claims process. Differing levels of state control can be seen when one compares California compacts with other Category 1 compacts. Some of the California compacts delineate specific requirements, which must be included in tribal ordinances, and the compacts allow for patrons to proceed to arbitration after exhausting the tribal process.[302] This is much more heavy-handed than the compacts in Connecticut, Arizona, and New York which simply require tribes to adopt reasonable procedures for the disposition of tort claims.[303]

The concerns of states interested in the California approach may be assuaged by the inclusion of an appeals process and/or enforcement mechanism within a tribe's ordinance. *Harris v. Sycuan Band of Diegueño Mission Indians*, 2009 WL 5184077 (S.D. Cal) teaches that in order to maintain legitimacy, tribes should first abide by the ordinances they create and provide for a meaningful enforcement mechanism for awards made to patrons.[304] Enforcement could occur in an intertribal court system, or in federal or state court.[305] Such enforcement

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[301] *See supra* Part III(A)(1)-(2).

[302] *See supra* Part III(A)(1).

[303] *See supra* Part III(A)(2)-(4).

[304] For a discussion of this case, *see supra* Part III(A)(1).

[305] If a tribe only wants to waive into federal court for enforcement, the lessons of *Sycuan* are very important. There, the Tribe only allowed enforcement in federal court. Harris v. Sycuan Band of Diegueño Mission Indians, 2009 WL 5184077 (S.D. Cal). The federal court refused to enforce the award on the basis that it lacked jurisdiction. *Id.* Thus, if a tribe wants to seek enforcement in federal court it would be important to provide a backup enforcement forum in case the federal court declines to hear the case. Such a provision could state, "Awards arising out of the procedure established in this tort ordinance shall be enforceable in federal court or state court if federal court denies jurisdiction." This language is similar to what the Newer/Amended California compacts require. *See supra* Part III(A)(1).

provisions are a meaningful way to inspire confidence in the procedures set up by a tribe's tort ordinance and may appease state concerns.

Like liability insurance, even if a tribe's gaming compact does not require the creation of a tort liability ordinance, some tribes have adopted one as an assertion of their tribal sovereignty. Doing so is a good idea because if questions arise as to whether or not a tribe has waived its sovereign immunity, the compact could be interpreted in light of the existence of an ordinance. In addition, depending on the level of specificity of procedure within the compact, courts may require patrons to exhaust tribal remedies before pursuing their claim in state or federal court.

D. Limited Waivers of Tribal Sovereign Immunity

There are two main reasons a tribe should consider waiving its sovereign immunity for the disposition of patron tort claims. First, for patrons to be encouraged to visit a tribe's gaming facility they must feel that business owners care about their safety and well being. Patrons want to know that the business will try to correct any harm that is done to the patron as a result of the owner's negligence. Thus, sacrificing some sovereign immunity ensures that a tribal casino is operating legitimately as a business and that patrons will be encouraged to frequent the gaming facility. To be effective, a limited waiver takes the form of an explicit statement either in a tribe's gaming compact or in a tribe's tort ordinance. Such a waiver would ensure that legitimate patron tort claims would not be ignored.

A second reason to consider engaging in a limited waiver of sovereign immunity is that such a waiver may reduce a tribe's liability insurance premiums and increase a tribe's appeal to financial lenders. By executing a limited waiver of sovereign immunity a tribe may be able to negotiate for lower insurance premiums with their carrier. For example, the Grand Traverse

Band in Michigan saw its liability insurance premiums decline by fifty percent once it waived its sovereign immunity in tribal court.[306] Financial lenders have also begun requiring tribes to adopt some procedure by which patron claims can be pursued. For example, the Pokagon Band, Nottawaseppi Huron, Little River Band, and Little Traverse Band in Michigan have all been required by lenders to adopt some tort claims procedure as a condition to their loans.[307] By effectuating a limited waiver of sovereign immunity, tribes' financial status is stabilized and the insecurities of lenders are somewhat appeased.

When considering a limited waiver of sovereign immunity for the resolution of patron tort claims, the question becomes: in what forum should this waiver take place? There are essentially three options for tribes to choose from: tribal court, state court, or arbitration, each with its own advantages and disadvantages.

1. TRIBAL COURT

Many tribes have executed a limited waiver of sovereign immunity for the disposition of patron tort claims in their own tribal courts. Some of these tribes include: Mashantucket Pequot, Mohegan Tribe, Cherokee Nation of Oklahoma, Choctaw Nation, Chickasaw Nation, Tulalip Tribes, Grand Traverse Band of Ottawa and Chippewa Indians, Pokagon Band of Potawatomi Indians, and Sault Ste. Marie Tribe of Chippewa Indians. Moreover, some of these tribes, like the Mashantucket Pequot and the Mohegan tribe, have created specialized tribal courts that are solely used for dealing with gaming related disputes and claims. I suggest that in the hierarchy

[306] *See* Email from Matthew Fletcher, Professor of Law & Director of the Indigenous Law & Policy Center, Michigan State University College of Law (March 9, 2010) (on file with author).

[307] *Id.*

of available forums, tribes first consider waiving into tribal court because of its institutional benefits.

Waiving sovereign immunity in tribal court has numerous advantages for tribes. If tribes have the resources, operating tribal courts and using them to adjudicate claims brought by non-member gaming-facility patrons offers institution building advantages that allows tribes to exercise their sovereignty in a way that strengthens the tribal community and the tribe's self-sufficiency.[308] Among these institution building qualities, Bethany Berger suggests that by allowing nonmembers to bring claims in tribal courts, tribal courts could be viewed on equal footing as state and federal courts rather than being seen as "inferior bodies designed only for control of Indians."[309] Thus, tribal courts are validated as legitimate judicial bodies when tribes use them in such a manner. Furthermore, Berger notes, when non-members are allowed to bring claims before tribal courts, there are institutional incentives that encourage tribal court judges to perform their duty appropriately, lest their performance be frowned upon by the outside world.[310] Thus, tribal court judges' "institutional pride leads the judges to carefully scrutinize the facts, law, and morality of the issues before them to fulfill this institutional role and resist the temptations to rule based on the status of the parties or political pressure."[311] Moreover, having patron tort claims brought in tribal courts forces tribal legal institutions to face new disputes that challenge community norms thus forcing the institution to grow and adapt.[312]

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[308] Bethany Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005).

[309] *Id.* at 1051.

[310] *Id*. at 1052.

[311] *Id*.

[312] *Id*. at 1051-52.

While there are many advantages to waivers in tribal court, some believe tribal court is an inhospitable environment for non-tribal members seeking redress.[313] The main reason some people believe tribal courts are inhospitable to outsiders is because they fear that tribal courts are incapable of being fair to non-members.[314] This fear of unfairness stems from two assumptions: (1) tribal courts are unfamiliar institutions applying unfamiliar law, and (2) tribal courts are biased towards the tribe and its members.[315]

As to the first assumption, many believe the unfamiliarity of tribal courts and their laws severely disadvantage the non-member party. In *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978), the United States Supreme Court demonstrated its reliance on this assumption when it stated that tribal jurisdiction over non-Indians would result in an "unwarranted intrusion[] on their personal liberty."[316] This intrusion would occur because "of the cultural and racial divide" between the tribe and the non-Indian.[317] Moreover, the Supreme Court has stated that tribal courts are not a place for non-members because tribal courts are "influenced by the unique customs, languages, and usages of the tribes they serve," thus, making tribal court an inappropriate forum for an outsider.[318] As stated by a tribal court judge, many people believe tribal courts are too unfamiliar to outsiders because "tribal courts make decisions based on some

[313] *Id.*

[314] *Id.*

[315] *Id.*

[316] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978).

[317] Berger, *supra* note 308, at 1057.

[318] Duro v. Reina, 495 U.S. 676, 692 (1990).

mystical, unwritten law that defies common understanding by non-Indians."[319] Another tribal court judge described the problem being that practitioners and other courts "have no confidence in [tribal courts]. There is this kind of overriding idea that we are wild beings on the edge of civilization," and thus not an appropriate environment for non-members to seek redress.[320]

As to the second assumption, many believe tribal courts cannot administer justice fairly to non-members because tribal courts are viewed as "non-neutral, justice-administering institutions."[321] This assumption has been relied on by the Supreme Court, which has stated that tribal courts are "often subordinate to the political branches of tribal governments."[322] The implication of this statement is that the lack of separation of powers and an independent judiciary subjects the tribal court to the whims of the Tribal Council or Tribal Government at the expense of the non-member party. Moreover, tribal courts are viewed as non-neutral because many believe tribal courts are partial to the tribe and its members and thus, a non-member would lose every time it comes before the court because of the political and community influences the court is subject to.[323] Additionally, some believe that since many tribal court judges are not lawyers

[319] Aaron Arnold and Robert V. Wolf, *Interview: B.J. Jones, Tribal Court Judge and Director, Tribal Judicial Institute, University of North Dakota School of Law*, 2 J. CT. INNOVATION 367, 371 (2009), *available at* http://www.courtinnovation.org/sites/default/files/documents/I_Jones.pdf.

[320] Juli Ana Grant, *Interview: Abby Abinanti, Chief Judge, Yurok Tribal Court, Klamath, California, and California Superior Court Commissioner*, 2 J. CT. INNOVATION 347, 354 (2009) *available at* http://www.courtinnovation.org/sites/default/files/documents/I_Abinanti.pdf.

[321] Nell Newton, *Tribal Court Praxis: One Year in the Life of Twenty Tribal Courts*, 22 AM. INDIAN L.REV. 285 (1998).

[322] Duro v. Reina, 495 U.S. 676, 693 (1990).

[323] Aaron Arnold and Robert V. Wolf, *supra* note 319 at 371.

themselves, but merely members of the tribal community, they are incapable of administering justice in a fair and even-handed way.[324]

While fears of the unfairness of tribal courts to the non-member party abound, research suggests the opposite—that tribal courts are capable of being neutral and impartial judicial bodies in which non-member patrons can successfully seek redress for their injuries. Nell Newton's study, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, found that in the eighty-five cases published in the Indian Law Reporter in 1996, non-Indian parties were consistently treated fairly.[325] Of the cases, Newton stated, "tribal court judges work hard to make the tribal judicial system fair for all parties appearing before them . . . [and] the tribe does not always win against the individual, and the tribal member does not always defeat the non-Indian."[326]

Building on Newton's study, in her article, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, Bethany Berger analyzed the decisions of the Navajo Nation Appellate Court and came to the conclusion that the Court's decisions were both quantitatively and qualitatively balanced when it came to the adjudication of cases in which a non-member was a party.[327] Berger found that out of the Court's thirty-five years worth of cases, or 122 opinions involving non-members, the non-members prevailed in just under fifty-percent of the cases.[328] Thus, there was roughly a 50-50 win to lose ratio. This quantitatively equitable

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[324] Aaron Arnold, *Interview, David Raasch, Judge, Stockbridge-Munsee Tribal Court, Bowler, Wisconsin*, 2 J. CT. INNOVATION 381, 383 (2009) *available at* http://www.courtinnovation.org/sites/default/files/documents/I_Raasch.pdf.

[325] Newton, *supra* note 321 at 351-52.

[326] *Id.* at 352.

[327] Berger, *supra* note 308.

[328] *Id.* at 1051.

result came from a tribe that represents the paradigmatic evils that courts have said make tribal courts unfair to non-members: all of the judges are Navajo, they have to be fluent in the Navajo language, very few judges are lawyers, and the Navajo court is known for its intentional incorporation of Navajo customary law into its adjudications.[329] The 50-50 win to lose ratio for non-members was consistent throughout the years analyzed and was the same whether or not the Navajo Nation itself was a party.[330] Moreover, this 50-50 balance was maintained in areas that may be seen as particularly prone to bias, including: cases involving Navajo common law, cases arising from business relationships, and child custody cases.[331]

Relying on a theory created by George L. Priest and Benjamin Klein, Berger suggests that this 50-50 win to lose ratio is what should be expected from litigation decisions.[332]

> Assuming that parties have relatively accurate information regarding their chances of success, they will settle cases in which they agree that one party is significantly more likely to win. It is only where the likely outcome is subject to a large degree of uncertainty, where each party appears to have a relatively equal ability to win, that parties will go to trial. Other factors being equal, therefore, one would expect the results to approach a 50-50 win-loss rate for any set of parties. But where judges are influenced by legally irrelevant factors such as bias against a particular kind of party or claim, it skews the results. Parties that make an accurate assessment of law and facts in their favor will nevertheless lose disproportionate numbers of cases[333]

Accordingly, Berger found that this 50-50 win ratio suggests that, to a certain extent, parties can make accurate assessments of their odds of prevailing in the court and that irrelevant factors, like

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[329] *Id.* at 1070.

[330] *Id.* at 1075-76.

[331] *See id.* at 1079-1094.

[332] *Id.* at 1076. In order to reach this conclusion, Berger relied on "an influential theory developed by George Priest and Benjamin Klein. *Id*. For a discussion of the theory *see* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEG. STUDIES 1, 51-52 (1984).

[333] Berger, *supra* note 308, at 1076-77. Berger notes that parties are unlikely to adjust their litigation decisions to account for bias, thus preserving the reliability of the expected 50-50 ratio. *Id.* at 1077. Rather, "[p]arties appear to continue to rely on their assessment that the law and facts are in their favor, and only very slowly, if at all, effectively strategize to avoid a court biased against them." *Id.* at 1077-78.

bias, "do not significantly influence the court's decisions in ways that disadvantage nonmembers."[334] Berger suggests that while this finding is not determinative of "fairness" of the Navajo Appellate Courts, the 50-50 win to lose ratio should provide reassurance to nonmembers who are concerned about bias.[335]

While the Navajo Nation case study explored all cases involving non-members and spanned a wide variety of legal issues, it is likely that its implication that tribal courts are balanced and nonbiased when adjudicating cases involving nonmembers can be extended to tort cases brought by non-member patrons. Thus, fears of the impartiality of tribal courts are likely mere misconceptions. Moreover, the institutional benefits of a wavier in tribal court outweigh these misplaced fears. Thus, if a tribe has the resources, I suggest this forum as the first choice for waiver.

There are, however, obstacles to waiving into tribal court that render some tribes less equipped to avail themselves of this forum. It is much easier to waive into tribal court if a tribe already has one. Unfortunately, many tribes, like most in California, do not have tribal courts. Thus, in order to choose tribal court, these tribes would need to invest extensive time and financial resources in creating the forum. Additionally, a steady flow of resources must be available to sustain a functioning tribal court system. This may be difficult for tribes that have only realized moderate financial success in their gaming ventures. This obstacle may be overcome if a tribe decides to use an intertribal court system, like the Intertribal Court of Southern California. Rather than creating its own tribal court, a tribe pays an annual fee to be a member of an independent intertribal court allowing the tribe to use the forum when tort issues

[334] *Id.* at 1079.

[335] *Id.* As to qualitative fairness, Berger found that the Navajo appellate courts' cases "appear uniformly governed by thoughtful attempts to determine the relevant law, policies, and facts." *Id.*

arise. This option may save tribes a significant amount of resources while still affording them the benefits of a tribal court forum.

2. ARBITRATION

Arbitration is a form of alternative dispute resolution that allows for the binding disposition of claims without litigation heard before a neutral arbitrator. This forum is utilized by the Amended/Newer California Gaming compacts which require gaming tribes to waive their sovereign immunity for binding arbitration of patron claims up to the limits of the tribe's insurance policy.[336] Because of its accessibility to patrons and flexibility, I suggest arbitration as a second choice in the hierarchy of forums.

One advantage to arbitration is that it may be a better forum than litigation because it has characteristics that make it cheaper, faster, and less formal. Thus, binding arbitration may be more hospitable to patron claims because it is easier and less expensive for patrons to pursue claims in this forum. Additionally, studies of mandatory arbitration clauses in the employment, consumer, and franchise contract context, where mandatory arbitration is commonplace, suggest that there is no evidence that plaintiffs do worse in arbitration that they do in court.[337] Thus, it is likely that plaintiffs are not automatically disadvantaged by being required to pursue a claim in arbitration rather than being free to file a claim in court. It is also beneficial to note that mandatory arbitration clauses, like those present in some tribal-state gaming compacts, are

[336] *See supra* Part III(A)(1).

[337] *See, e.g.*, Omri Ben-Shahar, *How Bad Are Mandatory Arbitration Terms?*, 41 U. MICH J.L. REFORM 777 (2008).

consistently held up as fair and enforceable under judicial interpretation of the Federal Arbitration Act.[338]

A second advantage of opting for mandatory arbitration as the forum for the resolution of tort claims is that it leaves the tribe and state a great deal of room for negotiating the details of the resolution process. For example, if a tribe is concerned with the neutrality of the arbitrator, it can negotiate for the arbitrator to be chosen by the tribe, or by agreement. A tribe and a state can even negotiate for the qualifications the arbitrator must have and they can exclude certain people or classes of people from serving as arbitrator. For example, in the Newer/Amended California gaming compacts, the arbitrator is required to be a retired judge.[339] Moreover, a tribe and a state can negotiate a choice of law clause that specifies which law will apply at arbitration. In California, the gaming compacts specify that California tort law will apply and that the arbitration must comply with the Federal Arbitration Act.[340] Negotiating the terms of the arbitration process in the compact ensures that the rules of the game are set prior to the filing of a claim, and in California's case it dispels any fear that the non-tribal member will be subjected to unfamiliar tribal law. However, the choice of law clause could stipulate that tribal law does apply and, moreover, terms can be negotiated in which arbitral recovery is limited to non-punitive damages up to the limits of a tribe's insurance policy.

One disadvantage of arbitration is that, if arbitration is the chosen forum but the tribe does not also allow for an adequate enforcement mechanism for the arbitral award, the waiver into arbitration will be useless to patrons seeking to enforce their awards. This problem is demonstrated in *Harris v. Sycuan Band of Diegueño Mission Indians*, 2009 WL 5184077 (S.D.

[338] *See* David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L.REV. 1247, 1252 (2009).

[339] *See supra* Part III(a)(1).

[340] *Id*.

Cal) in California. The Sycuan Tribe executed a limited waiver of sovereign immunity into binding arbitration for the resolution of tort claims in their tribal tort liability ordinance, which was required by their 1999 compact with the state of California.[341] The ordinance barred the Tribe from challenging any damages award made to the patron by the arbitrator and allowed for the enforcement of an arbitral award against the Tribe in the United States District Court of the Southern District of California.[342] The patron, Harris, filed a tort claim with the Tribe in which the arbitrator awarded her $160,000.[343] However, the Tribe refused to comply with the arbitral award.[344] Complying with the tribal ordinance, Harris filed a complaint in federal district court for enforcement. Even though the tribe's ordinance provided for enforcement in district court, the Tribe moved to dismiss the complaint for lack of subject matter jurisdiction.[345] The court agreed with the Tribe.[346] The federal court refused to hear the case on the basis that it lacked subject matter jurisdiction. Thus, even though Harris conformed to the Tribe's tort liability ordinance, because federal court declined to hear the case, she was left without a way to enforce the judgment awarded to her.

This disadvantage to arbitration is easily overcome by providing enforcement in federal court and, if it declines to review, in state court.[347] This enforcement mechanism will ensure that if a federal court refuses to hear the case because it lacks jurisdiction, the patron will be able to

[341] Harris v. Sycuan Band of Diegueño Mission Indians, 2009 WL 5184077, *2 (S.D. Cal).

[342] *Id*.

[343] *Id*.

[344] *Id*.

[345] *Id.*

[346] *Id.* at *8.

[347] This sort of enforcement mechanism can be found in the Newer/Amended California gaming compact. *See supra* Part III(a)(1).

seek enforcement in state court. While this type of provision is a compromise of tribal sovereign immunity, it is only for the enforcement of the arbitral award. Moreover, enforcement claims will never reach this level of adjudication in the first place if tribes abide by their agreements to binding arbitration.

There are some disadvantages to using arbitration as the forum to resolve patron tort claims. While arbitration may be cheaper than traditional litigation, it still involves some costs that a tribe may not be able to afford. Additionally, by opting for arbitration a tribe loses the benefits associated with waiving into tribal court. For example, arbitration does not provide the institution building benefits associated with tribal court and similarly, using arbitration is a less overt expression of tribal sovereignty.

In sum, by submitting to binding arbitration, assurances are made that patron claims will be resolved fairly, by a neutral decision-maker. Moreover, more patrons will be able to pursue their claims because they will not be stifled by the cost, formality, and time-consuming nature of litigation. Waiving tribal sovereign immunity into such a forum allows for the resolution of tort claims without a tribe submitting to the jurisdiction of state or federal courts on the merits of the claims, allowing the merits of these claims to be handled completely out of court. While some patrons may disagree with such a forum because they want their day in court, arbitration offers both patrons and tribes an agreeable forum and thus I suggest it as the second forum choice for tribes waiving their sovereign immunity for the resolution of tort claims.

3. STATE COURT

Some compacts subject tribes to state court as the forum for the resolution of patron tort claims. For example, tribes in New Mexico have waived their sovereign immunity in state

court.[348] More specifically, New Mexico tribes waive their sovereign immunity for tort suits in "a court of competent jurisdiction," which includes state court in its definition.[349] Because it lacks the benefits of tribal court and arbitration, I suggest that state court only be chosen as a forum for waiver as a last resort.

Using state court as the forum for the adjudication of patron tort claims may be beneficial to tribes that lack the resources to operate a tribal court. Moreover, it offers non-members a forum with which they are familiar to pursue their claims. Unfortunately, a waiver in state court lacks the advantages available when tribal court or arbitration is chosen as the forum. Specifically, a waiver in state court does not provide tribes with the institution building features of a waiver in tribal court. Moreover, a waiver into state court denies the patron the speedy, cheap, and informal benefits of arbitration. Last, a waiver in state court is a significant compromise of tribal sovereign immunity that forces tribes to rely on an entity that has been described as tribes' "deadliest enemies."[350] However, the motif of states understood as tribes' deadliest enemies has subsided with increased cooperation and compromise among some states and tribes.[351] For example, Michigan, Wisconsin, and Oregon have committed themselves to interacting with tribes on a government-to-government basis.[352] Where states have reliable government-to-government relationships with tribes, state court may not be as inhospitable of an

[348] *See supra* Part III(B)(2).

[349] *Id.* Note that there is evidence that New Mexico tribes attempted to avoid such a waiver. *Id.*

[350] United States v. Kagama, 118 U.S. 357 (1886).

[351] *See* Matthew L.M. Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal-State Relations*, Michigan State University College of Law, Research Paper No. 05-03 (2007), *available at* http://ssrn.com/abstract=1007756.

[352] *See* State of Michigan, Exec. Directive No. 2001-2 (May 22, 2001); State of Oregon, Exec. Order No. 96-30 (1996) *reprinted in* OR. REV. STAT. § 182.162-182.168 (2001); State of Wisconsin, Exec. Order No. 39 (2004).

environment for tribal governments.[353] Unfortunately, some states remain hostile to the protection of tribal sovereign immunity and in turn, hostile to tribes.[354] Because state court lacks the benefits of tribal court and arbitration I would suggest that it not be chosen over the other two viable alternatives.

E. OBSTACLES TO THIS FRAMEWORK

As with anything, there are obstacles in the way of tribes pursuing this framework of negotiation with states. If an Indian tribe is interested in operating Class III gaming, they simply have to ask the state within which they are located to negotiate a compact.[355] IGRA then requires the state to negotiate in good faith and enter into a compact with the tribe.[356] IGRA anticipated that tribes would be stonewalled by states that refused to negotiate in good faith, and thus provided a remedy to tribes in this situation.[357] Specifically, IGRA provides that tribes can bring suit in federal court against a state that refuses to negotiate a Class III gaming compact in good faith.[358] However, in 1996, the United States Supreme Court found that the provision in IGRA allowing tribes to sue states in federal court to enforce good faith negotiations was in

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[353] However, it is important to note that if a tribe is being sued on a tort claim in state court, a jury, not the state, will hear the claim. Thus, it does not necessarily follow that tribes will be treated fairly by juries in state court even if the state has agreed to interact with tribes on a government-to-government basis.

[354] *See e.g.,* Cossey v. Cherokee Nation Enterprises, LLC., 212 P.3d 447 (Okla. 2009); Griffith v. Choctaw Casino of Pocola, 2009 WL 1877899 (Okla.); and Choctaw Casino of Pocola, Oklahoma, 2009 WL 1877902 (Okla.).

[355] 25 U.S.C. § 2701(d)(3)(A) (1988).

[356] *Id.* IGRA states: "Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall require the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact." *Id.*

[357] *See* Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARVARD J. ON LEGIS. 39, 52 (2007).

[358] 25 U.S.C. § 2701(d)(7) (1988).

violation of the Eleventh Amendment.[359] In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Supreme Court dismissed an Indian tribe's suit against Florida for failure to negotiate in good faith for lack of jurisdiction.[360] The Court reasoned that Congress could not waive the sovereign immunity of a state.[361] Thus, tribes have a right to good faith negotiations, but cannot force states to comply.

The *Seminole* complication is amplified during the negotiation process and it is something to be aware of. In light of *Seminole*, some tribes have argued that the Attorney General can voluntarily bring an action and overcome the state immunity problem.[362] Additionally, states can voluntarily waive their sovereign immunity for failure to negotiate in good faith. California has executed such a waiver and has subsequently been found to have violated the good faith requirement.[363] If, however, a state asserts its sovereign immunity from a suit alleging a failure to negotiate in good faith, there is an administrative process available for tribes to pursue which looks something like baseball arbitration.[364] With this procedure, both the

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[359] Seminole Tribe of Florida v. Florida, 517 U.S. 44, 59-60 (1996).

[360] *Id.* at 75.

[361] *Id*. at 59-60. The Court states that "[e]ven when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id*. at 72.

[362] *See* Alex Tallchief Skibine, *Gaming on Indian Reservations, Defining the Trustee's Duty in the Wake of Seminole Tribe v. Florida*, 29 ARIZ. ST. L.J. 121, 162-167 (1997). Despite some disagreement about this possibility, according to Cohen's Handbook of Federal Indian Law, "[t]here is little doubt […] that the Attorney General can voluntarily bring an action and thus overcome state immunity." COHEN'S HANDBOOK, *supra* note 44, at § 12.06.

[363] *See* Rumsey Indian Rancheria v. Wilson, 64 F.3d 1250, 1255 n.3 (9th Cir. 1994) (California waived its immunity from suit so federal court could resolve scope of gaming issue); *see also* Cabazon Band of Mission Indians v. Wilson, 124 F.3d 1050, 1057 (9th Cir. 1997) (finding waiver to allow tribe to sue to enforce compact provisions against state); Rincon Band of Luiseño Indians of the Rincon Reservation v. Schwarzenegger, 602 F.3d 1019 (9th Cir. 2010) (holding California engaged in bad faith negotiations concerning amendments to the parties' existing compact because California imposed a tax on the tribe in violation of 25 USC § 2710(d)(4)).

[364] *See* 25 C.F.R. § 291 (1999).

tribe and the state submit their best-offer compact.[365] The Secretary of the Interior then appoints a mediator who selects which compact the Secretary should approve between the two available alternatives.[366]

In addition to the *Seminole* problem, once a state has negotiated a particular deal with one tribe, it will be difficult for another tribe in the same state to negotiate for a different or better deal. Even if the first tribe's compact contains an unfavorable tort provision, a tribe's agreement to the provision may be seen as a sign of good faith on the part of the state, making it very difficult for another tribe to argue for anything different. Model and statutory gaming compacts present a similar problem when negotiating for favorable terms regarding tort liability that differ from those in the model. If a state has a model gaming compact it may be hesitant to negotiate too far away from the preset terms. This is particularly troubling for a state like Oklahoma where the state model gaming compact was temporarily interpreted as containing a waiver of sovereign immunity in state court for tort claims.

V. CONCLUSION

With the passage of IGRA, tribes and states have the responsibility of negotiating and compromising over the regulation of Class III gaming. With the influx of patrons to gaming establishments it is inevitable that someone is going to get injured. Thus, compact negotiations will certainly include discussions regarding tort liability. It is important for tribes to evaluate the lessons of the five categories of gaming compacts to be fully apprised of the host of options available to address tort liability. Considering how existing provisions have played out, there are various things a tribe could negotiate for to avoid the disadvantages of some of the categories.

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[365] *Id.*

[366] *Id.*

These negotiation topics include: a clear statement on tort liability; liability insurance; a tort liability ordinance; and a limited waiver of sovereign immunity for the resolution of tort claims.

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