



LEGAL NOTES

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1825 W. Adams, Phoenix, AZ 8500 (602) 274-8222 FAX: (602) 274-8999

1661 N. Swan, Suite 144; Tucson, AZ; 85712 (520) 881-7930; FAX: (520) 327-1686

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**WAIVERS OF SOVERIGN IMMUNITY:
KEY TO CONTRACTING WITH INDIAN TRIBES**
By Judith M. Dworkin, Esq. and Sharon B. Shively, Esq.
Sacks Tierney P.A.

In this period of robust construction activity, tribal lands play host to a broad range of sophisticated projects. For such projects, the concept of sovereign immunity and its influence on legal disputes inevitably come into play.

Sovereignty has varied meanings but can generally be defined as "the power to govern, vested by the people in their leaders and government." One attribute of sovereignty is immunity from suit; likewise, a government's decision to waive its immunity is another expression of sovereignty. Tribes may waive their immunity on a case-by-case basis and negotiate limited waivers suitable to all contracting parties.

Immunity provisions. A limited waiver of immunity may include the following provisions:

Who may bring a claim. A waiver should specify who can bring a claim, e.g. the general contractor but not any other party, including any successor or assignee of the contractor.

Types of claims allowed. A waiver should specify claims to enforce the contract and any related disputes. A waiver can bar alternative theories of recovery, such as tort claims. Although claims would primarily pertain to monetary damages, they might include injunctive or declaratory relief.

Choice of forum. A limited waiver can permit suit against the waiving tribe in any forum that would otherwise have jurisdiction over the subject matter. If federal court jurisdiction exists, it may be a forum to which all parties can agree. However, federal jurisdiction will not exist in many situations; arbitration has become a

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Editor: Sharon B. Shively, Esq.

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common mechanism for dispute resolution, and waivers may include arbitration with suit to enforce the arbitration and any arbitration award.

Choice of law. Generally, a waiver should include a statement specifying the choice of law (i.e., the jurisdiction under whose laws the waiver is subject) to be applied by the court hearing the claim.

Judgment amount. A basic way in which a waiver can be limited is to a maximum dollar amount. The limitation may be based on the total contract amount or on some other figure.

Types of damages. If a waiver allows for monetary damages, the types of monetary damages can also be limited. For example, a limited waiver may permit recovery of only foreseeable damages, not lost profits, or only back pay and benefits, not front pay and emotional damages. Since many standard contracts include a provision allowing the recovery of attorneys' fees to a successful litigant under the contract, a limited waiver of tribal sovereign immunity should include such a recovery, or the standard contract

should be modified. Post-judgment interest may also be specifically addressed.

Duration of the waiver. A waiver may be limited in duration. Generally, the relevant period is determined by the specific circumstances involved with the contract (e.g., the length of the construction contract).

A final word of advice. Sovereign immunity poses a unique consideration for private companies that contract with a tribal entity, but it need not be a deterrent to doing business in a tribal environment. It is in the best interest of a non-tribal party and, in the majority of cases, the tribe to negotiate acceptable and beneficial waiver provisions. Absent a waiver, the resulting forfeiture of contract remedies can be devastating for the contractor.

Judith M. Dworkin and Sharon B. Shively are shareholders in the 28-attorney Scottsdale law firm Sacks Tierney P.A. Ms. Dworkin's practice includes Indian law, while Ms. Shively practices in the area of construction litigation.

WORKERS' COMP BENEFITS FOR INJURED, IMPAIRED EMPLOYEES

**By Sharon S. Moyer, Esq.
Sacks Tierney P.A.**

The Arizona Supreme Court has settled the confusion over whether employees who are injured on the job while drug impaired or intoxicated may recover workers' compensation benefits. The problem for employers is that the Court did not resolve the issue as employers or insurers wanted or,

some argue, in a manner consistent with public policy.

For the last few years, Arizona law has provided that, if an employee gets hurt on the job and he or she tests positive for drugs or alcohol, the workers' compensation insurer could deny benefits unless the

employee could show that the drugs or alcohol did not contribute to the accident. Consistent with that exclusion, employers could earn a small discount on their workers' compensation premiums if they had an acceptable drug testing program. The seemingly fair law gave employees another incentive to stay drug- and alcohol-free at work.

However, the Arizona Supreme Court struck down the law after ruling that it was unconstitutional as it applied to the facts of two cases involving injured workers.

Eligibility. To recover workers' compensation benefits, an injured employee must show that a work-related risk caused the injury. Consequently, if an employee suffers a heart attack while at work, and the job had nothing to do with the heart attack, the employee cannot recover workers' compensation benefits. If the job partially caused the heart attack because, for example, the employee was engaging in strenuous physical work at the time, the employee can recover benefits. Thus, if an injury has two causes - one work related and one not - the employee can recover workers' compensation benefits.

That right is protected by the Arizona Constitution, and the law - A R S § 23-1021(D) - that the Supreme Court just struck down was found to have run afoul of that right.

In one of the cases (*Komalestewa v. Industrial Commission*), an employee tried to repair a conveyor belt. His arm became entangled in the conveyor and was severely injured. His blood test revealed a blood alcohol content of 0.176%. The Court found that, while one cause of the injury (i.e., being under the influence of alcohol) was

not work-related, the other cause (i.e., being required to crawl under the conveyor in order to repair it) was work-related, and, thus, he should be entitled to workers' compensation benefits.

In the second case (*Grammatico v. Industrial Commission*), performing his job required the worker to walk on 42-inch drywall stilts. On the day of his injury, he worked most of his shift, walking on the stilts and navigating his way through a cluttered job site. Near the end of his shift, he fell and injured his wrist and knee. He tested positive for marijuana, amphetamine and methamphetamine.

The Court found it significant that he was able to work most of his shift without injury and concluded that the drug use was a comparatively minor cause of the fall. The fall was clearly related to the particular risks of the employment: walking in stilts in a cluttered work area.

Fault. The Court also discussed the concept of "fault" in the context of workers' compensation; that is, that there is no concept of fault in workers' compensation law.

Much like in divorce, the proof of fault, or the lack of it, has nothing to do with the recovery of benefits. Therefore, even if it was the employee's "fault" that he or she was injured on the job because of alcohol impairment, he or she is still eligible for workers' compensation benefits.

The "no fault" concept is a difficult one because much of our legal system is based on a concept of negligence, in cases ranging from automobile accidents to product liability. While it seems fair to place blame on someone who is so foolish as to work

while impaired, blame is entirely contrary to the entire construct of workers' compensation law. The Court noted that many work-related injuries are caused by cell phone use while driving, yet the legislature did not seek to deny workers' compensation benefits for such conduct.

Drug testing In light of this ruling, an employer might wonder whether there is any point to having drug and alcohol testing programs?

The answer is "yes "

Even if the workers' compensation insurer has to pay benefits to the drug-impaired injured worker, the employer can still terminate the employee for violating company policy. The employer simply must have and enforce a clear policy that provides for termination in such instances. Otherwise, the terminated employee could have a claim that he or she was terminated in retaliation for filing a workers' compensation claim.

Ms. Moyer is a shareholder with the firm of Sacks Tierney P.A. Her practice includes employment law and estate planning.

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