

## 3 Risk Management Tips To Protect Your Tribe's Resources

By **Venus Prince and Krystalyn Kinsel** (May 30, 2018, 4:05 PM EDT)

When a tribe thinks about risk management and insurance, it may first wonder whether it really needs to worry about it because of its unique defense of sovereign immunity. This defense, however, has come under much fire in recent years and is slowly being eroded. Many tribes have also become “deep pockets” that are the target of many plaintiffs’ counsel. So, even though tribes might have sovereign immunity against many third-party claims, they are certainly not immune to loss.

More significantly, loss for any organization, including a tribal government or tribal economic development entity, can take many forms — from financial to operational to reputational. For tribes involved in hospitality industries, reputational risk might be even more critical. While purchasing insurance may mitigate against financial loss, it’s only one piece of the puzzle. To truly manage the different types of risk effectively, tribes need to develop a holistic approach.

Preparation is the key to minimizing the cost of unexpected loss and protecting your tribe’s resources. Who is responsible for risk management within the tribe? Does your risk management program cover all tribal entities or only tribal government? How much insurance do you need? How do you control your potential exposure? Who is responsible for negotiating the terms that will best fit the needs of the tribe? How is a claim processed within the tribe? Can you challenge an insurance carrier’s denial of a claim for loss? How? Thinking about these few questions can quickly put your tribe on the road to a robust risk management program.

Here are our top three recommendations to implement basic risk management practices, including special considerations for maximizing insurance coverage for a tribe. Don’t wait until you’ve already incurred the loss. Start saving your tribe money now.

### Create and Recruit a Risk Management Dream Team

A successful program requires key players. While the roles and responsibilities of each individual may vary according to the size and needs of a tribal government, here are the most basic roles that should be assigned.

**Tribal Council or Tribal Administrator:** Sets the overall vision for the tribe and oversees the placement



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and functions of the tribe's risk management program. The tribal council should, with the assistance of the risk management team, determine what structure works best for the tribe.

**In-House Counsel:** Ensures that the insurance coverage complements the laws and needs of the tribe. Plays an active role in the insurance review process by reviewing all insurance policies and working closely with the risk manager and outside counsel to negotiate a new policy or make revisions to an existing policy. Gathers and reviews documents for a tribal claim.

**Risk Manager/Broker:** Serves as the liaison between the tribe and insurer. Because this is a difficult position to fill, in-house counsel can also serve as the de facto risk manager.

**Outside Counsel:** Assists in-house counsel — or delegated risk management employees — with policy questions and negotiation of terms in placements and renewals. Outside counsel may also apply additional pressure to a carrier to fully pay a tribe's claims under the tribe's existing insurance policy. When cost-effective, outside counsel should handle the tribe's complicated or labor-intensive claims.

**Insurance Carrier or Third-Party Administrator:** Pays claims and defense costs according to the tribe's insurance policy. While the processes of claims review and payment may vary, a tribe should regularly check-in to receive updates and ensure that the carrier has everything that is needed to move the claim along.

### **Negotiate and Secure a Tailored Insurance Program**

Any risk management program should carefully consider the needs of the tribe and what type of protection the tribe may need. When looking at potential insurance policies, do not be afraid to ask questions or to ask for special provisions! Insurance policies are confusing and may include provisions that are adverse to the tribe's interests. There is no harm in seeking clarification or offering revisions to better fit the needs of your tribe.

Consider notice provisions. While notice provisions may be difficult to negotiate, ensure that your internal risk management team fully understands them and identifies who will notify the carrier when a claim arises and when they should do so. For instance, a claim for litigation costs or settlement fees associated with third-party lawsuit would likely fall into a claims-made coverage policy, whereas a claim made for damage to tribal property that was caused by a fire would likely fall into an occurrence-based coverage policy. The notice provisions for each type of policy are different, so pay special attention to these provisions and ensure they will work for the needs and structure of your tribe. If the tribe fails to provide notice according to the terms of the applicable policy, the tribe may waive its coverage.

Consider limits of liability. Many insurance policies base their premiums on a \$10 million limit, even if your tribe may not need that amount of coverage. Therefore, be aware of what the tribe is paying for and seek to reduce those costs, if possible. Moreover, assist the tribe in passing tribal laws to reduce the exposure for both the tribe and its carrier. For instance, for a worker's compensation claim, a tribe may choose to waive immunity up to \$1 million. Not only does this protect the tribe, but it also limits the carrier's exposure as well. Therefore, ensure that your coverage corresponds to your tribe's estimated exposure.

Consider sovereign immunity. Policies typically have provisions addressing which party has the right to assert, or to decide not to assert, a sovereign immunity defense. Some policies expressly confer these rights upon the tribe. Other policies, by contrast, state that the tribe agrees not to waive sovereign

immunity. Tribes should make sure their policies provide them with the unilateral right to decide whether to assert sovereign immunity. Surrendering this power to an insurance carrier creates a serious risk that a carrier will assert this doctrine in cases involving unfavorable facts and unsympathetic judges, which can lead to erosion of this important doctrine. Tribes should also ensure that their policies state that nothing in the policies is intended to waive sovereign immunity.

Consider choice of defense counsel in liability policies. Negotiating for the selection of the tribe's own defense counsel is critical. Many aspects of a tribe's defense require special knowledge of the interplay between federal, state and tribal law. And depending on the subject matter of the litigation, it may require expertise in other areas of law, such as torts or products liability. Moreover, it is important for the tribe to feel that its legal representation is advocating on behalf of the tribe's best interests.

### **Don't Leave Money on the Table! File an Insurance Claim When the Need Arises**

Insurance claims can be confusing, but having an established tribal risk management program will simplify the process. When establishing a process for filing a claim, ensure that the following actions are incorporated into your plan. And, even if a carrier denies your claim at first, don't take no for an answer! You might be able to work out a deal.

Gather and review all insurance policies. While you may think that only one policy is applicable to your current situation, it is always a good practice to reexamine your other policies. For example, a claim could trigger an occurrence policy from one year and a claims-made policy from a different year. The easiest — and most avoidable — way to leave money on the table, is to overlook a policy that entitles the tribe to coverage.

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

Gather and preserve all documents. When placing your claim, the insurance carrier will likely have a million questions and request everything related to the tribe's claim. Use your in-house counsel and outside counsel to not only protect the tribe's confidential information, but also to strategize the best way to handle the tribe's claim, including, but not limited to: submitting the claim, preserving relevant documents, asserting attorney-client privilege or work product for certain documents and entering into confidentiality or clawback agreements.

Communicate with your carrier. Establish a good working relationship with the tribe's carrier. Keep the carrier apprised of new developments and needs within the tribe, as well as the broker and claims handler. When a claim has been filed, ensure that the tribe provides regular litigation updates to the carrier. A clear line of communication will help both the carrier and tribe resolve any outstanding claims more expeditiously.

### **Conclusion**

Although some loss is unavoidable, there are fairly inexpensive ways to minimize the risk for every tribe.

You only need to think ahead. Establish a comprehensive risk management program for your tribe that reflects its risk tolerance before it experiences a catastrophic loss. Then use your dream team to minimize loss and maximize recovery. At the end of the day, your tribe might not be “immune,” but it can certainly be well-protected.

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