THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

AMERIND RISK MANAGEMENT CORPORATION, Plaintiff, vs. MYRNA MALATERRE, CAROL BELGARDE, and LONNIE THOMPSON, Defendants.	)	No: 4:07-cv-00059-DLH-CSM

AMERIND's Memorandum in Support of Motion for Summary Judgment

Introduction

The resolution of this case turns on the following three issues:

- **Tribal Court Subject Matter Jurisdiction.** Under Federal law, a tribal court lacks subject matter jurisdiction over a claim against a nonmember of the tribe unless the nonmember consents to jurisdiction through a contract or other consensual relationship with the tribe or its members and the claim arises out of that contract. AMERIND, a nonmember federally regulated nonprofit risk pool, entered into a contract to indemnify the Turtle Mountain Housing Authority against liability associated with federally subsidized housing. Although Malaterre, who is not a party to the contract, voluntarily agreed to dismiss her liability claim against the Housing Authority with prejudice, and therefore, could not obtain a judgment against the Housing Authority, the tribal court nevertheless allowed her to sue AMERIND for the Housing Authority's alleged liability based on a misinterpretation of federal law. Did AMERIND consent to tribal court jurisdiction in this circumstance?

- **Federal Direct Action**. 24 C.F.R. § 1000.136(a) requires an Indian housing authority receiving federal housing funds to provide insurance "to indemnify the *recipient* against loss from fire, weather, and liability claims" associated with federally subsidized housing. The tribal court interpreted this language to imply an obligation of the Housing Authority to indemnify the *public* at large so that Malaterre could sue AMERIND directly for damages even though she voluntarily dismissed the Housing Authority with prejudice. Does the plain language of § 1000.136(a) require the Housing Authority to provide insurance to indemnify members of the public, rather than the Housing Authority, so that they can assert direct action claims against federally regulated nonprofit risk pools?

- **Federal Conflict Preemption.** Congress and HUD seek to achieve two statutory and regulatory objectives relating to insuring federally subsidized Indian housing: (1) to encourage Indian tribes to provide low cost self-insurance coverage for housing through nonprofit risk pools, as an alternative to expensive or unavailable commercial insurance, and (2) to preempt State and local laws preventing these pools from doing so. The tribal court ruled that federal law requires the Housing Authority to indemnify the public at large rather than the Housing Authority even when the Housing Authority itself sustains no loss. Does federal law preempt the tribal court's ruling because it prevents Congress and HUD from achieving these objectives?

Facts

In January 2003, Myrna Malaterre and Carol Belgarde, who are members of the Turtle Mountain Band of Chippewa Indians, sued the Turtle Mountain Housing Authority in the Tribal

Court.[1] In their suit, they claimed that the Housing Authority's failure to install smoke detectors in a house leased to another tribal member caused their decedents to die from smoke inhalation.

In September 2003, Malaterre and Belgarde along with Lonnie Thompson, a tribal member who suffered a smoke inhalation related injury (collectively "Malaterre"), amended their complaint to join AMERIND, a nonmember federal corporation,[2] as a defendant. Malaterre apparently did so because AMERIND administers a federally regulated nonprofit risk pool[3] providing self-insurance coverage to the Housing Authority for federally subsidized housing under the Native American Housing and Self-Determination Act of 1996 ("NAHASDA").[4]

Under § 203(c) of NAHASDA, each Indian tribe is required to "maintain adequate insurance coverage for housing units that are owned or operated or assisted with grant amounts provided under this chapter."[5] The federal regulation implementing this section, 24 C.F.R. § 1000.136(a), permits tribes receiving federal funds to satisfy § 203(c) either by (a) buying commercial insurance, or (b) self-insuring federally funded housing "in adequate amounts to indemnify the recipient against loss from fire, weather, and liability claims."[6] Because most Indian tribes are too small to separately self-insure, the Department of Housing and Urban Development ("HUD") allows them to combine their federal funds to self-insure federally

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[1] *Malaterre v. AMERIND Risk Mgmt. Corp.*, 373 F. Supp. 2d 980, 981 (D. N.D. 2005).

[2] 373 F. Supp. 2d at 985 (noting that AMERIND's status "as a non-member limits tribal court jurisdiction."); *see also* Charter of Incorporation of AMERIND Risk Management Corporation (approved by the Secretary of the Interior on February 27, 2004 under the Indian Reorganization Act of 1934, 25 U.S.C.A. § 477 (West 2001).

[3] 24 C.F.R. § 1000.139 (2008), current electronic version at http://edocket.access.gpo.gov/cfr_2008/aprqtr/pdf/24cfr1000.139.pdf.

[4] 25 U.S.C.A. §§ 4101-4212 (West 2001).

[5] *Id.* § 4133(c) (West 2001).

[6] 24 C.F.R. § 1000.136(a) (2008), current electronic version at http://edocket.access.gpo.gov/cfr_2008/aprqtr/pdf/24cfr1000.136.pdf.

subsidized housing through nonprofit risk pools. In this way, HUD also finances self-insurance coverage for federally subsidized Indian housing. Incorporated since 1986, AMERIND administers a nonprofit risk pool under federal regulations[7] on behalf of Indian tribes and Indian housing authorities. Since 1987, HUD has approved AMERIND for this purpose, initially under the United States Housing Act of 1937, and then under NAHASDA.[8]

A Membership Subscription Agreement[9] and a Scope of Coverage Agreement[10] govern the relationship between the Housing Authority and AMERIND. As required by 24 C.F.R. § 1000.136(a), the Scope of Coverage Agreement obligates AMERIND to indemnify the Housing Authority for "damages [it] is legally obligated to pay for . . . personal injuries."[11] Malaterre is not a party to these Agreements.[12] Nor has she ever entered into any contractual or other arrangement with AMERIND.[13] AMERIND maintains no offices, employees, or other physical presence on the reservation.[14] Until she filed her suit, AMERIND had never heard of her.[15]

In 2004, while her case was pending in the Tribal Court, Malaterre sued AMERIND separately in federal court seeking a declaration of coverage for her claim against the Housing Authority.[16] This Court, however, dismissed the action, requiring Malaterre to exhaust the

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[7] *Id*. § 1000.139.

[8] *See* Ltr. from Michael Liu, Asst. Sec., Public & Indian Housing, HUD, to Kent Paul, CEO, AMERIND Risk Mgmt. Corp. (July 31, 2003) ("HUD Approval Letter"), attached as Ex. A.

[9] *See* Membership Subscription Agreement (Feb. 1, 2000), attached as Ex. B.

[10] *See* Scope of Coverage Agreement between AMERIND Risk Mgmt. Corp. and Turtle Mountain Hsg. Auth. ("Scope of Coverage Agreement"), attached as Ex. C.

[11] Scope of Coverage Agreement, Business Liability Coverage Part, at 1.

[12] *See* Decl. of Kent E. Paul ¶ 7 (June 19, 2008) ("Paul Declaration"), attached as Ex. D.

[13] Paul Declaration ¶ 8.

[14] Paul Declaration ¶ 7.

[15] Paul Declaration ¶¶ 9-10.

[16] *Malaterre*, 373 F. Supp. 2d at 981.

remedies she initiated in the Tribal Court.[17]

After returning to the Tribal Court, Malaterre and the Housing Authority—without AMERIND's knowledge[18]—stipulated to the dismissal of the Housing Authority "with prejudice."[19] The Tribal Court approved the stipulation, and allowed Malaterre to proceed directly against AMERIND.[20] Because a stipulated dismissal with prejudice is deemed adjudication on the merits,[21] AMERIND moved to dismiss Malaterre's suit.

AMERIND also challenged the Tribal Court's subject matter jurisdiction to adjudicate Malaterre's claim against it under federal law.[22] Despite the stipulated dismissal with prejudice, the Tribal Court exercised its jurisdiction because AMERIND did business with the Housing Authority on the reservation.[23]

On interlocutory appeal, the Tribal Court of Appeals also ignored the stipulated dismissal with prejudice and affirmed the Tribal Court.[24] In doing so, the Tribal Court of Appeals ruled

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[17] *Id*. at 984.

[18] Paul Declaration ¶ 11.

[19] *See* Pls.' Stipulation to Dismiss Defendant Turtle Mountain Housing Authority with Prejudice, *Malaterre v. Turtle Mountain Hsg. Auth. & AMERIND Risk Mgmt. Corp*., No. 03-10102 (Turtle Mt. Tribal Ct. Oct. 24, 2005) ("Malaterre Stipulation"), attached as Ex. E.

[20] Malaterre Stipulation at 2.

[21] *See* 8 *Moore's Federal Practice* § 41.34[6][c] n. 49 (3d ed. 2008) ("When a stipulation is made with prejudice, the voluntary dismissal has the same res judicata effect as a final adjudication on the merits favorable to the defendant.") (citing cases).

[22] *See* Order Denying Mot. to Dismiss at 2, *Malaterre v. Turtle Mountain Hsg. Auth. & AMERIND Risk Mgmt. Corp*., No. 03-10102 (Turtle Mt. Tribal Ct. Dec. 15, 2005) ("Tribal Court Order"), attached as Ex. F.

[23] Tribal Court Order at 2.

[24] *See* Memorandum Decision, *AMERIND Risk Mgmt. Corp. v. Malaterre*, No. TMAC-06-003 (Turtle Mt. Ct. App. July 5, 2007) ("Tribal Appellate Decision"), attached as Ex. G.

that the Housing Authority's obligation under 24 C.F.R. § 1000.136(a) was really an obligation to insure the public at large, including Malaterre.[25]

The Tribal Court has set the trial of this case to begin on November 18, 2008.

With remedies now fully exhausted, AMERIND brings this action in this Court to review the Tribal Court's unlawful exercise of subject matter jurisdiction and misinterpretation of federal law.

Argument

I. As a matter of federal law, the Tribal Court lacks subject matter jurisdiction over Malaterre's claim against AMERIND, a nonmember of the tribe.

In *Strate v. A-1 Contractors*, the Supreme Court held that "tribal courts may not entertain claims against nonmembers" arising on non-tribal land within an Indian reservation.[26] A few years later, the Court, in *Nevada v. Hicks*, extended this holding to prohibit tribal courts from adjudicating claims against nonmembers arising on tribal land.[27]

In each of these cases, the Court applied the "general rule" of *Montana v. United States*—"that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe"[28]—to strike down the exercise of tribal court jurisdiction. The Court has since explained that *Montana*'s general rule "pertains to subject-matter, rather than merely personal, jurisdiction, since it turns upon whether the actions at issue in the litigation are regulable by the tribe."[29]

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[25] Tribal Appellate Decision at 10.
[26] 520 U.S. 438, 445-46 (1997).
[27] 533 U.S. 353, 368 (2001).
[28] 450 U.S. 544, 565 (1981).
[29] *Hicks*, 533 U.S. at 368 n. 8.

Montana's general rule "remains in effect"[30] unless the tribe demonstrates that one of the following two narrow exceptions (also recognized in *Montana*) apply:

> [First,] a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [Second,] a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[31]

As shown below, neither exception applies here.

A. Montana's first exception does not apply here because AMERIND did not enter into a consensual relationship with Malaterre and her claim does not arise out of a consensual relationship with AMERIND.

In *Atkinson Trading Co., Inc. v. Shirley*, the Supreme Court explained that a "consensual relationship *must stem from* 'commercial dealing, contracts, leases, or other arrangements'" with an Indian tribe or its members.[32] For the following three reasons, there is no consensual relationship here between Malaterre and AMERIND:

First, AMERIND has never transacted any business of any kind with Malaterre. Unlike *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, wherein a nonmember bank "not only transacted with a corporation of conspicuous tribal character, but also formed concrete commercial relationships with the Indian owners of that corporation,"[33] AMERIND has never entered into any kind of similar arrangement with Malaterre, and until Malaterre filed her claim against the Housing Authority, AMERIND had never heard of her.[34]

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[30] *MacArthur v. San Juan County*, 497 F.3d 1057, 1070 (10th Cir. 2007).

[31] *Montana*, 450 U.S. at 565.

[32] 532 U.S. 645 (2001) (quoting *Montana*, 450 U.S. at 565) (emphasis added).

[33] 491 F.3d 878, 886 (8th Cir. 2007).

[34] Paul Declaration ¶¶ 8-10.

Second, Malaterre is not a party to the Scope of Coverage Agreement between AMERIND and the Housing Authority. By its terms, the Agreement explicitly states, "This Scope of Coverage document is a contract between you [Housing Authority] and us [AMERIND]."[35] Malaterre is not mentioned anywhere in the Agreement.[36]

Third, the law of insurance confirms that Malaterre is neither a party nor a third-party beneficiary of the Scope of Coverage Agreement between AMERIND and the Housing Authority. Without a contract or statute providing otherwise, a third party cannot bring a direct action against an insurance company to enforce an insurance policy between the company and the policyholder because the third party lacks privity with the company.[37] This rule bars Malaterre's direct action claim against AMERIND unless she can show that the Scope of Coverage Agreement or a statute provides otherwise.

Malaterre, however, cannot do so because nothing in the Scope of Coverage Agreement allows third parties to bring a direct action against AMERIND. In fact, the Scope of Coverage Agreement plainly states that AMERIND is only obligated to indemnify the Housing Authority for "damages [it] is legally obligated to pay for . . . personal injuries."[38] But Malaterre voluntarily dismissed the Housing Authority from her liability suit with prejudice.

Moreover, because Malaterre's direct-action claim does not arise out of AMERIND's consensual relationship with the Housing Authority, the required nexus is missing; therefore, the Tribal Court lacks subject matter jurisdiction. In *Atkinson Trading Co., Inc., v. Shirley*, the Supreme Court expressed this principle, stating that "[a] nonmember's consensual relationship in

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[35] Scope of Coverage Agreement, Basic AMERIND Agreement, at 91; Paul Declaration ¶ 9.
[36] *See* Scope of Coverage Agreement generally.
[37] 7A Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 104.2 (3d ed. 2005).
[38] *See* Scope of Coverage Agreement, Business Liability Coverage Part, at 111.

one area . . . does not trigger tribal civil authority in another.'"[39] The Court there struck down a tribal hotel occupancy tax on guests of a nonmember hotel within the reservation because the tribe could not show a "nexus" between the tribe's tax on hotel guests and the tribe's consensual relationship with the hotel.[40] In other words, "[s]imply entering into some kind of relationship with the tribes or their members does not give the tribal courts general license to adjudicate claims involving a nonmember."[41] Rather the claim must arise out of the appropriate consensual relationship.[42]

The Court applied these limiting principles in *Strate*, wherein a third party sued a nonmember company in tribal court for fatal injuries to her husband from a car accident with an employee of the company on the reservation. Although the company had a contract with the tribe, the Court ruled that the tribal court lacked jurisdiction over the claim against the nonmember because the third-party was neither a party to the contract nor did her claim arise out of that contract:

> Although A-1 was engaged in subcontract work on the reservation, and therefore had a 'consensual relationship' with the Tribes, Fredericks was not a party to the subcontract, and the Tribes were strangers to the accident.[43]

As in *Strate* and *Atkinson Trading*, there is no nexus here between Malaterre's direct-action claim and AMERIND's consensual relationship with the Housing Authority because (a) her direct-action claim is based on the Tribal Court's misinterpretation of 24 C.F.R. §

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[39] 532 U.S. 645, 656 (2001).

[40] *Atkinson Trading*, 532 U.S. at 656-57.

[41] *Smith v. Salish Kootenai College*, 434 F. 3d 1127, 1131 (9th Cir. 2006) (en banc) (citation omitted).

[42] *Strate*, 520 U.S. at 457

[43] *Id*.

1000.136(a)—a federal regulation independent of that relationship, and (b) the Housing Authority is a stranger to Malaterre's claim against AMERIND.

Additionally, here, even if a nexus somehow existed under the Scope of Coverage Agreement, Malaterre voluntarily severed that nexus when she dismissed the Housing Authority from the suit with prejudice.

B. Montana's second exception does not apply here because AMERIND's conduct—merely entering into a contract to self-insure federally subsidized housing—does not imperil the tribe's political integrity, economic security, or health and welfare.

In *Atkinson Trading*, the Supreme Court explained that the second exception to *Montana*'s general rule "is only triggered by *nonmember conduct* that threatens the Indian tribe, it does not broadly permit the exercise of civil authority wherever it might be considered 'necessary' to self-government."[44] The nonmember's conduct, however, "must be *demonstrably serious and must imperil* the political integrity, the economic security, or the health and welfare of the tribe."[45]

In *Strate*, the Court also refused to apply the second exception to justify the exercise of tribal court jurisdiction over a fatal car accident on a reservation highway involving an employee of a nonmember company even though it may have involved careless driving:

> Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana*'s second exception requires no more, the exception would severely shrink the rule.[46]

[44] 532 U.S. at 657 n. 12 (emphasis in original).

[45] *Id*. at 659 (quoting *Brendale v. Confederated Tribes & Bands of the Yakima Nation*, 492 U.S. 408, 431 (1989)) (emphasis added).

[46] *Strate*, 520 U.S. at 457-58.

To get around these limitations, Malaterre asserts that AMERIND "through its acts and omissions, caused actual injury or damage within the . . . reservation, where such injury or damage was reasonably foreseeable."[47] AMERIND is at a loss to explain how it caused "actual" injury or damage when its only "conduct" was merely entering into a contract to administer self-insurance coverage on behalf of the Housing Authority for federally subsidized housing. Malaterre's complaints, filed in both the Tribal Court and this court, contradict her assertion—both complaints alleged that the Housing Authority was the sole tort-feasor, not AMERIND.[48] If reckless driving on a reservation highway cannot satisfy the second exception, then surely the act of simply entering into an agreement with an Indian tribe cannot do so. Otherwise, as noted by the Supreme Court, the second exception would "severely shrink" the *Montana* rule. Moreover, AMERIND maintains no offices, employees, or other physical presence on the reservation.[49]

Not surprisingly then, the Tribal Court allowed Malaterre's direct-action claim to proceed against AMERIND based on a misinterpretation of a federal regulation, 24 C.F.R. § 1000.136(a), rather than on AMERIND's consensual relationship with the Housing Authority. Under the pretext that this case posed a "difficult public policy issue . . . due to the deaths of two tribal members and the serious injuries to another," the Tribal Court unlawfully exercised its jurisdiction to find a remedy—any remedy—to compensate Malaterre even though she voluntary dismissed the Housing Authority from the case.[50] For this, the Tribal Court turned to the federal

[47] Pls.' Answer at ¶ XII.

[48] *See* Pls.' First Amended Compl. ¶ 10 (Sept. 5, 2003), *Malaterre v. Turtle Mountain Hsg. Auth. & AMERIND Risk Mgmt. Corp.* (Turtle Mountain Tribal Ct.); Pls.' Compl. for Declaratory Judgment ¶ 18 (July 1, 2004), *Malaterre v. AMERIND Risk Mgmt. Corp.*, 373 F. Supp. 2d 980, 981 (D. N.D. 2005).

[49] Paul Declaration ¶ 7.

[50] Tribal Appellate Decision, at 5.

regulation. But the regulation, as explained below, was never intended either to benefit third-parties, including Malaterre, or allow them standing to enforce a contract of self-insurance between an Indian tribe and a federally regulated nonprofit risk pool.

II. 24 C.F.R. § 1000.136(a), upon which the Tribal Court based its exercise of jurisdiction, does not create a right of direct action in third parties.

A. NAHASDA requires tribes to provide insurance to protect the financial stability of their federally subsidized housing programs, not the public.

The Tribal Court exercised jurisdiction over Malaterre's direct-action claim based on a misinterpretation of 24 C.F.R. § 1000.136(a). But neither NAHASDA nor § 1000.136(a) requires Indian tribes to provide insurance or self-insurance to protect the public from loss. A review of the language of NAHASDA and its implementing regulations demonstrate the point.

Section 203(c) of NAHASDA, for instance, requires "each recipient [to] maintain adequate insurance coverage *for housing units* that are owned and operated or assisted with grant amounts provided under this chapter."[51] Section 102(c)(5)(B) of NAHASDA further requires each recipient to certify in its one-year plan "that [it] will maintain adequate insurance coverage *for housing units* that are owned and operated or assisted with grant amounts provided under this chapter, in compliance with such requirements as may be established by the Secretary."[52] Nothing in NAHASDA manifest express Congressional intent to saddle the Housing Authority with the overarching obligation of insuring the public. The statute is focused on protecting federally subsidized housing.

Similarly, the regulations implementing § 203(c) do not extend any rights to the public. For instance, 24 C.F.R. § 1000.136(a) requires Indian tribes, as federal grant recipients, either to

[51] 25 U.S.C. § 4l33(c) (West 2001) (emphasis added).

[52] *Id*. § 4112(c)(5)(B) (West 2001).

provide commercial insurance or self-insure federally funded housing "in adequate amounts to indemnify the *recipient* against loss from fire, weather, and liability claims for all housing units owned or operated by the recipient." Similarly 24 C.F.R. § 1000.138 requires tribes to provide adequate insurance in an amount sufficient "to protect the financial stability of the *recipient's* IHBG program."[53] Conspicuously absent from these provisions is any obligation to insure the *public* at large.

The goal of NAHASDA and its implementing regulations is to protect the federal and tribal government's interest in federally subsidized housing. This understanding is further confirmed by the common meaning of "liability insurance," as "an agreement to cover a loss resulting from the *insured's* liability to a third party, such as a loss incurred by a driver who injures a pedestrian."[54]

Despite this plain language, Malaterre asserts that § 1000.136(a) imposes a federal obligation to protect the public. As shown, however, a plain reading of NAHASDA and its implementing regulations do not support this interpretation.

The biggest problem with the Tribal Court's misinterpretation of federal law is that it would require the tribe to indemnify a third-party in a situation when that party has dismissed the tribe from the case with prejudice. This ruling conflicts with the clear wording of 24 C.F.R. § 1000.136(a), which requires a tribe to provide insurance to protect itself from loss. The consequence of the Tribal Court's misguided interpretation is catastrophic—Congress will now be forced to provide more money to cover the amorphous and unknown risks and expenses of

[53] 24 C.F.R. §1000.138 (emphasis added).

[54] Black's Law Dictionary 817 (8th ed. 2004).

direct actions against federally regulated risks pools and insurers in addition to the money it already provides for protecting Indian housing.

B. Nothing in NAHASDA or its implementing regulations authorizes a direct action.

Nothing in NAHASDA or its implementing regulations either explicitly or impliedly creates a direct action right. To be sure, the "right to direct action does not flow from a statute requiring compulsory insurance, without explicit creation of direct action rights."[55]

Following this principle, Congress has authorized direct actions in three statutes: (1) the Resource Conservation and Recovery Act ("RCRA"),[56] (2) the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"),[57] and (3) 28 U.S.C.A. § 1364 (West 2006). In each statute, Congress explicitly created a right of direct action in third parties, stating in both RCRA and CERCLA, respectively, that "any claim arising from conduct for which evidence of financial responsibility must be provided . . . may be asserted directly against any guarantor providing evidence of financial responsibility."[58] And in 28 U.S.C. § 1364, Congress gave the federal courts jurisdiction over "any civil action commenced by any person against an insurer who by contract has insured [members of diplomatic missions and their families] against personal injury, death or property damage."

When compared to these statutes, § 203(c) of NAHASDA[59] and its implementing regulation, 24 C.F.R. § 1000.136(a), fall short. The Tribal Court admitted as much when it ruled that § 203(c) does not manifest congressional intent to confer a direct-action right on third

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[55] 7A Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* §104.18 (3d ed. 2005).
[56] 42 U.S.C.A. § 6924(t)(2) (West 2003).
[57] 49 U.S.C.A. § 9608(c)(1)-(2) (West 2005).
[58] *Id*. § 6924(t)(2); *id*. § 9608(c)(1)-(2).
[59] 25 U.S.C.A § 4133(c).

parties: "[t]his language, in and of itself, does not meet the significant hurdles confronting a party seeking to mount a direct action against an insurance carrier."[60]

Further, nothing in 24 C.F.R. § 1000.136(a), which implements § 203(c), manifests the required congressional or agency intent to confer a right of direct action on third parties. As noted, that regulation merely requires an Indian tribe, as a grant recipient under NAHASDA, to provide insurance or self-insurance "to indemnify the *recipient* against loss by fire, weather or liability claims."[61] The Tribal Court simply ignored the explicit regulatory purpose behind the insurance requirement as set forth in 24 C.F.R. § 1000.138—"to protect the financial stability of the *recipient's* IHBG program"—and impermissibly allowed third parties to sue nonprofit risk pools and insurers directly even if the third-parties voluntarily dismiss the tort-feasor from their liability suits.[62]

Instead, the Tribal Court latched on to the regulation's reference to "liability claims," stating that HUD must have "contemplated" third-party claims for which "the mandated insurance is therefore designed to cover the losses of tenants occasioned by the negligence of IHA employees."[63] As shown, the plain language of NAHASDA and its implementing regulations does not support this interpretation.

Even if NAHASDA somehow makes an Indian tribe directly liable to the public, Malaterre still could not enforce that liability unless Congress created a remedy. Private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the

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[60] Tribal Appellate Decision, at 9.

[61] 24 C.F.R § 1000.136(a).

[62] *See* 24 C.F.R. § 1000.138 (2008) (emphasis added), current electronic version at http://edocket.access.gpo.gov/cfr_2008/aprqtr/pdf/24cfr1000.138.pdf.

[63] Tribal Appellate Decision at 10.

statute to determine whether it manifests Congressional intent to create not just a private right but also a private remedy.[64] The intent to create a private remedy must be clearly expressed: where "a statute by its terms grants no private rights to any identifiable class" there is no private right of action.[65] The text of the statute must be "phrased in terms of the persons benefited."[66]

As explained above, NAHASDA speaks only of insurance to protect the financial stability of Indian housing authorities that receive federal housing funds. The fact that federal grant recipients are to provide liability insurance does not create a right of action in the public against insurers and certainly not against nonprofit risk pools approved and regulated by HUD.

III. Federal law preempts the Tribal Court's direct-action ruling because it requires the tribe to insure the public against liability and therefore it conflicts with federal law, which requires the tribe to insure itself against liability.

In *Fidelity Federal Savings & Loan Association v. de la Cuesta*, the Supreme Court held that State and local law is preempted when it "actually conflicts" with a federal regulation, and that an actual conflict occurs "[1] when compliance with both federal and state regulations is a physical impossibility, or [2] when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[67] Stated differently, the issue is "whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require

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[64] *Alexander v. Sandoval*, 532 U.S. 275, 286-287 (2001) (citations omitted); *Freeman v. Fahey*, 374 F.3d 663, 665 (8th Cir. 2004).

[65] *Touche Ross & Co. v. Redington*, 442 U.S. 560, 576 (1979).

[66] *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002) (*citing Cannon v. University of Chicago*, 441 U.S. 677, 692, n. 13 (1979)).

[67] 458 U.S. 141, 153 (1982) (citations and internal quotations omitted); *Wuebker v. Wilbur-Ellis Co.*, 418 F.3d 883, 887 (8th Cir. 2005) (*citing Chapman v. Lab One*, 390 F.3d 620, 624-25 (8th Cir. 2004)).

nonrecognition."[68] The Eighth Circuit elaborated that a "court will find that an agency intends for a [federal] regulation to preempt state law when a regulation conflicts with a state law."[69]

In this case, Malaterre asserts that the Tribal Court's direct-action ruling is "precedent" under tribal law.[70] The Tribal Court itself contradicted this assertion by basing its decision on an interpretation of a federal regulation, 24 C.F.R. § 1000.136(a). To the extent that the Tribal Court's ruling is somehow based on tribal law, federal law preempts it for two reasons.

First, the Tribal Court's direct-action ruling requiring an Indian tribe *to indemnify* the *public against loss* directly conflicts with the express terms of § 1000.136(a) requiring the tribe to provide insurance or to self-insurance "*to indemnify the recipient against loss*." Second, allowing a right of direct-action would severely undermine Congress' and HUD's objectives to: (a) encourage Indian tribes to provide low cost self-insurance coverage for housing through nonprofit risk pools, as an alternative to commercial insurance, and (b) preempt State and local laws preventing nonprofit risk pools from self-insuring federally funded housing, by requiring the tribes to provide a completely new form of sweeping no-fault insurance coverage in cases where the tribes are not liable.

A. The Tribal Court's direct-action ruling makes it impossible for the Housing Authority and AMERIND to comply with federal law.

The federal regulation at issue here, 24 C.F.R. § 1000.136(a), plainly requires any Indian tribe receiving federal housing funds to "provide adequate insurance . . . to indemnify the

[68] *Hisquierdo v. Hisquierdo*, 439 U.S. 578, 583 (1979).

[69] *Wuebker*, 418 F.3d at 887.

[70] *See* Pls.' Answer ¶ XX ("[E]xisting precedent in the Turtle Mountain Tribal Court allows a direct action against the plaintiff.").

recipient against loss from fire, weather, and liability claims" associated with federally subsidized housing.

The Tribal Court, by contrast, misinterpreted this regulation to require the Housing Authority to provide insurance to indemnify the *public* against loss so as to allow members of the public, such as Malaterre, to sue AMERIND directly even though she voluntarily dismissed the Housing Authority from her liability claim. The Tribal Court's ruling thus directly conflicts with federal law because it dictates who is to be indemnified by federally required insurance coverage for housing contrary to the express language of federal law and regulations. In this situation, neither the Housing Authority nor AMERIND can physically comply with both tribal and federal law.

That Congress and HUD intended to restrict the benefit of insurance to Indian tribes is further shown by the text of both NAHASDA and its implementing regulations. Section 203(c) of NAHASDA, for instance, requires an Indian tribe to "maintain adequate insurance coverage *for housing units* that are owned and operated by or assisted with grant amounts."[71] Similarly, 24 C.F.R. § 1000.136(b) does not require insurance coverage "if there is no risk of loss or exposure to the *recipient*." Further, 24 C.F.R. § 1000.138 explains the purpose of the insurance is to "protect the financial stability of the recipient's IHBG program." The Act and its implementing regulations plainly show intent to protect only federal housing grant recipients, such as the Housing Authority, from liability, not the public.

[71] 25 U.S.C. § 4133(c).

B. The Tribal Court's direct-action ruling stands as an obstacle to achieving federal objectives designed to protect nonprofit risk pools from state and local laws preventing them from providing low cost coverage for Indian housing.

In legislation and regulation, Congress and HUD have sought to achieve two objectives related to insuring federally subsidized Indian housing: (1) to encourage Indian tribes to provide low cost self-insurance coverage for housing through nonprofit risk pools, as an alternative to expensive or unavailable commercial insurance; and (2) to preempt State and local laws preventing these pools from providing low cost self-insurance coverage for Indian housing. Congress' and HUD's historical treatment of nonprofit risk pools show this intent. Because the Tribal Court's direct-action ruling stands as an obstacle to Congress' effort to achieve these federal objectives, it is preempted.

In 1988, Congress amended the United States Housing Act of 1937 ("1937 Act") to create a new program for Indian housing.[72] The 1937 Act permitted HUD to enter into contracts with the tribes, known as Annual Contribution Contracts ("ACCs"), to finance Indian housing.[73] These ACCs, among other things, required the tribes to provide insurance coverage for housing from a commercial insurance company on a competitive bidding basis.

HUD's "practice," however, was to buy one master insurance policy for the tribes and another for the Public Housing Authorities ("PHAs") directly from commercial insurance companies.[74] The tribes and PHAs would then reimburse HUD for the cost of this coverage from their federal housing funds.

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[72] 42 U.S.C. §§ 1437aa-1437ee, *repealed by* 25 U.S.C.A. § 4181 (West 2001).

[73] *Id.* § 1437bb(b), *repealed by* 25 U.S.C.A. § 4181.

[74] 71 Fed. Reg. 11,464 (proposed Mar. 7, 2006).

From 1982 to 1987, the commercial insurance companies throughout the country fell on hard times. During this period, 97 insurance companies were either "liquidated, put into receivership or conservatorship, or . . . issued cease and desist orders by various State insurance departments."[75] Some of these companies "wrote coverage for PHAs, depriving the PHAs of payments to cover their losses and the return of unearned premiums."[76]

This national crisis also impaired HUD's ability to find low cost commercial insurance coverage for Indian tribes and PHAs. In 1986, HUD "reject[ed] the only bid submitted for the master policy because it offered no liability insurance, had only limited property coverage, and was exorbitantly expensive."[77]

As an alternative, HUD encouraged the tribes and PHAs to create nonprofit risk pools to self-insure federally subsidized housing.[78] To provide an incentive, HUD contributed additional federal funds to the tribes and PHAs to create and fund nonprofit risk pools.[79]

In 1987, with HUD's urging and funds, the tribes formed AMERIND as a nonprofit risk pool.[80] Shortly thereafter, HUD approved AMERIND as a nonprofit risk pool.[81] HUD also waived the ACCs' competitive-bidding requirement for insurance.

In the early 1990s, HUD wanted to rescind the competitive-bidding-waiver for insurance. But the PHAs and the tribes resisted, asking Congress to prevent HUD from doing so. In the Departments of Veterans Affairs and Housing and Urban Development, and Independent

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[75] 54 Fed. Reg. 52,000, 52004 (Dec. 19, 1989).
[76] *Id.*
[77] 71 Fed. Reg. at 11,464.
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *See* HUD Approval Letter.

Agencies Appropriations Act of 1991 ("1991 HUD Appropriations Act"), Congress prohibited HUD from imposing competitive-bidding requirements for insurance.[82]

In the 1991 HUD Appropriations Act, Congress sought to protect the ability of tribes and PHAs to provide low cost insurance coverage for housing through nonprofit risk pools from "burdensome and counterproductive" federal laws. The Senate Appropriations Committee, for example, stated:

> In the case of general liability insurance coverage, *the Committee actively supported steps by public housing authorities to establish captive entities when due to market conditions such commercial*[] *coverage was either unavailable or exorbitantly expensive*. * * *
>
> The Committee is concerned, however, that the Department's currently proposed actions may unwittingly jeopardize continued availability of insurance coverage from alternative sources, such as captives, and over the longer term may lead to higher costs.[83]

The Conference Committee expressed this same desire:

> In the mid-1980s, many public housing authorities were unable to obtain liability or property insurance or were required to pay very large premiums to obtain minimal coverage. In response to that crisis, a number of public housing authorities banded together and formed nonprofit insurance pools and risk retention groups . . . . All of these groups were formed at the encouragement, and in many instances, with the assistance of the Department of Housing and Urban Development. When HUD approved the formation and operating plans of these groups, it granted a waiver from the requirement that insurance be procured only by competitive bidding to public housing authorities that joined such groups. *These groups have been extremely successful in providing low cost insurance*[] *to public and Indian housing authorities.* The Department has proposed a regulation that would revoke the waiver. The committee on

[82] Pub. L. No. 101-507, 104 Stat. 1351, 1369-70 (1990) (providing in part, "Notwithstanding any other provision of law, regulation or other requirement, the Secretary shall not require any . . . Indian housing authority to seek competitive bids for the procurement of any line of insurance when such . . . authority purchases such line of insurance from a nonprofit insurance entity, owned and controlled by . . . Indian housing authorities, and approved by the Secretary.").

[83] Sen. Rep. No. 101-474, 73-4 (Sept. 26, 1990) (emphasis added).

> conference agrees that the waiver should be continued and has included language to permit that.[84]

One year later, a dispute arose over whether Congress intended the waiver to be permanent. To settle the dispute, Congress enacted 42 U.S.C. § 1436c, restating its intent "that these nonprofit, PHA and IHA-controlled insurance entities are providing an effective and cost-saving alternative to conventional insurance carriers."[85] Accordingly, § 1436c now preempts both federal and state laws requiring Indian tribes and PHAs to competitively procure insurance coverage for federally subsidized housing.[86]

As directed by § 1436c, HUD issued regulations governing the approval and oversight of nonprofit risk pools.[87] The history of § 1436c thus highlights Congress's intent to protect nonprofit risk pools from predatory federal, state, and local regulation, and to encourage the tribes to use these pools to provide low cost self-insurance for federally funded housing.

In 1996, Congress enacted NAHASDA—a separate Indian housing block grant ("IHBG") program for federally subsidized housing. Section 203(c) of NAHASDA requires an Indian tribe "to maintain adequate insurance coverage for housing units that are owned or assisted with grant amounts provided under this chapter."[88]

In 1998, HUD issued regulations implementing § 203(c). Consistent with § 1436c, these regulations allowed Indian tribes to: (a) provide self-insurance coverage for federally subsidized

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[84] H.R. Conf. Rep. No. 101-900, 28 (Oct. 18, 1990) (emphasis added).

[85] Sen. Rep. No. 102-107, 77 (July 11, 1991).

[86] *See* 42 U.S.C. § 1436c.

[87] *See* 24 C.F.R. § 950.190 (Indian housing risk pools) *repealed by* 24 C.F.R. Part 1000, 48 Fed. Reg. 12,334 (Mar. 12, 1998); 24 C.F.R. § 965.205 (public housing risk pools).

[88] 25 U.S.C. § 4133(c).

housing through nonprofit risk pools,[89] and (b) procure coverage from these pools without the burden of state and federal competitive bidding laws.[90] HUD approved AMERIND under these regulations as well.[91]

Recently in 2007, HUD expanded federal preemption beyond competitive-bidding, preempting "conflicting state laws and widely varying and costly requirements" that impair the ability of nonprofit risk pools to "provide insurance for IHBG-assisted housing."[92] With this new regulation, HUD sought to achieve the following objectives:

- to ensure that the "requirement of adequate insurance is met in a cost-effective manner;"
- to establish "national guidelines" to prevent "a repeat of the 1986 situation where there will be no insurance coverage available for housing;"
- to remove "duplicative or conflicting state and local requirements [that] would cause IHBG recipients to divert scarce IHBG funds for affordable housing and limit the recipients' options;"
- to promote tribal self-sufficiency "by permitting tribal recipients to use nonprofit [risk pools] as an alternative risk financing mechanism to reduce the cost and expense of maintaining adequate insurance coverage" for housing; and
- to establish "uniform national federal regulation of nonprofit [risk pools]" to "maximize[] the economies of scale for Indian tribes in different states and foster[] efficient pooling of self-insurance risks by

[89] 24 C.F.R. § 1000.138 (stating that "Insurance is adequate if it is a purchased insurance policy from . . . a plan of self-insurance in an amount that will protect the financial stability of the recipient's IHBG program.").

[90] *Id.* (stating that tribes "may purchase the required insurance without regard to competitive selection procedures from nonprofit insurance entities which are owned and controlled by recipients and which have been approved by HUD").

[91] *See* HUD Approval Letter.

[92] 24 C.F.R. § 1000.139(g); Paul Declaration ¶ 14 (stating that AMERIND is working with HUD for approval as a nonprofit risk pool under 24 C.F.R. § 1000.139).

> removing the possibility of duplicative or conflicting state requirements."[93]

These objectives reflect Congress' original goals in the 1991 HUD Appropriations Act and in 42 U.S.C. § 1436c. When read in light of this legislative and regulatory background, the Tribal Court's direct-action ruling stands as an obstacle to achieving these federal objectives in the following ways:

First, the direct-action ruling will dramatically drive up the cost of self-insurance coverage for housing for both Congress and the tribes because it will be necessary to cover the increased costs and risks of direct actions against federally regulated risk pools even when, as here, the Housing Authority cannot be found liable;

Second, the tribes will be forced to divert scarce federal housing funds to pay for the additional coverage required by the direct-action ruling;

Third, Congress and HUD will be forced to appropriate more money to the tribes to pay for the additional coverage required by the direct-action ruling;

Fourth, the direct-action ruling will impair AMERIND's ability to provide low cost coverage for housing;

Fifth, the direct action ruling subjects federally regulated nonprofit risk pools to a multitude of conflicting tribal court direct-action suits in the 500+ tribal jurisdictions[94] where they operate, thereby undermining national uniformity that HUD intended to achieve; and

Finally, commercial insurance companies and federally regulated nonprofit risk pools will be discouraged from providing coverage for Indian housing if the direct-acting ruling is allowed to stand.

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[93] 71 Fed. Reg. at 11,465.

[94] Paul Declaration ¶ 5.

Conclusion

As a matter of federal law, the Tribal Court lacks subject matter jurisdiction because Malaterre is not a party to the contract between AMERIND and the Housing Authority, and her direct action claim does not arise out of that contract. Furthermore, the claim asserted by Malaterre is based on a misinterpretation of federal law. Federal housing law and regulations plainly require a tribe to provide insurance to protect itself, not the public, and do not provide a direct action against a federally regulated nonprofit risk pool. Finally, the consequences of allowing direct actions destroy the objectives that Congress and HUD sought to achieve. Federal law, therefore, preempts the Tribal Court's ruling.

For the foregoing reasons, AMERIND asks this Court to grant its motion for summary judgment.

Dated June 24, 2008.

Respectfully submitted,

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Certificate of Electronic Service

I certify that on June 24, 2008, I filed the foregoing AMERIND's Memorandum in Support of Motion for Summary Judgment electronically with the Clerk of the Court through ECF, and that ECF will send a Notice of Electronic Filing to the following:

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