THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

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

AMERIND'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

1. Federal law renders the Tribal Court's decision here null and void because Malaterre cannot show a nexus between her direct-action claim and a consensual relationship with AMERIND.

Under the general rule of *Montana v. United States*,[1] tribal courts lack subject matter jurisdiction over claims against nonmembers of the tribe who enter tribal lands.[2] Thus "any judgment as to the nonmember is necessarily null and void."[3] Although its jurisdiction over nonmembers is "presumptively invalid,"[4] the tribal court may still exercise jurisdiction if one of the following limited exceptions to *Montana*'s general rule applies:

(a) The first exception requires a "nexus"[5] between the regulation imposed by the tribal court and a relationship with the nonmember in the form of commercial dealing, contract,

[1] 450 U.S. 544 (1981).
[2] *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 128 S. Ct. 2709, 2718 (2008).
[3] *Id*. at 2717.
[4] *Id*. at 2720 (citation omitted).
[5] *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656 (2001).

lease, or other similar arrangement in which "the nonmember has consented, either expressly or by his actions."[6]

(b) The second exception requires conduct by the nonmember that "'imperil[s] the subsistence' of the tribal community," or that has "catastrophic consequences" for tribal self-government.[7]

"These exceptions are 'limited' ones, and cannot be construed in a manner that would 'swallow the rule' or 'severely shrink it.'"[8]

In her response brief, Malaterre contends that AMERIND is subject to the Tribal Court's jurisdiction because her "claims are based, in part, on the insurance policy issued to TMHA by AMERIND which covers activity and units located on the reservation."[9] Malaterre's contention, however, does not satisfy either the first or second exception to *Montana*'s general rule for the following reasons:

- ***Malaterre never established a consensual relationship with AMERIND through commercial dealing, contract, lease, or other arrangement with AMERIND.*** Tellingly, Malaterre, in her response brief, does not mention any consensual relationship with AMERIND other than AMERIND's interaction with the Housing Authority.[10] But "[a] nonmember's consensual relationship in one area . . . does not trigger tribal civil authority in another—it is not 'in for a penny, in for a Pound.'"[11] Thus AMERIND's consensual relationship with the Housing

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[6] *Plains Commerce Bank*, 128 S. Ct. at 2724.
[7] *Id.* at 2726.
[8] *Id.* at 2720.
[9] Defs.' Resp. to Mot. Summ. J. 15 (Aug. 29, 2008).
[10] *Id*. at 14-15 (stating that "AMERIND interacts regularly with TMHA employees and holds annual meetings for those employees").
[11] *Atkinson Trading Co.*, 532 U.S. at 656.

Authority cannot serve as a surrogate for Malaterre's lack of consensual relationship with AMERIND.

- ***Malaterre dismissed all her personal injury claims against the Housing Authority with prejudice.*** Because AMERIND consented only to "cover damages [that the Turtle Mountain Housing Authority] is legally obligated to pay for . . . personal injury,"[12] Malaterre's dismissal relieved the Housing Authority of any legal obligation to her for personal injury claims, and thereby any coverage obligation of AMERIND to the Housing Authority under the Scope of Coverage Agreement. AMERIND certainly did not consent to provide a blanket guarantee for Malaterre's improvident litigation decisions. Malaterre's direct-action claim thus cannot arise out of the Scope of Coverage Agreement.

- ***Malaterre is not a party to the Scope of Coverage Agreement between AMERIND and the Housing Authority.*** Indeed, the Agreement never refers to any third party, including Malaterre, but by its terms is exclusively between the Housing Authority and AMERIND. This is consistent with the general rule of insurance law within the United States that an injured party lacks "privity" of contract with the insurer and therefore cannot sue the insurer directly unless a statute or policy provision provides otherwise.[13]

- ***Malaterre's direct-action claim is instead based on a misreading of 24 C.F.R. § 1000.136(a), a federal regulation, from which the Tribal Court purported to deduce "what***

[12] *See* Scope of Coverage Agreement between AMERIND and Turtle Mountain Housing Authority, Business Liability Coverage Part, at 111, attached as Exhibit C to AMERIND's Memo. in Support of Mot. Dismiss (June 24, 2008).

[13] *Holmes' Appleman on Insurance* vol. 22, ch.142, § 142.1[A], 477-78 (2d ed., LexisNexis 2007).

HUD intended."[14] There is thus no nexus between Malaterre's direct-action claim and any consensual relationship in which AMERIND could be said to have consented.

- ***AMERIND's agreement to only cover damages that the Housing Authority is legally obligated to pay does not imperil tribal subsistence or have catastrophic consequences for tribal self-government because the Housing Authority agreed to (and federal law requires) this limitation.*** To be sure, the Housing Authority consented to this very arrangement in the Agreement. Federal law also requires the Housing Authority to provide coverage "to indemnify the recipient against from loss from fire, weather, and liability claims"[15] to "protect the financial stability of the recipient's IHBG program."[16] There is no federal requirement to provide coverage for third parties such as Malaterre. The federal coverage obligation simply protects the Federal Government's interest in federally subsidized housing. If there is any harm here, it is self-inflicted—Malaterre voluntarily and knowingly (with her attorney's advice) chose to dismiss all her personal injury claims against the Housing Authority. Such harm cannot be said to imperil tribal subsistence or have catastrophic consequences for tribal self-government.

Malaterre thus fails to meet the heavy "burden"[17] for establishing one of the exceptions to *Montana*'s general rule.

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[14] *See AMERIND Risk Management Corp. v. Malaterre*, No. TMAC-06-003, slip op., at 10 (Turtle Mt. Ct. App. July 5, 2007), attached as Exhibit G to AMERIND's Memo. in Support of Mot. Dismiss (June 24, 2008).

[15] 24 C.F.R. § 1000.136(a) (2008).

[16] *Id*. § 1000.138.

[17] *Plains Commerce Bank*, 128 S. Ct. at 2720 ("The burden rests on the tribe to establish one of the exceptions to *Montana*'s general rule . . . .").

2. This Court has no obligation to defer to the Tribal Court's interpretation of federal law in this case.

The "federal courts are the final arbiters of federal law."[18] So when a tribal court applies federal law, "the tribal court's determinations are accorded no deference and are reviewed by the district court de novo."[19]

In her response brief, Malaterre contends that this Court must defer to the Tribal Court's direct-action decision because she is "relying upon established tribal court law, *St. Claire v. Turtle Mountain Chippewa Casino*, in naming AMERIND as a defendant in the tribal court action."[20]

The Tribal Court, however, did not apply tribal law. The Tribal Court's decision here is revealing. After saying that it was "now turn[ing] to the real dispositive issue in this case,"[21] the Tribal Court engaged in an analysis of federal law—the Native American Housing Assistance and Self-Determination Act and its implementing regulations—purporting to determine "what HUD intended": [22]

> *HUD clearly contemplated* that third parties would have potential claims against IHA recipients of NAHASDA monies when the IHA and its employees were negligent. The mandated insurance [under federal law] is therefore designed to cover the losses of tenants occasioned by the negligence of IHA employees.[23]

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[18] *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990).

[19] *Prescott v. Little Six, Inc.*, 387 F. 3d 753, 757 (8th Cir. 2004) (*citing Duncan Energy v. Three Affiliated Tribes*, 27 F. 3d 1294, 1300 (8th Cir. 1994)).

[20] Defs.' Resp. to Mot. Summ. J. 15 (Aug. 29, 2008).

[21] *See AMERIND Risk Management Corp. v. Malaterre*, No. TMAC-06-003, slip op., at 8 (Turtle Mt. Ct. App. July 5, 2007), attached as Exhibit G to AMERIND's Memo. in Support of Mot. Dismiss (June 24, 2008).

[22] *Id*., at 10.

[23] *Id*.

Not once did the Tribal Court refer to a tribal ordinance, constitution, or other tribal law in reaching this erroneous conclusion. The Tribal Court instead based its decision squarely on 24 C.F.R. § 1000.136(a)—a federal regulation implementing NAHASDA, a federal statute.

Even the *St. Claire* case itself, arguably the precedent for the Tribal Court's direct-action decision here, makes clear that these rulings are not based on tribal law:

> Admittedly, these [direct-action] cases involve state courts and one federal court applying federal common law, precedents which are not binding upon this Court. However, the Turtle Mountain Tribal Code *permits this Court to apply state or federal law when tribal law is silent* on the subject at hand.[24]

In sum, neither in *St. Claire* nor in this case did the Tribal Court ever once refer to, apply, or interpret tribal law. Instead, the Tribal Court here referred to, applied, and interpreted NAHASDA and its implementing federal regulations. Surely in these circumstances, this Court is not obligated to defer to the Tribal Court's decision.

3. The public policy rationale for the Tribal Court's decision, which Malaterre urges this Court to consider, does not apply here.

The public policy rationale for the Tribal Court's decision does not apply here either. In her response brief, Malaterre urges this Court to consider the public policy rationale behind the Tribal Court's direct action decision—that when a tribal entity is required by federal law to buy insurance, the tribal entity's sovereign immunity should not bar an injured third party from pursuing a direct action against the tribal entity's insurance company.[25] According to Malaterre, the Tribal Court's decision allowing a direct action in these circumstances alleviates the

[24] *St. Claire v. Turtle Mountain Chippewa Casino,* No. TMAC 97-013, at 7 (Turtle Mt. Tribal Ct. App., May 11, 1998) (emphasis added) (footnote omitted), attached as Exhibit 7 to Defs.' Resp. to Mot. Summ. J. (Aug. 29, 2008).

[25] Defs.' Resp. to Mot. Summ. J. 6-7 (Aug. 29, 2008).

"harshness of the sovereign immunity doctrine" by providing a remedy for an injured third party.[26]

This rationale, however, does not apply here for three reasons:

First, the Tribal Council, as Malaterre acknowledges, had waived the Housing Authority's sovereign immunity two years before she voluntarily dismissed her claims against the Housing Authority, thus removing sovereign immunity as a barrier to her suit and thereby the need for a direct action.[27]

Second, in spite of the sovereign immunity waiver, Malaterre inexplicably dismissed all her personal injury claims against the Housing Authority with prejudice.

Finally, the Tribal Court itself, in its direct-action decision here, explicitly acknowledged that the "[sovereign immunity] issue is not directly presented by this case, however, because the Plaintiff voluntarily dismissed the Housing Authority from this suit."[28]

These facts are a far cry from the circumstances that apparently motivated the rationale for the Tribal Court's direct-action decision in *St. Claire*. If there is any unfairness here, as Malaterre claims, it is not because of sovereign immunity, it is because she knowingly and voluntarily gave up the remedy provided by the Tribal Council.

Malaterre thus should not be rewarded for her attorney's apparent high stakes gamble to inject the existence of a liability insurance policy into the lawsuit by suing AMERIND separately as a named party. *Cf. Ulrigg v. Jones*, 274 Mont. 215, 225, 907 P.2d 937, 943 (Mont. 1995)

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[26] *Id*. at 7.

[27] Turtle Mountain Tribal Council Res. No. TMBC 2454-07-03 (July 18, 2003), attached as Exhibit 39 to Defs.' Resp. to Mot. Summ. J. (Aug. 29, 2008).

[28] *See AMERIND Risk Management Corp. v. Malaterre*, No. TMAC-06-003, slip op., at 7 (Turtle Mt. Ct. App. July 5, 2007), attached as Exhibit G to AMERIND's Memo. in Support of Mot. Dismiss (June 24, 2008).

(prohibiting the joinder of the insurer as a defendant based on the potential prejudice to the insurer and the insured).

4. AMERIND did not know about or consent to the Stipulation of Dismissal until Malaterre presented it to the Tribal Court for approval.

In his declaration, Kent Paul, AMERIND's CEO, stated that the Housing Authority and Malaterre had entered into the Stipulation "[w]ithout AMERIND's knowledge or approval."[29] In her response, Malaterre accuses Mr. Paul of "submitting a false affidavit" for which she threatens to seek sanctions and attorney fees.[30] For this, Malaterre apparently relies on a letter to AMERIND's counsel that listed several options, including a stipulation, and a fax cover sheet from the Housing Authority's counsel referring to a stipulation.[31]

As explained, however, in the declaration of the Housing Authority's counsel, AMERIND did not know that Malaterre and the Housing Authority were negotiating a stipulation to dismiss her claims against the Housing Authority.[32] Moreover, AMERIND's counsel did not see or hear of the stipulation until Malaterre presented it at a hearing where the Tribal Court approved it over AMERIND's objections.[33] There is thus no basis for Malaterre to claim that Mr. Paul's declaration is false.

5. Federal law preempts the Tribal Court's direct-action decision.

Malaterre's response to AMERIND's federal preemption argument does not rebut the fact that the Tribal Court's direct-action decision stands as an impermissible obstacle to the

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[29] Decl. of Kent Paul ¶ 11 (June 19, 2008), attached here as Exhibit D to AMERIND's Mot. for Summ. J. (June 24, 2008).

[30] Defs.' Resp. to Mot. Summ. J. 6 (Aug. 29, 2008).

[31] *See* Ex. 20 and Ex. 23, attached to Defs.' Resp. to Mot. for Summ. J. (Aug. 29, 2008).

[32] Decl. of David Heisterkamp II ¶ 4 (Sept. 10. 2008), attached as Exhibit 1.

[33] *See* Transcript of Proceedings, at 3, attached as Exhibit 27 to Defs.' Resp. to Mot. for Summ. J. (Aug. 29, 2008).

objectives of federal law as expressed in 24 C.F.R. § 1000.136 and §1000.138, which is to enable the federally subsidized Indian housing authorities to obtain affordable insurance to protect their financial stability. If left standing, the Tribal Court's decision will allow each tribe to define the meaning of the coverage required by federal law, negating HUD's objective of achieving national uniformity. This will require a tribe-by-tribe assessment of the meaning of the federal insurance requirement that will increase AMERIND's cost of assessing and underwriting risk. This added cost, of course, would have to be passed on to the Indian housing authorities and Congress, which allocates federal funds to the tribes for insurance coverage.

In addition, the Tribal Court's decision will make a federally regulated risk pool (such as AMERIND) liable when an insured Indian housing authority is not. This is directly contrary to HUD's objective of protecting the financial stability of Indian housing authorities, as set forth in 24 C.F.R. § 1000.138, because it will inevitably increase the amount Indian housing authorities (and Congress) will have to pay for coverage for federally subsidized housing.

The Tribal Court's decision is also preempted because it seeks to intrude into an area occupied by federal law. As noted in AMERIND's opening brief, the history of federal regulation of Indian housing insurance is long and comprehensive, and these federal regulations leave no room for either State or tribal regulation.

Finally, there is a direct conflict between 24 C.F.R. § 1000.136(a), the federal regulation requiring coverage to indemnify the Housing Authority, a federal grantee, against loss, and the Tribal Court's direct-action decision requiring AMERIND, a federally regulated risk pool, to pay losses for which there can be no loss because of Malaterre's stipulated dismissal of the Housing Authority with prejudice.

CONCLUSION

This Court should grant AMERIND's motion for summary judgment for the following reasons:

- The Tribal Court lacks subject matter jurisdiction over Malaterre's direct-action claim against a nonmember of the tribe under federal law.
- The Tribal Court's direct-action decision is based on a misinterpretation of federal law.
- Federal law preempts Malaterre's direct-action claim because it interferes with overriding federal objectives.

Dated September 11, 2008.

Respectfully submitted,

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Certificate of Electronic Service

I certify that on September 11, 2008, I filed the foregoing AMERIND's Reply 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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