No. 08-3949

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

AMERIND RISK MANAGEMENT CORPORATION,
Plaintiff-Appellant,

v.

MYRNA MALATERRE, CAROL BELGARDE,
and LONNIE THOMPSON,
Defendants-Appellees.

Appeal from the United States District Court
for the District of North Dakota

Honorable Daniel L. Hovland
D.C. No. 4:07-cv-059

AMERIND'S OPENING BRIEF

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SUMMARY OF THE CASE

Amerind Risk Management Corporation is a federally regulated nonprofit self-insurance risk pool. The Department of Housing and Urban Development approved Amerind to provide low cost insurance coverage for federally subsidized housing operated nationwide by Indian housing authorities under the Native American Housing Assistance and Self-Determination Act (NAHASDA), 25 U.S.C. §§ 4101–4212.

In this case, a tribal court interpreted a HUD regulation implementing NAHASDA to broaden Amerind's coverage obligation from a duty "to indemnify the recipient [housing authority] against loss" under 24 C.F.R. § 1000.136(a) to a duty "to cover the losses of tenants" and other third parties. Under this interpretation, the tribal court permitted tribal members—who had previously released the housing authority from liability—to sue Amerind directly for the housing authority's actions.

The tribal court's interpretation unlawfully expands Amerind's and the Indian housing authorities' federal coverage obligations well beyond § 1000.136(a)'s plain language and purpose. Amerind asserts that tribal direct actions are preempted by NAHASDA's objectives protecting nonprofit risk pools from costly and burdensome requirements, and by *Montana v. United States*, 450

U.S. 544 (1981), divesting tribal court jurisdiction over claims against nonmembers of the tribe.

The district court erred by adopting the tribal court's interpretation of federal law without any review.

In light of the national significance of this case, Amerind requests oral argument.

CORPORATE DISCLOSURE STATEMENT

Amerind Risk Management Corporation is a non-profit federal corporation with no parent corporation and no stockholders.

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JURISDICTIONAL STATEMENT

After exhausting tribal court remedies, Amerind brought a declaratory judgment action against Appellees Myrna Malaterre, Carol Belgarde, and Lonnie Thompson (collectively, "Malaterre") in the United States District Court for the District of North Dakota, challenging the tribal court's jurisdiction to adjudicate direct action claims against Amerind in violation of federal law. Jurisdiction in the district court was based on 28 U.S.C. § 1331.

On November 14, 2008, the district court denied Amerind's motion for summary judgment and granted summary judgment *sua sponte* for Malaterre.

Amerind filed this timely appeal on December 9, 2008. This Court's jurisdiction is based on 28 U.S.C. § 1291, which provides for jurisdiction over a final judgment of the district court.

STATEMENT OF THE ISSUES

(1) Whether the Tribal Court exceeded its jurisdiction under *Montana v. United States* by adjudicating a direct action claim by Appellees against Amerind, a nonmember of the tribe, when Appellees had no contractual or other consensual relationship with Amerind and Amerind played no part in the factual circumstances that gave rise to the claim.

(2) Whether the decision of the Tribal Court allowing a direct action against Amerind, if viewed as an interpretation of federal law, is invalid because it is based on a misinterpretation of federal law.

(3) Whether the decision of the Tribal Court allowing a direct action against Amerind, when viewed as an expression of tribal law, is preempted by the Native Housing Assistance and Self-Determination Act and its implementing regulations.

(4) Whether the District Court erred in concluding that the presence of a conformity to tribal law clause in the coverage document issued by Amerind deprives Amerind of the right to challenge the Tribal Court's decision under federal law on the basis of the issues raised in (2) and (3) above.

STATEMENT OF THE CASE

This case concerns federal limits on the authority of tribal courts allowing actions that unlawfully expand the insurance coverage and financial obligations of Indian housing authorities and federally regulated nonprofit self-insurance risk pools operating under federal law.

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. Docket No. 25, Ex. 1. In their complaint, they alleged that the Housing Authority had "negligently maintained" housing on the Turtle Mountain Reservation in North Dakota. *Id*., ¶ 10. Eight months later, they, along with Lonnie Thompson, amended the complaint to join Amerind as a defendant. J.A. 000109–0112. Amerind—a HUD approved nonprofit self-insurance risk pool—provides liability coverage to the Housing Authority for housing financed under NAHASDA, 25 U.S.C. §§ 4101–4212. J.A. 000032-080.

Amerind challenged the subject matter and personal jurisdiction of the Tribal Court. J.A. 000115 ("Amerind hereby asserts that this court lacks personal and subject matter jurisdiction . . . [and] moves this Court for dismissal of this action based on lack of jurisdiction.").

While this case was pending, Malaterre sued Amerind separately in the United States District Court for the District of North Dakota for a declaration of

coverage of her claim under the policy between Amerind and the Housing Authority. *Malaterre v. Amerind Risk Mgmt. Corp.*, 373 F. Supp. 2d 980, 981 (D. N.D. 2005). The district court, however, ordered Malaterre to exhaust tribal court remedies. *Id*.

Four months later, Malaterre, with the Tribal Court's approval, dismissed the Housing Authority "with prejudice" leaving Amerind as the only defendant in the case. J.A. 000084 ("Plaintiffs Myrna Malaterre, Carol Belgarde, and Lonnie Thompson . . . hereby agree and stipulate to the dismissal, with prejudice, of Defendant Turtle Mountain Housing Authority from this action.").

Amerind then moved the Tribal Court to dismiss Malaterre's amended complaint because NAHASDA did not permit direct action claims against Amerind and Amerind did not waive its sovereign immunity from suit. J.A. 000123–0137. The Tribal Court, however, rejected Amerind's challenge. J.A. 000086–087.

On interlocutory appeal to the Tribal Court of Appeals, Amerind argued, among other things, that NAHASDA, 25 U.S.C. § 4133(c), and its implementing regulations, 24 C.F.R. §§ 1000.136, 1000.138, did not permit direct action claims against federally regulated nonprofit self-insurance risk pools, like Amerind. J.A. 0000123–0136. These regulations require Indian tribes, as federal grant recipients, to procure insurance from federally approved nonprofit self-insurance risk pools or

commercial insurance companies to "indemnify the recipient [Housing Authority] against loss from fire, weather and liability claims," 24 C.F.R. § 1000.136(a), "*in an amount that will protect the financial stability of the recipient's [Housing Authority's] IHBG [Indian Housing Block Grant] program*." 24 C.F.R. § 1000.138 (emphasis added). The Tribal Court of Appeals, however, held that HUD

> designed [these regulations] to cover the losses of tenants occasioned by the negligence of IHA employees.

J.A. 000097. The Tribal Court of Appeals thus held that Malaterre could bring a tort claim directly against Amerind even though the Tribal Court had previously dismissed the Housing Authority with prejudice such that the Housing Authority could not be found liable. *Id*.

After the Tribal Court of Appeals' decision, Amerind brought this declaratory judgment against Malaterre in the United States District Court for the District of North Dakota, alleging that NAHASDA and *Montana v. United States*, 450 U.S. 544 (1981), respectively, preempted or divested the Tribal Court's authority to adjudicate direct action claims against nonmembers of the tribe, like Amerind. J.A. 000008–012. Amerind moved for summary judgment on the grounds that (1) the Tribal Court lacked subject matter jurisdiction to adjudicate direct action claims against nonmembers of the tribe under *Montana*, (2) NAHASDA preempted tribal court direct action claims, and (3) the Tribal Court misinterpreted NAHASDA and its implementing regulations. Docket Nos. 17, 20.

The district court denied Amerind's motion, and granted summary judgment *sua sponte* in favor of Malaterre. Add. 15 n. 4. The district court concluded that the Tribal Court had jurisdiction over Amerind under the consensual-relationship exception to *Montana* because Amerind had (1) entered into an insurance policy "for the benefit of the Turtle Mountain Indian Reservation, the Turtle Mountain Housing Authority, and members of the tribe," Add. 15, and (2) agreed in that policy "to be bound by laws of the tribe, the Turtle Mountain Tribal Court, and the Turtle Mountain Tribal Court of Appeals." *Id*. The district court refused to reach Amerind's other federal law arguments by relying on the presence of a conform-to-law clause in the policy. *See generally* Add. 1–15.

This timely appeal followed. Docket No. 36.

STATEMENT OF THE FACTS

In 1986, HUD provided federal funds to the National American Indian Housing Council ("NAIHC") to form and capitalize a nonprofit self-insurance risk pool to provide low cost property and liability coverage for federally subsidized housing. 71 Fed. Reg. 11464 (Mar. 7, 2006). HUD did so because it could no longer find a commercial insurance company willing to provide affordable coverage for federally subsidized housing operated by Indian tribes. *Id*.

Later that year, NAIHC incorporated Amerind Risk Management Corporation as a nonprofit self-insurance risk pool. *Id*. Since 1997, HUD has

approved Amerind "as a means of protecting federally subsidized housing units." *Id*. Each year, the tribes, as members of the risk pool, contribute a portion of their federal funds, which are then combined, to self-insure housing-related risks. *See e.g.*, Add. 10 ("The Turtle Mountain Housing Authority paid the annual insurance premiums from federal grants which were provided to the Housing Authority to maintain Indian housing on the reservation."). As required by federal law, Amerind administers the risk pool on a nonprofit basis. 24 C.F.R. § 1000.138. Amerind provides property and liability coverage to about 230 members, mostly Indian housing authorities, which collectively represent over 500 Indian tribes throughout the United States. J.A. 000081, ¶ 5.

To become a member of the risk pool, the tribe or Indian housing authority must execute a membership subscription agreement. J.A. 000019–031. Amerind then issues each member a policy, called a scope of coverage agreement, providing the terms and conditions of coverage. *See e.g.*, J.A. 000031–080.

In early 2002, Amerind issued a policy to the Turtle Mountain Housing Authority to cover liability claims arising out of federally subsidized housing on the Turtle Mountain Reservation. *Id*. Under the policy, Amerind is obliged to indemnify the Housing Authority against these claims, but only if it becomes "legally obligated to pay" those claims:

> We cover damages a covered person is legally obligated to pay for advertising injury, personal injury or property damage which take

> place anytime during the term of coverage and are caused by an occurrence, unless stated otherwise or an exclusion applies.

J.A. 000054.

Sometime in December 2002, a fire broke out at one of the houses leased by the Housing Authority to a tribal member. Add. 2. Tragically, smoke from the fire injured Lonnie Thompson and claimed the lives of Myrna Malaterre's adult son and Carol Belgarde's teenage daughter, who were at the house. *Id*.

In January 2003, Malaterre and Belgarde sued the Housing Authority in the Tribal Court, alleging that the Housing Authority had failed to install smoke detectors in the house. Docket No. 25, Ex. 1. In July 2003, the Turtle Mountain Tribal Council passed a resolution waiving the Housing Authority's sovereign immunity from suit to the extent of insurance coverage. J.A. 000172. Two months later, Malaterre, Belgarde, and Thompson (collectively, "Malaterre") amended their complaint to add Amerind as a defendant. J.A. 000109–0112.

While the case was pending, Malaterre sued Amerind separately in federal court for a declaration of coverage of her claim against the Housing Authority. *Malaterre v. Amerind Risk Mgt. Corp.*, 373 F. Supp. 2d 980, 981 (D.N.D. 2005). The federal court, however, ordered Malaterre to exhaust tribal court proceedings. *Id*.

A few months later, on Malaterre's stipulation, the Tribal Court dismissed the Housing Authority from the case "with prejudice," leaving Amerind as the sole

defendant in the case. J.A. 000084–85. The Tribal Court approved the dismissal over Amerind's objection. Docket No. 25, Ex. 27, at pp.7-8. Unbeknownst to Amerind, the Housing Authority and Malaterre had been negotiating a dismissal for some time. Docket No. 25, Ex. 27. Pursuant to the dismissal, the Housing Authority could never be legally obligated to pay damages within the meaning of the policy.

Amerind then moved the Tribal Court to dismiss the suit against it, in part, because there was no duty to indemnify the Housing Authority given that Malaterre had already dismissed the Housing Authority from liability. J.A. 000123–0137. The Tribal Court rejected Amerind's motion. J.A. 000086–087.

On interlocutory appeal, the Tribal Court of Appeals affirmed the Tribal Court. J.A. 000088–098.

SUMMARY OF THE ARGUMENT

At its core, this case requires an interpretation of 24 C.F.R. § 1000.136(a), a federal housing regulation implementing the Native American Housing Assistance and Self-Determination Act of 1996. Under § 1000.136(a), an Indian housing authority is required to provide "insurance in adequate amounts to *indemnify the recipient [Indian housing authority] against loss* from fire, weather, and liability claims" (emphasis added). In accordance with this regulation, Amerind, a federally regulated nonprofit self-insurance risk pool, provides this insurance coverage on behalf of Indian housing authorities that have combined their federal funds to meet this requirement.

A tribal court interpreting this regulation, held that § 1000.136(a), however, was "designed to cover *the losses of tenants [and other third parties]* occasioned by the negligence of IHA employees." J.A. 000097. The tribal court thus permitted tribal members to bring a tort action directly against Amerind for the actions of an Indian housing authority, which these tribal members, with the tribal court's approval, had voluntarily dismissed with prejudice. *Id*.

Based on this interpretation, the financial and coverage obligations of both Amerind and Indian housing authorities have been expanded exponentially to cover tribal members and other third parties throughout the United States even in cases where Indian housing authorities are not liable.

Upon this Court's determination hangs the extent of Amerind's and Indian housing authorities' financial obligations under federal law.

Amerind contends that, under the general rule of *Montana v. United States*, Indian tribal courts lack subject matter jurisdiction over claims against nonmembers of the tribe, like Amerind. Although Amerind had a contract with the housing authority, the district court misapplied the consensual relationship exception to *Montana's* general rule by extending that contract to tribal members and other third parties when in fact they were not parties to the contract and their claim did not arise out of that contract.

If the Court rejects this contention, the tribal court's ruling, which the district court erroneously adopted, is nonetheless invalid for two reasons:

First, the tribal court misinterpreted 24 C.F.R. § 1000.136(a), which requires insurance coverage to be provided only for Indian housing authorities, not for tribal members or other third parties.

Second, federal law preempts the tribal court's ruling because it results in a diversion of federal housing funds for non-federal purposes thereby obstructing federal objectives to provide affordable housing.

Upon this *de novo* review, Amerind requests this Court to reverse the district court's decision granting summary judgment *sua sponte* in favor of Malaterre. *Nord v. Kelly*, 520 F. 3d 848, 853 (9th Cir. 2008) ("We review *de novo* the district

court's grant of summary judgment, applying the same standards as the district court.").

ARGUMENT

I. Under *Montana v. United States*, the Tribal Court lacked subject matter jurisdiction over Amerind, a nonmember of the tribe.

In *Montana v. United States*, 450 U.S. 544, 565 (1981), the Supreme Court established "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."

The Court has since held that, under *Montana*'s general rule, tribal courts lack subject matter jurisdiction to adjudicate claims against nonmembers of the tribe even if those claims arise on tribal land within an Indian reservation. *Strate v. A-1 Contractors*, 520 U.S. 438, 445-46 (1997) ("tribal courts may not entertain claims against nonmembers" arising on land owned by nonmembers within a reservation); *Nevada v. Hicks*, 533 U.S. 353, 368 (2001) (tribal court may not adjudicate claims against nonmembers arising on tribal lands). Thus, "[i]f the tribal court is found to lack such jurisdiction, any judgment as to the nonmember is necessarily null and void." *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 128 S. Ct. 2709, 2717 (2008).

Montana's general rule "remains in effect," *MacArthur v. San Juan County*, 497 F.3d 1057, 1070 (10th Cir. 2007), unless the tribe shows that one of two exceptions apply:

> [1] 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.
>
> [2] 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.

Montana, 450 U.S. at 565 (citations omitted). But "[t]hese exceptions are 'limited' ones, and cannot be construed in a manner that would 'swallow the rule' or 'severely shrink' it." *Plains Commerce Bank*, 128 S. Ct. at 2720 (citations omitted).

This Court reviews *de novo* the district court's determination of "the extent to which an Indian tribe has the power to compel a non[member] to submit to the civil jurisdiction of a tribal court." *Nord v. Kelly*, 520 F. 3d at 852.

Under the principles enunciated in *Montana* and its progeny, the Tribal Court lacked subject matter jurisdiction over Amerind. Accordingly, the district court erred in adopting the holding of the Tribal Court.

A. The district court erred in applying the first Montana exception because Amerind never entered into a consensual relationship with the tribe nor with its members.

Montana's first exception—the consensual relationship exception—does not allow a tribal court to exercise jurisdiction over a nonmember of the tribe unless two limiting conditions are satisfied:

First, the nonmember must form a separate consensual relationship with an Indian tribe or tribal member based on "commercial dealing, contracts, leases, or other arrangements." *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 655 (2001).

Second, the tribe's or tribal member's claim must arise directly out of that consensual relationship. *Id.* at 656 ("*Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a *nexus* to the consensual relationship itself.") (emphasis added).

As explained below, the district court erred in applying the first exception because Amerind never entered into a consensual relationship with Malaterre, and Malaterre's direct action claim did not arise out of the policy between Amerind and the Housing Authority.

(1) Amerind never entered into a consensual relationship with Malaterre.

The record is undisputed that Amerind never formed a separate consensual relationship with Malaterre.

First, until Malaterre filed the direct action claim in the Tribal Court, Amerind had no previous dealings with her. J.A. 000082, ¶¶ 9–10. This fact is undisputed. Malaterre can point to no record evidence to the contrary.

Second, Malaterre is not a party to the policy between Amerind and the Housing Authority, which is the only contract at issue in this case. The policy

states, "This Scope of Coverage document is a contract between you [Housing Authority] and us [Amerind]." J.A. 000034. Further, the policy provides coverage only for the Housing Authority, not for third parties. *See* J.A. 000054 ("We cover damages a covered person is legally obligated to pay for advertising injury, personal injury or property damages."); J.A. 000039 (defining a "covered person" as "the Tribe, IHA [Indian Housing Authority], or TDHE [Tribally Designated Housing Entity]."). Finally, the policy disclaims coverage for third parties, like Malaterre. *Id*. ("None of the following is a covered person: . . . tenants and participants of mutual help home ownership programs.").

The district court, however, held that "Amerind entered into a consensual relationship with 'the tribe or its members' when it agreed to insure the Turtle Mountain Housing Authority against personal injury and property loss." Add. 10. But a nonmember's contract with a tribe does not automatically accrue to the benefit of tribal members or third parties:

> A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another area—it is not 'in for a penny, in for a pound.'

Atkinson Trading Co., 532 U.S. at 656 (citation omitted) (nonmember's license to do business with tribe did not support tribe's tax on nonmember's customers); *see also Strate*, 520 U.S. at 457 (nonmember's construction contract with tribe did not

support tort claim against nonmember because claimant was not a party to the contract and tribe was not a party to tort claim).

Instead, the nonmember must have a separate contract or other consensual relationship with a tribal member. "Simply 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." *Smith v. Salish Kootenai College*, 434 F. 3d 1127, 1138 (9th Cir. 2006) (en banc). The controlling question is "whether there is a contract or consensual relationship between [a nonmember] and . . . the tribal member." *Phillip Morris USA, Inc., v. King Mountain Tobacco Co., Inc.*, 2009 WL 115589 * 7 (9th Cir. Jan. 20, 2009) (nonmember tobacco company's marketing contracts with businesses owned by tribal members did not support tribal member's claim against nonmember for declaratory relief in tribal court).

The record shows that there is no separate contract or anything evincing a consensual relationship between Amerind and Malaterre, as required by *Montana*'s first exception. Further, as stated, Malaterre was not a party to the policy between Amerind and the Housing Authority. Although the district court suggested that tribal members, including Malaterre, were beneficiaries of the policy, the policy, as noted above, expressly disclaims any intent to benefit third parties. It is a well-established principle of insurance law that injured parties do not automatically become third party beneficiaries of insurance policies. *See* G. Richard Poehner,

Injured Plaintiff's Right to Bring Action Against Defendant's Insurer, in *Holme's Appleman on Insurance 2d* vol. 22, ch. 142, § 142.1(F), 491 (Lexis Nexis 2003) ("An injured party does not become a third party beneficiary of an insurance policy merely because the policy recites that the insurer will directly compensate persons who are situated similarly to the third party. If there is any doubt that the injured party is a third party beneficiary, the doubt must be resolved against the injured party."). The district court's overly broad formulation of the consensual-relationship exception thus swallows *Montana*'s general rule that tribal courts may not adjudicate claims against nonmembers.

The district court erred in holding that a consensual relationship between a nonmember and an Indian tribe somehow transmogrifies into a consensual relationship between the nonmember and a tribal member or other third party. The district court error is highlighted when one considers a basic precept of *Montana*, *i.e.*, that in order to apply the first exception, there must be a voluntary commercial, dealing, lease or other arrangement between the nonmember and the tribal member. In the instant case, there is no relationship whatsoever much less a consensual relationship between Amerind and Malaterre. The judgment of the district court must therefore be reversed.

(2) Even if the policy between Amerind and the Housing Authority somehow extends to Malaterre, her claim did not arise out of that relationship.

Even if the policy between Amerind and the Housing Authority somehow extends to Malaterre, the "existence of a consensual relationship is not alone sufficient to support tribal jurisdiction." *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc*., 491 F. 3d 878, 886 (8th Cir. 2007), *rev'd on other grounds*, 128 S. Ct. 2709 (2008). There must also be a "nexus" between Malaterre's direct action claim and the policy between Amerind and the Housing Authority:

> The mere fact that a nonmember has some consensual commercial contacts with a tribe does not mean that the tribe has jurisdiction over all suits involving that nonmember, or even over all such suits that arise within the reservation; *the suit must also arise out of those consensual contacts*.

Phillip Morris USA, 2009 WL 115589 at * 7 (emphasis added); *Atkinson Trading Co.*, 532 U.S. at 656 ("*Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself.").

The district court wrongly concluded that the Tribal Court properly exercised jurisdiction over Malaterre's direct action claim against Amerind on the basis that their "dispute is distinctively tribal in nature." Add. 13. But the

Supreme Court has never upheld tribal court jurisdiction on this basis. Rather, the Court used this phrase only to describe a dispute between "two non-Indians" on a state highway. *Strate*, 520 U.S. at 457 ("The dispute . . . is 'distinctly non-tribal in nature.' It 'arose between two non-Indians involved in [a] run of the mill [highway] accident.'") (citations omitted). The dispute here, by contrast, is distinctively non-tribal in nature. The dispute is between Amerind, a nonmember, and Malaterre, a tribal member, over the extent of Amerind's insurance coverage obligations under federal law—NAHASDA and its implementing regulations.

More importantly, Malaterre's direct action claim does not arise out of the policy between Amerind and the Housing Authority. Rather, as explained infra, Part II.A., Malaterre's direct action claim arises out of the Tribal Court's interpretation of a federal housing regulation—24 C.F.R. § 1000.136(a). The required nexus is thus completely missing.

Finally, even if a nexus somehow existed, Malaterre voluntarily severed that nexus when she stipulated to the dismissal of the Housing Authority with prejudice. *See* J.A. 000084 ("Plaintiffs Myrna Malaterre, Carol Belgarde, and Lonnie Thompson . . . hereby agree and stipulate to the dismissal, with prejudice, of Defendant Turtle Mountain Housing Authority from this action.").

(3) Amerind did not contractually agree that a direct action may be brought against it.

The conform-to-law clause in the policy between Amerind and the Housing Authority provides:

> If any provision of this policy conflicts with tribal laws of your Tribe, this policy is amended to conform to those laws.

J.A. 000036, ¶ 7. The district court held that, by way of this clause, Amerind agreed to direct action claims in tribal court. Add. 14. Because the district court raised this issue *sua sponte* at oral argument, neither party had the opportunity to brief it. The district court's resolution of the issue is nonetheless erroneous for three reasons:

First, the conform-to-law clause was not intended to give a blank check to the Tribal Court to expose Amerind to claims imposing expansive financial obligations prohibited or preempted by federal law. The conform-to-law clause merely allows Amerind to provide one policy form to hundreds of Indian tribes rather than a multitude of separate policies tailored to each tribe's law. This is a common and expedient practice in the insurance industry. *See* Peter M. Lencis, *Insurance Regulation in the United States* 63 (Quorum Books 1997) ("Because the variety of insurance policy forms (including riders, endorsements, and schedules) is virtually unlimited, and because thorough regulatory scrutiny of all forms prior

to their use is not always possible, most state insurance laws include a provision which states that any policy issued in violation of the insurance laws is automatically deemed to be amended to conform to the applicable requirements. This concept is frequently written into the policy itself in a 'conformity to statute' or similar provision through which the policy automatically corrects or completes itself as to any overlooked or otherwise omitted regulatory requirements."). Because the Turtle Mountain Tribal Code does not establish specific requirements (and Malaterre asserts none) for insurance policies nor require specific clauses to be included in insurance policies, the conformity clause did not change the text of the policy in any way.

Second, the conform-to-law clause applies only when a policy provision conflicts with tribal law. Here there is no conflict because the policy is silent about direct action claims. *See generally* J.A. 000032–80.

Finally, nothing in the conform-to-law clause says that Amerind "expressly" agrees to direct action claims by third parties. *See Plains Commerce Bank*, 128 S. Ct. at 2724 (stating that because nonmembers "have no say" in tribal government, tribal laws cannot be imposed on them unless "the nonmember has consented, either *expressly* or by his actions.") (emphasis added). Particularly here where the Tribal Court's allowance of a direct action conflicts with federal law, the district court erred in holding that Amerind agreed to be bound by the Tribal Court's

decision. Nor did Amerind waive the right to challenge the Tribal Court's decision under federal law as will be discussed below. *See infra*, Part II.C.

II. The district court erred in adopting the Tribal Court's misinterpretation of a federal regulation.

A. Federal regulations require insurance to cover the losses of an Indian housing authority, not the losses of tenants or other third parties.

The plain language of NAHASDA and its implementing regulations merely require Indian housing authorities, as federal grant recipients, to maintain insurance for federally subsidized housing.

The Tribal Court, however, ruled that HUD "designed [these regulations] to cover the losses of tenants occasioned by the negligence of IHA employees." J.A.000097. Although it found the language of 25 U.S.C. § 4133(c) insufficient for this purpose, the Tribal Court stated that 24 C.F.R. § 1000.136(a)'s reference to "liability claims" "*implies* a legal obligation to indemnify the insured for the obligations owed by the IHA to a third party." J.A. 000097 (emphasis added). Because "HUD clearly contemplated" third party claims, *id*., the Tribal Court held that tribal members, like Malaterre, could assert direct action claims against Amerind even though the Housing Authority cannot be found liable because Malaterre agreed to its dismissal. J.A. 000084-085.

Although the district court did not review the Tribal Court's interpretation of federal law and regulations, it deemed the Tribal Court's "holding . . . to be persuasive" and "incorporated" that holding into its decision. Add. 14.

The Tribal Court's interpretation of 24 C.F.R. § 1000.136(a), however, is wrong for three reasons:

First, the plain language of NAHASDA and its implementing regulations merely require Indian housing authorities to maintain insurance to protect the federal government's financial interest in federally subsidized housing—not third parties. Section 203(c) of NAHASDA, for instance, requires each "recipient [Indian housing authority] shall maintain adequate insurance coverage ***for housing units that are owned and operated or assisted with grant amounts*** provided under this Act." 25 U.S.C. § 4133(c) (emphasis added). Specifically, the term "insurance" means "a contract by which one party (the insurer) undertakes to indemnify another party (the insured) against risk of loss, damage or liability arising from some specified contingency." Black's Law Dictionary 814 (8th ed. 2004).

Section 1000.136(a), as well, states that the tribes, as recipients of federal housing grants, must provide "insurance 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." 24 C.F.R. § 1000.136(a) (emphasis added).

Similarly, § 1000.138 states the purpose of the required insurance is "***to protect the financial stability of the recipient's IHGB program***." 24 C.F.R. § 1000.138 (emphasis added).

Conspicuously absent in both NAHASDA and its regulations is any language stating or implying that federally required insurance is "designed to cover the losses of tenants" or other third parties, especially when they have stipulated to the dismissal of the housing authority, which therefore cannot be found liable.

Second, under the Tribal Court's interpretation, Amerind and the Housing Authority will be required to divert federal funds to pay a loss for which the Housing Authority can never be found legally responsible given that Malaterre has stipulated to the dismissal of the Housing Authority with prejudice. The Tribal Court's interpretation thus undermines the federal government's financial interest in federally subsidized housing.

Finally, nothing in NAHASDA or its implementing regulations expressly authorize a direct action. *See* 7A Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 104.18 (3d ed. 2005) ("[T]he right to direct action does not flow from a statute requiring compulsory insurance, without explicit creation of direct action rights."). Indeed, Congress has explicitly created a right of direct action in only three statutes: (1) the Resource Conservation and Recovery Act, 42 U.S.C. § 6924(t)(2); (2) the Comprehensive Environmental Response, Compensation and

Liability Act, 49 U.S.C. § 9608(c)(1)-(2); and (3) 28 U.S.C. § 1364. NAHASDA and its implementing regulations fall short of an explicit Congressional creation.

B. The federal courts owe no deference to the Tribal Court's interpretation of federal law.

When a tribal court applies federal law, federal court review is *de novo* because tribal court determinations are accorded no deference. *Prescott v. Little Six, Inc*., 387 F. 3d 753, 757 (8th Cir. 2004) ("It is only when the tribal court applies federal law that the tribal court's determinations are accorded no deference and are reviewed by the district court *de novo*."). Below, Malaterre argued that the district court was obliged to defer to the Tribal Court's decision because it concerned tribal law on direct action claims. Docket No. 25. Because the Tribal Court's allowance of a direct action claim was based on a misapplication of federal law, the district court erred by adopting the Tribal Court's holding.

The Tribal Court construed a federal housing regulation. To be sure, the Tribal Court interpreted 24 C.F.R. § 1000.136(a) to determine whether HUD "intended" to require Indian tribes to provide coverage for tribal members or other third parties:

> [S]ome common sense has to be interjected into the analysis of ***what HUD intended*** when it mandated insurance coverage for liability claims [under § 1000.136(a)]. . . . ***HUD clearly contemplated*** that third parties would have potential claims against IHA recipients of NAHASDA monies when the IHA or its employees were negligent. The mandated insurance is therefore designed to cover the losses of tenants occasioned by the negligence of IHA employees.

J.A. 000097 (emphasis added).

Although it is true that an earlier tribal court case[1] had established the test for when a direct action can be brought under tribal law, that test specifically contemplated the application of federal law to resolve the issue:

> [I]n order for Appellees to surmount the general obstacle to bringing a direct action against an insurer they must demonstrate: 1) that the insurer is providing coverage pursuant to a mandate of ***federal*** or tribal law; and 2) that the type of insurance mandated is specifically designed to protect the public against losses and not merely to indemnify the insured.

J.A. 000091-092 (emphasis added). Under this test, the Tribal Court could and did apply federal law to reach its decision. The Tribal Court did not once refer to or interpret a tribal ordinance, constitution, or other tribal law in resolving the direct action issue.

Because the interpretation of a federal regulation controlled the outcome of the case, the Tribal Court clearly decided a question of federal law. *Cf. Longie v. Spirit Lake Tribe*, 400 F.3d 586, 590 (8th Cir. 2005) ("We agree with our sister circuits that a federal question exists if the outcome is 'controlled or conditioned

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[1] In *St. Claire v. Turtle Mountain Chippewa Casino*, after noting that a federal regulation, 25 C.F.R. § 531.1(13), requires casino management contracts to contain a mandatory liability insurance provision, *see* J.A. 000101 n. 2, the tribal court stated, "Therefore, if the insurance procured by the Casino . . . is mandated by tribal or *federal law*, the Plaintiff may proceed directly against the Casino's insurance carrier . . . ." J.A. 0000107 (emphasis added).

by Federal law,' but does not exist if 'the real substance of the controversy centers upon' something other than the construction of federal law.") (citation omitted); *see also Grable & Sons Metal Products, Inc. v. Darue Engr. & Mfg.*, 545 U.S. 308 (2005) (state quiet title action that depends on an interpretation of federal law presents federal issue).

Here, the Tribal Court's interpretation of 24 C.F.R. § 1000.136(a) controlled the outcome of the direct action claim. Because the Tribal Court applied federal law, no deference is owed to the Tribal Court decision to allow a direct action claim to proceed against Amerind. *Cf. Breisch v. Central R.R. of New Jersey*, 312 U.S. 484, 489 (1941) (stating that "interpretation of state statutes by state courts under compulsion of federal law erroneously understood does not bind federal courts.").[2] This Court thus reviews *de novo* the district court's decision to adopt the Tribal Court's holding.

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[2] The Supreme Court found that the state court decision at issue in that case did not, in fact, rely on an erroneous interpretation of a federal statute, but it cited two earlier Supreme Court decisions, *Tipton v. Atchison, Topeka & Santa Fe Ry., Co. 298 U.S. 141 (1936)* and *Red Cross Line v. Atlantic Fruit Co*., 264 U.S. 109 (1924), as establishing the rule quoted. *See* 132 A.L.R. 923 (1941) for a discussion of cases on this point.

C. Amerind did not contractually waive the right to challenge the Tribal Court's ruling.

The district court's opinion suggests that the conform-to-law clause may have waived Amerind's right to challenge the Tribal Court's decision under federal law. Add. 14. If the district court intended the conform-to-law clause to have this effect, it was in error for two reasons:

First, the conform-to-law clause speaks only to tribal law not federal law.

Second, the conform-to-law clause contains no language expressly waiving Amerind's rights under federal law. Indeed, waivers of rights cannot be presumed and doubtful cases must be resolved against waivers, particularly if fundamental rights are at issue, such as the right to have federal courts resolve federal issues.[3] *See* 28 Am. Jur. 2d Estoppel and Waiver §226 (1962).

Amerind did not waive its right to raise federal issues, the district court should have addressed those issues.

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[3] If the Tribal Court of Appeals' decision is interpreted to mean that tribal law deprives Amerind of its right to seek redress on federal questions in the federal courts, it would be unconstitutional. *See International Ins. Co. v. Duryee*, 96 F.3d 837, 838 (8th Cir. 1996).

III. Federal law preempts the direct action claim against Amerind in tribal court.

Under federal law, "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Strate*, 520 U. S. at 453. Thus if federal law preempts a tribe's legislative jurisdiction, its tribal court correspondingly lacks jurisdiction. *See Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F. 3d 1412, 1421 (8th Cir. 1996) ("It is true under certain circumstances, preemptive federal statutes . . . may serve to 'curtail[] the tribe's power to assert jurisdiction.") (citations omitted).

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." *Fidelity Fed. Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1982) (citations and internal quotations omitted); *Geier v. American Honda Motor Co*., 529 U.S. 861 (2000); *Wuebker v. Wilbur-Ellis Co*., 418 F.3d 883, 887 (8th Cir. 2005) *(same*). 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 objective of the federal program to require nonrecognition." *Hisquierdo v. Hisquierdo*, 439 U.S. 579, 583 (1979). This Court has elaborated that a "court will find that an agency intends for a regulation to

preempt state law when a regulation conflicts with a state law." *Wuebker*, 418 F.3d at 887 (citation omitted).

Indeed, federal laws preempt state direct action statutes. *See e.g.*, *Grier v. Tri-State Transit Co.*, 36 F. Supp. 26 (W.D. La. 1940) (Federal Motor Carrier Act, which requires interstate motor carriers to provide insurance coverage, preempts state direct action statute); *Rogers v. Atlantic Greyhound Corp.*, 50 F. Supp. 662 (S.D. Ga. 1943) (same).

As explained in more detail below, tribal direct action claims are preempted because, if allowed to proceed, they would obstruct federal objectives of providing affordable housing to low-income Indian families and of protecting the financial stability of Indian housing authorities by causing them to divert scarce federal funds for housing to pay for the additional cost of insuring third parties.

A. Tribal direct action claims obstruct Congress' longstanding objective to provide affordable housing by forcing Indian housing authorities to divert scarce federal housing funds to cover the cost of their expanded coverage obligations.

Congress' core objective in enacting NAHASDA is to provide affordable housing for low-income Indian families on reservations. 25 U.S.C. § 4131(a)(1). To accomplish this objective, Congress provides annual appropriations, which HUD distributes through grants, to Indian tribes for housing. *Id.* § 4111.

Although HUD distributes over $650 million to Indian tribes each year, this amount has been deemed woefully inadequate to meet the housing needs on

reservations. *See* Cohen's Handbook on Federal Indian Law 1393-94 § 22.05[2][a] (Nell Jessup Newton et al. eds., 2005) (NAHASDA "funding levels are only sufficient to meet 5% of the need for housing in Indian country"); *see also* Letter from Tom Daschle, United States Senate, to Christopher Dodd, Chairman, Subcommittee on VA, HUD and Independent Agencies, Senate Committee on Appropriations (Apr. 12, 2004) (requesting additional federal funding for Indian housing because "estimates indicate that existing funding is inadequate"), *available at* https://www.indianz.com/docs/congress/daschle041204.pdf; George H. Cortelyou, *An Attempted Revolution in Native American Housing: The Native American Housing Assistance and Self-Determination Act*, 25 Seton Hall Legis. J. 429, 456-57 (2001) ("Congress did not adequately fund NAHASDA to meet tribes' needs though it increased the number of tribes receiving funds.").

To protect the federal government's financial investment in housing, NAHASDA and its implementing regulations require Indian housing authorities to maintain insurance coverage for all federally funded housing units. *See* 25 U.S.C. § 4133(c); 24 C.F.R. §§ 1000.38, 1000.136, 1000.138, 1000.139, 1000.140. Despite inadequate federal funding, HUD permits the tribes to use their federal funds to pay for the cost of insurance required by NAHASDA. *See e.g.*, Add. 10 ("The Turtle Mountain Housing Authority paid the annual insurance premiums from federal grants which were provided to the Housing Authority to maintain Indian

housing on the reservation."). Congress thus finances the costs of both housing and insurance. *See* S. Rep. No. 101-474, 73 (Sept. 26, 1990) (noting that housing insurance "costs, are in part, subsidized by the Federal Government.").

HUD also permits Indian tribes and Indian housing authorities to combine federal funds to self-insure federally assisted housing through nonprofit self-insurance risk pools like Amerind:

> Recipients may purchase the required insurance . . . from nonprofit insurance entities which are owned and controlled by recipients and which have been approved by HUD.

24 C.F.R. § 1000.138. Each year the tribes and housing authorities, as members of Amerind, combine their federal funds to self-insure their housing-related risks.

Since 1987, HUD has approved Amerind for this purpose:

> Because of difficulties of procuring adequate housing insurance, HUD encouraged the National American Indian Housing Council . . . to form a risk pool composed solely of IHAs [Indian Housing Authorities] to provide the legally-required insurance coverage for HUD-assisted housing on tribal lands. HUD provided federal funds to assist with the creation of this risk pool. AMERIND Risk Management Corporation (AMERIND) was incorporated in 1986 . . . as a self-insurance risk pool for IHAs [Indian Housing Authorities] and Indian tribes pursuant to an intergovernmental agreement. HUD approved the self-insurance plan as a means of protecting federally subsidized Indian housing units. AMERIND continues to administer the approved self-insurance plan for properties funded under NAHASDA, pursuant to 24 CFR 1000.138.

Self-Insurance Plans Under The Indian Housing Block Grant Program, 71 Fed. Reg. 11464 (proposed Mar. 7, 2006) (codified at 24 C.F.R. § 1000.139); *see also*

J.A. 000018 (noting HUD's approval of Amerind under 24 C.F.R. § 1000.138).

Because certain laws might force Indian housing authorities to divert "scarce" federal funds for other purposes, HUD recently issued a new rule preempting "state laws and widely varying and costly requirements" on federally regulated nonprofit insurance pools, like Amerind. 24 C.F.R. § 1000.139(g).

> The cost of compliance with duplicative or conflicting state or local *requirements would cause IHBG [Indian Housing Block Grant] recipients to divert scarce IHBG funds for affordable housing* and limit the recipients' options, thereby failing to fulfill the intent of Congress 'to assist and promote affordable housing activities' (section 201(a) of NAHASDA, 25 U.S.C. 4131(a)(1)).

Self-Insurance Plans Under The Indian Housing Block Grant Program, 71 Fed. Reg. 11464, 11465 (proposed Mar. 7, 2006) (explaining the reasons for issuance of 24 C.F.R. § 1000.139(g) (emphasis added)).

In this case, Malaterre's direct action turns on a claim that Amerind and Indian housing authorities have a duty to provide expanded coverage for the losses of tenants and other third parties. In effect, the direct action unlawfully expands Indian housing authorities' and Amerind's coverage and financial obligations. To meet these expanded obligations, both Amerind and the tribes and housing authorities will be forced to divert scarce federal funds from housing to cover these new insurance costs. Because direct actions would do just that, they are preempted because they stand "as an obstacle to the accomplishment and execution of" Congress' objective to provide housing for Indian families on reservations.

B. Tribal direct action claims contravene Congress' objective to protect federally regulated nonprofit risk pools from state and local requirements that impair the cost and availability of insurance.

Amerind has been providing self-insurance coverage for federally financed Indian housing since 1987 while Indian housing authorities were still under the United States Housing Act of 1937. Under the 1937 Act, HUD awarded federal housing funds to both Indian and public housing authorities through annual contribution contracts. *See* 42 U.S.C. §1437bb(b) repealed by NAHASDA. These contracts required Indian and public housing authorities to buy insurance covering all housing units subsidized by federal funds.

Despite this requirement, HUD's actual "practice" was to buy a master insurance policy on behalf of Indian housing authorities and public housing authorities. 71 Fed. Reg. 11464 (Mar. 7, 2006). These housing authorities would then reimburse HUD for the cost of the insurance from their federal funds.

During the 1980s, nearly 100 insurance companies either went out of business or were prohibited by state insurance commissions from selling insurance. 54 Fed. Reg. 52000, 52004 (Dec. 19, 1989). Some of these defunct companies had been obligated to provide coverage to Indian housing authorities and public housing authorities. *Id*. Because of this crisis, HUD found it difficult to procure affordable insurance for Indian and public housing authorities. In 1986, HUD was forced to "reject the only bid submitted for the master policy because it offered no

liability insurance, had only limited property coverage, and was exorbitantly expensive." 71 Fed. Reg. at 11464.

As an alternative to commercial insurance, HUD urged Indian and public housing authorities to form separate nonprofit risk pools to self-insure federally subsidized housing. *Id*. To help them do so, HUD provided additional funding. *Id*. In 1987, Indian housing authorities used these funds to incorporate and capitalize Amerind. HUD later approved Amerind to self-insure federally subsidized housing operated by Indian housing authorities. 71 Fed. Reg. 11464. HUD also granted Indian and public housing authorities a waiver from federal competitive bidding requirements because it did not make sense for them to competitively procure their insurance.

Several years later, however, HUD threatened to rescind the competitive-bidding waiver. The public and Indian housing authorities then asked Congress to prevent HUD from doing so. In 1991, Congress enacted a law prohibiting HUD from imposing any competitive-bidding requirements for housing insurance. *See* Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1991, Pub. L. No. 101-507, 104 Stat.

1351, 1369-70 (1990).[4] Congress understood that housing insurance "costs, are in part, subsidized by the Federal Government." S. Rep. No. 101-474, at 73 (1990).

In that act, Congress sought to protect nonprofit risk pools owned by Indian tribes and public housing authorities from "burdensome and counterproductive" federal regulations. *Id*. The Senate Appropriations Committee, for example, stated HUD's proposed rescission would raise the cost of insurance and jeopardize the availability of insurance and from these risk pools:

> 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.

Id. at 73-4 (emphasis added).

The Conference Committee further noted that nonprofit self-insurance risk pools, like Amerind, "have been extremely successful in providing low cost insurances to public and Indian housing authorities." See H.R. Conf. Rep. No. 101-900, 28 (Oct. 18, 1990).

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[4] The 1991 Act provided 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.").

One year later, a dispute arose over whether Congress intended the competitive-bidding waiver to be permanent. To resolve this dispute, Congress enacted 42 U.S.C. § 1436c, which expressly preempts federal and state insurance procurement laws. Congress again restated its belief "that these nonprofit, PHA [Public Housing Authority] and IHA [Indian Housing Authority]-controlled insurance entities are providing an effective and cost-saving alternative to conventional insurance carriers." S. Rep. No. 102-107, 77 (July 11, 1991).

Under 42 U.S.C. § 1436c, HUD issued regulations governing the approval and oversight of nonprofit risk pools. *See* 24 C.F.R. § 950.190 (Indian housing risk pools) *repealed by* 24 C.F.R. Part 1000, 48 Fed. Reg. 12334 (Mar. 12, 1998); 24 C.F.R. § 965.205 (public housing risk pools). Although § 1436c is limited to competitive procurement of housing insurance, the legislative history of this statute highlights Congress' intent to: (1) protect nonprofit risk pools from federal, state, and local regulation that would either drive up the cost of self-insurance or make it unavailable, and (2) encourage Indian housing authorities to use nonprofit risk pools to provide low cost insurance for housing operated with federal funds.

HUD has since expanded federal protection of nonprofit risk pools beyond the narrow confines of state and federal competitive bidding laws. In 1996, Congress enacted NAHASDA as a separate program for federally subsidized

Indian housing. *See* Cohen's Handbook of Federal Indian Law, at § 22.05[2][a] 1390.

While this case was pending in the Tribal Court, HUD issued a new regulation expressly preempting "conflicting" state and local laws imposing "widely varying and costly requirements" on nonprofit risk pools, like Amerind. 24 C.F.R. § 1000.139(g) (2008).[5]

Under this new regulation, HUD reiterated long-standing national objectives for federally required insurance for Indian housing:

- to ensure insurance is provided 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 cause recipients "to divert scarce federal funds" from housing or limit their options.
- to promote tribal self-sufficiency through the use of nonprofit risk pools

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[5] Section 1000.139(g) provides: "In order that tribally owned Indian housing insurance entities that provide insurance for IHBG assisted housing will not be subject to conflicting state laws and widely varying and costly requirements, any self insurance plan under this section that meets the requirements of this section and that has been approved by HUD shall be governed by the regulations of this subpart in its provision of insurance for IHBG-assisted housing."

- to "reduce the cost and expense of maintaining adequate insurance coverage" for housing.
- 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 removing the possibility of duplicative or conflicting state requirements."

71 Fed. Reg. at 11465.

When read in light of this longstanding legislative and regulatory background, tribal direct action claims against nonprofit self-insurance risk pools, like Amerind, stand as an obstacle to achieving these federal objectives in numerous ways:

First, direct actions in tribal court 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—the only potentially negligent actor—cannot be found liable.

Second, as explained previously, the tribes will be forced to divert scarce federal housing funds to pay for expanded coverage required by the direct-action ruling.

Third, Congress and HUD will be forced to appropriate more money to the tribes to cover the additional financial burden imposed by direct actions.

Fourth, direct actions impair Amerind's ability to provide low cost coverage for housing.

Fifth, direct actions subject federally regulated nonprofit risk pools, like Amerind, to a multitude of potentially conflicting tribal court suits in the 500+ tribal jurisdictions where they operate, thereby undermining national uniformity.

Finally, federally regulated nonprofit risk pools face the danger of going out of business if they cannot meet the expanded coverage obligations.

CONCLUSION

As a matter of federal law, the Tribal Court lacked 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.

Further, the claim that the Tribal Court and the district court allowed to proceed against Amerind 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 permit a direct action against a federally regulated risk pool, like Amerind.

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, and the district court erred in adopting that ruling.

For the foregoing reasons, the judgment of the district court must be reversed and summary judgment be entered in favor of Amerind.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,744 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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February 10, 2009

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Lee Bergen

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 28A(d)(2)

I certify that a digital version of the foregoing Opening Brief is sent with this brief on CD-ROM and the file copied to the CD-ROM has been scanned for viruses and is virus-free.

February 10, 2009

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Lee Bergen

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Opening Brief of Appellant, one CD-ROM of the Opening Brief, and one copy of the Joint Appendix were served by overnight mail to the following on February 10, 2009:

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ADDENDUM