IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

(1) CHOCTAW NATION OF OKLAHOMA,	)	
Plaintiff,	)	**Case No. 14-CV-182-KEW**
v.	)	
(1) OCCIDENTAL FIRE AND CASUALTY COMPANY OF NORTH CAROLINA; and	)	
(2) GENERAL STAR INDEMNITY COMPANY	)	
Defendants.	)	

DEFENDANT OCCIDENTAL FIRE AND CASUALTY COMPANY OF NORTH CAROLINA'S RESPONSE TO PLAINTIFF CHOCTAW NATION OF OKLAHOMA'S MOTION TO REMAND

COMES NOW Defendant Occidental Fire and Casualty Company of North Carolina ("Occidental"), and files this response to Plaintiff Choctaw Nation of Oklahoma's Motion to Remand [Doc. # 17], following Occidental's Notice of Removal [Doc. # 3] of the above-titled action from the District Court of Bryan County, State of Oklahoma, to the United States District Court for the Eastern District of Oklahoma. Choctaw Nation's essential argument is expressed on page 4 of its Motion to Remand: "this case has nothing to do with Nation's right to assert its sovereign immunity." To the contrary, that is all this case is about. Take away sovereign immunity and there is no lawsuit, because Choctaw Nation's Petition expressly states that the actual controversy in this case is "whether Occidental or General Star may, without the Nation's express consent, assert sovereign immunity as a defense." [Doc. # 3-1, ¶ 20]. Whether an insurer can assert the defense of sovereign immunity on behalf of its insured, an Indian tribe, is a substantial federal question, and one that allows this case to be removed to federal court.

ARGUMENT AND AUTHORITIES

I. CHOCTAW NATION'S LAWSUIT CREATES A FEDERAL QUESTION FOR PURPOSES OF REMOVAL.

Federal question jurisdiction exists where a civil action arises "under the Constitution, laws, or treaties of the United States." 28 U.S.C. §§ 1331 & 1362. Where such federal question jurisdiction exists, any civil action brought in a state court can be removed by the defendant or defendants to the appropriate federal district court. *Id*. at § 1441(a). The United States Supreme Court has consistently held that "tribal immunity is a matter of federal law." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc*., 523 U.S. 751, 759, 118 S. Ct. 1700, 1705 (1998). Tribal immunity arises under the laws of the United States, because it exists only through acts of Congress: "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Id.*, 523 U.S. at 754, 118 S. Ct. at 1702. Very recently, the United State Supreme Court reaffirmed this concept that tribes retain "their historic sovereign authority" unless and until Congress decides otherwise. *Michigan v. Bay Mills Indian Community*, 2014 WL 2178337 at 4 (2014).

Choctaw Nation fails to cite a single decision holding that a determination as to who can assert the Tribe's immunity is purely a state law question. Its argument that this is a simple contract case between the insurers and the insured is akin to a party arguing that enforcement of a deed or neighborhood covenant barring the sale of property to persons of a certain race or religion is just a contractual dispute between a buyer and seller. If sovereign immunity is not the issue, then why does Choctaw Nation describe its own lawsuit as seeking a determination as to whether the Defendant insurers can "assert Nation's sovereign immunity"? [Doc. # 17, p. 3].

Choctaw Nation can attempt to cloak its lawsuit in terms of "what the language of the insurance policies" permits, but that does not mean a federal question is not presented.

Actually, the language of the insurance policies, in the context of Choctaw Nation's Petition, illustrates why federal question jurisdiction exists here. The Occidental policy grants Occidental the right to control the defense of Choctaw Nation (Exhibit # 1, Policy, Section II(A), OCCIDENTAL 9), and requires Choctaw Nation to "[c]ooperate with us in the . . . defense against the 'suit.'" (*Id*. at Section IV(A)(2)(b)(3), OCCIDENTAL 15). If Choctaw Nation fails to cooperate, there is "no duty to provide coverage." (*Id.* at Section IV(A)(2), OCCIDENTAL 15). The *sole* reason that Choctaw Nation asserts in its lawsuit that this language does not apply as it would to any other insured is that its immunity is *unlike* any other defense, and can only be asserted or waived by Choctaw Nation itself. Resolving the issue involves an interpretation of the Tribe's sovereign immunity, which is purely a question of federal law, and a determination of whether it can be contractually obligated to assert or waive it, which is also a federal question. For example, the *Kiowa Tribe* decision, 523 U.S. 751, 118 S. Ct. 1700, 1705 (1998), arose from a tribe's default on a note, which is a contract. No one questioned the Supreme Court's authority under federal question jurisdiction to resolve the question in terms of the tribe's sovereign immunity.

When the matter has arisen, the Tenth Circuit has held that whether a party "can demonstrate that the government has waived sovereign immunity to suit in federal district court" creates "the existence of a federal issue sufficient to confer jurisdiction under the general federal question statute, 28 U.S.C. § 1331." *Normandy Apartments, Ltd. v. U.S. Dep't of Housing and Urban Development*, 554 F.3d 1290, 1295 (10th Cir. 2009). Choctaw Nation relegates this decision to footnote 1 in its Motion to Remand and dismisses the decision's application because

federal question jurisdiction was undisputed. The fact that it was undisputed simply means the parties acknowledged it existed. It had to exist, because it involved a federal question of a sovereign's waiver of immunity.

Choctaw Nation's downplaying of *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 105 S. Ct. 2447 (1985), in the same footnote misses the point of that decision. Regardless of whether it involved a lawsuit against a non-Indian school district, the point is that the Supreme Court noted the unique status of Indian tribes, the significant protection for their rights provided by "[f]ederal law, implemented by statute, by treaty, by administrative regulations, and by judicial decisions" and the fact that for questions concerning the authority and immunity of tribes, "the governing rule of decision has been provided by *federal law*." *Id*. at 471 U.S. at 851, 105 S. Ct. at 2451 (emphasis added). In determining whether a federal question was presented, the Court stated:

> The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a "federal question" under § 1331. Because petitioners contend that federal law has divested the Tribe of this aspect of sovereignty, it is federal law on which they rely as a basis for the asserted right of freedom from Tribal Court interference. They have, therefore, filed an action "arising under" federal law within the meaning of § 1331.

Id. 471 U.S. at 852-53, 105 S. Ct. at 1042. While the facts of that case involved the jurisdiction of a tribal court, the *issue* was one to be answered by reference to federal law. Similarly, the question of who can exercise or waive tribal sovereign immunity, the Choctaw Nation or Occidental and General Star, can only be answered by reference to federal law. It would not be resolved by state law, because, as the Supreme Court recently reaffirmed, it is the Congress that exercises plenary control over the tribes' sovereignty, through the Constitution. *Bay Mills* at 4.

Neither does Choctaw Nation's argument that its sovereignty is a "personal defense" present a question of state law. [Doc. # 17, p. 10]. Actually, the issue presents a federal question of whether a tribe, by an insurance contract interpreted under state law, could cede the right to determine whether to assert its federal right of sovereign immunity to an insurer. Choctaw Nation relies on *Smith Plumbing Co. v. Aetna Casualty & Surety Co*., 720 P.2d 499 (Ariz. 1986), but that decision does not even mention federal question jurisdiction, and applies concepts of suretyship, not concepts of insurance law. Further, unlike anything in a surety contract, the insurance contract between Choctaw Nation and Occidental specifically grants Occidental the right to control the defense of Choctaw Nation. (Exhibit # 1, Section II(A), OCCIDENTAL 9). Additionally, the *Smith* defendant was an *insurer* attempting to assert a tribe's defense on its own behalf in a lawsuit to which the tribe was not a party, while the instant case involves Choctaw Nation as the defendant in the underlying lawsuits in which Occidental, which is not a party to them, seeks to assert the defense on Choctaw Nation's behalf.

These distinctions present a federal question of whether the Tribe, by the insurance policy, could cede the right to determine whether to assert its federal right of sovereign immunity to an insurer. Oklahoma law does not address this issue beyond stating that, absent some ambiguity in the pertinent language of the insurance contract (which has never been suggested to be present here), the plain language of the insurance contract controls the obligations of the parties. *Dodson v. St. Paul Ins. Co.*, 812 P.2d 372, 376 (Okla. 1991). The contract in the instant case affords the insurer the right to defend the case and make decisions as to how the case will be defended. Only if federal law affords Choctaw Nation some right to determine when its sovereign immunity is asserted may the Tribe limit the insurer in this regard.

The 10th Circuit has explained § 1331 jurisdiction as follows: "[T]o find jurisdiction

under 28 U.S.C. § 1331, two conditions must be satisfied. First, a question of federal law must appear on the face of plaintiff's well-pleaded complaint." *Nicodemus v. Union Pacific Corp.*, 318 F.3d 1231, 1235 (10th Cir. 2003). Such a question is evidenced by the Choctaw Nation's lawsuit, which asks the Court to determine who can assert or waive its tribal immunity. Choctaw Nation's argument on this issue [Doc. # 17, p. 15] is a complete misapplication of the rule. Occidental is not asserting sovereign immunity as a defense to Choctaw Nation's lawsuit for a declaratory judgment and bad faith; Occidental has no sovereign immunity. *Choctaw Nation* has defined the issue as who has the right to assert or waive Choctaw Nation's own immunity. In this lawsuit, Choctaw Nation is not litigating the validity of an "anticipated defense" to the underlying lawsuit; it is litigating the right to assert a federally-created sovereign immunity.

"Second, plaintiff's cause of action must either be (1) created by federal law, or (2) if it is a state-created cause of action, its resolution must necessarily turn on a substantial question of federal law." *Nicodemus*, 318 F. 3d at 1235. (internal quotation omitted). Federal question jurisdiction exists where it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims. *Id*. at 1236. The Choctaw Nation's claims for a declaratory judgment and damages for bad faith, by the language of its own lawsuit, turn on the question of federal authority to assert sovereign immunity. Therefore, this federal question is the heart of the Choctaw Nation's claims in this lawsuit, and federal question jurisdiction invites removal of the lawsuit.

Choctaw Nation also asserts this Court's resolution of the issues will have no impact on sovereignty generally. [Doc. # 17, p. 7]. To the contrary, this case will resolve the issue of whether a tribe can grant authority to a third party to make a determination about whether its

immunity can and will be asserted in civil litigation. With many tribes increasingly engaging in commercial activities and purchasing insurance, this is an important issue centering on a federal question of the application of sovereign immunity. Choctaw Nation's suggestion that this issue will have to be relitigated in every insurance dispute [*id*. at p. 13] is simply wrong. The issue in this case is whether federal law precludes or permits an insurer from assuming the authority to assert a tribe's sovereign immunity. This is not an issue over which the language of the insurance policies control. It is the authority or lack of it under federal law that will control.

Finally, while Occidental has focused on Choctaw Nation's argument, it should be noted that the Motion to Remand's Factual and Procedural Background omits several facts. First, in addition to the $5,000,000 insurance coverage provided by Occidental and another $5,000,000 in excess coverage from General Star, Choctaw Nation has $10,000,000 in excess coverage from another insurer. Furthermore, Choctaw Nation's allegation that Occidental's refusal to attend a mediation "expose[d] Nation to potential liability" [Doc, # 17, p. 7] ignores the fact that Choctaw Nation asserts it has immunity from these claims. Occidental's refusal to attend mediation could not possibly have exposed Choctaw Nation to liability, in light of that immunity. If it is immune, Choctaw Nation has no liability for the claims whatsoever.

II. THE REQUIREMENTS OF REMOVAL ARE SATISFIED, BECAUSE GENERAL STAR HAS TIMELY CONSENTED.

Under 28 U.S.C. § 1446(b)(2)(A), removal under § 1441(a) requires that all defendants who have been properly joined and served must join in or consent to the removal of the action. This requirement has been met. General Star consented to removal, as stated in Occidental's Notice of Removal [Doc. # 3, Section (A), ¶ 5]. Further, General Star attached an affidavit to its

Partial Response to Choctaw Nation's Notice of Removal [Doc. # 24-1] confirming it consented to removal.

Choctaw Nation relies on *Forsythe v. City of Woodward, Okla.*, 2013 WL 5230005 (W.D. Okla. 2013), for the proposition that consent by General Star must be in writing, either in the notice of removal or in other papers filed with the district court. *Id.* at 1. However, other courts have concluded that separate consents by all defendants is not reqired under the statute, which does not specify the form of consent, as long as at least one attorney certifies the other parties have consented. Ocidental did so in its Notice of Removal. This issue is more fully explained in General Star's Partial Response to Choctaw Nation's Notice of Removal [Doc. # 24], which Occidental hereby adopts.

Alternatively, even under *Forsythe*, the instant case has been properly removed. *Forsythe* states that consent to removal must be done within 30 days after the filing of the Notice of Removal or service of summons. *Forsythe* at 2. Occidental's Notice of Removal was filed May 12, 2014. [Doc. # 3]. Within the next 30 days, attorneys for General Star filed with this Court Entries of Appearance [Docs. 11 & 12], an Answer [Doc. #13], and a Notice of Consent by the Parties to the United States Magistrate Judge's Jurisdiction. In the Notice of Consent, General Star's counsel specifically checked the "CONSENT" box that allows the Magistrate the "[e]xercise of this jurisdiction" over the case. [Doc. # 19]. This Notice of Consent by General Star was filed June 9, 2014, which is less than 30 days from removal. Because General Star has consented to the Magistrate's jurisdiction, it cannot be denied that it has consented to removal to the federal courts. Thus, if the Court decides to follow *Forsythe*, § 1446(b)(2)(A)'s requirement has been met.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Defendant Occidental Fire and Casualty Company of North Carolina respectfully requests that this Court deny Plaintiff Choctaw Nation's Motion to Remand, and accept this action as one within its jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of June, 2014, I electronically transmitted this instrument using the Eastern District of Oklahoma's ECF System for filing and electronic transmission to the following ECF registrants:

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