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Galanda and Robenalt: Holding big insurance captive

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Let's pause to consider a few lessons for Indian country from the global economic crisis.

First, Wall Street cannot be trusted to manage its own, let alone another's, cash and risk. Private insurers like AIG that purport to protect tribes against financial loss, and imminent threats to Indian sovereignty, cannot be trusted with that responsibility. Just last month, those insured by the First Nations program were notified to find new insurance because it was without sufficient liquidity to continue operations.

Second, although the U.S. recently allocated $3 billion for tribal economic stimulus, it channeled those funds through broken BIA and state block grant delivery systems, which will delay its infusion into reservation economies.

For too long, tribes have transferred their wealth to outside insurers that approach Indian country as a one-size-fits-all corporate conglomerate.

Third, many tribes stand ready, willing and able to manage their own finances and risk. Notwithstanding, most tribes continue to rely on outsiders to do so, like private insurers that tribes pay $250 to $300 million in insurance premiums annually for financial "protection." That quarter-billion dollars leaves the reservation every year, never to return.

With all of that in perspective, what if tribes could harness and reinvest that money in premiums they expend annually? Cease paying tens of millions of dollars to private insurers for states taxes? Reassert control over their financial and risk management? More directly defend against attacks on Indian sovereignty? And, almost immediately create new wealth and jobs back home?

Indian country stands ready to do all of the above. Yes we can, and should.

The time is now for many tribes to enter the self-insurance business. More specifically, certain tribes should create captive insurance companies, which are wholly-owned by its “parent company” and can write policies to its parent and its affiliates. In other words, the parent entity creates an insurance company to insure itself.

In the non-Indian world, captive insurance companies are typically set up as “off-shore” subsidiaries for domestic companies wishing to self insure and thereby save millions of dollars in premiums they would otherwise pay private insurers annually. Off-shore governments such as Bermuda and the Cayman Islands, which, like tribes, enjoy sovereign rights, have attracted captive insurance business by lowering capitalization requirements and tax rates.

“On-shore” tribal governments can likewise create captive insurance companies, which can, in turn, insure tribes and tribal affiliates against loss and litigation. A tribal captive can write policies for a tribe’s casino, businesses, administration, clinic and housing authority, as well as all of its related property, vehicles and personnel. It can offer the tribe’s affiliates (and members) all of the insurance being purchased from outside insurers – property, home, auto, casualty, liability, life, health and workers’ compensation.

Consider the sovereign and economic advantages a tribe would enjoy by operating a captive insurance company:

Many tribes stand ready, willing and able to manage their own finances and risk.

Tribal Savings. While tribes receive an insurance “product” in return for the $250 to $300 million they pay annually, the premium costs for some tribes are grossly disproportionate to their actual losses (especially for 638 tribes that enjoy Federal Tort

Claims Act defense and indemnity). Under a captive insurance arrangement, a tribe could more closely align its premium-to-loss ratio, capture the difference, and reinvest in the tribe. The tribal captive would still need to buy reinsurance – insurance provided by private insurers for other insurers' risks of catastrophic loss. Still, a tribe's reinsurance premiums could be significantly less (perhaps by as much as 90 percent) than its current premiums. Some tribes may want to self-reinsure some risk, but still contract with private carriers to insure other risk.

New Jobs. Forming a tribal captive would generate significant employment for reservation Indians, as executive managers, salespersons, claims administrators, etc. The Indians filling these jobs would require insurance industry education and training, which would provide them far more career upside and self-determination than card dealing. While a tribal captive wouldn't require a significant influx of personnel for its start up, the new professional opportunities on the reservation would be profound.

Anti-State Taxation. Federal law clearly says that states cannot tax Indians in Indian country. Because the vast majority of a tribe's insured activity is by Indians, in Indian country, tribal insurance should not be state taxed. Private insurers pay state excise and other taxes on the insurance they sell and, in turn, pass on those "hidden" state taxes to tribes through premiums. One industry expert believes that state taxes constitute as much as 25 percent of the premiums paid by tribes to outside insurers. In Washington state, some tribes pay around $1 million annually for property and casualty insurance, meaning nearly $250,000 in state taxes per year. Creating tribal captive insurers will help stop one of the largest and most egregious forms of state taxation – revenue sharing – in Indian country.

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Sovereignty Defense. Most private insurance policies waive tribal sovereign rights, in multiple ways: Insurers retain the right to assign attorneys to defend the tribe, namely non-tribal "discount" lawyers who do not understand Indian jurisdiction and immunity issues and the significant legal, political and social implications of litigating those issues. The policies may allow an insurer to deny coverage to the tribal insured if it decides against asserting immunity for public policy reasons. Arbitration language may divest a tribe's court of jurisdiction, and waive tribal immunity from countersuit against its insurer. Through tribal captives, tribes can draft its own policies and retain control over its sovereignty.

Tailor-made Policies. Captive insurance would otherwise allow tribes to provide coverage that is consistent with core Indian values. Tribes could ensure consistent claims management at a low cost by creating a single all-risk policy, with clearly and narrowly defined exclusions that fit everyday reservation life and business.

Incorporation. To maximize sovereignty protection and tax immunity, a tribe should probably charter any captive insurance company under tribal law or Section 17 of the federal Indian Reorganization Act – but not state law. Favorable tribal business forms include the corporation or LLC. If the tribe requires a business partner to begin a captive company, a carefully created joint venture partnership arrangement might be appropriate.

The time is ripe for tribal captive insurance. For too long, tribes have transferred their wealth to outside insurers that approach Indian country as a one-size-fits-all corporate conglomerate. Tribal captive insurance companies will reduce costly premiums, increase reinvestment in reservation economies, and enhance tribal sovereignty protection.

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