

MODEL TRIBAL TORT CLAIMS ACT
FOR NON-GAMING RELATED TORTS
Reorganization with Revisions
March 20, 2008

Table of Contents

PART I - Title Scope and Definitions	<u>Page 1</u>
§ 1. Short Title	<u>Page 1</u>
§ 2. Scope	<u>Page 1</u>
§ 3. Definitions	<u>Page 1</u>
PART II - Liability in Tort	<u>Page 3</u>
§ 4. Claims; exclusive remedy	<u>Page 3</u>
§ 5. Obligation of the tribe	<u>Page 3</u>
§ 6. Extent of liability	<u>Page 4</u>
§ 7. Exemptions from liability	<u>Page 4</u>
§ 8. Default	<u>Page 6</u>
§ 9. Apportionment of Award	<u>Page 7</u>
§ 10. Assignment	<u>Page 7</u>
PART III - Procedure	<u>Page 7</u>
§ 11. Tort Claims Procedure	<u>Page 7</u>
§ 12. Notice	<u>Page 9</u>
§ 13. Tort Claim Notice Form	<u>Page 9</u>
§ 14. Arbitration: [Processing tort claims; interviews or depositions;	<u>Page 11</u>
§ 15. Arbitration Record	<u>Page 13</u>
PART IV - Insurance Commissioner	<u>Page 14</u>
§ 16. Office of [insurance commissioner]	<u>Page 14</u>
§ 17. [Insurance commissioner] powers and duties	<u>Page 15</u>
§ 18. Registration: Conditions and procedures	<u>Page 16</u>
§ 19. Insurance and self insurance; policy requirements and restrictions	<u>Page 16</u>
§ 20. Severability	<u>Page 17</u>
§ 21. Effective date	<u>Page 17</u>

PART I - Title Scope and Definitions

§ 1. Short Title

Sections 1 through 23 of this act shall be known and may be cited as the [Name of enacting Tribe or Nation] Tort Claims Act.

§ 2. Scope

- (a) Except as provided in subsection (b) of this section and other tribal law, the [Tribe or Nation] Tort Claims Act governs all tort claims asserted against the [Tribe or Nation].
- (b) The provisions of the [Tribe or Nation] Tort Claims Act do not apply and shall not be construed to apply to any claim against an enterprise pursuant to the provisions of a gaming compact between [Tribe or Nation] and the State of Oklahoma.

§ 3. Definitions

As used in the [Tribe or Nation] Tort Claims Act :

- (a) “Act” means the [enacting Tribe or Nation] Tort Claims Act.
- (b) “Claim” or “tort claim” means a claim recognized at law as a private or civil wrong or injury, that is independent of contract, that involves a violation of duty imposed by general law, and that results in a loss to a person as the proximate result of an act or omission of an employee of the tribe or other individual acting for the tribe, except an independent contractor, when that person is acting within the scope of the duties of that person.
- (c) “Claimant” means the person that asserts a tort claim which is subject to the provisions of this act.
- (d) “Days” means a business day as specified or provided under tribal law.
- (e) “Employee” means an individual employed by the tribe on a full time or

part time basis and elected or appointed officers of the government or subdivision of the tribe. The term does not include an individual working for the tribe as an independent contractor.

- (f) ["Tort Claims Administrator" or "TCA"] as the context dictates, means the individual who is, or the office of, the [TCA], or both, established to administer the provisions of this act.
- (g) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.
- (h) "Record" means information that is inscribed on a tangible medium, or that is stored in an electronic or other medium and is retrievable in perceivable form.
- (i) "Tribe" means the [enacting Tribe or Nation]. The term includes subdivisions, agencies, sections of tribal management, tribal business enterprises, all elected or appointed officers or members of any tribal governing body, and other individuals designated or authorized to act for any of the above who are acting in good faith within that designation or authority, and all other employees or other individuals except independent contractors acting in good faith within the scope of their duties, whether performing governmental or proprietary functions and whether acting together or singularly.

Comment

Independent contractors are excluded as the enacting tribe has no control over the performance of their duties and they have no immunity from suit.

PART II - Liability in Tort

§ 4. Claims; exclusive remedy

- (a) The tribe, as a sovereign and federally recognized Indian tribe, possesses and is legally entitled to sovereign immunity from liability for tort claims whether within the scope of this act or not. By adoption of this act, the tribe does not waive sovereign immunity in any respect.
- (b) This act provides the exclusive remedy with respect to the tribe for injury, damage, or loss to a person from a tort claim and displaces any other possible remedy regarding a tort claim, whether at general law, by statute, regulation, or ordinance, or otherwise, except as otherwise provided by tribal law.

Comment

A tribe is not liable due to sovereign immunity for any tort claim, including claims excluded under §7 of this act, except as may be provided under other tribal law, such as a workers' compensation act. This is only with respect to the tribe, a third party may be liable.

§ 5. Obligation of the tribe

- (a) The [Chief, Governor, or other appropriate tribal officer] shall determine the method and means for providing liability insurance pursuant to the provisions of this act.
- (b) The requirement for liability insurance and the purchase of such insurance is not a waiver of the sovereign immunity of the tribe but effectuates the purpose of the tribe to provide an appropriate remedy for claimants who have tort claims within the scope of this act.
- (c) If not self insuring, the tribe may contract with one or more of the parties registered pursuant to §18 of this act to provide liability insurance coverage on such terms as determined by the circumstances and needs of the tribe.

- (d) The tribe may purchase additional limits of insurance, establish deductible amounts, and establish, as an alternative to acquiring insurance from a source outside the tribe, a self-insurance policy to the extent insurance is required by this act.

§ 6. Extent of liability

The tribe shall acquire and keep in force a liability insurance contract with a registered and solvent insurance company or self-insurance, on behalf of the tribe for the purpose of paying tort claims. The total liability with respect to tort claims within the scope of this act arising out of a single act, accident, or occurrence happening after the effective date of this act may not exceed the [maximum insurance] limits [in force]. Those limits shall be not less than:

- (a) (\$50,000) for any claim, or to any claimant who has more than one claim, for loss of property arising out of a single act, accident, or occurrence;
- (b) (\$100,000) to any claimant for a claim for any other loss arising out of a single act, accident, or occurrence; and
- (c) (\$1,000,000) for any number of claims arising out of a single act, accident, or occurrence.

Comment

It is suggested the dollar limits be no less than those in comparable jurisdictions.

§ 7. Exemptions from liability

The following claims are excluded from coverage pursuant to this act unless specifically indicated to the contrary in a written policy of insurance, and thus are subject to the sovereign immunity of the tribe:

- (a) a claim arising from an act or omission of a person acting outside of the scope of the duties of the person;

- (b) a claim arising from an act or omission of a person that involves corruption, fraud, assault, battery, false imprisonment or arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, or interference with contract rights;
- (c) a claim seeking damages that are punitive, exemplary, incidental, or consequential;
- (d) a claim resulting from legislative, judicial, quasi-judicial, licensing, or prosecutorial functions, or execution of lawful court orders;
- (e) a claim arising from conduct that involves discretionary functions or duties, including planning and operational decisions based on policy judgment, whether or not a decision was considered, ill-considered, or unconsidered, including negligent hiring and retention, enforcement or lack or enforcement of any law, the grant, delay or denial of a license;
- (f) a claim that is barred by law, or beyond the limit as to amount of any claim imposed by law;
- (g) a claim based on an intentional tort or for strict liability or breach of warranty;
- (h) a claim based on the failure to enforce a law, to perform or the failure to perform an act or service, or to afford adequate protection, if the failure is justified [has a rational basis] under the circumstances then existing;
- (i) a claim based on attractive nuisance or unauthorized entry on or into property;
- (j) a claim based on a hidden danger if the danger would have been open and obvious to a reasonable person or a reasonable person would have perceived a potentially dangerous situation;
- (k) a claim based on natural conditions of property;
- (l) a claim arising from a defect in the manufacture or design of a product;

- (m) a claim for any loss covered by any worker's compensation program, or any other applicable tort claims act, or one that is incurred by a person employed by the tribe;
- (n) a claim by an person using tribal property or facilities for activities not related to tribal business or tribal obligations;
- (o) a claim payable from a collateral source of compensation,
- (p) a claim based on the absence or malfunction of any equipment unless uncorrected within a reasonable time after the absence or malfunction was discovered or should have been discovered;
- (q) loss due to theft or other criminal act;
- (r) a claim based on an act or omission done in conformance with then current recognized standards;
- (s) a claim for costs or attorneys fees; and
- (t) any claim arising before the effective date of this act.

§ 8. Default

- (a) Once a claim is finally determined as payable and there is no insurance to pay it, there is a default, unless the claimant has been informed by the [TCA] [insurance commissioner] that within twenty (20) days after the claim is finally determined:
 - (1) the tribe has deposited in an irrevocable escrow account at a state or federally chartered and insured bank cash or other security sufficient to cover any unpaid part of the tort claim, or
 - (2) insurance in compliance with this act has been acquired that will cover any unpaid part of the tort claim.
 - (3) the claimant and the tribe have agreed how a finally determined

amount may be paid out and that there has been an appropriation by the tribe for that purpose.

- (b) If there is a default, the sovereign immunity of the tribe precludes any remedy against the tribe or pursuant to this act.

§ 9. Apportionment of Award

If the amounts finally determined to be payable to multiple claimants exceed the limitations provided in this act, any claimant may apply to the appropriate tribal authority for apportionment to each claimant of a share of the total award as limited. The share apportioned to each claimant shall be in the proportion that the ratio of the award made to that claimant bears to the aggregate awards for all claimants arising out of the single act, accident, or occurrence.

§ 10. Assignment

An assignment of a tort claim within the scope of this act must be expressly approved in record form by the tribe. This limitation does not extend to:

- (a) a tort claim filed by a court appointed representative of a claimant's estate upon proof of authority,
- (b) a claim presented by indispensable party to the claim as determined under other law, or by a health provider or other party subrogated to the claimant's rights by virtue of any insurance policy or under other law, as long as the claim is in lieu of and identical to the claim that would have been made by the claimant directly and adequate evidence of status satisfactory to the tribe as well as sufficient advance notice is provided, or
- (c) an assignment required by federal law.

PART III - Procedure

§ 11. Tort Claims Procedure

- (a) In order to be entitled to a remedy pursuant to this act, a person who is

injured, damaged or otherwise suffers loss and asserts a tort claim must pursue the claim in the form and manner prescribed in this act.

- (b) By filing a tort claim pursuant to this act a claimant consents to the jurisdiction of the tribe and is subject to all the civil and criminal laws of the tribe.
- (c) A tort claim shall be styled as “In re Tort Claim of (Name of Claimant).”
- (d) Any claim filed pursuant to the provisions of this act is not a claim against either the tribe or the insurance carrier for the tribe.
- (e) The [TCA] shall accept all tort claims made pursuant to this act and within the limits outlined by this act and other tribal law including the tribal Constitution, customs, traditions, and all published regulations.
- (f) To initiate a tort claim under this act, it must be received in record form by the office of the [TCA] within thirty (30) days after the act, accident, or occurrence that gave rise to it. Failure to timely file the claim is grounds for denying the claim and loss of any rights granted a claimant pursuant to the provisions of this act. Provided that if a claim that would be appropriate pursuant to this act has been dismissed as having been improperly filed under another statutory authority, the [TCA] may allow the claimant to file a claim pursuant to this act within 30 days of the dismissal.
- (g) The [TCA] shall assign a unique numerical designation of the claim and forward the claim to the insurance carrier within five days after the claim is filed.
- (h) The insurance carrier, or in the case of self-insurance, the tribe, shall have ninety days from the date of filing of a tort claim to address the claim and attempt to resolve any issues by settlement. The parties may by written agreement extend the period in which to settle for not more than twelve months from the expiration of the ninety day initial period, or in the event the claim involves a death or unresolved injury, for 24 months.
- (i) At any time after the initial 90 day settlement but before the expiration of

the period to initiate a tort claim under the claimant may request Arbitration pursuant to § 14 by sending notice to the TCA.

§ 12. Notice

-
- (a) A person or office “receives” a notice or notification when it comes to that person’s or office’s attention or it is duly delivered in a form reasonable under the circumstances at a location held out by that person or office or at a location known to be the place for receipt of communications of the type.

 - (b) Notice, notification and knowledge received by a person or office is effective for a particular purpose from the time it is brought to the attention of the individual responsible for the matter involved and, in any event, from the time it would have been brought to that individual’s attention if the person or office had exercised due diligence by having reasonable routines for communicating significant information to the individual responsible for the matter involved and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the person or the office to communicate information unless the communication is part of the individual’s regular duties or the individual has reason to know of the matter involved and that it would be materially affected by the information.

 - (c) A person “sends” a notice or notification to another person or office by taking steps that are reasonably required to inform the other person or office in ordinary course, whether or not the other person or office actually comes to know of it.

§ 13. Tort Claim Notice Form

The following information must be provided for a tort claim, and may be in the following format:

TORT CLAIM NOTICE FORM

IN RE: Tort Claim of _____
[full legal name of Claimant]

Claimant Information

Full legal name of person making the claim, known and referred to as the Claimant: _____

Mailing address of Claimant: _____

Telephone number of Claimant: _____

E-Mail address of Claimant: _____

Details of Incident Resulting in the Filing of this Claim

Physical location where the incident upon which the claim is based occurred:

Date and time of occurrence of the incident upon which the claim is based:

Was an ambulance called? (circle one) Yes No

If called, time of arrival of ambulance: _____

Were offered medical services accepted? (circle one) Yes No

If medical services offered were rejected, explanation of reason for rejection. _____

Description of circumstances of the incident upon which claim is based:

Description of why the claimant believes the tribe is at fault:

Name, address, or other identifying information of individuals known to have witnessed or have information regarding the incident, including tribal employees:

Was injury reported to the tribe (circle one) Yes No

If so, name of employee of tribe who received the report: _____

Was the report verbal or written (circle one) Verbal Written

Date and time reported: _____

Compensation Claimed

Amount claimed for pain: \$ _____

Amount claimed for medical: \$ _____

Amount claimed for other: \$ _____

Explain reason for claim for other: _____

Total amount requested: \$ _____

By filing this tort claim, the undersigned consents to the jurisdiction of the criminal and civil courts of the tribe without regard to time or event.

The undersigned swears or affirms that this tort claim is made in good faith and acknowledges that false claims may be prosecuted by the federal government or the tribe, or both.

The undersigned is advised that your claim will be reviewed within ninety (90) days before responding to you. Unless the undersigned requests, the review deadline allows for little or no consideration of claimant’s schedule in this matter. Does claimant’s request a one hundred-eighty day (180) claims settlement period instead? (Circle One) Yes No

This tort claim is made under oath and any falsification of any part thereof by the signing claimant may result in criminal prosecution for perjury.

(Signature of Claimant)

(Date)

Name and mailing address of attorney, if claimant has retained an attorney at the time of filing this tort claim: _____

§ 14. Arbitration: [Processing tort claims; interviews or depositions;]

(a) Request for Arbitration

- (1) Within 10 days from the receipt of notice of a Request for Arbitration by the TCA, the TCA shall contact the Claimant using the information on the Tort Claim Notice Form, or the Attorney for the Claimant if represented. The parties shall begin selecting an arbitrator.
- (2) A single arbitrator from a list of qualified arbitrators maintained by the tribal Supreme Court may be mutually agreed upon by the claimant and the TCA. If an arbitrator cannot be selected from the list the parties may agree on any other arbitrator. If the parties cannot agree upon an arbitrator within [45] days from the date that the request for Arbitration is sent, then the Clerk of the Supreme Court shall randomly select an arbitrator from the list pursuant to procedures adopted by the Supreme Court.
- (3) The Claimant's right to be heard is contingent upon compliance with all requirements of this act, including filing deadlines provided herein.
- (4) In furtherance of the tribal's policy to simplify and expedite claims under this Act, arbitrators and courts shall give deference to unrepresented Claimants by excusing honest, non-material or correctable mistakes. Filing deadlines are deemed to be material and non-correctable for purposes of this paragraph.

(b) Arbitration Costs

- (1) The Claimant shall be required to pay, and submit with the request for arbitration, a \$100.00 filing fee in order to obtain arbitration; provided that said \$100.00 fee shall be refunded to the Claimant if said person prevails at arbitration.
- (2) Cost of arbitration shall be allocated by the arbitrator.
- (3) If the arbitrator determines that the claim is frivolous, some or all of the prevailing party's attorney fees and costs of arbitration may be borne by the non-prevailing party as determined by the arbitrator.

§ 15 Arbitration Record

- (a) The Arbitrator shall compile a record, for purposes of appeal of an arbitration award to the District Court, that shall include:
- (1) The casefile, including all documents, pleadings, motions, and intermediate rulings;
 - (2) Evidence received or considered at the arbitration proceeding;
 - (3) A statement of matters officially noticed;
 - (4) Questions and offers of proof, objections, and rulings thereon;
 - (5) Proposed findings and exceptions;
 - (6) The final arbitration decision appealed, and any other decision, opinion, or report entered by the arbitrator presiding over the hearing; and
 - (7) All other evidence or data submitted to the arbitrator in connection with consideration of the case, provided all parties have had access to such evidence.
 - (8) Arbitration proceedings shall be recorded by audio and may also be recorded by video at the option of the arbitrator. Such recordings shall be maintained for such time so as to protect the record through judicial review. Copies of the recordings shall be provided by the arbitrator at the request of any party to the proceeding. Costs of copying the recordings shall be borne by the party requesting the copy. For judicial review, recordings of an individual proceeding, as certified by the arbitrator, may be submitted to the District Court by the arbitrator as part of the record of the proceedings under review without transcription unless otherwise required to be transcribed by the Court.
- (b) Within thirty (30) days of the filing of the arbitration appeal, the TCA or arbitrator shall compile and transmit to the District Court the original or a

certified copy of the record of the proceeding under review. By stipulation of all parties to the review proceeding, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the Court for the additional costs resulting therefrom. The Court may require or permit subsequent corrections or additions to the record when deemed desirable.

- (c) The review shall be conducted by the District Court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the arbitrator pursuant to Sections 23 or 24 of the Cherokee Nation Arbitration Act which are not shown in the record, testimony thereon may be taken by the Court.

PART IV - Insurance Commissioner

§ 16. Office of [insurance commissioner]; appointment and removal of [insurance commissioner]

- (a) Within the government of the tribe, there is created the office of [insurance commissioner], and the position of [insurance commissioner].
- (b) The [insurance commissioner] is appointed by the [Chief, Governor, or other appropriate tribal authority] for a term of four (4) years. The [insurance commissioner] serves until resignation, removal, or a successor is appointed. In the case of a vacancy, the appointing tribal authority shall designate another individual to act as [insurance commissioner] on a case by case basis until the position has been filled pursuant to the provisions of this subsection.

Comment

No special qualifications to be the Insurance Commissioner are provided in this act. The enacting tribe has the option to impose any qualifications it thinks appropriate.

- (c) The [insurance commissioner] may be removed for cause. Removal is subject to review de novo by the appropriate tribal court.

Comment

Procedures for removal, compensation and the like are left to the appointing authority and any applicable tribal law.

§ 17. [Insurance commissioner] powers and duties

The [insurance commissioner] shall have the following powers and duties as well as those set forth in other sections of this act:

1. Registering insurance agents, insurance brokers, and insurance companies seeking to provide insurance coverage to the tribe for purposes of this act.

Comment

The purpose of requiring registration is to establish a consensual basis for the taking of any further action (see §19(d)) and not to regulate the business of the insurer.

2. Adopting regulations necessary or proper to implement the provisions of this act; regulations must be published by filing them with the [Chief, Governor, or other appropriate tribal officer], and the tribal court clerk. A published regulation remains in force until rescinded by law, a published withdrawal, or an amendment.

3. Establishing and maintaining a file of all proof of insurance and all policies when received.

4. Providing a copy of this act and any insurance regulations to a claimant upon request within [five (5)] days of the filing of a tort claim by or on behalf of that claimant.

5. Performing such other duties as may be necessary to implement the provisions of this act or as requested or designated by the [Chief, Governor, or other appropriate tribal officer].

Comment

A possible example of an additional duty that may be performed under subsection 5 is assisting in securing appropriate liability insurance coverage, and examples of additional duties that may be requested or

designated are advising on when to self insure, and on what deductibles are appropriate, and performing periodic review of such decisions.

§ 18. Registration: Conditions and procedures

- (a) An insurance company, or individual agent or broker, that provides or seeks to provide liability insurance or services associated with a policy of liability insurance is required to be registered by the [insurance commissioner].
- (b) The [insurance commissioner] may grant a registration, upon submission of an application in the form and with the requirements prescribed by the [insurance commissioner] and any required fee, to any person that has satisfied the requirements. A registration may also be granted to a person upon submission of an application if the person possess a valid license to provide liability insurance issued by a government of another jurisdiction.
- (c) A registration may be denied or revoked for cause upon hearing after not less than [10] days notice received from the [insurance commissioner]. Causes shall be those commonly cited by other governments for denial or revocation of an registration for insurance.
- (d) The solicitation of an insurance premium or the receipt of an insurance premium or payment for associated services by a person, or the application for registration, constitutes consent to the jurisdiction of the tribe and the courts of the tribe or courts provided for the tribe by the federal government unless this result is waived in a record by the [insurance commissioner] after consultation with the appropriate tribal authority.

§ 19. Insurance and self insurance; policy requirements and restrictions

- (a) A person providing a policy of liability insurance and not providing a policy in record form to the [insurance commissioner] within a reasonable time after procurement is subject to a proceeding by the [insurance commissioner] for an appropriate remedy.
- (b) All liability insurance policies issued pursuant to this act must include an endorsement providing that the insurer will not invoke tribal sovereign

immunity in connection with a tort claim made within the limits of liability and in compliance with this act. In the absence of an actual policy endorsement, the policy is deemed to contain an endorsement in compliance with this subsection.

- (c) An insurer that pays a tort claim is subrogated to any rights the person or individual paid may have under state or tribal law against a person other than the tribe. An insurer is not subrogated to any right the tribe may have against the person paid by the insurer. An agreement inconsistent with the limitations of this subsection is void.
- (d) A deductible amount may be established by the tribe before liability of an insurer commences, and the tribe may administer and pay such deductible amounts without regard to insurance procedures applicable to claims covered by liability insurance. A claim in record form for a deductible amount to be paid must be in accordance with §13, except as modified by the [insurance commissioner], and must be filed with the [insurance commissioner].
- (e) Notices otherwise to be given to the insurer are required to be sent to the [insurance commissioner] if insurance for claims is self insurance.

§ 20. Severability

If any part of this act is later determined to be invalid, the remainder shall continue in effect unless the invalid part renders the operation of the remainder impracticable.

§ 21. Effective date

This act is effective _____, and applies to all claims that arise after that date.