

Tribal Warfare

By Bruce Shutan

Fast-food restaurant owner Safar Ghaffari, a foot soldier in the small-business community's war on steep workers' comp rate hikes, sought in late 2002 to secure affordable coverage for roughly 120 employees at four restaurants he owns in Humboldt County north of San Francisco near the Oregon border.

Ghaffari acted on the advice of his insurance broker who suggested he find coverage through an occupational-injury system run by the Blue Lake Rancheria, a tiny Native American tribe with just 53 members spread across 42 acres. "The coverage was better and it stayed within the spirit of the workers' comp law," says Ghaffari.

Insuring through the tribe meant that Ghaffari would be able to pay half the cost of occupational-injury and medical indemnity benefits coverage than the rates paid by scores of businesses set by the State of California.

But before a deal could be finalized, California labor officials began questioning the carrier's integrity, eventually forcing Ghaffari to purchase coverage from a more expensive state fund.

Ghaffari wasn't pleased. "It costs twice as much, and they fight you tooth and nail over any claim," he fumes. The state demanded that he deposit 20 percent of his estimated annual premium, which was nearly \$50,000.

"I can't print money fast enough to do that," says Ghaffari, who pleaded with the regional labor office in Eureka, but to no avail. So state officials shut down one of his three Denny's franchises and an independent steakhouse.

Ghaffari consoled crying employees after voluntarily closing the other two Denny's operations until less than a week later when he raised the necessary cash.

The trouble with California's workers' comp law is that the state doesn't simply issue a citation, Ghaffari gripes, "they just shut you down. That's unfair and it doesn't help the state or the employer. Many small businesses are going belly up."

Roiled Regulators

The state of California doesn't see it that way. State officials say they worry that American Indian tribes may not always have the requisite capital to pay compensation claims, should the need arise.

He contends that city, county and state officials have marginalized tribal governments and their right to sovereignty.

“It’s easy for people in the outside world to beat up Indian tribes based on their tribal gaming operations,” says Ramos, a founder of Mainstay.

To Court, To Court-Of Course, Of Course

Where are all these disputes all headed? To court, of course.

The California Insurance Department has filed several motions seeing to prevent licensed insurance agents and brokers from marketing, soliciting and selling insurance coverage offered by Mainstay.

Westmore says the state is not convinced the tribal council is qualified to adjudicate compensation claims cases that come before it. “We’re not familiar with the make-up of that council or even if the tribe knows how it works,” she says.

“If they are not capable of paying their claims then employers have no recourse and claimants will be forced to seek assistance from the state,” she also says. “The state then has the right to subrogate its claim against the employer, causing the employer to pay for the individual claim that normally would have been covered under a workers’ comp policy.”

Hansen says these fears are completely unfounded. Claimants have nothing to worry about. Insurance through the tribe offers the insured access to a 40,000-strong credentialed PPO network guaranteeing access to 70 percent of the state’s physicians and hospitals, as well as vocational rehabilitation benefits and the use of mediation rather than litigation to resolve disputes.

Consequently, Mainstay can offer a cheaper alternative to the expensive rates levied by the California compensation system, which critics say is broken and “dysfunctional.”

“California has 2,000 permanent partial disability awards for every 100,000 workers,” he says. “The next-highest state is New Jersey at 900. You’re telling me it’s twice as dangerous to work in California as New Jersey? Absolutely not. The difference is it’s easier in California to settle a claim than fight it.”

The tribe’s appeal process is grounded in mediation, not litigation, and that lowers the insurance premiums for policyholders.

Mainstay, thanks to the economic backing of the Blue Lake tribe and its profitable casino operation, has more than \$12 million in surplus to fund \$1.7 million in reserves for future claims liability on 401 claims. A total of \$462,000 in payment have been made to injured workers on these claims. “We’re very well-funded relative to our claims liability,” Hansen says.

Revenue from the Blue Lake tribe's casino provides a safety net for injured workers if the loss fund contributions set aside in trust fall short of covering the entire cost of claims.

In short, Mainstay and the tribe say they have a case against the State of California. As a result, Mainstay has filed suit in Superior Court seeking to regulate its own licensed agents and brokers. A verdict is expected to take at least two years.

California Insurance Commissioner John Garamendi remains unconvinced. He says insuring workers through tribal ordinances amounts to back-door scheming.

“Because the schemes fail to comply with the licensing requirements of California law, the arguments about providing sufficient benefits, claims adjustment and mediation are irrelevant,” he says. Injured workers with so-called “coverage” under one of these tribal insurance programs would miss out on the full protections afforded under California law.

“There is no assurance that the Indian tribe or any other entity offering this product will have sufficient financial reserves to pay claims due over the extended life of a workers' compensation benefit,” says Garamendi.

Agents or brokers who sell illegal insurance products will have their licenses revoked, he says.

A Question of Precedent

The question before the litigants is whether the tribe has a right to be in the occupational-injury business off an Indian reservation. Both sides point to case law arguments to support their case.

Among the cases Mainstay cites that grant tribes sovereign immunity from state regulation in several areas of employment: *Worcester vs. Georgia*, which dates back to 1832, *California vs. Cabazon* and *Segundo vs. City of Rancho Mirage*, both of which were decided in 1987.

Moreover, Mainstay notes that case law affirming the sovereign right of tribes to govern their own workers' compensation claims both on and off reservation land can be found in *Oneida Indian Nation vs. Oneida County* from 1972 and *Sac & Fox Nation vs. Hanson* from 1995.

Late last year, Mainstay hired a lobbyist and political consulting firm to cajole the state legislature about the importance of enabling all employers to choose their own exclusive network of providers with a certain percentage of access to doctors and hospitals and pursue claims mediation rather than litigation.

California Indian tribes have successfully argued that they're exempt from regulation governing the state workers' comp system, notes Scott Rubel, an attorney with Rose, Klein & Marias in Ontario, Calif., citing a recent California Supreme Court case (*Middletown Rancheria of Pomo Indians vs. Workers' Compensation Appeals Board et al.*).

But at the same time, Rubel questions how the Blue Lake Rancheria Indian tribe can make available to non-tribal entities tribal-governed insurance without subjecting itself to California's insurance benefits regulation.

"The law is clear: you cannot sell insurance in the state of California unless you're licensed to do so," he says. "The tribe doesn't have a snowball's chance in hell of winning this issue because they're trying to expand their sovereignty into the United States. And if another nation like Mexico or Canada tried to do this, we could consider this an act of war."

Applying tribal law to non-tribal employers through an employee lease-back agreement just will not fly, says Rubel. Most workers have no idea they are subject to tribal law and not entitled to right guaranteed by California law.

Westmore says the California Insurance Department views the tribes' chance of success as a long shot. "It's an issue that will have to be resolved at the state or federal Supreme Court level," she says.

Since the California Department of Insurance is bound by the McCarran-Ferguson Act of 1945, she says, "some would say it does not comport with the sovereign immunity Congress granted to the Indian tribes, which does not let them engage in business off the reservation affecting the citizens of California."