

BUYER BEWARE: THE LIABILITY GAP CREATED BY TRIBAL FARMING

INTRODUCTION

Nearly every year, the media confronts the American public with reports of a new fresh produce related foodborne pathogen illness outbreak.¹ In 2003, green onions caused a scare² and the next year the headlines touted contaminated spinach.³ In 2008, the media erroneously reported on Florida grown tomatoes contaminated with salmonella but the actual culprit turned out to be jalapenos coming from Mexico.⁴ The Centers for Disease Control states that Americans annually suffer an estimated 76 million cases of foodborne disease.⁵ An estimated 325,000

¹ See Jennifer O'Shea, *Timeline: Deaths and Illnesses Caused by Food Contamination*, U.S. NEWS AND WORLD REPORTS, May 27, 2008, http://health.usnews.com/usnews/health/articles/070520/28food.timeline_print.htm (last visited Oct. 19, 2008).

² *Hepatitis A Outbreak Associated with Green Onions at a Restaurant — Monaca, Pennsylvania, 2003*, 52 (47) MORBIDITY AND MORTALITY WEEKLY REPORT 1155, 1155-1157 (Nov. 21, 2003), available at <http://www.cdc.gov/mmwr/PDF/wk/mm5247.pdf> (In 2003, 555 people were infected with hepatitis A from consuming green onions prepared in a restaurant in Pennsylvania. Three people died. "Green onions require extensive handling during harvesting and preparation for packing. Contamination of green onions could occur...by contact with HAV-infected workers, especially children, working in the field during harvesting and preparation . . . by contact with HAV-contaminated water during irrigation, rinsing, processing, cooling, and icing of the product. . .").

³ See *FDA Finalizes Report on 2006 Spinach Outbreak*, FDA NEWS, Mar. 23, 2007, <http://www.fda.gov/bbs/topics/NEWS/2007/NEW01593.html> (last visited Jul. 22, 2008) (In 2006, 207 people were infected with *e-coli* from Dole brand spinach. There were three deaths. The spinach was tracked to one field in California. Although the exact cause of the outbreak was not found, the growing practices were highlighted as a potential cause.).

⁴ Jonathan D. Rockoff, *Salmonella Signs Point to Peppers*, BALTIMORESUN.COM, Jul. 4, 2008, <http://www.baltimoresun.com/news/health/bal-te.salmonella04jul04,0,1339689.story> (last visited Jul. 5th, 2008) (In 2008, 920 people were infected with salmonella. At first it was believed that the infection was caused by tomatoes, but then jalapenos seemed more likely to be the problem.).

⁵ DEPARTMENT OF HEALTH AND HUMAN SERVICES, CENTERS FOR DISEASE CONTROL AND PREVENTION, *FOODBORNE ILLNESSES FREQUENTLY ASKED QUESTIONS 5* (2005), available at http://www.cdc.gov/ncidod/dbmd/diseaseinfo/files/foodborne_illness_FAQ.pdf.

hospitalizations and 5,000 deaths related to foodborne diseases occur each year.⁶ Consumption of raw fruits and vegetables cause particular concern because washing does not eliminate foodborne pathogens.⁷ It only decreases the risk of contamination.⁸

An individual infected with a foodborne pathogen disease caused by consuming tainted produce can find remedy under the theory of strict product liability.⁹ Any commercial supplier placing a defective product in the stream of commerce in an unreasonably dangerous condition may be held liable if that product harms an individual.¹⁰ The term “any commercial supplier” encompasses all parties in the chain of distribution, starting with the party creating the harmful aberration, and all subsequent sellers of the unaltered product.¹¹ In the case of a foodborne pathogen disease caused by consumption of tainted produce the chain of distribution would include the farmer who grew the produce, the retailer that sold the produce, and everyone in between.¹² The theory of strict product liability is not so much an assignment of negligence as it is a policy decision to place the burden of any potential injury on the party who stands to benefit from the commercial endeavor.¹³

A grocery store produce buyer may unwittingly create a huge liability for the company when taking the benign act of placing an order for produce.¹⁴ When the grower is a federally recognized tribe, legal issues ensue if the produce is contaminated with a foodborne pathogen because federally recognized tribes are immune from suit absent a waiver of im-

⁶ *Id.*

⁷ *Id.* at 9.

⁸ *Id.*

⁹ See *In re Shigellosis Litigation*, 647 N.W.2d 1, 4 (Minn. App. Ct. 2002); RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 cmt. a (1998) (“The imposition of liability for manufacturing defects has a long history in the common law. As early as 1266, criminal statutes imposed liability upon victualer, vintners, brewers, butchers, cooks, and other persons who supplied contaminated food and drink.”).

¹⁰ See *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 900 (Cal. Ct. App. 1963); see also *Codling v. Paglia*, 298 N.E.2d 622, 628 (N.Y. 1973); RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 (1998).

¹¹ See *Keener v. Dayton Elec. Mfg. Co.* 445 S.W.2d 362, 365 (Mo. 1969); see also *Burch v. Sears, Roebuck & Co.*, 467A.2d 615, 621 (Pa. Super. Ct. 1983).

¹² See *Burch*, 467 A.2d at 621.

¹³ See *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 866 (1986); see also *Temple v. Wean United, Inc.*, 364 N.E.2d 267, 269 (Ohio 1977); *Dippel v. Sciano*, 155 N.W.2d 55, 64 (Wis. 1967).

¹⁴ See *In re Chi-Chi's, Inc.*, 338 B.R. 618, 620 (Bkrcty. D. Del. 2006); see also *In re Shigellosis Litigation*, 647 N.W.2d at 4; *Cohron v. Wendy's International, Inc.*, No. 1:06-CV-146 TS, 2008 WL 2149386, at *1(D. Utah May 20, 2008).

munity or Congressional abrogation.¹⁵ As a result, grocery stores and others in the chain of distribution may find themselves liable to the consumer, but without remedy from the tribe.¹⁶ This scenario creates a gap of liability.

To avoid this kind of liability, it is necessary to explore how a grocery store or shipper could have gotten into this dilemma. The very nature of the industry makes it susceptible to this kind of liability because grocery store produce buyers do not necessarily request produce from any specific grower.¹⁷ In fact, the buyer rarely knows which farmer's produce fills the order.¹⁸ The buyer simply calls a supplier and asks for the required commodity.¹⁹ These transactions are done over the phone where the parties exchange the details of the sale.²⁰ The average buyer does not consider the potential liability any given purchase could cause the company.²¹

On the other side of the transaction is the shipper.²² A shipper represents different growers, and typically knows which grower's product is going to which order.²³ Typically a shipper sells many different growers' products at any given time.²⁴ Some of the growers have contracts with the shipper but other growers do business with the shipper on a handshake.²⁵ Shippers simply do not realize that a heightened liability exists when dealing with tribes; therefore, it often goes unaddressed.²⁶

¹⁵ See *Kiowa Tribe v. Mfg. Tech., Inc.*, 523 U.S. 751, 754 (1998) ("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 . . .").

¹⁶ See *id.* at 753-54.

¹⁷ Telephone Interview with Mike Crookshanks, Produce Salesman, Fruit Patch (Oct. 28, 2008) (Mike Crookshanks is a second generation farmer and shipper with 19 years experience as a produce seller. Mike Crookshanks has a B.A. in Agricultural Business from California State University Fresno.); interview with Alistair Wittus, Produce Buyer, Wakefern Food Corp., in Hanford, Cal. (Oct. 8, 2008) (Alistair Wittus is a second generation produce worker with an extensive background working for shippers and distributors as quality control.).

¹⁸ Crookshanks, *supra* note 17; Wittus, *supra* note 17.

¹⁹ Crookshanks, *supra* note 17; Wittus, *supra* note 17.

²⁰ Crookshanks, *supra* note 17; Wittus, *supra* note 17.

²¹ Crookshanks, *supra* note 17; Wittus, *supra* note 17.

²² Crookshanks, *supra* note 17; Wittus, *supra* note 17.

²³ Crookshanks, *supra* note 17; Wittus, *supra* note 17.

²⁴ Crookshanks, *supra* note 17; Wittus, *supra* note 17.

²⁵ U.S. Dep't. of Agric., 2002 Census of Agric.: United States Summary and Data 46 (2004), available at <http://www.nass.usda.gov/census/census02/volume1/USVVolume104.pdf> (only 2,099 vegetable, melon, and potato farms raised and delivered commodities under production contracts); *Id.* at A-8 ("A production contract is an agreement between a grower and a contractor that specifies the grower will raise an agricultural commodity and the contractor (integrator) will provide certain inputs such as feed, fertilizer, etc. The

Although there are several ways to overcome the hurdle of tribal immunity to suit,²⁷ waiver of immunity is the most likely solution in the

grower receives a payment or fee from the contractor, generally after delivery, which is usually less than the full market price of the commodity.”); Crookshanks, *supra* note 17 (Mike Crookshanks will not deal with a grower unless there is a contract in place. While this is the trend and tree fruit, he stated there are some who deal with out contracts altogether.); telephone interview with Ray Hansen, Interm Director, Agricultural Marketing Resource Center (Oct. 24, 2008) (Some farmers use marketing agreements and others do not. Whether a grower and shipper utilize a contract will be related to the risk involved for each party. The surge of the local foods movement has increased handshake deals.); telephone Interview with Dr. Dwight Minami, Professor of Agricultural Economics, California State University Fresno (Oct. 24, 2008) (Dr. Minami is a third generation grower and shipper, and has a B.A., M.S., and Ph.D. in Agricultural Economics from U.C. Davis. In 1994, Dr. Minami retired from farming. While Dr. Minami was a shipper he had no written contracts with growers he represented.).

²⁶ Crookshanks, *supra* note 17.

²⁷ Although this Comment is limited to exploring waivers of sovereign immunity there are other ways a party can overcome tribal immunity to suit. A tribe is not immune to suit by the federal government. *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459 (9th Cir. 1994); *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 383 (8th Cir. 1987); *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986) (en banc). Federal laws of general application apply to tribes. *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). Laws of general application which are silent regarding their treatment of tribes will apply unless this would be in conflict with matters of self-governance, rights protected by treaty, or legislative history which clearly indicates Congress did not intend for the law to apply to tribes. *Donovan v. Coeur d’Aleen Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985); *United States v. Farris*, 624 F.2d 890, 893-94 (5th Cir. 1980), *superseded by statute* 25 U.S.C. § 2710(d)(3), *as recognized in United States v. E.C. Investments, Inc.*, 77 F.3d 327 (9th Cir. 1996) (superseded with regard to application of state laws on reservations as relates to class III gaming, not federal laws of general application). Specifically, laws of general application which relate to commerce will always apply to a tribe. *San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306, 1313-14 (9th Cir. 2007) (“[W]hen a tribal government goes beyond matters of internal self-governance and enters into off-reservation business transaction with non-Indians, its claim of sovereignty is at its weakest.”); *NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995, 999 (9th Cir. 2002). A private entity will only be able to sue a tribe under the theory of violation of a federal law of general application if the law in question also creates a private right of action. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 78-79 (1977); *Chayoon v. Chao* 355 F.3d 141, 143 (2nd Cir. 2004); *Florida Paraplegic Ass’n v. Miccosukee Tribe* 166 F.3d 1126, 1128 (11th Cir. 1999). The Attorney General can sue for violation of laws of general application on behalf of aggrieved private parties who lack standing. *Florida Paraplegic Ass’n*, 166 F.3d at 1134; *Santa Clara Pueblo*, 436 U.S. at 67. Federal Bankruptcy Codes are an example of Congressional abrogation of tribal immunity to suit. “[T]he term ‘governmental unit’ means...a...domestic government.” 11 U.S.C. § 101(27) (2007). “[S]overeign immunity is abrogated as to a governmental unit to the extent set forth in this section...” 11 U.S.C. § 106 (2007) (*held unconstitutional*, *Nelson v. La Crosse County Dist. Atty.*, 301 F.3d 820 (7th Cir. 2002). *and Arcibo Cmty. Health Care, Inc. v. Com. of Puerto Rico*, 244 F.3d 241 (1st Cir. 2001), *and In re King*, 280 B.R. 767

case of tribal farming operations. As tribes seek out different ways to be self-sustaining, the collision of tribal immunity and tribal commerce creates a quagmire of legal issues. This Comment will examine how these immunities exist, whether there are any waivers of immunity related to tribal farming operations, and how those in the chain of distribution who are vulnerable to a tribe's blanket immunity can protect themselves.

I. HOW PRODUCE GETS FROM THE FARM TO THE CONSUMER

With regard to produce, there are several parties involved in the chain of distribution before any particular item ends up on the dinner table.²⁸ The farmer who grows the produce is dependent on many other businesses to get the product to market.²⁹ When any item of produce is grown, it must subsequently be harvested and packed.³⁰ Laborers pick the produce and for certain commodities the laborers also pack.³¹ Some items, like strawberries and cantaloupes, are packed by the same laborers who harvest it.³² Peaches, plums, and oranges are packed at a packing facility.³³ Once the product is harvested and packed, it must be transported from the field to the storage facility.³⁴ Typically, produce not packed in the field is packed at the location it is stored.³⁵ If produce is packed outside of the field, it is either packed by hand or machines that sort by weight, size, and color.³⁶ After packing is complete, the produce is placed in cold storage until there is an order for its shipment.³⁷

(Bankr.S.D.Ga. 2002), and *In re Jordon*, 275 B.R. 755 (Bankr.W.D.Va. 2002), and *In re Powers*, 301 B.R. 90, (Bankr.W.D.Okla. 2003) and, *In re Microage Corp.*, 288 B.R. 842 (Bankr.D.Ariz. 2003), and *In re Monseratt*, 289 B.R. 183 (Bankr.M.D.Fla. 2002), and *In re Levin*, 284 B.R. 308 (Bankr.S.D.Fla. 2002), and *In re Claxton*, 273 B.R. 174 (Bankr.N.D.Ill. 2002), and *In re Andres*, 288 B.R. 205 (Bankr.C.D.Ill. 2001), and *In re LTV Steel Co., Inc.*, 264 B.R. 455 (Bankr.N.D.Ohio 2001), and *Tennessee Student Assistance Corp. v. Glover*, 263 B.R. 588 (C.D.Ill. 2001), and *In re Dodson*, 259 B.R. 635 (Bankr.E.D.Tenn. 2001), and *In re Askey*, 261 B.R. 160 (Bankr.W.D.Pa. 2001), and *In re L. Luria & Sons, Inc.*, 282 B.R. 504 (Bankr.S.D.Fla. 1999)) (only unconstitutional with regard to abrogation of states' rights). Courts have interpreted these statutes to clearly abrogate tribal immunity to suit by a private individual. *Krystal Energy Co. v. Navajo*, 357 F.3d 1055, 1056 (9th Cir. 2004); *In re Russell* 293 B.R. 34, 40 (Bankr.D.Ariz. 2003).

²⁸ Crookshanks, *supra* note 17; Wittus, *supra* note 17.

²⁹ Crookshanks, *supra* note 17; Wittus, *supra* note 17.

³⁰ Crookshanks, *supra* note 17; Wittus, *supra* note 17.

³¹ Crookshanks, *supra* note 17; Wittus, *supra* note 17.

³² Crookshanks, *supra* note 17; Wittus, *supra* note 17.

³³ Crookshanks, *supra* note 17; Wittus, *supra* note 17.

³⁴ Crookshanks, *supra* note 17; Wittus, *supra* note 17.

³⁵ Crookshanks, *supra* note 17; Wittus, *supra* note 17.

³⁶ Crookshanks, *supra* note 17; Wittus, *supra* note 17.

³⁷ Crookshanks, *supra* note 17; Wittus, *supra* note 17.

Farmers utilize a variety of ways to get their produce to market.³⁸ Many farmers utilize shippers that market the produce to potential buyers like grocery stores.³⁹ These companies sell the product for a commission and the farmer receives the profit.⁴⁰ Whether the produce is marketed by a shipper or sold directly by the farmer, the produce is sold to a variety of different buyers.⁴¹ Although the produce may be sold to a variety of different buyers,⁴² the vast majority of produce either ends up in the grocery store or in foodservice.⁴³ Once an order is placed for the produce, either the seller or the buyer arrange for the produce to be transported to its final destination.⁴⁴ Clearly, there are many parties involved in the chain of distribution before any fruit or vegetable ends up in a shopping cart.

II. FARMING OPERATION LIABILITY FOR FOODBORNE PATHOGENS

A foodborne pathogen contamination at the farming level that makes produce unreasonably dangerous and causes injury could bring liability to any of the parties in the chain of distribution.⁴⁵ Each party in the chain of distribution could seek restitution from the party higher up the chain of distribution until the ultimate tortfeasor was held fully liable.⁴⁶ In this backdrop, a consumer could seek remedy from any commercial supplier,⁴⁷ but the commercial suppliers would be left without remedy due to the tribe's immunity.⁴⁸ Unfortunately, the ultimate tortfeasor, the tribe, could go free because they are immune from suit.⁴⁹

To put the potential for liability into perspective, it is noteworthy that strict liability claims regarding produce have come up within the past

³⁸ Crookshanks, *supra* note 17; Wittus, *supra* note 17.

³⁹ Crookshanks, *supra* note 17; Wittus, *supra* note 17.

⁴⁰ Crookshanks, *supra* note 17; Wittus, *supra* note 17.

⁴¹ Crookshanks, *supra* note 17; Wittus, *supra* note 17.

⁴² Crookshanks, *supra* note 17; Wittus, *supra* note 17.

⁴³ Crookshanks, *supra* note 17; Wittus, *supra* note 17.

⁴⁴ Wittus, *supra* note 17.

⁴⁵ See *In re Shigellosis Litigation*, 647 N.W.2d 1, 4 (Minn. App. Ct. 2002); see also *Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362, 365 (Mo. 1969); *Burch v. Sears, Roebuck & Co.*, 467 A.2d 615, 621 (Pa. Super. Ct. 1983).

⁴⁶ See *In re Shigellosis Litigation*, 647 N.W.2d at 12; see also *Burch*, 467 A.2d at 622.

⁴⁷ See *In re Shigellosis Litigation*, 647 N.W.2d at 7; see also *Keener*, 445 S.W.2d at 365; *Burch*, 467 A.2d at 622.

⁴⁸ See *Kiowa Tribe v. Mfg. Tech., Inc.*, 523 U.S. 751, 754 (1998) ("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 . . .").

⁴⁹ *Id.*

seven years.⁵⁰ In 1998, a foodborne pathogen outbreak injured more than 100 people in California, Minnesota, Massachusetts, and Ontario, Canada with *Shigella sonnei*.⁵¹ The infection was caused by the consumption of raw parsley grown in Mexico.⁵² The parsley had been contaminated by the water the grower used to rinse and ice it.⁵³ Affected consumers sued one of the restaurants who had served the contaminated parsley under the theory of strict liability.⁵⁴ The restaurant filed an action for contribution and indemnity against the shipper and the importer.⁵⁵ The restaurant did not include the Mexican grower as a party because the Mexican grower was not subject to the jurisdiction of Minnesota.⁵⁶ Both the restaurant and the shipper filed a motion with the lower court for dismissal under an exception in Minnesota law which stated that any strict liability claims against the seller would be dismissed once the seller identified the manufacturer of a product.⁵⁷ The trial court denied the motion.⁵⁸ On appeal, the appellate court held that the restaurant could pursue a claim of indemnity and contribution against the Mexican grower or seek remedy against the other passive sellers.⁵⁹

In 2006, another foodborne outbreak sickened seventy-three people with *E. coli*⁶⁰ due to contaminated lettuce they had eaten at Wendy's.⁶¹

⁵⁰ See *In re Shigellosis Litigation*, 647 N.W.2d 1 at 1; *Cohron v. Wendy's International, Inc.*, No. 1:06-CV-146 TS, 2008 WL 2149386, at *1 (D. Utah May 20, 2008); see also *In re Chi-Chi's, Inc.*, 338 B.R. 618, 620 (Bkrtcy. D. Del. 2006) (this case was not a strict liability claim but it is related to a food borne pathogen outbreak which caused 650 illnesses).

⁵¹ *Outbreaks of Shigella sonnei Infection Associated with Eating Fresh Parsley – United States and Canada, July-August 1998* 48(14) MORBIDITY AND MORTALITY WEEKLY REPORT 285, 285-287 (April 16, 1999), available at <http://www.cdc.gov/mmwr/PDF/wk/mm4814.pdf> (“[*Shigellosis*] is an infectious disease caused by a group of bacteria called *Shigella*. Most who are infected with *Shigella* develop diarrhea, fever, and stomach cramps starting a day or two after they are exposed to the bacteria.” Centers for Disease Control and Prevention, Division of Foodborne, Bacterial and Mycotic Diseases, What is *shigellosis*? http://www.cdc.gov/nczved/dfbmd/disease_listing/shigellosis_gi.html#1 (last visited Dec.19, 2008)).

⁵² *Outbreaks of Shigella sonnei Infection Associated with Eating Fresh Parsley – United States and Canada, July-August 1998*, *supra* note 51.

⁵³ *In re Shigellosis Litigation*, 647 N.W.2d at 4.

⁵⁴ *Id.* (plaintiff also filed claims of negligence, per se negligence for violation of food statutes, breach of implied warranties of merchantability and fitness, and strict liability).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 8.

⁵⁸ *Id.* at 8.

⁵⁹ *Id.* at 12.

⁶⁰ Centers for Disease Control and Prevention, Division of Foodborne, Bacterial and Mycotic Diseases, What is *Escherichia coli*?, <http://www.cdc.gov/nczved/dfbmd/>

The lettuce was grown by A & A Farming (A&A) and sold by Pacific International Marketing (“PIM”).⁶² The local county health department determined that the outbreak was traced to the consumption of lettuce, but the findings were inconclusive as to whether the lettuce was contaminated at Wendy’s or earlier in the chain of distribution.⁶³ In 2007, an injured family filed a claim in the United States District Court for the Northern Division of Utah against PIM and A&A.⁶⁴ Among the claims filed, one was against A&A for strict product liability.⁶⁵ This case is currently pending.⁶⁶ The nearly three year time span of the case makes it clear that a complaint stemming from foodborne pathogen injury can generate protracted litigation. These examples illustrate that foodborne pathogen injuries can spawn lawsuits where the harmed parties seek remedy against everyone in the chain of distribution.

III. TRIBAL FARMING OPERATIONS

Tribes are growing produce that enters the nation’s food supply.⁶⁷ In Arizona, Gila River Farms, a tribal farming operation, has 16,000 acres in operation.⁶⁸ Gila River Farms produce ends up in grocery stores.⁶⁹ In

disease_listing/stec_gi.html#1 (last visited Dec.19. 2008) (“*Escherichia coli* (abbreviated as *E. coli*) are a large and diverse group of bacteria. Although most strains of *E. coli* are harmless, others can make you sick. Some kinds of *E. coli* can cause diarrhea, while others cause urinary tract infections, respiratory illness and pneumonia, and other illnesses.”).

⁶¹ Carolyn Wallkup & Alan J. Liddle, *Outbreak of E. coli linked to lettuce at Utah Wendy’s unit*, NATION’S RESTAURANT NEWS, Sept. 11, 2006, at 1, <http://archives.lf.com/version2/assets/nonindexed/NRN/2006/pdf/788707.pdf>.

⁶² *Cohron v. Wendy’s International, Inc.*, No. 1:06-CV-146 TS, 2008 WL 2149386, at *1(D. Utah May 20, 2008).

⁶³ *Id.* at *2.

⁶⁴ *Id.* at *2.

⁶⁵ *Id.* at *2.

⁶⁶ *Id.* at *1. (Wendy’s was seeking indemnification from Pacific and breach of contract damages. *Id.* at *3. This motion was based on the supplier agreement between Wendy’s and Pacific International Marketing, in which Pacific agreed to indemnify Wendy’s for negligence or wrongful acts. *Id.* at *2. The supplier agreement also set forth that Pacific International Marketing was to carry insurance for Wendy’s benefit, protecting Wendy’s from product liability. *Id.* at *2. The court granted the motion on the issue of insurance and denied summary judgment on the issue of indemnification because there were triable issues of fact. *Id.* at *5.)

⁶⁷ Tribal Compliance Assistance Center, Tribal Enterprises Resources, <http://www.epa.gov/tribalcompliance/tribalenterprise/teenterprise/drill.html> (last visited Sept. 6, 2008).

⁶⁸ News From Indian Country, Tribal Farms Are a Growing Part of Arizona Agricultural Economy, http://indiancountrynews.net/index.php?option=com_content&task=view&id=1197&Itemid=84 (last visited Sept. 6, 2008).

⁶⁹ *Id.*

2006, Gila River Farms had almost \$11 million in sales.⁷⁰ Also in Arizona, the Colorado Indian River Tribe farms in excess of 80,000 acres of tribal lands.⁷¹ In 2002, there were 3,826 reservation farms in Montana, North Dakota, and South Dakota.⁷² These farms were comprised of 4,064,856 acres of farmland on the reservation.⁷³ In California, the Colusa Indian Community tribe farms approximately 4,000 acres.⁷⁴ These examples of tribal farming operations make it clear that the opportunity exists for a foodborne pathogen outbreak from produce grown by a tribal farming operation.⁷⁵

IV. TRIBAL SOVEREIGN IMMUNITY

To fully understand why it is possible for a tribe to escape liability, it is necessary to understand the origins of tribal sovereign immunity. During the Colonial Period, colonizing countries aggressively searched out new land in the pursuit of "Gold, Glory, and God."⁷⁶ Although North America was already populated with distinct cultures, the colonists considered themselves the discoverers of this new territory.⁷⁷ The discoverers were intent on obtaining complete dominion over this new land,⁷⁸ and the indigenous people posed a threat to the discoverers desire to hold title

⁷⁰ *Id.*

⁷¹ Linda Masters: Colorado River Indian Tribes-Parker, Indian Country Extension, 2008, <http://www.indiancountryextension.org/extension.php?=1> (last visited Jul. 23, 2008).

⁷² U.S. Dep't. of Agric., 2002 Census of Agric.: Am. Indian Reservations, Montana, North Dakota, South Dakota Pilot Project VII (2004), available at http://www.agcensus.usda.gov/Publications/2002/American_Indian_Reservations/amindian.pdf.

⁷³ *Id.*

⁷⁴ Colusa Indian Community, Farming, <http://www.colusa-nsn.gov/farming/farming.html> (last visited Jul. 5, 2008).

⁷⁵ The Santa Ana Indians in New Mexico grow blue corn which is being turned into an internationally marketed line of cosmetics. Clearly, food is being used in unconventional ways which illustrates that this kind of immunity can be far reaching into industries other than the local grocery store. Kathleen Teltsch, *Bernalillo Journal; A Tiny Tribe Preserves Itself by Returning to Farming Tradition*, THE NEW YORK TIMES NYTIMES.COM, Nov. 22, 1992, <http://query.nytimes.com/gst/fullpage.html?res=9EOCE2DA1f3DF931A5752C1A964958260> (last visited Sept. 6, 2008).

⁷⁶ DEBRAN ROWLAND, *THE BOUNDARIES OF HER BODY: THE TROUBLING HISTORY OF WOMEN'S RIGHTS IN AMERICA* 609 (2004).

⁷⁷ See *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 596 (1823).

⁷⁸ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 544 (1832), *abrogated by Nevada v. Hicks*, 533 U.S. 353 (2001); See also *Johnson*, 21 U.S. (8 Wheat.) at 595.

to the land.⁷⁹ This power struggle defined the relationship the indigenous people would have with the discoverers and their successors.⁸⁰

The United States, the successor to the discoverers,⁸¹ continued the struggle to carve out a relationship with Native Americans.⁸² The embodiment of this early struggle is clearly evident in three Supreme Court opinions penned by Chief Justice John Marshall.⁸³ These foundational opinions have been called the “Marshall Trilogy”.⁸⁴

The first principle set forth by the Marshall Trilogy is the discovery doctrine.⁸⁵ The discovery doctrine set forth that the Royal British Crown gained title to the land because they were a sovereign nation with legislative mechanisms which allowed them right to title upon discovery.⁸⁶ As the discoverers of the land, their title was automatic.⁸⁷ The United States, the successors in interest to the Royal British Crown, also gained title through this doctrine of discovery.⁸⁸

The other two principles set forth by the Marshall Trilogy were the intertwined tribal immunity and trust doctrines. The second installment of the Marshall trilogy⁸⁹ set forth the doctrine of tribal sovereignty.⁹⁰ The term “tribal sovereignty” does not mean that tribes are independent nations embedded within the boundaries of the United States and can take independent action like other sovereign nations.⁹¹ The idea of tribal sov-

⁷⁹ See *Johnson*, 21 U.S. (8 Wheat.) at 596; see also *Worcester*, 31 U.S. (6 Pet.) at 544.

⁸⁰ See *Johnson*, 21 U.S. (8 Wheat.) at 597.

⁸¹ *Johnson*, 21 U.S. (8 Wheat.) at 584.

⁸² See *Johnson*, 21 U.S. (8 Wheat.) at 571; see also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) at 15 (1831); see also *Worcester*, 31 U.S. (6 Pet.) at 521.

⁸³ *Cherokee Nation*, 30 U.S. (5 Pet.) at 15; *Worcester*, 31 U.S. (6 Pet.) at 521; *Johnson*, 21 U.S. (8 Wheat.) at 571.

⁸⁴ *United States v. Lara*, 324 F.3d 635, 642 (8th Cir. 2003), *rev'd*, 541 U.S. 193 (2004); *In re Krystal Energy Co., Inc.*, 308 B.R. 48, 54 (D.Ariz. 2002), *rev'd*, 357 F.3d 1055 (9th Cir. 2004).

⁸⁵ *Johnson*, 21 U.S. (8 Wheat.) at 595.

⁸⁶ See *id.*

⁸⁷ *Worcester*, 31 U.S. (6 Pet.) at 543; *Johnson*, 21 U.S. (8 Wheat.) at 595.

⁸⁸ *Worcester*, 31 U.S. (6 Pet.) at 544; *Johnson*, 21 U.S. (8 Wheat.) at 584.

⁸⁹ *Cherokee Nation*, 30 U.S. (5 Pet.) 1 (1831).

⁹⁰ See *Cherokee Nation*, 30 U.S. (5 Pet.) at 17 (“[Y]et it may be well doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations.”).

⁹¹ See *Cherokee Nation*, 30 U.S. (5 Pet.) at 17; see also *Worcester*, 31 U.S. (6 Pet.) at 561.

ereignty is more aligned with the sovereignty imbued upon the states.⁹² Tribes are “domestic dependant nations.”⁹³

The final installment of the Marshall Trilogy⁹⁴ set forth the trust doctrine.⁹⁵ Although tribes are considered distinct political groups, they are still under the purview of the United States Government.⁹⁶ The relationship between a tribe and Congress is akin to that of a ward and guardian.⁹⁷ Congress has plenary power over the tribes and is the medium through which the tribes may interact with the states.⁹⁸

These doctrines set forth that while tribes are subject to the plenary power of Congress, they retain some autonomy which includes limited sovereignty.⁹⁹ This sovereignty is the foundation of immunity to suit.¹⁰⁰

V. COMMON LAW TRIBAL IMMUNITY FROM SUIT

Tribal immunity to suit has a tenuous history. Stare decisis for tribal immunity from suit is purportedly based the United States Supreme Court holding in *Turner v. U.S.*, 248 U.S. 354 (1919). In *Turner*, a private citizen was looking to hold the Creek Nation liable for the offenses of its individual members.¹⁰¹ In *Turner*, the Supreme Court did not base its holding against liability on the idea that the tribe was immune from suit, but rather on the idea that a government cannot be held liable for the mob violence of its citizens.¹⁰² The Court stated, “like other governments, municipal as well as state, the Creek Nation was free from liability for injuries to persons or property due to mob violence or failure to keep the peace.”¹⁰³ This is an important distinction, because although the cases which followed *Turner* used the holding to support tribal immunity

⁹² *Worcester*, 31 U.S. (6 Pet.) at 561; see also *Kiowa Tribe v. Mfg. Tech., Inc.*, 523 U.S. 751, 756 (1998) (“[T]ribal immunity is a matter of federal law and is not subject to diminution by the States.”).

⁹³ See *Cherokee Nation*, 30 U.S. (5 Pet.) at 17 (“They [Indians] may, more correctly, perhaps, be denominated domestic dependent nations.”).

⁹⁴ *Worcester*, 31 U.S. (6 Pet.) at 515.

⁹⁵ See *Worcester*, 31 U.S. (6 Pet.) at 555.

⁹⁶ *Id.* at 555, 557, 559.

⁹⁷ *Cherokee Nation*, 30 U.S. (5 Pet.) at 17; *Worcester*, 31 U.S. (6 Pet.) at 555.

⁹⁸ See U.S. CONST. art. I, §8, cl. 3; see also *United States v. Kagma*, 118 U.S. 375, 386 (1886); see also *Worcester*, 31 U.S. (6 Pet.) at 558, 561.

⁹⁹ See *Worcester*, 31 U.S. (6 Pet.) 515 at 557, 561.

¹⁰⁰ See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1977); see also *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 n.10 (1940).

¹⁰¹ *Turner v. United States*, 248 U.S. 354, 357 (1919), *abrogation recognized by Bittle v. Bahe*, 192 P.3d 810 (Okla. 2008).

¹⁰² *Id.* at 357-58.

¹⁰³ *Id.*

from suit,¹⁰⁴ later cases would point out that *Turner* did not actually state that tribes were immune from suit.¹⁰⁵ This fact would later be used to expose the flaws in blanket tribal immunity from suit.¹⁰⁶ Case law after *Turner* developed the precedent that tribes are immune from suit absent an explicit waiver and consent to suit by the tribe or a Congressional abrogation of tribal immunity.

Tribal immunity is applicable to the tribe wherever the activity takes place.¹⁰⁷ This is clearly seen in *Kiowa Tribe v. Manufacturing Tech., Inc.*, 523 US 751 (1998), where the tribe was engaged in business off of the reservation but was still immune from suit.¹⁰⁸ It is understood that this immunity is federally derived and cannot be attenuated by the states.¹⁰⁹ Furthermore, when Congress did confer responsibility over “Indian country” to certain states, criminal and civil statutes¹¹⁰ granted jurisdiction only over individual “Indians” and not the actual tribes.¹¹¹ Although *Turner* may not have been a strong basis for tribal immunity to suit, the common law and statutes that followed certainly reinforced tribal immunity to suit.

The credit, given to *Turner*, of being the touchstone of tribal immunity from suit went unquestioned until 1998, when the Supreme Court in *Kiowa* suggested that the doctrine of tribal immunity from suit was created by accident.¹¹² The court stated that “*Turner*,...is but a slender reed

¹⁰⁴ See *Kiowa Tribe v. Mfg. Tech., Inc.*, 523 U.S. 751, 754 (1998) (“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”); see also *Santa Clara Pueblo*, 436 U.S. at 57 (“[W]ithout congressional authorization,” the “Indian Nations are exempt from suit.” . . . It is settled that a waiver of sovereign immunity ‘cannot be implied but must be unequivocally expressed.’”); see also *Puyallup Tribe, Inc. v. Dep’t of Game of State of Wash.*, 433 U.S. 165, 172 (1977) (“Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe.”); see also *United States Fidelity*, 309 U.S. at 512 (“These Indian Nations are exempt from suit without Congressional authorization.”).

¹⁰⁵ *Kiowa*, 523 U.S. at 756.

¹⁰⁶ *Id.*

¹⁰⁷ See *Puyallup*, 433 U.S. at 167- 68; *Kiowa*, 523 U.S. at 754.

¹⁰⁸ *Kiowa*, 523 U.S. at 755.

¹⁰⁹ See *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890 (1986) (“[t]ribe’s federally conferred immunity from suit”); see also *Kiowa*, 523 U.S. at 756 (“[T]ribal immunity is a matter of federal law and is not subject to diminution by the States.”).

¹¹⁰ 18 U.S.C. § 1162 (2007); 28 U.S.C. § 1360 (2007).

¹¹¹ See 18 U.S.C. § 1162 (“Each of the states...shall have jurisdiction over offenses committed by or against Indians”); see also 28 U.S.C. § 1360 (“Each of the states . . . shall have jurisdiction over civil causes of action between Indians”).

¹¹² *Kiowa*, 523 U.S. at 756.

for supporting the principle of tribal sovereign immunity.”¹¹³ It was not long after *Kiowa* that this slender reed began to wobble.¹¹⁴

While the Supreme Court in *Kiowa* acknowledged that the court had not drawn a division in application of tribal immunity to suit when the tribe’s activity was commercial rather than governmental, the dicta opened the door for that exact distinction.¹¹⁵ The Court stated:

There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation’s commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians.¹¹⁶

Although the Supreme Court in *Kiowa* was clearly disturbed by the unfairness of a tribe entering into business transactions and then using the umbrella of sovereign immunity to avoid their contractual obligations, the Court ultimately followed the precedent of tribal immunity from suit and found in favor of the tribe.¹¹⁷ Soon after *Kiowa*, courts began looking for ways to balance this unfairness.¹¹⁸

VI. WAIVER

A. *Solution Of Waiver*

To prevent tribes from participating in commerce and then hiding behind the shield of tribal immunity to escape liability, courts began to construe language in contracts to include a waiver of immunity to suit.¹¹⁹ Until the holding in *Kiowa*, case law had clearly established that an individual cannot sue a tribe in a matter of self governance or commerce, on or off the reservation, unless there existed a “waiver” or “Congressional

¹¹³ *Id.* at 757.

¹¹⁴ See *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 423 (2001) (First time the Supreme Court recognized a waiver in the language of a contract which involved a tribe.).

¹¹⁵ *Kiowa*, 523 U.S. at 754-755.

¹¹⁶ *Id.* at 758.

¹¹⁷ *Id.* at 760.

¹¹⁸ See *C&L Enterprises, Inc.*, 532 U.S. at 423; see also *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.* 207 F.3d 21, 30 (1st Cir. 2000).

¹¹⁹ See *C&L Enterprises, Inc.*, 532 U.S. at 418; see also *Ninigret Dev. Corp.*, 207 F.3d at 30.

abrogation."¹²⁰ Before *Kiowa*, many courts refused to construe any language in a contract involving a tribe as a waiver of tribal immunity citing that the language was not specific enough to elicit a clear waiver of tribal immunity.¹²¹ However, before and after *Kiowa*, some courts recognized waivers of tribal immunity in commercial contracts.¹²² It was not until 2001, when the Supreme Court spoke on the matter of waivers of immunity in *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001), that the dicta of *Kiowa* sprung to life.¹²³ Although the court in *C&L Enterprises, Inc.* did not explicitly denounce perpetuating the doctrine of tribal immunity from suit, the court relied heavily on a case that criticized this idea.¹²⁴

B. Supreme Court Recognizes a Waiver in the Language of a Commercial Contract

In 2001, the Supreme Court granted *certiorari* on the issue of whether a contract could be construed to create a waiver whereby a tribe involved in a commercial endeavor could be sued by the party it contracted with.¹²⁵ In *C&L Enterprises, Inc.*, the plaintiff entered into a contract with a federally recognized tribe to install a roof on a tribally-owned building located in downtown Oklahoma City.¹²⁶ The contract was a standard form agreement copyrighted by the American Institute of Architects.¹²⁷ It stated that any disputes related to the contract would be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association,¹²⁸ and that any arbitration award could be reduced to a judgment by any court having jurisdiction

¹²⁰ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1977); *Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165, 172 (1977); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940).

¹²¹ *See Sac & Fox Nation v. Hanson* 47 F.3d 1061, 1063 (10th Cir. 1995); *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989); *GNS, Inc. v. Winnebago Tribe of Nebraska*, 866 F.Supp. 1185, 1189 (N.D. Iowa 1994); *Native Vill. O Eyak v. GC Contractors* 658 P.2d 756, 760 (Alaska 1983); *Atkinson v. Haldane* 569 P.2d 151, 169 (Alaska 1977).

¹²² *See Ninigret*, 207 F.3d at 30; *see also Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Associates, Inc.* 86 F.3d 656, 660-61 (7th Cir. 1996); *see also Rosebud Sioux v. Val-U Constr. Co.* 50 F.3d 560, 562 (8th Cir. 1995) (very specific arbitration clause found to be a waiver).

¹²³ *C&L Enterprises, Inc.*, 532 U.S. at 418.

¹²⁴ *C&L Enterprises, Inc.*, 532 U.S. at 418; *Sokaogon*, 86 F.3d at 659-60.

¹²⁵ *C&L Enterprises, Inc.*, 532 U.S. at 416-17.

¹²⁶ *Id.* at 414.

¹²⁷ *Id.* at 415.

¹²⁸ *Id.*

thereof.¹²⁹ It also contained a “choice of law” clause which stated the contract would be governed by the law of the place of the project.¹³⁰ After a breach of the contract, the plaintiff submitted a claim to arbitration.¹³¹ The tribe claimed immunity and refused to participate.¹³² The plaintiff filed suit to enforce the arbitration award in Oklahoma state court.¹³³ The lawsuit was filed before *Kiowa* had been decided.¹³⁴ After *Kiowa*, the Supreme Court granted *certiorari* to resolve whether an arbitration clause in a contract for commercial purposes waives tribal immunity.¹³⁵ The Court held that the tribe had clearly waived its immunity to suit with regard to enforcing the arbitral award.¹³⁶ The plaintiff was entitled to sue in Oklahoma state court to enforce the arbitration award.¹³⁷ The clear impact of *C&L Enterprises, Inc.* was that tribal immunity from suit was no longer infallible.

C. *The Basis For the Supreme Court’s Reasoning*

The reasoning in *C&L Enterprises, Inc.* was rooted in the Seventh Circuit case *Sokaogon Gaming Enterprise Corporation v. Tushie-Montgomery Associates, Inc.*, 86 F.3d 656 (7th Cir. 1996).¹³⁸ The *Sokaogon* court held that unambiguous language in a contract entered into by a tribe wherein it agrees to prescriptions of how a dispute between the parties will be resolved, is a clear waiver.¹³⁹ In *Sokaogon*, a federally recognized tribe entered into a contract for architectural services related to a casino facility.¹⁴⁰ The contract between the parties, which the tribe breached, had an arbitration clause which stated the claims related to the contract would be decided by arbitration in accordance with the rules of the American Arbitration Association.¹⁴¹ The agreement stated that it was enforceable in accordance with applicable law in any court having jurisdiction and that any arbitral award could be converted into a judgment.¹⁴²

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 416.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 416-17.

¹³⁶ *Id.* at 418.

¹³⁷ *See id.*

¹³⁸ *See id.* at 420.

¹³⁹ *Id.*; *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Associates, Inc.* 86 F.3d 656, 659 (7th Cir. 1996).

¹⁴⁰ *Sokaogon*, 86 F.3d at 657-58.

¹⁴¹ *Id.* at 659.

¹⁴² *Id.*

The plaintiff submitted the breach to arbitration, and the tribe refused to participate on the grounds that the contract was void.¹⁴³ The tribe's refusal to participate was founded on the belief that the contract did not include a waiver of tribal sovereign immunity.¹⁴⁴ The plaintiff, who had won an arbitration award, submitted the award to the district court.¹⁴⁵ The district court found that the tribe had not waived its immunity and immediately submitted the finding to the Seventh Circuit Court of Appeals.¹⁴⁶ The Appellate Court acknowledged that the issue of waivers of tribal immunity to suit was in flux.¹⁴⁷ The Court found the arbitration clause to be a clear waiver of immunity.¹⁴⁸ It also explicitly delineated its policy on waivers by stating, "[t]o agree to be sued is to waive any immunity one might have from being sued."¹⁴⁹ The court went on to question the usefulness of requiring waivers of immunity to suit under the guise of protecting the tribe when a tribe is involved in a commercial transaction.¹⁵⁰ The Court exposed that, in reality, these types of restrictions can hinder a tribes' ability to participate in beneficial commerce.¹⁵¹ This reasoning is very similar to the dicta in *Kiowa*.¹⁵² Finally, the Court went on to dispel the notion that there need be any recitation of specific words to waive immunity from suit.¹⁵³ Contracts do not need to exactly state, "[t]he tribe will not assert the defense of sovereign immunity if sued for breach of contract . . .," in order waive immunity.¹⁵⁴ Further, the Court stated that, "[t]he term 'sovereign immunity' is a technical legal term, and anyone who knows what it means can also understand the arbitration clause."¹⁵⁵ In following the reasoning of *Sokaogon* when it decided the case of *C&L Enterprises, Inc.*, the Supreme Court was plainly creating an opening for suit when a tribe is involved in commercial transactions.¹⁵⁶

¹⁴³ *Id.* at 658.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 659.

¹⁴⁸ *Id.* at 661.

¹⁴⁹ *Id.* at 659.

¹⁵⁰ *Id.* at 660.

¹⁵¹ *Id.*

¹⁵² *Kiowa Tribe v. Mfg. Tech., Inc.*, 523 U.S. 751, 760 (1998) ("There are reasons to doubt the wisdom of perpetuating the doctrine [of tribal immunity from suit].").

¹⁵³ *Sokaogon*, 86 F.3d at 660.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 423 (2001); *Oglala Sioux Tribe v. C & W Enterprises, Inc.*, 542 F.3d 224, 229-

D. *The Limitations On Waivers*

Waivers do not mean that an aggrieved party has an automatic pass to sue a tribe for any cause of action. Even after *C&L Enterprises, Inc.*, courts have been careful to apply waivers only to what has been specifically waived.¹⁵⁷ For example, an arbitration clause which would create a waiver of immunity to suit to compel arbitration or enforce an award does not mean that a potential plaintiff can circumvent the arbitration process and go directly to court.¹⁵⁸ Some waivers only allow the remedy of filing a claim in tribal court.¹⁵⁹ Because waivers are voluntary submissions by a tribe, any waiver must be narrowly construed to only include what the tribe consented to.¹⁶⁰ This means that a waiver could be construed to limit legal remedies as well as the tribe's liability.¹⁶¹ Clearly these cases set forth that although a waiver can be powerful and beneficial, an aggrieved party may not be entitled to all of the same legal protections that are normally available.

E. *Third Party Beneficiaries To Waivers*

The cases discussed so far have explored waivers of tribal immunity within the language of a contract between the parties involved in the lawsuit.¹⁶² If there is no contract between the parties involved in the suit, the

231 (8th Cir. 2008); *Smith v. Hopland Band of Pomo Indians*, 115 Cal.Rptr.2d 455, 459 (2002).

¹⁵⁷ *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 920-21 (2008); *Lawrence v. Barona Valley Ranch Resort & Casino*, 64 Cal.Rptr.3d 23, 27 (2007); *Big Valley Band of Pomo Indians v. Superior Court*, 35 Cal.Rptr.3d 357, 363-64 (2005).

¹⁵⁸ *Marceau*, 540 F.3d at 920-21; *see also Lawrence*, 64 Cal.Rptr.3d at 27 (waiver to tort liability did not mean that the tribe could be sued in state court for negligence); *see also Big Valley Band of Pomo Indians*, 35 Cal.Rptr.3d at 364 (arbitration waiver only ensured right to compel arbitration or affirm award).

¹⁵⁹ *Lawrence*, 64 Cal.Rptr.3d at 27.

¹⁶⁰ *See Missouri River Services v. Omaha Tribe of Nebraska*, 267 F.3d 848, 852 (8th Cir. 2001) (scope of a waiver must be strictly followed); *see also Native Am. Distrib. v. Seneca-Cayuga Tobacco Co*, 546 F.3d 1288, 1293 (10th Cir. 2008) (a "sue and be sued" clause in the corporate charter can operate as a waiver, but only to the actions of Tribal corporation, and not the Tribe. (citing *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1263 10th Cir. 1998.)) ([H]ere the entity being sued was found to be part of the tribe and not the corporation and therefore the plaintiff was without remedy.); *Lawrence*, 64 Cal.Rptr.3d at 27 (voluntary waivers must be narrowly construed).

¹⁶¹ *See Campo Band of Mission Indians v. Superior Court*, 39 Cal.Rptr.3d 875, 881-882 (2006).

¹⁶² *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 423 (2001); *Oglala Sioux Tribe v. C & W Enterprises, Inc.*, 542 F.3d 224, 230 (8th Cir. 2008); *Smith v. Hopland Band of Pomo Indians*, 115 Cal.Rptr.2d 455, 457 (2002).

aggrieved individual is not necessarily without a waiver.¹⁶³ The courts have not limited their application of waivers to language in the contract between the party suing and the tribe.¹⁶⁴ A court can look into a tribe's corporate charter to see if a waiver exists.¹⁶⁵ For example, a "sue and be sued" clause in a tribe's corporate charter has been interpreted to be a waiver of immunity with regard to that tribal corporation.¹⁶⁶ A waiver may also take effect when a tribe enters into an agreement with a governmental agency and, as part of that agreement, waives their immunity to third parties.¹⁶⁷ One such example is the 1999 California Gaming Compact, which states in relevant part:

[T]he Tribal Gaming Operation shall: . . . Carry no less than five million dollars (\$5,000,000) in public liability insurance for patron claims, and that the Tribe provide reasonable assurance that those claims will be promptly and fairly adjudicated, and that legitimate claims will be paid [T]he Tribe shall adopt and make available to patrons a tort liability ordinance setting forth the terms and conditions, if any, under which the Tribe waives immunity to suit for money damages resulting from intentional or negligent injuries to person including procedures for processing any claims for such money damages; provided that nothing in this Section shall require the Tribe to waive its immunity to suit except to the extent of the policy limits set out above.¹⁶⁸

California courts have had the opportunity to analyze whether this section of the Gaming Compact creates a waiver of immunity with regard to torts that happen on casino grounds, and they have answered in the affirmative.¹⁶⁹ While the courts have acknowledged a waiver with regard to this provision in the Compact, the courts have been careful to high-

¹⁶³ *Native Am. Distrib.*, 546 F.3d at 1293; *Lawrence*, 64 Cal.Rptr.3d at 26; *Campo Band of Mission Indians*, 39 Cal.Rptr.3d at 882.

¹⁶⁴ *Native Am. Distrib.*, 546 F.3d at 1293; *Lawrence*, 64 Cal.Rptr.3d at 26; *Campo Band of Mission Indians*, 39 Cal.Rptr.3d at 882.

¹⁶⁵ *Native Am. Distrib.*, 546 F.3d at 1293.

¹⁶⁶ *Id.*

¹⁶⁷ See California Gaming Compact, section 10.2 (d) (1999), available at <http://www.cgcc.ca.gov/enabling/tsc.pdf>.

¹⁶⁸ California Gaming Compact, section 10.2 (d); see also *Colorado River Indian Tribes and State of Arizona Gaming Compact*, sections 13(c), 15 (1994), available at http://www.ncai.org/ncai/resource/agreements/az_gaming-cocopah_indian_tribe-1993.pdf; but see *1992 Class III Gaming Compact By and Between The Coeur D'Alene Tribe and The State of Idaho* (1992) available at http://www.ncai.org/ncai/resource/agreements/id_gaming-coeur_dalene_tribe-2-12-1993.pdf (No provision for tort claims).

¹⁶⁹ See *Lawrence v. Barona Valley Ranch Resort & Casino*, 64 Cal.Rptr.3d 23, 27 (2007); see also *Campo Band of Mission Indians v. Superior Court*, 39 Cal.Rptr.3d 875, 882 (2006).

light that the Compact allows the tribe to create its own tort ordinances.¹⁷⁰ The tribe's tort ordinance may set specific procedures a complainant must follow.¹⁷¹ For example, subsequent to the enactment of the Compact, the Barona Band of Mission Indians adopted a "Tort Claim Ordinance" which stated that "[i]f . . . the parties have reached an impasse as to the dollar value of the claim, appeal may be taken to the Barona Tribal Court."¹⁷² Again, because waivers are voluntary, any waiver is confined to the permissions granted by the tribe.¹⁷³

Before *C&L Enterprises, Inc.* had been decided, an earlier California case,¹⁷⁴ which involved a tort claim on the casino premises, focused its holding on whether the sovereign immunity of the tribe should be extended to the tribal casino operation.¹⁷⁵ The case did not hinge on whether any waiver of immunity to suit existed within the Compact.¹⁷⁶ The court held that the plaintiff had no cause of action against the tribe because the immunity of the tribe extended to the tribe's casino enterprise.¹⁷⁷ If this case had been decided after *C&L Enterprises, Inc.*, the case would have likely been decided differently because after *C&L Enterprises, Inc.*, courts resolving claims between casino patrons and tribes began focusing on whether the tribe had waived its immunity to suit under the Compact.¹⁷⁸ This change shows a trend of allowing suit against a tribe when a tribe is involved in commerce.

F. Standard Of Review To Determine If Waiver Exists

One issue that arises when a claimant is attempting to defeat tribal immunity to suit is conflicting evidence as to whether a waiver exists.¹⁷⁹

¹⁷⁰ *Lawrence*, 64 Cal.Rptr.3d at 27; *Campo Band of Mission Indians*, 39 Cal.Rptr.3d at 881.

¹⁷¹ *Lawrence*, 64 Cal.Rptr.3d at 25.

¹⁷² *Id.*

¹⁷³ *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 920-21 (2008); *Lawrence*, 64 Cal.Rptr.3d at 27; *Big Valley Band of Pomo Indians v. Superior Court*, 35 Cal.Rptr.3d 357, 363-64 (2005).

¹⁷⁴ *Trudgeon v. Fantasy Springs Casino*, 84 Cal.Rptr.2d 65, 65 (1999) (This case was decided in between *Kiowa* and after *C&L Enterprises, Inc. Kiowa Tribe v. Mfg. Tech., Inc.*, 523 U.S. 751, 751 (1998); *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 411 (2001)).

¹⁷⁵ *Trudgeon*, 84 Cal.Rptr.2d at 66.

¹⁷⁶ *See id.* at 67.

¹⁷⁷ *Id.*

¹⁷⁸ *E.g.*, *Campo Band of Mission Indians v. Superior Court*, 39 Cal.Rptr.3d 875, 882 (2006).

¹⁷⁹ *See Warburton/Buttner v. Superior Court*, 127 Cal.Rptr.2d 706, 721 (2002); *see also Smith v. Hopland Band of Pomo Indians*, 115 Cal.Rptr.2d 455, 458 (2002).

For example, a tribe may write language into a contract that creates a waiver, such as an arbitration clause or a choice of forum clause.¹⁸⁰ At the same time, the tribal constitution may set forth that a waiver can only be granted by tribal council ratification.¹⁸¹ If the tribe entered into a contract with a waiver, but the council has not taken any specific action to ratify the waiver, this could create a conflict.¹⁸² To resolve this issue, a court will not look within the tribal ordinances and constitutions.¹⁸³ Instead, the court will apply federal law.¹⁸⁴ A recent case in California has taken this idea one step further and allowed a plaintiff discovery to see if a waiver exists.¹⁸⁵ This is an interesting advance because it means that the court would be asserting jurisdiction to allow for discovery so the plaintiff could see if the court even has jurisdiction.¹⁸⁶

G. Waiver Hunting

A party in the chain of distribution that failed to put waiver language in the contract or lacked privity with the tribe may instead go searching for a third party waiver like the waiver provided in the Compact.¹⁸⁷ In the same way that tribal gaming casinos have compacts with the state, certain farmers have agreements with the federal government.¹⁸⁸ Farmers who are subsidized by the government must comply with certain requirements.¹⁸⁹ The 2008 Farm Bill has specific producer agreements that outline what compliances a farmer must make to receive subsidy pay-

¹⁸⁰ *Smith*, 115 Cal.Rptr.2d at 460.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 421 n.3 (2001); *Warburton/Buttner v. Superior Court* 127 Cal.Rptr.2d 706, 722 (2002); *Smith*, 115 Cal.Rptr.2d at 462.

¹⁸⁴ *C&L Enterprises, Inc.*, 532 U.S. at 421 n.3; *Warburton/Buttner*, 127 Cal.Rptr.2d at 722; see *Smith*, 115 Cal.Rptr.2d at 462 (Tribe's assertion that there was no waiver even though the tribes authorized agent entered into contract that waived immunity because the tribe had not enacted an ordinance waiving sovereign immunity was unfounded as federal law applies, not tribal law).

¹⁸⁵ See *Warburton/Buttner*, 127 Cal.Rptr.2d at 722.

¹⁸⁶ See *id.*

¹⁸⁷ See *Lawrence v. Barona Valley Ranch Resort and Casino*, 64 Cal.Rptr.3d 23, 27 (2007); see also *Campo Band of Mission Indians v. Superior Court*, 36 Cal.Rptr.3d 875, 882 (2006).

¹⁸⁸ See Food, Conservation, and Energy Act of 2008, (Farm Bill), H.R. 6124, 110th Cong. § 1106 (2008), available at http://www.usda.gov/documents/Bill_6124.pdf; see also California Gaming Compact, section 10.2 (d) (1999), available at <http://www.cgcc.ca.gov/enabling/tsc.pdf>.

¹⁸⁹ H.R. 6124, § 1106.

ments.¹⁹⁰ Tribal farming operations currently receive subsidies.¹⁹¹ For example, the Colorado River Indian Tribe has received \$342,703.00 in peanut subsidies between 1995 and 2006.¹⁹² The difference between the Farm Bill producer agreements and the Gaming Compacts is that the producer agreements do not include any kind of waivers of immunity from suit.¹⁹³ In fact, they do not deal with foodborne pathogens whatsoever.¹⁹⁴

Another place a potential claimant may look is within the Perishable Agricultural Commodities Act, 1930.¹⁹⁵ As the title indicates, 7 U.S.C. § 499b, sets forth the rules and regulations for those dealing in perishable agricultural commodities.¹⁹⁶ Any person dealing in produce as a commission merchant dealer, or broker is required to be licensed by the Secretary of Agriculture.¹⁹⁷ Licensed parties are subject to the jurisdiction of the complaint process set forth by the statute itself, or any competent court.¹⁹⁸ Here this appears to create a waiver similar to the waiver provided in the Compacts,¹⁹⁹ except this Act specifically does not apply to growers.²⁰⁰

Any party subject to liability for produce grown by a tribal farming operation would not be able to rely on a Farm Bill producer agreement or 7 U.S.C. §499a to create a waiver.²⁰¹ This is very different from the waiver built into the Compacts that protect tribal casino patrons.²⁰² As tribal commercial entities interact with the general public more frequently, more parties aggrieved by a tribe may find themselves without remedy. Although this could easily happen to an unwitting party, this situation can be completely avoided.

¹⁹⁰ *Id.*

¹⁹¹ Environmental Working Group, 2006 Farm Subsidies, <http://farm.ewg.org/farm/persondetail.php?custnumber=009399029> (last visited Aug. 3, 2008).

¹⁹² *Id.*

¹⁹³ See H.R. 6124, § 1106; California Gaming Compact, section 10.2 (d).

¹⁹⁴ See H.R. 6124, § 1106.

¹⁹⁵ 7 U.S.C. § 499a (2007).

¹⁹⁶ *Id.* § 499b.

¹⁹⁷ *Id.* § 499c.

¹⁹⁸ *Id.* § 499e(a)-(b).

¹⁹⁹ Compare California Gaming Compact, section 10.2 (d) (1999), available at <http://www.cgcc.ca.gov/enabling/tsc.pdf>, with 7 U.S.C. §499e(a)-(b) (2007).

²⁰⁰ 7 U.S.C. §499a(b)(6) (“[N]o producer shall be considered as a ‘dealer’ in respect to sales of any such commodity of his own raising . . .”).

²⁰¹ Compare California Gaming Compact, section 10.2 (d) with 7 U.S.C. §499e(a)-(b), and H.R. 6124, § 1106.

²⁰² See *Campo Band of Mission Indians v. Superior Court*, 36 Cal.Rptr.3d 875, 883 (2006); see also *Lawrence v. Barona Valley Ranch Resort & Casino*, 64 Cal.Rptr.3d 23, 27 (2007).

VII. PROTECTIVE MEASURES

One option would obviously be to not do business with the tribe in the first place. Although this would certainly be an avoidance of potential liability, it is a harsh remedy. For policy reasons, this remedy is not favorable because it would only serve to further disenfranchise Native American Tribes who are trying to become economically self-sustaining.

Another option would be for any shipper that represents tribal farming operations to require that the tribe sign a representation agreement that includes a waiver of immunity. The waiver could come in the form of a choice of forum clause or a governing law clause. In a contract between regular parties, leaving out a choice of forum clause or a governing law clause may merely cause some inconvenience.²⁰³ In a contract involving a tribe, leaving out a choice of forum clause or a governing law clause would mean the shipper would be without remedy against the grower.²⁰⁴ Any shipper doing business with a tribe must have a contract, and that contract must have a waiver. This is a useful suggestion for any party attempting to do business with a tribe. The shipper could simply include language which sets forth a waiver of immunity. Such as:

Waiver of Sovereign Immunity.

The tribe will not assert the defense of sovereign immunity²⁰⁵ regarding any claims, disputes or other matters arising out of or related to the Contract.²⁰⁶ The tribe will not assert the defense of sovereign immunity²⁰⁷ regarding any claims, disputes or other matters arising between the parties of this Contract as well as any third party who may have rights arising out of this Contract. If any claim shall arise from any product supplied by the "grower" which causes harm to the "shipper" or any other third party the tribe will not assert the defense of sovereign immunity.

²⁰³ Choice of forum clauses, which are enforceable under federal law absent a strong showing of inconvenience, designate in which jurisdiction a claim can be filed even when other jurisdictions may be appropriate. See *Carnival Cruise Lines, Inc., v. Shute* 499 U.S. 585, 591-592 (1991); see also *M/S Bremen v. Zapata Off-Shore Co.* 407 U.S. 1, 10, 17 (1972); see also *Ginter v. Belcher, Prendergast & Laporte* 536 F.3d 439, 441 (5th Cir. 2008); but see *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 422 (2001) (in a dispute with a tribe a choice of forum clause may designate the only remedy available because without one the tribe would not have to submit to any jurisdiction).

²⁰⁴ See *C&L Enterprises, Inc.*, 532 U.S. at 422; see also *Oglala Sioux Tribe v. C & W Enterprises, Inc.*, 542 F.3d 224, 231 (8th Cir. 2008); see also *Smith v. Hopland Band of Pomo Indians*, 115 Cal.Rptr.2d 455, 459 (2002).

²⁰⁵ *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Associates, Inc.*, 86 F.3d 656, 660 (7th Cir. 1996).

²⁰⁶ *Id.* at 659.

²⁰⁷ *Id.* at 660.

Choice of Forum Clause.

The Contract shall be governed and enforced in accordance with the laws of the state of [Insert State Here].²⁰⁸ Any claims, disputes or other matters arising out of or related to the Contract²⁰⁹ between the parties of this Contract as well as any third party claims arising out of the Contract between the parties shall be subject to this clause. If any claim shall arise from any product supplied by the “grower” which causes harm to the “shipper” or any other third party the claim shall be governed and enforced in accordance with the laws of the state of [Insert State Here].

American Arbitration Association Clause.

Any claims, disputes or other matters arising out of or related to the Contract²¹⁰ between the parties of this Contract as well as any third party claims arising out of the Contract between the parties shall be subject to and decided by arbitration in accordance with the rules of the American Arbitration Association. The agreement to arbitrate shall be specifically enforceable in accordance with applicable law in any court having jurisdiction. Judgment may be entered upon any arbitration award in accordance with applicable law in any court having jurisdiction thereof.²¹¹

For grocery stores to protect themselves, they need to educate the buyers that this type of immunity exists. Grocery stores need to have internal protocols requiring buyers to ask whether the supplier was filling orders with produce grown by a tribal farming operation. The grocer could require a produce supplier selling produce grown by a tribe to supply proof that the supplier’s contract with the farmer contained a waiver of immunity. Because there is no privity between the grocery store and the farm directly, the grocer would not necessarily be protected by the contract between the shipper and the tribe.²¹² To prevent this scenario, grocery stores could require any supplier that filled an order with tribally

²⁰⁸ *C&L Enterprises, Inc.*, 532 U.S. at 415; Mark J. Hanson, Joe R. Thompson, & Joel J. Dahlgren, Sample Marketing Agreement, Agricultural Marketing Resource Center, http://www.agmrc.org/business_development/operating_a_business/legal/articles/sample_marketing_agreement.cfm (last visited Oct. 24, 2008).

²⁰⁹ *Sokaogon*, 86 F.3d at 659.

²¹⁰ *Id.*

²¹¹ *Id.*; *C&L Enterprises, Inc.*, 532 U.S. at 415.

²¹² Because waivers are narrowly construed, it is highly unlikely that a waiver would be expanded to apply to a party who was not involved in the original contract. See *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1293 (10th Cir. 2008) (a “sue and be sued” clause in the corporate charter can operate as a waiver, but only to the actions of Tribal Corp., and not the Tribe (citing *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1263 (10th Cir. 1998))); see also *Mo. River Serv. v. Omaha Tribe of Neb.*, 267 F.3d 848, 852 (8th Cir. 2001) (scope of a waiver must be strictly followed); see also *Lawrence v. Barona Valley Ranch Resort & Casino* 64 Cal.Rptr.3d 23, 27 (2007) (citing *Campo Band of Mission Indians v. Superior Court*, 39 Cal.Rptr.3d. 875, 882 (2006)) (voluntary waivers must be narrowly construed).

grown produce to only do business with tribes that operate and contract as a tribal corporation which includes a "sue and be sued" clause in their corporate charter.²¹³

Another option would be for shippers or grocery stores to only do business with tribes who were willing to set forth tribal ordinances that create a waiver. The ordinances could be written to provide indemnity to any party in the chain of distribution should any produce the tribal farm grows cause a foodborne pathogen injury. The tribal ordinance could set forth a claims procedure and insurance requirements to protect any consumer who may be harmed by produce grown by the tribal farm. This option would be similar to the waiver created by the Gaming Compacts.²¹⁴ Both the tribe and the parties in the chain of distribution may find this option agreeable. This option allows the parties in the chain of distribution receive indemnity and the tribe retains control of their sovereignty.

VIII. CONCLUSION

With the current state of the law, any shipper or grocery store which purchases produce from a tribal farming operation would be wise to take the precautions outlined in this Comment. Any party dealing with a tribe who fails to do so may find themselves without a remedy. This does not need to be the case. Any individual or company doing business with a tribe should be educated about these potential liabilities. The paternalism of protecting tribes from suit when they are engaged in commercial activities does the tribes no favors.²¹⁵ These protections create more hurdles for a tribe attempting to participate in free trade.²¹⁶ There is much wisdom in the dicta of *Kiowa*, where the Supreme Court questioned the wisdom of perpetuating the doctrine of tribal immunity when a tribe is participating in commerce.²¹⁷ Although tribes who cling dearly to their sovereignty may not want to submit to a waiver of immunity, tribes who are not amenable to suit when they participate in commerce may find themselves without a market.

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²¹³ *Native Am. Distrib.*, 546 F.3d at 1293.

²¹⁴ See *Lawrence*, 64 Cal.Rptr.3d at 27; see also *Campo Band of Mission Indians v. Superior Court* 36 Cal.Rptr.3d 875, 882 (2006).

²¹⁵ *Sokaogon*, 86 F.3d at 659.

²¹⁶ *Id.* at 660.

²¹⁷ *Kiowa Tribe v. Mfg. Tech., Inc.*, 523 U.S. 751, 758 (1998).