



Consensually-Based Tribal Jurisdiction

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The Background

- **COVID-19 Pandemic**
- **Tribal losses (increased cleaning / PPE requirements, decreased casino revenue, decreased other business revenue (e.g., convenience stores, event centers, golf courses, museums, etc.), decreased tax revenue, etc.**
- **Potential recovery: business interruption insurance**

First Party Coverage: Business Interruption

- **Potential for coverage for direct physical loss or damage and for business interruption**
 - Approximately 2100 cases filed as of the end of January 2022
 - Of those decided, over 300 are currently on appeal
 - 28 appellate decisions thus far
- **Coverage issues**
 - Is infection by or presence of COVID-19 a “direct physical loss or damage”?
 - Are losses due to tribal / state shutdown orders covered under “Civil Authority” or “Ingress/Egress” coverage?
 - Is there a virus exclusion on the policy and is it effective to defeat coverage?

Courts Divided

- **Big area of litigation; decisions are not consistent**
 - ***Studio 417, Inc. v. Cincinnati Ins. Co.* (W.D. Mo. Aug. 12, 2020) (denying insurer’s motion to dismiss; coverage trigger is physical loss or damage)**
 - ***Nguyen v. Travelers Cas. Ins. Co. of Am.* (W.D. Wash. May 28, 2021) (granting insurer’s motions to dismiss because COVID-19 “does not cause physical loss or damage to property”)**
 - ***Ice House Pub, Inc. v Westchester Surplus Lines Ins. Co.* (M.D. Fla. July 26, 2021) (“[N]either COVID-19 nor corresponding governmental health precautions caused a ‘direct physical loss of or damage to’ [Insured’s] property.”)**
 - ***Rock Dental Arkansas, PLLC v. Cincinnati Ins. Co.* (E.D. Ark. July 28, 2021) (granting motion to dismiss, concluding no coverage “because Plaintiffs have not alleged that COVID-19 was ever present in its buildings”)**
 - ***Circle Block Partners, LLC v. Fireman’s Fund Ins. Co.* (S.D. Ind. July 27, 2021) (granting motion to dismiss, finding “‘direct physical loss’ requires a harmful alteration in the appearance, shape, color composition or other material dimension of the property”)**

Some Courts (Generally State Courts) Seem More Open to Coverage

- ***N. State Deli v. Cincinnati Ins. Co.*, (N.C. Super Ct. Oct. 7, 2020) (granting insured’s motion for summary judgment because “direct physical loss describes the scenario where businessowners and their employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing their business property”)**
- ***Perry Street Brewing Co., LLC v. Mut. Of Enumclaw Ins. Co.* (Wash. Super. Nov. 23, 2020) (granting insured’s motion for partial summary judgment; insured “has established that [its] claimed loss falls within the grant of coverage of the Business Income (and Extra Expense) Coverage Form of the Policy as a matter of law, because as a result of the proclamations and orders issued by Governor Inslee, [the insured] suffered direct physical loss of its property at premises.”)**
- ***Cherokee Nation v. Lexington Ins. Co.* (Okla. Dist. Ct. Jan. 28, 2021) (granting insured Tribe’s motion for summary judgment under a Tribal First policy, and agreeing that “it is plausible that a fortuitous ‘direct physical loss’ could mean that property is uninhabitable, inaccessible, or dangerous to use because of intangible, or non-structural, sources.”)**
- ***Choctaw Nation of Oklahoma v. Lexington Ins. Co.* (Okla. Dist. Ct. Feb. 15, 2021) (same)**

Some State Courts (Generally State Court) Seem More Open to Coverage (con't)

- ***Ungarean v. CNA* (Pa. Ct. Common Pleas Mar. 22, 2021) (granting insured's motion for summary judgment on the grounds that the meaning of the term "loss" includes the loss of use of property absent any visible harm to property)**
- ***Muscogee (Creek) Nation v. Lexington Ins. Co.* (Okla. Dist. Ct. June 9, 2021) (same as previous Oklahoma matters)**
- ***Snoqualmie Entertainment Auth. v. Affiliated FM Ins. Co.* (Wash. Super. Ct. Sept. 2, 2021) ("[T]he Court finds that one reasonable interpretation of the disjunctive phrase 'all risks of physical loss' is that it includes the risk that Snoqualmie be deprived of the ability to physically use, operate, or manipulate its properties because of the COVID-19 closure orders and Tribal resolutions.")**

Appellate Decisions

- **A number of cases on appeal**
- **Appellate decisions, especially federal court, have generally found that there is no coverage**
 - **Circuits: 2nd, 5th, 6th, 7th, 8th, 9th, 10th, and 11th**
 - **Predicting state law on the issue**
 - **Some states (no highest court has issued a decision yet): California, Indiana, Michigan, Ohio**

Select Tribal Court Decisions or Decisions Involving Tribes

- ***Cherokee Nation, Choctaw Nation and Muscogee (Creek) Nation*** (addressed previously): Favorable to coverage (Okla. Dist. Ct.); on appeal
- ***Snoqualmie*** (addressed previously): Favorable to coverage (Wash. Super. Ct.)
- ***Kickapoo Tribe of Oklahoma v. Lexington Ins. Co.*** (Okla. Dist. Ct. May 24, 2021): Denying insured Tribe's motion for partial summary judgment and granting summary judgment to defendant Insurers; motion for reconsideration pending
- ***Fort Sill Apache Tribe of Oklahoma v. Lexington Ins. Co.*** (Okla. Dist. Ct.): Insurers' motion for summary judgment pending
- ***Menominee Indian Tribe of Wis. v. Lexington Ins. Co.*** (N.D. Cal. Aug. 23, 2021): Granting motion to dismiss Tribe's claims; on appeal

Select Tribal Court Decisions or Decisions Involving Tribes

- ***The Suquamish Tribe v. Lexington Ins. Co.*** (Suquamish Tribal Court Mar. 16, 2021): Tribal jurisdiction confirmed on appeal; now before federal court on jurisdiction issue (filed by insurers)
- ***Port Gamble S’Klallam Tribe v. Lexington Ins. Co.*** (Port Gamble S’Klallam Community Court Mar. 1, 2021): Tribal jurisdiction confirmed on appeal; now before federal court on jurisdiction issue (filed by insurers)
- ***Jamul Indian Village Dev. Corp. v. Lexington Ins. Co.*** (Intertribal Ct. of S. Cali.): Tribal jurisdiction confirmed but motion to dismiss on the merits granted
- ***Cabazon Band of Mission Indians v. Lexington Ins. Co.*** (Cabazon Reservation Court Mar. 11, 2021): Tribal jurisdiction confirmed on appeal; now before federal court on jurisdiction issue (filed by insurers)
- ***Tulalip Tribes of Wash. v. Lexington Ins. Co.*** (Wash. Super. Ct.)

Tribal First Policies

- **Similar language between policies**
- **Similar type of issues: Does COVID-19 cause physical loss or damage?**
- **Some unique issues applicable to these policies**

Tribal Court Jurisdiction for COVID-19 Insurance Coverage

- **Insurer Challenges to Jurisdiction**
 - **Personal Jurisdiction**
 - Tribal Law
 - Federal Law
 - **Subject Matter Jurisdiction**
 - Tribal Law
 - Federal Law
- **The analysis for each is distinct but overlaps**

Jurisdiction Under Tribal Law

- **As sovereigns, tribes may establish courts and laws governing their jurisdiction**
- **Sources for tribal court jurisdiction may include**
 - Tribal Constitution
 - Tribal Code
 - Common law
- **Many tribes employ language setting tribal courts jurisdiction broadly and as co-extensive with the full scope of what federal law permits**
 - Tribal court has jurisdiction “to the fullest extent allowed” under applicable law
 - Tribal court’s jurisdiction extends to the fullest extent “consistent with due process”

Personal Jurisdiction – Waiver

- **Personal jurisdiction can be waived**
- **Some COVID-related policies have a “service of suit” clause**
 - **Insurers agree they will submit to the jurisdiction of a “court of competent jurisdiction” within the United States**
 - **Question becomes whether tribal court is of “competent jurisdiction”**
 - *i.e.*, whether tribal court has subject matter jurisdiction

Personal Jurisdiction – Specific Jurisdiction

- **Three general requirements:**
 - Defendant has “purposefully availed” itself of privilege of conducting activities within forum
 - Plaintiff’s claims must arise out of or relate to defendant’s contacts with forum
 - Jurisdiction must be “reasonable”
- **Tribal court personal jurisdiction exists in insurance disputes**
 - *Allstate Indemnity Co. v. Stump*, 191 F.3d 1071(9th Cir. 1999)
 - Purposeful availment because “Allstate not only sold a policy covering travel in the Rocky Boy Reservation, it sold the policy to a resident of the reservation.”
 - “[T]his dispute arose out of the insurance coverage.”
 - “[I]t is difficult to see why Allstate’s amenability to suit in tribal court is any less ‘reasonable’ than a state’s exercise of jurisdiction over a foreign insurance company.”

Subject Matter Jurisdiction

- **Montana Exceptions – *Montana v. United States*, 450 U.S. 544 (1981)**
 - **First Exception**
 - “A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”
 - **Second Exception**
 - Tribal jurisdiction over “the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”
- **Inherent Right to Exclude – *Water Wheel Camp Recreational Area, Inc. v. Larance*, 642 F.3d 802 (9th Cir. 2011)**
 - For tribal land, tribes retain inherent sovereign power to exclude non-members, which necessarily brings with it lesser power to regulate non-Indians on tribal land, and exercise adjudicatory authority over the same

First *Montana* Exception in Insurance Context

- **Supreme Court and Ninth Circuit have found colorable jurisdiction for bad-faith refusal to settle related to auto accident within reservation**
 - *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987)
 - *Allstate Indemnity Co. v. Stump*, 191 F.3d 1071 (9th Cir. 1999)
- **District Court found subject matter jurisdiction for claims pertaining to property insurance coverage on Reservation**
 - *State Farm Ins. Cos. v. Turtle Mountain Fleet Farm LLC*, No. 1:12-cv-00094, 2014 U.S. Dist. LEXIS 65748 (D.N.D. May 12, 2014)
- **Tribal courts have found subject matter jurisdiction for COVID-related insurance claims**
 - *Suquamish, Port Gamble, Jamul, Cabazon, Torres Martinez*

First *Montana* Exception Shortcut

- “Consensual Relationship” analysis in *Montana* resembles personal jurisdiction Due Process analysis
 - *Smith v. Salish Kootenai College*, 434 F.3d 1127 (9th Cir. 2006)

Issues Raised Regarding First *Montana* Exception

- **What is the claim**
 - Breach of contract? Bad faith? *See Allstate*, 191 F.3d at 1076
- **Consensual relationship when acquired through a third party**
 - *See Allstate*, 191 F.3d 1071
- **Sufficient connection to tribal lands**
 - “Whether the cause of action brought by these parties bears some direct connection to tribal lands.” *Smith*, 434 F.3d at 1135
 - Tribal regulation of “nonmember *conduct* inside the reservation” and “the *activities* of nonmembers.” *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 332 (2008) (emphasis by Court)
- **Whether matter must implicate tribe’s inherent sovereign authority**
 - *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916 (9th Cir. 2019), *cert denied* 141 S.Ct. 1046 (2021)

Right to Exclude

- **Well-established in Ninth Circuit**
 - *Water Wheel Camp Rec. Area Inc. v. Larance*, 642 F.3d 802 (9th Cir. 2011)
 - *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892 (9th Cir. 2019)
- **Tribal court jurisdiction over nonmember conduct on tribal land can be authorized under either *Montana* or right to exclude**
 - *Knighton*, 922 F.3d at 895
- **Inherent sovereign power to exclude means power to regulate non-Indians on tribal land, and adjudicatory authority over same**
- **Sufficient connection to tribal lands**
 - N/A where negotiation and issuance of insurance contracts to non-Indian entities occurred outside tribal land, and contracts made no mention of liability arising from activities on Reservation. *Emplrs Mut. Cas. Co. v. McPaul*, 804 Fed. Appx. 756 (9th Cir. 2020)

Challenge to Jurisdiction in Federal Court

- **Non-member may challenge tribal jurisdiction in federal court**
 - But only after exhaustion of tribal remedies
- **Insurers have filed federal actions regarding Suquamish and Port Gamble jurisdiction**
- **Suits name tribal court and appellate judges as defendants**
- **Tribe will intervene**
- **Parties will cross-move for summary judgment**

QUESTIONS?

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