

Insurance Bad Faith in Indian Country

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As Native American Indian tribes further develop their economic security and self-determination, many will turn to the business of owning insurance companies as a solid and credible addition to their business offerings. The public that deals with such tribally-owned insurance companies, by making claims against insurance protecting such tribes, needs to know that the tribally-owned insurance companies will handle claims in a fair and timely manner.

As of a February 2021 survey, except for an AMERIND Insurance cases involving sovereign immunity issues among member tribes and their insureds, no cases were found that involve tribally-owned insurance companies. However, several such cases exist with respect to non-tribally-owned, foreign insurance companies that insure patron liability and workers' compensation exposures connected with tribally-owned enterprises. The vast majority of such cases involve workers' compensation claims. Some involve patron liability for injuries incurred at Indian-owned casinos, gas stations, and other tribally-owned enterprises. All such cases involve claims by third parties as opposed to policyholders, which are first parties.

Below is a survey of cases against or at least mentioning tribal insurers and/or their third-party claims administrators. This starts with (1) tribal court cases, followed by (2) federal court cases and then (3) state court cases. This is the order of priority followed by tribal courts. The cases are further organized to discuss (A) personal injury claims and (b) workers' compensation claims.

This survey includes cases involving assertions of third-party insurance bad faith against tribal insurers. These are the federal court cases, and the state court cases. The federal cases and state cases mention bad faith claims being filed in tribal courts. It is unknown whether those tribal court cases resulted in reported decisions.

1. Tribal Court Cases:

There are few reported tribal court cases. One organization that reports tribal court cases is the Northwest Indian Court System ("NICS"), an independent company that is often retained by tribes to provide circuit-riding judges familiar with both federal Indian law and tribal law.

*I*t appears tribal court judges from Northwest Indian Court System ("NICS") have been fair to claimants, reversing Tribal First's pre-suit claims decisions. NICS sends circuit-riding court judges to tribal courts that are under contract with NICS. The tribal courts can be anywhere, but tend to be in Washington and Northern California.

A. Personal Injury Claims:

None reported by NICS.

B. Workers' Compensation Claims:

Jose Santibanez v. Tribal First / Ward First, Tulalip Casino

No. TUL-CV-GC-2006-0025 (April 11, 2007)

Cite as: 8 NICS App. 17, Santibanez v. Tribal First/Ward First (April 2007)

The case only mentions Tribal First in the caption-page list of parties. It shows that the Tulalip Tribal Court, at the Administrative Court trial level, reversed a pre-suit claim decision of the insurer on a workers' compensation claim. Without using names, the court was referencing Hudson, through Tribal First. The appellate court affirmed the trial court, maintaining the reversal of Tribal First's pre-suit claims decision. This is encouraging, as it indicates that at least contract/circuit-rider tribal law judges in Washington are predisposed to applying the law of the tribe, even if it is against the tribe or a tribal enterprise, or an insurer of the tribe or tribal enterprise.

Samish Indian Tribe v. Thomas Sperling,

No. SAM-APP-2010-01 (November 29, 2011)

Cite as: 10 NICS App. 37, *In Re Thomas Sperling* (November 2011)

The case does not include Tribal First as a party defendant. but Tribal First is mentioned in the body of the decision, and clearly ties Tribal First to Hudson Insurance. "The claimant..sustained an industrial injury...while working for the Tribe. He filed a workers' compensation claim with Tribal First...The Tribe has a contractual relationship with the Hudson Insurance Corporation to insure workers' compensation claims filed by its employees. Tribal First is the claims administrator for these claims." (10 NICS App. 37, *In Re Thomas Sperling* (November 2011) p. 38).

In *Sperling*, the Tulalip trial court case concluded that a workers' comp. claimant was permanently partially disabled and held that Tribal First erred in closing the claim before the disability was rated and compensated pursuant to R.C.W. 51.32.080. The Tulalip trial court also found that Tribal First erred by closing the claim before the claimant could be vocationally assessed and retrained into a new occupation. The court ordered the Tulalip Tribe to continue paying the claimant time-loss until he was retrained

in a new occupation and his disability was rated and compensated. This is a good case to evidence the willingness of tribal appellate judges to reverse a tribal trial court.

Delane Slater v. Hoopa Valley Tribe, PSI, c/o Tribal First

No. A-99-012 (C-96-076) (July 27, 2001)

Cite as: 6 NICS App. 59, Slater v. Hoopa Valley (July 2001)

The case only mentions Tribal First in the caption list of parties. This case involves the standard of review. The decision is encouraging since it appears the appellate court was willing to be guided by the law of the tribe. The tribe is in Northern California, and the NICS circuit-rider judges typically come from Lynwood, Washington or other locations in NW Washington.

2. FEDERAL COURT CASES:

A. Personal Injury Claims:

National Farmers Union Insurance Companies v. Crow Tribe of Indians, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985).

A Crow Indian child was struck by a motorcycle in the parking lot of a school located within the Crow Indian Reservation, not on tribal land, but on land owned by the State of Montana. The court held that the insurer was required to exhaust tribal court remedies before litigating in federal court, despite its argument that the case belonged in tribal court under 28 U.S.C. § 1331 (federal question).

Allstate Indem. Co. v. Stump, 994 F. Supp. 1217 (D. Mont. 1997).

Suit filed in the Chippewa Cree Tribal Court for the Rocky Boy Indian Reservation for an on-reservation injury and in federal court. This involved tortious conduct, an automobile accident among members of the tribe, resulting in wrongful death claims. **Not a workers' compensation case.**

A tribal court has the power and jurisdiction to resolve a bad faith insurance claim arising from a non-member, foreign insurance company's handling of a **liability** claim when the underlying tort took place within the exterior boundaries of an Indian reservation.

Strate v. A-1 Contractors, 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997).

This involved personal injuries on a highway through an Indian reservation, and suits were filed in both tribal court and federal court. The highway was maintained by the State of North Dakota pursuant to a federally granted right-of-way. The court analyzed the landmark cases of ***National Farmers*** and ***Iowa Mutual Insurance***, and the pathmaking case of ***Montana***. The court held: "When an accident occurs on a public highway maintained by the State pursuant to a federally granted right-of-way over Indian reservation land, a civil action against allegedly negligent nonmembers falls within state or federal regulatory and adjudicatory governance; absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers driving on the State's highway, tribal courts may not exercise jurisdiction in such cases."

Amerind Risk Mgmt. Corp. v. Malaterre, 633 F.3d 680, 683 (8th Cir. 2011).

Amerind Risk is a federal corporation chartered by three Indian tribes—"the Red Lake Band of Chippewa Indians, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, and the Pueblo of Santa Ana." (683). The federal district court held that the Turtle Mountain Tribal Court lacked jurisdiction over tort litigation, for personal injuries and wrongful death, among Amerind and three enrolled members of the Turtle Mountain Band of Chippewa Indians, and enjoined the Turtle Mountain members from proceeding in the Turtle Mountain Tribal Court.

B. Workers' Compensation Claims:

Jorgina Herrera v. Alliant Specialty Insurance Services, Inc. and Hudson Insurance Company (collectively "Tribal First"), (D. Colorado, 2011) (Reply In Support of Motion to Dismiss Complaint)

A bad faith workers' compensation claim against Tribal First/Alliant/Hudson. Colorado extends bad faith liability to third-party claims administrators. ***Scott Wetzel Servs. v. Johnson***, 821 P.2d 04, 811 (Colo. 1991).

Iowa Mutual Insurance Company v. LaPlante, 480 U.S. 9, 11, 12 (1987).

Claim filed in the Blackfoot Tribal Court for an on-reservation, workers compensation injury arising at the Wellman Ranch on the Blackfoot Indian Reservation. Any tribal law restrictions on exemplary or punitive damages, or other limitations on awards, judgments, or orders of monetary damages, relate only to claims against the tribe. Sovereign immunity of a tribe does not immunize private insurance carriers from liability in the context of bad faith.

3. STATE COURT CASES:

Arizona:

A. Personal Injury Claims:

Nesbitt v. Radisson Hotels Int'l, Inc. (Ariz. App. 2014)

NOTICE: NOT FOR PUBLICATION. UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

Sharyn Nesbitt fell and fractured her foot while attending a car auction at the Fort McDowell Yavapai Nation casino. She brought an action for personal injuries against the Fort McDowell Indian Community and Gaming Center in Fort McDowell Yavapai Nation Tribal Court. The tribal court dismissed her claim with prejudice based on the one-year statute of limitations under Fort McDowell Yavapai Nation Law and Order Code § 4-54.

Nesbitt sued Tribal First for insurance bad faith. The complaint alleged that Tribal First practiced "bad faith" in handling "legitimate liability claims," that "claims over \$5000 are routinely thrown out," that Tribal First discouraged (claimant) from filing a notice of claim, and that "Tribal First is lying." As expected, that was dismissed because third party bad faith claims against an insurer are not allowed under Arizona law. In Arizona, a third party can negotiate and receive an assignment from the first party, under a "Damron" or "Morris" agreement. A tribe may or may not be guided by state law. Tribal codes, ordinances, or acts will often state whether state law in general, or a specific state law, is accepted as guidance. There are many such examples.

B. Workers' Compensation Claims:

Colorado:

A. Personal Injury Claims:

B. Workers' Compensation Claims:

Scott Wetzel Servs. v. Johnson, 821 P.2d 04, 811 (Colo. 1991).

A bad faith workers' compensation claim against Tribal First/Alliant/Hudson. Colorado extends bad faith liability to third-party claims administrators.

Oklahoma:

A. Personal Injury Claims:

B. Workers' Compensation Claims:

Waltrip v. Osage Million Dollar Elm Casino, 290 P.3d 741, 742 (Okla.,2012).

A case involving Hudson Insurance and Tribal First, where the court held an “..insurer does not enjoy the tribe’s immunity and is estopped to deny coverage under a policy for which it accepted premiums...”).